ANNOTATIONS INCLUDE 168 N. C.

NORTH CAROLINA REPORTS
VOL. 24

CASES AT LAW ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1841
JUNE TERM, 1842

JAMES IREDELL
(2 IRE.)

ANNOTATED BY
WALTER CLARK

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OF

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REPORTER:

JAMES IREDELL.

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Ex Officio.

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CASES REPORTED

CASES CITED

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1841

STATE v. ISAAC MORRISON.

Where an indictment charges a rescue, and also an assault and battery, and the defendant is convicted generally; if the averments as to the rescue are uncertain or bad, these may be rejected as superfluous and immaterial, and the court may proceed to pass judgment upon the verdict as for an assault and battery.

APPEAL from *Manly, J.*, Fall Term, 1841, of MACON.

This indictment against the defendant was in the following words, viz.:

STATE OF NORTH CAROLINA, MACON COUNTY. } *ss.* Superior Court of Law, Fall Term, 1839.

The jurors for the State upon their oath present, that William Stalcup is one of the constables of the county of Macon, and that John Wilson is one of the justices of the peace for said county, and (10) that the said John Wilson, so being one of the justices of the peace of said county, on 20 May, 1839, did duly issue an execution to any lawful officer of said county, and the said execution being directed and delivered to the said William Stalcup by the said John Wilson, justice as aforesaid, and he, the said justice, having competent power and authority to issue said execution, and the said William Stalcup, by virtue of the said execution, commanding him to execute and sell as much of the goods and chattels of the said Isaac Morrison as will make the sum $29 principal, and 94 cents interest, and 40 cents costs, did seize and take into his possession, by virtue of the aforesaid execution, one sorrel studhorse, the property of the said Isaac Morrison, on 20 May, 1839; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Stalcup, so being in the lawful possession of the horse aforesaid, by virtue of his office and the aforesaid execution,

on 21 May, in the year of our Lord one thousand eight hundred and thirty-nine, the said Isaac Morrison, in the county aforesaid, on the day and year last aforesaid, with force and arms in the county aforesaid, in and upon the said William Stalcup, there and then being constable as aforesaid, and then and there lawfully having the said horse aforesaid in his custody by virtue of the said execution, for the cause aforesaid, in the due execution of his office then and there being, did make an assault, and him, the said William Stalcup, then and there did beat and bruise, and ill treat, to his great damage; and the said Isaac Morrison took the said sorrel studhorse out of the custody of the said William Stalcup, and against the will of him, the said William Stalcup, then and there unlawfully and forcibly did rescue and take from and out of the possession of said William Stalcup, and against the will of him, the said William Stalcup, there and then unlawfully and forcibly did rescue, to the great hindrance of public justice, in contempt of the laws of the State, to the evil example of all others in like cases offending, and against the
(11) peace and dignity of the State. J. W. GUINN, *Solr.*

The defendant having appeared at Fall Term, 1841, moved to quash the indictment, which motion was overruled. He then entered the plea of not guilty; and the jury found him "Guilty in manner and form as charged in the bill of indictment." The defendant's counsel then moved in arrest of judgment, which motion was also overruled, and the court proceeded to pass judgment, from which the defendant appealed to the Supreme Court.

For the State, J. W. Bynum, solicitor for Seventh Circuit, who, by appointment of the Court, attended to the business of the State at this term, in the absence of the Attorney-General, detained from the Court by indisposition.

No counsel for the defendant.

GASTON, J. The only question presented in this case is whether the indictment be sufficient in law to warrant the judgment which has been pronounced upon it. The averments in the indictment, with respect to the issuing by the magistrate and the delivery to the constable of the execution under which the defendant's horse was seized, and which horse he is charged to have forcibly rescued, are not set forth with critical precision; but whether, on that account, these averments are uncertain and bad, it is unnecessary for us to consider; for, if they be, the indictment nevertheless contains a distinct charge of assault and battery, to which no exception can be taken. The verdict finds the defendant guilty in manner and form as charged in the indictment, and, of consequence, guilty of the assault and battery therein contained. If all the

averments so questioned be as exceptionable as is supposed, they may be rejected as superfluous and immaterial, and enough will remain to warrant the judgment.

PER CURIAM. Affirmed.

Cited: S. v. Baker, 63 N. C., 281; *S. v. Cross,* 106 N. C., 651; *S. v. Toole, ib.,* 740; *S. v. Brady,* 107 N. C., 824.

(12)

JOHN R. ALLMAN v. DOUGLASS DAVIS.

In an action for goods sold and delivered, a delivery, actual or constructive, must be shown. If the goods were bargained for, but the delivery postponed for the happening of some future event or to some future period, the sale was not complete, and the vendor has no right to sue for the purchase money.

ASSUMPSIT for goods sold and delivered, tried at Fall Term, 1841, of MACON, before *Manly, J.*

The principal question was as to a wagon alleged to have been sold and delivered at the price of $125. It appeared from the evidence that this article was in the yard of the plaintiff, and the parties were negotiating about the sale of it for some time without any person being present. When they came into the plaintiff's storehouse, the defendant proceeded to purchase certain materials for making harness for the wagon, and desired that they might be put away until he should come for it. The plaintiff then stated that he had sold the wagon for $125, when the defendant remarked that there were no bows to the wagon yet; to which the plaintiff replied, "he had them already sawed out, and would put them in." It was proved by several witnesses that the defendant afterwards told them he had purchased a wagon from the plaintiff. A witness was then called by the defendant, who swore that he overheard the defendant say, when conversing with the plaintiff in the yard about the purchase of the wagon, that he would take the wagon if something or other (he did not know what) was done to it. The defendant's counsel insisted that the plaintiff could not recover, in this form of action, without proving an actual delivery, or, instead thereof, earnest paid, or some note accepted by the plaintiff as a security for the price; and that if any act remained to be done by the seller, the property would (13) not pass until that act was done. The court instructed the jury to inquire from the evidence whether there was a sale and delivery, and, if so, to find for the plaintiff; that a manual delivery was not necessary; nor was any earnest money or particular form of words required. If the parties agreed, the one to part with and the other to take the wagon, as

it then was, and when there was a stipulated price, the sale and delivery were complete, the one acquiring a right to the price and the other a right to the wagon. And in this case the law did not require a bill of sale, memorandum in writing, or payment of any part of the purchase money to make the bargain obligatory. If, on the other hand, the jury should collect from the testimony that the sale was not thus completed, but that, for some reason, the delivery was postponed to the happening of some event, or to some future period, no right to the purchase money would vest in the plaintiff, and the jury should find for the defendant.

The jury returned a verdict for the plaintiff, upon which judgment was rendered, and the defendant appealed.

No counsel for plaintiff.
Bynum & Francis for defendant.

RUFFIN, C. J. We admit that there is a difference between a count in assumpsit for goods bargained and sold and one for goods sold and delivered; and that, upon a count of the latter kind, a delivery, actual or constructive, must be shown. But it is not seen that the defendant can derive any advantage from those positions, since, as we understand the directions to the jury, they lay down the same doctrine. They are explicit that if the delivery was postponed to the happening of some event, or to some future period, then the sale was not complete, and the plaintiff would have no right to the purchase money. But the jury have found the delivery, and that terminates all controversy as to the form of action. The only question, then, which can be raised is whether there was evidence upon which it was fit to be left to the jury to find a
(14) delivery; and upon that there is no doubt, as it seems to us. The language and acts of the parties at the time of the contract, and when the wagon was immediately before them, might, in the absence of any evidence of a stipulation on the part of the plaintiff to put bows to the wagon as a condition precedent, induce a belief in the jury that the defendant had accepted the wagon in the state in which it then was, and looked to the promise of the plaintiff, as a collateral engagement to furnish the bows. But what was left doubtful, upon that part of the evidence, is cleared up by the subsequent and repeated declarations of the defendant that he had purchased the wagon, and that without expressing any qualification or condition whatever. Supposing this evidence true, as in this proceeding we must, it is plain the jury might, with good reason, find all that was necessary to a complete and executed contract; that is to say, not only a bargain for the wagon, but a delivery of it also.

PER CURIAM. Affirmed.

Cited: Waldo v. Belcher, 33 N. C., 612; *Morgan v. Perkins,* 46 N. C., 172; *Whitlock v. Lumber Co.,* 145 N. C., 124.

DEN EX DEM. ROBERT LOVE v. SILAS GATES AND ANOTHER

1. A *fi. fa.* is issued returnable to January Term, 1821, of a county court, and is returned to that term. The clerk reissues the same paper, marking on the back "*alias* to March Term, 1821," "*alias* to July Term, 1821," "*alias* to October Term, 1821," and signs his name as clerk to this memorandum. A sale of land, made by the sheriff under such a paper, between the July and October Terms, 1821, is utterly void.
2. After the return of a *fi. fa.* regularly levied on land, the sheriff cannot sell the land without a new writ giving him that authority.

APPEAL from *Manly, J.*, at Fall Term, 1841, of BUNCOMBE. (15)

The plaintiff, in support of his title to the land in controversy, in the court below, produced a judgment rendered in Buncombe County Court, an execution issued in pursuance of said judgment, and several indorsements on the execution, and also the deed of the sheriff of Buncombe, dated in August, 1821, conveying the said land. The execution was as follows:

State of North Carolina,

To the Sheriff of Buncombe County—Greeting:

You are commanded that of the goods and chattels, lands and tenements of Zachariah Candler, in your county, you cause to be made the sum of £188 8 6 debt, and £26 7 7 damages, which Robert Love lately before the justices in our court of pleas and quarter sessions for the county of Buncombe recovered against him for debt and damages, besides the sum of 2 pounds 5 shillings and 3 pence for costs and charges in that behalf expended, whereof the said Zachariah Candler is convicted, as appears on record; and have you the said moneys before our said justices at the courthouse in Asheville on the first Monday in January next, to be paid to the said Robert Love, and have you then and there this writ. Witness John Miller, clerk of said court, at office, the first Monday after the fourth Monday of September, 1820.

JOHN MILLER, *Clerk.*

By E. H. MCLURE, *Deputy Clerk.*

On which execution were the following indorsements: "*Fi. fa.* to January, 1821. No goods. B. S. Brittain, Sheriff, by H. Deyman, Dep. Shff." "*Alias* to March, 1821. John Miller, Clk., by E. H. McLure, Dep. Clk." "*Alias* to July, 1821. J. M., Clk." "*Alias* to October, 1821. J. M., Clk." "Levied on Candler's iron works land and other tracts, and sold, on the last Monday of August, to Robert Love, by agent, James Love, for $120. B. S. Brittain, by H. Deyman, Dep. Shff."

The court intimating that by this evidence the plaintiff had shown no title, he submitted to a nonsuit and appealed to the Supreme Court.

(16) *Francis for plaintiff.*
No counsel for defendants.

GASTON, J. The lessor of the plaintiff set up title to the land in dispute, under a conveyance from the sheriff, purporting to have been made under an execution sale. The paper exhibited as an execution was a writ of *fieri facias,* issued from the court of pleas and quarter sessions of Buncombe County, bearing teste the first Monday after the fourth Monday of September, 1820, returnable to January Term, 1821, of said court. It had been returned to that term "No goods," and afterwards the same writ, or rather the same paper, was repeatedly issued to the sheriff with the indorsation of *"alias,"* and under it, so reissued and indorsed, the sheriff levied on the land in dispute, and made the sale at which the lessor of the plaintiff purchased. The presiding judge held that the levy and sale were made without authority, and in deference to this opinion the plaintiff submitted to a nonsuit.

Of the correctness of this opinion a doubt cannot be entertained. After the return term of the *fieri facias,* the authority of the sheriff to seize property under the writ was at an end. The mandate of the writ expired by its very limitation. The reissuing of the expired writ and the indorsation of *alias* thereon did not change its tenor nor give a new mandate. A sheriff cannot levy without an existing authority. And, with respect to lands whereon he has made a valid levy, he cannot, after the return of the writ, proceed to a sale until a new writ shall be issued, communicating that authority. *Barden v. McKinnie,* 11 N. C., 279; *Seawell v. Bank,* 14 N. C., 279.

PER CURIAM. Affirmed.

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(17)

HENRY W. WATSON v. JOHN WILLIS.

1. When a person has been arrested on a *ca. sa.*, and given bond for his appearance at court, to take the insolvent debtor's oath, and the case is continued till the next term of the court, a notice served on his creditors ten days before the term to which the case is continued is a sufficient notice under the act for the relief of insolvent debtors.
2. If such person appears either at the first term of the court or, when a continuance is granted, at that to which the case is continued, though he has failed to give the notice required by law, or for any other cause is not permitted to take the oath, yet no judgment can be rendered against his sureties in the bond, who are only responsible for his appearance.

APPEAL from *Bailey, J.,* at Fall Term, 1841, of ROWAN.

The plaintiff had obtained a judgment against the defendant before a justice of the peace, and caused a *capias ad satisfaciendum* to issue thereupon. The defendant gave bond for his appearance at May Term,

1841, of Rowan County Court, to take the benefit of the act for the relief of insolvent debtors. He did not appear at May Term, but was absent from sickness, and the cause was continued on that account. No notice was given to the plaintiff of the defendant's intention to take the oath of an insolvent debtor before May Term, when the party was bound to appear. At August Term, to which the cause had been continued, the defendant appeared, and produced a notice served upon the plaintiff ten days before that term, and prayed that he might be permitted to take the oath of an insolvent debtor and be discharged. This was resisted by the plaintiff, upon the ground that notice should have been given before the first term at which he was to appear. The court was of opinion that the notice was sufficient, and permitted the defendant to take the oath, and thereupon he was discharged. The plaintiff prayed an appeal to the Superior Court, which was granted. The appeal came (18) on to be heard at Fall Term, 1841, of the Superior Court, when his Honor, being of opinion that notice should have been given ten days before May Term, when the defendant was bound to appear, and that the plaintiff had a right to appeal from the judgment of the county court, entered a judgment for the plaintiff against the defendant and the sureties in his bond. From this judgment the defendant prayed an appeal to the Supreme Court, which was granted.

No counsel for plaintiff.
Boyden for defendant.

RUFFIN, C. J. This judgment of the Superior Court consists of two parts. It first reverses that of the county court, upon the ground that the notice to the second term was not sufficient. Then the Superior Court, proceeding to give such judgment as, in the opinion of that court, the inferior court ought to have given, rendered a judgment against the defendant and his surety on the bond given to the constable, to be discharged by the payment of the plaintiff's debt, interest, and costs.

The opinion of this Court is that the statute for the relief of insolvent debtors, Rev. Stat., ch. 58, does not sustain the judgment of the Superior Court in either of its parts.

Though it should be admitted that the debtor was not entitled to take the oath of insolvency at the second term, for the want of a notice to the first term, yet it is clear that there could not be judgment on the bond. The surety binds himself "for the appearance of the debtor at the court," and is liable only "in case of the failure to appear" of the principal (section 7). He does not engage that the debtor shall give notice or shall take the oath. On the contrary, section 9 authorizes the surety to surrender the principal, either to the officer or in court, and, to that end,

vests the surety with the powers of special bail, and declares that the surrender shall discharge the surety. Consequently, if the surety brings in the body of the debtor, or if the latter enters his appearance,
(19) and subsequently makes no default, but is in court whenever duly demanded by the creditor, until the final adjudication of the case, the whole engagement of the surety is fulfilled. It is true, this debtor did not attend the first term. But that worked no forfeiture of the bond, because, in conformity with the second proviso of section 7, the court adjudged that he was in no default therefor, and gave him day to appear until the next term. In case the debtor does appear and then refuses to take the oath, or is unable so to do because he had not given the necessary notice, the act provides a remedy, not upon the bond, but against the debtor personally. For default of this last kind it is enacted (section 10) that the debtor, being thus in court, "shall be deemed in custody of the sheriff, and the court shall adjudge that he be imprisoned until he has given the necessary notice, which he may do at the next succeeding court." That adjudication, and, unless he shall pay the debt, the consequent imprisonment of the debtor, give to the creditor the full effect of the process against the debtor's body, and remove all ground for asking a judgment against the surety.

But we likewise think that, in this case, notice was given in due time, and that the debtor was properly admitted to his oath, and discharged in the county court. We do not think a debtor can wantonly or negligently defer giving notice. He is bound to do so before the first term, and to attend at that term, "unless prevented by sickness or other cause, to be judged of by the court." But if he be so prevented, the second proviso of section 7 enacts that the case shall be continued to the next court. From that it naturally follows that everything the party failed—for good excuse, allowed by the court—to do at or before the preceding might be done at or before the succeeding term. But the act proceeds, in the same sentence, explicitly to say that at the next term "the same proceedings shall be had as if he (the debtor) had appeared at the first term." The intention of the Legislature seems to have been, where a person is prevented by sickness, or other reasonable excuse allowed by the court, from doing all or anything that is requisite to entitle him to take the oath at the first term, that then the whole case shall be
(20) continued, and the party have his day at the next term in the same manner as if the process were returnable thereto and the party had been bound from the first to appear thereat. In this case the court found that the debtor's omissions did not arise from his default, but from the act of God, and, therefore, the case was continued at the first term; and before the next the notice was given, and at that term the defendant duly appeared.

The judgment of the Superior Court is, therefore, erroneous, and must be reversed, and that of the county court affirmed.

PER CURIAM. Judgment accordingly.

Cited: Mears v. Speight, 49 N. C., 421.

JAMES BLYTHE v. G. W. LOVINGGOOD.

1. An executory contract, the consideration of which is *contra bonos mores*, or against the public policy, or the laws of the State, or in fraud of the State, or of any third person, cannot be enforced in a court of justice.
2. When commissioners, appointed to sell lands for the State at public auction, declared, as one of the conditions of the sale, that if the highest bidder did not comply with his contract, the next highest bidder should have the lands; and an agreement was made between the highest bidder and the next highest that the latter should give the former his note for $100, in consideration that the former should not comply with his bid, and thereby permit the latter to obtain the land at an underbid: *Held*, that such note was void, on the ground of its fraudulent consideration.

APPEAL from *Manly, J.,* at Fall Term, 1841, of CHEROKEE.

The plaintiff declared upon a promissory note, not under seal. Upon the trial it appeared that at the public sale of lands belonging to the State, in Cherokee County, it was stipulated by the commissioners on the part of the State, as one of the conditions of the sale, (21) that if the highest bidder did not give bond before a certain hour on the day succeeding the sale, the next highest bidder might come forward and take the land, and so *toties quoties*. The plaintiff and defendant were both bidders for a certain parcel of land (the plaintiff the highest and the defendant the next), and it was agreed between them that if the plaintiff would fail to comply, and allow the land, according to the conditions of the sale, to be taken by the defendant, he (the defendant) would give him $100. The note sued upon was given in pursuance of that agreement. The recovery was objected to on the part of the defendant upon the ground that the agreement constituting the consideration was fraudulent and the note void. The court instructed the jury that the consideration was sufficient in law to support the action, and a verdict was returned for the plaintiff. From the judgment pursuant to that verdict the defendant appealed.

Francis for defendant.
Bynum, contra.

DANIEL, J. If the plaintiff intended to comply with the terms of the sale, but failed in consideration of the defendant's executing to him the

note, then the conspiracy had the effect of depriving the State of so much of the purchase money as made up the difference between the two bids; and such a transaction, we think, was fraudulent towards the State. The plaintiff's counsel contends that if the parties intended to defraud
(22) the State, it could be taken advantage of by the State only, and not by the defendant, who has reaped the benefit, and was a *particeps criminis* in the transaction. We are of a different opinion. The law prohibits everything which is *contra bonos mores,* and, therefore, no contract which originates in an act contrary to the true principles of morality can be made the subject of complaint in the courts of justice. It has been repeatedly decided in England that the vendor of goods could not recover the price of the vendee when he had aided the vendee, either in packing or otherwise, to defraud the revenue laws of that country. *Clugas v. Penabena,* 4 Term, 466; *Waywell v. Reed,* 5 Term, 599. So a contract which is a fraud on a third person may, on that account, be void as to the parties to it, as where A. succeeded B. in a house, and, not being able to pay for the furniture, proposed to D., his friend, to advance money for him, who accordingly treated with B. and agreed to purchase the furniture for A. at £70, which sum he paid B.; but there was a private agreement between A. and B. that A. should pay a further sum of £30, over and above the £70; and, in pursuance thereof, A. gave B. two promissory notes, of £15 each, for that sum: *Held,* that he could not recover on the notes, as the private agreement was a fraud upon D., who had advanced the £70 in confidence that it was the whole consideration. *Jackson v. Ducharie,* 3 Term, 551. So where a surety gave a guaranty to A. for a certain amount of goods to be sold to B., and the latter agreed to pay 10*s.* per ton beyond the market price, in liquidation of an old debt due to A., without communicating the bargain to the surety: *Held,* that it was a fraud upon the latter, and the guaranty was void. *Pidcock v. Bishop,* 10 Eng. C. L., 197. *Lord Mansfield* said, in *Holman v. Johnston,* Cowp., 343: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounded at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff—by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio.* No
(23) court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the action appears to arise *ex turpi causa,* or the transgression of a positive law of the country, then the court says he has no right to be assisted. It is upon this ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

We are of the opinion that the agreement in this case was in pursuance of a fraudulent design to deprive the State of a fair price for its land, and that the plaintiff ought not to recover. There must be a

PER CURIAM. New trial.

Cited: Futrell v. Vann, 30 N. C., 404; *Allison v. Norwood,* 44 N. C., 416; *Ingram v. Ingram,* 49 N. C., 189; *Garner v. Qualls, ib.,* 224; *Powell v. Inman,* 52 N. C., 29; *King v. Winants,* 71 N. C., 470; *s. c.,* 73 N. C., 565; *Lindsay v. Smith,* 78 N. C., 331; *Griffin v. Hasty,* 94 N. C., 443; *Burbage v. Windley,* 108 N. C., 362; *Culp v. Love,* 127 N. C., 461; *Corbett v. Clute,* 137 N. C., 552; *Hardison v. Reel,* 154 N. C., 277; *Owens v. Wright,* 161 N. C., 130.

DEN EX DEM. JAMES BALLEW v. JONATHAN CLARK.

1. The party signing a deed or other instrument, or any person claiming under him, may show that at the time such deed or instrument was signed he was of insane mind.
2. The old doctrine, that a man cannot stultify himself, has been long exploded.
3. Sanity is presumed *prima facie,* and the party who alleges insanity to avoid a deed must prove it; but if a general mental derangement or lunacy is shown previous to the execution of the instrument, the burden of proof as to the sanity of the person executing the instrument at the time of its execution is thrown upon the person offering the instrument in evidence.

APPEAL from *Bailey, J.,* at October Term, 1841, of SURRY.

The following is the case reported by the judge: This was an action of ejectment. The plaintiff offered in evidence a paper-writing, purporting to be a deed for the land in controversy, from Meredith Ballew, who is still alive, to the lessor of the plaintiff, and proved that the defendant held as tenant under the said Meredith. The sole ques- (24) tion was whether, at the time of the execution of the paper-writing, the said Meredith was of sane mind. A great variety of testimony was offered to show that before and at the execution of the instrument of writing, offered as a deed, he was and was not of sane memory. The court charged the jury that it was for them to decide from the testimony whether Meredith Ballew knew what he was doing when he signed the writing; that in making a disposition of his property they must be satisfied that he possessed at the time understanding and reason; that if he had not mind sufficient to understand what he was doing, his act would be null and void. The court further charged the jury that if the said Meredith was in his mind at any time previous to the execution of the paper-writing, the presumption was that he had his mind at that

time, and that the burden of proof would be upon the defendant to show the contrary; but that if the defendant had proved to the satisfaction of the jury that Meredith Ballew was a lunatic before he executed the paper-writing, the burden of the proof would be upon the plaintiff to show that he had his mind at the time of execution.

The jury found a verdict for the defendant. A new trial was moved for and refused, and judgment having been rendered for the defendant in pursuance of the verdict, the plaintiff appealed.

Boyden for plaintiff.
Alexander and Barringer for defendant.

DANIEL, J. We are of the opinion that the charge of the judge was correct. The general rule is that sanity is to be presumed until the contrary be proved; and when an act is sought to be avoided on the ground of mental imbecility, the proof of the fact lies on the person who alleges it. On the other hand, if a general derangement be once established, or conceded, the presumption is shifted to the other side, and sanity
(25) is then to be shown at the time the act was done. 3 Kent Com., 451 (3 ed.); 3 Bro., 441; 13 Ves., 88; *Jackson v. Vanduson,* 5 Johns., 144.

The case states that the defendant was the tenant of Meredith Ballew, and, we understand, that the lessee of the plaintiff contended that the law would not allow the said Meredith to stultify himself, or any other person to do it except his heir at law after his death. In 3 Kent Com., 451, it is said that the party himself may set up, as a defense and against the enforcement of the contract, that he was *non compos mentis* when it was alleged to have been made. The principle advanced by Littleton and Coke, that a man shall not be heard to stultify himself, has been properly exploded, as being manifestly absurd and against natural justice. *Yeates v. Bowen,* Strange, 1104; Buller N. P., 172; *Webster v. Woodford,* 3 Day, 90; *Mitchell v. Kingman,* 5 Pick., 431; *Hill v. Peet,* 15 Johns., 503. The judge was right, we think, in permitting the defendant to contest the validity of the deed on the ground of insanity in the supposed bargainor. The judgment must be

PER CURIAM. Affirmed.

Cited: Hudson v. Hudson, 144 N. C., 452.

(26)

JOHN REYNOLDS v. BENJAMIN MAGNESS' EXECUTORS.

1. In the case of an indemnity for becoming bail, the cause of action does not accrue until the bail is compelled to pay the money, and does actually pay it.
2. The entry of satisfaction of a judgment on the record is evidence to a jury from which they may infer that the judgment has been paid; but, *per se*, it only imports a release of the judgment, and it may be shown by extrinsic evidence that the judgment was not in fact paid.
3. The rule that where parties have reduced their contract to writing, parol evidence shall not be introduced to alter or contradict the written instrument, applies only to controversies between the parties themselves and those claiming under them. Between one of the parties and a stranger the rule does not apply.
4. Before a suit is brought on a contract of indemnity, notice of the loss should be given to the party indemnifying.
5. Where the judge below has misdirected the jury, yet the verdict has been such as it ought to have been had there been no misdirection, this Court will not grant a new trial. It will only do so where the misdirection has misled the jury into a wrong verdict.

APPEAL from *Battle, J.*, at Spring Term, 1841, of RUTHERFORD.

The following case was reported by the judge below: This was an action on the case brought by the plaintiff to recover of the defendants the amount which he had paid as the bail of one Samuel Magness, under a promise of the defendant's testator that if the plaintiff would become such bail he would save him harmless. Pleas, the general issue and the statute of limitations. The plaintiff, after producing a writ against Samuel Magness in favor of the administrator of one William Magness, issued in April, 1826, and a bail bond given thereupon by the said Samuel, with the plaintiff and two others as his sureties, introduced a witness who proved that at the time when the suit was (27) brought against Samuel Magness he resided in South Carolina, but was then on a visit to Rutherford County; that, upon being taken by the sheriff, the defendant's testator, who was one of the administrators of William Magness, and a brother of Samuel, requested the present plaintiff to become his bail, saying to him that if he would do so, "he would be his back bail, and he should not suffer." The plaintiff then showed a judgment obtained in the suit at July Term, 1828, of the county court, a *ca. sa.* against the said Samuel Magness, returned "Not to be found," and *sci. fa.* against the bail, upon which judgment was obtained at January Term, 1831, and execution issued thereon returnable to the term next ensuing. The plaintiff then proved that one of his cobail had left the State in 1827, and the other was insolvent; and, for the purpose of showing that he had paid the moneys, he produced a bill of sale for certain negroes, and a deed for a tract of land, executed to the surviving administrator of William Magness on 7 March, 1831,

which the parties said was to pay up an execution for which the present plaintiff was bound as bail for Samuel Magness, and the plaintiff said it was to enable him to recover the amount back from his principal, Samuel Magness. The writ, in the present suit, was issued in 1835; and for the purpose of avoiding the effect of the statute of limitations, the plaintiff offered to prove that the said bill of sale and deed, though absolute in terms, were intended by the parties only as a mortgage or security for the debt, and that in truth the execution against the bail of Samuel Magness was not paid off until 1833 and 1834, when two of the negroes mentioned in the said bill of sale were taken into possession by the plaintiff in that suit, the property, purporting to have been conveyed both by the bill of sale and deed, having remained in the possession of the grantor until that time. This evidence was objected to by the defendants upon the ground that the plaintiff was estopped from showing that his conveyances were not absolute, as they purported to be. But the court received the testimony, reserving the question of its admissibility. A witness then proved that he took the said bill of sale and deed from the present plaintiff for the plaintiff in the suit against Sam-
(28) uel Magness, being the agent of the said last mentioned plaintiff; that he intended that the conveyance should be absolute, so as to convey a firm and indefeasible title to the property therein mentioned, but that he only intended to hold it as a lien on the property, and agreed at the time that the present plaintiff should retain the possession of the said property until he could send out and try to recover the money from his principal, and, if he succeeded in getting the money, he was to keep the property altogether. This witness also proved that the property conveyed was worth much more than the debt intended to be secured, that no money was paid him by the present plaintiff at that time, but that, at his request, he indorsed satisfaction on the execution. An execution returnable in 1831 was then produced, with a return of satisfaction by the plaintiff's receipt. Another witness, a son of the plaintiff in the suit against Samuel Magness, then proved that his father, not receiving the money from the present plaintiff, took possession of one of the negroes mentioned in the bill of sale, in the fall of 1833, and of another in 1834, claiming them under the bill of sale aforesaid; that his father took the said slaves as his own property, having some time before that settled up the estate of his intestate, and he set up no claim to another slave mentioned in the bill of sale, or to the land conveyed by the deed, though he had not reconveyed them to the plaintiff. The defendant's counsel objected, first, that there was a satisfaction of the execution against the present plaintiff, as bail, in 1831, and that his right of action then accrued and was barred by the operation of the statute of limitations; second, that notice of the payment of the money as bail by

the present plaintiff was necessary to be shown to the defendants, or their intestate, before the action could be sustained. The plaintiff's counsel contended that no notice was necessary, but that, if it was, the jury might infer from the general notoriety of the transaction that the defendants, or their intestate, had notice; and that, with regard to the statute of limitations, it did not bar the action, because the debt for which the plaintiff was bound as bail was not, in fact, paid by him until he parted with his negroes, in 1833 or 1834. His Honor (29) instructed the jury that as the present plaintiff executed the bill of sale and deed in 1831, and directed satisfaction of the execution to be entered of record, in order to enable him to maintain an action for money paid, against his principal, he could not now be permitted to allege that the money was not paid in 1831; and that the statute of limitations barred the present action; and, secondly, that notice was necessary to be shown before the bringing of the present suit, and that there was no evidence before the jury of such notice. The jury found a verdict in favor of the plaintiff upon the general issue, but against him upon the plea of the statute of limitations. Judgment having been rendered, in pursuance of this verdict, in favor of the defendant, the plaintiff appealed.

No counsel appeared for the plaintiff in this Court.
J. G. Bynum for defendants.

GASTON, J. Upon the question, When did the plaintiff's cause of action arise? our opinion differs from that which was held in the court below. We are of opinion that his cause of action did not arise until the payment *in fact* of the judgment against him. The undertaking of the testator of the defendants was to save the plaintiff from harm because of his having become the bail of Samuel Magness, and the duty arising from this undertaking was broken when the plaintiff sustained damage by reason of his liability as bail. A contract may be so expressed as not only to indemnify against actual loss, but to protect against any claim, suit, or demand, and upon such a contract the recovery of a judgment, or even the institution of a suit against the person thus (30) protected, may entitle him to an action against his guarantor. But the general rule certainly is that in order to recover upon an indemnity, whether it be expressed or implied, it must be shown that a damage has been sustained. The damage alleged in the plaintiff's declaration is the payment of the money recovered against him. A judgment had been obtained therefor, and satisfaction of the judgment was acknowledged of record. This entry was evidence from which might be inferred a payment of the sum recovered, but *per se* it was but a release of the judgment, an extinguishment of that security. It was unquestionably com-

petent for the defendants to show, notwithstanding such release, that the plaintiff had paid nothing (*Brisendine v. Martin,* 23 N. C., 286), and if they were not thereby estopped from showing this fact, neither was the plaintiff estopped, for all estoppels must be mutual. The entry of satisfaction was made upon the plaintiff's executing conveyances of land and negroes to the creditor. If the property so conveyed was at the time received in discharge of the debt, the transaction would have constituted a payment. But the testimony, if believed, showed that these conveyances, though absolute in terms, were intended by the parties to be used, and in fact were used, only as a security for the payment of the sum recovered. There was, therefore, but a substitution of one security for another. It is true that if a controversy had arisen between the parties to these conveyances and the bargainee had denied the parol agreement, the plaintiff would have found serious, perhaps insuperable, difficulty in establishing it. But the grantee has never set them up as absolute conveyances. He took them as a security only, and afterwards received a part only of the property thus pledged in payment of the debt. The rule of evidence that where the parties to a contract have reduced their agreement to writing, parol evidence shall not be received to alter or contradict the written instrument, applies to controversies between the parties and those claiming under them. The parties have constituted the written instrument the authentic memorial of their contract; and,
(31) because of this compact, the instrument must be taken, as between them, to speak the truth and the whole truth in relation to its subject-matter. But strangers have not assented to this compact, and, therefore, are not bound by it. When their rights are concerned, they are at liberty to show that the written instrument does not disclose the full or true character of the transaction. And if they be thus at liberty when contending with a party to the transaction, he must be equally free when contending with them. Both must be bound by this conventional law or neither.

On the other question presented in the case we are of opinion that, upon an undertaking like that before us, the plaintiff, before bringing suit, is bound to give notice of his loss to his guarantor. *Grice v. Ricks,* 14 N. C., 62; *Sherrod v. Woodard,* 15 N. C., 360. If, indeed, the testator of the defendants in this case were alive when the loss complained of was sustained, formal notice might be dispensed with, because he was a party to the act causing the damage. From the case stated we infer, for the fact is not precisely set forth, that he was not then alive; but it is not necessary for us to examine how this matter may be, because the jury have found for the plaintiff on the general issue, and their verdict is against him only on the plea of the statute of limitations. If the reversal of a judgment be prayed for because of misdirection of the judge

in his instructions to the jury, and it appears that such misdirection did not and could not mislead the jury, because their finding has been such as it certainly ought to have been had the mistake not been committed, this Court has held that it will not interfere to enable the appellant to have a new trial of the issue. But where the misdirection has misled the jury into a wrong verdict, and upon that verdict the judgment complained of was rendered, it is a matter of right to have judgment reversed and a *venire de novo* awarded. We cannot set the verdict right, nor can we establish a compensation of errors, by setting off against the error of law complained of an error of fact in the jury, to the injury of the opposite party, upon another issue. In such case all the issues ought to be submitted to another jury, with the proper instruc- (32) tions.

PER CURIAM. New trial.

Cited: Costin v. Baxter, 29 N. C., 114; *Pollock v. Wilcox,* 68 N. C., 49; *Overby v. B. and L. Assn.,* 81 N. C., 62; *Mulholland v. York,* 82 N. C., 512; *Thomas v. Lines,* 83 N. C., 197; *S. v. Grady, ib.,* 648; *Cowles v. Hall,* 90 N. C., 333; *Moore v. Parker,* 91 N. C., 281; *Leak v. Covington,* 99 N. C., 566; *Puffer v. Baker,* 104 N. C., 153; *Carden v. McConnell,* 116 N. C., 876; *Ledford v. Emerson,* 138 N. C., 503; *Wood v. Kincaid,* 144 N. C., 395.

ISAAC SAUNDERS v. ABRAHAM HATTERMAN.

1. Where at the time of the sale of land a false and fraudulent affirmation of its value was made, yet an action on the case for deceit will not lie, as the vendee might, by reasonable diligence, have informed himself of its true value.
2. It *seems* such an action will lie if a false affirmation be made of the rent of the land.

APPEAL from *Bailey, J.,* at Fall Term, 1841, of CABARRUS.

It was an action on the case for deceit in the sale of land. It appeared in evidence that the defendant was the owner of a tract of land in Davie County, containing 210 acres, and sold the same to the plaintiff for a certificate of land script on the Texan Government; that the contract of sale and the executing of the deed for the land took place in the county of Cabarrus. Before the deed was executed the defendant told the plaintiff the tract of land was worth about $3 per acre, that it had sold for $500 or $600, and that it was good land. It was also in evidence that when the parties called upon the person who wrote the deed, the plaintiff stated to the draftsman that he was buying land he had never

(33) seen; that the defendant had affirmed it to be good, and worth about $3 per acre, and that it had sold for from $500 to $600. The deed was then executed, and was offered in evidence on the trial; the plaintiff then proved by witnesses from Davie County, acquainted with the land, and one of whom had owned the land and sold it to the defendant, that the land was not worth what the defendant had represented it to be; that it was poor land, and had never been sold for $500 or $600 to their knowledge, but had been sold for much less. It was further in evidence that the plaintiff, after seeing the land, became dissatisfied, and refused to perform a part of his contract, which was to iron a wagon for the defendant.

The defendant's counsel insisted that the action would not lie in this case, admitting the representation to have been false and fraudulent, because it was the plaintiff's own folly not to inform himself of the truth of the matter.

The court sustained the view taken by the defendant's counsel, and remarked that an action could not be sustained for every act of immorality, however injurious it might be to another individual; that in this case, if the plaintiff could have informed himself as to the value of the land by going upon it and there making an examination for himself, or if he could by making inquiries have ascertained what amount it had sold for (as he might have done in this case), he could not maintain the action, although the affirmation was false; that if he could have ascertained the truth by reasonable diligence, it was his own folly to trust to the misrepresentation of another.

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

(34) *Boyden for plaintiff.*
Barringer for defendant.

DANIEL, J. The defendant (in the county of Cabarrus) sold to the plaintiff a tract of land lying in the neighboring county of Davie, which land the plaintiff had never seen. At the time of the contract and at the time of the execution of the deed the defendant said that the land was worth about $3 per acre; that it had sold for $500 or $600 and that it was good land. It was alleged by the plaintiff that those assertions were all false, and known to be false by the defendant when he made them. The judge informed the jury that an action of deceit would not lie, admitting that the representations were false and fraudulent, if it was the plaintiff's own fault not to have informed himself of the truth of the matter, if by reasonable diligence he could have done so; that if he could have informed himself as to the value of the land by going upon it and there making an examination for himself, or if he could by making

inquiries have ascertained for what amount it sold (as he might have done in this case), he could not maintain the action, though the affirmation were false; that if he could have ascertained the truth by reasonable diligence, it was his own folly to trust to the representations of the vendor. We do not see any error in this charge of the court. The true rule is stated to be that the seller is liable to an action of deceit if he misrepresent the quality of the thing sold in some particulars in which the buyer has not equal means of knowledge with himself; or if he do so in such a manner as to induce the buyer to forbear making the inquiries which for his own security and advantage he would otherwise have made. 2 Kent Com., 487. The misrepresentation must be of a kind the falsehood of which was not readily open to the other party. Per (35) *Taylor, C. J., Fagan v. Newsom,* 12 N. C., 22. The cases have gone so far as to hold that if the seller should ever falsely affirm that a particular sum had been bid by others for the property, by which means the purchaser was induced to buy, and was deceived as to the value, no relief was to be afforded; for the buyer should have informed himself from proper sources of the value, and it was his own folly to repose on such assertions, made by a person whose interest might so readily prompt him to invest the property with exaggerated value. 2 Kent Com., 486 (3 ed.); 1 Rolls' Ab., 101; *Leakins v. Clissell,* 1 Sid., 146; 1 Lev., 102; *Lysney v. Selby,* 2 Ld. Ray., 1118. If the false representation had been made of the *rent,* then *it seems* that it would sustain the action. 2 Kent Com., 487 (3 ed.), in note where all the authorities are collected. In this case the plaintiff might have had equal knowledge with the defendant of the value of the land, if he had used reasonable diligence.

PER CURIAM. Affirmed.

Cited: Setzer v. Wilson, 26 N. C., 513; *Lytle v. Bird,* 48 N. C., 224; *Capehart v. Mhoon,* 58 N. C., 182; *Walsh v. Hall,* 66 N. C., 242; *Etheridge v. Vernoy,* 70 N. C., 724; *Conly v. Coffin,* 115 N. C., 565; *Cutler v. R. R.,* 128 N. C., 482; *Thomas v. Cooksey,* 130 N. C., 152; *Cash Register Co. v. Townsend,* 137 N. C., 656; *May v. Loomis,* 140 N. C., 357; *Williamson v. Holt,* 147 N. C., 520; *County v. Construction Co.,* 152 N. C., 30.

(36)

THOMAS DEVANE v. OWEN FENNELL.

Where there is a contract for the sale of goods, although the goods may have been put in possession of the vendee, yet if something still remains to be done by the vendor before the contract is completed, as to ascertain the price, quantity, or individuality of the goods, the constructive possession and the property shall remain in the vendor.

DEVANE *v.* FENNELL.

TRESPASS, tried at Fall Term, 1841, of NEW HANOVER, before *Pearson, J.*

Plaintiff declared that the defendant had taken possession of and carried away a certain raft of timber belonging to the plaintiff. It was proven that the timber was sent by the plaintiff to the town of Wilmington for sale; that the owners of the Clinton Steam Sawmill had bargained for the raft of timber with the agent of the plaintiff, and had agreed to pay him $4 per 1,000 feet; that at the time the bargain was made the timber was lying in the river, and was afterwards put in the timber pen, where all the timber belonging to the mill was kept, to be inspected; but the next day, before it was inspected, the timber was taken away, in consequence of which the owners of the mill did not pay or offer to pay for it. The defendant contended that from this proof the plaintiff had parted with his title to the timber, and the possession was in the owners of the mill, and that consequently he could not recover. His Honor was of opinion that there were no such sale and delivery as passed the title out of the plaintiff, and so instructed the jury. And evidence having been given to prove the taking by the defendant, the jury returned a verdict for the plaintiff. A rule for a new trial was discharged, and from the judgment rendered in pursuance of the verdict the defendant appealed to the Supreme Court.

(37) *Strange for plaintiff.*
No counsel appeared for defendant.

DANIEL, J. The owners of the sawmill agreed to give the plaintiff $4 per 1,000 feet for his raft of timber when inspected and measured. The timber was impounded, to secure it against the dangers of the river and to have it ready for inspection and measurement. When it was placed in the pen it was not intended to be an absolute delivery; the constructive possession was still in the vendor; there remained something to be done by the vendor, to wit, to have it inspected and measured. It is a well settled rule of law that the vendee's title to the property is not complete by force of a contract of sale if anything remain to be done on the part of the seller to ascertain the price, quantity, or individuality of the goods before delivery; thus if a portion of a larger quantity be sold and cannot be ascertained without weighing or measuring, or other act separating and distinguishing it from the rest, the purchaser has no title till his portion has been set apart. *Burk v. Davies,* 2 Maul. and S., 397; *Austin v. Craner,* 4 Taunton, 644; *White v. Wilks,* 5 Taunton, 176; *Simmons v. Swift,* 12 Eng. C. L., 388. Judge Kent says it is a fundamental principle, pervading everywhere the doctrine of the sales of chattels, that if the goods be sold by number, weight, or measure, the sale is

incomplete, and the risk continues with the seller until the specific property be separated and identified. 2 Kent Com., 496.

We are of the opinion that the charge of the judge below was correct, and that the judgment must be

PER CURIAM. Affirmed.

Cited: Waldo v. Belcher, 33 N. C., 612; *Morgan v. Perkins,* 46 N. C., 172; *Wittkowsky v. Wasson,* 71 N. C., 456; *Lumber Co. v. Wilcox,* 105 N. C., 39; *Heiser v. Mears,* 120 N. C., 445; *Elliott v. R. R.,* 155 N. C., 238.

(38)

LEWIS METCALF v. JOHN H. ALLEY.

Where A. carried on a suit in the name of B. without or against the consent of the latter, whereby B. was compelled to pay costs, B. may maintain an action on the case against A. to recover damages for the injury he has thus sustained.

CASE tried at September Term, 1840, of RUTHERFORD, before *Bailey, J.*

The facts appeared to be these: A suit was instituted in the County Court of Rutherford in the name of Lewis Metcalf and John Bradley against one Claton Brown. When the suit was called Brown's counsel moved to dismiss it, because no bond had been given for its prosecution. The court directed that Metcalf be called (the other plaintiff, Bradley, having left the State), and he was informed of the motion to dismiss the suit. Metcalf then declared to the court that he had nothing to do with the suit; that he had not authorized the suit to be brought, and he desired that it should be dismissed. The present defendant, John H. Alley, then in court, said he opposed the dismission of the suit, and desired it to be carried on; that John Bradley was in court, and that he was ready to give security for the costs. Alley then gave a bond, signed John Bradley's name by himself as agent, and also signed as security. The bond was received by the court and the cause continued. At a subsequent term of the court the cause was submitted to a jury, and a verdict returned for Brown. An execution thereupon issued for the costs, which were collected out of the present plaintiff. The court instructed the jury that Metcalf had a right to dismiss the suit, and that, if the present defendant opposed the dismission, and thereby caused the court to have the cause continued in the name of both, and the plaintiff afterwards had the costs to pay in consequence of the wrongful act of the defendant, he,
the plaintiff, had a right to maintain this suit, and recover of the (39) defendant the amount of costs incurred in the former suit.

There was a verdict and judgment for the plaintiff, and the defendant appealed to the Supreme Court.

J. G. Bynum for plaintiff.
No counsel appeared for defendant.

DANIEL, J. It appears that Alley, without authority, caused Metcalf to be joined as a plaintiff in the writ and declaration against Brown. In the progress of that suit, when Metcalf first learned that his name had been used, he came into court and moved to dismiss it. The motion was opposed by Alley, and at his instance the suit was continued in court till it was tried, when there was a judgment against the plaintiffs for costs. Bradley being out of the State, Metcalf was forced by execution to pay these costs. It appears to us that the instruction of the judge, upon these facts appearing in evidence was correct. The plaintiff had sustained an injury in consequence of the wrongful acts of the defendant; and the appropriate remedy was an action of trespass on the case. The judgment must be

PER CURIAM. Affirmed.

Cited: Hackett v. McMillan, 112 N. C., 522.

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(40)

STATE v. WILLIAM NORTON AND OTHERS.

To support an indictment for knowingly selling unwholesome provisions, the provisions sold must be in such a state as that, if eaten, they would, by their noxious, unwholesome, and deleterious qualities, have affected the health of those who were to have consumed them.

INDICTMENT, tried at Fall Term, 1841, of BUNCOMBE, before *Manly, J.*

It charged in substance, that the defendants had sold for $1 to the prosecutor, one T. W., to be eaten as food by him, a bear, which had died a natural death, and which had become spoiled, tainted, unwholesome, and unfit for the food of man, the said bear having been dead several days, the defendants well knowing these facts, and the state and condition of the said bear at the time of such sale, and the prosecutor being ignorant thereof. Upon the trial it appeared in evidence that the bear had died in a pen, either by the violence of the pressure or from starvation, and that the defendants had taken him out and carried the carcass to the prosecutor's in the nighttime and sold it for food. Upon the prosecutor's adverting to some peculiarity of scent and appearance about the flesh, the defendants assured him that it was good, and that they had shot it in the pen. There was much conflicting testimony as to the appearance of the meat and oil, and also as to its effects upon the health when taken into the stomach. The court instructed the jury that it was not necessary for them to find that the meat was such as to produce sick-

ness or death when eaten. If they were satisfied from the testimony that the bear was found dead, and in such a state as to render it unfit to be eaten, according to the usages of a decent and Christian people, and the defendants knowingly sold it to the prosecutor for food, without disclosing the condition in which it was found, they would be guilty. This part of the charge was excepted to, and there was a rule for (41) new trial for misdirection. The rule being discharged, and judgment pronounced in pursuance of the verdict, the defendants appealed to the Supreme Court.

J. G. Bynum for the State.

DANIEL, J. Knowingly selling unwholesome provisions is a misdemeanor at the common law. *S. v. Smith,* 10 N. C., 378; 2 East P. C., 822; 1 Rus. on Crimes, 114. The judge charged the jury that it was not necessary that the meat sold should be such as to produce sickness or death, when eaten, if it was in such a state as to render it unfit to be eaten, according to the usages of a decent and Christian people. We think that the charge was too broad. The gist of the offense consists in the knowingly selling, for lucre, provisions which may be injurious to the health of those who are to consume them. To support this indictment, the meat sold must have been in such a state that, if eaten, it would, by its noxious, unwholesome, and deleterious quality, have affected the health of those who were to have consumed it. *Rex v. Dixon,* 4 Camp., 12. The same case before the judges of the King's Bench, 3 Maul. and Sel., 11. We are of the opinion that there must be a

PER CURIAM. New trial.

(42)

JACOB NEWSOM v. WILLIAM ANDERSON.

1. If an injury to another be immediate, and committed with force, either actual or implied, it is the subject of an action of *trespass vi et armis,* whether the injury be willful or not.
2. Where a person was cutting down trees growing on his own land, and one of them accidentally fell on his neighbor's land: *Held,* that an action of trespass *quare clausum fregit* would lie, whether there was any grass or other vegetable matter growing on the ground or not.

TRESPASS *vi et armis quare clausum fregit,* tried at Fall Term, 1841, of STOKES, before *Nash, J.*

The plaintiff and the defendant were owners of contiguous tracts of land. In clearing near the dividing line, a tree cut on the defendant's land fell with part of the top on the land of the plaintiff. There was no evidence to show that the tree was felled by design or carelessness on the

plaintiff's land; nor was there any evidence to show that when the tree fell there was any grass or vegetable growth of any kind, or that any actual injury was sustained by the land. The counsel for the plaintiff requested the court to charge the jury that when a man, in clearing his land, fells a tree so that any part of it falls on his neighbor's land, it is a trespass for which an action of trespass *quare clausum fregit* can be sustained. The court declined giving the instructions as prayed for, but charged the jury that every voluntary entry on the land of another, without his consent, and not sanctioned by the law was a trespass for which an action could be brought; that in this case the plaintiff could not sustain his action unless they were satisfied from the evidence that the tree was designedly or carelessly felled by the defendant so as to fall on the plaintiff's land, or that, by falling on the plaintiff's land, it had fallen on his grass or vegetable growth of some kind. There was a verdict and judgment for the defendant, and the plaintiff appealed.

(43) *J. T. Morehead for plaintiff.*
No counsel for defendant.

DANIEL, J. To sustain trespass, the injury must in general be immediate, and committed with force, either actual or implied. If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured thereby, it is the subject of an action of trespass *vi et armis,* by all the cases, both ancient and modern, and it is immaterial whether the injury be *willful or not. Leame v. Bray,* 3 East, 599; 2 Leigh N. P., 1402. We think that the charge of the judge was incorrect when he said "that the plaintiff could not recover unless the tree was designedly or carelessly felled by the defendant, so as to fall on the plaintiff's land, or that, by falling on the plaintiff's land, it had fallen on his grass or vegetable growth of some kind." The ground of the action, q. c. f., is the injury to the possession (3 Black, Com., 210; 1 Term, 480), and that, whether the injury extends to the plaintiff's land in the mineral or vegetable kingdom. Is not the felling of trees on a person's land and encumbering it with rubbish an injury to the possession? We think it is. Where a master ordered his servant to lay down a quantity of rubbish near his neighbor's wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran from the pile against the wall, it was held that the master was liable in trespass. *Gregory v. Piper,* 17 Eng. C. L., 454.

We are of the opinion that there must be a

PER CURIAM. New trial.

(44)

WARDENS OF THE POOR ON THE RELATION OF CHARLES BUMGARNER v. ANDREW COPE.

1. Where an appeal has been taken from the judgment of a justice of the peace the parties may, by consent, while the papers remain in the hands of the magistrate, set aside the appeal and have a new trial.
2. Where a judgment is recovered in the name of the wardens of the poor, by a relator for a penalty, to one half of which he is by law entitled, he may release one half of the judgments, that being his own share, but he cannot release the other half, which belongs to the wardens.

APPEAL from *Manly, J.*, at Fall Term, 1841, of HAYWOOD, dismissing an appeal which had been taken to that court from the County Court of Haywood. The facts are sufficiently stated in the opinion delivered in this Court.

Francis for plaintiff.
No counsel for defendant.

GASTON, J. The transcript in this case shows that on 29 November, 1837, a warrant was issued by John Witherow, a justice of the peace of the county of Haywood, summoning the defendant to appear and answer the complaint of Charles Bumgarner, who sued as well for himself as the wardens of the poor of said county, in a plea of debt for $100, due by penalty under the act of 1826, for trading with David, the slave of Robert Love. On 2 December following, judgment was rendered thereon by the said Witherow and J. L. Dillard, justices of the peace, in the following words: "Judgment for the sum of $1.20 against the wardens"; and on the 9th of said month, the necessary affidavit having been made, an appeal from the said judgment was granted "to the plaintiff" by John B. Love, another justice of the said county. Mr. Francis, (45) as attorney "for the plaintiffs," on the same day gave notice to the justices Witherow and Dillard of this appeal, and required them to return the papers in the cause to the next county court. Afterwards, to wit, on 25 December, 1837, it appears from the transcript that the parties met and agreed "to have the business reconsidered," and on the succeeding day, 26 December, judgment was by consent rendered against the defendant, before Justice Dillard, for $100, and it was indorsed that the plaintiff, Bumgarner, agrees to claim only $50 of the judgment from the defendant, for which execution shall issue, and costs, $1.20. At January Term, 1838, of Haywood County Court the case is docketed as a suit of the wardens of the poor on relation of Charles Bumgarner against Andrew Cope, and after several continuances, the court, at January Term, 1839, dismissed the suit. From this order or judgment it is stated that the wardens, by their counsel, appealed to the Superior Court, and

in that court, at the last term thereof, on motion of the defendant's counsel, the cause was ordered to be dismissed, and the wardens appealed to this Court.

To us it seems that there was no error in the order or judgment of the Superior Court. When the first judgment was rendered on the warrant, the plaintiff had a right, within ten days, upon sufficient cause shown, to appeal therefrom, and, having exercised that right, the judgment was thereby vacated, and the further *exercise* of jurisdiction over the case by a justice out of court was at an end. But the appeal had not yet been returned to court, the papers were in the hands of the magistrate, and we see no reason why the parties might not then consent to withdraw the appeal, set aside the judgment, and try the cause *de novo*. No consent can give jurisdiction over a subject-matter to a tribunal which by law cannot take cognizance of it; but after a judgment has been rendered in a court, and while the record yet remains there, the parties may consent that the judgment be set aside; and when the judgment is set aside, the case is again open for the exercise of the jurisdiction which such
(46) court has by law over the subject-matter of the controversy. From the last judgment, that is, the one confessed by the defendant, there was no appeal; and we are at a loss to conceive what was the matter in dispute which the wardens supposed that the county or Superior Court had under their consideration. The wardens had no right to complain that Bumgarner had released a moiety of the judgment. He was personally entitled to a moiety, and this he could release. But the interest in the other moiety of the debt was the property of the wardens, and this he did not release, because he could not release it.

The judgment of the Superior Court

PER CURIAM. Affirmed with costs.

Cited: Carroll v. McGee, 25 N. C., 16.

STATE v. THOMAS ROBESON.

1. In cases of bastardy an examination of the woman which does not appear to have been taken within three years from the birth of the child is defective, and may be quashed; but the defect is not necessarily fatal, and all objection on that account is waived if not made in the regular mode and at the proper time. The objection should be made before the issue is tendered.
2. Notwithstanding such defect, the examination is evidence on the trial of the issue as to the truth of the charge.

APPEAL from *Pearson, J.,* at Fall Term, 1841, of BLADEN.

The case was a proceeding under an act of Assembly relating to bas-

tardy. An issue having been made up in the county court, whether the person charged was the father of the bastard, was (47) there tried, and an appeal taken to the Superior Court. Upon the trial of the issue in the Superior Court, the solicitor for the State offered in evidence the original examination of the woman. It did not appear upon the face of the examination whether or not it had been taken within three years from the birth of the child. His Honor held it inadmissible. The solicitor then offered to supply this defect by proof from the magistrates who took the examination, and others, that it had been in fact taken within a few months after the birth of the child, but this evidence was rejected by the court. A verdict and judgment were rendered for the defendant, and the solicitor for the State appealed to the Supreme Court.

J. G. Bynum, solicitor, for the State.
No counsel for defendant.

GASTON, J. By the act of 1741, "for the suppression of vice and immorality," it was enacted that any two justices of the peace, upon their own knowledge, or information made to them, that any single woman within their county was big with child, or had been delivered of a child, might cause her to be brought before them and examined on oath touching the father thereof, and that the person so accused upon her examination should be adjudged the reputed father of the child, and stand charged with the maintenance thereof as the county court should order. By the amendatory act of 1814 it was recited that the act of 1741, by rendering the oath of the woman conclusive evidence of the fact of paternity, had an injurious effect upon the public morals; and thereupon it was enacted that the person so accused should be entitled to have an issue made up to try whether he be the father of the child, and that upon the trial of such issue "the examination of the woman upon oath before two justices of the peace, in the manner prescribed by the said act (of 1741), and returned to court, should be *prima facie* evidence only against the person so accused." To this enactment was added a further one in these words: "And all examinations upon oath to accuse or charge any man of being the father of a bastard child shall be (48) had and taken within three years next after the birth of said child, and not after." In the Revised Statutes concerning bastard children, chapter 12, the enactments of the acts of 1741 and 1814 are consolidated, no alterations being made even in their phraseology, except such as became necessary because of their being brought into this intimate union. It reënacts the provisions of the act of 1741, with the exception of that which declares that the person charged by the examinant

shall be adjudged the father of the child, substituting for it the provision of the act of 1814, that "the examination of the woman taken before two justices of the peace, in the manner prescribed *above,* and returned to court, shall be *prima facie* evidence only against the person so accused," and *subjoins* the provision or enactment with respect to the time within which examinations shall be had.

Under this statute it is competent for the party accused to object that the charge has not been preferred within the time prescribed, and also to deny the truth of the charge itself. These, however, are defenses distinct in their nature, and the purposes of justice as well as the known analogies of law require that they should be brought forward, if meant to be insisted on, distinctly, in proper form and apt time. If the statutory prescription in regard to time is to be expounded as an ordinary act of limitation, the party charged may plead this prescription at the same time that he tenders a general denial of the charge. But it is clear that, unless he do bring it forward by plea, he cannot avail himself thereof on the trial of the truth of the charge, and it is equally clear that if he do bring it forward by plea, and issue be taken on the truth of the matter so pleaded, parol evidence may be received of the time of the birth of the child. The practice, however, has been to consider an objection to the time of the examination as one fit to be made *in limine,* before tendering an issue upon the matter charged. This seems to us the correct course. The statute makes no provision for the trial of any controverted fact except that of the paternity of the child. This silence, taken in connection with the general provisions of the act, induces the belief
(49) that the Legislature intended that the return of the examining magistrates should show that the examination was made within the prescribed time. If it do not, the party charged may move the court to quash the return. The court, on being satisfied that the defect is one of *form,* may allow the magistrates to amend the proceedings according to the truth of the case; or, if this be refused, a new warrant may be sued out and a new examination had without delay. It is to be borne in mind that the procedure is not in the nature of a prosecution for a criminal offense, but is designed to secure indemnity to the county against the charge of maintaining the unfortunate infant; and it ought to be so regulated that, while the person sought to be charged with this maintenance is fully secured in the enjoyment of every defense allowed by the law, the just object of the statute should, if possible, be effected in all cases coming within its purview.

While we admit that an examination which does not appear to have been taken within the prescribed time is defective and may be quashed, we understand it to be settled that this defect is not necessarily fatal, and that all objection to it on that account is waived if not made in the

regular mode and at the proper time. So it was adjudged in *S. v. Carson,* 19 N. C., 368. In that case the question did not arise, and was, therefore, left undecided, whether the defect might not be insisted on as an objection to the admission of the examination in evidence. Upon this question our opinion is that the examination is evidence, notwithstanding any such defect. The words of the statute conduct us to this conclusion. They prescribe the *manner* in which the examination shall be had, that is to say, upon a warrant issued by two justices of the peace against the mother of the illegitimate child, and declare that when taken in the manner "as above prescribed," the examination shall be evidence in the trial of the issue. The prohibition of examinations, not taken within three years from the birth of the child, not only follows after that declaration, but cannot, without violence to its language, be understood as prescribing the *manner* of taking the examination. But we have other reasons for adopting this conclusion. There is no necessity for permitting, and there may be much inconvenience from permit- (50) ting, the objection to be thus brought forward. The party sought to be charged, if he wish to rely on it as a defense, has a full opportunity of presenting it before tendering an issue; and if he will not avail himself of this opportunity, he ought not to be allowed to spring it upon the officers of the county upon the trial of the issue, and thus obtain a verdict by surprise, which will be forever conclusive, however repugnant it may be to the truth and justice of the case.

PER CURIAM. Reversed, and *venire de novo.*

Cited: S. v. Ledbetter, 26 N. C., 244; *S. v. Lee,* 29 N. C., 268; *S. v. Ingram,* 85 N. C., 517.

STATE v. WILLIAM STALCUP AND OTHERS.

1. An officer who has arrested a prisoner under a State warrant has a right to tie him, if he believes it necessary to secure him, and of this necessity he is himself the sole judge.
2. But if the officer is guilty of a gross abuse of this authority, that is, if he does not act honestly according to his sense of right, but, under the pretext of duty, is gratifying his malice, he is liable to indictment; and the jury must judge of his motives from the facts submitted to them.
3. In such a case those who are commanded by the officer to assist him, and do assist him, are justified, though the officer himself has abused his authority, provided *they* acted *bona fide* in obedience to this command, and not to gratify his or their malice.

APPEAL from *Battle, J.,* at Spring Term, 1841, of MACON.

The defendants were indicted for an assault and battery on the prosecutor. It appeared that the defendant William Stalcup, being a

(51) constable in the county of Macon, arrested the prosecutor under a State warrant, and, with the aid of the other defendants, who were commanded to assist him, *tied* the prosecutor and took him before a magistrate. A good deal of testimony, which is stated at large in the case, was introduced on the trial to show the circumstances under which the arrest was made and the tying ordered. It is deemed unnecessary to repeat it, as the only questions in this Court arose upon the instructions given to the jury in the court below which are stated in the opinion of this Court.

J. G. Bynum, solicitor, for the State.
Francis for the defendants.

GASTON, J. In this case the counsel for the defendants prayed the court to instruct the jury that an officer having a State's warrant to arrest an individual for an escape had a right to tie the prisoner, if he deemed it necessary; that the officer was the sole judge of this necessity; and that he was not answerable if he used no more force than was requisite to tie him. The court declined to give this instruction, but instructed the jury that the officer had a right to use such means as were necessary and proper to secure his prisoner; therefore, he might tie him if it were necessary so to do; but if the jury were satisfied from the evidence that a man of ordinary prudence would not have deemed it necessary and proper to secure the prisoner by tying him, then they were authorized to find the officer guilty of an assault.

With this instruction we are not satisfied, and the latter part of it we deem erroneous. The law gives the officer all the powers which are necessary for the effectual execution of the mandate issued to him. It is the duty of the officer to have the body of the person charged before the court or magistrate to whom the warrant is returnable, and it is (52) manifest that for this purpose it may be necessary to secure the prisoner by tying him. The act of tying is, therefore, within the limits of the officer's authority; and of the propriety and necessity of adopting this mode of securing the prisoner the officer is the judge, and the jury cannot supervise the correctness of his judgment. He will indeed be liable, although he does not transcend his powers, if he grossly abuse them; and whether he did or not so abuse them was the proper inquiry to be submitted to the jury. Upon this inquiry we hold that the instruction should have been, as we have before laid it down in an analogous case, *S. v. Pendergrass,* 19 N. C., 365, that there was an abuse of authority if the facts testified convinced the jury that the officer did not act honestly in the performance of duty according to his sense of right, but, under the pretext of duty, was gratifying his malice; but if they were not so convinced, he did not abuse his authority.

The counsel also prayed of the court to instruct the jury that the assistants of the officer were justified in tying and assisting to tie the prisoner, upon being commanded to do so by the officer, although he might have abused his authority in giving that command. It does not appear that the court gave any instruction upon this prayer. To us it seems that the instruction asked for was correct, with this modification, if *they* acted *bona fide* in obedience to this command, and did not avail themselves of it to gratify his or their malice.

We are of opinion that the judgment ought to be reversed and the case submitted, with proper instructions, to another jury.

PER CURIAM. *Venire de novo.*

Cited: Furr v. Moss, 52 N. C., 527; *S. v. Cruse,* 74 N. C., 492; *S. v. Belk,* 76 N. C., 14; *S. v. Sanders,* 84 N. C., 731; *S. v. Freeman,* 86 N. C., 686; *S. v. McNinch,* 90 N. C., 699; *S. v. Bland,* 97 N. C., 442, 443; *S. v. Pugh,* 101 N. C., 740; *S. v. McMahan,* 103 N. C., 382; *S. v. Sigman,* 106 N. C., 731.

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(53)

STATE TO THE USE OF THOMAS J. BUCHANAN v. EVANDER MCINTOSH.

In an action against a sheriff for the misconduct of a person alleged to be his deputy, it is not necessary to produce a written deputation, or give notice to the sheriff to produce it. It is sufficient to show that the person acted as deputy with the consent and privity of the sheriff.

DEBT upon the official bond of the defendant, as sheriff of Moore, tried at the Spring Term, 1841, of CHATHAM, before *Pearson, J.*

The breach assigned was that one Hedgepeth, the deputy sheriff, had, in January and February, 1838, received certain papers to collect, and had failed to do so. The bond of the sheriff, bearing date in August, 1837, was duly proved. The plaintiff then called one Curry, and proposed to prove by him that during the year commencing in August, 1837, and ending in August, 1838, Hedgepeth had acted as deputy sheriff with the privity of the defendant. Curry was asked by the defendant's counsel whether he did not know that Hedgepeth had received from the defendant a deputation in writing, and given the defendant a bond for the faithful discharge of his duties as deputy sheriff. Curry said he knew there was such a deputation in writing and such a bond. The defendant's counsel then objected to the evidence offered by the plaintiff, insisting that the deputation and bond ought to be produced, and that the fact of Hedgepeth being a deputy could not be proved in any other way. The court was of opinion that, although in a suit by the defendant or Hedgepeth, if it became material to show the fact of his being a deputy,

the written deputation might be required as the best evidence, yet in a suit by a third person, as in the present case, the plaintiff was not expected to know whether there was a written deputation or not, and
(54) was not bound to produce it or to give notice for its production, but was permitted to prove the fact of his being a deputy by showing that he acted as deputy with the consent and privity of the sheriff. This evidence having been given and the breach proved, there was a verdict and judgment for the plaintiff, and the defendant appealed to the Supreme Court.

J. H. Haughton for plaintiff.
No counsel for the defendant in this Court.

RUFFIN, C. J. For the reasons stated by his Honor, we think his opinion right. If the relator had endeavored to prove the connection between the defendant and his supposed deputy by the deed or writing constituting the deputation, it would have been incumbent on him to produce the written instrument itself, or to have taken such other steps as would let him in to prove its contents. But the relator did not offer evidence of that description. He proved that Hedgepeth acted as the defendant's deputy, not only in the particular instance for which he now endeavors to make the defendant responsible, but generally as undersheriff in the execution of mesne and final process, and other official duties. From the defendant it comes out that he had made Hedgepeth his deputy by deed; and for that reason he asked to exclude the relator from all circumstantial evidence of the fact, however cogent. But the objection is untenable. The relator can not be bound to produce a document, the existence of which he has no means of ascertaining, and still less of gaining a knowledge of its contents. There are many analogous cases. One is the case of partners. If a suit be brought by persons in that character and it be shown they contracted by deed, they must produce the instrument in order to show who are the partners. They have the instrument, and, therefore, must not keep it back. But if a suit be brought *against* copartners, it is sufficient to prove that they acted as such, and so held themselves out to the world. 2 Starkie Ev., 585.
(55) Another case is that of an ordinary agency, which is established by showing a course of dealing by one person for another, and the recognition by the one of the acts of the other in similar instances. In fine, the relation between the defendant and his deputy is established by means like those which establish the relation between the public and the sheriff himself, namely, by showing that he acted as such, without going back to his election and legal qualification.

PER CURIAM. Affirmed.

Cited: S. v. Allen, 27 N. C., 43; *R. R. v. Fisher,* 109 N. C., 3.

WILLIAM B. MOSS v. NICEY MOSS.

1. A husband cannot obtain a divorce from his wife on the ground of adultery committed by her after a separation, if such separation has been occasioned by the fault or at the instigation of the husband.
2. A party applying for a divorce is bound by his admission, in the pleadings or on record, of facts which legally bar his application, even though a jury, on issues submitted to them, find a verdict in contradiction of such facts.

APPEAL from *Manly, J.*, at Fall Term, 1841, of MACON.

It was a petition filed on 25 March, 1838, by the plaintiff against his wife, for a divorce from the bonds of matrimony for the cause of the wife's adultery. It states that the circumstances of the parties were humble, and that their marriage took place in December, 1835; they "lived happily together for some time, until the wife had a child under circumstances which forced upon the petitioner's mind the conclusion, beyond a doubt, that the child was not his, but spurious; that upon that unexpected change of his fortunes the petitioner deter- (56) mined to divulge the fact at once, and he then made known to his wife that he well knew, as she did, that her said child was not his issue, and that from thenceforth he would not receive her as his wife; upon which information the defendant, as soon as she had recovered from her indisposition (at lying in), left the petitioner's house, and hath not since returned." The petition further states that in the beginning of 1837 the petitioner left this State and was absent about one year; and then charges specifically that the defendant went to live with one W. G., and has continued to live with him in adultery ever since, and has there had another child, which is the issue of W. G., and not of the petitioner, who was absent and in a distant State at the period of conception.

The answer states that about two years before the marriage the defendant had a child of which the petitioner was the father, and so acknowledged himself to be; and that the adulterous intercourse between the parties afterwards continued up to the marriage, at which time she was again pregnant, and in about six months thereafter the second child was born. The answer then states that the defendant is unable to give a specific reply to the circumstances which, as the petitioner alleges, induced him to believe that the child was not his, for the reason that in the petition none of those circumstances are set forth. And it further states that about one month after the birth of that child the petitioner drove the defendant from his house in the manner stated in the petition; and it avers that from her marriage up to that time she had no criminal conversation with any man, but lived chastely. Upon the trial it was admitted by the parties that before their marriage the defendant was the kept mistress of the petitioner, and that they had one child; and also

that when they intermarried she was pregnant of a second child, and that upon the birth of it a dispute arose between them upon the paternity of that child, whereupon the wife left her husband's house. Upon issues to a jury, they found that the defendant separated herself from her husband and lived in adultery with W. G.; that the petitioner did not allow of his wife's prostitution, nor expose her to lewd company,
(57) whereby she was ensnared to the said crime, nor admit her into conjugal society after he knew of the criminal fact.

The cause then coming to be heard upon the pleadings, admissions of the parties, and finding of the jury, the petitioner moved thereupon for a divorce from the bonds of matrimony. But the presiding judge declared his opinion that it was not fit to grant that motion, and, no other being made, the petition was dismissed with costs. From this decree the petitioner appealed to the Supreme Court.

No counsel appeared for petitioner.
Francis for defendant.

RUFFIN, C. J. This case presents no new legal question; but the decision seems to be sustained by the previous adjudications of this Court.

The libel is not founded on antenuptial want of chastity nor on the alleged imposition on the husband from his supposing himself to be the father of the child of which his wife was pregnant at their marriage, when in fact it was the offspring of some other man. If it had been thus founded, *Scroggins v. Scroggins,* 14 N. C., 535, would have been an answer to it. The gist of the complaint is the subsequent adultery of the wife; and that is established. Her previous impurity is brought forward to account for and justify, on the part of the husband, the state of separation, during which this undoubted criminality of the wife arose. In that point of view it was properly stated as a material part of the plaintiff's case; for, as the statute provides that if "either party has separated him or herself from the other, and is living in adultery, the injured party may obtain a divorce," it follows, if the criminal fact has arisen wholly during a separation of the parties, that the occasion of the separation ought to be stated, so as to show that the party applying did not cause the separation, but was injured by it as well as by the adultery. Hence in *Whittington v. Whittington,* 19 N. C., 64, we held that adultery by the wife, after abandonment by the husband, would not
(58) found a decree for a divorce in his favor; and, indeed, that the marriage could not be dissolved at the instance of the party to whom default in any of the essential duties of married life is fairly imputable. Among the most essential of those duties is conjugal society;

both in being stipulated for in contracting the relation of man and wife and as a wholesome restraint upon and an effective protection against those passions and weaknesses to which both sexes are in some degree subject. When, therefore, a divorce is sought, for a cause supervening separation, it must be inquired whether that cause probably grew out of the separation, and whether the separation was the act, and, so, the fault of both the parties, or of one of them, and which.

Applying these principles to the case before us, the decision must be against the plaintiff.

It is true the jury have said the wife separated herself from her husband, and have exonerated him from the imputation of connivance, and it must be granted thereupon that *prima facie* it is to be taken that upon the wife rests the fault of the separation, as well as that of her subsequent incontinence. But upon the whole record that effect cannot be given to the finding of the jury, because it is inconsistent with the facts pleaded in the libel or otherwise admitted by the plaintiff on the record. The statute, indeed, requires all the material facts charged in the libel to be submitted to a jury, upon whose verdict, and not otherwise, the court is to decree. Rev. Stat., ch. 39, sec. 5. But that obviously means those facts upon which the plaintiff founds his or her right to a divorce. The purpose is to prevent collusion between the parties; and hence a divorce is not to be granted upon facts admitted in the pleadings or on the trial, but only on facts pleaded, proved, and found by a jury. But although a divorce can never be granted on such admissions, yet it is quite clear that it may and must be refused upon the ground of the admission by the party applying for it of such facts as legally bar the application. It is a general rule that a party is concluded by the statement of his own pleadings, and, therefore, that a verdict contradictory to them is naught. But, as the Legislature leans against divorces, the statute has introduced an exception to that rule thus far, (59) namely, that admissions shall not authorize a decree for a divorce. The same reason renders the general rule applicable, and with peculiar force, to admissions by the plaintiff of facts adverse to the divorce sought; and, therefore, it is to be seen how far the facts found by the jury are consistent with those stated or admitted by the petitioner. We think, notwithstanding the verdict, that in this case it is established by the admissions of the plaintiff that the separation was not the act of the wife merely and exclusively, or even principally her fault, but that it was contemplated, desired, and intended by the husband, and was chiefly his act, and without any sufficient cause as yet made apparent.

The libel states explicitly that upon the birth of the second child (with which the defendant was pregnant at her marriage) the husband told his wife "that from thenceforth he would never receive her as his wife,"

and this repudiation was founded entirely upon the declaration he then made, that he was not the father of the child. Upon that point a controversy existed between them; he denying and she affirming that the child was his. The result of that controversy was that he abjured the connection in the terms just mentioned; and "upon that information" the wife, as soon as she was able, left her husband's house. What else did the husband expect or wish? Their circumstances were narrow and rendered their joint labor needful for their support and that of their children. When people are in that condition, and the wife is charged by the husband with prostitution and imposing on him a spurious issue, and is told by him that he will never receive her as a wife, what else is she to understand but that they cannot have the same home, and that she must leave her husband's house and seek a home elsewhere? This defendant says that she did so understand the petitioner; for the answer states that "he drove her from his house." It seems to us that she understood him correctly; for, besides the plain sense of his language, there are the facts that he made no effort to detain her in the first instance, or to induce her return, although it is not intimated in the libel that
(60) her departure was unknown to him or her place of retreat concealed from him. Indeed, it is not unnatural, if he really believed she was the wanton he alleged, that he should desire to be freed from her society and relieved from her maintenance. The libel states as a fact that the plaintiff was not the father of the child, and thus states it as an excuse for the harsh sentence pronounced on the wife immediately after her confinement. The very manner and occasion of bringing that matter forward afford, therefore, the true interpretation of the plaintiff's language to his wife. They show his wish to get clear of her society and to drive her from his house. If, indeed, the plaintiff had informed us of the circumstances which established beyond a doubt in his mind that he was not the father of the child, and had shown their existence by proof, there might be some plausible ground to palliate, to some extent, the act of expelling his wife from his dwelling. But we need not consider the effect of such proof, for the case is utterly destitute of evidence on the point, and an issue on it was not even asked for. Therefore, we are obliged to say that in any legal or just sense it cannot be held that the wife separated herself from her husband, for that implies that it was without his concurrence, or, at least, not at his instigation or command. And we must further say that, without proof to the contrary, the legal presumptions of innocence on the part of the wife, and of the legitimacy of a child born in wedlock, must stand, and repel that part of the accusation against the defendant.

As the Court must take the case, then, it is that the plaintiff, without any reasonable cause, forced his wife to leave his house, and to leave it

with a character tainted by the unhappy connection to which he had seduced her before the marriage, and now unjustly ruined by his own false charge of infidelity to him; and that he then left the State for a year, without making any provision for her, and without her having, as far as appears, any friends to whom she might look for support or shelter, but obliged to gain a subsistence for herself and her children in the best way she could. In such a case, might not the husband, on his return, expect to find that a woman, thus seduced, traduced, degraded, destitute, and abandoned, had yielded to temptations to which, in her weakness and necessity, he had been the occasion of exposing (61) her?

We think, therefore, that immoral and criminal as the conduct of the wife has been, it furnishes no sufficient ground to dissolve the marriage. The husband also wants merits. By his own unfounded accusation and cruel expulsion of his wife from his roof he, probably, may have caused the "criminal fact" which forms the gravamen of the libel.

PER CURIAM. Decree dismissing the petition affirmed with costs.

Cited: Wood v. Wood, 27 N. C., 680, 681; *Tew v. Tew,* 80 N. C., 318; *Steel v. Steel,* 140 N. C., 635; *Ellett v. Ellett,* 157 N. C., 164; *Cooke v. Cooke,* 164 N. C., 282.

MARY ROWLAND'S ADMINISTRATOR v. JOEL ROWLAND.

1. In a civil suit against several persons who have a joint interest the declaration of one as to a fact within his own knowledge is evidence against the others as well as himself.
2. But where a suit, as, for instance, an action of detinue, is brought against one for certain specific property, the declarations of another person, who holds other property under the same title, cannot be introduced to impugn the title of the defendant. He may be examined as a witness in the cause.
3. Where there is *no* evidence to establish a fact, the judge has a right so to instruct the jury.

DETINUE to recover a negro named John, tried at Fall Term, 1841, of MONTGOMERY, before *Pearson, J.*

The plaintiff, in submission to the opinion of the presiding judge, having suffered a nonsuit, appealed to the Supreme Court. The case as sent up contained all the evidence offered on the trial, but it is unnecessary to insert it here, as the opinion delivered in this Court contains all the material part.

Barringer for plaintiff. (62)
Mendenhall for defendant.

DANIEL, J. This is an action of detinue to recover a slave by the name of John. The defendant offered in evidence a bill of sale for the said slave from his mother (the plaintiff's intestate) to himself. The plaintiffs contended that their intestate was *non compos mentis* at the time the said deed was executed, or that the same was obtained from her by fraudulent practices. In the progress of the trial the plaintiffs offered to prove the declarations of one Cagle, who had married the granddaughter of the intestate and who had obtained from her a bill of sale for four other slaves which deed bore even date with that executed to the defendant. This evidence was rejected by the court; and we think it was properly rejected. In a civil suit against several persons who are proved to have a joint interest in the decision, a declaration made by one of those persons concerning a material fact within his own knowledge is evidence against him and against all who are parties with him to the suit. Phillips on Ev., 73; 11 East, 589; *Lucas v. De la Cour,* 1 Maule and Sel., 249. This rule has been extended in actions so far as to admit the declarations of one partner to be evidence against another, concerning joint contracts and their joint interest, although the person who makes such declarations is not a party to the suit; it is received as an admission against those who are as one person with him in interest. Phillips, 73; *Wood v. Braddick,* 1 Taunt., 104. The above is the rule respecting admissions in the case of joint contracts, or where several persons have one and the same interest in the subject-matter. But the same rule cannot be applied in actions of trespass or to criminal proceedings. Cagle did not have one and the same interest with the defendant in the subject-matter of this action, which only related to the title to the slave John. There was nothing to prevent Cagle from being called and examined as a witness in the cause.

(63) Secondly. After a great deal of testimony had been received on the part of the plaintiff and the defendant, the defendant's counsel said he would still proceed and examine other witnesses. The court intimated "that it was unnecessary to call other witnesses, for, in the opinion of the court, the evidence already offered, taking it to be true, would not justify the jury in coming to the conclusion either that there was a want of mental capacity in Mrs. Rowland at the time she executed the deed or that such undue influence had been used as would avoid the deed. We have examined the testimony which had been given in before the judge made the above remarks, and we must say that it exhibited *no* evidence of mental incapacity in Mrs. Rowland at the time she executed the deed to the defendant; nor does it contain *any* evidence of a fraudulent contrivance to obtain the same. We think that the remarks of the judge went no farther than to intimate that there was *no* evidence to

support the allegations made by the plaintiffs, and thus far it was not erroneous in him to go. The judgment must be

PER CURIAM Affirmed.

Cited: Brown v. Patton, 35 N. C., 447; *Young v. Griffith,* 79 N. C., 203; *Barker v. Pope,* 91 N. C., 169.

JOHN E. FORTESCUE v. PELEG SPENCER, AND THE SAME v. THE THE SAME.

Where A. owes B. a debt by note of upwards of $100 and in lieu thereof gives B. several notes of less than $100, so that judgments may be taken on them before a justice of the peace: this is not either in fraud or evasion of the statute prescribing the jurisdiction of justices of the peace out of court.

THESE were appeals from *Settle, J.,* at Fall Term, 1841, of HYDE.

The facts were these: The defendant was indebted to the plaintiff in the sum of $148.42 due by bond, and on 26 May, 1840, in satisfaction of that bond, he gave to the plaintiff two other bonds in the sum (64) of $74.21 each, payable immediately. These two bonds were given and accepted by the parties, respectively, with the view that judgments might be taken thereon before a justice of the peace; and, accordingly, on the same day the defendant accepted the service of two warrants, issued on the bonds, and confessed judgment in each case for $74.21. Those judgments having become dormant, the plaintiff issued a new warrant on each of them and obtained judgment thereon before a justice of the peace, from which the defendant appealed to the county court. He there pleaded in each that there was no such former judgment as that alleged in the warrant; and on the issue joined thereon there was a trial and judgment in that court, from which the defendant again appealed to the Superior Court. On the trial in the latter court it was objected that the transaction was in fraud and evasion of the statute which confers jurisdiction on a single justice of the peace out of court, and therefore, that the judgments first given, and on which the present warrants are founded, were void and the plaintiff could not recover. But notwithstanding the objection, the court directed the jury to find for the plaintiff upon the issue, which was done. From the judgment thereon the defendant appealed to this Court.

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

RUFFIN, C. J. There cannot be the least question that the ruling of his Honor is right. There is no foundation at all for saying that the

parties acted in fraud of the law. Were a creditor, whose debt exceeded the sum of which a magistrate had jurisdiction, to remit a part of it by acknowledging a fictitious payment, for the purpose of taking advantage of his debtor, and obtaining a speedier judgment, there might be ground for this objection, if made in apt time. But what was done here
(65) was the act of the parties, and consisted of nothing more than the giving of new securities for a just debt. Whether that was effected by giving one bond for several before existing, or by giving several for aliquot parts of a debt before due on one bond, is not material. It oppresses no person and evades no law, although in the former case jurisdiction is given to a court of record and that of a justice of the peace ousted, and in the latter the magistrate acquires jurisdiction. It may have been at the instance of the defendant himself and for his benefit, as the costs would be less. Besides, if valid at all, the objection should have been directly taken in the first suit and not collaterally, as in this case, in an action on the judgment.

PER CURIAM. No error.

Cited: Moore v. Thomson, 44 N. C., 223.

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(66)

ROBERT McNAMARA v. JOHN KERNS ET AL.

1. The act of Assembly (Rev. Stat., ch. 89, sec. 24) authorizing the wardens of the poor to seize any horses, cattle, hogs, or sheep belonging to a slave is not unconstitutional.
2. The wardens may exercise this power either in person or by a precept or authority directed to another.
3. Such a precept or authority directed to "any constable of a county," without specifying his name, will justify the constable who executes it, if his act be afterwards ratified by the wardens.
4. It is not necessary that to such an authority or precept the wardens should sign their names as wardens, if in fact they were so.
5. By the phrase, "cattle, hogs, etc., *belonging* to slaves," the statute means such cattle, hogs, etc., as the master permits the slave to raise for his own use, and to exercise acts of dominion and ownership over as if they were his own.
6. Although defendants in an action of trespass sever in their pleas, yet where there is but one judgment in their favor, as "that they go without day," they shall recover but one set of costs.

TRESPASS, tried at Fall Term, 1841, of ROWAN, before *Bailey, J.,* in which judgment was rendered for the defendants, and the plaintiff appealed to the Supreme Court.

The action was brought to recover the value of nine hogs which the plaintiff claimed as his and which were taken by the defendants. The

facts were that the plaintiff was a farmer, and had several negroes upon his farm who were permitted to raise hogs for themselves. The negroes had the hogs in pen, within sight of the dwelling house of the plaintiff, and the plaintiff said that they were the negroes' hogs, that what was theirs was his, and that he claimed them as his, and forbade their being taken by the defendants. It was furthermore in proof that a paper-writing purporting to be a warrant, signed by five persons, all of whom were wardens of the poor, and some of whom were justices (67) of the peace of Rowan County, was directed to the "constables, etc.," of said county, and placed in the hands of the defendant, Daniel Kerns, one of the constables of the said county, to be executed. The paper-writing is as follows, viz.:

STATE OF NORTH CAROLINA,
ROWAN COUNTY.

To the Constables or Sheriff or Other Officers of Rowan County:

Whereas by and from information of John Kerns, planter, to the wardens of the poor of said county, that the slaves of Robert McNamara, and also the slaves of Charles L. Torrence, do, against the statute and to the abuse of the rights thereby secured to the citizens of Rowan County, raise, keep, and mark hogs as their own right and property: these are, therefore, to command you, in the name of the State of North Carolina, to take and seize upon the property of hogs owned by said negroes, and bring them to the wardens of the poor of said county, to be disposed of according to act of Assembly. Given under our hands and seals at Salisbury, 3 November, 1840.

WILL. BARBER, J. P. [L. S.]
ISAAC BURNES, J. P. [L. S.]
J. C. McCONNAUGHEY, J. P.
JNO. CAUGHENOUR, } *Wardens.*
DANIEL H. CRESS, }

Summons for witness,
JOHN WILLIS,
JAMES RUSH.

The hogs were taken by the defendants, one of whom was a warden of the poor, by virtue of said warrant, without any other notice to the plaintiff; and they justified the taking under an act of Assembly authorizing the wardens of the poor to seize hogs that shall belong to any slave, or be in any slave's mark in this State, and sell the same, the amount made by such sale to be applied by them one-half to the support of the poor of the county and the other half to the informer.

