ANNOTATIONS INCLUDE 168 N. C.

NORTH CAROLINA REPORTS
VOL. 25

CASES AT LAW ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1842
JUNE TERM, 1843

BY JAMES IREDELL
(3 IRE.)

ANNOTATED BY
WALTER CLARK

REPRINTED FOR THE STATE
EDWARDS & BROUGHTON PRINTING CO.
STATE PRINTERS AND BINDERS
1915

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CASES REPORTED

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CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

DECEMBER TERM, 1842

ANDREW W. KILLIAN *v.* ANDREW FULBRIGHT AND OTHERS.

An objection to the jurisdiction of the court in a penal action, because the action was not brought in the county where the offense was committed, must be brought forward by plea in abatement, and cannot be taken on the general issue.

CASE brought in MACON and tried at the Fall Term, 1842, of CHEROKEE, before *Pearson, J.*

The action was brought under the Statute in relation to the removal of debtors, Rev. Stat., c. 50, s. 9, and the plaintiff declared that the defendant, with an intent to hinder, delay or defraud his creditors, aided and assisted in removing one ..... who was a debtor of the plaintiff out of the county of Lincoln. The defendant pleaded the general issue. The court, on the trial, intimated an opinion that the Statute, upon which the action was brought, was a penal Statute; that the action was therefore local, and could only be sustained in (10) Lincoln County. The following facts were then agreed upon by the Counsel: At the time of the removal, the plaintiff, the defendants and the debtor, all resided in Lincoln County, and the defendants still reside there. The plaintiff, after the cause of action arose, removed to Macon County, and there commenced this action. He afterwards removed to Cherokee County, and the case was regularly transferred to the latter county, under the provisions of the Act of Assembly. The plaintiff, upon the intimation of the opinion of the court, submitted to a nonsuit, and appealed to the Supreme Court.

Clingman and *Francis* for the plaintiff.
Woodfin for the defendant.

GASTON, J. Admitting that the action in this case is to be regarded as a penal action, the nonsuit was, nevertheless, improperly ordered. It was decided in *Green v. Mangum,* 7 N. C., 39, that the objection taken to the jurisdiction of the court, because the action was not brought in the county where the offence was committed, must be brought forward by plea in abatement, and could not be taken on the general issue.

The judgment of nonsuit must be

PER CURIAM. Reversed.

(11)

JOSEPH ELLER *v.* WILLIAM B. ROBERTS.

1. Where a witness alleges that he was unable to attend court, this inability must be decided by reference to the modes of traveling, which are in use in the community.
2. If modes of conveyance to the court, which are not impracticable, exist, and nothing is shewn, on the part of the person summoned, that these were not within *his* power, his non-attendance cannot be attributed to inability.

APPEAL from *Pearson, J.,* at Fall Term, 1842, of BUNCOMBE.

A *sci. fa.* was issued against the defendant to show cause why the fine imposed upon him *nisi* for not attending as a witness at April Term, 1839, BUNCOMBE, should not be made absolute. The defendant relied upon his plea, that he was unable to attend court, in consequence of an injury upon his knee. One witness swore that, on the Thursday before April Term, 1839, the defendant *cut his knee badly with a wood-axe*—that on Sunday, the defendant started to court, and came back on Tuesday—that the defendant's knee *was swelled very badly*—that he was not able to get about to work for some time—that witness thought it might have injured the defendant to ride, for it was about two weeks before he was able to get about to work. Another witness, a son of the defendant, deposed that the defendant stayed at his house on Sunday night, on his way to court—that his knee was cut and swelled badly. On his cross examination, he said his father came on horseback, and went off on horseback—that he had no crutch or stick, and got on and off his horse without any assistance—that the defendant lived about forty miles from the courthouse, and the witness about ten miles. Another witness swore, that, on Monday evening of the court, he met the defendant about three miles from the courthouse; that he said

(12) he was going home; that he had been to court to file a petition for a divorce, and had expected Eller (the present plaintiff) to become his security, but Eller had refused—that the defendant told the witness he had cut his knee with a broad-axe the week before, but did not show the wound, or complain more about it. The case in which the defendant was a witness, was tried on Wednesday of the second week of the court.

The Court charged, that, to make out the defence, it was necessary for the jury to be satisfied that the defendant was unable to come to court, either to walk, ride on horseback, or in a carriage or wagon, without pain or great inconvenience, or danger of making the wound worse by the exertion; that when a witness was too poor to pay his expenses, or was in a condition making a carriage or wagon necessary, and notified the party, at whose instance he had been summoned, and the party neglected to furnish the money, or the necessary conveyance, it would be a good excuse for not coming; but, in this case, the simple question was, whether the wound on the defendant's knee was so bad, that he was unable to come, either on horseback or in a carriage or wagon, without pain and danger of making the wound worse—that if so, it was unreasonable for the plaintiff to expect him to come—if not, then he had no good excuse for failing to come.

The jury found in favor of the plaintiff, and a motion for a new trial on the ground of error in the Judge's charge having been made and refused, and judgment having been rendered for the plaintiff, in pursuance of the verdict, the defendant appealed to the Supreme Court.

Francis and *Woodfin,* for the plaintiff.
No counsel for the defendant.

GASTON, J. We see no error in the instructions complained of. They are quite as favorable as the defendant had a right to ask. He alleged, as a justification for his disobedience to the subpœna, inability to attend Court. This inability must be passed upon, and decided by reference to the modes of traveling which are in use in the community. If one mode of conveyance be impracticable, but others exist (13) which are not impracticable, and nothing is shown on the part of the person summoned to establish that these were not within *his* power, his nonattendance cannot be attributed to inability. Upon the evidence stated, admitting it to be true, it was scarcely possible for any Jury to find the defendant's plea in his favor, and he could ask for no instruction, which would have warranted such a verdict.

PER CURIAM. No error.

BARBE CARROLL *v.* WILLIAM K. MCGEE.

1. Where an appeal is taken from the judgment of a justice of the peace, and is reversed in the County Court, but on appeal to the Superior Court is there affirmed, the surety for the appeal from the justice is still bound.
2. A surety for an appeal from a justice, can only be bound, according to an act of Assembly, when he subscribes his name himself, a subscription by another, in his presence, and at his request, is not sufficient—but

when he holds the pen, and another guides it, to sign his name, this is a signature by himself.

3. Judicial proceedings before a justice of the peace, are conclusive in their *effects*—but they do not *prove themselves*, like records—parol evidence may be introduced to prove that they are void.

4. A surety who signs an appeal from the judgment of a justice will be bound, although the appeal is taken after the time allowed by the act of Assembly for taking an appeal, provided the opposite party consents that the appeal may be then taken.

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

(14) The action commenced before a Justice of the Peace, and on a judgment being rendered against the defendant, he appealed to the County Court. The plaintiff was there nonsuited, and appealed to the Superior Court, in which latter Court, a verdict and judgment were rendered for the plaintiff. A motion was then made by the plaintiff's attorney for judgment against the surety, for the appeal from the Justice of the Peace. On this motion, it was proved by the justice, who granted the appeal, that the appeal was prayed at the time of trial, but the defendant, being unprepared with surety, did not then give it. The ten days, allowed by the Act of Assembly for an appeal, had elapsed before he saw the surety. The plaintiff and the defendant both being present, it was agreed that the appeal might go up. The surety then directed the justice to put his name as surety for him, and held the top of the pen while it was done. It was then attested by the justice of the peace, in the presence of the surety and of the parties. Upon this state of facts, the Judge refused to give a judgment against the surety, and the plaintiff appealed to the Supreme Court.

Clingman, for the plaintiff.
Francis, for the defendant.

GASTON, J. Three objections appear to have been made by the defendant, to the prayer of the plaintiff for a judgment against him. He insisted, first, that, as his principal succeeded in the County

(15) Court in reversing the judgment rendered by the magistrate, the defendant's liability as surety for the appeal, was at an end; secondly, that he did not "subscribe" the engagement to be surety for the appeal, as required by the act of 1794 (Rev. St., c. 62, s. 23); and thirdly, that the engagement having been taken by the magistrate after the expiration of the ten days, allowed by that act for granting an appeal, it was taken *coram non judice,* and was therefore null.

The first objection was clearly untenable. *Dolby v. Jones,* 13 N. C., 109, is decisive that the surety for an appeal from the judgment of a magistrate, is surety to the action, and is bound to satisfy the judgment, which may be finally rendered therein against the appellant.

In answer to the second and third objections, it has been here urged that they ought not to have been entertained, for that the certified proceedings of the magistrate are in the nature of a record, and that evidence cannot be received to contradict them. We are not satisfied with this answer. The extrinsic evidence was not offered to impeach the *force* of the acknowledgment, made by the defendant as surety for the appeal, but to show that such acknowledgment was *not made* with the formalities required by law, or was made before one who had not jurisdiction to take it, and therefore was not in truth what it purported to be. The judicial proceedings before magistrates, do certainly resemble records in the conclusiveness of their *effect,* but they differ from records in this, that they do not conclusively *prove themselves.* Thus it may be shown, that a judgment which purports to have been rendered in a county, where a magistrate has jurisdiction, was in fact rendered out of his county. *Hamilton v. Wright,* 11 N. C., 283.

But while we hold the evidence to have been admissible, we agree with the counsel for the plaintiff, that the matters thereby shown, constituted no defence against the plaintiff's prayer. The act of 1794 does indeed require, that the surety for the appeal shall himself subscribe the acknowledgment before the magistrate, and this requisition would not, in our opinion, have been complied with, if the witness' (16) name had been subscribed by another in his presence, or by his direction. But in this case, the subscription was made by *himself.* He actually held the pen while the signature was written, and it was not the less *his* subscription, because he had the aid of a magistrate in making it. It is true, also, that the act of 1794 limits the time within which a defendant may demand an appeal from the judgment of a magistrate, to ten days after the judgment shall have been rendered, but we cannot doubt that, with the consent of the parties, the appeal may be taken after the expiration of the limited time. No consent can give *jurisdiction* where the law withholds it, but consent may enlarge the time, within which a legal privilege can be exercised. *Wardens v. Cope,* 24 N. C., 44.

We are of opinion, that the judgment below is erroneous, and ought to be reversed, and that the plaintiff is entitled to have judgment, as prayed for against the defendant, and to recover the costs of this appeal.

PER CURIAM. Judgment accordingly.

Cited: Long v. Weaver, 52 N. C., 627; *Reeves v. Davis,* 80 N. C., 210; *Spillman v. Williams,* 91 N. C., 489.

(17)

THE STATE *v.* BENJAMIN S. BRITTAIN.

When a Sheriff has arrested a defendant upon *mesne* process, and taken bail, he cannot afterwards arrest him, upon the ground that the bail is insufficient.

APPEAL from *Pearson, J.*, at Fall Term, 1842, of MACON.

The defendant was indicted for assault and battery on Eli McKee. Eli McKee proved that, as Sheriff of the County of Macon, he had two *capiases ad respondendum* against the defendant, for about $600—that he informed Brittain of the fact and asked him if he would give bail—that Brittain proposed to give one Bird and one Cruise—that the witness told him they were not sufficient, and he must give good freehold sureties; that Brittain promised to do so, and took the bonds off for that purpose—that after some time the bonds were handed to the witness, and he, without looking at them put them in his hat—that during the day he looked at the bonds, and, to his great surprise, found that they were only signed by Bird and Cruise; that he immediately went to Brittain and told him the securities were not sufficient, and he must give others—that Brittain said he had once accepted the bonds and had no right to arrest him again or to require other sureties; that the witness insisted he must give good sureties, as he had promised to do, or he would arrest him—that Brittain refused, and the witness walked up to arrest him, when Brittain struck him and threw him on the ground. The defendant introduced evidence tending to show that McKee, although he objected to Bird and Cruise at first, was finally induced to think them sufficient, and had accepted the bonds; and that it was not until sometime afterwards that, finding they were not good, he went to Brittain and required other sureties.

(18) The defendant's counsel moved the Court to instruct the jury, that if McKee had accepted the bonds, and discharged the defendant upon that bail, he had no right afterwards, although the bonds turned out not to be sufficient, to arrest the defendant and require other bail, and that the defendant was justified in the assault and battery, as resisting an illegal arrest. The Court refused so to instruct, but charged the jury that, although a Sheriff accepts a bail bond, believing it to be good, yet, if he afterwards discovers it not to be good, he has a right to notify the defendant of the fact, and require other bail, and, if this is refused, to arrest him, and the defendant is not justified in resisting—that the Court was of opinion, that the provision in the Act of Assembly, as to notice before the Sheriff is chargeable as special bail, being for the benefit of the Sheriff, he is not obliged to wait until he receives notice, but may proceed immediately, as soon

as he ascertains the insufficiency of the bail, to arrest the defendant, in order to protect himself as special bail.

The jury found the defendant guilty. A new trial having been moved for and refused, and judgment having been pronounced against the defendant, he appealed to the Supreme Court.

Attorney General for the State.
Francis for the defendant.

DANIEL, J. At the common law, if a Sheriff, who arrests on *Mesne process* (not on *Ca. Sa.*), lets the defendant go at large without taking bail, he may retake him at any time before the return of the writ, and he is not liable to an action for an escape. *Atkinson v. Watterson,* 2 Term, 192; *Fuller v. Prest,* 7 Term, 105; Watson on Sheriffs, 126; 1 Archb. Prac., 85.

In this State (by the Statute), if the Sheriff do not take bail, when he arrests on mesne process, he, himself, is special bail; and he may then, as *bail,* arrest at any time thereafter. But if the Sheriff has once taken bail on an arrest on mesne process, in a civil action, we find nothing in the law books, which authorizes him to arrest the defendant a second time on the same process, on the ground that the bail may have become insufficient. In this State, there is necessarily, (19) by force of the Statutes, but a small space of time between the date of the bail bond, (when the Sheriff may, and does exercise his judgment as to the sufficiency of the bail), and the return Term of the writ; at which Term only, can the plaintiff be at liberty to except to the bail bond. If the Sheriff might again arrest at any time, and as often as he pleased, before the return of the writ, then defendants in civil suits might be put to great inconvenience. The danger or loss, either to the Sheriff or to the plaintiff, can be but small, if the Sheriff is prohibited from making a second arrest, whilst the harassments and inconveniences to defendants might be great, by permitting him to arrest a second time, on the same process, after bail had been once given. We think that the Judge erred in this part of his charge to the jury, and that there must be a

PER CURIAM. New trial.

Cited: *S. v. Queen,* 66 N. C., 617; *S. v. Durham,* 141 N. C., 750.

(20)

STATE *v.* MALCOLM SHAW.

Where one is indicted for refusing to assist an officer in securing a person whom he has arrested, it is not sufficient to state in the indictment that this was an arrest by *lawful authority*, the authority to arrest must be set forth in the indictment.

APPEAL from *Dick, J.*, at Fall Term, 1842, of ANSON.

The defendant was tried at that term upon the following indictment:

STATE OF NORTH CAROLINA—Anson County—*ss.*

Superior Court of Law, Fall Term, 1841.

The jurors for the State, upon their oath, present that one William Bailey, being arrested by one William H. Gullidge, a deputy sheriff in and for said County of Anson, by lawful authority, on 10 April, 1841, the said William Bailey resisted the said officer; and the said William H. Gullidge, deputy sheriff as aforesaid, summoned Malcolm Shaw and Jacob Lockhart to assist in taking in custody the said William Bailey, which said summons of the said William H. Gullidge the said Malcolm Shaw and the said Jacob Lockhart then and there utterly disregarded and refused to obey the same, in contempt of the law, to the evil example of all others in like case offending, and against the peace and dignity of the State.

And the jurors aforesaid, upon their oath aforesaid, do further present that Elisha S. Hubbard, an acting justice of the peace in and for the County of Anson aforesaid, on the day and year aforesaid, at and in the county of Anson aforesaid, being in the discharge of his official duty as a justice of the peace, then and there commanded one William H. Gullidge, a deputy sheriff in and for the County of Anson aforesaid, to arrest one William Bailey for disorderly conduct

(21) then and there committed in the presence of the said magistrate, and then and there commanded the said Malcolm Shaw and the said Jacob Lockhart to assist the said deputy sheriff then and there in the said arrest, and that the said Malcolm Shaw and the said Jacob Lockhart, in contempt of the law, and in utter disregard of the said command of the said Elisha S. Hubbard, justice of the peace as aforesaid, then and there utterly refused and neglected to obey the said command, to the evil example of all others in like cases offending, and against the peace and dignity of the State.

On the trial, it appeared in evidence, that the said William Bailey was intoxicated, and swearing and making a loud noise, and threatening to beat some person, in one of the most populous streets in Wadesboro—that he was requested by a magistrate to desist and go home, which he refused to do, and continued swearing and making a loud noise

in the street; whereupon the magistrate verbally ordered a deputy sheriff, then present (W. H. Gullidge), to take said Bailey into custody and carry him before a magistrate, and Bailey resisted the officer. The deputy sheriff then summoned the defendant and Lockhart, who were present, to assist him in arresting the said Bailey, and carrying him before a magistrate, which they refused to do.

The jury, under the charge of the court, found the defendant Shaw guilty, and judgment having been pronounced against him in pursuance of the verdict, he appealed to the Supreme Court.

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

DANIEL, J. The defendant was indicted for a misdemeanor. The *first* count in the indictment charges, that one William Bailey was arrested by William H. Gullidge, a deputy sheriff of ANSON, *by lawful authority;* that Bailey resisted the officer, who summoned the defendant to assist, and who refused to obey. The *second* count charges, that Elisha Hubbard, a justice of the peace, commanded William H. Gullidge, the deputy sheriff, to arrest William Bailey for *dis-* (22) *orderly conduct,* then and there committed in the presence of the magistrate, and that the justice then and there commanded the defendant to assist the said deputy sheriff in the arrest, and that the defendant, in disregard of the command of the justice, refused to obey.

The jury, under the charge of the Court, found the defendant guilty on both counts.

We are of opinion, that the first count is so clearly insufficient, that it is not necessary to enquire, whether there was evidence to support it. That count is very bad, because the authority to the deputy sheriff to arrest Bailey, is not set forth in the said count. The statement that the arrest was *by lawful authority,* is not sufficient. The grand jury can only state such facts and circumstances, in the count, as will enable the Court (who is to decide upon the law,) to see whether they make up a crime, if true, as there stated. The grand jury are *lay gens;* and are not entrusted by the law to pronounce what will constitute a lawful authority, to enable an officer to make an arrest; the Court must see the authority set forth in the count, that it may judge whether it be a lawful authority or not.

The *second* count charges the defendant with disobedience to the command of Elisha Hubbard, the magistrate, to aid in the arrest of Bailey. Now, without deciding whether this count was sufficiently precise, there was *no* evidence in the cause that the magistrate ever ordered the defendant to aid the deputy sheriff in making the arrest of Bailey.

It appears from the case, that, after the deputy sheriff had been ordered by the magistrate to make the arrest, Bailey resisted the officer, and then the deputy sheriff summoned the defendant to aid him in making the arrest. Where the magistrate was, at that time, is not stated. But there is no evidence of any disobedience by the defendant to *his* command.

PER CURIAM. New trial.

Cited: *S. v. Jones,* 78 N. C., 422; *S. v. Baldwin,* 80 N. C., 393.

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(23)

THE STATE ON THE RELATION OF JONATHAN COPELAND *v.* JOHN WOOD, AND OTHERS.

When an order is made in a suit pending in a Court that a notice shall issue to one of the parties, the clerk is not bound to issue such notice unless it be applied for in behalf of the party who obtained the order.

APPEAL from *Bailey, J.,* at Fall Term, 1842, of PERQUIMANS.

The facts and questions presented in this case are stated in the opinion of the Court.

A. Moore, for the plaintiff.

No counsel for the defendant.

DANIEL, J. The defendant was the Clerk of the County Court of Perquimans, and this was an action of debt on his official bond. The breach assigned, was his failure to issue a notice to one Albertson, and place it in the hands of the Sheriff to be served. A constable had levied on the lands of Albertson, under an execution issued by a justice of the peace, on a judgment in favor of the relator against the said Albertson, and the warrant, judgment, execution and levy had been returned into the County Court of Perquimans, at May sessions, 1841; but the constable did not return any copy of a written notice of the said levy given by him to Albertson, as he, by Act of Assembly, was directed to do. At May sessions, 1841, the following entry was made on the record, in the aforesaid cause: "No judgment, for the want of notice, ordered that the Clerk issue notice." It was admitted, that the Clerk did not issue the notice of the levy as ordered, nor did the relator, by himself or agent, call upon the Clerk for the said notice. At August Sessions, 1841, the above order was renewed, and the defendant ceased to be Clerk at that Term. The Court charged the jury, that it was the duty of the Clerk to have issued the notice, as it had been ordered by the

Court, although neither the relator nor his agent had applied (24) for the same; and that if the relator had sustained damage by this omission of duty, he was entitled to recover the amount of that damage. The jury rendered a verdict for the plaintiff; there was judgment, and the defendant appealed.

We believe, that it has been usual for the Clerks of the Courts in this State, to issue process, notices and copies of orders made in civil causes, and place them in the hands of the Sheriffs to be served and executed; but we are ignorant of any law that makes it the official duty of the Clerk to do it. Neither the relator nor his agent ever demanded the notice of the clerk. If such a demand had been made, and the Clerk had then refused to make it out and deliver it to such demandant, in a reasonable time, he would have been guilty of a breach of his duty, but not before such demand. We are of opinion, that the judgment must be reversed, and a

PER CURIAM. New trial.

Cited: Ethridge v. Woodley, 83 N. C., 14; *Penniman v. Daniel,* 93 N. C., 336.

(25)

STATE, TO THE USE OF BEATY GOFORTH *v.* WILLIAM LACKEY AND OTHERS.

1. An action upon a constable's bond, for a breach of duty, must be brought upon the bond for the year during which the breach occurred. No action for such breach can be sustained on the bond given for the succeeding year, the bonds not being cumulative.
2. Where money has been collected during *one* year, upon a claim put into a constable's hands, although a demand upon him to pay what has been so collected is not made until the next year, the breach occurred in the former year, and the sureties for that year are alone responsible.

APPEAL from *Pearson, J.,* at Fall Term, 1842, of CLEVELAND.

This was an action of debt upon the bond of Lackey, as constable, and the other defendants as his sureties. Breach assigned, that he had not paid over certain moneys received on claims put in his hands for collection. The bond was in the usual form, dated at March Term, 1841. The plaintiff proved that in October, 1840, he placed in the hands of Lackey, certain judgments, notes, etc., to collect as constable. There was no evidence that Lackey held the papers at March Term, 1841, but on the contrary, it appeared that he had collected the money in 1840. In May, 1841, the plaintiff requested Lackey to pay the money, but he failed to do so. The plaintiff's counsel contended, that as the demand was made in 1841, the sureties for that year were liable; not those for 1840. The court was of opinion, that, as Lackey did

not hold the papers in 1841, but had collected the money in 1840, the action on the bond for 1841 could not be sustained. For although an action on the bond of 1840 could not be sustained until a demand, and the plaintiff might have lost his remedy by not making demand until May, 1841, still the delay of the plaintiff to make the
(26) demand, could not make the securities of 1841 liable.

The plaintiff submitted to a nonsuit and appealed.

No counsel for the plaintiff.
Hoke for the defendant.

GASTON, J. The office of constable is limited in its duration to one year. At the end of that time the office expires. If the former officer be then re-elected, he does not continue in office, but receives a new office. No analogy exists between bonds taken from one so re-appointed on the occasion of each election, and bonds which for greater caution the law sometimes requires to be given from time to time in the case of a continuing office, such as that of an executor or guardian. In the latter case, all the bonds are cumulative, being given to secure the performance of the same duty. But in the former they are altogether distinct, each to secure the performance of the special duties therein stated.

In the case before us, the sureties in the bond of March, 1841, stipulated for the faithful performance by their principal of the duties of the office then conferred, and for his diligence in endeavoring to collect, and his punctuality in paying over what might be collected on claims that should be put in his hands for collection. But the moneys, the non-payment whereof gives rise to this suit, were either collected *by virtue* of his antecedent office of constable, or upon claims put into his hands for collection, and satisfied before he received the second office. In the former supposition, the non-payment is a violation of the duty, which that former office imposed; and in the latter, it is a failure to comply with the stipulation in the bond, when that office was conferred. The sureties for the bond then given, are therefore liable, but not the sureties in the bond of 1841.

PER CURIAM. Affirmed.

Cited: Miller v. Davis, 29 N. C., 200; *Ringold v. McGowan,* 34 N. C., 45; *S. v. Lane,* 35 N. C., 256; *S. v. Galbraith,* 65 N. C., 411; *Morgan v. Smith,* 95 N. C., 402.

(27)

ALEXANDER MAY AND OTHERS, EXRS. OF PETER MAY, *v.* ALEXANDER LITTLE ET AL., ADMRS. OF WILLIAM B. MAY.

It is not competent for a plaintiff to give in evidence, declarations made by a wife, in the lifetime of her husband, showing his liability to a debt, she not being shown to be the agent of her husband, although she is now a party defendant on the record, as his administratrix.

APPEAL from *Dick, J.*, at Fall Term, 1842, of ANSON.

Debt on a bond, executed by William B. May, the defendant's intestate, to Peter May, the plaintiff's testator. The execution of the bond was duly proven. The defendants relied upon the plea of payment, and introduced a variety of evidence to prove that the bond had been fully paid off and discharged in the lifetime of their intestate. The plaintiffs also introduced evidence to prove that the bond had not been discharged. Among other testimony, the plaintiffs introduced a witness, who stated, that in the Fall of 1836, a month or two before the death of William B. May, Peter May, the plaintiffs' testator, handed him the bond now in suit, and requested him to call on William B. May for payment; that, at the house, he was informed by the said William's wife, (who is now a defendant as administratrix of the said William), that her husband was at home, but indisposed, and not in a situation to do business. The witness then stated his business to Mrs. May, the present defendant, who replied to him that she had a little money, and could pay him one hundred dollars. Mrs. May further remarked, that she had wished her husband to sell a negro and pay the debt. This evidence was objected to by the defendants as inadmissible, but was admitted by the court, upon the ground that it was a declaration of one of the defendants of record in this suit. The jury rendered a verdict for the plaintiffs; and a new trial having been moved for and refused, and judgment entered pursuant to the verdict, the de- (28) fendants appealed.

Strange for the plaintiffs.
No counsel for the defendants.

DANIEL, J. It is a rule of law, that when an action is brought by or against the husband, or by the husband and wife, jointly, in right of the wife, the declarations of the wife are not evidence against him. *Winsmore v. Greenbank,* Willes, 577; *Alban v. Pritchett,* 6 Term, 680; Phillips' Ev., 64. If William B. May had been sued on the bond in his lifetime, these declarations of his wife could not have been given in evidence against him. And there is nothing in the case to show that she acted as agent of her husband in the matter. The declarations of the wife

were not made to the witness, as coming from or directed by her husband. The evidence at the time being inadmissable, the *ex post facto* circumstances of the death of the husband, and the wife administering on his estate, and being a party to the record, does not, in our opinion, legitimate it—it was illegal evidence from public policy *ab initio,* and it is so still. There must be a

PER CURIAM. New trial.

Cited: *Coble v. Coble,* 82 N. C., 342.

(29)

THOMAS LEE *v.* JAMES J. MCKAY.

In an action of Trover for lumber *held* that although the defendant's slaves took the timber and sawed it without or against his orders, or even by mistake, yet, if the lumber, when sawed, came to the defendant's use either by being sold or otherwise appropriated to his benefit, however innocently on his part, this was a conversion, and the plaintiff was entitled to recover the value of the timber in this action.

APPEAL from *Dick, J.,* at Fall Term, 1842, of NEW HANOVER.

Trover to recover the value of a lot of timber belonging to the plaintiff, and alleged to have been converted by the defendant. The plaintiff proved that he had a quantity of hewed timber in the mill pond of the defendant, which mill pond was a common thoroughfare for all persons above the mill to raft timber through to Wilmington. The plaintiff further proved, that the timber had a particular mark or brand on it—and that a block of timber, about four feet long, was found near the mill dam of the defendant, with the same mark or brand on it—that some slabs, with the plaintiff's mark on them were found on the creek, a short distance below the dam—a slab, with the same brand, was also found in the mill house. It was proved on the part of the defendant, that he resided about ten miles from the said mill, and was seldom there —that the said mill, at the time of the said conversion and before, was under the management of an agent—that the operation of sawing and all other labor about the mill were performed by slaves. The agent, who had charge of the mill at the time of the alleged conversion, was examined for the defendant, and stated that, if any timber of the plaintiff was sawed up or otherwise used about the mill, it was without his knowledge or consent, and against his express directions; for he had
(30) frequently cautioned the slaves employed about the mill not to use any timber, except such as belonged to the defendant.

The Court charged the jury, that if they believed from the evidence, the timber of the plaintiff, or any part of it, had been sawed up, or otherwise used by the defendant or his overseer or agent, or by their

directions or assent, the defendant would be liable to such damages as they believed the plaintiff had sustained. But, if they believed that the slaves of the defendant had sawed up the timber of the plaintiff, without the knowledge or consent of the defendant or his agent, and contrary to the express directions of the agent, the plaintiff was not entitled to recover. Under this charge, the jury found a verdict for the defendant, and, a motion for a new trial having been made and refused, and judgment rendered pursuant to the verdict, the plaintiff appealed.

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

RUFFIN, C. J. This case, we think, was not submitted to the jury on its true point. His Honor left it to them to enquire whether the defendant's slaves sawed the timber under or contrary to the directions of the defendant or his manager; and instructed them that if they did it contrary to those directions, the defendant was not liable. But the question is not whether the master, under those circumstances, should be responsible for the acts of his slaves, merely as such; as to which, it is not necessary now to give an opinion; but as this is an action of trover, the question is whether there was not evidence on which the jury might have found a conversion, and whether it ought not to have been left to them upon that enquiry. In the absence of all evidence, that the slaves, themselves, consumed, sold, or otherwise disposed of the timber they sawed, a presumption arises, that it was mixed with the other lumber made for the defendant, and that the whole was disposed of together for the defendant, or to his use. That would be an actual conversion, and, of course, would sustain this action. For, however innocent the defendant might be of the wrong done by his slaves (31) to the plaintiff, in sawing his timber, yet the subsequent consumption or appropriation of the lumber by the defendant, would render him liable for the value, since he thereby became so much richer out of the plaintiff's property. Therefore, the instructions should have been, that, although the slaves sawed the timber against the orders of their master, or even by mistake, yet, if the jury believed from the circumstances, that the lumber, when sawed, came to the defendant's use, the plaintiff was entitled to recover the value of his timber in this action.

PER CURIAM. New trial.

Cited: Makely v. Boothe Co., 129 N. C., 12.

(32)

STATE *v.* GROVE TOMLINSON.

The indictment, under which a defendant is brought to trial, for trading with a slave, under the 75th sect., c. 34, of the Rev. Statutes, must be commenced within twelve months after the commission of the offense, according to the 80th sec. of the same chapter. It is no answer to this objection, that another indictment for the same offense was brought within the proper time.

APPEAL from *Nash, J.*, at Fall Term, 1842, of IREDELL.

The defendant was indicted for trading with a slave; and in his defense, relied upon the act prescribing the time within which such indictments should be commenced. From the evidence it appeared that more than one year had elapsed after the trading had taken place, before the filing of this bill of indictment. To answer this objection, it was shown that, within one year from the commission of the offense, another bill of indictment had been filed against the defendant for the same offense, and was then pending in Court. At the request of the counsel, the question as to the lapse of time was reserved by the Court. The jury, upon the evidence, convicted the defendant. On the question reserved the Court was of opinion, that the present bill was barred by the statute, as well upon general principles, as upon the provisions of the statute under which the indictment was preferred. In the act, limiting the time within which misdemeanors in general shall be prosecuted to two years, it is provided, that when the prosecution shall be commenced in time, but a *nol. pros.* shall be entered or the judgment arrested, a new bill may be sent, in which case the time shall be computed from the termination of the first. The act, under which this bill was preferred, has no such reservation, and it was passed at the same session of the Legislature with the other. The Court directed the verdict for
(33) the State to be set aside, and a verdict for the defendant to be entered. The State appealed to the Supreme Court.

Attorney-General, for the State.
Caldwell, for the defendant.

DANIEL, J. The defendant was indicted and tried for trading with a slave, an offense embraced in ch. 34, sec. 75, Rev. Stat. More than one year had elapsed between the time of the trading with the slave, and the finding of this bill of indictment. In sec. 80, Rev. Stat., ch. 34, it is enacted, "that no suit or indictment shall be prosecuted for any violation of the seventy-fifth and seventy-ninth sections of this act, unless such suit or indictment be commenced within twelve months after such violation." The defendant, on the trial, insisted that the indictment was barred by the said act of limitation. The solicitor for the State then

exhibited evidence from the records of the Court, that the defendant stood charged upon another indictment, for the same offense, found by a grand jury within the time specified by the act. The jury found a verdict for the State, and the question of law was reserved for the opinion of the Court. Afterwards, the Court gave judgment for the defendant, and the solicitor for the State appealed.

Section 80 of the statute directs, that unless the "indictment be commenced" within twelve months from the date of the offense, the prosecution shall not be carried on. An indictment (*indicare*, to show), is a written accusation of one or more persons, preferred and presented on oath by a grand jury. 4 Bla. Com., 302. *Vide* also, 2 Tomlin's Law Dictionary, 163.

When the accusation is thus found, it becomes an indictment. In the literal sense, therefore, of this section, the accusation must be thus found within twelve months after the violation of the Statute, or it cannot be presented afterwards. The phrase, "indictment *commenced*," is indeed one not of frequent use, and it has been suggested that probably the term indictment was used in the statute instead of, or in the sense of, the term "prosecution," and, therefore, in the construction of the statute, we may substitute the latter and more accurate expres- (34) sion. But there ought to be very cogent reasons for taking such a freedom with plain intelligible words, before it should be resorted to. There is nothing necessarily inaccurate in the phrase used by the Legislature. An indictment may be begun, as well as afterwards withdrawn or prosecuted. It is begun by the finding of the grand jury, as an action is begun by suing out the writ. There is nothing absurd in the supposition that the Legislature intended to prohibit prosecutions, unless the indictment were found within a limited period; for in the 8th section of the 35th chapter of the Rev. Stat., it is enacted, with regard to certain offenses, that "the prosecution shall commence within two years after the commission of the said trespasses and misdemeanors, and not after; *and*, no bill of indictment shall be found, or presentment made, by the grand jury of any county in the State, where the offenses aforesaid shall have been committed two years next before the finding of the said indictment, or making the said presentment." It would seem, indeed, that the Legislature had here declared, that the commencement of a prosecution, and the finding of an indictment, were equivalent expressions; and, if so, we should advance but little in the exposition of the statute before us, by substituting one for the other. But be this as it may, we deem it most safe, in the construction of a penal statute, to guard against that liberality of interpretation, which might give to it an operation more extensive than its words manifestly require, either by bringing within its purview cases not in terms within its enactments, or excluding from

its savings and exceptions cases which are comprehended within their literal sense.

PER CURIAM. Affirmed.

Cited: *S. v. Morris,* 104 N. C., 840.

(35)

JEFFERSON McGAHEY *v.* JOHN C. MOORE.

Where two persons cultivated a crop of corn in a field, to which each claimed, but neither had a title, and of which neither had the actual possession and one of them afterwards gathered the corn, piled it in heaps, and left it for a week, he did not thereby acquire such an exclusive possession of the corn as enabled him to maintain an action against the other for removing it.

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

The action was trespass for taking and carrying off a quantity of corn. By consent of the counsel, the jury found a verdict for the plaintiff, subject to the opinion of the Court, upon the following facts agreed. Johnson Murratt, who was a Cherokee Indian, lived in a hut, and planted and cultivated a field of corn around his hut, situated in the Indian Territory ceded by the treaty, in the spring of 1838. In May, 1838, the United States troops took possession of the ceded territory, and notified the Indians to surrender themselves for the purpose of being removed. On 11 June, 1838, Murratt, on his way to the station to surrender himself, came to the house of one Matlock, and executed the following writing:

"11 June, 1838. This day, Johnson Murratt has sold to Benj. A. Matlock his farm and plantation, provided the said Johnson is removed to the Arkansas this year. If he is not removed, he is to have and retain it himself.

JOHNSON MURRATT,
B. A. MATLOCK."

Attested by two witnesses.

The property purporting to be conveyed was of a greater value than ten dollars. Matlock transferred his interest to the plaintiff, who, on the next day after the sale, went to the hut and worked about one
(36) hour in the field. Some short time thereafter, one McReynolds, alleging himself authorized by the officers to sell the property of the Indians, put up to public sale, at the station, some ten miles from Murratt's, the standing corn of Murratt, and it was bid off by the defendant at $6, and the defendant, some weeks afterwards, went to the field and plowed the corn. Soon afterwards, the plaintiff also went and

worked it over. Neither the plaintiff nor the defendant lived near the premises, and the corn remained standing in the field until October, when the plaintiff pulled the corn, throwing it in small piles in the field, as corn is usually gathered. It remained in the piles for about one week, when both the plaintiff and the defendant entered the field with wagons, and, at the same time, commenced hauling it off in different parts of the field, the defendant taking off about fifty bushels, for which this action is brought. Murratt was removed with the other Indians. It was further agreed, provided the evidence was admissible, that, at the time the writing was executed by Murratt, the bargain was for his farm and standing crop at the price of $6, which Matlock then paid Murratt. The defendant's counsel insisted, 1st, that Murratt had no title to the standing crop of corn, and could not pass the right of property to Matlock; for, by the treaty, the Indians were to give possession in May, 1838, and Murratt was not entitled to emblements; 2d, that, if Murratt was entitled to the crop, he had no right to sell the farm and plantation, and, these being the words used in the writing, the standing crop as incidental to the farm and plantation did not pass; 3d, that the writing was not in compliance with the act of Assembly, as the consideration, which formed a part of the contract or agreement, was not in writing; 4th, that the writing could not be explained or added to by parol evidence; 5th, that defendant's purchase from McReynolds gave him the title, as the officers had possession of all the territory. The plaintiff's counsel denied all these positions, and insisted, 1st, that the right of property was vested in Matlock, under whom he claimed, by his purchase from Murratt; 2d, that if he had not thus acquired the right of property, the defendant had acquired no right from (37) McReynolds, whose authority to sell was not shown, and who sold ten miles from the field; and, if neither the plaintiff nor the defendant had the right of property, then the possession of the plaintiff would enable him to sustain the action. The Court was of opinion that the plaintiff had not proved a right of property; and, secondly, that the acts done by the plaintiff in working the corn and gathering it, afterwards suffering it to remain in the field a week, did not give him such a possession, supposing him not to have the right of property, as would enable him to maintain trespass against the defendant for hauling off the corn in one part of the field, while he was hauling from another part of the same field. The Court, therefore, set aside the verdict, and directed a nonsuit to be entered. From this judgment the plaintiff appealed.

Clingman and *Francis*, for the plaintiff.

No counsel for the defendant.

DANIEL, J. This is an action of trespass, *de bonis asportatis*. Plea, *not guilty*. The Cherokee Indians, by the treaty made in 1838, agreed to remove from the ceded territory in May in that year. On 11 June, 1838, Murratt (an Indian), when on his way to the place of rendezvous, for the purpose of removal, made a contract in writing, with one Matlock, for the sale of his "farm and plantation." There was then a growing crop of corn in a field around the hut, that he had left on the ceded territory in this State. Matlock sold and transferred all the interest he had in the said purchase to the plaintiff. The defendant, a short time thereafter, purchased the aforesaid growing crop of corn (thus left by the Indian Murratt), of one McReynolds, who pretended to have authority to sell the same; but no authority to make the said sale by him was shown on the trial. The plaintiff and defendant alternately worked and cultivated the said field of corn until it came to maturity. In October, the plaintiff gathered the corn, and threw it in small piles in the same field, where it lay for a week, when each party simul-
(38) taneously commenced hauling it away from the field. The defendant carried away about fifty bushels. It seems to us, that immediately Murratt left his hut and field to remove, the land and crop growing on it belonged to the State. Murratt, after that time, had no interest in the growing crop of corn which he could sell to Matlock. If the plaintiff and defendant were tenants in common of the corn, this action certainly could not be maintained. The case, therefore, seems to be narrowed down to the single question, whether the plaintiff, by the bare act of pulling the corn from the stalks, and throwing it in small piles in the field, and there leaving it for a week, had acquired such an exclusive possession of the corn as to enable him to maintain this action for that portion of it which the defendant took away. The Judge thought it did not, and we concur with him in that opinion. Each of the parties resided some distance from the field of corn; each had set up title to it; each had worked and cultivated it after the Indian had left the place. Can it then be said, after all these facts, that the bare severance by the plaintiff, of the ears of corn from the stalks, and throwing them in small heaps on the ground in the same field, gave him an exclusive possession of the whole of the corn thus severed? We think it did not. On the question as to the admissibility of the testimony, offered by the plaintiff to prove a parol sale by Murratt of the growing crop, we hold that the same was inadmissable, as being repugnant to the provisions of the act of 1836, ch. 8, relative to contracts with Cherokee Indians.

PER CURIAM. Affirmed.

(39)

JOSHUA LAZARUS AND COMPANY *v.* ELISHA T. LONG.

When the vendor of goods, at the time of the sale, professes to sell them to the vendee in his individual character, he cannot, in an action against a firm, of which the vendee was a member, give in evidence the declarations or admissions of such vendee that the goods were purchased for the benefit of the firm.

APPEAL from *Dick, J.*, at Fall Term, 1842, of RICHMOND.

The action was assumpsit, brought to recover the amount of a book account for goods sold to one Commodore Long, between 6 June and 2 December, in 1837. The plaintiffs proved the sale and delivery of the goods to Commodore Long. The plaintiffs alleged that the defendant was a copartner of C. Long at the time the goods were purchased. To prove this, he first examined one James H. Cole, who stated that he heard the defendant say, that he was interested in the profit and loss of a store that C. Long was then keeping in Anson County, and that this conversation was in 1836. James L. Terry stated, that he was a constable in 1837—that Commodore Long had placed notes and accounts in his hands for collection. In the fall of 1837, Elisha T. Long (the defendant), requested him to use diligence in collecting the said notes and accounts, for he was interested in them. The plaintiffs then offered in evidence a bond, under seal, payable to them, for the amount for which the goods were sold, signed E. & C. Long, dated 10 April,1838, and proved that the signature was in the handwriting of Commodore Long. This evidence was objected to by the defendant, because there was no evidence of a copartnership between the defendant and Commodore Long on 10 April, 1838, when the bond was executed; nor was there any evidence for what consideration the said bond was (40) given. The plaintiffs contended that the said bond was evidence to prove that the goods charged in the account, on which this suit was brought, went to the partnership concern of E. & C. Long, and although there was no evidence of the existence of the copartnership on 10 April, 1838, yet there was evidence to show that a copartnership existed in the fall of 1837, and it was to be presumed that it continued until April, 1838, unless the defendant proved the contrary. The Court rejected the evidence; whereupon, the plaintiffs submitted to a nonsuit, and appealed to the Supreme Court.

Ashe for the plaintiffs.
Strange for the defendant.

DANIEL, J. On the trial of this cause, the plaintiffs' counsel had *first* examined two witnesses (Coles and Terry) to prove that a copartnership existed between the defendant and C. Long. Conceiving that

he had, by these two witnesses, established the existence of the partnership at the date of the sale of the goods by the plaintiff to C. Long, he, then, *secondly,* offered in evidence the bond, which was for the same sum as now claimed by the account, as an admission of C. Long, one of the partners, tending to show that the goods mentioned in the account were purchased for the benefit of the firm of C. & E. Long. This evidence the Court rejected, and the plaintiffs were nonsuited. After the existence of a partnership has been established, *aliunde,* then the acts, admissions, or declarations of one partner, in matters relating to the affairs of the partnership, will be evidence against the firm. Collyer on Partnership, 454, 455, 17 Mass., 227. But here, the goods were not taken up in the name of the firm, but the plaintiffs had delivered them to *C. Long,* and had in their books charged the same to him only. Therefore, the hinge upon which the question turned was, whether the goods in fact were purchased for C. Long, individually, or for the benefit of the firm. C. Long was liable to the plaintiffs at all events, for the entire demand.

If his subsequent admissions were to be received in evidence
(41) against the defendant in such a case as this, he then would have it in his power to discharge himself of one-half of the debt, to which he is undoubtedly liable, and throw it on the shoulders of the defendant. It seems that he was, at the time, interested in making the admission or declaration, and that the Court acted right in rejecting it as evidence. *Purviance v. Dayden,* 3 Rawle, 402; *Willis v. Hill,* 19 N. C., 231. It is not intended by us to impugn the rule, that every partner is the agent of the rest of the partnership. And as LORD TENTERDEN said (2 Barn. & Ald.), that the act and assurance of one partner, made with reference to the business transacted by the firm, will bind all the partners. *Vide* also, Collyer, 212. But when the vendor of goods, at the time of the sale, professes to sell them to the vendee in his individual character, then, we think, that in an action for the price against the firm, or any other of the partners, the admissions of such a vendee would not be good evidence against the defendants that the goods were purchased for the benefit of the firm.

PER CURIAM. Affirmed.

(42)

WALL & HOLTON *v.* JARROTT AND ALS.

1. On motion for a judgment against the sureties in the bond of a debtor, given under the insolvent debtor's law, it was objected that the christian names of the plaintiffs were not inserted in either the warrant, judgment or *ca. sa.*: *Held,* that this was not a valid objection, as the imperfection was cured after judgment by our Statute of Amendments, and the *ca. sa.* properly pursued the judgment, and gave the officer authority to make the arrest and take the bond.

2. It was objected, *secondly*, that the bond was not made to the plaintiffs by their christian names. This objection also overruled, because the officer literally pursued the Statute in taking the bond, and the averment of the plaintiffs' christian names in the motion is equivalent to a similar averment in a declaration in debt on such a bond.

APPEAL from *Dick, J.*, at Fall Term, 1842, of RICHMOND.

A warrant from a Justice of the Peace had been issued against the defendant, E. D. Jarrott, to answer the complaint of "Wall & Holton, in a plea of debt," &c. Upon the trial before the magistrate, judgment was given against the defendant (Jarrott) for the amount claimed. Upon this judgment a *ca. sa.* issued. Neither the judgment nor *ca. sa.* mentioned the christian names of the plaintiffs. The officer took a bond from Jarrott, under the provisions of the insolvent debtors' act, for his his appearance at the County Court, etc., which bond was payable to "Wall & Holton." The bond was signed by Jarrott and E. Love, the present defendants. From the judgment of the County Court in this case, the defendants appealed to the Superior Court. The cause coming on in the Superior Court, the following judgment was entered: "The warrant, the judgment therein, the writ of *capias ad satisfaciendum,* and the *ca. sa.* bond taken pursuant thereto, being produced and proved with the transcript of the record from the Court of Pleas (43) and Quarter Sessions filed in this case, the plaintiffs, Stephen Wall and John B. Holton, partners in trade, trading under the name and style of Wall & Holton, moved to have proclamation made, and the defendant, Edward Jarrott, called preparatory to the trial of the issue made in this cause, which motion being granted and proclamation made at the door of the Courthouse, and the said Edward D. Jarrott being salemnly called three times, to make his personal appearance and having failed to appear, and proclamation having been made, and Erasmus Love, the other defendant, being called and required to produce the body of the said Edward D. Jarrott, and the said Edward not appearing, the plaintiffs moved to have judgment rendered for the penalty of the said bond against the said Jarrott and the said Love, to be discharged on the payment of said debt and costs. Whereupon, it is considered by the Court, that the said Stephen Wall and John B. Holton, trading under the firm and style of Wall & Holton, recover of the said defendants, Edward D. Jarrott and Erasmus Love, the sum of $100.76 the penalty of the said bond, and that the said plaintiffs have judgment for the said sum, to be discharged on the payment of $50.38 principal money, with interest thereon from the 10 Feb., 1841, being the sum of $.... for debt and interest and the sum of $.... for costs." A rule was granted to show cause why this judgment should not be set aside. The rule was discharged, and the defendants appealed to the Supreme Court.

Strange for the plaintiffs.
No counsel for the defendants.

DANIEL, J. The christian names of the two plaintiffs had not been inserted, either in the warrant, judgment or *capias,* which had been obtained against Jarrott. The *first* question raised, is, whether the constable had authority to arrest Jarrott under the *ca. sa.,* so as to enable him, the said constable, to take this bond of the defendants under the insolvent act. Upon this question, we think no reasonable doubt can be entertained. Jarrott might have availed himself by a
(44) plea in abatement, or by exception in the nature of a plea in abatement, of this defect in the warrant. But all imperfections of this sort were cured, after the judgment, by our Statute of Amendments—Revised Statutes, ch. 3. The judgment was a valid one, the writ of *ca. sa.* pursued the judgment, the officer was bound to execute the writ, and, on executing the writ, it became his duty to take the bond.

Secondly: When the motion was made for judgment by the plaintiffs, Stephen Wall and John B. Holton, it was resisted, because the bond was not made to them by their christian names. The Statute (Rev. Stat., c. 58, sec. 7) directs the constable to take the bond, "payable to the party at whose instance the arrest was made"; the names of the plaintiffs in the *ca. sa.* were "Wall and Holton"; he therefore literally complied with the Statute. The averment of the christian names in the declaration, if an action of debt had been brought on the bond, would have entitled the plaintiffs to offer in evidence the bond, in its present form, to maintain the declaration; parol evidence, in support of the averment, would neither have varied nor contradicted the bond. We think, that as the motion made in this case, contained the averment of the plaintiffs' christian and surnames, together with the name of the mercantile firm, expressed in the *ca. sa.* and bond, that there was not such a variance between the motion on record, and the bond taken by the constable, as to preclude the Court from giving judgment as prayed. The judgment must be

PER CURIAM. Affirmed.

Cited: Brooks v. Ratcliff, 33 N. C., 325; *Lash v. Arnold,* 53 N. C., 207; *Heath v. Morgan,* 117 N. C., 507; *Daniels v. R. R.,* 158 N. C., 427.

(45)

EZEKIEL DOWDLE *v.* WILLIAM STALCUP.

1. It is not necessary that the transcript of a record, containing the copy of an execution, should set forth that there was a seal to the execution.
2. Besides, if such an objection would lie, it should have been taken when the record was offered in evidence, and is too late on a motion for a new trial.

APPEAL from *Pearson, J.*, at Fall Term, 1842, of MACON.

This was an action of Trover for a horse. After the jury were impaneled, the plaintiff's counsel stated, that he was surprised by the fact that a record from Burke Superior Court, which he expected to offer in evidence, had no seal to the Clerk's certificate, or the seal was too indistinct to be identified, and intimated an intention to submit to a nonsuit. Thereupon, the defendant's counsel consented that the record might be read without objection for want of a seal. The record was read, and showed a judgment against one Brittain, and an execution thereon against the property of Britain, directed to the Sheriff of Macon, and an order for one Howell, the Sheriff of Haywood, to execute it, under the act of Assembly. A verdict was found for the plaintiff. A motion was made by defendant's counsel for a new trial, on the ground that it did not appear from the record read in evidence that the execution under which Howell sold had a seal to it. The Court refused to grant a new trial, because the objection had not been taken or noticed until after the trial, and for other reasons. Judgment was rendered for the plaintiff pursuant to the verdict, and the defendant appealed.

Clingman for the plaintiff.
Francis for the defendant.

DANIEL, J. This was an action of Trover. The plaintiff deduced his title to the horse in controversy, under a purchase at a sheriff's sale of the property of one B. Brittain. He produced a (46) transcript of a record of a judgment obtained in ..... Court of Burke against Brittain, and an execution issued on the same to the Sheriff of Macon, under which execution he purchased the horse. The plaintiff obtained a verdict. The defendant moved for a new trial, because the Court permitted the transcript of the record of the execution to be read in evidence, when it did not appear by the same that there had been a seal of Burke Court affixed to the original execution. The Court overruled the motion, and, we think, very properly. The transcript of the record of Burke was proper evidence; the seal to the original execution (when the execution is proved by a transcript), must *prima facie* be presumed to have been affixed, as the record, from which the transcript is taken, never contains a *fac simile* of the seal; and, besides, had there

been such an objection as that insisted on by the defendant, it was incumbent on him to make it upon the trial. It is too late for him to raise it upon motion for a new trial.

PER CURIAM. Affirmed.

(47)

OLIVER QUINN *v.* GILBERT PINSON.

Where, in an action for deceit in the sale of a horse, it was proved that the horse went blind soon after he was sold, without any subsequent hurt or ill-usage; that in the opinion of a farrier his eyes were naturally defective; that the defect was such as would not render the horse blind suddenly, and that the defendant had bred the horse and owned him till he was nine years old; these are circumstances the Judge must leave to the jury as tending to prove the *scienter*. He has no right to say there is *no* evidence upon that point.

APPEAL from *Pearson, J.*, at Fall Term, 1842, of CLEVELAND.

This was an action on the case, in the nature of an action of deceit, brought to recover damages for a deceit in the sale of a horse. On the trial, a variety of testimony was introduced, but the only material parts, which relate to the question brought before the Supreme Court, are stated in the opinion of the Court. The jury found a verdict for the plaintiff. The defendant's counsel then moved for a new trial, upon the ground that the Court erred in leaving to the jury the question as to the defendant's knowledge of the unsoundness of the horse; that the Court should have instructed the jury there was no evidence to justify them in finding such knowledge in the defendant.

The Court refused a new trial, and, having rendered judgment according to the verdict, the defendant appealed to the Supreme Court.

Hoke for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. It seems not to have been disputed that the horse's eyes were diseased at the time of the sale. That may have been inferred from the opinion of the farrier of the natural defect of those (48) organs, and from the circumstance that, without any particular hurt or subsequent ill-usage proved, they went out in so short a period after the sale. Against that inference the defendant made no objection; but he insisted only, that, "as to the defendant's knowledge of the unsoundness, there was no evidence." Now, if to those facts, which were thus taken for granted, be added, that the defendant bred the horse and owned him until he was nine years old, and that the witness stated that such eyes did not usually go out suddenly, but that

"they would come and go some time before they entirely failed"—we must say, there is some ground, though it must be admitted to be slight, for the jury to suppose, that during the long use of the horse by the defendant, some of those affections of the eyes had occurred, and, if so, were visible to him. It is true, they might reasonably have judged, that, if the eyes had been actually diseased before the sale, the plaintiff could have proved the fact explicitly, instead of offering a conjecture of the witness on the point; and had the Court authority to grant a new trial upon the ground, that the verdict was not warranted by sufficient evidence, we might feel inclined to set this verdict aside. But we have no such power; and we must admit, that the judgment of one skilled in such diseases, who saw the horse at the sale, and after he became blind, does afford some presumption that the seller had discovered the defect in the vision during his ownership. The expression "for some time" is indeed vague; but it was the duty of the party to ask for an explanation of his meaning from the witness, and the province of the jury to interpret his words. They do not, necessarily, relate back beyond the period of the sale; but they may not have been so intended, and, with the context, and under the finding of the jury, we are now so to understand them. We cannot, therefore, say that the case was so entirely destitute of proof of a *scienter* as to render it erroneous in his Honor to submit the point to the jury, and must affirm the judgment.

PER CURIAM. No error.

(49)

DEN ON DEMISE OF JOSEPH NORCOM *v.* THOMAS H. LEARY.

1. In all cases the effect of long and notorious possession, as affording presumptive evidence of right, is very powerful. In questions of boundary, it is at least tantamount to a general reputation.
2. When a course is resorted to for want of a better guide to find the *terminus* or boundary of a tract of land, it is the course as it existed at the time to which the description of the tract of land refers. If it appears that because of the magnetic variation, that course is not the same with that which the needle now points out, it is the duty of the jury to make allowance for such variation, in order to ascertain the true original line.

APPEAL from *Bailey, J.*, at Fall Term, 1842, of CHOWAN.

Ejectment. The question was, whether the line A, 1, 2, 3, on the annexed plat, or the line A, b, c, d, or the line A, B, C, D, was the line dividing the lands of Joseph Norcom from the lands of the defendant, Thomas H. Leary. The lessor of the plaintiff proved, that he and Edmund Norcom, his father, under whom he claimed, had been in the actual possession, for forty years or more, up to the boundary A, b, c, and on the line from c to d, as far as the point marked "Norcom's

fence," of the lands to the east of said line. The plaintiff then proved, that a fence extended all the way from c to d, and that the defendant, previously to the commencement of this action, moved that portion of the said fence, which extended from the point marked "Norcom's fence" to the letter d, and put it on the line extending from "Norcom's fence" to figure 3, and had possession of the land included between these lines and the Albemarle Sound. The defendant deduced his title to the land occupied by him and designated on the annexed plat as "Leary's
(50) land," from 1786 down to himself, the several deeds of conveyance describing it as adjoining the lands now owned by the lessor of the plaintiff. He then showed the copy of a deed from Charles Roberts, formerly Sheriff of Chowan, to Edmund Norcom, the father of the lessor of the plaintiff, which conveyed to him, by virtue of an execution against one Thomas Simons, a certain tract of land lying in Chowan County, and described as follows: "Beginning at a small dogwood at the crooked gully, and running along John Simons' and Thomas Charlton's line, So. 18, E. 62 poles, to a poplar; then along Charlton's line, No. 70½, E. 47 poles, to a hickory; Charlton's corner; then along Charlton's line, So. 35, E. 137 poles, to the Sound side; then along down the Sound side 120 poles, to John Norcom's line; then along said line No. 43, W. to the middle of the gully swamp; then up the meanders of the swamp and gully to the first station." The surveyor, who had been previously introduced by the plaintiff, identified the said copy as a copy of the deed by which he made the said survey. The surveyor also proved, that the beginning at A was admitted both by the lessor of the plaintiff and the defendant—that in running from A at the crooked gully, the courses of the said deed to the Sound, neither of the corner trees called for in the deed was to be found—that running the courses and distances called for in the deed would give the lines A, 1, 2, 3. It was in evidence that from a point near A, on the dotted line from A to b, was a fence which extended on the line from b to c, and from c to "Norcom's fence," which had been there for some forty years, which fence formed a part of Norcom's enclosure, and was known by common reputation to be the line fence between the tracts of land owned by Norcom and Leary. It was also in evidence, that the land between "Norcom's fence" on the annexed plat and the sound was woodland, and that about 19 years ago the fence from c to "Norcom's fence" was extended to the sound at d, which fence since that time had been considered to be the line fence between the said tracts of land. The lessor of the plaintiff also proved, that along the fence running from "Norcom's fence" to the sound at d, several trees were found, having the appearance of having been
(51) marked as line trees; and it was proved that they had been, by some of the old men of the neighborhood, who had since died,

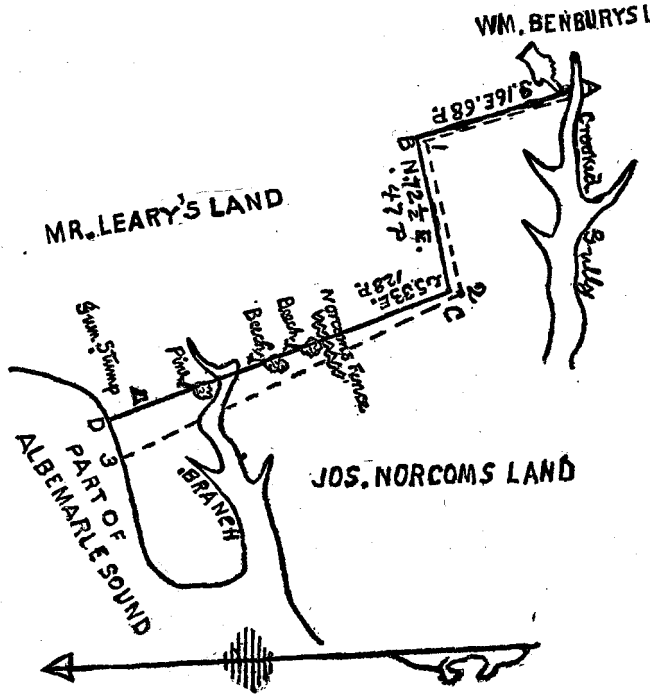
pointed out as the line trees of the two tracts of land, of which the defendant and the lessor of the plaintiff were in possession. It was also in evidence, that two of the trees on the line last mentioned were cut into and blocked out, and one of them had the appearance of having been marked as a line 42 or 52 years ago, and the other about 90 years ago. The defendant also introduced evidence tending to prove, that the line A, 1, 2, 3, was the true boundary of his land. The surveyor, upon examination on the part of the plaintiff, stated that he had established the line A, B, C, D, as the true boundary; that the line A, 1, 2, 3, is the line run according to the courses and distances of the deed from the Sheriff Roberts to Edmund Norcom, and the line, A, b, c, d, is the line run according to Norcom's fence and the line trees before spoken of; that in running the line A, B, C, D, he had allowed two degrees for the variation of the needle, which had taken place since the date of the deed from Roberts to Norcom. The witness stated that he had been a surveyor for many years, and he had discovered that the needle had varied one degree in twenty years. Upon cross-examination he stated, that no variation was allowed for the needle at the time of the deed from Roberts to Norcom. The defendant contended, that the beginning at A being known and agreed upon, the several courses and distances called for in the said deed from that point to the Sound should be run; that as there was no evidence showing where the two corners from A were, the surveyor should have run the courses of the deed and have stopped at figure 1, where his distance gave out, and in his second course he should have stopped at figure 2, where the distance in that course gave out, and from figure 2, he should have run the course of the deed to figure 3, on the sound; that, no line of marked trees having been called for in the said deed, the testimony, which had been given in relation to the fence on the several courses of the deed, and the marked trees on the third course, should be disregarded by the jury. His Honor instructed the jury, that, if the corners called for in the first and second courses were known and ascertained, the jury should disregard the evidence, (52) which had been given in relation to the fence and the marked trees.

But as these corners had long since disappeared, and there was no evidence where they stood, then the evidence which had been given in relation to the fence and the marked trees, was material, in order to enable the jury to determine where they stood. For if the jury believed that the fence and the marked trees, spoken of by the witnesses, were on the line dividing the lands of Norcom and Leary, they would disregard the courses and distances of the deed, and establish the line A, b, c, d, as the true line. The counsel for the plaintiff requested his Honor to instruct the jury that if they believed from the testimony of the surveyor that the variation of the needle spoken of by him had taken place, then they

could find that the line A, B, C, D, was the true line. His Honor declined to give the instruction prayed for. The jury returned a verdict for the plaintiff, and judgment being rendered pursuant thereto, the defendant appealed.

Kinney for the plaintiff.
A. Moore for the defendant.

GASTON, J. In our opinion, this is a very plain case against
(54) the appellant. In all cases the effect of long and notorious possession, as affording presumptive evidence of right, is very powerful. In questions of boundary especially, it authorizes the inference



of any fact which can rationally be inferred to make such possession consistent with right. It shows a claim distinctly asserted by the possessor, and acquiesced in by those most interested to repel it if unfounded, and most likely to ascertain whether it be or be not well founded. As such it is at least tantamount to a general reputation of boundary.

In the deed of the Sheriff to Edmund Norcom, of 15 March, 1796, the boundaries of the land conveyed, so far as they affect the present controversy, are thus described, viz.: "Beginning at a small dogwood at

the crooked gully, and running along John Simons' and Thomas Charlton's (deceased) line, South 18, East 62 poles to a poplar; thence along Charlton's line No. 70½, East 47 poles to a hickory, Charlton's corner; thence along Charlton's line, So. 25, East 137 poles, to the Sound side." The beginning of the deed being admitted on all hands, the dispute turned *mainly* upon the inquiry where were the second and third corners of this tract? *In law,* these corners were "the hickory" and "the poplar," wherever situate; and the evidence offered was received, as tending to establish where these trees were. It is conceded on the part of the defendant, that if the trees yet existed, and could be identified, they would control the courses and distances called for in the deed. But they are gone, and surely the destruction or decay of the trees did not change the *termini* of the land. Certainly it was competent to show, after their destruction or decay, where these trees had stood; and this fact might be shown, either by direct testimony thereof, or by testimony from which the fact could be satisfactorily inferred. *McNeill v. Massey,* 10 N. C., 91. Now, to us, it seems that the testimony given was not only pertinent and relevant for this purpose, but was entitled (55) to very great consideration from the jury.

The deed informs us that the poplar will be found by running from the beginning corner, South 18, East 62 poles, *along Charlton's line.* It tells us that the hickory is known as "Charlton's corner," and that it will be found by running from the poplar No. 72½, East 47 poles, "along Charlton's line." Charlton's line is then one of the indicia by which the poplar and the hickory are to be ascertained. They are both *in* that line, and the hickory is one of Charlton's corners. Besides, the next line from this corner of Charlton's, is represented as running thence along Charlton's line to the Sound side. Thus Charlton's line is referred to throughout as a known boundary, by which the corners of this tract are to be ascertained; and certainly if it were a known line, and can now be found, it furnishes, according to all our adjudged cases, a much surer and safer guide to direct us to these *termini,* than can be afforded by the courses and distances called for.

Now, when it is seen that almost from the date of this deed a fence has been uninterruptedly kept up, extending through the entire body of the cleared land; that during all this time it was held without dispute to be the line of division between the Charlton and Norcom tracts; and that, from the termination of this fence, and in its direction continued through the woods, an old line of marked trees is found leading down to the Sound; it would be difficult to resist the conviction, that Charlton's line was known; that the possession of the adjoining proprietors respectively conformed thereto; and that the fence and the line of marked trees from the fence to the Sound indicate that known line at this day.

It is not necessary that we should decide the question arising upon the instruction which was prayed for by the plaintiff, and which the Court declined to give. But as the point appears to us free from difficulty, we will not withhold the expression of our opinion upon it. When a course is resorted to for want of a better guide to find the *terminus* of a tract of land, it is the course as it existed at the time to which the de-
(56) scription of the tract refers. And if it be shown to the satisfaction of the jury, that, because of the magnetic variation, that course is not the same with the course which the needle now points out, it is their duty to allow for the variation, so as to enable them to pursue the direction of the original course. However the needle may vary, the boundaries of the land remain unchanged.

PER CURIAM. No error.

Cited: *Toole v. Peterson,* 31 N. C., 187.

THE GOVERNOR TO THE USE OF JOHN HALCOMBE *v.* THOMAS S. DEAVER AND OTHERS.

Where a debt is due to A, and he places it in the hands of a constable for collection, A is the only person who can maintain, as relator, an action on the official bond of the constable for a breach of duty, notwithstanding A may have afterwards assigned his interest in the debt to another.

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

Debt upon the official bond of the defendant Deaver, as a constable of the county of Buncombe. The breach alleged was, that the constable had not diligently endeavored to collect a certain judgment in favor of the relator against one Hickman, and the relator, as a part of his evidence, introduced a receipt from the officer to him for the said judgment. After the evidence on the part of the plaintiff was closed, the defendant called a witness and proved that he (the witness), being indebted
(57) to Halcombe, the relator, put into his hands the claim upon which this judgment was founded, with an understanding that it was to be collected by the relator, and be a payment upon the debt due him from the witness. Before, however, this action was brought, but after the omission and negligence on the part of the officer, the witness paid his debt to the relator; and, at the time this suit was brought, was alone beneficially interested in the collection of the debt from Hickman, and the suit was prosecuted in fact, for his benefit. Upon this state of the facts, the defendants' counsel moved the Court to instruct the jury that the action could not be maintained upon the relation of Halcombe, but the

Court declined giving such instruction. There was a verdict for the plaintiff, and a rule for a new trial having been granted and discharged and a judgment rendered pursuant to the verdict, the defendants appealed.

Clingman for the plaintiff.
Francis for the defendants.

DANIEL, J. The judgment against Hickman, which was placed in the hands of the defendant Deaver, as constable, for collection, had been obtained in the name of the relator; he was therefore the legal owner, and the contract of the constable to collect the judgment was made with the relator. When the loss of the debt happened by the negligence of the constable, Halcombe, the relator, and he only, had immediately thereupon a legal right of action on the constable's bond. The party injured at the time of the breach of the condition of the bond, must, of necessity, be the relator. He cannot assign his interest in the *chose in action,* so as to enable the assignee thereafter to bring an action on the bond as relator. The subsequent dealings of the witness with Halcombe, as stated in the case, made the witness only an equitable assignee of this demand, with which a court of law had nothing to do. *S. v. Lightfoot,* 24 N. C., 310; *Governor v. Franklin,* 11 N. C., 274. (58)

PER CURIAM. No error.

Cited: Garrow v. Maxwell, 57 N. C., 530; *Jones v. Brown,* 67 N. C., 479.

JUSTICE AND OTHERS, TO THE USE OF SITTON, *v.* JAMES D. JUSTICE AND OTHERS.

1. It is not competent for a party to raise an objection because of the admission of testimony offered by himself.
2. Where there has been a trial on a warrant before a justice, and the entry made by the justice may well stand either for a nonsuit or a judgment on the merits, parol testimony to show whether the merits were passed upon or not is admissible.

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

This was a warrant, commenced before a Justice of the Peace, and brought by successive appeals to the Superior Court. The warrant was brought on a note. The defendant pleaded a former judgment, and the sole question was, whether that was a bar to the plaintiffs' recovery. The entry by the Justice upon the former warrant was as follows:

"May 12, 1838. Judgment against the plaintiff for costs of suit, forty cents, by me. P. BRITTAIN, J. P." (59)

Philip Brittain, the Justice of the Peace, who had tried this case, was introduced by the defendants as a witness. He stated that one of the plaintiffs and both the defendants were present at the trial; that the defendants did not deny the execution of the note, but said it had been settled. The plaintiff present said he had never authorized the suit to be brought. The witness stated that he gave judgment against the plaintiffs for costs, because of this declaration of the plaintiff, and because an assignment on the note was made by George Justice, and not by the payee, and went on to say he was not influenced, as he thought, by the allegation that the note had been settled. His Honor was of opinion that if the facts, as stated by the witness, were believed, this was not such a judgment on the merits as would bar another suit. A verdict and judgment having been rendered for the plaintiffs, the defendants appealed.

Francis for the plaintiffs.
Clingman for the defendants.

DANIEL, J. This was a warrant in debt on a single bill for fifty dollars and interest. The defendants pleaded "a former judgment." To support their plea, they gave in evidence a warrant in debt, between the same parties, on the same bill, and a judgment on the same, in these words:

"May 12, 1838. Judgment against the plaintiff for costs of suit, forty cents, by me. P. BRITTAIN, J. P."

The defendants introduced the Justice as a witness, to prove that the merits of the controversy had been adjudicated in that trial. From what the witness deposed to, as set out in the case, the Judge was of opinion that the judgment had not been given on the merits; that
(60) it was only a judgment of nonsuit. We are of the same opinion with his Honor. But it is now contended that the Court should have decided the question, upon the face of the judgment itself, whether it was one of nonsuit or on the merits, and that parol evidence should not have been resorted to in aid of the construction. It is not competent for the defendants to raise an objection, because of the admission of testimony by them offered. Besides, it is well known, that the entries made by our Justices of the Peace, in most of their judicial proceedings, are very loose and informal; but this entry, we think, imports a judgment, according to the practice of the Justices of this State, aided by our act of Assembly. In *Ferrell v. Underwood,* 13 N. C., 114, the Court say: "If the entry imports a judgment, then we think it is proper to prove by the Justice, or any other person, that the merits were gone into, if the testimony be consistent with the judgment." We think that

this judgment may well stand, either for a nonsuit or a judgment on the merits; and, according to the above case, the testimony to show whether the merits were passed upon or not, was admissible.

PER CURIAM. Affirmed.

Cited: Massey v. Lemon, 27 N. C., 559; *Starke v. Etheridge,* 71 N. C., 245; *Davie v. Davis,* 108 N. C., 502; *Quinnerly v. Quinnerly,* 114 N. C., 147.

(61)

RHODA McDANIEL *v.* THE HEIRS OF WILLIAM McDANIEL.

The dower allotted to a widow under our Act of Assembly, must be one-third in *value*, not one-third in *quantity*.

APPEAL from *Pearson, J.,* at Fall Term, 1842, of BUNCOMBE.

Petition for dower. The defendants moved to set aside the report of the jury, because the one-third part assigned as dower exceeded in *value* one-third of the whole. From the evidence offered to the Court, it appeared that the land, although consisting of several parcels acquired at different times, adjoined. There were 639 acres, worth about $1,800. The dwelling-house, barn, etc., were comfortable log buildings, usual on farms. The houses, orchard, meadow and cultivated ground, were situated in the southwest part of the land, near the river. The dower assigned included the dwelling-house, barn, etc., and was one-third part in quantity, 213 acres. But the value of this third part, exclusive of the buildings, was about equal to the value of the other two-thirds. It also appeared that if the dower was laid off in a different way, so as to take in one-third in quantity and include the buildings, and also to be one-third in value, the land and plantation would be so cut up as to render the other two-thirds of little more value than as laid off by the jury; for the river, meadow, low grounds and road were so situated in reference to the buildings and the ridge land south of the house, that a third part laid off south of the road, including the buildings, would not have been a third in value. And if the line was run north of the road, between the road and river, so as to make the third in quantity also the third in value, it would split the meadow and bottom field lying between the road and river lengthwise, and the part between the line and river (62) would be a long narrow field, and the value thereof much diminished, in consequence of the inconvenient shape, and the fencing that would be necessary. So the jury took in the whole field, and thus assigned a third part in quantity, although it was equal nearly to the value of the other two-thirds. It also appeared that the land, from its situation, could not be divided into three equal parts, so that the value of

these parts separately, when added together, would be equal to the value of the whole tract. The Court was of opinion that when widows were deprived of their common law dower in all the lands of which the husband was seized *during the coverture,* and restricted to the land of which he *died seized,* it was intended to include in the dower the dwelling-house, etc., as a compensation, unless by so doing "manifest injustice was done to the heirs"; and the jury should, at all events, give one-third in quantity and include the buildings, unless from the value of the buildings, compared with the land, manifest injustice would be done; to avoid which they might, in such case, include only a part of the buildings. That the fact of the *value* of the dower being more than one-third, was not of itself a sufficient ground to set aside the report, unless it appeared that the jury had favored the widow to the manifest injury of the heirs, and that the jury might exercise a sound discretion, so as to make the dower include a proper quantity of cleared land and also of woodland, although the part assigned was thus rendered of more *value* than *one-third,* provided it was not done so as to render the other two-thirds of much less value than if the third part had been laid off differently. The law made no provision to secure the payment of the excess of value, as in case of tenants in common, but made it the duty of juries to lay off one-third part in quantity, so as not unnecessarily to impair the value of the other two-thirds. The motion to set aside the report was therefore refused, and the report confirmed, and the defendants appealed to the Supreme Court.

(63) *Clingman* for the plaintiff.
No counsel for the defendants.

RUFFIN, C. J. The question in this case is as to the mode of estimating the proportion of the husband's lands to be allotted to the widow for dower. The law gives her one-third part, and in ascertaining that part, is regard to be had to quantity alone or to value? It must be admitted, we think, that the purposes of justice are best effected by allotting the third in reference to the value. That is the substance of the thing. If quantity alone was to govern, a wide and dangerous latitude would be left to Sheriffs and jurors acting *in pais,* who might, and perhaps often would, make an illusive allotment of land of small productiveness and value, or leave to the heir his two-thirds, consisting of land not reduced to tillage, or not yielding profits. This principle, that the value shall govern, seems so just in itself, and has been so generally acted on, that some surprise was excited at seeing the proposition laid down broadly, "that the jury should, at all events, give one-third part in quantity"; and moreover include the buildings, unless, from the value of the buildings compared with that of the land, in justice would be done to the

heirs, in which last case a part only of the buildings should be allotted. The very disproportionate values of different parts of the same tract of land, and especially of those parts on which there are or are not buildings and other improvements, would seem naturally to lead every mind to adopt the value and not the quantity as the measure of the respective interests, since the value is a certain and equal standard in every case, and quantity is merely arbitrary, and, in almost every case, would be unequal. We do not find the rule laid down precisely in the old books, but we cannot doubt how it was at common law, since that was a system of law remarkable alike for its justice and uniformity; and we know that in some cases the third was ascertained by the value merely. Co. Lit., 32, a. As if the husband was tenant in common with others, so that the widow could not have an allotment in severalty, but was obliged to take an undivided third part of her husband's undivided share. Co. Lit., 32, b. She thereby became one of the tenants in com- (64) mon, and if there was a subsequent partition, she would only get her share in value. So where, from the nature of the estate, she was endowed of the profits, as of offices, a piscary or the like. But in the modern case of *Stoughton v. Leigh,* 1 Taunton, 402, we have just such a rule laid down as we should expect the common law to prescribe. It was there distinctly held, that the annual value of mines must be estimated as a part of the value of the estates, of which the widow was to be endowed. The words are, *"the third part in value* which he (the Sheriff) should assign to her, might consist," etc. That very case of mines is so glaring that we think the law never could have lost sight of value, and had regard only to quantity. Hence, as it seems to the Court, "one-third part" in the Statute, imports the third in value, unless some qualification had been added, which referred to quantity. But there are other provisions which lead to the same conclusion. One of them is, that which comprehends in the widow's third the buildings, "unless they cannot be so applied without injustice to the heirs." Now it can only be unjust to them as they increase or diminish the values of the respective shares, and consequently the value must be considered. That was certainly the view of the Court in *Stiner v. Cawthorn,* 20 N. C., 640, when it was said the widow was to have the mansion house in part of her third, not in addition to it, which could have reference only to the value. Then there is the third section of the act, Rev. St., c. 121, taken from the act of 1827, c. 46, which, instead of dower in every separate tract, authorizes the jury to allot the whole in one or more tracts, "having a due regard to the interests of the heirs as well as to the right of the widow." It was known that it might be beneficial both to the heir and the widow, if the dower were allotted together. To the latter, by having her estate compact and more manageable, and to the former, by avoid-

ing the incumbrance of dower upon each parcel of his estate, which might cut it up inconveniently. Those benefits the act meant
(65) to promote to each party, and it expressly requires regard to be had to them. But that would be entirely defeated in respect to the heir, if the jury can allot in one tract, as dower, one-third part in quantity of all the parcels, although it might take the whole productive part of the estate. There is no equality deserving the name, but that constituted by an assignment to the widow of a due proportion of cultivated and of wooded land, so as to vest in the parties respectively one-third and two-thirds of the lands descended, estimated in reference to their productiveness or annual net profits. It cannot, indeed, be expected that the values of lands not leased, but occupied by the husband, can be exactly determined in every case, but it can generally be done nearly enough for the purposes of substantial justice, and on it the rule may properly be rested. In this case the jury gave no heed to it, but did manifest injustice to the heirs by giving one-half, instead of one-third, of the estate. The judgment must therefore, be reversed and the report set aside, and a *procedendo* awarded to the Superior Court, directing that a new writ shall be issued, and other proceedings had thereon according to law.

PER CURIAM. Ordered accordingly.

(66)

DEN ON DEMISE OF SUTTON AND WIFE *v.* JOHN C. MOORE AND OTHERS.

The right to a reservation of land granted by the Treaty with the Cherokees in 1817, to each head of an Indian family, choosing to remain in this State, does not attach to the land ceded by the Treaty of 1835.

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

This ejectment was brought for a part of the lands known as the Cherokee purchase. The lessor of the plaintiff claimed title under the treaty made between the United States and the Cherokee Indians, 8 July, 1817, and offered the following evidence in support of his claim: First, a copy from the Register of the Indian agent, duly certified by the Secretary of War, under the seal of his department; Secondly, a plat and survey, made in the year 1840, by order of the Court, including the lands described in the said entry. The plaintiff then called a witness, who proved that, in or about the Fall of 1817, and after the lessor of the plaintiff had registered his name with the Cherokee agent, the lessor employed this witness to build a house, the location of which was made the center of the said survey of 1840, and in which, when built, the lessor was prevented from residing, by the threats and menaces of the

neighboring Indians, he (the lessor), at the time when the house was built, residing about three miles from the said location, and having never since resided on any part of the said land. It was further proved, that no other person was residing, or had any improvement on any part of said survey at that time, and that the lessor of the plaintiff went on the land and settled in the presence of witnesses the site of the said house; and further, the wife of the lessor of the plaintiff was an Indian, and had four children at the time of the said entry—that he never emigrated, but still resided east of the Mississippi. The (67) land in controversy was not a part of the territory ceded by the Indians by the treaties of 1817 and 1819, but was a part of that ceded by the treaty of 1835. The defendant's counsel objected, 1st, to the reading of the copy of the record from the War Department; 2d, that as the lessor of the plaintiff was not a resident, nor had an improvement upon the said tract of land at the time of the said entry, he was not entitled to a reservation under the terms of the treaty, or, at least, had abandoned the same, and lost his right thereto; 3d, that as the land in controversy was not included in the territory ceded by the treaty of 1817, the lessor of the plaintiff could have acquired no title by his said entry. It having been agreed by the counsel on both sides, that the points of law should be reserved, a verdict was rendered for the plaintiff subject to the opinion of the Court on those points. The Court, being of opinion with the defendant on the third point, directed the verdict to be set aside and a nonsuit entered—and the plaintiff appealed to the Supreme Court.

Badger, Bynum and *Francis* for the plaintiffs.
Clingman for the defendant.

GASTON, J. The tract of land, which is the subject of the present controversy, is part of the territory, which formerly was held by the Cherokee Indians, and which was ceded to the United States by the treaty of New Echota, concluded on 29 December, 1835. The lessors of the plaintiffs claim to be entitled to this tract, under the provisions of article 8 of the treaty made at the Cherokee agency on 8 July, 1817. Several questions presented themselves upon the trial, of which the most important is, whether "the reservations" thereby made to the heads of Indian families, residing on the east of the Mississippi, (68) and wishing to become citizens of the United States, attached to, and operated upon the lands which were ceded to the United States by the treaty of 1835. His Honor was of opinion that these reservations did not attach thereto, and a verdict having been taken for the plaintiff, subject to that opinion, judgment of nonsuit was entered, and the plaintiffs brought up the case by appeal to this Court.

We have met with difficulties in interpreting several parts of this treaty of 1817, nor can we be confident, after all the attention bestowed on it, that we fully comprehend every one of its provisions. In relation, however, to the precise question involved in the decision made below, we have no hesitation in declaring our concurrence in the opinion there held.

The treaty of 1817 begins by declaring, that one portion the Cherokee nation, consisting of those who were known as the upper Cherokee towns, had made known to the President of the United States their desire to engage in the pursuits of agriculture and civilized life in the country which they then occupied, and that, finding the other part of the nation not disposed to unite with them in these pursuits, they were solicitous to have a division line established between the upper and lower towns, and to contract their society within the special limits (including the waters of the Hiwassee River), to be assigned to them exclusively. It further recites, that the other portion of the nation, known as the Lower Towns, had made known to the President, that they desired to continue the hunter-life, and, because of the scarcity of game where they lived, wished to remove across the Mississippi upon the vacant lands of the United States. It states that the President, in answer to these respective communications, had expressed his solicitude to gratify both parts of the nation, and had promised to provide for those, who should remove across the Mississippi, a tract of country well suited to their object, and to allot it to them in exchange for that portion of the country, which they might leave and in which country they held an undivided share in the proportion which their numbers bore to the
(69) rest of the nation; that, in consequence of these communications and this promise, a region of country west of the Mississippi, on the Arkansas and White rivers, had been selected for the emigrating portion of the Cherokees, and had been settled by a part of them, and these were anxious to conclude the proposed exchange and were ready to relinquish to the United States the interest or right, which belonged to them as a part of the Cherokee nation, to a proportionable part of the country which they had left or were about to leave. After this recital, the treaty declares, article 1, that the whole Cherokee nation cedes to the United States all the lands lying north and east of certain boundaries therein described, "in part of the proportion of land in the Cherokee nation east of the Mississippi, to which those on the Arkansas and those about to remove there, are entitled." By the second article, the Cherokee nation make a further cession to the United States of the lands lying north and west of certain boundary lines therein described. In the third article, it is stipulated that a census be taken of the whole Cherokee nation in the month of June, 1818, and particular provisions are made as

to the mode of taking the census of those on the east side of the Mississippi, who declare their intention to remove, and "the census of the Cherokees on the Arkansas River, and those removing there, and who at that time declare their intention of removing there." In the 4th article, the contracting parties stipulate that the annuity due from the United States to the whole Cherokee nation shall be divided between the two parties agreeably to their numbers, and shall be continued to be divided, "and the lands to be apportioned and surrendered to the United States agreeably to the aforesaid enumeration, as the proportionate part, agreeably to their numbers, to which those who have removed and who declare their intention to remove, have a just right, including those with the lands ceded in the first and second articles of the treaty." By the 5th article, the United States bind themselves, in exchange for the lands ceded in the 1st and 2d articles, to give to that part of the Cherokee nation on the Arkansas River as much land on that and the White River as they have "or hereafter may receive from the Cherokee (70) nation east of the Mississippi, acre per acre, as the just proportion due that part of the nation on the Arkansas agreeably to their numbers." In the 6th, the United States, besides binding themselves to give to all the poor warriors, who may remove to the wetsern side of the Mississippi, some arms and utensils, as a just compensation for the improvements they may leave, agree to pay to those emigrants, whose improvements add real value to their lands, a full valuation for the same, to be ascertained by a commissioner to be appointed by the President for that purpose, and to be paid as soon after the ratification of the treaty as possible. The seventh article declares, that, for all improvements which add real value to the lands lying within the boundaries ceded to the United States by the 1st and 2d articles, the United States do agree to pay at the time and to be valued in the same manner as stipulated in the 6th article, or in lieu thereof to give in exchange improvements equal in value to those the emigrants may leave and for which they are to receive pay. "And it is further stipulated that all these improvements left by the emigrants within the bounds of the Cherokee nation east of the Mississippi, which add real value to the lands and for which the United States shall give a consideration and *not so exchanged* (that is, as we understand the phrase, not ceded nor to be ceded by this treaty in exchange for lands on the Arkansas and White rivers), shall be rented to the Indians by the agent, year after year, for the benefit of the poor and decrepit of that part of the nation east of the Mississippi, until surrendered by the nation or to the nation. And it is further agreed that the Cherokee nation shall not be called upon for any part of the consideration paid for said improvements at any future day." Then follows the 8th article, on the correct construction of which depends the

question presented for our decision. Its words are, "and to each and every head of any Indian family residing on the east side of Mississippi River, on the lands that are now or may hereafter be surrendered to the United States, who may wish to become citizens of the United
(71) States, the United States do agree to give a reservation of 640 acres of land in a square to include their improvements, which are to be as near the center thereof as practicable, in which they will have a life estate with a reversion in fee-simple to their children, reserving to the widow her dower, the register of whose names is to be filed in the office of the Cherokee agent, which shall be kept open until the census is taken as stipulated in the 3d article of this treaty. Provided, that if any of the heads of families, for whom reservations may be made, should remove therefrom, then, in that case, the right to revert to the United States. And provided further, that the land which may be reserved under this article be deducted from the amount which has been ceded under the first and second articles of this treaty."

On 27 February, 1819, a convention was entered into at Washington between the United States and the Cherokee nation, whereby, after reciting that the greater part of the Cherokee nation wished to remain on the east side of the Mississippi River, and, being desirous, without further delay or the trouble and expense of taking a census, finally to "adjust" the treaty of July, 1817, had offered to cede to the United States a tract of country at least as extensive as that to which the United States were entitled under its provisions, the Cherokee nation ceded to the United States all their lands lying north and east of a certain line therein described, "in full satisfaction of all claims which the United States have on them, on account of a cession to a part of their nation, who have or may hereafter emigrate to the Arkansas"; and it was further declared that this treaty was to be a "final adjustment" of that of 8 July, 1817. By the second article of this convention, the United States agreed to pay, according to the stipulations of the treaty of July, 1817, for all improvements on land lying within the country ceded by the Cherokees which added real value to the land, and to allow a reservation of 640 acres to each head of any Indian family residing within the ceded territory (those enrolled for the Arkansas excepted), who chose to become citizens of the United States in the manner stipulated in the said treaty.

None of these cessions covered the territory in which is situ-
(72) ate the land in dispute. But finally, by the treaty of New Echota of 29 December, 1835, as explained and amended by the supplementary articles of 1 March, 1836, the Cherokees made a cession of all their lands on the east side of the Mississippi. The consideration of this cession was a large sum of money, five millions of dollars, paid

by the United States, and in this treaty not only reservations are omitted to be made, but in the preamble to the supplementary articles it is declared that it is the determination of the President of the United States not to allow any reservations.

Sutton's wife, a Cherokee by birth, and with him a lessor of the plaintiff, was, at the date of the treaty of 1817, the mother of four children, and lived among the Cherokees of the upper towns on the unceded territory. In August, 1817, Sutton, in right of his wife, caused an entry to be made of the land now sued for as her reservation under that treaty. The Cherokees would not allow him to take possession thereof, but held the same as a part of their territory, until they surrendered all their country on this side of the Mississippi by the treaty of 1835.

The very term "reservation" seems to imply that the land reserved is taken out of the treaty ceded, that is to say, is a portion excepted from the mass of the general cession, and kept back or otherwise diverted when that mass was surrendered. The reservations, also, are described in the treaty as in the nature of donations or grants from the United States; "the United States *agree to give* to each head of an Indian family," and it would not only be a singular pretense of bounty, but a most unusual species of grant, for the United States to make gifts, by way of reservation, out of a territory, not only recognized as belonging to the Indians, but the enjoyment of which by the Indians it was an object of the treaty to secure, so that they might more effectually prosecute thereon their plans of agricultural improvement and civilized life. The provisos annexed to the 8th article further show that the reservations were not to take effect, until after the cessions made and except out of the territory ceded. The first declares that upon the removal of any Indian family from the reservation allotted to them, "the right," which (73) must mean the right to the land comprehended within the reservation, "shall revert to the United States." Such a stipulation would be shamelessly unjust to the Indians, if the reservation were made out of territory which they had never surrendered, and the phrase "revert" implies that the land coming back to the United States was such as had belonged to them, subject to the relinquished reservation. The second proviso stipulates that, when the United States shall be about to ascertain the quantity of land which they are to give on the Arkansas and White rivers, acre for acre, in exchange for the territory ceded by the Indians, the number of acres contained in the reservations is to be deducted from the amount ceded. This clearly indicates that the reservations are made out of the territory ceded.

Nor shall we be led to a different construction of this article by a consideration of the terms in which the agreement on the part of the United States is expressed. "The United States agree to give." These are

clearly words of promise, indicative of an engagement thereafter to be carried into execution. "To each and every head of an Indian family residing on the east side of the Mississippi River, on the lands that are now or may hereafter be surrendered to the United States, who may wish to become citizens of the United States." The persons thus described are the objects of this promise, and they cannot be mistaken. They are such heads of Indian families as, residing on the ceded lands, either the lands then ceded or thereafter to be ceded, may prefer, instead of accompanying their brethren to the Arkansas, to reside where they have theretofore resided, and, quitting their nation, to become citizens of the American Union. And to these the United States "agree to give a reservation of 640 acres of land in a square, to include their improvements." The reservations, then, are on the land which they have improved Now, when is this promise to be fulfilled? Unquestionably as the occasions for carrying it into execution shall arise. To the Indians residing on the lands actually ceded by the treaty of 1817, the United States
(74) were bound to furnish the means of immediately procuring their reservations. These might be regarded as having, *upon the execution of the treaty,* and, *upon the declaration of their purpose to become American citizens,* a vested right to the promised reservations upon the territory ceded. But no such right could be pretended on the part of those who might be residing on territory thereafter to be ceded. This part of the engagement rested solely in covenant. At any time before the fulfillment of that covenant could be demanded, it was competent for the contracting parties to annul or modify, at their will, the agreement whereby it was constituted. If the engagement continued in force and unchanged, until a subsequent surrender or cession was made, then, and not till then, it was incumbent on the United States to give the reservations promised to those residing in such surrendered territory.

If we attend to the context of the treaty of 1817, and attend also to the provisions already referred to in the treaties of 1819 and 1835, we cannot fail to see that the views now taken were those of the contracting parties. We shall see also what were the lands which the treaty of 1817 speaks of as "thereafter to be surrendered," and we shall be satisfied that all which good faith requires has been done, on the part of the United States, in regard to these lands, and, indeed, the basis of the treaty of 1817, that the Cherokees should cede to the United States such a portion of the territory then held by them, as was equivalent to the share, to which, in proportion to their numbers, the emigrating part of the nation was entitled, and that for the territory so ceded and to be ceded, the United States were to allot to this part of the nation an equal quantity of land, "acre per acre," on the Arkansas and White rivers. In the preamble to the treaty, the President's promise to the nation, with re-

spect to the wish of one part of them to remove beyond the Mississippi, is expressed in these words: "When this party (the exploring party) shall have found a tract of country suiting the emigrants, and not claimed by other Indians, we will arrange with them and you (75) the exchange of that for a just proportion of the country they leave, and to a part of which, proportioned to their numbers, they have a right." And again, in the preamble, the emigrating part declare their desire "to execute a treaty, relinquishing to the United States all right, title and interest to all lands of right to them belonging, as part of the Cherokee nation, which they have left, and which they are about to leave, proportioned to their numbers, including with those on the Arkansas, those who are about to remove thither, and to a portion of which they have an equal right, agreeably to their numbers." The cession made by the Cherokees in the first article of the treaty, is expressed to be made "*in part* of the proportion of land in the Cherokee nation, east of the Mississippi, to which those on the Arkansas, and those about to remove there, are justly entitled." A census was agreed to be taken of the whole Cherokee nation, in order, among other things, to ascertain, as is declared in the 4th article, what further lands were "to be apportioned and surrendered to the United States, agreeably to the enumeration," so as to make up with the lands ceded in the first and second articles, "the proportionate part, agreeably to their numbers, to which those who have removed, and who declare their intention to remove, have a just right." And in the 5th article, the United States bind themselves to give to that portion of the Cherokee nation on the Arkansas, as much land on that and the White River as they have, or *hereafter may receive,* from the Cherokee nation, east of the Mississippi, acre for acre, as the just proportion due that part of the nation on the Arkansas, agreeably to their numbers." It is manifest, that the lands spoken of as "to be surrendered," were such further lands as might be required to complete the full share of the entire Cherokee country, to which, in proportion to their numbers." It is manifest, that the lands spoken of as "to be surbeen exchanged with the United States for lands on the Arkansas and White rivers. Cherokee families residing on the lands actually ceded by the treaty, and on the lands which, in pursuance of the terms of that treaty, were to be afterwards surrendered, and quitting the nation in order to be incorporated into our Union as American (76) citizens, thereby ceasing to constitute a part of either portion of the Cherokees, were to have reservations of land assigned them; and the lands so reserved or taken out of the ceded territory, were not to be estimated in fixing the equivalent of land to be given in exchange for the territory ceded.

The treaties of 1819 and 1835 not only illustrate and confirm this

view of the subject, but show that the promises in the treaty of 1817 have been fulfilled. The former of these, announces its purpose to be to *adjust* finally the matters stipulated to be done, and remaining to be done, under the treaty of 1817, without the delay, trouble and expense, of a census, and for that end to make a further cession of a tract of country "at least extensive as that to which the United States were entitled, under its provisions." The tract thus ceded is declared to be in full satisfaction of all claims which the United States have under the treaty of 1817; the treaty of 1819 is pronounced to be "a final adjustment of that of 1817"; and the reservations allowed to heads of Indian families, desirous of becoming American citizens, are in terms confined to those residing on the ceded territory. By the treaty of 1819 all the promissory parts of the previous treaty were executed. The additional territory promised to the United States was surrendered, and the reservations promised by the United States to be made, in relation to such additional territory, were specifically provided for.

The treaty of 1835, as explained by the supplementary articles, is made on principles totally different from those on which were founded the treaties of 1817 and 1819. It provides for a sale out and out, of the remaining territory of the Cherokees, east of the Mississippi, for a stipulated price. It makes no reservations out of that territory for any Cherokee families, but, in the plainest terms, declares that the cession is of the entire territory, unincumbered by reservations, or promises of reservations.

Without passing upon the other questions raised, we are decidedly of opinion that the judgment of the Superior Court ought to be

(77) PER CURIAM. Affirmed.

JOHN COLBERT *v.* WILLIAM W. PIERCY.

1. A single magistrate has a right to administer the book debt oath, on a trial before him.
2. It is competent for a party under the *book debt law* to swear to the price, as well as to the delivery of the articles stated in his account.
3. And it is competent for the opposite party to cross-examine the party, taking his oath under that law, both as to the articles and the prices charged, with a view to contradict or discredit him, as he might do in regard to any other witness swearing to the account, the party so swearing being considered as a witness in his own cause.

APPEAL from *Pearson, J.*, Fall Term, 1842, of CHEROKEE.

This was an action of slander. The plaintiff proved that some few weeks before the writ issued, the defendant had in several conversations about him said: "Old Colbert in his suit with me about the corn, swore

to a lie; he swore I was to pay him $1.37½ per bushel, when I had agreed to give him but $1.25 per bushel, and I can now prove he swore to a lie, for I have it in writing, and if he and his sons don't cut their sails low, I will have his back whipped, though he is an old man." The defendant, under the plea of justification, offered in evidence a warrant issued by the plaintiff against him for $20, balance of (78) his account for corn. He also produced the account, in which 46 bushels of corn were charged to the defendant, at $1.37½ per bushel, and credits were entered for various payments in money, reducing the balance to $20, and proved by the magistrate, that the plaintiff swore to his account under the book debt law, and, after he was sworn, said that he let the defendant have the corn at $1.25, if the cash was paid down, but if it was not paid, then the defendant was to pay $1.37½ per bushel; that the cash was not paid, and he had charged the $1.37½ as agreed upon. Much evidence was then offered by the defendant to show that the price of the corn was $1.25, without any condition, and by the plaintiff to show that if the defendant did not pay the cash he was to pay $1.37½ per bushel. The defendant's counsel insisted that the magistrate had no right to administer the book debt oath, and therefore that the plaintiff could not have been convicted upon an indictment for perjury, although the oath was false, and upon this ground moved the Court to charge the jury that the action could not be sustained. The Court refused to so charge. The case was then submitted to the jury, who found for the plaintiff. A motion for a new trial having been made and refused, the defendant appealed to the Supreme Court.

Clingman and *Francis,* for the plaintiff.
No counsel for the defendant.

RUFFIN, C. J. From the manner in which the objection is expressed, "that the magistrate had no right to administer the book debt oath," it might be supposed it was contended that the act respecting the proving of book debts did not apply to trials out of Court. But it seems impossible that such a notion could be entertained, since it is perfectly certain, that ever since Justices of the Peace exercised any such jurisdiction, the most common subjects of it have been accounts proved by the party's oath and book. In *S. v. Molier,* 12 N. C., 263, it was said, the jurisdiction of the magistrate was not to be doubted, (79) and in that case there was a conviction for perjury upon precisely such a proceeding as that in this case.

