ANNOTATIONS INCLUDE 170 N. C.

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VOL. 27

CASES AT LAW ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FROM DECEMBER TERM, 1844
TO JUNE TERM, 1845

BY
JAMES IREDELL
(5 IRE. LAW.)

ANNOTATED BY
WALTER CLARK

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2 Jones Law	"	47	"
3 Jones Law	"	48	"
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6 Jones Law	"	51	"
7 Jones Law	"	52	"
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CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1844

JAMES H. QUIETT, ADMINISTRATOR OF J. H. STEVELIE, v. JOHN BOON, ADMINISTRATOR.

The court in which a suit is pending has the exclusive discretionary power of permitting amendments in the process and pleadings, and no appeal lies from the exercise of such power.

APPEAL from an interlocutory order, at Fall Term, 1844, of BURKE; *Battle, J.*

The writ in this case was returned to Burke, at Spring Term, 1842, and required the defendants to answer the plaintiff as administrator, etc., "of a plea of trespass on the case to plaintiff's damage $1,500." At Fall Term, 1844, the following record appears: "The defendants appeared by their attorneys, and by leave of court entered the following pleas: general issue, statute of limitations, payment and set-off, accord and satisfaction, fully administered," etc. Whereupon, on motion of the plaintiff's counsel and by leave of court, the following amendment was made, on the plaintiff paying all the costs up to this term: "On motion of the plaintiff's attorney, it is ordered by the court that the writ in this case be amended to the name of the (10) State of North Carolina to the use of James H. Quiett, administrator, etc., against (the defendants), and alter damages so as to meet sheriff's bond of 1837, viz., to render the sum of £5,000 to plaintiff's damage, for breach assigned, $1,500."

The defendant's counsel objected to the amendment upon the ground that if the action was changed the plea of the statute of limitations would not avail them in defense, as it would do if the action were to remain as it now was, or if the plaintiff should be put to commence a new suit.

From the order to amend the defendant prayed an appeal to the Supreme Court, which was granted.

Avery for plaintiff.
H. W. Miller for defendant.

NASH, J. The writ in this cause was originally filled up in *case,* and returned to Burke Superior Court of law, at Spring Term, 1842. The cause was continued until Fall Term, 1844, when, on motion of the plaintiff by his counsel, he was permitted to amend his writ by changing it from *case* to *debt.* The defendant complains of this amendment and appeals to this Court for the purpose of having it set aside.

It is very obvious from the phraseology of our act of amendment, that the power of a court, where a cause is pending, to make amendments, is a discretionary one. The words are "The court in which any action shall be pending shall have power to amend any process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before final judgment rendered thereon." Rev. St., ch. 3, sec. 1. It is difficult to conceive words more comprehensive or more expressive of the grant of a power to be exercised at the discretion of those to whom it is granted. Many cases have been in this Court upon the subject of amendments, and it has uniformly been decided that the court before whom the cause was pending might, in the language of the act (11) of 1790, amend anything at any time. In *McClure v. Burton,* 4 N. C., 84, the writ was amended by striking out some of the defendants. In *Grandy v. Sawyer,* 9 N. C., 61, the writ was amended by striking out some of the plaintiffs and inserting others. In *Davis v. Evans,* 4 N. C., 111, an amendment was made even after a special demurrer was filed. The last case on this subject in this Court was *Green v. Deberry,* 24 N. C., 344. It was an action of detinue, originally brought in the name of Green alone. The writ was returned to Spring Term, 1840, of Montgomery Superior Court. At the succeeding Fall Term the pleadings were made up, and at the Fall Term, 1842, the plaintiff, on his motion, was permitted to amend his writ by inserting the names of the other plaintiffs. From the order allowing this amendment the defendant was permitted to appeal to this Court, when the order below was affirmed. The Court in rendering their judgment say that the words of section 1, chapter 3, Revised Statutes, "confer plenary authority, while a cause is pending, to make any and every amendment, upon such terms as shall seem just to that court." In delivering the opinion of the Court the *Chief Justice* observes: "It has been very often mentioned by us that this Court would not undertake to revise an order, made in the exercise of a discretion of the Superior Court"; and in *S. v. Lamon,* 10 N. C., 135, the Court expressly say that no appeal lies from an act done by a Superior Court in the exer-

cise of a legal discretion. That this is the exercise of a discretionary power is evident from the act itself and the various decisions which have been made under it and the act of 1790, whish are before referred to.

Whether, in this particular case, the power has been judiciously exercised is not for us to say. His Honor below thought it a case calling for his interference. The law gave him the power to grant the amendment, and he has done so, upon the terms he thought (12) just.

PER CURIAM. Affirmed.

Cited: Bagley v. Wood, 34 N. C., 91; *Freeman v. Morris,* 44 N. C., 288; *Phillipse v. Higdon, ib.,* 382; *Pendleton v. Pendleton,* 47 N. C., 136; *Lane v. R. R.,* 50 N. C., 26.

NATHANIEL GALLOWAY, ADMINISTRATOR, v. MOSES MCKEITHEN.

1. A court has a right to amend the records of any preceding term by inserting what had been omitted either by the act of the court or the clerk.
2. A record, so amended, stands as if it had never been defective, or as if the entries had been made at the proper term.
3. The records of a court, upon matters within its jurisdiction, when offered in evidence, cannot be impugned by counter evidence.

APPEAL from an interlocutory order, at Fall Term, 1844, of BRUNSWICK; *Bailey, J.*

At March Term, 1837, of Brunswick County Court administration on the estate of J. Corbitt, deceased, was granted to the plaintiff, Nathaniel Galloway. John McKeithen, who opposed it, took an appeal to the Superior Court. At June Term, 1837, it was ordered that the administration should be granted to the said Nathaniel Galloway and his wife, Penina, on their giving bond in the penalty of $8,000; and that a writ of *procedendo* issue to the county court to carry this order into effect.

The writ was accordingly issued; and the records of the June Term, 1837, of the county court show, in their present form, that the letters of administration were ordered and a bond taken in obedience to the writ of *procedendo.* On 5 December, 1838, the plaintiffs issued their writ in this case in detinue against the defendants, returnable to Spring Term, 1839, to recover a slave, the property of the intestate, detained by the defendant subsequent to the death of the in- (13) testate. To this action the defendant pleaded *non detinet.* On

trial at Fall Term, 1844, the defendant objected to the plaintiffs' recovery, because, as he alleged, they were not the administrators of Corbitt at the date of the writ. The defendant, in support of this objection, produced in evidence the records of the county court of Brunswick at December Term, 1842, in which it is stated that the said county court, at June Term, 1837, omitted to comply with the writ of *procedendo* which issued to it from the Superior Court by extending the record; and, on motion, it is then ordered by the court that letters of administration issue to the plaintiffs and a bond be taken *nunc pro tunc,* with K. Langdon and Samuel Galloway as sureties; and that the letters and bond should have relation and bear date as of June Term, 1837. The judge thereupon nonsuited the plaintiffs, and they appealed.

Strange for plaintiffs.
W. Winslow for defendants.

DANIEL, J. We think that the judge erred in nonsuiting the plaintiffs. The county court of Brunswick, at December Session, 1842, had a right to amend any omission in the record of the same court which had taken place at June Term, 1837, by the act of the court or the clerk; and when the record was thus amended it stood as if it had never been defective, or as if all the entries had been made and completed at the June Session of 1837; for the affidavits, motions, and orders which were made at December Session, 1842 were not and ought not to have been incorporated in the amended record of the session of June, 1837. They were no part of it. *Bright v. Sugg,* 15 N. C., 492; *S. v. Roberts,* 19 N. C., 540. It appears by the transcript that the county court, at their June Session in 1837, did take an administration bond of the plaintiffs in the penalty of $8,000 with sureties approved by the said court. We think that the record of the June Session,
(14) in 1837, of the county court did show that the plaintiffs were appointed, gave bond, and qualified as administrators of J. Corbitt at that term.

The records of a court upon matters within its jurisdiction, when offered in evidence, cannot be impugned by counter-evidence. *Reid v. Kelly,* 12 N. C., 313.

The nonsuit must be set aside and a new trial awarded.

PER CURIAM. Judgment accordingly.

Cited: Jones v. Lewis, 30 N. C., 72; *Bagley v. Wood,* 34 N. C., 91; *Phillipse v. Higdon,* 44 N. C., 382; *Marshall v. Fisher,* 46 N. C., 116; *Pendleton v. Pendleton,* 47 N. C., 137; *Isler v. Murphy,* 71 N. C., 438; *Wall v. Covington,* 83 N. C., 146.

DANIEL WILLIS v. DAVID LEWIS, EXECUTOR OF R. M. LEWIS, DECEASED.

An appeal does not lie from an order of the county court appointing a guardian to a lunatic or idiot.

APPEAL from BLADEN, Fall Term, 1844; *Bailey, J.*

The record in this case, taken in connection with the statement made by the presiding judge, shows that at March Term, 1844, of Bladen County Court a petition was filed by the plaintiff, suggesting to the court that Martha Lewis was a lunatic and was wasting her property, and calling upon the court to issue a writ *de lunatico inquirendo.* The prayer of the petition was granted, and a writ issued to the sheriff, and at August Term following was returned, together with the inquest of the jury. The jury found that Martha Lewis was a lunatic, and at the same term the plaintiff was by the court appointed her guardian. From this order the defendant, as the executor of Richard Lewis, prayed an appeal to the Superior Court, which was granted; and in the Superior Court, on the motion of the plaintiff, through his counsel, the appeal was dismissed, and the defendant appealed to the Supreme Court.

Strange, W. Winslow, and Reid for plaintiff. (15)
No counsel for defendant.

NASH, J. The only question before us is, Has the defendant a right to appeal? The act granting appeals from the county to the Superior Court, Rev. Stat., ch. 4, sec. 1, provides: "When any person, plaintiff or defendant, or who shall be interested, shall be dissatisfied with the sentence, judgment, or decree of any county court, he may appeal," etc. This section evidently refers to cases of suits or actions in court where there are adversary claims. This is not such a case. The county court is notified, which may be done by any one, that within their jurisdiction is one of those unfortunate individuals whose situation demanded the care and attention of the court, and, in the discharge of a humane duty imposed upon them by law, upon being satisfied, in a legal manner, that the fact was so, they appointed a guardian. This case, then, is not provided for in this section; but if it were, the defendant has not brought himself within its provisions. He is neither a plaintiff nor a defendant, nor has he shown that he has any interest in the matter whatever. No connection is shown between him or his intestate and Martha Lewis, nor does it appear in what manner the appointment of a guardian to her concerns him. For aught that is disclosed to us, he is a mere intermeddler who has officiously stepped forward to stop the action of the court. The second section of the act

extends to cases which are mostly *ex parte,* but in which others may have an interest, and to which they may become parties if they please. The first clause applies to the appointment of guardians of infants. Lunatics and idiots are not included in this or any other clause of this section. Nor is there any provision in the act concerning idiots and lunatics for an appeal by any one from the county to the Superior Courts. But in the case of the appointment or removal of guardians to infants the law does not give the right of appeal indiscriminately to any and every one who may think proper to ask it, but extends it only to those who (16) may be injured or aggrieved by the order. In this case there is no pretense set up that the defendant was injured or aggrieved by the order appointing the guardian. As the section under consideration embraces a class of cases which are in their nature mostly *ex parte,* and enumerates specially those in which parties not appearing on the record may have an interest and in which an appeal is granted, and as the appointment of a guardian in lunacy is not among the enumerated cases, we hold that in this case no appeal lay by any one.

PER CURIAM. No error.

Cited: Ray v. Ray, 33 N. C., 358.

LEWIS BRIGGS v. JOHN J. EVANS.

1. A father can maintain either an action on the case or an action of trespass for the seduction of his daughter living with him or being under his control.
2. Nor, where pregnancy is a consequence of the seduction, is it necessary for the father to wait till the birth of the child to entitle him to full damages.
3. An actual contract for services between the father and his daughter, though she be of age, is not required to be proved. It is presumed from any, the slightest, services rendered by her in the family.
4. The action rests upon the assumed relation of master and servant, and not upon that of father and child.

APPEAL from YANCEY Fall Term, 1844; *Battle, J.*

This was an action on the case for the seduction of the plaintiff's daughter. For the plaintiff it was proved by his daughter that she was seduced by the defendant some time in the month of September, 1841; that pregnancy was the consequence of this seduction, and that on 11 June following she bore a child; that at the time of the seduction she

was living with her father and performing service in his family, and continued to do so until the March following, when she left (17) her father's house and went to live with her grandmother; that she remained with her grandmother until some time after the birth of her child, when she returned to live in her father's family; that about five or six weeks after she became pregnant her health was somewhat impaired in consequence thereof, and she became less able to perform the services usually required of her, and that just before she left her father's family she became altogether unable to discharge some of these services, though the lighter ones, such as knitting, etc., she could perform as well as usual. She further testified that she became 21 years of age in November, 1841. The writ was issued 31 March, 1842.

The court instructed the jury that before the daughter became of age the action might be sustained by the father in his paternal character for the loss of the services of the daughter, and that after she became of full age it must be sustained in the character of master for the loss of the services of his servant; that in this action the loss of some service must be proved in order to entitle the plaintiff to recover any damages at all; but if the evidence satisfied them of the loss of any services of the daughter, as daughter or servant, in consequence of the defendant's act of seduction, then they might take into their consideration the anguish and disgrace brought upon the plaintiff and his family, in order to enhance the damages.

The jury found a verdict for the plaintiff. The defendant moved for a new trial (1) Because the action ought to have been trespass *vi et armis,* and not case; (2) Because the action could not be maintained before the birth of the child; (3) Because the action could not be maintained without proof of an actual contract for services after the daughter became of age. The court overruled all the objections because it deemed them unfounded in law, and the last for the additional reason that it had not been so contended for in the argument of the de- (18) fendant's counsel, and no specific instructions to that effect had been prayed.

Judgment being rendered for the plaintiff, the defendant appealed to the Supreme Court.

Francis for plaintiff. (19)
No counsel for defendants.

NASH, J. Three objections were urged before the Superior Court. The *first* because the action ought to have been trespass and not case; the *second* because the action could not be sustained before the birth of the child; and, *thirdly,* because the action could not be sustained without proof of an actual contract for services after the daughter became of age.

These objections were overruled by the presiding judge, and we think very properly.

It is unnecessary to point out the distinguishing marks between the actions of trespass and case, and the necessity, in ordinary cases, of adopting the form of action appropriate to the cause of complaint. It is admitted by text-writers, and decided in many cases, that the plaintiff in an action for seduction may adopt either form, at his option. He may either bring trespass for the direct injury, laying it with a *per quod servitium amisit,* or in case for the consequential damage. 3 Stephens N. P., 2351, 2354. That trespass may be brought is shown by the cases of *Woodward v. Walton,* 2 N. R., 476; *Tulledge v. Wade,* 3 Wilson, 18— and that *case* may, by *Dean v. Peel,* 3 East, 43; *Heavitt v. Prime,* 21 Wend., 79; *Martin v. Payne,* 9 Johns., 387; *Speight v. Olivera,* 3 Stark., 435, by *Abbott, C. J.; Holloway v. Abell,* 32 Eng. Com. L., 615, and by many other cases. In *Chamberlain v. Hazelwood,* 7 Dow. Par. cases, cited in 3 Stephens N. P., 2353, *Mr. Baron Parker* declares that,
(20) although there may have been no direct adjudication on the subject, it had been the constant practice with pleaders to declare it either way. These authorities abundantly show that the action was properly brought in case.