The plaintiff insisted, in the first place, that the hogs belonged (68) to him and not to the negroes; and, secondly, if they were the

hogs of the negroes, that the wardens had no right to seize the hogs in the way they did; and, furthermore, that the act of the Assembly was unconstitutional and void. His Honor, after explaining to the jury the object of the act of Assembly and the mischief which it was intended to remedy, instructed them that if the plaintiff permitted his slaves to raise hogs for themselves for their own use and benefit, and not for the use of the master, although the property in the hogs would be in the master, that was the mischief contemplated by the makers of the act of Assembly; and that the wardens of the poor would be authorized to seize and sell the same; and that the act of Assembly was constitutional. A verdict was returned for the defendants, and judgment being rendered thereon for the defendants, and also that each defendant should recover his several costs from the plaintiff, allowing to each defendant an attorney's fee, the plaintiff appealed.

Badger for plaintiff.
Barringer for defendants.

DANIEL, J. The defendants justify the trespass under the written authority signed by five of the wardens and set forth in the case. *First,* it was insisted for the plaintiff that the act (Rev. Stat., ch. 89, sec. 24) was unconstitutional. This ground is abandoned here, and we think correctly, as the plaintiff, on the seizure, might have had his writ of replevin and tried the validity of the taking before a court and jury, according to the course of the common law; for replevin lies to recover the possession of goods and chattels unlawfully or wrongfully taken. Com. Dig., Replevin; Bul. N. P., 52; *Shannon v. Shannon,* 1 Sch. and Lef., 324; Leigh N. P., 1323. *Secondly,* the plaintiff contends that the hogs were his property, and not the property of the slaves. It is true that the title to the hogs was in the master until the
(69) seizure and sale for the forfeiture, and then the title was changed by force of the statute. The forfeiture arose in consequence of the plaintiff permitting his slaves to raise the hogs or mark them in their mark, and exercise acts of ownership and dominion over them as if they were their own; that is what the statute means by the words "that shall belong to any slave." *Thirdly,* it is said that the written authority under which the defendants justify is not signed by a majority of the wardens in their official characters as wardens. The answer is that the five persons whose names are signed to the writing were wardens at the time, and they had power to act in the business as wardens, and they had no authority to intermeddle as justices of the peace. The return is directed by the writing to be made to the wardens, and not to any justice or justices of the peace. The circumstances of the letters "J. P." being added to the names of some of them does not affect the validity of the author-

ity, given in that mode in which by law they had a right to exercise it. It is a maxim of law that that which is right and useful shall not be destroyed or vacated by that which is useless. *Fourthly,* it is admitted that the wardens, or a majority of them, might have taken the hogs, as it appears that there was a regular informer; but it is denied that they had any judicial powers to issue process to the ministerial officers of the county, or to any other persons, to have the hogs seized. We, however, understand that it is a rule of law that an authority is to be so construed as to include all necessary and usual means of executing it with effect. 2 H. Black., 618. We, therefore, think that the defendants could justify under the said order or license of the wardens in the same manner that a person can justify a trespass on land by the order or license of the owner. *Rex v. Croke,* Cowp., 26, does not militate against this opinion, for that case only decides that the proceedings of a court of limited jurisdiction must show upon their face that the court acted within the sphere of its powers. *Fifthly,* it is contended that the authority is defective and void, inasmuch as it is not given to the defendants, or either of them, by his and their Christian and surnames. The warrant is directed "to the constables or sheriff, or other officers of Rowan (70) County." The sheriff had nothing to do with it. Could Kerns, one of a general class of persons (viz., "constables"), be permitted to aver that he was a constable, and execute this power alone? We think we are not driven to the necessity of deciding this point of law, as all the wardens who signed the paper, as well as Kerns, the constable, and those who were with him at the seizure, are sued as defendants. And the seizure was subsequently assented to and ratified by the said wardens, which we think cured any irregularity, if there was any, in the mode of its execution. *Sixthly,* the defendants had a right to sever in their pleas. 1 Chit. Plead., 596. But if all of the several issues had been found for the plaintiff, the jury must have assessed the damages entire against all the defendants, and there would have been but one judgment and one set of costs for the plaintiff. Will the verdicts in favor of all the defendants, upon all of the several issues, subject the plaintiff to more than one set of costs? We think not, because there are not several judgments upon each issue, but one judgment reciting the several verdicts, and concluding that all the defendants go without day. The case, therefore, does not come within the rule laid down in *Stockstill v. Shuford,* 5 N. C., 39; *s. c.,* 1 N. C., 637.

The judgment is affirmed except so much of it as gives a separate set of costs to each of the defendants, and that portion of it is reversed with costs to the plaintiff in this Court.

PER CURIAM. Judgment accordingly.

Cited: Torrence v. Kerns, post, 71.

(71)

CHARLES L. TORRENCE v. JOHN KERNS ET AL.

APPEAL from *Bailey, J.*, at Fall Term, 1841, of ROWAN.

The case is precisely the same as that of *McNamara v. Kerns, ante,* 66.

Badger for plaintiff.
Barringer for defendants.

PER CURIAM. This case is governed by McNamara v. the same defendants. There must, therefore, be the same judgment in it.

Judgment accordingly.

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(72)

JOHN GRIFFITH, GUARDIAN, ETC., v. SAMUEL BYRD, ADMINISTRATOR, ETC.

1. On petitions for distributive shares, which are in the nature of proceedings in equity, an appeal for costs only will not be entertained except under very peculiar circumstances.
2. Where the guardian of an infant distributee sued the administrator of the estate the very day he was appointed guardian, and without any demand upon the administrator, and the administrator was guilty of no default, but promptly rendered an account, which was found to be correct: *Held*, that the guardian should pay the costs of the suit.

APPEAL from *Manly, J.*, at Fall Term, 1841, of YANCEY, on a petition for a distributive share of the estate of George Byrd, deceased. George Byrd died in 1825, leaving surviving him a widow and nine children, and also six grandchildren, who were the children of Anna Griffith, a deceased daughter of the intestate. Of those grandchildren, four were infants in 1839, and for them a county court then appointed a guardian; and he, on the day of his appointment, and without any communication with or notice to the administrator, filed the present petition in the county court in behalf of his ward for an account of the personal estate of the intestate, George Byrd, and payment of the shares of the four infants. The defendant answered and showed a balance in favor of the estate of $211.75, due in December, 1826, of which one-eleventh part, or the sum of $19.25, belonged to Mrs. Griffith's children. The answer states that the defendant had always been ready to pay the shares of the said sum of $19.25 to which the four infants were entitled, but could not do so for the reason that no guardian had been previously appointed for either of them; and, therefore, the defendant submits whether he
(73) ought to pay interest. In the county court there was a decree against the defendant for $26.83½, from which the guardian appealed. Upon a reference in the Superior Court, a report was made

in exact accordance with answer, except only that the clerk charged the defendant interest while the money lay in his hands. That made the share of all the children of Ann Griffith amount, on 11 October, 1841, to $35.96. Neither party excepted to the report, and it was confirmed, and a decree thereupon made that the defendant pay to the guardian that sum of $35.96, but that the guardian should pay the costs of the suit. From this decree the guardian appealed to this Court.

Francis for plaintiff.
No counsel for defendant.

RUFFIN, C. J. Petitions for distributive shares are in the nature of proceedings in equity, and are governed as to the costs, as well as other matters, by the principles and practice of the court of equity. *Ryder v. Jones,* 10 N. C., 24. In general, it is the rule of that court, except under very peculiar circumstances, that an appeal will not be entertained for costs only. 2 Mad. Eq., 577. The reason is that in equity costs do not, as of strict right, follow the event of the cause, but are given in the discretion of the court, according to the circumstances and conduct of the parties in each case. On this ground alone the decree would be confirmed in the case before us.

But, besides, this case very fully evinces the soundness of the principles on which costs are given in equity; and that the decree here was a very proper exercise of the discretion of the court. The defendant is an administrator, a mere trustee, charged with no breach of trust and guilty of no default whatever. He interposed no obstacle in the way of the plaintiffs. He might have done so without an imputation in this case, since the petition does not make all the next of kin of the intestate parties, nor even the two adult children of Mrs. Byrd; and it would have been but a reasonable precaution to make the objection that they were not parties, in order to protect the defendant from the ex- (74) pense and trouble of accounting a second time with those persons. But the defendant waived everything of that kind, and, without delay, rendered an account, which is found to be correct. Under such circumstances, the defendant ought not to be made to pay the plaintiff's costs nor even his own, but ought to be indemnified for his necessary expenses. Then the hasty institution by the guardian of a suit so entirely needless in the first instance, and the prosecuting of it by appeal from court to court for distributive shares so very small as these, indicate, altogether, that the guardian sought the office that he might vex the defendant with a litigation which he thought would be at the defendant's expense. The suit seems to have been wantonly brought and vexatiously pursued. It is to be observed, too, that the decree as it is does injustice

to the defendant, inasmuch as it makes him pay to four of the children of Ann Griffith what was found to belong to all six. This we cannot now correct, forasmuch as the defendant submitted to it. But it furnishes another reason for not disturbing, but affirming the decree appealed from; which is done accordingly and with costs in this Court.

PER CURIAM. Decree affirmed with costs.

Cited: Lewis v. Johnston, 69 N. C., 394.

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(75)

DEN EX DEM. WILLIAM P. WAUGH AND RICHARD CHOATE v. WILLIAM ANDREWS.

1. Where, in an action of ejectment, the defendant has entered a disclaimer as to a part of the land described in the plaintiff's declaration, that part is not within the issues submitted to the jury, and evidence of title to it is therefore irrelevant.
2. Where deeds, records, etc., are referred to and make a necessary part of the case transmitted to the Supreme Court, it is the duty of appellant to see that they accompany the case. Otherwise, the Court cannot determine that there is any error in the opinion of the court below, and the judgment will, of course, be affirmed.

APPEAL from *Manly, J.,* at Spring Term, 1841, of ASHE.

The following is the case transmitted to the Supreme Court. This was an action of ejectment, wherein both parties claimed title under William Edwards and admitted the title to be out of the State. As evidence of title, the lessors of the plaintiff introduced certain records, copies of which are hereunto annexed, and then attempted to prove that the land was set up by the sheriff of Ashe and sold to them as the last and highest bidder. In respect to this fact there was a conflict of testimony; two witnesses stating that they thought it was sold, and the sheriff and several others stating that it was not sold. A deed from John Gamble, sheriff, was also exhibited, a copy of which is made a part of the case; but it did not appear that it included any part of the land contained in the declaration. It was admitted that the defendant was in possession at the time of bringing the action.

The presiding judge instructed the jury that the plaintiff's right to recover depended upon whether he had shown title to the premises; that the levies, which described the land as "100 acres on both sides of
(76) Little River," and nothing more, were insufficient of themselves and needed aid from parol testimony to identify the land. If the jury had heard testimony to satisfy them that the land described in the declaration was the land levied upon, then the levies were sufficient. With respect to the other levies, the court instructed the jury that in

law they were sufficient, provided they were satisfied that the land in question was included by the description. The court further instructed the jury that if the levies or any of them were sufficient under the rules laid down, they would proceed to inquire whether the land was sold, and sold to the lessors of the plaintiff; that if the sheriff, having process for that purpose, set up the land and sold it to them, the title passed, and they should find for the plaintiff. But if the land had not been levied on, or, being levied on, had not been sold to the plaintiff's lessor, they would find for the defendant.

When the defendant offered John Gamble as a witness, he was objected to on the part of the lessors of the plaintiff, on the ground that he had joined in a deed, a copy of which is herewith sent, to a man by the name of Woodruff, and Woodruff had conveyed to the defendant. But the objection was overruled by the court.

In the progress of the trial the lessors of the plaintiff were proceeding to show title to a parcel of land of 25 acres contained in their declaration, and as to which the defendant had heretofore, with leave of the court, entered of record a disclaimer. But the evidence was stopped by the court.

The jury found for the defendant, and from the judgment pronounced thereon the plaintiff appealed.

The deeds and records referred to in the case were not sent up.

No counsel appeared for the plaintiff in this Court.
Boyd and Mendenhall for defendant.

RUFFIN, C. J. There can be no doubt of the correctness of the ruling of his Honor respecting the tract of land which the defendant disclaimed. Being disclaimed, it was not within the issue which the jury were trying, and therefore evidence of the title to it was irrelevant.

The Court is also obliged to affirm the judgment, notwithstand- (77) ing the exceptions of the plaintiff to the other matters which occurred at the trial. In the first place, it is stated in the record as a fact that it did not appear that the deed from the sheriff to the lessor of the plaintiff included any part of the land contained in the declaration. Of course, it is indispensable that the plaintiff should show that his deed covers the premises claimed by him; and if he does not, the verdict was properly rendered against him for that reason, and all errors committed by the court on other points become immaterial.

In the next place, however erroneous the decisions of the Superior Court may have been upon the other points stated in the record, this Court finds itself unable to correct or even examine them. The case states that transcripts of certain records were read in evidence, and also

the deed of the sheriff to the lessor of the plaintiff, and a deed from Gamble to Woodruff; and that on the effect of those documents the presiding judge delivered his opinions as set forth, and that the appellants excepted thereto. The case has not set out the substance or contents of those documents, but states that copies of them are annexed to the exception as part thereof, when in fact no such copies are annexed or otherwise appear in the record. Those papers are absolutely necessary to enable us to perceive whether the construction placed on them and the effect given to them on the trial were, in our opinion, proper or improper. Indeed, without them the case is not intelligible, and it cannot be seen what were really the points that were decided. It is the duty of the appellant to make out a case of error in the record; and unless he does, the judgment is of course affirmed. *Stewart v. Garland,* 23 N. C., 470. This is the second term since the trial, and, as the appellant has taken no steps in the matter, the Court must, on the motion of the appellee, decide, on the record as it is, that the judgment be

PER CURIAM. Affirmed.

Cited: Brown v. Kyle, 47 N. C., 443.

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(78)

MARY CLARY'S ADMINISTRATORS v. JOHN CLARY.

1. A witness who has had opportunities of knowing and observing a person whose sanity is impeached may not only depose to the facts he knows, but may also give his opinion or belief as to his sanity or insanity.
2. "Improper influence" constitutes no *legal* objection to the validity of a deed, but only furnishes a ground for the interposition of a court of equity. It is otherwise with a will.

DETINUE to recover several negroes, tried before *Bailey, J.,* at Fall Term, 1841, of ROWAN, when judgment was rendered for the defendant. On the trial the plaintiffs proved that the slaves in controversy did belong to their intestate, Mary Clary, and that the defendant was in possession and detained them. The defendant offered in evidence a paper-writing, purporting to be a deed of Mary Clary, giving the negroes to him in trust for himself, his sisters Nancy and Margaret, and a grandson of the said Mary Clary. The plaintiff insisted that at the time of the execution of the paper-writing, Mary Clary was of nonsane memory, and that it was obtained through fraud. Several witnesses were examined on both sides to show sanity and insanity in Mary Clary at the date of the paper-writing, and several physicians called upon to give their opinion whether she had a sound mind or otherwise. The plaintiffs offered in evidence the deposition of John Beard. When the plaintiffs'

counsel came to the last clause of this deposition, which says, "But deponent was impressed with the belief that as to her mental faculties she was in that state called childish," and proposed to read it as evidence, the defendant's counsel objected, saying that was the opinion of the deponent, and could not be evidence. The court rejected the part of Beard's deposition objected to.

The plaintiff likewise introduced a witness by whom, he stated, (79) he expected to prove that Nancy, the sister of the defendant, and one of the *cestuis que trustent,* asked the witness to go and exercise some improper influence over Mary Clary in obtaining a deed for the property, but that the witness did not go and did not endeavor to exercise such influence. The court rejected this evidence as improper.

The court instructed the jury that the sole inquiry they had to make was whether Mary Clary, at the date of the paper-writing purporting to be a deed of gift to the defendant, was of sound mind, and whether it was executed by her as her act and deed; that it was not sufficient that she could answer usual and familiar questions, but they must be satisfied that she had capacity at that time to make a disposition of her property with understanding and reason. The jury rendered a verdict for the defendant, and judgment being given pursuant thereto, the plaintiffs appealed.

Boyden and Barringer for plaintiffs.
Badger for defendant.

GASTON, J. The first opinion in the court below to which exception has been taken is the rejection as evidence of the last clause of the deposition of John Beard, wherein the deponent stated "that he was impressed with the belief that, as to her mental faculties, Mary Clary was in the state called childish." To understand the import of this fact of the deposition, it must be taken in connection with what precedes it. The substance of the entire deposition is that the witness had no acquaintance with Mary Clary other than such as resulted from one occurrence; that about 1826, eleven years before the execution of the deed in dispute, he visited her at Daniel Clary's house, in consequence of a message from said Daniel, and for the purpose of writing her will; that he received her directions with respect to the disposition of her property, and wrote the will according to these directions; that he did not attest the will, but left it to be attested by others; that at this time she appeared to him to be in good health, but he thought her intellect in the state usually termed childish. The objection to the rejected part of the deposition was for that it gives the *opinion* of the witness upon the state of Mary Clary's mind.

(80) It is certainly the general rule that witnesses shall be examined as to facts whereof they have personal knowledge, and not as to those in regard to which they have no personal knowledge, but have only formed an opinion or belief. But this rule necessarily admits of exceptions. There are facts which from their nature exclude all direct positive proof, because they are imperceptible by the senses, and of these no proof can be had except such as is mediate or indirect. No man can testify, as of a fact within his knowledge, to the sanity or insanity of another. Such a question, when it arises, must be determined by other than by direct proof. The precise inquiry then is, Must the evidence be restricted to the proof of other facts coming within the knowledge of the witnesses and from which the jury may draw an inference of sanity or insanity, or may the judgment and belief of the witness, founded on opportunities of personal observation, be also laid before the jury, to aid them in forming a correct conclusion? We understand that this is a matter on which different judges have ruled differently on the circuits, and it is important that a uniform rule should be settled in regard to it. The point was not determined in *Crowell v. Kirk,* 14 N. C., 355. Nor are we aware of any *direct* and authoritative decision, which supersedes the necessity of recurring to general principles and legal analogies to ascertain what is right.

In the first place, it seems to us that the restriction of the evidence to a simple narration of facts having or supposed to have a bearing on the question of capacity would, if practicable, shut out the ordinary means of obtaining truth; and, if freed from this objection, cannot in practice be effectually enforced. The sanity or insanity of an individual may be a matter notorious and without doubt in a neighborhood, and yet few, if any, of the neighbors may be able to lay before the jury *distinct facts* that would enable them to pronounce a decision thereon with reasonable assurance of its truth. If the witness may be permitted to state that he has known the individual for many years; has repeatedly conversed with him and heard others converse with him; that the (81) witness had noticed that in these conversations he was incoherent and silly; that in his habits he was occasionally highly pleased and greatly vexed without a cause; and that in his conduct he was wild, irrational, extravagant, and crazy; what would this be but to declare the judgment or opinion of the witness of what is incoherent or foolish in conversation; what reasonable cause of pleasure or resentment, and what the indicia of sound or disordered intellect? If he may not so testify, but must give the supposed silly or incoherent language, state the degrees and all the accompanying circumstances of highly excited emotion, and specifically set forth the freaks or acts regarded as irrational, and this without the least intimation of any opinion which he has formed of their

character—where are such witnesses to be found? Can it be supposed that those not having a special interest in the subject shall have so charged their memories with those matters, as distinct, independent facts, as to be able to present them in their entirety and simplicity to the jury? Or if such a witness be found, can he conceal from the jury the *impression* which has been made upon his own mind; and when this is collected, can it be doubted but that his judgment has been influenced by many, very many, circumstances which he has not communicated, which he cannot communicate, and of which he is himself not aware?

We also think that there is an analogy in the investigation of questions of this kind and in the investigation of other questions wherein positive and direct evidence is unattainable and in which the rule of evidence is well established. Of this kind are questions of personal identity and handwriting. Mere opinion as such is not admissible. But where it is shown that the witness has had opportunity of observing the *character* of the person or the handwriting which is sought to be identified, then his judgment or belief, *framed upon such observation,* is evidence for the consideration of the jury; and it is for them to give to this evidence that weight which the intelligence of the witness, his means of observation, and all the other circumstances attending his testimony, may in their judgment deserve. Any why is this but (82) because it is impossible for the witness to specify and detail to the jury all the minute circumstances by which his own judgment was determined, so as to enable them by inference from these to form their judgment thereon? And so it is in regard to questions repecting the *temper* in which words have been spoken or acts done. Were they said or done kindly or rudely, in good humor or in anger, in jest or in earnest? What answer can be given to these inquiries if the observer is not permitted to state his impression or belief? Must a *facsimile* be attempted, so as to bring before the jury the very tone, look, gestures, and manner, and let them collect thereupon the disposition of the speaker or agent?

In the ecclesiastical courts, where questions of sanity and insanity in cases of wills are of frequent occurrence, the practice is to interpose allegations, and admit these allegations to proof, that the general appearance, manners, conduct, and deportment of the testator denoted unsound intellect; that he was treated and regarded by his friends and acquaintances as one not in his right senses; and, on the other hand, to receive pleas, and of consequence proofs, that he was regarded by his friends and acquaintances as sane; that he was engaged in acts of business, which he conducted without suspicion of unsoundness, and that his general deportment was rational and proper. See *Wheeler v. Bestford,* 3 Haggart, 574. In this case it was stated by *Sir John Nicholl,* in pro-

nouncing his judgment: "There is a cloud of witnesses who gave unhesitating opinions that the deceased was mad." He declared, indeed, upon a consideration of all the circumstances of the case, "Their opinions are of little weight"; but he did not reject them as inadmissible nor remark upon them as contrary to the course of the Court. See, also, the testimony received in *Engleton v. Hingston,* 8 Ves., 449.

It is a well known exception to the general rule requiring witnesses to testify facts and not opinions, that in matters involving questions of science, art, trade, or the like, persons of skill may speak not only to facts, but give their opinions in evidence. It is insisted that by the terms of this exception persons not claiming to possess peculiar skill and all persons upon matters not requiring peculiar skill are excluded
(83) from giving opinions. Certainly the testimony rejected in this case cannot claim to be admitted under this exception, and, as we understand the exception, it does exclude *mere opinion* in all cases other than those which are embraced within it. Professional men are allowed to testify to the principles and rules of the science, art, or employment in which they are especially skilled, as general practical truths, or *facts* ascertained by long study and experience; and also may pronounce their opinion as to the application of these general facts to the special circumstances of the matter under investigation, whether these circumstances have fallen under their own observation or have been given in evidence by others.

The jury, being drawn from the body of their fellow-citizens, are presumed to have the intelligence which belongs to men of good sense, but are not supposed to possess professional skill, and, therefore, in matters requiring the exercise of this skill, are permitted to obtain what is needed from those who have it, and who are sworn to communicate it fairly. Thus shipmasters have been allowed to state their opinions on the seaworthiness of a ship from a survey which had been taken by others; physicians to pronounce upon the effect of a wound which they have not seen; and painters and statuaries to give their opinion whether a painting or statue be an original or copy, although they have no knowledge by whom it was made. This is mere opinion, although the opinion of skillful men. This none but professional men are permitted to give in matters involving peculiar skill, and none whatever are allowed to give in matters not thus involving skill; because, with this exception, the jury are equally competent to form an opinion as the witnesses, and, with this exception, their judgment ought to be founded on their own unbiased opinion. But judgment founded on actual observation of the capacity, disposition, temper, character, peculiarities of habit, form, features, or handwriting of others is more than mere opinion. It
(84) approaches to knowledge, and *is knowledge,* so far as the imper-

fection of human nature will permit knowledge of these things to be acquired, and the result thus acquired should be communicated to the jury, because they have not had the opportunities of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by the observations of others.

It has also been insisted that there is a difference between the attesting witnesses to an instrument and other witnesses, as to their competency to express an opinion upon the capacity of the maker. Wherever such a difference has been *intimated,* it seems confined to cases of wills, in which it is said that "The testator is intrusted to the care of the attesting witnesses; that it is their business to inspect and judge of the testator's sanity before they attest; that in other cases witnesses are passive; here they are active, and principal parties to the transaction." Now, we can readily conceive why, *prima facie,* it shall be presumed that witnesses thus engaged are more observant than others on whom the duty of observation has not been thrown, and also the propriety of the rule which obtains on the trials of an issue of *devisavit vel non,* that all the attesting witnesses, if to be had, shall be produced and examined before the jury. But we do not see (and without sufficient reason or clear authority for such a distinction we cannot admit it) why the judgment of any witness actually founded upon such observation shall not be received in evidence. It is conceded that the attesting witnesses may express an opinion upon the testator's capacity, because as the law has made it their duty to inspect the testator's capacity, the law presumes that they did observe and judge of it. If observation presumed be a sufficient ground for receiving in evidence the judgment of a witness supposed to be thereupon formed, it is not readily conceivable that actual observation is an insufficient ground to warrant respect for the judgment of a witness in fact formed upon it.

It has been also objected that the witness whose belief or opinion of mental capacity was in this case rejected had not the means of forming such a judgment thereon as was proper to be submitted to the jury. Unquestionably, before a witness can be received to testify as to the fact of capacity, it must appear that he had an adequate (85) opportunity of observing and judging of capacity. But so different are the powers and the habits of observation in different persons that no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation, other than that it has in fact enabled the observer to form a belief or judgment thereupon. So it is in the analogous case of handwriting. If a witness declares that he has seen the party write, whether it has been once only or a thousand times, this is enough to introduce the inquiry whether he believes the paper produced to be the party's handwriting. His belief is evidence, the weight

of which must depend upon a consideration of all the circumstances under which it was formed. It may be that the judgment of the witness in this case, founded solely upon the occurrences in a single interview, and of which, notwithstanding the general impression thereby created, he remembers no distinct marked act of childishness or folly, would have weighed little with the jury in determining the matter in controversy. But if belief of capacity founded on personal observation be evidence, and we think it is, it is admissible whether the opportunity for observation has been frequent or rare. Whatever might be the weight of the rejected testimony, we hold that the plaintiff had a right to insist on its being placed in the scales of evidence, and that there was error in the opinion which rejected it.

The other opinion to which exception has been taken is the rejection of the testimony offered to show that Nancy Clary, one of the *cestuis que trustent* in the deed, under which the defendant claims the property in dispute, had requested the witness to exercise some improper influence over Mary Clary in order to obtain a conveyance of the property, which request the witness had not complied with. In this opinion we see no error. Waiving other objections to the testimony, the inquiry about influence was altogether irrelevant and nugatory. "Improper influence" constitutes no *legal* objection to the validity of a deed, but furnishes a ground for the intervention of a court of equity. It is otherwise, indeed, with a will. There may be such an influence exerted over a mind
(86) of sufficient sanity for general purposes, and of sufficient discretion to regulate the party's affairs in general, as will invalidate a will and render it inconsistent with the legal idea of a free and disposing mind. *Mountain v. Bennett,* 1 Cox, 355. There is no power in a court of equity to set aside a will, as it may a deed, because of imposition. The whole jurisdiction over a will belongs to the tribunal appointed to decide whether it be or be not the will of the deceased, and that tribunal will refuse to the instrument this character when it sees that the *animus testandi* is wanting. See 1 Wil. on Ex., 35, 36, and the authorities there cited.

Because of the error in the first opinion to which the plaintiff excepted, the cause must be submitted to another jury.

PER CURIAM. *Venire de novo.*

Cited: Setzar v. Wilson, 26 N. C., 512; *Bell v. Clark,* 31 N. C., 244; *McDougald v. McLean,* 60 N. C., 121; *S. v. Ketchey,* 70 N. C., 624; *Isler v. Dewey,* 75 N. C., 467; *McLeary v. Norment,* 84 N. C., 236; *Barker v. Pope,* 91 N. C., 168; *McRae v. Malloy,* 93 N. C., 160; *S. v. Potts,* 100 N. C., 462; *Hopkins v. Bowers,* 111 N. C., 178; *Smith v. Smith,* 117 N. C., 327; *Sherrill v. Tel. Co., ib.,* 362; *Whitaker v. Hamil-*

ton, 126 N. C., 470; *Cogdell v. R. R.,* 130 N. C., 318, 326; *In re Peterson,* 136 N. C., 29; *Taylor v. Security Co.,* 145 N. C., 389, 396; *Wade v. Tel. Co.,* 147 N. C., 222; *Myatt v. Myatt,* 149 N. C., 140; *S. v. Khoury, ib.,* 457; *S. v. Banner, ib.,* 524; *Morrisett v. Cotton Mills,* 151 N. C., 33; *Moffitt v. Smith,* 153 N. C., 293; *Brazille v. Barytes Co.,* 157 N. C., 457; *Hodges v. Wilson,* 165 N. C., 518.

(87)

MALCOLM BUIE, EXECUTOR OF DUNCAN BUIE, v. MARGARET BUIE.

1. Where an action is brought against an obligor and the representative of a deceased obligor, and as to the latter the action is barred by the act barring claims against deceased persons' estates (Rev. Stat., ch. 65, sec. 11), a judgment may still be recovered against the former, for the act does not extinguish the debt, but only bars the remedy against the person to whom it applies.
2. A party cannot except for error to an instruction which he hath himself prayed.
3. The want of a person against whom to bring suit rebuts the presumption of payment arising from forbearance to sue.
4. It is a question of law for the court what facts will repel the presumption of payment under the act of Assembly (Rev. Stat., ch. 65, sec. 13.)
5. Where a person is sued in the same action as executor of A. and also as administrator of B., it is irregular to enter a nonsuit, so far as he is sued in the one capacity, and a judgment against him in his other capacity. A *nolle prosequi* is the proper course.

APPEAL from *Pearson, J.,* at Fall Term, 1841, of MOORE.

It was an action of debt upon two notes under seal, purporting to be executed by Alexander and Neil Buie, the one for $128, the other $68, bearing date 17 March, 1818, and written on the same piece of paper, one payable one day after date and one twelve months after date. Both were payable to Duncan Buie, the plaintiff's intestate. Alexander Buie died in May, 1818, and in August, 1818, the defendant qualified as his executrix. Neil Buie died in the fall of 1823, and the defendant was appointed his administratrix in 1837. Duncan Buie died in 1822, and in August, 1822, the plaintiff qualified as his executor. The writ in this case issued in February, 1838. (88)

The defendant, as the executrix of Alexander and the administratrix of Neil, relied upon the general issue, payment, release, and the act of 1715.

Some proof was given of a deed having been executed for a tract of land by Duncan Buie to Alexander on the day of the date of these notes. There was also evidence by a witness, whose character was impeached, of an acknowledgment of the debt by the defendant, but within what period was not distinctly stated. It was proved that Daniel Buie and

Alexander Buie were cousins. It was also proved that at the death of Alexander he owned a negro boy, stock, etc., but was a good deal in debt; that after his death the defendant, his widow, qualified as executrix, and, being a very industrious, managing woman, had made out to get along and pay such debts as pressed, without making a sale, as executors and administrators usually do; that for the last six or eight years the defendant, with the assistance of her sons and the negro boy, made fine crops for sale, and was evidently above the world and making money. Until that time, although she held property, she was hard run—for, besides paying debts, she was encumbered with three blind children, who were helpless and had to be supported. The facts relative to the plea of release and the act of 1715 not being controverted, it was consented to consider these questions as reserved, and if the jury should find the other issues in favor of the plaintiff, and the court, upon the questions reserved, should be with the defendant as executrix of Alexander or as administratrix of Neil, the verdict was to be set aside and a nonsuit entered as to one or both, according to the opinion of the court.

The court then left the questions as to the execution of the notes and the plea of payment to the jury. Upon the plea of payment the court charged that under the act of 1826 (Rev. Stat., ch. 65, sec. 13) a note, situated as this was, was presumed to have been paid after thirteen years, unless that presumption was rebutted; that here, as to Neil Buie's estate, it was admitted the thirteen years had run, but there was no administration upon his estate until the year before the suit was brought, and this was sufficient to repel the presumption, for during all that time there was no person to pay. So as to Alexander's estate, it was
(89) admitted the thirteen years had run, and the presumption was raised by law, unless that presumption was repelled; that whether the presumption was repelled or not was not to be left as an open question of fact for the jury; for, if so, and the lapse of time had no more than its natural weight, as a circumstance bearing upon the question of payment, the act of Assembly would amount to nothing; whereas the law intended to give to the lapse of time an artificial and technical weight, so as to require a jury to presume a payment unless the presumption was repelled; and it was a question of law for the court what circumstances, if true, were sufficient to repel it. In this case the court charged that the fact of Alexander Buie's estate being hard pressed, although there was property sufficient, the fact of the plaintiff being a near relative, and the other matters insisted on by the plaintiff's counsel, were not sufficient in law, with the exception of one, and that was the acknowledgment by the defendant of the existence of the debt. If the evidence satisfied the jury that such an acknowledgment had been made by the defendant within thirteen years next before the issuing of the

writ, that would repel the presumption; but unless the acknowledgment was made within that time, there was nothing to repel the presumption, and they would find for the defendant on the issue of payment; for if the presumption held as to the estate of Alexander, a payment by him or by his estate would also discharge the estate of Neil. The jury found both issues in favor of the plaintiff.

Upon the question reserved as to the release, the court was of opinion with the plaintiff; for, supposing the estoppel to be well pleaded, and supposing it to be competent to go into the consideration of the notes, and to show by parol that they were given in payment for the land, yet it being admitted that the deed and the notes were executed at the same time, the deed acknowledged the purchase money to be paid in full, the notes acknowledged the purchase money not to be paid, and covenanted to pay at a future day; and so there was estoppel against estoppel, which "left the matter at large." (90)

Upon the question raised as to the act of 1715, the court was of opinion that the defendant as executrix of Alexander was discharged, and as to her, as such executrix, the verdict was set aside and a nonsuit entered. But as to the defendant as administratrix of Neil, the court was of opinion that she was not discharged from the action by the act of 1715, there having been no administration until the year before action brought. The court was also of opinion that the discharge of Alexander's estate by the act of 1715 did not operate to discharge the estate of Neil, his coöbligor; for a distinction was to be taken between an act of the creditor by which, if one obligor is discharged, his coöbligors are also discharged, and an act of law operating upon the mere inaction of the creditor. The act of 1715 was intended as a protection against actions after seven years, and neither the words of the act nor the reasons for passing it could be made to extend to the protection of coobligors.

The counsel for the defendant then moved for a new trial because the court, in regard to the presumption of payment, instructed the jury that they should find for the defendant unless they were satisfied that the defendant had acknowledged the existence of the debt within thirteen years next before the action was brought, insisting that the court should have said ten years instead of thirteen. The motion was refused, first, because, supposing it to be erroneous, the instruction was given in the words requested by the defendant's counsel, the counsel on both sides having inadvertently fallen into the error, if it be one, and the attention of the court not having been called to it until after the verdict; second, because the evidence would as well have justified the finding of the jury if the court had used the words ten years instead of thirteen, and the court believed the correction would have been immaterial, so far as the

finding of the jury was concerned. The court, therefore, gave judgment for the plaintiff, from which the defendant appealed to the Supreme Court.

(91) *Badger and Winston for defendant.*
Strange for plaintiff.

GASTON, J. All the points made in this case in the court below appear to us to have been properly decided. There was no evidence to support the plea of release. The deed of conveyance from Duncan to Alexander Buie contained an acknowledgment of the receipt of the purchase money, and if an action of debt or assumpsit had been brought for the price of the land, this acknowledgment might have availed to bar a recovery. But this is not such an action. It is brought, not for the price of the land, but to recover a sum of money due by bond from Alexander and Neil Buie, and there is no pretense that the obligee ever released this debt. There was neither estoppel nor counter estoppel in the case.

It is clear that the operation of the act barring actions against the estate of a deceased person unless brought within seven years after his death does not effect to distinguish the debt, but only to bar the remedy. Its operation is necessarily restricted to the estate so protected.

If there was inaccuracy in the terms used by his Honor in the instruction that an acknowledgment of the debt within thirteen years before the institution of the action removed the presumption of payment, it furnishes no sufficient cause for reversing the judgment; and this for both the reasons assigned in rejecting the motion for a new trial. A party cannot except for error to an instruction which he hath himself prayed; and the *substance* of the instruction was correct, as the
(92) acknowledgment, if made at all, was made within ten years.

It cannot be doubted, we think, that the want of a person against whom to bring suit rebuts the presumption of payment arising from forbearance to sue.

There is, however, an irregularity in the rendition of the judgment below, as pointed out by the counsel for the appellant. It is irregular to enter a judgment of nonsuit against the plaintiff, so far as he is suing the defendant as executrix of Alexander Buie, and a judgment that he recover against her as administratrix of Neil Buie. As this irregularity was occasioned by the agreement of the counsel on both sides in the court below, we readily assent to the motion here made in behalf of the plaintiff. Let the record be amended by substituting, instead of judgment of nonsuit, that the plaintiff enters a *nolle prosequi* against the executrix of Alexander Buie, and let his judgment against the appellant, as administratrix of Neil Buie, be affirmed with costs.

PER CURIAM. Judgment accordingly.

Cited: Hubbard v. Marsh, 29 N. C., 205; *Walker v. Wright,* 47 N. C., 157; *Lowe v. Sowell,* 48 N. C., 69; *Woodhouse v. Simmons,* 73 N. C., 32; *Grant v. Burgwyn,* 84 N. C., 566; *Rowland v. Windley,* 86 N. C., 37; *Campbell v. Brown, ib.,* 381; *Moore v. Parker,* 91 N. C., 281; *Tucker v. Baker,* 94 N. C., 166; *Long v. Clegg, ib.,* 766, 768, 770; *Brawley v. Brawley,* 109 N. C., 526; *Copeland v. Collins,* 122 N. C., 623; *Kelly v. Traction Co.,* 132 N. C., 374.

(93)

SPENCER & MURRAY v. JOEL McLEAN.

Where A. agreed to buy a number of horses from B., and it was referred to an arbitrator to decide upon the value of the horses, and he decided that two of them were worthless, having an incurable and contagious disease, and so informed A., yet A. took them, by a subsequent agreement, and kept them with his other horses, whereby he lost many of the latter: *Held,* that A. could not maintain an action on the case in the nature of deceit against B.

APPEAL from *Nash, J.,* at Fall Term, 1841, of CASWELL. It was an action on the case for deceit in the sale of horses to the plaintiffs, who were stage contractors. The plaintiffs alleged that among the horses sold to them were two which had an incurable and contagious disease, well known to the defendant, of which they were ignorant, but which, they were induced to believe by the representations of the defendant, was only a common distemper; that by reason of this they not only lost those horses, but many of the others. The case reported to the Supreme Court contains a long statement of the evidence given on the trial, but it is deemed unnecessary to insert it here, as the only material facts upon which an application to reverse the judgment below was made are sufficiently referred to in the opinion delivered in this Court. The verdict and judgment below were in favor of the defendant, and the plaintiffs appealed.

Badger for plaintiffs.
Norwood and Morehead for defendant.

RUFFIN, C. J. The Court does not perceive in the proceedings at the trial any ground of complaint on the part of the appellants.

The defendant proposed to sell to the plaintiff twenty-eight (94) horses and represented that some of them had what is called the common distemper. When the horses were produced before persons chosen by the parties to set a value on them, two of them were obviously diseased. The arbitrators put a value upon twenty-six of them, and the parties afterwards made satisfactory arrangements in relation to them.

It is not alleged that either of them was then unsound. But the other two, which were seen to be diseased, were not valued by the arbitrators on account of the disease, as they thought them unfit for the service for which the plaintiffs wanted them. Afterwards the parties themselves came to an agreement with respect to those two horses also; and the plaintiffs purchased them at reduced prices, as unsound horses. The plaintiffs now say, in this action, that they believed the disease to be only common distemper, upon the representation of the defendant, whereas it was a different disease, called the glanders, which is incurable, and killed those horses and others which received the contagion from them; and the defendant, although well knowing the nature of the disease, concealed it from the plaintiffs, who were ignorant thereof. The points in dispute were, then, first, as to the kind of distemper, and, secondly, as to the *scienter* of the parties respectively. Upon those points his Honor instructed the jury, if they believed the horses had glanders, and the defendant had knowledge of it, yet if they were also satisfied the plaintiffs had as full knowledge of the nature of the disease as the defendant had, that then the plaintiffs could not recover.

The nature of the disease with which the horses were affected is matter of opinion, and, with respect to it, information is to be had from persons of skill who saw the horses. The plaintiffs called such a person, one whom they had selected as a judge of horses, to examine them and set a value on them; and he proved that they had glanders and were of no value. This is the evidence of the unsoundness of the horses, of its character, and of its effect on the value; and it may be taken to have established the disease alleged by the plaintiffs. But, then, the same witness went on further to say that before the plaintiffs purchased he frequently told them the horses had the glanders, and for that
(95) reason he had rejected them altogether on the arbitration. Upon this declaration of the witness the court ruled that if the jury believed him they ought to find against the plaintiffs. To this latter instruction the plaintiffs' exception is confined.

We must say that our opinion accords with that delivered to the jury. The evidence established the *scienter* in the plaintiffs, just as it did the existence of the disease in the horses. If the plaintiffs ask it to be believed by the jury, that the horses had glanders, because this witness states to them that, in his opinion, they had, surely it is a rational conclusion that when the witness gave the same opinion to the plaintiffs themselves it was a sufficient notice of the disease, and a fair warning to them not to buy. They were not then ignorant, and consequently not deceived men.

As the judgment is affirmed, we do not go out of the plaintiffs' exception. We feel it necessary to draw attention to this, lest it might be in-

ferred that this Court also adopts the rule laid down by his Honor as to the measure of damages if the jury had found for the plaintiffs. That point is not open to our consideration on this record; and, therefore, no inference is to be made as to our opinion on it either way.

PER CURIAM. Affirmed.

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(96)

JAMES SPENCER v. PELEG W. SPENCER.

A. was entitled to two tracts of land, an upper and a lower tract, and the water from the former was drained off by ditches running through the latter. By deed dated 12 May, 1797, he conveyed to his son Jones the lower tract, "a privilege of two leading ditches to Tucker Spencer excepted," and by deed dated 13 May, 1797, conveyed to the said Tucker Spencer, another son, the upper tract, but without saying anything of the privilege of those ditches. *Held*, that even admitting the words in the deed to Jones to have amounted to a grant of the privilege to Tucker, still there is nothing to annex that grant to the upper tract of land, and transmit it with the land to an assignee.

APPEAL from *Settle, J.*, upon a case agreed at HYDE, Fall Term, 1841. The case was as follows, as reported by the presiding judge:

It is an action on the case, brought by the plaintiff to recover damages from the defendant for his flowing the water that fell upon his land, which is situated above the plaintiff's, down into, through, and along a ditch situated on the plaintiff's land. It was admitted that the defendant had flowed his water into and through the ditch on the plaintiff's land, within three years next before the suit brought, and he claimed a right to do so under two deeds made by Edward Spencer, the owner of both tracts, to his two sons, Jones and Tucker, under the former of whom the plaintiff claims and has title as his heir at law, and under the latter of whom the defendant claims and has title. The deed to Jones Spencer is dated 12 May, 1797, and conveys to him the lower tract, describing it, and immediately following the description contains these words: "a privilege of two leading ditches to Tucker Spencer excepted." It is admitted that the ditch now in question was one of those ditches. The deed to Tucker Spencer is dated 13 May, 1797, and conveys to him the upper tract of land, but says nothing of the (97) privilege of the ditches mentioned in the deed to Jones. If the defendant has the right he claims, then judgment is to be rendered for him; but if not, then judgment is to be rendered for the plaintiff and sixpence damages and his costs of suit.

His Honor rendered judgment *pro forma* in favor of the plaintiff, and the defendant appealed to the Supreme Court.

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

RUFFIN, C. J. The deed to Tucker Spencer is silent as to the easement which is the subject of this suit. Moreover, the case states nothing respecting the enjoyment of the easement by either the defendant's father or himself. So there is no ground for presuming any grant for it, other than that appearing upon the face of the deed from Edward, the father, to the plaintiff. After conveying the land, that deed has this clause: "a privilege of two leading ditches to Tucker Spencer excepted." The question is whether that gives the right to the defendant to use those ditches. It is morally certain that it was expected that the water from the upper tract of land would, and intended that it should, be always drained by the ditches through the lower one; and it is probable that the deeds, though bearing the dates of succeeding days, were both executed together, and were designed by the father as one instrument, settling different parts of his land on his two sons as a family arrangement. But at present we can take notice of nothing of that kind, but must look to the terms of the instrument; and we are sorry to be obliged to say that they do not sustain the defendant's claim. Without stopping to consider whether the provision quoted can be regarded as a condition merely, it may be admitted most strongly against the plaintiff that the words amount to a grant to Tucker Spencer, the defendant's father. Still there is nothing to annex the grant to the upper tract of land and transmit it with the land to an assignee. Indeed, the deed to
(98) Tucker Spencer was not made until the day after, as is to be inferred *prima facie* from the dates of the deeds. The grant was, therefore, personal to Tucker Spencer, and the right to the easement expired, at all events, with his life, and did not come to his son and heir, the defendant.

PER CURIAM. Affirmed.

PELEG SIMMONS v. JESSE SIKES.

1. Where property bailed has been lost by the bailee, or stolen from him, or been destroyed by accident or from negligence, trover will not lie, but *case* is the proper remedy.
2. But where the bailee has been an agent in the destruction of the property, or in its injurious conversion, trover will lie against him.

APPEAL from *Battle, J.*, at Spring Term, 1841, of TYRRELL.

It was an action of trover for a canoe, in which it was proved for the plaintiff that the defendant borrowed the canoe from him, and some time afterwards came to him and apologized for not having returned it, as he ought to have done, when the plaintiff said it made no difference, as he had not needed it. The plaintiff then called a witness, who proved that the defendant brought the canoe to his (the witness's) dock, which

was a safe place for it, and left it there; that a short time afterwards the canoe was missing from the dock, and about two months from the time it was left there by the defendant the witness saw it some distance off, stranded on the beach and broken up. The defendant's counsel contended that, as the defendant had taken the canoe under a (99) bailment, and no demand and refusal to deliver it had been proved, he could not be charged with a conversion of it unless he had actually destroyed it, and moved the court to instruct the jury that there was no evidence of a conversion to be left to them. This instruction the court refused to give, saying that there was some evidence of a conversion, the weight of which, however, was entirely with the jury, and that if they were satisfied from it that the defendant had actually destroyed the canoe, they should find for the plaintiff. The jury found for the plaintiff, and judgment being rendered accordingly, the defendant appealed to the Supreme Court.

No counsel on either side in this Court.

DANIEL, J. This action is trover. If there be a deprivation of property of the plaintiff, it will constitute a conversion, though there be no acquisition of property by the defendant. *Keyworth v. Hill,* 3 B. and A., 687. If the property had been lost by the bailee, or stolen from him, or had been destroyed by accident or from negligence, this action could not have been sustained, but *case* would have been the proper remedy. 2 Saund., 47; *Packard v. Getman,* 4 Wend., 613; *Ross v. Johnston,* 5 Burr., 2285. To sustain this action of trover the defendant must have been proven to have been an actor and to have made an injurious conversion or done an actual wrong. Salk., 655; Peake, 49. The judge informed the jury that if they were satisfied from the evidence that the defendant had actually destroyed the canoe, they might find for the plaintiff. The defendant, however, insisted that there was *no* evidence that he was an agent in the destruction of the property, and, without some evidence upon this point, the judge should charge the jury to find for the defendant. The judge said there was some evidence of a conversion, the weight of which was left entirely with the jury. It seems to us that there was some evidence from which the jury might infer that the defendant was an agent in the destruction of the prop- (100) erty. The defendant had placed the canoe in the dock of the witness, which was a place of safety, and a short time afterwards it was missing, and in two months it was found broken up on the beach. It is not pretended that the canoe was removed from the dock by the winds; no presumption arises that the bailor removed it; the bailee had a right to remove it; and, in the absence of all other proof, the jury might presume that he, who had a right to remove, did remove the canoe, and,

the canoe being afterwards found broken up, the jury might presume, in the absence of other evidence, that it was broken up by the agency of him who had the control and management of the property. The judgment must be

PER CURIAM. Affirmed.

Cited: Powell v. Hill, 64 N. C., 172; *R. R. v. Baird,* 164 N. C., 256.

(101)

STATE v. EDMUND MARTIN.

1. The court is not bound to lay down to the jury an abstract proposition, but only to state the law as applicable to the evidence introduced.
2. If A., from previous angry feelings, on meeting with B., strikes him with a whip, with the view of inducing B. to draw a pistol, or believing he will do so, in resentment of the insult, and determines, if he does so, to shoot B. as soon as he draws, and B. does draw, and A. immediately shoots and kills B., this is murder.
3. It is not the duty of the State or of those who prosecute for it to examine, on a criminal trial, all the witnesses who were present at the perpetration of the act, or all the witneses who had been sent to the grand jury. It is the province of the prosecuting officer, and not of the court, to determine who shall be examined as witnesses on the part of the State.
4. An objection to a grand juror comes too late after a plea to the felony.
5. A clerk of a court to whom a *certiorari* has been directed should make a return that "in obedience to that writ he has sent the annexed record"; and this should be made under his hand and seal of office.
6. A court may either sit without adjournment or it may adjourn from one day to another within the term allotted to it; but it is not necessary to state the adjournment on the record.
7. Where two or more are indicted, it is competent for the court to order a removal of the trial of one, on his application, to another county, without removing the trial of the others.
8. Where the record uses the past tense, as that, in the award of a *venire facias*, the sheriff *was* commanded, or the indictment *was* found, etc., this, though not strictly regular, has been for so long a time the practice in this State, that the Court will not pronounce it a fatal error.
9. Where two have been tried on an indictment, and the record sent to the Supreme Court sets forth only the verdict in the case of the one who appealed, and does not state the verdict in the case of the other, this is not an error of which the appellant can take advantage.

INDICTMENT for the murder of William W. May, tried at Fall Term, 1841, of RICHMOND, before *Pearson, J.*

The indictment, which was against the defendant and two others, had been found a true bill at Fall Term, 1841, of ANSON. At this term the defendants pleaded not guilty, and on affidavits re- (102) spectively made by the present defendant and by Thomas Waddill, another defendant, the trial of these two was removed to Richmond

Superior Court of Law. The solicitor for the State then entered a *nolle prosequi* as to the other defendant, William Gatewood. The trial of the present defendant and Thomas Waddill came on before a jury at Richmond Superior Court of Law. The solicitor for the State called Vincent Parsons, who swore that he never heard any threats and never knew of any unkind feeling in either of the prisoners towards May, the deceased. They both disapproved of the match between May and Julia Martin, the sister of the prisoner Martin. He never heard Waddill speak disrespectfully of May; heard him say he believed letters were passing between him and Julia; heard Martin say he was certain May had been writing letters to Julia. When he said this, witness could not perceive he was angry. Witness concerned himself but little with their family matters; he had married the mother of Martin; Waddill had married one of Martin's sisters.

Philip Henry swore that on the Sunday before the election in May last he went to Mrs. Martin's and delivered Julia a letter from May; that while there Martin charged him with carrying letters from May to Julia, and said that whoever carried his letters was as damned a rascal as May; that if May ever came upon the premises he would kill him—he had money enough to pay for it. On the night before the election May stayed with witness at his father's. The next morning they went to May's house to breakfast. While there they loaded two pistols belonging to witness; May carried one, witness the other. The pistol May had was an ordinary pocket pistol, the barrel about 2½ inches long; it shot with force; once shot a ball through an inch plank at the distance of 50 yards. May said he was going to the election to show his independence; he was not afraid of Martin, and, if attacked by him, would defend himself. They called by for Capel and then walked to the election; each had a hickory walking stick. Capel had no pistol. The election was held on 13 May last, at the house of one Smith in the county of Anson. Witness and May acted as clerks of the elec- (103) tion; were called on after they got on the ground. Waddill was the superintendent of the election. Waddill and May spoke as usual; there was no exhibition of hostile feeling on the election ground. A short time before the polls were closed May and Gatewood took a walk. After the polls were closed, witness, May, Capel, William Smith, and Samuel Smith started home, all walking. They had got about 150 yards, and were in Smith's Lane, when they heard horses coming, and, looking round, saw Martin, Waddill, Gatewood, and Whitlock coming in a walk or trot. Martin rode up first. They divided to let him pass—witness, May, and William Smith turned to the left, Capel and Samuel Smith to the right. Martin rode past and immediately turned his horse across the road in front of May. Waddill, Gatewood, and Whitlock rode up

abreast and stopped, the head of Waddill's horse being near the tail of Martin's; the lane fence was on the left, and so they were hemmed in by Martin's horse in front, Waddill's on the right, and the fence on the left. As soon as Martin stopped he said, "May, I understand you came here today to make an attack on me." May said, "Who is your author?" Martin said, "A respectable man." May said, "Who is he?" Martin said, "Gatewood." May said, "Did I tell you so, Mr. Gatewood?" Gatewood said, "Yes." Martin said, holding a whip in his hand, "I have a mind to horse-whip you." Waddill said, "What does he say? God d—n him, whip him?" May looked at Waddill and said, "You would, eh?" Waddill got out a pistol, his little son, William, who was behind him, having tried to prevent him; he cocked it and held it up over May, the muzzle not being pointed at him, and said, "Damn you, I have a mind to shoot you." May opened his breast and said, "Here is an open breast; shoot." Whitlock came up and took little William, who was crying, off the horse, and put him on the ground. Waddill drew back his pistol, and witness did not see it again, and turning to witness said, "You are as damned a rascal as May." Whitlock said to witness, "Don't mind what he says." Witness said, "I can take that from you." (104) Waddill said, "Damn you, I can whip you." Waddill looked towards where May was standing, and said something, witness could not tell what, but witness looked and saw Martin standing near May, with a pistol presented near his face; it fired instantly. May fell, and died in twenty-five or thirty minutes. The ball entered his left eye near the temple. The whole took place in a very short time. May, when shot, stood a few paces from witness, with his back to him, and nearly between witness and where Martin stood when he fired. Witness did not see May's pistol until he was on the ground, when it was lying between his right arm and side; did not notice whether it was cocked or not. As soon as May fell, Waddill, who was still on his horse, said, "Edmund, you have killed him." Martin said, "Why, then, did he draw his pistol on me first?" and then said, "What shall I do?" Waddill said, "Go home." Martin said, "Follow me," and got on his horse and rode off. Waddill then said, "This is an unfortunate affair; I little expected it." Witness suggested that Martin should be arrested. Waddill said, "Yes, arrest him." Witness started back to the election ground to get help. Upon cross-examination, witness said he took the pistol to the election because he expected Martin would be there, and was determined not to be imposed on—he was too young to vote. Capel did not vote. Witness had agreed to go with May and help steal Julia. Witness was the nephew of Mrs. Parsons. Through Smith's Lane was the way for Martin, Waddill, and Gatewood to go home.

Thomas Capel was next called by the State and sworn. He described

the affair as Henry did, with this difference: he was on the outside of the horses while Waddill and May were talking; Martin got off his horse on the outside from May—did not fasten him; had a whip in his hand; witness saw no pistol. Witness said, "Martin, you ought not to interfere with May; he has given you no provocation." Martin replied, "You are all d—d rascals," and walked between the tail of his horse and the head of Waddill's, his back to witness. Waddill was then abusing Henry. Martin took the small end of the whip in his left hand, walked up to May, and gave him a light tap with the butt end on his breast. May put his hand in his pantaloons pocket and got his (105) pistol to his hip. Martin very quickly presented his pistol and fired. May fell to the ground, and died without speaking. He was shot in the left eye. Witness did not see where Martin drew his pistol from; did not think May got his pistol higher than his hip when Martin fired; between the tap of the whip and report of the pistol could have counted 1, 2, 3. Witness being asked by the prisoner's counsel, with a view to impeach him, if he had not said, at the burial of May, that if Martin had not fired as quick as he did, he would have been a dead man in a second, did not recollect saying so. Witness had agreed to go with May and see him married.

William Smith, for the State. He described the affair as Capel did, with this difference: he was on the inside with May and Henry, but while Waddill was trying to get out his pistol, retreated, as he did not wish to be in the scrape, and came around on the outside where Capel and Samuel Smith were. When Martin passed between the horses, he said to May, "I have a mind to horse-whip you." May said, "Attempt it." Martin walked up with the whip in his left hand and tapped May lightly on the breast with the butt end. Witness then saw May's pistol in his hand about his hip, and quickly heard a pistol fire. Martin's back was to witness; witness did not see his pistol; thinks he could have counted 1, 2, 3, 4, 5, from the tap with the whip to the report of the pistol; did not see May's pistol raised above his hip. May's pistol was lying on the ground between his hand and side—cocked or half-cocked, and a cap on the tube.

Samuel Smith, for the State, described the affair as William Smith did.

Washington Ingram, for the State, swore that on the day of the election, at the election ground, he saw Gatewood hand the whip to Martin. Martin asked witness if he could knock a man down with it. Witness said, "By striking him in the right place." Gatewood said he could knock a horse down with it. Afterwards Waddill took the whip out of Martin's hands and held it a while. Martin then took it, saying he wanted it, or had a use for it. This was about 2 o'clock. Witness

(106) described the whip; said it was such as overseers use—about 3 feet long, thongs of leather platted over a staff; thinks the staff was about 18 inches long, tapering to a point; about 1 inch in diameter at the butt; the staff was of white oak.

Young Allen, for the State, swore that the day after the homicide, while he was taking Martin to jail, he observed to him, "It was a pity the ball had not struck the bone, when it would have glanced and not have killed May." Martin said, "It would not have glanced if it had struck the bone, for his head was turned to one side when I fired."

Here the solicitor for the State announced that he would rest the case.

The prisoner's counsel stated to the court that Gatewood, Whitlock, and William Waddill, the three other persons who were present at the transaction, were in attendance, having been summoned by the prisoners, and moved that the solicitor might be required to introduce them. The solicitor declined using them as witnesses, and the court refused to require him to do so. The prisoner's counsel then moved that the court should call these witnesses and have them examined, as witnesses of the law, in behalf of the State. This the court declined doing, as no such practice had obtained in our courts.

The prisoner's counsel then called William Gatewood. The solicitor objected to his competency, because he was charged in the indictment as principal in the second degree, and the bill was found as to him. The prisoner's counsel produced a record showing that a *nol. pros.* had been entered as to him, and that he had been thereupon discharged. The court held that he was a competent witness.

William Gatewood, for the prisoner, swore that on the afternoon of the day of election, before the polls were closed, May asked him to take a walk. They went about 50 yards into the woods. May said he had heard of Martin's threats, and had come there that day expecting Martin to attack him; he had no other business; he was prepared for him, and if Martin did attack him, he would *cure* him. He then asked (107) witness to carry a letter to Miss Julia, which witness declined doing. They then walked back. After the polls were closed, witness, Martin, Waddill, and Whitlock started to get their horses to go home. Witness told Martin what May had said; could not recollect whether he told about being asked to carry a letter—thought he did not. Martin said, "This is no place to attack a man on such an account." They got their horses and started; does not think Waddill heard what he told Martin; little William Waddill rode behind his father. Witness did not know that May was before, and had no reason to believe that Martin or Waddill did. They rode on in a walk or trot, without saying anything, as he recollects, until they got within about 50 yards of May, when Martin pushed on ahead, and stopped in front of May, as described

by witness Henry. Waddill, witness, and Whitlock stopped near Martin. Martin said, "May, I understand you came to the election today expecting to be attacked by me?" May said, "Who is your author?" Martin said, "Gatewood." May asked witness if he had said so; he said, "Yes." Martin said, "I have a mind to horse-whip you." Waddill said, "Whip the d—d rascal." May turned towards Waddill and made one step, and said, "You would, eh?" Waddill put his hand in his coat pocket, pulled out a pistol and told him not to come nearer. May said, "Whoop and thunder, by God!"—opened his bosom and said, "Here's an open breast; shoot!" Waddill put up his pistol and began to quarrel with Henry. By this time Martin had got off his horse and came round to where May was. They had some words—witness could not recollect them. Witness turned his head at that moment towards Henry; heard Waddill say, raising both hands, "Boys, quit that." Witness looked at Martin and May; both had pistols presented, the muzzles within 3 inches; May's arm was stretched out, and his pistol level; instantly a pistol fired—could not tell which had fired till he saw May falling to the ground. Witness produced the whip. It corresponded with the description given by Ingram, except that the staff was of rawhide and not white oak; the end had brass tacks. Witness said he did not hand the whip to Martin, as stated by Ingram; it was taken from witness by little William Waddill, and he said he had no such conversation with Martin as (108) that stated by Ingram. On cross-examination witness said he was the overseer of the estate of which Martin and Waddill were part owners; he was in the employment of a Mr. Allen, who had the general superintendence of the Martin estate, as no division had been made; lived at Mr. Parsons'. On the day before the election witness rode with Martin to Lisles' store. Martin told witness May was a young man he liked very well in his place, but he liked no man out of his place; that he intended to have a talk with him and try and dissuade him from writing letters to his sister, and if he could not stop him in that way, he would make him stop. To impeach him, he was asked if, shortly after the affair, he did not tell Mrs. Biddle he was not certain whether May drew his pistol or not. He answered, he did not believe he had said so.

William Waddill, for the prisoners. He stated that he was about 12 years old, the son of the prisoner Waddill; that he rode behind his father to the election; took the whip from Gatewood, and was popping it about in the yard; his uncle Edmund told him to quit or he would take it from him; kept popping it, and his uncle took it from him, and had it the rest of the day. Never heard his father or uncle Edmund say anything about May, except his father told his mother that he was certain May was writing letters to his Aunt Julia, and they seemed not to like it. When his father started home, witness did not know May was on the

road ahead; rode behind his father; rode slow; overtook May; his father got into a quarrel with him, and drew his pistol out of his coat pocket; tried to prevent him; cried; Whitlock took him down. His uncle said to May, "You come here today for me to attack you." May said, "Who is your author?" Uncle said, "Gatewood." Gatewood said, "Yes, he was." His uncle gave May a light tap on the breast with the whip; May drew his pistol, presented it; his arm was stretched out and pistol level; his uncle drew his pistol and fired before his arm was
(109) entirely straight. Father of witness said, "You have killed him, Edmund." His uncle said, "Why did he draw his pistol on me first?"

The prisoner's counsel here stated to the court that the witness Whitlock was in town, and, being somewhat unwell when the trial began, was now too sick to come into court, and prayed to be allowed to read his examination, taken in writing by the committing magistrate. The solicitor admitted that Whitlock was too sick to be brought into court, but objected to the examination being read in evidence. The court allowed the prisoner's counsel to read it, being satisfied that Whitlock was not there, and would not be during the trial, to be examined in person. It was then read, as follows:

James D. Whitlock, the first witness for defendants, being duly sworn, states as follows: That he, Martin, and Waddill were going home, and when they came up with Mr. May and company, Martin rode on before May and turned his horse round and stopped. Waddill stopped just behind him, and Martin said to May he supposed that he, May, was going to attack him there that day, and May asked him his author, and Martin said it was a very respectable man. May asked him again who was his author, and he told him Mr. Gatewood. May turned round and asked Gatewood if he did say so, and Gatewood said he did. Then Waddill said, "Whip the d—d rascal," and began to get out his pistol; and May, he thinks, stepped up to him and opened his breast. Then I tried to take the pistol away from him, and Waddill turned towards Mr. Henry and went to cursing him, and said he had acted like a d—d rascal. Then I stepped up to Mr. Henry and told him I would drop it, if I were him. I don't recollect anything Henry said. While I was talking to Henry, I heard the pistol and turned round and saw the man fall; and Waddill said, "Edmund, you have killed him, and you ought not to have done it," and Edmund said he drew his pistol on him first. Martin then asked what he should do, and Waddill said, "Go home."

Question by Mr. Little: Did you hear Waddill at any time threaten to shoot May? Answer: I did not.

Question 2; When Waddill told Martin to whip May, what was his

reply? Answer: It was, that he did not want to whip him. He only wanted to tell him what he thought of him. (110)

Question 3: Describe how Waddill held his pistol. Answer: He had the breech in one hand and the barrel in the other when I tried to get it from him.

John C. Miller, for the prisoner, swore that at the burial of May the witness Capel said if Martin had not fired when he did he would have been a dead man in a second.

James B. Lindsay, for the prisoner. He got to the place before May died; found a pistol on the ground between his elbow and body, the muzzle towards his shoulder; thinks it was cocked; saw a cap on the tube [produced the pistol, which was admitted to be the same]; the trigger was secret; when half-cocked, the trigger did not show, as was usual with such pistols; when full cocked, the trigger only came out a part of the way—you had to push it back with the finger to bring it at right angles, its proper place to fire; thinks the trigger was not at right angles when he took it up, but partly out.

The prisoner then called several witnesses who proved that Gatewood was a man of good character. The same witnesses proved that Philip Henry, Thomas Capel, William and Samuel Smith, and Washington Ingram were men of good character.

The solicitor then called Fannie Biddle, who swore that shortly after the affair Gatewood told her he was not certain whether May drew his pistol or not, but thought he did draw it.

Mr. Biddle, for the State, swore that he washed the wound, but did not probe it; thinks the ball entered the corner of the eye and ranged towards the back of the head towards the right side.

As to the prisoner Martin, the court charged: That if the jury were satisfied that Martin had killed May with the pistol, as charged in the indictment, it would be a case of murder, unless the evidence made a justification, excuse, or mitigation; for the law implied malice where a man was wicked enough to kill another without justifi- (111) cation, excuse, or mitigation.

The position assumed by the prisoners' counsel, that if Martin approached May and touched him *lightly* with the whip, and May thereupon drew his pistol, intending to shoot, Martin was *justified* in killing to prevent a felony, was not law, because the wrongful act of Martin caused May to draw his pistol.

As to the second position assumed by the prisoners' counsel, that if Martin approached May and touched him *lightly* with his whip, and May instantly drew his pistol, so as to place Martin under the necessity of shooting to save his own life, it was *excusable*, in self-defense, or at most but manslaughter, the court charged that if, upon a sudden quarrel,

without preconceived malice, one strikes another an ordinary blow, and it is returned with such fierceness as to endanger his life, and, having no other chance to escape, he kills, this would be killing in self-defense; or if, being excited by the fierceness of the return, he kills without attempting to get out of the way when he might, this would be manslaughter, although he struck the first blow; for the sudden quarrel accounts for the first blow, and the fierce return accounts for the killing. If the jury were satisfied that Martin was angry with May for writing and sending letters to his sister, but had formed no intention of killing him or of attacking him when he went to the election; that May told Gatewood he expected Martin to attack him, and was prepared for him, and would cure him if he did; that Gatewood told this to Martin; that Martin, before riding up to May, determined to horse-whip and to kill him if he resisted; that for this purpose he stopped him, had the words with him, got off his horse, and approached him in the manner described, knowing that he was armed, and expecting that, when touched with the whip, he would draw a pistol or rather deadly weapon, and intending, if he did, to shoot him, it would be a case of murder, and would not come within the position laid down, because here was *preconceived malice.*

(112) But if the jury were not satisfied that Martin had formed this determination before he rode up to May, and believed that he determined to horse-whip May *just before* he dismounted, then it would be necessary to decide whether this determination was the effect of a quarrel that then took place or was the effect of previous angry feeling, inflamed by the words of Waddill. This was a question of fact for the jury. The court could only assist the jury by telling them that the word quarrel was used to mean not merely when two bandied angry and abusive words, but extended to the case where a man did or said anything calculated to offend an ordinary man, for the offense then given would account for the blow; and the jury would consider whether the conduct and words of May, at the time, were calculated to give offense, whether it would have been less offensive for May, when interrogated, to have answered "Yes" directly, instead of evading by asking for the author. It would also be necessary to decide whether, after Martin formed this determination, he approached and touched with the whip and met with a return unexpectedly fierce, or whether he did not expect May to draw a pistol or other deadly weapon when touched with the whip, and had not made up his mind to shoot him if he did. If the determination was the effect of the quarrel that then took place, and the return was unexpectedly fierce, it would come within the position laid down and be a case of killing in self-defense or of manslaughter. But if the determination was the effect of previous angry feeling, inflamed by the words of Waddill, and the return made was nothing more than

was expected by Martin, and in the event of which he had made up his mind to shoot, then it would not come within the position laid down, but would be murder.

As to the third position assumed by the prisoners' counsel, that if, upon a sudden quarrel, two men fight with deadly weapons, each having a fair chance, and one kills, it is but manslaughter, the court charged that such was the law; that cases of this kind were of more frequent occurrence in former times, when gentlemen usually went armed, than at the present day, but the law was still the same; that to make this position applicable, it was necessary there should be a sudden quarrel, giving it the meaning as explained before, and they fight so soon after as not to allow time for reflection; for if the parties had time to (113) reflect and become cool, it was the case of an ordinary duel, and it made no difference whether the challenge was verbal or in writing; and it was further necessary that no advantage should be taken, and the party must wait till his adversary was ready, for the law allowed this mitigation out of regard to the frailty of men who fought as a *point of honor*. Whether there was a sudden quarrel which caused the fight, or whether it was the result of previous angry feeling, inflamed by the words of Waddill, and whether Martin waited until May was ready, or whether he did not approach intending to touch May with the whip, to see if he would take a whipping, intending, if he attempted to draw his weapon, to take all advantages and shoot him as soon as he could, and whether he did not accordingly do so, are questions of fact left to the jury.

The jury found Martin guilty of murder, Waddill of manslaughter.

The prisoner Martin, by his counsel, moved for a new trial for the following reasons, viz.:

1. Because the verdict was contrary to law and evidence.

2. Because the court erred in instructing the jury: (1) The prisoners' counsel requested the court to charge the jury that if Martin, when he gave the deceased the tap on the breast with the whip, did not intend to injure him, but only to show the deceased that the prisoner was not afraid of him, or to offer him a mere personal indignity, then the drawing of a pistol by the deceased was a resistance disproportioned to the assault, changed the character of the combat, made the deceased an assailant, and the killing was only manslaughter. (2) That when Martin threatened to horse-whip the deceased, and the deceased replied, "Attempt it," Martin gave him the light tap on the breast, the deceased drew his pistol, Martin drew and shot him, it was an affray in heat of blood and the homicide only manslaughter. (3) That it was an affray; the parties fought on equal terms, and the killing was only manslaughter. (114)

3. Because Peter May, one of the grand jury who found the bill of indictment in this case, was the uncle and near relation by consanguinity of the deceased, William W. May.

4. Because Joel E. Horne, one of the witnesses indorsed on the bill of indictment as being sworn and sent to the grand jury as a witness in the case, was neither sworn on the trial, tendered, nor introduced as a witness.

5. Because, when the solicitor announced to the court that no other witnesses would be introduced by the State, the prisoners' counsel stated to the court that, as it appeared by the testimony for the prosecution three other witnesses were present when the homicide charged in the bill was perpetrated, and the court being then informed that these witnesses were summoned by the prisoners and were present in attendance on the court, the counsel prayed that in the furtherance of justice the State might be required to introduce them on the trial; the solicitor declined using them as witnesses, and the court declined to make the desired requisition; it was then moved that the court should call the witnesses and have them examined as witnesses of the law in behalf of the State, which his Honor also declined doing.

A new trial was refused. The court was of the opinion that the objection because Peter May was one of the grand jury could not avail after the trial. (2) In relation to the witness Horne: This witness had been called by the State before the trial and his absence made known, which fact, in the opinion of the court, removed all objections, supposing the State was bound to examine him if he had been present, from the fact of his having been sworn and sent to the grand jury. As to the fifth ground, that Gatewood, Whitlock, and William Waddill, who were present at the killing, were not examined by the State or by the court, the court refused a new trial, first, because, in the opinion of the court, no rule of practice by which the solicitor was expected or required to examine all the persons present at the transaction was in use or force in this State. But, secondly, the rule, if there be such a one, could not apply to this case, because Gatewood was the overseer of a planta-
(115) tion of which Martin and Waddill were part owners, and the same indictment had been found against him, although a *nol. pros.* was afterwards entered. William Waddill was a child about 12 years of age, the son of one of the prisoners and the nephew of the other, and Whitlock was at the time near the courthouse, so much indisposed with fever as to make it unsafe for him to be brought into court.

As to the other grounds, the court was of opinion that the matters of law had been fully and correctly given in the charge to the jury.

The rule for a new trial was discharged, and, the judgment of the court having been pronounced, the prisoner Martin appealed to the Supreme Court.

STATE *v.* MARTIN.

J. G. Bynum, solicitor, for the State.
Badger for defendant.

RUFFIN, C. J. The Court has carefully considered the instructions given by his Honor to the jury, and does not perceive any error in them to the prejudice of the prisoner. It was argued at the bar that it was a case of sudden affray or mutual combat in the heat of blood, and that the court ought to have directed the jury that if the prisoner touched the deceased with the whip as an invitation to him to draw his pistol, and they immediately proceeded to the mortal affray, with pistols on each side, the killing was not murder. But a court is not bound to lay down to the jury propositions merely abstract, however correct they may be in point of law. It is enough to inform the jury upon such questions as the evidence raises, and not trouble them with those upon which there is no evidence. In this case it is sufficiently obvious that the position taken in the argument had no application. When an invitation to May to draw his pistol is spoken of, it must mean that he was to draw for the purpose of fight with those weapons on both sides, and, moreover, for a fair fight with them. Now, there was no evidence of the state of facts supposed. But several circumstances show in the mind of the prisoner a different purpose. These were the previous ill-will, or angry feeling, as the judge called it; the communication to the prisoner, by his own witness, at the election, that May was armed to repel an (116) attack expected from him, and his reply, that *that* was no place for the attack; then, the following the deceased by Martin and Waddill, the stopping him and commencing an immediate quarrel with him by both, the assault on him by Waddill with a pistol; and, finally the assault on him with the whip, and the shooting by the prisoner as soon or immediately after May drew his pistol, without having said one word of having a pistol himself, or otherwise proposing a combat of that kind. There was no warning from the prisoner; nothing like "Prepare yourself," or "Are you ready?" So far, therefore, from being evidence of a challenge to fight on an equal footing, these facts, if believed by the jury, afford a rational inference that the prisoner had no such intention, but designed, upon the exhibition of an attempt on the part of the deceased to resent in that way the indignity of a stroke with a whip, to shoot him before he, the prisoner, could possibly be hurt. Upon that supposition, the killing would undoubtedly be murder. Being secretly prepared to kill, and intending to do so instantly in case he should perceive the appearance of danger from the other party, it is apparent that he sought the other's blood without meaning to be really exposed himself. In such a case it is not material that the purpose of the prisoner was inspired by high words between him and the deceased.

They furnish no mitigation for the killing an unarmed man, or an armed one taken designedly at a disadvantage; for the law is, "that in the case of mutual combat, in order to save the party making the first assault upon an insufficient legal provocation from the guilt of murder, the occasion must not only be sudden, but the party assaulted must be put on an equal footing in point of defense, at least at the outset." East P. C., 242. Admitting, then, this to have been a sudden mutual combat, it yet remained to ascertain, as matters of fact, whether the parties fought fairly and whether the prisoner allowed the deceased to get on an equal footing with himself, or whether it was or was not his (117) purpose, from the beginning, that the deceased should not have an equal chance.

Those inquiries naturally arose out of the evidence, and they were left to the jury with instructions which could not have been misunderstood. In substance, they were: That if the prisoner, when he made the assault with the whip, did not intend to shoot May, and his shooting was in consequence of the other party, contrary to the prisoner's expectation, resorting to the use of a deadly weapon, then the killing was not murder. But if the prisoner expected, in case he struck with the whip, that May would endeavor to return the assault by shooting him, and, nevertheless, the prisoner determined to make the attack, and made up his mind, if the other attempted to draw his weapon, to kill him as soon as he could, that, then, the killing with such a mind was murder. That such was the meaning of the presiding judge we think is apparent when the whole charge is considered.

The case was submitted to the jury under several aspects. It was first supposed the jury might be of opinion that before the prisoner rode up, and, consequently, before any words and without any immediate provocation, the prisoner "had determined to horse-whip the deceased, and kill him if he resisted, and for that purpose stopped him, had words with him, and touched him with the whip, expecting him to draw a pistol, and intending to shoot him if he did"—it would be a case of preconceived malice, and be murder. To so much of the charge there can be no exception; for, to follow a person and seek a combat with him for the purpose of killing him, and covering the act with the pretense of a dangerous resistance to a moderate assault, is nothing less than wreaking a diabolical vengeance.

A second hypothesis was that the determination to horse-whip might not have been formed beforehand, but was formed just before the prisoner dismounted for the purpose of inflicting it, when he said, "I have a mind to horse-whip you." In that case the attention of the jury was directed to two inquiries as material to the degree of the offense. First, they were told to ascertain whether *this* determination was the effect of

the quarrel that then took place, and not of previous angry feeling; and if they should so find, and be also of opinion that May's (118) return to the first assault was not expected by the prisoner, that then, from the nature of May's resistance and the danger arising therefrom to the prisoner's life, the killing would be extenuated to self-defense or manslaughter, according to certain circumstances mentioned. But they were told, secondly, that if this determination was *not* the effect of a quarrel that then took place—in other words, was not in fact provoked by the deceased at that time, but was the effect of previous angry feeling, inflamed by the words of Waddill—incited, that is to say, by the prisoner's own associate; and the jury should find that the prisoner expected May to draw a pistol if he struck him, and had made up his mind to shoot him if he did; and, accordingly, that the prisoner did shoot immediately upon the weapon being drawn—then it was murder. And, as we conceive, this instruction is law, for two reasons: The killing would be murder, without regard to the want of equality of the parties in the combat, upon the ground that it was upon previous ill-will, or, at all events, without recent provocation from the deceased; for the instruction supposes the assault to be found by the jury not to have been caused by the quarrel at the time; and, consequently, it is not a case of sudden heat of blood or provocation, but of preëxisting ill-will, wrought up to the pitch of taking life by the opportunity to do so, and the advice of a comrade who likewise cherished bad feelings toward the person attacked. But, besides, it would be murder for the reason on which his Honor submitted the case to the jury, that is to say, the undue advantage sought and taken by the prisoner. The case was distinctly, we think, put to the jury in that point of view; for it is to be observed that the jury was directed to consider whether Martin did not expect May "to draw" a pistol, and "made up his mind to kill him if he did," which is saying that he intended to kill him if he drew, and as soon as he drew, without allowing May time for full preparation, if he could prevent it. That the jury must have received the instruction in that sense is deducible from the terms in which it was expressed; but it is placed beyond doubt by the language used in closing the charge. It is, "that whether there was a sudden quarrel which caused the fight, or whether it was (119) the result of a previous determination, or of previous angry feeling, inflamed by the words of Waddill, and *whether Martin waited until May was ready,* or whether he did not approach intending to touch May with the whip, to see if he would take a whipping, *and intended, if he attempted to draw his weapon, to take all advantages and shoot as soon as he could, and whether he did not, accordingly, do so,* were left as questions of fact to them," the jury. Now, although one may not intend to kill another if he will stand and take a whipping, yet if he be pre-

pared with a weapon, and determined in his mind to kill him if he does not submit, but offers or attempts to resist by drawing a pistol, and with that resolution formed, and expecting such an attempt at resistance, he makes the assault, without more provocation, intending to kill before the other party can do more than *attempt* to draw, if death ensue, it must be murder. The assault was not designed to be, nor was it in fact, an invitation to fight with pistols; but it was a provocation by one party to the other to draw a pistol, with the intention to kill him if he made the attempt; and this without any notice of a purpose on his own part to use a deadly weapon. The suddenness of the purpose to kill in such a case does not extenuate the offense, more than a sudden determination to slay an unoffending man accidentally met in the street. The attack is found not to have been made on cotemporaneous provocation; and besides, if it had been, from the manner of it, it was rather an assassination than a mutual combat in a fair field.

Although the other grounds of exception stated in the record were not spoken to at the bar, yet in a case of such magnitude to the prisoner it seems proper to notice them.

The first is that the verdict is contrary to law and evidence. If it be so, the Court cannot help the prisoner. We can correct the errors of the judge, but not those of the jury, unless they may have been produced by the judge.

The position that the State is bound to examine all the persons who were present at the perpetration of the act, or to examine on the trial all witnesses who had been sent to the grand jury, has neither (120) principle nor practice in this State to support it. The persons present are not the witnesses of the law, like persons who have attested a will. It is in the discretion of the prosecuting officer, as of any private suitor, what witnesses he will call. He examines such as he deems requisite to the execution of the public justice. If others can shed more light on the controversy, or place it in a new point of view, it is competent to the prisoner to call them. Without considering, therefore, the peculiar reasons on which the particular persons were dispensed with on this trial, and notwithstanding a modern case in England, we think the ruling of his Honor right, on the broad ground that it was the province of the solicitor, and not of the court, to determine who should be the State's witnesses.

The objection to the grand juror comes too late after the plea to the felony. *S. v. Seaborn,* 15 N. C., 305.

The opinion of the Court, therefore, is that the prisoner is not entitled to a *venire de novo.*

But the counsel for the prisoner has taken numerous objections to the record, and insists that the judgment should have been arrested, and must now be reversed.

Upon the transcript filed by the prisoner, the indictment appeared to be defective, for the want of charging the giving of the mortal wound by the bullet shot from the pistol. The Attorney-General suggested the omission to be in making the copy, and obtained a *certiorari* for a fuller transcript. Upon that the clerk sent up a second transcript, in which the defect has been supplied, and the indictment seems to be perfect. But it is objected that the court cannot receive the second transcript because the writ of *certiorari* is not annexed to it, and no return is indorsed on the writ or made to the court, so as to make it appear that this transcript is sent in obedience to the writ. The clerk sent back the writ with the transcript inclosed together in a sealed letter, addressed to the clerk of this Court, in these words: "Pursuant to your writ, I have made out another transcript of record in the case of the State against Martin, which is herein handed you."

As the return was not entirely formal, and we always deem it best to follow settled precedents, we did not choose to determine whether that return would do when it was so easy to have one (121) undoubtedly regular. The writ and transcript were, therefore, returned to the clerk; and he has sent them back, attached together by wafers, and with the following return on the writ:

"State of North Carolina,

"Richmond County—In the Superior Court of Law.

"The execution of this writ appears in a certain schedule hereunto annexed. In witness whereof, etc.," the usual attestation following, under the hand of the clerk and the seal of the court, both to the return and the transcript. The objection is thus removed; and we should not have felt called on to notice it had we not observed that nearly all the clerks seem alike uninformed upon this subject, and hence we suppose they may profit by this as a precedent.

Upon the reception of the second transcript several objections were taken to it, which will now be mentioned and disposed of.

The indictment was preferred in the Superior Court of Anson against three persons, Edmund Martin, as the perpetrator of the murder, and Thomas Waddill and William Gatewood as accomplices, present at the fact, aiding and abetting. The trial of Martin and Waddill was removed to Richmond Court; and from that court this appeal was taken to this Court. The transcript of the record from Anson is set forth in the transcript from Richmond, and states that "At a Superior Court of law, *begun and held for,* etc., at, etc., on the second Monday in September, in the year, etc., before the honorable Justice J. W., the sheriff *returned* the *venire facias,*" etc., from which a grand jury is impaneled. It then proceeds: "A bill of indictment, in the following words and

figures, *was* preferred" before the grand jury, that is to say, etc.; which *was* returned into court by the said grand jury, "A true bill."

The transcript afterwards proceeds thus: "Wednesday, 15 September, 1841, the court met pursuant to adjournment," and it then sets out the arraignment of the three, and their plea of not guilty, and then the affidavits of Martin and Waddill respectively, and orders thereon made that the trial should be removed, as to those two, to Richmond.

(122) Again the transcript proceeds: "Tuesday, 21 September, 1841, the court met pursuant to adjournment," and then sets forth a *nolle prosequi* by the solicitor for the State, as to Gatewood, and his discharge upon proclamation.

The first exception to this record is that it does not appear *when* the indictment was found, nor that the arraignment and plea were in the same term, inasmuch as no adjournment is set forth from the second Monday in September to Wednesday, 15 September, which is the day of the prisoners' plea, and *the next time* that is mentioned after Monday on which the court was opened.

But, supposing, for the present, that the use of the past tense is not fatal, we think the time of finding the indictment does appear, and that the exception is not sustainable in any respect. It appears by the record that the court began on the day fixed by law, and was held by the proper person. No day is stated as that on which the indictment was presented other than that on which the court began; and, therefore, it follows that it was in fact found on that day. The term of a court is in legal contemplation as one day; and although it may be open many days, all its acts refer to its commencement, with the particular exceptions in which the law may direct certain acts to be done on certain other days. It is seldom necessary that the day of any proceeding should appear in making up the record, distinct from that of the beginning of each term, although a minute may be kept of each day's doings. Nor is it necessary that there should be adjournments from day to day, after the term is once opened by the judge; nor, if there should be, that they should be recorded, in order to preserve the authority of the court to perform its functions. The court may, in fact, not adjourn during the whole term, but be always open; though, for the convenience of suitors, an hour of a particular day, or of the next day, may be given them for their attendance. If the record state the time of doing an act, as the statement is unnecessary, so it is harmless surplusage, unless the day be beyond the period to which the term legally extends. Take this record either

(123) way, then, and we think it well enough. If it import that the court did not adjourn because no adjournment of the preceding day is set forth, then it is to be taken that the court was kept open, as it lawfully might be. If, on the other hand, the entry of the time, "Wednes-

day, 15 September, 1841, the court met pursuant to adjournment," imports that there had been an adjournment from a former day to the latter, there is no error, provided the latter day be not beyond the term; for the court, although not bound to adjourn, may do so from one day to another within the term. Each day mentioned in this record is within the term; for the Fall Term of Anson Superior Court continues two weeks if the business requires it. Rev. Stat., ch. 31, sec. 16.

The next point made is that the order of removal was not warranted by law, because there were three indicted, and the trial of only two removed; so that the whole cause was not removed, as it ought to have been. If the prisoner could be allowed an exception against his own action, yet it seems sufficiently clear that there is no error in the point supposed. The record shows that as to Gatewood, the third party, the prosecution was ended by a *nolle prosequi,* and, therefore, it pended only against the two whose trial was removed. It is true, the order and entry of his discharge were made on a day subsequent to that of the order of removal. But every act of the court, whenever made, has its efficacy from the first moment of the term; and during the whole term the record is in the breast of the judge, and an order may be modified or any new order made that may be requisite to give validity to one before passed. But we have no doubt that where two are indicted, the trial of one only may be removed. However it may be in cases of dependent guilt, or although it may be in the discretion of the court to refuse a removal as to one, without all, yet in ordinary cases the court undoubtedly has the power to allow such a removal. The charge is several; and the defendants may be tried separately in either court. There is no reason, therefore, why there may not be a separate removal. In neither case is the record removed. It remains in the original court, and the trial, whether of one or all in another county, is on a transcript. The removal does not change the mode of trial; but, for the purpose of impar- (124) tial trial, it is sent to another county, in which jurors of unbiased minds may be had. That may be necessary as to one of the accused and not the other; and, therefore, the court ought to have this power. Such we know has been the practice. An instance is found in *S. v. Lewis,* 10 N. C., 410. The facts of that case were that the indictment was found in Wake against three, two of whom removed their trial to Franklin, and one of them again removed his trial to Warren. The third was tried in Wake, and he and the one who went to Warren were both convicted and executed. The cases of *Carter* and *Snow,* and *S. v. Mills,* 13 N. C., 420, furnished other examples of this practice; and of its propriety we entertain no doubt.