But we are told that the point intended to be raised was whether the plaintiff could, within the meaning of the book debt law, prove or be examined to the price charged in the account, as having been agreed

on by the parties. Not to speak of the singularity of such an objection being taken on the evidence offered by the defendant himself, on his plea of justification, we are satisfied that it is altogether untenable. In the first place, admitting that it was not competent to examine the plaintiff to that point, yet, as he was examined, if he swore falsely and corruptly, he committed perjury. The subject was within the jurisdiction of the magistrate, and the matter deposed to was material to that in dispute, namely, the sum which the defendant owed. In such a case the legal incompetency of one, admitted and sworn as a witness, does not screen him from the guilt or penalties of perjury. That is unquestionably law, and was so laid down in the case just cited. In the next place, the Court is of opinion that the party is competent to prove the price as well as the delivery of the articles. The act is not restricted to counts on a *quantum valebat,* but embraces every case of *indebitatus assumpsit.* Apprehending that we might be drawn into a mistake on this point by the punctuation in the later editions of the statutes, we have had recourse to the earlier publications of the laws, and they render the point still more clear. Swann's edition of 1752, gives the act as it first passed in 1739, ch. 3, in these words: "That whenever any person shall bring any action of debt, or upon the case, and therein shall declare upon an *indebitatus assumpsit,* or *quantum valebat,* or *quantum meruit,* for goods," etc. This seems clearly to show, that in every case of assumpsit, for a demand within the limited sum, the party's oath and book are evidence, provided only that the buyer and seller are alone privy to the contract. But those are not the strongest reasons for this interpretation. It is to be deduced from other parts of
(80) the act, and necessarily results from the nature of the subject. When the act speaks of "books of accounts," it must mean books, as it was known they were universally kept; which is, by entering therein not only the articles sold or received in payment, but also the prices. Without the prices, the account is not true. Such is the variety in quality and price of articles of the same kind, that no just information of the state of the accounts can be gathered from books, in which only the articles are entered, without a price affixed. No third person can prove the value, unless he was also privy to the delivery, so as to know what the kind and quality of the thing were. Now the act makes not only the oath evidence, but also the book thus kept and thus known to be kept. The whole goes to the jury as evidence. Then, there is the provision, that the oath and book shall not be evidence to an amount exceeding sixty dollars; which can be enforced only by annexing the values to the articles. Furthermore, the party is to swear that the book contains a true account of all the dealings, or the last settlement of accounts, and that he hath given the defendant all just credits. A settle-

ment, in which the sums are not computed and the balance in money struck, is an absurd idea, not contemplated by the Legislature. As we conceive, the meaning of the act is, that, after the party has been sworn and made out by his oath, that his book has the requisite to make it evidence, the book proves the matters therein stated, as they are stated; subject, nevertheless, to being contested by the defendant, as provided in the fourth section, and as he could do if the account had been proved by any other witness. It was held in *Kitchen v. Tyson,* 7 N. C., 314, that the party is made a witness in his own cause, and may be treated as other witnesses, and discredited. It follows that he may be cross-examined as to all parts of the account to which his oath applies, with the view to discredit or contradict him, either in respect to the articles or prices charged, or to the credits entered or omitted. In this case, after the plaintiff had taken the usual oath, that this was a true account, and thereby had his book laid before the magistrate, (81) it was at the instance, and for the benefit of the defendant himself, that the plaintiff was subjected to the special examination respecting the agreement touching the price of the corn, in order to show that the account was not true. That was an enquiry material to the controversy; and if he had sworn falsely and corruptly upon it, the plaintiff would have been guilty of perjury, as was expressly decided in *S. v. Molier,* 12 N. C., 263.

PER CURIAM. Judgment affirmed.

(82)

NANCY EDWARDS *v.* JOHN S. EDWARDS AND OTHERS.

1. Courts of probate are not, like courts of law, under an absolute inability to reform their judgments after they have been rendered; and therefore application for relief against any of their judgments, may be made to the courts in which they were rendered.
2. But when the sentence of such a court has been regularly pronounced, it will not be set aside or vacated, except under such circumstances as would induce a court of equity to order a judgment at law to be set aside, and the matter to be retried.
3. Where a will was offered by the executor for probate in the County Court, and a caveat entered, and the jury found in favor of the caveators, upon which the executor was about to appeal, but declined to do so upon the assurance of the caveators, that if the widow of the testator did not assent to certain terms they proposed, the verdict might be set aside and a new trial had, and the widow refused her assent to these terms: *Held,* upon the petition of the widow, that the sentence of the County Court against the will should be revoked, and the will re-propounded for probate.

APPEAL from *Battle, J.,* at Fall Term, 1842, of EDGECOMBE.

The facts of this case are sufficiently set forth in the opinion delivered in this Court.

Whitaker, for the plaintiff.
Mordecai, for the defendants.

GASTON, J. Upon examination of the petition, answer and affidavits, the facts of the case appear to be these: Amos Wooten, one of the persons named, executors in a paper-writing purporting to be the last
(83) will and testament of Siley Edwards, deceased, offered the said instrument for probate in the County Court of Edgecombe where it was contested by William Faircloth and Bassett Sikes, two of the next of kin of the deceased. An issue was thereupon made up, whether the said instrument was the last will and testament of the said deceased, and at the August Term, 1841, of said Court was submitted to a jury, who returned a verdict in favor of the caveators. From this verdict, the propounder of the alleged will was advised by his counsel to appeal, and was about to appeal accordingly, when the caveators, being apprised of this his purpose, entered into an arrangement with him to the following effect: It was agreed on their part, if Wooten would not appeal, to secure, by a proper instrument to be executed by the next of kin of the said deceased, unto Nanny Edwards, his widow, the enjoyment during her life of all the property, which by the said instrument purported to be bequeathed to her for life. But as this arrangement was made without her knowledge, and upon the presumption merely that it would be satisfactory to her, it was further understood and agreed, that, if she should withhold her assent therefrom, no advantage should be taken of the said verdict, and the paper-writing might be propounded as a will *de novo.* In consequence of this arrangement and understanding, the appeal was not taken. The widow, being informed of this arrangement, refused to assent thereto, and thereupon, at the next term, the will was again brought forward for probate. This being resisted because of the former verdict and the judgment thereon remaining unreversed, the widow filed this her petition, praying that the verdict and judgment might be set aside, and that she might be permitted to cause the said instrument to be repropounded for probate. To this petition, all the next of kin of her deceased husband were made parties. The County Court dismissed the petition. From this sentence the petitioner appealed to the Superior Court, where the sentence of the County Court was reversed, and an order made that the alleged will be repropounded for probate. From this sentence the next of kin appealed to this Court.

There can be no question but that the petitioner, though not
(84) a party in form to the proceedings which were had when the supposed will was first offered for probate, was substantially a party thereto, as being represented by the executor, and is therefore bound by the sentence then pronounced, so long as it remains unreversed.

Redmond v. Collins, 15 N. C., 430. And it is because the petitioner is bound by the sentence rendered upon these proceedings, that she is under the necessity of having the said sentence set aside, before the instrument can be again propounded. It is certainly true also, that this sentence will not be revoked, except it be plainly shown, that in justice it ought not to be permitted to stand in the way of a second effort to prove the will. Courts of probate are not, like courts of law, under an absolute inability to reform their judgments after they have been rendered; and, therefore, application for relief against any of their judgments may be made to the Courts in which they were rendered. But when the sentence of such a Court has been regularly pronounced, it will not be set aside or vacated, except under such circumstances as would induce a Court of Equity to order a judgment at law to be set aside, and the matter to be retried. *Redmond v. Collins, supra.* A bill for a new trial is always watched by Equity with extreme jealousy, and Equity will not interfere, unless it sees, either that the judgment has been obtained by fraud, or that the party is unconscientiously availing himself of the advantage thereof, so that it ought to be put out of the way, or the party restrained from using it. *Bateman v. Willoe,* 1 Sch. & Lef., 201.

It seems to us clear, that it is unconscientious in the defendants to avail themselves of the advantage obtained by the sentence, on which they insist. But for the understanding that the will might be repropounded, if the proposed compromise should not be approved of by the widow, Wooten, who claimed to be executor, and as such represented her interest and acted for her, would, by appealing from the sentence, have rendered it null. To conclude her by a sentence *thus* rendered definite, would be to shock the plainest principles of justice. She must have some relief against it, and we see no sufficient reason why it should not be afforded according to her application. (85)

Some questions have been discussed here, which we shall not now decide. It has been disputed whether the will, if repropounded, should be so propounded by the executor, or whether it may not be propounded by the widow in her own name, after citing the executor and his renouncing the office. The petitioner will act in that matter as she may be advised. We merely affirm the judgment of the Court below, that the former sentence be set aside upon the prayer of the petitioner, so that the contested will may be again offered for probate.

PER CURIAM. Affirmed.

(86)

WILKINGS AND BELDEN *v.* CARTER B. BAUGHAN.

1. A debtor, arrested upon a *ca. sa.*, gives bond under the insolvent debtor's law for his appearance at the County Court. On his appearance, an issue of fraud is made up; the jury find the fraud and concealment alleged, and the Court orders the debtor to be imprisoned till he makes a full disclosure of his effects. The debtor appeals from this judgment, and gives bond and security for his appeal. In the Superior Court the issue is again tried and found against the debtor, but upon being called, he fails to appear: *Held*, that the plaintiffs are entitled to judgment against the sureties on the appeal bond for their debt and costs.
2. Upon such an appeal, the debtor is bound to appear in the Superior Court, as he originally was in the County Court.
3. Although the *ca. sa.* on which the debtor was arrested may have been defective, yet it is not competent for the sureties to the appeal bond to make that objection after judgment has been rendered against the principal.

APPEAL from *Dick, J.*, Spring Term, 1841, of CUMBERLAND.

The facts and questions in this case are fully stated in the opinion delivered in this Court.

Henry, for the plaintiff.
Strange, for the defendant.

RUFFIN, C. J. Carter T. Baughan was arrested by a constable at the suit of Wilkings and Belden, on a *capias ad satisfaciendum,* issued by a justice of the peace, and he entered into bond with John M. Jarrott and another (who is since dead), as his sureties, in the usual form, with condition for Baughan's appearance at the next County Court, to take the benefit of the act for the relief of insolvent debtors, as in the
(87) act prescribed. In the County Court, his creditors suggested his fraudulent concealment of sundry articles and sums of money; issues were made up on the several suggestions; the jury found the fraud and concealment as alleged; and the Court gave the judgment, as prescribed in the act, that Baughan be in the custody of the Sheriff, and be imprisoned until a full and fair disclosure of his effects should be made by him. From that judgment he appealed to the Superior Court, and entered into bond with Neil Johnson and others as his sureties, with condition that "the said Baughan do well and truly prosecute his said appeal with effect, or, in case he shall have the cause decided against him, shall perform the judgment, sentence or decree, which the Superior Court shall make or pass therein." At November Term, 1837, the transcript was filed in the Superior Court, and the case was thence duly continued until November Term, 1839. Being then called, Baughan failed to appear, and his failure was recorded;

and, at the same time, on the motion of his attorney, and cause shown by the affidavit of his agent, the case was continued by order of the Court until the next Term, and it was thence again duly continued until May Term, 1841, when the issues were tried and the jury again found the fraud and concealment as before. Thereupon, Baughan was, upon the motion of the plaintiff, called, but he failed to appear; and, his default being recorded, the Court rendered judgment thereon, against him and Jarrott, on the bond returned by the constable, to be discharged by the payment of the debt and interest, and the costs in the County and Superior Courts. The creditors then further moved the Court for a like judgment against the principal and his sureties on the appeal bond, or, if the Court should think them not entitled to more, for a judgment for the costs in the Superior Court. To that motion it was objected, that as the plaintiffs had gone to trial on the issues, the only judgment it was then competent for the Court to pass was that the debtor be imprisoned; and that there could be no judgment on the appeal bond. Of that opinion was the Court, and refused the motion entirely; and the plaintiffs appealed. (88)

It appears to the Court that these creditors had a right to judgment on the appeal bond for their debt and costs, according to the motion in its largest form. The act, Rev. Stat., ch. 58, sec. 10, gives to either party, dissatisfied with the verdict, an appeal "as in other cases." This imports that when the debtor appeals, he shall give bond for the performance of the judgment against him in the Court above, and also imports a summary remedy on it by giving a judgment against the sureties for whatever may be recovered against their principal. Revised Statutes, ch. 4, secs. 1 and 10. But the reasoning on which his Honor proceeded is that this cannot apply to the case before us, because, after fraud found, the judgment is, that the debtor be imprisoned; which operates upon the person merely, and is not a judgment for a sum of money, for which there can also be a judgment against the sureties. But this construction of the act seems to the Court to be very erroneous. What may be the liabilities of the sureties for an appeal by the debtor, against whom issues are found, and against whom, being in Court, the judgment of imprisonment is pronounced, as directed by the 10th section, we are not now to say. Certainly they are not to stand imprisoned, like a debtor, until a disclosure be made by him. And it may be admitted, for the purposes of this case, that there is no redress against them in the case supposed. But that is a question essentially different from that which arises here; which is, what is the liability of the sureties, when the debtor is not in Court, but makes default? In that event the judgment of imprisonment cannot be rendered, or, at least, executed as designed by the law; and unless

there can be a judgment for the debt and costs against the principal, so as to found a judgment thereon against some or all of his sureties, it is obvious the creditor is defeated of his whole remedy, simply by the default of the debtor, which would seem most extraordinary. It is yielded by the reasoning on which his Honor's decision proceeds that the sureties for the appeal would have been liable for the debt and costs, if the debtor had made default before the issues were tried,
(89) and the creditors had then taken their judgment for the default; for it is said, the creditors have confined themselves to the judgment against the debtor's person, by proceeding to the trial of the issues, and taking a verdict which authorized a personal judgment. Why would they have been thus liable? It can only be because, upon the failure of the debtor to appear, the creditors can take judgment for the debt and costs on the bond returned by the officer, and then a second judgment on the appeal bond, whereby the parties bound themselves that the debtor should perform the judgment the Superior Court might render against him. The same reasoning applies to the case of a default by the debtor at any time, and especially after the issues found against him. The debtor is bound to appear, whenever duly demanded by the creditor, until the final adjudication. *Mooring v. James,* 13 N. C., 254; *Arrington v. Bass,* 14 N. C., 95. He may be called to be examined before the jury, and, upon his failure, the act directs that the judgment shall be for the penalty of the bond taken by the officer, to be discharged upon the payment of the debt and costs. It may be true that the creditor is not bound to try the issues, and run the risk of having them found against him in the absence of the debtor, but may at once take his judgment for nonappearance; yet, when the verdict is the other way, that there are fraud and concealment, the debtor is especially bound *then* to appear, since the very object of the issues is to subject him to actual imprisonment. Sec. 10. To that end it is evidently contemplated in the act that the debtor shall be personally present in Court, the words being, "then and in that case the said debtor shall be *deemed* in the custody of the sheriff, and the Court shall adjudge him to be imprisoned," etc. The creditor, therefore, must have a right to demand him at that time, and that he should submit himself to the judgment of the law. It cannot be thought that, at the very time the law is about to pronounce judgment of imprisonment on the debtor, he can frustrate the creditor of the fruit of his suit, both as against himself and his sureties,
(90) simply by withdrawing himself from the Court. Even if he had made default before, and the creditor had recorded it, and had proceeded unnecessarily to try the issues, we do not perceive that it can make a difference, for the creditor has a right to try them and to require the appearance of the debtor to abide by the judgment to be rendered

thereon. If he fail to appear at any time, there is to be judgment on the bond given for his appearance, and in the case before us, his Honor gave judgment on that bond against Baughan and Jarrott, for the debt and costs. That judgment refutes the argument on which the Court refused to give judgment on the appeal bond. It shows that the judgment that the debtor be imprisoned, is not the only judgment that can be rendered after fraud found; for, upon a default after that finding, a judgment for the debt and costs was given on the appearance bond. Now, the rendering of judgment on that bond was absolutely inconsistent with the refusal of it on the other, for the sureties for an appeal are conclusively bound for the performance of their principal in this case, as in every other case of a judgment for money.

But, besides the reason stated in the record, others have been assigned in the argument here, why the motion should have been refused, which it is proper to notice. It was said, in the first place, upon the authority of *Page v. Winningham,* 18 N. C., 113, that the debtor was not bound to appear in the Superior Court. But that case is quite distinguishable from this. An appeal to the Supreme Court only brings up a transcript of record for review as to errors in law; whereas the whole case is removed by an appeal to the Superior Court, for a trial *de novo* there. Every reason which makes the debtor's appearance requisite in the County Court, applies with equal force to the proceedings in the Superior Court.

It was next said that there was a default of the debtor in November, 1839, and therefore that this motion could not be allowed in May, 1841, without a notice to the sureties. We see no reason why the creditor might not waive that default and proceed to a trial of (91) the issues, and then demand the debtor, and upon default then made, have judgment on the bonds. But, in truth, there was, we think, no default in 1839; for at that term, at which the debtor failed to appear, the case was continued by the Court, under the authority to do so, where the debtor has been prevented from attending Court by good cause, to be judged of by the Court. After that, it does not appear that he made default, until he was called after the verdict rendered, and, upon that then made this motion was grounded.

It was insisted, lastly, that the *ca. sa.* was defective, and did not authorize the arrest of Baughan; and, therefore, that the creditor ought to have no remedy or any security founded on it. We are not prepared to admit, that if the execution be invalid, the debtor could avail himself of it, after giving bond for his appearance, and, especially after joining in the issues tendered by the creditor. But if he could object that matter against rendering judgment against him on the bond for his appearance, yet it seems to be a clear answer to this, and indeed to the pre-

ceding objection, that it is not competent to the sureties in the appeal bond to allege that the judgment against their principal is erroneous. There is a judgment in this case against Baughan and Jarrott for the debt and costs, from which there was no appeal. If there be error in that judgment, yet it is perfectly settled that while it remains in force it binds the sureties for the appeal as much as the principal. It fixes the sureties with the debt, and the only questions between them and the appellees are, whether there be a judgment against their principal, and whether he has performed it. If he has not, then judgment is to be rendered against them for the same money.

The judgment below must be reversed, and judgment entered here for the plaintiffs on the appeal bond for the debt and interest, and
(92) the costs of the Superior and County Courts, as well as the costs in this Court.

PER CURIAM. Judgment accordingly.

Cited: Williams v. Floyd, 27 N. C., 658; *Mears v. Speight,* 49 N. C., 421.

STATE OF NORTH CAROLINA, ON THE RELATION OF JONATHAN B. LINDSAY *v.* ENOCH L. STEPHENS AND OTHERS.

Where one put into the hands of a constable for collection a note, the amount of which exceeded the jurisdiction of a Justice of the Peace, and the constable procured the maker to substitute for it two notes, each within the jurisdiction of a Justice, and afterwards failed to collect the same when he might have done so: *Held,* that he and his sureties were liable on his official bond for a breach of duty.

APPEAL from *Battle, J.,* Fall Term, 1842, of PASQUOTANK.

This was an action on a constable's bond, given by the defendant Stephens and the other defendants, as his sureties. The breaches declared on, were for collecting and not paying over, and for negligence in the discharge of his duty in not collecting certain claims put in his hands for collection by the relator of the plaintiff. It was admitted by the defendant's counsel, that the sum of $299.09, with interest
(93) from 7 September, 1842, had been collected and not paid over, and for that sum he admitted the defendants to be liable. The only contest arose upon a note put into the hands of the defendant Stephens, for $125.25, bearing interest from 1 January, 1838. This note was put into the hands of Stephens as the agent of the relator, Lindsay; and Stephens, as his agent, took a note from the maker for $80, and endorsed that sum as a credit on the note of $125.25, and thereby brought the whole amount within the jurisdiction of a justice of the peace. Stephens then issued a warrant on the note for $80, and

another warrant for the balance due on the note for $125.25, and obtained judgment in both cases. The maker of the notes, at that time, had property, and the judgments could have been collected; but the defendant Stephens neglected to use diligence in collecting them, whereby the debt was lost. The defendant's counsel contended, that, as the note of $125.25 could not, in its original form, have been collected by the constable, by virtue of his office, as it was beyond the jurisdiction of a justice of the peace, and consequently beyond that of a constable, the defendant and his sureties were not liable on his official bond.

His Honor instructed the jury that although the note of $125.25 could not, in its original form, have been collected by the constable by virtue of his office, yet, if the relator placed the note of $125.25 in the hands of Stephens as his (the relator's) agent and he reduced it to two notes, so as to bring the whole sum within the jurisdiction of a justice of the peace, it was the same thing as if the relator himself had done it, and then placed the notes in the hands of Stephens—and when Stephens had so divided the note as to reduce it within the jurisdiction of a justice of the peace, it was his duty to use due diligence in collecting the notes; and if the debt was lost by his negligence, they ought to find for the plaintiff for the amount of the note of $125.25, as well as for the sum admitted to be due. The jury found a verdict for the whole sum claimed. The defendants then moved for a new trial, which being refused, they appealed to the Supreme Court. (94)

Kinney, for the plaintiff.
No counsel for the defendants.

DANIEL, J. The reasons given by the Judge who tried the cause in the Superior Court, are, in our opinion, correct, and we adopt them. He might have made his charge still stronger for the relator, as it appears that the constable had actually obtained judgments in the name of the relator on the two notes. Why, then, did he not collect those judgments? The judgment, we think, must be

PER CURIAM. Affirmed.

Cited: Rogers v. Walker, post, 95; *Peace v. Mangum,* 28 N. C., 375.

(95)

THE STATE ON THE RELATION OF WILLIE ROGERS *v.* ANDERSON H. WALKER AND OTHERS.

APPEAL from *Dick, J.*, Spring Term, 1842, of GRANVILLE.

Badger, for the plaintiff.
Waddell and *Iredell,* for the defendants.

DANIEL, J. This case is in every particular like that of *S. v. Stephens, ante,* 92. The reasons there given induce us to affirm the judgment in this case.

PER CURIAM. Judgment affirmed.

(96)

THE STATE ON THE RELATION OF WILLIAM H. WILLS *v.* JOEL S. SUGG AND OTHERS.

In cases where a demand of a claim is required before suit can be brought, as against a constable for money collected, when the demand is made the claim is turned into an ordinary debt, and it becomes the duty of the debtor to pay the creditor in a reasonable time.

APPEAL from *Battle, J.*, Fall Term, 1842, of EDGECOMBE.

This was an action of debt upon a constable's bond, executed by the defendants, upon the appointment of Sugg as constable, in the county of Edgecombe, for the year 1838. Upon the trial, the relator, after proving the execution of the bond, produced a receipt given by the constable in 1838, for the collection of several claims against different persons, and among others, two against one F. Jones, for about forty dollars. He then called a witness, who stated that, sometime in February, 1841, he was present when the relator called on the defendant Sugg, and demanded a settlement; to which Sugg, admitting that he had collected the Jones claims, replied that he had no money nor his papers with him, but that if the relator would appoint a day, he would come to a settlement. The relator thereupon said that he had waited a long time and he would not have a settlement by piece-meal, and declined to appoint a day. This occurred in the town of Tarboro, within six miles of the residence of Sugg and eighteen of that of the relator, Sugg and the relator living about twelve miles apart; and it was after the defendant Sugg had gone out of office. The writ was issued in April following. The counsel for the defendants objected that there was no demand, sufficient to sustain the action made
(97) upon the defendant Sugg, prior to the bringing of the action, and that the fair interpretation of Sugg's reply, that "he had no money nor his papers by him," was, that he did not then have the money or papers about his person, but he had them at home, and there was,

therefore, no refusal to pay or settle. The counsel for the relator on the other hand contended that, upon the demand testified to by the witness, the defendant Sugg ought immediately to have paid or tendered the money, admitted to have been collected by him, or that he ought, after that time, to have sought out the relator, especially as they both resided in the same county, in a reasonable time, and have settled with and paid him. The Court held, and so instructed the jury, that the demand stated by the witness, if believed, was sufficient—that the defendant Sugg was bound then and there to have paid or tendered the money he had collected, and that failure to do so was a breach of his official bond, for which he was responsible, and that what the relator afterwards said about a piece-meal settlement, furnished no excuse for such breach. There was a verdict for the plaintiff, and judgment being rendered pursuant thereto, the defendant appealed.

B. F. Moore, for the defendants.
Badger & Whitaker, for the plaintiff, *contra.*

DANIEL, J. In February, 1841, the relator demanded a settlement of Sugg, the constable. Sugg then admitted that he had collected for the relator the sum of forty dollars, but that he, then and (98) at that place, had neither money nor his papers with him. On 28 April following the demand, the relator issued his writ against Sugg and his sureties. The parties lived about twelve miles apart. On the trial the defendants objected, that there had not been a sufficient demand to sustain the action. The relator insisted that the demand was sufficient, and that Sugg, after that event, in a reasonable time, ought to have sought him and made a settlement. The Court charged the jury that the demand was sufficient. And we think that the time, which intervened between the demand and the issuing of the writ, was amply sufficient for Sugg to have sought out the relator and made the settlement, as by law he was then bound to do. For, although according to the previous decisions, there must be a request before suit, yet the demand turns this into an ordinary debt, and it renders it the duty of the debtor to seek the creditor in a reasonable time. We, therefore, think that there was a breach of the bond before the writ issued. The remark of the Judge, that there was a breach of the bond instantly on the demand and refusal to pay, if erroneous, was altogether immaterial in this case, and therefore not a ground for a new trial. The relator proved a demand, and more than a reasonable time after for a settlement, before he issued his writ.

PER CURIAM. No error.

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

(99)

THE STATE ON THE RELATION OF J. & C. ELLEN *v.* SAMUEL ARRINGTON AND OTHERS.

The Clerk of a Court, having in his possession a bond of a large amount, which had been deposited in his office by order of the Court, and belonged to certain parties to a suit pending in the said Court, transferred the bond to one Ricks. In part consideration of the transfer, Ricks gave the Clerk a receipt for a sum of money then in the hands of the Clerk in his official capacity, and belonging to the relators, of whom Ricks was the guardian. Afterwards, the amount of the bond was recovered from Ricks by the persons to whom it belonged. *Held*, that under these circumstances the receipt of Ricks, the guardian, was no bar to an action by the relators on the official bond of the Clerk, to recover the money due to them, and which the Clerk refused to pay.

APPEAL from *Battle, J.*, Fall Term, 1842, of NASH.

This was an action of debt upon a bond executed in August, 1834, by the defendants as sureties of Arthur Whitfield, appointed Clerk of Nash County Court. Pleas, conditions performed, and statute of limitations. Upon the trial, the following facts were proved or admitted. In 1835, and prior to August in that year, a sum of money amount to $210 was paid into the Clerk's office, belonging to the relators, who were minors. This money was at that time demanded of the Clerk by John Ricks, then the guardian of the relators, but was not paid to him. On 19 June, 1837, the said Ricks, being still guardian, and having received of the said Clerk all of the above sum, except $123.53, purchased of the said Clerk the bond mentioned in *Bunting v. Ricks*, 22 N. C., 130, and

(100) gave in part payment therefor the said sum of $123.53, belonging to his infant wards, and gave to the said Clerk his receipt in full for the same. This receipt was not under seal, but was intended by the parties at the time to be a full discharge of the debt. Ricks was afterwards compelled, by a decree of the Supreme Court, to pay over the proceeds of the said bond to the parties properly entitled thereto, and no part of the same was applied to his own use or the use of his wards, the present relators. One of the relators came of age in August, 1839, and the other in February, 1841; and the suit was commenced on 7 August, 1841. A demand of the sum claimed just before issuing the writ was proved. Upon this case the Court was of opinion that the relators were entitled to recover, and thereupon a verdict and judgment were rendered for them, and the defendants appealed.

B. F. Moore, for the plaintiff.
Badger, for the defendants.

RUFFIN, C. J. This is an action on the official bond of Arthur Whitfield, as Clerk of the County Court of Nash. During the year covered by the bond, the sum of $123.53 was paid to him as Clerk, which be-

longed to the relators, who were then infant wards of John Ricks. Whitfield had also in his hands a bond given by Bunn and Cooper, for $1,106, which had been deposited in his office as a fund belonging to other persons, parties in another suit, which the Court had ordered him to collect. On 19 June, 1837, Whitfield assigned that bond to Ricks; and part of the consideration therefor was the said sum of $123.53, belonging to the relators, and Ricks then gave his receipt therefor, as being paid by Whitfield to him, as the guardian of the relators. Afterwards, in 1838, at the suit of the persons for whose benefit the bond had been given, Ricks was compelled by a decree of the Court of Equity to surrender the bond or pay over its proceeds to those (101) persons, on the ground that he had notice of their interest in it, and that Whitfield was misapplying it; *Bunting v. Ricks,* 22 N. C., 130. No part of the proceeds of the bond was applied to the use of the relators; and they afterwards coming of age, demanded payment and then brought this action, which was tried on the pleas of conditions performed and statute of limitations, and a verdict given under the direction of the Court for the principal and interest due the relators; and from the judgment the defendants appealed.

The Court is of opinion the judgment was right. The action was brought within due time, being less than three years after the elder of the relators came of age. On the other plea, the only objection urged is, that the guardian became chargeable to his wards on the transaction between him and Whitfield. But, supposing Ricks to be thus chargeable, it does not follow that Whitfield was thereby discharged. A guardian may become liable for a debt to the wards, in instances in which the debtor may not be discharged; as from negligence to collect or bring suit within a proper time, or the like. Both may be responsible to the infants. No doubt a guardian has authority to receive money owing to his ward. But it is a different question, whether the guardian can discharge the debtor without receiving satisfaction, whereby the insolvency of the guardian would cause a loss of the debt altogether. But that need not be considered; for here the receipt given by Ricks was not under seal, and is susceptible of explanation; and it turns out that, although intended at the time by Ricks and Whitfield as a payment, there was, in fact, no payment at all. It was held that the bond was not effectually transferred by Whitfield, and it was decreed still to belong to the original proprietors, and consequently taken from the relators. How, then, have they been satisfied by Whitfield for the money he received of theirs? This was no more a payment than if received in a forged bond, or counterfeit money. Whitfield, therefore, remains liable for the money in his hands; and, if he does (102) so, of course do his sureties.

PER CURIAM. Affirmed.

STATE OF NORTH CAROLINA ON THE RELATION OF PELEG S. ROGERS & CO. *v.* ISRAEL F. DILLARD AND OTHERS.

An officer has a right to levy an execution upon a horse, though the owner is riding him at the time.

APPEAL from *Settle, J.*, Fall Term, 1842, of GRANVILLE.

Debt upon a constable's bond. The breach assigned was the failure to levy and collect certain executions, which the relators had placed in the hands of the defendant Dillard, as constable, against Thomas A. York and W. S. Lloyd. The relators offered in evidence Dilliard's receipt for the notes of the parties aforesaid; and proved that they had a certain horse of the value of $50, which had belonged to York, but which he swore had been sold and purchased by Lloyd. It was further in evidence, that, after the executions came into the hands of the constable, Lloyd and the constable were together at the house of (103) the relator Rogers, and that Lloyd was riding the horse; that the relator directed the constable to levy on the horse and he would indemnify him; that the constable and Lloyd left in company, and went to two or three public places; that the constable endeavored to get Lloyd to dismount, in order to enable him to levy and get possession of the horse; that Lloyd refused to do so, and continued on the horse until the parties separated; that Lloyd returned to the house of York, where he lived, and left the horse; that on the following day another constable levied on the horse and sold him as the property of York. It was contended in behalf of the relator, and the Court so charged, that the constable had a right to levy on the horse, notwithstanding the owner was on him at the time; and if the jury collected from the evidence that the constable could have levied and got possession of the horse without a breach of the peace, it was his duty to have done so, and his failure was such a neglect as would render him liable.

The jury found a verdict for the plaintiff, and a motion for a new trial having been made and overruled, and judgment rendered for the plaintiff pursuant to the verdict, the defendants appealed.

Badger and *Saunders*, for the plaintiff.

No counsel for the defendants.

RUFFIN, C. J. It is stated by Lord Coke, 1 Just., 47-a, that a horse, when a man or woman is riding on him, or an axe in a man's hand cutting wood, are for that time privileged, and cannot be distrained. But this does not apply to a seizure in execution, though it is probable the objection here taken may have been drawn from it, upon some notion that the cases were similar. Very clearly the passage does not justify it,

for it is confined to distress for rent or of beasts *damage feasant*, and we know that many things can be taken on execution, which cannot, under like circumstances, be distrained. Though we find the rule thus clearly stated, with respect to distress, there is no such doctrine in any author, with respect to process of execution. There is (104) an obvious distinction between the cases, which furnishes the reason of the difference, which is, that making distress is the act of the party himself, to whom the law entrusts to some extent the power of self redress, and the seizure upon execution is the act of an indifferent minister of the law, not probably disposed to make an unnecessary seizure, or to make it at an unseasonable period. A man's house protects him and his property, if to be got at only by breaking the house. But there is no authority or reason which would exempt from seizure an article in the use of the owner which would not equally protect it if in his presence merely. It is as much the duty of the party to surrender to the officer the horse he is riding as it is to allow him peaceably to take the horse from which he has just dismounted; and a breach of the peace, or resistance to the authority of the officer, is not more provoked or probable in the one case than in the other; the law requiring in each case submission to its process, and conferring the power to use such force as may be needed to execute the process effectually.

PER CURIAM. No error.

(105)

DOE ON DEMISE OF JOHN H. BLANCHARD *v.* MARY BLANCHARD.

1. The purchaser at an execution sale must show a judgment, and an execution corresponding thereto. An execution at the instance of B is not warranted by a judgment in favor of A.
2. If a constable in returning to Court a levy on land does not describe it as required by the Statute, Rev. St., c. 46, s. 16, a purchaser under a *venditioni exponas*, issued by the court, in order to support his title in a trial at law must show by extrinsic evidence, that the return does as completely identify the land as it would have been identified by a literal observance of the Statute.

APPEAL from *Manly, J.*, Fall Term, 1842, of DUPLIN.

Ejectment. The lessor of the plaintiff, as a part of his title, produced a judgment in favor of William McCurdy against Noah Blanchard, obtained before a Justice of the Peace, and a separate execution with subsequent legal proceedings in favor of Reuben Blanchard, against Noah Blanchard. This execution was endorsed as follows:

"Levied on the land of Noah Blanchard, joining the lands of H. Blackmore, Reuben Blanchard and others.

8 April, 1831. JES. LAWSON, Dep. Sheriff."

This execution was returned to Court, and notice given to the defendant in the execution. A *venditioni exponas* issued from the Court founded on this levy, and, at the sale of the land, Reuben Blanchard became the purchaser, and under him the lessor of the plaintiff (106) claims. The Court intimated an opinion, that the plaintiff in the execution, who became the purchaser at the sale, acquired no title on account of the defectiveness of the proceedings, that the execution was not supported by the judgment, and, if it were, there was no sufficient levy endorsed upon the execution, and, without them, the subsequent judgment and order of sale were nullities.

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

No counsel for the plaintiff.
D. Reid, for the defendant.

GASTON, J. The plaintiff undertook to deduce a title in the premises to his lessor, under a purchase and conveyance from the Sheriff. The execution, under which the sheriff sold, was a *venditioni exponas,* purporting to have been issued from the County Court, and commanding the Sheriff to expose to sale "the land of Noah Blanchard, joining H. Blackmore and others," which land, the execution recited, had been theretofore levied on by a constable, by virtue of judgment against the said Noah, in favor of Reuben Blanchard, and which levy had been returned to Court and confirmed, and an order of sale thereon made. It does not appear that the order of Court was exhibited, but the plaintiff gave in evidence a writ of *fieri facias* issued by a justice in favor of Reuben Blanchard against Noah Blanchard, a return thereon by the constable, of a levy on the land of Noah Blanchard, "joining the lands of H. Blackmore, Reuben Blanchard, and others," and a notification from the constable to the said Noah, of the levy aforesaid, that it would be returned to the Court, and that the said Court would be moved for an order of sale thereon. The plaintiff also gave in evidence a judgment before the justice, which he alleged to be that whereon the *fieri facias* was sued out, but the same was a judgment rendered for (107) William McCurdy, against the said Noah. Upon this evidence the Court was of opinion that the plaintiff had not made out a title in his lessor, and, the plaintiff thereupon submitted to a nonsuit.

We see no error in the opinion expressed. Both the objections made below to the title appear to us to be well founded.

A *venditioni exponas* confers no original authority on the officer to make the debt recovered. It is but an order to carry out into final effect, by a sale, a levy previously made; and if *that levy* be not valid, the sale

under the *venditioni* transfers no title. If a valid levy has been made on *chattels,* the sheriff may, after the return of the *fieri facias,* sell without a *venditioni* because, by the seizure he has acquired a property in the chattels, for the purpose of satisfying the creditor. If the levy has been made on land, he cannot, after the return of the *fieri facias,* sell without a *venditioni* because with us, by such a levy, the land is not *seized* by the sheriff, but only *set apart* for the satisfaction of the judgment, and the authority of the sheriff to act under the *fieri facias,* expired by its return. But in each case, it is indispensable for the security of the purchaser, that the thing sold should have been seized or levied on by virtue of a valid *fi. fa.* It is also perfectly settled with us that however an officer may be protected in rendering obedience to an execution, although unwarranted by a judgment, because he is not bound to look behind his writ, a purchaser under an execution sale must show, not only the execution, but a judgment which warrants and sustains it. *Dobson v. Murphy,* 18 N. C., 586. And this doctrine has been explicitly held in cases of levies made by constables returned to Court, and sales under writs of *venditioni* there awarded. *Ingram v. Kirby,* 19 N. C., 21. Now it cannot be pretended that an execution in favor of B is warranted by a judgment rendered in favor of A.

The levy, too, as returned, does not conform to the provisions of the law. The law requires that it shall set forth what land the constable has levied on, "where situate, on what water course, and whose lands it is adjoining." Rev. Stat., ch. 62, sec. 16. In construing this enactment we have held that whenever the levy returned (108) departs from the terms of description prescribed in the statute, the *onus* is thrown on the purchaser of showing, by extrinsic evidence, that the return does as completely identify the land as it would have been identified by a literal observance of the statute. *Huggins v. Ketchum,* 20 N. C., 550; *Smith v. Low,* 24 N. C., 457. No extrinsic evidence in this case was offered to establish this identity.

PER CURIAM. Affirmed.

Cited: Ward v. Saunders, 28 N. C., 385; *Collais v. McLeod,* 30 N. C., 223; *Flemming v. Dayton, Ib.,* 455; *Jones v. Austin,* 32 N. C., 22; *Hilliard v. Phillips,* 81 N. C., 85; *Farmer v. Batts,* 83 N. C., 389, 392; *Blow v. Vaughan,* 105 N. C., 210.

FREEMAN LEATH AND OTHERS *v.* JACOB SUMMERS AND OTHERS.

In a petition to turn or change a public road, it must be alleged that the new road is necessary, or would be more useful to the public—otherwise the petition will be dismissed.

APPEAL from *Settle, J.,* Fall Term, 1842, of CASWELL.

This was a petition to alter a public road between certain (109) *termini* designated in the petition, and was brought up by appeal to the Superior Court. The petitioners merely prayed for an alteration of the road without assigning any reasons therefor. A copy of the petition had been served on the defendant, who appeared and opposed it. At the hearing the counsel for the defendant moved to dismiss the petition: 1st, for the want of sufficient matter set forth in the petition to enable the Court to found any decree thereon; 2d, because of a former decree on the same subject matter between these parties in the Court of Pleas and Quarter Sessions of Caswell, at April Term, 1841; and, in support of the latter petition, he produced a petition and the records of the County Court, showing a hearing of the petition at April Term aforesaid, upon the testimony of witnesses and argument of counsel, and a decree dismissing the said petition at the costs of the petitioners. His Honor being of opinion with the petitioners upon the latter question, refused the motion to dismiss upon that ground; but, being satisfied that the petition was so defective as not to authorize any decree, directed the same to be dismissed at the costs of the petitioners. From this decree the petitioners appealed to the Supreme Court.

W. H. Haywood, for the petitioners.
Morehead, for the defendant.

DANIEL, J. This was a petition to turn a road. The defendants moved the Court to dismiss it because there was no allegation in it, that the new road was necessary, or would be more useful to the public. The Court, for this reason, dismissed the petition, and the petitioners appealed. We are of opinion that the judgment of the Court was correct. By Rev. Stat., ch. 104, sec. 1, the County Court has power to order the laying out of public roads, *when necessary;* and to alter roads as often as occasion shall require, so as to make them *more useful.* The second section of the said act, after pointing out the mode of proceeding (110) in petitions of this kind, authorizes the County Court "to hear the allegations set forth in the said petition"; and, if sufficient reasons be shown, the Court has power to order the laying out or discontinuance of the said road, as the case may be. This petition has no general nor particular allegation in it, that the road sought to be estab-

lished, would either be necessary or useful to the public. The Court, therefore, had no power to hear witnesses to prove anything, except the allegations set forth in the petition; and these allegations ought to be such as to make a proper case, coming within the meaning of the act of Assembly. The petitioners did not move to amend their petition.

PER CURIAM. Affirmed.

Cited: Shoffner v. Fogleman, 44 N. C., 282.

(111)

STATE *v.* MICHAEL N. FISHER.

1. An indictment charging a person with disturbing "a religious assembly, commonly called a Quarterly Meeting Conference," cannot be supported.
2. The indictment should charge that the assembly had met "for divine worship," "divine service," "religious worship or service," or something of the same import.

APPEAL from *Manly, J.,* Fall Term, 1842, of CRAVEN.

The defendant was tried upon the following indictment, to which he pleaded not guilty, viz.:

"State of North Carolina, } *ss.* Superior Court of Law—
Craven County. } Fall Term, 1841.

The jurors for the State, upon their oath, present, that on the first day of October, one thousand eight hundred and forty-one, a certain assembly of people at a certain church or meeting-house, devoted to the service of Almighty God, situate, lying and being in the county of Craven, and commonly called Brice's Creek meeting-house, did meet and congregate for the purpose of public worship of God; and the said certain assembly of people, within the church or meeting-house aforesaid, in the county aforesaid, then and there did worship Almighty God, and engage in religious services; and after the said services and worship of Almighty God were finished and concluded, afterwards, to wit, on the said first day of October, in the year aforesaid, the said congregation and assembly of people, then and there in the said church or meeting-house, in the county aforesaid, did immediately meet and assemble together and hold a religious assembly, commonly called Quarterly Meeting Conference; and the jurors aforesaid, upon their oath aforesaid, do further present that (112) Michael N. Fisher, late of the county of Craven, afterwards, on the said first day of October, in the year of our Lord one thousand eight hundred and forty-one, whilst the said congregation and assembly of

people were so assembled as aforesaid, and engaged in the services, duties and business of the said religious assembly, commonly called Quarterly Meeting Conference, in the said church or meeting-house, commonly called Brice's Creek meeting-house, in the county aforesaid, unlawfully, wittingly and of purpose, maliciously and contemptuously did come into the said congregation, during the services of the said religious assembly, commonly called Quarterly Meeting Conference as aforesaid, and did then and there, unlawfully, wittingly and of purpose, maliciously and contemptuously disquiet and disturb the said congregation, by then and there talking and cursing and swearing with a loud voice, and also by cursing and abusing with a loud voice Robert J. Carson, he the said Robert J. Carson, being a regular minister of the gospel, and then and there presiding in the said religious assembly, and also by ridiculing and denouncing, then and there in a loud voice and in an insulting manner, the doctrines of our Saviour, as had been preached and held forth by the said Robert J. Carson, then and there from the pulpit during divine service as aforesaid, and by then and there making divers ridiculous and indecent actions and grimaces, and otherwise misbehaving himself during the performance and business of the said religious assembly in said church or meeting-house, to the great disturbance, insult and common nuisance of the orderly people then and there assembled, and against the peace and dignity of the State.

Upon the trial, it was proved that the defendant was one of a congregation of persons, who assembled at a meeting-house in Craven County, for the worship of Almighty God; that after divine service was concluded, and the assembly dismissed, certain members of the society, to the number of ten, or thereabouts (including the preacher), assembled in the meeting-house, and formed themselves into what is called "Quarterly Meeting Conference," for the transaction of business con-
(113) nected with the temporal welfare of the society; that soon after they were organized, and while the people were dispersing, the defendant came near the door of the meeting-house, and in a very angry manner walked backwards and forwards repeatedly before it, using loud, profane and threatening language, so that those persons, who were within the house, as well as those who stood around, heard him. In behalf of the defendant, it was contended that there should not be a conviction, for the reason that it was not a congregation engaged in religious exercise, and this was the charge. But the presiding judge believed, and so stated, that the substance of the charge was the disturbing of an assembly of *religious people,* not engaged in divine worship, but whilst they were performing duties and services of a secular character, appertaining to their association; and the Judge instructed the jury, that if they believed from the evidence, that ten or

more persons, *congregated* for such purpose had been disturbed and interrupted in the performance of their business by the defendant, they might and should find him guilty of the charge in the bill. The jury returned a verdict of guilty. Upon a motion in arrest of judgment, the Court arrested the judgment upon the ground that the indictment does not set forth any criminal offense. It does not charge that the assembly disturbed was engaged in the worship of God, or engaged about any other *public* duty, and such allegation is indispensable to make the charge in the bill a public wrong, proper to be redressed by complaint of the State. From this judgment, the Solicitor for the State appealed to the Supreme Court.

Attorney-General and *J. H. Bryan* for the State.
No counsel for the defendant.

RUFFIN, C. J. The points arising upon the record in this case were, we think, correctly apprehended, and decided upon proper principles in the Superior Court.

The offense charged is, that the defendant disturbed "a religious assembly, commonly called a Quarterly Meeting Confer- (114) ence," by certain acts set forth in the indictment. But it does not state the purpose of that assembly, and, particularly, that it was for divine worship. Without possessing precise information of the province of that body, which is known as "Quarterly Meeting Conference," among one of our respectable religious sects, we can only say, that we suppose it is not a meeting for divine service by worship, but for the secular service of the society in its temporal matters, or as a local ecclesiastical tribunal, for the purpose of discipline. But whether that be the true character of the body or not, certainly we are so to consider it on this indictment; for it expressly states, that, "after the religious services and worship of Almighty God were finished and concluded," the defendant committed the disorderly acts charged. Calling it "a religious assembly," means nothing more in this case than "an assembly of religious persons," who were disturbed by the defendant, but not while engaged in the exercise of their mode of worship. In the opinion of the Court, that, although a grossly indecent and immoral act, is not a criminal offense, punishable by indictment. There was no interference with the rights and duties of conscience, which are secured both to individuals and congregations, by the guaranty in the Constitution of liberty of worship. That is an offense, which cannot be described either in a statute or an indictment, without the use of such general terms as "divine worship," "divine service," "religious worship or service," or the like; or by some more special phrase, denoting the interruption or hindrance of the performance of a specific part of the religious service

adopted by the church or sect. Thus our statutes of 1800 and 1807 (Rev. St., c. 99, s. 8, 10) punish disorderly conduct at churches or meeting-houses, at which "persons are assembled for divine worship." In like manner the precedents, whether at common law or under the English acts of Parliament, use the same language; some of which may be found, 2 Chitty's C. L., 21, 24 to 34. In *S. v. Jasper,* 15 N. C., 323, the indictment was comformable to those precedents, using, (115) in one part of it, the words "public worship of God," and in another part, "during the performance of divine service." Nor can the defendant be regarded as hindering a legal—as contradistinguished from a religious—duty, in the performance of which, men are brought together in masses, in order to exercise political functions, or execute public service, such as attending an election or holding a Court. The interruption of such a duty by violence or menace, must be an injury to many individuals, and a detriment to the community; the duty being imposed by public law, and concerning the public welfare. But the association, on which this outrage was practised, though formed for purposes undoubtedly lawful and useful, is yet entirely voluntary. Not being required by the law, nor, like an assemblage of religious worshipers, its inviolability assured by the Constitution, the law cannot treat, as public wrongs, acts which incommode it as a private, secular and voluntary association, but can only punish them, when they amount to offenses against the persons of the individuals, who compose the meeting or some other specific offense. There must be some such restriction upon the doctrine, else we should be obliged to hold any conduct indictable, which annoys two or more persons called together for a purpose not unlawful; which would be extending the principle much further than it has been, or ought to be carried.

It was not even contended at the bar, that the indictment could be sustained, as one for blasphemy, by that part of it which states, the "ridiculing and denouncing, in an insulting manner, the doctrines of our Saviour, as had been set forth and preached by the minister, during the divine service," which had preceded, and it was properly not so contended. For, if an indictment for blasphemy will lie in this State, the present is clearly not one, since it does not state the doctrines set forth by the preacher, nor the blasphemous language of the defendant, whereby it might appear that the doctrine of the preacher is a doctrine of christianity, as known to the law, and that the object of the defend- (116) ant was not to discuss a controverted point of that religion, but maliciously to undermine or subvert the whole system.

In no point of view, therefore, can the indictment be supported.

PER CURIAM. Affirmed.

Cited: *S. v. Jacobs,* 103 N. C., 402; *S. v. Ramsay,* 78 N. C., 453.

STATE *v.* WILLIAM B. DUNKLEY.

1. In an indictment for murder, where the assault is alleged to have been committed in some county in this State, and the death to have occured in another State, it is not necessary that the indictment should conclude *against the form of the Statute.*
2. By the Statute (Rev. St., c. 35, s. 15) no offense is newly created, nor raised to a higher offense, nor an additional punishment annexed.
3. That part of the definition of murder expressed in the terms "the King's peace" refers not to the place of the assault and death, but to the state and condition of the person slain, as being or not being entitled to the protection of the English laws: for example, whether he be a subject or an alien enemy or traitor in arms, or, in more ancient times, an infidel, or guilty of a praemunire.

APPEAL from *Settle, J.*, Fall Term, 1842, of STOKES.

The defendant was tried upon the following indictment:

State of North Carolina, Stokes County—*ss.*

Superior Court of Law, begun and held on the second Monday (117) after the fourth Monday of September, A. D. 1842.

The jurors for the State, upon their oath present, that William B. Dunkley, late of the said county of Stokes, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the thirteenth day of August, in the year of our Lord one thousand eight hundred and forty-two, with force and arms in the county aforesaid, in and upon one Archibald McHone, in the peace of God and the State, then and there being, feloniously, willfully and of his malice aforethought, did make an assault, and that the said William Dunkley, with a certain knife of the value of six pence, which he the said William Dunkley in his right hand then and there had and held, the said Archibald McHone in and upon the right hip, and the left side of the back near the backbone of him the said Archibald McHone, then and there feloniously, willfully, and of his malice aforethought, did strike and thrust, giving to the said Archibald McHone, then and there with the knife aforesaid, in and upon the said right hip and the left side of the back near the backbone of the said Archibald McHone, several mortal wounds, each of the breadth of three inches and of the depth of six inches; of which said several mortal wounds the said Archibald McHone, from the said thirteenth day of August, in the year aforesaid, until the twenty-ninth day of the same month of August, in the year aforesaid, as well in the county aforesaid, as in the county of Patrick, in the State of Virginia, did languish and languishing did live, on which said twenty-ninth day of August, in the year aforesaid, the said Archibald McHone, in the said county of Patrick, in the State of Virginia, of the said several mortal wounds died; and so the jurors aforesaid, upon their oath

aforesaid, do say, that the said William B. Dunkley the said Archibald McHone, in manner and by the means aforesaid, feloniously, (118) willfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the State.

JOHN F. POINDEXTER, Sol'r.

Upon the trial of this Indictment, the jury returned a verdict of guilty. The prisoner's counsel then moved in arrest of judgment, upon the ground that the indictment did not conclude *against the form of the Statute.* This motion was overruled, and the Court proceeded to pass judgment, from which the prisoner appealed to the Supreme Court.

Attorney-General for the State.
J. T. Morehead for the defendant.

RUFFIN, C. J. This is an indictment for murder, found in Stokes, in which the assault is laid to have been committed in that county, and the death to have taken place in Patrick county, in Virginia. After conviction and sentence of death, the prisoner appealed to this Court; and here a motion has been made in arrest of judgment, because the indictment does not conclude *contra formam statuti.*

The Court, after duly considering the argument in behalf of the prisoner, is under the necessity of holding that the indictment is properly framed.

The act of 1777, in requiring pleas of the State to be commenced in the district wherein the offense was committed, but followed the principle of the common law, that the cognizance of crimes is local. It seems to the Court, that the subsequent act of 1831, was intended for the sole purpose of modifying that provision in particular cases, by conferring a jurisdiction to try indictments for murder or manslaughter, where the whole offense was not perpetrated or was not fully constituted within one county or within this State. It provides, Rev. St., c. 35, ss. 14, 15, first, that "in all cases of felonious homicide, where the assault shall have been committed in one county of this State and the person as- (119) saulted shall die in any other county thereof, the offender shall and may be indicted and punished for the crime in the county where the assault was made"; and, in the next place, that "in all cases of felonious homicide, where the assault shall have been committed in this State, and the person assaulted shall die without the limits thereof, the offender shall and may be indicted and punished for the crime in the county where the assault was made, in the same manner to all intents and purposes as if the person assaulted had died within the limits of this State." Here is no offense newly created, nor raised to a higher offense, nor an additional punishment annexed; in any of which cases,

it is admitted, the indictment ought to conclude *contra formam statuti.* In respect to a case, which occurs wholly in this State, the act is like that of 2 and 3 Ed., VI, c. 24, except that the English Statue directs the trial to be in the county wherein the person died. It enacts that "where any person shall be feloniously stricken in one county and die of the same stroke in another county, an indictment thereof, found by jurors of the county where the death shall happen, shall be as good and effectual in law as if the stroke had been given in the same county where the party shall die."

Mr. East says, this statute created no new felony, but merely removed the difficulty which existed in the trial. 1 East Cr. L., 365. Indeed it is obvious, that it provides only a mode of trial for a known existing offense, "where any person shall be feloniously stricken," and die thereof, without defining or enacting what shall be such felonious striking, or what the punishment, but leaving that to the law as it stood. The same observations apply to another statute connected with this subject, that of 28 Hen. VIII., c. 15, which provides for the case of both the stroke and death taking place at sea. The words are, "that all murders, etc., committed in and upon the sea, etc., shall be enquired, tried, determined and judged, in such shires as shall be limited by the King's commission, as if such offense had been committed upon the land." So, likewise, of Stat. 2 Geo. 2, c., 21, which embraces the case of the stroke in England, and the death without it, or *vice versa,* of which the language is "that an indictment thereof, found by the jurors, (120) etc., shall be good and effectual," etc. In prosecutions authorized by those acts, the indictments, as it seems, have always concluded at common law. Arch. Cr. Pl., 22, 57, 58; Dougherty's Cr. Cir., 295; Cro. Cir. Com., 278, 281; 3 Chit. Cr. L., 783. It is true, offenders are thereby punished, who could not be punished before. But the reason, why they were not punishable before, was solely, that no Court had authority to try them. It was not because the crime did not exist, for the crime, murder, is the killing any person in the peace of the State, with malice aforethought, and that is constituted alike by killing with the evil disposition, be the places of assault and death where they may. Language of precisely the same character is found in our act. It does not say, that killing a person with malice, when the stroke is in one county, and death in another county or in another State shall be deemed murder, or that on conviction the party shall be deemed a felon, and suffer death without the benefit of clergy. It does not profess to define "felonious homicide," or to constitute that crime by any particular acts, but merely says, that, in certain cases of felonious homicide, the offender may be indicted, and, of course, tried and punished in the county where the stroke was given—meaning, though it does not, like St. 2 and 3 Ed.

VI., expressly say so, "in the same manner as if the death had happened in the same county where the stroke was given." As the act of 28 Hen. 8, c. 15, says, "all murders committed on the sea shall be tried in a shire," by commission of Oyer and Terminer; so our act says, "in all cases of felonious homicide, etc., where, etc., the offender may be indicted," etc. Besides, the character of our enactment may be further deduced from the circumstance that it is found in the Revised Statutes, in the 35th chapter, on "Criminal Proceedings," and not in the preceding chapter on "Crimes and Punishments."

It was, however, argued at the bar, that it was an essential part of the definition of murder, that the person slain should be in the peace of the State; and that, where the death occurs in another State, that requisite is deficient in the crime at common law, and, therefore, it cannot be
(121) an offense against this State, unless made so by statute. And upon that ground a distinction was taken between the English statutes and ours, inasmuch, as it was said, the statutes both of Ed. V, and of Hen. VIII provide for cases of killing, in which the whole of the transaction occurred either in England, or within the jurisdiction of England, as exercised by her admiralty Court. But we think the reasoning is not sound. That part of the definition of murder expressed in the terms, "in the King's peace," refers not to the place of the assault and death, but to the state and condition of the person slain, as being or not being entitled to the protection of the English laws: for example, whether he be a subject or an alien enemy, or traitor in arms, or, in more ancient times, an infidel or guilty of a *præmunire*. Then, it is also a mistake to say, that the acts are confined to cases, in which every part of the transaction was within the jurisdiction of England, either as being within some of her territories, or on board of her ships. The act of Geo. II, before mentioned, provides for the case of one stricken in England and dying on the sea, or "at any place out of England"; and we do not find that this has received a different construction from that of the previous statutes. We find an adjudication, however, upon another statute, which shows that the question does not depend on the ground supposed, but that the indictment is to conclude at common law, although *no part* of the transaction was within the British dominions or jurisdiction. By the Stat. 33 Hen. VIII, c. 33, it is enacted, "that if any person, being examined before the King's council upon any murder, do confess such offenses, etc., then in such case a commission of Oyer and Terminer shall be made to such persons and into such shires and places as shall be appointed by the King, for the speedy trial, conviction or delivery of such offenders; which commissioners shall have power and authority to enquire, hear, and determine such murders within the shires and places limited by their commission by such good and lawful

men as shall be returned before them, in whatever other shire or place within the King's dominions or *without,* such offense of murder, so examined, was done or committed." In *Rex v. Sawyer,* Russ. (122) & R. Cr. Ca., 294, a British subject was indicted for the murder of another British subject, "at Lisbon, in the kingdom of Portugal, in parts beyond sea without England," and the indictment was at common law. The case was argued before the twelve Judges, and they held, that being for a common law felony, committed abroad, but made triable in England, under the 33d Hen. VIII, the indictment was right. That judgment is directly in point, and is decisive of this case against the prisoner.

PER CURIAM. Affirmed.

Cited: S. v. Hall, 114 N. C., 919.

(123)

CHARLES MITCHELL *v.* JANE FLEMING.

In a proceeding by inquisition for a forcible entry and detainer, before a writ of restitution can be awarded, the jury must find by their verdict that the party, forcibly dispossessed, had either a freehold or a term for years in the land, of the possession of which he has been deprived.

APPEAL from *Pearson, J.,* Fall Term, 1842, of BURKE.

Recordari in Burke, to certain Justices of Caldwell County, requiring them to bring before the Court, etc., the proceedings in an inquisition of forcible entry and detainer lately had before them in the county of Caldwell, at the instance of Jane Fleming against Charles Mitchell. The proceedings being returned appeared to be as follows:

State of North Carolina, Caldwell County—*ss.*

Andrew H. Tuttle and Alexander Perkins, Justices of the Peace for the said county, to the Sheriff of said county—Greeting:

Whereas, complaint has this day been made to us, by William Fleming, that a forcible entry has been made by Charles Mitchell, upon the lands and possession of his mother, Jane Fleming, and forcibly detains possession of the same, contrary to the statute in such cases made and provided. We therefore command you, in the name of the State, to cause to come before us at the dwelling-house of Jane Fleming, on the waters of Lower Creek, in the county of Caldwell, on the 14th day of this instant, eighteen sufficient and disinterested men, of the neighborhood of Jane Fleming, on the waters of Lower Creek, in the (124) county aforesaid, being freeholders, to enquire upon their oaths of a certain forcible entry and detainer, made with strong hand (as it is

said), by Charles Mitchell and others, into the lands and premises in the possession of Jane Fleming, tenant for life of William Fleming and Robert Fleming, lying and being in the county aforesaid, on the waters of Lower Creek, against the form of the statute in such cases made and provided. And have you then and there this precept, and this you shall in no wise omit, etc.

Given under our hands and seals, this 13 January, 1842.

(Signed and sealed by the Justices.)

Upon which precept, the Sheriff returned that he had summoned the following jurors (naming them).

Charles Mitchell was also summoned in writing to attend at the same time and place. The Justices having met at the time and place appointed, proceeded to draw and empanel a jury of twelve persons from the names returned by the Sheriff. Before doing this, Charles Mitchell, by his attorney, appeared and tendered the following traverse in writing, to wit: Charles Mitchell comes in his own proper person, before the Justices, Andrew Tuttle and Alexander Perkins, now sitting in judgment on the case wherein the said Charles Mitchell is charged with being guilty of a forcible entry and detainer, and traverses the force alleged against him in that he entered into the premises as tenant for years under a lease from the heirs at law of Robert Fleming, Sen., dec'd., and James Fleming, dec'd., to wit, William Fleming, Robert Fleming, Isabella Fleming, and others, and that he now holds possession by virtue of the said lease, and that the said lease has not yet expired.

CHARLES MITCHELL.

This paper the Justices objected to; but they proposed that if the said Charles would show cause on oath why the trial should not now be taken up, his affidavit would be duly considered, and if the reasons or (125) causes of delay, alleged by him were good and sufficient, time would be allowed him to be prepared for a hearing. This propositioned being declined, the Justices, assisted by the Sheriff, proceeded to draw a jury, when the following persons were drawn (here follow the names of the jurors), who being duly sworn and empaneled to inquire into the matter of a forcible entry and detainer made by Charles Mitchell, in and upon the land and premises of Jane Fleming, the following evidence was submitted to them on the part of the said Jane: First, a copy of the last will and testament of Robert Fleming, deceased, the husband of Jane Fleming, and also a copy of the last will and testament of James Fleming, deceased, one of the legatees under the last will and testament of the said Robert, who appears from the conveyances submitted to the Justices and jury, to have been the original owner of the premises in dispute; from all of which it appeared satisfac-

tory to the Justices and jury, that Jane Fleming has a right as tenant for life to the possession of the same. Secondly, George Holloway being sworn, deposed that he was present, and heard William Fleming (who has for some years acted as the agent of his mother, Jane Fleming, in all her business transactions), forbid Charles Mitchell from operating and digging for gold on the land of the said Jane—that Charles Mitchell replied it was a hard case to have discovered or opened a mine, and have to lose it—that the said Charles, after being thus forbid by the said William to operate and dig for gold on the land and premises in dispute, did continue to dig and operate on the land and premises in the possession of the said Jane. From which testimony, offered altogether on the part of the said Jane, the said Charles refusing to take any part in the proceedings, the jury returned the following verdict, to wit: "The undersigned jurors duly summoned etc., etc., do find that Jane Fleming was in peaceable and uninterrupted possession of the premises claimed by her for many years, and that lately, heretofore, the said Charles Mitchell did enter upon the same, and is now in possession of the same, and the same doth hold forcibly with a strong arm contrary to law and to the disturbance of the State." (This (126) verdict was signed by the jurors, and attested by the Justices.)

Upon the return of this verdict, Charles Mitchell, by his attorney, appeared, and again tendered a traverse as before. The Justices, however, without regard to the traverse offered by the said Charles, issued to the Sheriff the following precept: (Here follows a copy of the writ of restitution.) "The foregoing statement was certified by the Justices in their return to the *recordari.*"

This case coming on for hearing upon this return, the counsel for Charles Mitchell moved to quash the proceedings had before the Justices, and for a writ of re-restitution; first, because the Justices refused to receive his traverse in writing; secondly, because the finding of the jury did not set out the estate of Jane Fleming, the relator, so that it might appear whether she was entitled to the relief sought for. Upon the first ground, the Court was of opinion that as Charles Mitchell was present when the Justices were acting in the premises, and was informed by them that if he was not ready he might continue the case to some day when he would be heard, he did, in fact, have the benefit of his traverse on the question of force. Upon the second ground, the Court was of opinion, that, as the return of the jury set forth merely that the relator had been in possession for many years, without stating that she had either a freehold estate or a term for years, it was in this irregular and insufficient to warrant the Justices in ordering a writ of restitution. It was, therefore, ordered that the proceedings be quashed, and a writ of re-restitution issued. From this judgment, the relator appealed to the Supreme Court.

Hoke for the plaintiff.
Caldwell for the defendant.

DANIEL, J. In this inquisition upon a *forcible detainer,* the jury "do find that Jane Fleming (the relator) was in the peaceable and uninterrupted possession of the premises claimed by her for many years, and that lately, heretofore, Charles Mitchell did enter upon the same, and is now in possession of the same, and the same doth hold forcibly with a strong arm," etc. It is true, the Justices certify that certain evidence was given, "from which it appeared satisfactorily to the Justices and the jury, that the relator had a right as tenant for life, to the possession of the same." But the inquisition of the jury is afterwards given distinctly in the very words of the jury and signed by the jury, and in it nothing of that kind appears, but it is in the words already quoted. Upon the finding of the jury thus set forth, the two Justices who held the inquisition, issued a writ of restitution to the Sheriff, who restored the relator to the possession. The Judge was of opinion that the writ of restitution should not have been awarded upon this finding by the jury, and he ordered re-restitution to be made. We are of opinion that the judge was right. The second section of the act (Revised Statutes, ch. 49) authorizes the Justice or Justices who hold the inquisition, when the jury shall find the force as charged, to cause the
(128) party put out to be re-seized or re-possessed of the land so entered and holden as aforesaid; and the said party to be put in full possession of the said lands and tenements. But it is to be observed, that it is not upon every dispossession, either by a forcible entry or a forcible detainer, that a writ of restitution is to be awarded. By the 6th section of that statute, this writ is to be granted, only when the relator has a freehold estate, or a term for years in the land. And before the writ of restitution can be granted, the jury must find in their verdict that the relator had one or the other of these estates in the land. In this case, the jury did not find that Jane Fleming had either a freehold estate or a term for years. She might have been only a tenant at will, and then the writ of restitution could not legally have issued. *Sherrill v. Nations,* 23 N. C., 377. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: S. v. Anders, 30 N. C., 18; *Watson v. Trustees,* 47 N. C., 213; *Grissett v. Smith,* 61 N. C., 165; *Perry v. Tupper,* 70 N. C., 539.

(129)

JOHN LEATHERWOOD *v.* J. H. MOODY, AND OTHERS.

1. The writ of *recordari* in our practice may be issued to bring up proceedings before a Justice, after judgment rendered, for either of two purposes. The one, and the most usual, is, to have a new trial of the merits, and this is in the nature of an appeal. The other is for the purpose of reversing the judgment, because of error, and this is in the nature of a writ of error, or writ of false judgment.
2. One defendant cannot ask for a reversal of a joint judgment against himself and another.
3. When a *recordari* in the nature of a writ of false judgment has been sued out and the plaint returned, the petitioner or plaintiff in the writ ought to assign his errors.
4. If there be error in the proceedings, which does not appear on the plaint as recorded, the Court, upon suggestion and a proper case made, will by *mandamus* order the magistrate to record it more fully.
5. When no error is assigned or none appears, the proper course is to dismiss the *recordari* and award a *procedendo*.
6. Where the Court orders the case to be put on the trial docket, this is tantamount to a refusal to dismiss the writ, and granting a new trial.

APPEAL from *Pearson, J.*, Fall Term, 1842, of HAYWOOD.

The proceedings in this case in the Court below, are fully set forth in the opinion delivered in this Court.

Clingman for the plaintiff.
Francis for the defendant.

GASTON, J. On 8 February, 1841, Nathan G. Howell presented his petition on oath to one of the Judges of the Superior Courts, wherein it is set forth that John Leatherwood had obtained be- (130) fore a Justice of the Peace of the county of Haywood a joint judgment against John H. Moody, adm'r. of John Moody, dec'd, and the said Howell, for the sum of $100, besides interest; that the said Howell was not present when the said judgment was rendered, nor had been served with any warrant to appear before the Justice, nor notified of the existence of any warrant and that upon the said judgment, an execution had been issued to a constable of the said county, who was about to levy the same on the property of the petitioner; and wherein it is prayed of his Honor to cause to be issued, "the writ of *recordari* and *supersedeas*, and the writ of false judgment to be directed to the said Justice, constable and plaintiff, commanding them to desist from all further proceedings in the said case, and commanding the magistrate to make up and certify to the honorable Court (the Superior Court of Haywood), a record of the proceedings in said case had before him, that the said judgment may be reversed"; and the petitioner further prays for "such other and further relief as the nature of his case may

require." Upon this petition, the Judge made an order, directing the Clerk of the Superior Court of Haywood, to issue the writs of *recordari* and *supersedeas* prayed for. Upon this order there issued writs of *supersedeas* and *recordari*. The latter was directed to the coroner of Haywood County, commanding him "to cause the plaint to be recorded between John Leatherwood, plaintiff, and Nelson G. Howell, defendant, which was had before D. C. Howell, a Justice of the Peace for said county, and have it, together with this writ, before the said Court, on the Monday after the fourth Monday of March, 1841, and to prefix the same day to the parties, that they may be there ready to proceed in said plaint." In obedience to this writ, at the day named the coroner returned the plaint, and thereupon it appeared, that on 16 November, 1839, a warrant was issued by the Justice against John H. Moody, administrator of John Moody, Sen'r., deceased, and Nelson G. Howell, to answer to John Leatherwood, of a plea due by note of hand—
(131) that on the same day, a judgment by confession was rendered by the said Justice, for the sum of $100, principal money, with interest from 26 March, 1838—that execution of said judgment was stayed by giving Harben Moody as security—and that execution on the judgment against the property of the defendants, was issued by another Justice, on 27 January, 1841. After the plaint was returned, affidavits were filed, but on whose part does not appear, and among these was the affidavit of the Justice who rendered the judgment, setting forth, that a few days before it was rendered, the petitioner, who was surety for John Moody, deceased, in a note for $100 to John Leatherwood, had requested that a warrant might be sued out on the note, and to save expense, that it should not be put into the hands of an officer, and had desired the Justice to enter up judgment as against him without the warrant being served upon him, or any notice of the day or place of trial; that in pursuance of this request an arrangement had been so made, and the Justice, conceiving himself authorized as against the petitioner, entered the judgment as set forth in the plaint in the absence of the petitioner, and without any process being served on him. The case was continued from term to term in Court, without any special order or motion thereon, until the Fall Term, 1842, when it was transferred to the trial docket by an order *nunc pro tunc,* as of the preceding term, and the defendant had leave to plead thereto. It was then moved by the defendant to dismiss the proceedings, because the warrant had not been served on Howell, or to be permitted to plead this matter in abatement; but the plaintiff insisted, and the Court held, that there was not sufficient ground for this motion, and the defendants declining to enter any pleas, there was a judgment rendered against them by default upon the specialty filed and set forth in the plaint. From this judgment they appealed to this Court.

The writ of *recordari* in our practice may be issued to bring up proceedings before a Justice, after a judgment has been rendered, for either of two purposes. The one, and the most usual, is to have a retrial of the merits, and this is in the nature of an appeal. The other is for the purpose of reversing the judgment because of (132) error, and this is in the nature of a writ of error or a writ of false judgment. The *recordari* here issued does not indicate the purpose for which it was granted, but, judging from the petition, its object, or at all events, its primary object, would seem to be, to obtain a reversal of the judgment for error, because the warrant had not been served upon the petitioner. Considered in this light, however, it was irregular, and must, on objection thereto, have been dismissed, because the complaint was that of the petitioner alone, asking for a reversal of a joint judgment against himself and another. No objection of this sort, however, appears to have been made, and from the case we collect that it was regarded as one, wherein both of the defendants acted, and were parties through their attorneys.

When a *recordari* in the nature of a writ of false judgment has been sued out and the plaint returned, the petitioner or plaintiff in the writ ought to assign his errors. If there be error in the proceedings, which does not appear upon the plaint as recorded, he ought to make a suggestion to that effect, and the Court will, upon a proper case made by *mandamus,* order the magistrate to record it more fully. In this case no suggestion to that effect was made, nor were any errors assigned. Perhaps it was understood that the error was sufficiently assigned in the petition, and if this error had appeared on the plaint and the judgment had been therefor reversed, we should not have deemed this expeditious course erroneous. But upon the face of the plaint no such error appears. A judgment rendered against the defendants "upon confession," must be understood on a confession then and there made before the Justice. He certainly has no power to render a judgment without process, unless the parties personally appear before him. This judgment, therefore, could not have been reversed, because of error appearing in the proceedings; and the matters of fact appearing *dehors,* upon affidavit or otherwise, could not have been rendered available for that purpose. The regular course, in our opinion, would then have been to dismiss the *recordari* and award a *procedendo.* But instead of doing this, which we think the plaintiff, in the judgment or defendant in the *recordari* had a right to require, the Court ordered the case (133) to be put on the trial docket. This, according to our settled practice in the analogous case of *certiorari,* was tantamount to a refusal to dismiss the writ, and granting a new trial. It does not, indeed, appear at whose instance this was done, but as it was a course injurious to the

plaintiff in the proceedings before the Justice, and which could be beneficial only to the defendants, it must have been ordered at their instance, and, perhaps, without objection from the plaintiff. The affidavits disclosed the fact, which did not appear on the record, that one of the parties, against whom judgment was rendered, was not present thereat, nor had been served with process to attend thereat; and the petition, besides praying for a reversal of the judgment, had prayed for such other and further relief as the nature of the petitioner's case might require. The *recordari* was thus converted from a writ in the nature of a false judgment into one to have the judgment set aside, and to have a new trial on the merits. This was irregular and erroneous, but of this error and irregularity the appellants cannot complain, and their adversary has not complained.

The proceedings, after the cause was put upon the trial docket, were in accordance with the principles, which obtained the sanction of this Court in *Petty v. Jones,* 23 N. C., 409. We see no error in the case, to which the appellants can rightfully except.

PER CURIAM. Affirmed.

Cited: Webb v. Durham, 29 N. C., 132; *Steadman v. Jones,* 65 N. C., 391; *Wilcox v. Stephenson,* 71 N. C., 411; *S. v. Swepson,* 83 N. C., 588; *Weaver v. Mining Co.,* 89 N. C., 199; *Hartman v. Spiers,* 94 N. C., 153; *S. v. Griffis,* 117 N. C., 714.

(134)

DEN ON DEM. OF WILLIAM BROWN *v.* MARTHA BROWN AND OTHERS.

In a devise, before the act of 1827 (Rev. St. c. 122, s. 11), the words "if my son should die without lawful issue" unexplained, imported in a legal sense, the failure of issue at any indefinite time, whenever it might happen; and the remainder limited upon such a contigency was void.

APPEAL from *Bailey, J.,* Fall Term, 1842, of HERTFORD.

On the trial of this ejectment the following facts were agreed upon: Josiah Brown, Sen., died in 1801, having duly published his last will and testament in writing in due form to pass real estate, which will was subsequently admitted to probate in the proper Court. In the said will are the following clauses: "It is my will and desire, that my loving wife, Mary Brown, have the use of one-half of all my lands in Hertford County, and the other part to my son, Josiah Brown, and after my wife's decease or marriage, I give and bequeath to my said son Josiah, the whole of the remainder of my lands, to him and his heirs forever." Also, "it is my will and desire, my loving wife, Mary Brown, have the

use of all the remaining part of my property of every kind during her natural life or until marriage, and after her decease or marriage, to be equally divided between my three youngest children, Mary, Priscilla and Martha Brown, and provided, nevertheless, if any of my sons aforementioned should die without lawful issue, that then, in such case, I give to my three youngest daughters, Mary, Priscilla and Martha Brown, the lands I have bequeathed to such deceased, in as full and ample a manner, to all intents and purposes, as if the first bequest had been to them the said Mary, Priscilla and Martha, to be equally divided (135) among them." The land in dispute was admitted to be that devised in the first clause aforesaid to Mary Brown for life, and after her decease or marriage, to Josiah Brown, one of the sons of the testator. It was further admitted that the said Mary departed this life about two years ago, before the bringing of this action, never having married, and that Josiah Brown had died before the said Mary, and without leaving or having had any issue. It was further admitted, that if Josiah Brown, the devisee, had an absolute estate in the said land, then the lessor of the plaintiff, who claimed under the said Josiah Brown by purchase, was entitled to recover, but if the limitation in the said will to Mary, Priscilla and Martha Brown was not too remote, then the lessor of the plaintiff was not entitled to recover.

The jury found in favor of the lessor of the plaintiff, subject to the opinion of the Court upon the foregoing case agreed; and the Court, being of opinion that the limitation to the said Mary, Priscilla and Martha, was too remote, gave judgment in favor of the plaintiff. From this judgment the defendants appealed.

Bragg for the plaintiff.
No counsel for the defendant.

RUFFIN, C. J. It is not to be denied, that at common law it was settled, that the words, "if my son should die without lawful issue," unexplained, imported, in a legal sense, the failure of issue at any indefinite time, whenever it might happen. And this was true, both in respect of real and personal property. There is in England a vast number of cases on this branch of the law; beginning with that of *Burford v. Lee,* 2 Freeman, 210, and coming down to a very late day. Recently, they have been elaborately reviewed by Lord BROUGHAM, upon an appeal from the Vice Chancellor, in *Campbell v. Harding,* 2 Rus. & Mylne, 390, and the doctrine reasserted. In this State, the same con- (136) struction has prevailed. *Sutton v. Wood,* 1 N. C., 399. In *Davidson v. Davidson,* 8 N. C., 163, the point was raised once more, and the Court earnestly pressed to receive these words in their natural sig-

nification, of leaving issue living at the time of the death of the parent, so as to support a limitation over. But the Judges, though with the utmost reluctance, felt obliged by authority to hold that the limitation was too remote, although the words there were, "die without having issue." They were not insensible, that this technical construction often defeated the intention of testators, and would readily have laid hold of anything to take the case out of the rule; yet it had so long prevailed, and so much property depended on it, that no power, short of that of the Legislature, was competent to abrogate or modify it. Finally, however, the Legislature did interfere and pass the act of 1827, in which it is declared, that "dying without heirs or issue," shall be interpreted, "dying without heirs or issue living at the time of the death" of the first taker; and thus this mischief stands corrected. But the act expressly provides that the rule of construction therein contained shall not extend to any will executed before 15 January, 1828. Consequently, it does not operate on this will, which was made in 1801.

PER CURIAM. Affirmed.

Cited: Weeks v. Weeks, 40 N. C., 116; *Gilson v. Gilson,* 49 N. C., 427; *Buchanan v. Buchanan,* 99 N. C., 312.

DEN EX DEM. FRANCIS DAVIS *v.* WILLIAM R. ABBOTT.

1. A Sheriff may at his discretion sell land, under an execution, by the acre.
2. When he sells by the acre, he must have a survey made of the land sold, or the boundaries so described in his deed to the purchaser, as to identify the part sold; and he must be particular in describing the locality of the acres to the bidders at the sale.
3. When an officer has levied a Justice's execution on land and returned it to Court, his return of a copy of the notice given to the defendant, with his official certificate that he has served it, is sufficient *prima facie* evidence of such service.
4. It is not necessary that the Court, in an order for the sale of land so returned levied by the constable, should set forth that the notice had been proved to them to have been previously given.

APPEAL from *Bailey, J.,* Fall Term, 1842, of CAMDEN.

Ejectment. The following facts were agreed upon: The lessor of the plaintiff showed title in himself to the premises, and that the defendant was in possession at the time the suit was brought. The defendant then showed a judgment against the lessor of the plaintiff, before a Justice of the Peace, and an execution thereon, which execution for want of goods and chattels, was levied upon his lands, and returned to May Term, 1827, of Camden County Court, at which term an order of sale was

made, and execution issued from that Court, returnable to the ensuing August Term, 1827, of the said Court. Under this execution, the Sheriff exposed the lands of Davis to sale by the acre, and sold so much of the entire tract as would satisfy the execution, and executed his deed to the purchaser, and the purchaser afterwards sold the land to the defendant Abbott. The defendant showed another judgment obtained against the lessor of the plaintiff, before a Justice of the Peace, (138) the execution on which, for want of goods and chattels, was also levied upon the lands of Davis, and returned to November Term, 1831. At that term, a notice was returned to the said Court by the constable, of which the following is a copy:

"MR. FRANCIS DAVIS:

Sir—I have levied an execution at the instance of James Dozier, on your lands and tenements, that is to say, levied on the part of upland adjoining George Ferebee, Esq., and Nelson R. Cartwright and others, and levied on another piece of upland, adjoining the lands of Washington Brite, Charles Whitehurst, and others, and levied on one piece of Juniper Swamp, situate on the New Swamp Bridge, and on the Currituck line, and adjoining the lands of Washington Brite and others, and I shall return the said execution to the next County Court of Pleas and Quarter Sessions, to be held for the county of Camden, at the Courthouse in Camden, on the 7th Monday after the 4th Monday in September, 1831, at which time and place you can attend if you think proper. This 5 November, 1831. WILSON A. JONES, Constable.

It appeared by the return on the notice, that the constable had duly served the same on Davis. At the term the entry on the docket was in the following words, viz.:

"J. W. Dozier *v.* Francis Davis. } Execution levied on land. Ordered that execution issue."

From that term execution issued, and the land was sold by the Sheriff to the defendant Abbott.

The lessor of the plaintiff insisted as to the first sale, that the purchaser got no title, because it appeared that the Sheriff sold so much of the land as would satisfy the execution, whereas he should have sold the entire tract, and, as to the last sale, he insisted that there was no evidence that it was proved to the Court that notice had been given to the defendant of the levy upon the land; that before the Court (139) ordered the said sale, it should have been proved that the levy was made, and that the Court should have adjudged, that notice of the

said levy had been given to the defendant. His Honor was of opinion, that the notice and sale were sufficient to divest the title, and under his instruction the jury returned a verdict for the defendant. A rule for a new trial having been refused, and judgment rendered pursuant to the verdict, the plaintiff appealed.

A. Moore for the plaintiff.
Kinney for the defendant.

DANIEL, J. Under the execution, issued to satisfy the first judgment mentioned in the case, the Sheriff sold *by the acre* as much of the land that had been levied on, as made the debt and costs. This mode of sale is not usual, we admit, but we cannot conceive that there is anything illegal in it, and in this case there is no pretense of fraud in the Sheriff, or loss by the debtor. If chattels are levied on, the Sheriff sells the same in parcels, so as to make the debt by as few of them as he can conveniently. If he can save to the defendant a part of his land levied on, and satisfy the execution out of the remainder, the defendant must generally be benefited by it. The Sheriff is a high and responsible officer, and a reasonable discretion, exercised by him in making sales, either by exposing the whole tract or selling by the acre, we think is allowable: both the plaintiff and the defendant may, in many cases, be benefited by it. In such sales by the acre, the Sheriff will be under the necessity of having a survey made of the land sold, or the boundaries so described in his deed to the purchaser, as to identify the part sold. And the Sheriff must be particular in describing the locality of the *acres* to the bidders at the sale.

Secondly. It was contended by the lessor of the plaintiff, that the second judgment, under which the defendant claimed title, was void; because the preliminary notice to the rendering of such a judg-
(140) ment had not been properly proven to have been given. The act (Rev. Stat., c. 45, s. 19), does not prescribe the mode, in which the service of the notice shall be proved to the Court, but it directs that the officer shall serve the defendant with notice in writing, at least five days before the term at which the execution is to be returned, and that the Court shall not make an order of sale of the land, until such notice has been given. The notice, it seems, cannot be executed by any other person than the officer, whether he be Sheriff or constable. It seems to us that it is in the nature of a *scieri facias,* to show cause why the order of sale should not be made by the County Court, and that the return of the copy, with the officer's certificate, signed by him in his name of office, as this is, is *prima facie* evidence of the truth of it. The returns made by Sheriffs and constables on all processes and notices, which come into their hands to be executed, are uniformly made in this way.

Vide, Rev. St., c. 62, s. 33, as to notices served by constables; the certificate of the constable on the written notice is declared to be evidence of the service of the notice. We do not think that the Legislature contemplated a different mode of proof of the service of the notice in this case, from that which had been usually received. That the Court must adjudge and declare in the order of sale made, that the notice was proved to them to have been previously given, is not, in our opinion, necessary to the validity of the order. The judgment must be

PER CURIAM. Affirmed.

Cited: Jones v. Lewis, 30 N. C., 73; *Williams v. Dunn,* 63 N. C., 219.

(141)

DOE ON DEM. OF F. R. AND J. B. ROUCHE *v.* WILLIAM WILLIAMSON.

1. That part of the 40th section of our State Constitution which authorizes a "foreigner, who comes to settle in this State, having first taken the oath of allegiance to the State," to "purchase or by other just means acquire, hold and transfer lands or other real estate," is still in force.
2. The latter part of that section declaring when he shall become a citizen, is repealed by the Constitution of the United States.
3. Independent of the privilege conferred by the first part of the section above referred to, an alien may not only take a fee by purchase, but the estate remains in him with all the incidents belonging to it when taken, until and unless the sovereign, who has right thereto because of forfeiture, vests the forfeited estate in himself by an office of entitling.
4. An alien is therefore entitled to bring an action of ejection.
5. A plea in abatement to the *disability* of the lessor of the plaintiff in ejectment is not a good plea.

APPEAL from *Nash, J.,* Fall Term, 1842, of ROWAN.

It was an action of ejectment, to which the defendant pleaded not guilty. Both the lessors of the plaintiff and the defendant claimed under one Samuel Fraley. The case was, that two several judgments were obtained against the said Fraley, at the April Term, 1841, of ROWAN, that executions issued bearing *teste* of the same term, which were by the Sheriff levied on the premises in controversy, and at a public sale made in pursuance of these levies the lessors of the plaintiff became the highest and last bidders, and the premises were accordingly conveyed to them by the Sheriff by deed, bearing date 18 September, 1841. The defendants were admitted to be in possession. This action was commenced on 19 February, 1842. It was objected by the defendant that the lessors of the plaintiff were aliens, and, there- (142) fore, this action could not be maintained. The lessors of the plaintiff alleged that they had been duly naturalized, and to show this,

produced two copies of records, one of Lincoln County Court, at August Term, 1842 (after the institution of this suit), and the other of the said Court at July Term, 1833. These copies were objected to, but the objection was overruled. A deed from Samuel Fraley, the defendant in the execution, conveying the premises in question to a trustee to secure certain debts therein specified was introduced, which deed bears date after the *teste* of said executions. It was further proved that the defendant was put into possession of the premises by the trustee after the issuing of the executions.

The Court instructed the jury that an alien may take an estate in land by act of parties, but not by act of law; that when an alien purchases land, the estate vests in him, but he holds it for the benefit of the sovereign, and he may be divested of it by commission found; that until so divested he has entire dominion over it; that the lessors of the plaintiff, if still aliens, can maintain this action, because it is not a real action, but a mixed one. An alien cannot maintain a real action, as the old action of *ejectione firma* was, but this is an action of trespass in ejectment, in which nothing but the possession was recovered. The Court further instructed the jury, that as to the record of naturalization of Francis R. Rouche, it set forth that he, at the time he came to this country, was an infant, and, under the act of Congress, the decree of the Court had relation back, so as to render valid the title acquired by him under the Sheriff's deed. And that, as to the record of 1833, the Court was of opinion, and so instructed the jury, that it was competent to the State of North Carolina to say, by whom, and upon what terms, her territory might be held.

There was a verdict for the plaintiff, and a new trial moved and refused. Judgment being rendered for the plaintiff, the defendant appealed to the Supreme Court.

Copies of the records referred to in the above case:

(143) State of North Carolina, Lincoln County—*ss.*

County Court of Pleas and Quarter Sessions, July, 1833.

John Rouche, of the age of twenty-three years, who was born in the county of Fowntann, in the Kingdom of France, came into open Court and reports himself as having arrived at New York, in the State of New York, in the United States of America, in April, 1831, and that he intends to setle himself in the county of Lincoln, in the State of North Carolina, and also declares upon oath, in open court, that it is *bona fide* his intention to become a citizen of the United States of North America, and to renounce all allegiance and fidelity to any foreign potentate, prince, State or sovereignty whatsoever, and particularly to Louis Philippe, King of the French. He also swears, that he will support the

Constitution of North Carolina, and will true allegiance bear to the said State.

Certified by the Clerk in due form.

North Carolina, } *ss.* Court of Pleas and Quarter Sessions,
Lincoln County. } August Term, 1842.

To the Worshipful Justices of said Court:

Francis R. Rouche, declares on oath, that he was born in the department of the Rhine, in the Kingdom of France, on 30 September, 1814, that he sailed from the port of Havre de Grace, Kingdom of France, in June, 1832, and arrived at the port of New York, in the State of New York, in July, 1832—that at the time of his arrival he was a minor, under the age of twenty-one years, to wit, between the years of seventeen and eighteen, and that he has resided in the United States ever since; and that it was then *bona fide* his intention to become a citizen of the United States. And he hereby renounces forever all allegiance and fidelity to any foreign Prince, Potentate, State, or Sovereignty, and particularly all allegiance and fidelity to Louis Philippe, King of the French. He therefore prays to be now naturalized, according to the act of Congress made and provided in this behalf.

FRANCIS RICHARD ROUCHE.

Certified by the Clerk to be sworn to in open court.

North Carolina, Lincoln County—*ss.*

Court of Pleas and Quarter Sessions, August Term, 1842. (144)

The petition of Francis R. Rouche, a native of the department of the upper Rhine, in the Kingdom of France, praying to be naturalized and admitted to the privileges of a citizen of the United States, coming on to be heard, and it having been proven by the oath of John B. Rouche, to the satisfaction of the Court, that the said Francis R. Rouche arrived in the United States in the month of July, 1832, and that he was then a minor under the age of twenty-one years, to wit, between seventeen and eighteen, and that he has continued to reside in the United States ever since; and it moreover appearing to the satisfaction of the Court that it has been *bona fide* his intention for three years immediately preceding his application, to become a citizen of the United States, and well disposed to the good order and happiness of the same. And the said Francis R. Rouche having declared on oath that it was *bona fide* his intention of becoming a citizen of the United States, three years immediately preceding this application, and having on oath abjured and renounced forever, all allegiance and fidelity to any foreign Prince, Potentate, State or Sovereignty, and especially having renounced and abjured forever, all allegiance and fidelity to Louis Phil-

ippe, King of the French, and having taken an oath to support the Constitution of the United States, and the Constitution of the State of North Carolina: It is ordered and decreed by the Court, that he be naturalized, and be admitted to all the privileges of a citizen of the United States.

Certified by the Clerk in due form.

Barringer and *Hoke* for the plaintiff.
No counsel for the defendant.

GASTON, J. The lessors of the plaintiff set up title to the premises in dispute, as purchasers at a judicial sale. The Sheriff sold, by virtue of two writs of *fieri facias*, against the property of Samuel Fraley, (145) the owner of the premises, and to the validity and regularity of one of these writs, no objection has been taken. It is unnecessary, therefore, to examine the objection made to the other.

The lessors were both natives of the kingdom of France, and, at the time of their purchase, and at the date of the Sheriff's conveyance to them, neither had been naturalized. But one of them (John Rouche) had, before the purchase, as a preparatory step for his naturalization, reported himself in a Court of Record in this State, as having arrived from France, at New York, more than two years previously thereto, and, declaring his intention to become a citizen of the United States, then and there took an oath of allegiance to the State. And the other lessor, who, at the time of his arrival in the United States, was a minor, and therefore not under the necessity of taking that preparatory measure, was, before the trial of this suit, but after it was put to issue, regularly naturalized.

Section 40 of the Constitution of this State declares, that "every foreigner who comes to settle in this State, having first taken the oath of allegiance to the State, may purchase, or by other just means acquire, hold, and transfer land or other real estate; and after one year's residence, shall be deemed a free citizen." The Constitution of the United States having conferred on Congress the power to establish an uniform rule of naturalization," and Congress having accordingly prescribed the mode by which aliens may be naturalized, the last part of this 40th section in the State Constitution is no longer in force; but the residue of that section comes not into conflict with the Constitution, or any law made under the Constitution of the United States, and therefore is in full force. Consequently all the disabilities of alienage, so far as they extend to the acquiring, holding, and transferring of land and other real estate in North Carolina, were removed from John Rouche by his taking the oath of allegiance. Upon this state of facts, one of the joint

lessors of the plaintiff being qualified, at the time of the purchase made, to hold lands, the other then being wholly disqualified as an alien, and remaining such at the date of the demise laid in the declaration, and at the time when the issue was joined, but becoming natu- (146) ralized before trial of the issue, several interesting questions are very naturally suggested. But we shall not enter upon the investigation of any of them, because we hold that the objection of alienage, supposing it to apply in all its force and to both the lessors, would not avail to destroy the plaintiff's right to a recovery in this action.

A loose notion has to some extent prevailed in the profession of this State, that an alien cannot maintain an ejectment, and this notion we suppose has arisen from a *dictum* to that effect reported in *Barges v. Hogg*, 2 N. C., 485. That was an action of trespass, *quære clausum fregit*, in which the defendant pleaded in abatement that the plaintiff was an alien born. Upon demurrer, the Court held the plea bad, upon the plain ground that the possession of land by an alien is not necessarily illegal; that he can rightfully hold land, which he has bought, until the State take it from him, and that while thus rightfully holding it, he is entitled to all legal remedies for an injury to his possession. But in pronouncing this judgment, according to the Reporter, the Court took a distinction between the action of trespass on the one hand, and the action of ejectment or other actions for the recovery of a freehold on the other, and observed of *these* that they could not be maintained by an alien. This *dictum*, so far as it applies to the action of ejectment, we believe to be incorrect.

It is an elementary maxim, that an alien has capacity to take, but no capacity to hold land. Care must be taken, however, not to be led into an error by this epigrammatical distinction. When it is said that an alien has not capacity to hold land, no more is meant than that he cannot hold it against the sovereign, should the sovereign choose to assert his claim thereto as forfeited. But against all the rest of the world, the alien has full capacity to hold, and he can hold even against the sovereign, until the estate of the alien be divested by an office found, or some other equally solemn sovereign act. *Page's case*, 5 Co., 22; *Atty.-Genl. v. Duplessis*, Parker, 152; Hobart, 231; *Fairfax v.* (147) *Hunter*, 7 Cranch, 603; *University v. Miller*, 14 N. C., 188. It would, therefore, seem clear, that the alien being thus subject to the right of the sovereign to divest his estate for a forfeiture, and, until he shall be thus divested by office found, the owner of the estate, he may convey, lease, and do every other act in relation thereto, which a rightful owner may do, and can maintain any action and have the benefit of any remedy, which the law gives to secure the enjoyment of property unto those whom the law recognizes as entitled to its enjoyment. But these

inferences, however, logically they may appear to follow from the principles clearly established, seem to come into conflict with certain positions expressly laid down in books of undoubted authority. Thus it is said, Co. Lit., 426, Shep. Touchstone, 204, in the most general terms, that an alien cannot lease, or enfeoff, or make any other conveyance. But upon examination it will be seen, that the meaning of these positions is, that the grantees, feoffees or lessees of the alien take *defeasible* estates only; that they are in no better plight than their grantor, feoffor or lessor, and therefore hold their estates subject to be divested by the sovereign on office found. Shep. Touchstone, 56 and 132; Preston on Convey., 257; *Fairfax v. Hunter,* 7 Cranch, *ut supra;* 2 Kent Com., 61, and the authorities there cited. So also we find it stated in very general terms, that an alien cannot maintain a real or mixed action. But it is also stated, that if alienage be pleaded to an alien in league, that is to say, an alien not an enemy, it cannot be pleaded "to the writ or to the action, but in disability of the person as in case of villenage and outlawry"—but if it be pleaded to an alien enemy, "it may be pleaded to the action." Littleton, sec. 198; Co. Lit., 129; Brooke, title Denizen, 3, 10; Roscoe on Real Actions, 197. It has been thought by very learned Judges that it is difficult, at least, to reconcile the doctrine, that a plea of alien born is a good plea to the person of the demandant in a real action with the well established law, that, until office found, an alien purchaser is the rightful owner of the estate, and because of a supposed incompatibility between this doctrine, and the acknowledged do-
(148) minion of such alien in the land, the Supreme Court of New York have solemnly decided that this was a bad plea in abatement, when pleaded in a writ of right. *Bradstreet v. Supervisors,* 13 Wendell, 546. It has occurred to us that perhaps the doctrine may be thus accounted for and explained. In real and mixed actions, strictly so-called, the demandant seeks to obtain, by means of the law, the seisin of a land or tenement, whereof he has never had seisin, or of the seisin whereof he has been unlawfully deprived. Now as the law will not aid aliens to get land, because by such means the realm may be impoverished (*King v. Holland,* Allen, 14), it will withhold its aid to restore or to give him seisin, though, while he remains seized, it will protect him against wrong-doers. It may also be, that, while the alien is seized, the law regards him as holding for the use of the sovereign (1 Just., 186, a), but the law deems him an improper person to take such seizin for the King, without the King's license. But, be this as it may, it is manifest if the plea of alien-born be a plea impeaching the personal ability of the plaintiff to prosecute a real or mixed action, and therefore cannot be pleaded in bar to the action, or even in abatement of the writ, the doctrine, that it is a good plea, when properly pleaded to the per-

son of the demandant, is perfectly consistent with the settled principle, that until office found, an alien purchaser is rightfully seized of the land.

Nothing can show this more clearly than *Page's case,* 5 Co., 52. An office had there been found before certain commissioners, by force of a commission under the seal of the Exchequer, but it was held that such office was insufficient and void, because to entitle the Queen to the land of an alien, there must be an "office of entitling," one "that vests the estate and possession in the Queen, where she had but a right or title before," and such an office must be by force of a commission, under the Great Seal. And in illustration of the principle, that the estate was in the alien and not in the crown, until office found, the following case was referred to by the Court: "If an alien and subject born purchase lands to them and their heirs, they are joint tenants, and shall join in an assize, and survivor (*i. e.,* survivorship), shall take place, until (149) office found." An alien may, therefore, not only take a fee by purchase, but the estate remains in him with all the incidents belonging to it when taken, until and unless the soverign, who has right thereto because of forfeiture, vests the forfeited estate in him by an office of entitling.

Upon the trial of an ejectment under the common rule, and on the plea of not guilty, nothing is in dispute but the right of the plaintiff's lessor to demise the land, whereof the defendant is in possession. The plaintiff is entitled to a verdict upon showing that, at the date of the confessed demise, his lessor had a legal title to the possession of the premises. And this legal title to the possession must belong to him, who is recognized by the law as having the estate in the premises.

If, therefore, we should regard the action of ejectment as in all respects analogous to the properly so-called, real or mixed actions, for which it has been substituted in practice, we should be bound to hold that as a plea in bar to the action, or as matter of evidence on the general issue, the alienage of the lessor of the plaintiff, who has shown a good title as purchaser, will furnish no defense to the tenant. If the action be one which, because of the personal disability of the lessor, his lessee ought not to be permitted to maintain, this matter of personal disability must be pleaded in abatement.

Pleas in abatement are certainly very rare in actions of ejectment, but they may be pleaded whenever right so requires. *Wroot v. Fen,* 8 Term, 474; *Williams dem. Johnson v. Keene,* 1 Wm. Black, 197; *Morton v. Roe,* 10 East, 523; *Rust v. Roe,* 2 Bur., 1046.

But in our opinion, such a plea would not be good in an action of ejectment. Pleas, which take exception to the personal competency of the parties to sue or be sued, are not founded on any objection to the

writ or declaration. Perhaps, therefore, they do not strictly fall within the definition of pleas in abatement; but as they offer formal (150) objections merely, and do not deny the right of action, they are usually considered as of the nature of pleas in abatement, and pass under that denomination. As they are pleas of personal exemption from being sued, or of personal incompetency to bring the suit, they are necessarily restricted to the persons sued and suing. Upon principle, they are pleas personal to the parties, plaintiff and defendant in the action, and no instance that we are aware of can be found, where a dilatory plea of this kind was allowed, except as applied to one or the other of the parties. Now dilatory pleas are not such favorites of courts of justice, as to induce them to admit of such pleas, where the law does not distinctly recognize them. And the dilatory plea now spoken of has, if possible, less than the ordinary claims of pleas of that character, to an indulgent reception. The remedy by ejectment, as now used, is almost a creature of the Courts. It has been framed, moulded and improved from time to time, so as to present, in the least embarrassed and most direct shape, *the question of title* to the land in dispute. For this purpose—and so far as substantial justice requires—it is indeed an action between the plaintiff's lessor and the person admitted to dispute his title. But, in order to disembarrass it from all technicalities, it is regarded in form as the action of the nominal plaintiff.

If the plea of alien-born be a good plea in abatement to a real action, it is cause of gratulation that there is a remedy, whereby one, who has in law a right of entry, may regain his possession without being hindered by this plea. *In this respect* we feel the force of the observations made by Chief Justice SAVAGE in delivering the opinion of the Court in the case before cited of *Bradstreet v. Supervisors,* 13 Wend., 546. "If an alien may take and hold real estate against every person but the State, he may do so, because, by his purchase, he has an estate in the property which the laws guarantee to him. It is *his* against other individuals; and if they *attempt* to turn him out or disturb his possession, the law will protect and defend him. But suppose that some person succeeds in turning him out by force or fraud—shall he then be debarred from all redress for this greater wrong, by a plea that he is an (151) alien friend? Shall the successful intruder be suffered to enjoy with impunity the fruits of his wrongful conduct?" Does the law give remedy as against a wrongdoer, who has but imperfectly executed his injurious purpose, but withhold redress if he carry it into full execution? But quitting these speculations in regard to the hardness of the doctrine—it cannot escape observation that, if established, it would furnish strong inducements to disturb the repose of society. Men without right, or shadow of right, would be tempted to intrude into posses-

sions quietly held by persons against whom existed the objection of alienage; and these in turn would be stimulated to regain by every trick and artifice, the possessions so wrested from them; while the law would stand by, smiling upon the victor in this contest of force and fraud, ready to award to him the profits of the land, as a reward for his superior cunning and prowess.