The second exception is equally as untenable as the first. It assumes that the only consequential injury to the father of which he has a right to complain consists in the loss of the services of his daughter and the expenses he may incur during her confinement. This certainly is not so. If it were so, and pregnancy did not result from the seduction, the father would have no action. All the authorities show that the relation between master and servant between the parent and the child is but a figment of the law, to open to him the door for the redress of his injury. It is the substratum on which the action is built. The actual damage which he has sustained in many if not most cases exists only in the humanity of the law which seeks to vindicate his outraged feelings. He comes into the court as a master; he goes before the jury as a father. He must, indeed, show that his child stood to him in the relation of a servant; and it matters not how trivial the services she rendered, though it may have consisted but in pouring out his tea, he is entitled to his action. *Carr v. Clark,* 2 Chitty, 261; *Mann v. Barrett,* 6 Esp., 23. So it has been decided that the father need not show any actual service rendered if at the time of the seduction she lived with her father or is under his control. *Maunder v. Nun,* M. and M., 323, cited 3 Stephens N. P., *Mann v. Barrett,* and *Holloway v. Abell.* Upon this objection, however, there is an express authority that the father can maintain the action before the confinement of his daughter, even though he has turned her out of doors, per *Lord Denman* in *Joseph v. Cowen,* cited 2 Steph. N. P.,

2354, and Roscoe on Ev., 483. Both, then, upon authority and reason the objection cannot be sustained.

So neither can the third. In no case is an actual contract between the father and the daughter necessary to maintain the action. Before the child attains the age of 21 years the law gives the father dominion over her, and, after, the law presumes the contract when the daughter is so situated as to render services to the father or is under his (21) control; and this it does for the wisest and most benevolent of purposes: to preserve his domestic peace by guarding from the spoiler the purity and innocence of his child. If this were not so in those cases where the degradation would carry the largest portion of anguish and distress the unfortunate parent would be without redress if his daughter were over 21 years of age. That the law is not as the defendant contends is shown by many of the cases cited upon the other points. To these may be added *Bennet v. Alcot*, 2 Term, 166; *Nicholson v. Stryker*, 10 Johns., 115, and *Morgan v. Dawes*, 4 Cow., 417. In this case the daughter lived in her father's house at the time of the seduction, under his control and in the performance of actual services.

Here this opinion might be closed but for another part of the charge. The presiding judge told the jury that before the daughter came of age the action might be sustained in his paternal character for the loss of her services, and after she became of full age it might be sustained by him as master, for services lost. The distinction is new to us. We have been able to find no case in which it is recognized. On the contrary, the whole history of the action clearly shows that it rests upon the assumed or actual relation of master and servant, and that as well before the daughter has attained 21 as after. We notice this part of the charge, not because it at all enters into the decision of this case as presented to us by the parties, but because we are not willing it should be supposed we acquiesce in its correctness. The defendant did not except to it, and in *Ring v. King*, 20 N. C., 168, the Court say: "The rule of this Court is to regard as nearly as we can the case made by the judge in the light of a bill of exceptions for specified errors," and none others are considered here unless they appear upon the record strictly so called. The only way in which it could have been important in this case was as it might have affected the damages; and the defendant's not excepting is strong evidence that it did not affect him injuriously.

We see no error in the opinion of the presiding judge in the (22) points excepted to.

PER CURIAM. No error.

Cited: Kinney v. Laughenour, 89 N. C., 368; *Snider v. Newell*, 132 N. C., 615, 616.

DEN ON DEMISE OF MILES McLEAN v. ABRAHAM PAUL.

1. Where the execution of a justice of the peace is on the same paper with the judgment, it must be considered as referring to the judgment, and is made certain as to the debt, interest, and costs, and the person who recovered the same.
2. Where the levy of a justice's execution was "on 450 acres of land adjoining the lands of A. B., and C. (mentioning their names," the court can see no objection to the levy on its face, and without further evidence cannot say that the land was not sufficiently identified, as our act of Assembly requires.
3. It is not competent, on the trial of an action of ejectment, for a party who claims under a levy made by virtue of a justice's execution to prove by parol that due notice had been given of such levy by the constable, as required by Act of Assembly.
4. The awarding of the *venditioni exponas*, or order of sale, by the county court, imports that notice has been duly given to the defendant, unless the contrary clearly appear. Especially is that the case when the court expressly declare that notice has been given.

APPEAL from ROBESON Fall Term, 1844; *Bailey, J.*

The lessor of the plaintiff claimed the land sued for as a purchaser at a sale made by the sheriff under several executions issued from the county court of Robeson. The plaintiff produced the sheriff's deed and copies of the records of the judgments and executions under which the sale was made. From them it appeared that the defendant confessed four several judgments before a justice of the peace in favor of the lessor of
(23) the plaintiff, on 10 November, 1841. On each of them a *fieri facias* was issued 13 November, on each of which a levy was indorsed by one John McLean, a constable, in the following words: "This day levied on the legal and equitable interest of Abraham Paul to 450 acres of land, more or less, in Robeson County, adjoining the lands of Giles S. McLean, Dugald McCallum, John McLean, and others, to satisfy the above judgment, this 13 November, 1841. To the best of my knowledge, there are no goods or chattels of the defendant." One of the executions was in the words following:

"NORTH CAROLINA—ROBESON COUNTY.

"To any lawful officer: You are hereby commanded to execute and sell as much of the goods and chattels of the defendant as will satisfy the above judgment for debts and costs. For the want of such, levy on the lands and tenements as much as will be sufficient to satisfy the above judgment and the costs."

The others were substantially the same, though less formal even than the above.

The records then showed that at the court which sat on the fourth Monday of November, 1841, John McLean, the constable, returned the judgments, executions, and levies aforesaid; and thereupon follows this entry in each case:

"Due and legal notice having been given to the defendant, on motion it is ordered by the court that the judgment of the justice of the peace be affirmed with costs; and it is further ordered that a writ of *venditioni exponas* issue to sell the land levied on to satisfy the plaintiff's said debt, interest, and costs."

In each record is also set forth a written notice purporting to be a copy of a notice by the constable to Abraham Paul, dated 13 November, 1841, that he had that day made a levy on his land as described above, and that he intended to return the same to the next county court, as aforesaid, for the purpose of obtaining an order to sell the said land, when and where the defendant might attend. But it did not (24) appear upon the notice in what case or at whose suit the judgment and execution were, and the notice was in the name of the constable.

The defendant objected that the executions issued by the justice of the peace were informal and insufficient, and that the levies were also void because they did not conform to the statute; and he likewise objected that it did not sufficiently appear that the defendant had five days notice, as prescribed in the act; and thereupon the plaintiff offered the said John McLean as a witness, to prove that he did give the defendant notice in each case, for more than five days, of the levy and of the term of the court to which it would be returned. This evidence was objected to by the defendant, but was received by the court.

The jury under the directions of the court found for the plaintiff, and from the judgment thereon the defendant appealed.

D. Reid for plaintiff.
No counsel in this Court for defendant.

RUFFIN, C. J. It is sufficient for the purposes of the plaintiff in this suit if any one of the several proceedings will sustain the sale. Certainly the process and proceedings are very informal, as, indeed, almost all the acts of magistrates out of court and of their officers are. It has been found indispensable to show them great indulgence hitherto; and we are bound by the precedents. It is plain that the execution was on the same paper with the judgment, and by reference to it it is made certain as to the debt, interest, and costs, and the person who recovered the same. The case, therefore, falls upon those points within those of *Forsythe v. Sykes,* 9 N. C., 54, and *Governor v. Bailey,* 10 N. C., 463.

We see no objection to the levy upon its face, as without further evidence we cannot undertake to say that the land is not sufficiently identified by the description, or that there were any other means by which it could have been more perfectly identified, as by water-courses, if it laid on any, or the like.

(25) The Court is of opinion that it was not competent to prove by parol on the trial of the ejectment that notice had been given to the defendant by the constable. Such evidence the opposite party ought, of course, to have the right of answering by conflicting evidence; and thus the obligation of the judgment of a court would depend, not on its own terms or the authority of those who gave it, but on the credit given to the testimony of witnesses as to the proceedings in the cause.

We think, however, that the evidence of the witness was unnecessary and that the objection was untenable, to which the evidence was to apply. We have lately in *Burke v. Elliott,* 26 N. C., 355, had occasion to consider this question, and we then gave it as our opinion, that the rendering of the judgment imports that notice has been duly given to the defendant, unless, indeed, the contrary clearly appear. But in this case the court expressly declare upon the record that due notice was given, and that precludes all contradiction, or, indeed, inquiry into the matter. The judgment must, therefore, be

PER CURIAM. Affirmed.

Cited: Grier v. Rhyne, 67 N. C., 340; *Farrior v. Houston,* 100 N. C., 373; *Perry v. Scott,* 109 N. C., 384.

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(26)

THE STATE ON THE RELATION OF JOHN WOODS v. WILLIAM FULLER.

1. A sale of a chattel at the common law vested a title in the purchaser without a delivery.
2. So it was as to the sale of a slave, as between the parties, under our acts of 1784 and 1792, Revised Code, ch. 225, sec. 7, and ch. 363. They only affected the rights of creditors.
3. Whether our act of 1836 (Rev. Statutes, ch. 37, sec. 19), embodying these acts and omitting the preambles, may alter their construction, *quære.*

APPEAL from CASWELL Fall Term, 1844; *Pearson, J.*

Debt upon the administration bond of the defendant as administrator of his father, Moses Fuller, deceased. The relators were some of the next of kin of the said Moses, and alleged, as a breach of the conditions of the said bond, that the defendant had not accounted to them for a negro

woman Judy and her children, part of the estate of the intestate. The defendant claimed the said negroes as his own property by virtue of a sale and delivery to himself from his father. In support of this claim he introduced the evidence of Dr. William F. Smith, who stated that he practiced medicine in the neighborhood of the said intestate from 1818 to the latter part of 1822, and was called in to his family whenever a physician was needed; that at some period during that time a girl between 6 and 12 years old, the property of the intestate, was badly diseased with white swelling in one of her legs, so as to exhibit very alarming symptoms; that the intestate despaired altogether of her recovery, and declined employing a physician to attend her, but told the defendant, his son (who was then grown and living at his father's, except when occasionally absent) that if he, the defendant, would employ (27) a physician for the said girl at his own expense and could have her cured, he might have her as his own property; that the defendant then made a conditional contract with the witness to attend the said slave and cure her if he could; that the witness succeeded in effecting a cure, and that the defendant out of his own means paid to the witness the sum of $25 therefor; that the witness remained in that neighborhood a considerable time thereafter, and heard the intestate speak of the said slave as having become the property of the defendant by reason of the facts already stated; that if the said slave had been well she would have been worth, at the period referred to, $250 or $300, but in her diseased condition she was not worth more than $100; that the symptoms exhibited a worse state of the case than the witness found it on treatment; that the charge for his medical attendance was quite low. The defendant also proved by another witness two conversations with the intestate about six or seven years before his death, which took place in 1840, at times when some of his negroes were sick or dying, in which the intestate stated that he had been unlucky with his slaves; that the woman Judy had when a girl been diseased in one of her legs; that he and his wife had done all they could for her, and thought she would die, and that he told his son William if he would employ a physician and pay him he should have her; that William did employ Dr. Smith to attend her; that she got well; that William paid the doctor and she was now William's. It was shown that the defendant had always lived with his father until the death of the latter, and superintended his business; that he married six or eight years ago and then began to cultivate a plantation 4 miles from home; that the negroes as well of the father as of the defendant worked sometimes at one plantation and sometimes at the other; that Judy sometimes worked out and sometimes did house service, but it was not shown that Judy ever worked at the defendant's plantation. The judge charged the jury that the defendant could not set up a title in Judy with-

(28) out a written bill of sale, unless there had been a sale accompanied by an actual delivery from his father to him, and that in this case there was no evidence from which they could infer a sale accompanied by actual delivery.

J. T. Morehead and E. G. Reade for plaintiff.
J. H. Bryan and Norwood for defendant.

RUFFIN, C. J. The instruction, as we think, is certainly erroneous in the point that the defendant acquired no property in the slave by the sale because there was no actual delivery. A delivery is essential to the parol gift of a chattel, but a sale is good without it at common law. "As soon as the bargain is struck the *property* of the goods is transferred to the vendee and that of the price to the vendor; but the vendee cannot take the goods until he tenders the price. But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods or have an action against the vendor for obtaining them." 2 Bl. Com., 448. The rule is correctly and intelligibly laid down in several cases to be that when the bargain has been agreed on, and everything that the vendor has to do with the goods is complete, the sale is absolute, without actual payment or delivery, so that the property is in the vendee and the goods are at his risk. *Farling v. Baxter,* 6 Barn. and Cres., 360; *Hinde v. Whitehouse,* 7 East, 571. It is true that the vendee is not entitled to the possession until he pays or tenders the price or gets day for the payment; but, as Mr. Blackstone says, the property is absolutely vested by a regular sale, without delivery.

Thus it was at common law as between the parties to the contract and all other persons and in reference to all personal chattels. Acts of 1784 and 1792, ch. 225, sec. 7, and ch. 363, altered the rule of the common law respecting the sales of slaves, where creditors or purchasers from the vendor are concerned. Whether the construction of those acts must be changed by reason of the form in which they are combined in the Revised Statutes, ch. 37, sec. 19, in which the preambles and recitals are omitted,

it is not incumbent on us now to determine, inasmuch as this trans-
(29) action occurred in 1822 or before. As the acts then stood, it was in many cases decided that they had no operation between the parties, but were intended for the benefit of creditors and purchasers alone. *Knight v. Thomas,* 2 N. C., 289. Hence, where there is a bill of sale it is good between the parties, though it be unattested and unregistered, *Cutlar v. Spiller,* 3 N. C., 61; and there need be no writing at all, but the contract may be by parol, *Rhodes v. Holmes,* 9 N. C., 193. And in *Bateman v. Bateman,* 6 N. C., 97, and *Cotton v. Powell,* 4 N. C., 313, it was held that a sale of a slave was good by parol as between the parties, without delivery, as it was at common law. Those cases are in

point, and the evidence, if believed, established the payment of the money by the defendant according to his contract. This point being decisive of the case, we need not consider whether there was not evidence on which the jury might have found the possession of the slave to have been in the son after the contract with the father and while they were residing together. However that might be, the negro vested in the defendant by the contract of sale, without a delivery; and it does not appear that the father ever disputed it or set up any adverse possession or claim, but, on the contrary, he continued, as long as he lived, to acknowledge the son's title.

PER CURIAM. *Venire de novo.*

Cited: Buie v. Kelly, post, 174; *Thompson v. Bryan,* 46 N. C., 373; *Reeves v. Edwards,* 47 N. C., 464; *Richardson v. Ins. Co.,* 136 N. C., 315.

(30)

DEN ON DEM. OF ELIAS A. SPRINGS ET AL. V. ELIZABETH HANKS.

1. A deed under the statute of uses, can convey no title to land unless a good or a valuable consideration is expressed on the face of it, or if not so expressed, can be proved *aliunde.*
2. Conveyances by the common law, which operated by the actual transmutation of possession, required no consideration to support them; but those under the statute are void without consideration, because the statute only converts into a *legal* estate the use, which was before an equitable interest; and equity would enforce no use where there was not a good or a valuable consideration to support it.

APPEAL from LINCOLN Fall Term, 1844; *Manly, J.*

Ejectment. A verdict of guilty was submitted to by the defendant, subject to the opinion of the court upon the legal validity of the deed under which she set up title; and it was agreed by the parties that if that deed should be deemed sufficient in law the verdict might be set aside and a nonsuit entered. The deed was objected to on the ground that there is no consideration moving the donor, stated upon its face. The court being of opinion that a deed of gift such as the one in question might operate without a consideration as against a volunteer (which the lessor of the plaintiff was admitted to be), set aside the verdict and entered a nonsuit. From this judgment the plaintiff appealed to the Supreme Court.

The following is, in substance, a copy of the deed:

"STATE OF NORTH CAROLINA—LINCOLN COUNTY.

"Friday, 14 March, 1831.

"This day I, Adam A. Springs, have given unto Elizabeth Hanks, the daughter of Thomas Hanks of this county, during her natural life, and at her death to her two children, Lewis J. Bertrand and Parmelia, and their heirs and assigns forever, a certain tract or parcel of land (then describing it), which said lands I hereby warrant and defend to (31) the said Elizabeth Hanks and her two children above mentioned, according to the tenor above, against all manner of claims except my own during my natural life, after which the warranty is hereby confirmed forever. Witness, etc. (Signed and sealed by Adam A. Springs.)"