Another exception is that the past tense is used in several parts of the record, and so it is historical, and not a memorial of the acts of the

court made as they occurred. It must be owned that in strictness a record ought to be expressed in the present tense, because the acts of the court are supposed to be recorded simultaneously with their adoption. We are, therefore, fully sensible of the philological and legal propriety of the records speaking *in presenti,* and we are aware of *Perrin's case,* 3 Saund., 393, in which, upon a writ of error, the judgment was reversed because in the award of the *venire facias* the record stated that "the sheriff *was* commanded," instead of "*is* commanded." Nevertheless, we feel obliged not to reverse the judgment upon this ground. In this particular case we see that although the preter-perfect tense is used, yet that the words *cannot* relate to any period antecedent to the time of inserting them in the record; and, therefore, they must be taken in the sense of the present tense. There was no continuance; but the case arose and was disposed of in Anson Court, all in a single term. That term is one day or the same as one day; and in respect to anything during it there is, therefore, no prior or posterior time. But the Court is not disposed to put the decision on that peculiarity, since we know the question must arise in cases in which there were continuances, and, therefore, it ought to be put on some general ground at once. We (125) have, therefore, to state that we conceive ourselves bound by the most imperative considerations not to give to this grammatical inaccuracy the effect demanded. Were we inclined to an opposite opinion, we should be compelled to adopt the one we have, by numerous, we may say innumerable, precedents, and by a proper regard for the public security. Every one knows the defective professional skill of nearly all the clerks of our multiplied courts, and that the evil is constantly on the increase; and must be sensible that if such an objection were sustained, crimes would go altogether unpunished, and would have gone so for many years past. Indeed, this is the common form among us. We scarcely recollect a record coming to us in some part of which the past tense did not occur. Many judgments of death have been affirmed in this Court on such transcripts; and it is too late to listen to the objection. *S. v. Lewis, supra,* furnishes an example to our purpose. After the usual commencement, the record proceeds: "A bill of indictment *was* found, etc." All the considerations which long usage can furnish, and all the force which multiplied judicial precedents, hitherto unquestioned, can possess, unite to impose on us at this day the obligation not to allow this impediment to the course of justice. In reality, however, there can be no hesitation as to the sense of the record. It purports to be a relation by a tribunal of its acts at a certain term, begun and held on a certain day, and to have been drawn up during that term. Although it may be said therein "it *was* ordered," no one can misunderstand the meaning. The inquiry is, When was it ordered? and the

answer is, During that term. It must be so understood; and if it was at any period of the term, it is sufficient.

Some objections are also raised upon the transcript from Richmond. One is that it also uses the past tense; and that, of course, falls with the preceding one. Another is that the record states the court not to have begun on the proper day, namely, the third Monday of September, but makes it begin the proceedings at the *fourth* Monday, without any adjournments from the third. But this is a clear mistake of the (126) law fixing the terms of that court. In the spring the statute provides that the court shall be held on the third Monday of March; but in autumn it is on the fourth Monday of September.

By this record it appears that the two prisoners, Martin and Waddill, were put upon trial together; but the transcript does not set forth the verdict as to Waddill, but only as to Martin, the present appellant. For this cause, also, it is said the judgment is erroneous. But we do not perceive how this prisoner is concerned in that matter. It were well if the clerk would send a full transcript in every case, and not take on himself to judge which parts of the verdict and judgment are material. But we cannot assume that the whole has not been sent; and, on the contrary, unless a diminution be suggested, it is taken that the transcript is full and correct. If so, the conviction of this prisoner is not annulled by the failure of the jury to render a verdict as to the other party—which, indeed, is an acquittal. The court was bound to pass sentence on him whom the jury did find guilty, since the jury has responded fully to the only issue joined between the State and this prisoner.

Upon the whole, the Court is of opinion that the judgment of the Superior Court of Richmond was warranted by the record, and directs that this opinion be certified to that court, that the judgment may be carried into execution.

PER CURIAM. Ordered accordingly.

Cited: S. v. Carroll, 27 N. C., 142; *S. v. King, ib.,* 206; *S. v. Stewart,* 31 N. C., 344; *S. v. Rash,* 34 N. C., 386; *Brown v. Patton,* 35 N. C., 447; *S. v. Perry,* 44 N. C., 333; *S. v. Curry,* 46 N. C., 285; *S. v. Hogue,* 51 N. C., 384; *S. v. Douglass,* 63 N. C., 501; *S. v. Haynes,* 71 N. C., 84; *S. v. Smallwood,* 75 N. C., 106; *S. v. Baxter,* 82 N. C., 606; *S. v. Speaks,* 94 N. C., 875; *S. v. Hensley, ib.,* 1035; *S. v. Pankey,* 104 N. C., 845; *S. v. Lucas,* 124 N. C., 827; *S. v. Exum,* 138 N. C., 618.

(127)

STATE v. JAMES SMITH.

An indictment for a forcible entry into the *field* of the prosecutor cannot be supported by evidence that the defendant peaceably entered the field, but while there threw stones against the house of the prosecutor, situated adjoining the field, the prosecutor at the time being in the house, and not in the field.

APPEAL from *Bailey, J.*, at Fall Term, 1841, of ROWAN, upon a special verdict found by the jury on the trial of an indictment against the defendant for a forcible entry. The indictment was in the following words, to wit:

NORTH CAROLINA, ROWAN COUNTY. } *ss.* Superior Court of Law, Fall Term, 1841.

The jurors for the State, upon their oath, present that James Smith, late of the said county, laborer, on 25 August, in the year aforesaid, in the county aforesaid, into one field then and there being in the seizin and possession of Nancy Lyerly, with force and arms and with a strong hand did break and enter, she, the said Nancy, then and there being present and forbidding the same, to the great injury of the said Nancy and against the peace and dignity of the State.

H. C. JONES, *Solicitor.*

The defendant having pleaded not guilty, the jury found the following special verdict, viz.: That the prosecutrix (Nancy Lyerly) was in the possession of her dwelling-house, together with a field adjoining the same, which was inclosed; that she had shut up her house and gone to bed; that the defendant, after she had retired, entered into the field and threw stones against her house; that one broke the sash of her window and a pane of glass; that this frightened the prosecutrix, and was
(128) done against her will and consent. And whether this amounts to a forcible entry into the "field" of the prosecutrix, they pray the advice of the court. If it does, they find the defendant guilty; if not, they find him not guilty.

The court, upon argument, did not consider that this amounted to a forcible entry into the field of the prosecutrix, and gave judgment for the defendant, from which judgment the solicitor for the State appealed to the Supreme Court.

J. G. Bynum for the State.
Boyden for defendant.

DANIEL, J. We are of the opinion that the judgment of the court below was right. The defendant is only charged in the indictment with a

forcible entry into the *field* of the prosecutrix, she then and there being present. The jury find that the field which the defendant entered was inclosed, and adjoining to the dwelling-house, and that the prosecutrix was not in the field at the time. These being the facts, he was not guilty in manner and form as charged in the indictment. It is true that the defendant was guilty of an indictable trespass, but that was not the trespass he was charged with and against which he came to defend himself. A charge of a forcible trespass into a *field,* the owner then and there being present, cannot be supported by evidence that the defendant entered the field peaceably, and from thence threw stones against a dwelling-house adjoining, the owner being therein. The two cases are very different, and the defendant might be entrapped if we were to hold that such facts would support the charge in the indictment. The judgment must be

PER CURIAM. Affirmed.

Cited.: S. v. Walker, 32 N. C., 236; *S. v. Laney,* 87 N. C., 537.

(129)

JOSHUA A. POOL v. WILLIAM GLOVER.

1. A sheriff cannot sell under a *fi. fa.* what he has no power by the writ to sell—what is not goods or chattels, lands or tenements, within the sense of the writ, as, for example, bonds or bank stock; and the sale being a nullity, a bidder at such is not compellable to pay the amount of such bid.
2. Where a debtor has made a conveyance of his land to a trustee, to be sold for the benefit of his creditors at a certain time if the debts are not previously paid, and there is a resulting trust to himself, his equitable interest in the land may be sold under an execution, even before the day when, by the terms of the deed, the trustee was authorized to sell his legal interest.

APPEAL from *Battle, J.,* at Fall Term, 1841, of PASQUOTANK, on a case agreed. The following are the facts stated in the case agreed:

Josiah Jordan, being indebted to a number of persons, for the purpose of securing the payment of the debts, conveyed to Joshua A. Pool, by deed of bargain and sale bearing date 28 October, 1840, a tract of land situate in Pasquotank County, and containing 268 acres in fee, upon trust to sell as much of the land as would raise money sufficient to pay one-half of the said debts (which the deed particularly enumerates) on 1 January, 1843, or whatever may be then unpaid of that half; and upon the further trust that if upon 1 January, 1844, the whole of the said debts should not be paid, the trustee should, by sale of the said land, or such part thereof as should not before have been sold, raise

money sufficient to pay what should then be remaining due to the said creditors, respectively; and upon the further trust, in case the said debts should be paid without a sale of the land, or the whole thereof, to convey such part as should not have been sold to the said Josiah.

(130) In September, 1841, upon a writ of *fieri facias* issued to him on a judgment against Josiah Jordan, the plaintiff, who is sheriff of Pasquotank, offered for sale the equity of redemption or interest of Jordan of and in those premises and the present defendant, being the highest bidder, became the purchaser of the said equity at the price of $1,850. But the defendant refused to pay his bid and complete his purchase, upon the ground that the interest of the defendant in the execution was not the subject of a levy and sale under the writ. The plaintiff then tendered to the defendant a conveyance and assignment of the said equitable interest, and brought this action for the sum bid by the defendant. Upon this case agreed the court gave judgment for the plaintiff for the amount of the bid and interest, and the defendant appealed to the Supreme Court.

No counsel for plaintiff in this Court.
Badger for defendant.

RUFFIN, C. J. We concur in the position taken for the defendant, that the action cannot be maintained if Jordan's interest in the land, as set up by the sheriff and bought by the defendant, was not the subject of execution. We do not mean that a purchaser at a sheriff's sale is not bound for his bid unless he get a good title; for, as he may call for a conveyance from the sheriff, how inadequate soever his bid may be, so, probably, he must pay his bid, although the title of the defendant in the execution be defective—provided the interest offered, if it existed, was such an interest as the sheriff could sell and convey. But if the sheriff undertake to sell what he has no power by the writ to sell—what is not goods, chattels, lands, or tenements within the sense of the writ, as, for example, a bond or bank stock—it is the same thing as selling without a writ. As a judicial sale it must be a nullity; the deed tendered by the sheriff would be inefficient; and as the sheriff could not fulfill the contract on his part, so he ought not, we think, to compel the bidder to accept a void deed and pay his bid. The decision of the case, therefore, must depend upon the inquiry whether this was a sale without

(131) authority or not. It is a point of much importance, and was once, at least, if not now, a point of difficulty. It was argued fully and ably for the defendant, and has been very deliverately considered by us, and we have now to say that we feel ourselves constrained to affirm the judgment of the Superior Court.

If the matter were *res integra* there would, doubtless, be more hesitation in coming to the conclusion we have, though we cannot avoid the conviction that, accordong to the most approved principles of interpretation, the construction put upon the second section of the act of 1812 (Rev. Stat., ch. 45, sec. 5) in *Harrison v. Battle,* 16 N. C., 537, is the proper, nay, the unavoidable one. That case determines the precise point, that a conveyance of land of this nature by a debtor to a third person in trust by a sale to pay the bargainor's debts, with a resulting trust to the bargainor, leaves an interest in the bargainor which is not a trust within the first section of the act, but is an equity of redemption within the second branch of it. As an authority none could be more apposite to the case before us. The counsel, indeed, endeavored to distinguish the cases upon the ground that in *Harrison v. Battle* the time for the sale had passed and enough of the estate conveyed had been sold to pay all the scheduled debts; whereas here the time for a sale has not arrived, and no part of the debts has been paid. But that distinction cannot be sustained; for, although there might be something in it if the case stood on the act of 1812 by itself, yet the subsequent act of 1822 (Rev. Stat., ch. 45, sec. 5) subjects the legal right of redemption to execution in like manner as the equity of redemption was liable under the previous act. Therefore, whatever might have been sold after the day of forfeiture of a mortgage may now be sold before that day. The same principle is applied by the Legislature to both cases.

Arguments were then strongly urged against the principle of that case, upon the score of the uncertainty of the interests and their complexity, as existing in the different parties—the debtor, the creditors scheduled and those claiming by assignment subsequent to the deed and by executions, and the trustee—and the danger was clearly pointed out of loss and injury, sometimes to one of those parties and sometimes to another, and especially of numerous losses to the embarrassed (132) debtor. It was not needful that the mischiefs should be thus arrayed to make the Court sensible, and fully sensible, of them. They were duly appreciated by the judges who sat in the Court when *Harrison v. Battle* was decided; and, as far as was allowable to persons in judicial stations, the Court when cases arising under it have come up, has frequently since intimated its impression, "that the second section of the act would be found to be practically impolitic throughout." A sale of such resulting trusts is making a bargain so completely in the dark, as to the value of the subject of the sale, as to amount, in almost every case, to nothing more nor less than sheer gambling. It is a lottery, in which but little will be given for the tickets. Cases, too, may be supposed of conveyances to which it would be hard to believe the Legislature saw the consequences of applying their enactments. As if the deed convey

both land and personal estate, the latter of which is not within the act; if a creditor sell the equity of redemption in the land by execution, shall the mortgage debt then be made out of the land or the personalty? If the deed be to secure the debt of a third person, and so is merely a collateral and supplementary security, how is it to be then? So, in a variety of other cases equally conceivable, the danger is great of producing by such sales expensive and protracted litigation, of encouraging speculation, and overwhelming an indebted man in ruin by bringing his property to market with a doubtful title and with its value generally unknown. But forcible as these objections are, they cannot justify the Court in striving against the policy of the Legislature, by putting on the statute such a construction as will virtually repeal it by enabling every person to evade it by the simplest contrivance. The question is, What is a mortgage, and what is an equity of redemption, within the sense of the act? It is a deed of trust, like the one before us, of that character? To determine these questions, the arguments from the mischiefs and losses just spoken of do not give the least aid. For those mischiefs and lossses will be worked as well by an instrument which is
(133) a mortgage in the most appropriate sense of that term as by the ordinary conveyance in trust for payment of debts by a sale. If it be said that the Legislature could not have foreseen the effects of the enactment, else it would not have been made, and, therefore, that the Court ought not to carry the act beyond its words, the answer is that if unexpected evils arise out of the legislation of the country, it is not for courts to refuse to administer the law in its true sense, while it stands in the statute books, but it is for the General Assembly to repeal or modify their act. It is probable the law owes its origin to temporary causes; for those who were in active life at that day will remember that there were a few conspicuous persons who were rather notorious for encumbering their estates with mortgages, which kept off executions; and that, owing to the defective organization of the courts of equity at the time, there was great delay in reaching them before these courts—so great as to become a matter of general complaint. It is true that subsequent changes in the judicial system now facilitate decisions of causes in equity; and, as persons practically conversant with the subject, we might think it better to have the encumbrances ascertained, and a clear title sold under the supervision of that court rather than proceed on the execution at law under all the difficulties enumerated. Yet the lawmakers, and not ourselves, are the arbiters of policy; and it is our duty to execute the law in the spirit in which it is enacted. Now, as has been already said, not a reason can be given against the justice and propriety of selling a resulting trust arising on such a deed which would not equally condemn the sale of a proper equity of redemption.

When such a sale is argued is against, therefore, the fault is found with the policy of the act, not with its construction. The construction was unavoidable. It is to be remembered that the purpose of the act is to aid the creditor, who has gone through the courts of law and established his debt, to get the fruit of his judgment by the sale of a valuable interest of the debtor under his execution. The statute, therefore, purports to be beneficent to the creditor, and must be received by a court as remedial in its character, and construed so as to suppress the previous mischief and advance the remedy. With this view of our duty, (134) the Court could not allow the execution creditor to be balked, and turn around to begin another litigation in equity, by the literal impediment that the debtor had not an equity of redemption because he had not conveyed his land to his creditor with a power to redeem it by paying the debt, but had conveyed to a third person with the power to call for a reconveyance upon payment of the same debt before a sale. Such an interpretation would have been paltering with the sense of the Legislature. In substance, the debtor has the same interest in each case, and, therefore, it must be liable alike in both instances. Whether, then, we have a regard to the adjudication in *Harrison v. Battle* as an authority, or to the reasons on which it proceeded, we must affirm the judgment in this case.

PER CURIAM. Affirmed.

Cited: S. v. Pool, 27 N. C., 108; *Doak v. Bank,* 28 N. C., 332; *Anderson v. Doak,* 32 N. C., 297; *Frost v. Reynolds,* 39 N. C., 498, 501; *Presnell v. Landers,* 40 N. C., 254; *Taylor v. Newkirk,* 51 N. C., 325; *Hutchison v. Symons,* 67 N. C., 160; *Burton v. Farinholt,* 86 N. C., 265; *Mayo v. Staton,* 137 N. C., 675, 678, 680, 681, 682, 683.

JACOB HUBBARD v. JOHN B. TROY.

1. Protest of an order or inland bill of exchange is not necessary to enable the holder to recover principal and interest. Notice in due time of nonacceptance or nonpayment is all that is required for that purpose.
2. It is generally held that the holder must give notice of nonacceptance or nonpayment on the next day or by the next post, when the parties live in different places.
3. A delay in giving notice from 10 to 24 March held to be unreasonable and to discharge the drawer.

APPEAL from *Pearson, J.,* at Spring Term, 1841, of RANDOLPH. (135)

The plaintiff declared in assumpsit on the following instrument in writing, to wit: "26 February, 1837. Jonathan Church, Esquire, please pay to M. M. Troy or order, $32.68, and charge yours, etc. John

B. Troy," which was indorsed to the plaintiff by M. M. Troy for a valuble consideration.

The defendant pleaded the general issue. On the trial the plaintiff, after reading the instrument declared on, offered in evidence, a letter from the plaintiff to the defendant dated "Greensboro, 24 March, 1837," in which he informed the defendant that he had "received a short time since" from the indorser, M. M. Troy, an order on Jonathan Church for the sum above specified, and that he had "presented the order and Church failed to pay it off," and that he had understood Church had made away with his property. He then adds: "I have thought proper to give thee this information, believing that thee would do what is right and just in the case." The plaintiff then by consent of the defendant's counsel read a letter from John M. Logan to the defendant dated "Greensboro, 20 May, 1837," in which he stated that he had received on the morning of that day a letter from him "requesting me to give you some information respecting an order of yours to J. Church." He continues: "Jacob Hubbard handed me an order on Church from you on 10 March, 1837, or about that time, to present to Church when I went to Jamestown. I think I presented the order on that day to him. He said it was not due until April, and he would get the money from Washington City at that time and pay you according to the bargain he had made with you." Logan further adds that he returned the order to the plaintiff, and told him what Church said, and "that Church was bad to get money from at that time, from what he learned when in Jamestown." When the plaintiff closed his case the defendant's counsel moved the court that the plaintiff be nonsuited, first, on the ground that there had been no protest for nonacceptance, as required by the act of Assembly (Rev. Stat., ch. 13, sec. 2); secondly, that the notice from the plaintiff to the defendant did not state that the plaintiff would not give Church, the drawee, any further credit, and that he looked to the defendant for payment; thirdly, that the plaintiff had not used due diligence in
(136) giving the defendant notice of the nonacceptance of the drawee.

A verdict was rendered for the plaintiff for the full amount of the order, with interest from the date, subject, however, to be set aside and a nonsuit entered if the court should be of opinion for the defendant on the above points reserved. The court having sustained the defendant's objection, ordered the verdict of the jury to be set aside and a nonsuit entered, from which judgment the plaintiff appealed.

Mendenhall for plaintiff.
No counsel for defendant.

RUFFIN, C. J. Notwithstanding the act of 1762, Rev. Stat., ch. 13, sec. 2, the action is maintainable for the principal and interest due on

the order, although not protested for nonacceptance. In practice, inland bills have always been recovered on to that extent without a protest. Our statute is like those of 9 and 10 Will. III., ch. 17 and 3 and 4 Anne, ch. 9, sec. 4, from which it was probably taken. They all relate to damages and the costs of postage, brokerage, commission, and the like, none of which can be recovered without protest. But it has long been held that the remedy given by those statutes is cumulative; and that, therefore, upon notice of nonacceptance or nonpayment of an inland bill, a recovery may still be had at common law. *Brough v. Parking,* 2 Ld. Ray., 992; *Harris v. Benson,* 2 Strange, 910; *Windle v. Andrews,* 2 Barn. and Ald., 696. Hence, in a declaration on an inland bill, it is not necessary to set out a protest, as it is in the case of a foreign bill. In the latter case the protest is part of the custom of merchants, on which the liability of the drawer arises; and, therefore, the fact must appear on the record. Were there nothing more in this case than the want of a protest, the plaintiff would be entitled to judgment. (137)

But we think he must fail for the want of diligence. We need not advert to the question whether the bill was presented for acceptance in due time; for, supposing it was, yet we think the notice to the defendant of nonacceptance was out of time, and for that reason he was discharged from liability on the bill. The plaintiff, by his agent, presented the bill on 10 March, when the drawee denied the debt to be due and refused to accept. Moreover, it appears from the plaintiff's letter that he had heard a report that the drawee had made way with his property. He then knew there was danger; and yet he postponed giving notice for fourteen days—until 24 March. A holder ought to let the drawer of a bill know of its dishonor as soon as he conveniently can. He need not lay by everything he has in hand to do it immediately; but it is generally held that he must give notice the next day, or by the first post, when the parties live in different places. We do not see how the delay that occurred in this case could be accounted for. But if it could, it has not been; and without some explanation it was undoubtedly unreasonable. The judgment must be

PER CURIAM. Affirmed.

Cited: Farmer v. Willard, 71 N. C., 286; *Shaw v. McNeill,* 95 N. C., 539; *Bank v. Bradley,* 117 N. C., 530,: 531; *Neal v. Hardware Co.,* 122 N. C., 106.

(138)

ROBERT ELLIS v. THE PORTSMOUTH AND ROANOKE RAILROAD COMPANY.

Where A., in an action against B. for damages, caused by his negligence, shows damages resulting from the act of B., which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence, and must recover, unless B. proves he has used proper care or proves some extraordinary accident which renders care useless.

APPEAL from *Dick, J.*, at Fall Term, 1841, of NORTHAMPTON.

It was an action on the case to recover damages for burning 500 panels of fence, the property of the plaintiff. The plaintiff proved that he had a line of fence running parallel with the railroad track, belonging to the defendants, at the distance of 50 feet, in the county of Northampton; that on a certain day in the spring of 1839, immediately after the passage of one of the locomotives belonging to the defendants, the fence was discovered to be on fire and about 500 panels of fence were burnt before the fire could be stopped. The plaintiff's witness further proved that the engines run on the road usually had the spark-catchers on the funnel, but whether they were on upon that day he did not recollect. The defendants introduced no testimony. The defendants' counsel contended that they were only liable for negligence; that if they used the care that the nature of their business allowed, they were not liable. The court charged the jury that if the evidence satisfied them that the plaintiff's fence was burned by fire thrown from the defendants' engine, the defendants were liable for the plaintiff's recovery, upon the principle that every one is bound so to use his own property as not to injure his neighbor. The jury returned a verdict for the plaintiff. The defendants moved for a new trial, which was refused, and judgment being given for the plaintiff, the defendants appealed to the Supreme Court.

(139) *Iredell for plaintiff.*
Whitaker for defendant.

GASTON, J. It is no doubt a principle of law, as it is of morals, that one should so use his own as not to injure his neighbor, and this rule requires that even in the legitimate enjoyment of property such care shall be used as not to render it likely to impair their enjoyment of property by others. But no man, unless he has engaged to become insurer against unavoidable accidents, is responsible for damage sustained against his will and without his fault. We think, therefore, that the instruction asked for by the counsel for the defendant was abstractly correct, viz., that the company are not liable for an injury like that complained of, if they use all the care to prevent it which the nature

of their business allows; but we also think that as no evidence (141) was offered to show what they did use in the case under consideration, there was no foundation laid for asking the instruction. We admit that the gravamen of the plaintiff is damage caused by the negligence of the defendants. But we hold that when he shows damage resulting from their act, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence, which cannot be repelled but by proof of care or of some extraordinary accident which renders care useless. Although, therefore, we do not sanction the doctrine which was laid down as the rule of law in the court below, we do not feel ourselves authorized to reverse the judgment, as that doctrine could not have had the effect to mislead the jury.

PER CURIAM. No error.

Cited: Herring v. R. R., 32 N. C., 406; *Scott v. R. R.*, 49 N. C., 433; *Chaffin v. Lawrance*, 50 N. C., 180; *Bryan v. Fowler*, 70 N. C., 597; *Aycock v. R. R.*, 89 N. C., 327, 328; *Lawton v. Giles*, 90 N. C., 379; *Grant v. R. R.*, 108 N. C., 481; *Haynes v. Gas Co.*, 114 N. C., 208; *Mfg. Co. v. R. R.*, 122 N. C., 888; *Williams v. R. R.*, 130 N C., 121; *Hosiery Co. v. R. R.*, 131 N. C., 239; *Craft v. Timber Co.*, 132 N. C., 154; *Womble v. Grocery Co.*, 135 N. C., 481; *Meredith v. R. R.*, 137 N. C., 486; *Ross v. Cotton Mills*, 140 N. C., 120; *Overcash v. Electric Co.*, 114 N. C., 578; *Dermid v. R. R.*, 148 N. C., 197; *Deppe v. R. R.*, 152 N. C., 83; *Currie v. R. R.*, 156 N. C., 423; *Hardy v. Lumber Co.*, 160 N. C., 117; *Aman v. Lumber Co., ib.*, 373; *Ridge v. R. R.*, 167 N. C., 518; *Shaw v. Corporation*, 168 N. C., 616.

SAMUEL DUDLEY v. THOMAS ROBINSON.

Calling one a thief or a murderer, in the absence of context or proof to the contrary on the trial, *ex vi termini* imputes to him a felony, and, therefore, an action of slander well lies.

APPEAL from *Settle, J.*, at Fall Term, 1841, of CRAVEN.

The case made for the Supreme Court is as follows:

Action on the case. The declaration contained two counts: the first for the libel published in the *Washington Whig*, a newspaper published in the town of Washington, North Carolina, a copy of which is as follows:

To the Public: It is ascertained and can be proved by the most respectable part of the inhabitants of the island of Portsmouth that the

man now employed as a physician in the hospital at that place has
(142) frequently left it on his own private business, with several sick men in the hospital without any medical aid whatever; and three or four have died in his absence. At one time he was gone fifteen or twenty days, and no physician left in his stead. We feel for our fellow beings, who have to be left in such a place without any assistance, and also for ourselves, for during the month of January last smallpox broke out in the hospital, which joins the dwelling of the pretended doctor. The disease being in the center of the inhabitants, they of course protested against its remaining among them, and requested the aforesaid doctor to remove the patients to Shell Castle, which he refused to do until it was threatened to have them removed by violence. After they were removed there, four died out of ten without any medical aid, the present physician refusing to visit the patients. The collector then sent to Beaufort for a physician, but could not obtain one, and in this deplorable situation these unfortunate people were left without medical assistance. THOMAS ROBINSON.

PORTSMOUTH, 25 Feb., 1836.

The second count charged that the defendant spoke and published of and concerning the plaintiff, in the presence of several citizens in a public store, the following words: "Doctor Dudley (meaning the plaintiff) is a thief and murderer." The pleas were, general issue, justification, and statute of limitations.

To sustain the first count in the declaration, evidence was offered proving that the defendant brought the libel aforesaid in manuscript to the office of the *Whig,* and caused and procured the publication thereof in the *Whig;* and that the said paper had a considerable circulation, there being at the time of the publication between two and three hundred subscribers. It also appeared in evidence that the plaintiff was at and before the time of the said publication the hospital physician of the United States at the hospital on Portsmouth Island in this State. Under the second count it was proved that the defendant, within six months before the action, in a public store, at Portsmouth, in presence and hear-
(143) ing of several persons, said: "Dr. Dudley is a rogue, liar, thief, and murderer." His Honor held and instructed the jury that each of the words "thief and murderer" was actionable. There was no colloquium proved of any particular larceny, nor did it appear that any particular individual was referred to as having been murdered by the plaintiff. No exception was taken to the first count; but objection was made on the trial as to the words "thief and murderer" not being actionable. The jury found a verdict on all the issues for the plaintiff on both counts, and assessed his damages at $200. A motion for a new trial

was made, on the ground that the words "thief and murderer," charged in the second count, were not actionable. A new trial was refused, and judgment having been rendered for the plaintiff, the defendant appealed.

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

DANIEL, J. This is an action upon the case for words spoken, and for a libel. There are two counts in the declaration: the first is for a libel; the second for words spoken in the presence of a number of people, viz., that "Doctor Dudley is a rogue, thief, liar, and murderer." There was no exception taken as to the first count for a libel. On the second count there was no colloquium proved at the trial of any particular larceny, nor was there any particular individual referred to as having been murdered by the plaintiff. The judge, notwithstanding, ruled and instructed the jury that each of the words spoken by the defendant (viz., "Doctor Dudley is a thief and a murderer") was actionable of itself. We are of the opinion that the charge of his Honor was correct. Calling a person a *thief* is actionable, if it be thereby intended to impute a felony. If it appear from the context of the plaintiff's own showing that the word *thief* was not used in a felonious sense, the plaintiff will be nonsuited. *Thompson v. Bernard,* 1 Comp., 48. Otherwise, it lies on the defendant to show that the words were not used in a felonious sense. (144) *Penfield v. Wescote,* 2 New Rep., 335. An action may be maintained for calling a person a *murderer* (1 Rolle Ab., 72) under the same rules as we have just mentioned as to the word *thief*. Either of the said two words, in the absence of context, or proof to the contrary on the trial, *ex vi termini* imports a felony. The judgment must be

PER CURIAM. Affirmed.

STATE TO THE USE OF H. QUINN v. THOMAS J. ROANE.

1. Under the act of 1836, Rev. St., ch. 99, sec. 23, an action may be supported on the official bond of the sheriff for the neglect of his deputy to collect a claim put in his hands for collection, although the amount of the claim is within the jurisdiction of a single justice of the peace. Justices may direct their warrants as well to sheriffs as to constables.
2. It is no defense to such an action that after the default of the deputy the plaintiff has endeavored, but unsuccessfully, to collect his claim himself from his debtor.

APPEAL from *Manly, J.,* at Fall Term, 1841, of CHEROKEE.

The following is the case as appears from the report of the judge:

This was an action upon the official bond of the sheriff for the act or

omission of his deputy. Pleas, "Conditions performed and no breach." The bond was dated .. September, 1837. The breach assigned was that the deputy had failed to collect, for the plaintiff, a certain claim which the plaintiff had placed in his hands to collect, as evidenced by the following receipt, viz.:

(145) 17 July, 1838. Received of Hinson Quinn by the hands of B. K. Dickey, one note on Thomas B. Hair as principal and B. S. Brittain and John S. Dickey as securities, the amount of $100, that I am to do by best endeavors to collect and pay over or return as the law prescribes. THOMAS J. ROANE, *Sheriff*,
By JAMES TRUITT, *Deputy Sheriff*.

It appeared in evidence that the deputy sued out a warrant against the principal debtor only—obtained a judgment and *ca. sa.* under which the defendant was arrested, and gave bond according to the insolvent debtors' act, and at the return of the proceedings to court, took the oath of insolvency. It was also proved that the note was not to be found in the papers of the case, which were carried to court, or elsewhere; and it was admitted that one of the securities to the note was solvent, and that he resided in the county of the officer. It was also proved that, after the deputy sheriff had left the State, and the note could not be found, the relator attempted to obtain a judgment upon the note, as a *lost note,* but ultimately in the county court suffered a nonsuit. It was insisted by the defendant's counsel that the principal sheriff was not liable for the conduct of his deputy in regard to claims subject to the jurisdiction of a justice of the peace; and it was also contended that, although a right of action had accrued to the relator, yet when he sought to recover a judgment against the securities upon the note as a *lost note,* he elected to pursue a different remedy, and could not afterwards pursue his right against the sheriff. These objections were overruled by the court, and, there being a verdict and judgment for the plaintiff, the defendant appealed to the Supreme Court.

No counsel appeared for plaintiff.
Francis for defendant.

RUFFIN, C. J. Both of the objections taken by the defendant were, we think, properly overruled.

The act of 1794, Rev. Stat., ch. 62, sec. 7, provides that warrants from a justice of the peace may be directed as well to the sheriff as a constable; and, consequently, it is equally the duty of each of those offi-
(146) cers to execute them. By other acts (Rev. Stat., ch. 24, sec. 7) it is made the duty of constables diligently to endeavor to collect all

claims put into their hands for collection, and pay over over all sums received, either with or without suit; and for the performance of that duty the sureties of constables are made responsible on their bonds. Then follows the act of 1836, Rev. Stat., ch. 99, sec. 23, which makes it likewise the official duty of a sheriff to receive claims for collection and diligently to endeavor to collect them and pay them over in like manner as constables were then bound; and for a default therein a remedy is given on his bond. If, therefore, this had been a transaction of himself, instead of his deputy, he would, by the express enactment of the statute, be liable in this action of debt on his bond of office. As a general principle, he is likewise liable for the act or omission of his deputy as for his own. But, besides that, the act in this particular instance expressly includes the receipt of claims by a deputy for collection, and puts that case on the same footing with a receipt by the principal himself.

The relator neither waived nor abandoned his remedy against the sheriff by endeavoring to collect his debt by suit against the other parties to the note. Nothing less than satisfaction from some quarter or a release to the sheriff would be a bar. Indeed, one cause of complaint on the part of the relator is, or might have been, that the defendant or his deputy withheld, destroyed, or lost the note, the evidence of the relator's debt, so that he could not maintain his action at law thereon, for the want of sufficient evidence. But even if in that action he had obtained judgment against the parties, that would not have discharged the defendant. In the recent case of *Pitcher v. King,* 9 A. and E., 288, to a count for a false return of a *fi. fa.* the sheriff pleaded that the plaintiff, after the return of the writ, brought debt on the judgment and obtained a second judgment, in which the first was merged, and, upon demurer, the plea was held to be no answer to the declaration.

PER CURIAM. No error.

(147)

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF CAPE FEAR v. JOSHUA WILLIAMSON.

An amendment of an execution will not be allowed when such amendment will prejudice the rights of third persons.

APPEAL from *Pearson, J.,* at Fall Term, 1841, of NEW HANOVER.

A motion to amend an execution had been made in the County Court og New Hanover, and came up by appeal to the Superior Court, where the following, in substance, was submitted as a case agreed:

The president, directors and company of the Bank of Cape Fear, at September Term, 1839, of New Hanover County Court obtained a judg-

ment against James Burney and others for $4,261.60, with interest; a *fieri facias* thereupon regularly issued, tested at September Term, 1839, and duly came to the hands of the defendant, who was sheriff of the county of Columbus. Upon this execution the sheriff returned that by the sale of various articles of property he had satisfied the sum of $3,577.10, besides the costs and commissions. Afterwards the plaintiff sued out another execution, tested at December Term, 1839, and returnable to March Term, 1840, which duly came to the hands of the defendant as sheriff aforesaid. This execution did not profess on its face to be an *alias,* but on the back was the following indorsement by the clerk: "$3,577.10 paid." On this execution the sheriff returned "No property to be found." At Fall Term, 1839, of Cumberland Superior Court one ..... obtained a judgment against the said Burney and others for $..... A *fieri facias* thereupon regularly issued, tested at November Term, 1839, of Cumberland Superior Court, and duly came to the
(148) hands of the defendant as sheriff of Columbus. The motion was to amend the plaintiff's execution tested at December Term, 1839, by inserting the words "as we have heretofore done," for the purpose of making it relate back, as an *alias,* to the execution of the plaintiffs' tested at September Term, 1839.

Notice of this motion had been given to Williamson, the sheriff, but none to the plaintiff in the execution issued from Cumberland Superior Court, nor to the defendants in the present execution.

The court refused to allow the amendment, and discharged the rule, because the amendment, if it had any effect, would prejudice the interest of the plaintiff in the execution from Cumberland, and not upon the ground that the question of amendment was a mere matter of discretion. From this judgment the plaintiffs appealed to the Supreme Court.

William H. Haywood, Jr., for plaintiffs.
Strange for defendant.

DANIEL, J. Without stopping to remark upon the novelty of a motion to amend, without the defendants in the execution having any notice of it, we will say that in our opinion the decision of the judge was correct in refusing the motion and discharging the rule—and that, too, for the reasons given by him. In 4 Maule and Sel., 328, the Court refused to allow an amendment of a *fieri facias,* when the defendant had become a bankrupt before the sale of the goods taken in execution under the writ, because the amendment would prejudice the rights of third persons, namely, the assignee and the other credieors. See, also, 2 Arch. Prac. K. B., 279. When third persons are not thereby affected, a writ
(149) of execution may be amended from a day certain to a general re-

turn day; but if it will affect the rights of third persons, the amendment cannot be made. 1 Marshall, 399; 5 East, 291. The authorities are with the decision of the judge, and the judgment must be

PER CURIAM. Affirmed.

Cited: Smith v. Spencer, 25 N. C., 262; *Phillipse v. Higdon,* 44 N. C., 383; *Bennett v. Taylor,* 53 N. C., 283; *Simpson v. Simpson,* 64 N. C., 429; *Williams v. Sharpe,* 70 N. C., 584; *Phillips v. Holland,* 78 N. C., 33.

EDMUND HYATT & CO. v. JOHN TOMLIN AND OTHERS.

Where a plaintiff issued three separate writs on different days against three individuals, indorsing on each writ that it was for the same cause of action and in the same suit as the writs issued against the other two, and upon their return they were docketed as one suit and the defendants appeared and put in pleas thereto: *Held,* that whatever irregularities may have occurred in suing out the writs, these were waived by the defendants accepting a joint declaration and putting in pleas in bar thereto.

APPEAL from *Bailey, J.,* at Fall Term, 1841, of ASHE.

The case appeared to be this: It was an action of debt brought upon a promissory note, executed by John Tomlin in the name of John Tomlin & Co. and payable to the plaintiffs. It was alleged on the part of the plaintiffs that the firm of John Tomlin & Co. was composed of John Tomlin, William P. Waugh, and James Harper. Tomlin lived in the county of Ashe, Waugh in Wilkes, and Harper in Burke. Thee writs were issued from the Superior Court of the county of Ashe, one to the sheriff of Burke, returnable to Spring Term, 1839, and executed 31 January, 1839, on which was indorsed: "This writ is issued (150) in the same suit and for the same cause of action as two other writs, one against John Tomlin and the other against William P. Waugh, to Wilkes, and returnable to Ashe Superior Court, Spring Term, in favor of the same plaintiffs. The writ to the sheriff of Ashe against John Tomlin was issued 26 February, 1839, with a similar indorsement. The other writ to Wilkes does not show when it was issued. The sheriff indorses that he received it 7 March, 1839, and it has an indorsement similar to the others. These writs were returned to Spring Term, 1839, "Executed," and docketed by the clerk as one suit. At this term this entry is made upon the docket, to wit: "Harper and Waugh plead severally, general issue, payment, and set-off, statute of limitations with leave." At the same term Tomlin employed counsel, who entered no pleas for him. The cause was continued from term to term until Spring Term, 1841, when

an attempt was made to try it, but there was a mistrial. The counsel for Harper and Waugh at that term proposed to the plaintiffs' counsel that Tomlin would confess judgment, and this entry is made on the docket: "Defendant Tomlin offers to confess judgment for debt and costs, which is opposed by the plaintiff's counsel and refused by the court." The cause was continued till Fall Term, 1841, when, coming on to be tried, it was moved by the counsel for Harper and Waugh that, as the writs had been issued at different times, they were separate suits and should be so entered on the docket; that to make one cause of action, the writs must be issued on the same day. The court overruled the objection, and held that the cause was properly docketed. The same counsel insisted that the cause was discontinued because no pleas had been entered for Tomlin and no judgment had been taken against him. The court was of a different opinion, and overruled this objection. The same counsel proposed again that Tomlin be permitted to come forward and confess judgment, and that they wished to introduce him as a witness for the other two defendants. His motion was opposed by the plaintiff's counsel and refused by the court. The jury were then charged to try the issues. It was in proof that the defendants composed the firm of Tomlin & Co., and that the copartnership was in existence in 1834 and up
(151) to September, 1835, when it was dissolved; that soon after the dissolution of this firm Tomlin entered into copartnership with one Hardin under the same name of the old firm, viz., Tomlin & Co., and that the dissolution of the old and foundation of the new firm were before the note was executed upon which this suit was brought. It was furthermore in proof by a clerk of the plaintiffs that Tomlin had purchased goods of the plaintiffs at two several times in 1834, in the name of Tomlin & Co., and they had been paid for, and that when the last lot of goods was purchased for which the present note was given, to wit, in November, 1835, by Tomlin, he, Tomlin, gave no notice to the plaintiffs of any dissolution of the firm of Tomlin & Co., and that the goods were sold, as he supposed, to the same firm as the others were in 1834, and the same firm looked to for payment. It was further in proof that the defendants advertised at two storehouses in Ashe County that they had dissolved, and that these advertisements were seen some time about the last of 1835 and in 1836. The plaintiffs were merchants in Charleston.

The court charged the jury, upon this evidence, that if the defendants composed the firm of Tomlin & Co. in 1834, and up to September, 1835, and had traded with the plaintiffs, merchants in Charleston, as Tomlin & Co., at two several times and made payment, and Tomlin made a third purchase in the name of Tomlin & Co., and the trade was made in the same way and the same parties looked to for payment, the defendants would be liable to the plaintiffs, although there had been a dissolution of

the firm prior to the last purchase, unless notice had been given to the plaintiffs of the dissolution; that if the plaintiffs had notice of the dissolution, then the jury were instructed to find for the defendants. The defendants' counsel then asked the court to instruct the jury that if the plaintiffs did not know that Waugh and Harper were the partners of Tomlin, no notice of the dissolution would be necessary to exonerate them. The court declined giving this instruction, but told the jury that if the plaintiffs understood that Tomlin had partners in the trade, and goods had been sold to them as a firm, and the firm looked to (152) for payment, the defendants would be liable to the plaintiffs, although they, the plaintiffs, did not know their names, unless notice of the dissolution was given. The defendants' counsel further objected that the action was misconceived, and that the plaintiffs should have brought case and not debt.

The jury found a verdict for the plaintiffs, and judgment being pronounced thereon, the defendants appealed to the Supreme Court.

Barringer for plaintiffs.
Boyden for defendants.

GASTON, J. Whaever irregularities may have occurred in the suing out of the writs against the defendants, these were all waived by their accepting a joint declaration, and putting in pleas in bar thereto. His Honor, therefore, very properly overruled the motion for severing the action.

In no material circumstance, as it regards the other matters presented by the case, does it appear to differ from *Walton v. Tomlin,* 23 N. C., 593.

PER CURIAM. No error.

Cited: S. v. Jones, 88 N. C., 685; *Caldwell v. Wilson,* 121 N. C., 453.

(153)

STATE v. JOHN DAVIS.

1. On an indictment under the act of Assembly, Rev. St., ch. 34, sec. 55, in relation to the altering or defacing the marks of cattle, etc., if the act of altering or defacing, etc., is proved to have been willfully done, it necessarily follows that the intent was to defraud or injure the owner, unless there be proof to the contrary.
2. It is no objection to a conviction on an indictment for this offense that the cattle, beast, etc., had, at the time the act was done, strayed from its owner.

3. It is no ground for arresting judgment after conviction on an indictment that it appears from the record that the grand jury who found the bill consisted of only fifteen persons.
4. By the common law a grand jury may consist of any number between twelve and twenty-three. Our statute upon the subject of a grand jury is only directory to the court, and does not declare void a bill or presentment found by a grand jury consisting of the common-law number.

APPEAL from *Manly, J.*, at Fall Term, 1841, of MACON.

At this term the defendant was tried upon the following indictment, to wit:

STATE OF N. CAROLINA, MACON COUNTY. } *ss.* September Court of Law, Fall Term, 1840.

The jurors for the State, upon their oath, present that John Davis, late of the county of Macon, on 15 September, in the year 1840, with force and arms in the county aforesaid feloniously and knowingly did alter the *make* of one sheep, the property of William McConnell, knowingly with an intent to defraud the said William McConnell, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

(154) And the jurors aforesaid, upon their oath aforesaid, do further present, that John Davis, late of the county aforesaid, on the— day and year aforesaid, with force and arms in the county aforesaid, knowingly did deface the mark of a sheep, the property of one Wiliam McConnell, then and there with an intent to defraud the said William McConnell, contrary to the form of the statute in that case made and provided and against the peace and dignity of the State.

GUINN, *Solicitor.*

The grand jury, who found this bill "A true bill," consisted, as appeared by the record, of only fifteen persons.

On the trial it was proved that the sheep in question was the property of the prosecutor, as laid in the indictment; that it strayed away (being in his mark), and about two months afterwards was discovered in the inclosure of the defendant, with the mark altered to the defendant's mark. It was also proved that the alteration was made by the defendant.

It was argued there could not be a conviction in the case, because, first, there was no intention to defraud any person manifest; second, there was no evidence that the defendant knew, at the time he altered the mark, that the sheep was the prosecutor's, or intended to defraud him; third, the sheep was an estray and could not be the subject of this offense.

Upon these points the court instructed the jury that if the defendant knew the sheep was not his, but the property of somebody else, and with this knowledge altered the mark and kept it in his inclosure, claiming it

at his own, a fraud upon the owner followed as a necessary consequence, and one is always presumed to intend that which is the necessary consequence of his act. It was not necessary (the court charged) that the defendant should know, at the time of the offense committed, to whom the sheep belonged; if he intended to defraud the owner, whoever he might be, it was sufficient; and although the sheep was a stray at the time, it nevertheless was the subject of this offense. A verdict was rendered against the defendant, and, judgment being given (155) thereon, after an ineffectual motion for a new trial, on the ground of misdirection by the court, the defendant appealed.

Francis for defendant.
Bynum, solicitor, for the State.

GASTON, J. We are of opinion that the appellant has not shown any error in the instructions to the jury, nor sufficient reasons to arrest the judgment.

The indictment is founded on the act of 1822, ch. 1155, reenacted in Revised Statutes, ch. 34, sec. 55, whereby it is declared, "that if any person shall knowingly alter or deface the mark or brand of any person's neat cattle, sheep, or hog, or shall knowingly mismark or brand any unbranded or unmarked neat cattle, sheep, or hog, not properly his own, with intent to defraud any other person, he shall, on conviction in a court of record, be liable to corporal punishment in the same manner as on a conviction of petit larceny." The manifest purpose of the Legislature is to punish the act of changing or defacing these marks or brands, which are the ordinary indications of ownership in property of this description, and also the act of putting false marks or brands thereon with intent to injure the owner by either depriving him of the property or rendering his title thereto more difficult of proof. Now, when the act of willfully changing or defacing the mark is fixed upon the person accused, and no explanation is given of the act to render it consistent with an honest purpose, the conclusion follows irresistibly that it was done with intent to effect the injury which is the ordinary and necessary consequence of the act. Such intention is directed (156) against the owner, whoever he may be, and the charge that the act was done with intent to injure any individual named is made out when it is shown that *he* was the owner at the time when the act was committed.

It has been contended by the counsel for the appellant that the offense created by the statute and charged in the indictment could not have been committed, because at the time when the act was done the animal had strayed from the possession of the owner, and the statute, by declaring

that the offender shall be liable to corporal punishment in the same manner as on a conviction of petit larceny, must be understood as applying to those cases only wherein the offender, by a felonious appropriation of the animal, would have committed the crime of petit larceny. He further urges that this construction of the statute is strengthened by the circumstance that a special provision is made by the statute for improper interference with strays in chapter 112, sec. 8. We do not concur in this construction of the statute. In the description of the offense thereby created no reference is made to the crime of larceny. The offense consists in knowingly altering or defacing the mark of or in knowingly mismarking an animal, the property or another, with intent to defraud. The mere straying of the animal from the owner's premises makes no change of property. The animal still remains his, and the wrongful act is not less calculated, but in fact more likely, to do him an injury than it would be if done to an animal in his immediate possession. The reference in the statute to the punishment in cases of petit larceny does not affect the description of the offense, more than it would have affected that description if the reference had been to the punishment in cases of perjury or forgery or of any other crime. It only denounces against the offense previously described the same penalty by which the existing law is inflicted upon a conviction of petit larceny. The construction contended for is not only unwarranted by the language of the statute, but would render the statute itself inoperative in the cases which mainly rendered it necessary. Nor does the section referred to in chapter 112 provide for an offense of this description in cases of strays. The object of the
(157) Legislature in that chapter is to point out a mode of proceeding in those cases, whereby the owner may be enabled to regain the possession of his property or to get the value thereof, and a proper compensation may be made to those who shall render him their assistance for this purpose; and, in furtherance of this object, section 8 imposes a pecuniary mulct on those who may take up or use the stray otherwise than in the mode therein directed.

The motion in arrest of judgment rests on two grounds. The first is for that the offense is not described in the language of the statute. This objection applies only to the first count of the indictment, and as to that is well taken. The first count charges that the accused did alter the *make* of the sheep. No doubt the word "make" was intended to be written "mark," but it is a different word, having a different signification, and cannot be brought within the exception of *idem sonans*. But this mistake is not in the second count, which charges that he defaced the mark of the sheep; and a general verdict of guilty having been rendered, judgment will not be arrested if either count be sufficient to warrant it.

The other ground taken for this motion is for that it appears upon the

record that the grand jury who found the indictment was constituted of fifteen jurors only. The argument in support of this objection is that by the express words of Revised Statutes, ch. 31, sec. 34, the grand jury must consist of eighteen jurors; that under the Constitution of this State no freeman can be put to answer any criminal charge but by indictment, presentment, or impeachment; that an indictment is a written accusation found by a grand jury; and that the accusation which has been received as an indictment in this case is not an indictment, because not found by a grand jury legally constituted. We do not deem it necessary to enter into an examination of every part of this argument, because we differ from the counsel for the appellant in the construction which he attaches to the statute on which he relies. It was an established principle of the common law that no man could be convicted, at the suit of the king, of a capital offense unless by the voice of twenty-four of his equals and neighbors, that is, by twelve at least of the grand jury in the first (158) place assenting to the accusation, and afterwards by the whole petit jury of twelve more finding him guilty upon his trial. 4 Bl. Com., 306. To find a bill it was required that twelve, at least, of the grand jury should agree thereto; but if twelve did so agree, it was a good presentment, though the rest did not agree. 2 Hall P. C., 161. It was necessary that the grand jury should consist of twelve, at least, and it might contain any greater number, not exceeding twenty-three. There must be twelve, at least, because the concurrence of that number was absolutely necessary in order to put the defendant on his trial; and there ought not to be more than twenty-three, because otherwise there might be an equal division, or two full juries might differ in opinion. *Clyncard's case,* Cro. Eliz., 654; *King v. Inhabitants of Southampton,* 2 Black, 718; 2 Burr., 1088; 1 Chit. Crim. Law, 705. These great principles of the common law were brought over to this country by our ancestors, and, with an extension of their application to other offenses, were by the Constitution made a part of our fundamental law, and cannot be violated either by the judiciary or the Legislature. According to them, therefore, a bill found by twelve of a grand jury composed of any number between twelve and twenty-four (exclusively) is sufficient to put any man on trial for a criminal offense. We do not doubt but that it is competent for the Legislature to declare that although a bill be found by twelve of a grand jury the accused shall not be put upon his trial, and that the bill so found shall not be deemed an indictment unless the grand jury consisted of eighteen jurors. Such an act of legislation would not infringe any of the rights or liberties secured by the Constitution, but would be a regulation for the enjoyment of them under the Constitution. The question is, Has the Legislature made such a declaration or any enactment tantamount to such a declaration?

The words of the section referred to are: "The judges of the Superior Courts and the justices of the county courts shall direct the names of all the persons returned to serve as jurors at the terms of their repect-
(159) ive courts to be written on scrolls of paper, which shall be put in a box or hat and drawn out by a child under 10 years of age, and the first eighteen drawn shall be a grand jury for said county, and the residue of the names in the box or hat shall be the names of those who are to serve as petit jurors for said court." These words, it is obvious, are directory to the judges and justices of the courts in regard to the manner in which the grand and petit juries shall be formed out of the persons returned generally as jurors on the original *venire*. First, a sufficient number, eighteen, shall be drawn by lot out of the whole number returned, for the grand jury, and those not so drawn shall serve as petit jurors.

It does not in terms declare that a grand jury constituted of less than eighteen shall be insufficient to find a bill. It does not purport, otherwise than necessarily results from the directions so given, to add to or in any way modify the operation of the ancient rule in regard to the necessary number of a grand jury; and it cannot be believed that if any addition to or modification of the exercises of this so important rule were intended, but that it would have been distinctly and unequivocally announced. It simply gives the directions, but is silent as to the effect which may result from inattention to a nonobservance of them in any particular.

It cannot be pretended that the rule is not yet in full force that a bill may be found on the presentment of twelve only of a grand jury. Now, it would seem a singular anomaly that the concurrence of twelve out of eighteen is sufficient to prefer an accusation, but that twelve out of fifteen is undeserving of notice.

There are other directions in this statute in relation to the constitution of grand juries quite as explicit as those contained in section 74. Among these is to be found the express direction in section 27, that the original *venire* out of which the grand jurors shall be elected shall consist of not more than thirty-six nor less than thirty persons. What would be the effect of a disregard of this direction? Would a grand jury elected out of a *venire* containing a greater or less number than is herein
(160) directed be so incompetent to find an accusation that a bill by them presented must be regarded as a nullity? Upon this question we are not left to our own unaided reasoning, but have the safe guidance of authority. This question occurred in *S. v. McEntire,* 4 N. C., 267. At the time the provision of the law was that the original *venire* should consist of thirty persons. He was convicted of a capital offense, and it was moved in arrest for that it appeared that the original *venire,* out of

which was drawn the grand jury who had found the bill, consisted of forty jurors. It was unanimously decided by the then Supreme Court that, although the directions of the law had been disregarded in making out the original *venire,* it did not follow that the indictment would not uphold the conviction; that it was competent for the party indicted, upon his arraignment, to object to the irregularity as to the constitution of the grand jury, but that if he did not then object thereto, he should not afterwards be received to make his objection.

The directions contained in section 34 of the Revised Statutes were not then enacted for the first time. They are to be found, so far as respects the constitution of juries in the *Superior* Courts, in section 11, chapter 157, Laws 1779, and have ever since, so far, at least, been in full force. No direct determination has been made on the precise point before us. An intimation of opinion is found in *Nixon Currie's case* that a bill is sufficiently formed to support a conviction and warrant a judgment if the grand jury consisted of twelve jurors. In that case, which has not been reported, but which was determined in 1824, an objection was taken to the transcript of the record sent up to this Court as insufficient because it did not show by whom the indictment had been found, and thereupon a *certiorari* was awarded to bring up a full record. In delivering the opinion of the Court, *Judge Hall* observed: "It is not sufficient that a petit jury should find him guilty, but it is indispensable that the grand jury should find the bill of indictment against him. Suppose when the record is looked into it appears that a less number of persons *than twelve* composed the grand jury, that might probably be alleged as a good reason why judgment should not be pronounced." In *S. v. Seaborn,* 15 N. C., 307, it was remarked by one of the members of this (161) Court (*Ruffin, C. J.*): "We require the record to show that the inquisition was taken by a grand jury, *perhaps* that it was a grand jury of eighteen"; but it is manifest that this suggestion was made out of abundant caution, and we know that it was thrown out in deference to a doubt thereupon which was supposed to have been expressed by a late highly respected judge. Both of the members of the Court who delivered opinions in *S. v. Seaborn, supra,* expressed their approbation of the decision in *S. v. McEntire, supra,* and both held that the statutory enactments with respect to the organization of grand juries are directory merely, and that there is nothing in the statute which declares or imports that the proceedings shall be null if these directions be not observed.

It is our unanimous opinion that the accused may, before pleading to the felony, object to any irregularity in the constitution of the grand jury, if he deem such irregularity injurious to him; but that, after pleading to the felony, he cannot object to the indictment as not found (if it appear to have been found by a grand jury constituted of twelve or any

greater number of jurors, not exceeding twenty-three) as is required at the common law.

PER CURIAM. No error.

Cited: S. v. O'Neal, 29 N. C., 254; *S. v. Douglass,* 63 N. C., 501; *S. v. Boon,* 82 N. C., 647; *S. v. Barker,* 107 N. C., 918, 920; *S. v. Perry,* 122 N. C., 1022.

(162)

JONATHAN H. JACOCKS, ADMINISTRATOR OF SARAH WEEKS, DECEASED, v. BENJAMIN MULLEN AND OTHERS.

1. A. by will devised as follows: "I give to my son William certain negroes (naming them), to him, his heirs and assigns forever; but in case he should not arrive at the age of 21 years, or marry, my desire is that my daughter Sarah have the aforesaid negroes." Sarah married and died in the lifetime of William. Then William died unmarried and under age: *Held,* that the contingent interest thus bequeathed to Sarah in these negroes was transmissible to her representatives, and on the death of William, under age and unmarried, became a vested, absolute interest in her administrator.
2. And this construction is not affected by the circumstance that in another clause the testator gives other negroes to Sarah, with a like contingent limitation to William, in the event of Sarah's dying unmarried and under age.
3. When an interlocutory decree below is appealed from, it is the duty of the court below to state specifically in the case transmitted to the Supreme Court the question or matter from a decision on which the appeal is taken.

APPEAL from an interlocutory decree, by *Battle, J.,* at Fall Term, 1841, of PERQUIMANS.

The pleadings and decree are set forth in the opinion delivered in this Court.

Iredell for plaintiff.
Badger for defendant.

GASTON, J. The plaintiff filed his petition in the Superior Court of Perquimans at April Term, 1841, of said court, against Benjamin Mullen and Harriet, his wife, and Thomas Wilson. The petitioner sets forth that Greenbury Mullen, deceased, formerly of Bertie County, left a last will and testament duly executed, of which he appointed his wife, (163) Harriet, executrix, and William L. Gray and Turner Watson executors; that after his death the widow proved the will, and Gray and Watson renounced the executorship; that by the said will the testator bequeathed as follows: "I give to my son William certain negroes

(naming them), to him, his heirs and assigns, forever; but in case he should not arrive to the age of 21 years or marry, my desire is that my daughter Sarah Mullen have the aforesaid negroes," as by the will, which is referred to as part of the petition, more fully appears; that Sarah Mullen intermarried with Noah Weeks, and died intestate in the lifetime of her brother William; that no administration was had upon her estate until 1839, when the plaintiff was duly appointed her administrator; that the said William has died since the said Sarah, under the age of 21 years and unmarried, whereby the petitioner became entitled, as the administrator of the said Sarah, to the said slaves; that Harriet Mullen, the executrix of the testator, has intermarried with Benjamin Mullen, who, as the husband of the executrix, took the slaves into his possession, sold some of them, and received large profits from their hire. The petitioner further alleges that Thomas Wilson, having intermarried with one Elizabeth Mullen, and claiming that his wife was one of the next of kin of the said William, instituted a suit against Benjamin Mullen and wife, and recovered a part of the said negroes; that the petitioner has frequently applied to the said Wilson to pay over unto him what the said Wilson recovered in said suit, and to the said Benjamin to deliver over to him the negroes and account with him for their hire, and that both the said Benjamin and Thomas have refused to comply with these requests, denying his right to any part of the negroes so bequeathed. The prayer of the petitioner is that Mullen and wife may be decreed to pay over what is due to the petitioner, and to deliver up the said negroes and their issue, and the said Thomas to pay the amount recovered by him as aforesaid; and for such other and further relief as the petitioner may be entitled to. (164)

The defendants Mullen and wife filed their answer at the succeeding term. This answer, admitting all the material facts alleged in the petition, states that the testator died in 1811; that Sarah, his daughter, intermarried with Noah Weeks in 1818 or 1819, and died intestate and without issue in 1821; that William, her brother, died in 1823, unmarried and under the age of 21 years; that the defendants Benjamin and Harriet intermarried in December, 1813; that the said Benjamin, in right of his wife as executrix, took possession of these negroes as part of the estate of her testator, and that upon the death of the said William he kept the negroes, claiming them in right of his wife as the sole next of kin to the said William, until 1838, when a claim was set up to a share thereof by Thomas Wilson and his wife, Elizabeth, who was the half-sister of the said William on the side of the mother of the said William. The answer states that in 1835 the defendant Benjamin sold one of the said negroes, Aaron, because of his misconduct, for the sum of $375; that in 1839, at the suit of the said Wilson and wife, a decree was made for

the sale of certain others of the slaves; that they were sold accordingly for the sum of $1,302. These defendants insist that the petitioner is not entitled, under the will of Greenbury Mullen, to the slaves or their price; and, if he be, insist upon the lapse of time as a bar to that claim. The other defendant, Wilson, also put in his answer, in which he says only "that he and his wife recovered, by a decree of this Court, a part of the proceeds of the property mentioned in said petition, and insists that he is not liable therefor, or any part thereof, to the petitioner." Upon the filing of these answers a decree was made whereby it was declared "that the petitioner was entitled under the will of Greenbury Mullen, and upon the death of William Mullen, to the slaves bequeathed unto the said William, and to their increase, and to the hires thereof from the death of the said William, or to the value of such of them as have been sold, if in truth any were sold, and the interest thereon, and the hire of the said slaves until they were sold; and that the said petitioner recover of the said Benjamin Mullen the said slaves, with the hires and profits, or if they have been sold, their value, with interest, and the hires and
(165) profits up to the time of the sale." And the decree directed "a reference to the clerk to take an account of the value of the slaves that have been sold, with interest thereon, and their hires up to the time of the sale." From this decree the defendant Benjamin Mullen prayed an appeal to this Court, which was granted by the judge of the Superior Court.

This is an appeal by one of the defendants only, and from an interlocutory decree. The law directs that when the Superior Court, in the exercise of its discretion, shall permit an appeal from an interlocutory judgment or decree, the record of the case shall remain below, so that all necessary orders may be there made for preparing the cause for a final trial or hearing, and that the court allowing the appeal shall direct so much only of their proceedings in the cause to be certified to this Court as shall be necessary to present the question or matter arising upon the appeal fully to our consideration. From inattention to these provisions of the law inconveniences have been repeatedly experienced, and we feel it a duty to call the notice of the circuit judges and of the profession to them. When a transcript is sent up of all the proceedings in the cause, without a statement of the question or matter on which our judgment is invoked, we are not only put to much unnecessary trouble to find out what is the matter submitted to our consideration, but are often in danger of adjudging upon some technical defects, inaccuracies, and imperfections appearing in the transcript, to the surprise of one or other of the parties and to the hindrance rather than the advancement of justice. We have not hitherto deemed ourselves justified in refusing to take jurisdiction of appeals from interlocutory judgments and decrees because the

matter of appeal is not specifically stated, but it must not excite surprise if after this notice we should find ourselves compelled to adopt this course.

In the present case we have examined the matters alleged in the answer of the appellant, upon which answer the interlocutory decree is founded, to ascertain whether they be sufficient to warrant that (166) decree. If they be, then we cannot say that there is error in it.

The first question presented for consideration is as to the construction of the will of Greenbury Mullen. It is admitted by the counsel for the appellant that taking the clause under which the petitioner claims *per se*, it contains a bequest of the negroes to William, with a bequest over, in case he should die unmarried and under age, to his sister Sarah; that this ulterior executory bequest was good in law; that the interest therein was transmissible upon her death to her personal representatives; and that this interest was so transmitted, notwithstanding she died before the event happened upon which the ulterior bequest was to take effect in enjoyment. But he submits that this clause of the will is to be considered in connection with the one immediately preceding it, whereby the testator disposes of other negroes in the following words, "I give my daughter Sarah the following negroes (naming them), to her, her heirs and assigns forever; but in case she should not arrive to the age of 21 years or marry, at her death my will and desire is that my son William shall have the aforesaid negroes." The consequence of a literal construction of both these clauses would be that if both Sarah and William had died under age and unmarried, the negroes bequeathed in the first instance to her would go over to his representatives and those bequeathed primarily to him would become the property of her representatives. He contends that so absurd a result could not have been designed by the testator, and submits whether, to carry his intention into effect, we may not in such case understand that the ulterior limitation was to have effect only in the event of the ulterior legatee being alive at the time of the contingency. It is very probable that the testator did not intend the singular result which would in the supposed event have followed from the dispositions he has made. Perhaps he was ignorant of what would be the construction of law upon these dispositions, or, what is yet more likely, he did not extend his views so far as to contemplate or provide for the event of both of his children dying unmarried and without issue. However all this may be, we cannot interpolate into either of the clauses a further contingency than he has expressed or intimated, and it is the law which pronounces that an executory bequest, limited on the contingency declared, is transmissible in a course of succession. (167)

The next question presented is whether the petitioner is barred by the lapse of time. Upon this no doubt can be entertained. Sarah died

before her brother, and until an administration granted upon her estate there was no one to be barred, and he brought this petition within two years after obtaining administration.

The remaining question, if what is stated in regard thereto be intended as a defense against the claim of the petitioner, is, that in 1839 Wilson and wife, upon a claim that she was entitled as one of the next of kin of William Mullen, to a part of these negroes, brought suit against the defendant Benjamin and wife; and therein a decree was rendered for a sale of some of them, and they were sold accordingly. This furnishes no objection to the decree appealed from. The petitioner was no party to that suit, and, of course, is not precluded by the adjudication therein from setting up his claim to the negroes as belonging to him under the executory bequest. The decree now appealed from does not invalidate this sale, but declares the plaintiff entitled to the proceeds, and the defendant Benjamin is not aggrieved by this decree, because it does not appear that any part of the proceeds of this sale has been paid over to Wilson and wife.

An objection has been here taken to the form of the decree, because it is rendered against the appellant for the proceeds of these sales, whereas Wilson, being made a party defendant to this cause and having these proceeds in his hands, the decree for that amount ought to have been made against him primarily. We should have felt much difficulty in entertaining this object had it apparently been well founded, because it is rather a matter of controversy between the defendants, and Wilson is not a party to the *appeal*. But the objection is not warranted in point of *fact* by the allegations of the defendant Mullen. He does not state that any of these proceeds have gone into Wilson's hands, nor is it warranted by any admission in the answer of Wilson. He simply denies the right of the petitioner to any part of the proceeds of the property, which he and his wife recovered by a decree in their suit against the other de-
(168) fendants, but does not admit that what has been thus recovered by that decree has come into his hands or been paid over to him.

PER CURIAM. Affirmed.

WILLIAM W. PIERCY v. GIDEON F. MORRIS.

1. When a road has been laid off by order of a county court upon the report of a jury, confirmed by the court, and an appeal is taken to the Superior Court, it is too late to take exceptions to the jury. The objection should have been made in the court below, upon the return of the jury, by a motion to quash the proceedings of the jury.
2. Upon an appeal from the final judgment of the county court on the merits of the case, the Superior Court can only determine on the merits.

APPEAL from *Manly, J.*, at Fall Term, 1841, of CHEROKEE.

The plaintiff and others had petitioned the county court of Cherokee to have a public road laid out. Notice was given as required by the act of Assembly. The defendant and others appeared and opposed the prayer of the petition. The court ordered a jury, who made a report which was confirmed by the court and the road directed to be laid off. The defendant appealed to the Superior Court, and there objected to the legality of the proceedings, and contended that they were void, because, first, two of the jury were not freeholders (and in support of this exception proof was made); and, secondly, because one of the petitioners was on the jury which surveyed and laid off the road. These objections were (169) overruled. The defendant's counsel then offered to prove by one of the jury that he himself did not assent to the report, but this was also not allowed. The court then heard the case on its merits upon oral testimony and gave judgment for the petitioners, and ordered their judgment to be certified to the county court. From this judgment the defendant appealed.

Boyden for plaintiff.
Francis for defendant.

GASTON, J. The same points have been made before us as were raised in the Superior Court. In our opinion, the exceptions urged against the regularity of the proceedings before the jury and of the jury ought to have been taken in the county court when the report was returned, by a motion to quash the proceedings. This does not appear to have been done, and after an appeal from the final judgment of that court upon the merits of the dispute, the cause was to be heard and determined in the Superior Court upon the merits. This was done there, and we are bound to presume was rightfully done.

We see no sufficient cause to reverse the judgment of the Superior Court.

PER CURIAM. Affirmed.

Cited: Ashcraft v. Lee, 75 N. C., 158.

(170)

THOMAS H. MASSEY v. MARY BELISLE.

1. In a written contract the terms are fixed, and the meaning of those terms is a question of law. So also in a parol contract where the terms are precise and explicit.
2. But in a parol contract, if the parties dispute about the terms of the agreement, and these are obscure or destitute of precision or to be inferred from the conduct of the parties, the ascertainment of these terms is in the first place necessary, and this is clearly a question of fact.

3. Every deed of conveyance of land must set forth a subject-matter, either certain in itself or capable of being reduced to a certainty by a reference to something extrinsic, to which the deed refers.
4. It is a settled rule of construction in this State that when "stakes" are mentioned in a deed simply, or with no other added description than that of course and distance, they are intended by the parties and so understood to designate imaginary points.
5. Where the question on trial was as to the bundary of a town lot, and the deed under which one of the parties claimed contained two descriptions, one saying it "adjoined" a certain other lot and another giving a different description, the court did not err in leaving it to the jury to decide which description they thought was intended by the parties to the deed—whether the parties in using the word "adjoining" might not have meant "near" as the word is sometimes used in common parlance.

APPEAL from *Pearson, J.*, at Fall Term, 1841, of CUMBERLAND.

The suit was an action of assumpsit for $12, and commenced by warrant before a magistrate. The plaintiff proved on the trial that in January, 1834, he employed one Black, a surveyor, to run out his lot in the town of Fayetteville; that according to Black's survey, a small house, which the defendant had erected since the very destructive fire in 1831, which consumed all the houses in that part of the town, was about 2 feet on the plaintiff's side of the lime; that the defendant was informed
(171) of this fact and promised to pay the plaintiff $4 per annum until she should move the house; that at the expiration of the first year the plaintiff demanded the $4; that the defendant objected to paying it, saying that she had since become satisfied that the house was not on the lot of the plaintiff, and it was hard to pay rent for her own land; that the plaintiff said she might as well pay the money, and, if it turned out that the house was not on his lot, he would refund the money; that the defendant paid the $4; that afterwards the plaintiff and defendant agreed to have the lines run and established by two surveyors; that they, however, did not agree upon the line; that at the expiration of the four years the plaintiff demanded $12, according to their understanding, the house not having been removed; and that the defendant refused to pay it.

The defendant's counsel insisted that the promise to pay was upon condition that the house was in part upon the plaintiff's lot, and contended that the plaintiff must prove that fact; and in the second place, that, if the promise was not upon an express condition, at all events it was in consideration of the fact that the defendant's house in part stood upon the plaintiff's lot, and offered to show that the consideration had entirely failed, because in fact the house did not touch the plaintiff's lot. The plaintiff's counsel insisted that whether the house was or was not on the plaintiff's lot was immaterial, for that the promise was made in consideration of forbearance to sue, or by way of compromising a doubtful claim, and therefore binding. The court intimated the opinion that it was to be settled by the jury whether the promise was upon condition

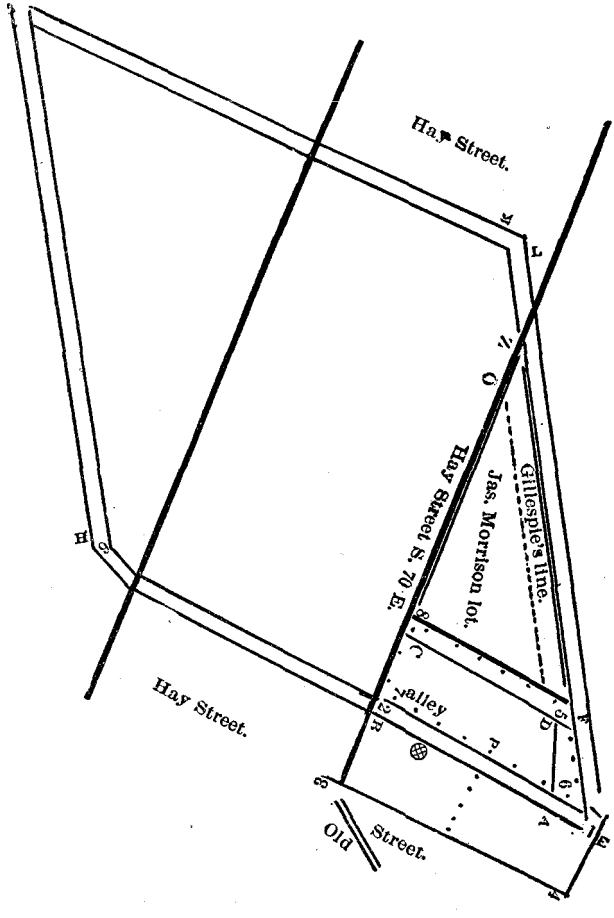
and what was the consideration of the promise; and said that if the jury were of opinion that the $4 per annum for the last three years was only to be paid upon condition that the house stood in part upon the plaintiff's lot, the plaintiff must prove that fact; if the promise was in consideration that the house stood in part upon the plaintiff's lot, the defendant might show an entire failure of the consideration by proving that the house did not touch the plaintiff's lot, and the promise would not in that event be binding; but if the consideration was forbearing to sue or by way of compromise, then it would make no difference how the line was.

Evidence was then offered on both sides as to the title. The (172) plaintiff contended that his lot was located as represented by A, B, C, D in the plat, and read in evidence a deed to himself from John G. Coster, together with regular conveyances to Coster. This deed described the land it conveyed, as follows: "all that tract or parcel of land situate, etc., in the town of Fayetteville, county of Cumberland and State of North Carolina, beginning at a stake on William Gillespie's line, running thence south 15 degrees west 94 feet 4 inches to a stake on Hay Street, thence on said street north 70 degrees west 30 feet to a stake, thence north 15 degrees east 74 feet 6 inches to a stake in said Gillespie's line, thence with said line to the beginning, being the same lot conveyed by William F. Strange, clerk and master in equity for said county, to said Coster by deed registered in said county, Book M, No. 2, page 544." The defendant read in evidence a deed to one Patillo, under which she claimed. The description of the land conveyed by this deed is as follows: "a certain lot or parcel of land in the town of Fayetteville adjoining William Riley's lot on the north side of Hay Street, beginning at a stake called Newberry's, Gillespie's, or Simpson's corner, running then south, 15 degrees west 104½ feet, more or less, to the plat of the street, thence along the street south 70 degrees east, 24 feet, thence north 15 degrees east, 104½ feet, thence north 79 degrees west, 24 feet, it being a square lot of land 24 feet in front and 104½ back. The defendant claimed that her lot was located as represented by 1, 2, 3, 4, and that the proper location of the plaintiff's lot was represented by 6, 7, 8, 5. To locate his lot the plaintiff read in evidence a deed to one Gordon for 1 acre, which he contended was represented by A or E, H, I, K, and proved that his lot and the Morrison lot were taken off of the Gordon lot, being the part north of Hay Street. The plaintiff also offered evidence to show that, by general reputation, a stone at E was the corner of the Gordon acre, and that E, K was the Simpson line mentioned in the deed. The plaintiff also proved that for many years before the fire a fence dividing his premises from the Morrison premises ran along the line C, D; some of the posts were still standing. He also proved (173)

that the corner of his house stood at C before the fire and extended to 7; and contended that Z, C, F represented Morrison's lot, and E, B, C, F, or A, B, C, D represented his lot, and so filled up that corner of the Gordon acre. The defendant's house extended about 2 feet west of the line E, B, but did not reach the line 1, 2. The defendant contended that 1, 9, 10, 7 represented the Gordon acre, and offered evidence to show that by general reputation a stone at 1 was the corner of his lot, and that 1, 9 was the Simpson line mentioned in the deeds. The defendant also offered evidence to show that by general reputation the southeast corner of her lot was at 3, where Old Street left Hay Street. It appeared by the survey that if Z was the intersection of Hay Street and the Simpson line, or the line of the Gordon acre, which corresponded, then Z, 8, 5 would fill the courses and distances of the Morrison lot; 8, 5, 7, 6 would fill the courses and distances of the plaintiff's lot; Z, 8 would be the front on Hay Street called for by Morrison, and 8, 7 the front called for by the plaintiff, and 2, 3 the front called for the defendant's deed; B, C was also the front on Hay Street called for the plaintiff's deed. The defendant also proved that for twenty-five years before the fire there was an alley about 4 feet wide at 2, 7, reaching back to P, and a fence from P back to 1. Some of the posts were still standing, although the fence was consumed by fire. This alley and fence separated the premises occupied by the defendant, or those under whom she claimed, from the premises occupied by the plaintiff or those under whom he claimed.

After leaving to the jury the question as to the promise and the consideration, as above stated, the court charged that in locating the plaintiff's lot the jury would commence in Simpson's line and then run to Hay Street, without regarding distance, as these two calls would control the distance; and it made no difference, in this view of the case, whether the line E, K, or the line 1, 9 was the Simpson line, for the con-
(174) test was how far *east* on Hay Street the plaintiff's lot extended; it was immaterial how far north it extended back; that, upon the supposition that E, H, I, K was the Gordon acre, as contended by the plaintiff, then the question was whether the east line of the plaintiff's lot extended to the line E, H, the east line of the Gordon acre. The plaintiff insisted that it did, because if C, D, where the old fence stood, was the west line, then, according to the distance on Hay Street, A. B or E, B would, for the other reasons suggested by his counsel, be the east line. The defendant insisted that the east line of the plaintiff's lot was 6, 7, and did not extend to the east line of the Gordon acre, because the plaintiffs' deed called for a stake in Simpson's line, then south to Hay Street, and did not call for the corner of the Gordon acre, or running with Gordon's original line, whereas, if it had commenced at the

corner and run with the old line, he contended such would have been the call. The defendant's counsel contended that the alley and the fence from P to 1 supported this position, together with the other suggestions he had made; to all which the jury would give the weight to which they thought them entitled in locating the line. In reply, the plaintiff's coun-



sel relied upon the fact that the deed to Patillo described the lot as adjoining the Riley lot, which was the lot owned by the plaintiff, and, in the particular description called for the original line of the Gordon acre, tending to show that the line of the Riley lot and of the Gordon acre was the same. The court observed to the jury that unless the east line of the plaintiff's lot and the east line of the Gordon acre was the same, there

was a discrepancy in the general and particular description used in the Patillo deed. How the fact was was a question for them. It might be, as contended by the defendant's counsel, that the general description meant, adjoining Riley's lot, with the slip between the Gordon acre and the plaintiff's line for an alley or outlet, as we might in common parlance say two lots adjoined, although there was an alley or even a street between; or it might be that, at the time the Patillo deed was drawn, the parties were under the impression that the two lines were the same, when in fact they were not. It was for the jury, from the evidence, the
(175) instructions of the court as to the law, and the suggestions made by the counsel, to locate the plaintiff's lot.

There was a verdict for the defendant. A motion for a new trial was made, on the ground that the court erred in the instruction as to the consideration of the promise, and also in that part of the instruction where the court observed "that it might be that the general description meant adjoining Riley's lot with the slip between," etc. The motion was overruled, and judgment being rendered for the defendant, the plaintiff appealed to the Supreme Court.

(176) *Strange for plaintiff.*
W. H. Haywood, Jr., for defendant.

GASTON, J. The first exception taken by the appellant is because the court submitted it to the jury to inquire whether the promise of the defendant to pay the sum demanded as rent was absolute or conditional, and, if absolute, whether it was made in consideration that the defendant's house was upon the plaintiff's lot, or in consideration of his forbearing to sue, and in compromise of a doubtful right. We do not think this exception well founded. No doubt, the construction of all contracts, in the proper sense of the term *construction,* is a matter of law, and, therefore, proper for the determination of the court. In written contracts, which cannot be modified or explained by parol, the terms of the contract are fixed, and the meaning of those terms is a question of law. Where the contract has not been reduced to writing, and its terms are precise and explicit, nothing more remains for determining the effect of the agreement than declaring its legal meaning. But if the contract be by parol, and the parties dispute about the terms of the agreement, and these are obscure or destitute of precision, or to be inferred from the conduct of the parties, the ascertainment of those terms is in the first place necessary, and this is clearly a question of fact. Such was the case with respect to the contract under consideration. The plaintiff stated to the defendant as a fact that it had been discovered that her house was 2 feet upon his lot. Upon this information she promised to

pay him $4 per annum while it remained there. At the expiration of the first year, when the rent was demanded, she refused to pay, alleging that the house was altogether upon her own land. After this refusal she did pay the $4, upon his express promise to refund it if it should turn out that the house was not upon his lot. The parties then (177) agreed upon a mode by which the boundaries of their respective lots should be determined. Unfortunately the attempt thus to determine their boundaries failed, and the plaintiff sued for the next year's rent. Now, it seems to us clear that upon what terms and upon what consideration the defendant promised to pay rent was an inquiry of fact, fit for the determination of the jury.

The next exception taken is because of error in a part of the judge's instructions on the much disputed question of the location and boundaries of the plaintiff's lot. This question was supposed to involve two inquiries. The first was what was the eastern line of the Gordon acre lot, of which the plaintiff's lot was admitted to be a part, whether it was the line E or A, B, H, as claimed by the plaintiff, or the line 1, 2, 9, as insisted by the defendant; and, secondly, if it were the line A, B, H, did the eastern boundary of the plaintiff's lot reach that line. The only evidence directly tending to establish the controverted boundary of the Gordon acre, with the exception of that which will be hereafter particularly noticed, was reputation respecting its beginning corner, and this was contradictory. There was a reputation that a stone at the letter E was the corner, and there was reputation that the stone at the figure 1 was the corner; and the weight of this evidence was left to the judge. But the location of the plaintiff's lot, whatever might be that of the Gordon acre, was a matter of great difficulty. The first *description* of it in his deed is "beginning at a stake *in* Gillespie's line, running S. 15, W. 94 feet 4 inches, to a stake in Hay Street, thence on said street N. 70, W. 30 feet to a stake, thence N. 15, E. 74 feet 6 inches to a stake in Gillespie's line, thence with said line to the beginning." According to this description, its location was impossible, because in law it covered no land. Every deed of conveyance must set forth a subject-matter, either certain in itself or capable of being reduced to certainty by a recurrence to something extrinsic to which the deed refers. The stakes may be real boundaries when so intended by the parties, but it is a settled rule of construction with us that when they are mentioned in a deed simply, or with no other added description than that of course and distance, they are intended by the parties, and so understood, to (178) designate imaginary points. Every corner in this description is "a stake," or imaginary point, and there is no reference by which the locality of any one of these points is fixed. Two sides of them are, indeed, in *Gillespie's line,* and two of them *on* Hay Street, and the bear-

ings and distances of all the points from each other are given. But in what part of Gillespie's line or on what part of Hay Street the points are can neither directly nor indirectly be discovered from this description. But the deed afterwards proceeds to state that the lot thereby conveyed is the same that was theretofore conveyed by William F. Strange, clerk and master in equity, to John J. Coster, by deed registered in said county in Book M, No. 2, page 544. Whether this deed to Coster contains any other description than that given in the deed to the plaintiff does not appear, or whether it refers to any other deed containing a more certain description is not stated. If this were the case, it would seem that the plaintiff would have availed himself thereof on the trial, in endeavoring to locate his lot. We have doubted, therefore, whether we were not bound to understand that the reference to the deed from Strange to Coster left the *termini* of the supposed lot as incapable of ascertainment as though no reference had been made thereto, and, if so, whether we ought not on this ground alone to affirm the judgment against the plaintiff. But we have declined to do so because this objection does not appear to have been taken to the plaintiff's title on the trial, and because, from the controversy about the limits of the Morrison lot, it seems to have been in some manner proved or admitted that the lot of the plaintiff *adjoined* that of Morrison. If it be assumed that this did appear in some of the conveyances, to which reference was either directly or indirectly made by the deed, under which the plaintiff claimed, then the *termini* of that were capable of ascertainment, and in law his beginning was Morrison's eastern corner in Gillespie's line, and his next corner was Morrison's eastern corner on Hay Street.

The case does not show what were the *termini* called for in Morrison's deed, but it states that if Z be the intersection of Hay Street with
(179) the Gordon line, as the plaintiff contended it was, then Z, 8, 5 would fill the courses and distances of the Morrison lot. We are bound, therefore, to understand that Morrison's lot was defined by courses and distances, beginning at that intersection, and we are not at liberty to presume that the description by course and distance was overruled or controlled by any more certain description. If this were so, and Z the point of intersection, it would seem to be fatal to the plaintiff's claim, for although Morrison's fence ran from C to D for several years before 1831, and whatever might be the effect of a long possession up to that fence in protecting Morrison's occupation, the fence could not control the calls in the deed, nor change the *termini* therein mentioned. Morrison's *deed* was to decide where were the two first corners of the plaintiff's lot; and if these were 5 and 8, then the two other corners, being imaginary points, designated merely by their courses and distances from the first two, were *fixed* at 7, 6, and he had no title to the *locus in quo*.

The legitimate effect of the long existence of the fence, C, D, was to raise a presumption that the course and distance of Morrison's line on Hay Street did terminate at C, and, therefore, that the intersection of Hay Street with the Gordon line was not at Z, but at O, or at some point east of Z. And had this been contended for by the plaintiff, the weight of that presumption under all the circumstances would have been a matter proper for the consideration of the jury.

But the defendant set up title to her lot under a deed made by John Simpson to Henry Patillo, on 23 February, 1792, which thus describes it: "A certain lot or parcel of land in the town of Fayetteville, adjoining William Riley's lot, on the north side of Hay Street, beginning at a stake *called* Newberry's, Gillespie's, or Simpson's corner, running thence S. 15, W. 104½ feet, more or less, to the plat of the street, thence along the street S. 70, E. 24 feet, thence N. 15, E. 104½ feet back." As to the location of this lot no doubt can be entertained if at the time of the execution of this deed the *reputation* existed, of which evidence was given in the case, that 1, 7, 9 was the Simpson or Gordon line mentioned in the deeds. In no other way can the defendant have her oblong (180) (or square) of 24 feet front and 104½ feet back than by assigning to it the boundaries 1, 2, 3, 4. If the beginning was at A or E, and not the figure 1, then a relatively considerable portion of her front would not be on Hay Street, or *on* any street, but would be taken away by being thrown *into* the intersection of Hay and Old streets. Under this deed the case states that she and those under whom she claimed held possession for at least twenty-five years before 1831. Whatever might be the location of the plaintiff's lot, if this were the location of defendant's lot, her possession under this deed gave her an indisputable title to the ground on which her house was built.

Admitting, however, that the proof was not to be credited, in regard to the reputation that 1, 7, 9 was the Simpson or Gordon line mentioned in the deeds, or that such reputation began after the date of the deed to Patillo, we are then brought to the particular part of his Honor's instructions to which the second exception of the appellant applies. While the Patillo deed in its particular description begins at the reputed Simpson or Gordon corner, and runs the course and distance of the Gordon line, it represents the parcel of land thereby conveyed as *adjoining* the Riley, or, as it is now called, the plaintiff's lot, and *this,* it was contended by the plaintiff, tended to show that the line of the Gordon acre and of the Riley lot was the same. The court, in its charge to the jury, called their attention to this argument or suggestion of the plaintiff's counsel, and told them that, "unless the east line of the plaintiff's lot and the east line of the Gordon acre were the same, there was a discrepancy in the general and particular description used in the Patillo deed. How the fact was

was a question for them to decide; that it might be, as contended by the defendant's counsel, that the general description meant adjoining Riley's lot, with the slip between the line of the Gordon acre and plaintiff's line for an alley or outlet, as we might in common parlance say two lots adjoined, although there was an alley or even street between them, or it might be that at the time the Patillo deed was executed the parties were under the impression that the two lines were the same, when in fact they were not; and that it was for the jury, from the evidence, the
(181) instruction of the court as to the law, and the suggestions of the counsel, to locate the plaintiff's lot."