In holding that the objection here set up cannot avail in an action of ejectment, either by way of a plea in abatement or a defense to the action, we have the satisfaction to find that our opinion has the sanction of several of the ablest Courts in the other States of the Union. See *McCreery v. Alexander,* and *Same v. Wilson,* 5 Harrison & McHenry, 409, 412; *Jackson v. Lunn,* 3 New York Cir., 109; *Sheaffe v. O'Neale,* 1 Mass., 256; *Ainslee v. Martin,* 9 Mass., 430.

PER CURIAM. Affirmed.

Cited: *Trustees v. Chambers,* 56 N. C., 263; *Johnson v. Lumber Co.,* 144 N. C., 720.

(152)

THE GOVERNOR TO THE USE OF C. G. LAMB *v.* CAROLINE WILLIAMS AND OTHERS.

1. In an action upon the bond of an administrator, appointed by one of the Courts of this State, the administrator can only be made accountable for the assets found within this State.
2. An administration granted in this State gives no authority to administer goods in another government.

APPEAL from *Bailey, J.,* Fall Term, 1842, of CURRITUCK.

This was an action of debt, brought by the relator of the plaintiff on the bond given by Caroline M. Williams, the defendant, on being appointed by the County Court of Currituck administratrix of Hollowell Williams, deceased. The breach assigned was, in not paying to the relator of the plaintiff the distributive share to which his intestate was entitled, as one of the children of the said Hollowell. It was in evidence that Hollowell Williams had his domicile in Virginia, and died there, but had personal property both in that State and in North Carolina, and that the defendant Caroline took out letters of administration on his estate both in Virginia and in North Carolina. It was further in evidence that the decedent left surviving him six distributees, of whom the intestate of the relator was one. It further appeared that there was in the hands of the administratrix on account of her administration in the State of North Carolina, after the payment of debts, the sum of $1,530.09½, with interest from 25 May, 1837, and a balance on account of her administration in Virginia of $2,515.35, with interest from 7 March, 1837.

The defendants insisted that the action could not be sustained
(153) at all, inasmuch as the administration here was merely ancillary to that in the State of Virginia, and that as soon as the debts here were paid, the funds remaining in the hands of the administratrix on account of her administration in North Carolina, if the administration had been committed to two different persons, ought to be paid over to the personal representative in Virginia, to be distributed according to the laws of the country where the decedent had his domicile; and that inasmuch as the personal representative in each State was the same person, by operation of law she held the fund as administratrix in Virginia, the place of her intestate's domicile, to be there distributed according to the laws of that State, and that there was no breach of her administration bond in this State. His Honor overruled the objection. It was then contended by the defendants, that at most, the relator of the plaintiff was entitled to recover in this action only the distributive share, to which his intestate was entitled to the fund remaining in the hands of the said Caroline, on account of her administration in North Carolina. His Honor being of that opinion, refused to give judgment for the whole amount of the distributive share to which the intestate of the relator of the plaintiff was entitled on account of the administration in both States, to wit, the sum of $851.13½, with interest on $419.22½, from 25 August, 1841, and interest on $255.01 from the same time, but was of opinion that he was entitled to recover one-sixth of the fund on account of the administration in North Carolina. And accordingly judgment was entered for the penalty of the bond, to be discharged on the payment of $319.70, with interest on $255.01 from 25 August, 1841, until paid. From this judgment the plaintiff appealed to the Supreme Court.

Kinney, for the plaintiff.
No counsel for the defendant.

RUFFIN, C. J. The defendant's objection, that the administratrix was accountable in Virginia, the domicile of the intestate, for
(154) the whole estate, is not presented by the case, as it comes up; inasmuch as judgment was given for the relator's share of the assets in North Carolina, and the defendants did not appeal. It would, therefore, be improper to give an opinion on that point.

On the other point we think the decision right. Our law intends only to secure the assets, of which it commits administration; and the bond given here must, accordingly, be construed as obliging the administratrix and the sureties to account to the Court of North Carolina for the assets received, or that might have been received, by virtue of the office conferred here. An administration granted in this State, although

general in its terms, is necessarily limited to the effects in this State, and gives no authority to administer goods in another government; especially when the domicile of the intestate was abroad. An administrator does not, in this respect, stand on the footing of an executor, who takes probate here of a will of one resident here, as determined in *Helme v. Sanders,* 10 N. C., 563; who undertakes the duty of collecting the effects, wherever they may be, and whose authority is derived from the will and not merely by act of law. But it is otherwise with an administrator; for at common law, each Bishop or Archbishop could grant administration of such goods only as were within his jurisdiction. And in *Raymond v. Watteville,* 2 Lee Ex. Rep., 551, Sir George Lee held, upon the authority of previous cases, that, where the same person was the representative in both counties, the Prerogative Court of Canterbury had no jurisdiction over German effects, and could not require an inventory of them, nor, indeed, of those lying in the province of York or in Ireland. Of course, then, it can be no breach of the administration bond not to return an inventory of such goods, or otherwise account for them here. No doubt an administrator may be compelled to account in a Court of Equity, where he may be found, to those entitled to the estate, wherever it may be situate; but that is on the ground of a personal trust, and it is no matter where it was assumed. But that is a different question from that before us; which depends on the (155) consideration that the administration here conferred authority to administer the goods here, and none other; and, therefore, that for the due administration of those goods only is the administration bond a security.

PER CURIAM. Affirmed.

Cited: Plummer v. Brandon, 40 N. C., 194; *Carmichael v. Ray,* 40 N. C., 367; *Sanders v. Jones,* 43 N. C., 248; *Charleton v. Sloan,* 64 N. C., 705; *Williams v. Williams,* 79 N. C., 421; *Grant v. Reese,* 94 N. C., 730.

HENRY W. SKINNER AND WIFE *v.* SAMUEL D. LAMB.

A, by will dated in December, 1836, devised and bequeathed, among other things, as follows: "The balance of my estate to be equally divided between my wife and children," and in another clause "My wish and desire is, should either of my children die, without leaving an heir begotten by their body or bodies, that the survivor or survivors have the whole"; and, in another clause, "should my children all die without leaving an heir, begotten by their bodies, my wish and desire is, that my brother T should heir the whole of my estate as allotted to my children." The testator died, leaving three children, M, O and E. M died, leaving a child. After the death of M, O died without issue, leaving E surviving. *Held,* that all the estate of O so dying became vested in E, her only surviving sister, and the child of M was entitled to no share of it.

SKINNER *v.* LAMB.

APPEAL from *Bailey, J.,* Fall Term, 1842, of PASQUOTANK.

The action was detinue, brought to recover certain slaves men-
(156) tioned in the declaration. On the trial, the will of William W. Freshwater was offered in evidence (of which the parts material to this case are quoted in the opinion delivered in this Court). It was admitted that the executor qualified to the will, and assented to the legacies contained in it. It was also admitted that Samuel D. Lamb, the defendant, married Matilda, the daughter of the testator, and the same person mentioned in the will as one of his daughters—that Henry W. Skinner, one of the plaintiffs, intermarried with Elizabeth T. Freshwater, another daughter mentioned in the will, and who is also a plaintiff—that Orange Ann Virginia, the other daughter of the testator, died after the death of the testator, under age and without issue—that administration on her estate was granted to Samuel D. Lamb, who, at the time of bringing this suit, had the negroes claimed in his possession, they being the negroes allotted to Orange, under her father's will—that before the death of Orange, Matilda had died, leaving an only child, who is still alive.

Upon these facts, his Honor instructed the jury that the plaintiffs were entitled to recover the negroes claimed in the writ. A verdict having been returned for the plaintiffs, and judgment pronounced accordingly, the defendant appealed.

A. Moore, for the plaintiffs.
No counsel for defendant.

DANIEL, J. William W. Freshwater made his will, and, after some devises of land and personal property, and directing his debts to be paid, bequeathed as follows: "The balance of my estate to be equally divided between my wife and children." The testator at his death had three children—daughters, Matilda, Orange and Elizabeth. In another clause of the will the testator said, "My wish and desire is, should either of my children die, without leaving an heir begotten by their body or bodies, that the survivor or survivors have the whole. And should my
(157) children *all* die without leaving an heir begotten by their bodies, my wish and desire is, that my brother Thaddeus Freshwater should heir the whole of my estate as allotted to my children." Matilda married and then died, leaving an only child, which is still alive. Elizabeth married Henry W. Skinner, and they are the plaintiffs. Orange died without issue, and after the death of her sister Matilda. The executor of William W. Freshwater had assented to the legacies. The defendant has possession of the slaves, which were allotted to Orange in the division of the property under her father's will; he refused to sur-

render them to the plaintiffs, and they have brought this action of detinue to recover them. The Judge was of opinion that the plaintiffs were entitled to recover these slaves. And we are of the same opinion, upon the authority of *Gregory v. Beasley,* 36 N. C., 25, and *Threadgill v. Ingram,* 23 N. C., 577; *Ferguson v. Dunbar,* 3 Bro. C. C., 469, in note (Belt's Ed.); 2 Roper on Legacies, 322. On the death of Matilda, leaving a child, the hopes and interest of the testator's brother, Thaddeus (the ulterior legatee), were extinguished; because he could never take, unless *all* the daughters died without leaving issue. The three original legacies were vested, on the death of the testator, subject each to be divested, and go over to the survivor or survivors, on the death of either legatee without issue. In this case, Elizabeth is the only *survivor,* and must take the entire legacy that had been assigned to Orange, who died without issue. The Court regrets that the child of Matilda is excluded, but we can only construe wills, and are not authorized to alter or make them.

PER CURIAM. No error.

Cited: *S. v. Norcum,* 26 N. C., 257; *Spruill v. Moore,* 40 N. C., 287.

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(158)

DAVID GASKINS' EXECUTORS *v.* DAVID GASKINS AND OTHERS.

1. By the ecclesiastical law of England, and under our law before the act of 1840, a paper-writing purporting to be the last will of a decendent, which it was proved he declared to contain his wishes as to the disposition of his property, but which he was prevented from either signing,, publishing, or having attested by the sudden visitation of God, was a good will as to personalty.
2. And though some short time may elapse between the period, when it was in his power to have executed formally such paper-writing, and that when he was incapacitated by the visitation of Providence, yet if such delay proceeded merely from convenience and not from any hesitancy as to the disposition he wished to make, or any desire to make changes therein, the paper-writing is a good will.

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

This was an issue of *devisavit vel non,* submitted to the jury, upon the trial of which a paper-writing purporting to be the last will and testament of David Gaskins, Sr., was offered by the plaintiffs, as executors thereof, for probate as a will of personalty. The plaintiffs proved by Dr. A. W. Mebane that during the last illness of David Gaskins, Sr., he was requested by Gaskins to write his will—that he wrote the paper-writing propounded by the plaintiffs, according to the directions given him by the said David Gaskins—that when he had written it, he read it over to Gaskins, who approved it—that Gaskins was then of disposing mind and memory—that when he had written it he handed it to Gaskins,

who said he would send for two of his neighbors and get them to sign it as witnesses—that Gaskins knew it was necessary he should sign it, and that it should be attested by two witnesses—that the witness then returned home, and that he never wrote any other will for Gaskins.

(159) The plaintiffs then proved by two witnesses that they were sent for by Gaskins, about two days after Dr. Mebane had written his will—that when they arrived at his house it was in the night—that they found him upon his sick bed, but in his senses—that he informed them he wanted them to witness a will, which Dr. Mebane had written for him, but it was then night, and he would sign it in the morning and get them to witness it—that late in the night Gaskins was taken worse, became speechless, and continued speechless, and seemed to be insensible from the time he was taken speechless until he died, which was about two days from the time they went to his house as above stated. The paper-writing offered for probate was then read and identified by Dr. Mebane, as being in his handwriting, and the same that was written by him at the time before stated. It was not signed by the testator, nor subscribed by any one as a witness. His Honor, upon this evidence, instructed the jury that if David Gaskins intended to sign the paper in question, and have it witnessed by witnesses before it should operate as a will, this intention must either be revoked or fulfilled, or its fulfillment prevented by some unavoidable necessity. If it were revoked at any time, and the intention entertained that it should operate in its existing state, it would be good as a will of personalty, and they should so find. But if his intention to sign and have it witnessed was at no time abandoned, this intention must be fulfilled to make it effectual, unless he was prevented from doing so by some overruling necessity, as by the sudden visitation of God. Wherever the finishing of a will as to its execution or publication has been voluntarily postponed, for the sake of convenience or other cause, to some future period, and death intervenes before the period arrives, and prevents the execution, this would not constitute such a providential interference, as to dispense with the intended completion. And if this latter were the case before the jury, they should find that the paper-writing was not the will of the supposed testator. The Court further informed the jury that the principles thus laid down should govern their deliberations, although they might

(160) be satisfied the paper embodied all the dispositions the deceased intended to make of his estate.

There was a verdict for the defendants, and judgment having been rendered accordingly, the plaintiffs appealed.

A. Moore, for the plaintiffs.
Badger, for the defendants.

RUFFIN, C. J. The paper is not propounded as a devise of lands, but

simply as a will of personal estate; and the single question in the case is whether, from the manner in which it was made and in its present form, it can be admitted to probate as a will of the latter kind.

Before the recent statute of 1840, which declares a will of personalty not to be good unless executed in the manner required as to wills of realty, there was a marked difference between the requisites of those two instruments. A devise being regulated by statute, it must necessarily come up strictly to all the requirements of the Legislature; and, among them, must be actually signed and also attested or deposited as a will, so as to show, in every instance, that the party deceased intended to devise by the particular instrument in its then state, as a finished instrument. But testaments existed at the common law, and their validity depended on principles declared by that law, or rather, by the common law, as a part of the common law administered in peculiar jurisdictions, that is to say, the Ecclesiastical Courts. And nothing can be more certain, than that, in those Courts, a will of personal property might be good without attestation and without signature, provided it was made to appear by witnesses, or other documents, or by the custody of the paper or other means, that the maker had declared or recognized it to be his will, or show his intention that it should operate in its present state, as expressed by his Honor in this case. The paper in all those cases takes effect from what, in the language of the Courts, is called publication; which is some declaration or act of the party, denoting that he had done with the instrument, and supposed and meant that, (161) if he died then or at any future time, it should pass his effects. Upon the law on this subject, thus far, there is an entire coincidence between the instructions delivered to the jury in this case and the opinions held by us. But to this particular case that doctrine is not very material, except for the better understanding of the peculiar principle, which is more immediately applicable to it. For it is certain, here, that the alleged testator did not deem this a finished paper, but purposed further to execute it by signing and having it attested; and, as he died without doing either, the paper is *prima facie* not a will for want of publication. This deficiency the propounders of the paper endeavored to supply by proof, that it was written during the party's last illness by a friend, read over to the supposed testator, when he had undoubted capacity, and was fully approved by him and left with him, and that he then said he would send for two of his neighbors and get them to attest it; and that two days afterwards he sent for two persons, who went to him some time in the night and found him ill in bed, but in possession of his mental faculties, and were then told by him that he wished them to witness this paper as his will; but he said it was then night, and he would sign it in the morning and get them to witness it. During that

night the party became suddenly speechless and insensible, and so continued until he died, two days afterwards. Upon these facts, his Honor delivered it as his opinion to the jury, in substance, that although the paper contained all the dispositions the deceased intended to make of his estate, and, therefore, would be a good will of personalty, if the execution of it by signing and attestation, was prevented by the sudden visitation of God, yet, that the voluntary postponement of the execution for convenience, or other cause, not amounting to an unavoidable or overruling necessity, and the death of the party interposing, would not constitute such a providential interference or visitation of God, as would dispense with the intended completion of the paper. The question brought up by this appeal is, whether this instruction be right (162) or not. The Court has duly considered it, and the result of our deliberation is, that in reference to this case, as stated, the latter part of the instruction is erroneous.

His Honor yields, and, undoubtedly, he correctly yields, that this paper, which is complete in all other respects—disposing of all the party's estate and nominating executors—may be pronounced a will of personalty, notwithstanding the want of execution, provided the execution was prevented by the act of God. In such cases, indeed, it must be clear, that the contents of the paper were perfectly understood, and satisfactory; and that the execution was not postponed from any hesitation upon that head. As Sir John Nicholl said, in *Scott v. Rhodes,* 1 Phillim., 12, the rule is held strictly and must be applied with firmness, that the proof must also show a continuance of intention to execute, down to the time when the act of God intervened and prevented. But supposing such a continuance of intention, there is no doubt, we think, that a paper may be established, the execution of which was ultimately prevented by the act of God, although the party was not prevented by unavoidable accident or overruling necessity, from previously executing it. The question really is not, whether in any case the paper was written, or the party could, speaking physically, have executed it, at an earlier or a later day, as determining in themselves the validity of the instrument, but it is, whether he postponed the execution because he was deliberating—which is the natural presumption, generally—or whether, still intending to execute it, he was, at last, prevented from performing that intention by sudden death, or the act of God, as it is called. If the latter be the truth of the case, the paper is deemed a will in the law of testaments, without formal execution, upon the principle that the act of God hurteth no man. It being conceded in the reasoning of his Honor, that the deceased adopted the paper fully, when prepared, and that he intended to execute it as his will, up to the time when he last spoke of it, a few hours before his death, we cannot agree

that his death, following so suddenly afterwards, did not sufficiently account to the jury for the want of execution, by attributing it to that cause, namely, his death, and no other. Where the intention to execute is brought down so low, almost in *articulo mortis*, and nothing appears to denote a subsequent change of purpose, it furnishes the strongest argument and evidence that the intention lasted as long as life, and that both were terminated by the same event. Upon these grounds, the Court dissents from the position, that the execution could not be dispensed with, inasmuch as the deceased had the possession of the paper and the ability to execute it, and without any absolute necessity, but for convenience, postponed the execution to the next morning, the party dying during the night. We think, on the contrary, that it should have been left to the jury upon this evidence, which was very strong, to say whether the party would have executed the paper the next morning, had he lived to that time and been able; and they should have been directed, that, if they so found, and, consequently, that the execution of the paper was prevented by death, then they should pronounce for the paper as a will of personalty. (163)

It will thus be seen, that the difference between the instructions given, and those which this Court thinks ought to have been given, turns upon the sense in which the phrase, "act of God" is to be received, as applied to questions of this sort. His Honor held, that if the party could have executed the paper, it was not a case of prevention by the "act of God"; whereas the true meaning seems to be that if the party would have executed his will but for death, it is then considered that he was prevented only by death, or, in other words, by the "act of God." This is very fully stated by the same eminent ecclesiastical Judge, Sir John Nicholl, in *Allen v. Manning*, 2 Adams, 490. He says, "That to constitute a case of prevention by the 'act of God,' it is not necessary that a case of *physical* prevention should be made out. In the case in question, for instance, it is not necessary to be shown that it was actually, or even morally, *impossible* for the deceased to have gone to Hull's office on 12 December. If the Court is convinced, upon the evidence, that he was prevented from going by extrinsic circumstances, of such a nature as to render his failure to keep his engagement with Hull (to go to his office and execute the will), not justly imputable to any *change* of intention on his part, the exigency of the law, in the particular in question, is fully satisfied. I think the fair result of the evidence is, that the deceased *was* solely prevented by the 'act of God,' in this sense and construction of the phrase, from executing the will." Accordingly, there are many cases in which probates have passed, where the party was prevented from executing by death, but *might* have easily done it before. *In the goods of Taylor*, 1 Hagg., 641, (164)

the case was very much the same with the present. A paper was prepared at the testator's request the day before he died, and while he was very ill, was read over to him, and approved by him; but he deferred signing it until the next morning, when he died without having executed it. The Court said, "This is an ordinary case of prevention by death; there was no hesitation as to the contents; the execution only was postponed until the following morning." So in *Scott v. Rhodes,* the Court pronounced in favor of a paper, written by the testator himself, as supposed on the day before his death, and not executed by reason, as inferred, of his sudden death that night or early next morning. And in *Allen v. Manning,* the paper had been written by a solicitor on 10 December, and the testator appointed to come the next day and execute it, but he did not, owing to some slight indisposition, which made it imprudent for him to go out for three or four days, and he was then taken violently ill and died on 16 December, without executing it. *Hoby v. Hoby,* 1 Hagg., 146, and *In Re Harvey, Ib.,* 575, are yet stronger, because longer time intervened, and the parties had more opportunities for execution. So the Court thinks it thoroughly settled in the law of England, and thence brought as the law of this State, that this paper cannot be held not to be a will, merely for the want of execution under the circumstances stated. On the contrary, so far as depends on this point merely, if the jury should think the party would have executed the paper the next morning, if God spared his life and senses that (165) long, we think it as much his will, as if he had lived until next morning, and actually signed it.

It was argued at the bar, that although that might be the law in England, yet that, since the jurisdiction is here changed to a common law Court and jury, nothing short of publication by execution will sustain even a will of personalty. But we cannot accede to the argument; for, although the jurisdiction be changed, the rule of decision is not. The canon law is a part of the common law, so far as respects testamentary causes; and, except such changes as may have been introduced by statutes, we now determine here what is or is not a good will of personal property, exactly upon the same principles that prevailed when the Governor took the probate of wills, or before the ecclesiastical Judge in England.

We feel ourselves therefore compelled to reverse the decision and order a *venire de novo.* But while we do so, we cannot avoid congratulating ourselves and the profession, that we are now happily spared from such difficult discussions, which leave so much in the breast of the Judge and jury, by the act of 1840; which requires, in all instances, a plain and unequivocal act of publication, about which there can be no mistake.

PER CURIAM. New trial.

(166)

THOMAS WHITE *v.* RICHARD ARRINGTON'S EX'ORS.

Under our act (Rev. Stat., c. 46, s. 23), allowing executors and administrators nine months before they are required to plead, they can no more avail themselves, under the plea of *plene administravit*, of a voluntary payment of a debt after notice of a writ sued out, than they could before the passage of this act.

APPEAL from *Settle, J.*, Spring Term, 1842, of NASH.

The following facts were admitted by the parties as constituting a case agreed for the opinion of the Court. The writ of the plaintiff was issued on 14 February, 1839, and executed on 7 March, returnable to the May Term of Nash County Court. At the return term the defendants craved the benefit of the act allowing time to executors and administrators to plead, and were allowed until the November Term of the said Court following, at which term the defendants entered their pleas, admitting the voluntary payment of debts of equal dignity with the plaintiff's, after the service of the writ, but before the November Term to which they had been allowed time to plead. It was admitted by the plaintiff that if the voluntary payments thus made by the defendants after the service of his writ and before plea pleaded were good in law, then the defendants had fully administered, and judgment should be entered in their favor accordingly. So it was admitted by defendants, that if their payments after notice of the plaintiff's debt but before plea pleaded should be deemed in law as not good, then they had assets, and judgment was to be entered for the plaintiff for the sum of $115.08, the principal of the note declared on, together with the interest thereon from 15 May, 1838, and costs. (167)

His Honor, being of opinion that the payments made by the defendants after the service of the plaintiff's writ, and with notice of his debt, were not good in law, gave judgment for the plaintiff. From this judgment the defendants appealed to the Supreme Court.

Saunders, for the plaintiff.
B. F. Moore, for the defendants.

DANIEL, J. It is admitted by the defendants' counsel that, at common law, an executor, after he is sued and has notice of the writ, cannot be allowed, under the plea of *plene administravit*, to give in evidence a voluntary payment, without suit, of a debt of equal or inferior dignity to that sued on; Williams Ex., 679, 1213, 1214. By the statute (Rev. Stat., ch. 46, sec. 23), "no executor or administrator shall be compelled to plead to any original suit brought against him in any Court, until the expiration of nine calendar months from and after his taking upon himself the office of executor or administrator." At the first term, after

the time given him by the act had expired, he must plead, or the plaintiff may take judgment by default against him. The act was only intended to give to executors and administrators an opportunity to learn the amount and nature of the debts, and also the amount of the assets, so as to enable them to act and plead understandingly. The act does not alter the rules of the common law, in any other particular that we are aware of.

PER CURIAM. Affirmed.

Cited: *Hall v. Gully,* 26 N. C., 347.

(168)

CHARLES BAKER *v.* PHILIP WILSON.

1. The mere appointment of an overseer and assignment of hands to a supposed road, by the County Court, are not *per se* a judicial determination, that a public road be laid out where none before existed.
2. Any inhabitant so assigned, when sued for the penalty incurred for refusing to work such road, and the overseer indicted for not having the road in order, may show that in fact there is no such public road.

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

The facts of the case are sufficiently stated in the opinion delivered in this Court.

Francis, for the plaintiff.

No counsel for the defendant.

GASTON, J. This case, laying aside the facts and circumstances which are unnecessary for a correct decision of it, may be briefly stated as follows: The County Court of Yancey, at its Spring Session in 1836, passed an order, "That Charles Baker and Charles Hall oversee the road from the top of the Iron Mountain, at the Low Gap, as the Engineers surveyed and marked it out, to *where it intersects the old road,* at the foot of said mountain, and that all hands belonging to Cane Creek Company, work under Charles Baker, six good faithful days." Shortly thereafter, but at what term it does not appear, this order was rescinded, and afterwards, at the February Term, 1839, it was ordered by the said Court, that the order rescinding the order of 1836, be itself rescinded, and the order of 1836 be revived. But in reciting the order of
(169) 1836, the order of 1839 somewhat misrepresents it, by describing the road therein mentioned, as a road "from the foot of the Iron Mountain, *at the ford of Spring Creek,* to the Tennessee line," according to which misrepresentation, the road would extend eastwardly beyond its

intersection with the old road, seventy-five yards upon the old road. The plaintiff, an overseer of the road as appointed by these orders, summoned the defendant, one of the Cane Creek Company, to work thereon, and, upon this requisition not being complied with, warranted him for the penalty incurred by such disobedience. The cause was carried up by successive appeals to the Superior Court, and there, upon the trial, it appeared that before the order of 1836 was passed, certain Engineers in the service of the Government of the United States, had surveyed and marked out a line as the route of the road contemplated to be made by the Federal Government, from the top of the Iron Mountain at the Low Gap, to its intersection at the foot of the mountain, with the old road; that this line passed wholly through wild and unappropriated lands belonging to this State, but that no such road at the institution of this action existed in fact, or had been ordered to be laid out by the County Court. Upon these matters so appearing and being so agreed by the parties, his Honor held that the defendant was not liable to the penalty demanded.

In this opinion we concur. It is clear, we think, notwithstanding the mistaken representation of the original order, that the order of the Court of February, 1839, revived and reënacted the original order, such as it in truth was. Neither, therefore, the appointment of overseers to superintend, nor the injunction upon the hands to perform the labor therein directed, applied to any part of the old road.

The orders of 1836 and 1839 are predicated upon the assumption that the road therein described as surveyed and marked out by the engineers, was a public road, and it would be doing violence to the language of these orders, to hold that *thereby* a new public road was laid out by the Court. It is unnecessary, therefore, to decide whether, when a new road is directed to be made wholly through lands (170) belonging to the State, the Court can lay out the road without the intervention of a jury, as required by the act of 1784, ch. 227, sec. 2 (Rev. Stat., ch. 104, sec. 4), or whether, if a new road be laid out, without the intervention of a jury, where a jury ought to have been ordered, such road, notwithstanding the irregularity in the proceeding, is not to be regarded as a public road, until the order of the Court be reversed or rescinded. Our laws are explicit in requiring that no new road shall be laid out but by a judgment of the Court upon a petition filed, and authorize an appeal from every such judgment, by any person dissatisfied therewith. 1813, ch. 862. (Revised Stat., ch. 227, secs. 3 and 4.) These requisitions would be substantially annulled, if the mere appointment of an overseer or assignment of hands to a supposed road, were to be held *per se* a judicial determination, that a public road be laid out where none before existed.

Nor can we doubt, whatever credit may be claimed for an order of this character, as *prima facie* evidence of the existence of the road therein described, that it is competent for the inhabitants so assigned, when sued for the penalty incurred in refusing to work on the road, and also for the overseer, when indicted for not having the road put in order, to show that they have committed no violation of law, for that there is no such road to be made or repaired, to be worked on or superintended. We must not extend penal enactments beyond their obvious meaning. Overseers are indicted for neglect of the public roads put under their charge; and the citizens of a district liable in penalties for refusing to work on the public roads to which they have been assigned. But neither the one nor the other can have failed in the performance of duty in regard to a public road, if it appear that such road has no existence either in law or in fact.

PER CURIAM. Affirmed.

Cited: Welch v. Piercy, 29 N. C., 368, 369; *S. v. Johnson,* 33 N. C., 649, 661.

(171)

THE STATE *v.* JOHN MCENTYRE AND OTHERS.

1. Under the act of Assembly of 1840, c. 57, "to incorporate the town of Rutherfordton," the persons elected town magistrate and commissioners, are not indictable for refusing to accept the said offices, even if duly elected. The act contains no such provision.
2. The Legislature may, if they think proper, require any person appointed to an office in any manner prescribed by law to serve therein, under the pain of indictment or any other penalty. But there is no principle of the common law that renders such an offense criminal.
3. A person, who undertakes an office, and is in office *de facto*, although not legally appointed thereto, is bound to perform all the duties, and liable for their omission, in the same manner as if the appointment were strictly legal, and his right perfect.
4. Under the above mentioned act, "to incorporate the town of Rutherfordton," the election for town magistrate and commissioners must be held by the Sheriff, or, at least, by a sworn deputy; otherwise, it is void.

APPEAL by the solicitor for the State, from *Pearson, J.,* Fall Term, 1842, of RUTHERFORD.

The charges in this indictment, and the facts of the case, are fully set forth in the opinion delivered in this Court.

Attorney-General, for the State.
Francis, for the defendants.

RUFFIN, C. J. By an act passed in 1840, ch. 57, "to incorporate the town of Rutherfordton," it is enacted, sec. 2, that the citizens of the

town, on the first Monday of March in each year, may elect a town magistrate and four commissioners, with certain qualifications, as therein specified, to serve for one year from the day of election; and, by sec. 3, "That the sheriff of Rutherford County shall hold said (172) elections for town magistrate and commissioners under the same regulations that elections are now held for members of Assembly, and shall determine who is elected; and that he shall immediately furnish the town clerk with a certificate, stating who are elected, which certificate the town clerk shall enter in a book to be kept for that purpose, and the said certificate or entry thereof in the clerk's book shall be deemed conclusive evidence of the election of such persons to the offices therein specified." By the fourth section it is further enacted, "that the said commissioners, after they are thus elected, and shall have taken an oath faithfully to perform their duty, shall be deemed and held a body politic and corporate, by the name and style of "The Commissioners of Rutherfordton," and have certain powers, authorities and duties as therein set forth; among which is that of appointing the town clerk; and, by the 11th section, that if the Sheriff shall fail to hold said election for town officers, he shall forfeit fifty dollars; and, by the 12th section, "that if the magistrate and commissioners shall permit the streets or roads within the limits of the corporation to get out of order, they shall be liable to indictment, and, on conviction, be fined at the discretion of the court."

The defendants, John McEntyre, Edmund Bryan, William Twitty and Harvey D. Collier were indicted in two counts. In the first count, after reciting the material parts of the act, it is alleged, "that, in pursuance of the directions of the said statute, the Sheriff of Rutherford County did, on the first Monday of March, in 1841, duly hold an election in the said town of Rutherfordton, for a town magistrate and four commissioners to serve for one year from the day of said election, and, that, then and there the said John McEntyre was duly elected and determined and declared by the said Sheriff to be duly elected to the said office of town magistrate; and the said Edmund Bryan, William Twitty and Harvey D. Collier, with one John G. Bynum, were duly elected and declared and determined by the said Sheriff to be (173) duly elected to the said offices of commissioners for the said town; and, thereupon it then and there became the duty of the said John McEntyre, Edmund Bryan, William Twitty and Harvey D. Collier, to take an oath respectively, faithfully to perform their duty respectively in their said respective offices. And the jurors do further present, that on 1 April, in 1841, and for a long space of time theretofore, to wit, from the said first Monday of March to 1 April, 1841, they the said McEntyre, Bryan, Twitty and Collier, refused to take the oath prescribed by said statute as aforesaid, and refused to perform their

duty as such town magistrate and commissioners as aforesaid, contrary to the form of the statute in that case made and provided, and against the peace and dignity of the State."

The second count, after again reciting the material parts of the statute, charges, "that it became thereby the duty of the said town magistrate and commissioners to keep the streets within the limits of the said corporation in order and good repair; and that the said John McEntyre, being elected town magistrate as aforesaid, and the said Edmund Bryan, William Twitty and Harvey D. Collier, being elected commissioners as aforesaid, with force, etc., in etc., did suffer and permit the streets of the said town of Rutherfordton to be and remain out of repair for a long time, to wit, from the said first Monday of March in the year, etc., to etc., contrary to the form of the statute and against the peace and dignity of the State."

Upon "not guilty" pleaded, the jury found a special verdict, by which it appears, that on the 1st Monday of March, 1841, an election was held in Rutherfordton, for persons to fill the several offices of town magistrate and commissioners, at which the persons named in the indictment received the majority of the votes given; that the election was not held by the Sheriff in his own person, but that by writing under his hand he appointed John G. Bynum his deputy to hold said election, and that said Bynum opened the polls and received a number of votes and then went away, leaving one Bryan to superintend the election in his stead, and that Bryan, in the absence of Bynum, received some votes, (174) which elected some of the persons indicted; that the names of the voters were truly entered by a clerk, and that the said Bynum returned before sunset and examined the list of voters and approved the same, and closed the polls, and then gave notice to the defendants of their election. If the Court should be of opinion, that the elections held, in the manner thus set forth, were lawful and valid, and that the persons thus chosen town magistrate and commissioners are indictable in law for failing to serve in the said offices, and perform the acts and things as laid in the indictment, the jury find the defendants guilty; if otherwise, then they find the defendants not guilty. The Court gave judgment for the defendants, and the Solicitor for the State appealed.

Besides objections that might be taken to the form of the indictment, there are several reasons why, upon the merits and substance, the judgment should have been for the defendants, as we think.

There is an essential difference between failing to perform a duty of an office, into which a person has entered and which he is *de facto* filling, and refusing or failing to accept the office, and qualify himself. A person who undertakes an office and is in office, though he might not have been duly appointed, and, therefore, may have a defeasible title or

not have been compellable to serve therein, is yet, from the possession of its authorities, and the enjoyment of its emoluments, bound to perform all the duties, and liable for their omission, in the same manner as if the appointment were strictly legal, and his right perfect. But when a person is charged, as a crime, with a failure to accept and serve in an office, he may, in the first place, insist, supposing him to have been duly chosen or appointed, that the omission is not punishable by indictment; and, in the next place, there is nothing to prevent him from showing that he was not duly appointed or elected. Upon each of these grounds we think these defendants should have been acquitted.

It is manifest, that these persons never entered upon the offices to which it is said they were elected. The act does not make the election of itself an investiture; but taking the oaths of office is a prerequisite to induction. The not taking them is the gist of the (175) first count; and the second count is founded on the idea, that election only is all that is necessary to put the persons in office. It does not charge that they *are* town magistrates, etc., or that *being* town magistrates, etc., that it was their duty as such officers to keep the streets in repair; but only, that they, *being elected as aforesaid,* did suffer, etc. Now, the Court has no doubt that it is competent to the Legislature to require any person, appointed to office in any manner prescribed by law, to serve therein, under the pain of indictment or any other penalty. But we are aware of no principle of the common law, that renders such an omission criminal; and this statute contains no provision to that effect.

But if it were an indictable offense not to qualify and serve in these stations upon valid appointments, our opinion is, that these persons were justified in not doing so, because of the insufficiency of the election. The charter says, the Sheriff of the county shall hold the election, under the same regulations under which elections are held for the Legislature, and shall determine who is elected. It furthermore prescribes the manner in which the determination shall be declared, which is by his certificate of election deposited with the town clerk. As this was the first election under the charter, and the power of appointing the clerk is vested in the board of commissioners, there could be no clerk to whom the certificate in this case could be given; and it may then be admitted, that, from necessity, the construction is, that the clerk's book is not indispensable evidence of the election. But the defendants contend, that the Sheriff has not in any manner determined who was elected; and that the deputy was not competent to it. It is probable the Legislature intended, that the Sheriff himself should conduct this election, as it is to be held at but one place and for one day; though it may be, that, from the inconvenience of not having an election, if the Sheriff were from

sickness or other cause necessarily absent, it was intended that this, like many other of his duties, might be performed by deputy. Without determining that point, the Court is of opinion, that, at least, the (176) deputy should have been sworn. The statute imports into this election the regulations prescribed for elections to the General Assembly. And as to them it is very clear, that the Legislature intended, as a security for their being conducted fairly and impartially, that they should be held and superintended by persons acting under the obligation of an oath.

The Sheriff himself is sworn, generally, to the faithful performance of all his duties, upon entering into office. By the 4th and 5th sections of the act, Rev. Stat., ch. 52, the inspectors are to be sworn; and by the 6th section, the Sheriff, or other returning officer, "or his deputy, *which deputy shall in all cases be sworn before proceeding to act,*" shall receive the tickets and deposit them in the proper box. In this case the election was in part held by a person not appointed a deputy by the Sheriff; and it is not found, that either of the persons who held it was sworn, and the contrary is to be presumed, from the silence of the special verdict on that point.

PER CURIAM. Affirmed.

Cited: *S. v. Allen,* 27 N. C., 42; *London v. Headen,* 76 N. C., 75; *People v. Heaton,* 77 N. C., 24; *S. v. McMahon,* 103 N. C., 382; *S. v. Pritchard,* 107 N. C., 926; *S. v. Wynne,* 118 N. C., 1207.

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(177)

PATRICK FOLEY *v.* WILLIAM H. ROBARDS, JR., ET AL.

Where a writ is issued against two copartners for a partnership debt, and one of them is arrested and gives bail, such bail, upon being afterwards compelled by due course of law to pay the debt, has no remedy except against the individual for whom he became bail. He has no claim upon the other partner.

APPEAL from *Settle, J.,* Fall Term, 1842, of GRANVILLE.

This was an action of assumpsit, to which the defendants pleaded the general issue, and on the trial, the facts appeared to be these: The defendants, being partners in trade under the firm of Robards & Ferguys, on 26 March, 1839, made their promissory note in the name of the said firm, for $870.75, payable six months after date, to Messrs. Doremus, Suydam & Nixon, of New York—that on 29 October, 1839, the said Doremus, Suydam & Nixon sued out a writ from the Circuit Superior Court of Law, for the town of Petersburg, in the State of Virginia, against the defendants as partners, under the said name and

style of Robards & Ferguys, upon which writ the defendant Ferguys was arrested, and gave a bail bond in due form for his appearance to answer the action with the plaintiff, as bail—that the writ was returned, *"non est inventus,"* as to the defendant Robards—that judgment was duly obtained against the defendant Ferguys alone, by default, the writ being abated as to Robards for want of service—and that such proceedings were taken upon the judgment, that (the said Ferguys neither appearing nor paying the judgment nor any part thereof) a recovery was regularly had against the plaintiff as bail, and the (178) said judgment paid and satisfied by the plaintiff. The counsel for the defendant Robards insisted, that the plaintiff was not, upon this state of facts, entitled to sustain his action against the said Robards, because no privity was established between them, inasmuch as by becoming bail for the said Ferguys, the plaintiff incurred a liability not for the said firm of Robards & Ferguys, but for the personal benefit and relief of the said Ferguys only, and was not in law the surety of the said Robards or of the said firm—and as it was not proved nor alleged that the plaintiff had in fact become bail upon any request of the said Robards, the plaintiff had not shown himself entitled to a verdict as against him; and the counsel prayed the Court so to instruct the jury. The Judge being of that opinion, instructed the jury accordingly. The jury found a verdict against the defendant Ferguys, and in favor of the defendant Robards, and the Court having rendered judgment in pursuance of the verdict, the plaintiff appealed to the Supreme Court.

Badger & Waddell for the plaintiff.
Iredell for the defendant.

RUFFIN, C. J. The opinion delivered to the jury is founded on *Osborne v. Cunningham,* 20 N. C., 559; and, as we think, is in conformity to that decision. On the part of the plaintiff, however, a distinction is taken between the case of ordinary joint and several contracts, and that before the Court; which is the case of partners, each of whom had authority to request for both, and on the credit of both, another person to lend money to pay their partnership debt, or to become in any way responsible for it. We admit that there is that difference between the two cases. If one of two makers of a promissory note borrow money to pay the debt, and therewith he doth pay it, the lender cannot look to the other maker of the note, saying that this money went to pay a debt for which he was liable; for it was not advanced at his request. On the other hand, one partner has authority to borrow money for (179) the partnership purposes generally, and especially to pay a debt of the partnership; and for the money thus borrowed, or for that which

the surety was compelled to pay upon his undertaking for the firm, each member of it is undoubtedly liable. But that distinction, as it occurs to us, will not sustain this action by taking it out of the rule in *Osborne v. Cunningham.* For, although one, who lends the money or becomes responsible upon the request of one partner, may have his redress against all the partners; yet that is only when he lends the money to the firm, or when he becomes responsible as surety for the debt of the partnership, as the debt of the partnership. With respect to advances of money, it is true that, if partners agree to borrow money and it goes to their use, the lender may come in upon the joint effects although he took as a security the bond or note of an individual partner; as was decided in *Ex parte Brown,* cited in *Ex parte Hunter,* 1 Atk., 225. But it was held by LORD HARDWICKE, in the latter case, that where the contract was not made with both partners, but the money was lent to one of them, though for the purpose of being applied to a partnership in which he was engaged, and the lender took his separate bond, he was confined to his remedy on the bond, and could not make the partnership liable, on the ground that it had the benefit of the money; for that was a matter between the partners themselves. *Bevan v. Lewis,* 1 Sim., 376, is a very strong authority to the same effect. There, one partner, with the privity of his copartner, borrowed money in his own name, and gave his separate notes for it, and it was applied to the purposes of the partnership by being paid, by the direction of the copartner, to the bankers of the copartners to their joint credit and used in payment of their debts; yet, after judgment on the notes, and execution served on the stock and effects of the company, it was held, on the bill of the other partner, that the judgment creditors could, in equity, only subject the share in the surplus of the defendant in the execution; and, consequently, the partnership accounts
(180) were taken in order to ascertain what was coming to that partner. To the same effect, is *Lloyd v. Freshfield,* 2 Carr and Payne, 325. These cases seem to establish a general principle, that in point of law the contract must be joint in order to charge thereon the partnership; and that it is not sufficient to make it a joint contract, that the money was applied to a partnership debt, provided it was not advanced upon a treaty with the partnership, but was advanced to one of the partners, and upon his separate security. Thus, if Ferguys had given the note of "Robards & Ferguys," for the debt to Doremus, Suydam & Nixon, and Foley had joined therein as surety, it is clear that the plaintiff would be entitled to an indemnity from the joint effects of both partners. But if Ferguys had given his own note for the debt, and Foley had executed that note as his surety, the cases cited establish that the form of that contract would limit Foley's recourse to Ferguys, although the debt originally was that of "Robards & Ferguys." In point of law, that

separate note of Ferguys was not the joint contract of the partnership; and this gives character to the remedy of the creditor and of the surety. The same principle applies to the case of the plaintiff's undertaking as the bail of one of the partners. The creditor in that action could take no steps upon that judgment against Robards, nor could the bail arrest Robards and surrender him, so that he might be imprisoned and enforced to pay the debt in discharge of the bail. He had the right to discharge himself by taking Ferguys, and he is confined to his redress against him. In point of form and law, the plaintiff entered into no engagement for "Robards & Ferguys," or for Robards, but only for Ferguys as *his* bail. It does not even appear that he knew the debt was a partnership debt. It would be a dangerous application of the doctrine of substitution, to enable a person, who pays money as the bail of one person, to have recourse for it against another person, who was remotely liable for it, if sued in another action. There is no case of the kind that we are aware of; and that there is none, is one of the strongest arguments and authorities against this action; since the instances (181) must have been numerous, in which the bail of one partner has been obliged to pay a partnership debt.

PER CURIAM. No error.

Cited: *Hanner v. Douglass,* 57 N. C., 266.

CHARLES CLARK *v.* JOHN WALKER.

1. Upon a writ against one A, the Sheriff took a bond, executed by the said A and by one B and conditioned that the said *A. and B.* should make *their* personal appearance, etc., to answer, etc., and then to stand and abide the judgment of the said Court, etc. *Held,* that it was unlawful (by the act, Rev. St., c. 109, s. 19) for the Sheriff to take such a bond, and the bond was therefore void.
2. This is not the contract of bail in its terms, nor can it be inferred from the bond, that one is bail for the other, but each is alike bound to perform the judgment.

APPEAL from *Dick, J.,* Fall Term, 1842, of BRUNSWICK.

The following is the case as transmitted from the Court below:

This was a proceeding by *scire facias* by the plaintiff against the defendant, as the bail of one John Polony, to which the (182) defendant entered the following pleas, to wit: *"Nul tiel record,* that defendant did not execute any bond as bail of John Polony; if he did execute any bond, the condition thereof was not for twice the amount of the debt, and not being conformable to act of Assembly, cannot be proceeded on by *scire facias;* if he executed any bond, it was a

bond, the condition whereof was contrary to the act of Assembly, Rev. Stat., c. 109, s. 19, and, therefore, it was illegal and void." The plaintiff produced and proved a paper-writing, of which the following is a copy:

"State of North Carolina, Brunswick County.

Know all men by these presents, that we, John Polony and John Walker, are held and firmly bound unto William Hankins, high Sheriff of Brunswick County, his heirs, executors, administrators and assigns, in the sum of one hundred and fifty dollars, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents—sealed with our seals, and dated this 19th day of June, 1838.

The condition of the above obligation is such, that if the above bounden John Polony and John Walker, do, and shall make their personal appearance before the Justices of the County Court, to be held for the county of Brunswick, at the Courthouse in Smithville, on the first Monday in September next, then and there to answer the complaint of Charles Clark, in a plea of trespass on the case to his damage one hundred and fifty dollars, and then to stand and abide the judgment of the said Court, and not depart the same without leave had and obtained—that the above obligation to be void and of no effect—otherwise to remain in full force and effect. J. POLONY. (Seal.)

J. WALKER. (Seal.)

Signed, sealed and delivered in
presence of S. A. LASPEYRE."

The defendant objected to the reading of the said paper-writ-
(183) ing and its being received in evidence, upon various grounds, as set forth in the pleas; but the objections were all overruled by the Court. And the case being taken up upon the record by his Honor, he proceeded to overrule all the pleas of the defendant, and to render judgment against him. From this judgment the defendant appealed to the Supreme Court.

No counsel for the plaintiff.
Strange for the defendant.

RUFFIN, C. J. The Court has been not a little embarrassed, as to the light in which this case is to be viewed, and the questions intended to be presented for our determination. The pleadings are so defective, and the proceedings so irregular, that we should be obliged to reverse the judgments on these grounds; for it would seem that there was no jury, but that the Court decided the case upon proof of the bond by witnesses, and the reading of that instrument. On the other hand, the bond

is not formally spread on the record on oyer, so as to found a demurrer or motion in arrest of judgment for any defect in it. We conjecture, however, that the real object was to obtain from the Judge in the Superior Court, and from this Court, an opinion upon the validity of the bond, as a copy of it is inserted in the record, and made a part of the case stated. We prefer, therefore, deciding the case upon that point, as involving the merits, rather than sending it back simply upon the bad pleading or error in the mode of trial.

It then appears by the *scire facias* in this case, that the defendant is sued as the bail of one John Polony, in an action instituted against Polony by the present plaintiff. The alleged bail bond is an obligation given by Polony and Walker to William Hankins, the Sheriff of Brunswick, in a certain sum, with the following condition: "that if the above bound John Polony and John Walker, do, and shall make *their* personal appearance before etc., at etc., on etc., then and there (184) to answer the complaint of Charles Clark, in a plea of trespass on the case to his damage $150, and stand and abide by the judgment of said court, and not depart the same without leave, that then this obligation, etc."

We hold this bond to be void by force of the act, Rev. St., c. 109, s. 19, which makes it unlawful for a Sheriff to take a bond from any person in his custody, concerning any matter relating to his office, otherwise payable than to himself as Sheriff, *and dischargeable upon the prisoner's appearance,* and rendering himself at the day and place required in the writ, *and his sureties discharging themselves as special bail of such prisoner;* and every other obligation taken by the Sheriff in any other form or manner, by color of his office is made null and void. Were it not for *Rhodes v. Vaughan,* 9 N. C., 167, it might be much doubted whether a bail bond was good, which omitted in the condition a clause for the discharge of the sureties as special bail; in which character only they have the privilege of surrendering the principal, or can avail themselves of his death or of the want of a *ca. sa.* But it was held in that case by a majority of the court, and we are not disposed to disturb the decision, that the rights of the bail were secured not merely by the words of the obligation, but by the law; and that if it appeared by the bond that the parties stood in the relation of principal and bail, that was sufficient to require the court to allow the latter all the privileges of bail, and, consequently, to sustain the bond. It was quite clear from the language there used by the court, either that the bond must expressly contain the clause, in the words of the statute, for the discharge of the sureties as special bail, or that in some other way it must express the relation of the obligors in the bond to each other, as principal and bail; so that the law could adjudge the consequences. In that case the condi-

tion was, that J. Jennings, "*one* of the above bounden should make *his* appearance, etc., to answer, etc., and not depart the Court without leave"; and that was held sufficiently to exhibit the relation of the parties. But in our case, upon a writ against Polony, the Sheriff took a bond from him and another, that *they both* should appear and an-
(185) swer the action, and stand to and abide the judgment of the Court. This is not the contract of bail in its terms; nor can it be inferred from the bond that one is bail for the other. But both appear to be principals, and each is alike bound to perform the judgment. In other words, the bail is bound absolutely for the payment of the recovery, according to the tenor of this obligation; which is directly contrary to the statute, and renders the bond void.

If we were sure that this was the point, on which the decision was made in the Superior Court, as upon a demurrer, we would reverse the judgment and give judgment here for the defendant. But as it cannot be told certainly how the parties intended to raise the question, we content ourselves with reversing the judgment and remanding the cause, that the issues may be tried or the parties replead and put the bond or any other matter on the record, which they wish to bring in review.

PER CURIAM. Reversed.

Cited: Bradhurst v. Erwin, 30 N. C., 498; *Watt v. Johnston,* 48 N. C., 126.

(186)

THE STATE *v.* SOLOMON MORGAN.

1. When A, being within striking distance, raises a weapon for the purpose of striking B and at the same time declares that if B will perform a certain act he will not strike him, and B does perform the required act, in consequence of which no blow is given, this is an assault in A.
2. It *seems* that an officer does not, in any case, become a trespasser by seizing under an execution privileged articles, such as arms for muster. Certainly he does not become so, unless he seizes with a knowledge that they are privileged goods.
3. If one deliberately kills another to prevent a mere trespass on his property, whether that trespass could or could not be otherwise prevented, it is murder; and consequently an assault, with intent to kill, cannot be justified on the ground that it was necessary to prevent a trespass on property.
4. A man shall not, even in defense of his person or property, except in extreme cases, endanger human life or great bodily harm.
5. In criminal as in civil cases, if there be an assault, it cannot be justified other than by showing specially all the circumstances which render the act rightful, and the sufficiency of the alleged justification is a matter of Law.

APPEAL from *Pearson, J.,* Fall Term, 1842, of HENDERSON.

Indictment against the defendant for an assault and battery on Elias

Cantrell, to which he pleaded "not guilty." The jury empanelled to try the issue returned the following special verdict: Elias Cantrell, on the day set out in the indictment, being a constable, and having a *fieri facias* against the goods of the defendant Morgan, went to the house of Morgan, in the county of Henderson, and, in the presence of Morgan's wife, she forbidding him to do so, took into his hands a gun, the property of Morgan. She then proposed that Cantrell should not take the gun off until Morgan was sent for. Cantrell assented, and held the gun in his hands, in the presence of the wife, in the yard, having stepped out of the house into the yard with the gun in his hands, until (187) Morgan came, which was about ten minutes. Morgan came up with an axe in his hand, and required Cantrell to give up the gun. Cantrell refused; whereupon Morgan stepped up within reach of him, held the axe up in a position to strike, and said "give up the gun or I'll split you down." Cantrell did not at the time give up the gun, but proposed some arrangement, upon which Morgan let the axe down. The matter was arranged, and then Cantrell gave up the gun. Morgan was, at the time, liable to muster, and the gun was his arms for muster. The jury further find, that Morgan, at the time he went up to Cantrell and raised the axe within reach of him, intended to strike, unless Cantrell gave up the gun; but did not intend to strike, if Cantrell gave up the gun—that Morgan used no more force than was necessary to compel Cantrell to give up the gun. Whether, upon these facts, the defendant, in law, committed an assault, and, if so, whether the assault was justified as being in the defense of his property, the jury are ignorant and pray the opinion of the Court. If the Court, upon these facts, is of opinion that the defendant is guilty, then the jury so find; and if the Court is of opinion that the defendant is not guilty, then the jury so find.

The Court was of opinion, that raising the axe, with an intention to strike unless the gun was given up, did amount to an assault; for if a man draws a weapon, intending to strike if the other does not pull off his hat, or surrender his money, or do some act which he has no right to require, the offer and intention amount to an assault, although it be his intention only to strike, provided his unlawful terms are not complied with. But the Court was of opinion, that, as the officer had no right to take the gun under the execution, although he did take it in his hands, yet the wife being present, when the defendant came up, the possession of the gun was not so lost by him and acquired by the officer, as to take from him the right to justify an assault in defense of his property; for a man may not only prevent another from laying hands on his property, but he may prevent him from taking it off, although it happens to get in the hands of the trespasser before he is stopped—the (188) possession for this purpose not being lost, while the property re-

mains in the presence of his agent or himself. The Court, therefore, pronounced judgment in favor of the defendant, from which the Solicitor for the State appealed to the Supreme Court.

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

GASTON, J. Two questions are presented for our consideration on this special verdict, and for the purpose of perspicuity it is necessary that they should be examined separately. The first is, whether the defendant committed an assault; and the second, if he did, whether that assault was justified as having been committed in the rightful defense of his property.

Upon the first question, this Court entertains the same opinion, which was expressed in the Superior Court. There are several ancient cases in which it was held, that an assault might be committed by threats of future violence; but it has long been settled, that words alone cannot constitute an assault. They may endanger the public peace, but do not break it. There is no assault, unless there be some *act,* amounting to an attempt or offer to commit personal violence. The instances usually given of such attempts or offers to do wrong to the person of another, are "by the striking at him with or without a weapon, or presenting a gun at him within a distance which the gun will carry, or pointing a pitchfork at him standing within the reach of it, or by holding up one's fist at him in an angry threatening manner." 1 Hawk. P. C., c. 15. The law regards these acts as breaches of the peace, because they *directly* invade that personal security, which the law guarantees to every citizen. They do not excite an apprehension that his person may be attacked on a future occasion, and thus authorize a resort to cautionary remedies against it; but they are the beginnings of an attack, excite terror of immediate personal harm or disgrace, and justify a resort to actual
(189) violence to repel the impending injury and insult. But even acts, which *prima facie* and unexplained are undoubtedly assaults, like other acts which are not unequivocal in their character, may be shown to be in truth different from what they purport to be; that they are not attempts or offers to do harm, but merely angry gestures without any accompanying purpose of mischief. The attending circumstances may plainly show this, and, among other circumstances, the declarations of the party at the time, inasmuch as such declarations are ordinarily indicative of the party's purpose, are very proper to be considered and weighed. The ordinary illustration of the doctrine, that a seeming assault may be explained away by the declarations of the supposed assailant, is the very familiar case, where a man laid his hand

on his sword and said to the person, with whom he was quarreling, "If it were not assize time, I would not take such language from you." There is also an illustration of it in *S. v. Crow,* 23 N. C., 375, where the defendant, when he raised the whip, used the words, "if you were not an old man, I would knock you down." In both it was held to be a fair subject of enquiry, whether, at the time these acts were done, there was a present purpose of doing harm, and that, if there was not, the acts did not amount to an assault. But these, and all the cases within our recollection where this doctrine has been held, were cases, in which there was a declared intent not to do harm at the time. The present case is one of a very different character. The act was not only apparently a most dangerous assault, but accompanied with a present purpose to do great bodily harm; and the only declaration, by which its character is attempted to be changed, is, that the assailant was not determined to execute his savage purpose unconditionally and without a moment's delay. He had commenced the attack and raised the deadly weapon and was in the attitude to strike, but suspended the blow, to afford the object of his vengeance an opportunity to buy his safety, by compliance with the defendant's terms. To hold that such an act, under such circumstances, was not an offer of violence—not an attempt to commit violence, would be, we think, to outrage principle and manifest an utter want of that solicitude for the preservation of peace, which characterizes (190) our law, and which should animate its administrators. To every purpose—both in fact and in law—the attack on the prosecutor was begun—and in the pause, which intervened before its consummation, most happily for both parties an arrangement was made, which prevented the probably fatal result. But this pause—though intentional, and announced when the attack began—does not prevent that attack from being an offer or attempt to strike. If a ruffian were to level his rifle at a traveler, and announce to him that he might have fifteen minutes to make his peace with his God—and the unfortunate man should save his life by prayers, by remonstrance, by money, or by any other means before the expiration of that time, could it be pretended that there had been no attempt nor offer to hurt him, because the intent was not to kill instantaneously, and therefore did not accompany the act? Will it be doubted, if a bully should present his pistol at a citizen and order him, under pain of death, not to walk on the same side of the street with him, whether there was an offer of violence, because the purpose to kill was not absolute but conditional merely? Wherever the act is done *in part execution* of a purpose of violence—whether that purpose be absolute or provisional—makes no difference as respects the question, whether the act be an assault. In both cases the assailant equally violates the public peace. In both he breaks down the barrier which the

law has erected for the security of the citizen. In the former he sets up none in its place. In the latter, he substitutes for it the protection of his grace and favor.

Upon the second question, the opinion of this Court differs from that of the Superior Court. If an assault be committed, but it is done in the lawful defense of one's person or property, the defendant cannot, in a civil action, give this justification in evidence under the plea of not guilty, but must set it forth to be judged of by the Court by a special plea. The act done was in law an assault, notwithstanding it was rightfully done. His plea therefore confesses the assault charged in the declaration, but avers that the plaintiff cannot maintain an action
(191) therefor, because of the special circumstances rendering the act, complained of, one which the defendant might of right do. But upon an indictment for an assault, the traverser may, under the plea of not guilty, show any matter of justification. There can be no offense against the community, where the accused has done no more than the law sanctions, and it is most convenient for the accused generally, that they should not be tied down to the strict rules of pleading. But in criminal, as in civil cases, if there be an assault, it cannot be justified other than by showing specially all the circumstances which render the act rightful; and the sufficiency of the alleged justification is a matter of law. The defendant in this case is guilty of an assault, unless the facts found by the verdict, make up a legal justification. In the judgment of this Court, they do not.

In the verdict it is found that the gun, which the constable seized under the *fi. fa.* against the goods of the defendant, was his "arms for muster," but it is not found that the constable either knew that fact, or was notified thereof by the defendant or any other person. Being his arms for muster, the gun was by law privileged from seizure. But we are not prepared to hold that the seizure was necessarily a trespass. If a Sheriff under a writ against A arrest B, he is guilty of a trespass, because he acts wholly without authority. But if he arrest, under a valid writ, one who is privileged from arrest, he is not guilty of a trespass. See *Countess of Rutland's case,* 6 Co., 53; *Tarleton v. Fisher,* Doug., 672; *Cropley v. Shaw,* 2 Bl. Rep., 1085; *Cameron v. Lightfoot, Id.,* 1190; *Parsons v. Lloyd,* 3 Wils., 340; Watson on Sheriffs, 91, 92. The appropriate remedy for the privileged person so arrested, is to move the Court for his discharge. So if a Sheriff, under a *fi. fa.* against the goods of A, take the goods of B, he is a trespasser. But it would seem, that if under the *fi. fa.* he take goods in a privileged place, as in the King's palace, or take goods which the law exempts from seizure, as the goods of a certificated bankrupt, or of a person discharged under an insolvent act, he is not a trespasser, but the party must apply to

the Court for relief. Watson on Sheriffs, 174, 175; *Winter v.* (192) *Miles,* 10 East, 578; *Lister v. Mundell,* 1 Bos. and Pul., 427. And the distinction in both classes of cases seems reasonable. The Sheriff or officer, acting beyond the mandate of the writ, is necessarily a wrong-doer. He must, therefore, take the responsibility of determining, whether the person or the goods taken be the person or goods which he, is ordered to take. But privilege—or exemption—is a legal advantage, which may or may not be claimed. Whether the person or goods be privileged or not, he has not the means nor the judgment to decide. Among the articles privileged from seizure, are "necessary school books." Must the officer decide at his peril what school books are necessary? One bed and furniture, one Bible, one loom, one hymn book, etc., are privileged. Which of these, if there be many, must he leave, and how is he to know whether the defendant in execution has but one? But, at all events, if the seizure of privileged goods can make the officer a trespasser, we are satisfied that it can only be, where he seizes with a knowledge that they are privileged goods. Our opinion, therefore, is, that the substratum of the alleged justification is removed in this case. It does not appear that the constable was a trespasser.

But we should be reluctant to decide the case upon this ground only, as possibly it was an inadvertent omission in the verdict in not stating, that the constable knew that the gun seized was the defendant's arms for muster; and, therefore, we proceed to a further consideration of the justification claimed for the assault. Assuming, then, that the constable had wrongfully taken the gun, and that the defendant had a right to require its return, and that exertion of force, nothing short of that which was begun on the part of the defendant, would have availed to compel its return, in our opinion the assault is not justified. It was made *with a deadly weapon,* which, if used, would have probably occasioned death, and made without any previous resistance on the part of the officer. It was, therefore, an assault with intent to kill. If this intent were lawful, the assault with that intent was lawful. (193) If this intent were unlawful, an assault with that intent cannot stand justified. Now, when it is said that a man may rightfully use as much force, as is necessary for the protection of his person or property, it should be recollected that this rule is subject to this most important modification, that he shall not, except in extreme cases, endanger human life or great bodily harm. It is not every right of person, and still less of property, that can lawfully be asserted, or every wrong that may rightfully be redressed by extreme remedies. There is a recklessness—a wanton disregard of humanity and social duty—in taking or endeavoring to take the life of a fellow being, in order to save one's self from a comparatively slight wrong—which is essentially wicked, and which

the law abhors. You may not kill, because you cannot otherwise effect your object, although the object sought to be effected is right. You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty. Thus an officer, acting under a legal process, has a right to arrest the person against whom it is directed, and to retake him, if he break custody; and for such purpose he may and ought to use necessary force—yet, if the process be in a civil case, or a misdemeanor only, and the officer, although he cannot otherwise arrest or retake his prisoner, intentionally kills him, it is murder. 1 Hale P. C., 481. Foster, 271. 1 East P. C., ch. 5, ss. 306, 307. The purpose is indeed rightful, but it is not one of such paramount necessity as to justify a resort to such desperate means. So it is clear, that if one man deliberately kills another to prevent a mere trespass on his property—whether that trespass could or could not be otherwise prevented—he is guilty of murder. If indeed he had at first used moderate force, and this had been returned with such violence that his own life was endangered, and then he killed from necessity, it would have been excusable homicide. Not because he could take life to save his property, but he might take the life of the assailant to save his own. If these principles be
(194) right, and we think they cannot be contested, it would follow that, if unfortunately the rage of the defendant in this case had not been pacified, and the fatal blow had fallen and death ensued, it would have been a clear case of murder. If so, then the assault made was an assault with intent to commit murder. A justifiable assault with intent to commit murder is a legal solecism.

The Superior Court will render judgment for the State, upon the special verdict.

PER CURIAM. Reversed.

Cited: S. v. Wallace, post, 196; *S. v. McDonald,* 49 N. C., 22; *S. v. Brandon,* 53 N. C., 467; *S. v. Myerfield,* 61 N. C., 109, 111; *S. v. Brittain,* 89 N. C., 494; *S. v. Horne,* 92 N. C., 807; *Braddy v. Hodges,* 99 N. C., 393; *S. v. Sigman,* 106 N. C., 732; *S. v. Scott,* 142 N. C., 584.

(195)

STATE *v.* WILLIAM L. WALLACE.

1. Where the jury in a special verdict do not say that they find in one way or the other, according as the opinion of the Court may be upon the law, the verdict is imperfect.
2. Where a special verdict is imperfect or bad, so that no judgment can be given thereon, the proper course is to direct a *venire de novo.*

APPEAL from *Dick, J.,* Fall Term, 1842, of MOORE.

The defendant was indicted for an assault and battery on Robert

Dean, and pleaded not guilty. On the trial of this issue, the jury found the following special verdict. The jury find, that while the prosecutor was sitting in a chair, the defendant raised his gun in a striking position, being within striking distance of the prosecutor, and declared that if he repeated certain words just uttered, he would strike him, which words were not repeated by the prosecutor, and the jury submit to the Court whether this is in law an assault.

The Court, being of opinion that it was not in law an assault, rendered judgment for the defendant, from which the Solicitor for the State appealed to the Supreme Court.

Attorney-General for the State.
D. Reid for the defendant.

GASTON, J. The special verdict in this case is so imperfect, that in law no judgment can be rendered thereon. The jury submit to the Court, whether the defendant be guilty of an assault, but they do not find the defendant guilty, if in the opinion of the Court he (196) is guilty; and not guilty, if in the opinion of the Court he is not guilty. The finding one way or the other must be a finding of the jury or the verdict is bad. When a special verdict is imperfect or bad, the proper course is to direct a *venire de novo*. Cro. Jac., 113; 2 L. Ray., 1521, 1522.

Should it be thought proper to bring the case before us after another trial, we desire that the circumstances be stated more fully than they are set forth in this verdict. The words used, which the defendant forbade to be repeated, and the intent with which he raised his gun, and whether as wielded by him it would probably have occasioned death or great bodily harm had it descended on the prosecutor, are all matters proper to be noticed.

We have had occasion, in *S. v. Morgan, ante,* 186, to give our views of the law on questions supposed to be involved in this case, and therefore our inability to render judgment in this case will probably not cause any serious disappointment to those interested therein.

The Superior Court will set aside the verdict, and issue a *venire de novo.*

PER CURIAM. Ordered accordingly.

Cited: S. v. Blue, 84 N. C., 809; *S. v. Bray,* 89 N. C., 481; *S. v. Stewart,* 91 N. C., 568; *Hilliard v. Outlaw,* 92 N. C., 268; *S. v. Hanner,* 143 N. C., 636.

(197)

NICHOLAS MASSEY *v.* JAMES HOLLAND.

A, being indebted to B, agreed by parol to sell to the latter his equitable interest in a tract of land, which B was to re-sell, and, after retaining the amount due to him, was to pay to A the surplus of price he might receive, beyond such debt. A accordingly conveyed, and B re-sold at an advance, and then refused to account with A for such advance. *Held*, that this contract of B was not one that came within the provisions of the act Rev. Stat., c. 50, s. 8, making void parol contracts for the sale of lands.

APPEAL from *Bailey, J.*, Spring Term, 1842, of HAYWOOD.

This was an action of *assumpsit*. The facts were, that the plaintiff was indebted to the defendant in the sum of one hundred dollars, and, being desirous of paying this debt, agreed with the defendant to sell him a tract of land—that the defendant agreed to resell the said land, and whatever he obtained for it over and above the one hundred dollars as aforesaid, he promised to pay to the plaintiff. The defendant sold the land to one Ephraim Christopher, who gave him one hundred dollars in cash, with notes and surety for one hundred dollars more. The defendant sold the notes, so received from Christopher, before they were due and before this action was brought, and Christopher paid part of the notes before and part after this suit was brought. It was further in evidence that the plaintiff did not have a legal title to the said land, but a bond for title only—that he gave up the bond to the defendant, and that the obligors in the bond made title to the defendant instead of to the plaintiff. The defendant's counsel objected to the plaintiff's recovery, first, upon the ground that the contract was about land,

(198) and should have been reduced to writing, and that parol evidence could not be received, because it would contradict the deed given to the defendant; and secondly, that the action was premature, for the notes were not due at the time they were sold by the defendant. The Court was of opinion this was not one of those contracts, which the law required to be reduced to writing; and instructed the jury, that the plaintiff was entitled to recover whatever the defendant received over and above one hundred dollars, and that there was evidence, if believed, from which they would have a right to infer that he received something.

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

Francis for the plaintiff.

No counsel for the defendant.

GASTON, J. The Court does not find any error in the instructions given to the jury. In the construction of the act of 1819 (Rev. Stat., c. 50, s. 8), to avoid parol contracts for the sale of lands and slaves, it

has been settled that the act has no effect upon executed contracts, but operates only to avoid every executory contract to sell or convey lands or slaves, unless there be a written memorandum thereof, signed by the party sought to be charged thereby. *Choate v. Wright,* 13 N. C., 289. If a parol agreement be made for the sale of a slave, neither party can sue the other for a breach thereof. The vendor cannot sue for the price, nor the vendee for nonperformance of the agreement to convey. But after a sale, completed by delivery or otherwise, the vendor may sue for the purchase money, or the vendee, because the vendor has retaken the slave. The plaintiff has not brought his action upon the agreement. He treats the agreement as having been executed, and claims the money, which, in consequence of the execution of that agreement, became due to him. The case states the facts to be, that the plaintiff being the equitable owner of the land, agreed to sell it to the defendant, (199) and the defendant engaged to resell it, and, retaining part of the purchase money to satisfy the debt which the plaintiff owed him, to pay over the residue to the plaintiff. Now if the *legal character* of the agreement was for a sale and resale, such sale and resale have been effectually made. The sale of the plaintiff was completed by the conveyance of the title to the defendant by the plaintiff's trustees, who had bound themselves to make title as they should be required by the plaintiff—and the resale was completed by the defendant's conveyance to the purchaser from him. It would be repugnant to the plainest principles of justice, to allow him to pocket that part of the purchase-money, which was to be paid to the plaintiff as the consideration for his sale. But the *legal character* of the transaction would rather seem to be, notwithstanding the terms which the parties used, or the forms in which the transaction was conducted, that the defendant sold the plaintiff's land for him, upon the agreement of the plaintiff that the defendant might deduct from the proceeds the amount of the debt due to himself. The delivery of the bond for title by the plaintiff to the defendant, and the conveyance to the defendant, by the plaintiff's trustees, may fairly be regarded as but the means employed to enable the defendant to sell the plaintiff's land. If this view can be sustained, then clearly all the money received by the defendant in consequence of this sale, over the sum which he had a right to retain for his own demand, was money received for the use of the plaintiff.

On the other point made, the only doubt was, whether the defendant had received the price of the land before suit was brought. This was a question of fact fit for the jury. There certainly was evidence tending to establish it, and the effect of that evidence was properly submitted to them.

PER CURIAM. No error.

Cited: Sprague v. Bond, 108 N. C., 385; *Brogden v. Gilson,* 165 N. C., 19.

(200)

FRANKLIN SWAIN & AL. *v.* PETER RASCOE.

1. A devise of personal property to A for life, and at his death, *if he should die leaving heirs lawfully begotten of his body, that the said property shall be equally divided between them,* is a limitation, *for life only* to A with remainder to his children as tenants in common.
2. The general rule is, that wherever words in a will would create an estate tail in land devised, the same words in a bequest of chattels will carry the absolute estate; but an exception to this rule is, where further words of limitation have been superadded, as "executors, administrators and assigns," or the words "equally to be divided," and the like.

APPEAL from *Bailey, J.,* Fall Term, 1842, of BERTIE.

This was an action of detinue to recover two slaves, the title to which they proved to have been in James Swain the elder, in his lifetime. The plaintiffs claimed title under the will of the said James Swain, dated in January, 1817, and proved at February Term, 1817, of Bertie County Court, a copy of which they produced. The particular clause under which the plaintiffs claimed the negroes in question, is as follows, viz.: "I lend unto my beloved son James Swain, the following negroes, to wit, Mark, Amy, and Ben, for his own use during his natural life, and at his death my will and desire is, if he should die leaving heirs lawfully begotten of his body, that the said negroes shall be equally divided between them, but if he should not leave heirs as above named, it is my wish that the said negroes should be divided between my surviving children, or their heirs lawfully begotten of their body." The plaintiffs then proved the death of James Swain, the younger, in 1841, and

(201) that they were his surviving children, and that the negroes were in the possession of the defendant. It was admitted that the executor of James Swain, the elder, had assented to the legacies contained in the will of his testator. His Honor instructed the jury, that, if they believed the evidence, the plaintiffs were entitled to recover. The jury having found accordingly, and judgment being rendered pursuant to their verdict, the defendant appealed.

A. Moore for the plaintiffs.

No counsel for the defendant.

DANIEL, J. James Swain bequeathed to his son James Swain, the following negroes, to wit, Mark, Amy and Ben, for his own use during his life; and, at his death, "if he should die leaving *heirs lawfully begotten of his body,* that the said negroes shall be equally divided between them, but if he should not leave heirs as above named, that the said negroes should be divided among my surviving children." James Swain, the legatee, took possession by the assent of the executor, and died in

1841, and the plaintiffs are his children, and have brought this action to recover Amy and her child born during the lifetime of the tenant for life. The general rule certainly is, that wherever words (202) in a will would create an estate tail in land devised, the same words in a bequest of chattels will carry the absolute estate. But it is equally certain that an exception to that rule has always been made, when to words of limitation (heirs of the body), improperly applied to personal bequests, further words of limitation have been superadded, as "executors, administrators and assigns," or the words "equally to be divided," and the like. It has always been inferred from the words, so grafted upon the limitation, "to the heirs of the body," of the legatee the testator could not intend the heirs to inherit *qua* heirs *ad infinitum,* but that they should take distributively as purchasers, so as to give the legatee an interest for life only, with remainder to his children or heirs as tenants in common. In *Jacobs v. Amyatt,* 4 Bro. Ch. Ca., 542, the bequest was to Lucy Cook for life, and, after her decease, to the *heirs of her body* lawfully begotten, *equally to be divided* between them, share and share alike; the words "heirs, etc.," were held to be words of purchase and not words of limitation. To the same effect, see, also, 13 Ves., 479; 1 Mad., 376; 2 Rop. on Leg., 354, 355. In the case now before us, by force of the superadded words, "equally to be divided," it is obvious that the testator intended, that after the death of his son, the legatees should take distributively and as purchasers, and not in succession as heirs, but together as children. *Target v. Gaunt,* 1 P. Wms., 432; 1 Rop. on Leg., 86. The decision that was made in the case of *Jesson v. Wright* (2 Bligh, 1), extended the rule in *Shelley's case* to a devise of lands, couched in words like those contained in this case. The devise there was, to *William* for life, and, after his decease, *to the heirs of his body, in such shares, etc.,* as he shall appoint; and for want of such appointment to the *heirs of the body of William,* share and share alike as tenants in common. *Held,* that William took an estate tail. Mr. Roper has noticed this case at the foot of his page (2 Roper, 354), to show that it had not escaped his observation, and that it did not affect the previous decisions relative to legacies of personal property, when to words of limitation, such as "heirs," or "heirs of the (203) body," were superadded expressions or sentences such as have been before mentioned. And that in *such* bequests of personalty, the rule in *Shelly's case* would not be applicable. The superadded words "equally to be divided," distinguish the case now before the Court from *Ham v. Ham,* 21 N. C., 598.

We accordingly regret that at the last term in *Bradley v. Jones,* 37 N. C., 245, the effect of these words, "equally to be divided among the heirs of her body," after a previous limitation to the mother expressly

for life was overlooked. The case was not argued for the children, and so the point was not brought to our notice, and was inadvertently passed over by ourselves. The best atonement that can be made for the error is, to seek the first opportunity to acknowledge it; and we deem it fortunate that one has occurred so soon, that it can be done before much mischief can have arisen from it. We now do so, by affirming this judgment on the strength of those words.

The case might also be considered upon the other words, "if he should die *leaving* heirs lawfully begotten of his body" then to them, but "if he should not leave heirs as above," then over to the testator's surviving children, as creating a contingent limitation with a double aspect; which, in relation to personal property, might confine the interest to James for life, and then vest it in his issue, as a class of persons, existing at James' death, taking as purchasers, or to his brothers and sisters, as the event might happen, as to his leaving or not leaving issue living at the time of his death. But as the point, on which the case has already been considered is a clear one, we do not think it necessary to say anything upon this last, but leave it untouched.

PER CURIAM. No error.

Cited: Lillard v. Reynolds, post, 371; *S. v. Skinner,* 26 N. C., 58; *Miles v. Allen,* 28 N. C., 89; *Evans v. Lea,* 40 N. C., 172; *Ward v. Jones, Ib.,* 405; *Pless v. Coble,* 58 N. C., 232; *Chambers v. Payne,* 59 N. C., 278; *Mills v. Thorne,* 95 N. C., 366.

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(204)

DAVID CARPENTER *v.* WILLIAM WHITWORTH.

Under the processioning act (Rev. Stat., c. 91), when one of the parties objects to the processioner's proceeding, the processioner must, in his return to the Court, state "all the circumstances of the case," as for instance, the nature of the objection, the line or lines claimed by each party, &c. If he does not, the report is invalid, and should be quashed.

APPEAL by the defendant from *Pearson, J.,* Fall Term, 1842, of CLEVELAND.

The nature of the proceedings and the questions involved in this case are fully stated in the opinion delivered in this Court.

Boyden and *J. H. Bryan* for the plaintiff.
Hoke for the defendant.

GASTON, J. The record states that at the August Term, 1839, of the County Court of Lincoln, Thomas Wilson, a processioner of said county,

returned a report to the court, that on 8 August, 1839, he had been previously called upon by David Carpenter "to procession a tract of land lying on the waters of the Suck Fork of Buffalo Creek, adjoining lands of Anderson Matthews, William Whitworth, Martin Hoyle and others, containing 150 acres of land originally granted to John Caruth, by patent dated 20 December, 1796, and conveyed to the said Carpenter, as by records will more fully appear"; that he commenced at a post oak, the beginning corner of said tract, and ran thence south 176 poles to a stake, thence with William Whitworth's line of a deed made (205) to the said Whitworth by William Killiam, bearing date 2d of March, 1790, thence east ninety-seven and a half poles," when William Whitworth forbade him "to run any further along said line to go to the stake the third corner of said patent." It further appears, that thereupon five persons were appointed commissioners to settle said disputed line or lines; that these commissioners, with the processioner, afterwards made a report of their proceedings to the Court, and that exceptions were taken thereto, and the report set aside. A new county, Cleveland, having by an act of the Legislature been erected, and the land in dispute lying within the limits thereof, the cause was then transferred to the County Court of Cleveland, and there, at the August Term, 1841, it was ordered, that a new jury be summoned to go upon the premises with the processioner, naming five persons, and Jacob Conner processioner. To the January Term, 1842, the said processioner and commissioners, or jury, made their report; wherein is set forth a plat of the lines run, and thereunder it is stated, that they did meet "on the 19th of November, at the beginning corner, and were duly sworn and did proceed as follows, beginning at a post oak, and ran thence south 186 poles to a stake, thence east 46 poles to said William Whitworth's old corner, thence with Whitworth's line east 124 poles to a stake, and we here run and marked the said lines, and processioned as above described." This report is subscribed by the processioner and commissioners, and upon it is indorsed, but without signatures thereto, "We the undersigned find the above in favor of David Carpenter." To this report exceptions were taken on the part of Whitworth, first, for that the jury had disregarded a continued possession by the defendant for more than forty years, which gave him a right to the land at the point where he had stopped the processioner; secondly, for that the jury had extended the first line of the patent, which called to run south 150 poles to a post oak, twenty-six poles farther to a stake, without any proof where the post oak had stood, and run from the termination of this line, thus improperly extended 46 poles, to what they termed Whitworth's line, and thence 124 poles, whereas they should have stopped the first line (206) at the distance called for in the plaintiff's patent, 150 poles,

and thence have run east 144 poles to his next corner, Whitworth's line, called for in his patent, not being a well-known or marked, but an open line, to be ascertained by survey; and, if this had been done, they would not have reached the point where the processioner was stopped, and thirdly, because the jury had totally disregarded the calls of the plaintiff's deed and made new corners, and added one call and one line. The record proceeds to state, that, the case coming on to be considered by the Court, the exceptions were overruled and judgment rendered that the plaintiff recover his costs from the defendant, and thereupon the defendant appealed to the Superior Court, and the judgment being there affirmed, the defendant appealed therefrom to this court. The record does not show how these exceptions were heard below, or upon what ground they were overruled. If it were established or admitted, or we could assume, that the matters of fact alleged in the exceptions were true, we then could determine whether they were valid in law. But they are presented to us merely as the allegations of the party excepting; they are not admitted, nor is anything shown from which we could infer that they were true. Even the calls of the patent or deed, under which the plaintiff claimed, are not set forth, except in the exceptions, and that only partially, so that we cannot see that the commissioners did extend his lines or disregard these calls. We do not know whether Whitworth had the continued possession, or, if he had, under what claim of title he so possessed. We have not, therefore, the means of ascertaining whether the exceptions be or be not well founded, whether the award of the freeholders be right or wrong; and, if nothing else appeared, it would be our duty to affirm the judgment of the Superior Court, simply because of our inability to discover that there is error in it, and of the legal presumption that it is not erroneous. But objections have been taken here by the appellant, which do not appear to have been raised below, and one of these, we think, renders it impossible for us to affirm the judgment.

(207) The practice of processioning lands, though recognized in our statutes for more than a century, has for many years been so generally disused, that few of the profession or of the bench can claim to be familiar with the law respecting it. The express enactments about it may be thus summarily stated. In each county districts are required to be laid off for having processioned the lands of such persons as shall desire it, and, in each district, a person capable of surveying shall be appointed processioner, who shall take an oath for the faithful performance of his duties. The proprietor of any tract, wishing to have it processioned, is required to give a previous notice of ten days to all the persons having adjoining tracts; the processioner shall make out, subscribe and return to the County Court, with a copy of the notices, a

certificate, in words of full length, for each tract of land processioned, containing the claimant's name, the quantity of acres, the corners, and the number of poles contained in each line, and the clerk shall record the certificate.

It is declared that every person whose land shall be twice processioned, shall be deemed and adjudged the owner of the said land, and, upon any suit commenced for such land, the party in possession may plead the general issue, and give the act in evidence. It is also provided, that where a line is disputed, and the processioner is forbidden by a party interested in the event of the processioning, to proceed further in running and marking the same, it shall be the duty of the processioner to report the same, stating truly all the circumstances of the case, with the name of the person who forbade the proceedings to the next County Court, and the Court shall appoint five respectable freeholders, to appear with the processioner on the line or lines so disputed, who shall proceed, after being duly sworn by the processioner or a Justice of the Peace, to do equal right and justice between the contending parties, to establish such disputed line or lines as shall appear to them right, and procession the same, and make report of their proceedings to the next Court, who shall cause the same to be recorded. Now it would seem indispensable, where, in the course of a processioning, a dispute arises with one of the persons notified, and the claimant wishes the dispute to be thus decided, that the certificate should set forth (208) enough to show *thereon* what the subject of dispute is—that is to say, the respective claims and allegations of the contending parties—so that the matter may plainly appear upon which they are at issue. Technical forms are not indeed required, but in the language of the act, "all the circumstances of the case," which must mean all the things controverted, shall be truly set forth. There will then be constituted between the parties a cause of record, so that when the proceedings therein of the appointed triers shall be recorded, the decision of the right in contestation will appear. It is insisted on the part of the appellant, and as we think correctly, that this was not done in the case before us. All that the certificate states is, that after the processioner had run from a postoak, the beginning corner of a tract of 150 acres, originally granted to John Caruth, and by him conveyed to the claimant, South 176 poles to a stake, he ran then with Whitworth's line of a deed made to him by William Killiam, thence east ninety-seven and a half poles, when Whitworth forbade him to run further along said line to go to the stake, the third corner of the patent—but why he forbade, and how far the claimant insisted the processioner should go—whether the dispute was about the first line, or as to the corner from which the processioner was running or the direction or length of the second line does

not appear upon the certificate. The pleadings of the parties are not made up so as to justify the appointment of the freeholders to try the controversy. *Wilson v. Shuford,* 7 N. C., 504.

Upon these principles and the authority of the case referred to, we are of opinion that the order ought to have been quashed, had a motion for that purpose been submitted in apt time by the appellant. After the tedious and expensive proceedings, which have since taken place, it is with reluctance we listen to an objection to the judgment, which should have been presented in the course of the cause, and at an early period of the litigation. But the defect is so radical, affecting the constitution of the cause in the Court below, that we cannot even now
(209) disregard it, and therefore must reverse the judgment there rendered with costs to the appellant in this Court. But, in analogy to the cases where a judgment is arrested merely, we shall render no judgment *in lieu* of that so reversed. The parties will then have to pay each his own costs incurred before, and the appellee may, if he pleases, commence his proceedings *de novo.*

PER CURIAM. Reversed.

Cited: Miller v. Heart, 26 N. C., 27; *Matthews v. Matthews, Ib.,* 158; *Hoyle v. Wilson,* 29 N. C., 469; *Porter v. Durham,* 90 N. C., 57; *Euliss v. McAdams,* 101 N. C., 398.

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(210)

ROBERT GREEN *v.* DAVID HARRIS.

1. The only thing, that gives weight to the declarations of a party to a suit in his own favor, is, that they are made in the presence of the person interested to deny them and are not contradicted.
2. No length of possession by a bailee, as such, will bar the right of the bailor; and, if the bailment be admitted, during the longest enjoyment, a title in the possessor cannot be presumed from the possession.
3. A bailee may turn his possession into a tortious and adverse one; but then there must be some demand or effort of the bailor to regain the possession, and a refusal or resistance on the part of the bailee, or *some act* must be done by the bailee changing the nature of the possession.
4. But the naked declaration of a bailee, that he claimed the property in his own right, without any change of the possession and without any demand or wish to resume the possession by the bailor, although such declaration be public or made even to the bailor himself, will not instantly terminate the bailment and immediately convert the possession into an adverse one.
5. Though a bailee in possession may maintain an action of detinue against mere wrong-doers, yet persons, who claim under the will of the alleged bailor, are not to be considered as wrong-doers, against whom the bailee may on that account maintain this action against them.

GREEN *v.* HARRIS.

APPEAL from *Dick, J.*, Fall Term, 1842, of MONTGOMERY.

Detinue for four slaves, to wit, Matilda and her three sons, Jerry, Sam and Doctor, commenced in January, 1840, in which possession by the defendant and a demand by the plaintiff immediately before bringing the action were admitted. The plaintiff introduced two witnesses, Britton Chappel and John Chappel, who stated that in 1798 the plaintiff was in possession of Matilda, and that the other three (211) slaves named in the declaration are reputed to be the issue of Matilda—that the plaintiff retained, from 1798, the possession of Matilda, then a girl, and her sons sued for from their birth, until just before the bringing of this action—that the first wife of the plaintiff was Nancy, the daughter of Joshua Harris. And the plaintiff here rested his case. The defendant then introduced Howell Harris, who stated that he was the son of old Joshua Harris, who formerly resided in this county, and removed many years ago to Georgia—that, about 1795 or 1796 the plaintiff intermarried with Nancy, the daughter of the said Joshua Harris—that, about two years after the marriage, Nancy had a child—that witness was then living with his father, who called Matilda and said to her, "Go over to Bob Green's and nurse for my daughter"—that Matilda then went to the plaintiff's and continued in his possession, with the exceptions hereinafter mentioned, until within a few days of the bringing of this action, when she and her sons came to the witness' house, where Olive Green was at that time staying—that he did not know how they came there—that Nancy, the wife of the plaintiff, died about 1805—that he thinks the last visit old Joshua Harris made to this country was in the fall of 1812—that Nancy, the first wife of the plaintiff, left four children, to wit, Olive, Betsy, Fady and Nancy, the two last named of whom married many years ago and removed to Kentucky, and are now married women—that about seven years ago he heard the plaintiff say that Matilda and her children did not belong to him, but belonged to his four daughters by his first wife, to whom they had been given by the will of their grandfather, old Joshua Harris—that this was about seven years after the death of old Joshua Harris—that the plaintiff said he had a right to the negroes by possession, and that he ought to have some of them for raising them—that Betsy, Fady and Nancy lived with the plaintiff till they were married—that Olive, who is now about 45 years of age, lived with the plaintiff, but was away from him about 3 years; that the plaintiff gave Olive, when she left him, Matilda and her child Doctor, but Olive was not satisfied, (212) and the plaintiff gave her Lucy, a daughter of Matilda, and her son Richmond, the plaintiff taking back Matilda and Doctor—that the witness hired, for Olive, Lucy and Richmond to the plaintiff for one year, for 15 dollars, and the next year hired them to Zachariah Hogan

for 12 dollars—that Olive, after being away about three years, returned to the plaintiff's, taking with her Lucy and Richmond, and remained there until about three years ago—that Matilda when she first went to the plaintiff's was a very small girl—that Dr. Ewing, as agent for Olive, hired to the defendant the negroes sued for not long before the bringing of this action, at first for two weeks. The defendant then introduced Zachariah Hogan, who stated that about 7 or 8 years ago he hired from Howell Harris, Lucy, Richmond and an infant child of Lucy for one year, for $12—that the plaintiff said to the witness that he had given Olive Matilda and Doctor, and took them back and gave her Lucy and children—that they said he could not hold the negroes, but he thought he ought to have a part of the negroes for raising them, and asked witness if he did not think he ought to have a share of them. Neil McLeod, a witness for the defendant, stated that his brother, John McLeod, married Fady, the daughter of the plaintiff, by his first wife Nancy—that the plaintiff gave John a girl named Edy—that the plaintiff afterwards proposed to John to *lend* him Winny, one of the children of Matilda—that John replied that he would not take her as a loan, but only in right of his wife under the will of old Joshua Harris—that the plaintiff then said, "that is right, John, but I ought to have some of them for raising them"—that the plaintiff then gave John Winny, the latter consenting to claim no more of the negroes—that John afterwards sold Winny to the plaintiff—that this was about the year 1819 or 1820. Roderick McLinden, a witness for the defendant, stated that he heard John McLeod claiming negroes in right of his wife from the plaintiff, who did not deny the right claimed—that McLeod afterwards got Winny, and the plaintiff got her again. William Hogan, a witness for the defendant, stated that on the birth of one of Matilda's children,
(213) he observed to the plaintiff that Matilda would make him rich,
and the plaintiff replied they would not do him much good, that when the children grew up he would have to let them go—that this conversation took place about 26 or 27 years ago, while the plaintiff was a widower—that the witness always knew Matilda in the possession of the plaintiff, and he treated her as his own slave. Doctor Ewing, a witness for the defendant, stated that in the fall of 1825, or beginning of 1826, he heard one Williams mention to the plaintiff that he had lent to one Woolley a negro girl, and that he had been raising negroes for other people—that the plaintiff said he held a negro under the same circumstances, that after he had married old Joshua's daughter, he lent the plaintiff a negro girl, that old Joshua always claimed and owned the negroes, that old Joshua had given the negroes by will to the plaintiff's four daughters by his first wife, that old Joshua had given Till and her increase to the plaintiff's four daughters, that the plaintiff had

no right to the negroes, but would raise them for his daughters—that the plaintiff also said that, after the death of his first wife, old Joshua wished to take away the negroes, but the plaintiff promised to keep them for Harris, and raise them for the plaintiff's daughters, and he was permitted to retain them. The defendant had several witnesses in Court, by whom, he stated, he expected to prove various declarations of old Joshua Harris, made publicly and openly on numerous occasions, but none of them in the presence of the plaintiff, beginning in 1801, and ending in the last of 1812, that he owned Matilda, that he had only lent her to his daughter Nancy Green, to assist her in nursing her first child, and that old Joshua, before he removed to Georgia, resided within three miles of the plaintiff.

The evidence of Harris' declarations so made was objected to by the plaintiff, and excluded by the Court. Grigsby Rush, a witness for the defendant, stated that he knew old Joshua Harris, and knew that Matilda was his slave—that Joshua Harris is dead—that in the winter of 1838 witness was at the house of the plaintiff, who stated that he had given McLeod, Shamwell and Harris each two of the negroes, (214) and that if they would take Olive to Kentucky, he would give up all the negroes except two—that Howell Harris persuaded the plaintiff to give up all the negroes, and the plaintiff replied, he would not say so then, but he did not know what he might do if they came in, that he had been at much trouble, and ought to have some compensation—that the plaintiff did not then set up any other claim to the negroes, but compensation for his trouble—that Harris married Betsey, the daughter of the plaintiff, McLeod married Fady, and Shamwell married Nancy. John Christian, a witness for the defendant, stated that he knew that old Joshua Harris let his daughter Nancy have the girl Matilda, but only on loan—that Joshua Harris always claimed the ownership of Matilda—that the plaintiff frequently complained of keeping the girl as a loan. The defendant then introduced the will of old Joshua Harris, in one clause of which he says: "I give Tilda and her increase to my daughter Nancy Green's children." The will was dated 29 January, 1816, and was proved at January Sessions of the Court of Ordinary of the county of Jones, in the State of Georgia. Executors were named in the will, but the record did not show their qualification.

The plaintiff then introduced David Green, who stated that he was a brother of the plaintiff—that he knew Matilda forty-five or fifty years ago in possession of the plaintiff, and that she so continued till the death of the plaintiff's first wife—that he then heard, for the first time, some complaint about Matilda—that more than forty years ago old Joshua Harris said to William Green, father of the plaintiff, "Darn it, William, why don't you give as much to Bob as I have given to my daughter?"

To which William replied, "If I were to give all my children a negro each I should have none left for myself"—that when Matilda first went into the possession of the plaintiff, his wife had no child, Matilda being very small. Joel Green, a witness for the plaintiff, stated that he knew Matilda in the possession of the plaintiff 45 or 50 years ago—that at William Green's, and before the plaintiff's wife had a child, he
(215) heard a conversation between old Joshua Harris and the father of the plaintiff, in which the former said to the latter, "Darn it, William, why don't you give Bob a negro as well as I have done?"—that David Green was not present at this conversation. William Pomar, a witness for the plaintiff, stated that he heard Joshua Harris say, at Steel's store, 45 years ago or more, that he had two daughters married, one to the plaintiff and one to John Christian, and he had given to each of them a negro girl—that Harris was a bragging, drinking man, but had not been drinking then enough to hurt him—that he had heard the plaintiff tell John McLeod that he had given his (McLeod's) wife one negro, that she was a cripple and he would give her another to make her equal with the rest—that the witness did not hear McLeod dispute the fact, or make any objection. James Green, a witness for the plaintiff, stated that he was the son of the plaintiff by his second marriage—that the negroes had been in the possession of the plaintiff as long as he could remember—that he heard the plaintiff say to Olive Green, 10, 12 or 15 years ago, that the negroes were his, and he would do with them as he pleased—that the plaintiff gave to Olive Matilda and Doctor, and she was not satisfied—that the plaintiff took them back and gave her Lucy and Richmond. Thomas Pemberton, a witness for the plaintiff, stated that he had heard various conversations between the witness, Howell Harris, and the plaintiff, in which the plaintiff claimed the negroes as his own—that the witness also heard various conversations between old Joshua Harris and the plaintiff, some time between 1806 and 1812, in which Harris contended that the negroes should go to the daughters of Nancy Green, and the plaintiff insisted that Harris had given them to him, that they were his property, and he would do with them as he pleased—that the witness was also present at a conversation between the plaintiff and John McLeod, relative to the negro Winny, which the plaintiff purchased back from McLeod, at the time of the execution of the bill of sale; that McLeod was in embarrassed circumstances, and was obliged to sell property, and the plaintiff said that the negro
(216) was his, but to avoid all difficulty he would buy, and accordingly did so; that Nancy Green died in 1805 or 1806.

The plaintiff then contended that Olive Green, under whom the defendant claimed, was a wrong-doer, and the plaintiff must recover in this action, on his possession; that if this be overruled, he then insisted

that the girl Matilda had been given to him and the title was in him; that the bailment had been determined by the declarations of the plaintiff, as stated by Thomas Pemberton and James Green, and that his subsequent possession barred the claim of Joshua Harris to the negroes, by the statute of limitations, and also barred all claiming under him; and, therefore, by virtue of the act of 1820 (Rev. Stat., ch. 65, sec. 18), the title was vested in the plaintiff.

The defendant insisted that the defendant was not a wrong-doer, but claiming a title under a will, and that from the circumstances of the case, especially the lapse of time, the assent of the executors of the legacy was to be presumed. He also insisted that the girl Matilda was not given but loaned to Harris, and that the bailment continued until the defendant got possession of the slaves; that the bailee could not determine the bailment by his own mere declarations or acts, and that, therefore, the statute of limitations could not have protected him, nor would his possession ripen into a title under the act of 1820.

His Honor charged the jury that, previous to the passage of the act of 1806, if a father, on his daughter's marriage or shortly thereafter, put a negro, or other personal property into the possession of a son-in-law, it was, in law, a gift, unless the contrary could be proven; that if the plaintiff had proved to their satisfaction that the negro Matilda was sent to him by his father-in-law, Joshua Harris, shortly after his marriage with his daughter, and that he had continued in possession of the said negro from the year 1798 or before, until shortly before bringing this suit, the law presumed it was a gift, and it was incumbent on the defendant to show that the original transaction was not a gift but a loan. And in order to determine that point, it was proper for them to see what was done and understood between the parties, at the time the negro went into the possession of the plaintiff, and if they (217) found it was a gift and not a loan, the plaintiff would be entitled to their verdict. But if they found the original transaction was a loan and not a gift, it would then be proper for them to enquire, if the plaintiff afterwards acquired title to the negro Matilda and her increase, and with that view it was proper for them to consider what took place between the plaintiff and Joshua Harris, as detailed by the witness Thomas Pemberton, in the year 1806 or 1807, and if they believed, as that witness stated, that the plaintiff told Joshua Harris that the negro Matilda and her increase were his own property, and he would do with them as he pleased, and Joshua Harris failed to sue for the negroes and suffered them to remain in the possession of the plaintiff more than three years after such declarations of the plaintiff, the plaintiff thereby acquired title to the slaves, and was entitled to recover in this action.

The plaintiff's counsel prayed the Court to instruct the jury, that

possession alone was sufficient to entitle the plaintiff to recover against a wrong-doer; and that Olive Green, under whom the defendant claimed, was a wrong-doer, as she had not shown the assent of the executors of Joshua Harris to her legacy. The Court declined giving these instructions.

The jury found a verdict for the plaintiff. The defendant's counsel moved for a new trial, 1st, Because his Honor instructed the jury that from the sending of Matilda to the plaintiff, the law presumed a gift, unless the defendant showed that it was not a gift but a mere loan, and that the enquiry of the jury was, whether it was understood by the parties at the time as a loan and not a gift. 2dly. Because his Honor instructed the jury that, if they believed the testimony of Thomas Pemberton, the bailment had been determined, and the statute of limitations attached, and, after three years, the claim of Harris was barred, and the operation of the act of 1820 vested the title in the plaintiff, so far as those were concerned under whom the defendant claims. 3dly. Because competent testimony offered by the defendant was excluded.

The Court refused to grant a new trial, and judgment being (218) rendered pursuant to the verdict, the defendant appealed.

Strange & Mendenhall for the plaintiff.
Winston for the defendant.

RUFFIN, C. J. The counsel for the defendant has given up the exception taken to the opinion of the Court upon the presumption of a gift, to which, indeed, this Court sees no objection. *Mitchell v. Cheeves,* 3 N. C., 126; *Dameron v. Clay,* 17 N. C., 17.

As we conceive, his Honor was likewise correct in rejecting the evidence offered of Joshua Harris' declarations, not made in the presence of the plaintiff. It is a general rule that a party's declarations are not evidence for himself, unless made in the presence of the opposite party, and not contradicted by him. The declarations in themselves prove nothing but that Harris said he had bailed the negro to the plaintiff; but they cannot establish that he in fact lent her. It is their not being contradicted, when made to the person interested to deny their truth, and gives weight to them as evidence of the fact declared. The evidence was therefore properly ruled out, upon the grounds both of irrelevancy and incompetency.

The remaining exception of the defendant relates to that part of the instructions, which respects the character of the plaintiff's possession, after the conversation between him and Harris, as proved by the witness Pemberton. That person stated that he heard frequent conversations between those parties between 1806 and 1812, in which Harris contended

that the negroes should go to the daughters of his deceased daughter Nancy, the former wife of the plaintiff, and the latter said that Harris had given them to him and they were his property, and he would do with them as he pleased. Upon this part of the case the Judge instructed the jury that if, from all the evidence, they found that the negro Matilda had been originally lent and not given, then the plaintiff could not recover unless he afterwards acquired a title to the slaves: (219) And with a view to ascertain whether the plaintiff had, after the original loan, acquired an absolute title, the jury was further instructed that, if they believed the witness Pemberton, and found that the plaintiff told Harris that the negroes were his own property, and that he, the plaintiff, would do as he pleased with them, then the failure of Harris to sue for the negroes, and suffering them to remain in the possession of the plaintiff for more than three years after those declarations of the plaintiff, gave the title to the plaintiff, and he ought to recover.