Boyden for plaintiff.
H. W. Guion for defendant.

DANIEL, J. The defendant's counsel contends that a deed of bargain and sale, without any consideration either good or valuable, will transfer the legal freehold in lands to the donee as against the donor and all volunteers; and he has cited Touchstone, ch. 10, p. 221, where the author says that "These words (bargain and sale) do signify the transferring the property of a thing from one to another upon valuable consideration by way of sale. And herein only it doth differ from a gift, that is, a *gift* may be without any consideration or cause at all." If the counsel had observed that the author had, on the same page, just concluded his observations upon the law of "feoffment," he must have clearly understood him, when the aforesaid remarks were used, to allude only to that mode of conveyance (feoffment) when he says a gift of a freehold estate in land may be good without consideration; for the author says (32) that the feoffment (*donatio feodi*) is the *gift* or grant of lands by *livery of seizin* and possession of the thing given; and from hence, he says, comes the word *enfeoff;* for by this word, and the words *give* and *grant,* is this kind of conveyance most commonly made; but *livery of seizin* is the operative and the essential part of the assurance. And no estate of freehold passes till *livery of seizin* is made. 1 Touch., 203 (Preston's ed.). A consideration given by the purchaser was never necessary to complete any species of common-law conveyances which operated by the actual transmutation of possession. The purchaser was bound only to perform the *feodal* services incident to the tenure of the land possessed by him. When the ceremonies were performed which the law prescribed, the purchaser was either seized of a freehold estate or he was possessed of a term in the land, as was intended by the parties. But a deed of bargain and sale, even with a consideration, transferred to the bargainee no *legal* estate in the lands prior to the passage of the

statute of uses. But before that time it was a court of equity only which created a *use* or equitable estate in the bargainee; and this was done from motives of conscience, upon payment of a valuable consideration; and equity took exclusive jurisdiction of such uses. It was the statute of uses (27 Ch. II) which changed the equitable estate in the lands (the *use*) into *legal* estates, but in those cases only where the grantor or some other person was *seized* to the *use* of the grantee or bargainee. The law, the statute, transferred the possession of the land to him who before had the use; and it declared that he who had the use in the land should thereafter have and hold the legal estate in the same plight and condition that he before held the *use*. Before this statute was passed courts of equity never declared the bargainor or covenantor a *trustee* for the bargainee or covenantee unless there was either a *valuable* consideration or a *good* consideration existing at the time; for these considerations only raise in equity, to the covenantee or bargainee, the *use* or equitable estate in the lands. Therefore, inasmuch as the statute only transferred the possession or *legal* estate in the lands to him who had the *use* in the same lands, it follows necessarily that if the bargainee or cove- (33) nantee has not the use in the land (and without a good or a valuable consideration no use could ever inure to such person), the statute cannot help him to the legal estate. It is very true that if the deed given to the defendant had been either upon a good or a valuable consideration, it might have been averred and proved, as no consideration is mentioned in the deed; and then a *use* would have been raised for the defendant and her children, which the statute would have converted into legal estates. But until that be done, no use exists in them, and of course no legal estate in the land. A. Springs never conveyed the freehold in the land to the defendant, either by any of the modes of conveyance known to the common law or under the statute of uses. The deed, in part, operated as a feoffment without livery of seizin, which created only an estate at will; and the death of A. Springs has determined that estate. The decision of the judge was, we think, erroneous, and, therefore, there must be a new trial.

PER CURIAM. *Venire de novo.*

Cited: Cobb v. Hines, 44 N. C., 348; *Bruce v. Faucett,* 49 N. C., 393; *Morris v. Pearson,* 79 N. C., 260.

(34)

CHARLES R. KINNEY, ADMINISTRATOR, ETC., TO THE USE OF JOHN Q. PERKINS v. WILLIAM ETHERIDGE, ADMINISTRATOR OF E. SAUNDERS.

On the petition of the guardian of a ward to the court of equity two negroes were directed to be sold by the clerk and master for the purpose of reimbursing him for certain necessary advances he had made for his ward. At the sale the guardian bought the negroes and gave his notes. The ward came of age, and with the consent of the clerk and master settled with his guardian and took back the negroes the guardian had bought. He then applied to the administrator of the clerk and master, to whom the bonds had been made payable, for the bonds, and brought suit on them in the name of the administrator: *Held*, it was competent for the defendant to give these facts in evidence to show a payment and satisfaction of the bonds to one authorized by the plaintiff to receive such payment.

APPEAL from *Camden* Fall Term, 1842; *Bailey, J.*

Debt on two bonds for $250 each, which were given by the intestate Saunders to the intestate Ferebee. Plea, payment. On the trial the defendant insisted that his intestate had made the payment to one John Q. Perkins for the plaintiff. For the purpose of establishing it, he offered evidence that Saunders was the guardian of Perkins, and that while guardian Saunders filed a petition in the court of equity and therein stated that the expenses of the ward's education exceeded the income of his estate, and prayed that two of his negroes should be sold under the direction of the court to raise a fund for that purpose; and that thereupon a decree was made that the negroes should be sold and that the sale should be made by Ferebee, who was the clerk and master of the court, upon the terms therein prescribed; that Ferebee made the sale, and at it Saunders became the purchaser of the negroes, and for the price gave the bonds now sued on. Ferebee died in possession of the bonds, and they came to the hands of Kinney as his administrator, who several times requested Saunders and Perkins, after the latter came of age, to settle the matter between themslves, so that Kinney might
(35) settle with Perkins, and they both generally replied "that they would arrange it." The defendant then proved that Saunders and Perkins came to a settlement; that Perkins received the negroes back from Saunders, and sold them to other persons, and with the money discharged debts to other persons incurred in his education, and for which Saunders had become responsible, and then gave to Saunders a release from all demands against him as his late guardian. Afterwards Saunders died, and Perkins applied to Kinney for the bonds and got them, and then instituted this suit in the name of Kinney. On the trial the

plaintiff objected to the evidence showing the origin of the bonds and the interest in them of Perkins, and his release. But the court received it, and the jury found that the debt had been paid; and from the judgment the plaintiff appealed.

Kinney for plaintiff.
A. Moore for defendant.

RUFFIN, C. J. The objection to the evidence is urged upon the ground that a court of law only recognizes the legal ownership, and that here Perkins had but an equitable interest, and could not receive payment or release the debt. But that principle is misapplied to this case. The defendant does not insist on the release as a bar *proprio vigore;* for he does not even plead it. But he relies on payment to Perkins, as a person authorized to receive it, by the plaintiff himself. That authority was contained in the directions of Kinney to Saunders and Perkins to settle these debts between themselves; and, perhaps, it was necessary to show nothing more on the part of the defendant to constitute an agency of Perkins for the plaintiff as the legal creditor. But the defendant was certainly at liberty to go further and satisfy the jury of the extent of the agency and the purpose of it by laying before them the origin of the debts and the original interest in them of Perkins, as explanatory of the whole transaction. It is like payment to one to whom a note is transferred without indorsement. The assignee thereby becomes the agent of the payee of the note, and the debtor may plead payment to (36) him as payment to the original creditor. But to establish the agency, evidence of the transfer of the note is competent; for that, indeed creates the agency. Here, there is complete evidence of an agency in Perkins to settle and receive payment for the plaintiff, and evidence from which the jury could fairly infer that, in conformity to the authority of Kinney to them, the parties, Saunders and Perkins, did settle, and Perkins received back his negroes in discharge of these bonds.

PER CURIAM. No error.

THE STATE ON THE RELATION OF J. & J. HORNE v. YOUNG H. ALLEN.

1. It is not necessary, in an action against a sheriff for the misconduct of one who acted as his deputy, to show a written deputation.
2. It is sufficient to show that he acted generally as deputy, without going back to his appointment.
3. There is no law which requires the deputation of the sheriff to be in writing.

4. The admissions or declarations of a sheriff's deputy are evidence against the sheriff, when they accompany the official acts of the deputy or tend to charge him, he being the real party in the cause, for he is the agent of the sheriff.
5. When claims are put into the hands of an officer for collection, and he refuses or neglects to account for them, he is justly chargeable not only with the principal sums, but also with interest from the time the claims began to bear interest.
6. The sheriff is subject to the payment of 12 per cent interest on moneys collected and not properly accounted for according to our act of Assembly, though the default was that of his deputy.

APPEAL from ANSON Fall Term, 1844; *Bailey, J.*

Debt against the defendant upon his official bond as sheriff of
(37) Anson County, dated 15 October, 1838, to recover the amount of certain claims placed in the hands of one William H. Gulledge, who, it was alleged, was the deputy of the said defendant, and had collected money for the plaintiff as deputy, and upon demand refused to pay.

Joseph White, the present sheriff of Anson, and who succeeded the defendant in October, 1840, proved a demand of the defendant before suit brought. He stated that in a conversation with the defendant upon the subject the defendant said he would see Gulledge and get him to settle it; that when he went to serve the writ the defendant remarked that he should have the money to pay, and that if James Horne was not as great a rascal as Gulledge he would confess a judgment and have recourse to the sureties of Gulledge; that the defendant said they could not prove that Gulledge was his deputy for more than three months. The witness further stated that soon after he entered upon the duties of his office in the fall of 1840 the defendant recommended Gulledge to him as a suitable person as deputy sheriff, stating at the same time that Gulledge had on hand some unfinished business which he wished to wind up. This witness further stated that he never heard the defendant admit that Gulledge was his deputy for more than three months, but never heard him say in any of the conversations alluded to that he was not his deputy for more than three months.

The plaintiff then offered in evidence the receipts of Gulledge for claims to collect as deputy sheriff, dated 25 October, 1839, which evidence was objected to by the defendant but admitted by the court.

The defendant then introduced Gulledge (having first released him), who stated that he was appointed a deputy of the defendant in October, 1838; that his deputation was in writing, and that it was lost and could not be found; that he was appointed for three months and three months only, during which time there was no defalcation; that after that
(38) period he acted for nearly two years as deputy sheriff in the county of Anson, and in the town of Wadesboro, where the de-

fendant lived; that he served warrants and returned them before justices of the peace on public days in the town of Wadesboro, as deputy sheriff; that this was frequently done; that he advertised lands and other property for sale to satisfy excutions in his hands for collection; that he did not remember that he added the letters D. S. to his name in the advertisements, but that he put them to his name indorsed on warrants and executions; that he arrested and took persons to jail; that the defendant had once sent him to summon a witness and gave him no special deputation; that he did not know that the defendant ever knew that he acted as deputy after his written deputation expired; that he continued to act as deputy until October, 1840, and was never forbidden by the defendant so to act. There was no evidence at what period the various sums were collected, but it was admitted on the trial that at the time of the demand Gulledge had in his hands, collected of the plaintiff's money as principal, $323, and the plaintiff admitted that out of this should be deducted $104.86.

The court instructed the jury that if Gulledge acted as deputy of the defendant in the county of Anson, and with his approbation and consent, and had as such collected money for the plaintiffs and refused to pay it over to them, that the defendant as sheriff would be responsible for the amount collected after demand made upon him, although a written deputation had been given him for three months only; that the testimony was submitted to them to inquire whether Gulledge acted as deputy when the money was collected, and whether it was known to the defendant that he was so acting and by his consent; and, in the next place, to inquire what amount of money Gulledge had collected, at the time of the demand, of principal and interest; that if they were satisfied he had acted as deputy with the consent of the defendant, and had collected money as such, and refused to pay, after demand upon the principal, they should find for the plaintiffs; and as it did not appear when the several claims were collected, they should calculate interest at 6 per cent from the (39) time they were due up to the demand, and that after that they should calculate interest at 12 per cent per annum to the present time; that if they were satisfied he did act as deputy, but without the consent or approbation of the defendant, they should find a verdict for the defendant.

The defendant's counsel requested the court to instruct the jury that if they believed Gulledge, who stated that in fact he was deputed for three months and for three months only, within which time there was no defalcation, the defendant was entitled to their verdict, notwithstanding Gulledge had done any acts such as before mentioned. The court refused to give this instruction, and again instructed the jury that it was not necessary for the plaintiffs to prove that an express appointment

was given to Gulledge by the defendant to act as deputy; but if it was known to the defendant that he was acting in that capacity, and he was doing so by his consent, he, the defendant, would be responsible for his conduct as much as if he had a deputation in writing.

The jury under these instructions found a verdict in favor of the plaintiffs and allowed interest on the claims to the time of the demand and 12 per cent afterwards.

The defendant's counsel moved for a new trial upon the grounds, *first,* that the receipts should not have been admitted in evidence; *secondly,* that the court did not charge the jury as required; *thirdly,* that interest should not have been calculated upon any claims from the time of the receipts by Gulledge, but only from the time of the demand; *fourthly,* that 12 per cent interest should not have been allowed at any time upon any claim. The court discharged the rule for a new trial, and rendered judgment for the plaintiffs, from which the defendant appealed to the Supreme Court.

(40) *Iredell for plaintiffs.*
Strange for defendant.

DANIEL, J. *First,* the defendant insists that as no defalcation took place until after the expiration of his written deputation to Gulledge, he is not responsible in this action. We think he is. In England the bailiff is not the general recognized officer of the sheriff, like the under-sheriff. It is from the warrant issued by the sheriff, or the deputy in the name of the sheriff, and not from his appointment as a sheriff's officer, that the bailiff derives his authority to execute the writ. Therefore, the acts of a regular sheriff's bailiff in the execution of process are not sufficient to fix the sheriff with a liability for such acts without proving the warrant. *Drake v. Sykes,* 7 Term, 113; Watson on Sheriffs, 36. But the acts done in the name of a sheriff by a person who is proved to have acted generally as deputy sheriff are good. *James v. Brown,* 5 Barn. and Ald., 243; *Francis v. Neaves,* 3 Brod. and Bing., 26. In *S. v. McEntyre,* 25 N. C., 174, the Court said that a person who undertakes an office and is in office, though he might not be duly appointed, is yet, from the possession of its authorities and the enjoyment of its
(43) emoluments, bound to perform all the duties and liable for their omission in the same manner as if the appointment were strictly legal. In *S. v. McIntosh,* 24 N. C., 53, the Court said that the relation between the sheriff and his deputy may be established by the same means by which that between the sheriff and the public is established, namely, by showing that he acted as such, without going back to his appointment. Indeed, in that case the very point which is now before us was decided.

We know of no law which requires the sheriff to make his deputation in writing. If a man acts as deputy with the knowledge and consent of the high sheriff, the high sheriff is as much bound for his acts and omissions as if the deputation were in writing. If that were not so the public might sustain great injury. *Secondly,* the defendant contends that the receipts given by Gulledge as deputy sheriff for the claims put in his hands were not evidence against him. We think they were evidence against him as admissions by the deputy. The admissions or declarations of the deputy are evidence against the high sheriff, when they accompany the official acts of the deputy or tend to charge him, he being the real party in the cause, for he is the *agent* of the high sheriff. *Snowball v. Godrick,* 4 Barn. and Ald., 541; *Yabsley v. Doble,* 1 Ld. Ray., 190; *Drake v. Sykes,* 7 Term. 113; *S. v. Fullenwider,* 26 N. C., 366. *Thirdly,* the defendant insists that the court erred in charging the jury that they might give interest at the rate of 6 per cent per annum from the time the claims bore interest up to the time of the demand on the sheriff, when in law, he says, the interest should have been calculated on the debts only up to the times when they were received by Gulledge. We think there was no error in this part of the charge. The time or times when Gulledge received the moneys from the several persons owing the claims was not exactly ascertained; and, as the money was not paid to the plaintiff when demanded, a presumption arose that Gulledge had used it as soon as he collected it, and the defendant offered no evidence to rebut this presumption. There is no other rule for making him liable for the interest which he collected, as he knew best when and how much he did collect. *Fourthly,* the defendant insists that it was (44) error for the judge to charge the jury that he was liable for 12 per cent per annum by way of damages from the time of demand up to the trial. We think the charge was correct in this particular also. The act of Assembly of 1819, Rev. Stat., ch. 81, sec. 5, subjects sheriffs, constables, etc., to 12 per cent per annum damages for the nonpayment of moneys collected by them, from the time of the detention from any person having a right to require the payment thereof up to the payment, and such damages shall form part of the judgment. On the sum on which the 6 per cent interest was given up to the demand, 12 ought to be given afterwards. The act of Assembly of 1836, Rev. Stat., ch. 109, sec. 23, declares that whenever a sheriff or deputy shall receive claims for collection, it shall be his duty to collect them and pay them over, and, in default of such duty, he shall be liable to the owner for damages, which may be recovered on the official bond. And the sheriff and his sureties shall be liable in like manner and for like damages as are provided for in the case of money collected by sheriffs under process of law; and we know that by the common law the high sheriff is liable for any injury occa-

sioned by neglect of duty in the under sheriff; the high sheriff *alone* is responsible to the party injured. *S. v. Fullenwider,* 26 N. C., 366; Watson on Sheriffs, 33.