It is not objected that there was error because the court did not instruct the jury that Patillo and those claiming under him were concluded or estopped from denying that the Riley lot and the Gordon acre had the same common boundary. When there are two descriptions in a deed, it is a matter of every day's occurrence to determine, between them, which shall be followed if they cannot be reconciled. It cannot with propriety be objected that the court did not allow to the suggestion or argument of the plaintiff's counsel the effect claimed for it, because his Honor did expressly state that "unless the east line of the plaintiff's lot and the east line of the Gordon acre were the *same,* there *was* a discrepancy between the general and particular description in the Patillo deed." It was not error, notwithstanding by the legal construction of the general and of the particular description in *this* deed these lines were *represented* as being the same, to leave it to the jury as a question of *fact,* from all the evidence in the case, whether they were the same or not. The Patillo deed was not evidence to establish the location or boundary of the plaintiff's lot further than as it contained declarations of the parties thereto showing where they understood the boundaries to be, and *they* might have made these declarations erroneously or inaccurately. Nor can it be error, while stating the suggestion of the plaintiff's counsel on the one side and allowing it its proper force, as showing that the parties to the Patillo deed did declare the Riley lot coterminous with the Gordon line, to submit, also, to be weighed by the jury, the suggestions on the other side of the probabilities of inaccuracy or error in this declaration.

The counsel for the plaintiff insists that the *termini* of every deed being a question of law, the judge was bound to say what were those *termini,* and, therefore, to instruct the jury that *in law* the land conveyed by the Patillo deed was coterminous with the Riley lot, and that it could not be so if there were a slip or interval, however small, between them. So it would be, if there were *no other* description in the Patillo deed than that relied upon; but there was another and a more particular
(182) description, and the latter, if *it varied from the former,* was to be preferred; and whether it did vary or not was a question of fact.

His Honor did not say that in *law* "adjoining" might mean "near," but he left for the consideration of the jury whether *in fact* this expression might not have been inaccurately used, as in common parlance it sometimes is, for "near"; and this was left, not for the purpose of controlling the operation of the description, but as tending to account for a mistaken representation of the parties.

It is not unimportant to remark that in relying on the Patillo deed as evidence of the boundary of his lot, the plaintiff rendered the whole of it evidence for that purpose. He could not insist on a part of the declarations of Simpson and Patillo therein contained and reject the rest. Now, if the matter in controversy is to be determined by these declarations, it must be decided against the plaintiff. They declare the Gordon line and the plaintiff's line the same, but at the same time they fix that line as leaving 24 feet for the Patillo lot on Hay Street—that is, they declare the line 1, 2 to be the common eastern boundary of the Gordon acre and the plaintiff's lot.

We have gone more into detail in the examination of this case than at first seemed necessary for the decision of the matter submitted to us, or than was apparently called for by the sum in dispute. But, no doubt, the controversy derives its principal importance from the effect it may have on the conflicting titles of the parties, and a few feet more or less of front in a town lot may be of considerable value. Besides, as the determination of this suit does not decide the question of title, and as it is possible, notwithstanding the care which has been taken in stating the case, that we may not have precisely understood all its minutiæ (and in a question of disputed boundary every circumstance, however minute, becomes of consequence), we prefer that the parties should have an opportunity of seeing how the case was here regarded, so that no permanent injury may result from any misapprehension of the facts on our part.

PER CURIAM. No error. (183)

Cited: Festerman v. Parker, 32 N. C., 478; *Mann v. Taylor,* 49 N. C., 273; *Archibald v. Davis,* 50 N. C., 324; *Miller v. Hahn,* 84 N. C., 229; *Shaw v. Burney,* 86 N. C., 334; *Wharton v. Eborn,* 88 N. C., 346; *Harris v. Mott,* 97 N. C., 106; *Blow v. Vaughan,* 105 N. C., 204; *Spragins v. White,* 108 N. C., 454, 455; *Lowe v. Harris,* 112 N. C., 479; *Walker v. Moses,* 113 N. C., 530; *Hemphill v. Annis,* 119 N. C., 515; *Edwards v. R. R.,* 121 N. C., 491; *Barker v. R. R.,* 125 N. C., 598; *Harris v. Woodard,* 130 N. C., 581; *Wilson v. Cotton Mills,* 140 N. C., 55; *Broadwell v. Morgan,* 142 N. C., 477; *Bateman v. Hopkins,* 157 N. C., 472; *Sanitarium Co. v. Ins. Co., ib.,* 555; *Allison v. Kenion,* 163 N. C., 587; *Speed v. Perry,* 167 N. C., 125; *Patton v. Sluder,* 167 N. C., 502.

STATE v. GEORGE ALLEN AND OTHERS.

1. It *seems* that no court has the power to issue a writ, pending a dispute between competitors for a public office, to prohibit those who are *de facto* in possession of the office from exercising the functions thereof.
2. If any court has the power, it should never exercise it except in a very clear case, peremptorily calling for an immediate remedy.
3. If a writ of prohibition can be issued, it should only be after notice to the parties to be affected, and affidavits verifying the suggestions upon which the writ is granted.

APPEAL from *Manly, J.*, at Fall Term, 1841, of BUNCOMBE, dismissing a writ of prohibition which had issued against the defendants from the last term of that court. The facts are sufficiently stated in the opinion of this Court.

J. G. Bynum for the State.
Iredell for defendants.

GASTON, J. The case now before us has grown out of the dispute respecting the location of the seat of justice in Henderson County, which has already more than once been brought under our notice. *S. v. King,* 20 N. C., 661; *S. v. Jones,* 23 N. C., 129; *s. c., ib.,* 414.

The Legislature, at its last session, in the hope of putting an end to this harassing controversy, passed an act (Laws 1840, ch. 53) by which it was declared that the question of location should be decided by the qualified freeholders of the county; that for this purpose an election should be held on the last Thursday of January, 1841, in each of the election precincts of the county, to take the ballots or suffrages of the freemen of the county on the question; that if the point selected by the majority of the voters should be nearer to the Buncombe Turnpike Road than to the French Broad River, George Allen, Andrew Maxwell, Jr., David Rees, John Davis, and James Spaun should be the commissioners to procure the land and lay off the town for the seat of justice;
(185) but if the point selected by the majority should be nearer to the river than the road, then Martin Gash, David Miller, John Hightower, Isaac Glarnier, and Col. John Clayton should be the commissioners to execute these duties. To insure impartiality and fairness in the election it was, among other things, enacted that the sheriff should appoint two judges for each election precinct, the one from the eastern and the other from the western section of the county, who should be sworn to conduct the election fairly and according to the usual manner of conducting elections in this State; that the sheriff and two commissioners, to be by him selected ten days before the election, should, from a comparison of the returns from all the precincts, ascertain and pro-

nounce the point having the greatest number of votes; and that the sheriff should thereupon notify the persons who according to that result were appointed commissioners, and swear them to discharge faithfully the duties by the act imposed. The election was had, the sheriff and the two commissioners by him appointed, upon a comparison of the returns from all the precincts, pronounced that a certain point upon the road had received a majority of the votes of all the qualified voters in the county; the sheriff notified the first named set of commissioners thereof, and they took the prescribed oath of office and entered upon the performance of its duties. At April Term, 1841, of the Superior Court of Buncombe an information in the nature of a *quo warranto* was filed, wherein it was charged that the sheriff, disregarding the provisions of the act and fraudulently contriving and intending to obtain a majority of votes in favor of a point near the road, did at one of the precincts, called the Flat Rock Precinct, appoint three judges to conduct the election thereat, of whom two, viz., Benjamin King and Meredith Freeman, were from the eastern and one only, viz., Joseph E. Patton, from the western section of the county; that "many persons at the election for said precinct tendered their votes to the two judges, Patton and Freeman, who rejected the same upon the ground that they were not qualified voters"; that "especially one Berry Fowler tendered his vote to the said judges Patton and Freeman, and the same was rejected by them, but was afterwards received by King, the other judge," and was counted in the enumera- (186) ation of the votes polled at that precinct. The information further set forth that the original return made out and signed by the judges of the Clear Creek election precinct was lost, and "that a fraudulent copy thereof was substituted in its place contrary to the true intent and meaning of the said act." It averred that if all the votes given at the Flat Rock election, or all those given at the Clear Creek election had been rejected, a clear majority of the votes was cast in favor of a point on the river, and insisted that, because of the matters charged, the elections at Flat Rock and Clear Creek, and the returns of the polls thereat, were altogether illegal, and the votes there taken ought to have been altogether rejected by the sheriff and commissioners of the election; that it should have been declared that the point on the river had received the majority of votes, and that the second named set of commissioners should have been admitted into the office so as aforesaid usurped by the first named set of commissioners. The information prayed that due process of law might issue against the said usurping commissioners and the sheriff, requiring of them to make answer thereto.

Upon the finding of this information, it was ordered by the court that a writ of prohibition *pendente lite* should issue, and also that writs of subpœna should issue to the parties defendant in said information. A

writ of prohibition thereupon issued, returnable to October Term, 1841, of said court, directed to the said commissioners, Allen and others by name, strictly commanding them to surcease from exercising any of the functions of commissioners under the said act until the further order of the court, and also a writ summoning the said persons and Robert Thomas (the sheriff) to answer the matters charged in the information. At the return term of these writs, Allen and the rest of the first named commissioners filed their answer on oath, wherein they stated that upon comparing the returns from all the elections precincts, the sheriff and the commissioners for that purpose duly appointed ascertained and declared that a point on the road had received a majority of upwards of one hundred votes, and that respondent, on being notified thereof, and

(187) that on them had devolved the office of commissioners under the act of Assembly, took the oaths of office and entered upon the performance of its duties. They stated their firm conviction that a decided majority of the qualified voters of the county had given their suffrages, as by the sheriff and commissioners declared, in favor of the point on the road; that not more than a dozen votes had been received at all the places of election of persons wanting the requisite qualifications, and that of all these at least half had voted for the point on the river. In answer to the alleged irregularity in conducting the Flat Rock election, they averred the fact to be that previously to the day of election the sheriff had appointed Joseph Patton from the western section and Meredith Freeman from the eastern section of the county to be the judges of the election at that place; that on the day of election and when the polls were about to be opened, Freeman, one of the judges, had not come to the place of election; and thereupon the sheriff, who was present, appointed Benjamin King to be a judge in his place; that Patton and King were thereupon qualified, the polls were opened, and some votes received; that afterwards Freeman arrived, and to prevent all difficulty, whether he or the substituted judge should act, Freeman was invited by Patton, the judge from the western section, to qualify as judge, and to unite with and aid Patton and King in superintending the election; that thereupon Freeman did take the oath and acted as judge, together with the other two judges; that in no one instance was Patton overruled by other judges, and that every vote that was taken was received under his sanction. In regard to the return of the votes of the Clear Creek election, the respondents averred that the original return signed by the judges, and not a copy thereof, as alleged in the information, was returned to the sheriff.

Accompany this answer was a statement on oath from the sheriff, setting forth that the entire number of votes received in the county

(188) was 817, which were as follows, viz.:

At Cathey's Creek Precinct:	For the road,	7;	for the river,	147
" Little River	do	do	3	do	114
" Free Bridge	do	do	63	do	68
" Clear Creek	do	do	118	do	4
" Flat Rock	do	do	272	do	21
			463		354

Leaving a majority in favor of the location on the road of 109 votes. He also set forth the various arrangements which he had made, as sheriff, for conducting the election fairly; confirmed the statement made by the commissioners in their answer respecting the Flat Rock election, adding that he was present thereat during the whole time, and averring that every vote there tendered was either rejected or received with the concurrence of all the three judges superintending the election. He also averred that the scrolls of the Clear Creek election were for a time lost, and that the same were afterwards found, and these and not a fraudulent copy, as alleged in the information, were counted by himself and the commissioners in ascertaining the result of the election. Besides this statement, the affidavits of Joseph Patton, one of the judges, and of John Case, clerk of the Flat Rock election, and the affidavits of M. M. Edney and Charles Hugh, the judges of the Clear Creek election, were also filed. The two former fully sustained the answer and the statement of the sheriff in all that respected the Flat Rock election, and the two latter directly negatived the fact charged in the information, that the return of the Clear Creek election, acted on by the sheriff and commissioners, was a copy, and not the original signed by the judges. It was thereupon moved by the defendants that the writ of prohibition be quashed. The court so ordered, and from this order the solicitor for the State was permitted to appeal to this Court.

The only question before us is whether the Superior Court erred in quashing the writ of prohibition, and we have no hesitation in answering this question in the negative. In the first place, it seems to us that the matters charged in the information do not make out a case for a prohibition. In England, from which country we have derived all our law upon this subject, this writ *ordinarily* issues from the Court of King's Bench, and its appropriate purpose is to restrain other (189) courts either from proceeding in a matter not within their jurisdiction or from acting in a matter, whereof they have jurisdiction, by rules at variance with those which the law of the land prescribes, or from proceeding therein after a manner which will defeat a legal right. Instances, indeed, are to be found where the writ of prohibition has been

used, not to restrain the action of courts, but to prevent individuals from committing acts of irremediable mischief—in cases of waste and nuisance. These instances, however, are not of modern occurrence, and are viewed as of an anomalous character. The remedy now deemed appropriate is either by action, by indictment, or by bill of equity. We have met with no case, ancient or modern, where the Court of King's Bench has issued the writ, pending a dispute between competitors for a public office, to prohibit those who were *de facto* in possession of the office from exercising the functions thereof; and we are very confident that if the court has the power, it would never exercise that power except in a very clear case peremptorily calling for this *festinum remedium.* See *King v. Justices of Dorset,* 15 East, 594. The *gravamen* of the information filed in this case is that the constituted judges of the election have declared one set of commissioners in office, when, under the act of Assembly and by virtue of the suffrages of a majority of the qualified voters of the county, the other set was entitled to the office. What is *the case* made to support this *gravamen?* It is not averred that a majority of the qualified voters did give their suffrages for the point on the river. It is not denied that such a majority did vote, as declared by the sheriff and commissioners, for the point on the road. But it is stated that if the votes taken at the Flat Rock or at the Clear Creek election be not counted, then there would be a majority of votes for the river location. And why are all the votes at either of these elections to be thrown aside? Not that those who gave the votes were not qualified to vote, nor that the suffrages of the qualified voters were refused to be received, nor that the result of the election was not truly set forth in the respective re-
(190) turns, but because of objections, either to the mode of conducting these elections or certifying the result of them. With respect to the Flat Rock election, it complains that three judges were appointed to superintend it, of whom one only was from the western section of the county; that many persons tendered their votes which were rejected by two of the judges, and that one person, Berry Fowler, tendered his vote, which was rejected by these two judges, but accepted by the other. Admit that all these irregularities did occur, what is the injury thence resulting? It is not alleged that any actual wrong was thereby done; that any of the persons, other than Berry Fowler, who offered to vote, and whose suffrages were rejected by the two properly constituted judges, were afterwards permitted to vote; nor that Fowler, nor the others, nor any of them, were not duly qualified to vote. Mere irregularities ought not to destroy an election, unless they be such as might affect the result of that election, and the court will not overrule the decision of those whom the law authorized to declare the result, unless that decision be shown to be wrong. Still more formal and more captious is the objec-

tion made to the counting of the votes taken at the Clear Creek election—"for that the original return thereof, signed by the judges, was lost by the returning officer, and a fraudulent copy substituted by the officer, contrary to the true intent and meaning of the act of Assembly." If the fact were that "the copy was not faithful, that it misrepresented the result of the election, unquestionably the information ought to have so stated, and we must presume would have so stated, the fact. We cannot intend that "the copy" was not a true copy because of the epithet "fraudulent" to be found in the information. What constitutes a fraud is matter of law, and no mere epithet, nor even averment, will raise the question of fraud, unless the precise facts be set forth upon which the alleged fraud arises. We must understand, therefore, that what is called a copy was in truth a copy, or faithfully represented the original; and if the original was indeed lost, the sheriff and commissioners acted properly in counting the votes which a faithful copy of the original return showed had been given by the qualified voters. But if the case made in the information had warranted a prohibition, we are of opinion, nevertheless, that the writ issued improvidently, because (191) ordered without notice to the commissioners *de facto,* and without any verification of the facts therein charged. It is an act of high authority to forbid men actually holding an office of public trust, and who, until the contrary is shown, must be presumed to hold it rightfully, from performing the duties which the law attaches to the office, and which they have sworn "faithfully to discharge." Such an act of authority will not be exerted, unless a *prima facie* case, well verified, be first made out, showing an apparent necessity for this intervention—nor unless an opportunity be afforded to those, sought to be thus prohibited, of showing cause against it. This we understand to be a well settled rule of practice. "Before prohibition granted there ought to be notice to the other party, and, therefore, it shall not be granted upon motion the last day of term, for it is sufficient to have a rule for cause at the first day of the next term." Com. Dig., title "Prohibition," H. 1; Latch., 7. And where a motion for a prohibition is founded on matter of suggestion only, an affidavit of the truth of the suggestion is necessary. *Godfrey v. Llewellyn,* Salk., 549; *Saville v. Kirley,* 10 Mad., 385; *Burdett v. Newell,* 2 Ld. Ray., 1211; *Buggin v. Bennett,* 4 Burr., 2035. The information filed by the solicitor may be sufficient to bring the defendant into court to answer to the matters charged, but unsupported by affidavits, and alleging matters wholly *in pais,* it is but a suggestion, and as such cannot authorize a writ of prohibition.

Finally, upon the facts stated on oath by the defendants in their answer, and verified by the affidavits produced, and which for the present

must be taken to be true, all ground for a prohibition, if any such there was, has been effectually removed.

PER CURIAM. Affirmed.

Cited: Perry v. Shepherd, 78 N. C., 84; *R. R. v. Newton,* 133 N. C., 138.

(192)

JOSEPH KINSEY AND OTHERS v. WILLIAM B. RHEM, EXECUTOR, ETC.

1. Parol evidence cannot be admitted to add to, subtract from, or modify a testamentary disposition, but it is properly admissible to identify the things therein described.
2. A. by will devised as follows: "I hereunto confirm the property I have heretofore given to my daughter Susan, and $1 to her, her heirs and assigns forever." Under this devise a negro girl named Fan was claimed. It was proved that Fan's mother had been called in the family Susan's negro; that when Susan intermarried this mother had been sent home with her and remained with her some time, and was afterwards taken back by the testator and continued with him till his death, claimed by him as his own; that the testator had quarreled with Susan's husband, and, besides the mother of Fan, some articles of household furniture had been sent home with Susan, which had never been reclaimed. It also appeared that in similar devises to his other children (four in number) he not only gave them in general terms the property he had before given them, but added, "including the negroes," naming them: *Held,* that the testator did not intend by this devise to convey any negro to Susan.

APPEAL from *Settle, J.,* at Fall Term, 1841, of JONES.

The petition was brought against the defendant as executor of William Rhem, deceased, for the recovery of a negro girl named Fan, and also for $1 alleged to have been devised to the petitioner Susan by the will of the said William. Much proof was taken in the case, and upon the final hearing the presiding judge decreed the petition to be dismissed at the costs of the petitioners. The pleadings and the facts established by the proofs are fully set forth in the opinion delivered in this Court.

(193) *J. W. Bryan for plaintiffs.*
J. H. Bryan for defendant.

GASTON, J. On 1 May, 1830, William Rhem, late of the county of Jones, duly executed his last will and testament, and therein, amongst other things, bequeathed as follows: "I hereunto confirm the property I have heretofore given to my daughter Susan Kinsey, and $1 to her, her heirs and assigns forever." The testator, after other specific bequests, gave all his negroes and all the residue of his property to his sons, Melchor Rhem and William B. Rhem, to be equally divided between them, their heirs and assigns, forever; and constituted the latter and Hardy

Perry his executors. After the testator's death, at December Term, 1833, of Jones County Court, William B. Rhem, the defendant, alone proved the will, and took upon himself the office of executor. At (194) September Term, 1838, of Jones Superior Court, Joseph Kinsey and Susan, his wife, filed their petition against the said defendant, in which they set forth that long previous to the intermarriage of the plaintiffs the deceased, William Rhem, gave unto the petitioner, Susan, his daughter, a negro child named Alice, and upon their marriage repeated the said gift, and sent the said Alice with her to her husband's house, where she afterwards remained until her death, being constantly recognized as the property of the petitioners. The petitioners further stated that while Alice was thus in their possession she gave birth to a child named Fan, and shortly afterwards died; that a short time before the death of the said William the said negro girl, Fan, was permitted by the petitioners to go to the house of said William for a temporary purpose, and was there at his death, but was recognized by him as the property of the petitioners; that the said William never did give unto the petitioner Susan any other property than the negro Alice; that he made no deed of conveyance, but that he made similar parol gifts to his other children, and by his will confirmed this gift to the petitioner Susan, and the other parol gifts to his other children. The petitioners further charged that the defendant had taken possession of the said Fan, as the executor of the said William, and, though often requested by them, refused to deliver her or to pay over the legacy of $1 bequeathed by the will. The defendant answered the petition, and in his answer set forth that the petitioners intermarried in 1823; that previously to the marriage the petitioner Susan, who lived with her father, called Alice her negro, and upon the marriage Alice was sent home with her, and he has no doubt it was then the intention of his father to permit the petitioners to have the use of Alice's labor, and at a suitable time thereafter to make a title for her; that Alice stayed two years with the petitioner Joseph, and, he being about to sell her, the deceased asserted his title to her and took her home, and that she died in his possession. The defendant further stated that at the time of the intermarriage of the petitioners Fan, the child of Alice, was about 4 years old; that she was not sent with (195) her mother, Alice, nor was she ever out of the possession of his testator until the day of his death; that it never was the purpose of the testator to give the said Fan to the petitioner Susan. The defendant further stated that when Alice was taken back, a quarrel took place between the petitioner Joseph and his father-in-law, and that an alienation between them was the consequence; that they never had any intercourse thereafter; that the testator, in consequence, declared his determination not to give Alice or any other property to the petitioners, except the

articles of furniture which he alleged were sent home with her when she married, and the gift of which and of which only was confirmed by his will. The defendant admitted that the testator had made parol or imperfect gifts of negroes to his other children, when they married, and confirmed these by his will, but insisted that in every such instance he distinctly named in the will the negroes so advanced. The defendant further stated that, after the death of his father, he and his brother Melchor Rhem, as residuary legatees, divided between them the negroes bequeathed to them, and that he had sold the said Fan, who had been included in his share of that partition. The defendant denied that previously to the filing of this petition any demand had ever been made upon him by the petitioners either for the negro girl, Fan, or for the $1; and that as to the said $1, the defendant would at any time have paid the same to the petitioners had he supposed the petitioners would have received it; that the petitioner Joseph was a wealthy man, and considering the circumstances of the quarrel between him and the testator, which continued to the testator's death, and which probably influenced the testator in making so slight a provision for the petitioner's wife, the defendant verily believed that an offer to pay it would have been regarded as an insult. The defendant, however, prayed leave to be permitted to pay the same into court, with interest thereon from the death of the testator. A replication was entered to the answer,

(196) and, proofs being taken on both sides, the cause was heard at the last term of Jones Superior Court, when the petition was ordered to be dismissed at the costs of the petitioners. From this decree they appealed to this Court.

The only inquiry in this case is one of fact, whether the negro Fan be, within the words and meaning of the testator, a part of the property he had theretofore given to his daughter Susan. In the *legal* sense of the term it was not a part, because since our act of 1806 (Rev. Stat., ch. 37, sec. 17) a parol gift of a slave is void in law; but in the common acceptation of the term a slave may be given by parol, and a testamentary declaration affirming that gift would clearly be effectual. Parol evidence cannot be admitted to add to or subtract from a testamentary disposition, but it is admissible to identify the things therein mentioned, and *for that purpose* it was properly received in this case. In prosecuting our inquiry we have rejected the testimony of Melchor Rhem as that of an incompetent witness. Fan having been allotted to the defendant in the division made between him and the witness, the latter has an interest in maintaining the title of the former, as in case of recovery he would be liable to contribution. But, after rejecting the testimony of this witness, we think the preponderance of the evidence is decidedly against the claim of the petitioners.

It is not deemed necessary to recapitulate that evidence minutely. We hold that it clearly shows that it was the custom in the family of the old gentleman for his daughters to claim each a negro as hers; that this custom was well known to the father; that the negroes so severally claimed were called the property of the respective claimants; and that, upon the marriage of any of his daughters, "her negro," as it was called, was sent with her to the house of her husband, together with such articles of household furniture as she was accustomed to use as her own. The negro Alice, before the birth of Fan, was called in the family Susan's, and, after the birth of Fan, she as well as her mother Alice were called Susan's negroes. When the petitioner Susan intermarried with the petitioner Joseph, she carried Alice with her, and also a bed and furniture and some other household articles of little worth. Fan did (197) not go, because Mrs. Rhem wished her to stay, and not because of any opposition on the part of Mr. Rhem. In two or three years after the marriage Alice was taken back by him and remained in his possession until her death. About the same time the quarrel mentioned in the answer took place, and from that time up to his death Alice and Fan, the former as long as she lived and the latter continually, were held and claimed by him as his property. Upon these facts we should feel ourselves constrained to hold that Fan is not identified to be a part of the property described by the testator in 1830 as theretofore given to his daughter Susan.

But there is evidence furnished by the will itself which strongly confirms this conclusion. In every other bequest in the will, where the testator confirms previous gifts to his children, he names the negroes so given. Thus, in the first clause, his language is: "I hereunto confirm the property I have heretofore given to my daughter Mary J. Perry, *including the negro woman Rose, with her increase,* and $1 to her, her heirs and assigns forever." So in the second: "I hereunto confirm the property I have heretofore given to my daughter Hannah Perry, *including the negro woman Nancy, with her increase,* and $1, to her, her heirs and assigns forever." So in the third: "I hereunto confirm the property I have heretofore given to my son Joseph Rhem, *including three negroes, Grace, Sall, and Mary, with their increase,* and $1, to him, his heirs and assigns forever." And in the fifth, which immediately succeeds the one now under consideration, his language is: "I hereunto confirm the property I have heretofore given to my daughter Elizabeth Loftin, *including two negroes, Lydia and Peggy, with their increase,* and $1, to her, her heirs and assigns forever." When in the fourth clause he departs from the settled phraseology observed in the others simply in omitting to name any negroes as given, the inference is scarcely to be resisted that in his contemplation none were given to his daughter Susan.

(198) We have no doubt that the negro Fan was the sole matter of this suit, and, therefore, hold that the decree below is substantially correct. In form, however, it ought to be affirmed only so far as it dismisses the petition in regard to the said negro, with costs, and be reversed so far as it claims the legacy of $1; and the petitioners are to have a decree therefor and with interest thereon from the death of the testator (say, 1 December, 1833), which the defendant has consented to pay. But the petitioners must pay the costs of this Court, also.

PER CURIAM. Decree accordingly.

Cited: Carson v. Ray, 52 N. C., 610; *Holt v. Holt,* 114 N. C., 244.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1842

STATE v. BAILY KIRBY.

1. If a known officer, who has two warrants in his hands, the one legal and the other illegal, declare at the time of arrest that he makes the arrest by virtue of the illegal warrant, yet this is not a false imprisonment; for the lawfulness of the arrest does not depend on what he declares, but upon the sufficiency of the authority which he then has.
2. When an arrest is made by one not a known officer, he is bound to make known, at the time, the warrant under which he arrests.
3. A warrant from a magistrate in a civil case, upon which bail is not required, is in law but a summons, and gives no authority to arrest.

INDICTMENT tried before *Bailey, J.*, at Spring Term, 1842, of MACON.

The indictment contained two counts: the first was for false imprisonment, the second for an assault and battery on Barnard Long. It was proved that the defendant, a constable, at the time he arrested (202) the prosecutor Long, had in his possession a warrant properly authenticated in favor of one Matthis against the said Long; and that he had in his possession two or three other warrants against the said Long in favor of Allison and Bryson and in favor of one Martin Adams, which were not signed by a magistrate, and on which he had no right to act. It was also proved that, at the time the defendant arrested Long, he said: "You are my prisoner upon bail warrants in my hands in favor of Allison and Bryson and Martin Adams. I also have a sealed warrant in my hands against you in favor of Matthis." The prosecutor was held in custody until he settled the claims held against him by Adams and Allison and Bryson, but nothing further was said about the Matthis warrant, nor was he asked or required to settle the Matthis claim at that time.

His Honor charged the jury that the warrant in favor of Matthis was a valid warrant, upon which the defendant had a right to arrest the

prosecutor; but that if the defendant did not arrest Long upon that warrant, nor intended to arrest him upon it, but arresetd him and held him in custody *exclusively* upon the warrants, not signed by a magistrate, in favor of Adams and Allison and Bryson, he was guilty as charged in the bill of indictment; that if he arrested him upon the Matthis warrant, which was legal, as well as upon the other warrants, then he was justified, although the other warrants turned out to be illegal.

The jury having found the defendant guilty, a motion was made for a new trial on the ground of misdirection by the court. This motion was overruled, and judgment being rendered against the defendant, he appealed to the Supreme Court.

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

GASTON, J. The case does not state explicitly that the defendant was a *known* constable, nor that the warrant in favor of Matthis was one on which bail was required. We feel ourselves bound, however, to (203) understand that the facts are so, because he is described in the case generally as "a constable," and the warrant was assumed by the judge to be one which gave authority to arrest the prosecutor. Under this view of the case, we hold that there was error in the instructions to the jury. If a known officer, who has two warrants in his hands, the one legal and the other illegal, declare at the time of arrest that he makes the arrest by virtue of the illegal warrant, that is not a false imprisonment, for the lawfulness of the arrest does not depend upon what he declares, but upon the sufficiency of the authority which he then has. *Greenville v. College of Physicians,* 12 Mod., 386; *Crowther v. Ramsbottom,* 7 Term, 655. If the defendant, indeed, were not a known officer, or if the warrant of Matthis was not one, on which bail was required, the defendant, under the circumstances disclosed by the testimony, would be clearly guilty of the offense charged. When an arrest is made by one not a known officer, he is bound at the time to make known the warrant under which he arrests; and a warrant from a magistrate in a civil case, upon which bail has not been required, is in law but a summons, and gives no authority to arrest.

PER CURIAM. New trial.

Cited: S. v. Elrod, 28 N. C., 251; *Meeds v. Carver,* 30 N. C., 301; *S. v. Belk,* 76 N. C., 14; *S. v. Rollins,* 113 N. C., 735.

(204)

STATE v. JESSE C. COCKERHAM.

1. The time at which a sentence in a criminal case shall be carried into execution forms no part of the judgment of the court.
2. Therefore, where a defendant who had been convicted of an assault was sentenced to be imprisoned for two calendar months "from and after 1 November next," and did not go into prison according to the sentence, and at a subsequent term of the court it was directed that the sentence of two months imprisonment should be immediately executed: *Held*, that the court had the power to make such order.

APPEAL from an order of *Bailey, J.*, made at Spring Term, 1842, of HAYWOOD.

At Fall Term, 1841, of HAYWOOD, which was on the first Monday after the fourth Monday of September, the defendant was convicted of an assault on one Thomas J. Cooper, and was sentenced to be imprisoned for two calendar months "from and after 1 November next"; that the defendant entered into recognizance to appear and go to prison at the time specified, but that, although he did not attempt to escape, yet in fact he was not imprisoned according to the said sentence; and now, at Spring Term, 1842, of the said court the solicitor for the State moved that the said defendant be taken into custody and that the sentence pronounced against him at the last term be forthwith carried into execution. The defendant's counsel objected on the ground that the time having elapsed at which the said sentence was to have been carried into execution, without any default on the defendant's part, the present court had no power to imprison him. This objection was overruled, and it was ordered by the court "that the said Jesse C. Cockerham be now taken into the custody of the sheriff and be imprisoned for the space of two months from the present time." From this order the defendant appealed to the Supreme Court.

Attorney-General for the State. (205)
No counsel for defendant.

GASTON, J. The time at which a sentence shall be carried into execution forms no part of the judgment of the court. The judgment is the penalty of the law, as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution. In this case the judgment was that the defendant be imprisoned two calendar months; and the words which follow in the record, "from and after 1 November next," direct the time of executing the judgment. The entry, indeed, would have been more formal had the judgment and the mandate for carrying it into effect been separate and distinct. But, however informal, it can be understood, in conformity to

the law, as consisting of distinct parts, and, therefore, ought to be so understood. Upon the defendant appearing in court and his identity not being denied, and it being admitted that the sentence of the court had not been executed, it was proper to make the necessary order for carrying the sentence into execution. There is, therefore, no error in the order appealed from.

PER CURIAM. Affirmed.

Cited: S. v. McClure, 61 N. C., 492; *S. v. Cardwell,* 95 N. C., 646.

(206)

JANE BALDRIDGE v. WILLIAM ALLEN.

1. Where one unintentionally does an act with force, which produces an immediate injury, the person injured may bring an action for *trespass* or an action *on the case*, and in the latter he declares upon the *negligence* or *carelessness* of the defendant.
2. But when the forcible act is done *willfully*, negligence is of course negatived, and the only remedy is *trespass* for the immediate injury.
3. In such an action of trespass, damages for ulterior injuries, beyond the immediate injuries, are to be recovered under a *per quod*, on being specifically stated in the declaration.

APPEAL from *Bailey, J.,* at Spring Term, 1842, of RUTHERFORD.

This was an action on the case in which the plaintiff declared for the injury which she sustained in consequence of the defendant's taking from her actual possession three negroes on or about the middle of May. It was in evidence that the negroes were in the actual possession of the plaintiff, and that about the middle of May, 1839, the defendant took them from her possession with force, by which she lost the crop which she had then planted. The counsel for the plaintiff waived the trespass, and declared for the consequential injury arising from the loss of the crop, which had been planted and which was lost for the want of some one to work it. The negroes were kept by the defendant for about two weeks. The court asked the plaintiff's counsel if he declared in trover. He said he did not, but declared in case for the consequential injury arising from the loss of the crop. By consent of the counsel, a verdict was taken for the plaintiff, subject to the opinion of the court. The court being of opinion that trespass or trover was the remedy, and that *case* would not lie for the consequential injury, set aside the verdict and directed a nonsuit to be entered. From this judgment the plaintiff appealed to the Supreme Court.

(207) *No counsel for plaintiff.*

J. G. Bynum for defendant.

BALDRIDGE *v.* ALLEN.

DANIEL, J. Where one unintentionally does an act with force, which produces an immediate injury, the person injured may bring an action of *trespass,* or he may bring an action *on the case.* If he brings *case,* he declares upon the *negligence* or *carelessness* of the defendant in managing the thing, which has produced the injury, as that he so negligently and carelessly drove his coach, used his gun, rode his horse, steered his ship, etc., that the plaintiff or his property was struck and hit, and was injured in consequence of such carelessness. In such an action, upon the case, the plaintiff may recover not only for the immediate injury, but for all other injuries flowing from and out of it. But when the forcible act is done *willfully,* negligence is of course negatived, and then trespass is the only remedy for the immediate injury. *Moreton v. Harden,* 10 Eng. C. L., 316; *Williams v. Holland,* 25 Eng. C. L., 50; *Lloyd v. Needum,* 11 Price, 608; 10 Wendell, 324. If trespass be brought, damages for all ulterior injuries beyond the immediate injury can be recovered only under a *per quod,* on being specially stated in the declaration. Chitty Plead., 442; *Lindon v. Hooper,* Peake, 63; Cowper, 418. *Judge Blackstone* says that every action of trespass with a *per quod* includes an action on the case. *Scott v. Shepperd,* 2 Black., 897. The plaintiff contends that, inasmuch as the damages now sought to be recovered (for the loss of the crop) would not have been recovered if she had brought trespass, but under a *per quod* in her declaration, she is now entitled to waive the damages for the willful taking of the slaves, and (208) recover in this action on the case for the loss of the crop, as a consequential damage. We answer that the declarations must of necessity state the forcible and willful taking of the slaves; the immediate injury, therefore, cannot be redressed in an action on the case. And it seems to us that all the subsequent injuries resulting from this willful act are as links in the same chain, or branches from the same stem; and if the immediate injury cannot be redressed in this action, none of the incidental injuries can be. When *Judge Blackstone* made the above remark he referred to the case of *Bourden v. Allaway,* 11 Mod., 180. That was an action on the case for procuring the plaintiff to be arrested and carried to prison without a just cause. The case in Modern is very loosely reported; it was, however, an action on the *case,* and if the process issued from a court having jurisdiction, and the defendant maliciously caused it to be issued, then *case* was the only remedy; but if the court which issued the process had no jurisdiction, then we hold that the plaintiff must bring trespass. *Allen v. Greenlee,* 13 N. C., 370. As the action was in case, upon an injury proper for that action, the observations made by the Court were correct, that the plaintiff might skip over the immediate injury and recover for any other injuries which followed and were consequent upon the immediate injury. We think that *Judge Blackstone*

meant no more than this when he made the remark referred to. *Pitts v. Gaince,* 1 Salk., 10, was an action on the case by the captain of a ship for the injury which he had sustained as *master.* He was not the owner of the ship, which the defendant had willfully seized; he did not declare upon his possession as bailee, but only for the injury which he had sustained as captain in consequence of the breaking up of the voyage. That case, therefore, is not one that supports the declaration in this case. In *Wilson v. Smith,* 10 Wendell, 328, the Court say that in trespass all the consequential damages may be recovered under a *per quod,* so that there is no necessity for departing from the appropriate form of action.
(209) We think that all the authorities are against the plaintiff, and that the judgment must be

PER CURIAM. Affirmed.

STATE TO THE USE OF H. G. WOODFIN v. FRANCIS MCGEE AND OTHERS.

An action on a sheriff's bond, in the name of the State to the use of an injured party, may be brought in the Superior Court of the county in which the relator resides, though all the defendants reside in a different county.

APPEAL from *Bailey, J.,* at Spring Term, 1842, of MACON.

The action was brought on the official bond of the sheriff of Cherokee against him and his sureties. At the return term the defendants pleaded in abatement that they all resided in Cherokee County, where the bond was executed; that the bond being payable to the State, though H. G. Woodfin, by whom it had been put in suit, did reside in this county, the suit should have been brought in the Superior Court of Cherokee County. To this plea there was a demurrer, and the demurrer being sustained by his Honor, an appeal was taken to the Supreme Court.

No counsel for plaintiff.
J. G. Bynum for defendant.

DANIEL, J. Where the action is not local, and the parties live in different counties, the suit may be brought in the court of either county, at the option of the plaintiff. Rev. Stat., ch. 31, sec. 39. It is true
(210) that pleas of the State are comprehended in the list of local actions; but that is where the State is the real and substantial party in interest. In this action the State is but a nominal party. The act of Assembly declares that, on a breach of the conditions in a sheriff's bond, the party or parties injured may maintain an action on the same in the name of the State, provided the person or persons so injured and bringing suit shall state in the declaration, as they are authorized to do,

matter of inducement sufficient to show the court at whose instance and in whose behalf the same is brought. Rev. Stat., ch. 81, secs. 1, 2. Then the *relator* is to be considered the real plaintiff; he must state in his declaration that the suit is brought at his instance and for his benefit. As the Legislature considers the relator to be the real plaintiff, we are of the opinion that this action was properly brought in the county of the relator.

PER CURIAM. Affirmed.

(211)

STATE TO THE USE OF ISAAC HUTCHINS v. PHILIP HOLCOMBE AND OTHERS.

1. A constable is not obliged to receive claims for collection, as he is bound to obey a legal mandate; but if he does so receive them, he and his sureties are bound in respect thereof, under the act of 1818 (Rev. Stat., ch. 34, sec. 9), so far as they have consented to be bound, "to endeavor diligently to collect them." The degree of diligence is no more and no less than is required by law from other collecting agents.
2. A constable, therefore, is not bound to sue out a warrant on a claim put in his hands for collection, when the issuing of such process would be entirely fruitless.
3. In an action on a constable's bond the constable's receipt for "an account" to collect is not even *prima facie* evidence that the amount of the account or any part of it was really due.

APPEAL from *Pearson, J.*, at Spring Term, 1842, of SURRY.

The case was thus reported by the judge:

It was an action of debt upon the bond of a constable. The bond was in the usual form, and the breach assigned was a want of due diligence and failing to collect a claim upon one John Perdee for $4.50. The relator read in evidence the receipt of Holcombe (the constable) for an account on John Perdee in favor of the relator for $4.50, which he was to collect as constable, dated February, 1838. The execution of the bond sued on, which was dated in February, 1838, was admitted. The relator here rested his case. The defendant's counsel moved to nonsuit the plaintiff because there was no evidence that Perdee had property out of which the money could be made, and because there was no evidence that Perdee had ever been in the county of Surry during 1838. (212) The court refused to nonsuit, being of opinion that the constable was bound to show that he had taken out a warrant and made a return of *non est inventus*, so as to inform the relator officially that Perdee could not be found, if such was the fact; if he was found, then the officer was bound to show that he had taken judgment, or account for not doing so; and if he got a judgment, then he was bound to sue out execution and make a return of no goods, so as to inform the relator officially that Per-

dee had nothing, if such was the fact; and that for a failure in these particulars the plaintiff was entitled, at least, to nominal damages. But the court was also of opinion that when an officer neglected to make a return which would discharge him from liability, a failure to do so would not only subject him to nominal damages, but would raise a presumption against him which, unless rebutted, would be sufficient to subject him to damages to the amount of the debt. If he failed to discharge himself by returning *non est inventus,* the presumption was that he could have been found; otherwise, why fail to make a return? If he failed to discharge himself by returning no goods, the presumption was that the debtor had property; otherwise, why fail to make the proper return?

The defendant's counsel then called one Haynes, who swore that Perdee was a strolling shoemaker, who came to the town of Rockford, in Surry County, in the winter of 1837-1838 without any visible property except his clothes and tools, and remained there two or three months, and then went off without any visible property, and, as he believed, perfectly insolvent; that the relator kept a store in Rockford, and on one occasion refused credit to Perdee for a hat at $4, and some other small articles, until witness agreed to see the amount paid; that witness had since paid the amount to the relator. He was not asked, and did not state, when he had paid. The defendants also called one Cook, who swore that he lived in the edge of Wilkes County, near the Surry line; that Perdee's family lived on his land in Wilkes; that Perdee himself was frequently absent;

(213) that in the fall of 1837 Perdee went over to Surry to make shoes, and did not return till the spring of 1838; that Perdee had not any visible property; that some time in the summer of 1838 Holcombe, the constable, who lived near Jonesville, some 18 miles from Rockford, and in that part of Surry adjoining Wilkes, told him that he had an account against Perdee in favor of the relator, and wished him to take it and try to make the money; he declined, and told Holcombe that Perdee was wholly insolvent. The defendants also called one John Perdee, who swore that he lived in Surry County; that his name was John Perdee, and that he was able to pay the amount of the claim, but that he lived some distance from Rockford, and never had any dealings with the relator and never owed him anything; that the man spoken of by Haynes and Cook, although usually called John Perdee, was, in fact, named John B. Perdee, and so signed his name.

The plaintiff's counsel then proposed to take a verdict for nominal damages. This was declined by the defendant's counsel, who insisted, and moved the court to charge, first, that if the debt had been paid to the relator by Haynes, he was not entitled to any damages; second, that from the evidence the relator never had a claim against Perdee, and so could not recover damages, for, in fact, he had been saved costs by the officer's

not returning the warrant, when the judgment would have been rendered against the relator.

The court charged that when a relator receives the debt before a breach of the bond, he was not entitled to any damage, for this would account for the officer's taking no further steps. But if, in this case, the jury was satisfied that the debt mentioned by the witness Haynes was the same as that stated in the receipt, still there was no evidence that Haynes had paid the debt before the breach of the bond; and, in the second place, the court charged that there was no evidence that the relator ever had a claim against Perdee, as stated in the officer's receipt, and it was not law that constables could neglect their duty, and, when sued, come into court and insist, by way of defense, that the relator had no claim. When a man gave a constable a claim, he had a right to expect him to take the necessary steps in order to have the question of debt or no debt tried in the regular way, and that question could only come in collaterally, (214) in a suit like the present, to lessen the amount of damages, and not to defeat the action. The court then told the jury that the relator who placed a claim in the hands of the constable had a right to nominal damages when the officer was guilty of neglect of duty, although the debtor had no visible property, for the relator might insist to take judgment and sue out a *ca. sa.* or reduce an open account to a judgment, and prevent the statute of limitations.

The jury found for the plaintiff, and assessed damages to one penny. A motion was made for a new trial, on the ground of misdirection by the judge, and the motion being overruled and judgment rendered for the plaintiff, the defendants appealed.

No counsel for plaintiff.
Boyden for defendants.

GASTON, J. We are of opinion that there is error in the instructions given to the jury on the trial of this case. Before the act of 1818 (Rev. Stat., ch. 34, sec. 9) it was no part of the duty of a constable, *as such,* to collect, or endeavor to collect, claims put into his hands for collection, and if he entered into an engagement to perform such service, he was responsible for a breach of that engagement according to the rules of law which regulate contracts of agency. By this act of 1818 it was enacted that every constable should give a bond, with condition, "not merely for the faithful discharge of his duty *as such,* but for his diligently endeavoring to collect all claims put into his hands for collection." Since the passing of this act it has been said that the collection of claims without suit as well as with suit is part of the official duty of a constable; but this *dictum* is not correct, if more be thereby intended than that his official

bond is broken as well by not "diligently endeavoring to collect all claims put into his hands for collection" as by failure to execute a precept to him properly directed, or to do any other act strictly official. Cer-
(215) tainly he is not bound to receive claims for collection, as he is bound to obey a legal mandate; but if he does so receive them, he and his sureties are bound in respect thereof, so far as they have consented to be bound, "to endeavor diligently to collect them." Neither the act nor the bond prescribes a new rule, nor do they furnish any measure of diligence, but they provide only a more ample security for its observance. Such acts, and such omissions as would have been deemed, before the act of 1818, or where there was no express stipulation for diligence, to constitute a compliance with or a breach of the implied duty of diligence in a collecting agent have the same legal character of diligence or neglect when brought under judicial cognizance, upon the alleged breach of the condition of a bond, since the act stipulating for diligence. It was distinctly held in *Governor v. Carraway,* 14 N. C., 436, that the act of 1818 "does not establish any new principle imposing a peculiar responsibility on constables, but provides that the sureties of constables shall be liable for their acts *as agents,* when they themselves would be responsible upon their *undertakings in that capacity.*"

The breach alleged in this case was that Holcombe (the constable) had utterly neglected to collect a debt due to the relator from John Perdee, the collection of which he had undertaken. It was incumbent upon the relator (the real plaintiff) to show this breach by at least *prima facie* evidence. But he offered *none.* There was no evidence that the plaintiff had a "claim" against Perdee, that is to say, a demand because of something due from Perdee. The receipt exhibited was not of a bond, note, or other evidence of a debt, but of an account or statement made out by the plaintiff, setting forth the items and amount of an *alleged* demand for goods sold and delivered. Without some proof of a *debt* due from Perdee, there was no *substratum* for the alleged breach. There was no "claim" to collect.

The general rule of diligence required of a collecting agent is that degree of vigilance, attention, and care which a faithful and prudent person, conversant with business of that description, would ordinarily use.

His Honor held that the constable was bound at all events to sue
(216) out process against the supposed debtor, whether he could be found or not, and, if process could be served, to prosecute the action to judgment and sue out execution, whether the debtor had or had not the ability to pay. It seems to us that such certainly is not the rule of diligence in an ordinary private agency, except, perhaps, when specific instructions have been given to that effect. Prudent men, in the management of their own concerns, do not ordinarily sue out process without

a prospect of having it served, or run themselves to the expense of bringing suits, obtaining judgments, and issuing executions against paupers. We have held that inability to find a debtor, and a want of ability in the debtor to pay the debt, afford a reasonable explanation of a forbearance to sue on the part of the creditor, and, therefore, remove the presumption of satisfaction which arises from *laches*. *Matthews v. Smith,* 19 N. C., 287; *McKinder v. Littlejohn,* 23 N. C., 66. If such circumstances remove the imputation of *laches* in the principal, they cannot be immaterial when the agent is sought to be charged because of his *laches*. But the very point is determined in *Governor v. Carraway,* already cited. It was there held that the sureties of a constable, unless there were express instructions to the contrary, are not liable, under the act of 1818, for not suing out an execution against an insolvent debtor.

PER CURIAM. New trial.

Cited: Morgan v. Horne, 44 N. C., 26; *Warlick v. Barnett,* 46 N. C., 541.

(217)

DEN ON DEMISE OF WILLIAM MATTHEWS v. EZEKIEL MATTHEWS.

In ejectment, the defendant, who has executed to the lessor of the plaintiff, a deed for the land in controversy, to which *feme coverts* were parties, but which was not regularly proved as to them, cannot deny the plaintiff's right to recover.

APPEAL from *Dick, J.,* at Spring Term, 1842, of CHATHAM.

It was an action of ejectment, and in the trial of the case the plaintiff offered in evidence a conveyance in fee simple for the tract of land in controversy. The deed was executed by the defendant, and proved as to him. It also purported to be executed by several others, some of whom were married women; but as to these there was not such a probate as is required by law to admit the deed to registration. The defendant objected to the evidence because the *femes covert* had not been privately examined; but the judge received the evidence, because the deed was good against all the parties except the *femes covert,* and the defendant having signed the deed, the probate and registration in the county of Chatham, where the land lay, was good against him at all events. The husbands of the *femes covert* who signed the deed are still living, and they also executed it. Judgment having been rendered against the defendant, he appealed.

No counsel for plaintiff.
Waddell and Iredell for defendant.

(218) DANIEL, J. We learn from the case that the deed was proved in Chatham County Court, and we must take it that it was duly registered, as there is no objection raised on that score. The deed, therefore, passed all the interest in the land which the defendant and the husbands of his sisters had in it. The deed certainly was evidence for the plaintiff. If the sisters are all alive, the plaintiff is entitled to recover his term in all the land mentioned in the declaration; as all the estate of the defendant and the estates of the husbands had, in right of their wives, passed to him by force of the deed. In the lands belonging to the wife in fee, which are in possession, the husband has an interest which his deed will pass; and at his death the wife or her heir may enter upon the husband's alienee. But during the lives of the husband and wife, or after her death, leaving issue, the bargainee of the husband has a good title during the husband's life. The judgment must be

PER CURIAM. Affirmed.

JOSIAH HOLLY v. ISAAC P. FREEMAN, ADMINISTRATOR, ETC.

The declaration of a defendant that she "remembered giving the note, but believed she paid it," is no evidence to rebut the presumption of payment arising under our act of Assembly from the lapse of ten years, and the judge has a right to so inform the jury.

APPEAL from *Manly, J.*, at Spring Term, 1842, of BERTIE.

The case was an action of debt commenced by warrant before a justice of the peace, to which were pleaded the general issue and the statute declaring a presumption of payment of all contracts after the lapse of ten years from the time the right of action accrued, passed in (219) 1826 (Rev. Stat., ch. 65, sec. 13). It appeared that the note sued upon was due 15 September, 1826, and the action was brought 18 January, 1841. A witness was introduced who proved that, a short time before the warrant was sued out, he, at the request of the plaintiff, spoke to the defendant's testator about the note, when she declared that "she remembered giving the note, but said she believed she had paid it." The testimony being here concluded on the part of the plaintiff, the presiding judge intimated an opinion that there was no evidence to rebut the presumption of payment raised by the statute; whereupon the plaintiff suffered a nonsuit, and appealed to the Supreme Court.

A. Moore and Iredell for plaintiff.
No counsel for defendant.

DANIEL, J. The statute declares that the presumption of payment shall arise in ten years after the right of action shall have accrued, under the same rules as theretofore existed at law in such cases. Rev. Stat., ch. 65, sec. 13. The Legislature has, therefore, said that forbearance for so long a time as ten years, unexplained, is a circumstance from which the jury ought to infer that the debt has been satisfied. However, the presumption arising after such a lapse of time may be repelled by the defendant's admission of the debt, or payment of interest within ten years; or the presumption may be answered by the proof of other circumstances explaining satisfactorily why an earlier demand has not been made. More than fourteen years after this bond was due the obligor was spoken to about it, when she said that she believed she had paid it. It seems to us that this evidence, so far from repelling the presumption of payment, which time had raised in her favor, rather went to strengthen that presumption. We think the judge was right in saying that it was *no* evidence to go to the jury to repel the presumption of payment which the statute had raised.

PER CURIAM. Affirmed.

(220)

WILLIAM COX v. MATTHEW AND NATHAN SKEEN.

1. Where a promise, not under seal, is made to A. for the benefit of B., B. may bring an action in his own name, but the promise must be laid in the declaration as having been made to B., and the promise actually made to A. may be given in evidence to support the declarations, for in such a case A. is considered as the agent of B.
2. But where it is apparent that A. was the principal, that the contract was for his benefit, and that B. was only to receive payment of the stipulated sum for and in behalf of A., then A. alone can bring the action.

APPEAL from *Dick, J.*, at Spring Term, 1842, of DAVIDSON.

The case was an action of assumpsit commenced by warrant before a justice of the peace, which was brought by successive appeals to the Superior Court. The plaintiff offered in evidence a paper-writing, which he proved was the agreement of the defendant, in the words and figures following, to wit: "9 November, 1838, between Nathan Skeen and Matthew Skeen an agreement with William Cox for his work for twelve months at the shoemaking business and other things, when called on, for the price of $50, $10 to be paid when the time is half out and the balance when the year is out, by the authority of William Riley. To commence 27 November, 1838; to be paid to William Riley.

"Wilson Skeen, witness."

"A part left out, which is, if can't agree, part and pay according to what he is worth; not considered to be worth as much the first as last."

The plaintiff proved that he worked for the defendants about eight months, and upon some disagreement left the defendants, and brought this warrant to recover the value of his services for eight months.
(221) It appeared in evidence that the plaintiff was under 21 years of age at the time this contract was entered into, and that William Riley acted as his friend, or assumed some control over him. The court intimated an opinion that the plaintiff could not sustain the action in his own name; that the suit ought to have been brought in the name of William Riley. The plaintiff, therefore, submitted to a nonsuit and appealed to the Supreme Court.

Mendenhall for plaintiff.
No counsel for defendant.

GASTON, J. Upon the case stated, we are of opinion that this action is properly brought by the plaintiff. It is a general rule that the action should be brought by the person in whom the legal interest in the contract is vested. In this case the agreement professes to be made between the plaintiff and the defendants, and the consideration of the defendants' promise is the labor stipulated to be performed by the plaintiff. If the agreement had been by deed, it is clear that no action could have been brought upon it for the breach of the defendants' covenant, but by the plaintiff. It is true that where an agreement is not under seal, the person for whose sole benefit it is evidently made may sue thereon in his own name, although the engagement be not directly to or with him. But in such a case, that is to say, of a promise to A. for the benefit of B., and an action brought by B., the promise must be laid as having been made to B., and the promise *actually* made to A. may be given in evidence to support the declaration. *Felt-makers v. Davis,* 1 Bos. and Pul., 102. This shows that the apparent exception from the general rule obtains only when he to whom the promise is made may be regarded as the agent of him for whose benefit it was made. Now, upon the face of the written agreement, as well as on the parol evidence, it is apparent that this contract was not made for the benefit of Riley, nor was the plaintiff
(222) Riley's agent, but that the contract was made for the benefit of the plaintiff, that the plaintiff was himself the principal, and that Riley was to receive payment of the plaintiff's wages for and in behalf of the plaintiff. The judgment of nonsuit must be

PER CURIAM. Reversed.

ENOCH P. DAILEY v. THE DISMAL SWAMP CANAL COMPANY.

In an action on the case, unless the injury complained of be of such a nature that actions can continually be brought from time to time, the jury may assess all the damages the plaintiff has sustained up to the time of the trial; they are not confined to the damages sustained previous to the date of the writ.

APPEAL from *Manly, J.*, at Spring Term, 1842, of CAMDEN.

It was an action on the case brought to recover damages for the negligence of the defendants' agents, in consequence of which a canal boat belonging to the plaintiff was sunk and his negro Aaron drowned. It was proved by the plaintiff that he hired the negro Aaron from one Ambrose Walston for the year during which he was drowned, at $65 for the year. The plaintiff then offered to prove the terms of the contract of hiring between him and Walston. This testimony was objected to by the defendants, but was received by the court; and the witness stated that it was a part of the contract that the negro should not be sent by or employed on the canal of the defendants, except at the risk of (223) the plaintiff. The plaintiff then asked the witness, who was the owner of the slave, what was the value of his (the witness's) estate in the negro. This testimony was objected to on the part of the defendants, but was received by the court, and the witness stated that he valued his estate in the negro at $300, but, upon cross-examination by the defendants' counsel, stated that he recovered of the plaintiff only $75. The plaintiff also offered evidence to prove negligence on the part of the defendants' agents in the management of the canal, from which the injury resulted. The only question submitted to the Supreme Court in this case is as to the amount of damages for the loss of the negro, and on this point the presiding judge charged the jury that the plaintiff was not only entitled to recover the value of the negro's services for the residue of the year for which he was hired, but also the $75, or such other sum as should compensate the plaintiff for the additional interest which he had in the preservation of his life. A verdict was returned in pursuance of this instruction, and a new trial having been refused, judgment was rendered in favor of the plaintiff, from which the defendants appealed.

Kinney for plaintiff.
A. Moore and Iredell for defendants.

DANIEL, J. The declaration is in trespass on the case. Plea, not guilty. The question was whether the jury could be permitted to include in the damages the $75 which the owner of the slave had recovered of the plaintiff upon the contract of hiring mentioned in the case. The

judge was of opinion that the jury might include it; and we think he was right. Unless the injury is of such a nature as that actions can continually be brought from time to time, the jury may give all the damages fairly sustained by the plaintiff up to the time of the trial, and they are not confined to the damages sustained previous to the date of the writ.

(224) Where a libel on a ship was published in a newspaper on 31 October, and the plaintiff commenced his action on 4 November, *it was held* that in estimating damages the jury need not confine themselves to the damages which occurred between the publication and the bringing of the action, but might give damages for the loss of passengers, in consequence of the libel, subsequent to the date of the writ, and before the trial. *Ingram v. Lawson,* 38 Eng. C. L., 136. The master of an apprentice brought an action on the case *per quod servitium amisit* against the defendant, whose dog (known and accustomed to bite mankind) had bit the hand of the apprentice and rendered him incapable of doing his duty as a watchmaker. The declaration alleged, as special damage, the loss of service during the term, in consequence of the permanent injury. *Held,* that the jury might award damages for the loss to the master, *up to the end of the term,* by reason of the permanent injury of the apprentice, and that they were not limited to damages for the loss up to the commencement of the action only. *Hadsall v. Stallbrass,* 38 Eng. C. L., 35. In the case now before us the plaintiff's loss of $75 was clearly in consequence of the misconduct of the defendants' servants in the management of their business, and the remedy was an action on the case. The judgment must be

PER CURIAM. Affirmed.

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DEN EX DEM. FINLEY & LEA v. GEORGE A. SMITH.

1. A judgment of a court, rendered on a day of the term subsequent to the day on which a conveyance of his property has been made by the defendant in the action has relation back to the first day of the term, and an execution issuing thereon and tested of the same term will overreach such conveyance.
2. Such a judgment, though voluntarily confessed by a defendant to a plaintiff, who had knowledge of the prior conveyance, is not on that account fraudulent as against him who claims under the conveyance. On the contrary, the conveyance is considered in law fraudulent as against the judgment.

APPEAL from *Dick, J.,* at Spring Term, 1842, of CASWELL.

The case is thus stated by the judge: This was an action of ejectment, brought by the lessors of the plaintiff, to recover the possession of one-third of Liberty Warehouse, a lot in the town of Milton. To sustain their action the lessors of the plaintiff produced a deed from the sheriff

of Caswell County which embraced, among other property, the premises in dispute. They also produced the records of two judgments, confessed in Caswell Superior Court at May Term, 1837, by one John H. Crockett, one in favor of A. C. Finley and the other in favor of Nathaniel Lea. The service of the writs upon which the judgments were confessed was acknowledged by Crockett on 11 and 12 May, and both judgments confessed in open court on the last named day, which was Friday of the term. Upon these judgments writs of *fieri facias* were issued, tested as of Monday of the term, under which writs the property in dispute was levied upon, sold by the sheriff, and purchased by the lessors of the plaintiff. It appeared that the judgments were confessed on the promissory notes of John H. Crockett & Co., which firm consisted of (226) himself and James W. Jeffreys. The writs embraced both names, though service was accepted and judgments confessed by John H. Crockett only. It was also proved that the defendant was in possession of the premises. On the part of the defendant it was shown that on 9 May, 1837, being Tuesday of the same term, John H. Crockett, being indebted to George W. Johnston & Co., of the town of Milton, in the sum of about $2,400, executed to one George Farley, for their benefit, a deed of trust embracing the premises in dispute, and all of his estate, both real and personal, which deed was duly proven and registered on the same day. A sale was made by the trustee under that deed, and the property in controversy purchased by George W. Johnston, under whom the defendant claims, and duly conveyed to him by the trustee. Both the debts to the lessors of the plaintiff and the debt to George W. Johnston were admitted to be *bona fide* due and owing, and the property supposed to be worth about $1,000, it being all the property belonging to Crockett. On behalf of the defendants it was contended that the judgments confessed in favor of the lessors of the plaintiff were void, first, because by Crockett's coming into court voluntarily and confessing a judgment, the consequence of which he knew was to defeat the object of the conveyance to Farley for the benefit of Johnston & Co., a fraud was perpetrated on their rights, and, therefore, the judgments were vitiated. Also, that the lessors of the plaintiff or their agents, by procuring Crockett to confess the judgments for the purpose of defeating the deed to Farley, with a full knowledge that it had been executed and registered, committed a fraud on Johnston & Co., and the judgments were thereby vitiated or made void. To sustain the latter position they relied upon the evidence of the sheriff, who stated that, during the week of May Term, 1837, he communicated to the lessors of the plaintiff the fact that Crockett had made the deed of trust above referred to, and that at that time James W. Jeffreys was considered wholly insolvent, having conveyed all his property in trust, and that at the instance of the lessors of the plaintiffs he procured

(227) Crockett to acknowledge the service of writs, which he filled up himself, and to confess the judgments as before stated; that, before this was done, he consulted with several of the attorneys in attendance on the court, to know if it could be done, so as to get the preference of the trust, and they advised it could. The court charged the jury that the plaintiff was entitled to recover, unless they believed from the evidence that the lessors Finley and Lea had combined, through their agent, the witness, with Crockett to prevent Johnston & Co. from enjoying the benefit of their deed; but if they believed that the object of these parties was simply to secure their debts, although by doing so they obtained the preference over Johnston & Co., then the transaction was not fraudulent, and the plaintiff was entitled to recover. There was a verdict for the plaintiff, and a motion for a new trial being overruled, the court gave judgment accordingly, from which the defendant appealed.

Kerr for plaintiff.
Badger for defendant.

RUFFIN, C. J. This action arises upon the same conveyance, judgments, and executions under which the parties claimed in *Farley v. Lea,* 20 N. C., 307, the parties only being reversed. We need but refer to our judgment then given to dispose of the present case. We then held, upon unquestionable authorities, that judgments rendered on any day of the term are by the rules of law deemed complete, and bind to all intents and purposes, by relation from the first day of the term, and that a *fieri facias* binds in like manner from its teste, so as to overreach an alienation of property made before the judgment was in fact rendered or the execution was in fact issued, but after the day to which they relate, as just mentioned. We observe that on the trial of this cause those positions were not even contested on the part of the defendant, and they seem to us decisive of this controversy. It was contended, indeed, that the judgments were fraudulent, and, so, void, because the effect of (228) them was to defeat the deed from Crockett to Farley which had been previously made. The case states the debts to Finley and Lea, as well as that secured by the deed of trust, to be true debts. That being the case, it seems impossible to impute fraud to the judgments upon any such principle as that supposed. They might be subject to such an imputation if there was a trust for the debtor or any case or favor was intended for him. But nothing of that kind is alleged, but merely that they are dishonest and covinous because they overreach and defeat the previous deed. But the very circumstance that they do so defeat the deed is conclusive that they cannot be deemed in law fraudulent; for they have that effect, not from the intent of the parties, but by

a rule of the law itself; and, indeed, the law deems the alienation of property subsequent to the teste of a *fieri facias* to be itself fraudulent, since it tends to defeat the process of the law. Instead, therefore, of the party, who claims under Farley, complaining of the judgments as defeating a prior valid deed, they must blame their own folly in relying on a conveyance that was not valid as against a judgment that might be rendered against the maker of the deed, and was so rendered. It is absurd to impute fraud to a security merely upon the ground that it is in law the best security, and preferred to a different and more imperfect one made before it. We think, therefore, it would have been more correct if the court had simply instructed the jury that the plaintiff was entitled to their verdict. The judge, however, thought it right, perhaps from abundant caution, to leave it to the jury—though without evidence, as it seems to us—to say whether the object of taking the judgments was to defeat the creditors secured in the deed, and not simply to secure the debts for which the judgments were rendered; and the jury found that against the defendant. He, therefore, has certainly nothing to complain of; and the judgment must be

PER CURIAM. Affirmed.

Cited: Harding v. Spivey, 30 N. C., 67; *Sawyer v. Bray,* 102 N. C., 84.

(229)

BOSTON GERENGER v. LUDWICK W. SUMMERS.

1. The ground on which is presumed a grant of the privilege of ponding water on another's land for the purpose of a mill is that it has been enjoyed by the person claiming and those with whom he connects himself for twenty years or more in the state or to the extent to which he claims.
2. It is no answer to this presumption that the height of the water had been sometimes lowered by a drought, or that the water had been occasionally let off for the purpose of repairing the mill, and only for the period required for such purpose.

APPEAL from *Dick, J.,* at Spring Term, 1842, of GUILFORD.

The plaintiff filed his petition to recover damages from the defendant for flooding the plaintiff's land and obstructing his mill and wheels by the erection of a dam across a stream on the defendant's own land. The plaintiff proved that he erected a grist and sawmill on the Reedy Fork of Haw River in 1826, and that he had been in the use and occupation of the same ever since; that the defendant, who is the owner of a mill on the same stream, below the plaintiff's mill, in 1839 built a new dam across the stream, about 35 feet above the defendant's former dam; that since the erection of the new dam by the defendant the water was raised

to the gudgeons of his sawmill wheel, and that the water stood about 6 inches on the floor on which his gristmill wheels rested, his gristmill being of the construction called a tub mill. The plaintiff alleged that the water was thus raised on his mill wheels by the new dam of the defendant, and that he was thereby greatly injured. The defendant proved that a milldam had been erected before the Revolutionary War, and (230) was then kown as Whitsett's Mill, and had been kept up ever since; that about 1796 his father, Peter Summers, purchased said mill, and in 1812 rebuilt the dam, and raised it about 1 foot higher than it had been before; that for several years before 1839 the dam had become very much dilapidated and leaked very much, so much so that the dam was rarely full of water unless in the time of a swell in the stream; that in the summer of 1839 he erected his new dam 35 feet above his old dam; that the new dam was made tight. The defendant alleged that the new dam was not as high as the old dam, and that he had not raised the water higher (if as high) than it was raised by the old dam; that he and his father, under whom he claimed, had been in uninterrupted possession from 1812 until the plaintiff filed this petition; that, having been in the uninterrupted possession more than twenty years, the law presumed a grant of an easement or privilege of ponding the water on the plaintiff's land. The defendant further alleged that the injury done to the plaintiff's mill wheels arose from the sinking of the foundation on which the plaintiff's mills were erected, and not from raising the water higher than it was before the new dam was erected. Upon the comparative height of the old and the new dam of the defendant much evidence was offered by both parties, both as to observations made from leveling and from water marks on the margin of the defendant's pound, and along the stream from one mill to the other. The defendant also offered evidence to prove that the foundation on which the plaintiff's dam and mills rested was not good, and was liable to be washed out in freshets. The plaintiff's counsel contended that the presumption of the grant of an easement did not arise in this case, for the erection of the plaintiff's mill in 1826 rebutted such presumption.

The judge left it to the jury to determine from all the evidence on both sides whether the new dam was higher than the old dam of 1812, and whether by it the water had been thrown back on the plaintiff's land and mill wheels; that if they should so find, the plaintiff would be entitled to recover damages. The judge further instructed the jury that if they should find the fact to be that the defendant and those under (231) whom he claimed had thrown back the water as high by the old dam as it was thrown back by the new dam for more than twenty years before the filing of the petition in this case, although the land and mill wheels might be affected thereby, yet the plaintiff could not recover,

because the law raised the presumption of a grant of an easement or license in favor of the defendant, which presumption, however, might be rebutted by evidence; that to entitle the defendant to this presumption of law the jury must be satisfied that the water had been kept up to its present height for more than twenty years before filing the petition; that any temporary lowering of the water, however, as by drought, sudden breaches in the dam by freshets, or drawing off the water with the view of erecting a new dam, if the same was repaired or erected immediately thereupon, would not rebut the presumption of a grant in the defendant's favor. The judge further instructed the jury that the fact of the plaintiff having erected his mills in 1826 on the same stream above the defendant, without any complaint of injury or notice to the defendant, until more than twenty years had expired from the erection of the defendant's dam in 1812, was not sufficient to rebut the presumption of a grant or license, provided they found that the defendant had kept up the water to the present height for more than twenty years before the filing of this petition. The jury found for the defendant. A new trial was moved for and refused, and judgment being rendered for the defendant, the plaintiff appealed.

No counsel for plaintiff.
J. T. Morehead for defendant.

RUFFIN, C. J. We do not perceive anything in the record which can be regarded as an error in matter of law on which this Court can reverse the judgment. The evidence, as stated on the part of the defendant, of the height at which the water had been kept up from the building of the dam by his father in 1812 was rather vague, and, perhaps, ought not to have been satisfactory. The ground on which a presumption rests of a grant of the easement, as claimed by the defendant, is that it (232) had been enjoyed by him and those with whom he connects himself for twenty years or more, in the state and to the extent in which he is now using it, as complained of by the other party. Now, from 1812 to 1839 is more than twenty years, it is true. But the case states that "for several years before 1839" the dam of 1812 had become so defective that it would not hold water well, and, as we must understand, did not usually raise the pond as high as it was while the dam remained in repair, or, perhaps, high enough to injure the plaintiff's mills. If such was the state of facts in 1832, or earlier, that is to say, before the expiration of the twenty years from the covering of the plaintiff's land by reason of the dam in 1812, then there would not have been the requisite time and enjoyment to raise the presumption urged on the part of the defendant; and it may be that he should have offered clearer proof that the

"several years" mentioned began after the completion of the full term of twenty years from 1812. But that was a topic for discussion before the jury, or a ground for setting aside the verdict by the court who tried the cause, for the want of sufficient evidence. It is not a matter on which this Court can act, since, notwithstanding the inconclusiveness of the proof, it may be that the period of twenty years elapsed before the pond became ordinarily lower in consequence of the insufficiency of the dam, and we must now take it that the jury have found that, in fact, that period did elapse. For his Honor explicitly directed the jury that, on the one hand, to entitle the defendant to the benefit of the presumption of a grant, "they must be satisfied that the water had been kept up for more than twenty years to its present height," and, on the other, that "if the new dam (of 1839) was higher than the old one of 1812, and thereby the water was thrown on the plaintiff's land and mills, they should give him damages." It is, hence, a necessary inference from a verdict for the defendant that the jury was of opinion that the defendant did not raise the pond higher on the plaintiff's land than his father did, and that, before suit brought, the pond had been kept at that height for twenty years or more. In that case it is settled by repeated declarations of this Court that a grant is to be presumed. *Wilson v. Wilson,* 15 N. C., 154; *Pugh v. Wheeler,* 19 N. C., 50.

(233) The Court likewise agrees with his Honor with respect to those matters on which the plaintiff relied as rebutting that presumption. The lowering of the water by drought could not have that effect; else the presumption could never arise, but would be defeated by the course of nature; nor will letting off the water for the purpose of repairs, and only for the period required for repairs; for that is only for the better enjoyment of the franchise, and not a surrender of it. Still less does the erection of the plaintiff's mill in 1826 repel the presumption; it rather strengthens it as an inference of fact; for, if the defendant did not throw back the water on the plaintiff's land under a grant, why should the plaintiff, after building his own mill, whereby his damages became increased, allow the other party to continue the nuisance in the same state, undisturbed, until August, 1841, when this suit was brought? Upon the whole, then, the judgment must be

PER CURIAM. Affirmed.

Cited: S. v. Marble, 26 N. C., 321; *Ingraham v. Hough,* 46 N. C., 42; *Benbow v. Robbins,* 71 N. C., 339; *Geer v. Water Co.,* 127 N. C., 354.

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JOHN COX AND WIFE ET AL. v. LEWIS WILSON.

In a suit by an administrator one of the distributees of his intestate cannot be a witness for him; but such distributee is a competent witness for the defendant, and if introduced by him, may be cross-examined by the plaintiff on any matter pertinent to the issue.

APPEAL from *Settle, J.*, at Spring Term, 1842, of PITT.

The plaintiffs brought a suit to recover certain property, a part of which had belonged, as was alleged, to one Ruth Wilson, who was dead, and whose administrator was a party plaintiff. On the trial of the issue the plaintiffs offered as a witness in their behalf Daniel Wilson, one of the distributees of the said Ruth Wilson. The competency of the witness was objected to by the defendant on the ground of interest, and the objection was sustained by the court. The defendant then offered as a witness on his part James Wilson, another distributee of the said Ruth. The plaintiffs objected to his introduction, but the objection was overruled by the court. The jury found a verdict for the defendant, and an application of the plaintiffs for a new trial having been refused, and judgment rendered according to the verdict, the plaintiffs appealed.

No counsel for plaintiffs.
Mordecai and J. H. Bryan for defendant.

DANIEL, J. John Cox, as administrator of Ruth Cox, sued to recover the slaves mentioned in the declaration; and he offered as a witness Daniel Cox, a brother and one of the next of kin of his intestate. The defendant objected, and the court refused to admit him as a witness. This was right in the judge; for Daniel Wilson was directly (235) interested that the plaintiff should recover in the action, so that the intestate's estate might be increased, and his distributive share of that estate enlarged. Secondly, James Wilson, another brother, and one of the next of kin of the intestate, Ruth Wilson, was offered as a witness by the defendant. The plaintiff objected, but the court admitted him as a witness; and we think that this was also correct in the court. It is a general rule that all witnesses interested in the event of a cause are to be excluded from giving evidence in favor of the party to which their interest inclines them. But a witness is competent when called on to testify by a party against whom he is interested; or, in other words, a witness is competent when swearing against his own interest. *Birt v. Wood,* 1 Esp., 20; 1 Johns., 59; 3 Binney, 336; 2 Mum., 49. The other party may then cross-examine the witness as to all matters pertinent to the issue on trial. *Webster v. Lee,* 5 Mass., 334.

PER CURIAM. No error.

Cited: S. v. Poteet, 29 N. C., 357.

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ANDREW FALLS ET AL. V. ABNER MCAFEE ET AL.

1. In an action upon a bond, the condition of which is to indemnify the plaintiffs "for all damages they might sustain by reason of the wrongful suing out of an injunction" by the defendants to stop the plaintiffs from working a certain gold mine, it is necessary for the plaintiffs to show a want of probable cause for the former suit, and also, in a legal sense, malice in bringing it.
2. But where it appears that the party who sued out the injunction really and *bona fide* entertained the belief that he had just grounds for his suit, the idea of malice is negatived, and the action upon the bond cannot be supported.

APPEAL from *Pearson, J.*, at Spring Term, 1842, of LINCOLN.

The plaintiffs brought this action of debt upon a bond of the defendants for $3,500, with a condition to indemnify the plaintiffs from all damage sustained by the defendants' wrongfully suing out an injunction to stop them from working a gold mine. The plaintiffs read in evidence the bond, also a decree of the Supreme Court dissolving the injunction, and the final decree dismissing the bill with costs. The plaintiffs then proved that in consequence of the injunction they had stopped working their gold mine from February, 1832, to February, 1835, and by reason of thus lying idle the pit had caved in, the ditch filled up, and the washers and other implements been much injured; they also offered evidence to show that if they had not been stopped they would have made during the three years, with the ten hands then working, $3,400 per annum, after deducting all expenses, which sums they did not make until 1836-37-38, by reason of being so stopped. The plaintiffs' counsel then rested the case. The defendants then proposed to offer evidence to show probable cause, and to repel the allegation of malice. But the court intimated that it was unnecessary, as the plaintiffs had not made out a case; for, in the opinion of the court, to sustain this action it was necessary to show malice and a want of probable cause, the action being similar to an action on the case for wrongfully suing a defendant and holding him to bail, or an action for wrongfully suing out a commission of bankruptcy, or for wrongfully suing out an original attachment, and differed entirely from an action on a prosecution bond, or an appeal bond, in which latter actions a failure to prosecute with effect was sufficient. The court was also of opinion that the decree dissolving the injunction and the decree dismissing the bill did not amount to *prima facie* evidence of a want of probable cause and of malice. The plaintiffs' counsel then proposed to offer evidence to show a want of probable cause and malice, and it was agreed that the same evidence should be given as had been given in the original case in equity, by which it was

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agreed these facts were established: that one Carpenter contracted to sell a tract of land to Falls, gave a bond for title, and took notes for the purchase money; that Falls took possession of the land, but was poor and unable to pay for it, and did not for several years pay more than the ordinary rent; that a valuable gold mine was discovered on the land, whereupon the defendants went to Carpenter and induced him to sell the land to them and execute to them a deed; that at the time of their purchase they had notice of the claim of Falls, but believed that, by securing the legal title, they could defeat Falls in a bill for a specific performance, on account of his laches in paying the purchase money, and his inability to pay but for the discovery of the gold mine; that, after obtaining the legal title, they sued out the injunction to prevent Falls & Co. from working the mine until the equitable title was settled. The court was of opinion that these facts were not sufficient to show a want of probable cause, much less were they sufficient to imply malice. It was then agreed by the counsel to reserve these questions, and let the jury pass upon the question of damages. The court left that question to the jury with instructions to find the amount of damages by reason of the dilapidation of the works, and by reason of the plaintiffs not (238) getting the several sums of gold as soon by three years as they would have got it but for the injunction, which would be the interest for the time. The jury found for the plaintiffs, subject to the questions reserved, and assessed the damages to $2,094. Upon the questions reserved the court was of opinion with the defendants, and directed the verdict to be set aside and a nonsuit entered, from which judgment the plaintiffs appealed.

Badger for plaintiffs.
Alexander and Caldwell for defendants.

RUFFIN, C. J. The counsel for the plaintiffs has not contended that the Superior Court erred in its opinion as to the nature of this action, but admitted that it can only be maintained by showing a want of probable cause for the former suit, and also, in a legal sense, malice in bringing it. That admission was properly made, in our opinion, as has been already expressed in *Davis v. Gully,* 19 N. C., 360. But it was contended that the court erred in holding that the proceedings and decrees in the former suit did not establish a want of probable cause; and the counsel endeavored to maintain that proposition by minutely commenting on the pleadings and proofs in the chancery suits, and also to infer from the want of probable cause, thus established, the existence of malice. We cannot, however, recognize any part of those proceedings further than

they are incorporated into the record of this cause; since we are restricted to this record as the ground of our decision. Now the parties have agreed, here, on the inferences of fact, which are to be considered as established by the evidence in the former causes; and among them is one which, in our judgment, puts an end to the plaintiffs' case.

The case, after stating the purchase by Falls and notice of it to the present defendants, proceeds to admit, on the part of the plaintiffs, that at the time they bought from Carpenter and filed their bill these defendants "believed that, by securing the legal title, they could defeat Falls in a bill for specific performance, on account of his laches in paying (239) the purchase money and his inability to pay it but for the discovery of the gold mine." Whether that was a reasonable belief or not is not material to the question we are now to consider. We remember, indeed, that counsel gave us much trouble to show that it was not well founded. But supposing that belief to be without a just foundation, we are, nevertheless, upon the admission quoted, to take it that it was really and *bona fide* entertained. Thus taking it, the ingredient of malice is absolutely negatived; and the present defendants, instead of having brought a groundless suit for the purpose of oppressing the present plaintiffs and subjecting them to losses, appear only to have honestly sought from the preventive justice of the court a remedy against impending injury to their right, or supposed right, until that right could be investigated and established. It has turned out, indeed, that those parties had not the right they then believed they had, and that the present plaintiffs have sustained a heavy loss from the operation of the process awarded against them. But, much as that is to be regretted, it cannot be repaired in the present action, as the defendants prosecuted that litigation from sound motives—just as much so as the present plaintiffs are now prosecuting their suit.

The truth is, the party was not so much in fault for asking the injunction as the judge was in error in granting it. The case arose early after the business of mining began, and the writ was improvidently awarded, without recollecting at the time that to stop the working of the mine was alike opposed by the public policy and the private justice due to the party that might be found ultimately to be the owner; and that it would the rather promote all interests to appoint a receiver, or take some other method for having the profits fully accounted for. It is, indeed, surprising that the present plaintiffs had not, at the first opportunity, moved to discharge the injunction by submitting to an order for a receiver. If they had, they would, doubtless, have avoided most of their losses; and, therefore, they are to attribute them to their own negligence, and must submit to them.

PER CURIAM. Affirmed.

Cited: Mining Co. v. Fox, 39 N. C., 75; *Gause v. Perkins,* 56 N. C., 180; *Thompson v. McNair,* 64 N. C., 448; *Burnett v. Nicholson,* 79 N. C., 551; *Parker v. Parker,* 82 N. C., 168; *Stith v. Jones,* 101 N. C., 365; *Mahoney v. Tyler,* 136 N. C., 43.

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DEN ON DEMISE OF JOSEPH RICH AND WIFE v. SAMUEL BEEDING.

A deed of husband and wife, dated 1 March, 1834, was offered in evidence. To prove the due execution of the deed by the wife, a commission *dated 17 February, 1834,* issued by the court to two justices of the peace to take the private examination of the wife, reciting that a deed had *theretofore* been executed by the husband and wife, and authorizing the justices to take the private examination, together with the return of the justices indorsed on the deed of 1 March, 1834, was offered in evidence. *Held,* that the deed of 1 March, 1834, was not the deed intended to be submitted to the commissioners, and that their certificate indorsed on that deed was made without authority, and was, therefore, void, and that, of course, the deed did not pass the title of the wife.

APPEAL from *Pearson, J.,* at Spring Term, 1842, of DAVIE.

On the trial of this ejectment it was admitted that the defendant was in possession, and that the land was once the property of Sarah Hoskins, who is now the wife of Joseph Rich, and they are the lessors of the plaintiff. The only question was whether a deed executed on 1 March, 1834, by John G. Hoskins and his then wife, the said Sarah, was valid to pass the title of the *feme covert.* The plaintiff's counsel insisted that the deed was invalid as to the said Sarah, first, because the commission to Brock and Ward, the two justices of the peace, to take the examination of Mrs. Hoskins, supposing it to have issued at the time insisted upon by the defendant, to wit, 17 February, 1834, in fact issued before the deed from Hoskins and wife was executed; secondly, because the commission when issued, and at the time the two magistrates acted under it, did not specify the particular deed as to which the examination was to be taken, but was left blank in that particular; thirdly, because the deed of Hoskins and wife to the defendant was not acknowledged by Hos- (241) kins before the commission issued, and in fact was not made until afterwards. (The other objections of the plaintiffs it is not material to state, as the court, in their view of the case, did not deem it necessary to notice them.) It was agreed, provided the court thought the evidence admissible which was objected to by the defendant because it contradicted the record, that the deed to the defendant was not executed until 1 March, 1834, on which day it was written and executed in the presence of the magistrates, Ward and Brock, who became subscribing witnesses

thereto, and then, on the same day, took the examination of Mrs. Hoskins, and made the return on the back of the deed, so that in fact, provided the evidence be admissible, the deed to the defendant was not acknowledged by Hoskins before the commission issued, and was not made until afterwards; and further provided the evidence be admissible which is objected to by the defendant for the same reason, that the deed was kept by the magistrates and not returned to court until May Term, 1839, and Hoskins died in April, 1834, so that, in fact, provided the evidence be admissible, the deed never was acknowledged by Hoskins in open court, and never was proven as to him. Upon these facts agreed, the court was of opinion against the defendant, and the jury having found in favor of the plaintiff, and a new trial having been moved for and refused, judgment was rendered for the plaintiff, from which the defendants appealed.

No counsel for plaintiffs.
Badger for defendant.

DANIEL, J. It is agreed that the lands were once the property of Mrs. Rich. The defendant is now in possession, and claims title to the same by a deed, written and executed on 1 March, 1834, by Mrs. Rich and her then husband, John G. Hoskins. The lessors of the plaintiff contended that Mrs. Hoskins (now Mrs. Rich) had never legally been privately examined as to her voluntary assent to the execution of that deed. (242) The defendant then produced a commission of two justices of the peace, signed by the clerk of the county court of Rowan, and issued at February Sessions, 1834, to take the private examination of Mrs. Hoskins as to the execution of a certain deed recited in the commission to have been *then* (17 February, 1834) executed by John Hoskins and Sarah, his wife, to Samuel Beeding, and that the said Samuel Beeding had procured the deed to be acknowledged or proven by the said John Hoskins before the justices of the court of pleas and quarter sessions of Rowan County. The commission recites that it was represented to the court that the said Sarah Hoskins, wife of John Hoskins, was, on account of sickness, unable to travel, etc. Under this authority, the defendant offered in evidence the certificate of the private examination of the *feme covert* by the said two justices, which certificate was indorsed on the deed, made and executed on 1 March, 1834, and after the order was made by the court to take her examination to a deed then said to be *in esse,* and after the date of the said commission. It appeared, therefore, from the order of the court granting the commission, and the commission itself issuing upon that order, that the deed of 1 March, 1834, was not the deed intended by the court or the parties to be submitted to the examination of the said commissioners. Their certificate indorsed

on the said deed of 1 March, 1834, was made without authority, and was, therefore, void. Waiving, therefore, the consideration of all other objections, the deed did not transfer the title to the land. The judgment must be

PER CURIAM. Affirmed.

(243)

NATHAN EASON v. DANIEL DICKSON.

A constable gave a receipt to A. B. as agent for C. D. for a certain note to collect or return. A. B. transferred the receipt to E. F. by an indorsement on the back of the receipt. Afterwards A. B. collected the money: *Held*, that E. F. could not recover this money from A. B. in an action for money had and received to his use, for the money was received to the use of the principal C. D., nor could he recover on a count for a bill of exchange, for it was no bill of exchange; nor on a guaranty, for he had used no diligence in endeavoring to collect, nor given notice to the guarantor of a default in the principal.

APPEAL from *Battle, J.*, at JONES, Spring Term, 1842.