We have to premise that, in deciding the point raised by this exception, the Court does not look into the evidence at large, with the view of seeing whether, upon the whole of it, a verdict might not, or ought not to have been found for the plaintiff. From the very great length of the plaintiff's possession, accompanied by a frequent claim of title by a gift originally made, and by acts of apparent ownership in dividing the negroes among and giving them to his children, a presumption of such gift, or of anything else necessary to constitute a good title, might and ought to be deduced, unless opposed by the very clear and consistent proof of an original bailment and of subsequent recognition of it from time to time by the plaintiff. But while we hold such to be the law, we likewise think that, if it be established to the entire satisfaction of the jury, that, in fact, Mr. Harris lent the girl Matilda to the plaintiff at first, and the effect of the length of possession and other acts of apparent ownership, as presumptive evidence of a gift subsequently made, be repelled by the well established and deliberate acknowledgments of the plaintiff, that he did not hold for himself, but held under and for his father-in-law, or for his own children, to whom his father-in-law gave them; then the plaintiff could not recover from one of his children, or from a person claiming under the child. For no length of possession by a bailee, as such, will bar the right of the bailor; and, if the bailment be admitted during the longest enjoyment, a title in the possessor cannot be presumed from the possession. *Darden v. Allen,* 12 N. (220) C., 466; *Palmer v. Faucett,* 13 N. C., 240; *Hill v. Hughes,* 18 N. C., 320. The difficulty under which the defendant lies, is to give such plain, continued, consistent and uncontradicted evidence of the plaintiff's acknowledgment of the title of Harris or of his children, as

will, in the minds of the jury, overcome the fair and legal influence of an uninterrupted possession of more than forty years.

From the tenor of the instructions to the jury and of the defendant's exception, we are, however, to consider that the negro was not at first given, nor at any other time, but was, in fact, lent; and, assuming that to be so, his Honor held, upon the testimony of Pemberton, and, as if that was all the evidence in the case, that the plaintiff's possession for three years, without suit, after he told his bailor that the negroes were his own property, and that he would do with them as he pleased, gave the plaintiff the title to the negroes. The meaning is, that by those declarations the party's possession became adverse, and was protected by the statute of limitations, and was ripened into the absolute title by the act of 1820 (Rev. Stat., ch. 65, sec. 18). Now, from that position, as an isolated point in the case, this Court dissents. We do not dispute that a bailee may turn his possession into a tortious and adverse one. We have held in *Martin v. Harbin,* 19 N. C., 504, that a demand of a negro by the bailor, and a refusal by the bailee will have that effect. In *Powell v. Powell,* 21 N. C., 379, we held that, where slaves were given by parol to one, who died intestate, and, in the division of the donee's slaves amongst his next of kin, those thus given were allotted in the share of one of the next of kin, and were taken into possession by him as a part of his share, the possession taken in that manner was adverse to the original donor, as to the rest of the world, and put the statute of limitations into operation. We considered that case as tantamount to an absolute purchase from a bailee, and possession taken thereon by the purchaser; in which case, unquestionably, the possession must be taken to be in the possessor's own right, and not as subsidiary to the right of the donor, or of any other person. But in all those cases
(221) there is something more than the bare declaration of the bailee, that he claims the property and does not hold for his bailor. There is a taking a new possession by a purchaser or by the next of kin in *Powell v. Powell, supra,* and in the other instance, there is a positive refusal to restore the possession which the bailor demanded, and which the bailee was bound to surrender, whereby he gave to the bailor an action immediately to recover the property, which it was the folly of that person not to bring. In this case there is no act of either of those descriptions. It is to be recollected, that all the rest of the evidence is to be put out of view, except that of Pemberton; because the Court laid it down to the jury, that the facts stated by him, if true, with a subsequent possession for three years, entitled the plaintiff to recover. We are, therefore, to shut out even the long possession, as evidence of an original gift, or of one subsequently, or as evidence of ouster—if we may use the expression—or rather of the adverse character of the plain-

tiff's holding. Now it has never been held that the naked declaration of a bailee, that he claimed the property in his own right, without any change of the possession and without any demand or wish to resume the possession by the bailor, although such declaration might be public or made even to the bailor himself, would *instantly* terminate the bailment and immediately convert the possession into an adverse one, so as to set the statute of limitations in motion from the day of such declaration. The contrary we conceive to be settled law. Without adducing from more remote sources authorities in support of our opinion, it is sufficient to say, that in *Collier v. Poe,* 16 N. C., 55, there was a loan of a negro in 1804, the death of the lender in 1807, and open and public annunciations by Poe in the lifetime of Payne of the claim of title by the former, and thereupon a continued possession under that claim up to 1824; and yet the Court distinctly said, that there was no pretense for the operation of the statute of limitations, on which the answer insisted, for by his declarations, that he claimed the negroes as his own, the defendant could not throw off his character as bailee. Again, in *Hill v. Hughes,* 18 N. C., 336, although the bailee not only (222) claimed and used the slave as his own, but actually conveyed him by a deed of trust as a security for his debts, yet, as the trustee did not take possession, but the bailee kept it as before he made the deed, we were of opinion that the bailment had not been determined, and consequently that the possession did not become adverse upon the execution of the deed. The present case cannot be distinguished from the principle of the two cases cited. It is precisely that of *Collier v. Poe,* except that the claim of title was made in the presence of the donor, while it does not appear that it was in *Collier v. Poe,* although publicly done. But *Hill v. Hughes* is a stronger case than the present, as there was an actual conveyance by Haynes. But here, according to the testimony of Pemberton, although there was a claim of property by the plaintiff, there was no refusal to surrender the possession to Harris, who, indeed, did not demand it. On the contrary, the witness states merely that Harris "contended that the negroes should go to the daughters of his deceased daughter," and not that he demanded them from the plaintiff, or said or did anything from which it can be inferred, that he meant or wished *then* to deprive the plaintiff of the possession and enjoyment of the negroes he had lent him. If then the plaintiff held as bailee before, he still held in that character; for there was no effort by the bailor to regain the possession, and no *act* done by the bailee changing the nature of it. Pemberton's testimony is strong to show there was a gift originally; for Harris did not allege the contrary but only contended that the negroes should go to his granddaughters, which he might well do, on the idea that the plaintiff got them from him, and

ought not to give them to children by another marriage. But the case was not put on that point, but was left to the jury on the hypothesis that it was not a gift, but a loan; and, thus regarded, the Court is of opinion that what passed, as stated by Pemberton, did not amount to a demand and refusal of itself, so as to make the possession adverse. The case must therefore again go before a jury, who can weigh that (223) evidence in connection with the long possession, prior and subsequent, and the other circumstances, and give the proper weight to the whole, as tending to establish a gift at some time, or to lay a foundation for the presumption of a demand by Harris or the plaintiff's children and a refusal on his part; and also to the evidence on the part of the defendant, tending to rebut those inferences and establish the continued relation of bailor and bailee between the parties.

The counsel for the plaintiff has, however, insisted that, even if there was error in the point already considered, the judgment should stand, because, as a bailee in possession, he can maintain this action of detinue against a mere wrong-doer, and, therefore, on the whole case the verdict was right. The general question was argued elaborately; and it may be that the special property of a bailee will sustain detinue against one, who actually deprives him of the possession without color of right in himself or in him through whom he claims. But we do not propose to discuss the point at present, because we think it does not arise in this case. The defendant claims under a gift in the will of a former owner, the alleged bailor of the plaintiff; and, even if, after so long a time, an assent to the legacy is not to be conclusively presumed, yet the connection with the property by force of the gift in the will, certainly, we think, prevents the plaintiff's children from being treated as mere wrong-doers and intermeddlers with effects to which they have no claim. After the lapse of twenty-five years from the probate of the will, without any interference by the executors, or suggestion of debts unpaid, it is a fair inference that the executors meant to leave the contest to be decided between the plaintiff and his children upon the right; that is, to let the question of loan or gift be determined between those parties themselves, and not to interpose in any manner so as to obstruct the decision. We concur, therefore, in the refusal of his Honor to give the instruction prayed for by the plaintiff on this point.

PER CURIAM. *Venire de novo.*

Cited: Bennett v. Williams, 30 N. C., 125; *Graham v. Davidson,* 32 N. C., 248; *Baxter v. Henson,* 35 N. C., 460; *Weeks v. Weeks,* 40 N. C., 117; *Koonce v. Perry,* 53 N. C., 61.

(224)

WILLIAM MAYHO, BY HIS NEXT FRIEND, *v.* EDWARDS SEARS.

By the law of Virginia a man is permitted to emancipate his slave, by deed, the emancipation to take effect at any time prescribed in the deed subsequent to its date. *Held*, that where such a deed of emancipation for a female slave was executed in Virginia, and she came to this State, and, before the day appointed for such emancipation to take effect, she had issue, the issue so born were slaves.

APPEAL from *Dick, J.*, Spring Term, 1842, of ORANGE.

This was an action of trespass *vi* and *armis*, and the parties submitted it to the Court upon the following case agreed:

On 23 July, 1805, John Moring, then a citizen of the county of Surry, in the State of Virginia, and the owner of certain negro slaves, made and executed a deed of manumission of the said slaves, according to the law of Virginia, which deed was by him duly acknowledged in the Court of the said county on the same day and ordered to be recorded, and was accordingly recorded in the said Court. The following is a copy of the said deed:

"To all whom it may concern: Know ye, that I, John Moring, of the county of Surry, do by these presents emancipate and set at full liberty from myself, my heirs, and all persons claiming under me, a certain parcel of negroes as they come to the age and time hereafter to be mentioned, Hannah, Patrick, Cherry, Jordan and Charlotte, to be free without day. Isabel to be free the first day of November, one thousand eight hundred and seven; Carter to be free the sixteenth day of August, one thousand eight hundred and twelve; Polly to be free the first day of April, one thousand eight hundred and four- (225) teen; Burwell to be free the tenth day of April, one thousand eight hundred and twenty-two; Maria to be free the twenty-fifth day of December, one thousand eight hundred and twenty-two; Willis to be free the eleventh day of April, one thousand eight hundred and twenty-four. Whereof, I have set my hand, this twenty-third day of July, one thousand eight hundred and five. JOHN MORING. (Seal.)"

After the execution of the said deed, the said John Moring removed into North Carolina, and settled in the county of Orange, bringing with him the negro Polly in the said deed named. She, before 1 April, 1814, had issue, a daughter, and that daughter, about 1830, had issue, the plaintiff. After the said 1 April, 1814, the negro Polly, being on that day of full age, lived by herself and with her children, and acted in every respect as a free woman, and she and her daughter and the plaintiff were recognized in the neighborhood as free persons of color, and as such were recognized by the said Moring, who disclaimed any owner-

ship of the negroes until the year 1838, when he sold and conveyed the plaintiff to the defendant, who, under that title, took and now detains the plaintiff as his slave. And this action was thereupon instituted to try the question of the freedom of the plaintiff, and it is agreed that the law of Virginia, applicable to the subject of the emancipation of slaves at the time of the said deed, is contained in sections 53, 54 and 55, chapter III, Revised Code of that State, entitled an act reducing into one the several acts concerning slaves, free negroes and mulattoes, and that the said sections as printed in the said Code or copies thereof, may be referred to by either party as part of this case. And should the Court be of opinion for the plaintiff, then judgment is to be entered for him for sixpence and costs. Otherwise, judgment to be for the defendant. Whereupon, his Honor being of opinion for the defendant,

(226) rendered judgment accordingly, from which judgment the plaintiff appealed to the Supreme Court.

Badger for the plaintiff.

Haywood, Waddell, Saunders and *Iredell* for the defendant.

RUFFIN, C. J. The deed of emancipation, stated in the case agreed, is in these words: "To all whom it may concern: Know ye, that I, John Moring, of, etc., do by these presents, emancipate and set at full liberty from myself, my heirs, and all persons claiming under me, a certain parcel of negroes as they come to the age and time hereinafter to be mentioned: Hannah, Patrick, Cherry, Jordan and Charlotte, to be free without day—Isabel to be free from 1 November, 1807; *Polly to be free 1 April,* 1814; Burwell to be free 10 April, 1822," etc. Before 1 April, 1814, *Polly* had issue in this State, a female child, who was the mother of the present plaintiff. The question in the case is, whether the plaintiff's mother was upon her birth free, or became so before the birth of the plaintiff; for it is admitted by his counsel, that the plaintiff's condition is necessarily to be determined by that of his mother at his birth.

There is a natural inclination in the bosom of every Judge to favor the side of freedom, and a strong sympathy with the plaintiff, and the other persons situated as he is, who have been allowed to think themselves free and act for so long a time as if they were; and, if we were permitted to decide this controversy according to our feelings, we should with promptness and pleasure pronounce our judgment for the plaintiff. But the Court is to be governed by a different rule, the impartial and unyielding rule of the law; and, after giving to the case an anxious and deliberate consideration, we find ourselves obliged to hold, that in law, the condition of the plaintiff is that of slavery.

By the statute law of Virginia, the owners of slaves could emancipate

them by will or deed; and therefore, our enquiry here only is as to the nature and extent of the emancipation granted to the (227) plaintiff's grandmother, *Polly*. In our own law, while emancipation was permitted, there could not be an emancipation to take effect *in futuro;* for as it was by the license of a Court, to be granted only for adjudged meritorious services, it could not relate back beyond that judgment, and moreover was necessarily immediate. *Bryan v. Wadsworth,* 18 N. C., 384. But as there was in Virginia, after 1782, no such restriction upon the power of the owner to renounce his dominion over his slave, it would seem, also, necessary to follow that the owner might use his pleasure in prescribing the conditions on which, and the time when, the liberation should go into operation. Accordingly there have been numerous adjudications in that State, that the owner may emancipate *in futuro;* as if by will he bequeaths a slave to one for life and then to be emancipated, or if by deed he emancipates at any certain day to come, or after his own death. *Pleasants v. Pleasants,* 2 Call., 319; *Maria v. Surbaugh,* 2 Rand., 228; *Isaac v. West,* 6 Rand., 652. The principle, indeed, seems to be settled law in all those States where liberation by the act of the owner simply, is tolerated. Admitting, then, that this deed of emancipation is not void because it did not grant immediate and unqualified freedom, and that upon the arrival of the period mentioned, 1 April, 1814, Polly would then be absolutely free, a question arises, what in the intermediate period is her state—that of freedom in some form and to some extent, or of continued slavery—and what is the state of her issue born within that period? As was said by U. S. Supreme Court, in *McCutcheon v. Marshall,* 8 Peters, 220, "If this were an open question, it might be urged with some force, that the condition of the person" (to be emancipated at a subsequent time) "was not that of absolute slavery, but was converted into a modified servitude, to end at the day, or upon the event specified in the will or deed; and that the children of a female in that situation would stand in the same condition and be entitled to freedom as the mother was."

But it is admitted in that case that the decision in the States (228) where slavery exists, go very strongly, if not conclusively, to establish the principle that persons thus situated are slaves, that the manumission is only conditional, and that, until the contingency happens, upon which the freedom is to take effect, they remain to all intents and purposes absolute slaves. And, upon that principle, that Court held in the case cited, that the children, born before the day when the mother became free by the limitations of the will, were slaves. The Court considered the principle so well settled that it could not be disturbed. Our researches, aided by those of the counsel in this case, lead us to the same conclusion.

The enquiries, what was the condition of the mother and what of the issue, up to the day when the liberation became absolute, arose in *Maria v. Surbaugh,* cited above; and, upon the unanimous opinion of the Judges, that of the mother was held to be that of temporary slavery and not of mere servitude, and that of the issue to be that of perpetual slavery. The questions were fully considered and elaborately discussed, and particularly by *Judge Green,* whose able and learned opinion will be generally looked to as the leading and most authoritative one upon this point of American jurisprudence. He examined the subject thoroughly at common law, as regulated by the civil law, and as modified by the legislation of his own State; and proves very satisfactorily to our apprehension, that the emancipation does not presently enure to the slave, when the instrument made by the owner postpones it. The consequence, that the issue, born of a female while in that state of slavery and with the prospect of emancipation before her, must be slaves, results conclusively from the maxim, *partus sequitur ventrem;* which, we believe, has been universally adopted in this country. But the decision depends upon the law of the State, where the act of emancipation was executed, under which the plaintiff claims. As that occurred in Virginia, it would suffice, that by the law of that State, as declared in her statutes and expounded by her Courts, the plaintiff's mother is deemed a (229) slave, because born before her mother became free. But it is the more satisfactory to find that, in deciding the case in conformity to the law of Virginia, we are not proceeding upon a rule peculiar to the law of that State, but one which has been declared to be a part of the law of nearly all the States in the Union, in which the question could arise, and which pervaded also that Code, which was at one time the law of nearly all the civilized world, the civil law of Rome, in the dominions of which nation the class of slaves was more numerous than it has ever been in almost all other countries. In 1809, it was held in Kentucky, that if a slave be entitled to freedom at a future day, her issue born before the day are slaves. *Frank v. Shannon,* 1 Bibb., 615. The doctrine was laid down a second time in the same State in 1811. *Ned v. Beale,* 2 Bibb., 298. In Maryland there was a similar decision in 1825, *Chew v. Gary,* 6 Harr. & John., 526, and in the previous case of *Hughs v. Milly,* 5 Harr. & John., 310. And in *Catin v. D'Orgenoy,* 8 Martin (La.), 218, where an owner had by deed emancipated a female slave "with the qualification and condition that she shall hold and enjoy freedom immediately after my death, but during my life she is to remain in my service and power as she has done to the date of these presents," it was held in 1820 that until the death of the owner the woman was of that class of persons known to the Roman law as *statu liberi,* and that her children, born while she was in that state, were not entitled to be

free. And finally followed in 1834, *McCutchen v. Marshall,* 8 Peters, 220, in which the U. S. Supreme Court, with inclinations to the contrary, acknowledged that, by the adjudications of the States tolerating slavery, the principle had been conclusively established. We have found, and indeed have heard of no opposing adjudication, nor of any opinion to the contrary, but that of the learned Judge who gave the judgment in *Harris v. Clarissa,* 6 Yerger, 227. The decision in that case was undoubtedly correct; for, as might be collected from his directing that not only all the grown negroes, but also "all the young negroes which I may have" should have their freedom, the intention of the testator (230) was to set the issue as well as the original stock free; and that intention is, of course, as efficacious in respect to the issue as it is in respect to the parents. *Pleasants v. Pleasants,* 2 Call, 319; *Hamilton v. Cragg,* 6 Harris & John., 16; *Fanny v. Bryant,* 4 J. J. Marshall, 368. This Court held the same thing upon the language of the will in *Campbell v. Street,* 23 N. C., 109. It is admitted, however, that in *Harris v. Clarissa* a dissatisfaction was expressed with the principles of the adjudications here adduced, as being in prejudice of human liberty, and the opposite principle was asserted, that an emancipation at a day to come creates a present right to freedom, though there may be an obligation of service until that time; and, as an inference, it was declared that the issue in the meantime was free by birthright derived from the mother. We have said that we do not find this opinion concurred in elsewhere; and therefore, we do not feel at liberty to be governed by it, in opposition to the many respectable adjudications before quoted.

It has, however, been urged that the instrument of emancipation in the case before us is a deed; and that, from the nature of that instrument, and from the words of present grant in this one, "do by these presents emancipate and set at full liberty," the liberation of Polly and all the other slaves mentioned in the deed, was immediate. And, in support of this position, another case from Virginia, *Isaac v. West,* 6 Rand., 652, was particularly relied on. We do not think that much can be built on the difference between the operation of a will and a deed; for, as a slave, the person is incapable of taking under either, as a grantee. The slave is not conveyed or bequeathed to himself. It is, in truth, nothing more than the renunciation by the owner of his right of property or dominion in or over the slave, rendered effectual by the law, when done with certain ceremonies; and, it would be doing violence to the cause of humanity towards the unfortunate slaves themselves, as well as to the intentions of the emancipator, if the same intention, expressed in the same language in those two instruments, were in the one case to be observed and in the other defeated. We conceive that the true rule is to carry out the real purpose of the party, so far (231)

as it can be collected, in whatever form it may be couched; and that when the intention is doubtful, whether the instrument be a deed or a will, there is to be a leaning and liberal construction in favor of liberty, as far as it is allowed by law to be conferred. These views are not opposed in *Isaac v. West.* The deed in that case begins with these words: "I, A. W., do by these presents manumit and set free the following negroes at my death." Upon that clause, standing alone, the Court said "it was clear the negroes would have continued slaves to all intents and purposes until West's death." But the deed had these other clauses: "They shall serve me as long as I live; and I do hereby relinquish all my right and title in and unto the aforesaid negroes, Josiah, Joshua, etc." Upon these last clauses, by themselves, the Court said the slaves would have been immediately free. The construction was, therefore, necessarily doubtful; and the Court said, that in such a case weight was to be given, not merely to the technical maxim of the common law, that a deed is to be taken most strongly against the grantor, but to the enlarged spirit of the laws of all civilized nations, which favors liberty. *In obscura voluntate, manumittentis favendum est libertati.* It is thus the purpose and intention, *voluntas,* of the manumitter, whether contained in one species of legal instrument or another, that governs; and when that is obscure, we presume most favorably for his charity and the liberty of the captive. The case relied on is thus seen to be really an authority against the plaintiff; for it expressly said that, notwithstanding the words in the present tense "Do by these presents manumit and set free," the negroes would be slaves until West's death, by force of the words "at my death." This is precisely our case. These negroes are set free "as they come to the ages and time hereinafter mentioned." There is no other clause in the instrument to come in conflict with this, or to obscure the purpose. The intention here cannot be mistaken; for the deed proceeds then to say, that certain of the negroes should (232) be "free without day," that is, without any day to come, immediately; and that the others should become free respectively on certain days to come, as therein specified. Thus the conditions of the different negroes are plainly and expressly distinguished from each other, as to their being or not being immediately free, and we cannot take it on ourselves to frustrate that positive condition of the emancipation, by saying that they were free before the days given them by their owner. Moreover, it is to be noticed that the case of *Catin v. D'Orgenoy,* 8 Mar. (La.), 218; arose upon a deed, of which the material words have been already quoted; and *Frank v. Shannon,* 1 Bibb., 615, arose upon an act *inter vivos,* a registration in Pennsylvania, under her act for the gradual abolition of slavery; and in each case it was held that, until the

period of actual emancipation arrived, the state of slavery continued, and that the issue of females were slaves absolutely.

The Court cannot, therefore, escape from the conclusion that the plaintiff's mother was a born slave, and so, consequently, was he. With this conviction it becomes our duty to affirm the judgment; consoling ourselves that the sentence is not ours, but that of the law, whose ministers only we are.

PER CURIAM. Affirmed.

(233)

LEVI HURLBURT *v.* JAMES SIMPSON.

1. A party may recover damages for a non-compliance with a parol contract for the purchase of an article of personal property, though no *earnest* was paid, nor any actual delivery made, nor any special time appointed for the delivery of the article or the payment of the purchase-money.
2. It is sufficient, if the vendor tender the article sold, or is ready to deliver it, when the vendee refuses it; and if no particular time is fixed for the delivery or for the payment of the price, the law says it must be done immediately, or within a reasonable and convenient time.
3. Where a vendee refuses to receive the article sold, the vendor may either rescind the contract, or may re-sell the article and make the original vendee responsible for the difference in price.

APPEAL from *Pearson, J.*, Fall Term, 1842, of NEW HANOVER.

This was an action on the case for a breach of contract in not receiving and paying for a barouche sold to the defendant, to which the defendant pleaded not guilty.

On the trial it was proved by one Hatsfield that he was a carriage maker in Wilmington—that on the....day of....., 1839, the plaintiff and the defendant came to his shop with a barouche; that the plaintiff told the witness, in the defendant's presence, that he had sold the barouche to the defendant, who wished it altered in some way, and requested the witness to alter it as he should be directed by the defendant; that he, the plaintiff, would pay for it; that the defendant then pointed out to the witness the alteration he wished made—it was a trifling alteration in the straps of the top; that the defendant said he wished the work done in about two hours, when he would call for the barouche, and the witness promised to have it ready; that, after the plaintiff went off, the witness asked the defendant (234) what he was to give for the barouche, and he said about $200, as well as the witness could recollect, and asked the witness what he thought the barouche ought to be worth; that the witness had the work finished within two hours, but no one called for it, and it remained there some time; that the plaintiff paid witness for his work. One Morris

swore that in....., 1839, at the request of the plaintiff, he called on the defendant for the sum of $150, the price of the barouche; that the defendant refused to pay, and said he had not bought the barouche; that afterwards, on the same day, the plaintiff, in the presence of the witness, asked the defendant if he did not intend to take the barouche; that defendant replied no, and said he never had bought it; that the plaintiff then said, I give you notice it is just where we left it. One Hatch swore that some time in 1839 the defendant bought a few articles in his store, and said he would call in about a week and pay for them; that he had to come to town about that time to say farewell to the plaintiff and his family, who were going to the North, and for the purpose of getting a barouche he had bought. One Williams swore that, before the plaintiff went to the North, he requested him to advertise the barouche, and have it sold at auction, which he accordingly did in about one month after the alleged sale; that it sold for $96, which he received as the agent of the plaintiff and paid over to him.

The defendant did not controvert the facts, so deposed to, but insisted, 1st, That no parol contract for the sale of property is binding, unless the property is delivered—or something is paid as earnest—or some time is fixed on for its completion, because otherwise there is no consideration. 2dly. That the vendor must prove a tender. 3dly. That by the resale at auction the vendor had waived the right to sue on the contract, if he ever had any such right. The Court charged that a parol contract to sell property, such as a barouche, was binding, without delivery, without the payment of earnest and without fixing on a time certain. As to the delivery, the distinction was, that after delivery the property was
(235) changed, and it amounted to a contract executed, or sale—before delivery, it was a contract executory, but an action might be sustained for a breach. As to the payment of earnest, that was not necessary at common law to bind a bargain, and was only made so in certain cases by some English statutes to prevent perjury, which did not apply here. As to fixing on a time, when no time was fixed on, the law presumed that the matter was to be closed within a reasonable time. As to the consideration, the promise on the one side was the consideration for the promise on the other. As to the tender, the court charged that, when by the contract the vendor was to deliver the article at a certain place or time, to enable him to recover, he must show that he had the article at the place and time, and was ready to comply with the bargain on his part; but when by the contract the vendee was to receive the article where it then was, it was sufficient for the vendor to show that he had the article there, and was ready and willing to comply with his part of the contract. As to the resale, the Court charged that when a vendee refused to receive and pay for the article, the vendor might leave

it and sue for the whole price if he saw proper, but if he did not choose to give up a lien he had on the article for the price, he might retain the possession and sell it over, in which case, provided the resale was fair and *bona fide,* the price it brought would be a proper consideration in estimating the amount of damages.

The jury found a verdict in favor of the plaintiff, and a motion for a new trial being made and overruled, and judgment rendered pursuant to the verdict, the defendant appealed.

Haywood and *J. H. Bryan* for the plaintiff.
Strange for the defendant.

DANIEL, J. This is an action of assumpsit, on a special count for not receiving and paying for a barouche, sold by the plaintiff to the defendant. The *first* objection was that no *parol* contract for the sale of property was binding, unless it was *delivered,* or something was paid in *earnest,* or a time was fixed on for its completion. The judge overruled this objection, and, we think, correctly. When a con- (236) tract of sale is made, it is capable of completion by either of the parties by a *tender* immediately made, or in a reasonable time thereafter. If the vendor tenders the thing, he is entitled to the price agreed for—if the purchaser tenders the price, he is then entitled to the thing contracted to be sold, and may have detinue for the thing or assumpsit for a breach of the contract. *Earnest* paid is not necessary to complete a parol contract of sale; when made, it only prevents the vendor, under any circumstances, from rescinding the contract without the assent of the vendee; and this, by the common law, and not by any statute. The vendor's remedy for the residue of the price is then only on the contract, or on his lien on the property thus sold. For he is not compelled to deliver until the residue of the price is tendered. And when no time is fixed for the delivery of the thing, and the payment of the price, the law says it must be done immediately, or within a reasonable and convenient time. The consideration is the mutuality of the promises. In this case, the plaintiff's promise to deliver the barouche was the legal consideration, by which the defendant was bound to comply with his promise, either by paying the price, or accounting in damages *on this count* in the declaration.

Secondly: The defendant insisted that the plaintiff should prove that he tendered the barouche. And so he did. The barouche was at the coach-maker's shop—the defendant had ordered some small alterations on it—the plaintiff was to pay for them—the work was to be done in two hours—and the defendant was then to take it away from the shop. The work was done within the time agreed on—the plaintiff paid for it, but

the defendant did not return and take it away. The shop was the place where the defendant was to receive the article. It was there at the time stipulated, ready for his reception. This, if not in law a tender of the article, was, at least, evidence of the plaintiff's readiness, and that is sufficient in this action. *Rowson v. Johnson,* 1 East, 203; *Waterhouse v. Skinner,* 2 Bos. & Pul., 447.

The *third* objection was that, by the resale of the barouche at
(237) auction, the plaintiff has rescinded the contract. In *McLean v. Dunn,* 15 Eng. C. L., 131, the Court says, that in regard to the resale of the articles, it seems clear that it did not rescind the contract. It is a practice founded in good sense, to make a resale of a disputed article, and to hold the original contractor responsible for the difference. If the count is *for goods sold and delivered,* he cannot, perhaps (says *Best, C. J.*), consistently with such a demand, dispose of them to another; but if he sues for damages, in consequence of the vendee's refusing to complete the contract, it is not necessary he then should retain dominion over the goods; he merely alleges that a contract was entered into for the purchase of certain articles, that it has not been fulfilled, and that he has sustained damage in consequence. There is nothing in this which requires that the property should be in his hands when he commences the suit; and it is required neither by justice nor by the practice of the mercantile world. It is most convenient that, when a party refuses to take goods he has purchased, they should be resold, and that he should be liable to the loss, if any, upon the resale. The goods may become worse the longer they are kept, at all events there is risk of the price becoming lower. In *Acebal v. Levy,* 25 Eng. C. L., 174, the Court, in the conclusion of the opinion, say, there can be no doubt but that the plaintiff might, after reselling the goods, recover the same measure of damages in a special count, framed upon the refusal to accept and pay for the goods bought. The authorities are conclusive against the defendant on this point in his case. See also *Sands v. Taylor,* 5 Johns., 395; *Martens v. Adcock,* 4 Esp., 251. Where no time is mentioned in the contract of sale for its completion, and the vendor immediately tenders the article and the vendee refuses to pay the price, then the vendor has his election to rescind the contract *in toto,* or he may *bona fide* resell the thing and recover the difference in damages on a special count in assumpsit for not receiving and paying for the article contracted to be sold. The resale by the vendor is not *per se* evi-
(238) dence of a rescinding of the contract.

PER CURIAM. No error.

Cited: Whitehead v. Potter, 26 N. C., 263; *Grist v. Williams,* 111 N. C., 55.

LEVIN B. LONG AND WIFE *v.* DAVID CARTER.

One partner cannot bind his copartner by any contract, unless it is in some way connected with the partnership business or unless the act be adopted and recognized by the copartner, or unless it be a bill or the endorsement of a note, which the party taking it had good reason to believe was authorized by the firm.

APPEAL from *Battle, J.*, Spring Term, 1842, of BEAUFORT.

This was an action of assumpsit brought upon two notes, of one of which the following is a copy, viz.:

Six months after date, with interest from date, we promise to pay John C. Blachford, or order, the sum of two hundred and seventy dollars, for value received; this 10 November, 1838. (239)

JUSTIN MARTINDALE.
CARTER & LAMB.

The other note was an exact copy of this, except that it was payable twelve months after date. The defendant Carter was sued alone, and pleaded the "general issue." On the trial it was admitted that at the time when the notes in question were given, one Lamb and the defendant Carter were engaged in business as merchants in the city of Raleigh, under the name of Carter and Lamb, and that the notes were signed by Lamb in the name of the firm. The defense relied upon was, that the notes were given by Martindale as principal, and were signed by Lamb, in the name of Carter and Lamb, only as surety, and that this was done without authority from the defendant, and that it had never been assented to by him. For the purpose of proving this, Mr. Jones was called as a witness and testified, that when the notes were given he was clerk for Carter and Lamb—that Martindale, who was a carpenter in the city of Raleigh, had purchased a parcel of brick of Blachford, and gave these notes therefor—that the notes were executed in the counting-room of the store of Carter and Lamb, and were signed by Lamb in the absence of Carter, who was at that time in the county of Hyde—that Martindale was a customer of Carter and Lamb, and as such was indebted to them for a store account, but that they did not owe him anything. Upon cross-examination the witness stated that he was present when the notes were given, that he knew of the purchase of brick by Martindale from Blachford—that he does not recollect that anything was said, at the time the notes were given, about the consideration of them, but he thinks he heard afterwards from Lamb that they were given for the brick, and Carter and Lamb were only sureties. The witness stated further, that Carter and Lamb dealt only in dry goods. The plaintiff introduced as a witness Mr. Blackwell, who stated that on one occasion

he was speaking to the defendant about these notes, when the
(240) latter said "he had once signed a note for Martindale, which he expected to have to pay, but as for these Blachford notes, he knew nothing of them and would not pay them."

The plaintiffs contended, 1st, That there was no evidence that Carter and Lamb were only sureties on the notes or that Blachford knew or had any reason to believe they were such, but if he had and the jury should be satisfied that they were only sureties, then, secondly, The defendant was liable, unless he could show that he had given no authority to his partner to sign the notes in the name of the firm; and, that at all events, as Martindale was a customer of Carter and Lamb, it must be presumed that each partner had authority to sign the name of the firm as surety for him. And thirdly, That the declaration by the defendant that he had signed a note for Martindale, was evidence from which an authority to the other partner to sign the name of the firm might be inferred.

His Honor instructed the jury that one partner had a right to bind the other by any act within the scope of his authority, but that, if in this case the jury believed that the notes were given for Martindale's own debt, and Carter and Lamb were only his sureties, then the plaintiff could not recover unless they could show that Carter had authorized his partner to bind the firm as surety, or had subsequently assented to the transaction; and that in this case there was no evidence of either an assent or authority given by the defendant.

The jury returned a verdict for the defendant, and judgment having been rendered accordingly, the plaintiffs appealed.

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

DANIEL, J. It is a general rule of law, that each partner is the accredited agent of the rest, whether they be active, dormant or nominal,
and has authority as such to bind them, either by simple con-
(241) tracts respecting the goods or business of the firm, or negotiable instruments circulated in its behalf to any person dealing *bona fide*. *Bond v. Gibson,* 1 Camp., 185; *Vere v. Ashley,* 10 Barn. and Cress., 296; Smith on Merc. Law, 19. Thus we see that the contract must be respecting the partnership business. Then both partners are authorized to treat for each other in everything that concerns or properly belongs to the joint trade. On the other hand, when the transaction has no apparent relation to the partnership, then the presumption is the other way; and the partnership will not be bound by the act of one of the parties without special circumstances. 2 Cox, 312. In a matter

wholly unconnected with the partnership one partner cannot bind the other. *Sandiland v. Marsh,* 2 Barn. and Ald., 673. One partner has no right to guarantee a separate transaction in the name of the rest, unless they afterwards adopt and recognize his acts. *Ex parte Nolte,* 2 Glyn. and Jam., 306; *Crawford v. Sterling,* 4 Esp., 207; *Payne v. Ives,* 3 Dow. and Ry., 664; Smith on Merc. Law, 23; *Ex parte Bonboners,* 8 Ves., 540. Martindale, the principal debtor to the plaintiff's intestate for bricks sold, had no connection with the firm of Carter and Lamb—his debt was in no sense of the word a partnership debt or a partnership transaction of the said firm. And Carter's subsequent statement, so far from adopting or confirming the act of Lamb in the business, expressly repudiates it. The circumstance that Martindale had, before the date of this note, been a purchaser of goods at the store of the firm, cannot, we think, take this case out of the general rule. This decision steers clear of *Cotton v. Evans,* 21 N. C., 284. In that case the Court said that a partnership security received from one of the partners *simpliciter,* in this charge of a separate claim against himself, is a badge of fraud, or such palpable negligence as amounts to fraud, which it would be incumbent on the party, who so took the security, to remove, by showing either that the partner from whom he received it acted under authority of the rest, or at least that he himself had reason to believe so. In deciding that cause, the majority of the (242) Court were of opinon that the evidence proved, that Van Bokkelin had good reason to believe, that William Ellison had the authority of the firm to draw the bill in the name of the firm. In the case now before us, there was no circumstance to warrant a belief in Blachford, that Lamb had the authority of the defendant to sign the name of the firm as surety for Martindale. It was manifest from the form of this security, that it was a mere guaranty by the firm of the debt of another person, with which the firm had no connection. It is not like the case of a note endorsed by a firm and put into circulation and taken in the course of business; for in that there is an apparent benefit or interest in the partnership.

PER CURIAM. No error.

Cited: Hartness v. Wallace, 106 N. C., 431; *Powell v. Flowers,* 151 N. C., 143; *Sladen v. Lance, Ib.,* 494.

(243)

ANN E. MORGAN *v.* SALLY BASS.

1. A general probate of a will, containing dispositions of realty as well as personalty, is presumed, if on its face the will purports to have been executed with the ceremonies necessary to pass lands, and unless something is shown to remove the presumption, to have been a probate of it both as to real and personal property.
2. And in the case of an unattested will, which may pass realty, if in the testator's handwriting, etc. (according to the act, Rev. St., c. 122, s. 1), when it appears from the record that the will was proved both as to real and personal estate, it must be intended that all the requirements to render an unattested will effectual for the devise of lands, had been shown to the satisfaction of the Court.
3. But from a general probate of an unattested instrument as a will, such a legal inference does not arise.
4. An instrument, which has once been proved as a will of personalty, may be subsequently propounded as a will of real estate.

APPEAL from *Battle, J.*, Fall Term, 1842, of HALIFAX.

This was an application to the County Court to admit to probate, as a will of real estate, an instrument signed Ann McKennie Pasteur, which had been previously proved in the same Court as a will of personalty only. The application was dismissed in the County Court, and an appeal taken to the Superior Court, where the same sentence was passed, and the plaintiff then appealed to the Supreme Court. The material facts are set forth in the opinion delivered in this Court.

B. F. Moore for the plaintiff.
Badger for the defendant.

(244) GASTON, J. At May Term, 1837, of the County Court of Halifax, Frances Clark offered for probate, as the last will and testament of Nancy Pasteur, an instrument in writing, purporting to be signed by her, but unattested by any witness, in which, with the exception of a small legacy to the defendant, Sally Bass, the testatrix declared that she constituted the said Frances Clark her sole heiress. The probate was *caveated* by the defendant, and thereupon an issue was made up, whether the said instrument be or be not the last will and testament of Nancy Pasteur. This issue, at the succeeding August Term of the said Court, was tried, and the jury found that the paper-writing offered was the last will and testament of Nancy Pasteur, and thereupon a judgment was rendered that the *caveator* pay the costs, and Frances Clark was permitted by the Court to qualify as the executrix of the said will. At the August Term, 1841, of the said Court, the plaintiff, Ann E. Morgan, who is stated upon the record to be the assignee of Frances Clark, applied to the Court to be permitted to prove the said instrument as a will valid to pass real estate, "which," the

record states, "had been already proved as a will of personalty." It appears that thereupon the defendant *caveated* the probate prayed for, and an issue was made up, "whether the paper-writing was executed in form sufficient in law to pass real estate or not." The cause was continued for the trial of this issue from term to term, until the February Term, 1842, when, on motion of the defendant, the cause was dismissed. From this sentence the plaintiff appealed to the Superior Court, and, the sentence being there confirmed, appealed thence to this Court.

That the probate of this instrument in August, 1837, was a probate of it as a will of personal property only, seems not to have been disputed between the parties, and we think that it was properly so regarded. Our statutes have indeed provided, that "all probates of wills in the County Court shall be sufficient testimony for the devise of real estate, and attested copies of such wills, or the records thereof by the proper officer, shall and may be given in evidence in the same manner as the originals." Rev. St., 3, 122, s. 9. But it is well settled that this enactment applies only to the probate of wills valid to (245) devise real estate. In England, the ordinary can take probate only of a will of personalty, and until our act of 1784, in which was inserted for the first time the enactment before recited, our County Courts as courts of probate possessed no other jurisdiction. But after that act, as the probate was made evidence of the devises in the will, it became the duty of these Courts to enquire whether the will offered for probate was valid so as to devise lands. They thus became Courts of Probate as to wills of every description, and a *general* probate of a will, containing dispositions of realty as well as personalty, was presumed, if on its face the will purported to have been executed with the ceremonies necessary to pass lands and unless something appeared to remove the presumption, to be a probate of it in both characters. Thus, in *University v. Blount,* 4 N. C., 455, where there was a probate of a will, purporting to be attested by two subscribing witnesses, made upon the oath of one, it was held that it was necessary to the efficacy of a probate of a will of realty, that it should appear therefrom to have been shown to the Court, that the will was executed under the circumstances required by law in devises of lands, and that, inasmuch as it appeared on the face of the will that it was attested by two witnesses, and it was certified to have been *proved* before the Court by the oath of one of them, it should be intended *prima facie* that it had been proved, as required in devises of land, that both himself and the other witness had subscribed the will in the presence of the testator. But when enough appeared to rebut the presumption, then the probate was taken to be a probate of a will of personalty only. Thus, in *Blount v. Patton,* 9 N. C., 237, where a will purported to be attested by two wit-

nesses and was certified to have been proved by one, whose testimony was set forth in the certificate, and it did not appear therefrom that he had testified to the subscription by the other witness in the presence of the testator, the probate was held to be one confined to personalty. The will in this case had apparently the forms requisite to make it good as a disposition of personalty, but it was *prima facie* insufficient to devise lands, because unattested by two subscribing witnesses.

(246) It is true, that there is a special case provided for by our statutes, in which devises may be valid without such attestation, "if the will shall be found among the valuable papers or effects of any deceased person, or shall have been lodged in the hands of any person for safe-keeping, and the same shall be in the handwriting of such deceased person, and his name subscribed thereto, or inserted in some part of such will, and if such handwriting is generally known by the acquaintances of such deceased person, and it shall be proved by at least three credible witnesses that they verily believe such will and every part thereof is in the handwriting of the person whose will it appears to be." And if the record had set out that this instrument was proved as a will both of real and personal estate, it must then have been intended that all the requirements to render an unattested will effectual for the devise of lands had been shown to the satisfaction of the Court. But from a general probate of an unattested instrument as a will, such a legal inference does not arise.

It does not appear upon what grounds, after the will had been permitted to be repropounded and the issue made up between the parties, the cause was dismissed by order of the Court. The counsel for the caveator insists that it was properly dismissed, because the Court had no authority to act upon the matter alleged. We hold it to be perfectly settled that the County Court has power to declare a will proved, both as a will of realty and as a testament of chattels. This doctrine is recognized in the cases referred to and in many others, which it is unnecessary to cite, and is clearly presupposed in the act of 1835, c. 13 (Rev. St., c. 122, s. 7), by the Legislature, when it provides the mode of proving wills made out of the State, containing dispositions of realty or other property within the State. By that act the County Court is authorized to issue commissions to take the examination of witnesses, touching the execution of the will, and "upon return of such testimony the Court may proceed to adjudge the said will to be or not to be duly proved, in the same manner as it now can on the oral examination of a wit-

(247) ness or witnesses in open Court." The County Court had authority to declare the instrument in question well proved as a will of realty as well as of personalty. And if it has as yet exercised *but a part* of this power, we do not see why it may not rightfully be invoked to ex-

ercise the remaining part thereof. It must be borne in mind that there was no specific allegation, in what character the instrument was propounded and that the judgment was just as broad as the allegation. Now *that* judgment being ascertained to be one establishing the instrument as a will of chattels only, we must understand that the instrument was offered as a will of chattels *only,* and has never before been propounded as a will of lands. It has been argued, however, that the person originally propounding it, who was the universal legatee and devisee, ought to have offered it in the first instance as a will both of lands and chattels, and neither she nor any claiming through her can now be permitted to claim for it a more extensive operation than was at first demanded. We are not aware of any rule of law, which sustains this proposition; and it is obvious, upon a little reflection, that such a rule would in many instances operate very inconveniently. Facts may be discovered after an instrument has been offered and proved as a testament, that were then unknown, but which, if permitted to be shown, would clearly establish it as a will of lands. Why should not the party have an opportunity to establish it as such? The former probate will not thereby be impeached, and the new matter alleged will be entirely consistent with the former allegation. The testimony, on which a general probate is stated to have been granted, as in *Blount v. Patton, supra,* may, from inadvertence, be insufficiently set forth to authorize the reception of the probate as evidence of a devise of lands, and therefore the probate must be treated as the probate of a testament merely. Why should not the consequences of this inadvertence be corrected by an application to have the will proved as one valid to pass lands? It is beyond question that the devisee may set it up as such in an action of ejectment, and on the trial prove its due execution. *Henry v. Ballard,* 4 N. C., 397; *Redmond v. Collins,* 15 N. C., 430. And (248) if there has been no previous adjudication of the Court of probate against the will, is it not better for the interests of all, that its validity or invalidity should be directly and conclusively decided in the mode prescribed by law, as most fit for trying such questions, by an issue between the parties interested, to be made up under the direction of the Court, whose peculiar duty it is to take the probate of all wills?

We are of opinion that there was error in the sentence dismissing the cause, that the same ought to be reversed, and a *procedendo* awarded to the Superior Court of Halifax to try the issue between the parties.

PER CURIAM. Reversed.

Cited: Harven v. Springs, 32 N. C., 183; *Osborne v. Leak,* 89 N. C., 435; *Jenkins v. Jenkins,* 96 N. C., 258; *Moody v. Johnson,* 112 N. C., 800; *Steadman v. Steadman,* 143 N. C., 350.

(249)

THE GOVERNOR *v.* JOSEPH WELCH AND OTHERS.

1. A bond payable to A B, Governor of the State, for the use of the State, goes to his successor in office, and may be sued upon in the name of such successor.
2. The plaintiff may enter a *nolle prosequi* as to any of the defendants in an action upon contract, at any time before final judgment, in the same manner he is permitted to do in an action *ex delicto*.
3. Where there were several defendants, and the process was served upon a part only, and not run out to a *pluries* as to the others, and a declaration accepted by those on whom the process had been executed and pleas entered for them, and when the cause came on for trial the defendants insisted that it was discontinued, and at the same time the plaintiff moved to enter a *nolle prosequi* as to those not taken, which was granted. *Held*, that this prevented a discontinuance of the cause as to those on whom the process had been executed.
4. Where there are several defendants, and the process is executed on a part only, and not run out against the others, this *may* amount to a discontinuance, but after verdict the error is cured by the statute of jeofails.

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

Debt, brought upon a bond, of which the following is a copy, viz.:

"STATE OF NORTH CAROLINA:

Know all men by these presents, that we, Joseph Welch, E. L. Poindexter and Joshua Parsons, proprietors of the Tennessee River Turnpike Road, and Asa Enloe, Benjamin S. Brittain, Gideon F. Morris and Isaac Truitt, are held and firmly bound unto Montford Stokes, Governor of the State of North Carolina, and his successors in office, in the sum of four thousand dollars, to the payment of which well and

(250) truly to be made, we and each of us do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated 1 June, 1832.

The condition of the above obligation is such that whereas, by an act of the General Assembly of the State of North Carolina, the public Treasurer of said State has been directed to loan to the proprietors of the Tennessee River Turnpike Road, the sum of two thousand dollars, upon terms specified in said act of Assembly: And whereas, the proprietors above named (Joshua Parsons, having lately purchased the interest of William Bryson in said road), have this day received of William S. Mhoon, Public Treasurer of North Carolina, the aforesaid sum of two thousand dollars. Now, therefore, if this sum aforesaid of two thousand dollars, with interest from this date, shall be fully paid up to the said William S. Mhoon, Public Treasurer or his successors in office, on or before the first day of June, 1837, and if upon application of such Public Treasurer, or his successors in office, said proprietors

shall promptly give other or additional security as prescribed by the aforesaid act of Assembly, then this obligation to be null and void, otherwise to remain in full force and virtue.

(Signed and sealed by the parties named in the bond)."

The action was brought in 1838, in the County Court of Macon, in the name of "Edward B. Dudley, successor in office of Montford Stokes, Governor of the State of North Carolina." The following persons were named in the writ as defendants, and process issued against them, viz.: Joseph Welch, Joshua Parsons, Benjamin L. Brittain, Gideon F. Morris, Isaac Truitt, John McDowell and W. W. Dobson, administrators of Asaph Enloe, deceased, and Thomas W. P. Poindexter and Judith Poindexter, administrators of E. L. Poindexter deceased. This process was returned executed on Welch and Britain, and on Enloe's administrators and the others not found. An *alias* issued against Morris and Parsons, which was returned executed on Morris, Parsons not found. Another writ issued against Parsons, which was also (251) returned, not found. This is all the process which appears to have issued. At the first return term, J. Roberts was marked as counsel for Poindexter's administrators, and this entry made: "N. W. Woodfin for J. Welsh and Parsons when taken." "Oyer as to Welch." The cause remained in this State eight or nine terms in the County Court, when the plaintiff was nonsuited and appealed to the Superior Court. The cause was placed on the trial docket in the Superior Court, at Spring Term, 1840, and so continued until Spring Term, 1842, when the following pleas were entered: "general issue—conditions performed—no breach." At this term a jury having been impaneled to try the cause, the bond was proved and read to them. The defendant's counsel contended, that from a reference to the act of Assembly authorizing the Treasurer to lend the money to the defendants and take the bond sued on, the action could not be maintained by the plaintiff without showing that the General Assembly had elected whether the money should be paid, or stock in the road be taken in lieu thereof; secondly, That the Legislature had not authorized the suit to be brought; thirdly, That the suit had been discontinued, because all the defendants had not been taken, and that the pleas, as it then appeared to the Court, were entered only for the defendants on whom process had been served. It was insisted by the plaintiff's counsel that this latter objection could not be taken after the jury had been impaneled. It was agreed, however, that all the exceptions of the defendants should be reserved until after the verdict, and leave was given the plaintiff to amend his writ, and to enter a *nol. pros,* as to those defendants on whom none of the writs had been executed. A verdict having been taken for the plaintiff, subject to the

opinion of the Court on the points reserved, his Honor was of opinion with the plaintiff on the two first objections, but, after an examination of the record, held on the last point that the suit had been discontinued, and gave judgment of nonsuit against the plaintiff, from which the plaintiff appealed to the Supreme Court.

(252) *Francis* for the defendant.
Clingman for the plaintiff.

DANIEL, J. This was an action of debt commenced in the County Court of Macon, on a bond given to Montford Stokes, Governor of the State of North Carolina and his successors in office, and executed by Welch, Poindexter, Parsons, Enloe, Brittain, Morris and Truitt. It was for money borrowed from the State under the provisions of an act of Assembly. The plaintiff issued a writ of *capias ad respondendum* against Welch, Parsons, Brittain, Morris and Truitt, and a summons against the representatives of Enloe and Poindexter, these two obligors having died since the execution of the bond. The *capias* was by the Sheriff executed on Welch, Brittain and Morris, and as to Parsons and Truitt, returned "not found." The process was run out to a *pluries* as to Parsons; but there was neither an *alias* nor a *pluries* as to Truitt; nor any *alias* or *pluries* as to Poindexter's representatives. The defendants, Welch, Brittain and Morris, received a declaration against themselves, and pleaded "General issue and conditions performed." At January Sessions, 1840, the plaintiff was nonsuited, and appealed to the Superior Court. At Spring Term, 1842, of the Superior Court, the cause was submitted to a jury, and, before they rendered a verdict, the defendant's counsel moved the Court to adjudge that the whole cause had been discontinued, because the process had not been run out to
(253) a *pluries*, as to some of the persons mentioned in the original writ, to wit, Truitt and Poindexter's representatives. At the same time the plaintiff's counsel moved the Court for leave to enter a *nolle prosequi* as to those persons. The Court reserved these questions and the trial proceeded. The defendants insisted on the trial that the action could not be maintained, as there was no proof that the Legislature had elected to take back the money, rather than its equivalent in the stock of the Turnpike Road, which privilege had been reserved in the said act, if the Legislature should think proper to take the stock in payment; nor had the Legislature directed a suit to be brought on this bond. These objections were overruled by the Court; and we think the Court was correct in so doing. There is no stipulation in the condition of the bond, that the State will take such stock in discharge of the bond, nor is there any law to stay proceedings on the bond until the Legisla-

ture should order it to be put in suit. If the Legislature has passed any resolution on the subject, it was the duty of the defendants to show it. The defendants again contended that the action could not be maintained in the name of Dudley, but that it should have been brought in the name of Stokes. They said that a bond given to a sole corporation and its successors, did not, in law go the successor, but would go to the executor of the first obligee—that bonds given to corporations sole. as bishops, prebendaries, parsons, vicars, etc., would enure to them in their natural capacity, as they cannot take a chattel or *chose in action* in succession, unless by custom; and for this were cited Bac. Ab. Obligation, D. 2; *Byrd v. Wilford,* Cro. Eliz., 464; *Fulwood's case,* 4 Co., 65. The answer is, that the rule relied upon does not apply to the King. He may take a chattel or *chose in action* to go in succession—the revenue, national ships and all the materials of war, which are things personal in their nature, go in succession. Specialties and obligations taken to the use of the King will go in the same way. We have no modern authority on this point, because, by the Stat., 33 Hen. 8, it is enacted, that all obligations and specialties, taken to the use of the King, shall be of the same nature as a *statute* (254) *staple.* They are now as records, and the usual remedy for a breach is by *scire facias.* Williams on Ex'ors 653; Bingham on Executions, 228, 229. It appears from the face of this bond that the money belongs to the State; and the act directs that the bond shall be payable to the Governor for the time being. We are of opinion that the plaintiff, who was the successor of Stokes as Governor, may maintain an action on the bond. The jury returned a verdict for the plaintiff. And the Court then returned to the point reserved; and was of opinion, that the cause had, in law, been theretofore discontinued and gave judgment accordingly, from which the plaintiff appealed to this Court. It may be, that an order of discontinuance might have been proper at the time the motion was made, had not the plaintiff simultaneously moved to enter a *nolle prosequi* as to those persons named in the original writ, who had not been taken. It is true, that, in England, if two persons are sued in a bailable action *ex contractu* or *ex delicto,* and but one be taken, the plaintiff cannot, without error, serve him with a declaration, until he has run the process to an outlawry against the other. 1 Stra., 473; 2 W. Blac., 759; 2 New. Rep., 404, 231, 433; 1 Wills., 242; 1 Mau. and Sel., 55; 1 Arch. Pr., 123, 124. If he declare against one only where two are named in the writ, the other may, if the writ be bailable, immediately sign judgment of *nol. pros.* 2 Term, 257. After proceeding to outlawry against the other, you may declare against the one, who has appeared alone, stating the outlawry of the other in the commencement of your declaration. 15 East., 1, 4; Taunt., 299; 1 Maule and

Sel., 242; 2 Arch. Pr., 179. By accepting a declaration and going to trial, and a verdict rendered, still at common law the error was not cured by the statute of jeofails 32, H. 8, c. 30, which is comprehended in our Revised Statutes, c. 3, s. 5. The idea of the Judge was not correct, that the action had been, by force of law, theretofore discontinued,

and that a *nolle prosequi* by the plaintiff, at the time moved for,
(255) could not help him. For if the verdict, which the jury were then

impaneled to give, had been rendered before the making of the motion for the discontinuance, the above mentioned statute of jeofails would have cured the defect, and the plaintiff would then have been entitled to a judgment against those who had been arrested and served with a declaration. The cause was, therefore, as to them, still in Court, until the order of discontinuance was entered by the Court. In England, in actions upon contracts against several defendants, if the defendants join in their pleas, the plaintiff cannot enter a *nolle prosequi* as to any one of them, without releasing the others. 1 Wils., 90; 1 Saunders, 297 (note). In actions *ex delicto* the plaintiff may enter a *nolle prosequi* as to some of the defendants, and proceed against the others, at any time before final judgment, even although they all join in the same plea and be found jointly guilty. 1 Lord Ray., 597; 1 Wils., 306; 2 Salk., 455, 466; 3 Salk., 244, 245; Arch. Pr., 249. The reason why in England a *nolle prosequi* cannot be entered as to one or more of the defendants who are sued upon contract, is, that it is a rule there in such actons, that the plaintiff must recover against all or none. That is not the rule with us, for here a plaintiff may recover against one or more in an action upon contract. Therefore the practice here has long been, to permit the plaintiff to enter a *nolle prosequi* in actions upon contract, just as he is permitted to do in actions *ex delicto,* at any time before final judgment. In this case, the record states that leave was given to the plaintiff to enter a *nolle prosequi* as to the defendants not taken. This was right, and, consequently, the order for discontinuing the cause was erroneous and must be reversed; and judgment must be rendered for the plaintiff upon the verdict.

PER CURIAM. Reversed and judgment for the plaintiff.

Cited: Dick v. McLaurin, 63 N. C., 187; *Etheridge v. Woodley,* 83 N. C., 13; *Webster v. Laws,* 86 N. C., 180.

(256)

RICHARD SMITH ON DEMISE OF JOHN B. KELLEY *v.* HARBORD SPENCER.

1. If goods be taken under a *fieri facias*, they vest in the Sheriff, and he may sell them after he has returned the writ, and at any distance of time.
2. If he does not sell, the plaintiff can compel him by a *venditioni exponas*, and this he may sue out, in like manner, at any distance of time.
3. When land is levied on, the plaintiff may sue out a *venditioni exponas* at any subsequent time, before the debt is satisfied, without regard to the year and the day, and without resorting previously to a *scire facias*.
4. A sale under such a *venditioni exponas* will be good against the defendant in the execution, and those who claim under him; but the *laches* of the plaintiff in not enforcing a sale may entitle creditors having younger executions to be preferred.
5. This was the law before the passage of the Rev. St., c. 31, s. 114—whether altered by that, quere?

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

Ejectment. It was admitted that the defendant was in possession. It appeared that one Laverty and Gantly obtained a judgment against one Munroe and others for $480.70, at September Term, 1835, of Cumberland County Court, that a *fi. fa.* tested of that term issued against the defendants to the Sheriff of Moore County, returnable to December Term, and was returned by the Sheriff "levied on the land in dispute—too late to hand to sell." Whereupon, *venditioni ex-* (257) *ponas* issued to the Sheriff of Moore, tested December Term, 1835, returnable to March Term, 1836, and was by him returned, "Indulged by plaintiff's attorney—costs satisfied and paid into office." No other process issued until December Term, 1837, when a *venditioni exponas* issued, tested of that term, and returnable to March Term, 1838, by virtue of which last *ven. exp.* the Sheriff sold the land on 19 February, 1838, to the lessor of the plaintiff, and made a regular deed to him duly proved and registered, and under this title the plaintiff claimed. It was also admitted that Munroe, whose land had been thus sold, on 27 May, 1837, conveyed the land to one Dowd in trust, to secure certain of his creditors, and that Dowd, on 10 February, 1838, sold and conveyed the land to the defendant, who claimed title accordingly. It was also admitted that at December Term, 1839, the County Court of Cumberland made the following order, viz.: "Laverty and Gantly *v.* Munroe and others. It appearing to the satisfaction of the Court, by the affidavit of John Winslow, Esquire, Attorney for Laverty and Gantly, that the judgment in this case rendered at September Term, 1835, was not satisfied at the time of the sale of certain property levied on as the property of one of the defendants, under an execution returnable to December Term, 1835, and sold under a *venditioni exponas*, issued from

December Term, 1837, returnable to March Term, 1838. And it further appearing to the Court, that executions have not regularly issued upon said judgment from March Term, 1836, to December Term, 1837: It is therefore considered by the Court, that a *venditioni exponas* issue *nunc pro tunc,* from March Term, 1836, to June Term, 1836, from June Term, 1836, to September Term, 1836, from September Term, 1836, to December Term, 1836, from December Term, 1836 to March Term, 1837, from March Term, 1837, to June Term, 1837, from June Term, 1837, to September Term, 1837, and from September Term, 1837, to December Term, 1837"; which writs of *venditioni exponas* were filled up under the seal of the Court by the Clerk, and filed among the records of
(258) the said suit.

The only question raised was, whether the title of the lessor of the plaintiff under the Sheriff's deed, or the title of the defendant under the deed of Dowd, was the better title.

The Court intimated the opinion that Laverty and Gantly, the plaintiffs in the judgment, had lost their lien by not continuing their executions, regularly from March Term, 1836, to December, 1837—that after March Term, 1836, the plaintiffs had abandoned their lien, so as to give the defendant, Munroe, the right to sell—and he having sold or conveyed for valuable consideration to Dowd, the title was out of him and was not subject to the *venditioni exponas,* from December, 1837, to March, 1838, under which the lessor of the plaintiff claimed—that, supposing the County Court had the power to order *venditioni exponases* to issue *nunc pro tunc,* the effect of this could not be to make the proceedings regular so as to protect the purchaser under the last *venditioni exponas* against the defendant in the execution, but not against the present defendant, who had before that by deed from Dowd to him, and from Munroe to Dowd, acquired vested rights, which rights could not be affected by any such order of the County Court, or by any thing done by the Clerk in pursuance thereof. In submission to this opinion, the plaintiff suffered a nonsuit, and appealed to the Supreme Court.

Badger & Mendenhall for the plaintiff.
Winston & Strange for the defendant.

RUFFIN, C. J. Supposing the lien created by the levy of the *fieri facias,* to have been once lost, the Court would be reluctant to hold, that it was revived by the order made in December, 1839, and the proceedings under it, to the prejudice of a title acquired by the defendant at a time when the lien was extinct or dormant. It must be admitted that it seems to be clearly settled in England, that the statute, West., II, c. 45, only requires a *scire facias* to revive a judgment when no execu-

tion is sued within a year and a day; and that if an execution be (259) sued within that period, and be returned and filed, another execution may be sued at any distance of time without a *scire facias,* by entering continuances from the first to the last writ. Indeed, it was held, with respect to the process of execution against land, that the creditor may, after a year and a day, enter an award of an *elegit* on the roll, as of the term of the judgment, and then continue the same down by *vice commes non misit, breve,* and sue out his *elegit* at any time without a *scire facias. Cook v. Bathurst,* 2 Show., 235; Carth., 283. Probably the practise of allowing the entry of contingencies began with the *elegit,* given by Stat. West., 2, c. 18, inasmuch as it could do no prejudice to third persons, under any circumstances. For, by the construction of the statute, the judgment bound the lands the debtor had on the day of the judgment rendered, or at any time afterwards; and this lien continued until satisfaction against the debtor, his alienees and junior judgment creditors. If the judgment became dormant, and was revived by *scire facias,* this latter judgment was only *quod executionem habeat,* by the express words of the statute; so that the *elegit,* then issued, ran in the same terms it would if the judgment had not become dormant, and commanded the Sheriff to deliver to the plaintiff one-half of all the land the defendant had on the day of the original judgment or at any time afterwards. It consequently rode over any intermediate alienation. Hard as the case may be, it follows inevitably, from the principle declared by the statute, that the judgment binds the land; and it charges every person with notice of the judgment. The allowing the continuances to be entered on the roll had the effect of making the record appear regular, and, it would seem, that it had no other object. No doubt, upon reasonable ground shown, as that the debt had been satisfied or released, the Court would not allow the continuances to stand, but would put the plaintiff to his *scire facias,* so as to let in the defendant to plead. Except in a case of that kind the *scire facias* answered no useful purpose; since as against the land the execution ran precisely as it would, if an *elegit* had been in the Sheriff's hands during all the time from the judgment rendered.

And such is the law of England to this day; for the stat. 29 (260) Car. 2, c. 3, s. 16, extends only to writs of execution against the goods of the party, as to which they bind only from the delivery to the Sheriff. It was easy, however, after this last statute, to transfer to executions against goods the rule, under which continuances of an *elegit* had been permitted; for this fiction also could do no harm, since the writ of *fieri facias* had no relation, but bound only while it was in the Sheriff's hands that is to say, provided it was not levied. Hence, if there was no suggestion of satisfaction, the *scire facias,* in this case

also was required by no purpose of justice, and the plaintiff was allowed to make his *fieri facias,* sued out after a long interval, orderly and regular on the record by continuances on the roll after one had been issued and returned. For it affected only the parties to the record, was a convenience to the plaintiff, did no injustice to the defendant, and saved expense to both.

Far different may be the consequences of such a course in our law. Here the common law is still in force, by which the *fieri facias* binds from its *teste;* and the unity of an original *fieri facias* and an *alias* and *pluries* regularly issued is, for the purposes of the lien created by the first, too firmly established to be shaken. *Gilkey v. Dickerson,* 9 N. C., 341; *Brasfield v. Whitaker,* 11 N. C., 309. To permit a plaintiff, after a return of a *nulla bona* on a *fieri facias,* to intermit his *alias* for a term, and then sue it out and connect it with the former by entering an intermediate one on the roll, so as to set up a lien against purchasers and creditors, which would not otherwise exist, but had been lost by the *laches* of the plaintiff, would be grievously unjust. It cannot be a matter of course here as in England, for the plaintiff to file his first writ, continue it on the rolls, and at a remote period take out another as a *pluries;* because in England he thereby defeats no creditor or purchaser from the defendant, while here, by the relation he may do both. There has been no such practice here, and it would be mischievous to introduce it. If such a thing can be done here, it can, at all (261) events, be done only by special leave of the Court. Here there was an order allowing writs to be put on file, so as to connect that finally acted on with that on which execution was begun. But the Superior Court held, notwithstanding, that a right had in the meanwhile become vested in the defendant, which could not be thus divested. Upon the correctness of that position the argument at the bar turned.

It was said for the defendant, that it was against first principles that third persons should be affected by fictions in proceedings, to which they are not parties, and that no Court has power to make an order thus to operate; and, in the next place, that, in re-enacting the stat., 18 Ed. I, c. 45, an important alteration has been introduced by the Legislature, Rev. St., c. 31, s. 114, by using the negative words "no execution shall issue after a year and a day from the rendition of such judgment"; with a proviso, that when an execution hath been issued within a year and a day, another may be issued within a year and a day from the issuing of the last execution—whence it was deduced, that it would directly contradict the statute to dispense with a *scire facias* in any case, where more than a year and a day had elapsed since the last execution. Upon the last point we refrain from expressing an opinion, as it does not arise in the case; for the act of 1836 went into operation 1 January, 1838,

and the writ, under which the plaintiff claims, was issued in December, 1837. Upon the former question, it was, on the other hand, insisted for the plaintiff, that this was but the exercise of the power of amendment, and that, especially under the liberal enactments in our statutes, it is possessed by all courts, inferior as well as superior, in their discretion, and not subject to revision; and that, in truth, the order ought not to be set forth in the record; but that the record itself is amended, so as to read as if the matter, embraced in the order of amendment, had been originally inserted in it; and that, hence, it cannot be judicially seen that the new matter is new, but it must be deemed that the executions were in fact issued, as upon the face of the record they now appear to have been.

The Court has no hesitation in stating that, after giving to (262) the question much attention, we should feel much embarrassed in coming to a decision, were this the case of a *fieri facias* not levied, and of *alias* and *pluries* writs of *fieri facias* founded on the first. We do not decide it, because we think the case before us essentially different from that supposed, inasmuch as here there was a levy followed by writs of *venditioni exponas;* though that difference does not seem to have been adverted to on the trial. We can, however, say this much explicitly, that upon the general principle that no person should be affected by *res inter alias acta,* on which he could not be heard, we should incline strongly to the opinion of his Honor, unless we should find ourselves compelled by imperative rules of law to hold the contrary. It may be that one Court cannot, for any purpose, look into the record of another Court as it now reads, so as to see how it was made to read thus: and, if so, we should of course yield to the rule of law. If such should be the law—as it possibly is—it furnishes a cogent reason why courts should be extremely cautious in allowing amendments, or, rather, statements of facts and proceedings, absolutely fictitious, to be inserted in the record, when the interests of persons not before the court may be, injuriously affected. The propriety of perfecting process actually issued, as by putting a seal to a writ, or making an execution conform to the judgment in the amount of the debt and costs, and the like is not denied, but has been declared by this Court. *Purcell v. McFarland,* 23 N. C., 34; *Clark v. Hellen, Ibid.,* 421. But an amendment of a *fieri facias,* by inserting words to alter it from an original to an *alias,* was refused, when it would prejudice the right of a third party. *Bank v. Williamson,* 24 N. C., 147. Yet, if the power be admitted, we think we may safely advise magistrates, who sit in inferior courts, never, under the pretense of amendment, to allow a mere fction, a false statement, to be inserted in the record. It is very proper to make amendments according to the truth; but the purposes of justice can hardly be promoted by

making the record speak untruly, especially when the object is (263) thereby to affect a stranger to it.

The occasion, as it has seemed to us, has called for the foregoing observations, although, as the Court thinks, in this case no prejudice was done to the defendant in the judgment, or to the present defendant by the order and continuances; because we hold that the lien created by the levy of the *fieri facias* was not lost. For this opinion, it is now proper to state the grounds.

The case has heretofore been considered, as if the first *fieri facias* had not been levied, and the subsequent executions had been *alias* and *pluries* writs of the same kind; in which case we have stated we should not be inclined to adopt what appears to be the practise in England. But we think a writ of *fieri facias* levied on land and returned, and writs of *venditioni exponas* founded thereon, make a case essentially differing from the former; and that the levy creates a specific lien, which binds the lands, as against the defendant and those claiming under him, to many purposes, as it would be bound by the judgment under the stat. 13, Ed. I, c. 18. This seems to result from the necessary effect of a levy, and the nature of a writ of *venditioni exponas.*

If goods be taken under a *fieri facias,* they vest in the Sheriff, and he may sell them after he has returned the writ, and, indeed, at any distance of time. If he does not sell, the plaintiff can compel him by a *venditioni exponas;* and this he also can necessarily do at any distance of time; for the execution was begun by the levy, and the goods are all the time in *custodia legis,* and the execution in progress. The plaintiff may have his remedy against the Sheriff for not selling. But there can be no doubt that he can also compel him to sell by a *venditioni exponas* and *distringas;* and as long as the Sheriff can have the power to sell, the plaintiff can have the power to enforce him. To the purpose of compelling the officer to sell, it cannot be requisite to revive the judgment by *scire facias* against the defendant. We hold, that, in like manner, when land is levied on, a *venditioni exponas* for the sale of it may be taken out, although a term intervene after the return (264) of the levy. It is true that land does not, like goods, vest in the Sheriff; and for that reason that officer cannot sell land without a *venditioni exponas. Barden v. McKinnie,* 11 N. C., 279; *Seawell v. Bank,* 14 N. C., 279. Yet if the levy have not the effect of appropriating the land to the satisfaction of the debt, it is difficult to conceive what effect it has at all. We cannot attribute to it a less operation. It is a declaration of record by the Sheriff that the particular land is attached and it would seem, that it should devote that land by sale to the debt, as much as an award of an *elegit* binds all the land of the debtor under the stat. of West., 2, and for similar reasons. Now, when that

writ is sued out, no matter when, it takes, by its words, all the land the defendant had at the date of the judgment. So the writ of *venditioni exponas* relates to the levy, and commands the Sheriff, in terms, to sell the land therein described, as having been made subject thereto by the previous levy. Is it an answer to the writ, that it did not emanate from the term to which the levy was returned? Can the Sheriff return to it, that the lands do not now belong to the defendant, but to another person, to whom the defendant sold them? Certainly not. Whenever the levy may have been made, it is the Sheriff's duty to sell the land according to the exigence of the writ. It is no injury, either, to the defendant to make the sale under the writ of *venditioni exponas.* Ought he to object, that the writ should have issued three or six months sooner? It is true, if the levy is discharged by an act of the plaintiff, the lien is gone, and there is nothing on which to found the *venditioni exponas.* Thus the issuing a second *fieri facias* discharges a previous levy. *Scott v. Hill,* 6 N. C., 143; *Amyatt v. Backhouse,* 7 N. C., 63. But it is a different question, whether, as against the defendant, the levy is vacated or abandoned by the omission merely to sue out a *venditioni exponas* from the first term and keep it up until a sale. Why should it be? What good purpose is answered by it? As to chattels, it is admitted the writ of *venditioni* may be sued at any time. And there seems no good reason why it should be otherwise in regard to land. We know in practice, that orders of sale in thousands of instances have been issued to sell land levied on under a Justice's judgment, (265) although no execution issued from the first term, or one or more terms, had been subsequently pretermitted. The omission is not like the positive act of issuing a general execution; for that must be deemed a disclaimer of the lien on the particular land. We know of no decision, that the levy becomes inoperative, unless followed up by process in hot pursuit. Indeed, the question is very much without direct authority, except in our own practise in this State, and by analogy to the effect of a levy on goods. In England, and in some of our sister States, the *fieri facias* does not run against land, and, consequently, there is no *venditioni exponas* to sell it. In others of the States the statute of George II is construed not to prevent the judgment itself from binding the land, as it did under the stat. West., 2, although the execution be by *fieri facias* instead of an *elegit,* and, of course, the elder judgment is entitled to the first satisfaction in all cases. With us, however, the judgment does not itself bind; but a levy of the *fieri facias* does, so as to authorize the writ of *venditioni exponas* to sell the land levied on as a thing *in custodia legis* for the purpose of satisfying that debt. In analogy to the case of goods, the levy on land must have the effect of placing the land in the custody of the law. In *Tarkinton v. Alexander,*

19 N. C., 87, the Court said: "The levy operates as a lien, *which sets apart the land levied on for the satisfaction of the creditor's judgment.*" After being thus set apart, what is there, we would enquire, to take it out of the custody of the law, and set it at large again before the debt be paid? We are speaking of the effect of the levy, as against the defendant himself. We can see many reasons why the levy of a *fieri facias* should not divest the freehold, and why that can be done only by a sale and a Sheriff's deed. But we can see no reason, why the defendant should claim to have the levy discharged, so as to prevent any action on it, unless that action be immediate and continued. He is not injured by its being enforced at any distance of time, and as to him the law may justly preserve the lien until satisfaction of the
(266) debt be had.

A purchaser from the defendant can be in no better situation than his vendor. That is the general condition of every person claiming under another, unless in particular instances of persons favored and protected by statutes or in equity. It is the direct operation of a lien, created by execution, to prevent the defendant from defeating the execution by alienating, and to give to the process the same effect against the property in the hands of the purchaser as in those of the debtor himself.

We think, then, that the writ of *venditioni exponas* issued from December, 1837, was an authority to sell this land. At most, it was irregular only and not void. The Sheriff is bound to obey a writ of execution issued after the year and day. *Dawson v. Shepherd,* 15 N. C., 497. It is only voidable at the instance of the party against whom it issues. *Oxley v. Mizle,* 7 N. C., 250. But, if the positions already laid down be correct, the Court might properly refuse a motion from the defendant to set this writ aside for irregularity; or might properly allow the plaintiff to remove the appearance of irregularity by entering continuances. The reason is, that no harm is done to any person by allowing the writ to remain in force, and amending the record so as to make it appear regular. For if a *scire facias* had issued, it would have been to show cause why execution should not issue, and the judgment would have been *habeat executionem;* upon which the question would immediately arise—what execution? The answer is, any execution that would suit the party's case. He might either have an original *fieri facias,* or an *elegit* extending to one-half of all the lands; or, if he have a specific lien on particular goods or land, he must be entitled to the writ of *venditioni exponas* against those specific things. There seems to be no ground on which he could be excluded from the latter writ more than the two former, unless the lien be entirely lost by the omission to enforce it for any one term—a point already considered.

If a *venditioni exponas* can be sued at any time within a year and a day, it follows, that, after a *scire facias* to revive, the plaintiff may have the same writ after the year and day; for he by the (267) *scire facias* entitles himself to execution, as if the judgment had never become dormant. Consequently no injury has been done by dispensing with the *scire facias* in this case and allowing the continuances to be entered; for the debt was unpaid, and the defendant did not pretend that it had been satisfied, and on that ground move either to set aside the execution or to oppose the continuances on the roll.

The opinion of the Court, then, is, that the lien of the execution levied, was not lost by the omission to keep up the executions from term to term; and for that reason we think the judgment erroneous.

It will not be understood that this decision touches the rights of other creditors. They stand on a different footing from the defendant or his vendee. Purchasers from the party can see to their security by covenants. But the law does not warrant the title of property sold under execution; and, therefore, for the purpose of enhancing the price as nearly to the value as possible, it makes its own sale an effectual title against persons having prior liens, who neglect to enforce them, until another has actually sold, though under a junior lien. Hence, when it was formerly thought that judgments *proprio vigore* bound land in this State, although a *fieri facias* was isued, it was held, that, though the debtor could not alien the land, a sale by a *fieri facias* on a younger judgment, passed the title. *Bell v. Hill,* 2 N. C., 72; *Ricks v. Blount,* 15 N. C., 128. As between the creditors, it is a fraud in one to hold up his execution until the other has sold, and then use it to avoid the sale. *Palmer v. Clark,* 13 N. C., 354; *Bank v. Pullen,* 15 N. C., 297. But the law allows not such an immunity to a sale by the defendant in execution.

PER CURIAM. *Venire de novo.*

Cited: Badham v. Cox, 33 N. C., 460; *Mardre v. Felton,* 61 N. C., 281; *Boyd v. Murray,* 62 N. C., 241; *Aycock v. Harrison,* 71 N. C., 435; *Baldwin v. York, Ib.,* 466; *Ripley v. Arledge,* 94 N. C., 472; *Cowen v. Withrow,* 114 N. C., 559; *McArter v. Rhea,* 122 N. C., 618.

(268)

CARTER BARNARD'S ADMINISTRATOR *v.* THOMAS JORDAN'S ADMINISTRATOR.

1. Where a suit is brought by the administrator of one intestate against the administrator of another intestate for a debt due from the intestate of one to the intestate of the other in their lifetime, the defendant may set off a debt that was due from the plaintiff's intestate to his intestate.
2. Where a suit is brought against an administrator for a debt due by his intestate, he cannot set off a debt due to himself for goods of his intestate, which he, as administrator, sold to the plaintiff's intestate.
3. The rule is, if *both* parties *must* sue and be sued in their representative characters, then debts respectively due in those characters may be set against each other; but where *one* of the parties *must* sue or be sued in his representative character, and the *other may* sue or be sued without naming him executor, then the debts, as being due in different rights, cannot be set against each other.

APPEAL from *Manly, J.*, Spring Term, 1842, of PASQUOTANK.

In the Court below the following facts were submitted to the Judge as a case agreed. The plaintiff's intestate became surety on a note given by the defendant's intestate, on which an action was instituted and judgment obtained against the plaintiff's intestate, at Pasquotank County Court, at March Term, 1841. Execution on this judgment issued, tested at March Term aforesaid, and came to the hands of the defendant, who was Sheriff of the county, and was levied on the goods and chattels of the plaintiff's intestate, and on 25 May, 1841, the sum of $1,000 was made upon the execution, out of the goods and chattels of the plaintiff's intestate. The plaintiff's intestate died on the .... day of March, 1841, and administration on his estate was granted to the plaintiff at June Term, 1841, of Pasquotank County Court. The
(269) defendant's intestate died in November, 1840, and administration on his estate was committed to the defendant in December, 1840, and he sold at auction the perishable property of his intestate in that month. Carter Barnard, the plaintiff's intestate, lived with the defendant's intestate at the time of the death of the latter, and in right of his wife was one of his distributees and heirs at law, and when the defendant sold his intestate's property had it in possession. At the sale thus made by the defendant of his intestate's property, the plaintiff's intestate purchased property to the amount of $972.06, on a credit of six months, which fell due on 6 June, 1841, and hired negroes to the amount of $179.15, which fell due on 1 January, 1842. The plaintiff's intestate afterwards delivered to the defendant a quantity of corn, which was to be sold by the defendant, and the proceeds thereof to be applied in part discharge of the hires and purchases so made by him, without specifying to which it should be applied. The corn was

sold for $403, and the defendant elected to apply this sum, first to extinguish the amount due for hire, and the remainder towards the purchases of the plaintiff's intestate from the defendant, leaving a balance due to the defendant as administrator of Thomas Jordan, of $768.20. The plaintiff's intestate is also indebted to the defendant in the sum of $90, on a note payable to his intestate, Jordan, and due 20 September, 1840. If the first sum be allowed as a set-off, the plaintiff is entitled to recover from the defendant the sum of $231, and if both sums be allowed as sets off, the plaintiff is entitled to recover the sum of $141.80. If neither sum be allowed as a set-off, the plaintiff is entitled to a judgment for $1,000, with interest from 25 May, 1841.

Upon this case his Honor was of opinion, that neither of the above sums was a set-off, and gave judgment *quando* for $1,000, with interest from 25 May, 1841.

From this judgment the defendant appealed to the Supreme Court. (270)

A Moore for the plaintiff.
Kinney for the defendant.

RUFFIN, C. J. The defendant, being sued in an action of assumpsit, and having pleaded the general issue and given notice (274) of set-off, set up two claims on the trial, of which he claimed the benefit as deductions from the plaintiff's demand. The demand of the plaintiff arose thus: Barnard, his intestate, was the surety for Jordan, the defendant's intestate, and after Jordan's death, judgment was obtained for the debt against Barnard, on which execution was issued and levied, and the Sheriff sold thereon after the death of Barnard, and before the plaintiff administered. For the sum thus paid, this action is brought by the plaintiff as administrator of Barnard against Pool as administrator of Jordan. The demands of the defendant arose thus: One of them is a note for $90, given by Barnard to Jordan in their lifetimes, and due before this action was brought; and the other is a debt which Barnard contracted with Pool, and after the death of Jordan, for the price of certain goods that had belonged to Jordan and were sold by Pool. His Honor thought that the defendant was entitled to a deduction for neither of those claims, and there was a verdict and judgment for the plaintiff for the whole of his demand, and the defendant appealed.

In the words of *Baron Fortescue* in *Shipman v. Thompson,* Willes, 103, the Court is not to consider the convenience or inconvenience on one side or the other in cases like this, but must go according to the act; and if the statute has not remedied all the inconveniences, we must yet take

it as it is, and cannot extend it farther. Now the act of 1756, c. 57, s. 7, "for preventing multiplicity of law suits," says that "where there are mutual debts subsisting between the plaintiff and defendant, or if *either party sue or be sued as executor* or *administrator,* where there are mutual debts subsisting between the testator or intestate and either party, one debt may be set against the other." Upon this statute it has been held repeatedly, that if an executor sue on a cause of action, which arose wholly in his own time, he may sue in his own name, without calling himself executor, and, therefore, the defendant in such action cannot set off therein a demand due to him from the testator. The

(275) leading case on this point is that of *Shipman v. Thompson,* just cited, but there are many others in confirmation of it. The decision is founded on the words of the act, that the parties, when executors or administrators, must sue and be sued in their representative characters. When therefore, the action is for a sale by the executor himself, or for money received for him, he declares without naming, himself executor, inasmuch as there had arisen no duty to the testator. And if, in such case, the executor in fact declare as executor, it makes no difference; for that is but surplusage, and if he fail in the action he shall pay costs. *Jenkinson v. Plombe,* Salk., 207; 6 Mod., 92, 181; *Goldthwayte v. Petrie,* 5 Term, 234; *Ballard v. Spencer,* 7 Term, 358. But besides the language of the statute, its policy also forbids its extension, so as to change the course of administration; and for that reason, likewise, the courts have held that a debt of the testator cannot be set off against one contracted with the executor, since the executor may need the money to answer debts of higher dignity. *Tegetwayer v. Lumley,* Willes, 264. Note by Mr. Durnford. These positions, if well founded, make it clear, we think, that the note for $90 is a proper deduction in this action. The plaintiff here has not only named himself administrator, but he could not sue without thus naming himself, as the money was raised on a judgment and execution in the time of his intestate, and before administration granted to the plaintiff, *Curry v. Stephenson,* Carth., 335; and for that sum of $90 this defendant could not sue but as administrator. That debt, then, is due to and from the parties respectively in the same representative character, in which the one claims and the other owes the debt for which the plaintiff sues.

But we think it is otherwise with respect to the sum of $768.20 due for the goods sold by the defendant himself to Barnard. For that debt the present defendant may declare in his own name, as has just been shown; and, for the purposes of set-off, it is considered a debt to himself, to all intents, according to the cases. Indeed the counsel admitted that if this defendant had sued Barnard for this sum, he, Barnard, could not have set off the debt for which this suit is brought; because

the sum which Pool would be then seeking to recover would be a debt due to himself. Yet it is contended that when Pool is (276) sued as administrator, he may set off this debt to himself. We entertain a contrary opinion. It seems very clear to us, that if the debts be not within the act, when one of the parties is plaintiff and the other defendant, they do not become so by reversing the parties. The statute was not designed to alter the law, so as to affect rights or change their character, but simply to prevent the multiplicity of suits, by allowing that to be done in one action, that before required two. If, when Pool should sue Barnard, the latter could not set off the demand now in suit, neither when Barnard becomes plaintiff could Pool set off the debt to himself; for the debts must be "mutual," and the right of set-off is necessarily "mutual." Then it is very clear, that, if Barnard himself could not use his demand as a set-off, his administrator, if sued, could not; and it follows, that, when he is plaintiff, the demand of Pool cannot defeat his action. Pool cannot have a right of set-off against a debt, which the plaintiff can only recover as administrator, when sued by the plaintiff, unless he could have used the same set-off, if the intestate, Barnard, had himself brought the suit. The distinction, we think, is this: That if *both* parties *must* sue or be sued in their representative characters, then debts respectively in those characters may be set against each other; but when one of the parties *must* sue or be sued in his representative character and the other *may* sue or be sued without naming him executor, then the debts, as being due in different rights, cannot be set against each other.

As the judgment was, in our opinion, erroneous with respect to the sum of $90 and interest, it must for that reason be reversed, and a *venire de novo* awarded.

PER CURIAM. *Venire de novo.*

(277)

JOHN D. COLLINS *v.* THOMAS BENBURY AND OTHERS.

1. No person has a several or exclusive right of fishery in any of the navigable waters in this State.
2. What is a navigable stream in this State does not depend upon the common law rule; but waters, which are sufficient in fact to afford a common passage for people in sea vessels, are to be taken as navigable.

APPEAL from *Bailey, J.*, at Fall Term, 1842, of CHOWAN.

Case brought for the purpose of recovering damages for interrupting the plaintiff in fishing his several fishery. It was in evidence that the defendant Benbury was the co-tenant, with Mrs. Harvey, of the Sandy Point Fishery, on the Albemarle Sound—that by several demises the

two co-tenants, Benbury and Harvey, leased the said fishery to H. W. Collins, who transferred it to Josiah Collins, and by him it was assigned to the plaintiff. The lease of Thomas Benbury, the defendant, to H. W. Collins, witnessed "that for and in consideration of the rents, covenants, provisos and agreements hereinafter mentioned and contained, the said Thomas Benbury has demised, leased, set and to farm let, and by these presents doth demise, lease, set and to farm let unto the said Hugh W. Collins, his executors, administrators and assigns, one-half of a certain fishery situate and being in the county of Chowan and State of North Carolina, and lying on Albemarle Sound, about ten miles below Edenton, and known by the name of the Sandy Point Fishery, to have and to hold the one-half of the aforesaid fishery, with all the privileges and appurtenances thereunto belonging or in any wise appertaining, to him, the said H. W. Collins, his executors, administrators and (278) assigns, for and during the full term of ten years, etc." This lease was dated 15 November, 1838. After Benbury had leased the fishery to Collins, he purchased a tract of land adjoining the fishery; and in the Spring of 1841, for the first time, as a co-partner with other defendants, established a fishery on the shore of that tract of land and fished thereat. The evidence showed that, when Benbury fished at the fishery, which he leased to Collins, he fished the waters of the said fishery with a seine about 1,300 yards long—that he had leased it to a company of fishermen two years previously to his lease to Collins, who fished with a seine 1,600 yards long, and that Collins, after he leased it, fished with a seine between 1,800 and 2,000 yards long. The seine, with which Benbury and the other defendants fished, at their fishery in 1841, was about 1,100 yards long. The evidence proved that the center stake by which Collins laid out his seine, stood in about the same place in which it was when Benbury fished the Sandy Point Fishery, and that a line drawn from Collins' fishery to his center stake would be nearly at right angles with his shore. The plaintiff, after offering evidence tending to prove that the water, which had before been occupied by those who fished at the Sandy Point Fishery previous to the lease from Benbury to Collins, was occupied in part by the seine which the defendants used in fishing from their beach, offered evidence to prove the number of hauls which he lost by reason of this interference—the imperfect character of the hauls he made, in consequence of such interference—and the number of fish which had been caught at the Sandy Point Fishery several springs preceding the Spring of 1841—and that during one day, when the seine of the defendants was not hauled, he caught 30,000 more fish than he had caught previously on any one day—as furnishing evidence of the amount of damages. The defendants objected to this evidence, and insisted, that the damages should be a compensation

for the loss sustained and not for the profits that he might have made. The Judge overruled the objection and admitted the evidence, because in his opinion the evidence showed the product and not the profits of the fishery. The evidence proved that the general course of (279) the Albemarle Sound is a little north of east and south of west. It was also proved that the nearest direct course from the Sandy Point Fishery to the channel of the Sound was nearly south, and that if his, Collins', seine had been laid out in this direction, no interference of the other seine with his could have taken place; but that in thus laying it out, it would have to pass over a sand shoal, which would have prevented the owner from catching the fish that he could take by fishing deeper water; and that in fact it could not be drawn across the shoal. It was also proved that Benbury and those who had occupied the Sandy Point Fishery never pursued the most direct course to the channel of the Sound, but had shot their seine in nearly the same direction in which Collins shot his. It was also proved that the dividing line between the two fishing beaches, extended into the Sound, was, when Collins' seine was laid out, transcended by him about two hundred yards towards Benbury's fishing shore, and that the staff of Benbury's seine was frequently seen between Collins' centre stake and his fish house, which would be beyond the said line several hundred yards. It was also in evidence that if the defendants had laid out their seine in the most direct course from their beach to the channel of the Sound they would necessarily have swept a larger portion of the fishing ground claimed by the plaintiff than they now did. About the interference of the one seine with the other there was conflicting testimony. The defendants' counsel submitted that the form of the action, if any could be maintained, should be *trespass* and not *case*. The Judge ruled that *case* was the proper form of action. The plaintiff's counsel insisted that, as Benbury had leased this fishery to H. W. Collins, as between Benbury and the plaintiff, who claimed under H. W. Collins, he was estopped from using the right of fishing to the injury of the Sandy Point Fishery. Upon this part of the case the Judge charged the jury that the State had never granted the beds of the navigable streams, and that, therefore, Benbury having no title to the Sound, the Sound not being a proper subject of grant, his lease to Collins conveyed the fishing beach, and, as incident to that, the several right of fishing in the waters opposite his shore —that if the defendants did fish water that was formerly fished (280) by those who occupied Sandy Point Fishery, the plaintiff would have no cause to complain, unless the defendants carried their seine beyond the dividing line between the two fisheries, extended into the Sound—that if the defendants transcended this line, they were wrongdoers, and the plaintiff would be entitled to recover of them the value of

the fish he was thereby prevented from catching. The defendants' counsel insisted that the plaintiff was obliged, in laying out his seine, to pursue the nearest and most direct course to the main channel of the Sound, as were also the defendants—that, each having a right thus to fish the waters opposite their lands, if, in the exercise of this right, the seines of both swept over the same ground, neither had the right to use the ground beyond the point of intersection to the exclusion of the other, and that, in the use of the ground thus common to both, each was compelled to make that use of it, in the prosecution of the fishing business, that would be the least injury to the other; and further, too, that, supposing the dividing line between the two beaches extended, to be the dividing line between the fishing grounds of the two fisheries, the action could not be maintained unless the interference proved proceeded from neglect or was willful. Upon these questions thus raised, his Honor instructed the jury, that, if the seine of the defendants reached over the dividing line between the beaches, extended into the Sound, and the seine of the plaintiff was thereby actually interfered with, either by being delayed in the hauls or rendering the hauls which were made imperfect, the plaintiff would be entitled to recover.

Under these instructions the jury found a verdict for the plaintiff, and the Court rendered judgment accordingly; from which the defendants appealed.

Badger & Kinney for the plaintiff.
A. Moore for the defendants.

(281) RUFFIN, C. J. The case does not state explicitly that Albemarle Sound is or is not a navigable water in its technical sense, nor any facts from which the Court can see that it is, to all practical purposes, navigable, as the term is understood among us, at least, in common parlance. But it is apparent that the Sound was assumed upon the trial to be navigable, if not strictly speaking, at least, within the meaning of the entry laws of 1765 and 1777. For the learned Judge instructed the jury that as the State had never granted the beds of navigable streams, Benbury had no title to the Sound, which was not the subject of grant; and, therefore, that his lease to Collins conveyed the fishing beach only. But to that was added the further instruction that "as incident to that," namely, the beach—"the several right of fishing in the waters of the Sound, opposite his shore," was also conveyed; and thus his Honor proceeded to designate the line within which this several right of fishing, incident to the riparian ownership, must be exercised by the proprietors of adjoining parcels of the shore. The case seems chiefly to have turned, in the discussion below, on this latter

point. But it will not be material to consider that subject here, with the view of ascertaining the extent to which the several fishery of these parties respectively goes, if neither party has such several right; and such is the opinion of the Court. The correctness of this opinion depends upon the enquiry, whether Albemarle Sound is to be regarded by us as being a navigable water and public highway or not; for if it be, it seems to be well established upon authority, that there can be no exclusive and several right of fishery in it, more than in the Ocean.

It is to be regretted, perhaps, that the date is not given of the patent by which the land was granted, of which this fishing beach is a part; and that there was no evidence offered as to the period, at which the regular ebb and flow of the tide in the sound ceased, in consequence of the closing of Roanoke Inlet. As the lands on the Albemarle were amongst the earliest taken up after the settlement of the Colony, it is extremely probable, that, at the emanation of the patent, there was a flux and reflux of the tide from the ocean as high up as the land in question; and if so, it seems agreed by all that, at common (282) law, the proprietors of the land adjacent have no propriety of soil in the land covered by the water or fishery, as a several right. But whether there was any tide or not in the Sound, when this patent issued, we do not think material; for we concur in the opinion of his Honor that this is "a navigable water," in the sense of our statutes. In *Wilson v. Forbes,* 13 N. C., 30, it was held, that a stream, comparatively short, narrow and shallow, was a navigable watercouse for the purpose of rendering the water's edge the line of a tract bounded on the creek, and not the thread of the channel. *Judge Henderson,* in commenting on the English rule, pronounced it entirely inapplicable to our situation, and by way of exemplifying the absurdity of applying it as the rule of construction for our statutes, he remarked that, "by that rule, Albemarle and Pamlico sounds, which are inland seas, would not be deemed navigable waters, and would be the subject of private property." He certainly could not by direct affirmation more forcibly have stated his opinion that they were to be deemed in our law navigable waters, as bounding the grants of land lying on them. If this vast body of water, actually navigated throughout by sea vessels of a large class, be not a navigable water, it is difficult to conceive to what waters those terms were intended by the Legislature to apply, though used twice in the act of 1765 and in that of 1777; for there are but a few miles near the mouths of some few of our rivers, among the whole of them, in which there is a regular tide from the Ocean. The Legislature must be supposed to have used them in reference to the nature and actual state of our own streams, rivers and sounds, rather than in the sense of the common law, which would render them inapplicable to our condition. And

it would seem, therefore, to be the fair construction of the acts, that any waters, which are sufficient in fact to afford a common passage for all people in sea vessels, are to be taken as navigable, and in that sense the act has commonly been received. If so, the statutes direct that the water shall form one side of the survey, and that the lines shall (283) run from the water landward. The result of this construction is, that the patent could cover only the land to the water's edge, and did not pass the soil, nor, as we think, any sole or exclusive right of fishing in the waters of the Sound. It was laid down by his Honor, that neither the soil nor the water of the Sound was included in the patent, but only the land up to the water. Yet he held that the right of a several fishery was acquired as incident to the grant of the land adjacent to the Sound; and it is in that part of his opinion that we cannot go along with him. The grounds of the difference we will now proceed to state.

We think a several fishery can only be acquired by a grant of the soil covered by the water in which the fishing is done, or by a grant, from the owner of the soil, of the fishery distinct from the soil. Mr. Blackstone, indeed, lays it down, that the ownership of the soil is essential to a several fishery, 2 Bl. Com., 39. In that, however, he differs from Lord Coke, who says, Co. Lit., 4 b., that if a man be seized of a river, and by deed do grant *separatum piscarium* in the same, and maketh delivery of seizin *secundum formam chartæ,* the soil doth not pass, but only a particular right, that is, of fishing. And afterwards, Co. Lit., 122-a, he says, a man may prescribe to have a several fishery in such a water, and the owner of the soil shall not fish there. It seems to be yet an unsettled point, which of those great authorities is right—*Seymour v. Courtney,* 5 Bur., 2814; *Hinnarsby v. Orpe,* Doug., 56—though the learned annotator, Mr. Hargrave, maintains Lord Coke's position with apparently good reason. If Mr. Blackstone be right, then the plaintiff here, not being owner of the soil, cannot be entitled to the fishery. But if Lord Coke is to be followed, we do not see that the plaintiff is better off. All he holds, is that the rights of fishery and soil are not so absolutely united that the owner of both cannot grant the fishery without the land. But it plainly follows from what he does say, that the fishery can be acquired only by a grant from the owner of the soil or from the sovereign; for a prescription supposes a grant originally, though it cannot now be shown. But here is no such grant shown, (284) nor prescription, nor use on which a presumption of a grant may rest. On the contrary, there can be no doubt that no right of soil in the land covered by the Sound ever did exist in any private person, who could convey the right of fishery; for it has at all times been unlawful to take out such a grant. We do not doubt that the right of fishing

in navigable streams, either as a common or several right, is a proper subject of legislative regulation, and may be granted to the proprietors of adjoining land, or to others, upon such terms as may seem meet to the General Assembly. There are many acts of the kind, such as those regulating lay days, and the like. But there has been no such grant of a several fishery in the Albemarle Sound to the plaintiff, or to any one from whom he could have derived it. Being a navigable water, a several fishery in it does not arise as an incident to riparian ownership, for in such waters the right of fishery is "*prima facie* in the King and is public." It is only in rivers not navigable or little streams that, as an *incident* to the ownership of the soil adjacent, the right of soil in the stream and of the several fishery therein, is acquired. *Seymour v. Courtney,* 5 Bur., 2814; *Carter v. Murcot,* 4 Bur., 2162; Thomas Coke, 231, note. And Lord Hale mentions, *De jure Maris* 5, "that fresh rivers do, of common right, belong to the owners of the soil adjacent, so that the owners of one side have, of common right, *the property of the soil,* and, *consequently,* the right of fishing *usque ad filum aquæ,* and the owners of the other side the right of soil or ownership, and fishing unto the *filum aquæ* on their side; and, if a man be owner of the land on both sides, in common presumption, he is *the owner of the whole river,* and hath the right of fishing according to the extent of his land in length." From which it appears that in Lord Hale's opinion, the right of fishing depends upon the right of soil, and, consequently, a grant of the soil must be shown, or a grant of the fishery from the owner of the soil. Neither is pretended in this case; for it is admitted that the law has at all times forbidden a grant of the soil, and the right of the fishery is claimed, not by a grant of it as an independent (285) right, but as an incident to the propriety of the soil adjacent.

It is said, however, that one of the defendants made the grant to the plaintiff's assignor, and that as against him, it assumed to be valid. To this there are several answers. From the terms of the contract, taken in the whole, it is rather to be inferred that the subject of the lease was the land adjacent to the Sound, the beach, the fish-houses, and other erections on "the premises," and not the right of fishing, as such. The right to land, cure and store the fish, was the important privilege contracted for. But, however that may be, it is very clear that a grant of a several fishery in the ocean or other navigable water by an individual, who could not acquire it from the State, must be merely void; and therefore it cannot estop.

Upon the whole, then, the Court is of the opinion that the action must fail for want of title in the plaintiff to the several fishery claimed by him; which is not merely the right of drawing his seine to his beach in exclusion of others, but is the sole right of fishing, independently of

all others, in a certain portion of the waters of Albemarle Sound. To such an action it is a good plea, that being a navigable water, every citizen of the State of right has the liberty and privilege of fishing. 3 Chit. Pl., 1108.