PER CURIAM. Judgment affirmed.

Cited: S. v. McGee, 29 N. C., 378; *Presson v. Boone,* 108 N. C., 87; *R. R. v. Fisher,* 109 N. C., 3.

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(45)

THE STATE v. DOCTOR F. MANN.

1. A magistrate has no right to issue a search warrant for runaway slaves or such as have been seduced away.
2. A search warrant can only issue for goods or chattels which are distinctly alleged to have been stolen.
3. Where on the face of such a warrant it appears that the magistrate had not jurisdiction, the officer who attempts to execute it is a trespasser.
4. A magistrate ought to issue no such warrant except on oath; but although it does not appear to have been issued on oath, the officer is justified in executing it if the subject-matter be within the magistrate's jurisdiction.

APPEAL from STANLY Fall Term, 1844; *Bailey, J.*

Indictment for an assault, and the jury returned a special verdict in which they state that the defendant presented a loaded pistol at one Rowland Forrest, the prosecutor, while he was attempting to enter the house of the defendant, in the daytime, claiming to do so by virtue of a warrant issued by a justice of the peace, to search the house of the defendant for a negro alleged to have been stolen from one Thomas Rowland, and further alleging that the negro was in the possession of the defendant; and the jury being ignorant whether said warrant was of sufficient legal form and substance to justify the said Rowland Forrest in entering the house of the defendant against his will, at the time and for the purpose aforesaid, submit the same to the judgment of the court, and if the court is of opinion that the warrant is of sufficient legal form and substance to justify the said Rowland Forrest, then they find the defendant guilty; if otherwise, they find him not guilty. The warrant, which is set forth in the special verdict, states that "Whereas, it appears to me, A. C. Freeman, one of the justices of the peace for Stanly County, that the following negroes (to wit, etc.) have within the last three days been by some person unknown feloniously stolen or went out of the pos-
(46) session of the said Thomas Rowland, Jr., in the county aforesaid, and that the said Thomas Rowland hath probable cause to suspect,

and doth suspect, that the said negroes are in the possession of Edith, Dr. F., and Rowland H. Mann, in the county aforesaid." It then goes on to command the officer to enter the dwelling-house of the said parties, warning them, and to search for the said negroes; if found, to bring them and the said parties before the said A. C. Freeman, or some other justice of said county. The judge presiding decided that this precept did not justify the officer in entering the dwelling-house of the defendant against his will, and gave judgment for the defendant, from which the State appealed.

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

NASH, J. The only question presented to us by the case is, Was the court correct in pronouncing the warrant insufficient to justify the officer? for if it was sufficient the defendant was guilty; if it was not, the defendant was not guilty, and entitled by the special verdict to an acquittal. We entirely agreen in opinion with the presiding judge. This is a search warrant, and substantially one to search for and apprehend negroes that had run away from Thomas Rowland; for although in the first part of the warrant it is stated that the negroes had been stolen from said Rowland by some person unknown, it immediately proceeds to qualify the charge by stating, "or went out of the possession of the said Thomas Rowland." Whether the warrant was issued upon the oath of any person or not we are not informed. If it was, it is evident the informant had not his own consent to swear they had been stolen. What confirms this view of the case is that the warrant proceeds to state that Thomas Rowland had probable cause to believe, and did believe, that the negroes were in the *possession* of the defendant, with others—not that they were *secreted*. It is evident, then, that this was a warrant to search for negroes who had either absconded from their owner and were in the possession of the defendant under a (47) claim of right, or that they had been seduced from his possession by the defendant and were harbored by him. Was it a case, then, which authorized the magistrate to issue a search warrant? We are of opinion it was not, and that the warrant of authority was evident upon the face of the precept. *Lord Camden*, in Entices, 11 State Trials, 321, states that warrants to search for stolen goods had crept into the law by imperceptible practice; that it is the only case to be met with, and that the law proceeds in it with great caution; for, first, there must be a full charge upon oath of a theft committed. The warrant in this case does not contain a full charge of a theft committed in stealing the negroes, nor, indeed, of any theft, and if the warrant pursues the affi-

davit, if any was made, does the affidavit make the charge. The case cited establishes the doctrine that a search warrant can be granted only upon a charge of stealing or of the commission of a felony. This doctrine has been expressly recognized in this Court as the law of this State, in *S. v. McDonald,* 14 N. C., 470. That, also, was a case of a search warrant for negroes who had been seduced from the possession of their owner, and the Court declared that the warrant did not justify the officer who executed it, and that he was criminally guilty of a trespass. Strike out from this warrant the words, "that said negroes have been within the last three days feloniously stolen," and the warrant in McDonald's case is the same with this, and those words, taken in connection with those that follow, fully explain them not to mean a felony, but simply a misdemeanor. The warrant, then, in this case was obviously to search for negroes who had run away or been seduced from the possession of Thomas Rowland, and been harbored by him, which by our laws is but a misdemeanor, for which a magistrate has no power to grant such a warrant. The warrant, therefore, in this case was null and void, and conferred upon the officer no power to act; and in attempting to execute it in the manner he did he is a trespasser, for every officer is pre-
(48) sumed to know the law, and to know that he is not bound and has no power to execute a precept which is not within the jurisdiction of the magistrate issuing it. 2 Hawkins P. C., 130, 5, 10; *S. v. McDonald, supra.* The warrant in this case does not profess to be issued upon the oath of any one, nor does it appear in any part of the case that such was the fact, nor is it at all important to this inquiry how the fact was; it being a matter between the defendant in the warrant and the magistrate. If the magistrate had jurisdiction, the officer was justified in executing it. Every State's warrant, however, issued by a magistrate for an offense not committed in his presence should be on the oath of the party requiring it, as well to ascertain that there is a felony or other crime committed, without which no warrant should be granted, as also to prove the cause and probability of suspecting the party against whom the warrant is prayed. 4 Bl. Com., 291.

We see no error in the judgment of the Superior Court, and it must, therefore, be

PER CURIAM. Affirmed.

Cited: Cohoon v. Speed, 47 N. C., 135; *S. v. Ferguson,* 67 N. C., 221.

(49)

AARON SIMPSON'S EXECUTORS v. LUCETTA BOSWELL.

1. A., having nine children, in 1826 put into the possession of James Boswell, who had married one of his daughters, Nancy, certain slaves. In 1832 A. made his will and died. By his will he gave to his wife certain real and personal property for life, and directed that after her death the personal property should be sold and the proceeds equally divided among his children. He then disposes of his property as follows: "I give to my son Joseph, after his mother's death, the land given to her. I also now give him a negro man, John, and his smithing tools (and other property named), in order to make him equal with my other children. I give to the heirs of my son Moses, deceased, one-ninth part of my estate not otherwise devised. I give to my daughter Kitty one-ninth part in like manner. I give to my son Roger the ninth part as above mentioned, after paying to the estate the sum of $60, that being a sum received over and above his equal part with my other children. I give to my son Heydon the ninth part of my estate not otherwise devised, after paying to the estate the sum of $300 which has been received by him in property. I give to my daughter Penelope Garves the ninth part of the estate, as above stated, after paying the sum of $300 to the estate it being for a negro which she now has in her possession. I will to my daughter *Nancy* the ninth part of the estate as above mentioned, except a tract of land I purchased from her husband, James Boswell, which land is to be sold and equally divided among my other children, and their heirs. I give to my daughter Priscilla the ninth part of my estate as above named. I will to my son Enoch the ninth part of the estate as above stated, with addition of $200 to be received out of the estate, it being due to him in consequence of having received no land. I will to my son Joseph the ninth part of my estate, as before stated; making it equal to them all." The legacies were assented to, and the executors paid over to James Boswell one-ninth part of the estate, not deducting from it the negroes put in his possession in 1826—which Boswell held from 1832 till 1843 as his own property.
2. *Held, first*, that the testator intended by his will to ratify all the gifts, perfect or imperfect, which he had made to his children in his lifetime, and that, therefore, the negroes placed in possession of James Boswell on his marriage with the testator's daughter were confirmed as gifts, though the gifts were not made strictly according to law.
3. *Held, secondly*, that this possession of Boswell from the death of the testator, claiming the property in the negroes, barred the action of the testator's executors by virtue of the statute of limitations.

APPEAL from CASWELL Fall Term, 1844; *Pearson, J.* (50)

Detinue for four slaves. It was decided in the Superior Court, on a case agreed, to the effect following:

In 1826 James Boswell intermarried with Nancy, the daughter of Aaron Simpson, and very shortly afterwards Simpson put into the possession of Boswell the slaves now in controversy, or one from which they descended. In 1832 Simpson made his will and died. By that instrument he gave to his wife a tract of land whereon he lived, for her

life, and also some slaves, which are named, and other articles of furniture and stock; and at her death he directed everything given to her, except the land, to be sold and the proceeds equally divided among his children. Then follow these dispositions:

"I give to my son Joseph, after his mother's death, the land given to her. I also now give him a negro man, John, and his smithing tools, a bed and furniture, one cow and calf, six sheep and six hogs, in order to make him equal with my other children. I give to the heirs of my son Moses, deceased, one-ninth part of my estate not otherwise devised. I give to my daughter Kitty one-ninth part in like manner. I give to my son Roger the ninth part, as above mentioned, after paying to the estate the sum of $60, that being a sum received over and above his equal part with my other children. I give to my son Heydon the ninth part of my estate not otherwise devised, after paying to the estate the sum of $300, which has been received by him in property. I give to my daughter Penelope Graves the ninth part of the estate as above stated, after paying the sum of $300 to the estate, it being for a negro which she now has in her possession, named Jemima. I will to my daughter Nancy Boswell the ninth part of the estate as above mentioned, except the tract of land I purchased from her husband, James Boswell, which land is to be sold and equally divided among my other children or their heirs. I give to my daughter Priscilla the ninth part of my estate as above named. I will to my son Enoch the ninth part of the estate as above stated,
(51) with the addition of $200, to be received out of the above named estate, it being due to him in consequence of his having received no land. I will to my son Joseph the ninth part of my estate as before stated, making it equal to them all. Furthermore, before the division takes place among my children, I will to my niece Sabina Graves, out of the above mentioned estate, the sum of $100, and a good bed and furniture; and then all the property not particularly devised to be sold by the executors and divided as before devised."

The testator appointed his son Joseph and Francis L. Simpson, who married one of his daughters, his executors; and soon after the testator's death they assented to the several legacies and settled the estate and divided the residue among the eight surviving children of the testator and the children of his deceased son, Moses. At that time James Boswell held the slaves so put into his possession by the testator and the issue then born, and the plaintiffs paid over to him his wife's legacy of one-ninth part of the residue of the estate, not including in the estimate of the residue the said slaves or either of them; and Boswell thereafter kept possession of them until the death of his wife in 1837 and until his own death in 1843. Upon that event the negroes were taken by his administrator and divided under the statute of distributions as parts of his

estate, and allotted in the share of the defendant, who was his second wife. The plaintiffs then set up a claim to the negroes, and demanded them from the defendant; and upon her refusal to deliver them, they brought this action, in which the pleas are "the general issue and statute of limitations."

The parties agreed that if in the opinion of the court the plaintiffs were entitled to the slaves, and the action was not barred by the statute of limitations, there should be judgment for the plaintiffs for the slaves and their several values as specified; but if the opinion of the court should be against the plaintiffs upon either of those points, then there should be a nonsuit.

The court gave judgment for the plaintiffs, and the defendant appealed.

E. G. Reade for plaintiff.
Kerr for defendant. (52)

RUFFIN, C. J. The reading of the will produces a strong impression that the testator believed he had effectually advanced several of his children, and, at all events, that he meant in that paper to recognize such gifts, perfect or imperfect, as being good gifts, or as made so thereby. He avows in almost every disposition the purpose of providing equally for his children, and that not by his will merely, but by the bounties bestowed in that instrument and others previously made to them altogether. The case agreed ought to have stated the facts more fully as to the advances to the several children, as it would have been much more satisfactory if we could know the particular advances to each child, their relative values, and when and how conveyed, if at all. But meager as the statement is in that respect, the will itself—which must be believed—puts it beyond doubt that Mrs. Boswell and all the children had received in the testator's lifetime gifts, or what the testator intended as gifts, to a considerable value, excepting only the son Joseph. The first disposition, after that to the wife and the remainder of the personalty given to her for life, is to Joseph, and consists of the remainder in that land and of a slave, who was a valuable mechanic, and other chattels which, the testator says, *"I now give him in order to make him equal with my other children."* What equality was then in the testator's mind? Certainly it was not in relation to donations to the other children contained in the will; for all the rest of his property, but the special gift to Joseph and a trifling legacy to a niece, is divided equally between all the children, including Joseph, and the issue of the deceased son, Moses, with certain exceptions, which, however, only make it more plain that the testator designed an absolute equality between his children and that equality con-

stituted by taking into account previous gifts. The will does not merely say that the residue shall be divided equally among the testator's children, but that it gives to each child separately one-ninth part in distinct clauses, that the testator might the more conveniently and clearly
(53) deduct from or add to that ninth part of each child what such child had received more or less than an average of the advances to the children as measured by the special gift in the will to Joseph. And such deductions or additions are stated in the will to be directed for the very purposes of fulfilling the prevailing intention of equality between the children. Thus, the sum of $60 is deducted from Roger's share of the residue, "it being a sum *received over and above his equal part with my other children.*" For the like reason he deducts from the shares of Heydon and Penelope, $300 each, and exclude Mrs. Boswell from any share of the proceeds of a certain piece of land which forms a part of the residue. On the other hand, he adds to Enoch's part $300, "it being *due* to him in consequence of his *having* received no land; and, as he began the donations to his children by the special one to Joseph, and gave the reason therefor, so he concludes it by the gift to him of a then remaining ninth part of the residue, and annexes to it the remark, "making it (Joseph's share of the residue) equal to them all," obviously meaning thereby again to declare that he gave Joseph an equal share of the residue of his estate, notwithstanding the preceding special gift to him, because that preceding gift to him in the will was but to make up for previous gifts to the other children made before he made his will. This view is confirmed by the terms used by the testator in the first gift to Joseph, "I *now* give him and in order to make him equal with my children," thus contrasting the gift to *this* child *then* made with *former* gifts to the *other* children. It is true that we cannot say that the testator had really, that is, legally, given slaves to his other children, because no written gifts appear, and such only are valid. And it is likewise true that the language of the testator in his will does not amount to an express gift to the other children respectively of the property put into their possession. But the understanding of the testator is so clearly seen that those children should have that property, and his intention so manifest that they should have it, that there is a cogent implication
(54) of a gift in the will, or, at the best, of a confirmation of previous gifts. Suppose the testator had given slaves to his children by parol, and had said in his will, "I confirm the gifts heretofore made to my children," although those were no gifts in law, for want of a writing and because the donor did not die intestate, yet, undoubtedly, that would be a valid testamentary disposition, amounting to a present gift, upon the strength of the intention. This will, taken in all its parts, conveys the intention of the testator not less clearly than if he had used the lan-

guage supposed. We are not in possession, indeed, of *data* for an accurate estimate of the advances to the several children; and if it were in our power to treat this case agreed as we liked, we should be disposed to refuse to give judgment on it unless it were more fully stated. But as we are obliged to proceed on it as it is, we must determine the rights of the parties as they may appear to be, both on what is set forth and what is not set forth in the case. It is to be observed, then, that it does not appear that Mrs. Boswell received anything from her father but the negroes. Nor are their numbers or values stated at the time the father sent them home with the daughter. It seems there are four now; but one of them is called in the declaration a child, one a boy, and one a girl; the fourth is called a woman. So it is probable that all except the woman have been born within the nineteen years during which Boswell and the defendant have held them, and that when the will was made, in 1832, this family was not of greater value than the extra gifts to Joseph, which the will declares were made to him in order to bring him upon an equality with Mrs. Boswell and the other brothers and sisters. Such an equality the testator could not have spoken of unless in reference to previous bounties to the other children. Such a reference, in that connection, must, by implication, give those previous bounties efficacy, at least, for that time, else the great object of the testator, as avowed by him in the gift to Joseph, will be defeated by his having so much more than the others, instead of being thereby made equal with them.