This was an action of assumpsit, in which the plaintiff declared, first, on a bill of exchange; secondly, on the indorsement of a constable's receipt for a note put into his hands for collection; thirdly, for money had and received by the defendant to his use. In support of this action the plaintiff produced a constable's receipt in the following words: "Received of Daniel Dickson for Joseph Whitty one note on Joseph M. French for $25, interest from 9 November, 1831, to collect or return as constable. 12 December, 1831. John G. Hadnot." On which receipt was the following indorsement by the defendant to the plaintiff: "Pay the within to Nathan Eason. 6 March, 1832. Daniel Dickson." The plaintiff then introduced a witness, who testified that he passed to the plaintiff a promissory note of the defendant for about $35, and that he afterwards heard the defendant say that he had taken up the note by giving the plaintiff the before mentioned constable's receipt and paying the balance in cash; that at the time he indorsed the receipt he had the judgment, which the constable had obtained on the note placed in his hands for collection, of which he did not inform the plaintiff; (244) that the constable had transferred the said judgment to one Barbee in payment of a gaming debt, and he, the defendant, had taken it from Barbee in a trade for a horse. This witness stated further that Hadnot, at and before the time the constable's receipt bears date, had made an assignment by deed of all his property to one Huggins, and was considered insolvent; that said Hadnot was largely indebted to him for money which he, the witness, had paid as his surety, and that he could not collect the same under an execution which he had caused to be issued

against him. The plaintiff then introduced the clerk of Onslow County Court, who stated that in 1831, when Hadnot gave the receipt in question, he did not appear from the records of the court to have been appointed constable for that year, though he was acting as such, and had been regularly appointed constable the year before, and was again appointed such for 1832. Mr. French, who owed the note placed in Hadnot's hands, was then introduced, and testified that the plaintiff called on him for the money due on it, but he declined paying it to any person except the holder of the judgment, and he afterwards paid it to the defendant. At what time this payment was made the witness did not state. Testimony was then introduced to show that Hadnot ran off and left the country in 1832, insolvent, and had not since returned. He carried off two negroes and a horse, and some of the witnesses thought that small sums of money might have been collected from him up to the time of his leaving the country. It was further proved for the plaintiff that the defendant said, "if he, the plaintiff, had not been in such a hurry to jump upon him, he would have paid him the judgment." For the defendant Mr. Whitty was introduced, who stated that the note placed in Hadnot's hands belonged to him; that he had delivered it to the defendant to be put into some officer's hands to be collected, and that the defendant afterwards (but at what time was not stated) accounted with him for it.

The court instructed the jury upon this case that the plaintiff could not recover on the count for a bill of exchange, because the indorsement of the alleged constable's receipt could not be considered as a bill (245) of exchange; but that, if it could, there was no evidence of it ever having been presented to Hadnot, either for acceptance or payment, which was necessary even if the drawee had no funds in his hands, in order to entitle the payee to recover on it as a bill of exchange. Secondly, that no recovery could be had on the second count, because the indorsement amounted in law at most to a guaranty, upon which it was necessary for the plaintiff to show that he had used due diligence in endeavoring to collect the money from Hadnot, and had given notice of his failure to get the money from him to the defendant, before bringing his suit. Thirdly, that the plaintiff could not sustain the last count for money had and received, because, if, as the plaintiff contended, he might treat the indorsement of the constable's receipt as a nullity, it would remit him to his original cause of action, which would be upon the note which evidenced the debt due him from the defendant. Further, that the money paid by French to the defendant, if paid after suit brought, could not, of course, be recovered in this action; and, if paid before, it was received by the defendant to his own use, under a distinct claim of title in himself on account of his purchase of it from Barbee, or it was received for the use of Whitty, to whom, in truth, it belonged; and in

either case it was not received for the use of the plaintiff. In submission to this opinion the plaintiff permitted a judgment of nonsuit to be entered, and appealed to the Supreme Court.

J. H. Bryan and J. M. Bryan for plaintiff.
Charles Shepard for defendant.

GASTON, J. In every point of view in which this case can be regarded we are of opinion that the plaintiff had no right to recover.

By submitting to a nonsuit it must be understood that the facts testified by the witnesses are admitted to be true, and the sole question is whether, assuming them to be so, the plaintiff could ask for a verdict. Now, it is admitted, and if it were not, it is apparent, because of the reasons stated by his Honor below, that he could not recover (246) on the first or second count in his declaration. It is insisted, however, that he might recover on the third count, because the indorsation made by the defendant to the plaintiff on the constable's receipt concluded him from denying against the plaintiff that the claim in the constable's hands belonged, at the time of such indorsation, to the defendant, and that he thereby assigned all his beneficial interest therein to the plaintiff. When, therefore, the defendant afterwards received payment of this claim, the law raised an assumpsit to pay it over to the plaintiff, as money received for his use. Now, without stopping to inquire into the force of this argument, had the receipt indorsed *purported* to be for a claim belonging to the defendant, its foundation is taken away when it is seen that the receipt declared that the claim belonged to Whitty, was put into the constable's hands for Whitty through the agency of the defendant, and was to be returned or accounted for to Whitty. Upon an indorsation of such a receipt there is no estoppel or legal conclusion against the defendant that the transaction is not what it purports to be, that is to say, an order by the defendant to pay over to the plaintiff money due to Whitty. When this money is afterwards received by the defendant, the law will indeed raise an assumpsit against him, but it will raise the assumpsit in favor of the person to whom it was due; and upon the evidence it was unquestionably due to Whitty, and not to the plaintiff. The judgment must be

PER CURIAM. Affirmed.

Cited: Garrow v. Maxwell, 51 N. C., 530.

(247)

THOMAS GARDNER v. HENRY ROWLAND.

1. It is not reasonable, and therefore not legal, to presume a more extensive license than is essential to the enjoyment of what is expressly granted.
2. Therefore, a license to enter a man's land for the purpose of taking off corn must be construed a license to enter by the usual mode of access provided for such purpose, as through the gate or other appropriate entrance.
3. He who abuses a *legal* license is a trespasser *ab initio*.
4. Where a man's hogs get on another's land, if he lets down a fence to drive them out, instead of driving them through a gap or gate, when there are such, he is guilty of a trespass.

APPEAL from *Bailey, J.*, at Spring Term, 1842, of YANCEY.

This was an action of *trespass quare clausum fregit*. The facts were that the plaintiff had possession of a small tract of land, which was inclosed and had been in cultivation, and that he had permitted the witness, who had worked with him in the crop, to put his corn in a house on said land; that the house was locked and the key given by the plaintiff to the witness to get his corn out, whenever he desired; that the witness let the defendant have some of this corn, who went for it in his wagon; that the witness told the defendant there were two ways of going into the field to the house, one at the end, where there were bars, and the other on the side of the field; that if he came in upon the side of the field the plaintiff would not like it; that he, the witness, would prefer that he should go to the bars; that the defendant went in at the side of the field with his wagon to the house, got his corn, and returned the same way, and the witness helped him to put up the fence. There was another field, which had been in cultivation, about a mile from the plain-
(248) tiff's house, a part of which had an old fence around it; the plaintiff had put up a new fence upon this land, but had not entirely inclosed it; the ends of the new fence did not meet the old fence; and in this field was a house occupied by a woman by permission of the plaintiff. The defendant's hogs got into this field. He let down the new fence, which had been erected by the plaintiff, and turned them out. He could have driven them out of the field at either end of the new fence, where it did not join the old fence, but that would have been farther than where he turned them out.

The court charged the jury, as to the first alleged trespass, that if the witness had his corn in the plaintiff's house by the permission of the plaintiff, and the key had been given up to him to get it whenever he thought proper, and he, the witness, had sold to the defendant a part of said corn, the defendant would have a right, in company with the witness, to enter the field, proceed to the house and get the corn and return, and that he would not be a trespasser, although there were bars through

which he might have gone, and he took down the fence and went in upon the side of the field, provided he did no unnecessary injury to the freehold. As to the second alleged trespass, if the plaintiff erected the new fence, although it did not meet the old fence at either end, and the defendant let down this fence and turned his hogs out, it would be a trespass on the plaintiff's possession, and would entitle him to recover nominal damages of the defendant as a wrongdoer. The jury returned a verdict of sixpence damages. The defendant moved for a new trial, on the ground of misdirection in the court in stating to the jury that the letting down the new fence erected by the plaintiff, although it did not meet the old fence and entirely inclose the field, would be a trespass on the plaintiff's possession. The motion was refused, and, judgment having been rendered for the plaintiff according to the verdict, the defendant appealed.

Alexander for plaintiff. (249)
No counsel for defendant.

GASTON, J. In our opinion, both of the questions of law raised on the trial of this case were against the defendant. The license under which he sought to justify the first alleged trespass was an implied or presumed license to enter the plaintiff's close in order to carry off the corn which the plaintiff had permitted to be there deposited. Now, it is not reasonable, and, therefore, not legal, to presume a more extensive license than is essential to the enjoyment of that which was expressly granted. The permission to keep the corn on the plaintiff's premises cannot be fully enjoyed without the liberty of ingress and egress to and from the place of deposit, for the purpose of watching over or disposing of the corn so deposited. But a permission to pass over the plaintiff's premises for a particular purpose must be understood to authorize an entry by the mode of access provided for such purpose, that is, through the gate or other appropriate entrance into the inclosure, and not by a breach of the fence, the very purpose of which is to defend and shut out the premises against all persons but the owner.

As to the second alleged trespass, if its character is to be tested by common-law principles, it was clearly without justification. Any entry upon the land of another, against his will and without his authority, is a trespass; and, by the common law, the owner of beasts or stock (as they are termed with us) is bound at his peril so to keep them as to prevent their trespassing upon the land of another, whether it be in fact inclosed or uninclosed. How far this obligation may be changed by reason of the enactment of our Legislature, whereby every planter is required under the penalty of $100 to keep a sufficient fence about his cleared ground

under cultivation, and a remedy is given to him for damage done upon his inclosed ground by the stock of another, provided it shall appear that his fence is sufficient (see Rev. Stat., ch. 48), is an inquiry which it is unnecessary now to prosecute. For, admitting, as appears to have been assumed below, that no trespass was committed by reason of the defendant's hogs wandering over the plaintiff's close, and that the defendant might lawfully enter thereon for the purpose of removing them, he ought to exercise this license without unnecessary damage to the plain-
(250) tiff. To pull down the plaintiff's fence, when there were gaps through which the hogs might be driven, seems to us an act of this kind, and, therefore, not warranted by any construction of the law. He who abuses a *legal* license is a trespasser *ab initio*.

PER CURIAM. No error.

Cited: Bear v. Harris, 118 N. C., 481.

MILLER, RIPLEY & CO. v. BENJAMIN RICHARDSON AND A. A. McDOWELL'S EXECUTORS.

1. It is fraudulent to receive from one partner, for his own separate debt, the security of the firm, unless he has authority from the other partner to that effect, or unless the creditor has reasonable and probable cause, from the conduct of the firm, to believe that such authority has been given.
2. Where a jury are left in a reasonable and real doubt as to the credibility of a witness, they should disregard his testimony and give such a verdict as they would have done if he had not been a witness.

APPEAL from *Manly, J.,* at Fall Term, 1841, of RUTHERFORD.

Assumpsit. The facts of the case were that on 20 March, 1832, A. A. McDowell, the testator of two of the defendants, became a partner with the defendants Richardson and others in a store in the county of Buncombe, which was under the general management of Richardson, and the firm was known as the firm of B. Richardson & Co. Before 20 March, 1832, Richardson had been engaged in merchandise, either by
(251) himself or in company with one Gray, and had contracted debts to a large amount in Charleston, South Carolina, in his own name and in the name of Richardson & Gray, and among others was indebted to the plaintiffs in the sum of $6,000, or thereabouts. In June, 1832, Richardson went to Charleston, leaving McDowell in Burke, and on the 19th of the month executed to the plaintiff, for his own debt and the debt of Richardson & Gray, two promissory notes, the one for $3,040.80, payable one day after date, and the other for $3,147.20, payable six months after date, signed B. Richardson & Co. McDowell having died, the

plaintiffs instituted this action against his executors and Richardson. There was no evidence of any assent, on the part of McDowell or the other partners, to the transaction between the plaintiffs and Richardson in relation to his giving the notes in question, except the deposition of one William Spann, who deposed that he heard McDowell say on one occasion, when speaking of the partnership affairs, that himself and the other partners had authorized Richardson to take up debts of his (Richardson's) in Charleston for the amount he and the other parties owed Richardson, being about $4,300. The character of the witness Spann was attacked by McDowell's executors, and several witnesses testified as to his general bad character. On the part of the plaintiffs several witnesses testified to his good character, and the defendants relied, and by their counsel commented, on various facts and circumstances growing out of the trial, to show that the witness had not deposed truly. The court charged the jury that if the notes sued on were given for a pre-existent debt or debts of one of the partners, as to the others it was a fraud in law; but that this legal fraud might be rebutted, either by proof that Richardson was authorized or that the plaintiffs had reason to think so. The court also charged that if the witness Spann was believed, the plaintiffs were entitled to recover; but that his credit was a matter for the sole consideration of the jury; that they were to weigh the testimony, and if their minds were left in a state of equilibrium, so that they could not tell how the matter was, then they ought to find for the defendants, McDowell's executors, so far as Spann's testimony (252) was concerned, for the plaintiffs ought to make out their case.
The jury returned their verdict in favor of McDowell's executors and against Richardson. A new trial having been moved for and refused, and judgment being rendered pursuant to the verdict, the plaintiffs appealed.

Badger and Bynum for plaintiffs.
Caldwell for McDowell's executors.

RUFFIN, C. J. The judgment in this case must, we think, be affirmed. It is too late to question the general proposition first stated by his Honor, that it is fraudulent to take from one partner, for the separate debt of that partner, a security of the firm, unless there be evidence of an authority from the other partners to give the security, or that the creditor had reasonable and probable cause, from the course of dealing of the parties or the like, to believe that such authority had been given. To that extent the majority of the Court thought themselves bound to go in *Cotton v. Evans,* 21 N. C., 284; and, even in that, one of the Court thought we were going too far, and that, however honest the intention of

the creditor might be, he could not enforce the security of the firm without establishing a previous express authority or a subsequent assent of the other partners. A broader doctrine, then, than was held in *Cotton v. Evans* in favor of the creditor cannot be admitted; and, without doing so, the judgment in favor of the defendants cannot be disturbed; for the case states there was *no* evidence of an assent by McDowell, but the testimony of the witness Spann, and the jury were told, if they believed him, to find for the plaintiff.

Whether this last position as to the effect of Spann's testimony be correct or not, we do not stop to consider, inasmuch as it was in favor of the plaintiff, who is the appellant, and, therefore, is not open to reëxamination. As the jury did not believe the witness, the plaintiff's case was without evidence, and the verdict was properly rendered, unless the judge erred in his subsequent observations to the jury upon the effect
(253) they should give to the evidence offered and the circumstances relied on for the purpose of discrediting the witness. We are not sure that we entirely apprehend the meaning of his Honor, as the statement in the record is not expressed with his usual perspicuity. But as understood by us, we agree to the directions. It is to be recollected that it is before stated that there was no evidence to charge McDowell but that of Spann, and that many witnesses had been called to impeach and sustain his credibility, and various other circumstances arising out of the trial were also relied on by counsel in the argument, and that all these things were left to the jury to be weighed by them as their exclusive province. Thereupon the judge told them that if they believed Spann, they should find for the plaintiff; but if they disbelieved him, then, of course, they should find for McDowell. There was, however, a third case which might happen, namely, that after weighing the evidence for and against Spann's credit, the jury might not be able to determine, in their own minds, which preponderated, or to say whether or not he was entitled to credit; and, in that event, the judge delivered his opinion to the jury, that, so far as concerned Spann's testimony, they should find for the defendant, if their minds were in a state of equilibrium, so that they could not tell how the matter was, that is to say, whether that witness was to be believed or not. We imagine that the case supposed will seldom occur, and that juries are not often so absolutely undetermined upon the credibility of a witness as not to be able to say one way or the other. But if such occurrence should happen, we are not prepared to say that the rule laid down by his Honor is wrong, but we rather concur in it. For if the point to which a witness is called be essential to the party, it behooves him to establish it by a witness whom the jury do believe; otherwise, he does not establish it at all. Consequently, if the jury be left in a state of reasonable and real doubt and uncertainty as to

the credibility of the witness, they cannot, with safety, found a verdict on his testimony, but must give the verdict they would if his testimony was struck out.

PER CURIAM. No error.

(254)

HUGH MOFFITT'S ADMINISTRATORS v. TIDENCE LANE.

1. In an action by an administrator to recover a debt due to his intestate, a release by a distributee to the administrator of all his interest in the said debt, if recovered, and also a release by the administrator to the distributee of all claim upon him for any part of the costs of the suit, if he should fail, will render the distributee a competent witness for the administrator.
2. And per GASTON, J., the release by the distributee to the administrator will of itself render him a competent witness.

APPEAL from *Dick, J.*, at Spring Term, 1842, of RANDOLPH.

The action was debt upon a bond given by the defendant to the plaintiffs' intestate. On the trial of the cause the execution of the bond was admitted, and the defendant relied on his plea of payment, and introduced witnesses to establish his plea. The plaintiffs then offered one Thomas Moffitt as a witness, who was objected to by the defendant on the ground that he was a son and one of the distributees of Hugh Moffitt, the intestate, which fact was admitted by the plaintiff. The said Thomas Moffitt then executed and delivered releases to the plaintiffs, a copy of which is as follows:

Know all men by these presents, that I, Thomas C. Moffitt, have released, and by these presents do release and discharge and forever acquit Charles Moffitt and William Moffitt, administrators of Hugh Moffitt, deceased, of all claim, interest, demand, right of action and recovery, for or on account of any part or portion, interest or claim, possibility thereof, which I have or can or may have to any share of the demand of $347.53, being a note or bond claimed by Tidence Lane by said administrators as due the estate of Hugh Moffit, deceased, with (255) a credit thereon of $37.40, 8 May, 1833, which note or bond purports to be due 2 November, 1832. And I make, execute, and now deliver this release for and in consideration of 5 shillings to me in hand paid by the said administrators, the receipt of which I hereby acknowledge. THOMAS C. MOFFITT. [SEAL]

24 March, 1841.

For the further consideration of 2 shillings to me in hand paid by the next of kin of Hugh Moffitt, deceased, I do hereby release to them and their assigns all my interest in the debt sued for by the administrators of the said Hugh Moffitt against Tidence Lane and now on trial.

THOMAS C. MOFFITT. [SEAL]

And I hereby release to the aforesaid William Moffitt and Charles Moffitt, administrators of Hugh Moffitt, deceased, for 2 other shillings to me in hand paid by them, a sufficiency of Hugh Moffitt's estate to satisfy all my portion of the costs which has accrued or shall accrue, and for which I may be liable in a suit now pending and on trial, by said administrators *v.* Tidence Lane.

THOMAS C. MOFFITT. [SEAL]

The plaintiffs also executed and delivered to the said Thomas C. Moffitt a release of which the following is a copy, viz.:

For 1 shilling paid down we hereby release to Thomas C. Moffitt all liability and charge from any and all costs accrued or which may accrue in a suit now on trial, ourselves against Tidence Lane. 1 April, 1842.

WILLIAM B. MOFFITT. [SEAL]
CHARLES MOFFITT. [SEAL]

The defendant still objecting to the introduction of the said Thomas C. Moffitt as a witness, notwithstanding the execution and delivery
(256) of the releases above set forth, the objection was overruled by the court, and the witness sworn and examined. The jury returned a verdict for the plaintiffs, a new trial was moved for and refused, and judgment being rendered pursuant to the verdict, the defendant appealed to the Supreme Court.

Mendenhall for plaintiffs.
Winston for defendant.

GASTON, J. It is impossible to reconcile with each other the various decisions which have been made respecting the nature of the interest which disqualifies a witness from giving testimony. But the general principle unquestionably is that it must be a direct and certain interest in the event of the cause. Tried by this principle, I should think that the first instrument executed by the witness removed all objection to his competency. According to our law, every plaintiff, whether suing in an individual or a representative character, is bound to give sureties for the costs, and is personally responsible for them. When he sues as an executor or administrator *bona fide* for the benefit of those interested in the estate, he is entitled as against them to be reimbursed out of the estate, and, therefore, the residuary legatee or next of kin has a direct interest that the cause be successfully prosecuted, not only because in that event his legacy or distributive share will be increased, but because, in the event of failure, it will suffer diminution by reason of the costs to be reimbursed thereout. But when the residuary legatee or next of kin has assigned and released his beneficial interest in the subject-matter de-

manded, to the individual sustaining the character of executor or administrator, and such assignment and release are accepted, then all interest in the cause is extinguished. He has no longer a right to (257) the thing, if recovered; and he is no longer responsible for the costs if the thing be not recovered, because the suit is prosecuted, not for his benefit, but for the benefit of his assignee, the executor or administrator himself.

This, however, must be understood to be my individual opinion, and not that which I am authorized to declare as the opinion of the Court; and I also would add that it is an opinion which I shall be very willing to reconsider and to abandon should it prove erroneous.

But all the Court agree that when to this assignment is added the actual release of the executor or administrator to the legatee or next of kin of all liability for costs, as is done by the fourth instrument set forth in the transcript, then the witness stands indifferent, and is competent.

PER CURIAM. No error.

STATE v. HARDY CARROLL.

When, upon a conviction for a clergiable offense, the defendant prays the benefit of clergy, and the Attorney-General or solicitor for the State objects, upon the ground that the prisoner has before had the benefit of clergy allowed him, he must present this objection in the form of a counterplea in writing.

APPEAL by the Attorney-General from *Settle, J.*, at Spring Term, 1842, of WAKE.

The following case was presented by the record: The prisoner (258) was indicted for, and convicted of, grand larceny. The Attorney-General having moved for judgment, the judge demanded of the said Hardy Carroll, the prisoner, what he had to say why sentence of death should not be pronounced against him, whereupon the prisoner, through his counsel, craved the benefit of his clergy; upon which it was suggested by the Attorney-General that the prisoner had before been convicted of a grand larceny and felony, and had then extended to him his clergy, and, as such, was not entitled to it the second time, and offered to the court the original records, showing the former conviction and the fact of the prisoner's then having had the benefit of his clergy. It was objected by the prisoner's counsel that there should be a counterplea in writing, and that it should set forth the former indictment, verdict, and judgment, and that the objection could not be received *ore tenus,* as the prisoner had a right to reply *nul tiel record,* and that he was not the same person, and had a right to a trial by a jury as to his identity. The

court, being of this opinion, sustained the prisoner's objection to the *ore tenus* suggestion of the Attorney-General, and allowed him his clergy, and thereupon pronounced the following judgment, to wit, that the prisoner be twice publicly whipped, and receive at each of the said whippings thirty-nine lashes on his bare back. Whereupon the Attorney-General prayed an appeal to the Supreme Court from the judgment of the court extending to the prisoner the benefit of clergy, which appeal was allowed by the court.

J. H. Bryan (by appointment of the Court) for the State.
Attorney-General on the same side.
Badger for defendant.

(259)

DANIEL, J. The prisoner was convicted of grand larceny. When he was brought up for judgment he prayed the benefit of clergy. The prayer was resisted on behalf of the State, and the Attorney-General offered to read to the court the record of a prior conviction for the
(260) same offense, when the prisoner had once before been allowed his clergy. The court refused to hear, in this way, the evidence of a former conviction and allowance of clergy. We are of opinion that the court acted correctly. When the benefit of clergy is demanded by a prisoner, who can only once receive it, and the prayer is entered on the record, the State may file a *counterplea,* stating that he has had it before, in order to bar his present claim. But where no *counterplea* is filed, clergy is allowed of course. 1 Chitty Crim. L., 688, 689 (Am. Ed.). The counterplea always recites the record of the prior conviction, the prayer of clergy, and the allowing of the same by the court; and then it makes an averment that the prisoner is the *same person* who was so convicted, and no other or different person; and the plea concludes with a prayer that the prisoner receive judgment *to die* according to law. To such a counterplea the prisoner may reply *nul tiel record,* and also deny that he is the person named in the said record. *Scott's case,* 1 Leach Cr. Cases, 402, 403 (4 Ed.). If the State was not compelled to counterplead on the record, the prisoner would be unable to put in his replication and make up an issue as to his identity to be submitted to a jury, which he is entitled to by law. It is, therefore, not admissible for the Attorney-General to counterplead *ore tenus* at the bar; the plea should be filed in writing. The form of such a plea may be seen in *Scott's case,* cited above. The judgment must be

PER CURIAM. Affirmed.

(261)

JOHN WADDELL v. SAMUEL MOORE

1. Where a bond was made payable to A as executor, with a condition that the obligor would pay a certain sum for the lease of lands belonging to the estate of A's testator, and to return the premises in good repair: *Held*, that the suit may be brought in the name of A without describing him as executor—the words "executor, etc.," being mere surplusage.
2. In such a case the guardian of wards, who are in equity entitled to the rent, is a competent witness for the plaintiff.

APPEAL from *Manly, J.*, at Spring Term, 1842, of HERTFORD.

The action was brought upon the penal bond of the defendant, with condition to return in good repair at the expiration of his lease a certain farm belonging to the estate of Titus Darden, deceased, and to pay the rent of the same to the plaintiff as executor of the said Titus Darden. The bond was delivered by the plaintiff to one Jesse Darden, upon his (Jesse Darden's) appointment by the county court of Hertford to be guardian to the children of Titus Darden, and before the commencement of this action. The breach assigned was that the fences on the premises were not in the order required. The bond was offered in evidence and objected to on the ground that it was payable to the plaintiff as executor, etc., whereas the bond described in the pleadings did not appear to be payable to him in that capacity. This objection was overruled and the instrument admitted.

In the course of the trial the plaintiff offered the guardian of the children of the said Darden as a witness, who stated that this suit was brought for the benefit of his wards, and, if it should be deter- (262) mined against the plaintiff, he (the witness) expected to pay the cost out of the income of the children. This witness was objected to on the ground of interest, but the objection was overruled. The jury found a verdict for the plaintiff. A new trial having been moved for and refused, and judgment being rendered pursuant to the verdict, the defendant appealed.

No counsel for plaintiff.
A. Moore and Iredell for defendant.

DANIEL, J. The defendant executed to the plaintiff, "executor of Titus Darden, deceased," the bond declared on. The bond was conditioned, at the expiration of the term, to return in good repair the farm belonging to the *heirs* of Titus Darden, which farm the defendant had leased for a term of years. The damages to be recovered on a breach of the conditions of this bond could not in any way be made the personal assets of the testator. The obligee being described in the bond "executor of Titus Darden" does not in law compel him to sue *as* executor. The

words are but surplusage; and he may and ought to sue in his own name, as on a bond in which he has the legal title. The plaintiff placed his bond in the hands of the guardian, because, in equity, the heirs of Darden had a right to all the benefit arising under it.

Secondly, the guardian was not a party to the record in this suit, and was not personally interested in the event of the suit. He had no interest in the damages or in the record. The circumstance that the guardian felt himself bound to pay the costs out of the funds of his wards, if the defendant should prevail and have judgment to recover his costs, did not disqualify him from being a witness.

PER CURIAM. No error.

Cited: Savage v. Carter, 64 N. C., 197.

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(263)

DEN ON DEMISE OF CHARLES FULLER v. BARNABAS WADSWORTH.

1. Where a demise in a declaration in ejectment was laid to be on 1 January, and the service of the declaration appeared by the sheriff's return to have been made on 31 December preceding: *Held,* that, after the defendant has confessed the lease, entry and ouster, he is precluded from making any objection to the declaration on that account.
2. A mortgagee, after the day of payment passed, may bring an action of ejectment against the mortgagor, without any notice to quit or demand of possession.

APPEAL from *Battle, J.,* at Spring Term, 1842, of LENOIR.

This was an action of ejectment, on the trial of which the following facts were agreed upon: On 4 November, 1835, the premises in dispute, and of which the defendant was in possession, were mortgaged by him to William D. Mosely. After the mortgage became forfeited, to wit, on 23 November, 1838, the said William D. Mosely, by deed, conveyed his interest in the said mortgaged premises to the lessor of the plaintiff, Charles Fuller. At Spring Term, 1838, of Lenoir, the lessor of the plaintiff obtained a judgment against the defendant Wadsworth, upon which a writ of *fi, fa.* was issued and levied by the sheriff upon the said Wadsworth's equity of redemption in the said lands; and on the first Monday of July, 1838, the said equity of redemption was sold by the sheriff at public sale, when the lessor of the plaintiff became the purchaser, and on 7 April, 1840, the said sheriff executed to the purchaser a deed for the same. The declaration in ejectment was issued to the county court of Lenoir, at January Term, 1839, and the demise

(264) therein stated was on 1 January, 1839. The defendant has never been out of the possession of the premises since the date of his

mortgage to William D. Mosely, and there was no evidence offered by the plaintiff of a notice to the defendant to quit, or demand of possession, before the bringing of this action. The declaration in this case appears from the return of the sheriff, indorsed on the same, to have been served, as follows: "Executed by delivering a copy of this on 31 December, 1838." The defendant had, as it appeared from the record, confessed lease, entry, and ouster, and pleaded not guilty. Upon these facts, the court was of opinion that the plaintiff was entitled to recover, and rendered a judgment accordingly, from which the defendant appealed.

J. W. Bryan and Iredell for plaintiff.
J. H. Bryan for defendant.

DANIEL, J. First, the possession of Wadsworth, the mortgagor, was not adverse to Mosely, the mortgagee. Mosely, therefore, had a right to convey, and he did convey to Fuller on 23 November, 1838. Fuller brought ejectment to January Term, 1839, of Lenoir County Court. The date of the demise in the declaration was on 1 January, 1839, when Fuller had a title to the possession. The sheriff, however, returned on the declaration that he had delivered a copy thereof to the defendant "on 31 December, 1838." We think that, as the defendant, at January Sessions, 1839 (after the date of the demise), accepted a copy of this declaration, and entered into the common rule to confess the lease mentioned therein, etc., he was precluded from making any objection on the score of the declaration being served on him by the sheriff before the date of the demise in the said declaration.

Secondly, the mortgage money not having been paid at the day mentioned in the mortgage deed, the mortgagor was thereafter but a tenant at sufferance. In such a case neither notice to quit nor a demand of the possession is necessary before bringing ejectment. *Patridge v. Beers,* 5 Barn. and Ald., 604; Coote on Mortgages, 326, 327. The mortgagor in such a case can sustain no injury for the want of a de- (265) mand of the possession; for he need not defend. Then the judgment is only against the casual ejector, and if the mortgagor surrenders the possession on the service of the declaration, the plaintiff can recover neither damages nor the costs of the ejectment in an action for mesne profits.

PER CURIAM. Affirmed.

Cited: Williams v. Bennett, 26 N. C., 127; *Gilliam v. Moore,* 44 N. C., 98; *Thompson v. Red,* 47 N. C., 413; *Jones v. Hill,* 64 N. C., 200; *Isler v. Koonce,* 81 N. C., 382; *Oldham v. Bank,* 84 N. C., 307; *Killebrew v. Hines,* 104 N. C., 196.

STATE v. JOSEPH RED.

1. The solicitor for the State is not entitled to a fee on a recognizance to keep the peace.
2. When such a recognizance is taken and not returned to the term of the court to which it is returnable, and the recognizance is not broken before the return term, *no* costs can at a subsequent term be awarded against the defendant.
3. If a magistrate fails to return at the proper term a recognizance to keep the peace, and the recognizance is broken, the solicitor for the State may, at a subsequent term, cause the recognizance to be returned, suggest a breach, enter a judgment *nisi*, and issue a *scire facias*.

APPEAL from *Bailey, J.*, at Spring Term, 1842, of HENDERSON.

The defendant, on 4 June, 1841, had entered into a recognizance before a justice of the peace to keep the peace, and to make his apparance at the next term of Henderson County Court, which was to be held on 19 July thereafter. The recognizance was not returned to the county court until February Term, 1842, when the court ordered that the de-
(266) fendant be discharged upon the payment of costs, including a fee for the solicitor for the State. From this order the defendant appealed to the Superior Court. In this court it further appeared that the person who had taken out the peace warrant did not desire that the defendant should be held longer under recognizance. His Honor was of opinion that the solicitor for the State was not entitled to a tax fee in proceedings on a peace warrant, and that, as the recognizance did not appear of record at July Term, when it was returnable, the defendant was not liable to pay any costs on the proceedings, and gave judgment accordingly. From this judgment the solicitor for the State appealed to the Supreme Court.

Badger (by appointment of the Court) for the State.
No counsel for defendant.

DANIEL, J. The State's attorney has no fee, in a case like this, at the common law; the Legislature has not given him a fee; and the judge, therefore, was right in saying that he was not entitled to one. The recognizance was returnable to July Sessions, 1841, of Henderson County Court. The defendant and his bail were by it bound to keep the peace only up to that time. There is no entry of continuance on the record of the proceedings from July Sessions, 1841, to February Sessions, 1842. The recognizance, not having been broken, was at an end by its very terms at July Term, 1841. No costs had then accrued except the constable's fee, for which the court could not give judgment against the defendant at February Sessions, as the proceedings were then not legally

before them, or, rather, the party was not then legally in court. If the recognizance had been broken before July Sessions, it then might have been carried in at that term or at a subsequent term, a suggestion of the breach entered of record, and a judgment *nisi* rendered, so as to lay a foundation for a *scire facias*. The debt due to the State, on a breach of such a recognizance before the term at which it is returnable into court cannot be defeated by the magistrate's omitting to return it, (267) as he ought to have done.

PER CURIAM. Affirmed.

STATE TO THE USE OF DUNCAN McRAE'S ADMINISTRATORS v. STEPHEN WALL AND OTHERS.

1. It is not necessary that the county court, authorized to appoint a constable in the case of a failure by the people to elect one, or in case of a vacancy from any other cause, should be the court immediately succeeding the time appointed for such election, or immediately succeeding such vacancy. The county court, at a subsequent term (seven justices being present) may fill the vacancy.
2. An entry on the county court records that "On motion, A B was permitted to renew his bond as constable by giving C D and E F as securities in the sum of $4,000," is not evidence that A B was duly appointed a constable.
3. A bond, executed by A B in pursuance of such an order, and without any other evidence of his appointment as constable, could not legally be accepted by the court, and is therefore void.

APPEAL from *Nash, J.*, at Spring Term, 1842, of RICHMOND.

This was an action of debt brought against the defendants as the sureties of S. H. Sedbury, on a paper-writing purporting to be a bond, payable to the State of North Carolina, and which is in the usual form of a constable's bond for Richmond County. The paper-writing is dated 16 April, 1839. The subscribing witness proved the signing and sealing of the paper, and its being left in his possession by the obligors, he being the clerk of the court of pleas and quarter sessions of Richmond County, and that it was by him filed with the constable's bonds, (268) in his office. Further, to prove the delivery of the paper and its acceptance by the county court as a bond, the records of the said court at their sessions in April, 1840, were produced by the plaintiff, on which is the following entry: "On motion, S. H. Sedbury was permitted to renew his bond by giving L. Garrett and Stephen Wall as securities, in the sum of $4,000." Upon the preceding page of the said records is an entry showing that more than seven magistrates were on the bench to lay the county taxes, and the next succeeding entry is as follows: "On motion, W. G. Webb was duly *elected* county trustee, and B. C. Covington treasurer of public buildings." To other entries are then made, and then follows the one first above recited. It was admitted that Sed-

bury was not elected by the people a constable, neither was he so elected by the county court. Objection to the reading of the paper to the jury was made by the defendant's counsel, on the ground that there was no evidence that the said paper-writing had ever been received by the State of North Carolina or by its legally constituted agent, and that if there was an election at April Term, as there was no evidence of there being a vacancy to be filled, such election was illegal and void. The court was of opinion that, as Sedbury had not been elected a constable in either of the modes pointed out by law, the county court was not the legally constituted agent of the State to receive this paper-writing as a bond, and that it was, therefore, void, never having been completed by a legal delivery. In submission to this opinion, the plaintiff suffered a nonsuit, and appealed to the Supreme Court.

Winston for plaintiff.
Badger and Strange for defendants.

GASTON, J. All the law relating to the appointment of constables, and to their qualification and giving security for their faithful performance of duty, is to be found in chapter 24, Revised Statutes. The important provisions of this chapter which bear upon the matter in con-
(269) testation are these: There shall not be more than one constable in each captain's district, except that in those districts which include county towns there may be two constables. The constables are to be elected in the respective districts by the freemen thereof, in the month preceding the first term in each year of the county court held *after* the first day of January, and the persons so elected shall take the oath of office and enter into official bonds, with approved sureties, in that court. Should there be a failure in any captain's district to elect a constable, or should any one elected constable die, or from any other cause fail to qualify and enter into the requisite bond, it shall be proper for the court which shall next happen, seven justices being present, to supply the vacancy occasioned by such failure. And upon the death or removal of a constable out of the county in which he was elected or appointed, it shall be lawful for the justices of the county court, seven justices being present, to appoint another person in his stead, who shall be qualified, and act until the next election of constables. And the bonds required from constables shall be made payable to the State in the sum of $4,000, conditioned for the faithful discharge of duty and diligently endeavoring to collect claims received for collection, and faithfully paying over the sums so received unto the persons to whom the same may be due; and suits may be brought and remedy had on such bonds in the same manner and under the same rules and restrictions as upon the official bonds of sheriffs and other officers.

In *S. v. Shirley,* 23 N. C., 597, we felt ourselves constrained to hold that it was essential to the validity of an instrument, declared on as a constable's bond, that it should be delivered to or accepted by an authorized agent of the State. The question, therefore, now presented resolves itself into this: Was there any evidence in this case from which such delivery or acceptance could rightfully be inferred?

The county court in this case undertook to act for the State, and to accept this bond. Two objections are made to its authority: first, for that the power given to the county court to appoint a constable when there is a failure to elect by the people, or a failure to (270) qualify on the part of the person elected, belongs to that body *only* when sitting at its first term that may follow after the failure; and, secondly, because no appointment of any kind was made under which this alleged bond was executed.

It seems to us that the act under consideration does not very happily or perspicuously express the will of the Legislature, and calls for a benign interpretation from the Court to give effect to what we must understand to be its purpose. It contemplates that there shall be this useful officer in every captain's district, and when such an officer shall not be elected, or, if elected, shall fail to qualify, it makes it the *duty* of the court to provide one without delay: "It shall be proper for the court which shall next happen as aforesaid, seven justices being present, to supply any vacancy occasioned by said failure." This is not to be regarded as a special authority to make an appointment, given to the seven justices who may happen to attend at that term, which authority may be exercised or not, at their discretion, but as a command imposed upon the court, to be executed forthwith, provided the requisite number for executing it be present. The main purpose is to have the vacancy supplied; the next, to have it supplied without delay; and we hold it a reasonable construction of the act, and, therefore, a rightful construction, that if, from the want of the necessary number of justices or from inattention, this duty is not executed at the first term, not only the court may, but it is bound to, execute it at a subsequent term, provided the necessary number of justices may be had. If, therefore, in this case it appeared that the justices had appointed this constable at the April Term, no election having been made in that district by the popular voice, we should hold the appointment good, and the bond legally delivered, because accepted by the authorized agents of the State.

But the record exhibited shows no appointment of constable then made. It states the election by the court of a county trustee, and of a treasurer of public buildings, and adds: "On motion, S. H. Sedbury was permitted to *renew his bond as constable* by giving L. Garrett and Stephen Wall as securities, in the sum of $4,000"; and the case made is (271)

express that it was admitted by the parties "that Sedbury was not elected by the people as constable, neither was he so elected by the county court." It has been argued that this admission of the parties must be understood with a necessary exception, "unless such record does, in law, constitute an appointment." We think the argument fair, and, therefore, view the admission as being thus modified. Now, what may mean an order that a man "be permitted to renew his bond as constable" it is not a little difficult for us to pronounce, because our laws are entirely silent in regard to a proceeding of this sort. It is required of guardians "to renew their bonds every three years *during the continuance of their respective guardianships,*" and it is possible that the court, or the clerk who entered the order, supposed there was some similar provision with respect to constables. But be this as it may, the renewal of a bond given in any character necessarily implies that the character has been previously conferred and is still continuing, and cannot, without violence, be tortured into the making of an original appointment conferring that character. We are disposed to make every reasonable allowance for the wretched manner in which records of this kind are kept—an evil growing worse and worse every year, and threatening consequences most injurious to the community—but we must remember that, as this is a record, and, therefore, imports absolute truth, we must understand it according to its terms, and not change its sense by conjecture. The county court, therefore, did not appoint Sedbury constable; and he was not elected constable by the people. The court, therefore, had no authority to take a bond from him as constable, and the instrument declared on as such was not accepted by any authorized agent for the State.

We hold it unnecessary to enter into the discussion which has been had at the bar as to the validity of acts done by officers *de facto,* who were not officers *de jure,* or the responsibility of persons undertaking to act as officers who are not such. This action is not brought personally
(272) against Sedbury, nor to enforce any liability which the common law imposes. It is an action given by statute upon bonds taken under the provisions of a statute, and will not lie upon instruments purporting to be bonds, but which that statute does not authorize.

We cannot refrain from expressing our regret at the inconveniences resulting from those blunders which cause men who are not officers to be held out to the world as effectually deserving confidence, because bound by oath and bonds to a faithful discharge of duty; but with us it is a vain regret. We must administer the law as it is. The remedy, if there be one, is committed by the Constitution to other hands.

PER CURIAM. Affirmed.

Cited: S. v. Powell, post, 276; *S. v. Lightfoot, post,* 309; *Burke v. Elliott,* 26 N. C., 362; *S. v. Pool,* 27 N. C., 111; *Forbes v. Hunter,* 46 N. C., 233.

STATE TO THE USE OF ALEXANDER LITTLE v. STEPHEN WALL AND OTHERS.

Seven justices must necessarily be present to make a valid appointment of a constable. If a less number be present, the appointment and the bond taken under it are both void.

APPEAL from *Nash, J.*, at Spring Term, 1842, of RICHMOND.

This was an action against the defendants as securities for one S. H. Sedbury on a paper-writing purporting to be a bond for the faithful discharge of the duties of a constable by the said Sedbury. The paper was dated 16 April, 1839. The subscribing witness proved the signing and sealing of the said paper-writing, and that it was by the obligors left with him; that he was the clerk of the court of pleas and (273) quarter sessions of Richmond County, and that he filed the said paper-writing among the constables' bonds in his office. Further, to prove the delivery and acceptance of the said paper-writing, the plaintiff produced the records of Richmond County Court, upon which, at April Term, 1839, thereof, appeared the following entries: "The resignation of S. H. Sedbury, constable, was received and filed." "On motion, S. H. Sedbury was again permitted to renew his bond as constable, by giving as security Stephen Wall and Stephen Parker, his securities." On the preceding page it appears that a number of justices, more than seven, were present to lay the county taxes, and the above entries immediately succeeded. The plaintiff further produced the records of the said court at their session in January, 1839, on which is the following entry: "Saturday, 26 January, 1839, court met at 12 o'clock; present, William Powell, E. T. Long, and J. W. Terry, justices present and presiding. On motion, S. H. Sedbury was permitted to renew his bond as constable, by giving as security John Morrison and William Powell," the said William Powell being one of the presiding magistrates. It was admitted that the said Sedbury was not elected by the people nor by the court as constable. The same objection was made by the defendant's counsel to the reading of the paper-writing to the jury in this case as in *S. v. Wall, ante,* 267, with the additional objection that if the court, at January Term, 1839, did make an election, only three magistrates being present, the election was null and void; but if valid, the said Sedbury had no right to resign at April Term, and the court then present no legal power to accept said resignation. And if at April Term they did elect said Sedbury constable, such election was void, either because the said election was not had at the time appointed by law, or because, if he was duly elected at January Term, he was still the constable, and there was no vacancy to be filled.

The court being of opinion for the defendant, the plaintiff submitted to a nonsuit and appealed.

(274) *Winston for plaintiff.*
Badger and Strange for defendant.

GASTON, J. The principles which we felt it our duty to sanction in *S. v. Wall, ante,* 267, lead us necessarily to the affirmance of this judgment also. Sedbury never was appointed constable, as far as we see. The order of the court at January Term, 1839, was not an appointment; indeed, the court could not then have made an appointment, because the power is, in express terms, restricted to a court consisting of seven justices. The alleged resignation of his office at the April Term following was perfectly nugatory, even if the court had power to receive the resignation (of which power nothing is said in the act), because there was no office to be resigned. Now, it may be that the subsequent entry on the record, "On motion, S. H. Sedbury was again permitted to renew his bond as constable, by giving as security Stephen Wall and Stephen Parker, his securities," was a misprision of the clerk, and, in truth, upon the supposed resignation of Sedbury he was then appointed constable to fill a vacancy which had been caused by a failure of the people to elect before the preceding term. But the record must speak for itself, and we cannot make that an appointment which purports not to be one.

PER CURIAM. Affirmed.

Cited: S. v. Wall, post, 275; *S. v. McIntosh,* 29 N. C., 69; *Forbes v. Hunter,* 46 N. C., 233.

(275)

STATE ON RELATION OF JOHN L. FAIRLEY v. STEPHEN WALL AND OTHERS.

GASTON, J. As this case is, in all respects, except as to parties, the same with that brought on the relation of Alexander Little against these defendants, *ante,* 272, there must be the same judgment in it.

PER CURIAM. Affirmed.

Cited: Forbes v. Hunter, 46 N. C., 233.

STATE ON THE RELATION OF ALEXANDER LITTLE v. WILLIAM POWELL ET AL.

The power given to the county court to appoint a constable in case of a vacancy is a *special* power, and cannot be exercised without the presence of *seven* justices; otherwise, both the appointment and the bond given under it are void.

APPEAL from *Nash, J.*, at Spring Term, 1842, of RICHMOND.

This was an action against the defendants on a paper-writing purporting to be given by one Sedbury and the defendants as his sureties, on a bond upon his appointment as constable, and dated 16 January, 1838. The signing and sealing of the instrument were proved, and that it was regularly filed by the clerk of the county court of Richmond among the constables' bonds in his office. Further, to prove the (276) delivery of the paper-writing and its acceptance by the court, the records of the county court of Richmond of January Term, 1838, were produced, where the following entry appears: "On motion, Shadrach H. Sedbury was appointed constable, gave bond with William Powell, John Morrison, and Stephen Terry securities." This entry was made on Wednesday, 17 January, 1838, when the court was held by three magistrates only. It was admitted that the said Sedbury was not *elected,* either by the people or by the county court, but was appointed as above stated. It was objected by the defendant's counsel that the paper-writing declared on was void, because Sedbury was not elected either by the people or by the county court of Richmond, seven magistrates being on the bench, but that he was appointed by a court consisting of but three magistrates, and that a court so constituted was not the legally constituted agent of the State to receive the said paper-writing as a bond. The court being of this opinion, the plaintiff submitted to a nonsuit and appealed.

Winston for plaintiff.
Badger and Strange for defendants.

GASTON, J. The county court derives *all* its power of appointing constables and taking bonds from them from the statute to which we have referred in the opinion in *S. v. Wall, ante,* 267. It is ordered to supply a vacancy when no election has been made by the people, "seven justices being present." From this act flows its authority, which is *necessarily special.* It is given to the court, seven justices being present, but not otherwise. The appointment, therefore, in this case was wholly without authority, and, for the reasons given in the case already referred to, the

instrument given as an official bond was altogether inoperative, because not accepted by an authorized agent of the State.

PER CURIAM. Affirmed.

Cited: Forbes v. Hunter, 46 N. C., 233; *Leak v. Comrs.,* 64 N. C., 135.

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(277)

JAMES W. NEWSOM, ADMINISTRATOR, ETC., AND OTHERS v. LEWIS THOMPSON, EXECUTOR, ETC.

To make a deed valid, the grantees (unless by way of remainder) as well as the grantors, must be *in esse;* at all events before the act of 1823 (Rev. Stat., ch. 37, sec. 22).

APPEAL from *Settle, J.,* at Spring Term, 1842, of NORTHAMPTON.

This was an action of detinue by James W. Newsom, administrator of Benjamin Pledger, Willie F. Pledger, Matilda Pledger, and Charity, Kinchen, John, and Jesse Pledger, infants, by their next friend, Willie T. Pledger, against the defendant, to recover a negro slave named Cary. The defendant pleaded *"non detinet* and statute of limitations," and issue was joined. The jury found a verdict for the plaintiffs, subject to the opinion of the court upon the following case reserved:

On 20 November, 1819, one John Pledger made a deed of gift, which was duly acknowledged at December Term, 1819, of Northampton County Court, in which county both the donors and donees then resided. The said deed, which was duly proved and recorded, is in the following words, viz.:

To all people to whom these presents shall come, I, John Pledger, of the county of Northampton and State of North Carolina, send greeting: Know ye, that I, the said John Pledger, for and in consideration of the natural love and affection which I have and bear unto my beloved grandsons, Benjamin W. Pledger and Willie Pledger, sons of my son George W. Pledger; and if, also, my said son George W. Pledger's present wife, Becky Pledger, should have another child or children, then and in that case to be equally benefited in this gift with the two above men-

(278) tioned; and for divers other good causes and considerations me hereunto moving, have given and granted, and by these presents do give and grant unto the said grandchildren, one negro man named Cary, to have, hold, and enjoy the said negro Cary unto the said Grandchildren, their executors, administrators, and assigns, forever. And I, the said John Pledger, all and singular the aforesaid negro Cary to the said grandchildren, their executors, administrators, and assigns, against

all persons whatsoever, shall and will warrant and defend by these presents. In witness whereof I have hereunto set my hand and seal this 20 November, 1819. JOHN PLEDGER. [SEAL]

In presence of

R. WHITAKER.

This deed was proved at December Term, 1819, and registered 24 January, 1820. At the time of the execution of this instrument, Benjamin W. Pledger and Willie Pledger, mentioned in the deed, were the only children of George W. Pledger and Becky, his wife, and were infants living with their father, George. The negro slave named in the deed went into the possession of the said George, and so continued until 1829, when the defendant's testator took possession and held and kept the slave as his own property until his death in the year ...., when the defendant assumed possession as executor, and hath retained and still retains it, after notice of the plaintiffs' claim, and refuses to surrender the slave to them. In 1831 Benjamin Pledger departed this life, intestate and an infant under the age of 21 years, and at March Term, 1841, of the county court of Northampton administration on his estate was duly committed to the plaintiff James W. Newsom; the other plaintiffs are children of the said George and Becky, born after the execution of the deed, and all of them before 1829, except Jesse Pledger, who was born in 1830. All were infants at the institution of this suit, except Willie, who came of full age within less than three years before its commencement.

On the trial it was insisted on the part of the defendant that (279) the said deed passed the whole legal title in the slave to the donees therein named, and who were living at the time of its execution; and that the grandchildren subsequently born did not, upon their births, become entitled at law under the said deed; and so the defendant's counsel insisted that the plaintiffs were not entitled to maintain this action. And the defendant's counsel further insisted that if the plaintiffs were entitled to recover the slave, yet as to the hire of the slave, while in the possession of the defendant's testator and before all the plaintiffs were in being, a recovery could not be had in this action. And it is agreed, if the court shall be of opinion that the plaintiffs are not entitled to maintain this action, judgment of nonsuit is to be entered; otherwise, judgment to be given upon the verdict. And if the court shall be of opinion with the defendant, upon the latter point as to the hire, then the damages are to be reduced by striking out therefrom the sum of $72.50 for the hire accrued before the birth of the last born of the plaintiffs, and judgment to be for the plaintiffs for the residue.

Upon consideration of which the presiding judge being of opinion with the plaintiffs, it is, therefore, considered by the court that the plaintiffs

recover of the defendant the negro slave Cary, of the value of $700, and also the sum of $942.50 as damages for his detention; from which judgment the defendant appealed to the Supreme Court.

No counsel for plaintiffs.
Badger for defendant.

RUFFIN, C. J. If the act of 1823, ch. 1211 (Rev. Stat., ch. 37, sec. 22), could help a deed like this, yet it cannot operate on that before us, inasmuch as it was made in 1819, before the act passed. As a conveyance at common law, it is clearly ineffectual to vest the slave in persons then unborn, the limitations to such persons not being by way of
(280) remainder after a proper particular estate. To make a deed valid, the grantee as well as the grantor must be *in esse*. Upon the case agreed, therefore, the judgment of the Superior Court must be reversed, and judgment of nonsuit entered.

PER CURIAM. Reversed.

THOMAS S. DEAVER v. JOSEPH M. RICE, ADMINISTRATOR, ETC.

It is not sufficient evidence of the loss of an execution, which had been in the hands of a constable, so as to let in secondary evidence, to show that the constable had removed to another State and had left his papers generally with an agent, who testified that the execution was not to be found among the papers so left.

APPEAL from *Bailey, J.*, at Spring Term, 1842, of BUNCOMBE.

This was an action of trover, brought to recover damages for some corn. The plaintiff claimed title as follows: It was shown that the corn had belonged to one Keith, and the plaintiff alleged that he had bought it at execution sale. A witness by the name of Bridgman was introduced, who stated that his brother had been a constable in this county, and had left the State about a year after the alleged sale and had not returned; that when he left the State, he placed in the witness's possession a parcel of his papers, and instructed him to get a portion of them which had been left with one John Carter. The witness said that he did obtain a bundle of papers from the said Carter. He further stated that he had recently, at the instance of the plaintiff, made a search among all these papers, and could find only three executions. (These executions
(281) are said to be marked A., and to be made a part of the case. They do not appear, however, on the record returned to the Supreme Court, nor do they seem to be material in the case as presented to the Supreme Court.) He further stated that he was present at the sale of the corn, when the plaintiff purchased from his brother, the officer; that

he did not see any execution or hear his brother say he had one, but Keith, whose corn was sold, told him that "the money was going to Deaver and others," or that "the execution was in favor of Deaver and others," he was not sure which. He also stated that when the corn was bid off he saw no money paid. Upon this statement, the plaintiff's counsel proposed to give parol evidence of an execution in favor of the plaintiff, Deaver against Keith, under which he alleged the sale had been made, and which had been lost. The defendant's counsel objected to this, because, even if it were admitted that there had been such an execution in the hands of the officer, Bridgman, at the sale, yet there was no evidence that it had been handed over with the bundle of papers either to the witness or to Carter, and by him to the witness; and that Bridgman and Carter should have been examined before parol evidence could be given. His Honor held that the loss of the paper was not sufficiently established to admit secondary evidence, and instructed the jury that they should not consider it. He then instructed the jury that, though there was no levy indorsed on either of the three executions in evidence, yet, if they were satisfied that the officer at the time of the sale had either of them in his possession, and in fact sold the corn under either of them, they would find for the plaintiff. A verdict was rendered for the defendant. A new trial was moved for because parol evidence was not permitted to be given of the Deaver execution. This motion was overruled, and, judgment being entered for the defendant according to the verdict, the plaintiff appealed.

No counsel on either side. (282)

DANIEL, J. The judge was of opinion that the plaintiff had not laid a sufficient foundation of the loss of the execution to be let in to give parol or secondary evidence of the same. And in this opinion we agree with the judge. The deposition of the constable has not been taken, John Carter has not been examined, nor the magistrate who issued the execution. The only evidence offered on this point was the testimony of the brother of the constable, who said that the execution was not among the papers left with him, or in the file of papers he had got from Carter. If a man had brought an action of debt on a bond, *profert* could not be dispensed with merely on the plaintiff's showing that the person who had possession of it had removed into another State.

PER CURIAM. No error.

HUGG & BELL v. BOOTH & PORTER.

Unliquidated damages, such as damages which in their nature are uncertain, for the breach of an agreement, cannot be made the subject of attachment under our attachment law.

APPEAL from *Battle, J.*, at Spring Term, 1842, of CRAVEN.

This was a proceeding by attachment against one Seldon Tryon, in which the defendants Booth & Porter were summoned as garnishees, upon the allegation that they were indebted to said Tryon. In their garnishment the defendants denied that they owed Tryon anything, and thereupon, at the instance of the plaintiffs, an issue was made up to try the fact. On the trial the plaintiffs, in order to prove the indebtedness of the defendants to Tryon, produced the instrument, of which the
(283) follow is a copy:

This may certify that if Mr. Seldon Tryon should wish to purchase of us tinware at our wholesale prices within twelve months from date, and should have Otis Porter's note in his possession, we will take the same in payment. BOOTH & PORTER.

NEW BERN, 13 May, 1836.

They also produced four notes, of which the following are copies:

$317.75. Six months after date I promise to pay Seldon Tryon the sum of $317.75, for value received, as witness my hand and seal, this 10 June, 1836. OTIS PORTER. [SEAL]

Eight months after date I promise to pay Seldon Tryon the sum of $317.75, for value received, as witness my hand and seal, this 10 June, 1836. OTIS PORTER. [SEAL]

One day after date I promise to pay Seldon Tryon or order $520.21, for value received, as witness my hand and seal. Edgecombe County, North Carolina, 18 July, 1836. OTIS PORTER. [SEAL]

Ninety days after date I promise to pay Seldon Tryon or order $525.56, for value received. Witness my hand and seal. Edgecombe County, North Carolina. OTIS PORTER. [SEAL]

The plaintiffs then proved that Tryon had, within twelve months from the date of the instrument above referred to, presented these notes to Booth & Porter, and demanded their amount in tinware at wholesale prices, and that Booth & Porter refused to comply with the demand. It appeared that Otis Porter was insolvent at the time of this de-
(284) mand. Upon this evidence the plaintiffs insisted that Booth &

Porter were indebted to Seldon Tryon the amount of the said notes, and that the issue must, therefore, be found in their favor. The defendants then introduced as a witness Otis Porter, the person named in the instrument given by them, who testified that he met Seldon Tryon in New Bern, where the defendants had a tin factory, and in the presence of James Porter, one of the firm of Booth & Porter, the witness agreed to purchase clocks of Tryon, and James Porter agreed to take Otis Porter's note for tinware at the wholesale prices, and thereupon the instrument above referred to was given by James Porter, in the name of Booth & Porter. The witness testified that he subsequently purchased of Tryon one hundred clocks, and therefor gave the two smaller of the notes above mentioned; that the clocks were then at Tryon's store in Edgecombe County, where the witness called occasionally and took them as he wanted them, he being at the time engaged in peddling, until he had received about one-half of the number purchased, and that the balance of them he never received, as Tryon refused to let him have them; that the two larger notes were given for dry goods, the whole of which he received from Tryon. The defendants then introduced Jonathan Pike, who testified that on a certain occasion Tryon came to him and offered to sell him the four notes above referred to; that Tryon was then about going on a trip to the north, and witness told him he would take the notes, provided Tryon would agree to take them back on his return, if the witness should not like them; that after Tryon returned, he, the witness, took the notes to him and requested him to take them back according to his promise, but he refused to do so, alleging that the notes were good, and saying that he had then in his possession $500 or $600 worth of property belonging to Otis Porter. This witness stated further that he renewed his application to Tryon two or three times; and finally sued him, when they settled the difficulty by Tryon taking back the notes and returning the money witness had given for them.

Upon this case the defendants objected to the plaintiffs' recov- (285) ery, upon several grounds; first, Because they were not *indebted* to Tryon, within the meaning of the act of Assembly (Rev. Stat., ch. 6) so as to make them responsible therefor as garnishees; secondly, Because the instrument upon which they were sought to be made responsible was not an available contract between them and Tryon, both for want of a consideration and want of mutuality; thirdly, Because the engagement only mentions one note of Otis Porter, and Tryon could not recover upon a demand of four. The court held that the only claim which Tryon could have against Booth & Porter was for damages in consequence of their refusal to comply with the contract above spoken of; that such damages were entirely uncertain, and that, as the act required garnishees to state on oath the amount of their indebtedness to the person whose prop-

erty was attached, it did not embrace cases where the claim was for uncertain damages, the amount of which could not be known to, and could not, therefore, be stated by, the garnishees. In submission to this opinion the plaintiffs suffered a nonsuit and appealed to the Supreme Court.

J. H. Bryan and J. W. Bryan for plaintiffs.
Badger for defendants.

RUFFIN, C. J. The provisions of our attachment law were, in our opinion, correctly construed by his Honor. That part of it which was taken from the act of 1777 authorizes a person to whom one removing is indebted to take out an attachment for his debt or demand" and have it levied "on the estate of such debtor, or in the hands of any person *indebted to* or having any effects of the defendant"; and it provides that where the attachment shall be thus served in the hands of one supposed "to be indebted to or to have any of the effects" of the party defendant, the garnishee shall be summoned to answer on oath *"what* he is *indebted* to the defendant, or what effects of his he hath in his hands"; and upon the examination of the garnishee, the court shall "enter judgment and award execution against the garnishee for all *sums of money due* (286) to the defendant from him, or for all effects, etc." It seems plain upon the act thus far that the garnishee could only be called on to account for specific estate and effects belonging to the debtor and left with the garnishee as the effects of the debtor, or for a *debt* owing from the garnishee and then due to the debtor. The plaintiff in attachment is permitted to use that process to recover his "debt or demand." But when the subject on which the process may be served is spoken of, the phraseology limits its operation yet more narrowly by requiring it to be served in the hands of one *indebted* to the defendant. And it would seem, indeed, that the indebtedness, at first, must have been in a sum of *money then due;* since the act directs an immediate judgment and execution, and uses the language, "sum of money due." Under the act of 1777, we think it clear that no demand could be attached in the hands of a garnishee but one that was a *debt* in a legal sense, and for which an action of debt or *indebitatus assumpsit* would lie, or arising upon a liability on negotiable paper, as upon drawing a bill of exchange or indorsing a promissory note, in which case the measure and nature of the party's liability are as clearly defined and as well ascertained in the law merchant as those of an obligor in a bond or the maker of a note. That act did not even embrace the cases of acknowledged money debts, not due at the time, or an indebtedness in specific articles; nor provide for a denial by the garnishee of his indebtedness. The attachment could only be served on one "indebted"; and the judgment was to be "upon his

examination only"—which yet more clearly evinces that it could only apply to such demands of which the garnishee could conscientiously and with reasonable certainty state the amount on his oath, and not to a case of uncertain damages, of which there is no standard until assessed by a jury. If the present case had, therefore, arisen before the act of 1793, it is apparent it could not have been sustained. Here it is impossible to say that Booth & Porter were *indebted* to Seldon Tryon, the defendant in the attachment; for if the contract had been for the sale and purchase of tinware at specific prices, to be paid at the time of delivery in money or otherwise, Tryon, upon the tender merely of the payment, could not recover the value of the ware as a debt, but could sue only on (287) the special agreement, and recover, in damages, the difference between the price the purchaser was to give and the market value when they ought to have been delivered. It would be the same case here. It is true, Otis Porter is said to have become insolvent, so that it is possible his notes may be worth nothing. But that is not absolutely certain, as he might from his age, connections, or enterprise, probably at some day be able to pay the notes or some part of them. At all events, a jury might think so; and they would be bound to make the estimate, since Tryon *did not transfer* those notes to Booth & Porter so as to vest them in those parties for what they were worth, be that little or much, but chose to keep them himself. They are thus still his, and he would have to account for them before the jury, and could recover only the difference between their value—as it might be made to appear—and the value of the tinware. This, therefore, was not a money debt, nor even a debt of any sort; but a liability upon a contract for unliquidated damages.

But it was argued that the other parts of the act, taken from the act of 1793, ch. 389, have provisions which will embrace this case. Upon an attentive consideration of them, however, we think otherwise; and, indeed, those parts of the act but serve to confirm the previous construction. They first authorize the plaintiff to take issue on the garnishment; but still terms are used equivalent to those in the act of 1777: this section saying, "when the garnishee shall deny that he *owes* to or has property of the defendant in his hands," then the plaintiff may suggest that the garnishee *"owes to,* etc." and an issue shall be submitted to a jury, Then follows a provision for other debts besides those in money, namely, where the garnishee "is *indebted* to the defendant by any security or assumption for the delivery of any *specific articles,"* in which case the garnishee may either deliver the articles in exoneration of himself, or, according to the circumstances, they are to be valued by a jury, and a judgment rendered against the garnishee therefor. And, lastly, the case of a debt not due is provided for in these words: "When (288) a garnishee shall declare that *the money* or *specific article* due by

him will become *payable* or *deliverable* at a future day," then there shall be a conditional judgment in the first instance, and a final one on *scire facias*. As to a money demand subject to attachment, the act of 1793 does not alter that of 1777, except to add one not due to that which was due, and to allow the plaintiff to take an issue when the garnishee denies the existence of a debt of either kind. It does, however, enlarge the list of the subjects of attachment by adding the indebtedness in specific articles. But the nature of the contract, upon which the specific article is deliverable, cannot be misunderstood. It is classed with that on which the garnishee has bound himself to pay a money debt, and the two are put on the same footing. It can, therefore, only mean a security or assumption for a certain sum of money, payable in specific articles at a particular day (which are very common contracts, and are called "trade notes"), or absolutely to deliver to another a certain quantity of specific articles, as 100 bushels of corn. On either of those instruments debt would lie at the common law; as in the one case the contract is really for money, to be discharged in specific articles, if the obligor offer them; and, in the other, the obligation is complete and the value may be averred and rendered certain on evidence. But upon an ordinary contract of sale, where both parties are to do something—the seller engaging to deliver certain things at a day and place named and the purchaser then to pay for them and receive them, the latter cannot bring debt for the value of the things the other ought to have delivered, but may have his action on the special agreement for damages; and the damages are not necessarily, as has been seen, nor ordinarily, the full value of the articles. There may be many reasons why they should be less; and, among them, the fact, here existing, that the party claiming the damages has kept what he was to have given to the other party as the price, and, therefore, the difference between the value of that and of the goods is a full indemnity for his loss. Damages arising on such a transaction is not a *debt* subject to attachment under the statute. It would in very
(289) many cases produce renewed litigation between the defendant in attachment and the garnishee if such demands were liable to be attached. In every case in which there could be a different view of the amount of damages which the garnishee ought to pay, the other party would say he had not admitted on his garnishment as much as he ought, or the jury had not properly assessed them, and he would bring a new action to recover what he claimed as the true amount. We think the intention of the Legislature was only to embrace the cases in which the demand may be easily ascertained, so that in a subsequent action against the garnishee by his creditor it may be plainly seen that it was covered by the garnishment and condemnation in the attachment, and, therefore, may be properly pleaded as a bar to the second action, brought by the

creditor himself. But that can never be said of a demand arising out of the breach of a special agreement which sounds altogether in damages, about the amount of which persons might differ, and which might, indeed, be varied by circumstances not known even to the garnishee, but to the other contracting party only.

PER CURIAM. Affirmed.

Cited: Deaver v. Keith, 27 N. C., 377.

(290)

JOHN LONG AND WIFE v. ROBERT BAUGAS.

1. A verdict in an action of detinue against the paintiff, on the plea of *non detinet*, is not sufficient evidence in another suit to show that the plaintiff had not title to the thing demanded.
2. If in such a case parol evidence can be introduced to show the grounds on which the verdict was given, this evidence must prove conclusively that the jury could have found their verdict upon no other ground than want of title in the plaintiff.

APPEAL from *Pearson, J.,* at Spring Term, 1842, of IREDELL.

This was an action of detinue for three negroes. The plaintiffs offered evidence to show that the negroes had been the property of one Patty Martin, and read in evidence a bill of sale executed by the said Patty to Elizabeth Gambol, now the wife of the plaintiff Long, for the negroes, dated in March, 1832. It was admitted that in February, 1837, the plaintiffs demanded the negroes of the defendant, who had them in possession and refused to give them up, saying he held them as administrator of Patty Martin. The defendant read in evidence a bill of sale from one William Martin to him, dated in 1836, and also introduced the record of a trial in the county of Wilkes, from which it appeared that Elizabeth Gambol, now the wife of the plaintiff Long, had brought an action of detinue for the negroes against William Martin and one Samuel Johnson, who pleaded the general issue, which was found by the jury in favor of the defendants. After this trial William Martin executed the bill of sale to the defendants for the three negroes now in controversy. The defendant's counsel thereupon insisted that the verdict and judgment in favor of the defendants in the former action had the (291) effect in law of transferring the title of the plaintiffs in that action to the defendants, under one of whom the present defendant claimed; and, secondly, that the plaintiffs were estopped by the former recovery from setting up title to the negroes against the present defendant, claiming under one of the defendants in the former action. The

plaintiff's counsel denied that the verdict and judgment in the former action operated in law to transfer the title, or to estop; and further offered evidence to show that the agent of the plaintiff Elizabeth, after the verdict had been rendered in that action for the defendants, without her privity or consent and contrary to the advice of her counsel, refused to move for a new trial or appeal, in consequence of which alleged fraud and collusion the plaintiff's counsel contended she was not bound or estopped by the proceedings in the former action. It was also in evidence that Patty Martin died soon after the trial, without issue, leaving William Martin her next of kin. The court charged that the defendant's counsel were altogether mistaken in the position that the verdict and judgment in the former action had the legal effect of transferring the title of the plaintiff to the defendants in that action; that in an action of trespass or trover, when the plaintiff recovered and received the value fixed on the property, the law transferred the title to the defendant, in consideration of the value so paid, but such was not the legal effect when the verdict and judgment were in favor of the defendant. As to the estoppel, the court charged that, supposing the pleadings to be properly framed so as to raise the question whether the plaintiff (Elizabeth) was estopped by the verdict in the former action from now setting up title, the court was of opinion that the verdict did not have that effect as between the present plaintiffs and the defendant. It was a rule of law that when parties joined issue upon a fact, and the jury decided the issue, neither of the parties nor their privies in blood nor privies in estate could afterwards be heard to deny it; but to make this rule apply, it was necessary that the fact should be expressly put in issue or necessarily implied from the verdict. If the verdict in that action had been
(292) for the plaintiff, it would necessarily have implied two facts: that the plaintiff had title, and that the defendants detained; but, as the verdict was in favor of the defendants, it might have been because the plaintiff had no title, or because the defendants did not detain, and, of course, the verdict could not necessarily imply that the plaintiff had no title, for it might have been on the other ground. Then the counsel for the defendant stated to the court that, entertaining the utmost confidence in the position first assumed, that a recovery against the plaintiff in detinue transferred the plaintiff's title to the defendant, he had deemed it unnecessary to offer evidence as to the point on which the former trial went off, and asked leave now to offer the evidence. The court considered it irregular, but, under the circumstances, permitted the evidence to be offered. It was then proved that at the former trial Patty Martin was examined as a witness for the defendants, and swore that the bill of sale to the plaintiff Elizabeth was obtained from her by fraud, being read to her as a mortgage, and not as an absolute deed. It was also in

evidence on that trial that, after the execution of the bill of sale to Elizabeth Gambol, Patty Martin borrowed a small sum of money from the defendant Johnson, and gave him a bill of sale for all the negroes to secure it, after which, in 1835, Johnson took the negroes into possession. On that trial the plaintiff, besides proving the due execution of the bill of sale, proved that she had paid upwards of $100 of the consideration money, and for the balance became bound to support Patty Martin during her life. There was no evidence on that trial of any title in the other defendant, William Martin, or that he had ever had the negroes in his possession. The plaintiff's counsel objected to this evidence on the ground that the former verdict, if relied on as an estoppel, must speak for itself, and could not be aided by proof as to what was then in evidence. The court proceeded to charge the jury that how the evidence as to what took place on the former trial, if admitted, would affect a case wherein Johnson was defendant it was unnecessary to inquire. But in this case, as the defendant claimed under William Martin, this evidence would not enable him to estop the plaintiffs; for the jury in the former action might well have found a verdict in favor of Wil- (293) liam Martin, without, as between him and the plaintiff, passing upon the plaintiff's title, upon the ground that he set up no title, did not have the negroes in possession, and so did not detain them; and, moreover, the defendant William Martin, having no title, could not, after the trial, convey to the present defendant, so as to give him the benefit of the estoppel as a privy in estate. The court then left the questions of fact to the jury, who found in favor of the plaintiff. A motion was made for a new trial for error in the charge as to the operation of the former recovery and as to the estoppel. The motion was refused, and, judgment having been rendered pursuant to the verdict, the defendant appealed.

Boyden for plaintiff.
Alexander for defendant.

RUFFIN, C. J. The position that the property of the plaintiff, in an action of detinue, in the thing sued for is transferred to the defendant in the action by a verdict and judgment for the defendant upon *non detinet* pleaded, is founded upon a total misconception. If the judgment be for the plaintiff, and the defendant pay and the plaintiff receive the assessed value, that works a transfer of the property. *Vines v. Brownrigg,* 18 N. C., 239. The maxim is, *Salutio pretii emptionis loco habetur.*

Our opinion likewise is that the judgment in the suit brought by the present *feme* plaintiff against William Martin and Samuel Johnson, which is pleaded in this action by way of estoppel, is not a bar to the recovery by the plaintiffs. A judgment is only conclusive when it is directly on the point in one suit which comes in question in another suit.

It is not even evidence of matter to be inferred only by argument from it. This doctrine, which was thus delivered by *Chief Justice De Grey* in the *Duchess of Kingston's case,* this Court had occasion to consider a few years past in *Bennett v. Holmes,* 18 N. C., 436, and upon it we felt it our duty to hold that a verdict and judgment, upon not guilty
(294) pleaded, in trespass *quare clausum fregit,* was not competent evidence of title in another action of trespass between the same parties or their privies. The same reason would seem to hold here; for the plea of *non detinet* is fully as broad and as far from drawing the controversy to the single point of title as *not guilty* in trespass. The only difference is that in the latter action there is an established special plea, *liberum tenementum,* which does precisely put the title in issue, and on which it is, therefore, necessarily determined; while in detinue there is no such plea. That the verdict was given for the defendants in the former action might have been, as stated in his Honor's reasoning, because the plaintiff had no title *or* because the defendants did not detain. Indeed, an action of detinue against two cannot be maintained except upon a joint detainer, as we have had occasion to say at the present term in *Slade v. Washburn, post,* 414. It is apparent, therefore, that it is a matter of inference only from the former judgment that the plaintiff in that action had no title to the slaves sued for therein; and, indeed, that it is a matter of remote inference only. So we are clearly of opinion that the judgment *per se* is not an estoppel to the plaintiffs in the present suit.

It is an opinion expressed, both judicially and in elementary works, that to render a record evidence it must appear from the record itself that the fact now in issue was directly in issue in the former suit and decided. If that opinion be correct, it is decisive against the estoppel in this case, for the reasons already given. But there are other authorities, and particularly those cited at the bar from a sister State (*Wood v. Jackson,* 3 Wend., 27; *same case in error,* 8 Wend., 9; *Lawrence v. Hunt,* 10 Wend., 80), that a former judgment may be pleaded with the necessary averments, or given in evidence, and sustained by parol proof, to show the grounds upon which it proceeded, where such grounds, from the form of the issue in the first suit, do not appear from the record itself. Those opposite positions present a question of great importance, which seems not to be settled. We do not propose to go into it; for it is not necessary to the determination of the case under adjudication; for, if the record can be aided by the averments and parol evidence, as held in New York, we find, according to those cases, that it can only be
(295) when from the form of the issue the record does not and could not show the grounds upon which the verdict proceeded, and when the grounds alleged are such as might legally have been given in evi-

dence under the issue and were given in evidence in such a way as to make it appear from the issue and verdict that those facts and grounds must have been necessarily and directly in question and determined, and that, upon those grounds, and no other, the verdict must have been found. It is distinctly stated that a verdict will not be an estoppel merely because the testimony in the first suit was sufficient to establish a particular fact. It must appear that was the very fact on which the verdict was given, and no other.

In the case at bar, under averments in the plea of the identity of the parties and subject-matter of the two suits, and that the question in the former suit was upon the title of the plaintiff therein to the slaves under a conveyance from Patty Martin, and that the plaintiffs in this suit claim and seek to recover the same slaves in this action, under and by force of the same title, the defendants were allowed to give parol evidence. But upon looking at it we see at once that it comes not within the doctrine of the cases under which it was offered. It appears that on the first trial Patty Martin deposed that the deed to the plaintiff was obtained from her by fraudulently reading it as a mortgage, and not as an absolute deed. This deed is for five negroes, and expressed to be made on the consideration of $590, and the plaintiff proved that she had paid $100 thereof, and in lieu of the residue was to support Mrs. Martin during life. It was further given in evidence for the defendants on that trial that, after the deed to the plaintiff, the defendant Johnson lent a sum of money to Mrs. Martin, and to secure it took a mortgage on the negroes, under which he took possession of them and detained them until the suit was brought; and the other defendant, William Martin, had never set up any title nor had any possession of the negroes. From that state of facts it is not easy to say upon what ground the verdict was found; much less does it appear that it must have been given on the ground of the defect of title in the plaintiff, and on no other. (296) It might have proceeded on the ground that the plaintiff had not given a full price for the slaves, but that the deed to her was to be treated as voluntary and void as against Johnson, a mortgagee from the vendor, continuing in possession of the negroes. If so, and that mortgage has been satisfied, the plaintiff's title would, as being good against the mortgagor, again revive; and, as we hear nothing of that mortgage on this trial, it is probable the debt has been paid and a release executed. The verdict might also have been founded on the fact that the two defendants did not *jointly* detain, as the plaintiff alleged they did, and as they proved they did not. We cannot, indeed, tell on what the jury went: possibly, upon either or all of those grounds together. It is certain that the evidence does not show, any more than the record itself did, that the verdict was given necessarily on the very fact that the deed to the plaintiff had

been fraudulently obtained by falsely reading it, or that, for any cause, the plaintiff had no title.

PER CURIAM. No error.

Cited: Burwell v. Cannaday, 48 N. C., 167; *Rogers v. Ratcliff,* 48 N. C., 226; *Yates v. Yates,* 81 N. C., 401; *Bryan v. Malloy,* 90 N. C., 513; *Person v. Roberts,* 159 N. C., 173.

(297)

ABEL GARDNER v. ROSWELL A. KING.

On a guaranty of a bond, the condition of which bond was that the obligors should at a certain time pay a certain sum of money "on receiving from the obligee a title" to certain land, the plaintiff cannot recover without showing a tender of a deed for the land to the obligors. In such a case it is not necessary to show a demand on the obligors for the money.

APPEAL from *Dick, J.,* at Spring Term, 1842, of GUILFORD.

This was an action of assumpsit, brought by the plaintiff on the undertaking of the defendant, written on a bond of John Rutter and Samuel Swartwout, which bond, with the condition and indorsement of the defendant, are in the words following, to wit:

Know all men by these presents, that e, John Rutter and Samuel Swartwout, of the city of New York, are held and firmly bound unto Abel Gardner, Sr., of Guilford County, in the State of North Carolina, in the sum of $14,080, lawful money of the United States of America, to be paid to the said Abel Gardner, Sr., his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated 14 April, 1838.

Whereas the said Abel Gardner, Sr., was appointed commissioner by a decree of the court of equity of Guilford County, made at February Term, 1837, for the sale of certain land in the said county, and whereas at the sale of said lands, in pursuance of said decree on 1 April, instant,

(298) the above bounden John Rutter became the purchaser of a certain tract containing 82 acres, with the addition of 2 acres called Gardner's Gold Mine, of Guilford County, at the price of $7,042; and whereas the said land was so sold on a credit of two years, with the condition that the purchaser should give to the commissioner security for the payment of said purchase money at the expiration of the said two years, and, also, that the title should not pass to the said purchaser until the payment of the said purchase money according to the aforesaid decree: Now the condition of this obligation is such that if the said John

Rutter, or his personal representatives or assigns shall at the expiration of two years from the said 1 April, instant, on receiving a title to said land, well and truly pay or cause to be paid to the said Abel Gardner, Sr., commissioner as aforesaid, the sum of $7,042, then this obligation to be void; otherwise, of force.

JOHN RUTTER. [SEAL]
SAMUEL SWARTWOUT. [SEAL]

Sealed and delivered in the presence of
HENRY OGDEN,
JOHN B. SICKLES.

The following indorsement appeared on this bond, to wit:

I, Roswell A. King, do hereby guarantee and bind myself and heirs to Abel Gardner, commissioner, for the payment of the amount of the within bond. 16 May, 1838.

ROSWELL A. KING.

For the plaintiff it was proved that the foregoing bond was executed in the city of New York and brought to North Carolina; that the defendant was called on to say whether or not the bond was good, and he replied that it was. He was then informed that the obligee declined to accept the said bond unless he would guarantee it. The defendant thereupon consented to do so, and in pursuance of this purpose the indorsement above mentioned was written by the plaintiff's agent and signed by the defendant. The bond so indorsed was then delivered to the obligee, and by him accepted. There was no proof of a request by Rutter or Swartwout to the defendant, to guarantee or in any way to be- (299) come bound for the payment of the bond. No proof was offered of demand by the plaintiff or any one in his name, on the obligors, Rutter and Swartwout, for payment of the bond, or of any steps having been taken to collect it, or of tender by the plaintiff or any one for him of a deed for the land mentioned in the condition of the bond. There was no proof offered of notice by the plaintiff to the defendant of the default of the obligors, although he was informed, before the bringing of this suit, that he was and would be held responsible.

Upon this evidence the defendant objected to the plaintiff's recovery: first, because the condition of the bond required that a deed for the land should have been tendered before payment could be required, and, there being no evidence of this, there was no breach; secondly, that there was no evidence of consideration for the guaranty. His Honor having intimated that a demand on the obligors and notice of their default were necessary, the plaintiff, in submission to this opinion of the court, suffered a nonsuit and appealed.

Badger for plaintiff.
Waddell and Iredell for defendant.

GASTON, J. The defendant in this case can be held responsible only to the extent of his engagement, and this cannot be construed to bind him further than that the obligors in the bond, which he guaranteed, should make payment according to its terms. These terms are explicit. The obligors are to pay "at the expiration of two years from the date, on receiving from the obligee a title to the land." The recital in the condition may properly be considered for the purpose of elucidating the meaning of the terms, where they are at all ambiguous; but there is nothing ambiguous in them. The payment of the price of the land is to be made upon receiving the title for the land, so that the receipt of title and payment of the purchase money are to be concurrent acts. Nor is there anything in the recital inconsistent with this construction. The
(300) recital, indeed, declares that the title is not to pass until the payment of the purchase money—it shall not *precede* the payment; but it does not thence follow that it may not *accompany* the payment of the purchase money.

It is to be regretted that the bond was taken in this form. In judicial sales the securities taken for the purchase money should be peremptory for the payment of the money at the appointed day. The purchaser is to rely on the court for obtaining his title, who will take care that justice is done him.

Upon this ground—that a tender of a deed was not shown—we feel ourselves bound to affirm the judgment below. The acceptance of the bond was a sufficient consideration for the defendant's guaranty, and that consideration, if it did not appear on the face of the guaranty, might be proved by parol. *Miller v. Irvine,* 18 N. C., 103. It was not necessary to prove a demand upon the obligors for the payment of the money. The most that could be required was to show that the defendant had notice of a default on their part to make payment, as stipulated, before suit brought against him.

PER CURIAM. Affirmed.

Cited: Williams v. Springs, 29 N. C., 386.

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(301)

CHARLES W. MIXON v. JAMES COFFIELD.

Where a guardian rented land and took no bond or other security to himself for the rent, and before the rent became due the ward came of age and conveyed the land in fee to the lessee: *Held,* that the rent, being incidental to the reversion, was extinguished by this conveyance of the reversion to the lessee.

APPEAL from *Manly, J.,* at Spring Term, 1842, of CHOWAN.

This was an action of debt, originally commenced before a magistrate,

brought to recover the rent of a tract of land. The plaintiff proved that on 1 January, 1841, he, as the guardian of Edward and Margaret Jones, rented by parol to the defendant a tract of land for that year for the sum of $60, taking no note, bond, or covenant for the payment thereof; and that the defendant entered and took possession thereof, and occupied the premises for that year. The defendant then proved that on 19 July, 1841, and before the rent or any part thereof fell due, the said Edward and Margaret Jones, having arrived at the age of 21 years, by deed conveyed the land, so rented, to the defendant in fee simple. The plaintiff then offered to show that he had accounted with and paid to the said Edward and Margaret Jones the rent of the said land for 1841, before the commencement of this suit. His Honor refused to receive the testimony as to the accounting for and paying the rent aforesaid to the said Edward and Margaret Jones, but held, and so charged the jury, that the facts proved by the defendant constituted no defense to the action for rent. A verdict was returned for the plaintiff for $60, the entire rent for 1841. A new trial having been moved for and refused, and judgment rendered pursuant to the verdict, the defendant appealed to the Supreme Court.

A. Moore and Iredell for plaintiff.
No counsel for defendant.

(302)

DANIEL, J. The judge was of opinion that the facts shown by the defendant constituted no defense to this action. We are of a different opinion. There is no covenant under seal that the defendant will pay the rent to the plaintiff, so as to make the contract entirely personal. The guardian has power to rent the land of his wards, provided always that he shall not let out any such lands of his wards for a longer term than until the orphans be of age, or in any other manner than by lease in writing, with proper covenants. Rev. Stat., ch. 54, sec. 15. Without stopping to inquire whether the act is only directory to the guardian, we are of opinion that if in this case the parol lease was good, the reversion in the land was in the wards, and the accruing rent was incidental to the reversion. Co. Lit., 143b. When, therefore, the wards came of age, and conveyed the land to the lessee, this conveyance united, in the same person and in the same right, the greater with the less estate, when the estate for years was drowned in the inheritance and thereby perpetually extinguished. The action of debt for rent is founded on privity of contract, which is said to be annexed to the person in respect of the estate, and so follows the estate. As soon, therefore, as the privity of estate is transferred, the remedy by debt is transferred also, and passes to the grantee of the reversion. Comyn on L. and T., 422, and the authorities there cited. The reversion, the rent, and the remedy for the rent were, by the

said conveyance, all transferred to the defendant; and, therefore, necessarily the rent was extinguished. There must be a

PER CURIAM. New trial.

Cited: Wilcoxon v. Donelly, 90 N. C., 247; *Holly v. Holly,* 94 N. C., 674.

(303)

E. D. LEWIS AND OTHERS v. JOHN BRADLEY.

1. In an action for breach of an agreement which is in the nature of a guaranty, if the circumstance which is alleged as the foundation of the defendant's liability is more properly within the knowledge and privity of the plaintiff than the defendant, then notice thereof should be averred in the declaration and proved on the trial.
2. But where it does not lie more properly within the knowledge of one of the parties than the other, notice is not requisite.

APPEAL from *Bailey, J.,* at Spring Term, 1842, of BURKE.

This was an action of covenant, brought upon the following instrument, to wit:

I, John Bradley, do hereby agree to bind myself to make all the bad debts created at the store in Buncombe County, North Carolina, at a place called Limestone, trading under the firm of Bradley, Lewis & McKesson, to wit, John Bradley, George W. Bradley, Elias D. Lewis, and William F. McKesson, and as said Lewis & McKesson has instituted suit, we have this day settled all matters on the following conditions: That I, John Bradley, do hereby bind myself, heirs and assigns, to see Lewis & McKesson paid for all notes and accounts created at the concern, so soon as they are handed over to an officer and he returns the same insolvent or that he cannot collect them; and it is further understood that Lewis & McKesson pay all the costs of said suit, returnable to Burke Superior Court, against said Bradley. Entered into this 24 November, 1837.

Witness my hand and seal. JOHN BRADLEY. [SEAL]

(304) The evidence was that the books of accounts and notes were handed over to McKesson; that he drew off the accounts and handed them and the notes to a constable for collection; that many of them could not be collected, and several of the debtors on the books were totally insolvent. The firm was composed of Lewis, McKesson, John Bradley, the defendant, and George W. Bradley; and the warrants were brought in the names of all. After the plaintiffs had closed their evidence, the defendant objected that they could not recover, for the reason that the undertaking was a collateral one, and that no notice had been

given to him, before suit brought, that the debtors could not pay or were insolvent. The plaintiffs contended that notice was not necessary, because the defendant knew as much about the situation of the debtors as they did; that the debts were contracted with him, and all they had to show was that the debtors were insolvent or that the officer had returned (as he had done) that the notes and accounts could not be collected. A verdict was taken by consent for the plaintiffs, subject to be set aside and a nonsuit entered if the court should be of opinion that notice was necessary. And the court, after hearing argument, being of that opinion, the verdict was set aside and judgment of nonsuit entered, from which the plaintiffs appealed.