We agree with the plaintiff's counsel, that the industry and enterprise of many of our fellow-citizens in some parts of the State may be seriously checked by thus holding fisheries in our large waters not to be sole proprietary rights; as, to some extent at least, we learn that they have been considered and treated by those engaged in fishing, among themselves. We doubt not that they will so continue to deal with each other as not unnecessarily or materially to interfere with their operations. Indeed, the Court would have gone far to sustain any long and established usage between the different fisheries, if such had been shown. And if experience should prove the necessity or utility of further regulations upon the subject, there is a ready access to the Legislature; by whose wisdom every mischief can be remedied. But as a question depending on the mere right, the Court can do no less than decide by the
(286) existing law; by which the right of fishery in Albemarle Sound is, we think, common and not several.

PER CURIAM. *Venire de novo.*

Cited: *S. c.*, 27 N. C., 124; *Gilliam v. Bird*, 30 N. C., 284; *Logan v. Armistead*, 33 N. C., 435; *S. v. Dibble*, 49 N. C., 110; *S. v. Glen*, 52 N. C., 325; *Skinner v. Hettrick*, 73 N. C., 58; *Hettrick v. Page*, 82 N. C., 68; *Hodges v. Williams*, 95 N. C., 334; *McLaughlin v. Mfg. Co.*, 103 N. C., 106; *S. v. Eason*, 114 N. C., 790; *S. v. Baum*, 128 N. C., 605; *Smith v. Ingram*, 132 N. C., 965; *Daniels v. Homer*, 139 N. C., 236; *S. v. Sutton, Ib.*, 576.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1843

ANTOINETTE SWAIM BY HER NEXT FRIEND *v.* JOHN M. STAFFORD.

In an action for malicious prosecution, those facts and circumstances, and those alone, which were known to the prosecutor at the time he instituted the prosecution, are to be considered in determining whether he had probable cause. Any other facts, which may be established on the trial to prove the innocence of the person accused, are irrelevant to the question of *probable cause.*

APPEAL from *Battle, J.,* Spring Term, 1843, of STOKES.

This was an action on the case for a malicious prosecution, in causing the plaintiff to be arrested on a warrant, charging her with feloniously stealing a parcel of belt ribbons—Plea, the general issue. In support of her action the plaintiff introduced and proved the warrant, as stated in the declaration, issued at the instance and on the oath of the defendant. The magistrate, before whom it was returned, testi- (290) fied that a belt ribbon, found in the possession of the plaintiff, was produced before him, and that, after examining the witnesses for the prosecution, among whom was the prosecutor, John M. Stafford, the present defendant, he, the magistrate, dismissed the warrant, it being proved on the part of the present plaintiff that she had purchased the belt produced, or one like it, at a store in Salem a short time before.

The defense relied upon was that the defendant had a probable cause for the prosecution, and to establish it he introduced several witnesses. Mr. Hartman testified that the defendant was a merchant, and that the witness, on a Friday about the last of April or first of May, 1840, went to his store and saw the plaintiff, two of her sisters, two or three other grown ladies and two or three school girls in the room; that several parcels of goods were on the counter, near which the grown ladies were standing, the children being a little in the rear; that he saw the plaintiff, with one elbow leaning on the counter, turning over, as if she were

examining a bunch of belt ribbons which she had in her hands; that he looked at the plaintiff and saw her look towards him; that he did not turn his attention towards her afterwards; that he did not see anything suspicious about her; that in about fifteen minutes she and her sisters left the store; that he did not see any other person handling the ribbons; that, after the company had gone, the defendant commenced putting his goods on the shelf, when he seemed to miss something, and took the goods down to examine whether the articles, alleged to have been lost, were among them; that the witness then told him he had seen the plaintiff have the ribbons in her hands; that the plaintiff lived with her father, about two miles or two miles and a half from the store; that on the following Sunday he saw her at a preaching about four miles off, wearing a belt which he thought like the ribbons she was looking at in the store; that he might, but did not recollect that he did tell the defendant or any other person that the ribbons were the same; and that the ribbon produced before the magistrate and now on this trial, was, he thought, like some of those he saw the plaintiff have in the
(291) store. Miss Martha Harris testified that she had frequently been in the defendant's store, up to within a few months of the time when the warrant was taken out, and had seen ribbons there exactly like the one the plaintiff produced on trial; that she had seen the plaintiff wear ribbons, but never saw her wearing one like that produced, either before or since the trial. W. L. Swaim stated that he acted as clerk for the defendant during April Court, 1840, and he saw there, during that time, ribbons like the one produced. *Jackson Stafford,* a brother of the defendant, testified that he had owned the store and sold it to the defendant about twelve months before; that, among the goods, were belt ribbons like that shown on the trial, and that he never saw any of the same kind in other stores.

The plaintiff then called Mr. Lineback, who stated that he had been acting as a clerk in a store for about five or six years; that, at the time when the warrant was taken out, he was clerk in a store in Salem, and, some four or five weeks before that time, had sold to the plaintiff, who came there in company with her mother, a belt ribbon of the same kind, quality and color with the one produced; that such ribbons were common, and there were three or four dozen in the store which he kept. It was also in proof that there were, besides the stores in Salem, two or three others within a few miles of the defendant's store. Jacob Shultz testified that he had known the plaintiff ever since she was quite young, and had never known any imputation against her character before, and that she was sixteen or seventeen years old when the warrant was issued. A correspondence just before issuing the warrant between the plaintiff's father and the defendant was also introduced, which showed nothing,

but the extreme indignation of the father at the accusation of the theft against his daughter, and the resolution of the defendant to prosecute the plaintiffs unless the articles alleged to be stolen were returned.

The Court charged the jury, that probable cause was the existence of such facts and circumstances, as would excite in a reasonable mind a suspicion of the party's guilt, and would prompt a reasonable man, having a due regard to the rights of others, as well as his own, (292) to commence a prosecution; that the question of probable cause was a compound one of law and fact, that is, the jury were to say, whether the facts were true, and the Court was to pronounce on these facts, taking them to be true, whether they constituted a probable cause or not; and that, if the jury believe all the facts testified in this case, there was not a probable cause for the prosecution. The counsel for the defendant then prayed the Court to instruct the jury in the very words of *Judge Washington,* adopted by the Supreme Court of this State in *Cabiness v. Martin,* 14 N. C., 454, "that probable cause is the existence of such facts and circumstances, as are sufficiently strong to excite in a reasonable mind, suspicion, that the person charged with having been guilty, was guilty; that it is a case of apparent guilt, as contradistinguished from real guilt," and that in this case, if the jury thought the facts were such as to excite suspicion in a reasonable mind, *that,* in point of law, amounted to probable cause. But the Court declined giving the instruction, as it had already declared, that the facts, if true, did not amount to probable cause.

The jury returned a verdict for the plaintiff and the defendant, after an ineffectual motion for a new trial, appealed to the Supreme Court.

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

DANIEL, J. This is an action on the case against the defendant, for malicious prosecution in issuing a State's warrant against the plaintiff for larceny. If there was, at the time, probable cause to issue the warrant, in law, the plaintiff should not recover. What is probable cause, when the facts are admitted or ascertained, is a pure question of law. But if the circumstances, alleged to show a probable cause, are disputed, the jury are to decide whether they are true or not. The Judge told the jury, "That if they believed *all* the facts testified to in this case, there was not a probable cause for the prosecu- (293) tion." It seems to us that the Judge left the question to the jury, as to the truth of all the facts, as they then appeared on the trial of this action. He told them that if "these facts were true," the defendant had no probable cause to issue the warrant. Whereas, we think, that the

question of probable cause rested only on those facts and circumstances, which were known to the prosecutor *at the time* he made his affidavit for the warrant. The facts and circumstances, which had come to his knowledge at that time are those contained in the statements of the witnesses Hartman, W. L. Swaim and Jackson Stafford, taken in connection with his own affidavit, as incorporated by the magistrate in the the State's warrant. All these facts and circumstances, as it seems to us, were sufficiently strong to induce the defendant to believe that the plaintiff was guilty, and in law amounted to a probable cause for him to issue the warrant. It is true that, on the trial, the plaintiff proved her innocence in the opinion of the Justice.

PER CURIAM. New trial.

Cited: *S. c.,* 26 N. C., 392, 396; *Johnson v. Chambers,* 32 N. C., 291; *Biles v. Holmes,* 33 N. C., 19; *Emry v. R. R.,* 109 N. C., 597; *Moore v. Bank,* 140 N. C., 303; *Humphries v. Edwards,* 164 N. C., 157.

(294)

JOHN McLAUGHLIN, CHAIRMAN, &c. TO THE USE OF JAMES STEPHENSON AND WIFE, *v.* JOHN S. NEILL AND OTHERS.

1. When an action is brought on an official bond, for the benefit of a person injured, in the name of the State or of the officer of the State to whom the bond is made payable, it is regarded as the action of the relator; and on his death is abated, as other actions abate by the death of the plaintiff, unless revived in the manner prescribed by law.
2. Executors or administrators of a plaintiff must, in general, apply to revive the suit within two terms after his death, computing from the day of his death and not from the time the suggestion is entered on the record.

APPEAL from *Dick, J.,* Spring Term, 1843, of IREDELL.

This was an action of debt, brought on the administration bond of the defendant, John S. Neill, to recover a distributive share of the estate of one.....deceased, to which distributive share the relator, James Stephenson, was entitled in right of his wife Nancy, the other relator. The plaintiff's counsel now alleged to the Court, that the said Nancy was dead, and that administration on her estate had been granted to Noble M. Mills, by the County Court of Iredell, at February Term, 1843. The plaintiff's counsel then moved that the said Noble M. Mills be made a party plaintiff to this suit. This motion was opposed by the defendant's counsel, who alleged that the said suit had abated, because the said Nancy Stephenson died in October, 1841, and offered the affidavit of John S. Neill, one of the defendants, to establish that fact. The plaintiff's counsel had not heretofore suggested the death of the

said Nancy on the record, nor did he now offer any evidence to show at what time she died. It was admitted, that the said James Stephenson and his wife had removed from this State before this suit was brought. The Court being of opinion that the said suit had abated, and, having directed an entry to that effect to be made on the record, (295) the plaintiff, James Stephenson, prayed for and obtained an appeal to the Supreme Court.

No counsel for either party.

GASTON, J. When an action is instituted upon an official bond, in the name of the State or of the officer of the State to whom the bond was made payable, by a person alleging himself to have sustained injury by a breach of its stipulations, he is required to set forth in the declaration how he has sustained such injury, and is entitled after judgment to receive to his own use the money therein recovered. Rev. Stat., ch. 81. Such action is therefore regarded as the action of the relator, and by his death it is abated, as other actions abate by the death of the plaintiff, unless revived in the manner prescribed by law. The general rule in regard to the revival of actions, where the plaintiff dies, is, that the cause will abate, unless the executors apply to carry it on within two terms after his death, computing from the day of his death, and not from the suggestion entered by the defendant. Rule, 1 N. C., 88; Anon., 3 N. C., 66. There was nothing in this case alleged to take it without the operation of the general rule, or to bring it within the limits of any exception thereto; and we therefore hold that the judgment of the Court below was correct.

PER CURIAM. Affirmed.

Cited: *Sanders v. Bean,* 44 N. C., 318; *Becton v. Becton,* 56 N. C., 423.

(296)

STATE TO THE USE OF UNDERWOOD, MARSH & CO. *v.* JOAB PARKS AND OTHERS.

A witness, who is introduced for the purpose of discrediting another witness in the cause, must profess to know the general reputation of the witness sought to be discredited, before he can be heard to speak of his own opinion or of the opinions of others, as to the reliance to be placed on the testimony of the impeached witness.

APPEAL from *Battle, J.,* Spring Term, 1843, of RANDOLPH.

The action was on a constable's bond, to which the defendants pleaded "conditions performed and not broken." After the plaintiffs had made

out a *prima facie* case, the defendants, in support of their plea, introduced as a witness, one *Tidence Lane,* who testified that some time before the action was commenced, he saw the principal defendant pay to one of the plaintiffs a sum of money larger than that now claimed by the plaintiffs. On the part of the plaintiffs, *Jonathan Worth* was then called to impeach the credibility of Lane, and stated that he, Worth, had resided for many years in Asheboro, while Lane lived about twelve miles from that place; that he did not know Lane's general character in the immediate neighborhood where he lived, but that Lane had been for many years a public man in the county of Randolph, and he had often seen him in Asheboro at Court, and on other public occasions, and had heard a great deal said about his character; that he was not certain that he knew his general character; that he did not know whether a majority of those he heard speak of it spoke well or ill of it, but he had heard a great many respectable men speak well of Lane's char-
(297) acter, and a great many equally respectable, speak ill of it. The plaintiff's counsel then asked the witness whether, from his knowledge of Lane's general character, he would believe him on oath. This question was objected to by the defendant's counsel, but permitted by the Court; when the witness said he would not believe him, if his story was at all improbable. The jury returned a verdict for the plaintiff, and the defendant moved for a new trial, because the Court permitted this last question to be asked. The Court overruled the motion and gave judgment for the plaintiff, from which the defendants appealed.

No counsel for the plaintiffs.
J. T. Morehead for the defendants.

GASTON, J. It is essential to the *uniform* administration of justice, which is one of the best securities for its *faithful* administration, that the rules of evidence should be steadily observed. Among these, the rule which regulates the admission of testimony, offered to impeach the character of a witness, is now so well established and so clearly defined, that a departure from it must be regarded as a violation of law. The witness is not to be discredited, because of the opinions which any person or any number of persons may have expressed to his disadvantage, unless such opinions have created or indicate a *general reputation* of his want of moral principle. The impeaching witness must, therefore, profess to know the general reputation of the witness sought to be discredited, before he can be heard to speak of his own opinion or of the opinion of others, as to the reliance to be placed on the testimony of the impeached witness. *S. v. Boswell,* 13 N. C., 209. *Downey v. Smith,* 18 N. C., 62. This rule, we think, was not observed in the case before

us, and the exception taken to the reception of Mr. Worth's testimony was, therefore, well founded.

PER CURIAM. New trial.

Cited: *S. v. Lanier,* 79 N. C., 624; *S. v. Efler,* 85 N. C., 588; *S. v. Wheeler,* 104 N. C., 894; *S. v. Coley,* 114 N. C., 883; *S. v. Spurling,* 118 N. C., 1253.

(298)

STEPHEN HENSHAW *v.* LEVI B. BRANSON.

A County Court cannot order an execution upon the return of a levy on land under a Justice's execution, unless it also appears on the return that there were *no* goods to be levied on, or when it appears on the return that goods were levied on, though not sufficient to satisfy the execution and it does not appear how those goods were disposed of.

APPEAL from *Battle, J.,* Spring Term, 1843, of RANDOLPH.

The case was this. An execution, tested 23 September, 1841, issued on a judgment obtained by the plaintiff against the defendant, before a magistrate, came to the hands of the sheriff of Randolph, who on the same day made return thereon, that he had levied on the goods and chattels of Branson, one of the defendants, and also on three tracts of land adjoining each other and the lands of other persons in the return named, on one of which the said Branson lived. On 26 April, 1842, the plaintiff made a further indorsement on the execution, in the nature of a return or as an amendment of his former return, "there are goods and chattels but not sufficient to be found." At the August Term, 1842, of the County Court of Randolph, the execution thus levied, returned and endorsed, was brought into Court, an advertisement was then ordered to be made to notify Branson of the levy on his lands. At the ensuing Term, November, 1842, the plaintiff prayed the Court to order a *venditioni exponas* to issue to sell the lands. This prayer the Court refused, and the plaintiff appealed to the Superior Court, and the order of the County Court being there affirmed, the plaintiff appealed to this Court.

No counsel for the plaintiff.
Swaim for the defendant. (299)

GASTON, J. We are of opinion that the Court properly refused the writ prayer for. Without considering several other objections, and apparently grave objections, which stand in the way of the remedy pursued by the plaintiff, it will be sufficient to state that the provisions of the acts of 1794 and 1803, as embodied in the Revised Statutes, ch. 62,

sec. 16, are explicit, that a Justice's execution shall not be levied on land, except where there is a want of goods to satisfy it, and if any goods be seized, and a levy made on land, because of the insufficiency of these goods to discharge the execution, the return of the officer shall set forth "what money he has made of the goods," and what land he has levied upon. The intention of the Legislature is manifest, that no proceedings shall be had for a sale of the land, except it be the return of a levy thereon, until the goods seized shall have been disposed of.

PER CURIAM. Affirmed.

Cited: Whitaker v. Petway, 26 N. C., 185; *Jones v. Austin,* 32 N. C., 22; *Presnell v. Landers,* 40 N. C., 256; *Tysor v. Short,* 50 N. C., 281.

(300)

ROBERT GRAHAM, ADM'R, *v.* JOSEPH HOLT.

1. A paper-writing, purporting to be a bond, signed and sealed by a party, in which a blank is left for the sum to be afterwards inserted, which blank is afterwards filled up and the paper delivered, not in the presence of the party signing nor by any person having authority from him under seal, is not the bond of the party so signing and sealing.
2. He who attempts to execute or consummate a deed, whether for money or other property, as agent for another, must be armed with an authority under seal.
3. In every good bond there must be an obligor and an obligee, and a sum in which the former is bound.
4. Before one partner or his representative can sue another partner at law, the settlement of the firm must be complete and a balance struck.

APPEAL from *Nash, J.,* Special Term, in June, 1843, of ORANGE.

This was an action of debt, in which the plaintiff declared in two counts: First, on a bond for two hundred and sixty-five dollars and two cents. Secondly, on a simple contract for the same amount. The defendant pleaded the general issue to each count. On the trial the plaintiff produced a bond for the sum stated in the declaration, payable at nine months, and dated 3 February, 1839, and proved the defendant's signature thereto. The defendant called as a witness *John Holt,* between whom and himself releases had been passed, so as to make him a competent witness. He stated that he, the witness, the defendant and the plaintiff's intestate, Robert M. Graham, had been partners in the trade of merchandise at a store in the county of Chatham; that the said intestate, who was the acting partner, having died in Janu-
(301) ary, 1839, the plaintiff, as his administrator, and the other two partners met at the store and commenced selling off the goods at auction; that it was apprehended that the goods would be sacrificed by

this mode of selling, and the sale was stopped; that the partners then agreed that the defendant should take the whole of the goods at New York cost at nine months' credit from that time, and should pay each of the other parties interest on his third part after that period; that it was also agreed that the defendant was not to pay these amounts, unless, on a settlement of the concern, there were profits to a like amount, and that no settlement had been made; that an inventory was then taken of the goods, and they were delivered to the defendant as his absolute property; that the amount of the goods so delivered was not then added up; that some time afterwards the three parties aforesaid met at a muster, when the plaintiff said he must have something to return to Court, as administrator, for his intestate's part of the concern; that the bond in question was then drawn and signed and sealed by the defendant, but, the witness not having the inventory present and the amount of goods taken by the defendant not being exactly known, the sum of money to be inserted in the bond was left blank, and it was agreed that the witness should take the bond in blank, add up and ascertain the amount of the inventory, when he went home, and insert one-third thereof in the bond and hand it to the plaintiff; and that the same conversation, which had passed at the store in regard to the payment, was, as the witness believed, then repeated; that he, the witness, did as directed, and, after inserting the proper sum, delivered the bond to the plaintiff. In support of the second count, the plaintiff offered to show that profits had been realized by the concern, but his Honor rejected the evidence. But his Honor being of opinion that no recovery could be had upon the evidence offered, the jury found a verdict in favor of the defendant, and judgment being rendered pursuant thereto, the plaintiff appealed.

Graham for the plaintiff.
Norwood for the defendant.

DANIEL, J. As to the first count. A bond is the acknowledg- (302) ment of a debt under seal, the debt being therein particularly specified. In every good bond there must be an obligor and an obligee, and a sum in which the former is bound. Shep. Touch., 56; Com. Dig. Obligation A; Hurleston, 2. In New York *ex parte Therwin,* 8 Cowen, 118, and some other American cases, the *nisi prius* decision before *Lord Mansfield* of *Traxira v. Evans,* 1 Anst., 229, *in nota* has been followed. That case was where a party executed a bond with blank spaces for the name and sum, and sent an agent, without a power of attorney under seal, to raise money on it, the agent accordingly filled up the blanks with the sum and the obligee's name. and delivered the bond to him.

On the plea of *non est factum* the bond was considered well executed. But *Traxira v. Evans* has been by this Court twice overruled, as attempting to establish a distinction in the mode of executing deeds by attorney, where the object was to raise or secure money, and when it was to operate as a conveyance; the first, by a power of attorney not sealed, the other with a power of attorney under seal. The notion with us has always been, what we learned from Co. Lit., 52 (a), and the Touchstone, 57, that he who executes a deed as agent for another, be it for money or other property, must be armed with an authority under seal. *McKee v. Hicks,* 13 N. C., 379; *Davenport v. Speight,* 19 N. C., 381. The insertion of the sum in the blank space was intended to consummate the deed; it was done without *legal* authority, and the instrument is void as a bond.

As to the second count. Before one partner or his representative can sue another partner at law, the settlement of the firm must be complete and a balance struck. Colyer on Part., 152. *Fromand v. Coapland,* 2 Bing., 170.

We see no error in the opinion of the Court, on either of the counts, and the judgment must be

PER CURIAM. Affirmed.

Cited: Phelps v. Call, 29 N. C., 264; *Blacknall v. Parish,* 59 N. C., 72; *Love v. Rhyne,* 86 N. C., 578; *Sandlin v. Ward,* 94 N. C., 497; *Humphreys v. Finch,* 97 N. C., 307; *Newby v. Harrell,* 99 N. C., 156; *Cadell v. Allen, Ib.,* 545; *Rollins v. Ebbs,* 137 N. C., 358, 359; *S. c.,* 138 N. C., 149.

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(303)

BRYANT BENNETT, EX'R., &c., *v.* ELIZABETH SHERROD.

1. When a will is found among a deceased person's papers, immediately after his death, in a mutilated condition, the presumption of law is that the act of mutilation was done by him in his lifetime, and for the purpose of revocation.
2. The same presumption arises, where the repository of the will was equally accessible to a stranger and to the deceased in the lifetime of the latter.
3. But no such presumption arises, but rather the contrary is to be inferred, when the will is not found mutilated until two days after the death of the testator—when in the meantime it has been under the control or in the custody of one interested to defeat it, and who refused, when it was first demanded, to produce it, and did not then allege that the will was mutilated.

APPEAL from *Manly, J.,* Spring Term, 1843, of MARTIN.

This was an issue to try whether a certain instrument of writing, propounded by the plaintiff, was the last will and testament of John

Sherrod, deceased. It was proved that the writing had been once executed with all the formalities necessary to constitute it a will of real and personal estate, and placed in the custody of Bryan Bennett, the present plaintiff, and the person nominated therein as executor; that sometime afterwards the deceased became dissatisfied with the will in respect to the provision made therein for his sister, and desired to add to the bequest to her another slave and a small sum of money; that he also desired to make his son a coexecutor with the plaintiff or to substitute him as sole executor, and that, for the purpose of making these alterations, he procured his will from the plaintiff and carried it back to his own house. It was further proved that, on the day after the decease of the said John Sherrod, application was made, in behalf of the plaintiff, to the widow, the present defendant, for the will, to (304) which she replied that there was one there, but it was not her husband's will nor was it her will; that, at any rate, if it was his, it was not hers, and she would not stand to it; that she then went into an adjoining chamber and consulted with a female acquaintance, whether she would give up the will, and that after a while she took the key of the drawer where the paper was and put it into her bosom. The papers of the deceased were examined the day after the first application, by the plaintiff and one of the subscribing witnesses to the will and others, when the instrument in question was found in the drawer with the names of the testator and subscribing witnesses cut out. In other respects it was identical with the paper, which had been executed as above stated. It was in evidence that the deceased had declared, if he should die without a will he wanted his sister to have the slave he intended to give her and one hundred dollars; that he also declared, after the making of the will, that he intended to make a will.

The Judge instructed the jury to inquire, first, whether this instrument had ever been executed with the formalities necessary to constitute it the will of John Sherrod. Upon this point they were informed what were the requisite solemnities for making a valid will of real estate, and directed to respond in the affirmative or negative, accordingly as they were satisfied by the testimony that these requisites had or had not been complied with. The paper-writing being once duly executed and published as a will, the jury were next instructed it would remain good as a will until it was revoked in some of the modes required by law. To this end it was necessary there should be a paper-writing in a certain form, of which in this case there was no evidence; or else a destruction, obliteration or canceling of the will by the testator; or by some one in his presence, and in pursuance of his directions. If the jury, upon a consideration of the evidence, came to the conclusion that the cutting out of the signatures from this paper was done by the testator Sherrod,

or by any one in his presence and by his directions, they should return a verdict that it was not his will. If, however, should they came
(305) to an opposite conclusion, then it was immaterial when it was done or by whom; it would be their duty to find it the last will and testament of the deceased. The Court, in conclusion, remarked to the jury, that it could hardly be necessary, after what had been already said, to inform them that the conversations of the supposed testator, as to his satisfaction of the will; his desire and intention to alter his will, and the like, were laid before them, not as proof amounting in themselves to a revocation, but as tending to throw light upon the enquiry, whether the mutilation described was done by the deceased or by any one for him and in his presence.

The counsel for the defendant asked the Court to instruct the jury, if they believed the instrument of writing was found in the possession of the deceased in a mutilated state, that there was a presumption of law that the mutilation was the act of the deceased, subject to be rebutted by the parties propounding the will. The Court declined giving this instruction.

There was a verdict establishing the will, and from the judgment thereon the defendant appealed.

No counsel for the plaintiff.
Badger for the defendant.

DANIEL, J. The authorities cited by the counsel for the appellant show that, where a will has been duly executed and left with the testator, if it be mutilated in his lifetime while in his possession, or upon his death if it be found among his repositories, cancelled or defaced, in such cases, in the absence of other proof, the testator is presumed to have done the act; and the law further presumes, that he did it *animo revocandi*. And if the repository of the will was at the same time accessible to the testator and another person and the mutilation was done in the lifetime of the testator the law would presume it was done by the testator. He had a right to do it, and a fraud will not be pre-
(306) sumed in the other person. All the rules above stated, we think, may be taken for good law, but it seems to us that they are not apposite to the case now before us. There is no evidence in the cause that the will was found mutilated in the lifetime of the testator, or found mutilated among his papers immediately on his death. It was on the day after his death that application was made to his widow for the will. She, who is the party defendant in this issue, acknowledged that the will or paper was there, but refused then to deliver it. She then locked the drawer, where the paper was, and put the key in her

bosom. There is no evidence that the will was, at that time, mutilated, for her declarations then made do not prove that fact, but rather import the contrary. On the second day after the testator's death, and after the widow had every opportunity of mutilating the paper, with which she was dissatisfied, the will was found by the plaintiff in the drawer in its present state. It seems to us, so far from its being the duty of the Judge to charge the jury that the law presumed this mutilation to have been the act of the testator, that it would have been erroneous if he had so charged.

PER CURIAM. No error.

Cited: Scoggins v. Turner, 98 N. C., 137.

(307)

JAMES SLOAN *v.* WILLIAM WILLIFORD.

1. A notice to take a deposition on Sunday is not good, and a deposition taken on such notice must be rejected.
2. In an action for a breach on a warranty that a slave is of "sound mind," it is not necessary for the plaintiff to show that the slave was an idiot or a lunatic at the time of the warranty. It is sufficient to show that he had been a lunatic, though in a lucid interval at the time of the warranty, and his insanity afterwards returned; or to show that he was of so weak an understanding and possessed so dim a reason, as to be unable to comprehend the ordinary labors of a slave and perform them with the expertness that is common to his class.

APPEAL from *Dick, J.,* Spring Term, 1843, of IREDELL.

The action was covenant on the following bill of sale under seal for a negro slave; to wit, "Received of James Sloan the sum of nine hundred dollars in full satisfaction of a negro man by the name of George, aged twenty-one or two years, which negro I warrant to be of sound mind and body, and I warrant the right of title of the said named negro from the claim of myself and all other persons. Given under my hand and seal, this 11 May, 1836"; which bill of sale was signed and sealed by the defendant and duly attested, proved and registered. The defendant pleaded covenants performed and no breach.

The plaintiffs alleged, and offered evidence to prove, that the negro slave was unsound both in body and mind. The plaintiff offered the evidence of one James Huie, taken in New Orleans, which was objected to by the defendant, because it was taken on Sunday. The Court overruled the objection and permitted the deposition to be read to the jury. The defendant's counsel requested the Court to charge the jury, that, unless the evidence satisfied them that the slave was an idiot or lunatic at the time defendant entered into the covenant, the (308)

plaintiff was not entitled to recover on this part of the covenant. The Court declined to give the jury the instruction prayed for, but told them that, if the slave's grade of intellect was below the ordinary grade of intellect of slaves of his age and appearance, the plaintiff would be entitled to recover. The Court further instructed the jury that, if they believed the slave was unsound, either in body or mind, at the time the bill of sale was executed, the plaintiff was entitled to recover. The jury found a verdict for the plaintiff. The defendant moved for a new trial: first, because Huie's deposition was permitted to be read; and secondly, because the Court refused to give the instructions asked for as before stated. The motion was refused, and judgment having been rendered according to the verdict, the defendant appealed.

Caldwell, Alexander and *Hoke* for the plaintiff.
Badger for the defendant.

RUFFIN, C. J. The Court is of opinion that the deposition should have been rejected. It is not material whether or not Sunday be *dies non juridicus* in Louisiana. By our law it is deemed requisite to the purposes of truth and justice, that one against whom a deposition is to be read, should be present when it is taken, and be allowed to cross-examine. For that purpose it prescribes a reasonable notice of the time and place of taking the deposition, so that the party may be actually present; and no practice should be countenanced, which tends to impair that right. On this principle alone the objection to the deposition was sufficient. For, if it be not against the law of the land, it is well known that many of the best men scruple in point of conscience, whether it be not against the moral law, to devote Sundays unnecessarily to secular concerns. They ought neither to be compelled to violate their sense of duty, nor to abandon their civil rights. The effect of (309) such a proceeding might often, and, perhaps, its object as often, be to keep the party from attending from tenderness of conscience. To say nothing, then, of an actual moral obligation of a Sabbath, or of the legal injunction of all persons to apply themselves on Sunday to the duties of religion, or of the indecency of violating the settled religious habits of a vast majority of our citizens, it is sufficient to say, that it would be indulging a wanton, or a worse spirit, if a party with six other days in the week appropriate to such a purpose, were encouraged to select for it the seventh day, which most ment among us dedicate to rest or devotion, and which many good men think themselves bound not to employ otherwise.

It may save time and expense to the parties, if, while sending the cause to another trial for the reason already stated, the opinion of the

Court should be expressed upon the construction of the warranty. We think the Court properly refused the instructions asked on the part of the defendant, and that a purchaser may recover on a covenant, that a slave is of sound mind, although he be not an idiot, nor, at the time, a lunatic. If, for instance, one subject to lunacy has a lucid interval at the time of sale, but afterwards becomes insane, the covenant would be broken. If a free person, he might, at the moment, have capacity to make a contract; yet, as the subject of a contract, a slave, needed not only for immediate mental capacity, but for use as a laborer through a long course of years, he could not, with that taint in the intellect, be said to have a sound mind; and if, by a subsequent paroxysm of the malady, he should lose his reason and his value, the seller ought justly to answer in damages. So, too, if the slave, though not actually an idiot, be so weak in understanding and possess so dim a reason as to be unable to comprehend the ordinary labors of a slave, and perform them with the expertness that is common with that uneducated class of persons, his mind must be deemed unsound within the meaning of the warranty. If, for want of competent sense, he cannot discharge the ordinary duties of our slave population, he is of no value to the purchaser, (310) who ought, therefore, to have redress upon his warranty.

PER CURIAM. New trial.

Cited: Harrell v. Norvill, 50 N. C., 30; *Taylor v. Gooch, Ib.,* 405; *Owens v. Kinsey,* 57 N. C., 40; *S. v. Ricketts,* 74 N. C., 194; *Latta v. Electric Co.,* 146 N. C., 308.

JOHN J. REED *v.* NATHAN MOORE.

1. Although it is erroneous to submit to the jury an inquiry of fact, as to which there is no evidence; yet this Court will suppose the evidence, as stated in the case brought up from the Court below, to have been stated only in reference to the objections there raised, and will not grant a new trial, where an exception, as to the total want of evidence, does not appear to have been taken, either on the trial or on a motion for a new trial.
2. Where matters might have been offered in evidence on the trial, but were not, they form no ground for granting a new trial.
3. In an action at law against the maker of a deed, which he impeaches for fraud, the only fraud he can allege must be in procuring the execution of the deed; and therefore evidence that he was imposed upon by the other party in a contract, the performance of which this deed, subsequently executed, was intended to secure, is irrelevant and inadmissible.

APPEAL from *Battle, J.,* Spring Term, 1843, of ROCKINGHAM. (311)

This was an action of detinue for a slave. Plea, the general issue. The plaintiff produced in evidence a deed in trust for the slave

in question to the plaintiff, professing to be given to secure the payment of certain debts which were acknowledged to be due to John and Absalom Reed. The plaintiff then called *Melvin Moore,* a subscribing witness, who stated that, on the date of the deed, he went to a store at Troublesome Old Iron Works, in Rockingham County, and was invited from the store to the dwellinghouse across the road, in which Absalom Reed, a brother of the plaintiff lived, to witness a paper—that he there found the plaintiff and John and Absalom Reed, and the defendant; that the deed lay upon a table in the room in which the parties were, when the witness enquired what it was; that John Reed replied it did not matter, that the parties all agreed to it; that the witness then wrote his name as an attesting witness; that he is a nephew of the defendant; that the defendant was then sober, and, a few minutes after, went to the store, which had before belonged to the said John and Absalom Reed, and sold coffee and other goods to the witness; that some five or six days afterwards the witness asked the defendant what he signed (this question was objected to by plaintiff's counsel); that the defendant replied, he hardly knew himself, but reckoned it was a trust; that the Reeds had taken advantage of him when he was drunk or something else was the matter with him. This witness also stated, upon cross-examination, that he did not remember whether the names of the defendant and other parties had been subscribed to this deed or not, when he signed, but presumed they were or he would not have signed it. The defendant's counsel asked the witness whether the defendant was not an illiterate man, with but little education, unable to make entries and keep books, as merchants ordinarily do, and unfitted to carry on that business himself. This was objected to by the plaintiff's counsel, remarking that there was a suit in equity, in which these matters were in contest, but the question was allowed by the Court to be put. The
(312) witness answered that his education was limited; that he could write his name, but could not write well enough to keep books, and was not suited to the mercantile business, but had traded considerably, having bought a negro woman and children shortly before. The plaintiff also called *Reuben Johnson,* the other subscribing witness, who testified that he went to the store about 10 or 11 o'clock in the morning; that soon afterwards he was asked by Absalom Reed into the house to witness the deed, and stated the same as to its attestation that *Melvin Moore* had done; that he could not remember whether the names of the parties had been subscribed, when he signed, but presumed they were or he would not have signed it; that he is acquainted with the handwriting of the defendant, and believes his signature to the deed to be genuine. He also testified that the defendant was "pretty groggy" the evening before at sunset, when, he attested, the defendant was sober; that he

went into the store in a short time and began to sell goods, and in the course of four or five days employed the witness as a clerk in the said store; that the witness continued some weeks, until a son of the defendant's returned from the lower part of the State, when they kept the store together, until the witness left the store in the possession of the son. The plaintiff also proved a demand of the store, after the expiration of the time allowed for payment in the trust deed and before this action was brought; also that the defendant, some twelve months before, had applied to a merchant to take his son as a clerk, saying he desired him to become acquainted with his business. The defendant called no witnesses. His counsel insisted that the deed did not pass the property in the slave for want of a pecuniary consideration, that there was not sufficient evidence of the delivery of the deed, and that the defendant was drunk or fraudulently imposed on at the time of delivery, if he delivered it at all.

The Court held that the deed, being a sealed instrument, was good to transfer the property in the slave, without the insertion of a pecuniary consideration, and instructed the jury that it was incumbent on the plaintiff to prove the due execution and delivery of the deed; that if execution and delivery were shown, it was binding on the defendant, unless they were satisfied from the evidence that he was so (313) drunk at the time or had something else the matter with him, so that he knew not what he was doing, or was fraudulently imposed upon by having been induced to sign one paper when he supposed he was signing another.

The jury found a verdict for the defendant. The plaintiff moved for a new trial, first, because of the admission of improper evidence; secondly, because the verdict was against the evidence and law; thirdly, that in the defendant's bill in Equity, heretofore filed, he had admitted the delivery of the deed and prayed relief in that Court, as the only *forum* with power to relieve. His Honor overruled the motion, remarking, as to the third point, that the plaintiff should have offered the bill of the defendant in evidence, if he had wished to derive any benefit from it, and, after risking the case without it, he had no right to urge it as a reason for a new trial. Judgment being rendered for the defendant, the plaintiff appealed.

Graham for the plaintiff.
Morehead for the defendant.

RUFFIN, C. J. For the plaintiff it has been argued that the Court erred in leaving it to the jury, without evidence, to find that the defendant was so drunk at the time he executed the deed as not to know what he was doing, or was fraudulently imposed on by having been induced

to sign one paper, when he supposed he was signing another. The Court has looked through the evidence stated in the case, and, if that be all that was given on the trial, we own that we should entertain doubts whether it amounted to any evidence upon those points, and certainly, if any, it is, after the clear testimony of the subscribing witnesses to the facts of the execution and delivery of the deed and the defendant's capacity to contract, so very feeble, as to render it somewhat surprising that the jury should have given a verdict on it. But in the state of this case we cannot interfere with the verdict on this objection. It (314) has been repeatedly declared that this Court cannot correct the errors of the jury in finding a verdict without or against evidence, or against law, but must leave it to the discretion of the Judge who tried the case. *Long v. Gantly,* 20 N. C., 457; *Terrell v. Wiggins,* 23 N. C., 172. We can deal only with the errors of the Judge; and, it is true it is erroneous to submit an inquiry of fact to the jury to which there is no evidence in the case. But, as to that we have to say, in this case, that the plaintiff took no exception at the trial nor on his motion for a new trial; and, consequently, we cannot suppose the evidence to have been stated but with a view to the objections raised. The plaintiff's motion for a new trial was on the ground that the verdict was against evidence and law, and not because the Court left a point to them without evidence.

We likewise think his Honor properly refused to act on the statements contained in the bill in the Court of Equity, filed by the present defendant; and that for several reasons. But it is sufficient to say that the plaintiff did not offer it upon the trial, but brought it forward first on the motion for a new trial. *Gibson v. Partee,* 19 N. C., 530.

Upon the question of evidence, however, our opinion does not concur with that of his Honor. After objection, a witness was allowed to state that the defendant's education was so defective that he could not write well enough to keep mercantile books, and was not suited to carry on mercantile business. It seems to us that evidence was irrelevant to any inquiry before the jury, and tended to mislead that body. The defense was rested on the points that the defendant was so drunk as not to know that he executed the deed, or was fraudulently deceived by having one paper imposed on him when he thought he was executing another. It may be supposed, now, that there was evidence to raise those points; yet, we think that the evidence objected to does not all tend to establish them, and was therefore improperly received. The instrument which the defendant executed, was a deed of trust whereby he conveyed (315) to the plaintiff among other things, the slave for which this action is brought, for the purpose of securing the payment of a debt of $1,475, therein acknowledged to be owing by the defendant to

J. and A. Reed. It is not distinctly stated how that debt arose; and nothing being said to the contrary, it is to be deemed a just debt. It certainly will not, in the opinion of any person, impeach a security for a just debt, that the person giving the security is neither a competent accountant nor a skillful merchant. But, as the witnesses stated, that, immediately after the execution of the deed, the defendant began to sell goods from the shop, which had before belonged to J. and A. Reed, we suppose the truth of the case to be that the debt in question arose out of a purchase by the defendant from J. and A. Reed of that establishment, in which the defendant, as alleged by him, was drawn into a disadvantageous bargain in respect to the price of the goods, and induced to embark in a business for which he was not qualified. As tending to establish a fraud of that kind, the evidence under consideration would have been pertinent and proper, and, accompanied by other proofs of the actual inequality of the bargain, and of a contrivance of the other party to draw the defendant into it, might afford a proper ground for relief in another *forum,* in which the deed of trust, subsequently made by the defendant, though held valid because executed voluntarily by one having capacity to contract, would be sustained as a security only for what the defendant ought really to pay. But that is a distinct species of fraud, and one calling for a different kind of redress from that which was the subject of enquiry before the jury in this case. The fraud here alleged, and the only fraud that could be alleged in this action, was in procuring from the defendant the execution of the deed; and to that point it was immaterial whether there was or was not imposition on the defendant in the original contract of sale. And the evidence was not only irrelevant, but tended to perplex the jury as to the true point for their consideration; which was the defendant's capacity to contract when he executed the deed of trust and his knowledge of the instrument he was executing, and not the equality or inequality of the prior (316) purchase. A jury does not readily, and, perhaps, is not naturally inclined to distinguish between the two species of fraud, and is apt to import an undue advantage, taken in one part of a transaction, into their consideration of a subsequent and distinct part of it, however fair in itself the latter may be. But it is manifest that the purposes of justice require that they should be kept asunder, and, therefore, that evidence tending to confound them ought not to be given to the jury. For nothing could be more unjust than to hold this deed void upon the ground merely of imposition in the original contract of sale of the goods, since the effect would be that the defendant would keep the goods bought by him, and, probably, now disposed of, and at the same time get clear of the security for the price, which he subsequently and voluntarily executed.

PER CURIAM. New trial.

Cited: *Setzar v. Wilson,* 26 N. C., 512; *S. v. Gallimore,* 29 N. C., 148, 149; *Canoy v. Troutman, Ib.,* 158; *S. v. Collins,* 30 N. C., 413; *Gant v. Hunsucker,* 34 N. C., 259; *Nichols v. Holmes,* 46 N. C., 363; *Hyman v. Moore,* 48 N. C., 419; *Gwynn v. Hodge,* 49 N. C., 170; *McArthur v. Johnson,* 61 N. C., 319; *S. v. Smallwood,* 78 N. C., 562; *Wiggins v. McCoy,* 87 N. C., 500; *S. v. Best,* 111 N. C., 643.

(317)

JOHN DEN ON THE DEMISE OF POLLY DUNCAN *v.* ROLAND DUNCAN.

1. Ejectment cannot be maintained in this State upon a naked possession, once had, where there is no presumption of a conveyance of the legal title, but it appears affirmatively to be in another person.
2. The purchaser at an execution sale need only show, as against the defendant in the execution, the judgment, execution, sale, and sheriff's deed.

APPEAL from *Nash, J.,* Spring Term, 1843, of BURKE.

The lessor of the plaintiff had made a contract for the purchase of the land in controversy in this suit—had given her obligation for the purchase money, and had been in possession since the date of the purchase; but had received no deed. The purchase money was not paid and is not yet paid, and when the obligation came to maturity, she was sued by the obligee, her vendor, and a judgment obtained. An execution issued and was levied upon the land, and at the sale Mr. McKesson became the purchaser, who took a deed from the sheriff, and subsequently sold the land to the defendant, the brother of the lessor of the plaintiff. The lessor of the plaintiff was in possession of the land, when the defendant, by his servants, entered and forcibly turned out her servants, who were ploughing the field, and took possession; leaving her in possession of the house, where she still is, and defendant in possession of the field, for which this action is brought. The Court

(318) instructed the jury that the lessor of the plaintiff had no such interest in the land as was the subject of a legal execution; that her interest could not rightfully be so sold, and what cannot rightfully be sold by execution cannot by such sale be rightfully acquired, and of course the purchaser could transfer no title to another. In this case McKesson acquired nothing, and transferred nothing to his alienee, the defendant, who was therefore a mere intruder, against whom the law would protect the possession of the lessor of the plaintiff, and she was entitled to a verdict. Judgment having been rendered pursuant to this verdict, the defendant appealed.

Caldwell for the plaintiff.

Alexander for the defendant.

RUFFIN, C. J. If the defendant were a mere stranger and a wrong-doer, as supposed by the Judge below, it cannot be held in this State that ejectment can be maintained upon a naked possession, once had, when there is no presumption of a conveyance of the legal title, but it appears affirmatively to be in another person. *Allen v. Rivington,* 2 Saund., 111, Serg't Williams' note a; *Sheppard v. Sheppard,* 4 N. C., 545.

But the defendant is not a stranger. It has long been held that, as against the defendant in the execution, the purchaser need show only the judgment, execution, sale and sheriff's deed. *Murphey v. Burnett,* 4 N. C., 684; *S. c.,* 6 N. C., 151; *Gorham v. Brenon,* 13 N. C., 174. Such is the case when the purchaser brings ejectment against the defendant in execution; and it proceeds upon the principle, that whatever the debtor had passed under the execution sale, and that, as it had been sold for his debts, he ought not, for the purpose of defeating the purchaser, to say he had nothing in the premises. That principle is equally applicable to an action, brought against the purchaser by the defendant in the execution. If the debtor had any estate, the purchaser, of course, acquired it, and for that reason is entitled to hold. If the debtor had no estate in the land, then that person cannot maintain (319) ejectment; for in that action the plaintiff must recover upon the strength of his own title, either as being, in itself, good against all the world, or good, by way of estoppel, against the defendant. Here it is admitted that the lessor of the plaintiff had not the title; and it is equally clear that there is nothing to raise an estoppel in her favor. In fine the action rests upon two inconsistent propositions: that nothing passed to the purchaser, because the lessor of the plaintiff had nothing in the premises; and yet, that she had an interest and estate at the sale, and, notwithstanding the sale, still has, which entitles her to recover.

PER CURIAM. New trial.

Cited: Davis v. Evans, 27 N. C., 522; *Clarke v. Diggs,* 28 N. C., 160; *Taylor v. Gooch,* 48 N. C., 468.

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(320)

IN THE MATTER OF J. W. HARDING & OTHERS, PETITION FOR DIVISION OF SLAVES.

Where slaves, on the petition of the owners have been ordered to be sold for a division, one who was no party to the petition but claimed by a lien, under an execution against one of the petitioners before the sale, has no right to apply to the Court to have the share of such petitioner in the proceeds paid over to him.

APPEAL from *Battle, J.,* Fall Term, 1842, of NORTHAMPTON.

The following case was agreed upon by the parties. At March Term,

1842, of Northampton County Court, which was on the first Monday of March, a petition was filed at the instance of James W. Harding, Archelaus Tisdale and others, praying for a sale, in order to make partition of certain slaves held in common by the petitioners; and it was then decreed by the Court that a sale should be made upon a credit of six months, and the petitioner James W. was appointed commissioner to make such sale. On the second day of April following the sale was effected, and a return thereof was made to the ensuing June Term of Northampton County Court, and at the September Term next ensuing, the report of sale was confirmed. At the Superior Court of Nash County, held on the third Monday of March, 1842, George Cooper recovered a judgment against the said Archelaus Tisdale for the sum of $..... Execution thereupon was issued, tested on the said third Monday of March, and came to the hands of the sheriff of Northampton on 17 April, 1842. At June Term, 1842, of Northampton County Court, George Cooper, by petition to the Court, put in his claim
(321) by virtue of his execution to the share of the said Archelaus Tisdale, in and to the proceeds of the sale of the slaves aforesaid, and prayed the Court, that, when the said share should be collected, as much thereof be paid to him as would satisfy his execution. At the same term the petitioner and commissioner, James W. Harding, by petition, also put in his claim to the share of the said Archelaus, in and of the proceeds of the said sale, alleging that he had purchased the same at the price of four hundred dollars, and prayed that the whole share might be paid to him when collected. The case was continued till September Term of said Court and the money arising from the sales of the slaves having been paid into the Clerk's office, the Court, after argument, ordered that as much thereof be applied to the satisfaction of the said Cooper's judgment as might be sufficient therefor, and the residue be paid to the said James W. Harding, from which said order and decree the said James W. appealed to the Superior Court. As to any effect which the following admissions may have on the judgment of the Court in this particular case, it is admitted that the assignment to the said James W. was for a valuable consideration, and executed on 4 April, 1842. It is further admitted that, on the day of the rendition of the judgment in the Superior Court of Nash County, the said Archelaus fled from that county, which was his residence, leaving not a sufficiency of property to satisfy the judgment, and all of this property has been sold either under an execution issuing on the said judgment or under older executions and levies. And that immediately after the assignment and before the execution reached the sheriff of Northampton he fled clandestinely beyond the limits of the State, carrying away his visible and other estate.

This case coming on to be heard upon an appeal from the County Court, his Honor was of opinion that there was no error in the order appealed from, and affirmed the same; and it was ordered that the appellant pay the costs of the appeal. From this decree James W. Harding appealed to the Supreme Court.

Bragg for Harding.
B. F. Moore for Cooper. (322)

DANIEL, J. Cooper, in his petition to the County Court of Northampton, states that he has a *lien,* by virtue of his execution from Nash, on Tisdale's share of the slaves that were ordered to be sold by the said Court, as is stated in the case; and that the Court should now order so much of the proceeds of the said sale, as belonged to Tisdale, to be applied to the satisfaction of his *lien.* Cooper, however, was no party to the petition for the sale of slaves for a division, nor was he a purchaser of them under the order of sale. He had no title either in law or equity, but by force of his claim of lien under his execution against Tisdale. Whether his claim of lien be good or not, we do not pretend to decide. But it seems to us he is such a stranger to the original petition and order of the Court, under which the slaves were sold, that he cannot now be permitted to intervene in the way he is attempting. We are unable to find any authority to support his claim in this manner. We therefore think that the judgment must be

PER CURIAM. Reversed.

Cited: Harding v. Spivey, 30 N. C., 68; *Jordan v. Faulkner,* 168 N. C., 468.

(323)

SAMUEL WALLACE AND OTHERS *v.* JAMES COWELL, EXECUTOR, &c.

1. Where a bequest is to the heirs of S. W. but that none of it should be sold but all kept until the said heirs should come of age or S. W. should die, *held* that a payment by the executor to S. W. in his lifetime, though he was poor and required the property for the support of his family, did not exonerate the executor from his liability to the children of S. W. after the occurrence of the events mentioned in the will.
2. The lapse of time will not help the executor, when he admits he paid the legacy to the father, and not to the children; either as evidence of payment to the children, or abandonment or acquiescence by them.
3. When a legacy is given to "children" as a class, payable at a future time, any child, who can entitle itself under the description *at the time when the fund is to be divided,* may claim a share thereof.

APPEAL from *Pearson, J.,* Spring Term, 1843, of CURRITUCK.

This was a petition filed by all the children who were alive and the

representatives of those who were dead, to recover from the defendant, who was the executor of Sarah West, the amount of a legacy left by her to them. Sarah West died in the year 1814, and by her last will, whereof she appointed the defendant executor, after one or two specific bequests and a nominal legacy to her daughter Courtney, the wife of Solomon Wallace, she directed the residue of her estate to be appraised and divided into three parts, and after division then she bequeathed one-third part to her daughter Sarah Hill, and the other two-thirds thereof "to the heirs of Courtney and Solomon Wallace forever," with a special injunction, that none of it should be sold, but that it should be
(324) kept for the said heirs until they should come of age or Solomon Wallace should die. The defendant proved the will, made sale of all the property, and, in 1817, paid over to Solomon Wallace the whole of the fund so bequeathed to his children. At the death of Mrs. West, Wallace and his wife had five children, the eldest nine and the youngest one year old, and they had other children, born after Mrs. West's death, and before the eldest child arrived at the age of twenty-one years. These children, and the representatives of those who had died in February, 1842, filed their petition against the executor for their legacy under their grandmother's will. The executor set up two defenses: *first,* that he had paid the whole of it as aforesaid to Solomon Wallace, who was poor and who needed it for the support of his infant children, and who had applied it to their support; and *secondly,* that the petitioners were barred by the length of time. The Court held that neither of these defenses could avail the executor, and that he must account to the legatees. The Court also held that only the children of Courtney and Solomon Wallace, who were in existence at the death of the testatrix, were entitled to claim the legacy; and, dismissing the petition so far as respected the claim of those born afterwards, gave a decree against the defendant in favor of those who were living at the death of the testatrix. From this decree the defendant appealed to the Supreme Court.

No counsel for plaintiffs.
Kinney for the defendants.

GASTON, J. We think his Honor erred in excluding from the benefit of the legacy such of the children as were born after their grandmother's death. It is settled that when legacies are given to "children," as a class of individuals, payable at a future period, any child, who can entitle itself under the description, *at the time when the fund is to be divided,* may claim a share thereof. See 1 Roper on Legacies,
(325) and the cases there cited. *Knight v. Wall,* 19 N. C., 125; *Vanhook v. Vanhook,* 21 N. C., 589. But as no appeal has been taken by the petitioners, whose claim was rejected, *we* cannot correct this error.

There is no error, we think, of which the defendant can complain. It is impossible for the Court to hold that the legacy has been paid to the petitioners; for the defendant sets up no such allegation. He admits the legacy to be unpaid, unless in law the payment thereof to their father and the application made by him of the money so paid to their support in infancy, operates as a satisfaction of their legacy. Now, without stopping to inquire how this might be in the case of a *naked* gift to suffering children, whose father was unable to support them, in this case it is impossible for us so to hold, without contradicting the will. The testatrix had a right to do with her own as she pleased, and she expressly directed that while the children were under age, and their father lived, the whole fund should be kept unimpaired. The trust, with which the defendant was charged, is thus, upon his own showing, an open unexecuted trust—and, therefore, the delay, which has occurred in calling for its execution, will not prevent the Court from decreeing that it shall be executed.

PER CURIAM. Affirmed.

Cited: *Sanderlin v. Deford,* 47 N. C., 77.

(326)

SPICER LANE *v.* ISAAC WINGATE.

1. Where A by a writing, not under seal, agreed that "he was held and firmly bound to B in the sum of two hundred dollars," conditioned to be void provided the said A kept and maintained a certain old negro woman belonging to B free from any expense to B and A afterwards failed to perform his agreement; *Held* that the $200 was not to be considered as an agreed penalty or stipulated damages—that the agreement was an indemnity to B against any loss or expense to be incurred in maintaining the said slave during her life—that the obligation was a continuing one on A—and that B might at any time sue A for neglecting to provide for the said negro, and would not be barred by the Statute of Limitations from recovering any damages he might have sustained within three years before the commencement of the suit.
2. *Held*, further, that B was not estopped, by a bill of sale under seal from himself to A for a negro Daniel, in which he acknowledged to have received the price of Daniel, from showing that the price of Daniel was the consideration of the agreement declared on.

APPEAL from *Bailey, J.,* Spring Term, 1843, of CRAVEN.

This was an action of assumpsit in which the plaintiff declared upon the common counts and also upon the following special agreement:

Be it known that I, Isaac Wingate, am held and firmly bound unto Spicer Lane in the sum of two hundred dollars, to be levied out of my goods and chattels, lands and tenements.

The condition of the above obligation is such that I, the said Isaac Wingate, for certain consideration to me in hand paid by Spicer Lane, which I do by these presents acknowledge, have agreed to take from the said Lane a certain old negro woman named Rhoda, and her to keep and maintain, so as to exonerate him, the said Lane, from any charge
(327) or expense on her account; provided, therefore, that I, the said Wingate, doth fully perform, agreeable to this agreement, the above obligation to be null and void—otherwise to remain in full force and virtue. ISAAC WINGATE.

12 December, 1832.

It appeared in evidence that, upon a contract made between the plaintiff and defendant, the plaintiff had agreed to sell certain negroes to the defendant, and the defendant was desirous of purchasing also a negro boy named Daniel, and that the plaintiff declined selling him, alleging that he wanted Daniel to wait upon an old negro woman in his possession named Rhoda, who was upwards of one hundred years of age, to which the defendant replied, that if the plaintiff would let him have Daniel he would support old Rhoda for life; that thereupon the plaintiff agreed with the defendant to let him have Daniel, in consideration that he, the defendant, would support old Rhoda during her life; the parties valued Daniel at two hundred dollars, and the defendant executed the agreement as above recited, the boy Daniel having been conveyed to the defendant by the plaintiff, as the consideration of the said agreement. This evidence was objected to by the defendant, but admitted by the Court, to show what was the true consideration of the written agreement. It further appeared in evidence that old Rhoda went into the possession of the defendant directly after the execution of the said agreement, under the same, and remained there for about four weeks, after which time she returned to the house of the plaintiff, where she has remained ever since up to this time, and been supported by him; and that within a month or two before the issuing of the writ in this case, the defendant was heard to declare that the plaintiff wanted him to take old Rhoda and support her, or pay him the two hundred dollars mentioned in the agreement, but, before he would do either, he would get clear of everything he had. It further appeared that it was worth twenty-five dollars a year to support Rhoda. The defendant then introduced in
(328) evidence a bill of sale under seal from the plaintiff to the defendant, for the boy Daniel and other negroes, dated on the same day with the agreement above recited, in which the plaintiff acknowledges that he has received five hundred and fifty dollars in full for the said negroes; and the defendant insisted that, as the agreement declared upon was founded on the consideration of the sale of Daniel as aforesaid, the plaintiff was estopped by the said deed to recover under the said

agreement; and, moreover, that his right of action in this case was barred by the statute of limitations.

Upon the question of the statute of limitations, the Court intimated to the plaintiff's counsel that, there being no seal affixed to the signature of the defendant in the agreement declared on, the plaintiff was barred of his recovery by the statute; but, by consent of the parties, this point was reserved, and the case was submitted to the jury upon the facts before stated, and, under the instruction of the Court, they found a verdict for the plaintiff, assessing his damages at seventy-five dollars. Upon the question reserved, after argument of counsel, the Court was of opinion that the statute of limitations was a bar to the recovery of the plaintiff, and therefore the verdict was set aside and a nonsuit entered, from which the plaintiff appealed.

J. W. Bryan for the plaintiff.
J. H. Bryan for the defendant. (330)

RUFFIN, C. J. The verdict was rendered for the value of the maintenance of the slave for three years immediately preceding the commencement of the suit, but subject to the point reserved, whether the action was barred by the statute of limitations. Upon that the Court was of opinion for the defendant, and the verdict was set aside and a nonsuit entered. As it seems to this Court, that opinion was erroneous.

It appears that the plaintiff owned a superannuated slave, whom he was bound in morals and in law to maintain, and that he contracted with the defendant to take, keep and maintain her, so as to exonerate the plaintiff from that charge. As the question is upon the statute of limitations only, it is to be assumed that the proper evidence was given in other respects, as, for example, that the defendant would not provide for the negro, but threw her back on the plaintiff's hands. Upon such a case, we think the recovery right as far back as it goes. The statute runs only from the time an action could have been brought for the sums now recovered, and not from the making of the contract, nor even from a prior breach, if upon such breach a distinct sum would have been recovered and not the sums now in question. The only way in which this action can be barred, is by holding that the contract is strictly for the payment of the sum specified, namely, $200, in case the defendant failed to take or keep the slave; and that whenever he might thus fail, he would be liable for that sum, neither more nor less, as an agreed penalty. But we think that is not the proper light in which this transaction is to be viewed. If the agreement were under seal, it might, (331) perhaps, be objected that it was not an affirmative covenant to do the acts therein mentioned to be done on the part of the defendant, but

strictly an obligation with collateral conditions. But, it may be mentioned, even in that case, under the statute, the obligee would substantially have his action from time to time as he sustained damages. But here the agreement, though not oral, is in *parol,* and the subject of the more liberal action of assumpsit, in which it is to be enforced according to the real meaning of the parties, as gathered from the whole instrument, without so much regard to the form, which the stipulations assumed. We think the plain import of the agreement is that the defendant will properly maintain this aged woman during her life, and that it is in truth an indemnity to the plaintiff against any loss or expense to be incurred in maintaining her during that period. We need not now say whether the $200 be not the extent of the indemnity, as the verdict is only for $75. But we are clearly of opinion that upon a breach by the defendant by merely not providing for the slave, say for a month or year, whereby the plaintiff was obliged to maintain her, the plaintiff could not recover the whole sum of $200, as it is obviously a penalty merely; and it cannot be supposed the parties contracted for it, without regard to the real injury arising out of the defendant's breach of contract. Suppose the defendant to have maintained the woman five years, and then turned her over on the plaintiff, who kept her a week, when she died; in that case the defendant would have reason for contending that he was not to pay the penalty, but only the value of the maintenance provided by the plaintiff. So, on the other hand, the plaintiff, upon a breach occurring, was entitled to recover only such damages as had arisen when he brought this action. And as the obligation of the defendant is a continuing one during the life of the slave, the plaintiff might waive a previous breach, without losing the benefit of the contract altogether. Here he sued for maintaining the slave from the time she left the defendants; and, as to that portion of the time, which (332) was more than three years before suit, the statute was a bar, but, for what fell within that period it was not a bar.

Being of opinion for the plaintiff on the point reserved, it becomes necessary that the Court should also advert to the objections, taken at the trial on the part of the defendant. Upon both of them we think the decision right.

The contract was not under seal, nor any consideration expressed on its face. It was, therefore, necessary that the true consideration should be alleged in the declaration and proved.

Robbins v. Love, 10 N. C., 82, shows that no estoppel arose out of the plaintiff's deed for the negroes. This action is not brought for the price of Daniel, as such, but for damages arising on a contract into which the defendant entered in consideration of the conveyance of that slave.

The nonsuit must be set aside and judgment for the plaintiff upon the verdict.

PER CURIAM. Reversed.

Cited: Mendenhall v. Parish, 53 N. C., 107; *Long v. Freeman,* 114 N. C., 570; *Ivey v. Cotton Mills,* 143 N. C., 194.

(333)

JOEL TYSON *v.* JAMES ROBINSON.

1. A party whose cause has been referred to arbitrators by a rule of Court, cannot, in this State, revoke the arbitration, without the permission of the Court who made the order.
2. Independent of an order of the Court, the rule of reference can only be revoked by an act of law, as by the death of either of the parties, or by the marriage of a *feme sole*, one of the parties.
3. Unless a rule of reference be expressly limited in its duration, it continues in force until it be executed, or revoked by act of law, or discharged by the Court.

APPEAL from *Settle, J.,* Spring Term, 1843, of ANSON.

Case instituted in ANSON, the writ being returnable to March Term, 1841, when the following rule was entered upon the appearance docket, to wit, "Referred to John A. MacRae and A. D. Boggan and their award to be a rule of Court." And at Spring Term, 1843, the plaintiff moved that an award filed by the said referees, pursuant to the preceding rule, might be made a rule of Court, and that judgment might be rendered accordingly. The defendant objected to having the said award made a rule, and moved that the same might be altogether set aside, upon the ground that the authority given to the arbitrators by the rule entered at Spring Term, 1841, had expired before the said award was made, and that the said authority had been duly revoked. And these two motions coming on to be heard, it appeared in evidence that the session of Anson Superior Court, at Fall Term, 1841, occupied (334) two weeks; that before or during the first week of the said term, the arbitrators had several meetings, with the parties before them, and had proceeded so far in making a rough statement of the accounts between the parties, as that each party had acquired some general idea of what would probably be the ultimate award, but the arbitrators filed no award until the latter part of the second week. On 20 September, 1841, the arbitrators being then in session, the defendant came with counsel, and, through his counsel, demanded the authority under which the arbitrators were acting, when a copy of the order of Spring Term, 1841, duly certified by the Clerk of Anson Superior Court, was produced. The counsel for the defendant thereupon wrote upon the same piece of

paper, beneath the said certified copy, as follows, to wit: "Messrs. MacRae and Boggan. I hereby notify you that I withdraw my consent to the reference in the above case, and decline submitting to any award that you may make, and shall move the Court to strike out the order of reference, and let the cause stand for trial. 20 September, 1841"; which writing was then signed by the defendant. The arbitrator then suspended proceedings, and, the Court being then in session, a motion was made by the defendant's counsel, in conformity to the above notice, that the said order might be stricken out and the cause stand for trial; which motion being overruled, the arbitrators, under the advice of the plaintiff's counsel, proceeded to consider further of their award, but, before doing so, invited the defendant to attend them, which he accordingly did, but there was no positive evidence that he said anything during their deliberations. The arbitrators then made their award, which was filed during the term. Previous to the filing of the said award, the defendant asked leave to enter on the docket the following, to wit: "Rule of reference withdrawn by Robinson. In this case the defendant Robinson comes into Court, and notifies MacRae and Boggan, who are in open Court, not to proceed with the reference, and that he revokes any authority heretofore given them and withdraws his consent to the reference made. It being admitted that no award was yet
(335) made, the Court granted leave, but refused to rescind the order of Spring Term, 1841, this being Tuesday, second week of this term, September, 1841." The arbitrators having afterwards filed their award, the following entry was made: "Award filed by Boggan and MacRae, September Term, 1841." The case was not regularly reached either at Spring or Fall Term, 1842, but at both terms ineffectual attempts were made to have the matter considered out of its course, but no final disposition was made until the present term, when the Court, upon the foregoing facts, ordered the award to be made a rule of Court, and rendered judgment accordingly. From this judgment the defendant appealed.

Strange for the plaintiff.
Iredell for the defendant.

GASTON, J. It is insisted on the part of the appellant that the Superior Court erred in rendering a judgment on the award, *first,* because the defendant had, before the award made, revoked his submission to arbitration; and *secondly,* because the rule of reference, under which the arbitrators professed to act, had expired on the first day of the term, at which the award was returned, and the award was not in fact made until a subsequent day of the term.

Where a submission to arbitration is made by the mere agreement of

the parties, beyond question, either of the parties can revoke such submission at any time before the award made, although he may thereby render himself liable to an action for a breach of his agreement. Every naked authority, until an act be done under it, is in law (336) countermandable by him who has granted it. And in England, where a submission to arbitration is made by the parties under a rule of Court, such submission is, in like manner, revocable by either party. The Court, however, may, at its discretion, attach the party so revoking for a contempt. Notwithstanding the rule purports to be an order of the Court, whereby the matters in difference are referred to the final determination of the arbitrators, yet the authority of the arbitrators is considered as derived from the submission of the parties and not under the order of the Court. So fully is this held that no reference whatsoever of a cause depending shall operate to stay the proceedings of the Court therein, unless in the rule it be expressed, that the parties have agreed that all proceedings in the action shall, in the meanwhile, be stayed. See Watson on Arbitration, 11. And when an award is duly made under a reference by rule of Court and is returned to the Court, no judgment is thereupon rendered, as upon a matter ascertained through the agency of the Court. Anciently the successful party was left altogether to his action to enforce the performance of the award, and even now, although the Court *may* grant an attachment for contempt, because of the nonperformance of the award, it is a matter of pure discretion to grant such attachment or not, and in very many cases, accordingly, it is refused. See Watson, *ut supra,* ch. 10, secs. 1 and 2, and the cases there cited.

In this State, from our earliest recollection of its legal usages, an operation, in many respects essentially different, has been allowed to a reference, under an order or rule of Court, of a matter pending before it to the determination of arbitrators. No such order could be made, indeed, but by the consent of the parties, who were entitled to demand as of right the trial of their controversy according to the law of the land. But when, upon the consent of the parties, the subject matter of the cause was referred by the Court, the tribunal thus constituted took cognizance of the matter referred under the authority of the Court. For the time, the controversy was withdrawn from the Court, and this withdrawal necessarily operated as a stay of proceedings (337) in the Court upon the cause in the meanwhile. The consent of the parties was essential to the making of the order, but, once made, the order existed *proprio vigore* and could not be annulled by the act of the parties. It might be revoked by act of law, as by the death of either of the parties, or by the marriage of a *feme sole,* one of the parties, which marriage operated as a death of her civil rights; it might

be rescinded or discharged by the Court which had made the rule, and it would be discharged as a matter of course, if both parties wished it to be set aside. But unless so revoked or discharged, it remained in force like every other order or rule of a Court, until it was executed. And when the award was returned, unless it could be impeached for just cause, a judgment followed thereon of course, as a judgment of the Court follows upon any other matter legally ascertained by it or through the agency of its officers. This operation of the rule of reference and the practice under it have been found of great public convenience, have repeatedly received, directly or indirectly, the sanction of our Courts, and are now too firmly rooted in our legal institutions to permit us to question the correctness of the principles, upon which they are understood to be founded. *Cain v. Pullam,* 3 N. C., 173; *Simpson v. McBee,* 14 N. C., 531; *Waugh v. Mitchell,* 21 N. C., 510; *Duncan v. Duncan,* 23 N. C., 466.

As to the other objection to the award, it would be worthy of consideration, if the rule of reference could be regarded as limited in its duration to the next term of the Court, whether, for the purpose of advancing justice, the whole of that term should not be considered as constituting in law but one day. But it follows clearly from what has been already said, that unless the rule be expressly limited in its duration, it continues in force until it be executed, or revoked by act of law, or discharged by the Court.

PER CURIAM. Affirmed.

Cited: Patrick v. R. R., 101 N. C., 604; *Williams v. Mfg. Co.,* 153 N. C., 10; *S. c.,* 154 N. C., 209.

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(338)

THE GOVERNOR TO THE USE OF WM. J. McELROY AND WIFE RACHEL *v.* A. G. CARTER, ADMINISTRATOR &c.

In this State, a decree in favor of the next of kin on a bill in Equity or petition against an administrator, is not admissible evidence for the next of kin in a suit brought by them upon the administration bond against the administrator and his sureties. Nor can a decree in favor of the administrator on such a bill or petition be given in evidence by him or his sureties in such an action on the bond.

APPEAL from *Nash, J.,* Fall Term, 1842, of DAVIE.

This was an action of debt upon the administration bond of William W. Long, administrator of Thomas Oaks, deceased, the defendant's intestate being one of the sureties in said bond. The following case was agreed upon. William W. Long was appointed administrator *de bonis non* of Thomas Oaks, deceased, at August Term, 1831, of Rowan County

Court, and gave bond with the defendant's intestate and John Hoskins as his sureties, in the usual form. About 1833, the relator Rachel, by her then guardian, with the rest of the next of kin of the said Thomas Oaks, deceased, filed their bill in the Court of Equity of Mecklenburg County, against the said Long and his wife, who was one of the children of the said Oaks, and against the said Long, as administrator of Thomas Oaks and Pleasant Oaks, for an account of the said estates. The defendants put in their answer, to which replication was taken. The matter was referred to the clerk and master, an account taken, returned and confirmed, showing that the relator Rachel was overpaid, and a final decree entered in favor of said Long. The present suit was brought to recover an alleged amount in the hands of the said (339) Long, with which the clerk and master had failed to charge him in taking the account. If the law be in favor of the relators, then they are to have judgment for $832.91, of which $441.84 is principal, and to have interest from 11 October, 1841: if for defendant, then judgment accordingly.

The presiding Judge haveing been of counsel in the case, declined sitting on it, but at the request of the parties, and to enable them to take the case to the Supreme Court, gave judgment in favor of the defendant, from which the plaintiffs appealed.

Morehead for the plaintiffs.
Boyden and *J. H. Bryan* for the defendant.

GASTON, J. It seems to us upon the facts agreed that the law is with the plaintiff, and that he is therefore entitled to judgment.

The statute of 22 and 23 Chas., II c., 10, in prescribing the form of the bond to be given by an administrator, makes it a part of the condition that the administrator "do make or cause to be made a true and just account of his said administration at or before the.....day of .....next, and all the rest and residue of the said goods, chattels and credits, which shall be found remaining upon the said administrator's account, the same being first examined and allowed by the Judge for the time being of said Court, shall deliver and pay over to such person or persons respectively, *as the said Judge or Judges by his or their decree or sentence,* pursuant to the true intent and meaning of this act, *shall limit and appoint.*" This condition is not broken by a refusal or neglect of the administrator to deliver and pay over the surplus or residue of his intestate's estate to and among the next of kin, according to the statute of distributions, unless there has been a previous decree or sentence of the spiritual court, limiting and appointing such delivery and payment, and therefore an action will not lie *upon the bond* (340) at the instance of the next of kin or any of them to recover the

amount of that surplus or residue, or a share thereof, until after a decree therefor in the spiritual court. *Archbishop of Canterbury v. Tappan,* 8 Barn. & Cress., 151; 15 Eng. C. L., 174. The corresponding part of the condition in the bond, which our statute requires from the administrator, is in these words: "That the said administrator do make or cause to be made a true and just account of his said administration within two years from the date of these presents, and all the rest and residue of the said goods, chattels and credits, which shall be found remaining upon the said administration account, the same being first examined and allowed of by the Court, shall deliver and pay unto such person and persons, respectively, *as the same shall be due unto,* pursuant to the true intent and meaning of this act."

In expounding this condition our Courts have uniformly held, at least ever since *Williams v. Hicks,* 5 N. C.. 437, decided in 1810, that it is broken by a refusal or neglect of the administrator to deliver and pay over to the next of kin what may be due to them under the act of distributions, and that therefore the next of kin may bring suit for their distributive shares against the sureties of the administrator upon the administration bond, without any previous proceeding against the administrator, and whether the administrator has or has not returned an account to, or has or has not made a settlement with, the Court which granted the administration. It is one of the necessary consequences of this construction that, if there has been a proceeding by the next of kin against the administrator for an account and a decree thereon, such proceeding and decree, when an action is brought against the sureties on the bond, are not permitted to be given in evidence against them. The whole is *res inter alios acta.* They have not bound themselves, that the administrator shall pay what *a court shall decree* he ought to pay, but that he shall pay *what may be truly due* to the next of kin. To establish a breach of this engagement, it must be shown that the
(341) administrator does owe what is alleged to be wrongfully withheld, and this must be shown by proofs upon the trial. And it necessarily follows, also, that as a decree against the administrator is not admissible in evidence against the surety, *e converso* a decree for the administrator cannot be received in evidence for the surety. All this doctrine is so fully asserted in *McKellar v. Bowell,* 11 N. C., 34; *Chairman v. Clark, Ib.,* and *Kaywood v. Barnett,* 20 N. C., 88, that we content ourselves with referring to these cases, as clearly recognizing and establishing it.

We cannot but be struck with the seeming hardship and inconsistency disclosed by this record of a judgment being rendered for a large sum against the surety, because of his principal, the administrator, having withheld from the female relator her share of the intestate's estate,

when, in a direct proceeding by her against that principal, it was decided that nothing was due to her; but such inconsistencies must occasionally occur, so long as the responsibilities of the surety remain as they have been definitely settled to be on the bond in its present form. It is for the Legislature to consider whether results of this kind do not furnish reasons for directing a modification of the bond, but we must apply the law as we find it.

PER CURIAM. Reversed and judgment for the plaintiff.

Cited: Lewis v. Fort, 75 N. C., 253; *Moore v. Alexander,* 96 N. C., 36.

(342)

THE GOVERNOR, TO THE USE OF WILLIAM J. McELROY AND WIFE *v.* RICHARD GOWAN.

A County Court has jurisdiction to take a new bond from an administrator or executor for the benefit of his former sureties, under the act, Rev. Stat., ch. 46, s. 30, although no petition has been filed or verified on oath, and no summons has been issued against the administrator or executor, the latter being present and not requiring these forms to be observed.

APPEAL from *Nash, J.,* Fall Term, 1843, of DAVIE.

This was an action of debt upon the administration bond of William W. Long, administrator *de bonis non* of Thomas Oaks, deceased, on the trial of which the following facts were agreed upon by the parties. William W. Long was appointed administrator *de bonis non* of Thomas Oaks, at August Term, 1831, of Rowan County Court, and gave bond with Nathan Chaffin and John Hoskins as his sureties. Thereafter, at November Sessions of the said Court, Long and Chaffin had some difference, and Long, to relieve, as he supposed, the said Chaffin from liability as his surety in the said bond, persuaded the defendant with the said Hoskins to enter into the bond, on which the suit is brought, and tendered it to the Court, by whom it was accepted, and on demanding that the bond executed by Chaffin at the August Sessions should be surrendered, the Court refused the application, observing that they would hold on to both. The bond was in the usual form. About 1833, the relator Rachel, by her then guardian, and the rest of the next of kin of the said Thomas Oaks, deceased, filed their bill in the Court of Equity of Mecklenburg County, against the said Long, administrator, and his wife, who was also one of the children of the said Oaks, and (343) against the said Long as administrator of Thomas J. Oaks and Pleasant Oaks, for an account of the said estates. The defendants put in their answer, to which replication was taken. A reference was made

to the Clerk and Master, an account taken, reported, and the report confirmed, showing that there was nothing due to the relator, and a final decree entered in favor of the defendant Long, so far as regarded the present relator. The present suit was brought to recover an alleged amount in the hands of the said Long, with which the Clerk and Master in taking the account had failed to charge him. If the law be in favor of the relators, then judgment is to be rendered in their behalf for the sum of $832.91, of which $441.84 is principal, and to bear interest from 11 October, 1841; if for the defendant, then judgment accordingly.

The presiding Judge having been of counsel in the case declined sitting in it, but at the request of the parties, and to take the case to the Supreme Court, gave judgment *pro forma* for the defendant.

J. T. Morehead for the plaintiff.
Caldwell & Boyden for the defendant.

GASTON, J. The question which has been raised in this case, whether the defendant can avail himself in this action of the decree, rendered in favor of William W. Long, administrator *de bonis non* of Thomas Oaks, in the suit in equity, instituted against the said administrator by the female relator and others, the next of kin of the said Thomas, is precisely the same which was raised in the case of the Governor at the instance of these relators against Carter, administrator of Chaffin, upon which our judgment has been given. (See the next preceding case.) This question, therefore, must be determined against the defendant.

But other grounds of defense have been taken by him, which (344) did not exist in the case referred to. One of these is, as has been insisted by his counsel, that the instrument declared on was delivered by Gowan, the surety, to Long, the principal, to be delivered by Long to the Court, upon condition that a previous bond of Long, to which Chaffin was surety, should be surrendered—that this condition was not complied with, and that therefore this instrument was not in law the bond of the defendant. The cause was submitted to the Court upon a state of facts agreed by the parties, and no such fact is stated as the deliverey of the instrument by Gowan to Long, and still less of the delivery of the instrument to Long, to be by him delivered to the Court upon any condition whatever. The case only sets forth the *motive* which Long had in persuading the defendant to execute this instrument, and distinctly states that the defendant did enter into the bond, and that it was tendered to and accepted by the Court. It adds, indeed, that on demand that the previous bond, to which Chaffin was surety, should be surrendered the Court refused the motion. This might have been a disappointment to Long, and possibly also to Chaffin,

but it was no injury to the defendant; and, at all events, did not impair the legal obligation, which, upon the facts stated, we must hold he had executed unconditionally, and which had been duly delivered to and accepted by the Court as the bond of the defendant.

But it is insisted further, on the part of the defendant, that the Court had no jurisdiction to take the bond which is sued upon in this action. The argument is that the Court had no authority to take a bond with sureties from the administrator but in two prescribed cases, that is to say, either at the time of granting administration, or in the case specially described in the act of 1822, ch. 1137, as modified by the act of 1826, ch. 23, and that this bond was not taken when the administration was granted, nor in the case provided for in these acts. Perhaps several answers might be given to this argument, but *that* which we deem conclusive is, that upon the facts agreed it does not appear that the bond was executed in a case embraced within the provisions of the acts referred to. These provisions are: See Rev. St., ch. 46, sec. (345) 30, that the surety of an administrator or executor, conceiving himself in danger by reason of such suretyship, may file his petition on oath in the county court wherein he has given bond, that thereupon a summons shall issue against the party or parties, with and for whom the surety is bound, returnable to the next term, and thereupon the Court may compel the party or parties to give other sufficient or counter security, or to deliver up the estate to the petitioner or to such other person as the Court shall direct, or make such other order or rule thereon for the relief of the petitioner and better securing the estate as to the Court shall seem just. The *case,* therefore, thus provided for, is one where the surety wishes some relief or counter security, because of his responsibility for the administrator or executor—the authority of the Court in such case is to require of the administrator or executor other or counter security, or to order him to deliver up the estate to the surety or other person it may direct, or to make such other order or rule for the relief of the surety and better securing the estate as its discretion may dictate—and the *form* of proceeding directed is by petition verified on oath, and a summons against the administrator or executor. Now it is clear that the *forms* of proceeding may be all waived by him for the security of whose rights they were devised. The administrator or executor in a case of this kind may dispense with the petition, the affidavit and the summons, just as a defendant in an ordinary suit may dispense with a writ, or, according to our practice, with a declaration. He may come into Court and assent to do what is asked by his surety, as he may voluntarily confess a judgment to his creditor. The declared object of the new bond was the relief of his surety in the old bond, and the Court had jurisdiction to take such new bond or to

adopt any other measure which, in its judgment, relieved the surety, and at the same time adequately provided for the safety of the estate. This measure did relieve the surety, if not as fully as he and his principal wished, yet at all events to the extent of binding the sureties (346) in the new bond to contribute to any loss he might thereafter sustain by reason of his liability, and it evidently tended to place the estate more effectually out of danger.

Another objection was taken, that if the Court had not jurisdiction to receive this bond under our statutes, and if it could be regarded as a *voluntary* bond binding upon the parties at common law, then the action was wrongfully brought in the name of the successor of the Governor. But as we hold that the Court did act within its prescribed jurisdiction, this objection necessarily fails.

The judgment of the Superior Court must be reversed and judgment entered for the plaintiff, according to the agreement of the parties.

PER CURIAM. Reversed and judgment for the plaintiff.

Cited: *Jones v. Blanton,* 41 N. C., 119.

(347)

JAMES MOORE *v.* JAMES TUCKER.

Where, upon the dishonor of a bill of exchange or promissory note, the endorsee has neglected to give the proper notice, the drawer or endorser of the bill or endorser of the note will still be liable, if, after a knowledge of all the facts, which in law have discharged him, he promises to pay the bill or note.

APPEAL from *Dick, J.,* Spring Term, 1843, of SURRY.

This was an action of assumpsit, in which the plaintiff declared in three counts: 1st, for the price of a slave; 2dly, on a written assumpsit, by endorsing a bond in the words and signature following, to wit: "One day after date I promise to pay James Tucker three hundred dollars, value received. Witness my hand and seal, 14 September, 1835.

D. WALKER [Seal.]"

Endorsed as follows: "I assign the within note to James Moore, for value received. 15 September, 1835. JAMES TUCKER."

Thirdly. Upon a parol assumpsit. The note and assignment were admitted, and the plaintiff then proved, that some time previous to September, 1835, in Grayson County, in the State of Virginia, he sold a negro slave to the defendant, who lived in North Carolina, for which the defendant gave his note; that the defendant on 15 September, 1835, in the State of Virginia, assigned to the plaintiff the above recited

bond on D. Walker, which had been executed in North Carolina, in payment of the note he had before given for the slave; that on 24 October, 1837, the plaintiff commenced suit in Grayson County, Virginia, on the bond and failed to make his debt; that in February or March, 1839, he presented by his agent a transcript of the (348) record of the suit in Virginia to the defendant in North Carolina, and demanded payment, when the defendant promised to pay the debt by giving his note with surety at six months, which was agreed to by the plaintiff, and which the defendant afterwards failed to do. It was also in proof that Walker, the maker of the note, remained solvent long enough for the plaintiff to have recovered his debt from him, but was insolvent at the time of the promise. The Court charged the jury that, if they believed the testimony the plaintiff was entitled to recover. The jury accordingly rendered a verdict for the plaintiff, and judgment being given thereon, the defendant appealed.

Morehead for the plaintiff.
Boyden for the defendant.

DANIEL, J. The bond was indorsed by the defendant in Virginia. The Judge instructed the jury that, upon the evidence offered in the case, the plaintiff was entitled to recover; and we agree with his Honor. It is certainly true, that the consequence of not *duly* presenting a bill or note is, that all the antecedent parties are discharged from their liability, whether on the instrument or on the consideration for which it was given, except the maker of a note or bond and the acceptor of a bill who, are in law, the principal debtors on the same. 1 Leigh Nisi Prius, 442, and the cases there cited. But it is equally true, that, as the rule, requiring notice to be given in a reasonable time of a demand and refusal to pay was intended for the benefit of the party entitled to it, that party may waive the consequence of a neglect of giving due notice; and the waiver may be either express or implied from circumstances. It has been held that the subsequent promise to pay the debt, when the promisor had full knowledge of all the facts, which in law would have discharged him, will dispense with proof of notice. But the promise must be express, unconditional, and unequivocal, to operate as a waiver of due notice of the dishonor of a bill. In this case it appeared that an express promise was made by the de- (349) fendant, with a full knowledge of all the facts, which, supposing the law of Virginia to be the same as ours, would have exonerated him from liability on his indorsement, and he is liable on it. See all the cases collected, Leigh N. P., 456, 457.

PER CURIAM. No error.

JAMES WILLIAMSON & CO. *v.* WYATT CANADAY.

1. The principal is bound by a warranty made by his agent in the sale of a chattel.
2. Where in an action for a breach of a warranty, that a slave was sound at the time of his sale by the defendant to the plaintiff, it appeared that he had taken the infection of the smallpox, of which disease he soon afterwards died: *Held* that it was not error in the Judge to tell the jury that they might take the price given for the slave as a measure of their damages, there being no objection taken to this instruction on the trial, the slave having been a total loss to the plaintiff and the price, without any evidence to the contrary, being considered the market value of the slave.
3. Nor was it error in the Judge to inform the jury that in such a case they might include, in their assessment of damages, interest on the principal sum.
4. Where the damages recovered in the Court below exceeded the damages laid in the writ and declaration, and the variance was not discovered in that Court but the defendant here insisted upon it on a motion in arrest of judgment, the Court permitted the plaintiff to amend the record by striking out the excess of damages in the verdict, upon his paying the costs of the appeal.

APPEAL from *Battle, J.*, Spring Term, 1843, of GRANVILLE.

Assumpsit, brought upon the warranty of soundness con-
(350) tained in the following bill of sale, to wit: "1836, December 2d. Received of James Williamson & Co. twenty-two hundred dollars in full for two negro men, Ephraim, a blacksmith, about 32 years old, and James, about 33 years old, which negroes I warrant sound, healthy, and free from all claims; and I further bind myself to ever warrant and defend a good and lawful right and title for and to the said negroes, unto the said James Williamson & Co. and their heirs forever. Given under my hand the date above written. John S. Butler for Wy. Canaday," which bill of sale was duly attested, proved and registered. The breach alleged was that the negro Ephraim mentioned in the said bill of sale was, at the time of the sale infected with the smallpox, of which disease he soon after died, and the plaintiff claimed as damages therefor the phole price paid for the said negro, with interest on the same to the time of the trial. Upon the trial it was admitted that Butler, who sold the negro and gave the bill of sale was the agent of the defendant Canaday, and sold the slaves as his agent; but it was contended that the suit could not be maintained against the principal upon the warranty contained in the instrument produced. The Court instructed the jury that the action against the principal was proper, and that in assessing the plaintiff's damages, if they found that the slave was infected with the fatal disorder, of which he died, at the time of the sale, they might give the sum paid as the price of the negro, with interest thereon to the time of the trial. No exception was made at

the time to the charge in relation to interest, nor was any specific instruction prayed on that point. The jury returned a verdict for the plaintiffs, in which they gave as damages the price paid for the slave, with interest to the time of the trial. A new trial was moved for upon the ground taken at the trial, that the action could not be maintained against the defendant, and also upon the ground that the Court had misdirected the jury upon the question of the allowance of interest in assessing the plaintiff's damages. The motion was over- (351) ruled, and judgment having been rendered pursuant to the verdict, the defendant appealed.

Graham and *Iredell* for the plaintiffs.
Badger, Haywood, and *Saunders* for the defendant.

RUFFIN, C. J. The objection that the action would not lie against the defendant has been abandoned in this Court; and we need say no more on it than that, as we think, it was properly abandoned. The bill of sale is not under seal, nor in the name of the agent, and is, in law, a contract of the principal.

Several other objections, however, have been taken. The first is, that the Court erred in stating the price given for the slave to be the measure of damages; whereas, it is the difference between the sum paid and the real value in the state in which the negro was. We believe the rule, as thus stated, is correctly expressed. Nevertheless the Court is of opinion, that the judgment cannot be reversed on that ground. It is apparent that the slave was a total loss to the plaintiff, and that the case was so treated by all parties on the trial. The direction to the jury to give the full price or value is based upon the hypothesis that the slave died of the smallpox, existing at the time of the sale, from which it followed almost necessarily that the slave had been of no value to the purchaser. For the judge and jury are both entitled to the small portion of common sense needed to know that a slave who died of smallpox was of no actual value between the infection and the fatal termination. It is a disease of steady continuance and rapid progress, which disables the patient from labor, and makes the necessary attention to him both troublesome and dangerous. But it was insisted that, diseased as he was, he was worth something when sold, for many recover from the smallpox, and there are persons who might give a considerable sum for a slave infected with that disease. If the plaintiffs had sold the negro as diseased, and thereby dimin- (352) ished their loss, the defendant would have been perhaps entitled to a corresponding diminution of the damages. But there is no such suggestion. The negro died the plaintiffs' and was their loss; and we

are clearly of opinion that they are, upon no principle, bound to account for any supposed price, which some persons might possibly have been willing to give for a slave in that condition. The purchasers were entitled to keep him; and, if he was not of the qualities warranted they were entitled to recover the damages actually sustained by them by reason of his unsoundness, which, in this case, amounted to the whole value of the negro, as has been already shown, and was so considered on the trial. But it was further urged that the price given may have been more than his value, if he had been sound, and that the plaintiffs have only a right to have the negro made good to them, as sold to them. But, generally speaking, we believe that the prices given for property of this description may be safely taken to be the fair market value, nothing appearing to the reverse. And, in this case, it was so assumed by everybody; and the defendant gave no evidence that the value was less than the price. But, besides these particular answers to the objections, there is a general one, which is that the defendant did not except to this part of the instruction, and, therefore, we must take it that he was satisfied with it. It may, indeed, have been favorable to him, as upon other evidence that may have been given, it may have appeared that the value of the negro, if sound, would have been more than the price.

Upon the question of interest we do not see that it was wrong for the jury, in their discretion, to consider the use of the money as a part of the plaintiffs' loss, as is often done in trover; and the Court informed them they might, and not that they were bound to give interest from the sale. But however that may be, under another objection of the defendant, the plaintiffs have found themselves under the necessity of giving up a larger sum than the amount of that part of the interest complained of. The objection can go only to interest for the time prior to notice that the plaintiff looked to the defendant for payment, (353) when the latter had an opportunity of making payment, and was placed in default. But the plaintiffs have been obliged, for another reason, to remit $144, which exceeds the interest accrued between the sale and the commencement of this suit, and thus puts this objection out of the case.

On the part of the defendant a motion was then made in this Court for arrest of judgment, upon a ground which was overlooked in the Superior Court; and that is that the damages assessed exceed those laid in the writ and declaration. To meet this objection, the plaintiffs offer to remit the excess and pray that the judgment may be affirmed for the less sum claimed in the declaration. In *Grist v. Hodges,* 14 N. C., 198, the Court allowed an amendment by increasing the damages demanded, but required the plaintiff to pay all the costs, because, after

doing so he was much a gainer by the amendment. But in this case the costs exceed the difference between the sums laid and assessed respectively; and therefore the plaintiffs do not move to amend the writ, but to remit a part of their damages. We find the practice well established in England in such a case, to allow the plaintiff to enter a *remittitur* in the Court below, after error brought and errors assigned, and then have the transcript in the court of errors made conformable, upon payment of the costs of the writ of error up to the time of the amendment made. It would be, of course, in our Superior Courts to allow the plaintiffs to remit, but it is not necessary to send them there for that purpose; because the statute authorizes the amendment to be made here at once, upon such terms as the Court may deem right. We think it must be on the payment of costs in this Court, which is according to the rule in England. Without the amendment the judgment would be reversed, and this defect may have led the other party to appeal. But we do not think the plaintiffs ought to pay more than the costs of this Court, for it is enough that the defendant gets clear of a part of the damages. Therefore, after the amend- (354) ment the judgment will be affirmed for the damages laid in the declaration and the costs of the Court below.

PER CURIAM. Plaintiffs allowed to amend on payment of the costs of this Court, and then judgment in their favor.

Cited: Harper v. Davis, 31 N. C., 44; *Connelly v. McNeil,* 47 N. C., 51.

STATE *v.* BRAXTON LANGFORD.

An indictment which charged that A B did construct and use a public gaming place in the town of H, in the county of H, at which a game of chance was played, and that the defendant in the said town of H did play at the said game, "and did *then* and *there* bet money with the said A B, at and upon the said game" is not good. It does not sufficiently charge that the playing and betting by the defendant were at any public gaming place. The words "then and there" have reference only to the time and to the *venue*, the County of H, and not to the public place of gaming before mentioned.

APPEAL from *Nash, J.,* Spring Term, 1843, of HENDERSON.

The defendant was tried upon the following indictment, to wit:

STATE OF NORTH CAROLINA—Henderson County—*ss.*

Superior Court of Law, Spring Term, 1843.

The jurors for the State upon their oaths present that Amos Dickson, late of the said county of Henderson, on 20 July, 1842, unlawfully

(355) did construct and use a public gaming place in the town of Hendersonville, in the county aforesaid, at which a game of chance was played called chuckaluck, at which game of chance money was bet, and that afterwards, to wit, on the day and year aforesaid, one Braxton Langford, late of the said county, with force and arms, at Hendersonville, in the county aforesaid, unlawfully did play at the said game of chance, commonly called chuckaluck, and did then and there bet money with the said Amos Dickson, at and upon the said game of chance, called chuckaluck, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

On the trial it was proved that a man by the name of Dixon carried about with him a box with three dice, and a paper, on which were marked in a circle six numbers, upon which was played the game called chuckaluck; that the game was played by the paper being placed on a board, barrel, stump, or whatever else would serve to rest it on; the person gambling selects his number on the paper, and the dice were thrown on the table by the proprietor Dixon. If the numbers on the dice, when thrown, presented on their upper surface the number selected, the proprietor lost; if not, he won. Any number of persons might, at the same time, bet on the game. It was further proved that at the Spring Term, 1842, of the Superior Court of Henderson County, the said Dixon had his paper on a board in the public courtyard, when he and the defendant played for money at the game mentioned. The paper was not affixed to the board, nor was all the gambling done at one spot in the courtyard. But the said Dixon would move about, and whenever he could get a crowd and persons to gamble with, use his paper and his dice. It was further proved that at the time the (356) defendant gambled with Dixon other persons also played. It was objected by the defendant's counsel that this was not gambling within the meaning of the act of Assembly.

The Court instructed the jury that under the evidence the defendant was guilty. The jury returned their verdict accordingly, and a motion for a new trial having been overruled, and judgment pronounced against the defendant, he appealed.

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

DANIEL, J. The statute, Rev. Stat., ch. 34, sec. 68, declares, that each and every person, who shall construct, erect, keep up or use any *public* gaming table or place where games of chance shall be played, shall be subject to indictment. And each and every person, who shall play at any of the gaming tables forbidden by this act, or any game

of chance, and bet any money or property, shall be guilty of a misdemeanor. We concur in the opinion expressed by the Judge on the trial, but find that the indictment is defective. It charges that the defendant did play at a game of chance, and that he did bet money with Dickson upon the said game of chance. But he is not charged with doing these acts at any public gaming *place*. The indictment states that Dickson had constructed and used a public gaming *place,* but it does not state that the betting of the money by the defendant with Dickson on the said game of chance was at the said public gaming *place,* so constructed by Dickson in the town of Hendersonville. *Non constat,* but that the betting at the said game of chance, charged in this indictment, might have been in the town of Hendersonville, but not at a public gaming table, nor at the *place* charged in the bill to have been constructed and used by Dickson for public gambling. The words "then and there" in the indictment have reference only to the *venue* (Henderson County), and not to the public place (357) of gaming in the town of Hendersonville constructed by Dickson. The indictment does not describe with certainty such facts, as in law, make an offense punishable under the statute.

PER CURIAM. Judgment arrested.

STATE *v.* MILES BRIGGS.

1. It is a good defense to an indictment for an assault and battery, that the defendant struck the prosecutor to prevent his taking away the defendant's goods and chattels, the prosecutor professing to seize them as constable, by virtue of an execution, but not having lawfully appointed a constable.
2. Where the only evidence of the appointment of one to be a Constable was an order of the County Court in the following words: "Ordered that G. S. be appointed Constable, and that he enter into bond in the sum of four thousand dollars, with J. O. and K. P., his sureties": *Held* that this was a void act of the Court, and conferred no authority, it not appearing that any case existed in which they could by law exercise the power of appointing a Constable.
3. It is not necessary that the defendant should have made an objection to the prosecutor's authority, at the time the assault was committed.

APPEAL from *Pearson, J.*, Spring Term, 1843, of GATES.

The defendant was indicted and tried for an assault and battery upon the prosecutor, who alleged that he was a constable. The facts were that the prosecutor had a writ of *fieri facias* against the (358) defendant, issued by a justice of the peace of Gates County to any lawful officer to execute, and under the said execution seized the goods of the defendant, and the defendant committed the assault in

attempting to remove the goods from the possession of the prosecutor. The appointment of the prosecutor as constable appeared from the records of the county court of Gates, to be in the following words, to wit: "Ordered that George W. Smith be appointed constable, and that he enter into bond in the sum of four thousand dollars, with John W. Odom and K. Parker his sureties." Bond was given accordingly, and nothing further in regard to his appointment appeared. The defendant then insisted that the said Smith was not, by an appointment so made, invested in the rights and powers of a constable, and that he had no right to seize the defendant's goods by virtue of the execution, inasmuch as it was only directed to a *lawful* officer. His Honor was of opinion, that as the defendant did not, at the time the assault was committed, insist on the defective appointment, he could not now take the objection. The defendant was convicted, and a new trial having been refused and judgment pronounced against him, he appealed to the Supreme Court.

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

DANIEL, J. If it was necessary to prevent the prosecutor from taking or carrying away from the presence of the defendant his personal property, he might strike in defence of the same, if the prosecutor was not then a lawful officer. To make the defendant criminal, the *onus* lay on the State, to show that the prosecutor was at the time a lawful officer and armed with a lawful execution. The defendant not
(359) raising the objection at the time, in our opinion makes no difference. The prosecutor certainly was not a lawful officer. The county court of Gates had no general authority to appoint constables for the county. The county court, seven justices being present, may appoint a constable, if any of the contingencies happen which are mentioned in section 4, chapter 24, Revised Statutes. The record of the appointment of the prosecutor to be constable, does not show that any one of the said contingencies or events had occurred; and there was no parol evidence, if competent, tending to supply that deficiency in the record.

PER CURIAM. New trial.

Cited: *S. v. Magness,* 26 N. C., 219; *Burke v. Elliott, Ib.,* 362.

(360)

CHARLES R. KINNEY, ADM'R OF GEORGE FEREBEE *v.* WILLIAM ETHERIDGE, ADM'R OF EDWARD SANDERS, AND OTHERS.

A bond, taken by a Clerk and Master of a Court of Equity in pursuance of an order of the Court, and made payable to him and his successors in office, must, on his death, be sued upon in the name of his personal representative, there being no act of the Legislature requiring bonds to be made payable to him and *his successors in office.*

APPEAL from *Pearson, J.,* Spring Term, 1843, of CAMDEN.

This was an action of debt upon two notes under seal for two hundred and fifty dollars each, payable to George Ferebee, clerk and master in equity for the county of Camden, and his successors in office. The execution of the notes was not denied. The defendant's counsel contended, first, that suit should have been brought in the name of the present clerk and master, and could not be sustained in the name of the administrator of Ferebee; secondly, that the notes had been paid off and satisfied. The first question was reserved. It is unnecessary to state the facts relied upon in support of the plea of payment, as the Supreme Court gave no opinion on the Judge's instructions upon that point. The jury found a verdict for the plaintiff, subject to the question reserved. Upon that question the Court was of opinion that the notes being taken by Ferebee as clerk and master, under the order of the Court, the legal title did not vest in Ferebee as an individual, but vested in him as clerk and master, and that, upon the death of Ferebee, these notes should have remained in the office and passed to his successor, and that they did not pass to his administrator, so as to enable him to bring this suit. The Judge, therefore, set aside (361) the verdict and directed a nonsuit to be entered, and the plaintiff appealed.

Kinney for the plaintiff.
No counsel for the defendant.