The Court is likewise of opinion, were the law otherwise upon the point already discussed, that yet the case is with the defendant upon the point of an adverse possession for more than three years. This matter would, perhaps, have been more properly left to a jury, (55) because the intention of the parties, as for the most part giving character to the possession, is more appropriate to that body, aided by explanations from the bench. But as the parties have chosen to withdraw it from the jury and refer it to the court by a case agreed, it becomes our duty, according to our practice, to decide it, and, from necessity, to deduce from the facts stated such other inferences of fact as a jury would or ought to make. In this view of the question it seems to us that although an adverse possession is not expressly stated in the case agreed, yet it is fairly to be inferred from the period at which the plaintiff settled the estate with the residuary legatees.

The presumption, both legal and natural, is that a person takes possession according to his title, and that as long as that possession lasts it retains its original character, unless, indeed, it be so very long as thereby, or with other circumstances, to create a presumption of a subsequent conveyance. Hence, in general, the possession of a tenant or bailee is subsidiary to the title of the owner. But those persons may hold ad-

versely, that is, in point of fact they may deny the title of those under whom they entered, and set up a title in themselves and hold possession upon their own alleged title. Such a possession is, in fact, adverse; and it would seem that it can be nothing in law. The difficulty in such cases is for a bailee to show, when the bailor is passive, that there has been a change in the character of the possession, in which there has been no chasm. But when the bailor demands possession and the other refuses, the latter subjects himself to an action as a trespasser, and, consequently, the possession becomes adverse. So, if the dealings of the parties be such as can consist only with an admitted or an open claim of absolute property in the bailee, the same consequence follows; as if the bailee sell the thing, or his administrator distribute it as a part of his estate, the possession of the purchaser or next of kin is deemed adverse.

(56) The circumstances here seem equally strong with those mentioned, and they are taken from decided cases. Up to the death of the testator Boswell held as bailee; and, also, up to the assent of the executors and their settlement of the estate he is to be presumed to have held in that manner. But after that event, as an inference of fact, the contrary is to be presumed; for it is almost impossible that he should then have held or that the plaintiffs should have considered him as holding in any other manner than upon a title asserted in himself and believed by all parties to be in him. The settlement in question was not merely for a particular legacy to Mrs. Boswell, but involved the whole residue; and all the children were necessary parties to it. Of the residue, which was then the subject of settlement between all the members of the family, these negroes, and any others then in like manner in possession of the other children, necessarily formed parts, unless they belonged to the possessors respectively. As parts of the residue, these slaves would have belonged legally to the executors, and two-ninths to them beneficially. One of them, as the will says, had received from the testator in his lifetime property to the value of these negroes; and the other received by express words of the will gifts of equal value, which are declared therein to be made in order to produce an equality between the testator's children. Yet the settlement was made by the whole family upon the basis that these negroes and, as far as appears, all others which the testator had advanced to the other children in his lifetime, did not form parts of the residue; and in that settlement all the parties to it have acquiesced for twelve years. From those facts, whatever may be the proper construction of the will, the inference is strong that all the parties interested were firmly of opinion that either by reason of previous gifts or by the provisions of the will the negroes before delivered to the children did not fall into the residue; and, therefore, they were not claimed or divided as parts of the residue, but left to the several pos-

sessors as their property. To the purpose now considered, it is not material whether that opinion was right or wrong. It certainly, we think, existed, and was acted on by the plaintiffs and all concerned. Thus both sides concurred in renouncing the relation of bailor and (57) bailee; and afterwards Boswell not only held for himself, but the plaintiffs must have known that he was so holding, and thought that he was thus rightfully holding. If that did not determine the possession under the bailor and turn it into one independent of him and adverse to him, nothing could. As an inference of fact, then, we find the possession to have been adverse, as the plain result of the acts of the testator in his lifetime, the contents of the will, the transactions between the executors and all the other children in settling the estate, and the acquiescence for so long a period in the possession kept after the division and settlements.

PER CURIAM. Reversed, and nonsuit.

Cited: Lawrence v. Mitchell, 48 N. C., 195; *Cotten v. Davis,* 49 N. C., 419; *Williamson v. Williamson,* 57 N. C., 285.

THE STATE v. CALVIN LYTLE.

1. In the trial of a capital case the original *venire* ought to be first drawn and tendered; but if the judge should, where there are only eleven of the original panel, direct *tales* jurors to be drawn with them, the prisoner has no right to a *venire de novo* on this account, if he has had an opportunity of accepting or rejecting all of the original *venire.*
2. Where one of the *venire,* upon being called, was challenged by the State and directed to retire till the panel was gone through with, and was not afterwards recalled, the prisoner making no motion to that effect and it being known that the juror was a witness for the prisoner: *Held,* that this was no ground for a *venire de novo* on the part of the prisoner.
3. A short absence of one of the jurors impaneled, for necessary purposes and without an imputation of improper motives, does not vitiate the verdict of the jury.

(58)

APPEAL from DAVIDSON Fall Term, 1844; *Pearson, J.*

The prisoner was indicted for burglary, and on not guilty pleaded he was convicted, and from the judgment of death thereon he appealed to this Court. Before sentence was passed the prisoner insisted there had been a mistrial, and, for the several reasons herein stated, moved the court to set aside the verdict and grant him a *venire de novo,* which was refused.

After forming a grand jury there were only eleven jurors of the original panel attending the court, and a special *venire* for seventy-five other

jurors was awarded. To form the jury, the jurors of the original panel were not tendered first and by themselves to the prisoner, but the names of those eleven persons and of the special *venire* of seventy-five were put into a box together, and were gone through without forming a jury, by reason of challenges, some peremptory and others for cause. While those jurors were being drawn the solicitor for the State chal-
(59) lenged some of them and required that they should stand by until the panel should be gone through, and when the first challenge of that kind was made, the court instructed the clerk to note the names of jurors who might be so challenged, so as, after going through the other jurors of the panel, they might be called back and passed on before ordering another *venire*. Accordingly, those who had been challenged by the State were thus called back and two of them challenged peremptorily and the third sworn on the jury.

The court then ordered another panel of twelve of the bystanders; and when one of them, who was witness for the prisoner, was drawn and tendered, he was challenged for the State and ordered to stand aside until the panel should be gone through. He did so, and remarked as he was retiring that he was a witness for the prisoner. The other jurors on this panel were exhausted without making a jury, and the clerk believed that Ridge had been excused or discharged on account of his being a witness, and did not recall him, but announced to the court that the whole panel had been exhausted. The prisoner and his counsel knew what Ridge had said, and also that he had not been called back nor his case decided on by the court; and no motion was made on behalf of the prisoner that the juror Ridge should be again tendered to him. But the presiding judge, believing that the previous panels had been exhausted, as had been announced aloud in open court, as aforesaid, ordered another panel of twelve of the bystanders to be summoned, without objection from the prisoner; and of the panel thus summoned the jury was completed. But in forming the jury from this panel the prisoner exhausted his peremptory alleges, and one person was sworn on the jury thereafter.

The trial continued from early in the day until after night, and not being then concluded, a recess was taken to enable the persons concerned in it to take some refreshment. The jury were allowed to go to an adjoining tavern to get supper, and for that purpose were put in charge of a constable, as usual. When they reached the tavern they went into a
(60) piazza, when two of the jurors requested the constable to stop and allow them to retire a short distance on a call of nature, and they went for that purpose 30 or 40 yards, and came back without any unnecessary delay. During that period three of the jurors went into the tavern, passed through an ante-room into the eating-room of the house, where the landlady and servants only were, and began their supper, before their fellows came in.

After supper, the court sat and the trial proceeded. When the judge had concluded his charge the jury retired under the charge of a constable, who took a candle and conducted them to their room in the courthouse. When they got to it they discovered that the door was locked, and then one of the jurors took the candle and returned into the courtroom for the key, and immediately returned with it. While that one was gone for the key another juror stepped around the corner of the courthouse upon a call of nature, and came immediately back. The jurors spoke with no person on the subject of the trial, nor on any other subject but that of getting their supper and getting the key.

Objections were also taken to the judge's charge upon the evidence. These will be found fully stated in the opinion delivered in this Court.

Judgment of death having been pronounced against the prisoner, he appealed to the Supreme Court.

Attorney-General for the State.
Morehead for defendant.

RUFFIN, C. J. The Court is of opinion that neither of the grounds in relation to the jury is sufficient to authorize a *venire de novo.*

We think it would have been proper to have kept the jurors of the original panel separate from those of the special venire. It was so held in *S. v. Benton,* 19 N. C., 196. It is true that in that case there were seventeen of the original panel attending, so that a jury might have been formed without any tales jurors, while here there were eleven only, so that resort to the special venire was indispensable. But (61) we think that is not material, because both the State and the prisoner have a right to a jury of the original venire if one can be had; and if a jury cannot be thus formed, they have an equal right to have of the jury such of the original venire as do attend to whom there is no sufficient objection. If, therefore, the prisoner had demanded the original panel to have been first gone through, and it had been refused, and it had happened that the prisoner had been compelled, by exhausting his challenges peremptory, to take a jury before he had an opportunity of accepting or refusing all the jurors of the original panel, we should have thought it erroneous. It would stand upon the same reason with the rule that the improper granting or refusing of a challenge by the court is cause for a *venire de novo.* But in this case the prisoner was in reality deprived of no right, nor even any of his privileges abridged; for it so happened that every one of the original panel was tendered to him and accepted or refused by him or rejected by the court for legal cause before a jury was formed or his challenges exhausted. Consequently he sustained no prejudice by the alleged irregularity, and the verdict ought not to be disturbed. *S. v. Arthur,* 13 N. C., 217.

The court made no erroneous decision with respect to the juror Ridge. What the court did as to him was proper—that is, to direct him to stand by and wait the decision upon the challenge of him until the panel to which he belonged had been gone through. That challenge never was decided. But he was not called back for a decision merely from a mistake of the clerk as to the point of fact that the juror was excused for the reason he was a witness, by consent of both sides. Hence that officer declared as a fact that the panel had been perused, although the court had not passed on this juror, and the prisoner and his counsel, with a full knowledge of the truth of the case, acquiesced in that statement, and upon the basis that the panel had been perused and all the jurors had been accepted, challenged, or excused, made no objection to another panel being ordered. Instead, then, of the court having erroneously
(62) decided upon the challenge to this juror, it is a case in which by the concurrence of the prisoner no decision was asked from the court. To set aside the verdict in such a case would be to enable the prisoner to annul the most solemn trial by a trick.

The short adjournment of the court for necessary refreshment, and the separation of some of the jurors from the body of the jury upon the occasions and for the very short periods mentioned, do not vitiate the trial. *S. v. Kimbrough,* 13 N. C., 431; *S. v. Miller,* 18 N. C., 500. Indeed, there does not seem to be the least ground of suspicion that the verdict could have been influenced by anything that occurred while the jurors were out of the presence of the court.

The counsel for the prisoner took an exception to parts of the charge to the jury, to the proper understanding of which it is necessary to state the parts of evidence. The house that was broken was situated in Davidson County, and belonged to two men named Newsom and Spence, and was used by them as a shop for the sale of merchandise, and also a dwelling-house. The prisoner was a house carpenter, and resided in Randolph County, and was engaged in building a house there, at the distance of about 30 miles from the house of Newson and Spence. On Monday, 8 May, the prisoner was in the shop, had some dealings with Newsom, and paid him three $1 bills, which he saw Newsom put into the till. The house was broken open on the night of Sunday, 14 May. The entrance was effected by boring a hole in the shutter of a window in the shop with a 1½-inch auger, so as to take out a piece large enough to admit the hand, and then the key of an iron crossbar was removed on the inside and the window opened. The appearance of the holes showed that they were bored with a peculiar auger, called an Edding auger, of which none were known in that neighborhood, and that this auger had a gap in it. There were stolen from the till the sum of $10 or $12 in small silver coins, three $1 bank bills, and a South Carolina due-bill for 50 cents.

On the evening of 13 May the prisoner left his place of residence in Randolph County, saying to a witness that he was going (63) on a money speculation; and he returned on Monday evening following.

On Monday morning, 15 May, the prisoner was seen about sunrise, about 1½ miles from the store, going in the direction from the store to his residence. He was walking very fast, and dodged when he saw the witness, though at some distance off, and the witness did not perceive that he was carrying anything. At 12 o'clock of the same day he was seen by another person going in the same direction, 15 miles from the shop. He had his coat off and carried it on his arm, and this witness, also, did not perceive that he was carrying anything else.

During the week following the prisoner passed to a person three $1 bills and a South Carolina bill for 50 cents, which Newsom identified as those that were stolen from the shop. On Monday, 22 May, he also passed to another person $10 in silver change, only one piece of which was as large as 20 cents, the rest being mostly dimes and half-dimes. Of these coins, the owners identified two of the dimes, with particular marks, one half-dime and one piece of 12½ cents.

On Monday, 22 May, the prisoner was arrested at the house on which he was working, and there was found among his tools an Edding auger of the same dimensions with which the holes in the window shutter were bored, and with a gap in it corresponding with the impressions from the gap in the window shutter. A person who worked with the prisoner said that while the prisoner was absent he had not missed the auger, though his attention had not been directed to it.

The counsel for the prisoner, in the course of his defense, contended there was not sufficient evidence that he committed the burglary, and, particularly, that the possession of the stolen money was not sufficient evidence, because, from the lapse of time between the burglary and the prisoner's being seen with the money, he might have probably received it from some other person. And to fortify that position, (64) and also in reply to an argument of the solicitor, founded on the correspondence between the prisoner's auger and that with which the entry had been effected, the counsel for the prisoner further contended that he could not have been the burglar, because, if he then had his auger with him, it must have been seen by the two witnesses who saw the prisoner returning home on the next day after the burglary.

His Honor, in summing up to the jury, stated to them, among other things, that the prisoner had not been seen in possession of the money so recently after it was stolen as of itself legally to raise a presumption that he had stolen the money or, consequently, broken the house. There was opportunity in the interval for some other person to have passed it

to him; and, therefore, he ought not to be convicted of breaking the house on that evidence. But the court further observed to the jury that the possession of the money was nevertheless a circumstance to be considered by them, with other circumstances, tending to show that the prisoner was the person who broke the house; and if the whole evidence satisfied them that he did, then they ought to find him guilty; that it was a material circumstance for their consideration, in connection with the prisoner's possession of the stolen money, that it consisted of a considerable number and various kinds of coin, besides several bills of paper money, and that all of it was in the prisoner's possession, or had been passed by him, as enabling the jury to estimate the degree of probability that the prisoner had himself taken it, or, on the contrary, that some one else had stolen it and passed the whole sum to him in the very pieces that were taken. And in reference to the point disputed between the counsel, whether the prisoner had his auger with him on Monday morning, the court told the jury that they must judge how the fact was from the circumstances. On the side of the prisoner there were the circumstances that the workman with whom the prisoner was employed had not missed the auger while the prisoner was gone, and that the witnesses who saw the prisoner going home did not see the auger. On the other hand, there were the several points of agreement between the
(65) auger with which the window shutters was bored and that belonging to the prisoner; and also the considerations that the prisoner might have had the auger, although the witnesses did not see it, as he passed them at a distance, and they did not attend particularly to what he had and moreover, that he might have been able to conceal it in some way, as by taking off the handle, for example, as it could easily be replaced when needed for use, and while the pieces were separated they could be carried without being so readily discovered as when united.