No counsel on either side.

DANIEL, J. The defendant bound himself to pay all notes and accounts created at the firm, so soon as they were handed over to an officer and he returned the same insolvent or that he could not collect them. The papers were then placed in the hands of one of the plaintiffs. The officer was not named in the covenant; the plaintiffs had a right to select what officer they pleased, and it seems they did so. Many of the accounts could not be collected, the debtors being insolvent. The constable had sued the debtors in the name of the partners of the firm, the defendant being one of them. The judge was of opinion that the undertaking of the defendant was a collateral one; and, as no notice had been given him, before action brought, that the debtors would not pay (305) or were insolvent, that the plaintiffs should be nonsuited. It was insisted on behalf of the plaintiffs that the return of the constable that the debtors were insolvent was a fact as well known to the defendant as it was to the plaintiffs, and that he was bound in law to take notice of it. The rule of law in this respect appears to be that wherever the circumstance which is alleged as the foundation of the defendant's liability is more properly within the knowledge and privity of the plaintiff than the defendant, then notice thereof should be averred in the declaration and proved on the trial. *Herrings' case,* Cro. Ja., 423; 2 Saund., 62; *Rex v. Holland,* 5 Term, 62; *Spooner v. Baxter,* 16 Pick., 419. But where it does not lie more properly within the knowledge of one of the parties than the other, notice is not requisite; as if a man contract to do a thing on the performance of an act by a stranger, or to give for a commodity so much as a third person *named,* notice need not be averred, for it is in the knowledge of the defendant as much as in that of the plaintiffs, and he ought so to take notice at his peril. 2 Saund., 62a; 1 Chitty Plead., 328; 1 Saund., 117, note 2. In this case the plaintiffs were to place the accounts and notes in the hands of an officer for collection; the particular officer is not named in the covenant; he is to be selected by the

plaintiffs; the plaintiffs are, of course, to use reasonable diligence in establishing the claims before the proper courts and causing them to be made available. Who the officer was, and what were the acts and doings of that officer, were facts, we think, more properly within the knowledge and privity of the plaintiffs than of the defendant. Notice thereof should have been averred and proved, according to the first class of authorities cited above. The covenant of the defendant was, as it seems to us, in the nature of a guaranty of the notes and accounts; and it has been repeatedly decided in this State that before a person can be made liable upon his guaranty, he must have reasonable notice of the failure to obtain the debt, after reasonable diligence had been used by the guarantee. *Green v. Ricks,* 14 N. C., 362; *Adcock v. Fleming,* 19
(306) N. C., 470. The fact of the warrants having been brought in the name of the partners does not alter the case, because the plaintiffs and their officers were the only actors in prosecuting the said demands. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Weatherly v. Miller, 47 N. C., 167.

STATE TO THE USE OF EVANS, HORNE & CO. v. HENRY LIGHTFOOT ET AL.

1. The county court has no jurisdiction to appoint a constable, except in the case of a vacancy in the district.
2. The "county town" which, under the statute (Rev. St., ch. 24) relating to constables, is entitled to an additional constable, means the town which is the seat of justice for the county.
3. Where claims put into a constable's hands for collection belong to a copartnership, all the members of the firm, being in law the "persons injured," must be relators in an action for a breach of the constable's bond in not collecting such claims, notwithstanding any private agreement or arrangement among the partners as to the beneficial interest in the proceeds of the claims.

APPEAL from *Pearson, J.,* at Spring Term, 1841, of CHATHAM.

This was an action of debt on the following bond, to wit:

STATE OF NORTH CAROLINA, } *ss.*
CHATHAM COUNTY. }

Know all men by these presents, that we, Henry Lightfoot, Henry A. London, James Taylor, and Abraham G. Keen, all of the county aforesaid, are held and firmly bound unto the State of North Carolina
(307) in the just and full sum of $4,000, to be paid to the State aforesaid, to which payment well and truly to be made we bind our-

selves and heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 10 May, 1837.

The condition of the above obligation is such that whereas the above bounden Henry Lightfoot has been elected by the town of Haywood, constable for the town aforesaid: Now, in case the said Henry Lightfoot doth well and truly and faithfully discharge his duty as constable in said county by executing and making due returns of all warrants, precepts and processes which shall come into his hands by virtue of his office, and by 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, unto the persons to whom the same may be due, and in all things discharge his duty in the said office of constable agreeably to law during his continuance in said office, then the above obligation to be void; otherwise, to remain in full force and virtue.

H. LIGHTFOOT, [SEAL]
HENRY A. LONDON, [SEAL]
JAMES TAYLOR, [SEAL]
A. G. KEEN. [SEAL]

The plaintiff assigned two breaches of the said bond: first, failure to collect; secondly, the collection of $800 by Lightfoot, and his failure upon demand to pay over to the relators, which last breach was proved by the plaintiff. The pleas were general issue and payment. The defendants, under the first plea, offered in evidence the records of the court of pleas and quarter sessions of Chatham County, at February and May Terms, 1837, from the former of which it appeared that one Thomas J. Utley had been elected in January, 1837, constable for Captain James Winnock's District, in which the town of Haywood was situate, and at the said February Sessions entered into the usual bond; and by the record of May Term, 1837, it appeared that the defendant Lightfoot was appointed by the court constable for the town of Haywood, and an entry made on the minute docket in the following words, to (308) wit: "Henry Lightfoot was elected by the court constable for the town of Haywood, and entered into bond in the sum of $4,000 with Henry A. London, James Taylor, and Abraham G. Keen, his securities, and was qualified." Thereupon Lightfoot, together with the other defendants, executed the bond on which this action was brought, and went on to act as constable. The defendants further proved that Henry A. London, one of the defendants, at the time of executing said bond, and also at the time the receipts were given to the relators by Lightfoot for the claims he received to collect, was a member of the firm of "Evans, Horne & Co.," although it appeared that, before the breaches, he had

ceased to be so, the firm having dissolved, and the other members having executed to him a release of all liability.

As to the first objection made by the defendants, that the appointment of Lightfoot and the bonds sued on were utterly void, his Honor instructed the jury that the county court had the power of appointment. Whether their construction of the act of Assembly was right or wrong could not be inquired of in this collateral manner. That court had jurisdiction over the subject-matter, and it was not for these defendants in this action to deny the validity of the bond upon the ground that the court erred in making the appointment. As to the second objection, that London, one of the defendants, was also one of the firm of Evans, Horne & Co., and was necessarily one of the relators, and so both plaintiff and defendant, the court charged that the objection could not be sustained; for, to say nothing of the fact that the State was the legal plaintiff in this case, at the time of the breaches assigned London had ceased to be a member of the firm, and was not one of the "parties injured," at whose instance the State had brought the action.

A verdict for the plaintiff was rendered, and a new trial being refused and judgment given according to the verdict, the defendants appealed.

W. H. Haywood, C. Manly, John H. Haughton, and Badger for plaintiffs.

(309) *Waddell and G. W. Haywood for defendants.*

GASTON, J. The instrument declared on in this case was executed, or purports to have been executed, in May, 1837, before our Revised Statutes went into operation; but chapter 24, which we have had occasion to consider and explain in *S. v. Wall, ante,* 267, is but a reënactment, in a condensed form, of the statutory provisions which were in force in January, 1837, when the Revised Statutes were ratified. The provisions referred to in the opinion delivered in that case, that there shall be but one constable in each district, except in that containing the county town, that the constables in each district shall be elected by the people, and the constables so elected are to qualify and give bonds at the succeeding county court, and that on failure to hold elections in any district, or of the person elected to qualify and give bond, it shall be proper for the court which shall next happen, seven justices being present, to supply the vacancy, are all taken, *totidem verbis,* from the act of 1833, ch. 5. In the case before us there was not a failure to elect a constable in the district in question. Thomas Utley had been elected in that district, and given the necessary bond and taken the oaths of office. But while the office was thus full, the county court of Chatham undertook to appoint Henry Lightfoot a constable for the town of Haywood, within that district. This act, we are obliged to say, was wholly unauthorized, the ap-

pointment null, and the instrument executed as an official bond accepted by persons who were not agents of the State for that purpose. Could we believe with his Honor (and we would fain so believe if we could) that the court acted within its jurisdiction, but erred in its judgment, we should certainly acquiesce also in his conclusion. But the *jurisdiction* is in itself limited and precise to fill a vacancy. To make an appointment where there is no vacancy is to usurp a power not granted. It cannot be pretended that Haywood was "a county town," which means the town which is the seat of justice for the county; and, therefore, we need not examine whether, where the people have chosen to elect but one constable for the district including the county town, the (310) court may, under a liberal construction of this very defective statute, appoint another constable for that district. Entertaining a clear opinion that the act done by the county court transcended its jurisdiction, we are led by the principles and reasoning which we have set forth in our opinion in the case already mentioned to hold that the delivery of the instrument declared on was not proved.

It is not necessary to express our opinion upon the other question supposed to be involved in the case. But on that also we take a different view from the one expressed by his Honor. The object of these official bonds is to afford a cumulative remedy to that which the party injured had, independently of the bond, against the officer. The claims put into the hands of the constable for collection were received from the firm of Evans, Horne & Co., and with the persons constituting that firm he contracted to account therefor. When he violated this engagement, those with whom he contracted were, in contemplation of law, the persons injured; and whatever arrangements might have been made between themselves as to the beneficial interest in the proceeds of these claims, they were the persons authorized to sue because of that injury.

PER CURIAM. New trial.

Cited: S. v. Farmer, 32 N. C., 48; *Governor v. Deaver,* 25 N. C., 58; *S. v. Cordon,* 30 N. C., 182; *S. v. Corpening,* 32 N. C., 61; *Sanders v. Bean,* 44 N. C., 318; *Garrow v. Maxwell,* 51 N. C., 530; *Jones v. Brown,* 67 N. C., 479.

(311)

OZIAS STAPLEFORD v. HIRAM BRINSON.

A savanna, which is a natural open meadow, not uncommon in the lower part of the State, is a natural boundary, in the sense in which that term is used in the construction of deeds.

APPEAL from *Battle, J.,* at Spring Term, 1842, of CRAVEN.

This was an action of trespass *quare clausum fregit,* on the trial of

which it became necessary to ascertain the location of a patent granted to one Carson Brinson in 1745, as both the grants under which the plaintiff and defendant respectively claimed called for one of the lines and corners of that patent. The first and second corners of that patent were admitted. From the second corner the patent called for a certain course and distance "to a pine in the bottom of a savanna," which the defendant contended was at C., but which the plaintiff alleged was at G. The witnesses who were examined to this point stated that C. was about 50 or 60 yards from the savanna, but that G. was in the savanna and near one edge of it. Some of the witnesses stated that the land about C. might be called savanna land, though it had a growth of pines upon it, it being in other respects of the same character with the open savanna. One witness, an old man, testified that the open savannas frequently changed in some degree their location by growing up in timber on one edge, while they might encroach upon the adjoining pocosin on another; but he did not know that it was the fact in relation to the savanna in question. The defendant contended that the call on the Brinson patent for the savanna was too indefinite to be considered as a call for a natural boundary, and that, therefore, it must be controlled by the course and distance, which terminated at C., whereas neither the course nor distance pointed
(312) to G. as the corner; and if the call was a natural boundary, it was a matter of construction for the court, and the jury should be instructed accordingly. The court instructed the jury *what* was the *terminus* of a call in a patent was a matter of law to be decided by the court; that *where* was such *terminus* was a matter of fact to be found by the jury; that a savanna was a natural boundary, which controlled the course and distance, if the jury could ascertain that it had an existence, and find where it was; that if, in the course of time, the savanna had changed its location in some degree by growing up in timber in one part and becoming open in another, that circumstance would not alter the original boundaries of the patent, and that if the evidence satisfied them that in 1745, when the patent was taken out, there was a savanna at C., and that was then made a corner, they should so find; but if from the testimony they believed the line was then extended to G., they should fix upon that as the corner, and in that event their verdict should be for the plaintiff; otherwise, for the defendant. A verdict was returned for the plaintiff, and a motion for a new trial on the ground of misdirection having been overruled, and judgment rendered for the plaintiff, the defendant appealed.

J. H. Bryan for plaintiff.

J. W. Bryan and Iredell for defendant.

RUFFIN, C. J. Although a savanna may not be as well defined as some other natural objects, yet it cannot be seriously questioned that it is a

natural boundary, in the sense in which that term is used in the construction of deeds. It is a natural open meadow, not uncommon in the lower part of this State. It is not, indeed, always absolutely in the same state and extent. Yet from the constitution of the soil, or its humidity, or other natural quality, not well understood, there takes place in savannas but little change, and thus they may be considered nearly permanent, unless interfered with by the cultivator, and that seldom happens as yet, we believe. We think, therefore, that it was properly held that the line was to go to the savanna, notwithstanding the distance to the contrary; and that it could not stop at C., unless that was in the savanna. Whether it was or not was a point for the jury, and was left to (313) them.

The court further instructed the jury, "that should the evidence satisfy them that in 1745 it was savanna at C., *and that was then made a corner, they should so find,*" that is, find for the defendant, who contended the corner was at C. according to the course and distance and the state of the savanna when the land was taken up. It is said that that instruction was erroneous because the circumstances just mentioned fix that to be the corner, whether the party *actually made* a corner there originally or not. There is certainly an inaccuracy in the language used, and for the reason assigned by the counsel; and, at first, we thought it might have misled the jury. But upon further consideration we think it sufficiently plain that it did not. It seems that each of the parties insisted on a particular point as the corner, and it does not appear, indeed, how it would affect the place of the trespass, if any other point besides C. and G. should be the corner. Nor is it material to the defendant that if C. was not in the savanna he was entitled to pursue his course beyond C. until he reached the savanna, provided the court, in summing up, gave him the benefit of the corner being supposed to be anywhere else he chose to place it, in case the plaintiff did not locate it at G. to the satisfaction of the jury. Such, however, was the course of the court on this trial. It would, indeed, have been more satisfactory if the evidence had been set out upon which course and distance were disregarded, and G., one point in the savanna, taken in preference to C., another point therein, and, indeed, to all other points therein; because then it could have been seen affirmatively that justice had been done. There might, for example, have been a marked line of the proper age, pointing to G., or evidence of its locality in "the *bottom* of the savanna," on which the jury might properly have proceeded. If there was no such proof, it is the fault of the defendant that he did not make his exception fuller; for, as we have often said, we can disturb a verdict only when error is made to appear. We must suppose there was some evidence on which it (314) might be left to the jury to say that G. was the corner actually

made, since no exception is taken to its having been so left without any evidence. Then, it is to be noticed in what terms the court submitted that question to the jury and informed them of the effect of their being of opinion that G. was or was not, in fact, the corner made for the Brinson patent. They are these: "But if, from the testimony, they believed the line was *then extended* to G., they should fix upon that as the corner; and in *that event* their verdict should be for the plaintiff; *otherwise, for the defendant.*" Whatever uncertainty might have arisen upon the first part of the instruction, to the prejudice of the defendant, is thus taken entirely out of the way; for it was distinctly laid down to the jury that the plaintiff failed in his suit if he failed to establish G. as the corner made upon the original survey. It was not, therefore, material to the defendant to establish C., on his part; since he was declared to be entitled to the verdict if that or any other point, saving and excepting G. only, was the corner. We must, therefore, take it that G. was proved to be the corner; and that, for that reason, and not merely that the defendant did not show that the corner *was made* at C., the verdict was given for the plaintiff. Consequently, the judgment must be

PER CURIAM. Affirmed.

Cited: Waters v. Simmons, 52 N. C., 542; *Brown v. House,* 118 N. C., 881; *Rowe v. Lumber Co.,* 128 N. C., 304.

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(315)

LUCINDA E. WILKERSON BY HER NEXT FRIEND, v. JULIUS S. BRACKEN.

1. When an estate comes to a person through a series of descents or settlements, and that person dies without issue, it results back to those of his collateral relations who would be heirs of the ancestor from whom it *originally* descended or by whom it was *originally* settled.
2. Therefore, where B., a daughter, took by descent from A., her father, and C., the daughter of B., took by descent from C., and then died, intestate and without issue, leaving uncles and aunts, who were not of the blood of A., but great uncles and aunts, who were brothers and sisters of A.: *Held,* that the land descended to the latter.

APPEAL from *Dick, J.,* at Spring Term, 1842, of ORANGE.

This was an action on the case in the nature of an action of waste, brought by the plaintiff, claiming to be tenant in fee in remainder, after the life estate of the defendant, in certain lands lying in the county of Orange; and the parties agreed to submit, and did submit, the same to the judgment of the court upon the following facts stated as a case agreed, to wit: John Bracken, in the year ...., purchased the said lands, and in the year .... departed this life, seized of the same in fee,

having first made his last will and testament and thereby devised the same to Nancy, his widow, and Julia Ann, his only child and heir at law, between them equally to be divided; and the same were accordingly divided between the widow and daughter in moieties. The widow, who is still living, intermarried with one James Wilkerson, and by him had issue, a daughter, who is the present plaintiff. The said Julia Ann, after the death of her father, intermarried with the defendant, and by him had issue Anna Jane, and died, leaving the said Anna (316) Jane, as well as the defendant, her surviving. The said Anna Jane departed this life in 1840, an infant of tender years. The defendant, being in possession as tenant for life of said moiety allotted to the said Julia Ann of the premises, in August, 1841, cut down and disposed of three timber trees growing upon the premises, to recover for which injury to the inheritance this action is brought. The said John Bracken left him surviving a brother and sister, who are now in full life, and are the next collateral relations of the said Anna Jane, of the blood of the said John Bracken; and the plaintiff is the next collateral relation of the said Anna Jane, of the blood of the said Julia Ann, her mother, but are not of the blood of the said John Bracken.

And if the court shall be of opinion for the plaintiff, judgment to be entered for sixpence and costs; otherwise, judgment to be for the defendant.

His Honor *pro forma* rendered judgment for the defendant, from which the plaintiff appealed.

No counsel for plaintiff.
Badger and Waddell for defendant.

RUFFIN, C. J. As the devise from John Bracken to his daughter did not change the nature and the quality of the estate which she would have taken had he died intestate, she took by descent and not by devise, according to the well known preference of the common law for the title of descent. But it is, in truth, not material to consider that point, inasmuch as the fourth canon of descent puts a devise between such parties on the same footing with a descent.

We have, then, the case of a purchase by John Bracken; a descent from him to his daughter, Julia Ann; and then a second descent from her to her daughter, Anna Jane, the *propositus*. The question is, Who, *quoad* this land, is the heir at law of Anna Jane; whether the present plaintiff, who is the maternal half-sister of the mother of the *propositus;* or the brother and sister of John Bracken, the maternal grandfather of the *propositus,* and by whom the estate was brought into (317) the family?

The solution of the question mainly depends on the fourth canon of descents, which more particularly embraces this case. It provides, "that on failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise, or settlement from an ancestor to whom the person thus advanced would, in the event of such ancestor's death, have been heir, or one of the heirs, the inheritance shall descend to the next collateral relations of the person last seized who were of the blood of such ancestors, subject to the two preceding rules." The argument for the plaintiff is that, as the descent which the canon enacts is that *from* the propositus *immediately*, so that which gives the estate its quality as an estate descended is the descent to the propositus *immediately*, and, therefore, that in looking for the heir of Anna Jane we can go no farther back than her mother, Julia Ann, from whom the descent was the immediate one to the propositus.

The Court does not think that the proper construction of the act. We do not think its language ties down the construction so strictly; and we know that it is not in accordance with judicial interpretation hitherto received, and is directly opposed to the recorded purpose of the Legislature.

At common law every inheritance was either *antiquum* or *ut antiquum*, and, in assigning an heir to the person last seized, we had to look farther than merely to find the nearest relation of that person, and had to discover who was his nearest relation of the blood of the first, or supposed first, purchaser of the estate. In respect to land purchased by a propositus, that rule is abrogated here by the act of 1808; and it descends indiscriminately to all his relations in equal degree of either side. But in respect to lands actually descended—and those placed by the act on the same footing—the rule of the common law is, at least in part, preserved and reënacted. The principle of the enactment is that in the descent of an estate which was derived by descent, respect shall be had to that mode of its derivation; and the heir must be of the blood of
(318) the person from whom it was thus derived. This the plaintiff must admit; for her claim is founded on it, as being the nearest relation of the propositus on the side of her mother, from whom the land descended to Anna Jane. But it is said it stops in its application at the descent to the propositus, and does not go back to a previous descent to the mother herself. Now that, it seems to us, is to make the principle mentioned inconsistent with itself. As has been observed, this principle is that of the common law to a certain extent, and, therefore, as far as it goes it is to be applied to cases arising under the statute, as it would be at common law. An estate derived by descent is, therefore, to go in a course of descent to the blood of him or them from whom it was so derived, unless otherwise provided in other parts of the act. By a proviso

to section 6, for example, parents are, in certain cases, let in for life. But that does not impugn the general rule declared, that the heir must be of the blood of the ancestor from whom the land descended; and we are only further to inquire, what ancestor is the one meant from whom the inheritance was thus transmitted. In pursuing that inquiry, it is to be borne in mind that the Legislature was not essaying to provide in detail for every possible case; but was providing general rules or canons, founded on *certain principles,* by the application of which to cases as they might arise the ambiguity would be avoided which almost inevitably attends the attempt to regulate so extensive a subject by descending to every particular in detail. *The principle,* in respect to that portion of the law of descents now under consideration, we have just seen to be that the blood of an ancestor from whom the land descended must be in the person who claims to inherit that land. It is true, the present plaintiff is of the blood of the person from whom the estate *last* descended, when it came to the propositus, being her mother's maternal sister; and it may be admitted that this would be a case within the words of the act if it were the apparent legislative intention to adopt a principle to which the words in that restricted sense would be appropriate. But why adopt that restricted sense, or, rather, how can it be done? The case specified in the act is, "where an inheritance has been transmitted by de- (319) scent from an ancestor." If it be asked *what* ancestor, the act does not answer, *The last* from whom it descended to the propositus. On the contrary, it leaves it more at large: a "descent from *an* ancestor," and may, therefore, mean any and every descent from an ancestor, or a succession of ancestors, through whom the inheritance has been transmitted. And if it so mean, then it follows that "such ancestor," in the latter part of the canon, must also embrace every ancestor from whom the inheritance has come mediately or immediately to the propositus; and so we should have to go up to the first, instead of the last, ancestor from whom the descent was cast. The utmost extent to which the plaintiff's argument can reach is that the language of the canon is not as explicit as it might, perhaps, have been. But whatever ambiguity there may be in it is very slight, and probably arises from the brevity occasioned by a reluctance to mar the act by the cumbrous tautology of repeating, after the words "such ancestor," these others, "from whom it was transmitted by descent, or derived by gift or devise or settlement, to the person so last seized, or to any other person from whom it was, in like manner, transmitted to the said person so last seized." Whatever may be deemed equivocal in the language by hypercriticism is, however, rendered sufficiently clear by the plain meaning of the Legislature as seen in the principle on which the canon rests. When it is once declared that the blood of a person from whom an estate is descended is to regu-

late the future succession thereto, the law and good sense must concur in requiring us to trace the line back to him from whom it originally descended; provided, the line of descent or advancements has been unbroken. It would be strange if this were not so; that is, if we are to respect blood at all. From the rule of the common law, that inheritances should descend to the collateral relations of the person last seized, being of the blood of the first purchaser, was deduced, as a corollary, this maxim: "That he who would have been heir to the father" (or mother, as the case may be) "of the deceased shall also be heir to the son" (or daughter). This is stated by Mr. Blackstone, 2 Com., 223, to hold (320) universally in that law, except in the case of a brother or sister of the half-blood, which depends on special grounds. The same maxim must, in the nature of things, attach to our case and every other which respects the line through which the inheritance traveled. Consanguinity once established as the test of the right to inherit, must be followed throughout. If the present defendant were to marry again, and have issue, it is certain that issue could not inherit this land, being neither of the blood of the mother nor maternal grandfather of the propositus—that is, while any of that blood can be found. In the like manner, if the mother of the propositus had died without issue this inheritance would not have gone to the present plaintiff, her maternal half-sister, but would have gone to her paternal uncle and aunt. Now, it would seem most extraordinary that while the paternal half-blood of the propositus is excluded, yet the mother's half-sister, *ex parte materna,* should be admitted to inherit from the propositus, though she could not inherit from the mother herself, because this inheritance came to the mother *ex parte paterna.* Why should the law exclude the deceased's paternal half-blood, and not exclude all other half-blood not being of that side whence the land comes? The incongruity thus apparent in the doctrine contended for proves that it is contrary to the intention of the act. It follows, we think, from the principle on which the Legislature went, as collected from the act and also from the language used, that when an estate comes to a person through a series of descents or settlements, and that person dies without issue, it results back to those of his collateral relations who would be heirs of the ancestor from whom it *originally* descended or by whom it was *originally* settled.

Although our attention has not been particularly directed to this point in any previous case, yet it has not been entirely unperceived. The general impression made, at least, on my mind, from reading the act, without any special reference to this question, cannot fail to be seen in the opinion delivered in *Burgwyn v. Devereux,* 23 N. C., 583. I took it for granted that an inheritance which has descended, no matter *when,* and I might have added, no matter *from whom,* or *how many,* shall descend

to the blood of the ancestor from whom it did descend: which, of course, includes the ancestor from whom it first descended. (321)

But the impression on *Judge Henderson's* mind is yet more plainly expressed in *Bell v. Dozier,* 8 N. C., 333. He says the same principle which excludes a maternal half-brother from an inheritance *ex parte paterna* would exclude all other half-blood not of the blood of the first purchaser; for which reason he thought, indeed, the words "such ancestor" should be struck out of the act, and "first purchaser" inserted in their place. In the construction I entirely agree, though not in the necessity for the proposed change of phraseology. The term "purchaser" was, no doubt, purposely omitted. The canon provides for the descent not only of descended estates, but also of certain purchased estates; and to all of them, as forming one class, the phrase "first purchaser" could not, without some confusion, be applied. But when the descent is to be in a particular family, we necessarily go back to the person who brought the estate into the family, that is, the first purchaser, though he be not so described. But besides the language which fell from *Judge Henderson* in *Bell v. Dozier,* the judgment itself in that case is an authority in point in this case, though the question seems not to have been there discussed. Peter Barnard purchased the land, and upon his death it descended to his two children, Elizabeth and Jesse; and upon the subsequent death of the former the latter took her half *as her heir.* Yet, when Jesse afterwards died, it was held that the half which descended from her father to Elizabeth, and from her to Jesse, as well as Jesse's original half, descended to the brothers and sisters of the father, Peter, and not to a maternal half-sister of Elizabeth and Jesse. Now, the principle of the decision as to Elizabeth's half, of which there were two descents between the father and Jesse, is precisely apposite to the present case, in which the plaintiff claims as the maternal half-sister of the person from whom the immediate descent was to the propositus, Anna Jane. If anything further were necessary to open to us the sense of the act, we have it in the plain declaration of the purpose of the Legislature, as set forth in the report of the committee which considered this important subject and brought in the bill as it passed. In that document it (322) is stated, amongst other things, "that it was difficult" (under the previous acts) "to understand the meaning of the Legislature on several points," of which one was, "whether it was designed *to retain* a preference in favor of relations *of the blood of the purchasing ancestor.*" Then, afterwards, it proceeds to say, amongst other things, *"that the fourth rule has for its principal object the securing to the family of the man by whose industry the property was acquired the enjoyment of such property in preference to those who have no consanguinity with him."*

The foregoing considerations produce a very clear opinion that (323)

the plaintiff is not the heir of Anna Jane Bracken; and, therefore, has not the reversion in fee of the land, so as to enable her to maintain this action for the waste committed.

PER CURIAM. Affirmed.

Cited: Sawyer v. Sawyer, 28 N. C., 415; *Gillespie v. Foy,* 40 N. C., 281; *Poisson v. Pettaway,* 159 N. C., 652.

NOTE.—In accordance with the suggestion of the *Chief Justice,* and as the report referred to in this opinion has been more than once introduced in discussion before the Supreme Court, the Reporter has thought it not irrelevant to present the report in this note, more especially as the bill reported by the committee (as he has understood) was adopted without any amendment, and as the law constitutes a prominent feature in our legislation. The following is an official copy of the report referred to:

(*Journal of the House of Commons, Friday,* 8 *December,* 1808.)

MR. GASTON, from the committee who were directed to inquire into the expediency of amending the law of descents, reported that, having assiduously examined into the important subject referred to them, they find that the various acts which have been passed to regulate the course of descents are so replete with ambiguities that it is difficult to understand the true meaning of the Legislature; whether it was designed to retain a preference in favor of relations of the blood of the purchasing ancestor; whether kindred on the part of the father were to have a prior claim to those of the mother; whether the provision in favor of one half-blood over the other did not apply to the whole blood also; whether the abolition of the distinction between males and females was confined to individuals or extended to stocks; and whether the provision in favor of parents comprehended the case of lands inherited by the intestate, are all questions, on which the most intelligent may differ, and which must occasion the most extensive litigation. Your committee, conceiving that certainty in the law of descents is of the utmost importance and of universal consequence, have been anxious to discover whence this ambiguity in the existing law has arisen, that, in endeavoring to remove it, they might avoid the cause by which it has been occasioned. They believe that all these errors have arisen from the Legislature having undertaken to define, with minuteness, the cases which might occur, and having undertaken to make provision for each of them, instead of establishing certain plain and general principles which might be susceptible of application in every instance. Your committee, strongly impressed with this belief, have conceived it their duty to attempt the framing of rules embracing such principles, and in making such rules they have been studious to conform, as nearly as might be, to the existing law. The three first rules, it will be perceived, do not introduce any innovation in those which now prevail, and would be altogether unnecessary were it not for the advantage which is derived from bringing together all the rules upon the subject. The fourth rule has for its principal object the securing to the family of the man by whose industry the property was acquired the enjoyment of such property, in preference to those who have no consanguinity with him. The fifth rule is designed to embrace those cases in which the intestate was himself the first purchaser and in which reason dictates that his nearest relations should succeed to his estate, whether on the side of his father or mother. The sixth rule is but a simple affirmation of principles now existing. The proviso is founded upon that sentiment of natural affection which has received the sanction of the Legislature in two acts of 1784. The committee have deemed it advisable, to avoid all uncertainty, that the proviso should embrace every case in which the collateral kindred are more remote than the issue of brother and sister, and to prevent the inconvenience which might

result from interrupting the general course of descent, they have proposed that the provision should be for life only. [Note by Reporter: This refers to the proviso for parents.] Your committee do, therefore, recommend that the bill accompanying this report, entitled "A bill to regulate descents," be put on its passage and enacted into a law. [See this act in the first six sections of Rev. Stat., ch. 38.]

(324)

DEMPSEY R. GARRIS v. THE PORTSMOUTH AND ROANOKE RAILROAD COMPANY.

1. If, in the prosecution of a lawful employment a pure accident occurs, no action can be supported for an injury arising therefrom. It is otherwise where any blame or carelessness is attributable.
2. Where the engine running on the railroad of defendant killed a steer under such circumstances as showed that the killing was accidental, *Held*, that the company were not responsible for the loss.
3. The statute (Rev. Stat., ch. 17, sec. 7) giving jurisdiction to a magistrate in the case of stock killed on a railroad does not alter the rules of the common law in relation to such injuries.

APPEAL from *Dick, J.*, at Fall Term, 1841, of NORTHAMPTON.

This action commenced by a warrant under the act of Assembly (Rev. Stat., ch. 17, sec. 7) to recover damages for killing the plaintiff's steer, and was brought up by successive appeals to the Superior Court. The killing of the steer by the defendants' engine, while in their employment on their railroad, was admitted. It was proved by one Culpepper, a witness for the defendants, that on the night the injury occurred to a steer (which this deponent afterwards understood was the steer of the plaintiff) he was in charge as engineer of one of the engines belonging to the Portsmouth and Roanoke Railroad Company. It left Weldon about 8 o'clock at night, bound to Portsmouth. The night was extremely dark and very rainy, with occasional lightning. When about 2½ miles from Gary's, by the aid of a flash of lightning he discovered some cattle on the side of the road, and, being apprehensive that they might attempt to cross the road, he immediately reversed the steam and ordered a boy, who was with him on the engine, to get upon the brake, which he did forthwith. In an instant it was discovered that there was a steer, (325) or some animal of that kind, on the track, and in the attitude of rising. He was discovered too late, however, to stop the engine, and, as it passed over him, the engine was thrown off the road and the steer killed. This witness deposed that every effort was used to prevent any accident whatever, but that, owing to the darkness of the night and the position of the steer, it was impossible to see him in time to prevent his being run over; that the injury was purely accidental, and without any fault on the part of any of the agents of the company.

The judge instructed the jury that the killing of the steer being admitted, the plaintiff was entitled to recover, notwithstanding the testimony of Culpepper; for, taking all he said to be true, yet it did not deprive the plaintiff of his right of recovery. The jury found a verdict for the plaintiff, and a new trial having been moved for and refused, and judgment rendered pursuant to the verdict, the defendant appealed.

No counsel for plaintiff.
Whitaker for defendants.

DANIEL, J. When the Legislature (Rev. Stat., ch. 17, sec. 7) gave jurisdiction to a magistrate in cases of this description it did not intend to alter the rules of the common law in relation to such inquiries. Culpepper (whose deposition is made a part of the case) says that the injury was purely an accident, and without any fault on the part of any of the agents of the company; and the facts and circumstances deposed to by him show that it was purely an accident that the animal was killed, and without any blame on the part of the agents. The judge, however, was of opinion that the plaintiff was entitled to recover, notwithstanding. We think differently. A merely accidental involuntary trespass may be justified. *Beckwith v. Shoredike,* 4 Burr., 2092. If in the prosecution of a lawful act an accident, which is purely so, arises, no action (326) can be supported for an injury arising therefrom. *Davis v. Saunders,* 2 Chitty, 639; *Goodman v. Taylor,* 5 Car. and P., 410. But it is otherwise where any blame or carelessness is imputable, though a person be innocent of any intention to injure. *Wakeman v. Robertson,* 1 Bing., 213; *Wooley v. Scovill,* 3 Man. and Ryland, 105.

PER CURIAM. New trial.

SIMON M. SMITHWICK v. WILLIAM J. ELLISON.

1. A tenant who is about to remove has a right, where there is no covenant nor custom to the contrary, to all the manure made by him on the farm. It is his personal property and he may take it with him. But the manure ceases to be his if he leaves it when he quits the farm.
2. Taking up with the manure the slight portion of the earth which is necessarily mixed with it in raking it into heaps will not make the tenant a *tort feasor.*

APPEAL from *Dick, J.,* at Fall Term, 1841, of MARTIN.

This was an action on the case brought to recover damages done to a lot in the town of Williamston. The declaration contained a count in case for removing from the said lot heaps raked up for manure and a quantity of rails, and a count in trover for the articles alleegd to have

been removed. The plaintiff first offered in evidence a deed from Asa Biggs to him, dated 18 February, 1841, conveying the lot in question, and also a deed in trust from Thomas R. Coffield to the said Asa Biggs, dated 26 February, 1840, by which the said Biggs was authorized to sell and convey the said lot. It was admitted that the defendant had rented the lot from Thomas R. Coffield for the year 1840, and (327) that the defendant continued to hold and possess the same until about 25 February, 1841, when he surrendered the possession and the plaintiff took it. The plaintiff then proved a sale of the lot by the trustee, Asa Biggs, on 18 February, 1841, at which sale the defendant was present, and set up no claim thereto. The plaintiff further proved that after the said day of sale the defendant, while in possession of the lot, removed a quantity of rails which had been used for fencing the lot, and a quantity of manure which had been raked up into heaps before 18 February, the day of sale; and that after 18 February, and before the removal of the said articles, the plaintiff had forbidden him to do so. It was stated by Long, one of the plaintiff's witnesses, that the heaps of manure had a portion of soil raked up in them. The plaintiff here closed his case.

The defendant, by his counsel, moved to nonsuit the plaintiff on this evidence, which motion was overruled by the court. The defendant then proved by Thomas R. Coffield, from whom he had rented the lot, an agreement for the lease of the said lot for 1840, and that whatever was annexed thereto for the accommodation or use of the defendant, by him, he should have liberty to remove; and he further proved that the said lot was without fence of any sort at the time it was leased, and that the defendant placed the rails thereon. The defendant then introduced a witness who stated that the manure was in large heaps, part of it in the garden and part near the site of an old kitchen in the yard. This witness, who lived with the defendant, further stated that the pile of manure in the yard was made from the decayed litter of the woodpile and the sweepings of the yard, and had no appearance of containing a part of the soil, and that the heap in the garden was near a hog-pen placed there by the defendant.

His Honor charged the jury that the defendant had a right to remove the rails, and that the plaintiff could not recover for them; and if the defendant took nothing more from the lot than what he had carried there, or if the heaps which he carried away was manure which had been made by his own industry or out of materials which he (328) had furnished, then the plaintiff could not recover for that either. But if the defendant had carried away a part of the soil, then the plaintiff would be entitled to recover, for the defendant had no right to carry away any part of the soil. His Honor was requested by the defendant's

counsel to charge that if the manure was raked up into heaps before the day of sale, it was personal property, and did not pass by the deed from Biggs, the trustee, to Smithwick, the plaintiff. This instruction the court refused to give, but charged the jury that if Ellison took away nothing more than he carried there, he had a right to do so, but had no right to carry away any part of the soil. The defendant's counsel also prayed the court to charge the jury that if the soil were injured in the raking up of the manure before the day of sale from Biggs to the plaintiff, the plaintiff could not maintain his action. This instruction the court refused to give. The defendant's counsel also prayed the court to instruct the jury that if the plaintiff had a right of action, it was trespass *quare clausum fregit* and not case, which instruction the court also refused to give.

A verdict was found for the plaintiff, and after a motion for a new trial, which was refused, and judgment rendered according to the verdict, the defendant appealed.

B. F. Moore for plaintiff.
J. H. Bryan and J. Allen for defendant.

DANIEL, J. This is an action of trover which the plaintiff has brought to recover damages of the defendant for severing from his freehold a parcel of fence rails, earth and soil and manure, and removing and converting the same to the defendant's use. The plaintiff purchased the land on 18 February, 1841. The defendant had been tenant of the former owners, and before the date of the plaintiff's purchase he had raked in piles the manure which he had made on the land, and in raking up the manure a portion of the *soil* was raked up with it. After the purchase of the land by the plaintiff, the defendant remained on the
(329) same, and removed the rails and the said piles of manure, and then gave up the premises to the plaintiff. On 25 February, 1841, the defendant proved an agreement made by his lessor with him, that he might carry away everything which he might bring on the premises. The lot of land had no fence on it when the defendant leased it; he caused the rails to be brought there and the fence to be made; and he removed the said rails before he left the premises. The judge charged the jury that the defendant had a right to remove the fence rails, by force of the contract with his lessor, the former owner of the land; that the defendant had a right to remove the piles of manure which had been made by his own industry and out of materials which he had furnished. But if the defendant had carried away any part of the soil, then the plaintiff would be entitled to recover. There was a verdict and judgment for the plaintiff, and the defendant appealed.

The outgoing tenant, where there is no covenant or custom to the contrary, has a right to all the manure made by him on the farm. It is his personal estate. *Roberts v. Baker,* 1 Compton and Meeson, 309; *Beatty v. Gibbons,* 10 East, 116; Watson on Sheriffs, 181. We are aware that the rule is otherwise settled in some of the States, as in New Hampshire, Massachusetts, and New York. But we apprehend it is so settled upon the ground of the usage and general understanding of the country. No usage or general understanding on the subject has ever been brought under our notice as prevailing in this State, and, therefore, we feel it incumbent upon us to determine the question on common-law principles. The manure, however, ceases to be his if he leave it when he quits the farm. Whatever things the tenant has a right to remove ought to be removed within the term; for, if the tenant leave the premises without removing them, they then become the property of the reversioner. But where the tenant holds over, even so as to become a trespasser, he will not be considered as having abandoned the things he had a right to remove. Comyn on Landlord and Tenant, 191, 192; Gibbons on Fixtures, 63, 64. The judge instructed the jury that if the defend- (330) ant had carried away a part of *the soil,* then the plaintiff would be entitled to recover. It was held in *Higgon v. Mortimers,* 25 Eng. C. L., 553, that if a tenant, during his tenancy, remove a dung heap, and at the time of so doing dig into and remove virgin soil that lies beneath the dung heap, the landlord might maintain either trespass *de bonis asportatis* or *trover* for the removal of the virgin soil. In that case the tenant had taken and carried away a spade's depth of the virgin soil that lay beneath his bed of manure. In the case now before us it appears that in raking up the manure into heaps (and which was done before the plaintiff purchased the land) a portion of the soil was raked up with the manure. A small portion of the soil must of necessity be gathered with the manure in all attempts to heap it, and then it becomes mixed in and composes a part of the manure or compost, which belongs to the tenant. It certainly was not virgin soil which the defendant carried away. We, therefore, think that the judge erred in charging the jury that the plaintiff was entitled to recover. Leigh N. P., 1466; Comyn's Dig., *Biens,* H. The opinion expressed by the judge on the other questions, as to the right of the defendant to remove the rails which he had put on the demised premises, is not brought before us by this appeal, and, therefore, as to that question we express no opinion.

PER CURIAM. New trial.

Cited: Sanders v. Ellington, 77 N. C., 257.

(331)

ELI JONES v. BENJAMIN C. D. EASON.

Where the judge left a material fact, alleged in the plaintiff's declaration, to the jury, when there was *no* evidence to support it, and the jury found for the plaintiff, a new trial will be awarded.

APPEAL from *Battle, J.*, at Spring Term, 1842, of GREENE.

This was an action on the case for the abuse of valid legal process. In support of his case the plaintiff introduced as a witness one Silas Walston, who testified that the defendant, who was a justice of the peace for the county of Greene, handed him a note in favor of one Samuel Moore against the present plaintiff, with instructions to collect it as soon as possible, saying that Moore had so ordered; that the witness, who was a constable in Greene County, went, some six or seven days after receiving the claim, to Eason's house on Sunday evening, and thence, the next morning between daylight and sunrise, to Jones' house, when he found him putting on his clothes. The witness said he went thus early lest Jones should be gone over to Edgecombe County, where he was then working; that he told Jones his business and said he must go to trial that morning, and that, as Eason was the nearest magistrate, he must go there, to which Jones replied that he would not go to Eason's, because he and Eason were at variance; that Jones then got his gun and commenced rubing it up, but upon the witness insisting that he must go, Jones finally agreed that he would go to Eason's gate; that they then went to Eason's gate, and Eason came out to them, and at the witness's request there tried the warrant; that upon the trial Eason read over the note, and read the amount nine dollars and some cents, when

(332) Jones said it was only seven dollars and some cents; that Eason then asked Jones if he denied the note, to which Jones replied that he must prove it; when Eason said he need not deny it, for he knew his handwriting, and, therefore, gave judgment against him. The testimony as to what passed at the trial was objected to by the defendant upon the ground that he was not responsible in a civil action for what he did in his judicial capacity; but upon the plaintiff's saying that it was only offered for the purpose of showing the *animus* or intent by which the defendant was actuated throughout the whole transaction, it was admitted by the court for that purpose, and for that alone. This witness testified further that after the judgment was given he immediately took out a *ca. sa.*, which was issued by Eason; that whether he did this from any suggestion of Eason then made or of his own accord he did not recollect, but Eason had formerly told him that a *ca. sa.* would have to be issued; that about the time the *ca. sa.* issued, Jones said that, if he were permitted, he could give security for the stay of execution, and named Amraff Beeman, who lived about a mile off, and who was suffi-

cient security, or that he could get the money from Mr. Webb, who lived 3 miles off in the county of Edgecombe, if he were allowed to go there; that Jones then got one Willie Barnes to go off after security, and they waited until his return; that upon his coming back without security, the witness, Eason, and several other persons set off to carry Jones to Snow Hill (where the jail was), and after proceeding about a mile, they met John Beeman, whom Jones asked to be his security, to which Beeman replied by asking him whom he could get to stand with him, to which Jones said he did not know that he could get any person, and the witness did not hear Beeman offer to stand alone; that soon afterwards Eason started on, when the witness called to him and said, "Stop, 'squire; perhaps it can be accommodated," but he said it was not worth while to be bothered with it, as they had to go on anyhow. This witness stated further that he had another warrant against Jones, in favor of Eason, of which he had notified Jones, and that after they had the (333) interview with John Beeman, they proceeded on towards Snow Hill and stopped at the house of a Miss May, where Eason and Jones had a settlement of their own matters, and Eason paid the costs of his warrant, and then offered to be Jones' security for his appearance at court on the Moore debt, which Jones declined at first, but soon after called the witness to request Eason to become his security; that Eason said something about Jones' family being poor and in distressed circumstances, when Jones said they had a barrel of meal and 60 pounds of meat; upon which Eason said to the witness, go ahead, and they went and put him in jail. On his cross-examination the witness stated that while the party were at Eason's gate, Eason invited the whole company, including Jones, to take breakfast with him and likewise to drink with him, which Jones refused.

Willie Barnes testified that he was present at the trial of the warrant in favor of Moore, and that the note was not proved, though Jones required it; that after the *ca. sa.* was issued, Walston, the officer, asked Jones what he would do, to which Jones said he could do nothing unless he could be permitted to go and get security; that the witness went after Amraff Beeman, who, he said, would be his security, and went for that purpose, but the party had gone before he got there; that A. Beeman lived about a mile from Eason's, and witness was gone about an hour; that Eason was not present when the witness started after A. Beeman. This witness testified further that three or four weeks before this transaction he heard one Asa Gay tell Eason that Jones had warranted him, when Eason said, if he had, he (Eason) would put him in jail.

John Beeman stated that when Jones asked him to be his surety, as testified by Walston, Eason said it was discretionary with him whether he would take surety. Jones said he could get any person, upon which

Eason said: "I'll be damned to h—l fire if any man living between heaven and h—l shall stand his surety." Witness then applied to Walston to know where the judgment was. This, he said, was done with the intention of becoming surety for Jones, though he did not distinctly tell the company he intended to do so. Walston said to Eason, "Stop; you know what you have to do today," upon which Eason repeated
(334) that no man should stand. This witness had been at variance with Eason three or four years.

Jeremiah Beeman stated that he was the son of John Beeman; that he carried a letter from J. T. Eason to the defendant the Tuesday after the transaction spoken of by the other witness; that the defendant said if it had been presented to him the day before, he would have been bound to take the surety mentioned in it, but he did not think he was then bound; but that he would take the letter home, and if he found it according to law he would let his father know it; that Eason then said he saw that witness's father wanted to stand for Jones the day before, but he gave him to understand he did not want him to have anything to do with it; that he saw that J. T. Eason had influenced his father to take a part in it, to get some chance of the law on him, and said, further, that he had taken a part in it himself about the proof of the note.

William Webb testified that he lived 3 miles from Eason, in the county of Edgecombe, and that had he been applied to he would have paid Jones $5 which he owed him. This testimony was objected to, but received by the court.

For the defendant, Elkanah Bailey was examined, and testified that he was present at the trial of the warrant at Eason's gate; that Eason read the note as if it was nine dollars and some cents, when Jones said it was seven dollars; that Jones disputed the note, but Eason said he knew his handwriting, and, therefore, gave judgment; that Jones, after the *ca. sa.* was taken out, said that if he could see William Webb, who lived 2 or 3 miles off in Edgecombe, he could give security, but Eason replied he should not release him to go after security; that Walston, the officer, said that if the men who were summoned would risk him, he might go after security; that Barnes went in search of security for him. This witness stated further that he was present when they met John Beeman, and heard Jones ask him to stand for him; but Beeman did not agree to do so; that he did not hear Eason, on that occasion, say that he would not take any person, though he was only 5 or 6 yards behind; that at May's, Jones and Eason settled their individual matter of dispute,
(335) and then Eason offered to be his surety on the Moore claim, to which Jones said if Moore had a mind to put him in jail he would pay him there; that after leaving May's, Jones asked Walston to request Eason to be his surety, when Eason said he was sorry for Jones' family,

to which Jones replied that he had meat, etc., and Eason thereupon told Walston to go on. This witness stated further that Eason furnished horses and carriages for the party to ride, but Jones refused to accept the accommodation, and that he heard nothing of the expressions attributed to Eason by John Beeman, though he was near enough to have heard them. Other witnesses were introduced by the plaintiff, who testified to very nearly the same facts as those stated by the witness Bailey, and, further, that Moore placed the note referred to in the hands of Eason to have it collected, and that Eason had no interest in it other than as agent.

The defendant's counsel objected that the action could not be sustained for anything done by the defendant in his official capacity as magistrate; that after Moore's claim was put into the officer's hands for collection, the defendant ceased to be Moore's agent, and had no right to control and did not control the process, and that the officer was solely responsible, if there was any abuse of the process, and that the case made out did not support the plaintiff's declaration.

The court instructed the jury that the plaintiff was not entitled to recover, and in this action did not seek to recover, damages for anything done by the defendant Eason while acting in his official capacity; but that, after Jones was arrested on a *ca. sa.*, he was entitled to have a reasonable opportunity to discharge himself, either by paying the debt or procuring sureties for the stay of the execution or for his appearance at court to avail himself of the act for the relief of insolvent debtors, and that if Eason, acting as the agent of Moore, by his conduct deprived Jones, or prevailed upon the officer to deprive Jones of such reasonable opportunity to procure his release, either while at Eason's gate or afterwards when they met John Beeman, the plaintiff was entitled to recover in this action. The jury were instructed, further, that if, after the arrival of the party at May's, on their way to the jail, the defendant Eason offered in good faith to become Jones' surety, so as (336) thereby to procure his release, and Jones refused through obstinacy to accept the offer, he was not entitled to damages for his subsequent detention. The jury found a verdict for the plaintiff for $50 damages. A motion for a new trial having been made and refused, and judgment having been rendered according to the verdict, the defendant appealed.

J. H. Bryan and Mordecai for plaintiff.
J. W. Bryan and Iredell for defendant.

DANIEL, J. The declaration states that the plaintiff was arrested on a *ca. sa.* issued on a judgment which one Moore had obtained against him; and that he, then being desirous to take the benefit of the act of the General Assembly for the relief of insolvent debtors, did offer and tender to

the constable who arrested him, Miles Beeman and John Beeman, as his sureties, to appear at the next county court of Greene to take the benefit of the said act; that the said sureties were good and sufficient; that the constable would have taken the said men as his sureties and released him from the arrest, but that the defendant, assuming to have the control of the said execution as the agent of Moore, did, by his undue and improper influence over the constable, maliciously cause and procure the said constable to reject and refuse to take the said sureties as then tendered, in consequence whereof he was put in jail on the said *ca. sa.* and deprived of his liberty, to his great damage, etc.

The judge charged the jury that if the defendant, acting as the agent of Moore, by his conduct deprived the plaintiff, or prevailed on the officer to deprive him, of a reasonable opportunity to procure his release by giving security under the insolvent debtor's law, then the plaintiff was entitled to recover. The jury found a verdict for the plaintiff; there was judgment, and the defendant appealed.

On examining the case sent up to this Court, we do not find or discover that the plaintiff tendered to the constable either Miles Beeman, John Beeman, or any other person, as his surety. John Beeman was asked to be a surety, but he never openly gave his assent to be a surety of
(337) the plaintiff. It does not appear that the declaration made by the defendant, that no person should be taken as security for the plaintiff, had the effect either of deterring Beeman from tendering himself or the constable from receiving him had he been tendered. We must say that there was no evidence offered in this cause that either John Beeman, Miles Beeman, or any other person was tendered to the constable as surety for the plaintiff. There is no evidence that the defendant deterred any person from becoming surety, or prevailed on the officer to deprive the plaintiff of a reasonable opportunity to get surety. If, therefore, the declaration contain a sufficient cause of action, on which point we express no opinion, there must be a new trial, because there was no evidence to support its material allegations.

PER CURIAM. New trial.

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JOHN C. BLUME v. ANDREW BOWMAN ET AL.

1. A bond cannot be delivered to the obligee as an escrow, for such a delivery would make it absolute at law; but it may be delivered by the sureties to the principal obligor as an escrow.
2. Where a bond has no subscribing witness, then the proof of the possession by the obligee, and of the handing of the obligors is a sufficient ground for presuming that the bond was sealed and delivered by the obligors.

BLUME *v.* BOWMAN.

3. The bare circumstance that the name of a person who did not execute the bond is inserted in the body of it as one of the obligors is not *of itself* evidence to show that those who did sign and seal and deliver it delivered it only as an escrow, upon condition that that person should also execute it.

APPEAL from *Dick, J.*, at Spring Term, 1842, of STOKES.

Debt, brought by the plaintiff, as clerk and master, on a penal bond for $5,000, alleged to have been executed by Andrew Bowman and others, of which the following is a copy:

Know all men by these presents, that we, Willis Pilkington, Ryland Roberts, and James Martin, Jr., A. R. Ruffin, William Barr, Andrew Bowman, Isaac Nelson, Joseph W. Winston, and Jacob Salmons, acknowledge ourselves held and firmly bound unto John C. Blume, clerk and master in equity for the county of Stokes, and his successors in office, in the sum of $5,000, to the which payment well and truly to be made and done we bind ourselves, our heirs, executors, and administrators, jointly and severally, unto the said John Blume, clerk and master in equity, and his successors in office, firmly by these presents, sealed with out seals and dated this 15 November, 1820. The condition of the above obligation is such, for that whereas one William (339) Buford has commenced a suit in the court of equity for the county of Stokes against the above bounden Willis Pilkington and Ryland Roberts, which suit is now pending: now, in case the above bounden Willis Pilkington and Ryland Roberts shall well and truly abide by and perform such order and decree as shall be made in said case, fully to all intents and purposes, then the above obligation to be void; otherwise, to remain in full force and virtue. Day and year first above written.

WILLIS PILKINGTON,	[SEAL]
RYLAND ROBERTS,	[SEAL]
WILLIAM BARR,	[SEAL]
J. NELSON,	[SEAL]
A. R. RUFFIN,	[SEAL]
ANDREW BOWMAN,	[SEAL]
JOSEPH W. WINSTON,	[SEAL]
JACOB SALMONS,	[SEAL]
Signed, sealed, etc.,	[SEAL]
in presence of	[SEAL]

The breach assigned was the failure to abide by and perform the final decree made by the Supreme Court at June Term, 1837, in the suit mentioned in the bond. The defense relied upon was that the bond was delivered as an escrow. The plaintiff, to show the execution of the bond, proved the handwriting of those whose names appeared to be subscribed to it. Upon his cross-examination, the witness also proved that the name

"James Martin," interlined in the face of the bond, was in the proper handwriting of the said James Martin, but that his signature was not attached to the instrument as an obligor. The plaintiff, further to prove the delivery of the bond, called upon Emanuel Shober, who testified that in 1820, and since that time, he, as deputy, has transacted the business of the clerk and master of Stokes County; that after the Fall Term of the Superior Court of Stokes in 1820 he was absent some weeks as a member of the Legislature; that before he left he drew the in-
(340) strument in controversy, leaving blanks to be filled up, and handed it to Ryland Roberts to have it executed; that shortly after his return home the plaintiff handed him the same instrument, in its present form, to be filed among the records in the suit; that he accordingly filed it, and it remained on file among the records of the court until Fall Term, 1828, when it was transferred with the original papers in the case to the Supreme Court for hearing, and that he did not see the same afterwards until it was put in suit. The defendants then offered additional evidence to prove that the words "James Martin" in the face of the bond were in his own handwriting, and that he had not signed the bond as obligor; that James Martin was a practicing solicitor in the court of equity of Stokes County, and was one of the solicitors who defended the suit in behalf of Pilkington and Roberts. The defendants insisted that the instrument declared on was not the act and deed of the defendants, as it was inchoate and never delivered, which appears not only from James Martin's failing to sign the bond as an obligor, but because the clause *"his testibus"* shows it was their intention to have it witnessed. The plaintiff insisted that the evidence offered proved a delivery; that the signing of the bond by the obligors, and returning the same either to Roberts or the plaintiff, and the approval of the same by an order of court in the suit, was a delivery in law, which precluded them from denying a delivery, and the plaintiff's counsel requested the court so to instruct the jury, which instructions the court refused to give.

His Honor instructed the jury that delivery was essential to the valid execution of the bond; that delivery was purely a question of fact for their decision, and they must be satisfied that the defendants intended, when they put their names to the instrument, that it should become their act and deed, and that the order of the court, approving and accepting the instrument, did not preclude them from showing that there was no delivery. His Honor further instructed the jury that if they should find the fact to be that when the defendants signed the bond they were induced to do so because the name of James Martin was written in the face of the bond, and they signed the same upon the understand-
(341) ing that he was also to sign and be jointly bound with them, a delivery of the deed to Roberts, or any other person for the plain-

tiff, without their consent, was not a legal delivery; that there was no evidence on this point except that the name of James Martin in the face of the bond was in his own proper handwriting.

The jury returned a verdict for the defendants, and, after the refusal of a motion for a new trial, judgment having been rendered according to the verdict, the plaintiff appealed to the Supreme Court.

J. T. Morehead and Boyden for plaintiff.
Waddell and Badger for defendants.

DANIEL, J. This was an action of debt. Plea, *non est factum.* The writing declared upon was prepared by the deputy of the plaintiff, and by him delivered to the principal (Roberts), to be executed as a bond by himself, and his sureties. The next thing we hear of the bond, it is in the hands of the obligee, signed and sealed by the defendants. It appears that, after the writing had been prepared for execution by the deputy, one James Martin had inserted his name in the body of the instrument as one of the obligors, but he had omitted to seal the same. The defense at the trial was that the writing was sealed by the defendants and delivered to Roberts as an escrow; and that it was not intended to be delivered to the plaintiff as their deed, unless James Martin also executed it. The only circumstance relied upon by the defendants to show it an escrow was the fact that Martin had written his name in the body of the instrument as one of the obligors. A bond cannot be delivered to the obligee as an escrow, for such a delivery would make it absolute at law; but it may be delivered by the surety to the principal obligor as an escrow. *Pawling v. The United States,* 4 Cranche, 219; 1 Touchst., 58, 59. When a bond like this has no subscribing witness, then the proof of the possession by the obligee, and also the handwriting of the obligors, is a sufficient ground for presuming that the bond was, as it purports to be, sealed and delivered by the obligors. Phillips on Ev., 364; *Grellier v. Neale,* Peake, 145; *Burrows v. Lock,* 10 Ves., 474. (342)

The court instructed the jury "that if they should find the fact to be that when the defendants signed and sealed the bond they were induced to do so because the name of James Martin was written in the body of the bond, and they signed and sealed the same upon the understanding that he was also to sign and be fully bound with them, then a delivery of the said writing to Roberts or any other person for the plaintiff, without their consent, was not such a delivery of the bond as in law would bind them." There was no evidence in the case that the defendants would or would not have sealed if Martin's name had not been in the writing. They all did seal, none of them making a declaration that it was done upon the condition that Martin should seal. In de-

livering a writing as an escrow two cautions are to be heeded: first, that the form of words used in the delivery of a deed in this manner be apt and proper; secondly, that the deed be delivered to some other person, and not to the party himself to whom it is made. 1 Shep. Touchst., 58 (marginal page). In the case before cited from 4 Cranche one of the surety obligors, at the time of executing the bond, said, in the presence of some of the other obligors, "We acknowledge this instrument, but others are to sign it." This was admitted to be evidence from which the jury might infer a delivery as an escrow by all the obligors, who were then present. In the case now before us the plaintiff proved that which in law amounted to a presumption of an absolute sealing and delivery by the defendants. The burden of proof was then thrown on the defendants to show that the sealed writing had been delivered to Roberts or some other person as an escrow. Six persons have signed and sealed the instrument as sureties, and there is no evidence of any declaration by them or any of them to Roberts or any other person that they executed it on condition that Martin should be jointly bound with them.

In *Fitts v. Green,* 14 N. C., 291, the Court had made an order that the guardian renew his bond, with Solomon Green and John C. Johnson as his securities. Green sealed and left the writing with the clerk, (343) and Johnston did not execute the bond. It was held that Green had delivered the bond only as an escrow; that he had declared through the mouth of the court that the bond was not to be accepted until Johnston had executed it.

If the court in this case had made an order that Roberts should execute the bond to the master, with the defendants and Martin as his sureties, then it would have been presumed that the sealing and the delivery of it by the defendants to Roberts were only as an escrow. But in this case there is no order of court designating the sureties, and there was no declaration made by the sureties, or either of them, in the presence of the others or in any other manner, that Martin should sign and seal. The name of Martin being inserted in the body of the writing before the defendants executed it, *per se,* is no evidence that the defendants did execute it on condition that he, Martin, should also execute it. We must, therefore, say that there was *no* evidence in the case upon which the court could properly leave the jury at liberty to say that the bond was delivered as an escrow.

PER CURIAM. New trial.

Cited: Williams v. Springs, 29 N. C., 386; *Pate v. Brown,* 85 N. C., 167; *Whitman v. Shingleton,* 108 N. C., 194.

(344)

OLIVE GREEN AND OTHERS v. WILSON DEBERRY.

The courts below have the power, at their discretion and on such terms as they may prescribe, to add new plaintiffs to those mentioned in the writ and original declaration.

APPEAL from an interlocutory order made by *Nash, J.*, at Spring Term, 1842, of MONTGOMERY.

Detinue, brought in the name of Olive Green against the defendant, returnable to Spring Term, 1840.

At September Term, 1840, the defendant appeared by his attorney and pleaded *non detinet,* and admitted on the record a demand of the plaintiff and that he was in possession of the slaves sued for. The cause was regularly continued till Spring Term, 1842, when, "on motion in open court, and after argument, the court ordered that the plaintiff Olive Green have leave to amend the writ by making Henry Harris and wife, Elizabeth, John McLeod and wife, Judy, and James Shemwell and wife, Nancy, parties plaintiffs with the said Olive, with leave to prosecute the suit under the writ so amended," which amendment was accordingly made. From the order allowing this amendment the defendant, by leave of the court, appealed to the Supreme Court.

Winston for plaintiff.
Mendenhall and Strange for defendant.

RUFFIN, C. J. An action of detinue for a slave was instituted by Olive Green in her own name only, and, after the general issue pleaded, a motion was made to amend the writ and declaration by adding three other persons as joint plaintiffs with Olive Green, which (345) was permitted by the court. From that decision the defendant was allowed an appeal to this Court. It has very often been mentioned by us that this Court could not undertake to revise an order made in the exercise of a discretion of the Superior Court. The only question, therefore, is whether the order here complained of be one of that character or one which the Superior Court had no power to make. The Revised Statutes, ch. 3, sec. 1, gives the answer in precise terms to that question. The words are, "that the court in which any action shall be pending *shall have power* 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, at any time before judgment rendered thereon." These terms are, if possible, still more comprehensive than those of the act of 1790, and confer plenary authority, while a cause is pending, to make any and every amendment upon such terms as shall seem just to that court. But under the act of 1790 the decisions would have authorized

the order made in this case. In *Grandy v. Sawyer,* 9 N. C., 61, the names of some plaintiffs were struck out and others inserted. In *Wilcox v. Hawkins,* 10 N. C., 84, the Court said that although this Court could not allow the pleadings to be amended by inserting the names of the true members of a firm in the place of others which had been put into the writ by mistake, yet such an amendment might have been made on a reasonable application to the court below.

PER CURIAM. Affirmed.

Cited: Quiett v. Boon, 27 N. C., 11; *Lane v. R. R.,* 50 N. C., 26.

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(346)

STATE v. THOMAS PATTERSON.

1. Where a witness on the part of the State, on his cross-examination, was asked whether the prosecutor had not paid him for coming from another State to be a witness, and answered that he had not, it is incompetent for the defendant to introduce witnesses to prove his declaration that he had been so paid.
2. Where the fact to which a witness deposes constitutes a part of the transaction under investigation, then evidence of inconsistent statements by him, in relation to this fact, may be introduced to impeach his credit.
3. But in respect to collateral matters, drawn out by cross-examination, the answers of the witnesses are in general to be regarded as conclusive. The exception to this rule is when the cross-examination is as to matters which, although collateral, tend to show the temper, disposition, or conduct of the witness towards the cause or the parties. The answers of the witness as to these matters may be contradicted.
4. If a witness is asked whether *he has made representations* as to particular facts, and denies it, then evidence of such representations would be proper, but not in relation to collateral matters.
5. On an indictment for bigamy, the second wife is admissible as a witness, either for or against the prisoner.
6. Marriage is in law complete when parties able to contract and willing to contract, have actually contracted to be man and wife in the forms and with the solemnities required by law. Consummation by carnal knowledge is not necessary to its validity.
7. Where a marriage is solemnized in another country, in the manner prescribed by the laws of this State, the court must understand such a marriage to be good, unless the contrary be shown.
8. The laws of this State at the time of the cession of Tennessee must be taken to be the laws of that State until it is shown that they have been altered or repealed.
9. The certificate of the Secretary of State in relation to the statutes of another State, given in pursuance of our statute (Rev. Stat., ch. 44, sec. 3), is evidence in criminal as well as in civil cases.
10. Questions to a witness, tending to disparage or disgrace him, may be asked, and cannot be objected to by the opposite party. Whether the witness is bound to answer them is doubtful.
11. Where a person is called in an indictment by the name of Deadema, and it is proved her name was Diadema, the variance is not material.

STATE *v.* PATTERSON.

APPEAL from *Pearson, J.*, at Spring Term, 1842, of SURRY. (347)

This was an indictment for bigamy, charging the first marriage to have been in Tennessee in 1823, with Deadema Kidwell, and the second marriage in Surry County in this State, in 1838, with Leah Carter. On the trial the State called Josiah Cluck, who swore that the resided in Jefferson County, Tennessee; that many years before—he could not be certain as to the time—he was present at the house of his brother Daniel Cluck, in the said county, and saw Patterson, the prisoner, married to one Diemena or Diema Kidwell; he was not certain as to her name; it was Diemena or Diema or some such name; he had no acquaintance with her, before or afterwards; knew her only as Mrs. Patterson; the marriage ceremony was performed by one Isaac Barton, an old Baptist preacher, who was now dead; he had frequently heard Barton preach, and, although not himself a member of the Baptist Church, he knew that Barton had for many years before and since preached and been recognized and considered as a regular member of the gospel; he had regular meeting houses and congregations, where he was in the habit of preaching at stated times. The witness stated that it was not a large wedding, nor a very small one; he supposed about twenty persons were present; that Barton stood up in the floor, Patterson and Miss Kidwell standing before him; Barton asked for the license; Patterson handed him a paper; Barton said that authorized him to celebrate the marriage, and called upon all who knew any impediment to make it known or forever thereafter hold their peace; Barton then told the parties to join hands; asked Patterson, "Do you take this woman for your wedded wife, and will you love and cherish her and cleave to her only until death?" to which Patterson assented; he then asked Miss Kidwell, "Do you take this man for your wedded husband, and will you cherish and obey him and cleave to him only until death?" to which she assented. (348) He then pronounced them man and wife. The witness was asked if he had witnessed any other marriages in Tennessee, and how they were celebrated. He answered that he had been married in Tennessee himself, and had witnessed many weddings there; they were all solemnized in the same way as the one described by him, and he never heard any question about their validity or lawfulness. This question and answer were objected to by the prisoner's counsel, but admitted by the court.

Daniel Cluck was then called, and swore that he resided in Jefferson County, Tennessee; was present at the marriage of the prisoner and Diadema Kidwell. The ceremony was performed at his house by old Isaac Barton, who was a regular Baptist preacher, and had acted and been recognized as such for many years before and after. He gave the same account of the manner in which the ceremony was performed as the former witness gave, and, upon being asked the same question, said

he was married himself in Tennessee, and had been present at several other marriages; they were all solemnized in the same way as the marriage of Patterson and Diadema Kidwell, and he never heard that their validity or lawfulness had been questioned. He said Mrs. Patterson was his wife's sister, and he knew her Christian name was Diadema; she was called by that name and married by that name. The marriage took place nineteen years ago. Patterson and his wife settled about 2 miles from him, and lived together as man and wife for many years, he could not say how long, but until they had five children, when they disagreed and parted; but Patterson stayed in the same neighborhood four or five years after the separation, when he left the country and took the children with him. Mrs. Patterson still lives in his neighborhood, and was at his house a few days before he left home. The fact of Mrs. Patterson being alive was also proved by the witness Jacob Cluck.

Both these witnesses, upon cross-examination, were asked if the prosecutor had not paid them for coming to this State as witnesses, and replied that they had never been paid a cent for coming.

The State then called one Swain, who swore that he was a justice of the peace for the county of Surry, and as such had married the
(349) prisoner and Leah Carter, who was a single woman. The marriage was solemnized at his house in Surry on....day of....., 1838. The license was produced. He stated the manner in which he was in the habit of performing the ceremony, and in which he had married the prisoner and Leah Carter. It was the same as that described by the witnesses Jacob and Daniel Cluck. He said the wedding took place about sunrise, and Patterson and Leah Carter started off soon afterwards.

The solicitor for the State then read a copy of the laws of Tennessee on the subject of marriage, certified by the Secretary of State of this State as prescribed by the statute (Rev. Stat., ch. 44, sec. 3). This was objected to by the prisoner's counsel, because, as he alleged, it appeared upon its face to be only detached sections; but it was received by the court. The solicitor then offered to read a record of the bond and license, certified by the record of the county court of Jefferson County, Tennessee. This was objected to, and the objection was sustained, because, although by the laws of Tennessee the bond and license are required to be filed in the office of the clerk of the county court, they are not made a record which he is authorized to certify.

The prisoner's counsel then called a witness and proposed to ask him whether Jacob and Daniel Cluck had not told him that the prosecutor had paid them for coming to this State as witnesses. This was objected to and rejected by the court.

The prisoner's counsel then introduced a witness who swore that, at

the last term of the court, finding Jacob and Daniel Cluck, who had attended as witnesses, out of money, he had assisted them in borrowing $10 to bear their expenses home; but this was not done at the instance of the prosecutor.

The prisoner's counsel then called on Sammons, who swore that he had resided in Tennessee about two years, some seven or eight years ago; was well acquainted with the character of Daniel Cluck, and that he was a man of bad character. Upon his cross-examination this witness was asked whether he had not started, when he went to Tennessee, between sundown and sunrise. This question was objected to as tending to make the witness disparage himself, but was allowed by the court. The witness answered that he had started after night. He was then asked if he had not started back from Tennessee between sundown and (350) sunrise. He said he had.

The prisoner's counsel then called Leah Carter, who was alleged to be the prisoner's second wife, and proposed to ask her whether the prisoner ever had connection with her. She was objected to on the part of the State, and the objection was sustained by the court, because the prisoner could not examine her without admitting that she was not his wife.

The solicitor for the State then called Joshua Carter, who swore that after the prisoner had married his daughter he went out to Tennessee, and that the witnesses Jacob and Daniel Cluck had the character of respectable men in that country. Upon cross-examination, this witness said he could not say whether the prisoner had consummated his marriage with his daughter or not; that as soon as he heard of the contemplated marriage he pursued his daughter and found her at the house of the prisoner, and succeeded in getting her home with him by 12 o'clock of the same day on which they were married. This witness also deposed that he had frequently seen Mrs. Patterson in Tennessee, and that her name was Diadema.

The prisoner's counsel insisted, first, that his marriage with Diadema Kidwell had not been proven to be valid according to the laws of Tennessee; secondly, that supposing her name to be Diadema, there was a fatal variance from the name Deadema set out in the indictment; thirdly, that to constitute the offense of bigamy, the second marriage should not only be celebrated, but consummated by having connection; fourthly, that it did not appear but that the prisoner's first wife was beyond seas for seven years before his second marriage; fifthly, that it did not appear, supposing her not to have been beyond seas, but that the prisoner had been separated from her, and did not know she was alive, for seven years before the second marriage.

The court charged that if the two Clucks were believed, the prisoner had, about the year 1823, married Diadema Kidwell, in Tennessee, and

she was still living, and, if the marriage ceremony was performed
(351) in the manner stated by them, and that was the usual mode of being married in Tennessee, there was a presumption that the marriage was valid and according to the laws of the State, unless the contrary was shown, upon the plain principle that, in a matter of so much importance as marriage, a certain mode would not be adopted and become common unless it was according to the laws of the country. Besides, the laws of Tennessee, as read in evidence, showed that this mode was according to law, and although the license had not been produced on the trial, it appeared that the law of Tennessee, like our laws, did not declare a marriage void when there was no license, but merely imposed penalties. Upon the second point it was for the jury to say whether the name of the woman was Diema or Diadema. Then the court charged that there was not a fatal variance from the name Deadema stated in the indictment. Upon the third point, the crime of bigamy consisted not in the injury to the first wife nor in the injury to the second wife, but in the injury to society, by violating an institution, necessary to the very existence of civil life; and, although the consummation of the second marriage by connection would have been a great injury to the second wife, still it was not the gist of the offense, and it was not necessary to inquire whether it had been done or not. Upon the fourth point, the court said the evidence did not raise the question. Upon the fifth point, it was necessary that there should be an absence of seven years, and that the prisoner did not know, during that time, of his wife's existence. How these facts were was a question for the jury.

The jury found the prisoner guilty. There was a motion for a new trial because the court received testimony that was inadmissible and rejected testimony that ought to have been received, and for error in the judge's charge. This motion was overruled. There was then a motion in arrest of judgment because the indictment laid the *venue* of the first marriage in Tennessee. The court was of opinion that the place of the first marriage was not material, and the *venue* in Tennessee could be treated as surplusage, especially after verdict; for the substance
(352) of the offense was that, being in the county of Surry, a married man, and his wife alive, he then and there married a second time. The motion was overruled; and the court then proceeded to pass this judgment: That the prisoner be fined $10, be imprisoned for three months, and that the sheriff bring him into court this day at 11 o'clock and brand him on the left cheek with the letter B, and that he give him thirty-nine lashes on his bare back on the Tuesday of the next county court at the public whipping post, and that he be in custody thereafter till the fine and costs are paid. From which judgment the defendant appealed to the Supreme Court.

Boyden for defendant.
Attorney-General for the State.

GASTON, J. It is objected on the part of the appellant that the court below erred in rejecting proper evidence which was offered in his behalf. The case states that on the cross-examination of Jacob Cluck and Daniel Cluck, witnesses examined on the part of the State to prove the first marriage of the defendant, they were asked whether the prosecutor had not paid them for coming to this State as witnesses, to which question they replied that he had not; and that afterwards the prisoner called a witness and proposed to ask him whether the said Jacob and Daniel Cluck had not *told him* that the prosecutor had paid them for coming to this State as witnesses. This question was objected to, and the court sustained the objection. The case does not set forth for (353) what purpose the question was asked, or on what ground it was overruled. If it was a proper question for any legitimate purpose, the refusal of the court to let it be proposed was error. It cannot be contended that the evidence offered was competent to establish the fact that the witnesses had been paid by the prosecutor; for that fact, if material, must be proved by persons testifying under the sanction of an oath, and subject to cross-examination, and could not be established by the declarations of one not a party nor a privy to the cause. But it is insisted that the evidence was receivable as having a tendency to affect the credit of those witnesses, because it showed that, as *to this fact,* they had given, when not on oath, a different representation from that to which they had deposed on the trial. If the fact in relation to which these inconsistent representations were alleged to have been made had been one constituting a part of the evidence of the witnesses upon the transaction under investigation, we should not hesitate in holding that it was competent to attack the credit of the witnesses by testimony of the kind offered. It is well settled that the credit of a witness may be impeached by proof that he has made representations inconsistent with his present testimony, and whenever these representations respect the subject-matter in regard to which he is examined, it never has been usual with us to inquire of the witness, before offering the disparaging testimony, whether he has or has not made such representations. But with respect to the collateral parts of the witness's evidence, drawn out by cross-examination, the practice has been to regard the answers of the witness as conclusive, and the party so cross-examined shall not be permitted to contradict him. Of late, however, it is understood that this rule does not apply in all its rigor when the cross-examination is as to matters which, although collateral, tend to show the temper, disposition, or conduct of the witness in relation to the cause or the parties. His answers as to these matters are not to

be deemed conclusive, and may be contradicted by the interrogator; and in this class, we think, may be included the inquiry whether the
(354) witnesses have been paid by the prosecutor for their attendance.

So the court below thought, and, therefore, did receive the evidence of the witness who was subsequently offered for this purpose. But the testimony rejected was *not* offered to *contradict* what the witnesses had deposed. Had these witnesses been asked whether they had made the representations attributed to them, and on being so asked had denied the fact, then the representations might have been proved upon them, and the effect of this contradiction upon their credit would have been a fit matter to be weighed by the jury. But we hold it to be unfair to attack the credit of a witness by showing that his answer, extracted by cross-examination, on an inquiry of this character, does not correspond with some statement previously made, without first drawing his attention to such supposed statement, so as to revive his recollection thereof and afford him an opportunity, if he remembers or admits it, of giving it fully, with such explanations as the circumstances may justify. With respect to the subject-matter of the witness's evidence, he may be presumed to come prepared to testify with a freshened memory and carefully directed attention; but this presumption does not exist as to collateral matters, remotely connected with that subject-matter; and justice to the witness, and, still more, reverence for truth requires that before he be subjected to the suspicion of perjury he shall have a chance of awakening such impressions in respect thereof as may be then dormant in his memory. We hold, therefore, that the court did *not* err in rejecting this testimony.

It is further objected that the defendant proposed to prove by his second wife that his marriage with her had not been consummated by carnal knowledge of her body, and that the court rejected this testimony. The ground on which the court below placed the rejection of this testimony was because the defendant, by calling her as a witness, admitted that she was not his wife, and by that admission, inasmuch as the fact of the second marriage had been established, he necessarily admitted the validity of the first marriage, and of consequence the crime wherewith he was charged. We are not satisfied that this ground can be sustained, on an indictment for bigamy. The second wife, it seems, is a
(355) witness either for or against her husband, simply because such second marriage is *ipso facto* void. Buller's N. P., 286-7. Unquestionably she is admissible as a witness against him (1 Hale P. C., 693, 661), and it is believed to be a settled principle that whenever husband and wife are admissible witnesses against each other, they are also admissible for each other. *Rex v. Sergeant,* Ryan and Moody, 352 (21 E. C. L., 453).

There are certainly cases where the fact of a second marriage being had, living a former wife or husband, does not constitute the crime of bigamy. Our statute defining the crime and declaring the punishment thereof, provides that it shall not extend to any person whose husband or wife shall continually remain beyond sea for the space of seven years together, nor to any person whose husband or wife shall absent him or herself in any other manner for the space of seven years together, such person not knowing his or her husband or wife to be living within the time. In neither of these excepted cases can the husband or wife be prosecuted for the second marriage; yet that second marriage is absolutely void. An admission of the invalidity of the second marriage is not, therefore, a necessary admission of guilt. But we hold that the testimony offered was properly rejected, because the fact proposed to be established by it was wholly irrelevant. The crime, in the language of our act, was completed when "any person now married, or who shall be hereafter married, doth take to him or herself another husband or wife while his or her former wife or husband is still alive"; and there can be no question but that this is done when the parties before the authorized minister declare that they there take each other for man and wife. *Consensus non concubitus facit nuptias.* Marriage, or the relation of husband and wife, is in law complete when parties, able to contract and willing to contract, actually have contracted to be man and wife in the forms and with the solemnities required by law. It is marriage—it is this contract, which gives to each right or power over the body of the other, and renders a consequent cohabitation lawful. And it is the abuse of this formal and solemn contract, by entering into it (356) a second time when a former husband or wife is yet living, which the law forbids because of its outrage upon public decency, its violation of the public economy, as well as its tendency to cheat one into a surrender of the person under the appearance of right. A man takes a wife lawfully when the contract is lawfully made. He takes a wife unlawfully when the contract is unlawfully made; and this unlawful contract the law punishes.

It is also objected on the part of the prisoner that improper evidence was received against him. In the first place, he objects to all the evidence received tending to establish that a marriage contracted in Tennessee, with the forms and solemnities described by the witnesses as accompanying that with his former wife, was a valid marriage, according to the laws of that State. If we were to give this objection all the effect claimed by it, and to admit that the whole of this testimony was improperly received, yet the defendant would derive no benefit therefrom. The marriage was solemnized in the manner prescribed by the laws of this State, and, until the contrary appears, we must understand that a mar-

riage so solemnized would be good wherever celebrated. But, besides, it was solemnized according to the laws existing when Tennessee constituted a part of this State, laws which still exist here, and which must yet exist there, unless they have been repealed or modified by subsequent legislation. We know judicially, because it is a part of the public law of this State, that the State of Tennessee was once a territory within the limits of this State, and in 1789 was ceded to the United States, upon an express stipulation that the laws in force and use in the State of North Carolina at that time should be and continue in full force within the territory thereby ceded, until the same should be repealed or otherwise altered by the legislative authority thereof. (See act of cession, Rev. Code, ch. 299.) We must presume the continued existence of this law until the contrary is shown. But there is no doubt entertained upon the questions raised with respect to the reception of the certified copy of Tennessee from the Secretary's office. It is enacted that "in all suits wherein it may be necessary, for the decision of the case, to pro-
(357) duce in evidence the law of any of our sister States, it shall and may be lawful for either party to produce in court a copy of the law of such State, drawn off by the Secretary of our State from the copy of the laws of our sister State, deposited in his or the executive office, certified under his hand with the seal of the State of North Carolina attached, and it shall be his duty to furnish said copy when required, and such copy, thus attested, shall be held and deemed sufficient evidence of the existence of such law." Rev. Stat., ch. 44, sec. 3. It is admitted that the *certificate* accompanying the copy of the law of Tennessee from the Secretary's office was in all respects full and in due form; but it is contended that the act referred to authorizes the production of such copies as evidence in *civil* suits *only,* and not in pleas of the State; and further, that on an inspection of the copy certified by the Secretary it was apparent that the same was not a full copy. Now it cannot be denied that the words of the act, "all suits wherein it may be necessary for the decision of the case to produce in evidence the law of a sister State," are sufficiently broad to take in criminal prosecutions as well as civil actions. Nevertheless, as it is possible that these terms may have been used with reference to cases of the latter description only, we should not hesitate so to construe the act, if any sufficient reason were offered for assigning to it this restricted meaning. But, instead of this, we have strong grounds for believing that it was with a special view to criminal prosecutions the act was passed. It was first enacted at the session of our Legislature in December, 1823, and the avowed purpose of its enactment was to correct an inconvenience which had been proclaimed by this Court at the preceding term in a criminal prosecution. The Court there reversed the judgment rendered below against one indicted for passing

counterfeit money, purporting to have been issued by the bank of another State, because the statute book of that State had been received as evidence on the trial to prove the law establishing the bank. *S. v. Twitty*, 9 N. C., 441. Besides, the act of 1823, by its second section, provided that the Secretary should receive fees from the Treasurer of the State "for all copies thus furnished for the use of the Attorney- (358) General or solicitor of the State in any suit in which the State may be party," and ever since the act of 1823 down to this day copies of laws so certified have been received on trials of pleas of the State without a question or doubt of their admissibility. The Revised Statutes of 1837 reënact the whole of the act of 1823, giving the first section of it *verbatim*, in chapter 44, sec. 3, and the second section substantially in chapter 105, sec. 13. We have no doubt that the act of 1823 received a proper construction, and that the act on the same subject in the same terms in the Revised Statutes should receive the same construction. The other ground on which the prisoner's counsel contends that the certified copy of the Tennessee law was improperly received, viz., that on inspection it appears not to be a full copy of the law, is, we think, founded in a misapprehension. The law whereof a copy is requested to be certified is the law of Tennessee. All of *that law* is certified, beginning with those parts of the statutes of North Carolina which were in force when Tennessee was ceded and going down to the latest legislation on that subject. What would seem to be omitted are the sections of the North Carolina statutes which had been repealed before Tennessee was ceded. It may be added, on this head, that if the certified copy of the Tennessee law was properly received in evidence, it becomes unnecessary to inquire whether the testimony of the witnesses on that point was admissible. It could do the prisoner no injury.

The remaining part of the evidence alleged to have been improperly received against the defendant is to be found in that part of the case which states that the prosecuting officer in cross-examining a witness for the prisoner, was permitted to ask him, in relation to his peregrinations between this State and Tennessee, whether he had not selected the night as the most opportune season for commencing his journeys, notwithstanding this question was objected to by the prisoner's counsel, because of its tendency to disparage the witness. Now, it has certainly been much disputed how far a witness shall be compelled to answer questions which without charging him with crimes, have a tendency to his disparagement or disgrace, and, although we believe that the weight (359) of authority is that the witness may be compelled to answer such questions, we feel that the subject is not free from difficulty. But we understand that there is no doubt but that such questions may be rightfully asked; and the only doubt is whether, when they are so asked, the

witness may decline to answer them. (See the cases referred to 1 Star. on Ev., note to 172.) We hold, therefore, this objection unsupported.

An exception was also taken because of an alleged misdirection of the jury on the subject of a variance between the name of the lawful wife, as stated in the indictment, and her true name, as proved by the witnesses. It is charged in the indictment that the defendant married one Deadema Kidwell, spinster, and that, afterwards, and while the said Deadema was alive, he took to wife one Leah Carter. The court instructed the jury that if, upon the testimony of the witnesses, they should believe the Christian name of the first wife was Diadema, there was not a fatal variance between the indictment and the proof, and the defendant might be convicted as charged. It is a rule of evidence that the proofs should correspond with the allegations, and where persons are described by name simply, in the allegations, evidence in relation to persons of different names cannot be considered as applicable to those so described. But it is also well established that a name merely misspelled is, nevertheless, the same name. Now, as names are to a great extent arbitrary, and to that extent are distinguishable from each other only by the combinations of the letters or syllables whereof they are composed, it becomes a difficult matter to fix the line which separates the cases of mistake in spelling the same name from those variations in spelling which constitute different names. The nearest approach to it is to be found in the rule of *idem sonans,* that those names shall be considered identical which sound alike. Instances of the application of this rule are of Segrave for Seagrave (*Williams v. Ogle,* 2 Str., 889); Benedetto for Beneditto (*Abuthol v. Beneditto,* 2 Taun., 401); Whineyard for Winyard (*Rex v. Foster,* R. and R., 412); and of Anny for Anne (360) (*S. v. Upton,* 12 N. C., 513). The variance here objected to seems to us not greater than those, which in some of the cases referred to were held to be immaterial, and to amount to no more than misprisions in spelling. We cannot doubt but that Deadema and Diadema Kidwell are one and the same person, and, therefore, we hold this direction of the judge not erroneous. We deem it unnecessary to take particular notice of the other matters of exception raised upon the record. They are clearly untenable.

PER CURIAM. No error.