DANIEL, J. The bonds were executed, payable to Ferebee, as clerk and master in equity for the county of Camden, and his successors in office. On the death of an obligee his interest vests in his personal representatives, though not included in the terms of it. A bond given to a man and his successors on his death, belongs to and is to be sued on by his executor or administrator, unless the obligee is a corporation sole. In England corporations are erected either by the charter of the King or by act of Parliament, or they exist by prescription. In this State they are created only by the Legislature. The Legislature has heretofore passed acts, directing bonds in certain cases to be made payable to persons holding certain offices and to their successors in office, as to

the Governor and his successors, the chairman of the county court and his successors. These individuals then became sole corporations, by force of the acts of the Legislature, for the particular object contemplated, and a bonds taken in pursuance of those laws would go to the successor, and not to the executor of the obligee. But there is no act of the Legislature, which directs bonds of the description of those mentioned in this case, to be made payable to the clerk and master in equity, and his successors. The bonds in this case were executed to the clerk and master by an order of the court of equity, but that order could not vest in the successor to the office the legal right to sue on the bonds. We are of opinion that the administrator only had the legal right to sue on the bonds. Therefore, the nonsuit is set aside, and a

PER CURIAM. New trial.

Cited: *S. v. McAlpin,* 26 N. C., 150; *McDowell v. Hemphill,* 60 N. C., 96.

(362)

DEN ON DEMISE OF GREEN B. HUMPHRIES *v.* BERRYMAN HUMPHRIES.

1. Where a person is put in possession of land by the owner without any agreement for rent, and with an express provision that he shall leave it whenever the owner may require him to do so, he is not a tenant from year to year, but strictly a tenant at will, and is not entitled to six months' notice to quit.
2. A right to emblements does not give a right to the possession or an estate in the lands, but only the privilege of ingress and egress, as far as necessary for due attention to the crop.

APPEAL from *Nash, J.,* Spring Term, 1843, of CLEVELAND.

On the trial of his ejectment, it was proved that the father of the defendant was the owner of the land, and had put the defendant in possession with an express agreement that he was to leave it whenever the father should require him to do so. There was no promise or agreement by the father to give the land to the defendant. The defendant remained in possession of the land more than one year, and made improvements on it. The father became dissatisfied with the defendant, sold the land to the lessor of the plaintiff, and conveyed it to him by deed, bearing date 14 February, 1840. In the latter of the spring, or the first of the summer of the same year, he gave the defendant notice to leave the land, the latter not doing so, this action was brought in August, returnable to the Fall Term, 1840, of the Superior Court. It was urged on the part of the defendant, that he was tenant from year to year or at will, and entitled to six months notice. The Court

instructed the jury that the defendant was not a tenant, but a (363) mere occupant, and not entitled to six months notice. The jury found a verdict for the plaintiff, and judgment being rendered pursuant thereto, the defendant appealed.

Hoke for the plaintiff.
Caldwell for the defendant.

RUFFIN, C. J. It is true that every occupation of land under another is, in modern times, from considerations of policy, *prima facie* deemed a tenancy from year to year. But it is clear that while the owner is thus under the necessity of showing the particular terms of the contract under which the occupation arose, he may show that it was not a tenancy from year to year, but strictly a tenancy at will, or any other tenancy to be determined at a particular time or upon a particular event, by the express agreement of the parties; and by that means avoid the necessity of giving six months notice to quit. Thus, one let into possession upon a contract of sale, is but a tenant at will, strictly so called. *Love v. Edmonston,* 23 N. C., 152. In like manner, one entering under a voluntary promise of the owner to convey is not tenant from year to year. *Carson v. Baker,* 15 N. C., 220. And those persons, it was held, were entitled, before being sued, to notice to quit for the purpose of determining the lawfulness of their possession, but were not entitled to six months notice. So, it would seem, it must be in every case in which the parties contract for a less notice than six months, or agree that there need not be any notice, or the occupation is not referable to year or any particular part of the year, but is referred expressly to the determination of one or both of the parties. *Richardson v. Longridge,* 4 Taunt., 128; 5 Barn. & Ald., 604; (364) 1 Dow. & Ry., 272. Here the case states that the father put the son into possession without an agreement for rent, and with an express provision, that the latter should leave it "whenever" the former should require, and not at the end of any year that the father might require. It seems to us, that there could not be a plainer common-law tenancy at will, nor a more distinct renunciation of the right to six months notice.

As to the argument, that the defendant's right to the emblements should prevent the turning him out in August, when a growing crop might need cultivation and saving, the answer is that the right to the emblements does not give a right to the possession or an estate in the land, but only the privilege of ingress and egress, as far as necessary, for due attention to the crop.

PER CURIAM. No error.

Cited: Stedman v. McIntosh, 26 N. C., 295; *Hartz v. Harris,* 120 N. C., 410.

WILLIAM HUNT *v.* JAMES C. STEVENS.

Money in the hands of the Clerk of a Court by virtue of his office cannot be attached.

APPEAL from *Manly, J.*, Spring Term, 1843, of NASH.

This was a proceeding by original attachment. B. H. Blount, the clerk of the Superior Court of Nash County, was summoned as a garnishee and stated in his garnishment the amount of money he had in his office as clerk, which apparently belonged to the defendant. The plaintiff moved the Court that the money thus held by the clerk be condemned to the satisfaction of his demand. The Court refused this motion, upon the ground that funds in his hands, in his official capacity, were not liable to be attached; from which decision the plaintiff appealed.

No counsel for the plaintiff.
B. F. Moore for the defendant.

DANIEL, J. We think the opinion of the Court below correct. It has been repeatedly decided that money in the hands of a sheriff, raised by execution, or moneys in the hands of a clerk of a court, by virue of his office, cannot be attached. *Alston v. Clay,* 3 N. C., (366) 171; *Overton v. Hill,* 5 N. C., 47. The Court, and not these officers, is the proper judge to whom such moneys belong.

PER CURIAM. Affirmed.

Cited: Coffield v. Collins, 26 N. C., 491; *Williamson v. Nealy,* 119 N. C., 341

BOOKER T. LILLARD *v.* JOHN M. REYNOLDS.

1. Where a testator bequeathed as follows: "I lend to my daughter B. G. one negro woman and her increase that she may hereafter have": *Held* that this bequest was not void for uncertainty, but that the legatee in order to identify the woman, might show that the testator had bequeathed all the negro women he had, except one, specifically by name to other legatees, and *held* that this one, not named in the will, passed under this bequest.
2. Where one, who claimed a specific legacy, was permitted by the executor to take it into possession, upon an agreement that if it should be decided he was not entitled to it, it should be returned to the executor: *Held* that this was a sufficient assent to the legacy, it being afterwards determined that the claimant was entitled under the will to the legacy claimed.

APPEAL from *Battle, J.*, Spring Term, 1843, of ROCKINGHAM.

Detinue to recover a slave named Julina. The plaintiff claimed

title under the following clause of the will of Daniel Ellington: "I lend to my daughter Betsy S. Guerant, one negro woman and (367) her increase that she may hereafter have, one negro girl named Jinny, during her life, and after her death I give them and their increase to be equally divided amongst the heirs of her body lawfully begotten." It was admitted by the parties that the slave in controversy is one of the children of a slave by the name of Tabby; that Tabby was the daughter of a woman by the name of Sylvia, and was born between the making of the will and the death of the testator, Daniel Ellington; that the testator owned the woman Sylvia at the time of making his will and up to his death. It was further admitted that the plaintiff is entitled, as one of the children of Betsy S. Guerant, whatever that interest may be, and, if entitled to recover, the suit is properly brought. The defendant admitted possession of the slave, claiming under a purchase at a sale under an execution against Thomas P. Guerant, husband of the said Betsy, which issued in February, 1841. The plaintiff proved that Daniel Ellington made his will at the time it bears date, and died about 1 November, 1813; that his will was proved at Rockingham county court, November Term, 1813, when his executor, John Ellington, qualified, and that the slave Tabby was born on 28 April, 1811. It was also proved that Betsy S. Guerant died in 1838. The defendant insisted that the bequest was void for uncertainty; that the limitation over was too remote, and that the same was barred by a sale of negro slave Tabby, made by the executor, John Ellington, to Thomas P. Guerant, on 20 October, 1814. The plaintiff proposed to show by parol that the negro woman Sylvia, though not named in the will, was the slave intended to pass to Betsy S. Guerant under said testator's will, by showing the condition of the testator's estate at the time of his death. To the introduction of this evidence the defendant objected, but the Court ruled it to be admissible. The plaintiff then introduced as a witness the said Thomas P. Guerant (the Court overruling an objection to his competency), who testified that, with the consent of the executor, he took possession of the negro girl Sylvia, and her child Tabby, a short time after the (368) testator's death, and kept possession of the slave Tabby up to the death of his wife Betsy, in 1838; that he had had possession of Sylvia in the lifetime of the testator, but that he returned her to the testator some two years before his death and received another slave, Violet, mentioned in the will, in her stead; that this was done because Sylvia commenced breeding; that Violet was in his possession at the testator's death, and that Sylvia and her child Tabby were the only slaves owned by the testator at his death, which were not bequeathed by name in his will. This witness, on cross-examination, testified that

it was denied by one of the legatees that he could take the slave Tabby under the will; that whether there was any dispute about her, when he first took possession of her, he did not recollect, or whether he took possession under any special agreement he did not recollect; but he did recollect that his right to this negro Tabby was disputed after he got possession; that after the assent above spoken of he and the executor came to an agreement that he might keep possession of Tabby until the opinion of certain counsel could be had; that considerable time elapsed before the opinion was had; that they, under the advice of counsel, concluded that, to satisfy the other legatees claiming an interest in Tabby, the executor should sell her at public auction; that, before the sale, he came to a private understanding with all the nine legatees except one, Paschal Ellington, that he should have their shares at the sum of ten dollars each that the slave was advertised and he and several persons bid; that the executor bid for him at his request, and the slave was knocked off to him at the sum of $136.50; but it was then mentioned and declared by the executor that he bought for the witness, and the executor so returned it in his account of sales; that this sale was in October, 1814, when the executor also sold some small articles of personal property belonging to the estate; that he, the witness, paid all the legatees, except P. Ellington, ten dollars each, and they gave to the executor their receipts in full for their share of the purchase money; that he also gave a receipt to the executor for his share; (369) but that he paid the amount of the purchase money due to P. Ellington to the executor, $15.16, who paid it and took Paschal's receipt therefor. This witness also proved that after his wife's death he sold Tabby to his son John, one of the tenants in remainder; that he did so, under the belief that he had a right; that John sold her to another, but when the other children put up their claim John got her back and had her divided with the other slaves, the issue of Sylvia. The plaintiff also read the inventory of the executor, in which, among other things, he says "one negro girl named Tabby, in the possession of Thomas P. Guerant, which I have a bond from said Guerant to deliver me the said negro, provided said Tabby does not belong to said Guerant."

For the defendant Paschal Elliott testified that shortly after the testator's death all the legatees were present, when the testator's will was opened; that he disputed Guerant's right to take Tabby under the will; that Guerant took the child Tabby home with the mother Sylvia some time after the testator's death, whether before or after the will was proved he did not recollect, under an agreement with the executor that, if counsel declared he was not entitled to her she was to be returned; that she was sold by the executor at auction in October, 1814;

that several persons bid at the sale, and she was bid off to Guerant; that some time thereafter the executor paid him his share of the purchase money, when he gave him his receipt therefor as for a part of the estate of the testator. He also testified to similar receipts given by the other legatees, including Guerant. The defendant also showed by an account of sales returned by the executor at November Term, 1814, that he had charged himself with the sale of a negro girl at the sum of $136.50, sold to Thomas P. Guerant.

The Court instructed the jury that if they believed all the testimony in this cause, the plaintiff was entitled to recover. There was a verdict for the plaintiff, and judgment being rendered pursuant thereto, the defendant appealed.

Graham and *Kerr* for the plaintiff.
Badger and *Morehead* for the defendant.

GASTON, J. The plaintiff claims the negro in dispute as the issue of a female slave named Tabby, which was born after the making of the will and before the death of Daniel Ellington, and (370) was the child of a negro woman named Sylvia, belonging to the said Daniel. He charges that Tabby, by the will of Daniel Ellington, was bequeathed to his daughter, Betsy S. Guerant, for life, with remainder to her children. The bequest, under which this claim is asserted is in these words: "I lend to my daughter, Betsy S. Guerant, *one negro woman* and her increase that she may *hereafter* have, one negro girl named Jinny, during her life, and after her death, I give *them* and their increase to be equally divided among the heirs of her body." It must be conceded, and indeed it has not been denied upon the argument here, that the words "her increase that she may *hereafter* have" do embrace such increase as might be born after the making of the will and before the death of the testator. *Covington v. McEntire,* 37 N. C., 316. Now such a disposition puts it beyond doubt, that the testator, in his bequest, contemplated to give a particular negro woman, which he *then* owned and the issue which *she thereafter* might have. The legacy is clearly, therefore, on its face a specific legacy. But the testator has not named this negro woman, nor so described her that she can, by that description, be distinguished from any others that he owned. To remove this difficulty the plaintiff was permitted to show that the plaintiff owned no negro but Sylvia, except such were by name given away in the same will to other persons; so that Sylvia was the *only one* which could, without violence to the will, be the subject of this bequest. And it seems to us, that this evidence was properly received. It was not offered to explain, control, alter or add to the dispositions expressed

in the will, but simply to apply those dispositions to the subjects matter thereof, to identify the things therein given. If the testator had owned but the one negro woman, there would have been no ambiguity. (371) But the fact of his owning more raises the ambiguity, and the same kind of testimony which creates, is fit to be used for removing ambiguities.

The position taken on the part of the defendant in the Court below that, under the bequest in question, an absolute estate in the negroes therein mentioned passed to Betsy Guerant, has been here abandoned. According to *Swain v. Rascoe, ante,* 200, she took but an estate for life and her children took the remainder as purchasers.

There is a remaining question. Was the Judge correct in holding that, if the evidence were credited by the jury, there had been in law such an assent on the part of Ellington's executor as to perfect the right of Betsy Guerant's children under the will and entitle the plaintiff to a verdict? This question, we think, is to be answered in the affirmative.

As the law makes the executor, to the amount of the assets, answerable to every person having demands against the testator's estate, it vests in him primarily the property in these assets. A bequest confers indeed a right on the legatee to the thing bequeathed, which is transmissible to his representatives. But until the executor consents that the bequest shall take effect, this right is inchoate, imperfect and liable to forfeiture; and it will not entitle the legatee to the possession of the thing given. If he takes possession without the executor's assent, he makes himself liable to an action of trover or trespass. When the executor assents to the bequest, the legal interest which he had in the thing bequeathed ceases, and upon its ceasing, the entire property, both legal and equitable becomes vested in the legatee. But the consent of the executor operates only to complete and perfect the previous inchoate and imperfect right of the legatee, and when the legatee's right is thus perfected, he derives his legacy from the bounty of the testator, and takes only what was given and such interest therein as was given to him by the testator. The assent of executor is not a conveyance or transfer of his legal interest. It gives no new (372) title to the legatee, and, consequently, as to all that is not given by the will to the legatee, the assent is altogether nugatory. 1 Roper on Leg., 565, 566; *Brunsley v. Grantham,* Plow., 526. Now in this case the evidence is full, that Guerant, the husband of the legatee for life, took the negro woman Sylvia and her child with the consent of the executor; that he held the negro woman with such consent as being unquestionably bequeathed to his wife; and that he held with the same consent the child Tabby, which he claimed as passing under the

same bequest, but under an engagement with the executor to give up the child if it was insisted, on the part of one of the residuary legatees, she did not pass under that bequest. That is, the executor assented to the *bequest,* but would not take upon himself the responsibility of determining between the specific legatees and the residuary legatees, whether under the bequest Tabby passed or not. If she did pass, the specific legatees had his full consent to hold her. Now the most unqualified consent on his part could *in law* amount to no more; and therefore this assent was fully sufficient to perfect whatever inchoate rights were given by that bequest. The executor's legal interest was, by his consent, not to stand in the way of the enjoyment of these rights.

Guerant having thus become the owner of the negro girl during his wife's life, and her children having become the owners of the remaining interest in the said girl, he might, in any mode allowed by law for the the disposition of slaves, have conveyed his temporary estate, either to the executor or any other person; but he could not convey, relinquish, or destroy, by any act of his *their* interest. Upon the death of his wife, notwithstanding any act of his, with or without the concurrence of the executor, whose consent once given could not be retracted, their right to the possession of the slave commenced. But it is manifest upon the case, that no retraction of the executor's assent, nor relinquishment of the rights of the legatee was made or attempted to be made. The formal sale by the executor; the purchase thereat by Guerant, and the settlement by the residuary legatees were all parts of an arrangement which, for aught that appears, was a perfectly honest ar- (373) rangement for buying in the alleged title of these residuary legatees. If Tabby did not pass under the bequest to Betsy Guerant and her children then the title of these legatees was good, and by this mode he would acquire it. If Tabby did pass under that bequest, he paid so much for his peace, and held by his title under that bequest.

PER CURIAM. No error.

Cited: *Johnson v. Arnold,* 47 N. C., 116; *Bivens v. Phifer, Ib.,* 439.

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(374)

THOMAS WEBB *v.* MOSES CHAMBERS.

Where a merchant renders an account to one of his customers, and the latter keeps it without making objection to any of its items, the jury may infer an admission of its correctness and a promise to pay the balance.

APPEAL from *Battle, J.,* Spring Term, 1843, of PERSON.

This was an action of assumpsit brought to recover the amount of a

store account contracted from 1830 to 1833. Pleas, general issues and statute of limitations. On the trial the plaintiff introduced a witness, who proved that on 19 October, 1840, the defendant was at the plaintiff's store, and the parties had a conversation for some time by themselves in relation to the account; when they came into the witness's presence and the defendant, in reply to a proposition of the plaintiff that he should close his account by bond, said he would come up at any day that might be named and settle the account, and would pay it off as soon as he could sell his tobacco; that the defendant then had the account in his hand, but the witness did not see him read it over, nor did he hear it read in the defendant's presence. The plaintiff then introduced a son of the defendant, who testified that his father traded at the plaintiff's store during the years mentioned in the account, but he could not state that any particular article therein mentioned had been purchased by his father. The counsel for the defendant contended that the testimony was not sufficient to prove the account, and that if it were, there was no such acknowledgment or promise to pay as would take the case out of the operation of the statute of limitations. (375) But the Court instructed the jury that if they believed the testimony, they might find for the plaintiff, which they did. Judgment being rendered pursuant to the verdict, the defendant appealed.

Norwood for the plaintiff.
Kerr for the defendant.

RUFFIN, C. J. There can be doubt of the correctness of the opinion given to the jury. It is the ordinary evidence of the justice of a merchant's account, when he renders it to his customer and the latter keeps it without objection to any of its items. Without a denial of it *in toto* or of some part of it, the jury may infer an admission of its correctness and a promise to pay the balance. Upon that part of the case alone, therefore, the Court might have left it to the jury on both points, that is, as proof of the delivery of the articles and of a mere promise to pay. But in addition to those inferences, here the defendant, with the account in his hand, and after perusing it or opportunity of perusing it, expressly promised to settle the account and pay it. A promise could not be more direct or precise, for there was nothing left to uncertainty, as the account fixed the debt, which the defendant agreed to pay.

PER CURIAM. Judgment affirmed.

Cited: Daniel v. Whitfield, 44 N. C., 297.

(376)

JAMES RAINEY *v.* SILAS M. LINK, ADMINISTRATOR OF JOHN TURNER.

Proof that the defendant said at one time "He owed the plaintiff right smart of money," and at another, "he owed him the biggest debt he owed to any person," will not take a case out of the statute of limitations.

APPEAL from *Battle, J.*, Spring Term, 1843, of ORANGE.

Assumpsit to recover the amount of a carpenter's bill, and also the amount of a claim for services rendered defendant's intestate as a doctor. Pleas, the general issue and the statute of limitations. Upon the trial, the testimony introduced by the plaintiff showed that all the items of the plaintiff's demand, amounting to upwards of one hundred dollars, were contracted more than three years before the commencement of the action. In order to repel the bar of the statute of limitations, the plaintiff introduced two witnesses, one of whom, a sister of the intestate, stated that not long before her brother's death and within three years before the suit was brought, she was at his house in company with the plaintiff, who was drunk and behaved very rudely; that, upon the witness making some remark as to the impropriety of the plaintiff's conduct, her brother said he did not care to affront the plaintiff as he, the intestate, "owed him right smart of money." The other witness testified that not long before the intestate's death, and within three years before the commencement of this action, he heard the intestate say, "he owed the plaintiff the biggest debt he owed to any person." By another witness it appeared that he, the witness, had a debt against the intestate at the time of his death of about (377) eighty dollars.

The Court held and instructed the jury that there was not such an acknowledgment by the intestate of the plaintiff's claim as to take it out of the operation of the statute of limitations. The jury returned a verdict in favor of the plaintiff upon the general issue, but against him upon the issue on the statute of limitations. The plaintiff's counsel thereupon moved the Court to set aside the verdict upon the latter issue on account of misdirection, and to enter judgment for the plaintiff for the amount of the verdict in his favor on the first issue, or to grant a new trial. The Court refused the motion, and having rendered judgment for the defendant, the plaintiff appealed.

Graham for the plaintiff.
Norwood for the defendant.

RUFFIN, C. J. Perhaps no undertaking would be more difficult than an attempt to lay down beforehand what words will or will not

amount to a promise, so as to take a case out of the statute of limitations; for the construction will necessarily vary with the infinite variety of expressions that persons may use. But it is our duty to attain a rule upon this subject, as on others, as nearly as may be, that persons may know how to regulate their dealings and come to settlements without resorting to judicial decisions. We have heretofore in *Smallwood v. Smallwood,* 19 N. C., 330, stated our opinion that, although the plaintiff need not declare on the new promise, but may declare on the old one, and give the other in evidence to repel the statute, yet the new promise, in order to have that effect, must be such as might be laid in the declaration as a promise to pay the same debt and to the same extent, as is sought to be recovered in the action as brought. We can conceive no other rule, unless one so very loose as to render the statute nearly inoperative. And we held in that case, that if the de-
(378) fendant's letter were to be considered a promise to pay the plaintiff'c demand, yet the term "demand" was too vague in itself, without some reference to the particular demand meant, its nature or amount, to authorize a recovery, if directly declared on, and therefore inadequate to help out an action on the original consideration. The same reasons apply to the case before us now.

There is no direct promise to pay any debt; but it is an attempt to infer a promise to pay this debt from a mere acknowledgment that the intestate owed the plaintiff some debt, but on what account or to what amount he did not say and we have no means of collecting, nor whether he was willing to pay it. It would be opening the door to every mischief, for which the statute was intended as a remedy, if these loose declarations were allowed to constitute a promise to pay whatever the plaintiff could prove the intestate had owed him at any time and upon any account.

PER CURIAM. No error.

Cited: Sherrod v. Bennett, 30 N. C., 311; *McRae v. Leary,* 46 N. C., 93.

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(379)

DEN EX DEM. JESSE SNELL AND OTHERS *v.* RICHARD YOUNG.

Where, in a deed for land, a life estate only is mentioned in the *premises* and *habendum*, this cannot be enlarged into a fee, either by a warranty in fee or by a covenant for quiet enjoyment to the grantee and his heirs.

APPEAL from *Bailey, J.,* Spring Term, 1843, of HYDE.

The facts of the case, so far as they relate to the point decided in this Court, are sufficiently stated in the opinion of the Judge.

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

DANIEL, J. The lessor of the plaintiff claimed title to the land in dispute under a deed to his grandfather, John Mason, from David Jones, dated in 1793. In the *premises* of the said deed, Jones appears to "bargain, sell, set over and assign unto the said John Mason, a certain tract of land, etc." The words "and his heirs," are not superadded to the name of John Mason. The said words (his heirs) are also wanting in the *habendum* clause of the deed. But the covenant of warranty in the said deed is thus: "I, David Jones, do covenant and agree to and with the said John Mason to warrant and forever defend the aforesaid premises from me, my heirs and assigns unto him the said John Mason, *his heirs* and assigns forever." The words, *heirs of the grantee,* are in no part of the deed, except in the clause of warranty. From what appears in the *premises* and *habendum* of the deed, (380) John Mason had but a life estate in the land. And a life estate is not enlarged into a fee, either by a warranty in fee, or by a covenant for quiet enjoyment to the grantee and his heirs. *Roberts v. Forsythe,* 14 N. C., 26; *Seymour's case,* 10 Co., 97. The ancestor, John Mason, had but a life estate in the land; the lessor of the plaintiff therefore never had any interest in the same which he could lease.

There are several circumstances stated in the case, from which, perhaps, it might be argued that the defendant is estopped to deny the seizure in fee of John Mason. But we do not consider them at all, because the verdict is found subject to the opinion of the Court on certain points, beyond which we have not thought ourselves at liberty to go.

PER CURIAM. Affirmed.

Cited: Armfield v. Walker, 27 N. C., 582; *Register v. Rowell,* 48 N. C., 315; *Gray v. Mathis,* 52 N. C., 504; *Stell v. Barham,* 87 N. C., 67.

(381)

JOHN D. GRAHAM *v.* H. C. HAMILTON AND ANOTHER.

1. A motion to nonsuit a plaintiff for not producing books or papers, according to the provisions of the Rev. Stat., ch. 31, s. 86, cannot be made, unless a previous order of the Court has been obtained for the production of such books or papers.
2. Where it appears there was a written contract showing the nature of the title to certain personal property in dispute, the party wishing to avail himself of that title must produce the written contract, or account satisfactorily for its non-production.

APPEAL from *Dick, J.,* Spring Term, 1843, of LINCOLN.

This was an action of trover, brought to recover the value of a quan-

tity of castings, alleged to have been converted by the defendants to their own use. After the jury were charged with the cause, the defendant's counsel produced a notice, which had been served on the plaintiff, in the following words, to wit: "Mr. John D. Graham, you are hereby notified to produce on the trial of the suit in Lincoln Superior Court, by appeal from the County Court, June Term, 1841, in the case where you are plaintiff and H. C. Hamilton and John Brinkley defendants, to produce the original books, in which the castings, the subject matter of dispute, are charged to Owen Clark. H. C. HAMILTON,
JOHN BRINKLEY."

And enquire of the plaintiff's counsel whether they would produce the plaintiff's books? The plaintiff's counsel refused to produce the books. Whereupon the defendant's counsel moved the Court that the plaintiff be nonsuited. This motion was refused by the Court. The plain-
(382) tiff then introduced one Owen Clark as a witness, and proposed to prove by him that he received the castings as the agent of the plaintiff, for the purpose of taking them to South Carolina to sell. This evidence was objected to by the defendants, who allege there was a written contract between the plaintiff and the witness Clark about the said castings, and that the plaintiff was estopped from giving any parol evidence of the contract between him and Clark. The defendants then produced a letter of which the following is a copy, from the plaintiff to the defendant Hamilton:

"Vesuvius Furnace, N. C., 16 November, 1839.

Mr. Hamilton—Mr. Owen Clark has just informed me the load of castings he started with a few days since was stopped by you. The castings I sent to pay a debt I am bound to Col. John Hoke, $118 and interest, for security to Owen Clark. The money I have promised, without fail, against Lincoln Court. Clark further owes me and my father's estate $120 more. Finding I would have to pay the debt to Col. Hoke, and could not get further indulgence than Lincoln Court, I directed Clark to come and get the castings you stopped on my account, and pay the money over to Hoke as promised. I have a written agreement with Clark as to his property that was sold and the castings I sent with him. Respectfully yours, etc.,
JNO. D. GRAHAM."

The Court overruled this objection of the defendants. Owen Clark was then examined, and swore that he received the castings as the property of the plaintiff, to take to South Carolina and make sale of them, and return the proceeds to the plaintiff. He further proved, that, on his way to South Carolina, the defendants levied on the castings, took

them out of his (witness') possession, and converted them to their own use. The defendants contended that the castings were the property of witness Clark; that the defendant, Hamilton, was a creditor of the said Clark, and that he levied on and sold the castings by virtue of an execution against Clark, which execution was produced in Court. The other defendant was the officer who levied the execution. (383) The defendants introduced several witnesses to establish the fact that the property in the castings belonged to Clark. The Court instructed the jury that, if they believed Clark, the plaintiff was entitled to recover the value of the castings. Whether they would believe him or not under all the circumstances, was for them to decide. The jury found a verdict for the plaintiff, and a new trial being refused and judgment rendered pursuant to the verdict, the defendant appealed.

Osborne and *Boyden* for the plaintiff.
Alexander and *Hoke* for the defendant.

DANIEL, J. *First,* the defendant moved to nonsuit the plaintiff, because he did not produce his books in Court on the trial, pursuant to the notice given him. Without now deciding whether the act of Assembly, Rev. Stat., ch. 31, sec. 86, extends to books of the description mentioned in this notice, we nevertheless think that the plaintiff should not have been nonsuited. Before the defendant could legally move for a nonsuit, he should, at some previous stage of the proceedings, have obtained an *order* of the Court for the plaintiff to produce the books on the trial; no such order had even been obtained. The act says that, if the plaintiff shall fail to comply with such *"order"* to produce the books, he may be nonsuited.

But on the second question, it seems to us the Judge erred. The goods were in the possession of Clark, and *prima facie* he was the legal owner. The plaintiff had afterwards written a letter to Hamilton claiming the property, in which letter he says, "I have a written agreement with Clark as to his property that was sold, *and the castings I sent with him.*" It therefore appears by the plaintiff's own acknowledgment, according to the grammatical, and, as we think, obvious meaning of the letter, that he had an agreement in writing with Clark, as to (384) the castings sent with him. The title to this property was to decide the action; the written agreement was better evidence of the title than the parol testimony of Clark, and the plaintiff, we think, should have been compelled to produce it, unless he had shown by satisfactory evidence that the written agreement did not extend thereto, or was not in existence or in his power.

PER CURIAM. New trial.

Cited: McDonald v. Carson, 95 N. C., 384.

(385)

DEN EX DEM. HENRY A. SHULTZ AND WIFE *v.* ROBERT YOUNG.

Where part of the description of the boundary of a tract of land, contained in a grant, was from a certain point "South with A. B.'s line 310 poles to C. D.'s old corner," and A. B.'s line did not reach C. D.'s corner nor run in the direction towards it, but at the expiration of the 310 poles on A. B.'s line you had to run nearly at right angles to arrive at C. D.'s corner. *Held*, that you must run on A. B.'s line 310 poles, and then a straight line to C. D.'s corner, as by so doing you would best conform to the whole description of the deed, though you would run *two* lines instead of *one* called for.

APPEAL from *Battle, J.*, Spring Term, 1843, of STOKES.

This was an action of ejectment, in which the plaintiff claimed title under a grant, showing mesne conveyances to himself, and proving the defendant to be in possession of the land claimed. Upon the trial, a question arose respecting the construction of the description of the land contained in the grant. The grant, after setting forth several lines, concerning which there was no dispute, called for "the northwest corner of Richard Goode's tract," and then proceeded thus: "thence south with Richard Goode's line 310 poles to Thomas Goode's old corner, thence west in said line to the beginning." All these termini, "the northwest corner of Richard Goode's tract," "Thomas Goode's old corner," and the beginning of the grant were admitted. It was insisted on the part of the defendant, that, in construction of law, the line of the grant from the northwest corner of Richard Goode's tract to Thomas Goode's old corner was a straight line, although such straight line departed
(386) from Richard Goode's line, and ran a different course and distance from those mentioned in the grant. On the part of the plaintiff it was insisted that, in construction of law, the line of the grant pursued Richard Goode's line south 310 poles, and then turned directly to the next terminus, "Thomas Goode's old corner," although, in so doing, it diverged at the end of 310 poles nearly at a right angle, and thus formed two lines instead of one. His Honor left it to the jury, as a question of fact, whether the line of Richard Goode did run from the northwest corner of the tract south 310 poles as called for in the grant, and instructed the jury, if they so found upon the proofs, they should extend the line of the grant as contended for by the plaintiff. The jury found a verdict for the plaintiff, and a judgment being rendered pursuant to the verdict, the defendant appealed.

Morehead for the plaintiff.
Boyden for the defendant.

GASTON, J. *Prima facie* a call in a grant for one *terminus* to another is understood to mean a direct line from the former to the latter point.

But assuredly there may be accompanying words of description, which will indicate that the line is not to be a direct line. Thus it is of ordinary occurrence that, when the call is with a river or creek from one *terminus* to another, the river or creek, however crooked its direction or numerous its courses, if it will carry you to the proposed *terminus*, must be followed throughout. Nor could there be any difficulty in holding that, if the call were for a county line or the line of another tract, or a marked line, such line, however sinuous or indirect, if it ended at the *terminus* called for must be faithfully followed. In these cases, and cases like these, the whole of the description of the thing granted is *obviously* consistent, and every part of it by this construction receives its *full* effect. You go from one *terminus* to another, and you go by the guide which you are directed to follow. But when the *terminus* cannot be reached *merely* by following the mode pointed out in (387) the description, the question occurs, shall this mode be wholly disregarded, or shall it be observed so far as it is represented as leading to the *terminus* and *then* to be relinquished for a direct line to the *terminus?* Herein it appears that the law distinguishes between the degrees of certainty, which different descriptions hold forth. If the description be one by course and distance only, it is clear that such description is disregarded, and the line is in law a direct line from one point to the other. But if it be by a permanent natural boundary, then the description is regarded as sufficiently certain to require that it should be respected, and the line must pursue that description so far as it conducts towards the *terminus*. This is fully established in *Sandifer v. Foster*, 2 N. C., 237, which is always referred to as a leading authority on questions of boundary.

Now, independently of the peculiar respect which natural boundaries command with us, this decision is proper on general principles. By following the line referred to in the description, so far as it leads towards the *terminus* or is expressly directed, the call for the *terminus* is not disregarded. The *terminus* is still reached, though not reached by the direct line, which would have been presumed to be intended, had that call been the only description. But by running a direct line to the *terminus*, a part of the description, which is perfectly intelligible, and which was assuredly designed to aid in ascertaining the thing granted, is wholly rejected. It is a leading rule in the construction of all instruments, that effect should be given to every part thereof; and in expounding the descriptions in a deed or grant of the subject matter thereof, they ought all to be reconciled, if possible, and so far as possible. If they cannot stand together, and one indicate the thing granted with superior certainty, the other may be disregarded as a mistaken reference. But so long and so far as they may stand together, each of them may be

considered as declaring the intent of the parties. When, indeed, the description accompanying a *terminus* is, "running with a line"
(388) of another deed or tract, such description is ordinarily less certain than where it refers to a natural object. The latter is usually notorious, and can seldom, therefore, be mistaken; while the former may not be well known, and is consequently sometimes misapprehended. But in fact the lines of other tracts *may* be as notorious and certain as any natural objects, and by making one of these lines a part of the description of the thing granted, the parties represent it as a known line by which the certainty of the thing granted is defined. It seems to us, therefore, that such a description as a guide for reaching a *terminus,* ought equally to be respected with one referring to natural objects, if the line described can be ascertained to have been then well known—and that it ought never to be disregarded altogether, unless there be reason to believe that it was misapprehended by the parties.

In this case there was no reason for such belief, unless it were that the line described did not *directly* reach the *terminus;* and to hold this a sufficient reason were to decide that the call for the *terminus* overruled the rest of the description. On the contrary there were manifest and strong reasons for believing that this line was well known to the parties. The *terminus,* described in the grant as the northwest corner of the Richard Goode tract, is admitted to be the true northwest corner of that grant; and the call "thence south with the line of the tract 310 poles," corresponds with the course and distance of the line of the tract, which runs from that northwest corner. The jury have found that the line was where the parties to the grant called for it, and this must exclude the inference that they called for it by mistake.

PER CURIAM. No error.

Cited: Long v. Long, 73 N. C., 371; *Allen v. Sallinger,* 108 N. C., 161; *Buckner v. Anderson,* 111 N. C., 575; *Brown v. House,* 116 N. C., 869; *Deaver v. Jones,* 119 N. C., 599; *Tucker v. Satterthwaite,* 123 N. C., 530; *Bowen v. Lumber Co.,* 153 N. C., 371.

(389)

DEN EX DEM. ALEXANDER BROOKS *v.* SIDNEY BROOKS.

The guardian of a lunatic cannot bring an action of ejectment, nor any other action at law, in his own name, though the guardian of an infant may.

APPEAL from *Settle, J.,* Spring Term, 1843, of STANLY.

In this action of ejectment, in which the demise was laid from Alexander Brooks, the defendant pleaded specially her coverture and not guilty.

The plaintiff regularly deduced a title to the land in dispute to Ezekiel Brooks. He then offered in evidence the inquest of a jury in 1818 finding the said Ezekiel Brooks an idiot, and also another inquest of a jury taken in 1836, finding the said Ezekiel Brooks an idiot from his nativity. He also showed the record of the appointment of Alexander Brooks, the lessor of the plaintiff, to be guardian of the said Ezekiel by the County Court of Montgomery, in 1836. It was admitted that the defendant was in possession of the land in controversy, and had been for twenty years and more, claiming as the wife of Ezekiel Brooks, to whom she was married about 1820. The plaintiff introduced several witnesses to prove that Ezekiel Brooks, at the time of the alleged marriage with the defendant, was, from mental imbecility, incapable of entering into the marriage contract. The defendant introduced on her part witnesses to prove that, at the time of the alleged marriage and for several years thereafter, the said Ezekiel had sufficient capacity to contract marriage —and she also proved her marriage with him.

The defendant's counsel then moved the Court to instruct the jury, 1st, that if they were satisfied from the evidence that (390) Ezekiel Brooks had mental capacity to enter in the marriage contract with the defendant, then the plaintiff could not recover in this action; 2dly, that the plaintiff could not recover in this action upon the demise laid in the declaration in the name of Alexander Brooks individually, and not as guardian—for the demise should have been laid in the name of Ezekiel Brooks, by his guardian, Alexander Brooks, or in the name of Alexander Brooks as guardian of Ezekiel Brooks; 3dly, that the plaintiff could not recover in this action, admitting the demise to be laid correctly, or to have been laid in the name of the ward by his guardian, or in the name of the lessor of the plaintiff as guardian, against the wife of the ward. These questions of law were reserved by the Court. Under the charge of the Judge as to the alleged insanity at the time of the marriage, the jury found a verdict for the defendant. It was agreed by the counsel on both sides, that Ezekiel Brooks was of nonsane memory at the last finding of the jury of inquest in 1836, and that Alexander Brooks, the lessor of the plaintiff, was appointed his guardian and has continued so ever since. Upon the question of law reserved, the Court, being of opinion that the plaintiff could not sustain this action upon the demise of Alexander Brooks individually, rendered judgment for the defendant, from which the plaintiff appealed.

Winston for the plaintiff.
Alexander and *Iredell* for the defendant.

RUFFIN, C. J. The Court could not help being struck with the novelty of this proceeding, which seems to be an attempt to try the validity of

the defendant's marriage in this ejectment, and appears to us not an appropriate method of doing so. On the one hand it is substantially a suit at law by the husband against the wife. If, on the other hand, the defendant supposed that as the wife of the lunatic she had a right to continue her residence on the land in opposition to the guardian's
(391) disposition of the premises, she is mistaken. It is true, as we think, that the wife and children of a lunatic are entitled to maintenance out of the estate, according to their circumstances, after providing properly for the lunatic. The statute *de prerogativa regis,* 17 Ed. II, ch. 10, which provides that lunatics "and their households" shall live and be maintained competently from the issues of their estates, has not indeed been reënacted here; and for that reason our Courts may not be authorized to extend the allowance to collateral relations, or to advancements to married children, as is done in England. *In re Cotton* and *in re Hinde,* 2 Mer., 99. But the wife and children, constituting the lunatic's family and household, are entitled to maintenance, upon the principle that the lunatic is bound in law to provide for those persons, and, therefore, it is a fair charge on the income of the property. Yet it will not do for those persons to assert their claims in this way. A reasonable allowance by the guardian would no doubt be sanctioned by the Court. But it would be safest for one of the parties to apply, in the first instance, by petition to the Court of Equity for an order. It seems, however, anomalous and needless—if it can be done—to institute a suit at law against the lunatic's wife and household, in order to let the committee into the management of the estate. A more direct and less expensive mode seems to be, to apply to the chancellor on petition to make an order on those persons, not to injure the estate nor obstruct the committee in the execution of his duties; for a breach of which they will incur a contempt. *In re Hallock,* 7 John., ch. Ca., 24. But we do not pursue the subject further; for whether ejectment can be maintained against the lunatic's wife, or, if not, whether the defendant presented that point in the proper manner, need not be decided in this case; since, upon another point, the opinion of the Court is decisively against the action.

The action is brought on the demise of the guardian; and, upon a point reserved as to the propriety of such a demise, the Court held that it could not be maintained, and gave judgment for the defendant.
(392) Of that opinion is this Court also; not that it makes any difference whether Alexander Brooks is or is not named in his style a guardian, but that he cannot in either manner make a demise to try title in ejectment. That this was so at the common law, was admitted in the argument. The reason is that the demise in ejectment must be made by the person who has the estate and could enter to make the lease; for,

originally, the lease was made on the premises, and yet the question on the trial is as to his right to enter and there make the lease. But the committee of a lunatic had not the right of entry, as an estate in the land, nor any interest therein, nor any power over it, except as the mere bailiff of the sovereign, acting under the directions and control of the chancellor, and dischargeable at his pleasure. And even if the chancellor made an order, under which the committee leased, the legal title did not pass. These doctrines are stated in *Knife v. Palmer,* 2 Wils., 130; and their correctness is unquestionable. The inconveniences resulting from this state of the law produced in England several statutes, 43 Geo. III, ch. 75, and others subsequently, to give the chancellor power to order committees to make leases, and making the leases, when executed, valid conveyances at law. But it is obvious that under these statutes the nature of the office and rights of the committee in the estate are not altered. He still has the management of the estate barely, with *a power* to make leases in certain cases. But nobody supposes that a power to lease enables one, who has the power, to bring ejectment for the land. The power is not the legal title, though, when executed, it passes that title; but the person taking the conveyance does not derive title under him who executed the power, but under him who created it, as is exemplified in conveyances under a letter of attorney. Therefore, at this day in England, the committee cannot maintain ejectment on his own demise, although his lease, actually made under the direction of the chancellor, there passes the legal estate to the lessee.

The same law, we think, holds here; and this is necessarily (393) so unless it has been altered by statute. On the part of the plaintiff it has been contended that the law has been changed on this point by ch. 54, and ch 57, Revised Statutes. That on "Guardian and Ward," ch. 54, sec. 9, requires the guardian of an infant to take into possession the estate of his ward, and enacts "that he may bring such actions in relation thereto as by law a guardian in common socage might do." Upon this we admit that a guardian under the statute may bring ejectment on his own demise; because it is well known that a guardian in socage could. But it does not follow that this statute means that an orphan's guardian may bring ejectment upon a mere authority and without an interest in the land; but, on the contrary, it imports that the necessary estate is given to the guardian under the statute to maintain the action, as at common law the guardian in socage had. Then follows the act concerning "Idiots and Lunatics," ch. 57, which, after authorizing the County Courts to appoint guardians, enacts that "such guardians shall continue during the pleasure of the Court, and shall have the same powers to all intents and purposes, as guardians of orphans." Upon this it was urged that the guardian of a lunatic acquires

the estate, as far as is necessary to bring ejectment, inasmuch as the guardian of an infant has it. But the Court cannot accede to that inference. The act in its terms does not confer on a lunatic's guardian "the estate" or "interest" of an infant's guardian, but only the same powers; and we do not feel authorized to introduce so material an alteration in the *rights* of persons without a plain legislative direction. There is not only none such, but there seem several reasons tending to show that no such change was intended. In the first place, the office, as at common law, is during the pleasure of the Court, and not during lunacy, nor even during good behavior; which indicates that he was still regarded but as the bailiff. Again, no useful purpose is answered by such a change in the law. We have no doubt but that the act gives the guardian the *power* to make leases, without the previous sanction
(394) of the Court, and that such leases are valid as legal instruments.

That, we suppose, was the principal object of the act, together with vesting the power of appointment in the County Court, inasmuch as the terms of the Court of Equity rendered it impossible to obtain the requisite orders in every case, in which prompt action would be useful. Therefore this power was proper. But why should the law confer on the guardian an estate? It was intimated in the argument, that it was proper for the preservation of the estate, inasmuch as the action of ejectment cannot be maintained upon the demise of the lunatic himself, for want of capacity to make a lease. But, of necessity, if the action cannot be brought on the demise of the committee, it must lie on that of the infant; else the estate would be open to all intruders, who would be dispunishable. And there is no incongruity in allowing the demise by the lunatic. In him is the estate; and the action being fictitious and designed to try the title, it may be so moulded by the Court as to make it answer that purpose. Therefore an actual lease to the plaintiff in ejectment is not requisite; but one is supposed, if the person, by whom it is alleged to have been made, had the right and estate necessary to make it, and, when supposed the lease, the capacity also is supposed. For it is the right to make it, and not the fact whether it was made, that is in issue. But, in truth, it has long been held, that in no case can the committee maintain an action at law in its own name, but that "such action must be brought in the name of the *non compos,* whether it be trespass, ejectment, covenant, or of any other kind." Shelford on Lunacy, 395, and the authorities there cited.

PER CURIAM. Affirmed.

Cited: In re Latham, 39 N. C., 235; *Green v. Kornegay,* 49 N. C., 69; *Setzer v. Setzer,* 97 N. C., 255; *Smith v. Smith,* 108 N. C., 372; *Lemly v. Ellis,* 146 N. C., 223.

(395)

THOMAS GARRETT, ADMINISTRATOR, &c., *v.* HENRY M. SHAW.

Where a justice of the peace has jurisdiction of the principal question, as on a contract to pay for certain articles, he also has the jurisdiction to determine every incidental question, as for instance, whether the condition upon which the contract was to be executed has been performed.

APPEAL from *Pearson, J.*, Spring Term, 1843, of CAMDEN.

This action was commenced by warrant before a single justice of the peace. The proof was that, in 1841, the plaintiff's intestate had got out a number of juniper rails in a certain swamp—that an action of trespass Q. C. F., in the name of the defendant Shaw (who was not in actual possession but claimed title), as plaintiff, against the present plaintiff's intestate was then pending, in which the plea of *liberum tenementum* was relied on; that, pending this action and while the intestate was engaged in carrying the rails out of the swamp to the landing, the defendant came and insisted upon taking the rails, which the intestate permitted him to do, upon his promising to pay for the rails unless the swamp was his; that the rails taken were worth about $20. The plaintiff also proved that at the same time an action of trespass q. c. f. in the name of Shaw against one Jesse Dailey, for getting rails in another part of the same swamp, which Shaw alleged was also covered by his title, was pending, in which the plea of *liberum tenementum* was relied on; that the intestate and Shaw agreed that, in case Dailey's suit was carried to the Superior Court, as both cases depended upon the same question, to wit, the title of Shaw to the swamp, the suit against the intestate should abide the event of (396) that against Dailey: if Shaw recovered against Dailey, the intestate was to pay for the trespass he had committed; but if Dailey was successful, then Shaw was to dismiss the case against the intestate. At Fall Term, 1841, of the Superior Court, the action against Dailey was tried, and there was a verdict and judgment in favor of Dailey. Soon after the decision of that case, the warrant was issued, after which, at the next term of the County Court, Shaw submitted to a nonsuit in the case against the plaintiff's intestate. The plaintiff also proved that, upon the trial of the case against Dailey, the fact of cutting the timber was admitted, and the only question submitted to the jury and decided was the title of Shaw to the Swamp. This evidence was objected to by the defendant, but admitted by the Court. The defendant's counsel insisted, 1st, that the justice had jurisdiction; 2dly, that there was not sufficient evidence that the swamp did not belong to the defendant. The Court was of opinion that the justice had jurisdiction. A promise to pay the value of certain rails was within the jurisdiction, and the condition did not have the effect to take away the jurisdiction. A jurisdiction

over the principal implied a right to try all the incidental qualities. The Court was also of opinion that, supposing it was for the plaintiff to show that the swamp did not belong to Shaw, instead of Shaw's being required to show affirmatively that the swamp was his, so as to defeat the promise by the condition, still the verdict and judgment in the case against Dailey, explained and connected with the question of Shaw's title, as between the parties to this suit, as it was by the evidence, was at least *prima facie* evidence that the swamp did not belong to Shaw, and, in the absence of any proof of title by Shaw, the Jury should find for the plaintiff upon the promise proved. There was a verdict for the plaintiff, and judgment being rendered pursuant thereto, the defendant appealed.

No counsel for the plaintiff.
Kinney for the defendant.

(397) DANIEL, J. The Judge below was of opinion that the justice of the peace had jurisdiction in this case, and we are of the same opinion. He has jurisdiction for a balance due on any special contract, and for goods sold and delivered. Rev. Stat., ch. 62, sec. 6. But it is said that these goods were to be paid for upon a condition, and a justice cannot determine a case of this description, because it may involve the question of the title to land. We think that he can, because, by the act of Assembly, he has jurisdiction of the principal question, namely, the special agreement to pay for the rails, and that necessarily involves the jurisdiction of determining every *incidental question. Secondly,* the plaintiff proved by a witness that, upon the trial of the suit against Dailey, the fact of the cutting of the timber was admitted, and that the only question submitted to the jury and decided was the title of Shaw to the swamp. This evidence was objected to by the defendant, but admitted by the Court. The objection really has no force, except that the evidence was superfluous in further establishing what the record had already. *Thirdly,* the defendant objected that the warrant was brought too soon, being before he had dismissed his suit. But the answer is that the question upon which the plaintiff's right depended, had been decided which was the title to the land as determined in the suit against Dailey.

PER CURIAM. No error.

Cited: Hardee v. Williams, 65 N. C., 60; *Lutz v. Thompson,* 87 N. C., 337; *Bell v. Howerton,* 111 N. C., 73.

(398)

THE STATE *v.* HENRY HILL AND OTHERS.

1. A Sheriff has no right to take a recognizance to keep the peace from any person, arrested by him for a breach of the peace, or committed to his custody by a Court for want of sureties for keeping the peace.
2. A Sheriff or other officer, when he arrests, as he has a right to do, for a breach of the peace, or to prevent a breach of the peace, can only carry the offender before a judge or justice of the peace, who may commit or bail him, as if he had been arrested on a warrant.
3. Regularly if a person be committed by a Court for want of sureties to keep the peace, and he afterwards become able to give them, he should be taken by *habeas corpus* before a judge, for the purpose of entering into recognizance. But in our practice the Court generally, by consent of the prosecuting officer, entrusts the power of taking the cognizance to a justice of the peace.

APPEAL from *Bailey, J.*, Spring Term, 1843, of CRAVEN.

The case was a *scire facias* upon a recognizance, and the following facts appeared in evidence: The defendant, Henry Hill, had been committed to the common jail of Craven County upon a charge of assaulting and beating his wife, in consequence of his inability to give security for his good behavior and appearance at May Term, 1841, of Craven County Court. At that term, the sheriff brought the body of the said Hill into Court, and it was "ordered by the Court that the said Henry Hill enter into recognizance in the sum of $1,000, with sureties in the sum of $1,000, for his keeping the peace towards all the citizens, and particularly towards his wife Catherine for 12 months, and for his appearance before the Court at the next May Term, 1842," and the said Henry Hill, in default of such surety, was committed to the custody of the sheriff. And afterwards, to wit, at August Term, (399) 1841, of the said Court, John B. Dawson, Sheriff of Craven County, returned into Court the following recognizance, to wit:

State of North Carolina—Craven County.

Be it remembered, that on 26 May, 1841, personally were present before me, John B. Dawson, Sheriff of the county aforesaid, Henry Hill, Abner Hartley and James Roach, who acknowledge themselves held and firmly bound to the State of North Carolina in the following sums, to wit, the said Henry Hill in the sum of one thousand dollars, and the said Abner Hartley and James Roach, in the sum of five hundred dollars each, to be levied out of their respective goods and chattels, lands and tenements.

The condition of the above recognizance is such, that if the above bounden Henry Hill shall keep the peace towards all good citizens of North Carolina, and particularly towards Catherine Hill, and shall make his personal appearance before the Court to be held for this county

on the second Monday of May, 1842, and shall not depart the Court without leave had and obtained, then the above recognizance to be void; otherwise to remain in full force and virtue.

JOHN B. DAWSON, Sheriff. (Seal.)

A breach of the said recognizance was suggested in this, that the defendant, Henry Hill had, within the twelve months for which the said recognizance was given, been guilty of an assault and battery on one Catharine Hill, and failed to appear at Court according to the recognizance. Thereupon a *scire facias* was ordered to issue upon the recognizance; and, upon the return of the *scire facias,* the said defendants, Hartley and Roach (the defendant Hill having left the State), pleaded *"nul tiel record,"* upon which issue was taken by the State. It was admitted by the defendants, that there had been a breach of the recognizance, as suggested in the *scire facias,* but they contended that there was no such record; that the County Court could not confer any power on the
(400) sheriff to take a recognizance, and that the sheriff could not, *virtute officii* or otherwise, take such a recognizance.

The Court thereupon rendered judgment for the defendants, from which the State, by its solicitor appealed to the Supreme Court.

Attorney-General for the State.
J. H. Bryan for the defendants.

RUFFIN, C. J. The single question in the case is whether, when a person is committed to the custody of the sheriff by a Court, for want of sureties for keeping the peace, that officer can in vacation take security by recognizance acknowledged before him. Upon this question I was led to express the inclination of my mind in the negative, in *S. v. Mills,* 13 N. C., 555, when I mentioned some of the reasons which influenced my opinion. Those reasons have lost none of their force by further enquiry and reflection; and my brethren direct me to say that they concur in them and the conclusion. We cannot learn that the sheriff ever took recognizances or let persons to bail in this State before the act of 1797; nor, since that act, but in the case of one in custody under a capias on indictment found. There are many reasons why he should not, and why the power, which is a judicial function, should be exercised by judicial officers alone. It is true, the sheriff is a conservator of the peace, but that does not authorize him to require security for the peace nor to take the recognizance, for a constable is likewise a conservator of the peace, and no one supposes that officer can take the acknowledgment of a recognizance. Both the sheriff and constable have authority to arrest for a breach of the peace or to prevent a breach of the peace; but neither can commit the offender, or do more than carry him for

examination before a judge or justice of the peace, who may commit or bail, as if the arrest had been on a warrant. Regularly, (401) if a person be committed by a Court for want of sureties to keep the peace, and he becomes able to give them, he should be taken before a Judge on *habeas corpus,* who would take the recognizance and discharge him. But as that may often be attended with delays and much expense, a practice has grown up, for the ease of the citizens, to obtain an order of the Court, by the consent of the prosecuting officer, that the recognizance may be entered into, in a sum specified, before one or more justices of the peace. But in acting under that authority, those officers assume not a power, as far as respects the taking of the recognizance, which they did not possess *virtute officii.* What they have no right to do is to let at large a person committed by a Court of record; and it is for the purpose of preventing a discharge by them from being an escape, that the previous order of the Court, authorizing such discharge, is necessary. But this has no application to the case of a sheriff, who has not the power, under any circumstances, to take a recognizance, unless in the particular case authorized by the act of 1797.

PER CURIAM. Affirmed.

Cited: *S. v. Edney,* 60 N. C., 468.

(402)

ROBERT J. SAUNDERS *v.* NATHANIEL HATHAWAY.

1. Although the County Courts, in authorizing the erection of toll bridges, are required to *lay* uniform tolls, yet the owner of a toll bridge is not obliged to *collect* the same toll from every person. He may levy what he chooses from each person, keeping within the rates prescribed by the Court, or relinquish it altogether.
2. The County Court of Perquimans has the same power, under the private act of Assembly of 1838, c. 11, in relation to the toll bridge over Perquimans river, at the town of Hertford, which by that act they were authorized to purchase.

APPEAL from *Pearson, J.,* Spring Term, 1843, of PERQUIMANS.

This suit was commenced by warrant for $9.05, the amount of toll for passing a bridge over Perquimans river, at the town of Hertford. The defendant admitted that he had crossed the bridge as alleged, and that the usual rate of toll amounted to the sum sued for, and put his defense on the ground that, as the plaintiff did not take toll from any citizen of Perquimans, he had no right to exact toll from him, he being a citizen of Chowan County. It was admitted that the Perquimans River at Hertford was a rapid and wide stream, within the meaning of the act of 1784, one over which it would have been too burdensome for

the county of Perquimans to have erected a bridge, a free bridge. It appeared that in 1797 the County Court, in pursuance of the act of 1784, had made a contract with one Newby and Clary to build a toll bridge, had fixed the rates of toll, and granted the revenue arising therefrom to the said Newby and Clary, and their representatives, for 99 years; that in 1799, and for several successive years, the County
(403) Court of Perquimans made a bargain with Newby and Clary to permit all citizens of that county to pass toll free on public days, for a fixed annual sum; that under a private act of Assembly passed in 1838, the Justices of the County Court had bought the bridge at the price of $5,700, and the Justices held it as trustees for the people of the county; that the Justices had, from year to year since the purchase, leased the bridge to the plaintiff with the privilege of charging toll to all persons, except the citizens of Perquimans County and ministers of the gospel, who were to be permitted to pass toll free. The defendant's counsel relied on the proviso of the act of 1784, that such toll should be general to all persons, and no one to be exempt therefrom, and insisted that the county, having become the owners of the bridge, with power to exact or remit the usual lawful toll, had no power to lease to the plaintiff, making such an invidious distinction in favor of the citizens of Perquimans. The Court was of opinion that, by the law in reference to bridges, water courses are divided into three classes: 1st, the small ones are to be bridged, if necessary, by the overseer of the road; 2dly, those of a larger size to be bridged out of the funds of the county; 3dly, those of the largest size are to have ferries, or toll bridges, under the act of 1784. On the first two classes, the citizens of the State have a right to expect to pass with safety and convenience free of toll. On the third class, they have no right to expect to pass toll free. The proviso in the act of 1784 making the toll general, was intended to prevent the County Court from being tempted to include in the third class a water course of the second class, by being at liberty to make a stipulation with the contractor to let the citizens of the county pass toll free, and from being tempted to grant the revenue of the tolls for a longer time for the like consideration. After the contract was made, the tolls fixed and the bridge built, the contractors might let any one pass toll free, or might take a certain yearly sum in lieu of the tolls arising from any class of persons or the citizens of any particular county, without violating the proviso in the act of 1784. The purchase by the County Court
(404) in 1838, operated to vest in the Justices, as the successors of the original contractors, all their rights for the unexpired term of 99 years; and the Justices had a right to lease to the plaintiff for a larger sum with the privilege of exacting toll from all persons, or for a less sum without the privilege of exacting toll from the citizens of Per-

quimans or ministers of the gospel, but of all other persons, without violating the act of Assembly, and without being liable to the imputation from the citizens of other counties, who had no right to expect to pass the bridge toll free at least till the end of 99 years, of making a distinction in favor of the citizens of Perquimans, who had been taxed $5,700, the price given, in lieu of all toll which they would otherwise have had to pay. The jury found a verdict for the plaintiff, and judgment having been given accordingly, the defendant appealed.

No counsel for the plaintiff.
Kinney for the defendant.

RUFFIN, C. J. We think no serious doubt can be raised of the plaintiff's right to recover. Although the Legislature does not allow the County Court to build a toll bridge, nor to authorize a private person to build one and collect thereat unequal tolls from different persons; but, for obvious reasons, requiring the Court to *lay* uniform tolls: yet it is clear that the builder of the bridge is not obliged to *collect* the same toll from every person. None of the reasons for laying such a toll apply to its collection. It is granted to the builder as his compensation. It is for his benefit and is his property; and, consequently, he may levy what he likes for each person, within the rates fixed by the Court, or relinquish it altogether. As applied to a bridge, remaining private property, these positions were not disputed at the bar. But it was (405) said that, upon a purchase by the County Court, the bridge becomes free for all persons, as there is no difference between building a bridge and buying one already built; and it was pressed upon the Court that there would be danger of evading the act of 1784 (Rev. Stat., ch. 104, sec. 26), if the Court might grant the franchises to an individual, and then buy him out, with a view to the tolls as a revenue to the county, raised at the expense of passengers from other counties. But there is no color for the imputation of collusion in this case; for the bridge was held as private property for upwards of forty years, and was then purchased by the county under the sanction of the Legislature. In the next place it may be admitted that, under the act of 1784, upon a purchase by the public, the bridge is made public and free, yet in this case the parties did not trust to that act, but procured a special one to be passed to obviate that provision of the general law. The private act of 1838, ch. 11, confers on a majority of the justices of the County Court of Perquimans, power to purchase this bridge "for the benefit of the county," and to receive a conveyance for and "hold it as trustees for the county, and to exact or remit the usual lawful toll for passing thereof, as to them may seem most conducive of the benefit of the people of said

county," and then the justices are required to keep the bridge in repair, and in default thereof, are made liable, as other owners of toll bridges, to be sued for damages sustained by any person. It is evident that the object of this act was to enable the justices to purchase and hold this as a toll bridge. Without any act they could, by a mere purchase, have opened the bridge freely to the public; and it was the purpose of the Legislature to prevent the purchase from having that effect, and to vest the bridge in the justices as legal owners, without therein changing it from a toll to a free bridge. By virtue of their ownership, the justices, without restraining words in the act, could, of course, collect or not collect the tolls from any individuals or classes in their pleasure. (406) There is no such restriction upon their rights as general owners; but, on the contrary, the language, when applied to one who is the owner of the bridge, imports the utmost latitude of discretion and power to "exact or remit the toll." Whether, therefore, we advert to the rights of ownership, or to the authority conferred on the justices by the act of 1838, to collect or remit tolls, we conclude that they could lease to the plaintiff upon an agreement, that he should not demand toll from certain persons and might from all others.

PER CURIAM. Affirmed.

Cited: Carrow v. Toll Bridge Co., 61 N. C., 121; *Barrington v. Ferry Co.*, 69 N. C., 170, 171.

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(407)

THOMAS McLIN *v.* JOHN H. HARDIE.

A Sheriff, to whom a writ has been delivered, but who goes out of office before the return day of the writ, has no power to make a return on it, and therefore is not subject to an amercement for not doing so.

This case originated in this Court. An execution having issued from June Term, 1840, at the instance of *Thomas McLin v. Robert McNamara,* Adm'r, etc., on a decree in a suit in Equity, 36 N. C., 75, and no return being made at December Term, 1840, on motion an order was made, as recited in the following *scire facias,* and the *scire facias* directed to be issued, as follows:

THE STATE OF NORTH CAROLINA.

To the Sheriff of Rowan County, GREETING:

Whereas, at the present term of the Supreme Court, begun and held in the city of Raleigh, on the last Monday in December, 1840, it has been made to appear to the Court that John H. Hardie, late sheriff of

the county Rowan, has failed to make return of a writ of *fieri facias* issued from the office of the clerk of said court, bearing date the 2d Monday in June, 1840, directed to the sheriff of Rowan County, and returnable to the present term, at the instance of Thomas McLin against Robert McNamara, administrator of Stephen L. Ferrand; and whereas, on motion, it was considered by the Court that the said John H. Hardie be amerced in the sum of $1,000 *nisi.* These are therefore to command, that you make known to the said John H. Hardie, that he appear before the judges of the said court, at the city of Raleigh, on the second Monday of June next, then and there to show cause, if any he has, why the aforesaid judgment should not be made ab- (408) solute. Herein fail not, etc. Tested the last Monday of December, 1840, and signed by the clerk.

On the return day of the *scire facias,* the defendant appeared and entered the following pleas:

JOHN HARDIE, Administrator THOMAS McLIN:

And the said John, by David F. Caldwell and John H. Bryan, his attorneys, comes and defends the wrong and injury, when, etc., and says that there is not any record of the said supposed judgment in the said *scire facias* mentioned, remaining in the said Court here in manner and form as the said Thomas hath above in his said *scire facias* alleged, and he the said John is ready to verify, whereupon he prays judgment if the said Thomas ought to have or maintain his aforesaid action thereof against him, the said John.

And for a further plea in this behalf, the said John, by leave of the Court, etc., and according to the statute, etc., says, that the said Thomas ought not to have or maintain his aforesaid action thereof against him, because, he says, that neither at the time of the issue of the said execution or writ of *fieri facias,* in the said *scire facias* mentioned, nor at the return day thereof, nor of the delivery thereof to him, the said John, nor at any time between the said issue and return day was the said John sheriff of Rowan County aforesaid; and this the said John is ready to verify. Wherefore, he prays judgment if the said Thomas ought to have or maintain his aforesaid action thereof against him, etc.

To which pleas the plaintiff put in the following replication:

And the said Thomas, as to the said plea of the said John by him first above pleaded, saith, that he, the said Thomas, by reason of anything by the said John in that plea alleged ought not to be barred from having and maintaining his said action thereof against him, because he says that there is such a record of the said judgment remaining in

the said court here, as he, the said Thomas, hath above in his said writ of *scire facias* alleged; and this he, the said Thomas, is ready (409) to verify by the said record when, where, and in such manner as the Court here shall award and direct; and he prays that the said record may be inspected and seen by the Court here. And because the said Court are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid until the last Monday of December, now next ensuing, to have the judgment of the said Court thereupon, for the said Court now here are not yet advised thereof, etc.

And the said Thomas, as to the plea of the said John, by him secondly above pleaded, says the said Thomas, by reason of anything by the said John in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, because, he says, that at the court of pleas and quarter sessions, begun and held for the said county of Rowan, at the courthouse in Salisbury, on the third Monday of August, in the year of our Lord, 1838, a majority of the acting justices of the same county being then and there present, the said John was, by the said Court, declared to have been duly elected sheriff of the said county of Rowan for the term of two years thence next ensuing, and to be complete and ended, and the said John thereupon presently appeared before the said justices in the said court then and there held, and accepted the said office, and then and there before the said justices in the said court, entered into the bonds and took the oaths by law in that behalf required for his qualification, and thereupon was then and there admitted and received by the said justices in the said court as such sheriff for and during the term aforesaid, as by the record of the said proceedings now remaining in the said court of Rowan, it doth and may more fully appear. And the said Thomas in fact says that he, the said John, from thence afterwards until the end of the said two years continually held, used, and exercised his said office of sheriff, to wit, at Rowan aforesaid. And the said Thomas further in fact says that while the said John so held, used, and exercised his said office of sheriff, and more than twenty days before the end of his said term of and in his said office, to wit, on 1 July, (410) 1840, at Rowan aforesaid, the said writ of *fieri facias* was duly delivered to the said John as such sheriff, to be executed. And this the said Thomas is ready to verify. Wherefore he prays judgment and the said sum of $100 to be awarded to him, etc.

To this replication there was a general demurrer, and the plaintiff joined in demurrer.

The cause stood over till this term (June, 1843), when it was argued by counsel.

W. H. Haywood and *Badger* for the plaintiff.
D. F. Caldwell and *J. H. Bryan* for the defendant.

DANIEL, J. It does not appear that the sheriff had made any levy under the execution before his office of sheriff expired. If he had made a levy it would have been his duty to have proceeded and completed the sale, notwithstanding a new sheriff had been appointed before the return day of the execution. But as nothing had been done on the execution, when the defendant's office expired in August, 1840, he thereafter had no power to act on it. For all writs of execution, not executed or begun to be executed by the old sheriff before his office expires, it is the duty of the new sheriff to execute. *Fonseck v. Magney,* 6 Taunt., 231; Watson on Sheriffs, 21. The question now is not, whether the defendant handed over this execution to the new sheriff, or whether it was his duty to have done so, but whether he is subject to a penalty for failing to return the writ into this Court on the return day, towit, at December Term, 1840, four months after his office had expired. We think that he is not subject to the forfeiture. The Legislature did not contemplate a case like this when it passed the act. The defendant could not in law have made the return on the execution at the time it was returnable. Dyer 41, 355, *in nota* Dalt., 18. The demurrer must therefore be sustained, and judgment rendered for the defendant to go without day and recover his costs. (411)

PER CURIAM. Judgment for the defendant.

Cited: S. v. Woodside, 29 N. C., 298.

STATE *v.* JOSEPH KING.

An indictment against an individual for permitting a public bridge to become ruinous, which he was bound to repair, must set forth *how* he became subjected to the duty of making repairs.

APPEAL from *Nash, J.,* Spring Term, 1843, of HENDERSON.

The defendant was tried upon the following indictment:

The jurors for the State upon their oaths present, that on 1 January, 1842, there was and yet is a public bridge commonly called the Free bridge, situate and being in the county of Henderson, on the public road leading from Mills River to Flat Rock in said county, on French Broad River, used by and for all the citizens of the said county on foot, and with their horses, coaches, carts, and other carriages to go, return, pass and repass, and ride over at their free will and pleasure;

that Joseph King has a toll gate on the said road, and receives tolls from the passengers crossing over the said bridge and is bound and of right ought to keep the said bridge in good repair; that on 1 January, (412) 1842, and at divers times afterwards up to the taking of this inquisition, to wit, for the space of twenty days, the said Joseph King, late of the said county of Henderson, with force and arms, unlawfully did permit and suffer the said bridge to be and remain very ruinous, broken, dangerous, and in great decay for want of upholding, maintaining, mending and repairing the same, so that the citizens upon and over the said bridge with their horses, coaches, carts, and other carriages, could not, during the time last aforesaid, go, return, pass or repass, and ride as before they were used and accustomed to do, and still of right ought to do, to the great danger of their lives and property, to the great damage and common nuisance of all the good citizens of the State upon and over the said bridge going, returning, passing, repassing and riding, against the form of the statutes in such cases made and provided, and against the peace and dignity of the State.

On the trial it was proven, that there was a bridge over French Broad River in Henderson County; that there was a public road leading to and from that bridge on either side; that the defendant had placed a gate across the said road near the bridge, and that he had, for many years before the finding of the bill, exacted toll from persons passing the said bridge. There was no evidence offered to show that persons traveling this road could cross the river except by going over the bridge. It was further proved that the bridge was out of repair. It was objected by the defendant's counsel that, although this evidence might have been sufficient to convict the defendant for obstructing a public highway by means of his gate, yet it was not sufficient to render him liable for not keeping the bridge in repair. But the jury were instructed that, if from the evidence they were satisfied that the bridge was the property of the defendant, that the road leading to and from the bridge was a public highway, and that the defendant exacted toll from the public for crossing the bridge, and further that there was not any way for the public to cross the river but by the bridge, the (413) defendant was guilty, as it was his duty in law to keep the bridge in proper repair; it being conceded it was out of repair. The jury found a verdict against the defendant. A motion was then made in arrest of judgment, which being overruled, and judgment rendered for the State, the defendant appealed.

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

STATE *v.* KING.

GASTON, J. It is very probable from the evidence disclosed in this case, that the appellant has been guilty of an offense, for which he is liable for punishment; but the indictment does not, in our opinion, set forth any offense with such explicitness as to warrant the rendering of a judgment thereon. It purports to charge the defendant with neglect of duty in permitting a public bridge to become ruinous, which he was bound to repair. As he was not chargeable with the duty of repairing such bridge of common right, it was essential that the indictment should set forth *how* that duty was imposed upon him. It accordingly alleges that he has a tollgate on a public road adjoining the said bridge and receives tolls from passengers crossing the said bridge, and it thence infers as a legal consequence, "that he is bound and of right ought to keep said bridge in good repair." Now the statutory regulations, which we have on this subject, are those set forth in the 104th chapter and 26th section of the Revised Statutes, by which the county courts are authorized to contract with builders to build bridges over large water courses and creeks, and to grant to them for a prescribed number of years the right to take certain tolls on persons, horses, carriages and cattle passing over the same, and by which it is made the duty of the builder or builders, his or their heirs or successors, "to keep the same in constant repair at his or their sole expense." Under the provisions the builder and an assignee of the builder, whether an assignee in law or in fact, may be regarded as the temporary owner of a bridge of (414) this description, and *in that capacity* is bound to keep such bridge in repair. Now the fact that the appellant was in the habit of demanding and receiving tolls from passengers crossing the bridge, was *evidence* against him to show that he was the owner of "a public toll bridge," because he assumed to act in that character. *S. v. Wynne,* 8 N. C., 451. But the indictment should have charged the fact of ownership, to which is attached the duty of making repairs, and not have set forth the evidence of that fact.

The indictment in this case is defective.

PER CURIAM. Judgment arrested.

Cited: *S. v. R. R.,* 44 N. C., 236; *S. v. Fishblate,* 83 N. C., 656.

(415)

HENRY RHODES *v.* HENRY FULLENWIDER AND ANOTHER.

1. To avoid a security as usurious you must show that the agreement was illegal from its origin. If the taking of usurious interest be cotemporaneous with the making of the bond, or in the contemplation of the parties, the security will be void, although no usury appears on the face of it.
2. If a loan be made in silver, and the bond to secure it is made, by a *bona fide* agreement, payable in current bank notes, it is not usurious to include in the bond for such loan the difference in value between such notes and the silver loaned.

APPEAL from *Dick, J.*, Spring Term, 1843, of LINCOLN.

This was an action of debt upon a bond, of which the following is a copy:

$250. One day after date, I, Henry Fullenwider, as principal, and William Fullenwider, as security, do promise to pay Henry Rhodes, his order or assigns, two hundred and fifty dollars, for value received. As witness our hands and seals, this 25 January, 1839.

HENRY FULLENWIDER, [Seal].
WILLIAM FULLENWIDER, [Seal].

The defendants pleaded the general issue and the statute against usury. On the trial, the plaintiff proved the execution of the bond. The defendants then called a witness who proved that the defendant Henry Fullenwider inquired of him if he knew any person who had money to loan; that witness informed him the plaintiff had $250 in silver, which he would loan at six per centum if the money was returned to him in silver, but if not, and the money was repaid in bank
(416) notes, he must have four per centum in addition to the lawful interest, silver being four per centum more valuable than bank notes. The witness at the same time informed Henry Fullenwider, that he (the witness) was the agent of Rhodes, and could then let him have two hundred and fifty dollars in silver on the above terms, provided said Fullenwider would give him security. Fullenwider remarked that he did not know what to do, went off, and in a short time returned with the bond, on which this suit is brought, handed it to the witness and received from the witness two hundred and fifty dollars in silver. Fullenwider immediately handed back to the witness ten dollars, and told him to give the ten dollars with the bond to the plaintiff. The witness further stated that very shortly afterwards, he gave the bond and the ten dollars to the plaintiff, and that the plaintiff made no objection to receiving the bond or the ten dollars. The plaintiff then proved, that at the date of the said bond specie in the county of Lincoln was worth from four to ten per centum more than bank notes.

The plaintiff's counsel requested the Court to charge the jury that if the transaction was a fair sale of the silver followed by a loan of the money, in that case the contract was not usurious. The counsel further requested the Court to charge the jury that if the silver was actually worth the four per cent premium allowed for it by the defendant, then the contract was not usurious. The Court declined giving the instructions prayed for, but instructed the jury, that if from all the circumstances of the case, they found that the plaintiff by the contract had secured to himself a greater rate of interest than six per centum for the money loaned, and that it was his intention to do so, the contract was usurious, and they ought to find for the defendants. The jury found for the defendants, and judgment being rendered pursuant thereto, the plaintiff appealed.

Hoke and *Osborne* for the plaintiff.
Alexander and *Boyden* for the defendants.

DANIEL, J. To avoid a security as usurious, you must show that the agreement was illegal from its origin. If the taking of usurious interest be cotemporaneous with the making of the bond, or in (417) the contemplation of the parties, the security will be void, although no usury appears upon the face of it. Therefore, when A. had borrowed £100 from B., for which he had given a bond payable with lawful interest; but, at the time of the advance of the money, paid an additional premium, *Lord Mansfield* decided that the bond was void. *Fisher v. Beasley,* Douglass, 225; Comyn on Usury, 188, 189. In the case now before us, the Judge charged the jury that if the plaintiff, by the contract, had secured to himself a greater rate of interest than six per centum for the money loaned, and that it was his intention to do so, the contract was usurious and void. We see no objection in point of law to this charge.

What the counsel for the plaintiff intended by his prayer to the Court to charge, is quite unintelligible from the case made out and sent up to this Court. It may be that he intended to pray the Court to charge the jury, that if it was at the time agreed, that the bond then taken was to be paid in current bank paper, and that part of the agreement had been left out of the bond by mistake, then the intent to violate the statute would be negatived, and the bond would not be usurious. Had such an instruction been prayed, we think it ought to have been given. But we are unable to see from the case sent here, what the counsel wanted the Judge to charge, and therefore no opinion can be given by us upon his prayer.

PER CURIAM. No error.

Cited: Wharton v. Eborn, 88 N. C., 347.

(418)

STATE *v.* ROBERT S. HUNTLEY.

1. The offense of riding or going armed with unusual or dangerous weapons, to the terror of the people, is an offense at common law, and is indictable in this State.
2. A man may carry a gun for any lawful purpose of business or amusement, but he cannot go about with that or any other dangerous weapon, to terrify and alarm, and in such manner as naturally will terrify and alarm a peaceful people.
3. The declarations of the defendant are admissible in evidence, on the part of the prosecution, as accompanying, explaining, and characterizing the acts charged.

APPEAL from *Settle, J.*, Spring Term, 1843, of ANSON.

The defendant was tried upon the following indictment:

The jurors for the State upon their oath present, that Robert S. Huntley, late of the county aforesaid, laborer, on the first day of September, in the present year, with force and arms, at and in the county aforesaid, did arm himself with pistols, guns, knives, and other dangerous and unusual weapons, and being so armed, did go forth and exhibit himself openly, both in the daytime and in the night, to the good citizens of Anson aforesaid, and in the said highway and before the citizens aforesaid, did openly and publicly declare a purpose and intent, one James H. Ratcliff and other good citizens of the State, then and there being in the peace of God and of the State, to beat, wound, kill, and murder, which said purpose and intent, the said Robert S. Huntley, so openly armed and exposed and declaring, then and there had and en-

(419) tertained, by which said arming, exposure, exhibition, and declarations of the said Robert S. Huntley, divers good citizens of the State were terrified, and the peace of the State endangered, to the evil example of all others in like cases offending, to the terror of the people, and against the peace and dignity of the State.

On the trial it was insisted on the part of the defendant, that allowing all the facts charged in the indictment to be true, they constituted no offense for which the defendant could be punished as for a misdemeanor. His Honor instructed the jury, that if the facts charged in the indictment were proven to their satisfaction, the defendant had been guilty of a violation of the law, and that they ought to render their verdict accordingly. In the investigation before the jury it appeared, among other things, that the defendant was seen by several witnesses, and on divers occasions, riding upon the public highway, and upon the premises of James H. Ratcliff (the person named in the indictment), armed with a double-barreled gun, and on some of those occasions was heard to declare, "that if James H. Ratcliff did not surrender his negroes, he would kill him"; at others, "if James H. Ratcliff

did not give him his rights, he would kill him"; on some, that "he had waylaid the house of James H. Ratcliff in the night about daybreak, and if he had shown himself he would have killed him; that he showed himself once, but for too short a time to enable him to do so, and that he mistook another man for him, and was very near shooting him." On one occasion, that "he would kill James H. Ratcliff if he did not surrender his negroes, and that as for William Ratcliff, he was good for him anyhow on sight; that there were four or five men whom he meant to kill." All these declarations were objected to by the defendant's counsel, but were received by the Court, as accompanying and qualifying and explaining the defendant's riding about the country armed with a double-barreled gun. The jury having found the defendant guilty, his counsel moved for a new trial upon the grounds, *first,* that the declarations of the defendant before mentioned, were improperly received; *secondly,* because the Judge should have told the jury, that supposing all the facts charged in the indict- (420) ment to be true, still the defendant was entitled to their verdict. The motion was overruled, and judgment having been pronounced, the defendant appealed.

Attorney-General for the State.
Winston for the defendant.

GASTON, J. On the trial it was insisted by the defendant's counsel, and the Judge was required so to instruct the jury, that if the facts charged in the indictment were all true, they nevertheless constituted in law no offense of which they could find the defendant guilty. His Honor refused this prayer, and instructed the jury that if the facts charged were proved to their satisfaction, it was their duty to find him guilty. The same ground of defense has been taken here by way of a motion in arrest of judgment; but we are of opinion that in whatever form presented, it is not tenable.

The argument is, that the offense of riding or going about armed with unusual and dangerous weapons, to the terror of the people, was *created* by the statute of Northampton, 2 Edward III, ch. 3, and that, whether this statute was or was not formerly in force in this State, it certainly has not been since the first of January, 1838, at which day it is declared in the Revised Statutes, ch. 1, sec. 2, that the statutes of England or Great Britain shall cease to be of force and effect here. We have been accustomed to believe, that the statute referred to did not *create* this offense, but provided only special penalties and modes of proceeding for its more effectual suppression, and of the correctness of this belief we can see no reason to doubt. All the elementary writers, who give us any information on the subject, concur

in this representation, nor is there to be found in them, as far as we are aware of, a *dictum* or intimation to the contrary. Blackstone states that "the offense of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrify-
(421) ing the good people of the land; and is *particularly* prohibited by the statute of Northampton, 2 Edward III., ch. 3, upon pain of forfeiture of the arms, and imprisonment during the King's pleasure." 4 Bl. Com., 149. Hawkins, treating of offenses against the public peace under the head of "Affrays," pointedly remarks, "but granting that no *bare words* in judgment of law carry in them *so much terror as to amount to an affray,* yet it seems certain that in some cases there may be an affray, where there is no actual violence, as where a man arms himself with dangerous and unsual weapons in such a manner as will naturally cause a terror to the people, *which is said to have been always an offense at common law* and *strictly* prohibited by many statutes." Hawk. P. C., B. 1, ch. 28, sec. 1. Burns & Tomlyns informs us that this term "Affray" is derived from the French word *"effrayer,"* to affright, and that *anciently it meant no more,* "as where persons appeared with armour or weapons not usually worn, to the terror of others." Burns' Verbo "Affray." Dier do. It was declared by the Chief Justice in *Sir John Knight's case,* that the statute of Northampton was made in affirmance of the common law. 3 Mod., 117. And this is manifestly the doctrine of Coke, as will be found on comparing his observations on the word "Affray," which he defines (3 Just., 158) "a public offense to the terror of the King's subjects, and so called because it affrighteth and maketh men afraid, and is enquirable in a *leet* as a common nuisance," with his reference immediately thereafter to this statute, and his subsequent comments on it (3 Inst., 160), where he cites a record of 29 Edward I., showing what had been considered the law *then.* Indeed, if those acts be deemed by the common law crimes and misdemeanors, which are in violation of the public rights and of the duties owing to the community in its social capacity, it is difficult to imagine any which more unequivocally deserve to be so considered than the acts charged upon this defendant. They attack directly that public order and sense of security, which it is one of the first objects of the common law, and ought
(422) to be of the law of all regulated societies to preserve inviolate— and they lead almost necessarily to actual violence. Nor can it for a moment be supposed that such acts are less mischievous here or less the proper subjects of legal reprehension, than they were in the country of our ancestors. The bill of rights in this State secures to every man, indeed, the right to "bear arms for the defense of the State." While it secures to him a *right* of which he cannot be deprived,

it holds forth the *duty* in execution of which that right is to be exercised. If he employs those arms, which he ought to wield for the safety and protection of his country, to the annoyance and terror and danger of its citizens, he deserves but the severer condemnation for the abuse of the high privilege with which he has been invested.

It was objected below, and the objection has been also urged here, that the Court erred in admitting evidence of the declarations of the defendant, set forth in the case, because those, or some of them, at least, were acknowledgments of a different offense from that charged. But these declarations were clearly proper, because they accompanied, explained, and characterized the very acts charged. They were not received at all as *admissions* either of the offense under trial, or any other offense. They were constituent parts of that offense.

It has been remarked that a double-barrel gun, or any other gun, cannot in this country come under the description of "unusual weapons," for there is scarcely a man in the community who does not own and occasionally use a gun of some sort. But we do not feel the force of this criticism. A gun is an "unusual weapon," wherewith to be armed and clad. No man amongst us carries it about with him, as one of his everyday accoutrements—as a part of his dress—and never, we trust, will the day come when any deadly weapon will be worn or wielded in our peace-loving and law-abiding State, as an appendage of manly equipment. But although a gun is an "unusual weapon," it is to be remembered that the carrying of a gun, *per se*, constitutes no offense. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun. It is (423) the wicked purpose, and the mischievous result, which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm a peaceful people.

PER CURIAM. No error.

Cited: S. v. Brandon, 53 N. C., 466; *S. v. Lanier,* 71 N. C., 289; *S. v. Norton,* 82 N. C., 630; *S. v. Vann, Ib.,* 634; *S. v. Roten,* 86 N. C., 704; *S. v. McNair,* 93 N. C., 630; *S. v. Smith,* 125 N. C., 623; *S. v. Griffin, Ib.,* 693.

(424)

STATE *v.* HAMPTON B. TILLY.

1. In an indictment against an overseer for the murder of his employer, it is not competent for the prisoner to offer evidence of the general temper and deportment of the deceased towards his overseers and tenants.
2. It is not competent for a prisoner indicted for murder to give in evidence his own account of the transaction related immediately after it occurred, though no third person was present when the homicide was committed.
3. It is not error in the Judge to tell the jury, on the trial of an indictment for murder, that "if they believed from the evidence that the prisoner had malice against the deceased on the morning of the day when the killing occurred, and there was no evidence that such malice was abandoned, even if the prisoner accidentally fell in with the deceased, the question of manslaughter could not arise, as the malice would exclude provocation," it being clear from the context of the charge that the *malice* spoken of was *the purpose to kill or do great bodily harm to the deceased.*
4. The language of a Judge in his charge to a jury is to be read with reference to the evidence and the points disputed on the trial; and, of course, is to be construed with the context.
5. Although a person may not go in search of or lie in wait for another, whom he kills, yet if he has formed the purpose to kill him, and, within a short time after forming and avowing such purpose, he, duly armed, meets the other by chance, whether in public or in secret, and slays him immediately, there is a presumption that he did it on the previous purpose and grudge, if there be no evidence of a change of purpose.

APPEAL from *Battle, J.,* Spring Term, 1843, of GUILFORD.

The defendant was tried upon an indictment for the murder of William G. Martin. On the trial, Rebecca Goff, the first witness for the State, testified that at the time of the homicide, 9th September last, she was a single woman, living in the family of the prisoner, who was an overseer of the deceased on a plantation in Stokes, about 4

(425) miles from the place at which the deceased used to reside; that in the evening, before it took place, the deceased was superintending the mowing of the meadow and putting away the hay, on the said plantation, over which the prisoner had no supervision. While the deceased was so engaged, she testified that the prisoner, being then at the house with the witness and his wife, cursed and abused the deceased with great bitterness, said his house was about to be watched that night, and he would see who watched it; that he went out into the yard when it was supposed the deceased was about to pass with the hands and ox-cart from the meadow, but the deceased did not pass by. On cross-examination, she stated that the prisoner said the deceased accused him of trading with his negroes, and therefore was going to watch. She stated that, after the return of the prisoner into the house, he said that deceased accused him of not working enough and running about; that the deceased was the meanest man living, he would not take

as much from him as he had done; that the devil was getting in him (prisoner) stronger and stronger every day; that he had had 12 fights in one year and whipped every time; had whipped better men than the deceased. When supper was prepared he refused to eat, saying the devil was too strong in him for him to eat; and wished he had a dram. The next morning he said the devil was still in him; went off to carry to a neighbor's house a cross-cut saw, which had been borrowed to saw board timber, and returned with ardent spirits; cursed the deceased and said that whenever Martin heard his horn blow, he came around the fields. And he then went out into the yard and blew his horn. He then went off to where the hands were at work. In about two hours he came back in a hurry and got his gun, loaded it in great haste in the yard. Witness asked him what he was going to shoot. He replied, "nothing much," and went off in a run, in the direction from which he came, having driven back his hounds, which were about to follow him; that he both came from and went in the direction of the *board tree*. Soon thereafter a negro man of the plantation came to the house where the witness was, on the riding-horse of the deceased (426) (which he usually rode and kept at his own house) for a frow to rive the timber into boards, got it, and went in the direction of the tree. A short time after this, another negro of the plantation came running from the same direction in great alarm with the intelligence of the killing. On her cross-examination she stated that the deceased had been at the prisoner's house about sunset of the afternoon previous to get a web of cloth, that the prisoner's wife had woven for him, but the prisoner was not then at the house; also, that she heard no cry of hounds in the woods at the time; that the prisoner hurried off with his gun as before stated. The counsel for the prisoner admitted that the deceased had been slain by the prisoner, but alleged that it was done in self-defense, and offered to show what were the acts and declarations of the prisoner, made immediately after the transaction, upon his return to his house, in relation to it. On objection by the State, his Honor ruled that the declarations of the prisoner after the homicide were not admissible, unless offered by the State, in which event, he had a right to all that he then said. But that he had a right to give in evidence what was his conduct and demeanor after the killing. He then showed by this witness, as well as others, that about an hour after he had gone off with his gun, he returned to his house; made no effort to escape; that the line of the State of Virginia was about 10 miles distant; that he went off to some neighbors' houses and asked them to view the body of the deceased, and sent for a magistrate; staid at home all the night following, and made no effort to escape or resist when arrested the next day.

Christopher Eaton, a witness for the State, was mowing for the deceased in the meadow aforesaid; the deceased came there on his riding horse in the forenoon, was in jocose conversation with him an hour or two, when a cloud rising, the deceased went off in the direction of the board tree aforesaid to get the prisoner and the hands to help to put up the hay. About an hour afterwards one of the negro men came galloping to him on the riding horse of the deceased, with the (427) alarm of the homicide. Witness went then to the house of the prisoner, about a mile from the meadow, and meeting the former witness and the wife of the prisoner and one Breedlove at the spring, they all walked to the house together; they found the prisoner there. Witness went then with Breedlove to the board tree, and saw the body of deceased lying dead, and also an axe, his head badly wounded and very bloody. Spattered blood or other fluid of the body was also visible on the leaves around and on the helve of the axe, which had the appearance of having come from the right side, and a drop on the axe itself which lay near him. Witness testified that he saw no marks of scuffle or rencounter at the place, and that a heavy shower of rain fell after he left, and before any other person came.

Ann Sturdivant, a sister of the first witness, saw the prisoner at the house of one Watson, his brother-in-law, two weeks before the homicide; he had pistols, and on being asked by Mrs. Watson why he carried them, he said he expected to *meet out* that d—d long-nosed Bill Martin.

Jackson Goff, who had married the first witness since September, stated that he had often seen the prisoner carry a dirk and pistols; that at a gathering to raise a mill 2 or 3 weeks before the homicide, the prisoner used his dirk in killing some rats secreted in the mortices of the timbers. Upon being asked why he carried such a thing, he said he carried it for deceased, whom he cursed; and characterized by the epithet before stated. The prisoner was then on his way from Salem; had a pistol in his carryall; said he had been to sell tobacco to get money to pay a judgment in favor of the deceased, which one Moses, a constable then present, held. He paid Moses the money, again cursed the deceased as before, and advised Moses not to pay it to him for 3 months, saying that he could not be sooner obliged to do it; Moses replying that he paid plaintiffs in execution the first time he saw them; the prisoner replied he hoped he would not see him (cursing the deceased as before) in that time.

Martin Gordon testified that a few days before the killing he asked the prisoner if the deceased had been over, and how they got on. (428) The prisoner replied that the deceased had been there and that he behaved like a saint; that he, the prisoner, was glad of it, he would do anything to oblige the deceased if he would treat him prop-

erly. But he expected they would come together; and if they did, he wished it to be where no one was present but negroes. If Martin could give it to him, he would take it for his share; and if he could give it to Martin, d—n him, he should take it; they would make it a counter one way or t'other.

Susanna King testified to a conversation with the prisoner 3 or 4 weeks before the homicide, in which, she said, he threatened (at Judge Venable's in the neighborhood in which they lived) to kill the deceased if he ever treated him as he had done—the details of which conversation she gave at length, and said that said Venable and his wife were present.

Elizabeth King, a sister-in-law of the last named witness, swore that on the day after this alleged conversation the said Susanna told her there would be murder, and related the conversation with the prisoner as she had sworn in the trial. The said Jesse Venable and Charity, his wife, were called by the prisoner, and swore that the prisoner and Susanna King were at their house at the time spoken of, and conversed together, but that no threats were made by the prisoner against the deceased. Mary Francis, a witness for the State, also detailed a conversation of the prisoner, two or three weeks before the killing, when he came to her father's with a bottle of spirits, cursed the deceased, saying that he (the deceased) had cursed his (the prisoner's) gray-headed father, and told him that "if he could not stand his hand with him, to fetch his crew; that the prisoner was one of old David Tilly's crew for him." He said he, the prisoner, had been accused of many offenses which he named, and had been accused of stealing the corn of the deceased, and that the deceased had ordered his negroes to whip Jerry Slaughter, a man who formerly had lived on his plantation. John H. Bitting and Alexander King, both minutely described the situation of the body of the deceased as it was found (429) on the assembling of the neighbors. The tree for making boards was felled from north to south, on the bank of a small branch, and parallel to the stream, the stump being up stream. A pathway, worn by stock, crossed immediately above the stump, and formed the most convenient way of going to the position of the deceased from the prisoner's house. The tree had been sawed into timber for boards to cover a tobacco barn, and two of the cuts had been split into billets ready for riving. These billets lay on the ground, one of them under the body of the deceased, another with the end riding on the log near to where it was last sawed off. Beyond this, parallel to the log, was a brake partly prepared for riving boards; that is to say, there was a pole with two stubs or pins driven into the earth to fasten it at the end nearest the tree top, and one stub partly driven into the ground at the other,

near to the deceased; that the stubs were battered at the ends, and had been apparently driven with an axe; that the axe lay with the helve from the deceased, about four or five feet from the partially driven stub, and two feet and one inch from the elbow or arm of the deceased. The feet of the deceased were near the end of the log where last sawed off, and he lay on his belly, inclining to the left side; his left hand across the abdomen, and the right above it in front of the breast, with the forefinger pointed to his mouth. His hat lay under him, about the groin, unbroken in any way, but bent up by the pressure upon it. He was dressed in but a shirt and pantaloons; in the pocket of the latter was found a small pocket-knife unopened. The body lay nearly perpendicular to the tree. All the witnesses agreed that at least two blows had been given on the head, and some supposed three or more. One, which had broken the skull, was on the right side of the head near the top, ranging at a considerable angle with the horizon, the highest point being nearest the forehead. Another wound was larger and lower down, passing nearly horizontally across the right side of the head, and cutting off the upper portion of the ear. The fracture of the
(430) skull in this wound extended in to the upper one, and the whole side of the head had been broken so as to yield easily to pressure. A portion of the skull bone had fallen out, and lay on the shoulder of the deceased. There was a cut apparently breaking the skin across the back of the head. King also said that there was a wound across the right side of the head, just below the ear. Just behind the body lay three large fragments of the gun of the prisoner, which was well known to the witnesses, and some smaller pieces of the stock lay in front of his face. It was a long smooth-bored gun, with a thick heavy barrel; the barrel and stock were broken off about a foot and a half from the muzzle; blood and hair were found at the point of breaking on the lower end of the barrel, and a mark on the ground was found, in which the muzzle end of the barrel fitted, in front of the face of the deceased. By putting the muzzle in that mark, and fitting the other part to it, they were found to join at the large wound on the head of the deceased. The mark on the ground, and the situation of the wound, induced the belief on the part of three witnesses, that the blow which caused it, had been given with the gun from behind; the gun-barrel was found loaded, and so continued until the load was drawn in the presence of the Court and jury. It was heavily charged with riffle bullets, buckshot, and some misshapen pieces of lead or slugs. The witness King also testified that two or three weeks before the killing the prisoner and deceased came to his house to refer to him a matter of difference about some wheat which had been grown on the said plantation that year; that much ill feeling was manifested between them, and they wrangled

nearly all day. The deceased cursed the prisoner for a d—d rascal, and prisoner retaliated in like manner; the deceased also found great fault with the management of the prisoner at the plantation, and the neglect of business, and the prisoner excused himself by alleging that what was charged as negligence, arose from neighborly acts of kindness to persons in the vicinity, and if he did not help them, they would not assist him in raising his tobacco barns; the deceased told him that he had hands enough, and to apply to him when more (431) force was wanted than he had. Witness refused to settle their difference, and they finally agreed, and prisoner gave his note to the deceased for nine dollars, and they left in better temper apparently. To sustain his allegation that the killing was in self-defense, the prisoner inquired of several witnesses whether the deceased was not of a violent and dangerous character. All of whom replied in the negative, but some of them said he was mischievous and addicted to teasing others jocosely. The prisoner also proposed to inquire whether the deceased did not bear the character of being high-tempered, over-bearing, and oppressive towards his overseers and tenants, but the question was objected to and ruled out. Several witnesses were called by the State who testified that the deceased was a peaceable and orderly citizen. The prisoner called as a witness Polly Vaughan, who said she lived with her sister, about a mile and a half from the prisoner's, and on the day of the killing, heard the cry of hounds in chase between 12 and 1 o'clock, M., coming from the direction of Tilly's, and passing beyond the opposite side of her house; that she was acquainted with the cry of the prisoner's hounds; these were not his, and she did not know whose they were. Also, William B. Boils, who said that on the fourth Saturday of July, 1842, he heard the deceased say that if the prisoner did not mind he would give him the d—st beating he ever had. Also, Reuben Vaughan, who said that the deceased, on showing witness some corn, which the prisoner had planted but never worked, cursed him, and said he would sue him. Also, Joseph Falke and John Booze, who said that the deceased in their presence had cursed prisoner about a stray lamb, which he supposed the prisoner had marked in his (deceased's) mark, and said he would drive him off or whip him, if he did not do better. The prisoner was not present at any of these declarations. Also, Henry McCarter, who said that on the election day in August, he and the deceased were riding together when the deceased said he wished he might land in h—ll if he did not put a stop to Tilly's hunting, and would go and catch him that evening. On (432) cross-examination he said he had seen the prisoner with pistols, and heard him speak of the deceased's telling his father that he didn't mind him or his crew. Also Jesse Cox and William E. Simmons, each

of whom testified to separate conversations of the deceased; the former that he, deceased, would drive off or kill the prisoner and the latter, that if the prisoner did not do better he, the deceased, would kill him before the year was out. As to the two latter witnesses the State called several persons who testified that Cox's character was bad as a man of truth, and that Simmons was notoriously infamous for dishonesty, and that they would not believe him. The prisoner called sundry witnesses, who swore that he went or sent for them soon after the homicide, and they went the same day and saw the body of the deceased. He also proved Falke and Booze to be persons of good character. He also called Floyd Webb to sustain Simmons, who swore that some time before the homicide Simmons told him that Martin or Tilly would be killed that year, but why Simmons thought so Webb could not recollect.

The State then called witnesses who stated that the prisoner was a right-handed man, but could work tolerably well with either hand; and that Polly Vaughan, defendant's witness, was a low prostitute.

For the State it was contended that the prisoner left his house with his gun, as described by Rebecca Goff, to attack the deceased, and that from the situation of the felled tree, the dead body, the wounds, the brake, axe, etc. it was to be inferred that the deceased was standing with his hat in hand, at the point where his feet were found, looking at a negro, who was, it was admitted, driving the partially driven stub, when the prisoner crossed the branch above the stump, approached him behind and struck him with the gun, felled him and beat him to death; or that, even if there was a sudden rencounter (casting out of view the evidence of previous malice), the wounds, etc., showed that undue advantage was taken, by which the killing could not even be extenuated to manslaughter. For the prisoner, it was con-
(433) tended that he took his gun to shoot a deer then chased by hounds; that from the evidence in relation to the previous declarations of the deceased against the prisoner; his not shooting the deceased with his gun, the position of the axe, and the other circumstances in evidence, it was to be inferred that the deceased had made a sudden attack on the prisoner with the axe, and that the latter was under a pressing necessity to kill to avoid death or bodily harm to himself; that if this were not so, it was to be inferred that the deceased was slain in a mutual combat on equal terms, and that the killing was but manslaughter at the most.