The court further informed the jury that they were the exclusive judges of the credit of the witnesses and of the weight of the circumstances; and that the court presented the subject in different points of view to aid them in their deliberations, and without any intention to intimate an opinion as to the facts; and that the various suggestions submitted to them were to receive from the jury only that consideration to which, in the opinion of the jury, they were entitled.

Though the exception to his Honor's summing up has not been argued by counsel for the prisoner here, yet, as in every other case of the like serious consequence, we have given it our deliberate attention. We regret that we have not had the views of counsel, because, after full consideration, we are at a loss to conjecture what the objections can be. The judge intimated no opinion as to the facts. The very argument for

the prisoner assumed that there had been a burglary committed and the money stolen by some person. Therefore, in noticing that point to the jury his Honor did not err in taking those facts for granted. The only question was whether the prisoner or some other person was guilty; and to that question the circumstances to which the attention of the jury was called and the various aspects in which they might be regarded were relevant and pertinent. The probability certainly is greater that a possessor of stolen property was the thief, if many small articles, and especially of coin, were stolen, and all of them found upon a person shown to be at or near the scene of the theft, than if he had (66) only one or two of them. It was, therefore, fit to lay that view before the jury. So the argument that the prisoner did not have an auger was necessarily noticed by his Honor in the discharging of his duty of summing up, and in so doing he was obliged to explain to the jury the rule in law of evidence as to the difference between affirmative evidence to a fact and the negative testimony of a witness that he did not observe or recollect the fact and make that explanation in connection with the case upon trial. Therefore, it was proper, to enable the jury to carry out the rule, that their attention should be called to the circumstances which would properly tend to weaken in their minds the influence of the negative testimony and induce a belief by them that the prisoner had the auger, though the witness did not see him have it. Those circumstances the court simply recapitulated in order; that the prisoner might have been at such a distance that the witnesses could not see the auger, even if he had it; or, if near enough, that the witnesses had no interest in the matter, and had not their attention excited; or that the prisoner had concealed the auger from observation, which he might have done under his coat that was hanging on his arm, or by taking the handle and barrel apart and carrying them side by side, so as to be more readily kept out of sight. These were probabilities that it was proper to submit to the jury for their consideration, provided they were fairly left with the opposing probabilities to the unbiased consideration of the jury; and we seen othing whatever in the case to raise a doubt that the summing up by his Honor was not full and impartial, intended and calucalated to aid the jury in coming to a just conclusion on the facts, as the result of their own convictions upon a full deliberation on all the evidences and the discussions of it on both sides.

PER CURIAM. No error.

Cited: S. v. Godwin, post, 404; *S. v. Nash,* 30 N. C., 37; *S. v. Owen,* 61 N. C., 427; *S. v. Durham,* 72 N. C., 448; *S. v. Patterson,* 78 N. C., 473; *S. v. Barber,* 89 N. C., 526; *S. v. Hensley,* 94 N. C., 1029.

(67)

MICHAEL FERRALL v. WILLIAM W. BRICKELL.

A sheriff is bail for two defendants. After judgment, a *ca. sa.* is issued and executed on one, who gives security for his appearance at court. The other defendant is not to be found. Before the day when the defendant, who was arrested, was bound to appear, he and the plaintiff entered into an agreement that he would secure the plaintiff in some other debts that he owed him, and in consideration thereof the plaintiff would release him from the *ca. sa.* and would not at court oppose his discharge under the insolvent debtor's law: *Held*, that this does not operate as a release of the debt, nor did it discharge the sheriff from his liability as bail for the other defendant.

APPEAL from HALIFAX, Fall Term, 1843; *Bailey, J.*

The case was that the plaintiff sued out his writ against Redding J. Hawkins and Figures Lowe, returnable to Halifax County Court, which was executed by the defendant Brickell, he being then the sheriff of said county, without taking any bail. The plaintiff prosecuted his suit regularly to judgment, and then sued out his *ca. sa.* against the defendants, to wit, Hawkins and Lowe. Hawkins was arrested under the *ca. sa.* by the sheriff Brickell, the defendant, and the execution returned *non est inventus* as to the defendant Lowe. This *sci. fa.* then issued to subject the defendant Brickell to the payment of the judgment against Hawkins and Lowe as the special bail of Lowe. Before the arrest of Hawkins he claimed the benefit of the act of the General Assembly passed for the relief of insolvent debtors, and gave to the sheriff a *ca. sa.* bond, as it is termed, that is, a bond for his personal appearance at the succeeding term of Halifax County Court to take the benefit of said act. Before the day upon which Hawkins was, by his bond, bound to appear he and the plaintiff came to an agreement that Hawkins should give the plaintiff Ferrall security for some other debts which he owed him, and Ferrall should release his claim against him under the judgment upon

(68) which he had been arrested, and should withdraw all opposition to his discharge; and it is further stipulated that Ferrall should be at liberty to pursue his claim against Lowe and the defendant Brickell as his bail. Hawkins did secure the debts as agreed, and no further steps were taken by Ferrall upon the *ca. sa.* bond against him, but no release was executed. The jury found a verdict in favor of the plaintiff, subject to the question of law reserved for the consideration of the court. The presiding judge set aside the verdict, and gave judgment of nonsuit against the plaintiff, from which he appealed.

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

NASH, J. In the opinion of this Court, there was error in the judgment of nonsuit gaainst the plaintiff, and we suspect the error was occasioned by not duly regarding the situation in which the parties stood at the time the agreement was entered into. The defendant Brickell, by not taking bail from the defendants Hawkins and Lowe, became under our law special bail, or bail to the action, and, as such, liable to all the responsibilities of bail; he became bound that the defendants should pay such judgments as might be recovered against them, or surrender their bodies. Both in England and in this State it is well settled that a plaintiff seeking redress against bail must first sue out an execution against the body of the principal, and have it returned, before he can proceed against the bail either by action of debt on the bond or by *scire facias*. But the *ca. sa.* answers, and it is intended to answer, a very different purpose there from what it does here. The bail in England stipulates merely for the delivery of the defendant, and not for the payment of the demand, and the plaintiff has the right to proceed either against the property or person of the defendant. It has, therefore, been held proper that he should do something plainly indicating his intention to proceed against the person in order to fix the bail. Petersdorf on Bail, p. 355; *Wilmon v. Clark,* 1 Lord Ray., 156; *South v. Griffith,* Cro. Car., 481. Upon the above principle 2 Sellon's Practice, 44, lays down the rule that if plaintiff sues out execution against (69) property of the principal, it is an election by him which discharges the bail. This doctrine has been long since overruled, and it is settled that plaintiff may make out a *fieri facias* against property of defendant, and, upon its proving unavailing, may issue his *ca. sa.,* or may issue both at the same time, provided the latter is not executed until the former is returned, even where there is a partial payment on the *fi. fa.* Archbold's Practice, addenda, 13; *McNair v. Ragland,* 17 N. C., 42. The object of the *ca. sa.,* then, is to give the bail notice that the plaintiff has elected to go against the body of the defendant, and until he receives such notice he is not bound to surrender his principal. Petersdorf, 355, 359. It does not in England issue with any view to its execution. The sheriff is not guilty of any misfeasance in office by not executing it, for after it has lain in his office the last four days next before it is returnable, the plaintiff can compel him to return a *non est inventus,* although he may know where the defendant is. Petersdorf, 359; *Hunt v. Cox,* 3 Bur., 1360; 1 Black., 393; 2 Tidd, 1128, n. i. But the *ca. sa.* in this State was intended for a different purpose; not simply to notify the bail of the election the plaintiff had made, but to give to him the full benefit of the process. *Finley v. Smith,* 14 N.C., 248. By sec. 3, ch. 10, Revised Statutes, it is provided that "the plaintiff, after final judgment, shall not take out an execution against the bail until an execution be

first returned that the defendant is not to be found in his proper county, and until a *scire facias* has been made known to the bail, which *scire facias* shall not issue until such return." Section 18, ch. 119, Revised Statutes, makes it the duty of the sheriff, under a heavy penalty, by himself or his lawful officer or deputy, to *execute* and duly return all writs and other process which shall be delivered to him twenty days before the sitting of the court to which they are made returnable. When, therefore, a plaintiff has taken out his execution against the body
(70) of the defendant, directed to the proper county, and caused it to be placed, in proper time, in the hands of the proper officer, he has done all the law requires him to do to entitle himself to the benefit of the process against the bail; but not until the sheriff has returned he is not to be found in his proper county can he proceed; and the sheriff makes his return upon oath. It is not denied that if the plaintiff Ferrall had released to Hawkins the debt for which he had a judgment against him and Lowe, that the release would have operated to the benefit of Lowe and to the discharge of the bail, for a release to one coöbligor is a release to all. Coke L., 252; 2 Bos. and P., 630. But there is no evidence in the case that any release was executed by Ferrall. So, if Ferrall, after Hawkins was arrested under the *ca. sa.* and while so in the custody of the sheriff, had discharged him from arrest, it would have discharged the debt also against Lowe, and consequently against the bail, because it would have been the act of the party himself. *Bryan v. Simonton,* 8 N. C., 51. At the time the agreement took place between Ferrall and Hawkins the latter was no longer in the custody of the sheriff. The defendant Brickell, as sheriff, had discharged his duty by making the arrest and taking the bond for the appearance of Hawkins, and as bail for Hawkins he was discharged the moment he was in custody upon the *ca. sa.* In *Hawkins v. Hall,* 38 N. C., 280, the Court say that when a debtor in custody under a *ca. sa.* tenders to the sheriff a bond, as prescribed in ch. 58, secs. 5, 8, Revised Statutes, that it is his duty to accept it and release the debtor from custody. The discharge, then, from actual custody or imprisonment is the act of the law or of the debtor under the law; consequently, the creditor is at liberty to proceed against any other person liable to the payment of the debt. But it is said the agreement not to oppose the discharge of Hawkins as an insolvent operated as a discharge to Lowe, and consequently to Brickell as the bail of Lowe. We are at a loss to perceive upon what principle his conclusion is founded. The plaintiff has done all the law required him to do. He has taken out his execution, as broad as his judg-
(71) ment, and placed it in the hands of the proper officer, and he has done nothing to impede its full operation. Was he bound to oppose the discharge of Hawkins? In the case last referred to the court

say he was not bound, nor was the sheriff as bail in any manner concerned in the efforts to be made by Hawkins to procure his discharge under the insolvent law. *Wistanly v. Head,* 4 Taunt., 193. The agreement not to look to him for the debt for which Lowe was jointly bound did not operate as a release to Lowe, nor would it have had that operation if under seal. In *Hutton v. Eyn,* 6 Taunt., 289, it is expressly decided that a covenant not to sue one of two joint obligors does not operate as a release to the other. Nor has it that operation when the covenant provides that if the suit is brought against the other obligor the covenant may be pleaded in bar. *Dean v. Newhall,* 8 Taunt., 168.

We are, therefore, of opinion that there is error in the judgment of his Honor; that the judgment of nonsuit must be set aside, and judgment entered for the plaintiff, with costs.

PER CURIAM. Reversed, and judgment for plaintiff.

Cited: Trice v. Turrentine, post, 238; *Jackson v. Hampton,* 32 N. C., 582.

(72)

JOHN WELCH AND WIFE *v.* EMSEY SCOTT AND OTHERS.

1. The following entry of the appointment of a constable on the records of a county court, to wit, "It appearing to the satisfaction of the court, present, Philip Baker, Esq. (and six others, naming them), that Emsey Scott has been appointed constable in Captain Phipps' company, the said Scott comes into court and enters into bond, etc., which is approved by the court," imports that Scott had been chosen by popular election, according to law, and that it was so decided by the county court, and, therefore, the appointment was a valid one.
2. A seal is indispensably necessary to a warrant issued by a magistrate to arrest a defendant on a criminal charge.
3. It is the duty of a magistrate, before issuing a warrant on a criminal charge, except in cases *supra visum,* to require evidence on oath, amounting to a direct charge or creating a strong suspicion of guilt; and an innocent person, arrested on a warrant issued by a magistrate not on his own view, nor on any oath, would have an action against the magistrate. But the officer executing such warrant is justified, the subject-matter being within the magistrate's jurisdiction, though it does not appear upon what evidence it was issued.

APPEAL from CHEROKEE Fall Term, 1844; *Battle, J.*

Action for an assault and battery on the *feme* plaintiff, in which the defendant justified under a State's warrant issued by a justice of the peace of Chereokee County and produced on the trial. It was directed to any constable of that county, and commanded him to take Elizabeth

Welch (the plaintiff) and several other persons, and have them before some justice of the peace of the said county to answer to a charge on behalf of the State for an assault on William W. Pearcy with intent to kill and murder him. It did not purport to have been issued on the view of the justice, nor on a charge made on oath by another person; and it was not under seal, but only under the hand of the magistrate.

The magistrate was examined, and he stated that Percy was
(73) dangerously wounded by some person; that it was not in his presence, but that he was credibly informed of it, and that it was done by the sons of Mrs. Welch, and that she encouraged them to do it; that Scott, the defendant, was an acting constable of the county, and that he then commanded Scott orally to arrest those persons and bring them before him, the magistrate, for trial; and the defendant refused to do so unless he should have a warrant in writing; that thereupon, without any charge on oath, he issued the warrant and delivered it to the defendant, who proceeded to arrest the persons, including Mrs. Welch, and brought them before him for trial. On the part of the plaintiffs it was further proved that the defendant came to their house and told Mrs. Welch that he came to arrest her on the State's warrant, which he then produced. He required her to go with him, but she alleged that she was unwell, and remonstrated against going. One Powell, who was present, then told Scott that the warrant was void because it was not issued on oath. But the defendant insisted that Mrs. Welch should go with him to the magistrate, and stated to her that although he did not wish to do anything he was not obliged to do, yet that he must carry her, and "if she did not go quietly with him, he would put her in strings." Whereupon she went.

The defendant also gave in evidence a record of the county court in the following words: "It appearing to the satisfaction of the court, present Philip Baker, Esq. (and six others who are named), that Emsey Scott has been appointed constable in Captain Phipps' company, the said Scott comes into court and enters into bond with, etc., which is approved by the court."

The counsel of the plaintiffs contended that it did not appear that the defendant had been duly elected, and, therefore, that he was not a lawful constable; but the court held that he was.

The counsel further contended that the warrant was void, because,
(74) first, it was issued without a charge on oath; and, secondly, because it was not under seal. The court held that the warrant would be sufficient to justify the defendant, though not founded on an oath, if that were the only objection to it. But the court further held that it was void for want of a seal, and instructed the jury that for that reason the plaintiffs were entitled to recover.

The counsel for he plaintiff further argued to the jury that the information of Powell to the defendant that the warrant was void was evidence to them of malice on the part of the defendant towards Mrs. Welch. But the court instructed the jury that the damages were in their discretion, and that though they might give exemplary damages, if they thought from the circumstances the defendant had acted from malice towards the plaintiff or wantonly, yet that the defendant's not regarding the opinion given by Powell, and acting in opposition to it, was not evidence of malice in him.

The jury assessed the plaintiff's damages to 6¼ cents; and the court having refused a *venire de novo*, and given judgment according to the verdict, the plaintiffs appealed to this Court.

Francis for plaintiffs.
No counsel for defendant.

RUFFIN, C. J. We concur in the opinion that the defendant is to be deemed to have been duly in office. The entry on the record of the county court is much like that in *S. v. Fullenwider*, 26 N.C., 364, and imports, we think, that Scott had been chosen by popular election, according to law, and that it was so decided by the county court, who is to judge of a disputed election. Besides, it appears in the case that he acted *de facto* and was a known constable in the county; and that is sufficient, as we have recently had occasion to say. *Burke v. Elliott*, 26, N. C., 355.