Cited: Edwards v. Sullivan, 30 N. C., 306; *S. v. Garrett,* 44 N. C., 358; *S. v. Houser, ib.,* 411; *S. v. McQueen,* 46 N. C., 179; *S. v. March, ib.,* 527; *S. v. Oscar,* 52 N. C., 306; *S. v. Sam,* 53 N. C., 151; *S. v. Murray,* 63 N. C., 32; *S. v. Kirkman, ib.,* 248; *S. v. Davidson,* 67 N. C., 121; *S. v. Elliott,* 68 N. C., 126; *S. v. Patterson,* 74 N. C., 158; *Jones v. Jones,* 80 N. C., 248; *S. v. Lane, ib.,* 409; *S. v. Roberts,* 81 N. C., 606; *Rhea v.*

Deaver, 85 N. C., 339; *Black v. Baylees,* 86 N. C., 534; *S. v. Davis,* 87 N. C., 524; *S. v. Lawhorn,* 88 N. C., 637; *S. v. Williams,* 91 N. C., 604; *S. v. Gay,* 94 N. C., 818; *Kramer v. Light Co.,* 95 N. C., 279; *S. v. Ballard,* 97 N. C., 445; *S. v. Thomas,* 98 N. C., 603; *S. v. Dickerson, ib.,* 711; *S. v. Morton,* 107 N. C., 894; *Loyd v. Loyd,* 113 N. C., 189; *S. v. Behrman,* 114 N. C., 804; *S. v. Staton, ib.,* 816; *S. v. Collins,* 115 N. C., 719; *S. v. Goff,* 117 N. C., 761; *Cathey v. Shoemaker,* 119 N. C., 427; *Burnett v. R. R.,* 120 N. C., 519; *S. v. Wilson,* 121 N. C., 656; *S. v. Lewis,* 133 N. C., 655; *S. v. Crook, ib.,* 674; *Cogdell v. Tel. Co.,* 135 N. C., 438; *S. v. Robertson,* 166 N. C., 361.

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WILLIAM E. ADAMS v. JOHN HAYES.

1. A., living in North Carolina, sent to his son-in-law B., living in South Carolina, certain negro slaves. Afterwards A., being in South Carolina at the plantation of B. where the negroes then were in the possession of B., told B., in the presence of other persons, "that he (A.) had no claim to the negroes or the other property that had been sent to B.'s wife," and further said "that the negroes were the property of B., that B. might dispose of them as he saw proper, and that he (A.) had no claim to them." The law of South Carolina in relation to parol gifts of slaves is the same as the common law respecting parol gifts of other personal chattels.
2. *Held* by the Court, that this was not a gift of the negroes to B.; that to constitute a valid parol gift of personal chattels an *actual delivery* is necessary, that is, some *act* is required by which the *possession* of the thing delivered shall be *transferred* from the donor to the donee. The circumstance that the negroes are in the actual possession of the donee at the time the parol declaration of gift is made forms no exception to this general rule.
3. If a gift had been made in South Carolina, according to the laws of that State, the gift would have been good here.
4. For the purpose of showing that a loan and not a gift to a married daughter was intended, it is not competent to prove that loans and not gifts were made to other daughters on their marriage.

APPEAL from *Pearson, J.,* at Spring Term, 1842, of LINCOLN.

Trover for five negro slaves, which the plaintiff claimed under a parol gift by the defendant in the State of South Carolina. The law of South Carolina on the subject of parol gifts of slaves was proved by the depositions of professional men in that State to be the same as the common law in relation to parol gifts of other personal chattels. It was proved that the plaintiff, residing in South Carolina, married in North Carolina the daughter of the defendant, who resided in the latter State; that this marriage took place in September, 1836; that after the (362) marriage the plaintiff took two of the negroes claimed, Ramulus and Julia, with him from the house of the defendant to his own residence

in South Carolina; that the defendant told the plaintiff he would send the negroes Selina and her two children (the other three negroes claimed) to his plantation in South Carolina as soon as he could make it convenient; that soon thereafter, in November, 1836, the defendant employed one Baker to carry the three negroes and certain articles of household and kitchen furniture to the plaintiff's plantation in South Carolina; that while Baker was loading and the negroes getting into the wagon, the defendant told him this was property he was loaning to his daughter, Mrs. Adams, and directed him to deliver the negroes and other articles at the plantation of the plaintiff, which he accordingly did. It was proved by the deposition of Joseph Adams, that in the latter part of 1836 the negroes were in the possession of the plaintiff at his plantation in South Carolina; that in the latter part of 1837, at the plantation of the plaintiff, he heard the defendant tell the plaintiff "that he (the defendant) had no claim to the negroes now in controversy, or the other property that had been sent to his wife;" that the defendant said "the negroes were the property of the plaintiff; that the plaintiff might dispose of them as he saw proper, and that the defendant had no claim to them." This witness stated that the negroes were then in the plaintiff's possession, and present. The defendant offered to prove that upon the marriage of his other children, some of whom married before and some after Mrs. Adams, the defendant had expressly made loans of the property they had got, and not gifts. This evidence was objected to by the plaintiff and rejected by the court. It was also in evidence that in the spring of 1837 the plaintiff and his wife, disagreed, so much so that she left his house and returned to her father's, who prevailed upon her to go back and try to live with her husband, and observed at the time, "that if they should conclude to make a final separation, her going back would give him a footing to get back the property." She went back, but
(363) she and her husband agreeing no better, some time in the fall of 1837, whether before, after, or at the time of the conversation deposed to by Joseph Adams, the evidence left uncertain, the defendant went to South Carolina and brought Mrs. Adams and her infant child home with him, where they still remain. It was also in evidence that some few weeks afterwards the defendant procured two men to go to South Carolina and take the negroes from the possession of the plaintiff in the nighttime and bring them to him; that the plaintiff demanded the negroes of the defendant, who refused to give them up, whereupon this action was brought. In the course of the trial certain depositions were offered by the plaintiff, to which the defendant's counsel objected, because the notice being to take them on the 10th and 11th of a certain month, the depositions, as he alleged, were not taken in pursuance of the

notice, inasmuch as they were commenced on the 10th and certified on the 11th. The court overruled the objection.

The court charged the jury that whether the negroes were in the first instance loaned or given by the defendant to the plaintiff it was not material to inquire; for the transaction, taking place in North Carolina, did not pass the title, whether it was a parol gift or a mere loan; that part of the case was with the defendant, taking it either way; that the position assumed by the plaintiff's counsel, that if the defendant made a parol gift in North Carolina, the fact of the defendant's afterwards sending the three negroes Selina and her two children to his son-in-law, the plaintiff, in South Carolina, brought the case, so far as these negroes were concerned, within the laws of South Carolina and passed the title to the plaintiff, was entirely erroneous; for if the gift was made in North Carolina, it was subject to the laws of North Carolina, and it made no sort of difference whether, after that, the plaintiff took the negroes himself to South Carolina or the defendant had the kindness to send them to him there; but the court further told the jury that after the negroes got into South Carolina, whether there had been a previous gift or loan in North Carolina or not, if, then, the defendant, being in South-Carolina, made a parol gift of them there to the plaintiff, that new gift, if there was such a one made in South Carolina, would (364) be governed by the laws of South Carolina, according to which negro property could pass by parol gift, and the plaintiff would be entitled to recover. The court then left it to the jury to say whether the evidence satisfied them that the defendant had made a new gift in South Carolina, charging them that they must first satisfy themselves whether the conversation deposed to by Joseph Adams took place as stated by him; and, if so, whether by that conversation the defendant intended then and there to give the negroes to the plaintiff, or merely to admit that he had previously made a gift to him in North Carolina, and in deciding this question they must give to all the evidence offered in this case its proper consideration. If there was a new gift in South Carolina, the plaintiff was entitled to recover, but if the defendant merely admitted then that he had made a gift in North Carolina, then the plaintiff was not entitled to recover. The jury found a verdict for the plaintiff. The defendant moved for a new trial, first, because the court erred in permitting the depositions to be read; secondly, in excluding the evidence of the manner in which the defendant had put property into the possession of his other children upon their marriage; thirdly, in leaving to the jury the question whether there had been a gift in South Carolina, upon the ground that there was no evidence of such a gift. The motion was overruled, and judgment being rendered for the plaintiff, the defendant appealed.

Boyden for plaintiff.
Badger, W. J. Alexander, and D. F. Caldwell for defendant.

GASTON, J. The two first exceptions taken by the defendant in this cause appear to us clearly untenable, and have, indeed, been virtually abandoned by his counsel. But the third exception deserves a particular examination.

The presiding judge upon the trial directed the attention of the jury to the inquiry whether the evidence established the fact of a parol gift of the slaves in dispute, made in the State of South Carolina; and,
(365) upon that inquiry; he especially instructed them to ascertain whether in the conversation between the defendant and the plaintiff in South Carolina, as set forth in the deposition of Joseph Adams, the defendant declared an intent then and there to give these slaves to the plaintiff, or only admitted that he had previously so given them; and that, to fix the meaning of this conversation, they should also take into consideration all the other evidence given in the cause; and then added that if they ascertained that the defendant thus made a gift in South Carolina, the plaintiff was entitled to recover; but if they collected no more than an admission by him of a previous gift in North Carolina, the plaintiff was not entitled to recover. The specific objection taken to this instruction is for that there was no evidence before the jury upon which they could find a gift then made.

The conversation referred to is thus stated: The parties were together at the plantation of the plaintiff in South Carolina in the latter part of 1837, and the negroes in dispute were then present and in the possession of the plaintiff, when the defendant told the plaintiff that he (the defendant) had no claim to the negroes or the other property that had been sent to his (the plaintiff's) wife. The defendant said that the negroes were the property of the plaintiff; that the plaintiff might dispose of them as he saw proper, and that the defendant had no claim to them.

It is to be regretted that the witness had not stated circumstantially all that occurred in this conversation. It cannot be doubted but that it was a mutual conversation, and what passed therein on the part of the plaintiff might well elucidate the words of the defendant, to which, or to the substance whereof, this witness has undertaken to depose. But be this as it may, we feel ourselves bound to say that what was thus said was not in law evidence of a gift then made of the negroes.

The common law on the subject of gift chattels is, we are informed, the law of South Carolina with respect to gifts of slaves, and by that law a gift of chattels may be made by parol. But it is the settled rule of the common law that to a parol gift of chattels delivery of the chattels
(366) is an indispensable requisite. In the elementary books the doc-

trine is thus expressed: "Grants or gifts of chattels personal," says Blackstone 2 Com., 441, "are the act of transferring the right and the possession of them, whereby one man renounces and another man immediately acquires all title and interest therein, which may be done either in writing or by word of mouth *attested by sufficient evidence,* of which the delivery of possession is the strongest and *most essential.*" *Chancellor Kent* in his lectures, 2 Kent Com., 438, lays down the rule thus: "Delivery is essential, both at law and in equity, to the validity of a parol gift of a chattel or a chose in action, and it is the same whether it be a gift *inter vivos* or *causa mortis.* Without an actual delivery the title does not pass." In delivering the opinion of the Supreme Court of New York, in *Noble v. Smith,* 2 Johns., 52, this eminent jurist, then the Chief Justice of the Court, traces this rule up to the time of Bracton, by whom it is laid down in precise terms. In *Ward v. Turner,* 2 Ves., Sr., 431, which has been regarded as a leading case in all donations *mortis causa,* it was most emphatically declared by *Lord Hardwicke* that an actual delivery is indispensable to vest the property, if the subject of the gift be capable of delivery, and where it is not, there must be a delivery of something which is altogether equivalent to an actual delivery of the thing itself. The ground of his lordship's decision is that by the law of England the delivery of things which lie in livery is indispensable to a gift, and, in adopting from the civil law donations *mortis causa,* the English law admitted them only when they conformed to this inflexible rule and were accompanied by delivery. To show this, he referred to Swinburne, who is explicit on the point. Swinb., 17, 22, 23. The doctrine established in *Ward v. Turner* has been recognized as undoubted law, and has been applied also to cases of gifts *inter vivos* in *Tate v. Hibbert,* 2 Ves., Jr., 111; in *Antrobus v. Smith,* 12 Ves., 39, and in *Bunn v. Markham,* 7 Taun., 224. In *Ivans v. Smallpiece,* 2 Barn and Ald., 351 (a case of gift *inter vivos*), it was laid down by *Abbott, C. J.,* that "by the law of England, in order to transfer property by gift there must be either a deed or instrument of gift, or *there must be* an (367) actual delivery of the thing given to the donee"; and *Holroyd, J.,* in expressing the same opinion, uses this language: "In order to *change the property* by a gift of this description, there must be a *change of possession.*"

It may be thought unnecessary to adduce authorities in support of a doctrine which, as a general rule, has not been controverted, but these may be of use as showing the extent of the rule and tending to throw light upon a supposed exception to the rule which is set up by the counsel for the plaintiff. It is admitted that the general rule may well apply where the donor has possession of the thing to be given, and, therefore, can transfer the thing and the possession of it together; but it is insisted

that where the possession is already in the donee, and, therefore, a transfer of possession cannot be made, delivery is necessarily dispensed with, and the property may pass by unequivocal words of direct gift. In support of this alleged exception no authority is produced, and, so far as our researches extend, none which we are bound to respect can be found. Nor are we led to adopt it by the compendious argument which has been urged. Finding the rule settled that delivery is indispensable to a gift, we infer that, where delivery may not be given, the transfer to be effectual must be made otherwise than by gift. If there cannot be a delivery there cannot be a gift. In the law of real property a feoffment is defined the gift of a fief or feud, and to its validity it is essential that the possession of the fief should be formally delivered by the feoffer to the feoffee. This act is called livery of seizin, and without it even a deed of feoffment will not pass a freehold. If there be a tenant in possession, it is competent for him who has the estate or right in the land to transfer it to the tenant, but not by a feoffment or a gift without livery. He must do it by another mode of conveyance appropriate to that state of the possession. He may release his estate or right, and when, by virtue of such release, it becomes united with the seizin or possession of the tenant, then the release operates either to enlarge the estate of the tenant or to (368) pass or extinguish the estate or right of the releasor. The analogy between dispositions of real and personal property is not complete; for there may be a gift of chattels by deed, and a delivery of the deed renders the transfer effectual. But when there is no deed, the analogy prevails generally. Thus a chattel may pass by gift, but to this gift a delivery or transfer of the possession is indispensable. If the chattel be in the possession of him to whom a transfer of the right or interest of another is desired to be made, the latter cannot make it by a gift without delivery, but he may do it by a sale or other appropriate mode of transferring interests and rights which do not lie in livery. When rules of property are once settled, it is not necessary, before we yield them obedience, that we should perceive the reasons upon which they are established. It is understood that the distinction between feoffments and releases of real estate is founded mainly on feudal principles, and it is believed that the distinction between gifts of chattels and sales or releases of interest in them is derived from considerations of public policy. Where property is claimed under a transfer purely gratuitous, unauthenticated by any formal instrument, there ought to be unequivocal evidence of a deliberate and final purpose of gift in the supposed donor. Now, words indicating a purpose of immediate bounty may have been inadvertently uttered, or words intended to express a purpose of future kindness may be misunderstood or misrepresented as declarations of immediate bounty. Some act, therefore, or some instrument evincing

deliberation and completeness of purpose, and manifesting an intent to be carried into immediate execution, is very properly required to prevent imposition. Without delivery a parol gift is, in law, but a promise to give, which, being without consideration, is not obligatory. *Picot v. Sanderson,* 12 N. C., 309. A *transfer* of the property is required—and "an *intention to give* is not a *gift.*" *Hooper v. Goodwin,* 1 Swans., 485.

The case before us strikingly illustrates the wisdom of the rule. The negroes were present and in possession of the plaintiff, who held them either as his own property or as the bailee of the defendant. Certain words used by the defendant in a conversation with the plain- (369) tiff in relation to these negroes, admitted to be of equivocal import, and constituting but part of that conversation, and extracted therefrom without the context, are left to the jury as evidence of a donation of the negroes, if upon the whole testimony they believe these words import a present intention to give, and do not refer to a former invalid attempt to give. Now, it is very probable that the words had another and a very different meaning. They seem to import rather a renunciation of title, or the declaration of a purpose in the defendant to renounce his title, and it may have been that they were used as an artifice by which the more easily to accomplish the father's purpose of carrying his daughter back to her ancient home. Is it not obvious how exceedingly unstable would be the title to property if it were to pass or not to pass from man to man according to the interpretation which might be put upon loose terms, imperfectly remembered or inaccurately represented. not fully set forth, and, at the best, susceptible of many different meanings? Is it not wise to require some unequivocal act or authentic instrument—some form or some ceremony, easy of observance and unambiguous in its character, to manifest the intent of the parties and to give effect to a transaction of so much importance? We do not hold that a *manual* tradition of the negroes was necessary; but, to give these words the operation of a gift, we are bound to say an *actual delivery* is necessary. There is no prescribed form for such a delivery, more than there is for the delivery of a deed, but an act is required in each case by which the *possession* of the thing delivered, whether it be a chattel or a deed, shall be *transferred* from the donor or grantor to the donee or grantee. An old case, *Flower's case,* reported Noy., 67, of which there is a note in Viner, title "Gift," letter A, may serve to explain this position. "A. borrowed of B. £100, and at the day brought it in a bag and cast on the table before B., and B. said to A., being his nephew, *I will not have it; take it, you, and carry it home again with you.*" *Per Curiam:* "This is a good gif by parol, being cast upon the table, for then it was in the possession of B., and A. might well wage his law. But it had been otherwise if A. had only offered it to B., for then it was a (370)

chose in action only, and could not be given without a writing." So, in this case, if the plaintiff had surrendered the slaves to the defendant, so as to put them into possession, or it was shown that the slaves were then regarded as in the possession of the defendant, and thereupon the defendant had restored them to the plaintiff, accompanied by the words used, this might have geen a good gift by parol, for this return of the slaves would have been a delivery. But the witness deposed to no act nor circumstance whatever showing or tending to show any change of possession. Such as the possession was before the conversation, it remained during the conversation, and continued ever afterwards, until the defendant took away the negroes, for which act he is sued as for a conversion of the plaintiff's property, alleged to have been made his property by that conversation.

We agree with his Honor that if a gift had been made in South Carolina, effectual by the laws of that State to pass the title of the negroes, they became thereby the negroes of the plaintiff, and the laws of this State will respect that title and enforce his rights acquired thereby. There is nothing in the transaction which would violate our policy. In requiring gifts of slaves to be made in writing, our law looks only to gifts made in *this State,* and regulates *such transactions* as matters of internal policy. It leaves to the other States to regulate transactions of that character occurring among them, according to their notions of expediency. Nor is there any reason to suppose that in an executed contract or an absolute gift the parties had in contemplation any other law than the law of the country where the thing was done. They intended the act to be effectual. They certainly meant it to be effectual where it took place; they looked to no other place especially, but presumed that the rights acquired where the act occurred would be protected in every country where rights of that kind are recognized.

We think that his Honor erred in instructing the jury that they should find for the plaintiff if they collected or were satisfied from the testimony of Joseph Adams, as explained by all the other testimony in (371) the case, that, in the conversation deposed to by him, the defendant intended then and there to give the negroes to the plaintiff, for an intention to give, however distinctly declared, is not in law a gift if it be declared by parol and be unaccompanied by an act of delivery.

PER CURIAM. New trial.

Cited: Meadows v. Meadows, 33 N. C., 149; *Thompson v. Bryan,* 46 N. C., 343; *Davis v. Boyd,* 51 N. C., 254; *Hicks v. Skinner,* 71 N. C., 546, 555; *Medlock v. Powell,* 96 N. C., 501; *Newman v. Bost,* 122 N. C., 531, 532; *Wilson v. Featherstone, ib.,* 751; *Patterson v. Trust Co.,* 157 N. C., 714.

(372)

THE STATE v. JAMES GALLIMORE.

1. Where the defendant is indicted for a perjury, committed on the trial of an issue in a former indictment, the indictment must set forth the finding of the former indictment in the proper court of the proper county, and should also set forth that indictment, or so much thereof as to show that it charged an offense committed in that county, and of which said court had cognizance, and also the traverse or plea of the defendant in that indictment whereon the issue was joined. Judgment on an indictment, defective in these particulars, must be arrested.
2. The act of 1791 (Revised Code, ch. 338, sec. 3) is repealed by Revised Statutes adopted in 1837, and the act of 1811 (Rev. Stat., ch. 35, sec. 12) does not cure such defects, for they are neither informalities nor refinements, within the meaning of that statute.

APPEAL from *Pearson, J.*, at Spring Term, 1842, of CABARRUS.

Indictment for perjury in swearing corruptly and falsely, in a former indictment against one B. Erwin and others in the county court of Cabarrus County, for an affray. It is unnecessary to state the facts proved on the trial and reported by the judge, and the various objections urged by the defendant's counsel, as the opinion of the Supreme Court is confined entirely to the motion in arrest of judgment. The verdict of the jury was against the defendant; whereupon his counsel moved in arrest of judgment because the indictment did not *recite* the record of the county court in which the former indictment was found and tried, upon the ground that the act of 1791 being omitted in the Revised (373) Statutes, indictments for perjury must be drawn as at common law. The court overruled the motion in arrest; for, supposing the act of 1791 to be omitted, the act of 1811 is retained, and the act of 1811 is general and applicable to all indictments, and so includes the act of 1791, which is confined to indictments for perjury. The motion in arrest was overruled, and, judgment being given against the defendant, he appealed. The objections to the indictment urged on the motion in arrest of judgment are fully stated in the opinion of the Court.

Barringer for defendant.
Attorney-General for the State.

GASTON, J. The principal question in this case arises on the motion in arrest of judgment. The indictment sets forth that at a court of pleas and quarter sessions held for the county of Cabarrus on the third Monday of April, 1841, before John Stile, Jr., B. W. Allison, William Barringer, and James Young, Esquires, justices qualified by law to hold the said court, "a certain issue in due manner joined in said court between the State of North Carolina and one Benjamin Erwin (374) upon a certain indictment depending against the said Benjamin Erwin for assaulting and beating one Michael Holbrook and for making

an affray, came on to be tried by a jury of the county in due manner sworn and taken for that purpose; and that "upon the trial of said issue James Gallimore did then and there appear, and was produced as a witness in behalf of the State against the defendant Benjamin Erwin," and proceeds to charge that the said James then and there took his corporal oath to testify the truth, the whole truth, and nothing but the truth, upon the said issue, "they, the said John Stile, Jr., B. W. Allison, William Barringer, and James Young, Esquires, justices aforesaid, then and there having competent authority to administer the said oath"; that a certain inquiry became material on the trial of the said issue, and that thereupon the said Gallimore did corruptly, maliciously, and falsely depose, swear, and give in evidence as is therein particularly stated; and then it proceeds to falsify the testimony so given, and to aver that therein the said James did commit willful and corrupt perjury. The objection to the indictment is for that it does not distinctly and certainly set forth the facts which show that the alleged false oath was taken in a judicial proceeding before a court having jurisdiction thereof.

It is a general rule that every indictment should charge explicitly all the facts and circumstances which constitute the crime, so that, on the face of the indictment, the court can with certainty see that the indictors have proceeded upon sufficient premises, and afterwards, when these facts and circumstances are confessed or found to be true, can behold upon the record an undoubted warrant for awarding the judgment of the law. According to this rule, the indictment in this case should have averred, as a fact, the finding of an indictment in the county court of Cabarrus against Benjamin Erwin, and should have set forth that indictment, or so much thereof as to show that it charged an offense committed within that county and of which said court had cognizance, and also have set forth the traverse or plea of the said Benjamin whereon the issue was joined. Had it done so, it would then have appeared, upon the
(375) face of the indictment, whether the alleged false oath was taken in a judicial proceeding before a court having jurisdiction thereof. Nor on common-law principles is the want of precision in this matter helped by the averment in the indictment that the justices before whom the oath was taken had competent authority to administer said oath, for this is but the averment of a legal inference and not of a distinct fact, and an averment by the indictors, whose province it is to state facts, and who must leave legal inferences to be drawn by the court.

We believe, therefore, that at common law this indictment must be held insufficient; and the next and chief inquiry is whether the defects be cured by any statutory provision.

The necessity at common law, in indictments for perjury, of showing the proceedings wherein the false oath was taken caused these indict-

ments to be drawn out frequently with great prolixity, and by reason of inaccuracies in them the guilty were occasionally enabled to escape with impunity. To remedy these inconveniences the British Parliament passed the statute 23 George II. This statute, though enacted before the Revolution, was not in force in North Carolina; but in 1791 our Legislature incorporated its provisions into the act then passed, entitled "An act for the punishment of such persons as shall procure or commit any willful perjury" (Revised Code, ch. 338, sec. 3). By this act it is enacted "that in every presentment or indictment to be prosecuted against any person for willful and corrupt perjury it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court or before whom the oath or affirmation was taken (averring such court or such person or persons to have a competent authority to administer the same), together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceedings, either in law or equity, other than aforesaid, and without setting forth the commission or authority of the court or person or persons before whom the perjury was committed." The principal effect of this enactment was to substitute in the indictment the general averment of a competent (376) authority to administer the oath in the place of a specific averment of the facts, showing such authority, and to make the question whether the oath was or was not taken before a competent jurisdiction a compound question of fact and law, to be decided by the petit jury under the advice of the court.

Since the act, the compendious form thereby authorized has been generally adopted, and if that act were yet in force we should have no difficulty in overruling the objection to this indictment. But by the act concerning the Revised Statutes, ratified 23 January, 1837, it is declared that all acts and parts of acts theretofore passed, the subjects whereof are revised and reënacted in the Revised Statutes, are repealed from and after 1 January, 1838, with certain exceptions not applying to this matter. The subject of crimes and punishments and the subject of criminal proceedings are revised in those statutes, and the first and second sections of the act of 1791 are reënacted with modifications; but the third section, containing the enactment in question, is omitted. It, therefore, ceased to be a part of the law of North Carolina before the present indictment was preferred.

But it is insisted on the part of the State that the insufficiency or defect in this indictment is cured by the act of 1811, ch. 809, which is reënacted in the Revised Statutes, ch. 35, sec. 12. This act provides with respect to all indictments that "It shall be sufficient that an indictment

contain the charge against the criminal, expressed in a plain, intelligible, and explicit manner, and that no indictment shall be quashed or arrested for or by reason of any informality or refinement, when there appears sufficient in the face of the indictment to enable the court to proceed to judgment." After the very many adjudications which have been had on this statute, it must be regarded as being now completely settled that it does not supply nor remedy the omission of a distinct averment of any fact or circumstance which is an essential constituent of the offense charged. *S. v. Haddock,* 3 N. C., 152; *S. v. Owen,* 5 N. C., 152, commented on in *S. v. Moses,* 13 N. C., 452; *S. v.* (377) *Davis,* 4 N. C., 271; *S. v. Neese,* 4 N. C., 691; *S. v. Brown,* 7 N. C., 224; *S. v. Jim,* 12 N. C., 142; *S. v. Shaw,* 13 N. C., 196; *S. v. Aldridge,* 14 N. C., 201; *S. v. Fitzgerald,* 18 N. C., 408; *S. v. Enloe,* 20 N. C., 508. The ground of these adjudications is that sufficient does not appear to the court in the face of any indictment to induce them to proceed to judgment when, in the indictment, they do not see distinctly every fact and circumstance which make up the crime. Call the defect in the indictment what you may—a defect of form or a defect of substance, a departure from good sense or only from the refinement of pleading—if by reason thereof there be this insufficiency in the indictment the court has no authority to render judgment. And if this settled exposition of the statute be departed from, we are left without a rule whereby to decide what defects are and what are not cured by it.

But this defect ought not to be called an informality or refinement. By an informality is understood a deviation, in charging the necessary facts and circumstances constituting the offense, from the well approved forms of expression, and a substitution in lieu thereof of other terms, which, nevertheless, make the charge in as plain, intelligible, and explicit language. Such a deviation is always dangerous, but by means of such a substitution it may be rendered a mere informality, which is cured by the statute. A refinement is understood to be the verbiage which is frequently found in indictments in setting forth what is not essential to the constitution of the offense, and, therefore, not required to be proved on the trial. The defect here complained of is a defect in the substance of the indictment in omitting *the facts* which show the oath to have been taken in a judicial proceeding before competent authority, and substituting therefor the conclusion of the grand jury that it was so taken.

It has been argued, however, that the act of 1791, although repealed, furnishes a legislative exposition of what is substance, and, of course, what is informality or refinement in an indictment for perjury, and, therefore, we should recur to it in interpreting and applying upon (378) such indictments the act of 1811. To this argument it has been well answered that the act of 1791 does not purport to give an

exposition of what is substance, much less of what is informality and refinement in an indictment, and was passed not with a view to show the distinction between the former and the latter, but for an entirely different purpose. Definitions, from the great difficulty of couching them in precise language, are always confessedly dangerous things; but the danger of being led into error is inconceivably greater when terms are taken for definitions which were not so designed. In no part of the act of 1791 do we find the terms form, informality, refinement, or any of a similar import. We do, indeed, find the term "substance," but we find it used in such connection and with such exclusions as to show that it is employed (to adopt the language of *Lord Kenyon,* in *Rex v. Dowlin,* 5 Term, 311) in contradistinction to detail, and not to form or verbal accuracy. The statute provides that the indictment shall set forth "the substance of the offense," but it requires that, in addition thereto, it shall also set forth "by what court or before whom the oath was taken," and also shall contain "the proper averment or averments to falsify the matter or matters wherein the perjury is assigned." Will it be contended for a moment that these *additional* matters formed no part of the *substance*—as distinguished from the *form*—of an indictment for perjury at common law? If not, upon what ground can we hold that the other matters with which the statute dispenses formed no part of the substance, but were mere matters of form in such an indictment? The purport of the statute is obvious. It was intended to authorize an indictment in many respects substantially different from that which the common law required—one more summary, less in detail. While the statute remained in force this summary mode of indictment was sanctioned by law. After the statute was repealed this mode was no longer thus sanctioned; and indictments thereafter found are not good unless they conform to all the essential requirements of the common law. It may be that the omission in the Revised Statutes of this part of the act of 1791 occurred from inadvertence or misapprehension. If it be so, and the omission be an evil, the Legislature can supply the remedy. The (379) opinion of the Court upon this point renders it unnecessary to express any upon the other question raised in the case.

The Superior Court will arrest the judgment.

PER CURIAM. Reversed.

Cited: S. v. Hoyle, 28 N. C., 3; *S. v. Tom,* 47 N. C., 417; *S. v. Noblett, ib.,* 431, 435; *S. v. Robinson,* 98 N. C., 753.

STATE v. JACOB B. TRAMMELL AND OTHERS.

An indictment for a conspiracy, charging the object of the conspiracy to be to cheat and defraud the citizens at large or particular individuals out of their land entries, is not supported by evidence that the defendants conspired "to make entries in the Land Office before it was opened, or before it was declared to be opened, or after it was opened, for the purpose of appropriating the lands to their own use and excluding others."

APPEAL from *Bailey, J.*, at Spring Term, 1842, of BURKE.

The defendants were tried upon the following indictment, which had been removed from Macon to Burke County, to wit:

STATE OF NORTH CAROLINA, MACON COUNTY. } *ss.* Superior Court of Law, Spring Term, 1837.

The jurors for the State, upon their oath present, that Jacob B. Trammell, entry taker of the said county of Macon, Jonathan Phillips, William Roane, Bynum W. Bell, John Strain, Benjamin Trammell,
(380) Bartlett Wilson, Young Ammons, and Thomas Ray, all of the county aforesaid, being evil disposed persons, and wickedly devising and intending to cheat and defraud all the good citizens of the State of divers large sums of money, and of their locations and of their entries of vacant and unsurveyed lands lying and being in the said county, which lands were, by law, subject to be entered by any of the good citizens, on 2 May, in the year of our Lord 1836, with force and arms in the county of Macon aforesaid, did, amongst themselves, combine, conspire, confederate, and agree together to cheat and defraud the said good citizens of divers large sums of money and of their respective entries of the said vacant and unsurveyed lands, and unlawfully, unjustly, and corruptly to secure and appropriate the same to their own use. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Jacob B. Trammell and [*the others, naming them*], on the day and year aforesaid, in the county aforesaid, in further pursuance of the said conspiracy, combination, confederacy, and agreement, did proceed to a certain room in the courthouse, in the town of Franklin, and did then and there enter divers tracts and parcels of land embracing 50,000 acres and more of the most valuable lands in the county of Macon aforesaid, in their own names and for their own use before the said entry taker's office was opened for the reception of entries of vacant and unsurveyed lands from the said good citizens of the State and to the fair and equal competition of the good citizens who should desire to make entries therein, it being about the hour of 1 o'clock, a. m., of the day and year aforesaid, and of the day upon which the said entry taker's office was by law required to be opened. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Jacob B. Trammell, entry taker as

aforesaid, and [*the others, naming them as before*], on the day and year aforesaid, in the county aforesaid, while so in the room in the said courthouse in the town of Franklin, shut and locked up apart from the other citizens of the State, in further pursuance of the said conspiracy, combination, confederacy, and agreement, did unlawfully, secretly, deceitfully, and corruptly enter in the said entry taker's office, and upon the books of the said entry taker's office, many large, valu- (381) able tracts and parcels of land as aforesaid; and the more effectually to deceive, defraud, and injure the said good citizens who were then and there assembled with their locations and entries for vacant and unsurveyed lands in the said county, waiting for the said entry taker's office to be opened, that they might make their said entries therein, and the said Jacob B. Trammell, entry taker as aforesaid, and [*the others, naming them as before*], at divers times gave out and proclaimed to the said good citizens so being assembled and crowded around the courthouse, waiting for an opportunity to make their said entries, that they might go home, for that the said entry taker's office would not be opened for the reception of entries until daylight in the morning of the day and year aforesaid; by means of which conspiracy, combination, confederacy, agreement, and false pretenses the said Jacob B. Trammell, entry taker as aforesaid, and [*the others, naming them as before*], fraudulently, corruptly, unlawfully, and secretly did procure and enter in said entry taker's office locations and entries for many large and valuable tracts or parcels of land in said county of Macon in their own names and for the use of themselves exclusively, to the great damage of the said good citizens, in contempt of the laws and statutes of the State, to the great hindrance of public justice, to the evil and pernicious 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 the said Jacob B. Trammell and [*the others, naming them*], all late of the county aforesaid, on the day and year aforesaid, with force and arms in the county aforesaid, unlawfully, corruptly, and deceitfully designing and intending to cheat and defraud the said good citizens of the State of many large sums of money, did then and there, amongst themselves, conspire, combine, confederate, and agree together falsely and fraudulently to cheat the said good citizens of divers large sums of money; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said Jacob B. Trammell, entry taker as aforesaid, and [*the others, as before named*], on the day and year aforesaid, in the county aforesaid, in further pursuance of and according to (382) the said conspiracy, combination, confederacy, and agreement among themselves, had as aforesaid, did, after they had so entered the vacant and unsurveyed lands, being so shut and locked up in the said

courthouse as aforesaid, give out and proclaim from the window of the said courthouse that the good citizens might then and there make their locations and entries of and for the said vacant and unsurveyed lands, with the intent to cheat and defraud the said good citizens of their money, which is required by law to be paid to the entry taker on making entries in his office, the said Jacob B. Trammell and [*the others, naming them*], well knowing that the said vacant and unsurveyed lands had been previously entered by them in their own names while so shut up in the said room as aforesaid, before the said entry taker's office was open to the fair and equal competition of all the said good citizens of the State, by means of which said conspiracy, combination, confederacy, agreement, and false and deceitful pretenses and representations the said Jacob B. Trammell and [*the others, naming them*], deceitfully, corruptly, and unlawfully did procure of and from the said good citizens large sums of money on entries previously made by themselves, and did thereby cheat and defraud the said good citizens of divers large sums of money so paid in with and on the said entries and locations which had theretofore been entered by themselves as aforesaid, to the great damage of the said good citizens, in evasion of the entry laws of the State, to the evil and pernicious example of all others in like cases offending, in violation and contempt of the laws of the State, and against the peace and dignity of the State. And the jurors aforesaid do further present, that the said Jacob B. Trammell and (the others before named), all of the said county of Macon, with force and arms in the county aforesaid, on the day and year first aforesaid, wickedly devising and intending to cheat, defraud, and prejudice the good citizens of the State, did, amongst themselves, conspire, combine, confederate, and agree together falsely and fraudulently to cheat and defraud the good citizens of the State of divers large
(383) and valuable tracts or parcels of vacant and unsurveyed lands in the said county of Macon, and divers large sums of money, to the great damage of the said good citizens, to the evil and pernicious example of all others in like case offending, in contempt of the laws and against the peace and dignity of the State; and the jurors aforesaid, upon their oath aforesaid do further present, that the said Jacob B. Trammell and [*the others named as before*], all late of the said county of Macon, with force and arms in the county aforesaid, on the day and year first aforesaid, unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud one Benjamin S. Brittain of his money, entries, and locations of vacant and unsurveyed land in the county of Macon, which were then and there presented at the said entry taker's office, to the great damage of the said Benjamin S. Brittain, in contempt of the laws of the State, to the evil and pernicious example of all others in like case offending, against the peace and dignity of the State.

J. W. GUINN.

Before the trial a *nolle prosequi* was entered as to Young Ammons and Bartlett Wilson. On the trial it was proven that Jacob B. Trammell, the entry taker of Macon County, with five clerks, to wit, Jonathan Phillips and others, on 2 May, 1836, were in the entry taker's office in the town of Franklin after the hour of midnight; that they made a number of entries before the office was opened for the entries of other citizens, then assembled in great numbers about the said office; that when the window was opened and the entry taker declared himself ready to receive entries and money, one Sedford was the first to hand in his entry at the window, and that his entry, when enrolled in the entry taker's books, was number 234. It also appeared that the preceding entries on the book were in the names of Phillips and the others in the room, and of some forty persons besides; that several hundred entries were thrust in at the window in parcels with great rapidity and in great confusion, after Sedford's, and that they, in many instances, were for the same lands as those of Phillips and others in the room. There was also (384) evidence tending to show that Trammell and Phillips had combined to secure for him, Phillips, and some of their friends, the entries of several parcels of land before the office was announced by the said Trammell to be open for the reception of the entries of the citizens generally, by which a priority was obtained as to the date and number of the entries as placed in the entry taker's book. It was in evidence that there was a dense crowd of some four or five hundred persons assembled about the office of the entry taker before and after the hour of 12 o'clock at night on 2 May, and that they continued there till after the office was opened. There was also evidence showing that the defendant Trammell had advertised 8 o'clock of the said day as the hour at which the office was to be opened; that he alleged the advertisement had been torn down, and he should give himself no further trouble about it; and there was also evidence to show that there was a diversity of opinion as to the hour at which the office would be opened. There was no evidence to show any combination between the defendants to obtain money from any person, or to defraud any individual of his own land. The proof was directed entirely to establish a combination and conspiracy to secure to themselves the entries of the vacant lands, in exclusion of the rights of others, and thereby gain a preference in time. The defendants' counsel insisted that the evidence in the case only tended to show (if anything) a combination of the defendants to get the first entries of the vacant lands in Macon County, and obtain a preference over other citizens in entering the same, and that such combination would not constitute a conspiracy, however improper it might be; and, in the second place, it was insisted that even if such a combination did amount to a conspiracy, yet the proof did not support the indictment, by reason of its variance from the charge.

The indictment, it was insisted, charged a conspiracy to cheat the citizens of their moneys, of their respective entries, and of their lands, and to cheat Benjamin T. Brittain of his moneys, entries, and locations, and that proof of the defendants having formed a conspiracy to enter
(385) for their own use the lands in question, before the other citizens had an opportunity of making their entries, whereby they had by unlawful means obtained a preference over others, would not, in law, support any count in the indictment.

The court charged the jury that to constitute a conspiracy, subjecting the parties to an indictment, it must appear that two or more persons combined together to effect some unlawful purpose; that in this case, if the jury believed from the evidence that the defendants or any two of them entered into a combination to make entries in the entry taker's office before it was opened, or before it was declared to be opened or after it was opened, for the purpose of gaining a preference and appropriating the land to their own use, and thereby excluding the other citizens, that, in law, amounted to a conspiracy, and it was sufficiently averred in the indictment. The jury returned a verdict of guilty as to Trammell and Phillips, and judgment having been given accordingly, the said defendants appealed.

Badger (in the absence of the Attorney-General) for the State.
D. F. Caldwell for defendants.

GASTON, J. The case, stated by his Honor to have been made out by the testimony, certainly exhibits a course of proceeding on the part of the defendants exceedingly unfair and greatly to their discredit. But whether this conduct, on an indictment properly framed, would or would not subject them to the penalties of a conspiracy, we need not inquire, for we are clearly of opinion that it did not support any of the charges contained in this indictment. It is of the first importance in the administration of criminal justice that the proofs should correspond with the allegations, and for that reason, among others, the allegations are required to be distinct and explicit. It is not easy to understand those set forth in this indictment, but by no reasonable intendment can we so construe them as to accommodate the case made to the charges preferred.

The case made is of a scheme contrived between the defendants
(386) and others whereby to procure the first entries of vacant land in the entry taker's office, so as to secure to themselves a priority over entries that might be afterwards made in that office by others; and it is expressly stated that it was no part of this scheme to obtain money from any person, or to defraud any person of his land. Now, what is the conspiracy charged? In the first count, it is to cheat and defraud all the

good citizens of the State of divers large sums of money and of their entries of vacant and unsurveyed land lying in the county of Macon, and to secure and appropriate the same to their own use. What is an entry? It is lawful for a citizen to make with the entry taker a claim for vacant land, setting forth in writing the situation of the land claimed, and the entry taker is then to enter in his book a copy of this claim, and thereupon it becomes an entry. A copy of this entry, with a warrant to survey the land wherein described, is afterwards to be delivered to the enterer, who, in due time, can perfect the entry with a grant. A combination or conspiracy to cheat a man of his entries of vacant and unsurveyed lands, and to appropriate the same to the use of the conspirators, necessarily means to deprive him, who has made such entries, but has not yet had them surveyed and granted, of the rightful benefits thereof, and to take these entries or the benefits thereof to the conspirators. It is said that the gist of a conspiracy is the unlawful concurrence of many in a wicked scheme, and that the crime of conspiracy is complete without any act having been done to carry it into execution. This consideration renders it but the more important that the charge of conspiracy should clearly set forth the purpose and object of the combination, as in these are to be found almost the only marks of certainty by which the parties accused may known what is the accusation which they are to defend. The third count states the purpose of the conspiracy as the first, and the fourth count states its purpose to cheat an individual, Benjamin S. Brittain, of his money and entries. There is, therefore, the same variance between the proofs and these charges as there is between proofs and the charge in the first count. The second count charges the purpose of the conspiracy to cheat the good citizens of the State of large sums of money, of which purpose the case expressly states there was no evidence. (387)

We hold, therefore, that his Honor erred in instructing the jury that if they believed from the evidence that the defendants entered into a combination to make entries in the office before it was opened, or before it was declared to be opened, or after it was opened, for the purpose of appropriating the lands to their own use, and excluding others, they were guilty of the conspiracy charged in the indictment.

The Superior Court will set aside the verdict, and, if the State chooses to proceed further in the case, order a *venire de novo*.

PER CURIAM. Reversed.

Cited: *S. v. Van Pelt,* 136 N. C., 639.

(388)

ALLEN MORROW AND WIFE v. ELIAS ALEXANDER.

1. A deed, executed in South Carolina, for a slave then being in this State, with certain limitations over, which by the law of that State are invalid, but which by our law are good, must be construed according to the law of that State, and, therefore, the limitations over are void.
2. A deed for a female slave and "her increase" can only convey the woman and her issue born after the execution of the deed.
3. Where a father signed and sealed in South Carolina a deed for a slave to his daughter, who resided in North Carolina, and delivered it in South Carolina to his son, to be given to his daughter: *Held*, that the delivery was complete, and the deed, therefore, well executed in South Carolina.

APPEAL from *Pearson, J.*, at Spring Term, 1842, of MECKLENBURG.

Detinue for eight negroes. The possession and detention of the negroes by the defendant were admitted. The plaintiff offered in evidence a deed from one Rooker to Mrs. Mary Spears, the daughter of Rooker, dated 29 August, 1839, of which the following is a copy:

STATE OF SOUTH CAROLINA, } *ss.*
YORK DISTRICT. }

Know all men by these presents, that I, John Rooker, of said State and District, do, for and in consideration of the tender love and affection which I have and bear unto my daughter Mary Wyatt Spears, let her have for her entire and independent use, independently of every other person whatsoever, a certain negro woman by the name of Sylvia, and her increase, so long as she, the said Mary, may live; and after her death, for said negroes to belong to the issue of said Mary's
(389) body, if any there be; and if there should not be at said Mary's death any of her issue, then the said negroes to go to her nearest kindred by blood. Now, know all men by these presents, that I, the said John Rooker, do hereby forever warrant and defend the above mentioned negroes for the above mentioned purpose, from the lawful claim or claims of any other person or persons whatsoever. In testimony whereof I have hereunto set my hand and seal this 29 August, 1839.

J. ROOKER. [SEAL]

Signed, sealed and delivered
in the presence of
J. H. ROOKER.

It was proved that the wife of the plaintiff Morrow was the only child of Mrs. Spears by her first husband; that in the lifetime of Spears, who resided in North Carolina, Rooker, who resided in South Carolina, loaned Spear's wife the negro girl Sylvia. Spears continued in the possession of Sylvia and her children until his death in 1837. After his death the negroes remained in the possession of Mrs. Spears in North

Carolina, and while so in her possession Rooker caused the deed in question to be written, signed and sealed it at his residence in South Carolina and handed it to John H. Rooker, his son, and directed him to deliver it to Mrs. Spears. He accordingly did so, some ten days afterwards, at her residence in North Carolina. Mrs. Spears afterwards married the defendant, who took the negroes into possession in 1840. Mrs. Alexander died, leaving no child by the defendant, her second husband. The plaintiffs then demanded the negroes and brought this suit. The plaintiffs' counsel insisted that, upon this state of the facts, the deed did not take effect until its delivery to Mrs. Spears, and that, as Mrs. Spears lived in North Carolina, the laws of that State were applicable to the case. The defendant's counsel insisted that the deed took effect the instant it was delivered by the donor to his son, which being done in South Carolina, the laws of that State were applicable to the case, and that the plaintiff could not recover without showing that, by the laws of (390) that State, a limitation of a life estate in slaves could be made by deed; secondly, that the limitation in this deed, by the operation of the rule in *Shelley's case,* gave the entire estate to Mrs. Spears by the laws of this State. The facts not being controverted, the court directed the jury to render a verdict for the plaintiffs, subject to be set aside upon the questions reserved. Upon the first question reserved the court was of opinion with the plaintiffs that the case was to be decided by the laws of North Carolina, but upon the second question reserved the court was of opinion with the defendant that Mrs. Spears took the entire interest, and directed the verdict to be set aside and a nonsuit entered. From this judgment the plaintiffs appealed.

Boyden for plaintiffs.
W. J. Alexander, D. F. Caldwell, and Barringer for defendant.

RUFFIN, C. J. The action is for a female slave and her seven children. The deed under which the parties respectively claim conveys to Mary W. Spears "a certain negro woman by the name of Sylvia, and her increase, so long as the said Mary may live, and after her decease, for said negroes to belong to the issue of the said Mary's body, if any there be; and if there should not be, at the said Mary's death, any of her issue, then the said negroes to go to her nearest kindred by blood."

It does not seem to have been adverted to on the trial, though it is pretty certain, that neither of the present parties has a title to most of the negroes in dispute. The woman Sylvia and her issue born after the execution of the deed, only can pass under the conveyance of her and *"her increase"* (*Cole v. Cole,* 23 N. C., 460); and those born before yet belong to Rooker, the original owner. As the deed was executed in

August, 1839, and the action was brought in January, 1841, it is not probable that more than one child, if any, was born in the interval.

However, all the questions made at the trial apply to the mother (391) herself; and, therefore, must be determined.

If the limitation over to the "issue" of Mrs. Spears, after a life estate to herself, be good, it can only be under our statute of 1823, Rev. Stat., ch. 37, sec. 22, whereby limitations of slaves by deed are made effectual if they would be so in a will. At common law there could be no remainder after a life estate in a personal chattel created by deed. The case does not expressly state what is the law of South Carolina on this point. But we suppose that we must take such a limitation to be void there, because we know that they brought from England the common law, as we did, and, therefore, that it still prevails except as it may be altered by statute; and especially because, on the trial, the plaintiffs insisted that the limitation operated under the law of North Carolina, in contradistinction to that of South Carolina, which we understand to be an admission that it was not good in the latter law. If, then, the deed took effect under the law of South Carolina, and not under ours, it is not material to consider how the particular limitation would be regarded, had the deed been made in this State. And we are of opinion that this instrument was executed and delivered in South Carolina so as to become completely a deed there, and, consequently, that the absolute property in the negro Sylvia rested in Mrs. Spears, and the gift over to her issue is void.

When Rooker gave the deed to his son, it was not with the view that he should keep it for him, the donor, so that it might be under the control of the father, even for any short period. The son did not have the possession of the deed, as the agent for the father, for keeping it. Nothing like that was said, nor can such a thing be inferred from any part of the transaction, or from any purpose which can be supposed to have actuated the donor at the time. He had no reason for withholding the immediate delivery of the deed or postponing its operation.

If he could by parol constitute the son his agent to deliver a deed, sealed by himself, we see nothing to induce a belief that this was an act of that character. Did he mean that the deed should never take effect in case he or his daughter should die before it actually came to her hands?

Why he should have so intended cannot be imagined. If, on the (392) contrary, the purpose was that the interest which the deed purports to convey should take effect at all events, it follows that, in delivering the deed to his son, he meant to part, and did part, with all dominion over the instrument; and, therefore, that the delivery to him was a delivery for the donees. When the maker parts from the possession of a deed, and directs it to be delivered to the grantee, without any

condition expressed, there is a presumption that it was then delivered as a deed for the benefit of the grantee. Such a delivery to one for another makes the deed operate presently, and until it be refused by the grantee, which was never the case here; but, on the contrary, it was accepted. These positions are of such frequent occurrence as to require no discussion at present; but it is sufficient to refer to *Bank v. Pugh,* 8 N. C., 198; *Tate v. Tate,* 18 N. C., 22; and Shep. Touch., 57-8.

It is said, however, although it be a general principle that the efficacy and construction of contracts depend upon the *lex loci contractus,* yet that this case falls within an established exception: which is, that where a contract is made with a view to its operation in another country, then the law of the place in which it is to be performed, or the *lex rei sitæ,* furnishes the rule upon which the efficacy of the instrument is to be judged. We think, however, that this is not a case of that kind. In the first place, this is not an executory agreement, to be performed anywhere, but it is an executed conveyance of a slave. It is true, the subject and the donee were, at the time, in this State. But the deed does not so state, nor contain any reference thereto. There is no ground for the assumption that the deed was intended to have any peculiar operation under the law of North Carolina, contradistinguished from the law of South Carolina, or from the law of the civilized world generally, whereby the alienation of personal property is permitted to the owner. The parties may have been aware that by the laws of some countries slavery is not recognized, and that the instrument could not there operate: not, however, by reason of the particular limitations to one for life, and then to her issue, but because negroes were not there the subjects of sale and conveyance. But, undoubtedly, the maker of this deed did not intend or expect that it would have effect by the law of North (393) Carolina, and by that singly or merely; but he expected that it would, and meant that it should, inure to the benefit of the grantees in every place in which slaves might be given or sold or conveyed. This is a very different question from that which relates to the forms and ceremonies of a contract made in one place for the conveyance of personal property situate in another, so as to make it effectual against creditors or other persons having claims on the property under the laws of the country in which it is. There is no obligation on the tribunals of a country to defeat peculiar rights conferred by their own law on their own citizens, by sustaining a contract not executed in conformity with that law. But here the maker of the deed has, by his domestic law, and by ours also, parted with all his property in the subject, at all events; and the only question is, to whom he has by the conveyance transferred it. Is it to the person in whom the deed would vest it by the law of his own country in which he executed it? or is it to one in whom, according

to the limitations contained in the deed, it would be vested by the law of another country to which no reference is made, but in which the subject, in itself transitory, happened to be at the time? Clearly, we think, the maker of the deed cannot be said to have had a view to any other but his own law; and, therefore, that must determine the construction of the instrument. For this reason the judgment was, in our opinion, rightfully given for the defendant, and must be

PER CURIAM. Affirmed.

Cited: Robbins v. Rascoe, 120 N. C., 82.

(394)

WILLIAM S. BLACKLEDGE v. WILLIAM M. CLARK.

When from the circumstances proved in a case a reasonable suspicion or presumption of a fact may be inferred, although the court might think the jury would be well justified in not inferring such fact, yet it is not error in law in the court to submit the matter to the jury to be passed upon by them.

APPEAL from *Battle, J.,* at Spring Term, 1842, of BEAUFORT.

Trespass for taking five negro slaves, named Jack, Henry, Daniel, Toney, and Moses. In support of his action the plaintiff introduced Jeremiah Brown, who testified that some time in the summer of 1830 he, as the agent of the plaintiff, had possession of the slaves in question, when they were taken by the defendant, put in jail, and subsequently sold; that the plaintiff was present at the sale, forbade it, and gave public notice that he claimed the slaves as his own; that the slaves were valuable; that he does not recollect the price at which slaves sold in 1830, but that some time after that period four of the slaves would have sold for $1,200 each, and the fifth for $1,500 or $1,600, and that the first four would hire for $120 each per annum, and the other for $400 per annum. Upon cross-examination the witness stated that the slaves in question had formerly belonged to him; that they had been levied on by Jeremiah Allen, a nephew of his, who was deputy marshal for the District of North Carolina, in New Bern, under a *fieri facias* issuing from the district court of this State; that the slaves ran away from a tanyard, where they were employed under the charge of the witness, and could not be taken so as to be sold by the deputy marshal in New Bern; that he, the witness,

(395) contrived to have an interview with the slaves about 9 o'clock at night at the wharf in New Bern, and prevailed upon them to accompany him to the town of Washington; that he carried them up the river and Swift Creek to the bridge across the latter, where he arrived with them about sunrise, and he thence took them to Washington

by land in open day, and carried them to a house where they remained all night, and the next day he delivered them to Mr. Demilt, the deputy marshal, in the town of Washington, and that the latter sold them at public auction at the door of the courthouse, about the hour of 1 or 2 o'clock in the afternoon of the same day; that Mr. Demilt had previously advertised them; that there were four or five persons present at the sale, one of whom, Mr. Holmes, bid them off for Mr. Hollister and Mr. Blackledge, the plaintiff in this suit, at the price of $210; that after the sale the witness took the slaves, with the consent of Mr. Holmes, and without any objection from the officer, Demilt, and carried them to New Bern, where Mr. Hollister refused to have anything to do with them, but the plaintiff, Mr. Blackledge, received them, and placed them under the charge of the witness, who employed them in working out some leather, which the plaintiff had purchased at a sale of the witness's property made by the deputy marshal in New Bern. This witness testified further that the deputy marshal in New Bern did not deliver the slaves to him, nor authorize him to bring them, nor know of his intention of bringing them to Washington; that he brought no paper from the deputy marshal at New Bern to the deputy marshal at Washington, though he did bring the writ of execution from the deputy in New Bern to Major Thomas H. Blount; that the plaintiff, who was his brother-in-law, did not authorize him to have the slaves bought for him, nor know of his intention to do so; that he had them bid off for Hollister and the plaintiff, who were his sureties, and had paid large sums of money for him; that the slaves had been previously advertised for sale in New Bern, but could not be sold there on account of their having run away, and that he brought them to Washington to be sold, because he could not induce them to come in to be sold at New Bern, where they feared they would be purchased by speculators. The witness stated further that (396) nothing was paid at the time of the sale to the officer for the slaves, nor did he know of anything having been subsequently paid for them.

For the defendant Mr. Demilt was then examined. He testified that some time before the sale of the slaves in question by him, he was requested by Major Thomas H. Blount to advertise Mr. Brown's slaves for sale in Washington, and on 27 March, 1830, he did advertise them, in the usual way, to be sold on the 6th day of the following month; that on the morning of the latter day Mr. Brown came to his store and remained there until 1 or 2 o'clock in the afternoon, when they went to the courthouse, and the witness, having received the execution from Mr. Blount, offered the slaves for sale, when Mr. Holmes bid them off for Mr. Hollister and the plaintiff for $210; that there were only three or four persons at the sale; that no money was paid to him, nor did he then require

it, though he would have received it had it been tendered to him; that he made no objection to Brown's taking the slaves, though he heard him order them home; that he gave no receipt for money nor bill of sale for the slaves, because the money was not paid him; that some time afterwards Brown sent him the plaintiff's check on the bank for the purchase money, but the check was protested for nonpayment, and some short time afterwards, when he was informed the check would be paid, he declined receiving the money, and wrote to Mr. Brown that if the plaintiff thought proper to claim the slaves he might pay the money into the clerk's office; that after the sale he handed the execution to Brown, who stated it was necessary to complete sales in New Bern.

Mr. Hollister, for the defendant, testified that he never authorized Brown to have the slaves purchased for him; that he gave no authority to Holmes to do so, and that, when informed of the purchase, he refused to have anything to do with it; that at the subsequent sale of these slaves in New Bern he purchased two of them, but does not recollect at what price.

Thomas H. Blount testified that, some time before the sale of the slaves in Washington, Brown came to his house after dark and told him that if his property was sold at New Bern it would be sacrificed,
(397) and asked the witness whether the deputy marshal in Washington would not sell them there; said the execution was in the hands of his nephew in New Bern, from whom he could get it, and asked the witness to purchase the negroes for his creditors; witness declined to do so himself, but, after some further importunity from Brown, he agreed to ask Mr. Holmes to purchase for Brown's creditors. In speaking of a sale in New Bern, he said something about Mr. Jarvis and speculators.

John B. Dawson swore that he lived at Swift Creek Bridge in 1830; that Brown came there one morning before breakfast with the slaves in question, and said that he was carrying them to Blount's Creek to a seine there; that the negroes were not confined, but seemed to go willingly. Witness further testified that in 1830 the plaintiff was considered to be in embarrassed circumstances, and he did not think he could have paid for the slaves at a fair price, though he could easily have raised $210 at any time; that the plaintiff was in possession of a plantation and negroes worth $8,000 or $10,000, which, however, were understood to belong to his wife.

Moses Jarvis testified that he knew the slaves in controversy, and thought two of them were worth $600 each in 1826 and 1827; that at the time of the sale he was not a creditor of Brown's; that at the sale of the tanyard, etc., at New Bern, by the deputy marshal there, the plaintiff purchased the stock of leather, and that Brown and the deputy marshal, Allen, had charge of the tanyard.

Howard Wiswall swore that he lived in Washington in 1830, and was at that time engaged in the purchase of negroes, but he never knew or heard of the sale of the slaves in questions until after it was over.

The record of a judgment in the district court of the United States for the District of North Carolina against Brown, and the different executions issuing thereon, under one of which the alleged sale took place, were also introduced. The marshal at first returned this sale under the execution, but afterwards had leave to amend his return, and then returned a levy upon these slaves, and that there was no sale for want of bidders. A *venditioni exponas* then issued, under which the defendant, as deputy marshal, seized the slaves. The money (398) under the sale at Washington was paid into the clerk's office on 12 May, the day the first execution was returnable.

The plaintiff contended that he was entitled to recover, first, because he acquired title to the slaves in dispute under his purchase at the sale by the deputy marshal, Demilt, at Washington; but if that were not so, then he was entitled to a verdict in this action, secondly, because, having shown possession at the time of the slaves being taken by the defendant, the latter could not justify his taking under the *venditioni exponas,* the levy by the deputy, Allen, having been divested by the proceedings at Washington.

The defendant contended that the plaintiff could not recover, first because the alleged sale by Demilt, at Washington, conveyed no title to the plaintiff, for want of delivery, and because no money was paid by the purchaser; secondly, because the purchase was for Hollister and Blackledge, and the suit is in the name of Blackledge alone; thirdly, that the defendant was an officer acting under a legal process, and could not, therefore, be rendered liable for acting under such process; fourthly, that the deputy marshal in Washington could not sell under a levy made by the deputy marshal in New Bern; fifthly, that the whole transaction by which the slaves were taken from New Bern to Washington to be sold there was fraudulent and void, and the plaintiff could not claim title under it, whether he was privy to the fraud or not.

His Honor instructed the jury that the purchase made by the plaintiff's agent, Holmes, was not void for want of delivery or for the nonpayment of the purchase money, if the jury were satisfied that the officer, Demilt, permitted Brown to take the slaves without requiring the previous payment of the price bid for them. But if the sale made by Demilt were for any cause void, then the slaves never had been divested from the possession of the deputy marshal in New Bern, and they might well be sold under the *venditioni exponas,* under which the defendant acted. His Honor further instructed the jury that if the slaves were purchased for Hollister and Blackledge, and the former refused to have anything

to do with them, the latter might take the benefit of the purchase
(399) himself and might sue alone for them, and that there could be no objection to a sale made by the deputy marshal in Washington, under a levy made by a deputy in New Bern. Upon the question of fraud the court charged that if there was an understanding between the plaintiff and Brown by which the negroes were to be taken to Washington and there sold, so that they might be purchased by the plaintiff at an undervalue, the transaction was fraudulent, and the plaintiff could acquire no title under it. So, if the money paid for the slaves by the plaintiff was furnished by Brown. The court charged further, that if there was fraud in conducting the sale itself, either by Brown or by Brown and the officer Demilt, then the plaintiff could not claim the slaves bid off at such sale, though he might not be privy to the fraud. The court charged, lastly, that if the plaintiff acquired a good and valid title to the slaves by his purchase at the deputy marshal's sale, then the officer (the present defendant) could not justify taking the slaves under the execution in his hands. There was a verdict for the defendant, a new trial moved for and refused, and judgment according to the verdict, from which the plaintiff appealed.

Badger and J. H. Bryan for plaintiff.
C. Shepard for defendant.

RUFFIN, C. J. The transactions out of which this case arose are so palpably dishonest on the part of Brown that counsel has not attempted to defend them in any of their parts. Nor, indeed, has fault been found with any of the views taken of the case by the court, excepting only the observation, "So, if the money paid for the slaves by the plaintiff was furnished by Brown," the transaction would be fraudulent, and the plaintiff could acquire no title under it. It is said that suggestion was made and submitted to the jury without evidence, and, therefore, erroneously. If it be so, the verdict must be set aside; for, however much we might regret sending a case back to another trial, in which, upon the plaintiff's own evidence, the result must always be against him, yet we should be obliged to do so if he did not have the full benefit of the
(400) law upon the former trial. But in such a case as the present certainly the court cannot be expected to require less than the entire and absolute want of *any* evidence, direct or inferential, upon which the jury could have acted. We do not think there was such a total destitution of proof on that point, but that it was furnished by the other fraudulent circumstances of the case, tending to establish a secret trust between those parties for Brown. Among these circumstances are the following: Allen, the deputy marshal, was the nephew of Brown, and in his employ-

ment in his tanyard, in which the negroes in controversy were also employed under him. All that property, tanyard, stock, and slaves, was, among other things, advertised to be sold on 1 April, in New Bern, by Allen, under the execution; but before that day of sale, by the procurement of Brown, the sale of these negroes was advertised in Washington, by Demilt, another deputy marshal, to take place there on 6 April. Accordingly at the New Bern sale on 1 April these negroes were allowed to be out of the way, and were not sold; but the tanyard, stock of leather, hides, etc., and two other negroes were sold, and purchased by the present plaintiff. But Brown still continued in possession of everything thus purchased, and worked out and sold the leather, and, as far as we see, enjoyed all the profits. Then, on the night of 4 April, he, Brown, set out secretly with the execution and the negroes to Washington, and had them in Washington for sale on the morning of the 6th of the month, and they were then sold by Demilt, and, as Brown says, were, without the privity of the plaintiff, also purchased, by his procurement, in the name of Blackledge. No money was then paid on account of the purchase. But it is certain, and the contrary is not pretended, that Brown supplied the money to defray the expenses of the trip to and from Washington, and that he also took the execution again and the negroes back to their old employment in the tanyard, which was still in his own occupation and enjoyment; and there they remained until they were seized a second time by the present defendant for the purpose of making the sale which gave rise to this action. The negroes, which Brown values at about $4,000, were bid off at Washington for $210, and that sum was (401) paid into the clerk's office on 12 May following by a respectable gentleman in the name of the plaintiff; and it must be admitted that there is no direct evidence that it was not the money of the plaintiff, but was furnished by Brown. But when we find that Brown furnished other money, namely, that for the expenses as just mentioned; that in making the purchase he used the plaintiff's name, at his will, and without the leave of the plaintiff, and that the purchase was made for his, Brown's benefit, collected from the attending circumstances and to be inferred from his subsequent possession and enjoyment of all the property thus put into the plaintiff's name; that he, Brown, made the remittance to Demilt, which was intended to complete the fraudulent purchase, and did all the correspondence towards closing the transaction, as he had begun it, there is, at least, some if not a strong ground of suspicion that the plaintiff, throughout, furnished nothing but his name to his brother-in-law, Brown, and that the latter, as he gave his personal agency, so also supplied out of his funds, or, possibly, out of the tanyard, which was still in his disposition, the pecuniary means that were used to carry out the dishonest purposes of this unfortunate man. We do not say that a jury

would be obliged to infer from these circumstances that Brown furnished the money; but, on the contrary, we think they might well have refused so to find. But we do not think the circumstances enumerated so irrelevant or so inconclusive to establish the fact that the money was probably, *per indirectum,* furnished by Brown, instead of being thrown away by the plaintiff for the other's benefit, as to give to a verdict finding that fact the characteristic of being a finding without evidence. Those circumstances certainly tend towards that conclusion; they raise some suspicion or presumption of the supposed fact; and it was not, therefore, erroneous to leave them to the jury, to be weighed by them and allowed such force as they thought them entitled to, from their knowledge of business and the usual motives of men in the relation and condition in which the plaintiff and Brown stood.

PER CURIAM. Judgment affirmed.

Cited: Null v. Moore, 32 N. C., 328.

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(402)

STATE v. SCIPIO SMITH.

1. Defendants in an indictment have a right to plead severally not guilty; but a general plea of not guilty by all the defendants is, in law, a several plea.
2. Whether the *trial* shall be separate or not is a matter of sound discretion to be exercised by the court under all the circumstances of the case.
3. The right to challenge a juror is a right to reject, not to select; and, therefore, neither of two defendants in an indictment on a joint trial has cause to complain of a challenge by the other.
4. Whether the trial be joint or separate, one defendant in an indictment cannot, until finally discharged, be a witness for another, and wherever the wife of one is not permitted to testify for the others on a joint trial, she will not be received for them, although her husband be not then on trial.
5. The presumption that he who is found in possession of stolen goods recently after the theft was committed is himself the thief applies *only* when this possession is of a kind which manifests that the stolen goods have come to the possessor *by his own act,* or, at all events, *with his undoubted concurrence.*
6. Thus, where the defendant Scipio Smith and two of his sons, who lived with him, were indicted for stealing tobacco, and the tobacco, which had been stolen in the night, was found the next day in an outhouse of Scipio, occupied by one of his negroes, and in which Scipio kept tobacco of his own, and the tobacco so found was claimed by him as his own, though proven to be the tobacco that had been stolen: *Held,* that it was error in the judge to charge the jury "that the possession of the stolen tobacco *thus* found in Scipio Smith raised, in law, a strong presumption of his guilt."

APPEAL from *Dick, J.,* at Spring Term, 1842, of ROCKINGHAM.

This was an indictment for petit larceny in stealing a quantity of

tobacco, the property of one John T. Chambers. The defendants' counsel moved the court for leave to plead severally "not guilty" for each of the defendants, but the court refused the motion and (403) required them to join in their plea. The State examined several witnesses, and proved a variety of circumstances tending to establish the charge against the defendants. Among other things, the State proved by the prosecutor that his tobacco was stolen on Friday night; that he followed the track of a cart from near his tobacco barn to a house of the defendant Scipio Smith on the next morning; that said house was on the land of the said Scipio Smith, about 80 or 100 yards from the dwelling-house of the said Scipio; that the witness then sued out a search warrant against the said Scipio on the same day, Saturday, placed it in the hands of an officer, who on the same day opened the said house and there found his (Chambers') tobacco, which he immediately claimed to be his, in the presence of the said Scipio Smith; that the said Scipio replied that the tobacco was his (Scipio's) property, that it was grown on a certain field of his, and had been put in this house by his direction. It was also proved that there was a quantity of other tobacco in the said house, and that a negro man, the property of the said Smith, occupied the said house. It was also proved that the defendants Gordon and William Smith were the sons of Scipio Smith, and lived with him. On this part of the case the court charged that if they believed the tobacco found in the said house to be the property of Chambers, and that it had been stolen on the night before, the circumstance of the tobacco being found in the possession of the defendant Scipio Smith so recently after it had been stolen raised a strong presumption of guilt against the defendant Scipio, but raised no presumption of guilt against the other defendants. The jury found all the defendants guilty. The defendants' counsel moved for a new trial, first, because the defendants were not permitted to sever in their pleas; secondly, because the court charged the jury that the tobacco being found in the possession of the defendant Scipio Smith as above stated was a strong presumption of his guilt. The court overruled the motion for a new trial, and pronounced judgment against the defendants, from which judgment they appealed to the Supreme Court.

Attorney-General for the State. *(404)
J. T. Morehead for defendants.

GASTON, J. It is assigned for error on the part of the prisoners that upon their arraignment it was prayed by their counsel that they should be permitted to plead not guilty severally, and that the court refused this permission. We admit, without hesitation, that they should have so pleaded, and that the refusal of his Honor was founded in a mistake of

the law. But the record states generally that the defendants pleaded not guilty, and thereupon a jury was duly impaneled and charged to try whether they were guilty or not guilty of the offense charged in the indictment. Now, in contemplation of law, the plea was a several one, and the jury was impaneled to try the question of guilt as to each of the defendants. No idea was entertained, much less such an extravagant position taken, that if one were guilty all were guilty. It distinctly appears in the case that the jury was instructed, as to a part of the evidence, that, although it raised a strong presumption of guilt against one of the defendants, it raised no presumption against the others. As therefore, no error appears upon the *record,* and the mistake set forth in the case was harmless and inoperative, we cannot reverse the judgment because of this exception.

It has been stated at the bar, and we have no doubt correctly, that the true question intended to have been submitted to and decided by the court was whether the prisoners were entitled to claim separate trials, and *that* question has accordingly been here argued. Although it is not properly presented to us, we will not decline to express our opinion upon it. This question was fully examined in *U. S. v. Marchant,* first in the Circuit Court for the District of Massachusetts and afterwards in the Supreme Court of the United States. The case is reported in 1 Mason, 158, and 12 Wheaton, 480, and all the learning applicable to the question will be found stated and ably illustrated in the opinion of *Mr. Justice Story.* It was decided with entire unanimity that the court had a power, and would ordinarily exercise it, to direct separate trials, at the (405) request of the accused, when separate trials might be had without inconvenience, but that "this was a matter of sound discretion, to be exercised by the court with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence." It was in that case objected, as it has been argued here, that if a joint trial were had, and the prisoners did not agree in the challenges, one might desire to retain a juror who was challenged by another; that a juror challenged by any one must be withdrawn from the panel as to all the prisoners, and that thereby the right of each prisoner to select his jury would be impaired. But to this it was answered by the Court that the right of challenge was a right to reject (not a right to select) jurors; that neither of the prisoners had cause to complain that the others or any of them challenged a juror by whom he was willing to be tried, but by whom he had no right to be tried, and that all the law designed, by conferring on him the privilege of challenge, was to secure for the trial of his case unexceptionable jurors, and this it would secure to him, whether tried apart or together with the others jointly accused.

It has been insisted in argument that where a separate trial is had the

prisoner may have witnesses who cannot be admitted if he be tried jointly: for example, his codefendant or their wives. But this is a mistake. Whether the trials be separate or not, one of several defendants, indicted together, cannot, until he is finally discharged, be a witness for the others; and wherever the wife of one is not permitted to testify for the others on a joint trial, she will not be received for them, although her husband be not then on trial. This Court fully acquiesces in the reasoning and in the judgment of the case referred to, and believes that judgment to be in conformity with the usage and law of this State.

Another exception has been taken on the part of the defendant Scipio Smith. It is to that part of his Honor's instruction to the jury which he has stated as follows: "On this part of the case the court charged the jury that if they believed the tobacco found in the said house to be the property of Chambers, and that it had been stolen on (406) the night before, the circumstance of the tobacco being found in the possession of the defendant Scipio Smith so recently after it had been stolen raised a strong presumption of guilt against the defendant Scipio Smith, but raised no presumption of guilt against the other defendants." The part of the case to which the instruction refers is as follows: That tobacco had been stolen from Chambers, the prosecutor, on Friday night; that on the next morning Chambers followed the track of a cart from the neighborhood of his tobacco barn to a house belonging to the defendant Scipio Smith, situate on his land about 80 or 100 yards from his dwelling, and on the same day sued out a search warrant, opened the house, and found there the stolen tobacco, which he claimed; that Scipio Smith at the same time claimed it as his tobacco which was grown on a certain field of his and had been there housed by his direction; that there was a quantity of other tobacco in the same house; that the house was occupied by a negro man belonging to Scipio Smith, and that the other defendants, Gordon and William Smith, were the sons of the said Scipio, and lived with him.

In the opinion of this Court the circumstance of the stolen tobacco being *thus* found in the possession of the defendant Scipio did not, in law, "raise a strong presumption of his guilt," and the instruction of the court below, on this part of the case, is erroneous.

From necessity, the law must admit, in criminal as well as civil cases, presumptive evidence; but in criminal cases it never allows to such evidence any *technical* or *artificial* operation beyond its natural tendency to produce belief under the circumstances of the case. Presumptions of this kind are derived altogether by means of experience from the course of nature and the habits of society, and when they are termed legal presumptions, it is because they have been so frequently drawn under the sanction of legal tribunals that they may be viewed as authorized pre-

sumptions. Among these is that which was in the mind of his Honor, the recent possession of stolen goods in the case of larceny, raising the presumption of an actual taking by the possessor. But when we
(407) examine the cases in which such a presumption has been sanctioned, or consider the grounds of reason and experience on which the presumption is clearly warranted, we shall find that it applies *only* when this possession is of a kind which manifests that the stolen goods have come to the possessor by *his own act,* or, at all events, with his *undoubted concurrence.* A leading case is that mentioned by *Lord Hale,* in illustrating the doctrine of presumptions in criminal cases. "In some cases (2 Hale P. C., 289) presumptive evidences go far to prove a person guilty, though there be no express proof of the act committed by him: but then it must be very warily pressed, for it is better that five guilty persons should escape unpunished than one innocent person should die. If a horse be stolen from A., and the same day B. be found upon him, it is a strong presumption that B. stole him; yet I do remember, before a very learned and wary judge, in such an instance B. was condemned and executed at Oxford assizes, and yet within two assizes after, C., being apprehended for another robbery and convicted, confessed upon his judgment and execution that he was the man that stole the horse, and being closely pursued, desired B., a stranger, to walk his horse for him, while he turned aside upon a necessary occasion and escaped; and B. was apprehended with the horse and died innocently." Here the horse had been stolen, and on the day of the theft B. was found upon him. B. had, unquestionably, therefore, *taken* the horse from some one, and on the very day of the theft; and because he could give no satisfactory explanation, that he got the horse from any other person, the presumption was allowed to be raised that he took the horse from the owner, and was, therefore, himself the thief. An *agent* in the change of the possession was found; there was guilt by some one in making the change; the circumstances all pointed to him as the person, and none raised a suspicion of any other; the *agent found* was, therefore, presumed the *guilty agent.* The rule is thus stated by Mr. East, 2 East P. C., 656: "Wherever the property of one man, which has been taken from him without his consent, is found (recently after the taking) upon another, it is incumbent on that other to prove how he came by it; otherwise, the pre-
(408) sumption is that he has taken it feloniously." The cases mentioned in illustration of this rule are such as the following: "Upon an indictment for stealing in a dwelling-house, the defendant is apprehended a few yards from the outer door with the stolen goods in his possession," Archbold's Crim. Pleader, 123. And the very common case where a gentleman has his watch stolen from his fob in a crowd, and shortly thereafter it is found concealed about the person of one who can

give no rational account of how he obtained it. These raise the presumption of guilt against him thus found in possession. But it is obvious that presumptions of this kind, which even in the strongest cases are to be warily drawn, want one of the indispensable premises to warrant them, when the possession from which a *guilty* taking is inferred does not show *a taking* or *privity in taking* on the part of the possessor. If the tobacco stolen could not have been deposited in this house of the accused without his *agency* or privity, there would then have been a *fact* established, viz., that he had placed or caused it to be placed there since the theft, as a foundation for the inference of another fact, that *he* had participated in the theft itself. But clearly the court could not, upon the evidence stated as all the evidence on that part of the case, declare the *fact,* forming the foundation of the inference, to be *established,* and, therefore, could not rightfully instruct the jury that the inference might legally be drawn therefrom.

Nothing was said pointedly by his Honor regarding the claim set up by the accused to the property in the tobacco stolen, probably because he regarded such claim, taken in connection with the place where the tobacco was found, as evidencing no more than possession in the accused of the thing stolen, and, therefore, bringing the case within the operation of a precise rule of law. Nor can we draw any inference of guilt or innocence from it. If the tobacco of the prosecutor was so *obviously* different from the rest of the tobacco that the prisoner could not have mistaken it for part of the crop which he had made and housed the preceding year, this would certainly have been an unfavorable circumstance against him; but if it might honestly have been so mistaken by him, the claim (to say the least of it) was not inconsistent with (409) the hypothesis of his innocence. A case in this respect strikingly analogous is found in the books. If the sheep of A. stray from his flock to the flock of B., and B. drive them along with his own flock, and by mistake, without knowing or taking heed of the difference, shear them, it is no felony. But if B. knew them to be the sheep of another person, and tried to conceal that fact—if, for instance, finding another's mark upon them, he defaced it and put his own mark upon them—this would be evidence of felony. 1 Hale P. C., 506-7; 2 Russell on Crimes, 98. It appears that there was other testimony, independent of that, which was regarded as raising the presumption of guilt against this defendant, tending to establish the charge against all the accused. How much of it applied to them respectively does not appear. But as upon that other testimony, rejecting as to them the supposed presumption, the jury convicted the other two defendants, and as the court approved the verdict, and no exception is shown on their behalf to any instruction of the court or other proceeding bearing upon them, we are bound to hold that they

were guilty of the crime charged. Not only, therefore, can we not interfere to relieve them from the merited penalty of the law, but this their established guilt renders more apparent the fallacy which misled his Honor in the instruction excepted to by this defendant. The tobacco was stolen by the two sons, who resided with their father. It was found in a house on the father's land, occupied by one of his negroes, together with other tobacco made and housed the former year. And these circumstances, *of themselves,* are supposed to raise, in law, a strong presumption of the father's guilt. We cannot so believe; because, unless there be other facts and circumstances to warrant the inference, such a presumption would be rash and irrational.

It may be that we have not clearly apprehended the sense and effect of the instruction excepted to, but we are constrained so to interpret it. And it may be that there was *other* evidence against the father, besides that upon which the erroneous instruction was given, to warrant the verdict against him. But this we do not know, and if we did, we
(410) are bound to say that as his case has been submitted to the jury, with instructions which we believe unwarranted in law, and which may have had an improper influence on their minds, he has not been tried according to law, and is entitled to have another trial.

The Superior Court will set aside the verdict, as against the defendant Scipio Smith only, and award an *alias venire* to try him upon this indictment, and proceed to sentence upon the verdict against the defendants Gordon Smith and William Smith.

PER CURIAM. Ordered accordingly.

Cited: Harriss v. Lee, 46 N. C., 227; *S. v. Williams,* 47 N. C., 272; *S. v. Harvell,* 49 N. C., 56; *S. v. Worthington,* 64 N. C., 596; *S. v. Bruner,* 65 N. C., 500; *S. v. Collins,* 70 N. C., 244; *S. v. Brown,* 76 N. C., 226; *Capehart v. Stewart,* 80 N. C., 102; *S. v. Gooch,* 94 N. C., 1006; *S. v. Jacobs,* 106 N. C., 697; *S. v. Oxendine,* 107 N. C., 784; *S. v. McRae,* 120 N. C., 609; *Dunn v. R. R.,* 131 N. C., 451; *S. v. Barrett,* 142 N. C., 567; *S. v. Anderson,* 162 N. C., 575.

(411)

ABRAHAM BAUM v. ENOCH L. STEVENS.

1. To make an affirmation at the time of a sale a warranty, it must appear upon evidence to have been so intended, and not to be a mere matter of opinion and judgment.
2. Whether an affirmation in a parol contract of sale amounts to a warranty is a matter of fact to be left to the jury, with instructions from the court according with the above rule.

BAUM *v.* STEVENS.

APPEAL from *Manly, J.*, at Spring Term, 1842, of CURRITUCK.

This was an action of assumpsit, in which the plaintiff declared against the defendant for having warranted the soundness and healthiness of a negro slave named Jim. It was shown in evidence that the defendant sold a number of negroes at public auction, among which was negro Jim, which was purchased by the plaintiff; that the defendant declared, when the negro prior to Jim was offered, that he did not warrant that negro, as he was unsound; that when Jim was offered, he remarked, "Here is a young, likely, healthy negro; what is bid for him?" whereupon the plaintiff bid the sum of $480, and Jim was stricken off to him as the last and highest bidder, and delivered to him. The plaintiff was proceeding to give evidence of the unsoundness of Jim, when his Honor remarked that he held, and should so charge the jury, that the words spoken by the defendant would not constitute a warranty. In submission to this intimation of his Honor, the plaintiff suffered a nonsuit. A rule was obtained to show cause why a new trial should not be granted, and this being refused, the plaintiff appealed.

No counsel for plaintiff. (412)
Kinney for defendant.

RUFFIN, C. J. We think the rule on which this case depends is correctly laid down by *Chief Justice Taylor* in *Erwin v. Maxwell,* 7 N. C., 241, that "to make an affirmation at the time of the sale a warranty, it must appear upon evidence to have been so intended, and not to be a mere matter of judgment and opinion." It is certain that *warrant* is not an indispensable term in contracts respecting personalty, as it is in conveyances of freehold. It is also true that a representation simply of soundness does not import, absolutely, a stipulation of the existence of that quality. But the representation may be made in such terms and under such circumstances as to denote that it was not intended merely as a representation, but that it entered into the bargain itself. If the contract be in writing, the Court cannot go out of it, but must find in its own language the exposition of its sense; and *that* it is the province of the Court to do. *Ayres v. Parks,* 10 N. C., 59. But in deeds, words which in themselves import to be but words of description or affirmation have been held to amount to a covenant, because of their inutility in the deed as constituting merely an affirmation, and because of the inference from their insertion in the deed that they were so inserted as a part of the contract. *Gilchrist v. Marrow,* 4 N. C., 410; *Ayres v. Parks,* 10 N. C., 59. In this last case it was also admitted that whether an affirmation was intended as a warranty is a matter of fact to be left to the jury. This, of course, refers to a transaction resting entirely in parol. The

same doctrine is also settled in New York by many cases. *Duffee v. Mason,* 8 Wend., 25; *Whitney v. Sutton,* 10 Wend., 411. Of necessity, in verbal contracts a greater latitude must be allowed to evidence to establish the words and the meaning of parties. The evidence may consist of everything which tends to establish that the vendor meant to convey the impression that he was binding himself for the soundness of the article and that the vendee relied on what was passing as a stipulation. Among those circumstances would, of course, be the understanding, at the time, of the bystanders who witnessed the transaction and the facts on which the impressions of those persons were founded. Thus, if a person in this case had said, "I will not bid unless Stephens will
(413) warrant the negro to be sound," and the defendant had replied, "He is sound," no one could be mistaken in taking that to be a contract, and not a mere representation of soundness, as the seller's words, in themselves, import. So here, when a seller at auction, who, as we must suppose, was the owner, and interested in the price to be had, and that the negroes should be bid for as sound, expressly refused to warrant one negro, and gave as his reason therefor, "that *he* was unsound," and immediately afterwards, in offering the next, proclaimed, "Here is a healthy negro," it might not, perhaps, be considered as straining the words beyond their obvious and natural sense, taking the whole together, to hold that there was a warranty of the latter negro. But, at the least, it is highly probable the vendor so meant to be understood and so was understood, from the contrast exhibited by him in respect to the condition of the two slaves. Besides, much may have depended upon the tone and emphasis, as well as on the words of the party and the period of his uttering them. These, we think, were all matters properly belonging to the jury, to whom they should have been submitted, with instructions that if they collected the defendant did not mean merely to express an opinion, but to assert positively that the negro was sound, and that bidders should, upon the faith of that assertion, bid for the negro as sound, then it would amount to a warranty; otherwise, not.

PER CURIAM. New trial.

Cited: Foggart v. Blackweller, 26 N. C., 240; *Henson v. King,* 48 N. C., 420; *R. R. v. Reid,* 64 N. C., 158; *Horton v. Green,* 66 N. C., 600; *McKinnon v. McIntosh,* 98 N. C., 92; *Osborne v. McCoy,* 107 N. C., 730; *Beasley v. Surles,* 140 N. C., 608; *Wrenn v. Morgan,* 148 N. C., 105; *Harris v. Cannady,* 149 N. C., 82; *Smith v. Alphin,* 150 N. C., 427; *Robertson v. Halton,* 156 N. C., 220; *Hodges v. Smith,* 158 N. C., 260; *Tomlinson v. Morgan,* 166 N. C., 560.

(414)

WILLIAM SLADE, ADMINISTRATOR, ETC., v. ABRAHAM WASHBURN AND ANOTHER.

1. Where two persons took from the plaintiff, at the same time, several negroes, one claiming and keeping possession of a certain portion of them as his own and the other in like manner claiming and holding possession of another portion as his: *Held*, that the plaintiff could not maintain a joint action of detinue against them, though he might have had a joint action of trespass.
2. The gist of the action of detinue is not the original taking, but the wrongful detainer.

APPEAL from *Bailey, J.*, at Spring Term, 1842, of RUTHERFORD.

The case, so far as it is necessary to state it, was as follows: It was an action of detinue for a number of slaves. The plaintiff having possession of them, the defendants went together to his house, and the defendant Abraham took a part of the slaves, which he claimed, and the defendant Josiah took another part, which he claimed. After taking the slaves, they set off on their return about the same time, and went for a few yards or rods the same road and then separated, each taking the slaves claimed by himself. It further appeared that some time after the taking and before suit brought the plaintiff demanded of Abraham the slaves he had in possession, and of Josiah the slaves he had in possession. The defendants' counsel insisted that the plaintiff could not recover, as no joint taking or possession of the said slaves was proved. The court charged the jury that if the defendants went together for the purpose of assisting each other, and took the slaves away jointly, although they separated a short distance from the house, each one taking such as he claimed, yet the plaintiff could maintain his action against them for the joint act; but that if there was no concert between them, (415) and they did not assist each other in taking the negroes, then, although they went together, and started away together, the plaintiff could not recover. There was a verdict for the plaintiff, a new trial moved for and refused, and judgment being rendered pursuant to the verdict, the defendants appealed.