His Honor, after explaining to the jury the difference between the three species of homicide, murder, manslaughter, and excusable homicide, charged them that the admission of the prisoner that he had slain the deceased, made the homicde a case of murder, unless he could show

from the testimony introduced on the part of the State or in his defense, that there were circumstances of provocation to mitigate the offense to manslaughter, or of excuse to reduce it to excusable homicide in self-defense; that in the examination of the testimony it became important to ascertain the purpose for which the prisoner loaded his gun and left his house on the day of the homicide, and in doing this, they must consider with care the testimony of Rebecca Goff and Polly Vaughan, and that of others that might bear upon this part of the transaction, and they must take into their consideration the characters of the two witnesses named that if they found that the prisoner left his house with a settled purpose to seek the deceased and kill him, or to provoke him into a fight that he might have a pretext to kill him, it was a case of murder; that if they believed from the testimony of Rebecca Goff that the prisoner had malice against the deceased on the morning of the day when the killing occurred, and there was no evidence that such malice was abandoned, even if the prisoner went out with his gun to shoot a deer and accidentally fell in with the deceased, in such case the question of manslaughter could not arise, as the malice would exclude provocation, and the only inquiry would (434) be between murder and excusable homicide; and that to excuse the homicide, they must be satisfied that the deceased had made an assault upon the prisoner, endangering his life or threatening his person with great bodily harm, and he must have done what he could to avoid the necessity of killing before he gave the fatal blow. That if malice were excluded and the rencounter a sudden one, then the parties must have fought on equal terms and the prisoner must not have taken any undue advantage of the deceased, to make the homicide a case of manslaughter. The jury returned a verdict of murder against the prisoner, and his counsel moved for a new trial, first, because the Judge did not tell the jury they might reconcile the testimony of Rebecca Goff and Polly Vaughan, if they believed there was not discrepancy between them.

Second. Because of misdirection in law in saying that if there was malice in the prisoner against the deceased on the morning of the day on which the homicide occurred, there was no evidence that it had been abandoned, and in saying further, that the only question in such case was between murder and excusable homicide.

Third. For rejecting the testimony of the declarations of the prisoner, giving an account of the manner in which the homicide took place.

Fourth. For rejecting the testimony offered to show that the deceased was a man of high temper, overbearing and oppressive towards his overseers and tenants, and confining the inquiry to his being a violent and dangerous man.

The Court overruled all the reasons urged for a new trial, remarking as to the first, if the prisoner's counsel had desired the charge to be more specific than it was in the particular alluded to, he should have so asked, and it would have been given.

Sentence of death being pronounced, and it being admitted by the Solicitor of the State that the prisoner was insolvent, an appeal to the Supreme Court was prayed and granted without requiring se-
(435) curity therefor.

Attorney-General for the State.
Morehead for the prisoner.

RUFFIN, C. J. The Court is of the opinion that evidence of the temper and deportment of the deceased towards his overseers and tenants was properly rejected, for several reasons. In the first place, it was irrelevant, as it did not profess to state that the deceased was in the habit of assaulting the persons in his employment, but, at most, of being overbearing to them and provoking them by arrogant and abusive language. If all that be admitted, it does not raise an argument of an assault by the deceased on the prisoner, but of ill words only, which would not palliate the homicide. And, indeed, in a case in which there is no direct evidence of a mutual combat, or any appearance at the place of a scuffle, or any wound on the prisoner, or even the slightest mark of violence, it would be impossible that the jury could rationally infer an attack of any sort by the deceased, or even an effort at defense. Besides, this is not one of those points on which character is evidence. Temper and deportment are not matters to be proved by reputation; but if they are evidence at all they can be established as facts only by those who know them. A second objection taken is, that the Court would not allow the account given by the prisoner of the manner in which the homicide took place, to be proved as evidence for him. We concur in that opinion. As evidence, what a party says, is received against him but not for him. It does not prove the truth to be as related; and the truth is the subject of inquiry by the jury. It does not matter that the account is not a recent one, but was given early after the transaction. Unless the declarations form a part of the transaction they are not receivable in evidence. When it was usual for the accused to conduct their own defense, such indulgence was shown in allowing them to state their cases in their own way. But these were statements then made by the accused to the jury, face to face, and were received merely as statements combined with argument. So, at present, counsel,
(436) though they ought properly to confine their opening to the case they expect the evidence to establish, do frequently take a greater latitude of statement, as being the truth of the case, as they are in-

structed by their clients; and in permitting that the Courts have been also liberal. But it is unknown that a party's previous declarations have been proved by witnesses for him as evidence to the jury of the true nature of the transaction in issue.

We think the exception to the terms in which his Honor left the testimony of Goff and Vaughan to the consideration of the jury, untenable, for the reason given by the Judge for overruling it. But, in reality, directions "to consider with care" the testimony of two witnesses, bearing upon a particular point of inquiry in order to ascertain the truth on that point, with the further direction to consider in like manner the testimony of other witnesses that might bear upon the same part of the transaction, must be understood by the jury as enjoining the duty of fairly comparing and weighing the testimony of each, and deciding against that part of the testimony which could not be reconciled with other parts, in which the jury had more confidence.

The remaining exception is principally of importance, and relates to the manner in which the law was laid down, as to the degree of the homicide. But we think that when understood as it properly ought, and, indeed, must have been understood by the jury, the proposition stated was correct. The language of the Judge is to be read with reference to the evidence and the points disputed on the trial and, of course, is to be construed with the context. Here the prisoner contended that the homicide was, at the most, manslaughter, because it occurred on a sudden quarrel in a mutual combat on equal terms; and further, that it was excusable homicide, because the deceased made an attack on the prisoner with an axe, which was likely to kill or do him great bodily harm. It had been before admitted that the prisoner slew the deceased, and the legal inference was that it was murder, unless mitigated by circumstances proved, and so the jury was informed; and there it seems to us the Court might have stopped, adding only (437) that there was no evidence of any fact which could reduce the offense below murder. For there is not a scintilla of what can be called proof that there was a mutual combat, much less that the deceased made a deadly assault on the prisoner. We say his Honor might have stopped as above, because the Court is not bound to respond to a prayer to lay down abstract propositions to the jury, which do not arise on the evidence, nor to leave to them propositions of fact to be guessed at, without proof. There was nothing to raise the hypothesis that the evidence was not all on one side, and therefore the admitted killing was no less than murder.

But the Court in mercy proceeded to discuss the case more minutely. And, after laying down the general rule, that it lay on the prisoner to show the mitigation, the Court explained to the jury the nature of the

three species of homicide, namely, murder, manslaughter, and that which is excusable. That explanation is not set forth; but no fault was found with it, and therefore we assume that those subjects were correctly defined; as, for example, that murder was a felonious killing with malice aforethought, and that malice for this purpose, would be constituted by a deliberate purpose to kill or do great bodily harm with a weapon likely to kill. Having thus explained these questions to the jury, which they were to decide, the Judge informed them that the homicide could not be excusable, unless there was an assault on the prisoner, endangering his life or threatening him with great bodily harm, and he did what he could to avoid the necessity of killing. Supposing that the jury could see nothing to constitute this a case of excusable homicide, the Court then proceeded to inform the jury, how they might ascertain whether it was murder or manslaughter. And upon the supposition of a mutual combat, excluding malice, that is to say, a previous purpose of the prisoner to kill or do great bodily harm, and supposing the affray to be sudden, the Court informed the jury that the killing would be manslaughter or murder, as they might find that the prisoner (who used a deadly weapon) had or had not taken undue advantage in the fight, so that it was not on equal terms. To noth-
(438) ing that was said thus far, which seems, as was before remarked, to have been sufficient to dispose of the whole case, was any exception taken. But the Court proceeding to discuss the question of malice, as if it were necessary to the conviction for murder to prove affirmatively the actual existence of it in the heart of the prisoner, stated two cases for the consideration of the jury: the first, supposing the prisoner to have left his house, immediately before the killing, with the settled purpose to seek and kill the deceased, or to provoke him to a fight, that he might have a pretext to kill him—in that case it was murder; and the second, "that if the prisoner had malice against the deceased in the morning of the day, when the killing occurred, as there was no evidence that such malice was abandoned, even if the prisoner went out with his gun to shoot a deer, and then accidentally fell in with the deceased and killed him, the killing would not be manslaughter, as the malice would exclude the notion of provocation, if any there was; and the enquiry would be between murder and excusable homicide." To the former proposition no objection was taken by the prisoner; but to the latter he has excepted.

In disposing of the exception, perhaps it might be sufficient to say, that there was no ground for supposing a provocation, and that the chief objection to the instruction is that it unnecessarily went out of the evidence to suppose a case, in which peradventure the jury might find an excuse. There certainly appears no provocation, and without it

the killing cannot be manslaughter. But supposing there was evidence of it, yet *S. v. Johnson,* 23 N. C., 354, sustains the instruction, as it must have been intended. The only objection to it, perhaps, is in the want of precision, as to the sense in which the term, "malice" is there used. We admit that his Honor did not express himself with his usual clearness. But in connection with all that passed, the meaning of it must have been correctly apprehended. The "malice," required in the case supposed, must have been known to be, that temper and disposition of the prisoner's heart towards the deceased, which had been before spoken of and explained to the jury, as distinguishing the (439) crimes of murder and manslaughter, namely, *the purpose to kill or to do great bodily harm to another.* Now, thus received, the instruction is not only within the principle, but the language in *Johnson's case;* with which case the Court is entirely satisfied. For although a person may not go in search of or lie in wait for another, whom he kills, yet if he has formed the purpose to kill him, and, as here, within one or two hours after forming and avowing that purpose, he, duly armed, meets the other by chance, whether in public or in secret, and slays him immediately, there is a presumption that he did it on the previous purpose and grudge, if there be no evidence of a change of purpose. When the thing designed follows so immediately the design formed, and in the manner purposed, it would be strange not to regard it as the execution of the design.

PER CURIAM. No error.

Cited: S. v. Barfield, 30 N. C., 351; *Bottoms v. Kent,* 48 N. C., 155; *S. v. Robbins, Ib.,* 255; *S. v. Black,* 51 N. C., 511; *S. v. Brandon,* 53 N. C., 466; *S. v. Howard,* 82 N. C., 628; *S. v. Vann, Ib.,* 634; *S. v. Boon, Ib.,* 649; *S. v. Williford,* 91 N. C., 532; *S. v. Mills, Ib.,* 596; *S. v. McNair,* 93 N. C., 630; *S. v. Hensley,* 94 N. C., 1031; *S. v. Holman,* 104 N. C., 867; *S. v. Edwards,* 112 N. C., 909; *S. v. Rollins,* 113 N. C., 734; *S. v. Byrd,* 121 N. C., 687; *S. v. Lilliston,* 141 N. C., 861; *Colton v. Mfg. Co.,* 142 N. C., 531.

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(440)

HENRY BOND *v.* WILLIAM MCNIDER & AL.

1. An entry in a suit, "dismissed at the costs of the defendant," is not to be construed as a *retraxit,* or a judgment upon the merits, so as to bar another action for the same cause. It is simply a judgment of discontinuance, where the Court erred in ordering the defendant to pay the costs, or where such order was made by consent of the parties.
2. No judgment, but one on a *retraxit* or on the merits, will bar a subsequent action.
3. The entry, that the costs are to be paid by the defendant, is not even *prima facie* evidence to be left to the jury, of an accord and satisfaction.

APPEAL from *Pearson, J.*, Spring Term, 1843, of GATES.

Debt upon a note under seal, for $930.80. The defense relied on was the plea of a former trial and judgment for the same cause of action, to which the plaintiff replied, *"nul tiel record";* and there was also a plea of "accord and satisfaction." In support of the first plea, the defendant offered a record of a suit from the County Court of Chowan, from which it appeared that an action had been instituted by the plaintiff against the defendants, in that Court, upon a note, which was admitted to be the same note now sued on. In that case, the plea of "release" had been pleaded, and then there was an entry, "dismissed at the defendant's costs." An execution thereupon issued for the costs, and was satisfied by the defendants. The Court was of opinion that the entry, "dismissed at the defendants' costs," did not support the plea of former trial and judgment, and could not be taken as the act of the Court, because upon a trial either by verdict or upon the admission of the parties, the Court had no authority to enter such a judg-
(441) ment. If the Court dismissed the suit, the defendants were entitled to recover their costs, and could not be made to pay costs; so that the entry could be no more than an agreement of the parties. The Court was also of opinion that, supposing the pleadings proper to present the question, whether a dismission of the suit by agreement, at the costs of the defendants, amounted to a *retraxit,* so as to conclude the plaintiff from bringing another suit, the entry could not have that effect, for it did not amount to an admission, either expressly or by implication, that the plaintiff had no cause of action, but it was a mere agreement not to prosecute that particular action. Upon the other plea, the Court was of opinion that the dismission of the former suit and the payment of the costs by the defendants, was not sufficient evidence to justify the jury in finding that there was an "accord and satisfaction." The jury found a verdict for the plaintiff, and a new trial having been moved for and refused, and judgment being rendered pursuant to the verdict, the defendants appealed.

A. Moore for the plaintiff.
Kinney for the defendants.

DANIEL, J. At common law there is no form of an entry in the books of a judgment dismissing an action. Every judgment against a plaintiff is either upon a *retraxit, non pros.,* nonsuit, *nolle prosequi,* discontinuance, or a judgment on an issue found by the jury in favor of the defendant, or upon demurrer. The inducements or preliminary recitals in these several kinds of judgments are variant, but the conclusion in each is always the same; it is as follows: "Therefore it is con-
(442) sidered by the Court that the plaintiff take nothing by his writ,

and that the defendant go without day and recover of the plaintiff his costs, etc." If the entry above mentioned could be considered as a *retraxit,* or a final judgment on the merits, it would bar the plaintiff's action; otherwise it would not. A *retraxit* it cannot be, for that is always made in person in open court, when the trial is called. 2 Arch. Prac., 250; 3 Thomas Coke, 500. The issue upon the plea of "release" in the County Court, was not tried by a jury; so that the said entry could not be considered a judgment upon a verdict. The entry does not show that the merits of the cause passed *in rem judicatum.* We know of no reported case like it in this State. We must, however, consider it as nothing more than a judgment of discontinuance, where the Court erred in ordering the defendants to pay the costs, or it is such a judgment, with the consent of the parties that the defendants should pay the costs. *Carter v. Wilson,* 19 N. C., 276. It is therefore no bar to this action. Archb. Prac., 235; Maul. & Selw., 153.

Secondly, in the absence of all other proof, we think that the entry of the payment of the costs by the defendants was not even *prima facie* evidence, to be left to the jury, of an accord and satisfaction. The above cited case of *Carter v. Wilson* supports this opinion.

PER CURIAM. No error.

Cited: Trice v. Turrentine, 35 N. C., 215; *Plummer v. Wheeler,* 44 N. C., 473; *Carr v. Woodleff,* 51 N. C., 401; *Idding v. Hiatt, Ib.,* 404; *Koonce v. Pelletier,* 82 N. C., 240; *Rollins v. Henry,* 84 N. C., 579; *Weeks v. McPhail,* 129 N. C., 75.

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(443)

WILLIAM COXE *v.* NATHAN SKEEN & AL.

1. In all cases under the "book debt" law, Rev. Stat., ch. 15, it is the duty of the party, who wishes to prove his debt by his own oath, to produce the original account, when notice to that effect has been given to him by the other party. A voluntary destruction of the original will not authorize the introduction of a copy.
2. Where the agreement was that the plaintiff was to receive from the defendant $50 for his work for twelve months, "$10 to be paid when the time is half out, and the balance when the year is out"; and "if can't agree, part and pay according to what he is worth, not to be considered worth as much the first as last," and, at the end of 9 2-3 months they parted, and the defendant contended that the plaintiff was to receive only $10 for the first six months and $40 for the last, the Court did not err in informing the jury that, if this were the true construction of the agreement, then the plaintiff was entitled to recover for the time served, after the first six months, a ratable proportion of the $40 for the last six months.

APPEAL from *Battle, J.,* Spring Term, 1843, of DAVIDSON.

This case which has before been in this Court, 24 N. C., 220; was an

action of assumpsit, brought upon the following written agreement, viz.: "9 November, 1838, between Nathan Skeen and Matthew Skeen, an agreement with William Coxe for his work for twelve months at the shoe-making business, and other things, when called on, for the price of fifty dollars, ten dollars to be paid when the term is half out, and the balance when the year is out by 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 the last." Pleas, general issue, payment and set-off. It was (444) proved and admitted that the plaintiff worked with the defendants in the shoe-shop 9 2-3 months, and then left their employment, upon some disagreement arising between them. For the defendants, it was proved that they had paid the plaintiff ten dollars upon the expiration of six months, according to the contract; and, after proving some other small payments, the defendants offered to prove an account against the plaintiff as a book debt account, by the oath of one of them. This was objected to by the plaintiff, because the account produced was admitted to be a copy from loose slips of paper, on which the defendants kept their accounts against their customers, and a notice had been given them to produce their original book of accounts. The defendants admitted the notice, and contended that the section of the book debt law, which required the production of the original books, when demanded, applies only to the copies of book debt accounts to be proved by executors or administrators, but the Court was of a different opinion, and rejected the testimony. The defendants then offered to show that the originals had been lost or destroyed, and one of them testified that these accounts were kept on loose scraps of paper; that from these scraps the accounts were drawn off against each customer, and then the originals were thrown aside as valueless, and thus lost or destroyed. The plaintiff objected to the proof of the loss by one of the parties. The Court was of opinion that, whether the loss could be proved by one of the parties or not, and whether an account could be proved as a book debt account or not when the original book was lost or destroyed, the defendants could not prove their account under the book debt law, when they showed that they themselves had destroyed the originals.

In ascertaining the amount of wages to which the plaintiff was entitled for the time he worked with the defendants, they contended that under the contract he could claim but ten dollars for the first six months, and for the residue of the term an increasing rate per month, and that consequently for the time wanting to complete the twelve months (445) for which he had engaged to work, a deduction of a larger sum per month was to be made than was to be allowed him per month

for the time he worked after the first six months. This construction was the more insisted on because it appeared in evidence that the plaintiff had no skill in making shoes when he commenced working with defendants. The Court held, that, though the contract was not very perspicuous in relation to this question, yet if it were admitted that the plaintiff was entitled to only ten dollars, as contended for by the defendants, for the first six months' work, he was entitled for the time he worked over six months at the rate per month of $40 for six months, to wit, the sum of $6 2-3 per month. The jury returned a verdict for the plaintiff according to this instruction, and a new trial having been moved for and refused, and judgment rendered for the plaintiff, the defendants appealed.

Iredell for the plaintiff.
No counsel for the defendants.

GASTON, J. Section 3, chapter 15, Revised Statutes, is very positive in declaring that when one of the parties shall have given notice to the other, who seeks to establish a "book debt" in the manner therein authorized, requiring the book to be produced on the trial, no copy thereof "shall be received or admitted as evidence." There is no room to doubt that this provision applies to all the cases previously mentioned in the chapter as cases of "book debts." Now, if we admit, which is by no means certain, that the accidental destruction or loss of the book constitutes an exception from this precise enactment, it cannot be conceded that a voluntary destruction of the book, by him who offers a copy, comes within the reason of such an exception. If the slips of paper, on which the defendants kept their accounts, are to be regarded under the equity of the statute as their *book,* they were bound to produce the original on the trial. If they do not come within the purview of (446) the statute, neither the original nor a copy was evidence.

The agreement between the defendants and the plaintiff is expressed to be "for his work for twelve months at the shoe making business and other things when called on, for the price of $50, ten dollars to be paid when the time is half out and the balance when the year is out"; and to it is subjoined a memorandum in these words, "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 agreement is not to work for two successive periods of six months each, at the price of ten dollars for the first—and forty dollars for the second period, but an agreement to work one year for fifty dollars, with a stipulation to receive a partial payment at the end of six months. And the proper construction of the clause providing for a case of disagreement and separation before the year should

be out, is, that the plaintiff should receive a fair price for his services, estimating their value at $50 for a year, and making reasonable deductions because of their being less valuable in the beginning than when he had become more expert in his business. But the defendants contended that under the agreement the plaintiff was to be paid $10 for the first six month's labor, and forty dollars for the second; and that the parties having separated before the last term had expired, he was entitled to receive in addition to the $10, but a ratable part of the $40, on account of the portion which he served of the last term—and that in estimating this ratable part each month's labor to be priced as being worth less than the next succeeding one of that term. Now we think his Honor might very properly have rejected both the construction and the inferences drawn from it; but, assuming the construction as he did hypothetically, we do not see that he then erred in his conclusion. If the agreement fixed the *value* of the services at $10 for the first six, and $40 for the last six months, the stipulation that in the event of parting he should be paid *what he is worth,* but "not to be considered to be worth
(447) as much the first as last," would seem to refer to the two parts of the year, for which his labor had been severally priced as aforesaid. We see no error of which the defendants can complain.

PER CURIAM. No error.

JOHN J. ALSTON'S EX'RS *v.* GEORGE W. ALSTON.

In this State, only the executors, who qualify by taking the necessary oaths, are required to join in an action for a debt or demand due to their testator.

APPEAL from *Battle, J.,* Spring Term, 1843, of CHATHAM.

This is an action of debt brought by the plaintiffs, as executors of Joseph J. Alston, deceased, against the defendant for a debt due
(448) to the testator in his lifetime. It appeared that the plaintiffs' testator had appointed several executors, of whom the plaintiffs only qualified, the others having renounced, or refused, or declined to qualify. The defendant on the return of the writ, pleaded in abatement, that all the executors named in the will, and now alive, are not joined as plaintiffs in the writ. To this plea the plaintiffs demurred, and the defendant joined in the demurrer. The Court overruled the demurrer and gave judgment that the writ should be abated. From this judgment the plaintiffs appealed.

Manly for the plaintiffs.

No counsel for the defendant.

DANIEL, J. The English authorities certainly sustain the Judge in his opinion. They are collected in Williams on Executors, 627, and show, that if there are several executors appointed by the will, they must all join in bringing actions, even though some are infants, or have not proved the will, or have refused before the ordinary. And if one sue alone, the defendant, after oyer of the probate, may plead in abatement that the other executor mentioned therein is alive and not named. 1 Saund., 291 (note 1). If one executor proves the will, the proof enures to the coexecutors. 10 Cond. Eng. Ch., 176; 1 Myl. & Craig, 97. But, so far as we have been able to learn, the law and practice of this State invariably have been, for those executors only who qualify to sue. The practice may have originated in consequence of the act of 1715 (Rev. Stat., ch. ..., sec. 4), which enacts "that no person do presume to enter upon the administration of any deceased person's estate, until they have obtained a commission of administration or letters testamentary, signed by the Governor, under the penalty of fifty pounds." But as long ago as 1797, this question seems to have been judicially settled in this State, in *Burrow v. Sellars,* 2 N. C., 501, 502. The defendant then pleaded in abatement that there were other executors (449) not named in the writ.

PER CURIAM. "The plea is bad—it should have been stated that those others qualified as executors and took upon themselves the burden of executing the will." We, therefore, are of opinion that the judgment must be reversed, the demurrer sustained, and a *respondeas ouster* awarded.

(450)

WILLIAM HUNTINGDON *v.* GEORGE W. SPEARS.

Where an administrator or executor in his inventory has returned a debt "desperate," it is not necessary for a creditor, suing such administrator or executor, to show that the debt was due to the testator. It is sufficient for him to prove that the debtor was solvent, in order to throw upon the administrator or executor the burden of showing that the debt could not be collected.

APPEAL from *Dick, J.,* Spring Term, 1843, of CABARRUS.

Assumpsit against the defendant as the administrator of one Dr. Negle. The defendant pleaded fully administered and no assets, and on the trial relied on these pleas. The plaintiff offered in evidence the inventory filed by the defendant, from which it appeared that he had returned sundry book accounts against a number of persons, amounting to several hundred dollars, as belonging to the estate of his intestate, and stated that all the said accounts or charges were "desperate." The

plaintiff then proved that several persons charged on the books of the intestate and so returned in the inventory of the defendant, were solvent at the time the inventory was returned and remained solvent and able to pay the charges against them at the present time. It did not appear that the intestate left any other estate except the accounts above mentioned. The plaintiff contended that he was entitled to recover, by showing that the persons charged on the books of the intestate were solvent and able to pay at the time the inventory was returned, without showing that the debts were due and had been or might have been collected by the administrator. The Court charged the jury that, as the administrator had returned all the amounts without distinc-
(451) tion as desperate, it was incumbent on the plaintiff not only to show the solvency of the persons charged, but likewise to show that the debts were due to the estate of the intestate, at the return of the inventory by the administrator, and had been or might have been by him collected. The jury under this charge found a verdict for the defendant. A new trial having been moved for and refused, and judgment rendered according to the verdict, the plaintiff appealed to the Supreme Court.

Caldwell for the plaintiff.
Alexander and *Osborne* for the defendant.

RUFFIN, C. J. It is not stated in the case what length of time elapsed between the administration of the defendant and the making of his inventory, and the commencement of the action by the plaintiff; and we suppose it was not thought material to the point ruled on the trial. We assume, therefore, that the period was sufficient to charge the administrator with the debts as assets come to hand, if he had returned them as good debts; and the only question intended to be presented, was upon the effect of the return that the debts were desperate. Upon that question we must acknowledge that the rule laid down in the Superior Court, is new to us, and, as we conceive, is erroneous. The effect of it would be that an executor could never be charged with debts as assets, which he had returned as desperate, unless the creditor proved he had actually collected them; for, as the creditor has not the books of the deceased and cannot know what are the items of account, it would be impossible for him to establish the justice of the debts. Indeed, it would be the same if the debt were due by bond; for that being in the defendant's hands, the creditor would be unable to bring the necessary evidence of its execution. In truth, however, both classes of debts are to be deemed *prima facie* to have been debts owing to the deceased, because the executor has returned them as subsisting debts due to his testator. When he
(452) adds that they are desperate, the presumption is not that they

were not owing, for his return is apparently to the contrary. But the presumption is that the debtors are not able to pay, and when the creditor shows that they were solvent, and further that a sufficient time has passed to have enabled the executor to have collected the money, if he had used ordinary diligence, he makes a *prima facie* case, which throws the *onus* on the defendant to show that he has made some reasonable efforts to collect the debts and could not, because the supposed debtors to the deceased had counter demands or refused payment, because they denied the debts, or the demands were stale, or the like; from which it might appear, either that the defendant had been unable to collect the debts after proper efforts, or that no efforts would have been effectual. He has it in his power to produce the evidences of debt, on which his inventory is based, so as to lay before the jury a probable ground in justification of his failure to collect the money, or in excuse for not attempting to collect it.

PER CURIAM. *Venire de novo.*

Cited: *Grant v. Reese,* 94 N. C., 724.

(453)

MARTIN WOOLARD *v.* JAMES R. GRIST.

A bond, taken by one who is overseer of a road, from a person bound to work on the road, the consideration of which is for work on the road which was done by the overseer but which the obligor was bound to do, is not void on account of the consideration.

APPEAL from *Bailey, J.,* Spring Term, 1843, of BEAUFORT.

Debt on a bond, commenced by warrant before a magistrate and carried by successive appeals to the Superior Court. The execution of the bond was admitted. The defense relied on was that the consideration of the bond was illegal, as being against public policy. It was admitted that the plaintiff was overseer of a road in the said county, appointed at .....Term of the County Court, and that the defendant was liable to work on the said road. A witness for the defendant proved that he, at the request of the plaintiff and in the presence of both parties, wrote the bond; that the plaintiff then said that it was taken for work done by him for the defendant, as a hand on a road of which the plaintiff was overseer. Another witness for the defendant proved that he was a constable in that county; that the plaintiff put the bond declared on in his hands for collection, and he, the plaintiff, then said that the defendant contracted with him to do work on the road to the amount of sixty dollars, and that he (the plaintiff) had done the work by hiring hands and his own labor to that amount, and that the defendant had given the

bond for that labor. The Court was of opinion and so charged the jury, that the law was in favor of the plaintiff. The jury found a ver-
(454) dict for the plaintiff, and, judgment being rendered pursuant thereto, the defendant appealed to the Supreme Court.

No counsel appeared for either party in this Court.

DANIEL, J. The defense to the bond relied on at the trial was that the consideration of it was illegal, as being against public policy. There is no statute, prohibiting the taking of such a bond; and we are unacquainted with any rule of the common law, which would make the bond void as being against public policy. It seems to us that the bond is good in law, and the judgment must be

PER CURIAM. Affirmed.

(455)

STATE *v.* WILLIAM P. WATTERS.

1. The declaration of the grandmother of one, who is charged to be a person of color, that his mother was the offspring of a white man and herself, are not admissible evidence upon that question.
2. The act, prohibiting marriages between white persons and "persons of color," includes in the latter class all who are descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person.

APPEAL from *Dick, J.*, Spring Term, 1843, of ASHE.

This was an indictment for a libel, a copy of which is as follows, viz.:

"Notice. A man called Isaac Tinsley on the first day of this month in a suit wherein the State was plaintiff and myself and wife were defendants, swear a willful lie and I can prove it. 15 October, 1841.

WILLIAM P. WATTERS."

The defendant pleaded not guilty and justification. The State proved that the libel was written and published by the defendant. The defendant relied on the truth of the charge as a justification. The facts of the case as disclosed by the testimony were as follows: The defendant and one Zilpha Thompson were indicted in Ashe County Court in the year 1841, for fornication and adultery. The defendants, on the trial, proved that they had been married. The State alleged that the defendant, William P. Watters, was a man of color, and that his marriage, therefore, with a white woman was void. The defendant, William
(456) P. Watters, contended that he was descended from Portuguese, and not from Negro or Indian ancestors. The State examined one Isaac Tinsley as a witness on the trial, who swore that he knew the

grandfather and grandmother of the said William P. Watters, and they were coal black negroes. There was a difference in the testimony as to what Tinsley said on that trial about the color of the mother of the defendant. The defendant and Zilpha Thompson were convicted and punished under that indictment.

On the trial of this case the defendant examined witnesses who swore that they knew the mother of the defendant; that she was a bright mulatto, with coarse straight hair; that her name was Elizabeth Cullom, and that she lived with a man by the name of John P. Watters, who was a white man, but of dark complexion for a white man; and that the said John P. Watters was the reputed father of the present defendant. The same witnesses swore that they were acquainted with Mary Wootten, the mother of Elizabeth Cullom and the grandmother of the defendant; that Mary Wootten was not as black as some negroes they had seen, and had thin lips. A witness on the part of the State swore that he knew Mary Wootten, that she was black, with thin lips and sharp features. The defendant then proposed to prove that Mary Wootten, in her lifetime, had stated to one of the witnesses that the father of Elizabeth Cullom was a white man. This evidence was rejected by the Court.

The jury found the defendant guilty, and, after a motion for a new trial which was disallowed, judgment being rendered against the defendant, he appealed to the Supreme Court.

Attorney-General for the State.
Boyden for the defendant.

RUFFIN, C. J. If the evidence had been heard, it could have availed nothing; and for that reason the verdict should not be disturbed. The oath of the prosecutor was, on the former trial, that the (457) grandfather and grandmother of the defendant were coal black negroes. In that we must understand him to mean the reputed grandfather, as no marriage is stated. Now, that is not contradicted by the declaration of the grandmother, even if true, that the natural father of her daughter was a white man; for it is not suggested that the prosecutor knew thereof, or, even that there was such a reputation in the neighborhood, or among the kindred of the defendant. But admit that the defendant's grandfather was white, and the grandmother only half African—of which last there is no evidence, still the defendant would have been within the degree prohibited from contracting marriage with a white woman. We say prohibited degree because, although the act which annuls marriages between the two races, uses the words "persons of color" generally, we are of opinion, that expression must be construed in reference to other disabilities imposed, for reasons of a similar

nature, upon persons of mixed blood. The act of 1777, ch. 115, sec. 42, the Rev. Stat., ch. 111, sec. 74, and the Constitution, article I, sec. 3, besides other laws, designate such persons as those descended from negro ancestors, to the fourth generation inclusive, though one ancestor of each generation may have been a white person. And thus restricted, the act includes the defendant, who, at most, was only the third generation from a full negro.

But we are of opinion that the evidence was properly rejected, independent of the above ground. It was hearsay, and does not fall within any of the established exceptions to the general rule, which excludes such evidence. The Legislature has not prescribed the mode in which, in cases of birth out of wedlock, it is to be ascertained whether one of the ancestors was a white person; and we should, perhaps, be at some loss to lay down a rule. But certainly if this is to be viewed as an attempt to prove a pedigree by the reputation in the family, and the declarations of deceased members of it, there is a signal failure. The declaration of the grandmother assigns the paternity of her child to no man in particular, but only to some white man; and would be
(458) the loosest proof of pedigree that ever established one. But if she had mentioned the father by name and nothing more appeared, such as a recognition of the child by the designated person, or the appearance in point of color of the child or the like, it would have amounted to nothing. It could not be admitted under that class of cases in which entries or declarations of third persons, with peculiar means of knowledge have been received. For in those cases the entry or declaration was cotemporaneous with the fact; and was also made by one under no motive to pervert the truth. It does not appear that this declaration was at or about the birth of her child, nor when it was. And, besides, it is well known that persons of the description of this woman have a strong bias in their minds to induce the declaration from them, and, if possible, the impression on others, that their illegitimate child is the issue of a white man: if not to gratify a personal vanity in themselves, for the reason that it removes their offspring one degree from the humble caste in which he is placed by the law, whereby he is excluded from the elective franchise, and from competency as a witness between white persons, and prohibited from intermarrying with them.

PER CURIAM. No error.

Cited: S. v. Shields, 90 N. C., 694; *McMillan v. School Committee,* 107 N. C., 614; *Hare v. Board of Education,* 113 N. C., 15; *Ferrall v. Ferrall,* 153 N. C., 176.

(459)

JOHN C. DAVIS *v.* MARTIN R. GARRETT.

1. No specific tangible property can be attached, which cannot be sold under the execution after judgment obtained.
2. Where an estate is vested in trustees, and the purposes of the trust require that the legal estate shall remain in them, the property so conveyed cannot be sold under execution, so as thereby to divest the trustees of their estate, or any part of it.
3. The owner of property attached is not obliged to interplead, though he may do so for the sake of convenience. A sale under an execution, issuing upon a judgment on an attachment, only passes the right of the defendant in attachment.

APPEAL from *Battle, J.*, Fall Term, 1842, of WARREN.

This was an action of debt upon a note executed by the defendant to the plaintiff, and was commenced by original attachment, which was levied upon the defendant's interest in four negroes, and returned to Warren County Court. At the term to which the attachment was returned, William Burt and John A. Burt filed their petition in writing, therein setting forth a claim to seven-eighths of one of one undivided fifth part of the slaves, as trustees for the children of the defendant Garrett. In the Superior Court an issue was made up between the plaintiff and the said petitioners, to determine what interest the latter had in the slaves levied upon. And upon the trial of the said issue it appeared that some time in 1833, William Burt, Sr., died, leaving a last will and testament in writing, which was duly proved and recorded. A copy of the material parts of the said will, which was made and proved in 1823, is as follows:

"*Item.* I give in trust to my sons, William Burt and John A. (460) Burt, the following property, that is, three negroes, Jesse, Henry and Rosina, now in the possession of my daughter Lucretia A. Garrett, also one equal part of my estate, not otherwise given away, at the death or marriage of my wife Salamith Burt; the above property to be under the entire control of my two sons named above, and to be managed by them as in their judgment will be most conducive to the mutual benefit and interest of my daughter Lucretia A. Garrett and her children; and as the children come of age or marry, that the property so managed shall be equally divided between her and her children, and that at her death her part thereof should be equally divided between her surviving children. *Item.* It is my will and desire that my two married daughters, Salamith Sims and Lucretia A. Garrett, should in the division of my estate of negroes, stock, furniture, etc., have so much given them, as to make their negroes now in their possession of equal value with their other sisters' negroes, and the property so given to come under the same regulations and restrictions as their other property before given.

Item. It is my will and desire that all my property, not specifically given, should be kept together and managed for the mutual interest and benefit of my wife and three daughters, Elizabeth, Ann, and Harriet D. Burt, and my son John A. Burt, and as they come of age or marry, that the above property should be equally divided between my wife and four children above named, with this reserve, that my son John A. Burt is to have only an equal part of my negroes, with one horse of his own choosing out of all my stock, and that at the death or marriage of my wife her part of the above property to be equally divided between my five daughters or their surviving children. *Item.* It is my will and desire that all my land in Halifax County should be sold, and the proceeds divided between my five daughters, under the same regulations and restrictions as their other property."

The petitioners are the sons of the testator, and the William and John A. Burt mentioned in the said will—and Lucretia A. Garrett, also mentioned in the said will, as the daughter of the testator,
(461) is the wife of the defendant Garrett. The slaves levied upon are those which fell to the widow of the testator in the division, which was had between her and her four children, as directed in that part of the will where the testator disposes of his property not specifically given away. The testator, at the time of making his will, had five daughters, of whom Mrs. Garrett was one. The widow of the testator died a short time before the attachment was sued out, and at that time Mrs. Garrett had seven children. Upon the trial of the issue, his Honor instructed the jury that seven-eighths of one-fifth of the slaves levied upon belonged to the petitioners as trustees for Garrett's children, and were not liable to the satisfaction of the plaintiff's recovery. The jury found a verdict in conformity to this opinion of the Court, and judgment having been rendered accordingly, the plaintiff appealed.

No counsel appeared for the plaintiff in this Court.
(466) *Edward Hall* for the petitioners.

RUFFIN, C. J. Very much for the reasons given in the full and satisfactory argument of the counsel for the interpleaders, the Court is of opinion, that the judgment should be affirmed. Indeed, we think, that the interest of the wife in the negroes is not the subject of attachment at the suit of the husband's creditors: because no specific and tangible property can be attached, which cannot be sold under the execution, after judgment obtained. And we are of opinion, as stated in the argument, that the purposes of the trust absolutely demand that the legal estate should vest in the trustees; and, therefore, that the property cannot be sold under execution, so as thereby to divest the trustees of

their estate, or any part of it, in the present state of the family. However, that question does not arise here on the record, as it stands; though we have thought it proper to notice it, in the hope of preventing unprofitable and vexatious litigation. For, although the trustees have interpleaded for seven-eighths only of this share of the negroes, that will not conclude them as to the other eighth; since the owner is not obliged to interplead, though allowed to do so for convenience, and the sale under the execution only passes such right as the defendant in attachment has in the thing attached or sold.

PER CURIAM. No error.

Cited: Stein v. Cozart, 122 N. C., 282; *Electric Co. v. Engineering Co.,* 128 N. C., 201; *Johnson v. Whilden,* 166 N. C., 110.

(467)

MARY BRYAN *v.* WILLIAM A. PHILPOT, ADMINISTRATOR OF SOLOMON PHILPOT.

Where a negro belonging to A was sold to B, at the request of A's wife, in the lifetime of her husband, and the price received by B, and after A's death B gave his promissory note to the wife for the amount he had so received: *Held*, that there was no consideration for the note, as the money belonged to A's representatives.

APPEAL from *Battle, J.,* Spring Term, 1843, of GRANVILLE.

Assumpsit brought upon an instrument of which the following is a copy:

"Received of Mary Bryan, three hundred and fifty dollars, which I will pay as soon as collected, with interest from the time I have had it in my hands. This 11 September, 1837. SOL. PHILPOT."

On which instrument was indorsed as follows:

"Received of Solomon Philpot, fifteen dollars in part of the within receipt. MARY BRYAN."

Upon the trial the witness who subscribed the instrument in question, testified that it was signed or acknowledged by the defendant's intestate in his presence; that he did not know what passed between the plaintiff and the defendant's intestate before he was called upon to subscribe it as a witness, but that it was given for the proceeds of the sale of a negro slave, made under the following circumstances: The (468) slave had belonged to the father of the plaintiff, who gave him to the plaintiff while she was the wife of one Samuel Bryan; that Bryan becoming insolvent, and the slave in danger of being taken to pay his

debts, the plaintiff, his wife, took the slave to the defendant's intestate, and, stating that he was hers, requested him to sell the slave for her; that he did so, and received the proceeds and retained them during the life of Bryan; that, some two or three years after his death, the plaintiff called upon the defendant's intestate, and claimed the proceeds of the said slave, when he gave her the instrument sued upon. It appeared by the testimony of another witness, that after the death of the defendant's intestate, the plaintiff by her agent demanded the money of the defendant, when he declined paying it to her, alleging that he had paid it to the administrator of her husband, or was advised that he was bound to do so. Upon this statement of facts the defendant's counsel insisted that the plaintiff had made out no case which entitled her to recover, of which opinion was the Court. Whereupon the plaintiff submitted to a judgment of nonsuit, and appealed to the Supreme Court.

Badger for the plaintiff.
Iredell for the defendant.

DANIEL, J. This was an action of assumpsit on a promissory note, set out in the case. Plea, *non assumpsit.* The defense against the recovery was that it was a *nudum pactum,* and without any consideration. It appears that the slave was the property of the plaintiff's husband, for a gift and delivery of him to the wife, transferred the title in law to the husband. The plaintiff, while she was a *feme covert,* took the slave to Philpot, and directed him to convert the said slave into money by a sale, which he did. If the wife was the agent of her husband in this transaction, the purchase money was in law received by Philpot to the use of the husband. When the husband died, the (469) agency of the wife was revoked (if she had been an agent), and Philpot could not then on any pretense have paid the money to the widow. If we take the case on the other hand, that Philpot sold the slave without any authority from the husband, he would be a *tort feasor,* and the damages would still belong to the husband; or he, and so might his representative, elect to confirm the sale and take the purchase money. Therefore, it seems to us, that at the time the note as given the plaintiff had sustained no loss, nor had the defendant's intestate derived any benefit, as a consideration for giving the note. The case states that the plaintiff told Philpot, when the slave was delivered to him to be sold, that he belonged to her, and she requested him to sell the slave for her benefit. It does not appear that the husband was present at the time, or that he ever assented to that declaration. Gifts or presents from a husband to his wife, though made after marriage, will be supported in equity against himself and his representatives, and such gifts will be

considered as the wife's separate property. Atherley, 331; *Lucas v. Lucas,* 4 Atk., 270, and the cases there cited. If we could see that the slave was the separate property of the wife, even as against her husband only and not against his creditors, as if it were a voluntary gift from him, then the note would be founded on a consideration sufficient for the plaintiff to recover in this action—and to hold the money against all persons except the creditors of the husband. But we do not see that she had any interest in the slave, at the time of the sale, or at any other time; therefore the note was executed by Philpot without any consideration, and the plaintiff was not, in law, entitled to recover. It has, indeed, been argued here, that from the facts shown there was some ground to infer, that the husband had consented that the wife should hold this negro and its proceeds to her separate use, and that it should have been left to the jury, as a matter of fact, whether he had or had not so consented. But to this we answer in the first place that it does not appear that any such allegation was made upon the trial, and *secondly,* that *merely* upon the facts disclosed in the case an (470) inference of such a fact would have been unwarranted by the evidence. It would have been a *guess* or *conjecture,* which will never authorize a verdict.

PER CURIAM. Affirmed.

REDDICK POLLARD *v.* DRURY TEEL.

1. The refusal of the Court to instruct the jury upon a supposed state of facts, which does not appear on the evidence, constitutes no error.
2. What degree of *care* and *diligence* is required of one, who undertakes to sell goods for another, and to sell to none but solvent persons, and what degree of *attention* and *diligence* in one who undertakes to collect notes or accounts for another, *quere?*

APPEAL from *Manly, J.,* Spring Term, 1843, of PITT.

Assumpsit, in which the plaintiff declared upon the defendant's undertaking to sell certain goods, under instructions not to sell to any insolvent persons; and also upon his undertaking to collect certain notes and accounts, arising from the said sales: to which was added a count for money had and received. The proof was that the defendant agreed with the plaintiff for a compensation of 13 per cent to peddle off a stock of goods for him in the county of Martin, and the plaintiff (471) instructed him not to sell to any one who was not good. It was also in proof that the parties, after the sale of the goods was completed, had a settlement, upon which the money proceeds of the sale (after deducting the compensation for the defendant's services) and a number of notes and accounts, the residue on hand, were paid over to the plaintiff.

Whereupon the plaintiff again placed them in the defendant's hands for collection, telling him to do the best he could with them. Of these, the amount of $17.50 was collected, and, upon a demand of a settlement prior to the bringing of the suit, the uncollected notes and accounts were offered to the plaintiff, which he refused to receive, upon the ground, as he alleged, that the defendant had had them long enough. Evidence was gone into on the part of the plaintiff to show that more of these notes and accounts were collected, which it is unnecessary to state. The Court informed the jury that the undertaking by the defendant to sell the goods and to sell them according to the instructions given, imposed upon him obligations of the *strictest care and diligence,* and if he had failed to exercise this degree of prudence in the discharge of these obligations in any particular, whereby loss had resulted to the plaintiff through bad debts or otherwise, the defendant was bound to make good such loss, and the jury should assess damages accordingly. Upon this first part of the case, however, they were further charged to enquire whether there had been, at the settlement spoken of in the testimony, an adjustment of mutual differences between the parties, and an agreement on the part of the plaintiff to abandon all causes of complaint he might have against the defendant. If there was a settlement in this sense of the word, then the jury should not go behind it and assess damages for any such adjusted differences, but should confine their enquiries to the subsequent part of the case. Upon the next count in the declaration, respecting the collection of the notes and accounts, the Court instructed

(472) the jury that the defendant, having upon sufficient consideration undertaken to collect, was bound to bestow the *strictest attention and diligence* on this duty; and, on failure, must make good the loss, if there was any debt or debts which might have been collected by the degree of diligence thus imposed upon the defendant by law, and the jury upon this part of the case would assess damages of an equivalent amount. The jury were informed that they should find upon the third count the sum of $17.50 if they were satisfied by the proof of its collection, and this, added to such sums as they might assess upon the other parts of the case, would, in the aggregate, constitute the proper verdict for them to render. The Court further remarked that the defendant did not, in respect to either of the commissions he had undertaken to fulfill, stand in the condition of an insurer. And, if bad debts had been made in the one case, which no degree of prudence could have avoided, and losses in collecting sustained in the other, which no diligence could have counteracted, the defendant would not be responsible in respect to them. The plaintiff's counsel asked the Court to instruct the jury that "if they believed the bargain to sell the goods, and that to collect the notes and accounts was all one transaction, then there was a

presumption of law that the notes and accounts were good, until the contrary appeared." The Court declined giving such instruction. The jury found a verdict for the plaintiff for $17.50. A new trial having been moved for and refused, and judgment rendered according to the verdict, the plaintiff appealed to the Supreme Court.

No counsel appeared for either party in this Court.

GASTON, J. The only specific instruction, which was prayed in this case on the part of the plaintiff, was, as we think, properly declined by the Court. The prayer was to instruct the jury that "if they believed the bargain to sell the goods and that to collect the notes and accounts was all one transaction, there was a presumption of law that the notes and accounts were good, until the contrary appeared." Now, without deciding what would be the presumption of law upon the supposition that the bargain to sell the goods and the bargain to collect the notes constituted but one transaction, the instruction was (473) rightfully refused, because they were *apparently* separate and distinct contracts made at different times, and there was no evidence to show that they were *in fact* variant from what they purported to be.

No exceptions are put upon the record to the instruction given by his Honor, nor are we apprised (for the case has been submitted to us without argument) in what respect the plaintiff alleges them to be erroneous. We do not see that the plaintiff has any cause to complain of them. The rule of diligence, which the Court laid down, was certainly as rigorous as *he* could rightfully have asked to be applied to the defendant's undertaking. Had the defendant excepted to this rule as too rigorous, it would perhaps have been so held. But on this it is unnecessary to give an opinion.

PER CURIAM. No error.

(474)

STATE v. CHARLES A. BATEMAN.

A judgment was obtained before a Justice of the Peace against A and his surety B. B paid a part of the judgment and took the constable's receipt, which receipt he fraudulently altered so as to make the sum larger. Afterwards A settled with B and repaid him what appeared by the receipt to have been paid by B. *Held* that on an indictment against B for the forgery, A was a competent witness for the State.

APPEAL from *Pearson, J.*, Spring Term, 1843, of WASHINGTON.

The defendant was tried upon the following indictment, viz.:

"The jurors for the State upon their oath present, that on the ninth day of November, in the year one thousand eight hundred and forty, at

and in the county of Washington, one Caleb Phelps confessed a judgment for the sum of forty-three dollars and seventy-nine cents, with interest from 6 January in the year aforesaid, in favor of one Wm. A. Spruill, and also for the costs due on a warrant, which theretofore had been brought by the said William A. Spruill against the said Caleb Phelps, before Ashbury Norman, then and there being one of the Justices of the Peace in and for the county of Washington, and that stay of execution on the said judgment was, on the day and year aforesaid, then and there granted to the said Caleb Phelps by the said Ashbury Norman agreeably to law, he the said Phelps giving as surety one Charles A. Bateman. And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on 10 July, 1841, in the county aforesaid, the said Ashbury Norman, then being one of the Jus-
(475) tices of the Peace for the county aforesaid, issued an execution on the said judgment against the goods and chattels of the said Phelps and the said Bateman, which said execution duly went into the hands of one John Freeman, then being one of the constables in and for the said county, and having full power and authority to execute the same; and the jurors aforesaid, upon their oath aforesaid, do further present that the said Charles A. Bateman, afterwards, to wit, on 14 August in the year last aforesaid, with force and arms in the county aforesaid, of his own head and imagination, did wittingly and falsely forge and make a certain receipt for the payment of money, which said false, forged and counterfeited receipt for the payment of money is in the words and figures following, viz.:

" '14 August, 1841. Rec'd of Charles A. Bateman twenty-eight dollars and sixteen cents in full of this claim. Cost one dollar. J. Freeman, Const.'—with intent to defraud the said Caleb Phelps, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said Charles A. Bateman, with force and arms, in the said county, afterwards, to wit, on the day and year last aforesaid, did wittingly and knowingly utter and publish as true, a certain other false, forged and counterfeited receipt for the payment of money, which last mentioned false, forged and counterfeited receipt for the payment of money is in the words and figures following, to wit (here the same receipt as in the foregoing count is recited), he, the said Charles A. Bateman, at the time he so uttered and published the said last mentioned receipt for money, as true, well knowing the same to be false, forged and counterfeited, with intent to defraud one Caleb Phelps, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said Charles A. Bateman, with force and arms in the said county, afterwards, to wit, on the day and year last aforesaid, of his own head and imagination did wittingly and falsely (476) forge and make a certain other receipt for the payment of money, which said last mentioned false, forged and counterfeited receipt for the payment of money is in the following words and figures, to wit (here the same receipt is recited), with intent to defraud one Caleb Phelps, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

On the trial the solicitor for the State read in evidence a judgment in favor of one Spruill against Caleb Phelps for $43.79, which was stayed by the defendant, and an execution therefor against Phelps and the defendant. A credit of $20 was indorsed as a payment made by Phelps and at the foot of the paper was a receipt written and signed by one Freeman, the constable who had the execution to collect, as set forth in the indictment, except the word "eight," which was written on some other word that had the appearance of being defaced and the words "cost one dollar," which were written under the receipt, and admitted to be in the hand-writing of the defendant. The forgery alleged was in altering the word "six" to "eight," so as to make the receipt read "twenty-eight dollars" instead of "twenty-six dollars," and in adding to the receipt the words "cost one dollar." One Davis swore that on the .. day of August, 1841, (that being a law day at a place called Cool Spring), Freeman, the constable, requested the witness in the presence of the defendant Spruill, the creditor, and Phelps, the original debtor, to calculate the balance due on the execution, saying the defendant was to pay it. The witness made the calculation and ascertained the balance to be, including interest and costs, $26.16, which he stated to the parties. The witness then left them to attend to his own business. Spruill, the creditor, swore that after Davis made the calculation the defendant immediately placed $26 on the counter, which Freeman pushed to the witness, who was standing by his side. The defendant then handed Freeman the 16 cents change which Freeman handed to the witness, and the witness then gave Freeman one dollar, the amount of his costs, and so the execution was fully (477) paid, he receiving $26.16 out of which the officer was paid one dollar for costs. He stated that the defendant then asked Freeman to write a receipt on the paper, to enable him to settle with Phelps. Freeman took up a pen and wrote something, which the witness supposed was the receipt, although he paid no further attention to it. The witness said he was well acquainted with the hand-writing of Freeman, and also the hand-writing of the defendant; that the whole of the receipt

then exhibited was in the hand-writing of Freeman, except the word "eight" (that seemed to be written on some other word, which was defaced), and the words "cost one dollar"; that the latter words were in the hand-writing of the defendant, but he could not be positive, as it was written on some other word, and seemed to be rather a feigned hand, as if in imitation of Freeman's writing. But he was certain it was not Freeman's hand-writing. This witness also stated that Freeman had, a short time before the Court, removed to the western country. The defendant took the papers after Freeman had written upon them the receipt in question.

One Davenport corroborated the testimony of the preceding witness. The solicitor for the State then called Caleb Phelps. He was objected to by the defendant's counsel, because he was the person to be charged by the receipt, and whom it was alleged the forgery was intended to defraud. The solicitor stated he was prepared to show that Phelps had settled and fully paid off the liability he was under by reason of the receipt, and was permitted by the Court to proceed with the examination. Phelps swore that the defendant, being indebted to him by note, had agreed to pay the balance of the judgment, and take the officer's receipt therefor, which Phelps was to allow as a credit on settlement. He gave much the same account of the payment of the balance of $26.16 as the witness Spruill. He further stated that some
(478) four or five months after the defendant had paid the money he and the defendant met to settle; that in making the calculation to see how much would be the balance on the note of the defendant, and what credit the defendant was entitled to, the defendant, among other items, produced the execution and receipt in question, and said, "the receipt is for $28.16. I also paid the officer's cost, one dollar, which he did not give me a receipt for, but I set it down at the bottom of the receipt for fear of forgetting it." The defendant was allowed a credit for the $28.16, and also for one dollar as for costs paid the officer, and when the balance was struck, gave his note to the witness for such balance. As soon as the balance was ascertained the defendant said he would take up the old note and give a new note for the balance. He did so, and said, "we had as well burn up the old papers," and accordingly tore up and cast into the fire the old note. But the witness, who had then got the judgment, execution, and receipt in question into his possession, did not burn them, because, although he was an illiterate man and could not read, and did not like to dispute with the defendant as to the receipt, he was confident it ought only to have been $26.16, including costs, and wished to see the officer before he made any objection. A few days afterwards, meeting Freeman and the defendant at the Cool Spring, he showed the receipt. Freeman, as soon as he looked

at the receipt said: "Whose work is this? It is none of mine." The defendant said, "I'll swear I paid you $28.16." Freeman said again: "Whose work is this?" to which the defendant again replied: "I'll swear I paid you $28.16." They then seemed angry and separated. The witness stated that afterwards the defendant offered to pay him back the $3, if he would take up the receipt and not have the defendant indicted.

Hardy Phelps corroborated the preceding witness as to the settlement between him and the defendant. Several other witnesses were examined, who did not vary the case.

The Court charged that as to the "cost one dollar," as it was not interlined, but merely put at the bottom of the receipt, and the defendant explained at the time, although the jury might think (479) he thereby got a dollar too much, it did not amount to forgery. Upon the other charge, for altering "six to eight," the matter was left to the jury. The jury returned a verdict of guilty. The defendant moved for a new trial, because the Court should have rejected the testimony of Caleb Phelps. The motion was refused, and judgment having been pronounced against the defendant, he appealed to the Supreme Court.

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

DANIEL, J. We think that the decision of the Court upon the competency of Phelps as a witness for the State was right. We admit that the case of forgery stands by itself, and is considered as an anomaly in the law of evidence. In that case the party, who has interest in setting aside the instrument, is not admitted to prove it forged, if he would either be liable to be sued on it, supposing it genuine, or be thereby deprived of a legal claim against another. 2 Stark, 338; Phillips, 88. But if the witness would not incur any loss nor be liable to a suit, his evidence ought to be received, as when he had paid off the forged instrument. 2 Stark., 339; Phil. Ev., 90. Here the payment of the instrument was proved not only by the person offered, but also by another witness.

Secondly, it is contended, that on this record the Court had no power to render any other than a common-law judgment. We have examined the record, and it is in substance correct in all its parts. The indictment in every count concludes against the statute. The verdict is, "that the defendant is guilty in manner and form as charged in the indictment." The statute (Rev. Stat., ch. 34, sec. 21) declares, among other things, that for the forging of any acquittance or

(480) *receipt* for *money* or goods, with intent to defraud *any person* or corporation, the person convicted shall be adjudged, etc. This record, we think, brings the defendant within the provisions of the statute, and we also think that a statute judgment was the proper one to have been rendered by the Court against him.

PER CURIAM. No error.

(481)

ABSALOM B. BAINES, ADMINISTRATOR OF PILGRIM L. WILLIAMS, *v.* JOHN W. WILLIAMS.

1. Where A undertook to go to Georgia, sell a negro of the plaintiff and collect his hire, and with the proceeds pay off, *upon his return to this State*, a certain judgment, a right of action accrued to the plaintiff, as soon as A returned to this State, and, instead of applying such proceeds to the satisfaction of the judgment, appropriated them to his own use; and of course the statute of limitations began to run from that time.
2. No excuse (beyond the exceptions in the statute itself), such as the deception of the defendant, &c., will, in a court of law, prevent the statute from running.

APPEAL from *Battle, J.*, Fall Term, 1842, of NASH.

This was an action of assumpsit, in which the plaintiff declared upon a special contract and in all the common counts. The defendant pleaded the general issue and the statute of limitations. The writ was issued 25 September, 1840. Upon the trial, the plaintiff proved by a witness that in 1829, he, as a constable of the county of Nash, obtained a judgment in favor of one Jacob Boykin against the plaintiff's intestate and the defendant, who was his son, on a claim in which the latter was surety; that it was then agreed between the intestate and his son, that the latter should go to Georgia, where the father had a negro, should sell him, and collect the proceeds of the sale and of the previous hire of the negro, and should therewith, upon his return, pay off the judgment, the officer agreeing to wait therefor until that time; that in two or three months the defendant did go and return with about $200, the proceeds of the hire and sale of the said negro;
(482) and that upon his return the witness applied for the money, to which the defendant replied, "Never fret, it is time enough yet."

Another witness stated, that just before the death of the plaintiff's intestate, which took place in June, 1838, he, the witness, as constable, served a *scire facias* on the intestate to revive the judgment aforesaid, when he appeared to be surprised that it had not before been paid off, and asked the defendant, who was present, why he had not done so, to which the defendant made no answer. The judgment was revived against both the intestate and the defendant, and a part thereof was paid by the intestate in his lifetime, and the balance by the plaintiff as his

administrator, in December, 1838. It appeared further, that the defendant had paid other judgments against his father and himself, to the amount of about one hundred dollars. The plaintiff then produced the record of a suit, commenced by a warrant issued 18 February, 1839, in the name of Jacob Boykin, to the use of A. B. Baines, against the present defendant, in which the plaintiff was nonsuited at the Fall Term, 1840, to which it had been carried by successive appeals. A witness testified, that he was examined in that suit, and gave evidence in relation to the same matters, which form the subject of the present suit. The plaintiff also produced the record of a suit, brought by the present defendant, against the present plaintiff, which was by a rule of [Court] referred to certain arbitrators, who returned their award in favor of the then plaintiff, for $250, on which he had a judgment. One of the arbitrators testified, that the amount of the judgment in question was claimed of the present defendant on the arbitration, but the arbitrators declined to take it into account, because they conceived that it was not embraced in the reference.

The plaintiff closing his case upon this testimony, it was objected by the defendant, that the action was barred by the statute of limitations, and that nothing had been shown to repel that bar; of which opinion was the Court. The plaintiff, in submission to that opinion, (483) suffered a judgment of nonsuit, and appealed.

B. F. Moore for the plaintiff.
Saunders for the defendant.

GASTON, J. We see no sufficient reason to doubt of the correctness of the opinion expressed by his Honor. The law prescribes that all actions upon the case shall be brought within three years *next* after the cause of action, and not later. The undertaking of the defendant was to go to Georgia, there sell a negro of the plaintiff's intestate, and collect his hire, and with the proceeds of the said sale and hire, pay off, *upon his return to this State,* Boykin's judgment. Now this undertaking was broken, when upon the defendant's return to this State, instead of applying these proceeds to the discharge of the judgment, he appropriated them to his own use. Thereupon the cause of action arose. *Topham v. Braddick,* 1 Taunt., 572, referred to in the argument of the plaintiff's counsel, belongs to that class of cases, where, by the express or implied terms of the contract, the defendant is not bound to perform his engagement, until after a demand or a request made. There such demand or request is in the nature of a condition precedent, and there is no breach of the defendant's promise, and of course no cause of action arises, until such demand or request be made.

Nor is the case before us analogous, as is insisted, to the ordinary case of principal and surety. The promise of the principal to the surety is simply a promise of indemnity—to save the latter from damage by reason of the responsibility incurred at the principal's request. This promise is not broken, and consequently no action arises to the surety, until the latter hath sustained damage. Here the engagement of the defendant was not to indemnify the plaintiff's intestate from
(484) liability on Boykin's judgment, but directly and definitely to apply certain moneys of the plaintiff, that should come into the defendant's hands, to the payment of that judgment. When this engagement was broken, the intestate, without waiting to discharge Boykin's judgment, might instantly have brought his action against the defendant.

As to the matters stated in the case, tending to show that the plaintiff's intestate had been kept in ignorance, or had been deceived by the defendant in regard to the breach of the defendant's engagement, or furnishing some excuse for the delay in bringing this suit, we have only to say, that in a court of law they cannot avail to take the case out of the operation of the statute. *Hamilton v. Sheppard,* 6 N. C., 115. Whether they can be urged with more effect in another tribunal, it is unnecessary to inquire.

PER CURIAM. Affirmed.

Cited: Johnson v. Arnold, 47 N. C., 115; *Blount v. Parker,* 78 N. C., 131.

(485)

WILLIS WEBB *v.* JAMES FULCHIRE.

Where a man is cheated out of his money, though it is in playing at a game forbidden by law, he may recover back what he has paid from the person who practiced the fraud on him.

APPEAL from *Bailey, J.,* Spring Term, 1843, of ONSLOW.

Assumpsit, brought by the plaintiff to recover the sum of forty dollars. The jury found a verdict for the plaintiff, subject to the opinion of the Court on the following facts. The defendant had three acorn cups and a white ball, which he placed under one of the cups in the presence of the plaintiff. The defendant proposed to bet the plaintiff twenty dollars that he could not tell which one of the three cups the ball was under. The plaintiff bet him that he could, and thereupon staked twenty dollars. The plaintiff pointed to the cup, and bet that the ball was under that one. The defendant raised the cup and the ball was not there. The money staked was then paid over to the de-

fendant as being won by him. In the same way the defendant won twenty dollars more, which was in like manner paid over to him. The Court was of opinion that the plaintiff could not maintain this action, and set aside the verdict and entered a nonsuit. From this judgment the plaintiff appealed.

No counsel appeared for the plaintiff.
J. W. Bryan for the defendant.

RUFFIN, C. J. It is not denied that the law gives no action to a party to an illegal contract, either to enforce it directly or to recover back money paid on it after its execution. Nor is it doubted that money fairly lost at play at a forbidden game and paid, cannot be recovered back in an action for money had and received. But it is perfectly certain that money, won by cheating at any kind of game, whether allowed or forbidden, and paid by the loser without a knowledge of the fraud, may be recovered. A wager won by such undue means is not won in the view of the law, and, therefore, the money is paid without consideration and by mistake, and may be recovered back. That, we think, was plainly this case. The bet was that the plaintiff could not tell which of the three cups covered the ball. Well, the case states that the defendant put the ball under a particular one of the cups, and then, that the plaintiff selected that cup, as the one under which the ball was. Thus we must understand the case, because it states as a fact, that the defendant "placed the ball under *one* of the cups," and that the plaintiff "pointed to *the* cup," that is, the one under which he had seen the ball put, as being that which still covered it. We are not told how this matter was managed, nor do we pretend to know the secret. But it is indubitable, that the ball was, by deceit, not put under the cup, as the defendant had made the plaintiff believe, and under which belief he had drawn him into the wager; or that, after it was so placed, it was privily and artfully removed either before or at the time the cup was raised. If the former be the truth of the case, there was a false practice and gross deception upon the very point that induced the laying of the wager, namely, that the ball was actually put under the cup. For, clearly, the words and acts of the defendant amount to a representation that such was the fact; and indeed the case states it as the fact. Hence, and because we cannot suppose the vision of the plaintiff to have been so illuded, (487) we rather presume the truth to be that the ball was actually placed where the defendant pretended to place it, that is to say, under the particular cup which the plaintiff designated as covering it. Then the case states that the defendant raised that cup, and the ball was not

there; a physical impossibility, unless it had been removed by some contrivance and slight of hand by the defendant. Unquestionably it was effected by some such means for presently we find the defendant in possession of the ball, ready for a repetition of the bet and the same artifice. Such a transaction cannot for a moment be regarded as a wager, depending on a future and uncertain event; but it was only a pretended wager, to be determined by a contingency in show only, but in fact by a trick in jugglery by one of the parties, practiced upon the unknowing and unsuspecting simplicity and credulity of the other. Surely, the artless fool, who seems to have been alike bereft of his senses and his money, is not to be deemed a partaker in the same crime, *in pari delicto,* with the juggling knave, who gulled and fleeced him. The whole was a downright and undeniable cheat; and the plaintiff parted with his money under the mistaken belief that it had been fairly won from him, and, therefore, may recover it back.

The judgment of nosuit is reversed, and judgment for the plaintiff according to the verdict.

PER CURIAM. Reversed and judgment for plaintiff.

Cited: Warden v. Plummer, 49 N. C., 526; *Edwards v. Goldsboro,* 141 N. C., 72; *Smathers v. Ins. Co.,* 151 N. C., 104; *Sykes v. Thompson,* 160 N. C., 351; *Pierce v. Cobb,* 161 N. C., 302.

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(488)

STATE TO THE USE OF W. W. BODDIE *v.* SAMUEL W. VICK & AL.

1. A memorandum, made by an officer in a private memorandum book, of the time of the levy of an execution, is no evidence for him.
2. Executions from Justices of the Peace are entitled to priority, as between themselves, according to the time at which they came to the officer's hands.
3. If an officer neglect to levy first an execution from a justice, which first comes to his hands, he and his sureties are liable to the creditor having such execution.

APPEAL from *Manly, J.,* Spring Term, 1843, of NASH.

Debt upon the official bond of the defendant Vick, as sheriff of Nash, the bond containing the usual conditions for the faithful discharge of his duty as sheriff. Breaches of all the conditions were assigned.

It was proved that on 30 May next after the date of the bond, judgments before a justice of the peace were obtained in favor of the plaintiff against James C. Stephens, and on the same day executions on these judgments were placed in the hands of the defendant Vick, as sheriff for collection. About a week afterwards, the relator of the plaintiff,

hearing that sale by a constable was advertised of some portion of his debtor's assets, inquired through his son of defendant Vick, what was the then state of his demands; upon which Vick informed him they were levied and had priority of other levies. Vick also claimed, in a conversation with a constable, to have a prior lien upon Stephens' property, by virtue of his executions in favor of Boddie, which (489) was conceded to him. Upon another occasion, when Vick advertised a sale of Stephens' property under sundry executions, the son of Boddie attended as his agent, and when asked by Vick if he intended to bid, said he did, if his father's executions were first. Vick then told him that his father's executions had the preference over others, but, after conversing with Stephens apart, he requested the son not to bid, as the debtor was going away soon, and wanted to keep his property till that time; that his father would then certainly be paid, as his executions were first and bound the property. Mr. Boddie acquiesced, and the property was offered but not sold for want of a bidder. The defendants introduced evidence of judgments before a justice in favor of other persons against Stephens. Only one execution on these judgments was produced, and there was no memorandum of a levy entered on that. A memorandum book was introduced by Vick, in which he had entered levies made by him in virtue of executions upon the foregoing judgments, and also in virtue of Boddie's executions. From this the levies appeared to have been all made on the 2d of June, three days after the reception of Boddie's executions. Evidence of the entries in the memorandum book was objected to by the plaintiff's counsel, but received by the Court. Boddie's judgments and executions were not produced. It was also in evidence on the part of the defendants, that the property levied on was sold and divided ratably among all these creditors, there not being enough to satisfy all. The Court instructed the jury, that the sheriff, in collecting claims put into his hands for that purpose, was bound to use strict diligence and good faith, and if he failed in either of these respects, whereby the plaintiff sustained a loss, he was bound to make good that loss. The sheriff's entries in regard to the levies were at best but *prima facie* evidence of the facts stated in them, and the jury were charged to inquire upon the whole of the facts before them in relation to this point, how the truth was. If the defendant had levied the executions in favor of Boddie first, it would be his duty to satisfy them first, and his failure (490) to do so would make him liable to the plaintiff in this action for the residue of his debt. If the levies were made at the same time, and rightfully so, and afterwards the defendant Vick *faithlessly* represented to Boddie's agent that his executions had the priority, whereby Boddie was lulled into a false security and induced to cease his efforts

to secure his debts, and in consequence thereof they were lost, this would amount to a breach of his bond, and the plaintiff would be entitled to recover what he had so lost. If, on the contrary, the jury believed the levies had been made in accordance with the defendants' entries, and there had been no want of good faith or diligence in the attention to Boddie's claims, they should return a verdict for the defendants. If the jury arrived at the conclusion that, although there might have been a breach of duty on the part of the defendant Vick, in respect to the degree of diligence and good faith required of him, yet if no special damage to Boddie resulted therefrom, he would be entitled to verdict for nominal damages. The property levied upon by Vick under the executions above mentioned, was indisputably sufficient to satisfy Boddie's executions. The jury returned a verdict for the plaintiff and assessed the damages to the residue of Boddie's debt, after deducting the sum he had already received. An ineffectual motion was made for a new trial, and judgment having been rendered pursuant to the verdict, the defendants appealed.

B. F. Moore for the plaintiff.
W. H. Haywood for the defendants.

RUFFIN, C. J. The Court has not thought it worth while to consider whether, if all the executions were in fact and properly levied at the same time, the sureties of the sheriff would be liable on his official bond for his falsehood in informing the relator, that his execution was entitled to priority by having been served first. For we think
(491) there are other clear grounds, on which the judgment should be affirmed.

There is full evidence of the relator's execution, of its delivery to the sheriff, and of the levy of it on sufficient property to satisfy it, and of the sale of the property. That forms in itself a case for a recovery. The defense against it is, that the sheriff had other justice's executions which he levied at the same time, and that the money raised is consequently divisible ratably among them all. If that were true in law, yet the defense must fail, because it does not appear to be true in fact. There is no legal evidence that the other executions were levied together with the relator's. All that was offered was a memorandum of the sheriff—made, we know not when—in a private book of his own. To the admissibility of it the plaintiff objected, and the objection, we think, is good. A levy indorsed on the execution has been received as *prima facie* evidence for the sheriff, upon the ground that such an entry was a cotemporaneous official act, being a part of his return. *Loftin v. Huggins*, 13 N. C., 10. But this is not an act of that sort;

and for the falsehood of it the officer would be in no wise responsible. It would lead to great abuses if sheriffs were permitted at remote periods, to give evidence of this nature, which might be fabricated by them *post litem.*

If, however, the levies were made at the same time, the judgment ought, as the case is, to be against the defendants. It is not positively stated when the executions of the other creditors came to the sheriff's hands. But we are obliged to understand that it was after the relator had delivered his; because the contrary was not suggested, and because the sheriff repeatedly declared that Boddie's were the prior executions. The defense was placed solely on the fact of a simultaneous levy. Now, we hold it clearly to be the duty of the sheriff, as between executions issued by a justice of the peace, to serve that first which came first to his hands. This is not within the rule of *Green v. Johnson,* 9 N. C., 309; but, on the contrary, the reasoning of all of the Judges there show it to be governed by an opposite principle. That case proceeds on the ground that a *fieri facias* binds from its *teste,* and, as the majority of the Court thought, it thus binds as (492) against another execution. It was therefore held that executions from a Court of record of the same *teste* were equally entitled, and that one of prior *teste* was first entitled to satisfaction, without regard to the period of delivery to the sheriff or of the levy; provided they all came to hand before the sale. For that reason that case was distinguished from *Smallcomb v. Buckingham,* 1 L'd Ray, 251, and other English cases upon priorities among executions. But that has no application to a case in which the lien of the execution is not from the *teste,* but from the delivery to the sheriff, or the levy by him. Such is now the law with respect to executions issued by a justice of the peace, which, by the act of 1828, Rev. Stat., ch. 45, sec. 16, "bind by and from the levy." As to them the rule of *Smallcomb v. Buckingham,* ought, obviously, to prevail; because the law serves the vigilant, and because the sheriff should first do his office for him who first applies. The only exception is, when the process of one creditor, in itself, creates a preference, as, for example, being of an older *teste,* when the lien depends on the *teste.* But when a creditor places his process in the hands of an officer, it is his duty promptly to execute it, so as to prevent other creditors from coming in before him who has asked his services; and if he is prevented from doing so on the instant by other official duties, or omits it from any other cause, he ought, when he does levy, to preserve the priorities as if he had promptly done his duty. That is a rule of sound justice; and it is the only one that can be laid down, without leaving creditors to the caprice or negligence of the officer. Our act, like the English statute of frauds, operates only between cred-

itors and purchasers from the debtors. As between execution creditors, it leaves the duty of the sheriff to be regulated by the general principles of good morals and justice, which certainly requires that he who comes first shall be served first.

PER CURIAM. No error.

Cited: Miller v. Powers, 117 N. C., 220.

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(493)

ISAAC HELLEN *v.* PETER NOE & AL.

The Commissioners of the town of Beaufort have authority, by an act of Assembly, to make ordinances for the removal of public nuisances, and also all such necessary rules as may tend to the advantage, improvement and good government of the town, not inconsistent with the laws and constitution of the state. Under this power, the Commissioners had a legal and valid authority to pass an ordinance to this effect, "that every hog at large in the said town should be taken up and penned and advertised to be sold on the third day, and unless the owner should pay the charge for taking up such hog, and if a sale is effected, the money arising therefrom, after paying the charges, will be paid over to the owner of such hog."

APPEAL from *Bailey, J.,* Spring Term, 1843, of CARTERET.

Trespass for taking a hog belonging to the plaintiff. On the trial it was in proof, that the plaintiff lived in the town of Beaufort; that his hog was running at large in the streets of the said town; that the defendant, Peter Noe, as the constable of the said town (having been duly appointed to that office), and under an ordinance of the commissioners of the town, seized and sold said hog to Whitehurst for twenty-five cents; and that the ordinance under which Noe acted was made by the other defendants as commissioners. The following is a copy of the ordinance, viz.:

"Ordinance of the commissioners of the town of Beaufort, passed 5 August, 1841.

"Whereas, complaint having been repeatedly made to us, the commissioners of the town of Beaufort, that the number of hogs run-
(494) ning at large in the town has increased greatly, and that they root up and otherwise impair the streets, and that they annoy and are a nuisance to the community: Be it therefore ordained, that from and after the 15th inst. each and every hog at large in the town will be taken up and penned and advertised to be sold on the third day, and unless the owner or owners of such hog or hogs shall pay the charges for taking up such hog or hogs, and if a sale be effected, the money

arising therefrom after paying the charges, will be paid over to the owner or owners of said hog or hogs. Charges for taking up each hog, 30 cents; keeping, 10 cents per day."

The defendants' counsel insisted that the defendants were justified under an act of the General Assembly and the ordinance aforesaid, and that if the action could be maintained at all, it could be sustained only against the constable, and not against the commissioners, although he acted under their direction. The Court charged the jury, that if they were satisfied the hog belonged to the plaintiff, and the defendant, Peter Noe, seized and sold it, and that he acted under the direction of the other defendants, as commissioners, the plaintiff was entitled to recover the value of the hog, and that the defendants were not justified under the ordinance and acts of Assembly. The jury found a verdict for the plaintiff, and judgment having been rendered pursuant thereto, the defendants appealed.

No counsel appeared for the plaintiff in this Court.
J. W. Bryan for the defendants.

DANIEL, J. This was an action of trespass for taking a hog. Plea in justification, that the defendant, Peter Noe, was then the town constable of Beaufort, and that he took up the hog of the plaintiff within the limits of the said town under town ordinance mentioned in the case. Had the Commissioners of the town power to make such an ordinance? The private act of Assembly, passed in the year 1825, for the better regulation of the town of Beaufort, authorized the commissioners to make ordinances for the removal of public nuisances, and also all such necessary rules as may tend to the advantage, improvement, and good government of the said town, not inconsistent with the laws and Constitution of the State. The commissioners are to be annually elected by the free white men of the town who are of the age of twenty-one. Their rules or ordinances are subject to be repealed or (499) amended at the pleasure of a majority of the commissioners. The plaintiff and defendant are both citizens of the said town. If the commissioners deemed it to be to the advantage of the town to prohibit the hogs of its citizens from running at large within the limits of the corporation, we cannot see that they had not the power, under the above recited act, to pass any reasonable by-law to effect that end.

Shaw v. Kennedy, 4 N. C., decides that a town ordinance is not lawful which authorizes the property of one man to be taken from him and given to another, without any notice to the owner or trial of his rights. But in this case the ordinance does not attempt to deprive the owner of his property, provides for his having

notice, and secures to him every right which he can claim, not inconsistent with the object of the ordinance, the prevention of mischief to the community. If a majority of the citizens of the town deem the ordinance impolitic or injurious to the people of the corporation, they have the power in their own hands to remedy the evil; but we cannot say that this ordinance is either against the general law, or is in itself unreasonable. The seizure and distraining of the hog by the proper officer, and impounding the animal, with a three days public advertisement for the owner to come forward and take his property, and pay the officer's charges only, or if a sale took place, the purchase-money, after deducting the costs, to be held for the owner, distinguish this case from *Shaw v. Kennedy.* Notice to the owner of the hog is given by force of the distress of the property and the public advertisement. Such notice has been declared by the courts to be sufficient to bring the owner of the property seized into Court under our attachment laws. Personal notice is not absolutely necessary; if the owner of the property be unknown no other notice can be given, or this method of giving notice will be the best. The Legislature has, in many instances, given the commissioners of towns the right to make regulations concerning the swine of the citizens of those towns. Swine
(500) running at large in a town may or may not render the enjoyment of life and property uncomfortable. And if they belong to the citizens of the town, we think that they come under the legislative power of the commissioners. Whether the commissioners will make rules concerning such property, is only a matter of expediency.

PER CURIAM. New trial.

Cited: Whitfield v. Longest, 28 N. C., 271; *Rose v. Hardie,* 98 N. C., 47; *S. v. Austin,* 114 N. C., 860; *S. v. Tweedy,* 115 N. C., 705; *Broadfoot v. Fayetteville,* 121 N. C., 420; *S. v. Ray,* 131 N. C., 820; *Daniels v. Homer,* 139 N. C., 251, 263, 271.

(501)

GIDEON C. MARCHANT *v.* MAXCY SANDERLIN.

When a guardian of an infant, under an order of the County Court, sells his ward's land for payment of the debts of the ancestor, he is bound to observe the same priority in the payment of the debts, as an administrator or executor in applying the personal assets.

APPEAL from *Bailey, J.,* Fall Term, 1842, of CAMDEN.

This was a proceeding under the act of Assembly by *scire facias* against the guardian of the heirs of Edward Saunders, to subject the

proceeds of the land of the heirs to the payment of the plaintiff's judgment. The plaintiff commenced his action against the administrator of Edward Saunders upon an open account, who pleaded that he had fully administered, which plea was admitted to be true by the plaintiff, and thereupon he proceeded to ascertain the amount of his demand and took judgment against the heirs, and issued *scire facias* against them, and had judgment thereon for the amount set forth in the *scire facias*. The defendant Sanderlin is guardian to the heirs of Edward Saunders, and having notice of debts due from his wards on account of their ancestor, filed his petition in the county court of Camden, and obtained an order for the sale of the lands descended to his wards from their said ancestor. The lands were sold for a sum more than sufficient to satisfy the plaintiff's claim, and the funds are now in the hands of the defendant as guardian. To the *scire facias* the defendant pleaded that there were other judgments against his wards, obtained upon bonds of the said Edward Saunders, yet unpaid, and that he had not assets to satisfy them and also the plaintiff's demand. To this plea there was a general demurrer, and it was also admitted that the (502) plaintiff's judgment was obtained before the judgments upon the bonds mentioned. The defendant insisted that the fund in his hands, arising from the proceeds of the lands, were assets for the benefit of creditors, to be applied, as would be the case of personal assets in the hands of executors or administrators, to the payment of debts of the highest dignity first. His Honor being of opinion that the defendant must first satisfy the judgment obtained on bonds, gave judgment for the defendant, from which plaintiff appealed.

Kinney for the plaintiff.
A. Moore for the defendant.

RUFFIN, C. J. We think the judgment must be affirmed. The act of 1789, Rev. Stat., ch. 53, sec. 11, enacts that the proceeds of sales made by the guardian of the estates of the wards, under an order of the Court, "shall be considered as assets in the hands of the guardian for the benefit of the creditors, in like manner as assets in the hands of an administrator or executor, and the same proceedings may be had against such guardian with respect to the assets aforesaid, as might be had or taken against an executor or administrator in similar cases"; and we think this provision conclusive upon the question. It is said for the plaintiff, that under the act of 1784, the dignity of the debt does not determine the priority of satisfaction out of the land descended, but that the creditor, who first gets a judgment, may proceed to an immediate sale; and it is hence inferred, that, when the land is sold by the guard-

ian the proceeds are to be applied in like manner, as there is no reason for changing the order of payment. But to that it is to be replied that the act of 1784 in itself establishes no priority among the creditors, as against land descended, but simply renders it liable for all debts in a particular manner; and the priority results by adjudication, (503) from the fact that the creditor obtains satisfaction by sale, and that the purchaser must be protected. It is not, in truth, the date of the several judgments against the executor or the heir, that determines the preferable right to satisfaction among the creditors; but he who gets the first specific lien by execution and a sale under it, entitles himself to the money. *Ricks v. Blount,* 15 N. C., 128. But when the land is turned into money by the guardian, a necessity arises, that the law should, for his security and to prevent favoritism to creditors, prescribe some order for administering the fund; and it has seemed good to the Legislature to adopt the common law dignity of debts, as known in the administration of personal assets. If the act does not mean that, we are unable to put any sensible interpretation upon its language; and we see a necessity for some such provision. But the correctness of this construction is the more probable from a reference to that part of the act —sec. 16—which provides for the case of a sale by an adult heir or devisee himself; "in which case all creditors shall be *preferred,* as in actions against executors and administrators." These words, with the rest of the provision as it stood originally, are taken from the statute of fraudulent devises in England. 3 and 4 W. and M., ch. 14, of which it is the settled construction, that the dignity of debts, as due by judgments or specialties, is to be observed. The same meaning must be put on that part of our act, of which the meaning, indeed, cannot be mistaken, since there can be no other *preference.* In the like sense we are obliged to understand similar language in another part of the act, providing for the application, among creditors, of the proceeds of land sold by the guardian of an infant heir or devisee.

PER CURIAM. Affirmed.

STATE *v.* JOHN A. GRIFFIS.

On the trial of an indictment for assault and battery, in order to show some motive of resentment, on the part of the defendant, it was competent for the State to prove that the prosecutor had said in the defendant's hearing, a short time before, "that no honest man would avail himself of the bankrupt law," and then to prove further that the defendant's father had previously been talking about taking the benefit of that act.

APPEAL from *Manly, J.,* Spring Term, 1842, of JOHNSTON.

This was an indictment for an assault and battery on one George W.

Daughtry. On the trial, it appeared there had been a political wrangle between Daughtry and a company assembled at a vendue in Johnston County, which was continued into the twilight of the evening, until nearly dark. At the time while Daughtry and one of his friends were engaged in conversation apart from the assembly, some one from behind struck Daughtry three blows with a knife, two of which wounded him. As he received the third blow, he caught around and seized the hand of a man, who, upon being led to the light, was identified as the defendant John A. Griffis. Immediately after the commission of the offense, the defendant was charged with it, and did not deny it. It was also in proof, that there was no one near enough to Daughtry, at the time of the blows, to strike him, except the defendant. No one saw the blows given; and there was no proof of any quarrel between Daughtry and the defendant. But in behalf of the State it was proved that Daughtry declared in the crowd, in the course of the (505) dispute, that no honest man would avail himself of the late bankrupt law of Congress, and, in connection with that declaration, a witness was called and proved that he had heard the defendant's father previously talking about taking the benefit of that act. This evidence was objected to on the part of the defendant, but admitted by the Court, as tending to establish *some motive* in the defendant for the act, with which he was charged, and thus to throw light upon the question of his guilt. The jury found the defendant guilty, and a new trial having been refused and judgment rendered pursuant to the verdict, the defendant appealed.

Attorney-General for the State.
J. H. Bryan for the defendant.

GASTON, J. The testimony to which the defendant has excepted is not liable to the objection that it is "hearsay evidence." It was not offered to establish the *truth* of what the defendant's father had said, but simply to prove the fact, that he made such a declaration. If that fact became material or relevant in the inquiry before the jury, certainly testimony of the fact was proper. Now we cannot say that the fact was altogether immaterial or irrelevant. The assault upon the prosecutor followed soon after his declaration, that no honest man would avail himself of the bankrupt law, and such a declaration was likely to provoke to resentment the son of one thus publicly branded as dishonest. We think the State had a right to show this circumstance as tending to point out the individual who took fire at this remark, and wreaked his vengeance on the person who made it. The circumstance, *per se,* would be exceedingly weak, but in connection with the other evidence in the case, it was entitled to some regard.

PER CURIAM. No error.

(506)

STATE *v.* NOAH BELL.

1. All the acts passed at the same session of the Legislature are to be considered as but one statute.
2. Therefore the Revised Statutes, passed at the session of the Legislature in 1836, constitute but one statute.
3. All persons, and not planters only, are subject to indictment for not keeping up good fences, as required by the 34th and 48th chapters of the Revised Statutes.
4. Where the county is mentioned in the caption, the last of the words "then and there" in the body of the indictment will be understood as referring to that county.

APPEAL from *Manly, J.*, Spring Term, 1843, of EDGECOMBE.

The defendant was tried and found guilty upon the following indictment, viz.:

STATE OF NORTH CAROLINA, Edgecombe County—*ss.*

Superior Court of Law, Fall Term, 1842.

The jurors for the State upon their oath present, that Noah Bell, late of the county of Edgecombe and State aforesaid, on the
(507) 1st day of July, in the year of our Lord, one thousand eight hundred and forty-two (1842), and continually before and after that time, during the crop season of the year, then and there being the occupier and cultivator of a farm as owner of the same, and being bound during the said crop season to keep up his fences around his cultivated fields five feet high, unlawfully, willfully and negligently did permit his said fences around his said fields to be and remain during the crop season of the year aforesaid, less than five feet high, there being no navigable stream nor deep water course around the same, to the common nuisance of the good people of the county and of the State then and there being, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

After conviction, the defendant moved in arrest of judgment, upon these grounds: First. Because it was not sufficiently averred in the bill that the defendant was the cultivator of the field in question. Second. Because the indictment concluded "against the form of the *statute*" and not *"statutes,"* as it ought to have done. The motion in arrest was overruled and judgment pronounced, from which the defendant appealed.

Attorney-General for the State.
B. F. Moore for the defendant.

DANIEL, J. Chapter 48, sec. 1, Revised Statutes, declares that every planter shall make a sufficient fence about his cleared ground under cul-

tivation, at least five feet high, unless where there shall be some navigable stream or deep water-course, that may be deemed sufficient, instead of a fence aforesaid. Chapter 34, sec. 42, Revised Statutes, declares "that all persons neglecting to keep and repair their fences during crop time, required by an act concerning fences, passed at this present session, shall be liable to be indicted." The defendant (508) was indicted for not keeping up a sufficient fence, and the indictment concludes against the "statute." This conclusion in the singular number, we think, was right, because the said two chapters, which we admit must be taken together to make up the body of the defense, are but parts of *one statute*. The law which was embraced in both these chapters, was passed in a constitutional form, at one and the same General Assembly, to wit, the session of 1836. All laws passed at one session of Parliament were anciently strung together, making so many *capitula,* or chapters of one statute. *Dwarris on Statutes,* 2. All the acts of one session of parliament, taken together, make properly but one statute; and therefore when two sessions have been held in one year, we usually mention Stat. 1, or Stat. 2, of the particular year of the reign of the then King. 1 Black. Com., 85, 86. Before the session 1836, the portions of the two above mentioned chapters were contained in *two statutes,* because they became the law by force of two acts, passed at different sessions of the Legislature. But since the acts have all been revised and reënacted in a constitutional manner at one session of the Legislature, they are now but one statute, and were so when the defendant committed the offense charged in this bill of indictment. It is said, however, that the Legislature did not intend that all the old act of Assembly, which were revised and reënacted at the session of 1836, should be considered as one statute. We have no evidence that the Legislature intended otherwise, certainly it has not expressed a contrary intention; and, therefore, the rule which has prevailed for ages must still be adhered to by us.

Secondly. It is said by the defendant's counsel, that the offense mentioned in the statute, is not described with sufficient certainty in this indictment. This objection is founded upon the indefiniteness of the phrase, "continually before and after that time," but this phrase is modified by the subsequent words "during crop time," so as to bring the offense within the description in chapter 34. It is further objected that in chapter 48 the enactment applies only to planters, and that (509) the indictment is defective in not having averred that the defendant was a planter; but to this, we think, it is properly replied that chapter 34 applies the enactment to "all" persons neglecting to keep up their fences during crop time.

It is again objected, that the offense is not stated in the indictment

to have been committed within the county of Edgecombe, where the defendant was tried. We think that the last of the words, "then and there," sufficiently refers to the county of Edgecombe, mentioned in the caption. *S. v. May,* 15 N. C., 328. All the objection which have been taken, are overruled.

PER CURIAM. No error.

Cited: *S. v. Tolever,* 27 N. C., 454; *S. v. Hoyle,* 28 N. C., 3; *S. v. Melton,* 44 N. C., 51; *S. v. Taylor,* 69 N. C., 545; *Rhodes v. Lewis,* 80 N. C., 139; *S. v. Kittelle,* 110 N. C., 578; *Wilson v. Jordan,* 124 N. C., 688; *Greene v. Owen,* 125 N. C., 219; *S. v. Patterson,* 134 N. C., 620.

(510)

MARY MORRIS *v.* MILES COMMANDER.

A person, who has acquired, by presumption of law, a right to pond water on another's land to a certain height, is not thereby entitled to increase the height of such pond, but, if he does, is liable to the other in damages for the excess. And it is incumbent on him who claims the privilege to pond water, to show that that privilege authorized him to pond the water as high as he now ponds it.

APPEAL from *Pearson, J.,* Spring Term, 1843, of PASQUOTANK.

This was an action of trespass on the case for ponding water on the plaintiff's land, by means of a dam erected on the defendant's land. It appeared that a branch or natural drain passed through the lands of both the plaintiff and the defendant, the defendant's land lying below that of the plaintiff. The defendant, in June, 1842, made a dam across the said drain on his own land, a few feet from the line that divided the two tracts of land, and by that means the water, that usually passed along down the drain, was ponded upon the plaintiff's land. The defendant contended that a grant to him to erect a dam and to pond back the water on the plaintiff's land, was to be presumed from an undisturbed *user* by him for upwards of twenty years. It appeared in evidence, that the defendant had made a dam across this drain in 1831, near where he made the dam in 1842. The son of the defendant deposed, that for twenty years before the time of the trial (April, 1843), his father had a dam across this drain, so as to protect his fields from the water running off the plaintiff's land; that this old dam was about 75 yards down the drain; that it was superseded by the new dam of 1831, erected at another place, and that the old dam was at
(511) that time removed. In 1838, this son of the defendant was the owner of the land now owned by the plaintiff; and he asked the permission of his father to cut a ditch through the dam of 1831,

and the defendant gave him liberty to do so. He then cut a ditch a foot deep in the bottom of the drain through the dam, and drained the water into the defendant's large ditch, which he had cut across the natural course of the drain, on his side of the dividing line between the two tracts of land. In March, 1842, the witness sold his land to the plaintiff, and then told her that he had cut the said small ditch along the drain, and through the dam of 1831, by the permission of his father, the defendant. There was no evidence that the old dam, which stood 75 yards down the drain, ever ponded the water on the plaintiff's land to as high a point as either the dam of 1831 or that of 1842 did.

The Court charged the jury, that to raise a presumption of a grant to the defendant to stop up the natural drain of the water, and pond the same on the plaintiff's land, there must have been an enjoyment of the right to obstruct, to the same extent as it is now obstructed, continually for twenty years. And if the water was ponded back farther upon the plaintiff's land by the dam of 1831 than it had been by the old dam 75 yards down the stream, then as to the *excess,* a presumption of a grant for that *excess* commenced running only from 1831; and that the plaintiff was entitled to recover for that *excess,* notwithstanding time sufficient had run to raise a presumption of a grant to the defendant to erect the old dam, 75 yards lower down on the stream, and to pond the water to a less height. The Court said that sixteen years undisturbed *user* of the said dams by the defendant, by which the water was thrown back on the plaintiff's land, with a four years discontinuance of the dams by contract with his son, the then owner of the land of the plaintiff, would not raise a presumption of a grant to him to erect the said dams; that there must be an actual and continued enjoyment of the easement for at least twenty years, to raise such a pre- (512) sumption.

The jury found a verdict for the plaintiff, and there being judgment pursuant thereto, the defendant appealed.

No counsel for the plaintiff.
Kinney for the defendant.

DANIEL, J. Whether the sixteen years undisturbed *user* of the dams by the defendant, taken together with the four years discontinuance of the dam of 1831, by contract with his son, is or is not sufficient in law to raise a presumption of a grant to him of the privlege to dam the drain and throw back the water on the plaintiff's land, is a question not necessary for us now to decide. For it is admitted that there was no evidence in the cause, that the water was ever ponded, by means of the erection of the old dam 75 yards down the stream, to as high a point

on the plaintiff's land, as it was by the dam made by the defendant in 1842. The plaintiff was then certainly entitled to recover, under any aspect of the case. The damages assessed are but nominal, and the defendant has no right to complain.

PER CURIAM. No error.

Cited: *Reed v. Earnhardt,* 32 N. C., 529.

(513)

MARTHA COPELAND *v.* JOHN F. PARKER.

1. An overseer, from whom a slave is retreating against his orders, has no right to shoot him for the purpose of stopping him.
2. A plaintiff has a right to recover damages for an injury done by a defendant to his slave, while hired out, if the injury was unjustifiable, and was of such a nature as impaired the value after the term of hiring expired.

APPEAL from *Pearson, J.,* Spring Term, 1843, of GATES.

Case to recover damages for an injury done by the defendant to the plaintiff's slave. The plaintiff proved that she had hired the boy Gilbert, who was her slave and about twenty years of age, to certain gentlemen, who were opening a turnpike road in Gates County, for the year ending 25 December, 1840; that in November, 1840, the defendant at the distance of ten paces, fired at him with a shot gun, loaded with squirrel shot, and lodged the load in his back and thigh. In consequence of the wound Gilbert was disabled from work for the balance of the year, and for nearly half the year 1841. Several doctors were examined, as to whether the wound impaired his value permanently, the shot remaining in the flesh after the wound had healed. About this the doctors differed in opinion. The defendant relied on the plea of justification, and proved that he was the overseer of the hands; that Gilbert had left his work without leave the day before, but came back in the morning and went to work; that about 10 o'clock the defendant requested the witness, who was passing by, to stop and help him whip Gilbert for having run away. As witness was getting off his (514) horse Gilbert stuck his spade in the ground and started off in a walk; the defendant ordered him to stop; Gilbert continued to walk, and rather quickened his pace, and the defendant then fired and brought him to the ground. This was done at a place in the swamp, where, at a distance of some twenty or thirty paces, the bushes and water rendered it difficult to get along. The defendant's counsel moved the Court to charge: First, that the defendant was fully justified; secondly, that the plaintiff could not at any rate be entitled to a verdict, unless the jury was satisfied that the value of the negro was per-

manently impaired; that a temporary injury, extending only a few months after the hiring for the year expired, would not support an action, inasmuch as the overseer had a right to chastise on the last day, and might be under the necessity of disabling the slave, in which event the owner had no right to complain.

The Court charged that a gun was not a fit instrument for chastisement, and that an overseer had no right to shoot a negro down who refused to stop when ordered, and was in the act of making off. If he did so it was a wrongful act, and he was responsible to the owner for any loss sustained by reason thereof. That to entitle the plaintiff to a verdict it was not necessary that the negro should have been permanently injured after the wound healed up—it was sufficient if the negro was disabled from working after the expiration of the year, so that the plaintiff sustained damage by losing his services. There was a verdict for the plaintiff, and judgment having been rendered, the defendant appealed.

No counsel for either party in this Court.

DANIEL, J. The charge of the Judge we think was unexceptionable. The overseer had a right to correct the slave for leaving his work the day before without permission. But in attempting to perform this duty, as the slave was not in resistance to him, but was only retreating against his orders, he had no right, we think, to use a deadly instrument to stop him. The slave was not likely then to be lost: it was probable that in a few hours or in a few days he would (515) have returned, or would have been brought back, when the overseer might have corrected him for his misdeeds in a reasonable manner. The act of shooting the slave betrayed passion in the overseer, rather than a desire to promote the true interest of his employers, or to keep up that subordination, which the state of our society demands.

Secondly. We agree with his Honor in the opinion that any injury to the plaintiff's reversion in the slave, done by the illegal act of the defendant during the time of the particular estate, might be redressed in an action on the case.

PER CURIAM. No error.

(516)

CHARLES M. FORD *v.* JOHN H. BLOUNT'S EX'OR.

If an executor or administrator, at his own sale, procure an agent to buy for him any part of the property of his testator or intestate and then to re-convey it to him, such executor or administrator shall account for the full value of such property, or for such higher prices as he subsequently obtained for it, beyond the amount bid by his agent.

APPEAL from *Pearson, J.*, Spring Term, 1843, of PERQUIMANS.

Debt upon a note under seal, for $960.90. The defendant relied on the plea of fully administered. To show assets, the plaintiff proved that at the sale of the effects of the testator in June, 1838, the growing crop of corn was sold by the defendant and bought by one Skinner, who also bought most of the negroes of the testator; that afterwards the defendant had the crop cultivated by the negroes, and the crop, when sold by him, produced $1,800, over and above the price given by Skinner and a reasonable sum for the after cultivation, gathering, etc. Skinner gave high prices for the negroes, much more than they could be now sold for; and bought the crop of corn, which was sold by fields, at $1.50 per 1,000 hills, about $3.50 cents per acre, which was a fair price under the circumstances—the time of the year—the little demand for growing crops, as all farmers then had crops in tend—though the crop would have been worth much more to a man who had force to cultivate it. Skinner swore that Mrs. Blount, the widow, who was his wife's sister, both being the daughters of the defendant, before the sale, re-
(517) quested him to bid for her; that in several instances he bid openly for the widow, thinking that would affect the prices, and the clerk of the sale set such articles down to the widow; but as Blount's estate was supposed to be insolvent, and many creditors were present, he found they were not inclined to favor the widow, and when the negroes were sold, he bought them in his own name. He bought the crop in his own name, and both the negroes and crop were set down in the account of sales to him, although he bought them as the agent, and at the request of the widow. But afterwards the defendant executed to him bills of sale for the negroes, and he immediately reconveyed at the prices to the defendant. The defendant also credited him for his several bids for the corn crop, and immediately took the corn from him. There was evidence tending to show that the defendant had procured the widow to request Skinner to buy the negroes and corn. Unless the defendant was charged with the $1,800 thus realized from the corn crop, it was admitted that he had fully administered.

The plaintiff's counsel insisted that, in fact, Skinner had, through the instrumentality of the widow, been procured to buy the corn for the

defendant, and then having reconveyed to the defendant, it became again the testator's property, in the same way as if the defendant had bought it himself directly; and that the doctrine in *Hoskins v. Wilson,* 20 N. C., 385, was confined to slaves and land, which passed to the agent by a written transfer. The Court charged that if in fact Skinner bought the corn from the defendant, and, after the title was in him, immediately transferred it back to the defendant, although this circumstance might have the effect in equity, where matters of account can be properly adjusted, to charge the defendant with the net proceeds, after proper allowances, yet, in law, the corn, having passed to Skinner, ceased to belong to the estate of the testator, and the defendant was not chargeable in respect thereof for more than the amount of Skinner's bids; that this principle depended upon the title passing to the agent, and it made no difference whether the title passed by deed or by a mere parol sale, when the property was of a nature to pass (518) without deed.

The jury found for the defendant upon the plea of fully administered, and judgment having been rendered accordingly, the plaintiff appealed.