As the defendant has submitted to the judgment, the point ruled against him as to the invalidity of the warrant for want of a seal does not strictly arise in the case, as it comes before us on the plaintiffs' appeal. But it is a point so material to an important process and to the security of ministerial officers we think it ought not to (75) be left in doubt. We, therefore, deem it our duty to express our opinion in accordance with that of the learned judge. Though it seems recently to be thought sufficient by some if the warrant be in writing and under the hand of the justice, 1 Chit. C. L., 38; Bul. N. P., 83; yet so many of the older and most respectable authorities lay it down positively that a seal is necessary to a warrant for a criminal charge that we are obliged to consider it established law, and do not feel at liberty to say anything to unsettle it. Lord *Hale* so states the law explicitly. 2 P. C., 577; 2 P. C., 111. Hawkins adopts his authority; Hawk. P. C. B., 2, 6, 13. Lord *Coke* so states it in 2 Inst., 52; and Baron Comyns, in his digest, *Imprisonment*, H. 7, under the head, "What shall be a lawful warrant," says: "It must be made under hand and seal." In this State the same law was held in *S. v. Curtis*, 2 N. C., 471, and we believe

it has deemed uniformly acted on upon the circuits. The warrant being thus put out of the plaintiffs' way, it would not, in general, be necessary to consider whether the plaintiffs' other objection was good or not. But we must do so in this case because it concerns the correctness of the instructions as to the effect on the question of damages which the opinion of Powell ought to have. The warrant did not purport to have been, and was not in fact, issued on oath; and for that reason that person advised Scott it was void. If that opinion was correct, we will not say the plaintiffs' argument was duly unfounded. It would depend much upon the inquiries who Powell was; how connected with the parties or the controversy; and whether, from his information or standing, the defendant would probably feel more or less respect for his opinion than he did for that of a public magistrate. But if his opinion was not correct, as his Honor had just informed the jury was the case, then, manifestly, the defendant could not in any degree be blamable for not being guided by advice which was erroneous in point of law. We are, therefore, called on to determine whether the warrant is void for that
(76) reason; and we hold that it is not void, but is a good justification to the defendant.

A magistrate may grant a warrant *super visum.* But except in that case it is his duty, before issuing a warrant, to require evidence on oath amounting to a direct charge or creating a strong suspicion of guilt. There is no doubt that an innocent person, arrested on a warrant issued by a magistrate, not on his own view, nor on any oath, would have an action against the magistrate. It is usual in England for magistrates to take written affidavits to the charge, separate from any statement of the oath or warrant, so that they may have at all times in their own power evidence in justification of issuing the warrant. But it is not necessary to set out the evidence in the warrant, even in justification of the magistrate. Nor is it necessary to the justification of a ministerial officer for executing the warrant that it should even have been granted on an oath. The constable must take care not to execute a warrant for a matter not within the jurisdiction of the magistrate; for all men must take notice whether a person under whose authority they act could grant that authority. But when the warrant purports to be for a matter within the jurisdiction of the justice, the ministerial officer is obliged to execute it, and, of course, must be justified by it. He cannot inquire upon what evidence the judicial officer proceeded, or whether he committed an error or irregularity in his decision. This is elementary and familiar doctrine, and needs not that authorities should be cited to support it. But it is laid down in *S. v. Curtis* and *S. v. McDonald,* 14 N. C., 468. Here the jurisdiction is clear, as the charge is for a battery and the warrant was executed in the magistrate's county. That it is not

necessary that the warrant should set forth the evidence on which it was granted, or even that it was granted on an oath at all, is distinctly stated in *Sir William Wyndham's case,* 1 Str., 2, and in Hawkins. And in *Wilkes' case,* 2 Wils., 158, it was so held upon those authorities and the authority of many precedents, and particularly because of all the authors, who had treated of the form of warrants, each had omitted to mention any such requisite as its setting out that it was issued on a charge on oath. That the magistrate issued the warrant, (77) though for a matter within his jurisdiction, without information on oath and not on his view, may render him responsible. But as the recital of the information in the warrant is not an essential part of it, and the constable has nothing to look to but the warrant as his guide, it follows that he is justified by the warrant, though not purporting to have been, nor in fact issued on a sworn charge.

The defendant was, therefore, right in paying no attention to the opinion of Powell; and it furnishes no argument against him of malice in the transaction. Consequently the judgment must be affirmed for 6¼ cents damages and 6¼ cents cost, according to the act of 1826; and judgment is given against the plaintiffs, as appellants, for the costs of this Court

PER CURIAM. Affirmed.

Cited: Duffy v. Averitt, post, 458; *S. v. Worley,* 33 N. C., 243; *S. v. Ferguson,* 67 N. C., 221, 222; *S. v. Ferguson,* 76 N. C., 198; *S. v. Bryson,* 84 N. C., 781; *Lineberger v. Tidwell,* 84 N. C., 512.

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(78)

WILLIAM J. COWAN, ADMINISTRATOR, v. SAMUEL TUCKER.

Where a parent, since the act of 1806, places slaves in the possession of a child, and then dies intestate, in order to make it an advancement, a gift of the slaves at the time, and not a loan, must have been intended.

APPEAL from IREDELL Fall Term, 1844; *Manly, J.*

Detinue for two slaves; plea, *non detinet.* The defendant married a daughter of Allison after 1806, and soon after the marriage Allison sent the slaves home with his daughter, and they remained in the possession of the defendant until Allison's death, intestate, which occurred eighteen years afterwards. The plaintiff then administered on Allison's estate, demanded the negroes, and upon the defendant's refusal to deliver them, he brought suit.

Upon the trial it was insisted for the defendant that the slaves were his as an advancement from his father-in-law. The plaintiff then offered to prove that Allison did not give nor intend to give the slaves to the defendant or his wife, but at the time he put them into their possession he expressly lent them. But the court rejected the evidence, holding that the defendant was equally entitled to the slaves, whether his father-in-law expressly gave them by parol or expressly lent them by parol for an indefinite period.

The plaintiff, in submission to this opinion, suffered a nonsuit and appealed.

No counsel for plaintiff.
H. W. Miller for defendant.

RUFFIN, C. J. The opinion of this Court differs from that of his Honor. We think that the only subject within the purview of the act of 1806, Rev. Stat., ch. 701, is that of the gifts of slaves, and not
(79) other species of contracts respecting them, such as hiring or lending. That is shown by the title itself, which is, "An act declaring *what gifts* of slaves shall be valid." The same is seen throughout the enactments in the body of the act. Before that, a parol gift, either expressly made or implied from a parent's putting the slave into the possession of a child, was good; and such gift constituted an advancement from the time of the gift or possession received, under the statute of distributions. It happened that many pretended gifts were set up after the deaths of the alleged donors, who often retained the possession during life, and also that disputes arose between the creditors of spendthrift children and their parents, whether the latter had given or lent negroes which they had put into the possession of their children upon coming of age or marrying. Much litigation originated in such controversies, and perjuries and successful frauds were committed. As the remedy for those evils the act of 1806 enacts that all gifts shall be by writing with certain ceremonies, and that no other shall be valid. That is the scope of the first section of the act, which is as general as it can be in its terms, and embraces every possible case. It cuts up parol gifts, express or implied, thought made to children. But it is of "gifts" only that it speaks. Then comes, however, a proviso to that sweeping enactment, which is, "that when any person shall have put into actual possession of his or her child any slave, and the said slave shall remain in the possession of such child, at the time of the death of such person, he or she dying intestate, such slave shall be considered as an advancement to such child and be regulated by the laws now in force relating to advancements made to children by a parent in his or her lifetime." The

obvious import of this clause is that, notwithstanding the extensive enactment in the first section, it was the legislative intention that certain gifts from parents to children should be good, though not in writing. That is the nature of a proviso, merely to except a certain case out of a general rule which would otherwise include it. The exception, it is not to be supposed, covers more than the general (80) provision to which it is an exception. As the enactment here relates only to gifts, the proviso cannot, then, be supposed to include gifts and loans both. It meant merely that where a parent intended to make a gift to a child, and put the slave into his possession, and did not in his lifetime retract the gift, nor dispose of the property by making a will, that such a gift, though not in writing, should be good, as it would have been before the act. But there could have been no intention that what the parties never meant should be a gift, but agreed on as a loan, should, nevertheless, be a gift. It is said that the phrase, "shall have *put into the possession* of his child," embraces the case of a slave delivered on loan, as well as one delivered by way of gift, and that unless both be within the proviso there are the difficulties in investigating the terms upon which a child received slaves at a remote period which the Legislature meant to remove. But those particular words cannot help us on this point. In the first place, the proviso being by way of exception, the natural construction is that the slaves to which the proviso relates are such as may be "put into the possession of a child" upon the terms and for the purposes before spoken of in the enacting part of the statute, that is to say, as gifts. In the next place, it is certain that every possession of a slave derived by a child from a parent cannot be within the proviso, as if it be upon a hiring or a loan for a year. It will not be contended that on such a hiring or loan the slave would belong absolutely to the child if the parent should die intestate within the period. The same principle must govern a hiring or loan for ten or twenty years, or during the will of the parties. If the agreement be for a loan of either kind, the possession is under and for the parent, not only in law, but according to the actual intention of the parties. Whereas, if the transaction was in terms and in intention a gift, then, though in parol, the donee holds in fact for himself, though in law both his title and possession are liable to be defeated by the act of the donor in resuming or demanding the possession, or in making his will. As to the argument from the danger of perjury and fraud, we have to say that was a subject for legislative deliberation, and cannot affect the (81) judicial construction of a statute the provisions of which are in themselves ambiguous. We may observe, however, that while the enactment is very broad, the exception is very narrow, being confined to a single case, that of a parol gift to a child accompanied by possession deliv-

ered at the time and continued during the life of the parent, and having the ingredient that the parent does not affect to dispose of the slave at his death by making a will, but leaves the donation to become absolute by dying intestate. We adopt the language of *Henderson, J.*, in *Stallings v. Stallings,* 16 N. C., 298, "that the circumstances stated in the proviso are evidence, in the estimation of the Legislature, equal to that which is required in the first section to make a valid gift, viz., a writing evidencing an intent to give," and that "in the opinion of the Legislature the mischief intended to be prevented by the first section, the setting up of spurious gifts by perjury and misconception, would not arise in the case within the proviso." He concludes thereon, "that the Legislature not only withdrew the case" (that within the proviso) "from the operation of the act, but validated it and made it a good gift." It is thus plain that *Judge Henderson* deemed the case within the act, and the proviso to be those of *gifts* and those only; which are required to be, generally, written, but with a single exception, that if to a child, they may still, under circumstances, be by parol. Indeed, to make the proviso embrace anything else but gifts would render it inconsistent with itself. It expressly declares the slave that is in its purview to be an advancement. In *Stallings v. Stallings* and other cases it is held that this advancement is to be taken as having been made at the time the slave was put into the child's possession. Of course, the gift is deemed to have been effectually made at that time. But that is perfectly incompatible with the idea of an express loan. Suppose this defendant to have continually acknowledged, from year to year through the eighteen years, that he held under Allison on loan, is it not obvious that (82) such an acknowledgment excludes the notion of advancement *ab initio* by way of gift? The legal gift is the same, whether the defendant made such acknowledgments of the nature of his possession or whether he acquired the possession as a loan and tacitly continued it as such. There is, indeed, a difference in the greater or less clearness with which the nature of the possession may be shown, and the inference that may be drawn, that there might or might not have been a subsequent gift or purchase. But we have nothing to do with such inferences now, as we are not considering the sufficiency of the plaintiff's proofs of a loan, but inquiring whether they are admissible, and, therefore, we are at present to assume them to be complete. If the transaction was a loan, it is clear that the slave could not be an advancement, and, therefore, it is not within the proviso. Besides the reasoning which leads to this conclusion, it is directly supported by authority. *Davis v. Brookes,* 7 N. C., 133, was the first case that arose under the act, and that turned on this very point. The jury was instructed

that if upon the evidence they found the defendant received the slaves as a gift, they should give a verdict for him, and if as a loan, for the plaintiff. The instruction was approved; and in delivering the opinion of the Court *Chief Justice Taylor* said "That from the general purview of the act the proviso excepts the *case of a gift* from a parent to a child," under the circumstances mentioned. In fine, the obvious import of the proviso, from a regard to the presumed wish of a parent, is to sustain a parol gift where one was intended, but not to defeat the intention when a loan was intended by turning such loan into a gift. We think that a loan is not within the act or proviso, and, therefore, that the plaintiff's evidence was erroneously rejected.

PER CURIAM. *Venire de novo.*

Cited: *S. c.*, 30 N. C., 427; *Meadows v. Meadows,* 33 N. C., 150; *Hicks v. Forrest,* 41 N. C., 531; *Hanner v. Winburn,* 42 N. C., 144; *Cotten v. Davis,* 49 N. C., 417.

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(83)

B. W. BELL v. WILLIAM W. PEARCY.

1. In an action on the case for a malicious prosecution, the want of probable cause for the prosecution does not *necessarily* imply malice in the prosecutor, so as to authorize the judge to pronounce that this want of probable cause implied such malice.
2. And as the defendant in that action may prove that the plaintiff was actually guilty of the offense charged, so he may also prove matters showing probable cause, though he did not know them at the time he instituted the prosecution.
3. The right to recover in such an action depends upon the entire innocence of the plaintiff, and malice in the defendant.

APPEAL from MACON Fall Term, 1844; *Battle, J.*

This was an action for maliciously prosecuting the plaintiff for a conspiracy with certain other persons. The defendant pleaded "not guilty," and upon the trial he gave evidence tending to show probable cause for the prosecution of the plaintiff. Thereupon the court instructed the jury that in their investigations upon the question of probable cause only such facts were to be considered as were known to the defendant when he instituted the prosecution; and, in this case, if the facts testified were known to the defendant when he became the prosecutor, they made out probable cause. The court also instructed the jury that a want of probable cause implied malice, and that in case they should find that there was no probable cause, it was not necessary the plaintiff should prove express malice.

The jury found for the plaintiff, and the defendant moved for a *venire de novo,* on the ground that the court erred in the direction that malice was implied in law from the absence of probable cause

The court refused the motion, and, judgment for the plaintiff being rendered, the defendant appealed.

(84) *Francis for plaintiff.*
No counsel for defendant.

RUFFIN, C. J. We think there is error in the point excepted to by the defendant. The grounds of this action have been said to be, "on the plaintiff's side, innocence; on the defendant's malice." Bul. N. P., 14. The innocence of the plaintiff which is meant is not merely that he is able upon a trial to prove himself not guilty, but it is such entire innocence that there was no just ground of probable cause to suspect his guilt. If in such case as this last a person be maliciously prosecuted, the law most properly gives an action. But as the common interest requires, when a crime has been committed, that the prosecutor should be discovered and punished, the action is not given, though there was not probable cause to believe that the accused was not guilty, unless the prosecutor made the charge, not with a view to a fair investigation, but from malice, for the purpose of oppressing the accused, or from some other bad motive. Now, there may be many cases in which the influence of such bad motive may be almost irresistible, from the absence of probable cause. The grounds of suspicion may be so slight as to satisfy the mind that the prosecutor could not expect the accused to be convicted on them, and that they were used as a pretense, as furnishing the opportunity, under the semblance of aiding in the execution of public justice, to gratify private ill-will. Again however grave the circumstances of suspicion may in themselves appear, yet if the prosecutor be aware that any that are material be not as they appear, if he *knew* that the person charged was not guilty, the conclusion would unavoidably be that *he* had no probable cause; and, further, that he was actuated by malice, the intention to use the privilege of prosecuting for a wrongful purpose. But, on the other hand, there are many other cases in which a person may prosecute another without sufficient *prima facie* evidence, without a bad motive and from upright views of enforcing public justice. It often requires professional skill to connect and weigh the evidence and give opposing probabilities their proper effect.