D. F. Caldwell and Bynum for defendants.
Alexander, contra.

RUFFIN, C. J. In our opinion this joint action cannot be maintained; and as that point is decisive of the plaintiff's case, we shall confine our observations to it. If the plaintiff had brought trespass, he might have maintained it on the joint taking of the defendants, or by their taking severally what each claimed, both being present and each giving countenance and aid to the other. But the gist of the action of detinue is not the original taking, but the wrongful detainer. 3 Black. Com., 152. It

is founded on the possession of the defendant at the time of the action brought; and that notion has been carried so far that where there were several executors and one only had the possession, it was held that the action must be brought against him alone. Bul. N. P., 51. We need not say whether that would now be held or not; for, possibly, in that case the possession by one executor might be deemed the possession of both, if they themselves so regarded it; that is, if the one, with whom the actual possession was not, was still considered as having a control over and power of disposition of the chattel. But the passage is quoted for the purpose of showing the nature of the action and the acts of the defendant necessary to its support. Now, in this case it is clear that, (416) though both of the defendants were present at the taking, and might have had the purpose of assisting each other, yet they, respectively, took possession of different slaves, each for himself, upon distinct and several claims of title; and they have so held them ever since. There was at no moment anything like a joint possession, or claim or pretense of such possession. Indeed, the plaintiff himself made his demands of the defendants severally for the negroes in his possession, thus admitting the possession to be exclusive and the detainer several. In such a case it would be clearly wrong to make one defendant liable for the value of the chattels held by the other and which the former would have no power to surrender in discharge of the recovery; or liable for profits made exclusively by the other.

The counsel, however, relied on *Jones v. Green,* 20 N. C., 488, and *Garth v. Howard,* 5 Car. and P., 346, as authorities in favor of the action. Neither of them seems to us to warrant the position. In the case in this Court the reasoning goes altogether upon the circumstances, which showed that the possession, alleged to be in Lane, was in law and truth in Green, and that the latter had, in fact, the entire control of the negro, notwithstanding the pretense to the conrary. But here there is nothing to base such an hypothesis on. *Garth v. Howard* proceeded on something of the same principle. The rule established in it is merely that if one pledge a chattel belonging to another, the owner may maintain detinue against both the pledger and the pawnbroker, upon the ground of the personal possession by the latter and of the potential possession and dominion of the former. That is carrying the doctrine as far as it will bear, but, certainly, if received in its full extent, will not give color to an action against two where each took distinct chattels upon several claims of title and has constantly had a separate possession, without any control assumed by one over the property held by the other.

PER CURIAM. New trial.

Cited: Webb v. Taylor, 80 N. C., 306.

GEORGE W. PRICE v. GRANDISON M. SHARP.

1. In an attachment the defendant, by accepting a declaration and pleading to it, waives all objection to defects in the process.
2. When a bill of exchange made payable to a third person is protested and taken up by the drawer, the latter cannot again put it in circulation.
3. A person cannot negotiate paper when, by so doing, he would render responsible on it another person from whom he had taken it up under a prior responsibility.
4. But a person who takes up a negotiable paper once due to himself may again put it into circulation, provided that in so doing he exposes no person to a prejudice but himself or those who are justly and legally liable on the paper before him.
5. When a bill of exchange payable to A. is taken up by the drawer and the indorsement of A. stricken out, it becomes dead to all intents and purposes as a negotiable instrument.

APPEAL from *Dick, J.*, at Spring Term, 1842, of CASWELL.

This was an action of assumpsit. The suit commenced by original attachment, returnable to January Term, 1842, of Caswell County Court, and the following facts were agreed upon by the counsel:

Peebles, Hall & Co., of Petersburg, Virginia, on 10 July, 1841, drew two bills in favor of Francis E. Rives on the defendant, Sharp, who lived in Danville, Virginia, one payable at ninety days, for the sum of $783.85, the other payable at four months, for the sum of $787.71. The bills were presented before maturity, and accepted by the defendant. At maturity the bills were presented for payment and dishonored. Peebles, Hall & Co., after protest for nonpayment, took up the bills and paid off the same to Rives. The defendant had property, both real and personal, in North Carolina, which Peebles, Hall & Co. wished to subject to attachment, and, in order to do so, on 10 December, 1841, indorsed the (418) bills, without consideration to the plaintiff, who was a citizen of Caswell County, North Carolina, and who, immediately upon the assignment to him, sued out the attachment which is the original process in the case. The defendant replevied the property attached, and pleaded to the action *the general issue, etc.* It was further agreed that the defendant had been for some years before the suing out of the attachment a citizen of Virginia, where he resided when the attachment was taken out, and that he had not left this State secretly, fraudulently, or with a design to avoid the ordinary process of law. Upon this statement of facts, his Honor was of opinion that the law was with the plaintiff, and so instructed the jury, who returned a verdict for the plaintiff. A new trial having been moved for and refused, and judgment rendered according to the verdict, the defendant appealed.

Kerr for plaintiff.

J. T. Morehead for defendant.

RUFFIN, C. J. This is an action of assumpsit on two bills of exchange by the plaintiff as an indorser of Peebles, Hall & Co., against the acceptor. The bills were drawn on 10 July, 1841, by Peebles, Hall & Co., of Petersburg, in Virginia, in favor of F. E. Rives, on the defendant Sharp, of Danville, in Virginia, who accepted them, but failed to pay them when they fell due. The one was for $783.85 at ninety days, and the other for $787.71 at four months from date. Upon the failure of Sharp, the payee, Rives, returned the bills to the drawers, Peebles, Hall & Co., for payment, and they accordingly paid him and took up the bills. On 10 December, 1841, Peebles, Hall & Co. indorsed the bills to the present plaintiff, who resides in Caswell in this State, and immediately commenced this action by original attachment levied on the estate of the defendant situate in Caswell. The indorsement from Peebles, Hall & Co. to the plaintiff was without consideration, and was made for the purpose of enabling Price to take out an attachment in his name for the
(419) benefit of Peebles, Hall & Co., and the present action was accordingly brought for their use. Upon the return of the attachment the defendant gave bail, and appeared and pleaded, first, nonassumpsit, and, secondly, by way of special plea in bar, the facts stated respecting the indorsement and the purpose of it. Upon the trial the facts were agreed upon as here stated, and upon them his Honor was of opinion for the plaintiff, and so instructed the jury, who found a verdict accordingly, and from the judgment the defendant appealed.

For the defendant it has been insisted that the plaintiff cannot maintain this action, commenced by original attachment, because it is not brought for his own benefit, but in evasion and fraud of the act of 1777, for that of Peebles, Hall & Co., who could not have brought it in their own names, according to *Broghill v. Welborn*, 15 N. C., 511. Whether this objection be valid or not, if taken in apt time, it is not now necessary to say; for, if good, it comes too late. Undoubtedly the holder of a bill may indorse it to another, in trust for himself, or to collect as his agent, and the indorsee may have an action against the acceptor of the bill. The objection is not, therefore, that this plaintiff could not maintain assumpsit on these bills, but that he cannot commence that action by attachment, but should have done it by *capias*. The imputed defect lies in the writ, and the answer is obvious that, by accepting the declaration and pleading to it, the party waives all defects in the process. This point should have been raised by a plea in abatement or in some other method before pleading in bar.

But in the opinion of the Court there is another objection to the plaintiff's recovery which has more force. It is that the bills could not be put into circulation by the indorsement of Peebles, Hall & Co., after those persons had paid them to Rives. If Rives' name had been put on the

bills, the case of *Beck v. Robley,* 1 H. Bl., 89, is a direct authority against this action. In that case a bill was drawn by Brown on Robley, payable to Hodgson or order. Hodgson put his name on the bill, and, not being paid when due, Hodgson, without striking out his blank indorsement, returned the bill to Brown, and he took it up, and afterwards passed it to Beck, who brought the action. It was held that when (420) the bill came back unpaid, and was taken up from the payee by the drawer, it ceased to be a bill; for it could not then be negotiated by him without making Hodgson liable thereon, for which there was no color. Between that case and the present there is but one point of difference, and that but increases the difficulties in the plaintiff's way. Hodgson's name was on the bill when he returned it to Brown; whereas it does not appear that Rives ever put his name on these bills, and it cannot be assumed that he did. But, waiving that for the present, the case cited is conclusive for the defendant, even if Rives' indorsement were on the bills. The counsel for the plaintiff, however, opposes to that case the more recent one of *Callow v. Lawrence,* 3 Maule and Selwyn, 95, and the language there used by *Lord Ellenborough,* "That a bill of exchange is negotiable *ad infinitum* until it has been paid by or discharged in behalf of the acceptor; and that if the drawer has paid the bill, it seems he may sue the acceptor on the bill; and if, instead of suing the acceptor, he put it into circulation upon his own indorsement only, it does not prejudice any of the other parties who may have indorsed the bill, that the holder should be at liberty to sue the acceptor." But it seems to us that neither the case itself nor the doctrine here quoted, when correctly understood, shakes the principle of *Beck v. Robley,* but rather sustains it. No one can deny that a bill is negotiable indefinitely until payment. But the question is, By whom may it be negotiated? Why, by the payee or by any person entitled under his indorsement; and the acceptor will be as much bound to pay it to such indorsee, however remote, as he was to the payee himself, before he indorsed it. But it does not follow that the drawer of a bill, who takes it up, after dishonor, from the payee, is to be considered the indorsee of the payee. Far from it; for, instead of claiming from the payee under him, he was, in truth liable on it to the payee, in default of the acceptor, and in discharge of that liability took it up. Then he could not look to the payee to make the bill good to him, and by consequence, he could not by his subsequent indorsement give to his indorser the right to recourse against the payee. But as that would be the necessary effect of such indorse- (421) ment, if allowed at all, it resulted that in such a case the law would not allow the drawer again to put the bills into circulation. That the payee suffered his name to remain on the bill when he returned it will not be an authority to the drawer to negotiate it; for it was not left

there to give credit to the bill with the drawer, or, in other words, as an indorsement, but merely as a receipt for the amount paid by the drawer, *animo solvendi*. After such payment it would be unjust to the payee to allow the drawer to pass the bill on the responsibility of the former; and, therefore, he is not permitted to pass it at all. With this reasoning the passage quoted from *Lord Ellenborough* consists. In *Callow v. Lawrence* the bill was not, as here and in *Beck v. Robley,* payable to a third person, but was payable to the drawer's order. After acceptance the drawer indorsed it, and it went through several hands, and was finally returned to the drawer by a holder, who struck out all indorsements after that of the drawer, and received payment from him, and then the drawer passed the bill to Callow; and it was held that the latter might maintain his action against the acceptor. A bill payable to the drawer's order, when accepted, becomes substantially a promissory note from the acceptor to the drawer, being an express promise to pay the drawer or his assigns. When it comes back to the drawer, he is remitted to his original rights upon an instrument payable to himself, and may sue on it, without noticing indorsements that had been made of it. *Doak v. Caswell,* 2 N. C., 18; *Strong v. Spear, ib.,* 214; *Callow v. Lawrence* 3 M. and S., 95. It would seem to follow, necessarily, that the drawer might again indorse it; for in so doing he passes the instrument regularly according to its face, and leaves no one liable to his indorsee but himself and the acceptor, each of whom ought thus to be liable. *Gomez Serra v. Berkeley,* 1 Wils., 46, and *Guild v. Eager,* 1 Mass., 615. Upon this distinction between bills payable to a third person, on the one hand, and a promissory note or bill payable to the drawer's order, on the other, are
(422) obviously founded the observations of *Lord Ellenborough* in the case cited. He admits the authority of *Beck v. Robley,* and carefully confines his rule to the case then before him, that is to say, of a bill payable to the drawer's order, by saying that "If, instead of suing the acceptor, he (the drawer) put the bill into circulation upon *his own* indorsement *only,* the holder might sue the acceptor," which can apply to no case but that of a bill payable to the drawer's order or to a promissory note. Then he immediately proceeds to declare, further, that "The case would be different if the circulation of the bill would have the effect of prejudicing any of the indorsers," as in *Beck v. Robley* was the case. The other judges place the matter in a still clearer light. *Le Blanc, J.,* said: "There was in *Beck v. Robley* no color to charge Hodgson, and, striking out Hodgson's indorsement, the bill could not possibly be negotiable." And *Bagley, J.,* who is high authority upon a point of this kind, states the distinction very shortly and happily by saying that "In *Beck v. Robley* payment by Brown *struck* out the indorsement of Hodgson, whereas the payment by Pywell (the drawer in *Callow v. Lawrence*)

did not, in legal effect, strike out Pywell's own indorsement, so as to render the bill no longer negotiable." Thus those two cases stand well together. The principle of *Beck v. Robley* is that which governs this case, and is, that a person cannot negotiate paper when by so doing he would render responsible on it another person, from whom he had taken it up, under a prior responsibility; while the principle of *Callow v. Lawrence* is that a person who takes up paper once due to himself may again put it into circulation, provided that, in so doing, he exposes no person to a prejudice but himself or those who are legally and justly liable on the paper before him.

In considering the case hitherto, it has been treated as if Rives had put his name on the bills; in which case, even, we have seen that the law is against the plaintiff. But that fact is otherwise here, or, at least, does not appear, which is the same thing. In *Beck v. Robley* the plaintiff, no doubt, did sue as the indorsee of Hodgson, the payee; so that he had apparently a regular title to the bill. But this plaintiff declares, not as the indorsee of Rives, but upon the indorsement of Peebles, (423) Hall & Co., which is certainly bad. No person can acquire a title to a bill payable to the order of Rives, but by the order of Rives. When he gave it back to Peebles, Hall & Co. without his indorsement, it was dead to all intents and purposes as a negotiable instrument. In the words of *Mr. Justice Le Blanc,* "striking out the payee's indorsement, the bill could not possibly be negotiated." The indorsement to the plaintiff was a nullity, and he cannot maintain any action on the bills.

PER CURIAM. New trial.

Cited: Howell v. McCracken, 87 N. C., 402.

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(424)

JOHN WADDELL v. ABRAHAM REDDICK.

1. When in a contract no particular time for doing an act is specified, the general principle is that it must be done in convenient time, to be judged of by the court according to the circumstances and situation of the parties, unless that be in some respects modified by the terms of the contract.
2. Where A. contracted to deliver cotton grown on his plantation in Florida "as soon as it could be picked out and shipped," *Held,* that he was not thereby restricted to the shortest possible time in which, by any means or upon any terms, he could convey the cotton to a seaport, but that he was only bound to employ the usual mode of transportation, and, therefore, had a right to wait a reasonable time to avail himself of that mode.

APPEAL from *Manly, J.,* at Spring Term, 1842, of HERTFORD.

WADDELL *v.* REDDICK.

This was an action of assumpsit. The plaintiff declared upon the following agreement:

9 October, 1839.

I have bought of John Waddell, 100 bales of cotton of the present crop (1839) on his plantation in West Florida, to be delivered to Charles and George Reed in Norfolk. The said Waddell is to pay the freight. The cotton to be delivered as soon as it can be picked out and shipped. For which I am to pay 12½ cents per pound, at one, two, and three months from the delivery. A. REDDICK.

He then proved by Charles Reed, of the firm of C. & G. Reed referred to in the contract, that on 1 May, 1840, a lot of cotton, consisting of 100 bales, arrived at the port of Norfolk, consigned to C. & G. Reed by Charles Rogers of Appalachicola for account of Waddell, Southall (425) & Co., and on the same day John Waddell, the plaintiff, tendered to them the said lot of cotton for account of Abraham Reddick, the defendant, which they, by the instructions of Reddick, refused to receive; and the cotton was then left with them to be sold for Waddell's account, and was accordingly sold; that they received a letter from the defendant on 26 February, 1840, dated the 25th of that month, directing them not to receive the cotton before referred to, should it arrive; that Reddick was informed of the sale about to be made by them of the cotton on Waddell's account, and that he would be held responsible by the plaintiff for any deficiency. The plaintiff proved by James Williams that he was the manager of the firm of Waddell, Southall & Co. in Florida, in 1839; that the water-courses in Florida continued low through the winter of 1839-40, and did not become navigable until about 1 March, 1840; that the cotton raised in the section of country in which this farm is is sent down the Chippola to market; that by hauling it 35 or 40 miles it can be sent to Brown's Ferry, whence it can be sent down the Appalachicola and Chattahoochee rivers; but these last mentioned rivers were not navigable for boats earlier than the time stated at which the Chippola River became navigable; that he attended to the shipping at Mariana on Chippola River to Appalachicola of the cotton sold by the plaintiff to the defendant; that the cotton was shipped early in March, 1840; that the cotton was a part of the crop of 1839; the greater part of it was of that which was first picked out and was the best of the crop, it being all of good quality; that it was sent down the Chippola as soon as that river or any other in West Florida became navigable that year; that he used more than ordinary pains to have the cotton forwarded by the earliest day, and paid a higher freight than was usual in order to expedite it, and that from the situation of the river it was forwarded as early as could possibly be done; that from the farm before spoken of it is 80 or 90 miles to Appalachicola, the port from which cot-

ton raised in the section of the country in which this farm is situated is shipped to other ports of the United States; that he has never known cotton to be hauled overland from that section of the (426) country to Appalachicola or any other seaport for shipment.

The plaintiff then proved by Charles Rogers that the water-courses in Florida in the winter of 1839-40 continued low very late, in consequence of which the crop of 1839 was greatly retarded in coming into market; that the cotton in controversy in this suit, as appears by the date of the bill of lading, was shipped from Mariana 18 March, 1840, arrived at Appalachicola the 28th of that month, and was placed on board a vessel 11 April, and a bill of lading taken that day, and the vessel was ready for sea 15 April; that under the direction of Southall & Co. he reshipped the cotton with as little delay as possible, and, to that end, he paid a higher freight than was usual.

The defendant then proved by Reed, the witness before examined, that in a conversation between him (the defendant) and the plaintiff in relation to the cotton which the plaintiff had sold the defendant, the plaintiff said the cotton would arrive at Norfolk as early as the month of January, 1840. The defendant then read in evidence a letter from the plaintiff, addressed to the defendant, dated Jackson County, West Florida, 25 December, 1839, of which the following extract is the only part relating to this controversy: "The only obstacle which now remains in the way of shipping the cotton that I contracted to deliver to you is the low state of the water-courses. The Chippola, the only avenue for getting our produce to market, is as yet too low for that purpose. There being no vessels that sail directly from Appalachicola or St. Joseph to Norfolk, I shall have necessarily to ship it by way of New York."

It was insisted on the part of the defendant that the plaintiff could not recover, for that, first, it was not proved that the cotton, which was tendered to Messrs. C. and G. Reed, of Norfolk, and by them refused, was the cotton of the plaintiff; secondly, that nothing but an actual performance of the contract on the part of the plaintiff according to the terms of the contract would enable him to recover; that an inability to perform the contract by the act of God would not excuse performance; that if the streams of Florida, which were usually navigable, failed (427) him, as he had made no reservation in the contract by which he was authorized to delay the delivery until he could avail himself of them for that purpose, he should have resorted to land carriage to get his cotton to a shipping port.

His Honor instructed the jury upon the first point that if the plaintiff had an interest in the farm upon which the cotton was grown, though others might own it in common or as copartners with him, it was a substantial compliance with that part of his contract. Secondly, that the

plaintiff was bound to send the cotton by any of the ordinary avenues that were used for transporting cotton that was raised in that section of the country to a port to be reshipped to other ports of the United States; and if the plaintiff used reasonable diligence in getting it to the port of delivery in this way, he had performed his part of the contract; that he was not bound to resort to land carriage in order to ship it as soon as any exertion of physical power would enable him.

There was a verdict for the plaintiff; a new trial was moved for and refused, and judgment rendered for the plaintiff, from which judgment the defendant appealed.

Kinney and Iredell for plaintiff.
Badger and A. Moore for defendant.

RUFFIN, C. J. We have but little doubt that in putting a construction on this contract his Honor received it in the same sense in which the parties themselves understood each other when they bargained; and that we conceive to be the true principle of interpretation for mercantile and, indeed, all other agreements.

But it is said, first, for the defendant, that the cotton delivered was not that contracted for, as it did not grow on a plantation owned by the plaintiff, but grew on one owned by him and others. We admit the defendant was not bound to accept 100 bales of cotton made anywhere in Florida. It may have been his interest in reference to the quality of the article or in other respects to have the quantity bought by him taken out of a particular crop. The plaintiff was, therefore, under an (428) obligation to send the cotton from the plantation which the parties call "his plantation" in the contract; and the question is, Which was that? There seems no difficulty in ascertaining that. We find the plaintiff cultivating one plantation, and from that the cotton in question was sent; and no doubt that, and that alone, was in his view at the time. It is true that he was cultivating it in conjunction with others; but that would not, for any purpose of the transaction between the parties, prevent its being called "his plantation." If the defendant had shown that the plaintiff owned or was interested in any other plantation, or that he had said so, or that the defendant had any reason to believe so, it might be supposed the defendant did not understand this to be the crop out of which he was to be supplied. But, in the absence of all such evidence, one must believe that each party had in view 100 bales of this very crop; and, therefore, that this was *his* (the plaintiff's) plantation within the sense of the contract. There is no other to which either party could have referred.

With respect to the time of delivery, the objection of the defendants seems to be equally captious and untenable. It assumes that the plaintiff

is endeavoring to excuse himself for the nonperformance by himself of some part of the contract, upon the ground of his inability having arisen from the act of God; and then it proceeds to assert that the plaintiff is not thereby excused for want of a provision in the agreement to meet the event that happened. But the point assumed cannot be yielded; indeed, it is the very point in this cause. Before we consider whether the plaintiff has excused or could excuse himself for not performing the contract on his part, it is first to be ascertained what he did contract to do. Now, it is important, as to that, to see, in the first place, that he did not agree to make the delivery on or before any particular day. If he had, he would have taken on himself all risks by land or on water. If no time for doing an act be specified, then the general principle is that it must be done in convenient time, to be judged of by the court, according to the circumstances and situation of the parties, unless that be, in some respect, modified by the terms of the contract. Here the delivery was to be made in Norfolk as soon as the cotton could be picked out and (429) shipped. What was the period thus designated, as understood by the parties? Let the sentence be divided, and the question first considered upon the words, "as soon as it *can* be picked out." It has not been argued, even, that those words mean "as soon as it can *possibly* and *by any number of hands* be picked." The language might be absurdly strained to that sense; but no such thing was meant. We have seen that the parties were contracting respecting part of a crop made on a certain plantation, and when they speak of a thing to be done when that crop can be picked out they refer to the time in which it will or may with ordinary diligence be picked out by the hands belonging to the plantation, and not by any, the largest number, which the proprietor could employ. In other words, the picking was to be in convenient season, according to the usual operations of agriculture. In like manner of the other word of the sentence, "shipped." It follows "picked out" and is to be understood in the same sense. The plaintiff was not thereby restricted to the shortest possible time in which, by any means or upon any terms, he could convey the cotton to a seaport; but, upon the principle already mentioned, he wes expected to employ the usual mode of transportation, and, therefore, had a right to wait a reasonable time for an opportunity of availing himself of that mode. In fine, he had convenient time for shipping as well as for picking his cotton.

Now, we think the plaintiff is under no necessity to offer an excuse for any omission on his part, for there was no such omission. The declaration truly states that the plaintiff delivered the cotton as soon as it could be picked out and shipped, that is to say, in the true sense of the contract; for the plaintiff adopted not only the usual, but the universal mode of conveyance employed in his part of the country; and he did so

as early as he could, and at an extraordinary expense. We see no reason, therefore, why the defendant was not obliged to accept the cotton tendered, and, consequently, the verdict and judgment were right.

PER CURIAM. No error.

(430)

STATE ON THE RELATION OF JOHN B. KELLY v. THE JUSTICES OF MOORE COUNTY.

1. Where a mandamus is issued against the justices of a county, in their official capacity as justices of the county court, and a judgment rendered against them, they may appeal, although a minority of the justices refuse to join in the appeal.
2. The rule as to appeals, in relation to joint *individuals*, defendants to a suit, does not apply.
3. A writ of mandamus will not be granted to a relator for his relief except where he has *a specific* right, and has no other specific remedy adequate to enforce it.

APPEAL from *Nash, J.*, at Spring Term, 1842, of MOORE.

This was a petition for a mandamus against the justices of Moore. An alternative mandamus was issued, and upon its return and the answers of the defendants being filed, the Superior Court ordered that a peremptory mandamus should issue. From this judgment a majority of the justices appealed. A number of the justices (a minority, as it appeared) refused to join in the appeal. The facts appertaining to the case and the questions raised are so well expressed in the opinion delivered in the Supreme Court that it is unnecessary to detail them here.

Badger and Winston for plaintiff.
Strange for defendants.

GASTON, J. At August Term, 1841, of MOORE, the relator, John B. Kelly, exhibited, a petition in said court wherein he alleged that at February Term, 1838, of the court of pleas and quarter session of said county, a majority of the justices of the county being present, an order (431) was duly made for building a new courthouse for the county, and the petitioner and others named in the petition were appointed commissioners to carry said order into effect, and to contract with some fit person for doing the contemplated work; that the commissioners, in pursuance of the authority so given, contracted with Dabney Cosby to perform all the labor and furnish all the materials required, at the price of $5,000, to be paid at the discretion of the commissioners as the work progressed; that a considerable portion of the work being done, and Cosby requiring a payment, the said court, at February Term, 1839, authorized the said commissioners to raise money by a loan from any of

the banks, pledging the faith of the county for the payment of the money borrowed; that the commissioners accordingly offered their own note for discount at the Bank of Cape Fear, and thus obtained a loan for $2,000, and paid over this money to Cosby; that this note has been several times renewed on payment of installments, which payments were made by the county until it was reduced to a sum between $300 and $400, and that it was then due, unpaid, and under protest. The petitioner further alleged that the courthouse having been completed and received by the county, and the said Cosby being urgent for the payment of the balance due him on account thereof, and the commissioners being without funds for making the payment, the petitioner and the rest of the commissioners (with the exception of one who had left the State), relying on the authority given by the justices of said county, and on the pledge of the public faith, did, on 26 October, 1839, execute a note "in behalf of the county and as commissioners" to the said Cosby, for $2,957.73, with interest from that date; that the said Cosby, contending that the commissioners who had executed that note had rendered themselves personally responsible, had brought suit thereon against them, and should he obtain judgment the petitioner would be grievously oppressed and the character of the county injured and degraded. The petitioner stated, further, that upon his application the county court, at its February Term, 1841, a majority of the justices being present, duly passed an order lay- (432) ing a tax of 50 cents on the poll and 50 cents on every $300 worth of real estate, to raise a part of the fund for payment of the debt due to Cosby and the balance due the bank, in addition to a tax or rate of 85 cents levied for county purposes; but that at August Term thereafter, a majority of the justices being present, the justices rescinded the order for laying a tax for the purpose of paying what was due to Cosby and the bank, and that at the time of preferring the petition there was no tax for raising funds to discharge these demands. The prayer of the petition was for a mandamus to be directed to the justices of the county of Moore, commanding them to impose a tax for that purpose or show cause wherefore they declined and refused so to do; and the petition set forth the names of the said justices (thirty-five in number) and prayed that the said writ might be served on each of them. Upon this petition the alternative writ of mandamus issued as prayed for, returnable to the following term, when it appears that eight of the said justices filed what is called their return to the said mandamus, stating, in substance, that they have read the petition, admit the facts to be true, have no cause to show against the mandamus, are ready to proceed to the levying of a tax, but are unable to do so because a majority of the justices of the county refuse to concur in said act. The rest of the justices, constituting a large majority of the whole body, made their joint return to the mandamus, in

which they show, for cause against the levying of the tax therein directed, that at February Term, 1838, of the county court of Moore, the justices, a majority being present, had imposed a sufficient tax to defray the expenses of building the courthouse; that the tax had been collected by the sheriff, but not accounted for; that the justices had caused legal proceedings to be instituted against the sheriff and his sureties to recover the moneys so collected, which proceedings were in a vigorous course of prosecution, and as the respondents hoped and believed would result in bringing into the county treasury funds amply sufficient to meet all demands against the county; and, further, that the court, at its Au-
(433) gust Term, 1841, had repealed the special tax imposed as in the petition stated at the preceding February Term, because said special tax had been irregularly imposed, after a portion of the justices present at levying the general county tax had left the bench, and because it was deemed by them oppressive to the people of the county, and was disapproved by a large majority thereof; and that the respondents are unwilling to impose any further tax to pay for the courthouse until a reasonable opportunity shall be had to render available the tax heretofore levied and collected by the sheriff, and for the recovery of which suits are now prosecuted; and that they have imposed a sufficient tax to pay the bank debt set forth in the petition. And the respondents further showed that no application had been made to the county court in behalf of Dabney Cosby, the creditor, for levying a tax to raise funds for payment of his demands; that nothing is due from the county to the relator, and that he has no legal interest in the subject-matter of this writ, or right to ask for this extraordinary interference of the court; that the power of laying taxes for county uses is in the nature of the legislative power, to be exercised according to the sound discretion of the justices of the county, and that, in the exercise of this discretion, according to their honest judgment and within the legitimate bounds thereof, they are not accountable; and that, in the measures which they have taken for raising the necessary funds, they have fully performed all that duty required of them.

Upon argument it was held that the reasons shown against the mandamus were insufficient, and that a peremptory mandamus issue. From this judgment an appeal was prayed by the respondents, who had resisted the mandamus, the other eight justices refusing to join in the said appeal, and the same was granted as prayed.

It has been moved here on the part of the relator to dismiss this appeal, because, as is alleged, the judgment rendered in the Superior Court is a joint judgment against all the justices of the county of Moore, and the appeal has been allowed at the instance of part of them only. *Hicks v. Gilliam,* 15 N. C., 217; and *Dunns v. Jones,* 20 N. C.,

291, are relied upon as authorities decisively supporting this mo- (434)
tion. It is clearly settled by these cases that if a joint judgment be rendered in a civil suit against the plaintiffs or defendants therein, a part of those aggrieved by the judgment cannot appeal therefrom; and these decisions are avowedly founded on the principle that an appeal from a judgment vacates that judgment *in toto,* and, therefore, must be taken by all bound thereby or it cannot be taken at all. But the present case, in our opinion, falls neither within the rule thus sanctioned nor the reason of the rule. This is not an action prosecuted against several persons as individuals, and of a joint judgment rendered against them all, but it is a proceeding to compel the performance of an alleged duty by a municipal body, which acts only through the medium of a majority of its members, and whose action, when done, binds the body as such, and not the individuals of whom it is composed. This proceeding has been opposed and defended by that body for the reasons set forth in the return to the alternative mandamus by the majority of its members, and, judgment having been rendered against the sufficiency of that return, the body, through the agency of the same majority, appeals for the revision of the sentence thus pronounced. The writ of mandamus, when ordered to issue, must, of course, be directed to all the justices, because it is the justices, as a body, who alone can execute it. But this does not show that the judgment, by which it is ordered to issue, is in the nature of a joint judgment against several. In the case cited on a former occasion in *S. v. Jones,* 23 N. C., 135, from 2 Chitty, 254, when an application was made by a church warden against his colleague to compel him to concur in a rate with the overseers, the Court said: "You must take the mandamus against the whole of the parish officers, against yourselves as well as the other overseers." Surely it will not be contended that the judgment awarding this mandamus was a judgment against the relator individually, or that, in a like case, if an appeal had been allowed to the party aggrieved, the relator must concur in the appeal. The statement made upon the record by the eight justices is not a return. As a minority they are *wholly inefficient* to act. They were inefficient (435)
to lay the tax, because overruled by the majority, and they were equally inefficient to make a return or to prevent an appeal, because overruled by the same majority.

This motion having been denied, many very interesting questions were made by the counsel on both sides in relation to the matters involved in the proceedings below, and were learnedly and ingeniously argued. As, in our judgment, there is one clear ground upon which the decision below must be reversed, and as we entertain a strong hope that what justice and honor may demand will be done without the necessity of our interference hereafter, we forbear from expressing an opinion upon most of these points.

The application is at the instance of Mr. Kelly, as an individual relator, to compel the justices of the county court of Moore to lay a tax to relieve him from a liability which he fears that he may have incurred to pay a debt that ought to be paid by the county. Now, we hold it to be elementary doctrine, in support of which it is needless to refer to any of the very numerous adjudged cases that acknowledge and sanction it, that the writ of mandamus will not be granted to a relator for his relief except where he has a *specific legal right,* and has no other specific remedy adequate to enforce it. Here Mr. Kelly has *no right* to this money. He is not a creditor of the county. According to his own showing, he is not even liable for the county. He expressly declares that he signed the note "in behalf of the county and as one of its commissioners," and although he states that Cosby *contends* that he is personally liable, he does not admit that liability. It seems to us, therefore, that the court could not rightfully move in this case at his instance. We think that the judgment below is erroneous and ought to be reversed, and that the defendants ought to have judgment to go without day and to recover their costs against the relator.

PER CURIAM. Reversed.

Cited: Attorney-General v. Justices, 27 N. C., 329; *Donnell v. Shields,* 30 N. C., 373; *Tucker v. Justices,* 46 N. C., 462; *Kinsey v. Magistrates,* 53 N. C., 187; *Taylor v. Comrs.,* 55 N. C., 145; *Gooch v. Gregory,* 65 N. C., 143; *Hughes v. Comrs.,* 107 N. C., 605; *Wool v. Edenton,* 115 N. C., 15; *Lyon v. Comrs.,* 120 N. C., 244; *Barnes v. Comrs.,* 135 N. C., 34; *Edgerton v. Kirby,* 156 N. C., 351.

(436)

WILLIAM C. MOORE'S ADMINISTRATOR v. ERI BARROW'S EXECUTOR.

A. devised as follows: "I lend my daughter Nancy E. Moore the following property, to wit, negroes (Lewis and eleven others, mentioning them by name), and one bed and furniture (and sundry other articles of furniture). If my daughter Nancy E. should depart this life without issue, then it is my will that her husband, William C. Moore, should have one-half of the property I have lent to her; but the property is to be held in trust by my executors until the death of my daughter Nancy E., and then her half of the property is to be equally divided between her brother Joseph and her two sisters, Martha and Rachel." William C. Moore died, after the testator, leaving his wife Nancy surviving him, and then Nancy died without issue. *Held,* that William C. Moore took a contingent interest in remainder in one-half of the property, which upon his death was transmitted to his administrator, and that upon the death of Mrs. Moore, without issue, his administrator had a right to recover it.

MOORE *v.* BARROW.

APPEAL from *Manly, J.*, at Spring Term, 1842, of PERQUIMANS.

This was a petition originally filed in the county court of Perquimans, and brought thence by appeal to the Superior Court, where a decree was rendered in favor of the petitioner, and the defendant appealed to the Supreme Court.

The substance of the pleadings, the facts, and the questions presented are sufficiently set forth in the opinion delivered in this Court.

A. Moore and Iredell for plaintiff.
Badger for defendant.

RUFFIN, C. J. E. Barrow died in 1832, having made his will, and amongst other things bequeathed as follows: "I lend my daughter Nancy E. Moore the following property, to wit: negroes Lewis, Huldy, Baker (and nine others by name), and one bed and furniture (and (437) sundry other articles of furniture). If my daughter Nancy E. should depart this life without issue, then it is my will that her husband, William C. Moore, should have one-half of the property I have lent to her; but the property is to be held in trust by my executors until the death of my daughter Nancy E.; and then her half of the property is to be equally divided between her brother Joseph and her two sisters, Martha and Rachel." The testator appointed as his executors his said son Joseph and John Mardree and Alfred S. Barrow, who were the husbands of the daughters, Rachel and Martha, respectively; and all of those persons and William C. Moore and his wife, Nancy E., survived the testator.

In the lifetime of the testator the slave Baker died, and Huldy was by him sold. But upon his death the other ten negroes and their increase, and the other chattels bequeathed, were placed by the executors in the possession of Mr. Moore, to be held under the executors upon the trusts of the will.

In 1838 William C. Moore died intestate, leaving his wife, Nancy E., surviving him; that she died in 1839, having made a will, and thereof appointed her said brother Joseph the executor, and left surviving her the said Joseph and her sisters, Martha and Rachel. Upon the death of Mrs. Moore, Joseph Barrow and John Mardree and Alfred S. Barrow, the two latter of whom claimed in right of their wives, claimed all the slaves and other property as theirs, and divided it into three parcels accordingly, which they now severally hold. The present plaintiff is the administrator of the intestate, William C. Moore, and instituted this suit by petition in the county court against those persons who thus have possession of the slaves and are also the executors of the original testator, E. Barrow, and prays therein to be declared entitled, under the disposition to his intestate, to one-half of the slaves, and of the other property

bequeathed as aforesaid in trust for his wife, and of the increase thereof, and of the hires since the death of Mrs. Moore, and to have a (438) division, account, and payment.

The defendants respectively answered, substantially admitting the case here stated, but insisting that the plaintiff was not entitled, as his intestate died before his wife, and that they, having survived her, were entitled to the whole.

In the county court the petition was dismissed, but on appeal to the Superior Court the decree was reversed, and a declaration made that the plaintiff was entitled according to the prayer of the petition, and commissioners appointed to divide and allot to the plaintiff his half part of the negroes and their increase, and other specific articles, and an inquiry directed as to the profits, and as to the value of any part of the property that might have been sold by the defendants. But from that interlocutory decree the court allowed the defendants to appeal to this Court.

The decree, we think, proceeds on the proper construction of the will, which seems, indeed, to be very plain.

The limitation over after the death of the first taker "without issue" is within the letter of the act of 1827 (Rev. Stat., ch. 122, sec. 11), and is made effectual by it.

It may be granted as highly probable that the testator expected his daughter's husband to outlive her, and, in that expectation it was that he gave him one-half of the property, as a personal benefit, upon the death of the wife without leaving issue. We can readily believe that if Mr. Barrow had thought of the case of their having no children, and of Mr. Moore's dying before Mrs. Moore, he would have limited the property to his own children, and not to Mr. Moore, for the sake of vesting it in an administrator for the benefit of the son-in-law's creditors or next of kin. But this is conjecture only; and on it the will is not to be altered by the introduction of another contingency besides that expressed by the testator. The gift over to the husband, brother, and sisters of Mrs. Moore is simply on the contingency of her "dying without issue," and it is not to him or them "if then living," or "to such one or more of them as might be then alive." Consequently, as Mrs. Moore never had issue, and is now dead, the legacy has become absolutely vested. That contingent (439) interests of this description are transmissible to executors, and are not lost by the death of the person before the event happens on which they are to vest in possession, though once doubted, has long been settled. *King v. Withers,* Cas. Temp. Talb., 117; *Purefoy v. Rogers,* 2 Saund., 288, e *note.*

PER CURIAM. Affirmed.

(440)

WILLIAM LEE, ADMINISTRATOR, ETC., v. BRYANT GAUSE, ADMINISTRATOR.

1. To prove the record of a suit in South Carolina, the plaintiff introduced the certificate of J. R., clerk of the court, under the seal of the court, "that the annexed are correct transcripts of the original proceedings filed in this office in the suit of William Todd, administrator, *v.* William Lee," to which was added the certificate of the presiding judge "that J. R., who gave the attestation above set forth, is the clerk of the said court and keeper of the records thereof, and that said attestation is in due form." *Held*, that this authentication was sufficient.
2. Where in a bill of sale of a slave there was the following covenant: "which said negro I do hereby warrant and defend forever to the said John Harris, his heirs and assigns forever," and after the death of Harris the value of the negro was recovered from his administrator in an action of trover by one having a better title than the vendor: *Held*, that such recovery in trover amounted to an eviction, and, therefore, the covenant was broken.
3. *Held, also*, that the administrator of Harris could support an action as administrator to recover damages for such breach, though the covenant was not broken until after Harris's death, and although the action of trover was brought against him personally, he having possession of the slave as administrator.
4. Nor could the administrator in this State have united in this action one who was a joint administrator with him in South Carolina.
5. In case of one dying intestate in another State, the statute of limitations does not begin to run until administration is granted in this State.

APPEAL from *Nash, J.*, at Spring Term, 1842, of BRUNSWICK.

This was an action for a breach of the covenant contained in a bill of sale, of which the following is a copy:

Received, 23 August, 1833, of John Harris, Sr., $500, in full (441) payment for a certain negro fellow called January, which I have this day sold and delivered to him, which said negro I do hereby warrant and defend forever to the said John Harris, his heirs and assigns, forever. Witness my hand and seal, the day above written.

ANDREW L. GOLD. [SEAL]

The facts were that one Cochran died in 1830, upon whose estate one William Todd administered, in the State of South Carolina, in the same year, and took into his possession as such administrator the negro slave mentioned in the bill of sale above set forth, which slave was, at the time of the decease of the said Cochran, of his proper goods and chattels; that some time previous to the date of the said bill of sale the said negro came into the possession of Andrew L. Gold, who was one of the next of kin and distributees of the said Cochran, and, as was contended by the defendant, with the assent of Todd, the administrator, but, as contended by the plaintiff, without his assent; that while so in possession of the slave, Andrew L. Gold conveyed him to the said John Harris by the said

bill of sale, and shortly thereafter died, and administration was soon afterwards taken out upon the estate of the said Andrew by the defendant, in Brunswick County; that John Harris remained in the undisturbed possession of the negro in question until his death, which took place in the latter part of 1834; that the said Harris resided in South Carolina at the time of his death, and had the negro then with him; that in the early part of 1835 letters of administration were granted in South Carolina to the plaintiff and one John Vereen upon the estate of the said John Harris, and they inventoried the said negro in question as parcel of his estate; that soon afterwards an action of trover was instituted by Todd, as administrator of Cochran, against the plaintiff, without naming him as administrator of Harris, for the recovery of the value of the negro, in South Carolina, in which a verdict and judgment were rendered against the present plaintiff, the defendant in that suit, for $600 and execution issued thereon, which was returned by the sheriff "Satisfied." The transcript of the record in this case from South Caro-
(442) line was certified in the following manner:

STATE OF SOUTH CAROLINA, HORRY DISTRICT.

I, John C. Readman, clerk of the court of common pleas and general sessions, do certify that the annexed are correct transcripts of the original proceedings filed in this office in the case of William Todd, administrator, v. William Lee. Given under my hand and seal of office this 28 March, 1840. JOHN C. READMAN, C. C. P.

[SEAL]

I, Josiah J. Evans, one of the associate judges of the said State, and presiding judge of the said court of common pleas, do hereby certify that John C. Readman, whose signature is affixed to the above certificate, is clerk of the said court and keeper of the records thereof, and that the said attestation is in due form. Given under my hand at Horry Courthouse this 31 March, 1840. JOSIAH J. EVANS.

To these certificates was annexed the certificate of the Governor of South Carolina, under the seal of the State, that the said Josiah J. Evans was a judge as above set forth, etc. It also appeared that at December Term, 1838, of Brunswick County Court the plaintiff took out letters of administration on the estate of John Harris, and immediately thereafter instituted this suit against the defendant; and that the defendant, soon after qualifying as administrator of the estate of Andrew L. Gold, advertised pursuant to the act of 1789. The defendant objected to the reading of the transcript from the court in South Carolina for want of due authentication, but the objection was overruled and the transcript received in evidence. The defendant relied in his defense upon the following grounds:

1. That the recovery in South Carolina had not been made against the plaintiff upon title paramount in the negro; because Todd, having assented to Andrew L. Gold taking the negro in question as a part of the distributive share coming to him from the estate of Coch- (443) ran, had thereby parted with his right as administrator.

2. That the covenant contained in the bill of sale was for quiet enjoyment, and there was no evidence that there had been any evidence of the plaintiff.

3. That the act of 1789 was a bar to the plaintiff's claim against the defendant, as administrator of Andrew L. Gold.

4. That the action was brought by the wrong person; for, if any one had a right to bring an action on the covenant, it was of course the person injured by its breach. No breach had taken place in the lifetime of Harris; consequently no right of action had accrued to him which would survive to his personal representatives. If the present plaintiff had sustained an injury in being sued for the property in his own name, he had no right to sue in the name of the administrator of Harris to redress that injury; and if he had sustained the injury in truth *qua* administrator, why, then, it appeared that the injury consisted in the breach of a contract to which Vereen was a party as well as himself, and, therefore, Vereen should have joined him in bringing the action.

5. That at any rate, even if the plaintiff had a right to his election to sue in the present form or with his coadministrator, Vereen, yet he could not, by his election to sue in this form, defeat the operation of the statute of 1789, which commenced running immediately upon the breach.

It was further proved that a judgment had been obtained against Todd as administrator of said Cochran, upon which execution was issued, and was, by the direction of the administrator, levied upon the negro in dispute, then in the possession of the said Harris, who refused to give him up. What became of the levy was not shown, but Harris retained the possession of the negro to the time of his death.

The court instructed the jury, upon the first point, that if the evidence satisfied them that Todd, as administrator of Cochran, had, prior to the date of the bill of sale to Harris, surrendered up the property of Cochran to his distributees, of whom Andrew L. Gold was one, his recovery in his action against the plaintiff was not a recovery by paramount title, and the plaintiff could not recover in this action. On the second point the jury were instructed that the covenant in the bill of sale was a covenant for quiet enjoyment, and if they believed (444) the testimony, there was an eviction as would sustain this action. Upon the third, fourth, and fifth objections the jury were instructed that the plaintiff could maintain this action if the other questions were decided by them in his favor, and that the defendant was not protected by the act of 1789.

There was a verdict for the plaintiff, and a rule for a new trial having been discharged and a judgment rendered for the plaintiff, the defendant appealed.

No counsel for plaintiff.
Strange for defendant.

RUFFIN, C. J. The first question for our consideration is upon the admissibility of the record of the court of South Carolina, to the authentication of which, by the clerk of that court, objection is made. That document purports on its face to be, not an abstract or extract of a part of the record of a suit, but a full memorial of all that was done in the suit, from beginning to end. It begins with the writ in trover, contains a declaration, a plea of not guilty and issue thereon, and the *postea,* setting forth the *venire facias,* the return of it to the court, the appearance and impaneling of the jury, a verdict for the plaintiff, and a judgment for the damages assessed and costs, and execution therefor, with satisfaction returned. To this is annexed, under the seal of the court, a certificate of J. R., the clerk of the court, "that the annexed are correct transcripts of the original proceedings filed in this office in the suit of William Todd, administrator, against William Lee"; and to that is added the certificate of the presiding judge of the court, "that J. R., who gave the attestation above set forth, is the clerk of the said court and keeper of the records thereof, and that that attestation is in due form." To this it is objected that the clerk's certificate does not state that the transcript furnished by him is a copy of *the record* of the cause between those parties, and it may be that this is only a transcript of a *part* of the record or of minutes of the court, not engrossed in the record.

(445) But, it seems to us, the objection is overnice, and that the attestations are substantially in conformity with the act of Congress. The proceedings certified do not appear to be minutes or a portion only of what the court did in that matter, but in themselves import to be a complete history of a suit from its commencement to its termination. When the proper officer gives his testimonial that the annexed are *correct transcripts of the proceedings,* we must suppose that they are transcripts of *all* the proceedings in that cause; in other words, of the whole record. But, however we might be disposed to cavil at the particular wording of this certificate, we must receive it, inasmuch as its correctness, according to the law of South Carolina, is vouched by the judge of the court, who certifies that it *is* in *due* form; and such certificate is made conclusive by the act of Congress. We, therefore, think the record was properly admitted.

We will next proceed to notice the other grounds taken on the part of the defendant.

The first depended merely upon a question of fact, which was left by his Honor to the jury, and with which this Court cannot meddle.

Next, it is said that the covenant of warranty of title in the bill of sale from Gold to Harris is but a covenant for quiet enjoyment, and was not broken by a recovery of the value of the slave in an action of trover by the true owner, because it was not an eviction. But, unquestionably, it is tantamount to eviction. It is a loss of the property by the covenantee, who is by a legal compulsion under a necessity to pay the value to the true owner, and thus purchase the same slave a second time. Upon a proper covenant of quiet enjoyment annexed to land, we held that an adverse possession under the better title was the same as eviction, although the bargainee was never in possession under his deed, and so was not actually evicted. *Grist v. Hodges,* 14 N. C., 198. So, here, to all intents and purposes, the covenantee has lost all benefit of his purchase from the defendant's intestate; which purchase the latter bound himself to make good.

But it is further said that this action will not lie in the name of the administrator, because the breach, if any, did not occur in the time of the intestate. But the answer, is that although that rule (446) may be true as regard covenants relating to the freehold, yet in respect of debts, personal covenants, and, indeed, all personalties, the administrator fully represents his intestate, and may have all actions touching the same which the intestate himself might have had. The law assigns to the executor not only the property of the testator, but also all personal actions and the causes of such actions. Went. Off. Exr., 159. It is true, a covenant of this sort, touching a personal chattel, does not attach itself to the chattel, or run with it, as it is called, as a like covenant does with realty; and, therefore, the assignee of the personal property cannot sue on a covenant of warranty to his vendor. But if such assignee be evicted by title paramount, he may have recourse to his assignor; and the latter again, after making satisfaction, may fall back on the original vendor to himself to recover in damages what he has been compelled to pay by reason of the defective title warranted. Thus it is in cases of covenants of warranty in conveyances of land, where a second purchaser does not sue on the covenant of the original vendor, but is reimbursed by his immediate vendor; then the latter may recover from the first. *Herrin v. McEntyre,* 8 N. C., 410; *Markland v. Crump,* 18 N. C., 94. Much more must that be so in respect of personal covenants, which are not susceptible of assignment by act of the parties. Therefore, this action will lie by the personal representatives of the intestate Harris; provided the intestate or his estate hath sustained the injury against which the covenant was intended to be an indemnity, which brings us to another question raised in the argument.

It was further contended that as the action of trover was brought against the defendant in his own right and not in the character of administrator, he must now sue in his own right, or, at all events, that he cannot recover in his name as administrator, for two reasons: the one, that no damage is shown to the intestate, because the recovery was paid out of the present plaintiff's own money; and the other, that if he can sue as administrator, his coadministrator in South Carolina should have
(447) been joined with him. Our opinion is against the defendant, notwithstanding these objections, also. As to the form of the action in South Carolina, it could not have been otherwise. The plaintiff Lee had the possession of the negro, and, of course, the conversion complained of in that action was *his* conversion and not that of his intestate or, necessarily, that of his coadministrator. But he held the negro as assets of his intestate, recovered and left by the latter as a part of his estate. Although he was bound by the judgment to pay at all events, and out of his own money, the recovery therein made from him, yet, as between him and the estate, he was undoubtedly entitled to make such payment out of the assets, if he had sufficient in his hands, or to reimburse himself out of any that might thereafter come to his hands. As he could not sue himself, the law works the satisfaction between the person who had thus a claim against the estate and the estate; and, therefore, in substance and reality the damages were paid out of the assets, or reimbursed out of them; and it is immaterial which, for in either case the intestate's personal estate has sustained the damage for which this suit was brought. It follows that the suit must be brought by the administrator as such. Indeed, it is quite clear, as before mentioned, that personal covenants of this kind are not assignable but by act of law, as to the executor or administrator as such. Lee could not have sued, therefore, in his own right. Neither would it have been proper to unite Vereen, the other administrator in South Carolina, with him. If they were suing here for the negro himself, of which they had been in possession in their own State, they might have maintained an action by the two jointly, because there they declare on their own possession, and do not name themselves administrators or make profert of their letters. *Leake v. Cilchrist,* 13 N. C., 93. The property would there be vested in both by virtue of the possession in South Carolina under the administration. But the present is an action for damages for what has never been in possession, which will lie only in the name of an administrator; and as an administration in another State is not recognized in our courts as an authority
(448) to sue here, Vereen is, of course, not an administrator in our view, but the present plaintiff solely. The demand which is the subject of this action arose, it is true, out of transactions occurring in South Carolina; but when it is sought to be enforced in North Carolina, it can

be done only by him or those who have obtained administration here, as is too well settled to require the support of authorities. The action was, we think, properly brought by the present plaintiff and in his representative character.

Then as to the act of limitations of 1789 for the protection of administrators and executors, it is plain that it does not bar. The case does not state when the defendant administered. Its language is, that Gold died "shortly after" he conveyed to Harris, and that administration was "soon afterwards" taken by the defendant, which is too indefinite to found a bar of the statute. But if that was out of the way, the answer is equally complete that the present suit was brought within the same month in which the plaintiff took administration here; and the statute did not begin to run until that event. *Grubb v. Clayton,* 3 N. C., 378; *Jones v. Brodie,* 7 N. C., 354.

PER CURIAM. Judgment affirmed.

Cited: S. c., 26 N. C., 9; *Kinsley v. Rumbough,* 96 N. C., 196; *Hodges v. Wilkinson,* 111 N. C., 60; *Copeland v. Collins,* 122 N. C., 626.

(449)

HENRY J. CANNON v. ETHELDRED PEEBLES.

A deed in trust for the sale of property, dated 16 August, 1841, made by an insolvent debtor for the benefit of preferred creditors, provided as follows: That the property shall be sold, "at any time after 1 January, 1842, or before, if directed by the said Samuel B. Spruill" (the debtor), "on such terms and at such places as shall be directed by him; the said Henry J. Cannon" (the trustee) "is to sell the aforesaid property, and out of the proceeds to pay, first, the expenses of executing this indenture; in the next place, the debt of Thomas Deloach" (one of those recited in premises of the deed); "and, as to all the other debts and dues mentioned, he is to pay them with interest, and the costs now due or which may become due on suits now pending, *pro rata.*" A declaration or stipulation is then appended: "It is, however, stipulated that, as the said Samuel B. Spruill is anxious to save harmless all his securities, if there be any of them unprovided for in this indenture, he is at liberty to direct them to be paid in like manner as his other securities are." The property conveyed consisted of lands in different parts of this State, and of slaves in different counties, of contracts unexecuted, etc. *Held,* by the Court, that these provisions did not *per se* make the deed fraudulent in law against other creditors.

APPEAL from *Settle, J.,* at Spring Term, 1842, of NORTHAMPTON.

This was an action of trespass to recover damages against the defendant for seizing and detaining a negro slave Sam. And on the trial the plaintiff produced, proved, and gave in evidence a deed in trust executed

by Samuel B. Spruill, bearing date 16 August, 1841, and conveying to the plaintiff a large amount of real and personal property (including the slave in question) in trust, to be sold by the plaintiff and the proceeds to be applied to the payment of certain debts therein mentioned
(450) and described. The only provisions in the said deed which it is necessary to mention are these: *"The property shall be sold at any time after 1 January, 1842, or before, if directed by the said Samuel B. Spruill, on such terms and at such places as shall be directed by him; said Henry J. Cannon is to sell the aforesaid property, and out of the proceeds to pay, first, the expenses of executing this indenture; in the next place, the debt due Thomas Deloach; and as to all the other debts and dues mentioned, he is to pay them with interest, and the costs, now due or which may fall due on suits now pending, pro rata. It is, however, stipulated that, as the said Samuel B. Spruill is anxious to save harmless all his securities, if there be any of them unprovided for in this indenture, he is at liberty to direct them to be paid in like manner as his other securities are."* It was admitted by the defendant that the slave in controversy was, at the time of the execution of the deed, the property of the said Samuel B. Spruill, and that he seized the said slave. And thereupon the defendant showed that certain writs of *fieri facias* against the said Spruill, one issuing from September Term, 1841, of Northampton County Court at the instance of Samuel Calvert, and one from the Superior Court of Wake, tested of the Autumn Term, 1841, came to his hands as sheriff of Northampton County, and that by virtue of these writs he made the said seizure. And thereupon the counsel for the defendant, not denying that the said deed of trust was executed, proved and registered before the teste of the executions, or that the debts specified in the said deed were true debts, nevertheless insisted that the plaintiff was not entitled to recover in his action, because, on the face of the said deed, and the several provisions therein contained, and particularly from the delay authorized by the deed in the sale of the property, and the power reserved to the said Spruill to determine the places and terms of selling; the same was, in law, fraudulent and void as against the creditors of the said Spruill. And his Honor having *pro forma* declared himself of the opinion that the deed could not be supported as against the creditors, and hence could not entitle the plaintiff to recover against the defendant, the plaintiff's counsel, thereupon—not denying that
(451) the said Spruill, at the time of the execution of the said deed, was insolvent and unable to pay his debts, and that the said deed conveyed or attempted to convey all his property, and that he retained the use and possession of the whole thereof until after 1 January, 1842, and admitting that on 15 November, 1841, an execution, issuing upon the judgment in Wake Superior Court aforesaid to the county of Duplin,

was levied upon certain of the negro slaves mentioned in the deed, and thereupon settled to the value or part of the value of the said slaves by a security furnished by the said Spruill—offered to prove that after the sand 1 January, 1842, and before the 15th of the same month, the said plaintiff did assume possession or control of all the slaves conveyed by the said deed, and on said 15 January sold the same, the seizure by the defendant having been made between the said 1 January and such sale; and the plaintiff's counsel also offered in explanation of the provision in the deed for postponing the time of sale until after the said 1 January, and to repel any legal presumption thence arising against the instrument, to prove that the said Samuel B. Spruill, at the time of executing the said deed, was engaged in fulfilling a contract for work, etc., on the Wilmington and Raleigh Railroad, which was to be continued throughout 1841, and had employed in that work eleven of his negro slaves (the whole number conveyed by the deed being twenty-seven) and also twelve mules and three wagons, and that of the remaining sixteen slaves, all (except the children who were unable to labor and three servants employed in attendance on said Spruill's family) were occupied in making a crop then growing on the land in Northampton mentioned in the deed; and in explanation of so much of the deed as authorized a sale to be made before 1 January, 1842, at the discretion of the said Spruill, the plaintiff's counsel offered to prove that the said Spruill desired and hoped to rescind the said contract with the said railroad company before the said 1 January. To this evidence the defendant's counsel objected, on the ground that it was inadmissible and irrelevant to the purpose for which it was offered, and, if admitted, could not repel the (452) presumption against the deed arising from the other provisions of the instrument. And the judge *pro forma* rejected the evidence; and it was thereupon agreed by the parties that a verdict should pass for the plaintiff, subject to the opinion of the court upon the foregoing case. And it was agreed that should the court be of opinion that the said deed in trust is on its face good and sufficient in law to pass the title to the plaintiff as against the creditors of the said Spruill, and to maintain this action against the defendant, then judgment to be entered upon the verdict against the defendant; and if the court shall be of the contrary opinion, and also that the matter offered to be proved by the plaintiff was inadmissible or irrelevant, or, if proved, would not be available to repel the presumptions against the deed arising from the provisions thereof, the verdict to be set aside and a nonsuit entered; but should the court hold the said matter admissible and relevant, and if proved sufficient to repel the said presumptions, then the verdict to be set aside and a new trial granted. And his Honor (*pro forma,* both parties being desirous of taking the questions to the Supreme Court) declared his opinion to

be against the plaintiff, and set aside the verdict and entered a nonsuit, from which judgment the plaintiff appealed.

B. F. Moore and Iredell for plaintiff.
Badger for defendant.

GASTON, J. This case has called for the most deliberate consideration of the Court, not more because of the amount of property involved in the contest than because of the importance of the principles which are to be settled by the decision.

It is admitted that the deed under which the plaintiff claims title to the property in dispute was made by a debtor hopelessly insolvent; that the creditors for whose benefit it purports to be made are *bona fide* creditors, and that the deed conveyed or attempted to convey all the debtor's property to the uses therein declared. And the principal question which presents itself is, Does the conveyance itself manifest any intent (453) which the Court is authorized to declare fraudulent? In the case made, the attention of the Court is especially drawn to two provisions in the deed, the one directing a postponement of the sale until 1 January thereafter, unless a previous sale be directed by the debtor, and the other authorizing the debtor to declare the terms and places of sale. The deed bears date 16 August, 1841, and states the property conveyed to consist of the lots and houses in the city of Raleigh and a tract of land in the county of Wake which had been allotted to the debtor's wife as her dower in the real estate of her former husband; all his interest in the lands of his wife situate in the State of Alabama and Illinois, his tract of land in the county of Northampton purchased from E. J. Peebles; twenty shares of stock in the Gaston Railroad, four shares in the Portsmouth and Roanoke Railroad; all his stock of horses, mules, cattle, sheep, and hogs; all his bacon, lard, corn and fodder, household and kitchen furniture, his farming utensils, library, saws, axes, bridle and saddle; all his interest in a contract with the Wilmington and Raleigh Railroad Company for the year 1841; twenty-seven negroes, named; his interest in certain negroes hired for the year; his carriage, gigs, buggies, wagons and carts, with the gear thereunto belonging, and the timber which he has on hand and not yet delivered to the Raleigh and Wilmington Railroad Company; and the trusts declared are that the trustee (the plaintiff) shall, with respect to his contract with the said company for the year 1841, and the timber and other things therewith connected, and the negroes hired and employed in working under said contract, collect what may become due from the company, and, after paying the necessary expenses under the said contract, hold the balance as thereinafter directed; "and as to the other property and the said balance, the property

shall be at any" time after 1 January, 1842, or before if directed by the said "Samuel B. Spruill" (the debtor), "on such terms and at such places as shall be directed by him, the said Henry J. Cannon" (the trustee) "is to sell the aforesaid property, and out of the proceeds to pay, first, the expenses of executing this indenture," in the next place the debt of "Thomas Deloach" (one of those recited in the premises of the (454) deed), "and as to all the other debts and dues mentioned, he is to pay them with interest and costs now due or which may become due on suits now pending, *pro rata.*" The following declaration or stipulation is then subjoined: "It is, however, stipulated that, as the said Samuel B. Spruill is anxious to save harmless all his securities, if there be any of them unprovided for in this indenture, he is at liberty to direct them to be paid in like manner as his other securities are."

We find no difficulty in ascertaining the meaning of the parties in the trusts declared with respect to the selling of the property conveyed. The instrument is imperative in requiring the trustees to sell after 1 January, 1842, and reserves to the debtor the power of ordering a sale at an earlier day, and also of directing the terms and places of sale, whether made before or after that day.

It is insisted that because of these provisions the deed is fraudulent on its face, first, for that such provisions are obviously framed for the ease and favor of the debtor, and to obtain for him a benefit out of the property conveyed; and, secondly, for that they enable the debtor to exercise a control over the property which is inconsistent with the professed object of the conveyance, the appropriation of all the property to the satisfaction of the creditors, and which control may enable him to hinder and defeat that object.

We do not feel ourselves much embarrassed by the first objection. The deed is silent in regard to the possession of the property until the sale, and if we suppose, which is perhaps a fair interpretation of it, that the maker of the deed was to retain the possession until it was demanded for a sale, it by means follows that such possession would be an ease or favor to him, and still less that the object of such an arrangement was to procure any benefit to him. We cannot hold that the delay of a sale until 1 January, 1842, is not, under all the circumstances of the case, a provision for the benefit of the creditors, so as to insure to them the full profits of the contract with the railroad company, the gathering of the growing crop, which passed with the land as an incident, and perhaps the obtaining of better prices for the property. And this (455) stipulation, that with Spruill's consent the sale may be hastened, seems to be so naturally and fairly accounted for by the evidence offered in explanation that we not only do not feel ourselves bound to declare that the deed shows an intent in this respect to ease and favor the debtor,

or to divert any part of his property from its professed destination, but that we are strongly impressed so far with a conviction of the honesty, both moral and legal, of the conveyance.

We find more difficulty in the second objection. It does seem to us that the power reserved to the debtor, after the conveyance, to direct the terms and places of the sale, is one which, if followed as a precedent, may lead to great abuses. It is natural for an honest debtor, who is unable by a devotion of all his property to the satisfaction of his debts, to save altogether his preferred creditors—his sureties, or those having, in his judgment, the strongest claims on his justice and benevolence; to provide for such a disposition of the property as will probably render it most available for that purpose. Stipulations in the deed prescribing the terms and designating the places of sale, with the view to command the best prices for the property, if they be not plainly unreasonable, may well be regarded not only as fair, but even as commending the instrument to a favorable consideration. But stipulations that the debtor may hereafter direct the terms and places of sale are of a very different character, and ought to be watched with much jealousy. We believe that they are unusual, and on that account alone they ought to excite suspicion. But, besides, they may be so used as to embarrass, and even prevent the sale; and the reservation of such a power is not easily reconciled with the absolute and *bona fide* appropriation by the debtor of his property to the payment of his debts. Yet, after much reflection, we do not deem ourselves justified in pronouncing that, suspicious and dangerous as these stipulations are, they make the deed which contains them *fraudulent in law*. We are satisfied that under the terms used the debtor had no power to *prevent* a sale. The words are, "that the property shall be at any time after 1 January, 1842, or before, if directed by the said Sam-
(456) uel B. Spruill, on such terms and at such places as may be directed by him, the said Henry J. Cannon *is to sell* the aforesaid property." It is made the duty of the trustee to sell. This is the main object and principal intent of the conveyance. A discretion over the terms and places of sale is indeed given to Spruill, and this discretion the trustee is to afford him a fair opportunity of exercising. But if he will not exercise the power, the trustee is, by the terms of the instrument, nevertheless bound to sell. The power, therefore, is not necessarily inconsistent with the professed object of the conveyance, and when we advert to the multifarious nature of the property, and its scattered condition, and the probability that its former owner was deemed more competent than the trustee or the creditors to prescribe the best mode of selling it, we cannot say but that the power may have been reserved for a perfectly honest purpose. If it was—if the actual intent was to effect a disposition of the property most conducive to the avowed object of the conveyance: to satisfy as far

as the property could, by reasonable means, be made to satisfy the just demands of the preferred creditors—it was not, in law, a fraudulent conceyance. And what was the actual intent is a proper question for the jury.

The defendant's counsel has very much pressed another objection, which is not distinctly, if at all, referred to in the case. He insists that the last stipulation in the deed, by which the debtor is authorized to put other *cestuis que trustent* into the conveyance, is one fatal to the validity of an assignment of an insolvent debtor; for that it is, in effect, a provision for changing at his will the application of the property professed to be conveyed for the benefit of others. There would be great force in this objection if the stipulation in question actually conferred the power supposed; but we cannot say that it does. It professes to authorize the grantor, in the event of its appearing that he has omitted to provide in the deed for the indemnity of all his sureties, to require that the forgotten sureties shall share with those remembered in the conveyance. But the case does not state that any of the sureties have been thus overlooked; and unless such were the fact, the debtor had no power to make any change in the distribution of the funds assigned. (457)

The judgment of nonsuit should be set aside.

PER CURIAM. New trial.

Cited: S. c., 26 N. C., 206; *Hardy v. Skinner,* 31 N. C., 194; *Gibson v. Walker,* 33 N. C., 329; *Dewey v. Littlejohn,* 37 N. C., 507; *DeCourcy v. Barr,* 45 N. C., 187; *Sharpe v. Pearce,* 74 N. C., 602; *Blalock v. Mfg. Co.,* 110 N. C., 107; *Stoneburner v. Jeffreys,* 116 N. C., 85.

DOE ON DEMISE OF FREDERIC SMITH v. JOHN LOW.

1. The Superior Court has no right, on a trial before it, to permit a return of a constable to a county court to be amended.
2. A constable is not bound (though it is safest for him to do so) to describe the land, returned by him to the county court as levied on, precisely according to the directions of the statute (Rev. Stat., ch. 62, sec. 16). It is sufficient if he gives such a description as will distinguish and identify the land.

APPEAL from *Dick, J.,* at March Term, 1842, of GUILFORD.

This was an action of ejectment. The plaintiff claimed title under a sheriff's deed, and, in order to support his action, read in evidence two warrants against one Coley, and judgments thereon by a justice of the peace, and executions thereon dated 23 March, 1839. On 3 May, 1839,

these executions were levied, and the levy indorsed on the back of each as follows, viz.: "For want of goods and chattels of the defendant, Julius Coley, I levied this execution on three tracts of land, the home place, the Lynn place, and the Leonard Greeson place, containing 400 acres, be the same more or less," which levy was signed by the constable, John
(458) Rightsell. These warrants, with the judgments, executions, and levies aforesaid, were returned to the county court of Guilford at May Term, 1839. Notices in both cases were ordered to issue and did issue, returnable to August Term, 1839, of Guilford County Court, and were returned, "Made known 9 July, 1839." At August Term the cases were continued, and at November Term, 1839, orders of sale were granted in both cases, and from that term two writs of *venditioni exponas* were issued to the sheriff of Guilford, commanding him "to expose to public sale three tracts of land, the home, the Lynn place, and the Leonard Greeson place, containing 400 acres, the property of Julius Coley, which was levied upon by virtue of an execution at the instance of" A. B. and C. D. (mentioning the names of the plaintiffs in the warrants). Upon these writs, at February Term, 1840, the sheriff made the following return: "The within described land, after being advertised according to law, was sold at the courthouse door in the town of Greensboro on 17 February, 1840; at which time Frederick Smith became the highest bidder for the home place, at the sum of $17.25; also the Lynn tract, Frederick Smith became the highest bidder for at $27, and Eli Smith became the highest bidder for the Leonard Greeson place." The defendant objected to plaintiff's recovery, upon the ground that the levies of the justice's executions were too vague and uncertain. His Honor entertained the opinion that the objection was fatal. The plaintiff insisted that the description of the lands levied upon need not be in the precise words of the act of Assembly,* and that he had a right to show as a fact
(459) that the return of the levy by the constable, in the cases referred to as above, identified the lands levied upon as effectually as they would have been identified by a description conforming to that prescribed in the act; and he offered to show, by oral evidence, that there were no water-courses on either of the said tracts, except springs and the branches which run therefrom; that they were generally known in the neighborhood as "the home place," "the Lynn place," and "the Leonard Greeson

*The act of Assembly here referred to prescribes that where upon an execution from a justice no goods and chattels shall be found, or not sufficient, the officer "shall levy on the lands and tenements of such person or persons" (defendant or defendants) "and make return thereof to the justice who issued the same, setting forth in the same the money he has made of the goods and chattels and what lands and tenements he has levied on, on what watercourse, and whose land it is adjoining"; and the justice is directed to return all the papers in the case to the county court, etc. 1 Rev. Stat., ch. 62, sec. 16.

place," belonging at that time to the defendant Coley; that the lands sold by the sheriff were the same as those levied on by the constable, Rightsell. The counsel, being asked by the court if he expected to show that the lands sold had a notoriety to be better known or more distinguished by those names than the other neighbors' lands, replied in the negative. Thereupon the court intimated that evidence short of that would not cure the defect in the levy.

The plaintiff then moved the court that the constable, Rightsell, might be permitted to amend his return of his levies, as he was present in court. To this the defendant objected, and insisted that the warrants, judgments, executions, and returns of levies, upon their return to the county court, became records of that court, and that the Superior Court had no authority to alter or amend the records of the county court; which objection was also sustained by the court. Under an intimation of these opinions by his Honor, the plaintiff submitted to a nonsuit and appealed.

No counsel for plaintiff.
J. T. Morehead and Waddell for defendants.

RUFFIN, C. J. For the reasons stated in the record, the Court concurs in opinion with his Honor that there could be no alterations made in the constable's return.

But, in our judgment, it was error to reject the evidence offered by the plaintiff for the purpose of sustaining the levy of the constable and the sale by the sheriff by showing that the land was well identified by the description therein given. It has been stated by this Court, *Huggins v. Ketchum,* 20 N. C., 550, that the return of the levy need (460) not be in the very words of the act of 1794, though in this, as in other instances, it is safest and most proper to comply with the terms of the statute. But as the object is that the sheriff should be at no loss, when he comes to sell under the *venditioni exponas,* as to the land which it is his duty to offer for sale, we thought it would be sufficient if, from the description given, the sheriff, the parties, and the bidders had as correct or as sufficient means of judging as to the identity of the land levied on as if it had specified "where situate, on what water-course, and whose land adjoining." If the levy be returned precisely as presented in the act, yet it may require extrinsic evidence to identify the land and show that the land sold is that levied on. So if there be a departure from those terms of description, the *onus* lies on one claiming under the levy, of proving clearly, by extrinsic evidence, that the description therein given does adequately identify the land; that it does it as satisfactorily to the mind as if the statute had been literally observed. In the case

cited no such evidence was given; and for that reason the case was sent back to another trial. Here the levy is on "three tracts of land, 'the home place,,' 'the Lynn place,' and 'the Leonard Greeson place,' containing 400 acres, more or less, and belonging to Julius Coley." To the judge on the bench those terms, it is true, convey no certain information of the parcels of land. Nor would a call for water-courses and adjoining lands, or even for particular corners, have had that effect by themselves. In each case proof *aliunde* is requisite to apply the description to a particular thing; and when so applied, the inquiry results, Does the thing answer the description so far as to satisfy a rational mind that this particular parcel of land is that meant? This extrinsic evidence may be of various kinds, as by showing that certain natural objects called for, or certain courses and distances and corners, or the lines of other tracts are known, and upon survey are found to correspond with the description in a deed or levy. So it may be by showing that the parcel of land is well known by a particular name—so well known thereby that a sheriff's return, a will, lease, or other deed, calling it by that name, would at once convey to the minds of those generally who reside in the vicinity a (461) knowledge of the parcel meant. Evidence of this latter kind, if precise and clear, is not less satisfactory than the former. The name of a place, like that of a man, may and does serve to identify it to the apprehension of more persons than a description by coterminous lands and water-courses, and with equal certainty. For example, "mount Vernon, the late residence of General Washington," is better known by that name than by a description of it, as situate on the Potomac River, and adjoining the lands of A, B, and C. Frequently, indeed, the name of a place by which it is well known to those who know it at all overrules a further and mistaken description. *Proctor v. Pool,* 15 N. C., 370. As a consequence, that name is a sufficient description when no other is superadded. Suppose, for instance, that the return here had described one of these tracts as "Julius Coley's Leonard Greeson place, which the said Greeson conveyed to said Coley by deed of such a date, and duly registered," and the deed was produced on the trial, and found to describe the land by metes and bounds, and witnesses also proved that the particular parcel conveyed in that deed became known and was thereafter called "Coley's Leonard Greeson place": it would seem impossible that any description could more specifically point to the particular parcel. So when witnesses state that the parcel received such a name—from any cause whatever—and it is so well known thereby that no other parcel could be mistaken for it, the same conclusion would seem to follow. It is probable that one Leonard Greeson, for instance, may have leased this land from Coley, or resided on it, or conveyed it to him, or, in some other way became so connected with it as to impart his name to a certain part of it;

and if it be so, it is competent to prove the fact in this, as in every other, inquiry of parcel or not parcel. His Honor appears to have been of that opinion himself, to some extent, but to have refused the evidence offered because in strength and fullness it seemed to him insufficient to attach the names to the several tracts, inasmuch as they had not a greater notoriety by those names than "other neighbors' lands." We think (462) this standard entirely too vague and uncertain. No rule can be drawn from it. We cannot tell to what degree or extent the lands of Coley's neighbors may have received names, as distinguishing them in particular; nor is it material to the inquiry whether this tract is well known by the name it bears, that the land of another person is or is not known as well by a similar designation. Besides, this question of identity is one for the jury. If the description in the levy or deed be not so indefinite that by the help of no evidence can it be told to what subject it applies, the identity of that subject is not for the court, but for the jury to determine on the evidence; for, to use the words of my brother, who delivered the opinion of the Court in *Huggins v. Ketchum, supra,* the inquiry is whether *"as a fact* the land levied on is as effectually identified" —that is to say, can be as well known and ascertained by the description given—"as it would have been identified by a description conforming to that prescribed by the act."

PER CURIAM. Judgment reversed and new trial.

Cited: Blanchard v. Blanchard, 25 N. C., 108; *Morrisey v. Love,* 26 N. C., 41; *Ward v. Saunders,* 28 N. C., 385; *Parks v. Mason,* 29 N. C., 364; *Jones v. Austin,* 32 N. C., 21; *Chasteen v. Phillips,* 49 N. C., 461; *Stancill v. Branch,* 61 N. C., 219; *Grier v. Rhyne,* 67 N. C., 340; *Phillips v. Holland,* 78 N. C., 33; *Hilliard v. Phillips,* 81 N. C., 105; *Farmer v. Batts,* 83 N. C., 389; *Thornburg v. Mastin,* 88 N. C., 296; *Scull v. Pruden,* 92 N. C., 174; *Blow v. Vaughan,* 105 N. C., 210; *Euliss v. McAdams,* 108 N. C., 511, 512.

APPENDIX

The Reporter deems no apology necessary for presenting to his professional brethren the following decision of an important question arising under the bankrupt law. Although the judgment was pronounced by his Honor, *Judge Battle,* of the Superior Court, yet, at his request, he was assisted at the hearing of the case by all the judges of the Supreme Court, who concurred in his conclusions.

The case was ably argued on the part of the petitioner by Mr. Badger.

EX PARTE JOHN ZEIGENFUSS.

BATTLE, J. This was an application to me by petition for a writ of habeas corpus, to be discharged from the custody of the sheriff of Wake County. The petition was preferred 22 July inst., and a writ was granted and returned the same day. The facts disclosed in the petition and sheriff's return to the writ were, that on 13 May last the applicant, John Zeigenfuss, a citizen of the State of North Carolina, residing in the county of Wake, being unable to pay all his debts, and being desirous to avail himself of the benefits of the law passed by the Congress of the United States, entitled "An act to establish a uniform system of bankruptcy throughout the United States," filed his petition for that purpose before the district judge for the District of North Carolina, in which he set forth a list of all his creditors and an inventory of all his property, rights and credits, according to the directions of the said act; that upon the filing said petition public notice was given according to law for all the creditors of the petitioner to appear before the said district judge, on 1 September next, to show cause, if any they had, why (464) the prayer of the petitioner should not be granted; that after the said petition was filed and notice given, a writ of *capias ad satisfaciendum* was issued from the May Term, 1842, of the court of pleas and quarter sessions of the county of Wake, returnable to the ensuing term in August, at the instance of Hastings, Pierce & Co., of Petersburg, in Virginia, one of the creditors of the petitioner, whose debt was mentioned in the said petition, and who had been notified as a creditor to appear and show cause why the petitioner should not be declared a bankrupt; that under and by virtue of this writ the sheriff of Wake County, to whom it was directed, took the body of the petitioner and detained him in custody. Upon these facts appearing, the applicant insisted that he had shown sufficient cause to entitle him to be discharged. I did not think so; but as the question was an important one, and I had understood that a different opinion had been entertained and acted upon by other judges, I was desirous to have the case considered by the judges of the Supreme Court, and they readily agreed, at my request, to assist me in the hearing of it. It has been accordingly argued before us by counsel

on behalf of the applicant, and I am now instructed to declare the unanimous opinion of all the judges of the Supreme Court, with which mine concurs, that the cause shown for the discharge of the applicant is insufficient, and that he must be remanded to the custody of the sheriff of Wake County, to be detained under the writ of *capias ad satisfaciendum* set forth in his return.

The main ground assumed and relied upon in the argument of the counsel for the applicant is that upon the filing of the petition in bankruptcy a jurisdiction was acquired over the person and property of the petitioner which is inconsistent with the jurisdiction of our State courts under the insolvent laws of the State, and which necessarily supersedes them. In support of this argument the provisions of the State law in regard to insolvent debtors have been referred to (see 1 Rev. Stat., ch. 58) and their inconsistency with those of the bankrupt laws pointed out and commented upon. I do not deny that to a certain extent the (465) objects of the insolvent laws of this State and the bankrupt law of the United States, namely, the equal distribution of the debtor's property *pro rata* among all his creditors, and the exemption of his body from imprisonment, are the same; yet in some respects there are essential differences between them, particularly in this, that the latter goes much farther than the former, inasmuch as it entirely discharges the debts themselves, while the former only releases the body, but permits the debts to remain to be enforced whenever the debtor acquires property to satisfy them. It is also conceded by me that the bankrupt act passed by Congress under an express provision of the Constitution of the United States must necessarily supersede any State law with which it comes in conflict. But after these admissions are made, the consequences deduced from them do not, in my opinion, necessarily follow. It is to be borne in mind that the bankrupt law nowhere expressly repeals the insolvent laws of the State; indeed, there is no allusion to them whatever in any section or clause of that act. It is only by judicial construction that the one law is made to give way to the other. So far as the State insolvent laws may prevent or even impede the operation of the bankrupt law, they must yield to it in order that it may fully accomplish its object of establishing an uniform system of bankruptcy throughout the United States; but while the State laws thus yield, they are not entirely abrogated. They exist and operate with full vigor until the bankrupt law attaches upon the person and property of the bankrupt, and that is not until it is judicially ascertained that the petitioner is a person entitled to the benefits of the bankrupt law by being declared a bankrupt by a decree of the court. Before that time, I think, upon a sound construction of the bankrupt act, it does not necessarily come in conflict with the insolvent laws of the State.

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The first section of the bankrupt law declares what persons shall be entitled, upon their voluntary application, to the benefit of its provisions; and that section, together with the seventh section, prescribes the manner of proceeding in order to obtain that benefit. The third section provides that "all the property and rights of property of every name and nature, and whether real or personal or mixed" (except a certain (466) portion thereof to be set apart for the support of himself and his family), "of every bankrupt who shall by a decree of the proper court be declared a bankrupt within the act, shall by mere operation of law, *ipso facto,* from the time of such decree be deemed to be divested out of such bankrupt," and shall, by force of the same decree, be vested in an assignee to be appointed by the court. Prior to this time the property remains in the petitioner, though he is prohibited by the second section from making any disposition of it even to a creditor, in order to give him a preference over the general creditors; and if any such disposition of it should be made, it will be deemed null and void, should the petitioner be subsequently declared a bankrupt. Up to the time of the decree everything is voluntary on the part of the petitioner. He is not bound to ask for a decree declaring him a bankrupt. He may delay the proceeding as long as he chooses, and may finally withdraw his application or have it dismissed; for he is not required even to swear that his petition was filed with the *bona fide* intention of being declared a bankrupt. His creditors, prior to the decree, acquire no interest in his property, and have no means of compelling him to proceed so as to give them an interest. He may not be entitled under the act to be declared a bankrupt, or he may never choose, though his petition has been filed, to ask such a decree; and there is nothing in the act to authorize the judge to make the decree without his asking it, much less where he opposes it. Can it be, then, that the mere filing his petition and notifying his creditors, will, *ipso facto,* prevent them from proceeding against his property in order to obtain satisfaction of their debts? If so, then the bankrupt act, instead of operating to procure a distribution among his creditors of the property of an insolvent who could not be proceeded against as an involuntary bankrupt, would afford him an easy and certain means of setting his creditors at defiance and securing to himself the quiet and undisturbed possession and enjoyment of his property. He would have nothing to do but to file his petition, notify his creditors, and then postpone the hearing to the most distant period which the judge (467) would allow, and when that time arrived forbear from asking any decree at all. The same argument which would protect the property of a debtor from execution under such circumstances would also exempt his body from arrest; but I think a construction attended with such manifest evils cannot be adopted without a positive declaration to that effect in

the act, or a necessary inference from it. It is not pretended that there is any positive declaration in the bankrupt act to oust the jurisdiction of the State courts under their insolvent laws, and I will now proceed to examine whether the objection urged by the applicant's counsel furnishes the grounds for a necessary inference of such a result. The objection is that the jurisdiction under the insolvent laws of the State is inconsistent with that under the bankrupt law of the United States, and I am told—

1. That under the provisions of the bankrupt law the voluntary applicant for its benefits is liable, at any time after filing his petition, to be examined orally or upon interrogatories in and before the court, or before any commissioner appointed by the court therefor, on oath or affirmation, in all matters relating to such bankruptcy (see section 4 of the bankrupt act), and that allowing a petitioner to be taken in execution under a writ of *ca. sa.* issued from a State court would altogether prevent, or at least very much obstruct, the carrying this provision into effect.

2. Section 3 of the bankrupt act provides that the property of an applicant shall be vested in an assignee from the time of the decree of bankruptcy, for the purpose of being distributed among all his creditors, *pro rata,* securing at the same time certain preferences before such distribution is made, and allotting a certain portion of this property for the support of the bankrupt and his family, while under the State laws, if the petitioner be taken under a *ca. sa.* and is desirous of availing himself of the benefit of the insolvent law, he must file a schedule of all his property, which vests the same in the sheriff of the county, who is to
(468) distribute the same among all the creditors; and that if the State court to which the writ of *ca. sa.* is returnable should set before the time appointed for hearing the petition in bankruptcy, the property of the petitioner would become vested in the sheriff, and thereby entirely defeat or very much embarrass the rights of the assignee.

To the first of these objections the answer is that it may well be doubted, notwithstanding the decision of the Court in the case of Dr. Lee referred to in Bicknell on the Bankrupt Law of 1841, page 36, whether section 4 of the bankrupt act does give to the judge the power to examine a voluntary applicant until after he has been declared a bankrupt. That section speaks throughout of a "bankrupt," and evidently means by the use of that term in all the clauses before and after that giving the power of examination a person declared a bankrupt by a decree of the court. In the particular clause now under consideration the sentence begins, "And such bankrupt," which would seem to indicate a person declared a bankrupt, as in the other parts of the section. But admitting that this is not the correct construction of section 4 of the act, and that a petitioner may be examined before he is decreed to be a bankrupt, still I think that all the objects of this provision of the bankrupt law may be

attained by the power which the judge has of having the petitioner brought before him by a writ of *habeas corpus* if in actual custody, or of appointing a commissioner to examine him in jail; and I do not think that the slight inconvenience of the judge being compelled to resort to such a course creates such an inconsistency with the provisions of our insolvent laws as entirely to supersede them, and thereby let in all the mischiefs before adverted to.

The second objection admits of an answer, in my view, equally decisive. In the first place, it might be contended with some show of reason that if the petitioner should be compelled to file his schedule in the State court under its insolvent law before the time appointed for hearing the petition, the act, being an involuntary one, would not at all affect his right to the benefit of the bankrupt law, and that law would only assign by the decree of bankruptcy such property and rights of property as the party then had, or had previously voluntarily disposed of within the time mentioned in the act. The words used in section 3 in (469) relation to the assignment speak only of divesting the title of the petitioner and vesting it in the assignee from the time of the decree, and make no allusion whatever to the property as having been theretofore scheduled; and it may be that this peculiar phraseology was used designedly for the purpose of conveying to the assignee only such property mentioned in his schedule as had not been taken from him, *in invitum*, and at the same time to embrace such other property as he may have acquired in any manner, either by descent or purchase since the filing of the schedule. But if this be not so, still I think the petitioner may state in his schedule filed in the State court that he has before that time filed a petition in the district court to obtain the benefits of the bankrupt act, and has filed therewith an inventory of the same property. In that event the property would vest in the sheriff, subject to be divested in favor of the assigneee upon the party being subsequently declared a bankrupt. After all, before the decree of bankruptcy, it cannot be said that the conflict of jurisdiction *does* exist, but only that it *may hereafter* exist; and the law will not, upon the mere possibility that such conflict may arise upon an act to be done by a party who is under no legal obligation to do it, adopt a construction which, instead of accomplishing one of the main purposes of the bankrupt act, would seriously thwart, if not entirely defeat, it.

The conclusion to which I am led by this course of reasoning is fortified by the settled construction which has always been placed upon the English bankrupt law. Under that law a bankrupt is not entitled to be discharged from an arrest for debt until he is summoned to surrender, which is never until after he has been declared a bankrupt. Eden on Bank. Law, page 85. If the suing out a commission under the English

law will not protect a debtor from arrest before he is declared a bankrupt, I cannot see how any greater effect can be given to a mere petition and notice to the creditors by a voluntary applicant under the United States bankrupt law. There certain cannot, unless there is a difference in this respect in suing in a court of the United States and (470) a State court; and I can hardly think that the bankrupt law was intended to give, directly or indirectly, an advantage to a creditor having a judgment in the court of the former over a creditor having a judgment in the latter. Before a decree of bankruptcy, a debtor, applying voluntarily for the benefits of the bankrupt law, cannot be protected from arrest on a writ issuing from *any* court, whether State or Federal; but after such decree he will be protected against the process of *every* court, because then his property is taken from him to be applied, under the provisions of the bankrupt act, to the payment *pro rata* of all his creditors, and as the law has taken his property, it will protect his person.

To prevent misconception, it is proper that I should state that though the judges of the Supreme Court concur in the conclusion to which I have come in these cases, yet they are not at all answerable for the course of argument by which I have arrived at it.

Cited: *Walton v. Gatling,* 60 N. C., 315.

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