A. Moore for the plaintiff.
Kinney for the defendant.

GASTON, J. It seems to us that upon one view of the case, which was properly submitted to the consideration of the jury, the instructions of the Court were erroneous. His Honor having left it to them as a question of fact, whether the witness Skinner, at the public sale made by the executor, bid off the growing crop for *him,* instructed them that if they should so find, the executor was nevertheless not, in law, chargeable to the creditors of his testator for the amount which that crop actually produced in his hands, but only for the sum at which it had been so bid off. In support of this position it has been argued by the defendant's counsel that by the contract of sale the *legal* title in the crop passed to the purchaser, and was wholly divested out of the defendant as executor, and that, upon the retransfer, it vested in the defendant again, but in his individual character; that the alleged trust under which the purchaser bought could not be noticed in a Court of Law, as invalidating the sale, but was cognizable only in a Court of Equity, which would not allow the executor to derive gain therefrom; that these principles were distinctly recognized in *Hoskins v. Wilson,* 20 N. C., 385, where there was a transfer from the vendor and retransfer from the vendee by deed, and that the same principles must apply in cases of transfer and retransfer by parol, if the nature of the property permitted it to pass

without deed. We do not think that the question to be decided necessarily involves the enquiry whether at law the title of the growing corn passed to the supposed purchaser, and was immediately thereafter
(519) revested in the defendant, or whether, notwithstanding such apparent or pretended sale and resale, it continued in the defendant until his final disposition of the corn. The question to be decided is, for what sum is the defendant chargeable to the creditors of his testator because of that crop of corn. Is it what he actually got, or only the price at which his agent bid it off? Assets in the hands of an executor or administrator are thus defined: "All those goods and chattels, actions and commodities, which were of the deceased in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator doth get into his hands as belonging to him in the right of his executorship or administratorship, and all such things as do come to the executor or administrator in lieu or by reason of that, and nothing else shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee."—Touchstone, 496. 2 Will's on Ex'rs, 102. Now the net price, which the defendant obtained for the corn, when ultimately disposed of by him, was obtained in lieu and by reason of goods of the testator which had come to him in his office of executor, and for this price he ought to be charged unless he had therefore *rightfully* disposed thereof at a less price. Nothing is better settled with us than that an executor cannot buy at his own sale. It would be a miserable evasion of the law, if he could rightfully do this through the intervention of an agent. What is prohibited directly cannot be sanctioned, if done indirectly. Suppose, therefore, the sale, or pretended sale to Skinner did pass the legal title, yet if in this transaction he were the agent of the executor and bought for the executor, it was a wrongful disposition, and the price is not the measure of the value of the corn wrongfully sold. An executor cannot be allowed to speculate upon and make profits out of the estate of his testator. Whenever it is seen that he has made profits thereout, these profits, as well at Law as in Equity, are assets for the satisfaction of creditors and legatees. So if he buys in a debt of his testator for less than its nominal amount, he shall be allowed only
(520) what he paid therefor. And it will make no difference whether he buys in his own name or through the intervention of an agent.

If *Hoskins v. Wilson* has been regarded as authority for the position that a transfer by an executor to an agent, and a retransfer by the agent to the executor, changes the character of the executor's ownership, that he now holds absolutely what he before held *in trust,* we must be permitted to say our decision has been misunderstood. There is a great difference between the legal effect of sales, conveyances and other dis-

positions, when made by trustees, who are at law the owners of the property, and when made by those who, without having an estate therein at law, are entrusted with certain powers in relation thereto. In the case referred to, the trustee, whose conduct was arraigned, was of the latter description. Upon the petition of several tenants in common of certain slaves, an order was made by a competent Court for the sale. The sale was made, reported to the Court, and confirmed, and a conveyance in due form executed to the reported purchaser by the petitioners. Some of these petitioners were under age, and it was alleged that the purchaser bought in the slaves for the guardian of the infants, and, shortly after taking his conveyance, conveyed them to the guardian. We held that although the sale might have been set aside under the rule which prevails in Equity, that no trustee or agent of the parties to a sale shall be allowed to purchase for himself, yet the legal title of *the petitioners* passed under their conveyance to the reported purchaser, and by his conveyance to the guardian of the infant petitioners. So in the case there quoted of *Jackson v. Walsh,* 14 Johns., 407, there was a sale of *land* made by an executor, and it was objected that under his deed the purchaser could not take the legal estate, because the purchase was made in trust for the executor. Here the vendor was not owner, and the estate did not pass from him. His deed operated at law as an appointment, and the vendee as the appointee under it took the estate from the devisor. The objection that the estate did not pass under this appointment *at law* was overruled, but it was distinctly (521) admitted that a court of equity would have readily listened to an application from persons interested in and aggrieved by this transaction, had it been made in due season, and have set aside the sale as one in violation of the settled law of that Court. But an executor holds the goods, which were of his testator as the legal owner, and although the law gives him this dominion for the benefit of others, yet a sale of these goods by him is made in the legal character of owner. Now no man can sell his own property to himself, and whenever an alleged sale, however disguised, is perceived to be of this character, it must be pronounced by every Court, which can look beyond the forms of the transaction, to be a nullity. Whether there may not be cases in which, because of the peculiar operation of the solemnities accompanying a pretended transfer from and retransfer to the executor, a Court of law may be incompetent to ascertain the truth of the transaction, we forbear to say until a necessity for a determination of that question shall arise. But in the case under consideration we have no difficulty in saying that there was no impediment of this character. If no consideration passed or as intended to pass from the bidder to the executor, there was no contract of sale. The transaction was in fact a *sham,* a pretended sale,

and the law will so pronounce it. The property remained what it had been, the property of the executor.

The judgment must be reversed and a

PER CURIAM. New trial.

Cited: Stewart v. Rutherford, 49 N. C., 485; *Stradley v. King,* 84 N. C., 638; *Tayloe v. Tayloe,* 108 N. C., 73.

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(522)

JOHN C. EHRINGHAUS *v.* CHARLES M. FORD & AL.

1. Where a Bank of this State agreed to lend to an individual notes of a Virginia Bank, which were at a depreciation in the market, below both specie and the notes of the bank in this State, and the borrower was to give his note at ninety days, to be discounted by the Bank, and to be paid in specie or in the notes of the bank making the loan: *Held,* that the note given in pursuance of this agreement was void for usury, though the borrower stated at the time that he could make the Virginia notes answer his purpose in the payment of his debts to others.
2. Usury consists in the unlawful gain, beyond the rate of six per cent, taken or reserved by the lender, and not in the actual or contingent loss sustained by the borrower. The proper subject of inquiry is, what is the lender to receive, and not always what the borrower is to pay, for the forbearance.

APPEAL from *Pearson, J.,* Spring Term, 1843, of CAMDEN.

This was an action of debt upon a note for $4,400, dated 17 June, 1842. The defense relied on was the statute of usury. On the trial it appeared in evidence that Williams and Green, the principals in the note, on 17 June, 1842, had their notes in bank, two for $1,200 each, and one for $2,000; that at the instance of Williams and Green, the cashier agreed to consolidate the three notes, and the note in question was taken in renewal thereof. The usury alleged was in the $2,000 thus included in the note of $4,400. The $2,000 note was offered for discount, on 25 February, 1842, and was then discounted as to $1,000. On 4 March following, it was discounted as to the other $1,000, and when discounted, the proceeds were placed on the books of the bank as a credit to Williams and Green, in Virginia bills. Williams and Green were then charged with the amount of several notes the bank had received
(523) for collection against them, and the balance was checked out by Williams and Green, and paid to the bearers of the checks in Virginia bills. There was evidence tending to show that the terms upon which the $2,000 note was discounted were, that Williams and Green should receive Virginia bills, and pay in North Carolina bills or specie. It was also in evidence that on 25 February, 1842, and on 4 March,

1842, and for some time afterwards, the bills of the Virginia banks were seven per cent below specie value in the money market, and between two and four per cent below North Carolina bills. That on 2 February, 1842, the bank made a rule that all deposits in Virginia bills should be considered and entered as special deposits, and paid out in Virginia bills. That in February, March and May, the difference between North Carolina bills and Virginia bills in the money market at the North and in Norfolk was 2 per cent in North Carolina bills, that in Elizabeth City, where the bank is located, the difference was between 2 and 4 per cent in favor of North Carolina bills, during the latter part of February, March, April and May, 1842; that the bank, in February, 1842, refused to take Virginia bills in payment of claims sent to them from the North to collect, but at that time took such bills in payment of notes discounted previous to February. The plaintiff's counsel called as a witness John C. Ehringhaus, the cashier. The defendant's counsel objected to his competency, as he was the plaintiff of record. The Court considered him incompetent. The plaintiff offered in evidence the book kept by the cashier in pursuance of a clause in the bank charter, and made evidence by that clause. The book was objected to by the defendant's counsel, but was admitted by the Court. It appeared from the book that on 18 February, 1842, the president and directors entered into a resolution, that all notes discounted on that day and afterwards should be paid in North Carolina notes or specie; and, on 25 February they adopted another resolution, that one-half of the payments upon all notes discounted prior to 18 February should be in North (524) Carolina bills. A copy of these resolutions was posted up in the bank room. Several witnesses swore that, although in February there was a difference in the money market of 2 per cent in favor of North Carolina bills and of 4 per cent after these resolutions of the bank on Virginia bills, still Virginia bills continued current, and passed at par in payment of debts and in the purchase of produce. The sheriff swore that he had many executions to collect returnable to March Term, and he received Virginia bills, except in two cases, where he was instructed to require specie; but these instructions were withdrawn in a short time, and, as far as he knew, Virginia bills were received at their nominal value in the payment of debts, and answered that purpose the same as North Carolina bills, except at bank. One Butler, the teller of the bank, swore that when Williams applied for the discount of the $2,000 note, he stated that he was entirely willing to receive Virginia bills, as they would answer to pay debts at their nominal amount, for which purpose he wished to get them. He stated that the bank resumed specie payment on 1 May, and, as preparatory to that, in February and afterwards, paid out few of its notes, and wished to get in as many as possi-

ble. He also stated that it was the practice of the bank to have quarterly settlements with the Virginia banks, and exchange to them such of their notes as this bank had received, for the notes of this bank, which they had received, and the excess was entered to the credit of the one or the other.

About February, and for some time afterwards, the credit of excess was in favor of this bank for a considerable amount, and this amount did not draw interest from the debtor bank. It was also in evidence that Williams and Green were in debt to many persons, and that persons, situated as they were, could get off Virginia bills at their nominal amount in payment of debts. Green was one of the directors present when the $2,000 note was discounted. The Court charged that if there was usury in the $2,000 note, and it was included in the $4,400 note, now sued on, it would vitiate the whole. That to constitute usury
(525) there must be a loan of money, to be returned, at all events, at a profit of more than six per cent to the lender, and a loss of more than six per cent to the borrower. In this case it was not contradicted, but that there was a loan to be returned at all events; the only question was, as to the profit of the one and the loss of the other; that if Virginia bills were depreciated at the time, so as to be from 2 to 4 per cent below North Carolina bills in value, and 7 per cent below the value of specie, and the bank, as a condition of the loan, required the borrower to receive such Virginia bills, with the expectation and right to make him repay in North Carolina bills and specie, without explanation, it made out a case of usury; for, besides the six per cent interest, the lender received, and the borrower lost, the difference in value. That as to the receipt of the Virginia bills, after the credit was given to the borrower, it made no difference whether he received them himself, or whether they were received by persons having his check; that if this additional profit was made by the one and lost by the other as the terms of the loan, it made no difference whether the officers of the bank thought it was usury or not, for no man was allowed to give in excuse his ignorance of the law, if in fact the law was violated. The Court further charged that the plaintiff, by way of explanation, insisted, *first*, that there was no additional gain to the bank; for, supposing Virginia notes to be then depreciated, they would, in after settlements with the Virginia banks, when they should in the course of trade get notes of this bank, answer as well as specie; 2d, that there was no loss sustained by the borrower, for he was enabled, being in debt, to pay off his debts with these Virginia bills, dollar for dollar, and that was the motive of the bank in letting him have them. As to the first, was there an additional gain to the bank? This was a question of fact for the jury.

It was insisted that as the excess of Virginia bills did not draw interest, the bank gained, as a matter of course, in getting off depreciated paper at par, which would otherwise lay upon its hands unproductive. As to the second, was there a loss to the borrower? (526) This was also a question of fact for the jury. If the borrower owed debts, and his creditors were willing to receive Virginia bills in payment at par, it would seem, he lost nothing by receiving them at par. The defendant's counsel here moved the Court, that he lost in this, that if he had received specie, or even North Carolina bills, he could have exchanged the one at 7 per cent premium and the other for 2 per cent premium for Virginia bills, which latter bills would have paid his debts, dollar for dollar, and he would have the premium extra. The Court charged that the premium extra, if the borrower could have realized it, would certainly have been desirable. But if the bank did not have the ability to lend specie, and was unwilling to lend its own notes, and the borrower was thus unable to make this premium extra, it was rather a disappointment than a loss or sacrifice on the part of the borrower. If the borrower, being unable to get a loan of specie or North Carolina bills, received Virginia bills at par and passed them off to his creditors at par, he could not, as the term loss was understood in law, be said to have submitted to a loss, for the debts he owed and thus paid, might be called for in specie as well as the debt he incurred in order to pay it. The defendant's counsel then moved the Court to charge that if the credit of Williams and Green was so much impaired that a depreciated currency would pay their debts at the full nominal value of such depreciated currency, yet it did not follow that they did not suffer loss by borrowing such surrency and contracting to pay in a better currency, though they did in fact pay off debts to the whole amount of the sum borrowed, and that, although the borrower did not lose beyond the six per cent, yet if the lender gained or made a profit over and above six per cent, and the making this profit was a part of the agreement, upon which the loan was made, this agreement was in law a corrupt and usurious agreement. The Court refused so to charge; but charged that the essence of usury consisted in the fact that one man, having the means, should take advantage of the necessities of another, and (527) exact a gain of more than six per cent at the expense of the other for a loan, that although it was understood that the lender would gain over and above six per cent, yet if it was not to be at the expense of the borrower, it did not come within the legal meaning of usury—there must be a conjunction of a profit to one, and a loss to the other. For instance, if A applies to B to borrow $1,000, B says I have not that much cash, but I have $500 cash and a note on C for $500, C being doubtful and his note not being worth its nominal amount; whereupon A says the

note of C will be as good as cash for what I owe, and I am borrowing the money to pay him, and B thereupon let him have $500 cash and C's note, and takes his note for $1,000, with six per cent, this is not usury, for although B gained by getting off a doubtful note at par, yet A lost nothing, for that note was worth to him its nominal amount. So in this case, if the bank, being about to resume specie payments, was unwilling to lend its own notes, but having these depreciated Virginia bills, was induced to lend them under the full belief that the borrower could use them at the nominal value, and so would lose nothing, the fact that the bank did gain would not constitute usury because the borrower did not lose; but in considering the question the jury must be satisfied that the bank had no reason to believe that the borrower would lose, and was satisfied that he would not, for if a needy man says to a money-lender, that bills 50 per cent below par will answer him as cash, the lender must necessarily know that it is not so, and that the borrower means to submit to a sacrifice for the sake of getting money. So if the bills are 25 per cent, 10 per cent, 5 per cent, 2 per cent, the argument upon the question of fact is still the same, weakened only in degree, and the question resolves itself into this, did the parties really believe that the depreciated bills would answer the borrower to pay his debts as cash; if so, then the one has not made a gain at the expense of the other, and there is no usury; but if a loss to the borrower was expected (528) by reason of the bills, then the lender has taken advantage of the necessities of the borrower, to compel him to submit to a loss for his benefit, and the law pronounces the transaction usurious, and the note void.

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

GASTON, J. The best definition which can be given of usury will be found in the words of the statute by which it is prohibited: No person or persons whatsoever, upon any contract, shall directly or indirectly take for the loan of any moneys, wares, merchandise or commodities whatsoever, above the value of six dollars by way of discount or interest for the forbearance of one hundred dollars for one year, and so after that rate for a greater or lesser sum, or for a longer or shorter time, and all bonds, contracts and assurances whatever for the payment of any principal or money to be lent or covenanted to be performed upon any usury, whereupon or whereby there shall be reserved or taken above the rate of six dollars in the hundred, as aforesaid, shall be utterly void." Usury consists then in taking directly or indirectly, upon a loan of money or commodities, either by way of discount or interest, above the value of six dollars for the forbearance of one hundred dollars for

one year, or that rate for a greater or less sum, or for a longer or shorter time. It follows then, that the test proper to be applied to the loan, which in this case is alleged to be usurious, is whether it was made upon an agreement to render therefor a higher rate of compensation than the statute sanctions. Now if the agreement was that the borrowers should receive the amount lent, after deduction of the discount, in notes known to be depreciated at their nominal value, and at the expiration of the term should repay that amount in lawful money, or in a currency less depreciated than that in which it was advanced, without further explanation, an assurance to carry that agreement into execution would be usurious. It is manifest that by that assurance there is re- (529) served to the lender, after taking out the legal discount, the difference between the actual value of what was lent and what is to be returned. This is prohibited gain. If upon a loan it is agreed that the borrower shall be paid in bills at a premium, which they actually command in the market, all will admit that in this there would be no usury, and it must follow that if he be required to take it in bills at par, which are then at discount, this must be usury. Whatever may be the motives which induced the Legislature to regulate the value of the use of money, and by severe penalties to prohibit all bargains for its use at a higher price, the standard of this value is the gain taken by or reserved to the lender, not the price paid or to be paid by the borrower. Accordingly, we cannot doubt, if it was a part of the consideration for a loan, that in addition to the principal and lawful interest to be paid by the borrower, a stranger should allow a gratuity to the lender, such loan would be usurious under the statute. The proper subject of enquiry is what is the lender to receive, and not always what the borrower is to pay, for the forbearance. Where the entire gain of the lender is derived from the borrower, the profit of the former and the loss of the latter, are necessarily commensurate. But it is always safer to apply, when we can, the standard given by the law, than to make use of any other, however exactly in general it may appear to correspond therewith.

In this case, it seems to us, that his Honor, after laying down very accurately the general rules of law applicable to it, in considering the explanations, by which the agreement was sought to be rescued from the imputation of usury, has permitted his intelligent mind to be perplexed and finally led into error by an unnecessary enquiry about the loss of the borrowers. And having arrived at the conclusion that, in consequence of the use to which the money borrowed was applied, they had not subjected themselves to a loss upon the loan greater than at the rate of six per centum per annum, he was of opinion that (530) the assurance was not tainted with usury, although the lender

was thereby to receive more than the compensation for forbearance fixed by law. That error, we think, was occasioned by not regarding the loss as determined *by the agreement,* but as ascertained by combining therewith the gain of the borrowers in their disposition of the money lent. Upon these combined transactions, they may not have finally lost the premium allowed upon the depreciated notes, but, if it be so, it is because their creditors have consented to allow it. They did lose more than the lawful interest by the agreement, but they were enabled to throw off this loss upon others.

If the depreciated notes—depreciated in the money market or even with all other persons, had been to the borrowers *intrinsically* worth the value at which they were received, then there would have been no usury in requiring that they should be received at that value. It might have been fortunate for the holder to meet with a person to whom these notes were *as cash,* but, if they were, then in effect there was a loan of the *money* which the notes called for, and six per centum per annum interest thereon, would not have been a greater gain on such loan than the law authorized. Such a case might be put; as if the borrowers had been permitted to deposit, as cash, Virginia notes to that amount, on a promise to take them back at the same rate, or were under any other valid obligation to redeem them. And perhaps there are others, but it will be sufficient to state these as illustrations of this position. It is very probable that neither the borrowers nor the lender had an actual intent to violate the statute against usury, and it is not unlikely that the loan, as made, under the then pressure of the times and embarrassments of the banks, was not only prompted by commendable public motives, but in truth also an act of favor to the borrowers. But if, by the agreement, it was intended to obtain in fact a greater compensation for the money lent than the statute allows, the law pronounces the agreement corrupt, whatever misapprehensions might have prevailed as to the construction of the statute, or however free the agreement (531) from every taint of moral turpitude. This may be hard, but *sic lex scripta est,* and we must obey it.

The Court is of opinion that there was error in the instructions given to the jury, and that the judgment must be reversed and

PER CURIAM. New trial.

Cited: Stedman v. Bland, 26 N. C., 300; *Bank v. Ford,* 27 N. C., 696; *Webb v. Bishop,* 101 N. C., 102; *Moore v. Beaman,* 112 N. C., 565.

(532)

STATE v. ELLIOTT SHAW.

1. Where a juror was challenged for cause, and it appeared that his wife was cousin to the prisoner's former wife, who was now dead, leaving no children. *Held* that this was no cause of challenge, the affinity having ceased with her death.
2. The improper allowing or disallowing of a challenge is a ground for a *venire de novo*, not as a matter of discretion in the Court, but of right to the party; and is therefore a good foundation for a writ of error.
3. The withdrawal of a juror from the panel by the Court, without *sufficient* cause, is in law, however excusable the error, an arbitrary withdrawal, for which the Court has no authority.
4. The jurors of the original venire constitute a distinct panel. When that panel is persued—or gone through with—without forming a jury, any individual member thereof, who, upon the challenge of the State, has been set aside, to see whether a jury might not be formed from the panel without him, must be brought forward and challenged or taken, before the special venire or tales jurors can be resorted to.

APPEAL from *Manly, J.*, Spring Term, 1843, of HALIFAX.

The defendant was indicted for the murder of one Randolph Powell, and pleaded not guilty. In forming a jury to try the issue, a juror from the original panel was drawn, and, being brought to the book to be sworn, was challenged by the Attorney-General in behalf of the State, and the cause of challenge alleged was, *first*, that the said juror had formed and delivered his opinion, that the prisoner was not guilty of the charge in the indictment specified; and *secondly*, that he was connected by affinity with the prisoner. And issue being taken by the prisoner upon the matter alleged in support of the challenge, (533) the Attorney-General examined the said juror to prove the same, who deposed that he had not formed and delivered an opinion that the prisoner was not guilty of the said charge, and that a former wife of the prisoner, now deceased, was in her lifetime a cousin of the said juror's wife. His Honor declared his opinion in favor of the challenge taken, allowed the same and set aside the juror, and to this opinion the prisoner by his counsel excepted.

And another juror, from the special venire, being in like manner drawn, was challenged by the Attorney-General in behalf of the State, and the cause of challenge alleged was, that the said juror had formed and delivered his opinion that the prisoner was not guilty of the charge in the indictment specified; and issue being taken thereon, the Attorney-General examined the juror to prove the same, who, being asked whether he had formed and delivered an opinion, said he believed he had—being asked to explain himself as to the nature of the opinion, he said that the opinion referred to had been formed from a rumor or report of the transaction heard by him at the time, and upon supposition that the same was true, but he had not formed any opinion whether the rumor

or report was true or not—and being asked whether he had any reason to disbelieve the said report, he said he had not. His Honor sustained the said challenge and set aside the said juror, and the prisoner by his counsel excepted.

A jury being impaneled, found the prisoner not guilty of the murder charged, but guilty of manslaughter.

After the rendition of this verdict, a motion being made on behalf of the prisoner for a *venire de novo,* on the ground of error in the matters aforesaid, his Honor declared that as the jury was completed without exhausting the prisoner's peremptory challenges—and as the right of challenge was a right to reject and not a right to choose, and as, therefore, whether the challenges aforesaid were rightfully maintained or not, the whole jury was accepted and taken by the free consent of the (534) prisoner, there was no ground either for a *venire de novo* or a new trial, and therefore denied the motion.

Judgment having been pronounced against the prisoner, he appealed to the Supreme Court.

Attorney-General for the State.
Badger for the prisoner.

GASTON, J. Upon the trial of the prisoner, a juror of the original panel was challenged by the State, because that he was connected by affinity with the prisoner, and upon its being shown that the deceased wife of the prisoner was in her lifetime a cousin of the wife of the juror, the Court allowed the challenge, the prisoner excepted thereto, and his exception was recorded. It does not appear whether, at the time of the trial, there was or was not issue living of the prisoner by his deceased wife, and, as it is incumbent on him who challenges to make out his cause of challenge, we must understand that there was not such issue. On examining the authorities we find the law to be that in such case the affinity ceased with the death of the wife. There was, therefore, error in the part of the Court in allowing this challenge. Co. Litt., 156, 7-a; Hargrave's note 1 and 2. *Mounson v. West,* 1 Leonard, 88; 11 Viner Title Trial F. d. 2, pl., 10 and 11.

The improper allowing or disallowing of a challenge is a ground, not for a new trial, but for what is strictly a *venire de novo. S. v. Benton,* 19 N. C., 196. The party complaining thereof does not apply to the Court for the exercise of its discretion in setting aside a verdict, by which, because of the irregular formation of the jury, he may have been injured, but insists, as a matter of right, that there hath been a mistrial, because the trial was by a jury not constituted according to the due course of law. The improper granting or the improper refusing of a

challenge on the part of the Court is therefore alike the foundation of a writ of error. *King v. Edmunds,* 4 Barn. and Ald., 472.

But it has been argued on the part of the State that the right (535) of a prisoner is not to be tried by a jury of his own choice, but by one free from exception; that this right the prisoner hath fully enjoyed, for he had a trial by a jury whom he accepted as liable to no objection, and that therefore he cannot be heard to allege, as an error in law, the withdrawal of a juror from the panel without cause by the Court. And, in support of this argument and the conclusion drawn from it, *S. v. Arthur,* 13 N. C., 217, is relied on as an authority. We acknowledge fully the authority of that case, and if the question now to be decided had been there determined, we should unhesitatingly adhere to the decision. But in the case referred to it is stated as a fact, and upon that fact the judgment of the Court was founded, that a jury was formed *from the panel* without exhausting the peremptory challenges of the prisoner. The Court held that the State had a right to require that the challenged juror should stand aside until the panel was gone through, and that as a jury had been formed without going through the panel, the act of the Court complained of was, *in effect,* no more than the setting aside of the juror for an allowed time. One of the Court, indeed, took care to state, "That had the panel been gone through, the prisoner could then have claimed the right to have on his trial the juror who had been challenged by the State, and the prisoner might have had reason to complain if the juror were discharged, and the cause assigned did not disqualify him."

We distinctly admit that the ground on which *peculiar privileges of challenge* are allowed to prisoners in capital cases is in the language of the eminent Judge, whose words are embodied in the argument of the Attorney-General, "Not that the prisoner shall be tried by a jury of his own choice or selection, but by one against which, after exhausting his peremptory challenges, he can offer no just exception." But the question now presented is not as to the extent or nature of a privilege claimed by the prisoner as *such,* but involves general principles of law applicable to the trial of all cases, civil as well as criminal. It is a great object of the law to keep unsullied the purity of jury trials, and, among other rules which it has established as settled to (536) accomplish that object, it has given to each party to an issue the right of challenge for sufficient cause. Now it is essential, as well to the protection of this right as to the guarding against the abuse of it, that every erroneous decision, in matter of law, upon such a challenge, shall be the subject of correction. All will admit that the Court *cannot arbitrarily* withdraw a juror without any cause," *S. v. Arthur, supra,* and, in our apprehension, the withdrawal of a juror without *sufficient*

cause is, in law, however excusable the error, an arbitrary withdrawal. In the case before us the jury was not formed before the original venire had been exhausted, and the material question occurs, was it then necessary for the State to show its cause of challenge, or might it require that the juror should still stand aside until the special venire was gone through. We think this question was substantially decided in *S. v. Benton, supra.* In that case the prisoner demanded that the names of all the jurors summoned should be deposited in a box together, but the Court directed that those of the original venire should be first deposited and drawn, and that the tales jurors should not be resorted to, unless a full jury could not be constituted without them. The case was brought before us by appeal of the prisoner, and we held that the course pursued was proper, not only as conforming to the general practice which had obtained throughout the State in the trial of capital offenses, but as most in accordance with the statutory provisions on the subject of juries, that upon the petit jurors of the original venire was imposed the general duty of trying all issues, as well in criminal as in civil cases, which might be submitted during the term, and that bystanders were to be called into the performance of this duty only upon a deficiency of the original panel, or where a necessity for resorting to bystanders should occur. We also held that the jurors of the special venire were likewise but auxiliaries to those of the original venire, in the performance of the duties primarly imposed upon the latter, and "were so far in the
(537) nature of tales jurors as being provided to supply a deficiency of the original venire." It is an obvious corollary from the principles thus asserted, if it be not in terms decided by the case, that in legal contemplation the jurors of the original venire constitute a distinct panel. When that panel is perused or gone through with, without forming a jury, any individual member thereof, who, upon the challenge of the State, has been set aside, to see whether a jury might not be formed from the panel without him, must be brought forward and challenged or taken, before another panel can be resorted to. We forbear from noticing the exception taken by the prisoner to the allowing of the challenge of the juror belonging to the special venire; for, according to *S. v. Arthur,* the juror was at all events rightfully kept back from the jury, until the special venire was gone through. The Superior Court of Halifax will set aside the verdict rendered against the prisoner as null, because the jury was not constituted according to the due course of law, and order a new jury to try whether the prisoner be or be not guilty of the premises charged in the indictment against him.

PER CURIAM. *Error.*

Cited: S. v. Owen, 61 N. C., 427; *S. v. Washington,* 90 N. C., 667; *S. v. Hensley,* 94 N. C., 1028.

(538)

JOSIAH IVES *v.* JOSIAH JONES.

1. A promise to indemnify another for committing a willful and wicked trespass is not binding.
2. But, where the object is apparently in furtherance of justice and in the exercise of a right, and the means are not in themselves criminal, and not known to the person employed to be wrongful to a third person, a contract to save harmless one, who from good motives did an act for his employer, which, contrary to his expectation, happened to be an injury to a third person, will be enforced.
3. Where one was employed, under a promise of indemnity, to do an act which turned out to be a trespass on another's property, and the employer and the person employed were both sued, but the jury found the former not guilty, and assessed damages only against the latter: *Held*, that his verdict did not conclude the person employed, in a suit by him on the promise of indemnity, from showing the true state of the facts and the liability of the defendant.

APPEAL from *Pearson, J.*, Spring Term, 1843, of CURRITUCK.

Assumpsit. The plaintiff proved that the defendant had contracted to sell him a piece of land, and that he had taken possession of it in pursuance of the contract; the title to be made when the land was paid for. The plaintiff was the overseer of the defendant, and attended to his hands on a plantation some few miles distant. The defendant told the plaintiff that the fence on one side of the tract he had agreed to sell him, did not run quite out to the line, but departed from the line about ten or fifteen steps—that he had notified Ballance, who owned the land adjoining this tract, of his wish to have this, which was the dividing fence, let out to the line, and directed the plaintiff that, unless Ballance came within twenty days to assist in removing the fence, he should take the defendant's hands and set the fence out to a certain place, which he pointed out and designated, (539) saying, "If Ballance does not agree to it, but chooses to bring suit against you, I will pay all damages and save you harmless." The plaintiff moved the fence accordingly, the defendant in the meantime having gone to sea. The plaintiff read in evidence the record of an action of trespass by Ballance against the present plaintiff and the present defendant and one Woodhouse, for moving the fence. In that case the jury found Ives, the present plaintiff, guilty, but found Jones, the present defendant, and Woodhouse, not guilty. The plaintiff also proved that the defendant had attended in person to the defense of the action of trespass, not only for himself but for the present plaintiff and Woodhouse. Execution issued against the present plaintiff for the amount of the damages and costs, which he paid. The defendant having been notified of the facts, refused to indemnify the plaintiff, who thereupon brought this action. The defendant's counsel insisted, first, that as the defendant had been sued as a cotrespasser, and the

verdict was in his favor, he was under no obligation to pay the damages and costs, which had been paid by the plaintiff. Secondly. Supposing he had promised to indemnify the plaintiff for moving out the fence, that being a promise to induce another to commit a trespass, it was against the policy of the law and not binding. The Court held that the verdict in the action of trespass did not discharge the defendant from his obligation; thirdly, that although a promise to induce another to commit a willful and wicked trespass would not be binding yet the promise in this case, taking the evidence to be true, was binding, because the plaintiff was the overseer of the defendant, and obeyed his directions, not in committing a willful and naked trespass, but in the assertion of title to land, which he had no reason to believe was not the property of his employer, and which, moreover, he had contracted to buy. There was a verdict for the plaintiff, and a rule for a new trial having been discharged and judgment rendered for the plaintiff, the defendant appealed.

Pinney for the plaintiff.
No counsel in this Court for the defendant.

RUFFIN, C. J. We think his Honor put the case upon the true ground, and that the judgment must be affirmed. The correct
(540) distinction is stated in *Merriweather v. Nixon,* 8 Term, 186, which has been cited for the defendant. The particulars of that case are not given in the report, but the injury must have been forcible and wanton. For Lord KENYON, after recognizing the general rule, that there could be no contribution between joint wrong-doers, nor, of course, redress upon a contract to do an unlawful thing, distinguishes that case from one in which there could be redress, by saying "that decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting right." If it were not so, no one could ever expect assistance in enforcing his rights by means, even the most peaceable, which would subject the parties to an action sounding in *tort,* and an end would be put to indemnities. For, if the right be with the person indemnifying, there is no need of the indemnity; and if it turn out to be in another, who recovers for the injury, the rule would make the indemnity void. But when the object is apparently in furtherance of justice and in the exercise of a right, and the means are not in themselves criminal, and not known by the person employed to be wrongful to a third person, there can be no objection to giving effect to a contract to save harmless one, who, from good motives, did an act for his employer, which, contrary to his expectation, happened to be an

injury to a third person. That is not like the perpetrator of an act, manifestly unlawful and criminal, seeking redress against the procurer. Indemnities for acts apparently right, or not apparently wrong, have always been upheld.

As long ago as *Arundel v. Gardner,* Cro. Jac., 652, it was held that an action would lie for the sheriff on a promise of indemnity, made by an execution creditor for levying on goods, as the property of the defendant in the execution, which were in the possession of (541) another person, who was in fact the owner. The same doctrine has been recently held by the House of Lords in *Humphreys v. Pratt,* 2 Dow. & Clark, 288. If, in truth, such a seizure by a sheriff were a wanton act in him, well knowing that the property was in the possessor and not in the debtor, and made for the purpose of harrassing the former, he, as purely a wrong-doer, could receive no countenance from the law. But when it is made upon the assertion of the creditor, that the goods are property of his debtor and liable to be seized, the conduct of the sheriff is fair, and being for the benefit of the creditor, it is manifestly just that the latter should make good his promises, that the officer should not be a loser by such an act. There have been other cases which have further extended the principle. In *Adamson v. Jarvis,* 4 Bing., 66, the plaintiff, an auctioneer, sold goods under the order of the defendant, who represented himself to be entitled to them, and received the proceeds from the auctioneer, from whom, however, the true owner afterwards recovered the value, and it was held, that the action would lie to recover back the damages and costs. Chief Justice BEST thus expressed himself, "Every person, who employs another to do an act, which the employer appears to have a right to authorize, undertakes to indemnify him for all such acts as would be lawful, if the employer had the authority he pretends to have, and a contrary doctrine would create great alarm." He added, "that from the concluding part of Lord KENYON'S judgment, in *Merriweather v. Nixon,* and from reason, justice and sound policy, the rule that wrong-doers cannot have redress against each other, is confined to cases, where the person seeking redress must be presumed to have known that he was doing an unlawful act." In *Betts v. Gibbons,* 2 Adol. & El., 57, the defendant sold ten casks of goods to N. & W., and sent them to the plaintiffs with notice that they were for N. & W., and with directions to deliver them. After delivering two casks the plaintiffs were ordered by the defendant and indemnified not to deliver any more to N. & W., but to deliver the remainder to another person—which they did. The plaintiffs were then sued (542) in trover by the assignees of N. & W., who had become bankrupts, and, for the damages and costs in that action, the plaintiffs then

sued the defendant, and had judgment. Lord DENMAN said, supposing there was a *bona fide* doubt, the plaintiff had a right to act upon the instructions of the defendant, and might come on him for the consequences of so doing. He further said, that *Merriweather v. Nixon* had been strained beyond what the decision would bear, that the general rule is, that between wrong-doers there is neither indemnity nor contribution, but there is an exception, where the act is not clearly illegal in itself. And one of the other Judges remarked that the case bore no analogy to those, in which an indemnity is claimed for acts obviously unlawful, like breaches of the peace, or to cases in which the conduct of the parties is in contravention of public policy. In the case at bar, the defendant claimed to be the owner of land up to a particular line, and ordered the plaintiff, who was in his employment, to set his fence to the line, and the plaintiff, simply for obedience to those orders and without having committed any public offense, and being innocent of any intentional wrong to any other person, has been compelled to pay damages and costs for the trespass, to a person who turned out to be the owner of the land, and now sues on the defendant's express promise of indemnity. Surely no claim could have a broader foundation of justice, or, as we think, law, to support it. The verdict in the former action, acquitting the defendant, avails nothing here. It only shows, that the plaintiff in that action could not prove the present defendant's orders, or indemnity to the present plaintiff. But, as between the present parties, those facts were not in issue before, and therefore neither is concluded.

PER CURIAM. No error.

Cited: *Hunter v. Jameson,* 28 N. C., 262; *Lewis v. Fort,* 75 N. C., 253.

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(543)

RICHARD H. MOSELEY *v.* CHARLES G. HUNTER.

1. A plea to the jurisdiction of the Superior Court of W., which, after setting forth that the plaintiff is not an inhabitant of the county of W., but is an inhabitant of the county of H., alleges only "that the defendant was an inhabitant of the county of E., and not an inhabitant of any other county than the county of E.," is bad, because it does not expressly aver that the defendant did not reside in the county of W., but only states that fact in an argumentative way.
2. A plea to the jurisdiction of the Court properly concludes with the prayer, "whether the Court will or ought to take *further* cognizance of the plea aforesaid."

APPEAL from *Manly, J.,* Spring Term, 1843, WARREN.

Case, in which the writ was directed to the sheriff of Edgecombe,

where it was executed, and returnable to Warren, Fall Term, 1842. At the term, to which the writ was returned, the defendant filed the following plea, viz.:

And the said Charles G. Hunter, in his own proper person comes and defends the wrong and injury, etc., and says he ought not to be compelled to answer the said original writ, because he says that the said Richard H. Moseley was at the time of suing out the said writ, and has been ever since, and is now an inhabitant of the county of Halifax, and at the time aforesaid resided therein, and that the said Richard H. Moseley was not, at the time of suing out the said writ, nor at any time since, an inhabitant of the county of Warren, nor resided therein, and because the said Charles G. Hunter (544) further says that he, the said Charles G. Hunter, was at time of suing out the said writ, and always has been, up to this time, an inhabitant of the county of Edgecombe, and resided therein, and was not at the time of suing out the said writ, nor at any time since, an inhabitant of any other county than the said county of Edgecombe, and this he is ready to verify; whereupon he prays judgment whether the Court will further take cognizance of the said suit.

To which plea the plaintiff demurred as follows, viz.:

And the said Richard, as to the said plea of the said Charles by him above pleaded, says that the said plea and the matters therein contained, in the manner and form as the same are above pleaded and set forth, are not sufficient in law to abate the said suit of the said Richard, nor is the said Richard under any necessity, or in anywise bound by the law of the land to answer thereto, and this he, the said Richard, is ready to verify. Wherefore, he prays judgment, and that the said Charles may answer over to the aforesaid declaration against him. And for causes of demurrer in law, he, the said Richard, assigns and shows to the Court here as follows, to wit, for that the said Charles in the conclusion of the said plea, prays judgment whether the Court will *further* take cognizance of the said suit, whereas the matters in the said plea stated, if true, and well pleaded so as to have any effect in law, are sufficient to show that the said Court had and could not take *any* cognizance whatever of the same; for that the commencement of the said plea insists, that the said Charles ought not to be compelled to answer the writ, and the conclusion praying judgment if the Court will *further* take cognizance, etc., admits that the said Court had cognizance thereof, and the said Charles was once compelled to answer the same, for that the commencement of the said plea is inconsistent with and repugnant to the conclusion thereof; for that the said Charles in the commencement of the said plea says that he ought

(545) not to be compelled to answer the said writ, whereas, the matters in the said plea alleged being designed to oust the Court of all jurisdiction of the suit, no such commencement should or ought to have been made or introduced in the said plea; for that the said plea doth not *directly* deny that the said Charles resided in Warren aforesaid, at the time of the commencement of the suit, or at any time since, but only by way of inference and argument, and doth not *directly* aver or allege any matter as to his residence in Warren aforesaid, on which issue can be taken or tendered; for that the said plea doth not directly and expressly allege that the said Richard resided in the county of Halifax, and did not reside in the county of Warren at the time of the plea being pleaded; for that the said plea doth not directly deny that the said Charles resided in Warren at the time of suing out the writ, or at any time since; nor doth the said plea allege that the said residence of the said Charles in Edgecombe was his only residence; for that the said plea is uncertain and double in this, that the said plea avers that the said Richard was an inhabitant of and resided in Halifax, and was not an inhabitant of or resided in Warren; for that the said plea denies that the said Charles was an *inhabitant* of any other county but Edgecombe, but doth not deny that he *resided* in any other county, upon which no certain or material issue can be taken or tendered, and for that the said plea is in other respects uncertain, double, argumentative, insufficient and informal.

The defendant joined in demurrer, and the Court upon the hearing thereof sustained the demurrer, overruled the plea and directed the defendant to answer over. From this order and decision of the Court, the defendant, by leave, appealed to the Supreme Court.

Badger and *W. H. Haywood* for the plaintiff.
No counsel in this Court for the defendant.

RUFFIN, C. J. This being a plea to the jurisdiction, it properly concludes, according to the precedents, with the prayer "whether (546) the Court will or ought to take *further* cognizance of the plea aforesaid." In that respect it differs from those that are, strictly speaking, pleas in abatement for matter existing at the time of action brought. Com. Dig. Abatement, D. 2; 1 Went. Pl., 49; Stephens Pl., 46, 394.

The plea however, is bad, as we think, in not traversing in terms, the residence of the defendant in Warren. By the statute, Rev. Stat., ch. 31, sec. 39, this action, which is case, may be brought in the Court of the county in which both parties reside, or, where they live in different counties, in either county, at the option of the plaintiff. The ac-

tion, therefore, supposes that both or one of the parties lived in Warren, and it may be maintained there, if either of the parties did reside there. Consequently, it is the material part and point of a plea to the jurisdiction, to deny that fact, and so put it in issue. Whatever may be stated touching residence in another county, is only matter of inducement. Issue cannot be taken on it, since the jurisdiction does not depend on the residence of the plaintiff in Halifax, or of the defendant in Edgecombe, but of one of the other of them in Warren, and one may have fixed places of residence in more than one county, as recognized in the act concerning executors and administrators, Rev. St., ch. 46, sec. 1. It is, however, a necessary part of the plea, (although it cannot be traversed in the replication), in compliance with another rule of pleading, namely, that the plea must give the plaintiff a better writ, and tell him in what Court he may properly sue. This plea, therefore, is right as respects the plaintiff's residence. It states that *he* resides in Halifax, and then, "that the said Richard was not at, etc., an inhabitant of the county of Warren, nor resided therein." So, the plea sets out the residence of the defendant in Edgecombe properly enough; but it omits to traverse the defendant's residence in Warren, by averring *that the defendant did not reside in Warren.* Instead of that, the plea is, that the defendant "was not an inhabitant of any other county than the said county of Edgecombe," which, no doubt, was intended as a traverse of a residence in Warren. (547) But that method of taking it is a departure from the established rules of pleading, and cannot therefore be allowed. The plaintiff could not take issue on this part of the plea, according to its terms, by replying that the defendant did live in a county other than Edgecombe, because by so doing he would admit that he, the plaintiff, did not live in Warren, and then, if it should be found that the defendant did live in some other county besides Edgecombe, it would not determine the question of jurisdiction, for the county of the party's residence might be any other county, as well as Warren. Therefore, the plaintiff would be under the necessity of replying by way of direct averment, what in bringing the action was before supposed, namely that the defendant *did* live in Warren, so as to draw the defendant to an issue by a rejoinder, that he did *not* live in that county. It is manifest, therefore, that the denial of the defendant's residence in Warren, contained in the plea, is argumentative, and not, as it ought to be, in an absolute form, and is therefore defective. It is not bad, because it precludes the plaintiff from taking a material issue by a proper replication, but it is bad, because the defendant has so pleaded as to prevent the issue being taken in that orderly mode and proper stage of the pleadings, which the law requires. The plea tends to perplex and

draw out the pleadings to an unnecessary prolixity, by compelling the plaintiff to reply matter already supposed, for the purpose of drawing back the defendant to an issue, which is indispensable in the cause, and which the defendant had it in his power at once to tender, by a direct negative in his plea of a residence in Warren, and would not. That this absolute form of allegation or traverse, as to the material fact in the plea, is necessary, is manifest from the inspection of any record or book of precedents. Thus, one was sued by the addition of "broker," and pleaded in abatement. The plea begins by stating that the defendant is a *merchant,* and then proceeds, "that he, the defendant, on, etc., was not or at, etc., has been a *broker,* as by the said writ is above supposed." To that, without taking any notice
(548) of the inducement, that the defendant was a *merchant,* the replication is, "that the said defendant, on, etc., was, etc., a *broker,* as by the said writ is above supposed, and this he prays may be inquired, etc." 1 Went. Pl., 3. In like manner a plea of nonjoinder of a partner states, that the supposed promises were made as well by A. B. and the said C. D., the defendant, and then traverses the sole promise of the defendant by adding, *"and not by the said C. D. alone,"* which said A. B. is still living, etc., and the replication takes issue by saying, "that the said promises *were made by the said C. D. alone, in manner, etc.,* and this he prays, etc." 1 Went. Pl., 16, 17. It takes no notice of A. B., whose name was only given to inform the plaintiff, against whom he should bring suit the next time, if that should be abated.

PER CURIAM. Affirmed.

(549)

HORACE B. SATTERWHITE *v.* J. W. CARSON.

1. The goods of a deceased person in the hands of an administrator *pendente lite,* cannot be taken under an execution against the administrator for his personal and individual debt.
2. An administrator *pendente lite* has no power to sell the effects of the deceased, except perishable property.
3. Where goods of a deceased person, while in the hands of an administrator *pendente lite,* were seized and sold by the Sheriff under an execution against such administrator for his personal debt: *Held,* that an administrator with the will annexed, subsequently appointed, could support an action of trespass or trover against the Sheriff for such seizure and sale.
4. In such case the Sheriff could not reduce the damages by showing that he had paid to the administrator *pendente lite* the surplus of money arising from the sales, that remained after satisfying the execution.
5. The Sheriff is liable for a trespass committed by his deputy in seizing the property of A under an execution against B.

6. It is only in actions brought *upon contract,* that the court can render judgment for interest on the amount found by the jury. In other cases such a judgment is erroneous.
7. Though there be but one judgment in the Court below, yet, where it consists of several distinct and independent parts, it may be reversed as to that part, wherein it is erroneous, and affirmed for the remainder.
8. If a judgment against a defendant is reversed in this Court as to part and affirmed as to the remainder, the defendant is entitled to his costs in this Court.

APPEAL from *Pearson, J.,* Fall Term, 1843, of BURKE.

Trover for the conversion of a slave named James. The plaintiff proved that in October, 1840, he was regularly appointed administrator, *with the will annexed,* of one Daniel Jones; that in the year 1838, after the death of Jones, one Morgan, a deputy of the defendant, who was sheriff of the county of Rutherford, levied upon and sold the boy James to one Jay, for $401, who took the slave out of (550) the State. The defendant proved that, after the death of Jones, a caveat being entered as to the probate of his will, Ann Jones, the widow, was regularly appointed administrator *pendente lite,* and soon after married one McElrath, and this boy and the other property of Jones were taken into possession by them; that executions issued to him as sheriff of Rutherford County against the said McElrath and wife for their individual debts, commanding him to make the debts out of the goods and chattels of the said McElrath and wife; that Morgan, his deputy, under these executions levied upon and sold the boy James, and that after the sale McElrath received from Morgan the sum of $200, as the excess of the price of James remaining after the executions levied on him had been satisfied, and McElrath said at the same time, that it was well enough for the negro to have been sold, as he brought a fair price.

The defendant's counsel insisted that McElrath, in right of his wife, as administrator *pendente lite,* had a right to sell the negro, and the sheriff had also the right to sell him for McElrath's debts, and that McElrath had ratified and confirmed the sale; secondly, that as Satterwhite was not appointed administrator until after the negro was sold, he could not sustain this action, for a conversion while McElrath was acting as administrator *pendente lite,* but must look to the administration bond to recover for the misconduct of McElrath in suffering the property to be taken away; thirdly, that supposing the negro not to be subject to the executions, which the defendant had placed in the hands of his deputy, the levy and sale by the deputy was a *tort,* for which the defendant, as sheriff, was not liable; fourthly, that as McElrath had received $200 of the price from the deputy, the defendant had a right to mitigate the damages by that amount, as McElrath had the right

to receive it. These questions were raised, with the understanding that if the Court was with the defendant upon either of the three first, the verdict should be set aside and a nonsuit entered; if the
(551) Court should be with the defendant upon the fourth point, the verdict should be reduced by that amount. The jury returned a verdict for the plaintiff for $401, and interest from the time of the conversion.

Upon the first point the Court was of opinion that an administrator *pendente lite* was appointed merely to collect and keep the estate together; that he had no power to sell negroes or any property except such as would injure by being kept; that the sheriff having an execution against the property of McElrath and wife, had no power to levy upon and sell the property of Daniel Jones, deceased, and that McElrath, after the sale, had no right to confirm the sale so as to pass the title. Upon the *second* question, the Court was of opinion that the plaintiff, after he was appointed administrator, etc., had a right to sue for a conversion, while the property was in the keeping of McElrath and wife, as administrators *pendente lite,* for, after his appointment, his right to sue related back to the death of Jones, and the intermediate possession of the administrators *pendente lite* was a bailment for the plaintiff, and, when property is converted while in possession of a bailee, the bailor may maintain trover for the conversion, for he has the right of possession in contemplation of law. Upon the *third* question, the Court was of opinion that the defendant was liable for the acts of his deputy, because he was doing the business of his principal, and acted by virtue of the execution. Upon the *fourth* question, the Court was of opinion, that as McElrath had no right to convert the negro into money, the defendant could not avail himself of the fact that McElrath had received $200 of the price, in mitigation, unless the plaintiff had afterwards received the money, which was not proved nor alleged.

Judgment was then rendered for the plaintiff for the amount of the verdict, and also that that amount should bear interest from the time of the judgment until paid. From this judgment the defendant appealed.

Caldwell and *Alexander* for the plaintiff.

No counsel in this Court for the defendant.

GASTON, J. It has been questioned, whether the goods of a testator in the hands of his executor might not be seized, in execution
(552) of a judgment against the executor in his own right. *Farr v. Newman,* 4 Term, 621. We presume that this question is set-

tled in Enland (see Lord ELDON's remarks, 17 Ves., 168-9), and we certainly understand that it is settled in this State, in conformity to the opinion of the majority of the Court in the case referred to. But whatever doubts have been entertained on this question, it could never have been supposed that such goods might lawfully be seized in execution for the debt of an administrator *pendente lite*. Generally speaking, an executor or administrator has the property of the goods of his testator or intestate, although he has such property in *autre droit*, as the minister and dispenser of these goods. By virtue of that property he can sell the goods, and, except under special circumstances, the goods, after such a sale, cannot be followed by the creditors of the testator or intestate. It was not extraordinary, therefore, that very able Judges should have regarded such a property, with such a power of disposition, as equivalent to absolute *ownership in law*, therefore rendering the goods liable to seizure under an execution against the proper goods and chattels of the executor or administrator. But an administrator *pendente lite* has no power to sell the goods of the deceased. Indeed, it was not until after much controversy and some conflicting decisions, that it was settled that such an administration *could* be granted pending a controversy about a mill. *Walker v. Wollaston*, 2d P. Will., 576; *Willis v. Rich*, 2 Atk., 285.

And the ground upon which validity was allowed to such an appointment, was because of the necessity that there should be a proper curator of the goods during the dispute. The authority of the appointee was limited by this necessity. He might, because of (553) this necessity, sell *bona peritura*, but he could sell no others, and he might bring actions to collect debts due, or to get possession of the effects of the deceased. Thus far he might be deemed to have a property in the goods of the deceased, but in the main he was a mere bailiff, appointed by the ordinary to hold them for *him*, to whom, on the termination of the controversy, should be confided the execution of the will or the administration of the estate of the testator or intestate. We entertain, therefore, no doubt but that the seizure and sale of the negro in question by the sheriff's deputy, under the execution against McElrath and wife, was a tortious act, that McElrath and wife could not themselves have sold the negro, and, therefore, that they could not, by their sanction, either express or implied, legalize or ratify the seizure and sale so unlawfully made by the sheriff's deputy. For this unlawful disposition of the negro there must be some remedy; and we see no well founded objection to the remedy, which has been resorted to by the administrator with the will annexed. It is said in the books, that the interest of an executor in the estate of the deceased, being derived exclusively from the will of the deceased, vests

in the executor from the moment of the testator's death, whereas the title of the administrator being derived altogether from the grant of the ordinary, the goods of the deceased vest in him only from the time of said grant. Whether, in respect of relation, there be any difference in the property, which an ordinary administrator, and that which an administrator with the will annexed (whose office is in most respects identical with that of an executor), takes in the goods of the deceased, we need not stop to inquire, because the proposition that the interest of an administrator does not relate back beyond the grant, must be taken with some important modifications. Thus it is certain, that, if there has been an unlawful intermeddling with the goods of the deceased after the death of the intestate and be-
(554) fore a grant of administration, the administrator may maintain trespass or trover therefor, and for this purpose his interest, derived under the letters of administration, shall relate back to the death. And this is allowed by the law, upon the same principle, upon which it permits the ordinary to grant a temporary administration pending a controversy respecting a will—the principle of necessity—to afford protection to the estate of the deceased. See 1 Wills. on Ex'rs., 396 *et seqa.* There could be no difficulty, therefore, in this case, we suppose, if the conversion complained of had occurred either before the temporary administration was granted, or after it had terminated. Does the circumstance that it was committed pending that temporary arrangement for the safe-keeping of the property, interpose a fatal objection to this action? We think not. That circumstance in no manner changes the nature of the injury done to the property of the testator, and we see not why it should change the nature of the remedy appropriate to the redress of that injury. The plaintiff is not an administrator upon goods not previously administered. He claims the property of the negro, and sues for the conversion of this property, under an original grant of letters of administration with the will annexed of his testator. In these there is no notice taken of the former limited and temporary appointment, and under these he takes "full power and authority to administer and faithfully dispose of all the goods, chattels and credits of the deceased, according to the tenor and effect of his will." For every purpose of protecting and securing these goods and chattels from injury, this power relates to the death of the testator. It is not asked to give to this relation an effect which will work harm to any person—to overrule or set aside any rightful transaction of or with the temporary keepers of these goods. The act complained of was a wrong done to the property of the testator, which has not been redressed, and cannot now be redressed, except at the instance of and in the mode pursued by the plaintiff.

We are also of opinion, that, in ascertaining the amount of damages, which the plaintiff was entitled to recover because of the conversion complained of, it was proper to make no deduction (555) because of the return to McElrath of the surplus remaining of the price of the negro after satisfaction of the judgment. This was returned to McElrath as *his money,* and received by him as such. This money was no part of the assets of the testator's estate, and could not be made such, but as the price of a part of those assets rightfully sold. And we have seen that the sale was altogether wrongful. If McElrath and his wife, or either of them, concurred in the sale, he, she or they became *tort feasors* with the sheriff and his deputy, and the person wronged may hold any one of the wrongdoers responsible for the injury received, without regard to the distribution made of the gains of the unlawful act among the parties concerned in it.

It admits of no dispute but that the sheriff was properly held responsible for this wrongful act of his deputy. See *Sanderson v. Baker,* 2 Bl., 832; 3 Wills., 309; *Woodgate v. Knatchbull,* 2 Term, 148; *Coltraine v. McCain,* 14 N. C., 306. We concur entirely, therefore, in the opinion of his Honor upon the case, and would direct the judgment to to be affirmed altogether, but that there is an error in that judgment, which has not been noticed by the parties.

The judgment is not only that the plaintiff recover his damages as found by the jury, but also interest upon a part of those damages, as principal money, until it shall be paid.

We have a statute, which authorizes a judgment of this sort to be rendered in actions brought upon *contracts,* but it extends to no others. Rev. St., ch. 31, sec. 95. The judgment, so far as it gives interest on the damages, is therefore erroneous and must be reversed, and a judgment rendered here for the plaintiff, that he recover his damages only and the costs assessed below. For although there be but one judgment below, yet as it consists of several distinct and independent parts, it may be reversed as to that part where it is erroneous, (556) and affirmed for the remainder. See *Bellew v. Aylmer,* 1 Stra., 188; *Henriques v. Dutch West India Company,* 2 Stra., 807; *Frederick v. Lookup,* 4 Bur., 2018.

The defendant is entitled to his costs in this Court.

PER CURIAM. Reversed.

Cited: Grant v. Williams, 28 N. C., 342; *Harriss v. Lee,* 46 N. C., 228; *Watson v. Trustees,* 47 N. C., 216; *Wooten v. Jarman,* 51 N. C., 113; *Moore v. Ingram,* 91 N. C., 379.

(557)

WILLIAM SLADE, ADM'R., &c., *v.* JOSIAH AND ABRAHAM WASHBURN.

1. Letters of general administration, granted during the pendency of a contest respecting the probate of a will, are null and void.
2. And such letters being entirely void, as exceeding the powers of the Court, cannot be supported as a grant of administration *pendente lite.*

APPEAL from *Manly, J.,* Spring Term, 1843, of RUTHERFORD.

This case was before the Supreme Court at June Term, 1842, when the points then presented were determined and a new trial granted. *Slade v. Washburn,* 24 N. C., 414. On the return of this decision to the Superior Court of Rutherford, that Court, on the application of the plaintiff, permitted him to amend his writ from detinue to trespass. In this new form the case came on for trial at the Spring Term, 1843, of Rutherford Superior Court. It appeared in evidence, that one Gabriel Washburn died about the year 1824, leaving a paper purporting to be his last will and testament, of which his wife Priscilla, and the two defendants, were nominated executors; that at January sessions, 1826, of the county court of Rutherford, it was offered by them and admitted to probate, as appears by the following entry on the docket of that term, viz.:

"The last will and testament of Gabriel Washburn was presented in open court for probate. Achilles Durham and Farmer Moore, two of the subscribing witnesses thereto, came into court and proved the same in the usual form, and Josiah Washburn and Abraham Washburn, two of the executors named, qualified and took on themselves (558) the burthen thereof." "Copy of letters issued."

At July Sessions, 1826, one Gilbert Harrill and Martha, his wife (she being one of the next of kin of the testator), filed their petition and caused the same to be served on the defendants, praying that the said probate of the will be set aside. It was returned to October Sessions following, at which term the following entry appears on the docket:

"Gilbert Harrill and wife, v. Abraham and Josiah Washburn, executors of Gabriel Washburn. *Devisavit vel non. Caveat.*"

At July Sessions, 1827, the entry on the docket is in the following words, after stating the case as before:

"Compromised. Terms filed."

The following is a copy of the terms filed:

"Gilbert Harrill
v.
Abraham Washburn and Josiah Washburn, executors of G. Washburn. } Petition to set aside a will.

This suit is compromised on the following terms, viz.: Priscilla Washburn is to remain in possession of the whole estate, real and personal, during her life, and at her death the land is to be divided between Abraham and Josiah Washburn, and all the personal property to be equally divided between the balance of the heirs of Gabriel Washburn, deceased. The cost of the suit to be paid out of the personal estate.

GILBERT HARRILL,
JOSIAH WASHBURN."

At March Sessions, 1828, the following entry appears on the docket: "Priscilla Washburn appointed administrator of Gabriel Washburn."

And it also appeared that the defendants became her sureties in the administration bond. The said Priscilla died in January, 1839, and at the next March Term of the county court of Rutherford in the same year, the following entry appears on the record:

"A paper-writing, purporting to be the last will and testament of Gabriel Washburn, deceased, was presented for probate, which was objected to, and the validity of said will was caveated, and (559) an issue of *devisavit vel non* made up thereupon. After some contestation, the Court appointed William Slade administrator *de bonis non testatoris*, of the estate of Gabriel Washburn, deceased, who entered into bond with security. He prayed an order of sale—granted. The property not to be moved out of the county."

It appeared that, shortly after the death of Priscilla, the widow, the defendants went to her late residence, and, before the January Term, 1839, of Rutherford County Court, removed the negroes Polly and Rachel, and the four children of the latter, claiming them under the will of the said Gabriel, deceased, and each took the negroes willed to him. It also appeared, that the defendant Abraham did did not sign the compromise above set forth. And the plaintiff, to connect him with it, adduced evidence to show that he had declared afterwards, that the lands of his father were to be divided between him and Josiah, and the other property was to be divided among the other heirs. And it also appeared, that in the Spring of 1826, the defendants had caused an inventory of the property of the deceased to be made out, and at the following October Sessions, returned the same to Court. There

was no evidence to show, further than has been here stated, what disposition had been made in the county court of Rutherford, of the issue made up at the January Sessions, 1839, to try the validity of the will then offered for probate, or whether the issue was or was not now pending in that Court. It was admitted, that the will offered at January Sessions, 1839, was the will previously offered at the January Sessions, 1826, and that it was offered at both times by the present defendants. The questions of law arising in the case were reserved, and the jury found a verdict for the plaintiff. The Court, on argument, directed the verdict to be set aside, and judgment of nonsuit to be entered. From this judgment the plaintiff appealed.

(560) *Alexander* for the plaintiff.
Caldwell and *Hoke* for the defendants.

GASTON, J. After the issue had been made up, on the petition of Harris and wife, at the October Term, 1826, of Rutherford County Court, we must understand that the Court had revoked the previous probate of the supposed will, and that the paper, which had been propounded as such, remained before it, to be established or rejected according to the determination of that issue. This appears more clearly from the order made at the same term, which we find in the record accompanying the case, whereby William Slade, the present plaintiff, was appointed administrator *pendente lite*. The entry made at the July Term, 1827, "compromised, terms filed," especially when taken in connection with the "terms" referred to, whereby it is seen that the parties had agreed upon a disposition of *all* the property of the deceased, we feel ourselves justified in interpreting as a withdrawal of the alleged will by its propounders, thereby authorizing the general grant of administration to the widow at the subsequent March Term. Thus far, vague and imperfect and informal as are the several entries of record, we are enabled to give them a reasonable construction with some degree of confidence, but when we come to the order or entry of March Term, 1839, under which the plaintiff undertakes to make out his title in, and constructive possession of the negroes carried away by the defendants, the hope of a satisfactory construction vanishes. At this time the widow, to whom a general administration had been granted, was dead. Thereupon, the same paper-writing, containing the alleged will of the deceased, was again brought forward for probate, "which was objected to, and the validity of said will was caveated, and an issue *"devisavit vel non"* made up thereupon. This is intelligible, and though much wanting in precision, as not showing by whom the alleged will was thus a second time propounded, or who contested its validity,

or between whom the issue was made up, is decisive, we think, that the *allegation* repropounding the will was *admitted* by the Court, that this allegation was met by counter allegations, and that (561) the truth of the matter in contest was to be determined by an issue under the direction of the Court. What follows of the order is very much like gibberish. "Thereupon, after some contestation, the Court appointed William Slade administrator *de bonis non testatoris* of the estate of Gabriel Washburn, deceased, who entered into bond with good security. He prayed an order of sale; granted, the property not to be removed out of the county." If an explanation could be given of this entry by any contemporaneous act, such as the letters thereon issued or the bond then taken, none such is given; it must therefore be expounded without any aid of this kind. We have little difficulty in rejecting altogether the word "testatoris." Perhaps it was a misprision for the word "administratis," but, if not, it is wholly unmeaning. Certainly, as yet there had been no sentence establishing a will of the deceased, and it sufficiently appears that the administration, whatever its character, was an administration "of the estate of Gabriel Washburn, deceased." The order therefore remains one, appointing the plaintiff administrator *de bonis non* of that estate, and this is made at the same moment, when the Court entertains a contest respecting the alleged will of the deceased, and has no issue made up to try that contest. Such an order must, we think, be held null.

The power of the Court to grant letters of administration exists only when one has died without making any disposition of his goods. Such a grant is founded upon a sentence, express or implied, which is set forth in the letters, that the deceased has died intestate. A grant, therefore, of such an administration, founded upon a judicial declaration that the fact of testacy or intestacy is then *sub lite* in the Court, is a legal absurdity. Upon the death of an original administrator, leaving some part of the goods, chattels and credits of the deceased unadministered and not fully disposed of, the authority of such administrator having expired, supplementary grant of administration, still founded on that sentence of intestacy, issues to authorize and empower the grantee "to administer and faithfully dispose (562) of the goods, chattels and credits left unadministered, as aforesaid." The original grant of administration to the widow was upon its face good, because *then* there was no allegation or suggestion that the deceased had left a will. Until such allegation or suggestion was received by the Court, it was *per se* a judicial declaration that he had died intestate. But when such an allegation was received, which, perhaps, under the circumstances of the compromise and the withdrawal of the alleged will, when formerly propounded, might have been re-

jected, necessarily the sentence of intestacy was revoked, or at all events suspended. There was thus, therefore, no foundation on which to rest the supplementary grant.

We have had occasion to see, as has been stated in *Satterwhite v. Carson, ante*, 549, that so strictly was the power of the ordinary in granting administrations limited to cases of ascertained intestacy, that it was for a long time held that where a will was in contestation the ordinary could not grant special letters of administration *pendente lite*. This strictness was afterwards relaxed, because of the necessity that there should be a *temporary* keeper of the goods of the deceased, while the controversy lasted. Nothing can be more conclusive to show that a grant of general administration made during such a contest was altogether null. But it has been asked, if the Court had authority to grant an administration thus limited, *pendente lite*—why may we not uphold the grant made to the *extent* of *that authority?* This cannot be. The general appointment of an administrator, and the special appointment of an administrator *pendente lite* do not differ from each other merely in the limited duration of the latter. The offices conferred are in many respects different, having different powers and properties. We cannot convert one into the other. Besides, there is an essential distinction in the effect of grants, conveyances, or other acts operating upon or by virtue of ownership in the grantor, and such as operate because of a power delegated by law to the grantor. With respect to the former, they *may* be allowed to be effectual to the (563) extent of the grantor's dominion, and be held imperative as to all beyond it, but the latter are valid or invalid accordingly as they fall within or transcend the power of the grantor. The other matters in the case, tending to show that the conduct of the defendants is in violation of a family arrangement to which they were parties, will have their just influence before a tribunal which has jurisdiction to enforce such arrangements. But they cannot affect the construction of the grant, under which the plaintiff claims to have been the *legal* possessor of the negroes that were of the deceased.

It is exceedingly to be regretted that, in the act of Courts, which exercise so important a jurisdiction in our country, we have to encounter at every term such absurd, irregular and defective entries, as almost to defy interpretation, and often to thwart what would seem to be the clear demands of justice and the best interests of the community. We greatly fear from our experience, that these evils are becoming more frequent, and see not how they can be lessened until the authorized registers of these Courts, who are intrusted with the momentous duty of recording their acts, shall be qualified by special

training to express these acts in distinct, perspicuous and appropriate language.

PER CURIAM. Affirmed.

Cited: St. John's Lodge v. Callender 26 N. C., 343; *Springs v. Erwin,* 28 N. C., 29; *Hartsfield v. Allen,* 52 N. C., 440; *London v. R. R.,* 88 N. C., 589.

(564)

STATE TO THE USE OF J. S. WOOD & CO. *v.* JOHN W. SKINNER & AL.

1. In an action against a Constable for not collecting notes placed in his hands for collection, where it appears that the Constable, before suit brought, had tendered back the notes to the plaintiff, and the debtors were still good, the plaintiff is not entitled, by reason of the mere negligence of the Constable in not collecting, to recover the whole amount of the debts, but, unless he shows some actual injury sustained thereby, he is entitled only to nominal damages.
2. In actions for breach of contract, where there is no statutory provision or express agreement of the parties on the subject, the person injured should be reimbursed in damages what he has lost—and, if no loss be shown by proof, should be reimbursed to the extent of the loss which the law presumes.

APPEAL from *Pearson, J.;* Spring Term, 1843, of PERQUIMANS.

This was an action of debt upon the bond of the defendant Skinner, and the others, his sureties, as Constable. The bond was in the usual form, and dated 10 February, 1840. The breaches assigned were: First, failing to pay over money collected; secondly, failing to collect. Pleas, conditions performed, conditions not broken.

On the trial the plaintiff produced two receipts of the defendant Skinner, as Constable. The first set forth a number of small notes and by whom signed, payable to the relators; the second, a number of book accounts due the relators for goods sold. The plaintiff then proved that on 20 January, 1842, the relators demanded of Skinner the money for all these notes and accounts. Skinner said he had no money, but he had the papers, most of them were with him, and the others he could soon get from his house. Wood, one of the relators (565) replied, that he did not want the papers—he wanted the money—that he had had ample time to collect, and he should hold him accountable for the money. The writ issued 24 January, 1842. The Court here remarked to the plaintiff's counsel, that, as to the *onus probandi,* the Court was of opinion that to charge the agent, the relators were to show that the debtor had effects; but, if it was shown that the officer had taken judgment and sued out execution, and made no return, his failing to discharge himself by the return of *nulla bona* raised a presumption against him, and it was then for the officer to show that the

debt could not have been made. Then as to the measure of damages. The Court was aware that it was a practice almost universal, when the claim was good during the official year, in which it was received by the constable, although it continued good at the end of the year, was good when the writ issued and when the suit was tried, still to make the amount of the claim the measure of damages; and afterwards the constable or his sureties were allowed, by favor of the relator, to collect the debt for his or their own use by way of reimbursement. To this practice there were several objections. The constable, being a collecting agent, had a right, in mitigation of damages, to show that he had tendered back the papers, and that the relators of the plaintiff might still collect their debts and interest. It was no reply to say that the relators, having received the amount of their debts by way of damages, usually permitted the constable or his sureties to collect the debts for themselves, in case the legal title did not pass. The relators might refuse to let their names be used, or might get the notes or judgments and collect them for their own use, and so be twice paid. The Court was clear in the opinion, that when the agent, before suit brought, tendered back the papers, and had them ready at the trial to be handed over, and the debtors were still good, the measure of damages was not the amount of the debt, but would be nominal. It might also be contended, with what force the Court was not pre-
(566) pared to say, that when the agent tendered back the papers and they were refused by the principal, although then good, and suit was brought on the bond of the agent, and the debtors became insolvent pending the suit, the loss should fall on the relators, provided the agency be determined. And it might be said, in behalf of the sureties of 1840, that if the debts were good at the end of the year and the relators' damages in their suit nominal, the subsequent insolvency of the debtors should not throw loss on them. The plaintiff's counsel stated, that many of the debtors, though good at the end of the year, for which the bond was given, had become insolvent before the writ issued; many good when the writ issued were now insolvent, and many were still good but the relators were unwilling to take back such as were now good, and take nominal damages for the failure to collect them, unless they had no better remedy. The plaintiff's counsel, in submission to the intimation of the Court, suffered a judgment of nonsuit to be entered, and appealed to the Supreme Court.

No counsel in this Court for the plaintiff.
A. Moore for the defendants.

GASTON, J. We are not called upon by this appeal to examine the several matters, which were discussed on the trial of this cause, but

only the opinion of the Court, in deference to which the plaintiff submitted to a nonsuit. That opinion was, "that where the agent," a constable who had received a claim for collection, "had, before suit brought, tendered back the paper and had it ready at the trial to be handed over and the debtor was still good, the measure of damages was not the amount of the debt, but nominal damages only." And in this opinion, as declaratory of the rule applicable to the case under consideration, we see no error. The engagement of the defendant, was, that Skinner should diligently endeavor to collect all claims put into his hands for collection, and faithfully pay over all sums by him received, to the persons to whom they might be due. The engagement was broken by his failure to use reasonable diligence (567) in collecting, and, for this breach, the plaintiff was entitled to recover damages commensurate with the injury sustained. From every breach of a contract, the law infers that some injury has been sustained, but if the contract itself does not furnish a measure for the injury, and there is no proof of actual injury, it can infer no more than what is termed "nominal damages." It cannot be that any negligence of the agent, however slight, and unattended with actual loss to his principal, should make him responsible to the full amount of the debt put into his hands for collection. This would be to inflict a wrong on the agent, for it would be to take from him, and put into the pocket of the principal, what the former does not in conscience owe, and the latter is not in conscience entitled to receive. Sometimes, indeed, on the ground of public policy, it is prescribed by positive law, that certain acts of misfeasance or omission on the part of a public officer, with respect in the collection of a debt, shall make him liable to the whole amount thereof, as in the case of escape of a debtor, who has been in custody under a lawful execution. But, wherever there is no positive enactment on the subject, the rule of law is the rule of reason, that he who injures another shall compensate to the extent of that injury. This principle was distinctly asserted in *Russel v. Palmer,* 2 Wilson, 325, where, in an action by a creditor against his attorney, who after judgment against the debtor had neglected to charge him in the execution when surrendered by his bail, whereby the debtor was superseded and discharged out of custody, the jury, under the directions of the Chief Justice, had rendered a verdict for the entire debt, but the Court ordered a new trial because of this misdirection. And so it was held in this Court, in an action brought on the sheriff's bond, for a breach thereof in permitting a defendant to escape, that the extent of the injury sustained by the plaintiff, and not the amount of the debt due to him, was the true measure of his damages. *Governor v. Matlock,* 8 N. C., 425. We do not understand his Honor as

saying that it was not competent for the plaintiff to take his
(568) case out of the rule by showing that, although the *debtor* remained good, the *debt* had been lost by the constable's neglect, because it was barred by time, or the proof thereof by the party's oath was no longer admissible, or the testimony of witnesses necessary to establish it was lost, or in any other manner. Nor do we understand him as saying, that it was not competent for the plaintiff to show any partial damage, less than the loss of the debt consequent upon the delay, as that the debtor had removed to a distance, or that the plaintiff was subjected to any extra expense or inconvenience in the collection of the debt. But simply, that where the debt is not lost by the constable's neglect, the plaintiff is not entitled, by reason of that negligence, to receive the amount of the debt, and when he does not show any actual injury thereby sustained, he is entitled only to the damages which the law infers without proof—nominal damages.

It will never do in matters of contract to leave the question of damages to the *arbitrary* discretion of a jury. There must be a rule whereby to assess them, although the application of that rule is with great propriety confided to the jury. And we know of no other that can legally be laid down, where there is no statutory provision on the subject, and the parties have not described any by the terms or nature of their contract, than that the person injured should be reimbursed what he has lost, and if no loss be shown by parol, should be reimbursed to the extent of the loss which the law presumes. It may be that the same policy which has induced the Legislature from time to time to secure, by amercements and other penal enactments, diligence and fidelity on the part of sheriffs in the execution of their official duties, may indicate a necessity for similar provisions, in regard to officers intrusted with the collection of claims under the jurisdiction of a single magistrate. In consequence of that jurisdiction having been so greatly extended, a large portion of the property of our citizens is now in the
hands of these officers, and the community has a deep interest
(569) that while they are not held to a ruinous responsibility, they may be made to know and feel that honesty and diligence are not only their bounden duties, but their best interest; and that such a measure of accountability may be established, as will insure to every one injured by them, full redress for losses probably sustained, although not susceptible of proof. But these considerations are not for the Court which tried the cause, nor are they for us. The Constitution has provided another department of the government, to whom they may properly be addressed, and with whom they will no doubt have the weight to which they are entitled.

PER CURIAM. Affirmed.

Cited: S. v. Eskridge, 27 N. C., 413; *Monroe v. McIntyre,* 41 N. C., 71; *McLaurin v. Buchanan,* 60 N. C., 92; *Harris v. Harrison,* 78 N. C., 217; *Creech v. Creech,* 98 N. C., 159; *Tharington v. Tharington,* 99 N. C., 125; *Brunhild v. Potter,* 107 N. C., 419; *Richardson v. R. R.,* 126 N. C., 102.

(570)

STATE *v.* SANDY, (A SLAVE)

1. A building, in which goods are kept for sale by a retail merchant, is a "storehouse," within the meaning of the act of Assembly, Rev. St., ch. 34. s. 1.
2. A room in a large building, which room was separately leased by the owner of the building to a merchant who occupied it as a store, and having no direct communication with the other parts of the building, properly laid in an indictment for arson as the property of the lessee.
3. To constitute arson, the least burning of the house is sufficient. The charring of the floor to the depth of half an inch is certainly sufficient.
4. Where there is but *one* statute, an indictment which concludes against the form of *the statutes,* is bad, and, after conviction, judgment will be arrested. Where there are more than one statute, a conclusion against the form of *the statute* is also bad.

APPEAL from *Settle, J.,* Spring Term, 1843, of NEW HANOVER.

This was an indictment against the prisoner for burning the storehouse of Hugh M. Cowan, and concluded "against the form of the statute, etc." The prisoner on his arraignment pleaded Not Guilty. On the trial, Hugh M. Cowan, the first witness on the part of the State, testified that he was a retailer of groceries and dry goods in the town of Wilmington, and rented from Hector McKellar a tenement in a large building, the upper part of the building being occupied by the said Hector McKellar; that the tenement occupied by the witness had been, for several years, commonly occupied as a store, and an adjoining tenement, occupied by one Alfred Dudley at the time of the transaction which gave rise to this indictment, had been commonly, and was at the time spoken of, also used as a store; that the whole of the building, being under one roof, was owned by one Ed- (571) ward P. Hall, who leased to Alfred Dudley one tenement, and Hector McKellar the rest of the building; that the term of the witness in his lease began in October, 1842, and would expire in October, 1843; that the tenement occupied by the witness had no internal communication with any other part of the building, and there was no ingress to or egress from it, except by the street or a back yard; that the witness had no other depository either for his dry goods or groceries, among the latter of which were hogsheads of molasses and other heavy articles, besides the said tenement; that the said tenement consisted of two rooms,

although the doorway between them had no shutter, but always remained open; that the witness was acting in his business entirely on his own account and without any partner; that on the evening of 21 January, 1843, he shut up his store about half-past nine o'clock, and retired to his lodgings in another house; that about three o'clock on the following morning, being Sunday morning, he was aroused from his slumbers by one of the town watch, who informed him that his store had been broken open, robbed and set on fire; that he immediately went to his store and found that the door had been forced open; that the floor was on fire, or at least that the goods lying on it were so, although the fire had apparently been deadened by throwing water on it; that he proceeded to extinguish the fire entirely; and found that the floor was charred in three places, in one to the depth of half an inch, in another to the depth of a quarter of an inch, and in another it was only superficially charred; that the counter was also charred; that a barrel of flour was nearly consumed; that some of his goods were burned, others missing, and what remained very much injured, so that his property in the store, in one way or another, was nearly destroyed; that, the next day, goods, which he identified as his, were brought to him; that, having reason to believe that the prisoner, who was then in custody, though not upon any warrant, was the perpetrator or one of the perpetrators of the act,
(572) he asked, "What had become of the rest of his sugars?" to which the prisoner replied, "That the boat was so heavily loaded that he had thrown it overboard"; that he then asked the prisoner how he got into the store, to which the prisoner replied that he forced the door with crowbars; that he then asked the prisoner, who put the fire to the store, to which the prisoner replied that he did, but he did not do it alone, and then mentioned another negro who assisted him; that he was then asked how he got a light, to which he replied that there were some matches which he lighted, and, having lighted a candle, took two boxes of matches, and, after having lighted them, put them on the floor and piled the goods upon them; that all this the prisoner answered, without any violence, threats or persuasions having been used to him by any one, and without any appeal whatever having been made to his hopes or his fears.

Skipper, one of the town guard, testified that about 2 o'clock on Sunday morning, 22 January, he discovered a light in the store of Hugh M. Cowan, and, on pushing the door with his stick, found it was not fastened; that on entering he found the house full of smoke and a pile of goods in a light blaze on the floor; that one of his fellow guards who was with him brought some water and threw it upon the flames, which being thrice repeated the fire was deadened; that he then sent for Mr. Cowan, who soon came. The witness then described the effects of

the fire in the same manner as the preceding witness. Several other witnesses were examined, to prove that the prisoner was the perpetrator of the act, but their testimony has no relation to the questions of law arising in the case.

The prisoner was defended on the ground that the proof was insufficient to convict him, but that, supposing all the alleged facts true, *first,* there was a variance between the allegation and the proof as to the property in the storehouse; *secondly,* that the tenement set on fire was not such a one as was meant by the term "storehouse" in the act of Assembly; *thirdly,* that the tenement was not so burned, as to constitute the offense from which clergy is taken by the act of Assembly.

His Honor, leaving it to the jury to ascertain the facts, informed (573) them that such a building as was described by Hugh M. Cowan was a storehouse within the meaning of the act of Assembly; that, if they believed the testimony of Mr. Cowan, it was properly described in the indictment as the storehouse of Hugh M. Cowan; and the burning described by the witnesses, if done willfully and maliciously, was such a burning as rendered the perpetrator an offender against the act of Assembly.

The jury found the prisoner guilty, and a motion for a new trial and also in arrest of judgment having been overruled, and judgment pronounced against the prisoner, he appealed to the Supreme Court.

Attorney-General for the State.

No counsel in this Court for the prisoner.

RUFFIN, C. J. The act of 1836, Rev. Stat., ch. 34, sec. 1, introduced for the first time, the term "storehouse" into the statute book, and accompanies it with two explanatory words to show precisely to what particular building the Legislature meant to apply it. Having, previously, no legal signification, as a term of art, it must, of course, be understood in its general sense, given to it as a word in our language in approved dictionaries. In that way we find it to be defined, "a building for keeping grain or goods of any kind; a repository; a warehouse"; which signification clearly covers the place in this case, and, indeed, much more, and even more, perhaps, than was actually in the mind of the writer of the act. For we believe, the word is vulgarly used in different senses, and, perhaps, not exactly alike in different parts of the country. A common use of it is to designate a building, in which domestic supplies are kept at a place of residence. It is also applied to places of business, and is there vulgarly used as synonymous with "shop" in one of its proper senses, meaning a building in which goods are offered openly for sale. It is probable the Legislature had in view a (574) building of the latter character, since one of the former kind

would probably in most cases be protected as "part of the dwelling-house" mentioned in the previous part of the sentence. If such was the intention, it is to be regretted that the term "shop" had not been adopted, as having an established legal meaning. But as another term was chosen, it is the duty of the Court to execute the act accordingly, and it cannot be doubted that "storehouse," both in its proper sense and according to a common acceptation of it, embraces the building here burnt.

The determination of the preceding point goes far in deciding also that the ownership was properly laid to be in Cowan. It was certainly not a part of McKeller's house, in legal contemplation. There was no communication between this and the other parts of the building, and they were severed by being employed for different purposes, and occupied by different persons, as their own for the time. The several portions thereby became distinct properties and houses, for the purposes of constituting the crimes of burglary or arson, as much so as if they had not been under the same roof. 1 Hawk. P. C., ch. 38, sec. 34; East. P. C., 504.

The next objection is nothing at all, being no more than a question whether burning is burning. It is stated in the case that the floor of the building was charred to the depth of half an inch. The definition of "char" is to reduce wood to a coal or burning. Therefore the crime was complete here, for although to constitute arson there must be a burning of the house, and not merely something that is in it, yet the least burning of the building is sufficient. The opinion of the Court therefore is that the conviction was right.

But the Court is likewise of opinion that there cannot be judgment on this indictment, because it concludes "against the form of the statutes," while the offense depends on but a single statute. We think it settled that when the offense depends on more than one statute, the conclusion *contra formam statuti,* is bad, and in like manner, that a con-
(575) clusion *contra formam statutorum* is bad, when there is but one statute. The former proposition is not susceptible of dispute, but all seem agreed in it. *Broughton v. Moore,* Cro. Jac., 144; 2 Hale, 173; *S. v. Jim,* 7 N. C., 3. The reason is, that the party has a right to know the law against which it is alleged he has offended. Hence if the indictment be given by a statute, it must conclude "against the statute," otherwise it is at common law; and if the party be not punishable by that law, there can be no judgment against him. So, with reference to offenses depending on more than one statute, the indictment must be varied in the conclusion, to suit the truth. For, anciently, the pleadings recited the statute or statutes, and, of course, the necessity which caused the recital of the one, when there was but one, would likewise

require the recital of all, when there were more than one. Afterwards, the general conclusion, *contra formam,* etc., was received instead of the recital. But it is manifest that the reference to the statute or statutes in the general conclusion ought to correspond to the recital or recitals, for which it was substituted. Hence, as has been already stated, it is clear law that a conclusion, *contra formam statuti,* is bad, when there are two or more statutes, and the conclusion ought to be *contra formam statutorum.* It thus appears that the conclusion against the statute or statutes is of the substance of an indictment or declaration, as has been indeed recognized in the other cases in this State, besides that before cited. *Scroter v. Harrington,* 8 N. C., 192; *S. v. Muse,* 20 N. C., 463. And it further appears that those two forms of conclusion are substantially different, since the use of the word in the singular will not do, when it should be in the plural. Now, it would seem to follow necessarily that *vice versa, statutorum* will not do, when it should be *statuti.* For if, by the conclusion in the singular, it is to be understood, that the accused is charged but on one statute, so, when the conclusion is in the plural, it is affirmed that he is charged on more than one, and they should be shown accordingly. But it was said that as this (576) conclusion may be rejected, when there is no statute, and the offense is at common law, so by parity of reason may a conclusion in the plural be rejected as surplusage, when it should be in the singular. This position is entitled to the more respect from being sanctioned by *Judge Story* in *Kenrick v. United States,* 1 Gallis., 263. The answer to it is the dissimilarity of the cases. If, indeed, the statutes were recited at large, and one of them fully gave the action and the other had nothing to do with the subject, the latter might perhaps be disregarded, because there would be enough still on the record to authorize judgment, and *utile per inutile non vitiatur,* in the same manner as when an indictment for a common law offense concludes against a statute. But when the statutes are not recited, but there is merely the conclusion, *contra formam,* etc., that in the plural cannot be received as the substitute for one in the singular, because the two conclusions are essentially different in meaning, and the one is so opposed to the other as to be incapable of such a modification as being turned into the other; and, furthermore, because the conclusion in the plural cannot be treated as surplusage, since, if stricken out, the indictment would fail, without inserting in its place the word *statuti,* for which there is no authority. While a reference to the statutes is deemed of the substance of pleading, it would seem upon principle, that the conclusion must be in the singular or plural accordingly as the offense may depend on one or more statutes. And we think it equally well supported by authority. That a conclusion *contra formam statutorum* is not good, when there is but

one statute, though not the point adjudged was laid down by the Court in *Andrew v. Hundred of Lewkner,* Yelv., 116, is quoted thence without a question by Sergeant Hawkins, P. C., 1, B. C., 25, sec. 117, and is repeated without qualification, and as clear law, not needing the support of authorities, by Sergeant Williams. 2 Saund., 377, note 12; besides being thus stated by subsequent text-writers. It might, perhaps, have been well, if the distinction had never been allowed; and (577) it is obvious that it was never in much favor, for the Courts tolerated an evasion of the rule, by permitting, when the proceedings were in Latin, a contraction, thus, *contra formam statut.,* and construing it to be *statuti* or *statutorum,* as the one or the other happened in each case to be proper. It might have been more creditable to have abolished at once a form of pleading thus readily dispensed with. But it is certain that, after the subterfuge was taken away by the pleadings being turned into English, the rule yet remained in full force in England, until within a very recent period. It is only by the stat. 7, Geo. IV, ch. 44-5, sec. 20, that it was enacted, "That judgment shall not, after verdict, be stayed or reversed for the insertion of the words 'against the form of the statute,' instead of the words, 'against the form of the statutes,' or *vice versa.*" The statute itself furnishes cogent proof of the law, as it stood antecedently. Until a similar one shall be enacted here, however, our Courts must recognize and enforce the rule as found at the common law. But this case may, perhaps, be turned to profitable account by again attracting attention to the subject, as one proper for legislative consideration.

PER CURIAM. Judgment arrested.

Cited: S. v. Abernathy, 44 N. C., 428; *S. v. Smith,* 63 N. C., 237; *S. v. Toy,* 82 N. C., 681; *S. v. Hall,* 93 N. C., 573.

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(578)

BENJAMIN BYNUM *v.* GEORGE THOMPSON & AL.

1. The declaration of a tenant in possession of a piece of land, that he claimed according to the boundaries of a patent, with which he cannot connect himself by a claim of title, is not admissible evidence for himself or those claiming under him, to show that his constructive possession in law extended beyond his actual possession by cultivation, fences, &c.
2. If one enters into land under a deed or will, the entry is into the whole tract described in the conveyance *prima facie,* and is so in reality, unless some other person has possession of a part, either actually or by virtue of the title. But when one enters on land, without any conveyance, or other thing, to show what he claims, his possession cannot by any presumption or implication be extended beyond his occupation *de facto.*

3. A partition of land, made by order of Court on the petition of parties interested, is a good color of title.

4. Where one, under a partition of land made by order of Court according to the act of Assembly, takes actual possession of a part of the share allotted to him, his possession will be deemed to extend to the boundaries of the share so allotted, in the same manner as if he had taken possession under a deed.

APPEAL from *Bailey, J.*, Spring Term, 1843, of WAYNE.

Trespass, *quare clausum fregit.* Much testimony was introduced as to the boundaries claimed respectively by the plaintiff and defendants. It is unnecessary to state it, as the following are the only facts, upon which the questions arose, on which the Supreme Court decided. The plaintiff claimed title to the land in dispute under a patent, granted to Richard Braswell, dated 11 July, 1739, which was produced, and was alleged to cover the *locus in quo*. The plaintiff then intro- (579) duced deeds from Saunders, Lane and others, heirs of John Lane, to himself, dated in 1830, which he also contended was for the same land. He then proved by the witness actual possession of part of the land in the Braswell patent (though not of the *locus in quo*) in Thomas Lane and others under whom he claimed for sixty years past. He also proved the declarations of those in possession, that they claimed under the Braswell patent. The evidence of these declarations was objected to by the defendant's counsel, but was admitted by the Court. A trespass was admitted on the part in dispute, if it belonged to the plaintiff. The defendants claimed under a patent, which they introduced, to Stephen Dewey and Blake Baker, dated 14 April, 1761, which, they alleged, covered the *locus in quo*. They then introduced a deed from one Burwell Mooring to Joseph Green, dated 7 October, 1802—also a deed from the said Green to Zadock Thompson, dated 2 July, 1804—and a division of record among the heirs of the said Zadock Thompson, made in the year 1826; all of which they alleged covered the land in dispute. The heirs of Thompson lived upon the several lots assigned to them by that division, each of which, it was alleged, covered a part of the *locus in quo;* and the plaintiff also lived upon the land included in the boundaries of the grant under which he claimed. But neither of the parties had ever had actual possession of the part now in dispute.

The Court, after instructing the jury upon the questions of law applicable to the evidence in relation to the lines, as claimed by the respective parties, proceeded to charge that if the plaintiff and those under whom he claimed had been in possession of the land within the boundaries of the patent to Braswell for the space of fifty or sixty years, claiming it as theirs, under that patent, up to the time of bringing this suit, and those boundaries included the land in dispute, the law would presume all the necessary mesne conveyances to give the plaintiff a good

title; unless the defendant could show a superior title: that if they believed the Dewey and Baker patent, the deeds from Mooring and
(580) Green, and the division under the heirs of Thompson, included within their boundaries the *locus in quo,* and the Braswell patent also included the same; then the plaintiff would be entitled to recover, provided he, and those under whom he claimed, had been in possession more than sixty years, claiming under the Braswell patent. The Court further charged that if the jury believed there was a vacant space between the true lines of the Braswell patent and the Dewey and Baker patent, and that the deed from the Lanes to the plaintiff covered that vacant part, on which it was admitted the alleged trespass was committed, the plaintiff, having had actual possession of a part of the land included in that deed (though not of the *locus in quo*) for more than seven years, was entitled to recover against the defendants as wrongdoers, although no grant from the State could be shown for that vacant part. The Court also instructed the jury, that they had a right to take into consideration the division among the Lane heirs (offered by the defendants) to show how far they claimed under that division; but that the plaintiff was not precluded thereby from claiming beyond the boundaries of the said division, but might go to what they believed the true line of the Braswell patent, notwithstanding a reference in the plaintiff's deed to the said division.

The jury found a verdict in favor of the plaintiff, and, judgment being rendered pursuant thereto, the defendant appealed.

Henry for the plaintiff.
J. H. Bryan and *Mordecai* for the defendants.

RUFFIN, C. J. The Court perceives no error in those parts of the instructions given to the jury, which were intended to enable them to ascertain the boundaries of the patent of 1739 to Braswell, and of that of 1761, to Dewey and Baker. But the opinion of the Court does not accord with other views taken of the case by his Honor. In one
(581) aspect of the case, it is assumed that the jury would find that the grant to Braswell covered the *locus in quo,* and that the other did also, and in that case, the jury was instructed that the plaintiff could maintain the action, because the title was in Braswell, as the elder patentee, and that the title was vested in the plaintiff. Of course, the consequence was stated still more clearly to follow, if the grant to Dewey and Baker did not cover the *locus in quo* at all. The necessity for thus considering the question of the superior title did not arise, because title is indispensable to maintaining this action, which is trespass; for there is no doubt that possession alone will support it against every

person but the owner. But the necessity arose in order to determine, whether the plaintiff was really, in a legal sense, in possession. The case states, "that neither party was in the actual possession of the *locus in quo,*" which we understand to mean, that neither party occupied it by cultivation, inclosure, or the like. But it has been long held in this State, that such an occupation is not necessary to maintain trespass, but that it is sufficient if the plaintiff have the title, and the actual possession is in no one else. For the law adjudges the possession, by construction, to be in the owner. *Graham v. Houston,* 15 N. C., 232. But if the plaintiff fail to prove title to the *locus in quo,* then he must prove possession by enclosing or improvments thereon. *Smith v. Wilson,* 18 N. C., 40. It was thus essential to the plaintiff to show title. This we think he has not done. He produced deeds from the Lanes to himself made in 1830, which cover the *locus in quo,* but he omitted to produce a conveyance from the patentee Braswell to the Lanes. To supply that *hiatus* he gave evidence that the Lanes had been in possession sixty years, declaring "that they claimed under the Braswell patent," and the evidence was admitted, as the foundation of a presumption of conveyances made by Braswell to those thus in possession. That evidence was, in the opinion of the Court, improperly received. The declarations of a tenant of land are competent to qualify his possession, as that he does not hold for himself, but under another. So one, who takes actual possession of one parcel, may show that he then (582) declined any possession of another tract, for that is against his interest. *Davis v. Campbell,* 23 N. C., 482. But the declarations of a person in possession, that the land is his, cannot be received to supply the place of a conveyance and constitute a title. But it is said that they were not offered as in themselves forming a title, but, in conjunction with a long possession, to show the extent of that possession, and to raise a presumption of a conveyance from the owner for all the land, to which the possession, thus extended by the declaration, applies. But in effect, that is making a title by the mere declaration of the party himself. It is admitted that upon a long possession all necessary assurances may and ought to be presumed. But the question is, what is possession for that purpose? Plainly, it must be actual possession and enjoyment. It is true, indeed, that if one enters into land under a deed or will, the entry is into the whole tract described in the conveyance, *prima facie,* and is so deemed in realty, unless some other person has possession of a part, either actually or by virtue of the title. But when one enters on land, without any conveyance, or other thing, to show what he claims, how can the possession by any presumption or implication be extended beyond his occupation *de facto?* To allow him to say that he claims to certain boundaries beyond his occupation, and by construction to

hold his possession to be commensurate with the claim, would be to hold the ouster of the owner without giving him an action therefor. One cannot thus make in himself a possession, contrary to the fact. It is against principle, and no case in support of the doctrine has been cited. In the case at bar it is clear that the Lanes had no actual possession of the disputed land, and that the object of the evidence, that they claimed under the Braswell patent, was to include that part of the land in the presumed conveyance to them, as well as those parts which they cultivated or otherwise occupied. Now it may well be, that Braswell conveyed to Lane one part of the land granted to him and not the other part, and so far as possession raises a presumption of such
(583) a conveyance, it is necessarily confined to the possession in fact.

If, indeed, Lane, like the plaintiff, had entered under a deed from some one else, though not from Braswell, it would have been different. His possession would then have been to the limits of his deed, and a conveyance from Braswell would have been presumed accordingly. But, as it is, it cannot be, because Lane's possession is limited to his occupation, and the possession of the plaintiff under his deeds has not been of sufficient duration. As far, therefore, as appears to us, the title remains in Braswell's heirs, and consequently, the possession, and the plaintiff could not recover. The Court also took another view of the case, in which it is supposed, that neither patent covered the land in dispute, and under that aspect the jury was instructed, that the plaintiff could recover, because his deed covered the *locus in quo,* and he had been in the actual possession of a part of the land included in the deed for more than seven years, and thus was to be deemed in the possession of the whole. We concur in that opinion, as to the presumed extent of the plaintiff's possession, and it is obvious that, if either of the patents covers the land, the plaintiff would have a title to the land under the statute of limitations, unless there was a like and prior possession of the same part of the land in the defendants. Such, in the opinion of the Court, was the fact. The deeds to the plaintiff and his possession taken under them, were in 1830. But in 1826 there was a partition between the defendants under a judgment of the Court upon petition, according to the statute, and therein the several shares, five in number, are described by metes and bounds, which include the *locus in quo,* and under the same the defendants respectively then took possession in severalty. The possession thus taken must extend to the limits of the tracts allotted to the respective parties, upon the same principles on which the plaintiff claims to have possession coextensively with his deed. It was taken under a permanent written and recorded muniment of title, describing accurately the land claimed and entered into.
(584) The partition does not indeed constitute a title, except as against

the parties to it. But is certainly constitutes a color of title, as much as any of the defective instruments which have been thus deemed. If the parties had made a deed of partition, it could not be doubted that it was color of title for each party for his share, severally, and so we think must a partition by judgment. The defendant's constructive possession, therefore, being prior to that of the plaintiff under his deed, it was not tolled by the plaintiff's entry, without title, into a part of the land covered by his deed, which part did not include the *locus in quo*. We are not considering how either of these parties might claim the possession as against the owner of the disputed land, so as to make a title under the statute of limitations, after a grant. However that may be, we think the plaintiff cannot make out a possession of the *locus in quo* in himself, without establishing, on the same ground, a prior possession of it by the defendants, and, therefore, that he cannot maintain this action.

PER CURIAM. *Venire de novo.*

Cited: Wallace v. Maxwell, 29 N. C., 138; *Smith v. Bryan,* 44 N. C., 182; *Logan v. Fitzgerald,* 87 N. C., 314; *Hamilton v. Icard,* 114 N. C., 540, 541; *Smith v. Tew,* 127 N. C., 300; *Lindsay v. Beaman,* 128 N. C., 192; *Hill v. Lane,* 149 N. C., 272; *Tuttle v. Warren,* 153 N. C., 461; *Burns v. Stewart,* 162 N. C., 366; *May v. Mfg. Co.,* 164 N. C., 265; *Ray v. Anders,* 164 N. C., 314.

(585)

WILLIAM LEE, ADMINISTRATOR OF JOHN HARRIS, *v.* BRYANT GAUSE.

Upon the suggestion of the death of a party, which is denied, the Court will decide the question of affidavits.

In this case an opinion in favor of the plaintiff was delivered by the Court at June Term, 1842, but no judgment was entered for want of the pleadings. At December Term, 1842, a suggestion was entered on the record that the plaintiff had died before June Term, 1842; and this suggestion was denied on the record. At this Term (June, 1843), *Strange* for the defendants produced affidavits proving the truth of the suggestion, and there being no counter affidavits,

PER CURIAM. Let the cause be entered abated.

(586)

JAMES RUNYON *v.* PINKNEY ANDERSON.

Where pleadings are not filed, no judgment will be entered in this Court. (a)

This appeal was brought up by the plaintiff from Yancey County, to December Term, 1841. No pleadings were sent up with the case, and notice having been given to the parties to file their pleadings, and none being filed, it was ordered by the Court at this term that the judgment be arrested.

(a.) NOTE BY THE REPORTER.—It is the invariable rule of the Supreme Court to enter no judgment at law until the pleadings have been filed; and no decree in Equity, until the draft of the decree has been made by counsel and submitted to the Court.

MEMORANDUM.

At the session of the General Assembly, 1842-1843, SPIER WHITAKER, Esquire, was appointed Attorney-General in place of HUGH MCQUEEN, Esquire, resigned.

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