(85) Ordinary persons may honestly err in deducing conclusions from circumstances indicative of the guilt or innocence of the accused person; for it is a nice point, on which even judges differ, whether in a particular case there was or was not probable cause. If, therefore, a prosecutor erred in that point, and yet was able to show the honesty of

his error, he ought not to be liable in damages. Such honesty may be established in a variety of ways, as from friendly relations between the parties, or a reluctance to institute the prosecution except, apparently, as a matter of duty, or from the near approach of circumstances to the constitution of probable cause, though not coming up to it, or any other evidence of the actual considerations which prompted the charge. Hence it has been properly said that malice may be inferred from the want of probable cause. *Sutton v. Johnston*, 1 Term, 493, 545. It is equally apparent that it is not necessarily to be inferred therefrom. On the contrary, it must in every case be properly an inquiry for the jury as to the actual fact, under explanations from the court. If it were not so, it should be said at once that the action lies for a prosecution without probable cause, for it is obviously idle to add that there must also be malice in the prosecutor, if the want of probable cause proves malice. The law draws no such presumption; for, though it often might be true, it would often be untrue in point of fact.

Although the defendant's exception does not embrace it, yet another observation dropped from his Honor which, as applicable to this case, we deem not entirely accurate, and therefore notice. It is the direction that upon the inquiry into probable cause only such facts are to be considered as were known to the defendant when he instituted the prosecution. The proposition is true when a plaintiff is endeavoring to establish that there was in fact no probable cause, by new evidence which rebuts the circumstances on which the prosecutor acted. The latter may with reason insist that of this new evidence he knew nothing, and as without it the other circumstances would make a probable cause, they justified at the time his proceeding. But it is not equally (86) reasonable with respect to further evidence offered by the defendant to establish just grounds of suspicion. Such evidence for that purpose seems to stand on the same footing with similar evidence that the plaintiff was actually guilty. There is no doubt that the defendant in this action may allege that the plaintiff, though acquitted in the prosecution, was actually guilty, and that he may prove the guilt by any evidence in his power, though discovered after the prosecution began, or after it ended. The law does not give the action to a guilty man. He brings it as an innocent one, and if it appear on the trial in any way that he is not, he must fail. So it must also be as to probable cause; for, as the defendant may show that an acquitted plaintiff was, nevertheless, guilty, he can for the same reason show that he was probably guilty, and in each case by evidence of the like kind.

PER CURIAM. *Venire de novo.*

Cited: *Johnson v. Chambers*, 32 N. C., 291; *Bradley v. Morris*, 44 N. C., 397.

(87)

JASPER ETHERIDGE, ADMINISTRATOR DE BONIS NON, ETC., v. ELIJAH S. BELL.

1. Where slaves are bequeathed by a testator to his widow for life, or during widowhood, and after her death or marriage to be divided among her and his children, the assent of the executor to the legacy vests a right in those in remainder, and an administrator *de bonis non* cannot recover them.
2. They are to be divided according to the provisions of our statute for those who hold slaves in common.

APPEAL from CARTERET Fall Term, 1844; *Dick, J.*

Trover, to recover damages for the conversion of a slave. Plea, *not guilty.* William Hatsell made his will, and thereby bequeathed to his wife all his slaves for her life or widowhood; and on her death or marriage he gave the whole of his said slaves to his children and wife, should she marry, to be equally divided between them. The original executor assented to the legacy and delivered the slaves to the widow (tenant for life) who never afterwards married, and she held possession of them up to her death, which happened in 1833. Archelaus Hatsell, one of the children of the testator, sold the said slave to the defendant. The defendant contended on the trial that the plaintiff, as administrator *de bonis non,* never had any title to the slaves, as the assent of the original executor to the legatee for life was an assent to the remainderman, and that the whole title thereby passed to the testator's children and out of the executor; and that as Archelaus Hatsell, one of the tenants in common in remainder of the slaves, made a conveyance of this slave to him, he had a right to hold him against the plaintiff. The judge charged the jury that the plaintiff had a right to recover. There was accordingly a verdict and judgment for the plaintiff, and the

(88) defendant appealed, for misdirection as to the law.

J. W. Bryan and Iredell for plaintiff.

J. H. Bryan and Washington for defendant.

DANIEL, J. The authorities cited by the defendant's counsel, *Burnett v. Roberts,* 15 N. C., and *Smith v. Barham,* 17 N. C., 420, clearly show that the plaintiff had no title to the slave after the assent of the original executor to the legacy for life, which is an assent to the legacy in remainder. The remedy for division by the tenants in common of the slaves (the defendant, by the assignment of A. Hatsell, being one of the tenants in common) was by petition under the act of Assembly, Rev. Stat., ch. 85, secs. 18, 19.

PER CURIAM. *Venire de novo.*

Cited: Acheson v. McCombs, 38 N. C., 555; *Johnson v. Corpening,* 39 N. C., 219.

THE STATE v. THOMAS J. PATTERSON ET AL.

1. Upon an appeal to this court, the appeal bond covers the costs both of this court and the court below.
2. Where upon an appeal to this court by a defendant in an indictment judgment was directed to be entered by the court below both for the punishment and the costs, and the court below at September Term, 1842, entered judgment only for the punishment, they had a right at September, 1844, upon a rule previously obtained for that purpose, to enter a judgment *nunc pro tunc* for the costs also against the defendant and his surety on his appeal to the Supreme Court.

APPEAL from SURRY Fall Term, 1844; *Manly, J.*

Thomas Patterson was convicted of bigamy, and appealed to this Court, and for that purpose entered into bond with Greenbery Patterson as his surety. The judgment was affirmed, and the certificate thereof sent down to the Superior Court at September Term, 1842, with directions to proceed to execute the sentence and give judgment for the costs in that court. At September Term, 1842, the Superior Court gave a judgment in obedience to the mandate from this Court in regard to the punishment, but that respecting costs was omitted. A rule was obtained at April Term, 1844, on the defendant and his surety to show cause why judgment should not be entered for the costs, or why that rendered in 1842 should not be amended by an entry therein, *nunc pro tunc,* of a judgment for the costs. At September Term, 1844, the rule was made absolute that judgment should be entered *nunc pro tunc,* and the defendant appealed.

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

RUFFIN, C. J. *S. v. Saunders,* 8 N. C., 355, establishes that upon an appeal to this Court the appeal bond covers the costs, both of this Court and the courts below. The point has been considered (90) as settled ever since. Some years past one Turner was convicted of murder in Granville, and prayed an appeal, which the Superior Court refused unless he should give a bond that should cover the costs in that court; and he then applied to this Court for a *certiorari,* offering to give bond for the costs of this Court; but the Court refused it, and he was executed.

As to the mode of entering the judgment, we see no objection. It is a common method of obtaining judgment on appeal bonds to give notice of a motion when it happened to be omitted at the rendering of the principal judgment. But there can be no doubt of the power of the court to supply

a mere formal omission in entering up the judgment of that court, in conformity with the certificate from this Court and in obedience to its mandate. There is no adjudication in the case. That had been made here, or, rather, directed here, and it was the simple duty of the Superior Court to enter the judgment in that court in accordance with it, which may be done at any time. If it were not done voluntarily, this Court would enforce it by *mandamus*.

PER CURIAM. Affirmed.

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(91)

WILLIAM G. FREEMAN v. DAVID M. LEWIS.

1. A vendor of a personal chattel is an incompetent witness to prove title in his vendee, because in every sale there is an implied warranty of title, if there be no contract to the contrary. But he becomes competent upon receiving from the vendee a release of his liability.
2. A seal of a court is essential to the validity of a commission to take testimony, directed to persons out of the county, from the court at which it issues.
3. A mortgagee, for a valuable consideration, is to be considered a purchaser under our statute against fraudulent conveyances.

APPEAL from FRANKLIN Fall Term, 1842; *Caldwell, J.*

Detinue, brought to recover the possession of five slaves. The plaintiff, in support of his title, produced and duly proved a deed of mortgage for the said slaves (or their maternal ancestors) from William Green, dated 16 August, 1820, and duly registered, by which the slaves were conveyed for the consideration of $784.46 to the plaintiff, on condition, nevertheless, "that if the said William Green should pay to the plaintiff the sum of $784.46 on or before 25 December next, with lawful interest for the same for redemption of the said slaves, then this bill of sale is void; otherwise, to remain in full force and virtue." He also proved the possession of the slaves by the defendant previous to the issuing of the writ. The defendant claimed title under a purchase from James Green, and alleged that the negro woman from whom these slaves had since descended was given to the said James Green by his father, the said William, by parol, prior to the act of 1806 prohibiting parol gift of slaves. To prove this allegation he offered the said James Green, whom he had released from all liability to him, as a wit-

(92) ness. The testimony of the plaintiff was objected to by the counsel for the plaintiff on the ground that, though released, he could not be a witness to prove a parol gift to himself. This objection was overruled. This witness proved that prior to 1806 his father, Wil-

liam Green, the maker of the deed of mortgage above mentioned, gave him the slave Hannah, from whom the slaves claimed by the plaintiff are descended, and he took possession of Hannah; that about 1805 he left that part of the State, resided in Randolph and Montgomery counties, leaving Hannah in the possession of his father, and did not return until 1818; that he then lived on a plantation near his father, and resumed the possession of Hannah. He further stated that in 1818 or 1819, he sold one of Hannah's children in Georgia, in the presence of his father; that they both lived there a short time, and then returned to the county of Franklin, where he sold another of Hannah's children with his father's knowledge, and that he had since sold the negroes sued for to the defendant. The defendant then proved by several witnesses that in 1806, and up to 1810, they heard the said William Green say the negro woman Hannah was the property of the said James Green, and that he had given her to James when she was a small girl. The plaintiff then proved by his mother that he was born on 4 November, 1819, and that the said negro Hannah and her children, after the execution of the deed to the plaintiff, came into the possession of the father of the plaintiff, where he resided, and remained in his possession about one year, and that they were then taken off by some persons unknown to her. The defendant then offered in evidence the deposition of Nathaniel Hunt, a nonresident, which was shown to have been taken under commission signed by the clerk, but without the seal of the court affixed. The plaintiff objected to the reading of the deposition because the seal of the court was not affixed to the commission. The court overruled the objection and decided that, although there was no seal to the commission, and the deposition was taken in another State, yet it might be read. It was proven by the deposition that William Green ad- (93) mitted to the deponent that he had given the said negro Hannah to his son James Green when a small girl, and said that James was a very imprudent man, and that many efforts had been made to sell her by his creditors, on which occasions he had interposed his own claims, and thus prevented a sale. The plaintiff offered no evidence of the payment of any part of the consideration money mentioned in his deed, nor of any debt owing by William Green to him, or to any one for his use; but the subscribing witness swore that William Green said, at the time of executing the paper, he intended it as a gift to his grandson, the present plaintiff.

It was insisted on the part of the plaintiff that the parol gift before 1806, if any was made to James Green by his father, was not sufficiently proven as a gift at common law, because there was no proof, in the manner and form requisite at common law, of an actual gift and delivery of the negro Hannah. *Secondly,* it was contended that, even admitting

the parol gift to have been sufficiently proven, the plaintiff was still entitled to recover, because by the deed from William Green to him he was a purchaser, and, as against him, the parol gift was inoperative and void. His Honor declined to give these instructions, but charged the jury that a mortgagee was not such a purchaser as would avoid a parol gift of slaves made prior to 1806; that a mortgagee was in point of law, so far as this case was concerned, not a purchaser, but an encumbrancer, and the question at law was whether a valid gift had been made by William Green to James Green prior to the passage of the act of 1806; that if such gift was made prior to that time, the defendant was entitled to a verdict; if no such gift had been made, the plaintiff was entitled to a verdict.

The plaintiff thereupon submitted to nonsuit and moved for a new trial, which was refused and judgment entered for the defendant for his costs, etc. The plaintiff then appealed to the Supreme Court.

(94) *G. W. Haywood for plaintiff.*
Saunders and Badger for defendant.

NASH, J. The defendant claims the negroes in dispute by purchase from James Green. In order to make out his title he offered James Green as a witness, having previously released him from all claims in consequence of the sale. The introduction of the witness was opposed upon the ground that, although released, he was incompetent to prove a gift to himself. The objection was correctly overruled by the court. Upon his examination Green proved that prior to 1806, his father, William Green, from whom also the plaintiff claimed title, had given him a negro woman named Hannah, whom he had taken into possession, and that from her the negroes now in dispute had since descended, and that he had sold them to the defendant. A vendor is, in general, an incompetent witness to support the title of his vendee, for the reason that he is directly interested in so doing. In every sale of a personal chattel the law implies a warranty of title, unless it is agreed to the contrary by the parties in the contract or there is an express warranty of some other kind. Upon a defect of title, therefore, if his vendee for that cause loses the chattel, he is bound to make compensation in damages. His interest, therefore, is direct and positive, and he is incompetent as a witness for the defendant to support the title; but his
(95) incompetency lasts no longer than his interest endures, and a release removes his interest. The relation in which this witness stood to the case, and his importance to the plaintiff, rendered it necessary for the plaintiff to sustain and prop his testimony. With that view the deposition of one Nathaniel Hunt was offered in evidence. Its

introduction was opposed by the plaintiff on the ground that the commission was not under the seal of the court from which it was issued, and that it was to be executed in another State. The objection was overruled by the court, and the deposition was read. In his opinion of his Honor we think there was error. By the common law the seal of the court is a necessary and essential part of every writ. In England the original is a mandatory letter from the King in parchment, issuing out of chancery and sealed with the great seal, and directed to the sheriff of the county wherein the injury was committed or supposed to be. 3 Bl. Com., 273. That the seal has ever been considered a necessary part of the writ in the State is evident from the act of 1797. By that act it is provided, "that in all cases where the clerk of a county or Superior court issue process to the county of which he is clerk it shall not be *necessary* for him to affix the seal of his office thereto." Rev. Stat., ch. 31, sec. 125. From the phraseology of this act it is evident the law was at that time considered settled that the seal of the court was deemed *necessary* to any process issued by the clerk. The only effect the act had or was intended to have was to make the writ valid when to be executed within the county from the court of which it issued. The Legislature might well suppose it unnecessary to require the writ to be authenticated by the seal in the latter instance, as the officers of the court would be known officially to the citizens of the county; when beyond its limits they would not, and their official acts could be recognized only when evidenced by the seal of the court whose officers they were. Every writ, therefore, issuing from a court of record which is to be executed without or beyond the limits of the county in which it issued, in order to its validity, must be evidenced by the seal of the Court. *Goodman v. Armistead,* 11 N. C., 19; *Seawell v. Bank,* 14 N. C., 279, and *Finley v. Smith,* 15 N. C., 96. Otherwise (96) it confers no power to act, upon any one. A *dedimus potestatum* is within the words of the act of '97, and within the equity of it. See *Duncan v. Hill,* 19 N. C., 293. The witness Hunt, if he had sworn falsely, could not have been convicted of perjury, because the deposition was not to be taken within the county of Franklin, and not being under seal, it conferred no authority on any one to act under it. The judge, therefore, erred in suffering the deposition to be read in evidence. It might have been very material to the support of the defendant's case if it had gone to the jury, in propping and sustaining the evidence of James Green, his material witness; for, though there were other witnesses who testified to similar declarations of William Green, they may not have been as well known to the jury as Mr. Hunt, or, being known, were not entitled to equal weight with him. We cannot tell. There was error in the opinion, and there must be a new trial.

The plaintiff claimed the negroes in dispute by virtue of a conveyance from William Green to him subsequent to the alleged gift to James Green. The deed to him was a mortgage of the negroes for value expressed in the face thereof. The judge was requested to charge the jury that the plaintiff was a purchaser, and, therefore, entitled to hold the negroes against a prior gift. The judge refused so to charge, but told the jury that a mortgage in point of law, so far as this case was concerned, was not a purchase. We do not concur with his Honor in this opinion. A mortgage is a purchase under the statute of 27 Elizabeth. *Chapman v. Emery,* Cowper, 279; and in *Roe v. Hutton,* 2 Wilson, 356, the court declared that under that statute those are considered purchasers who take under instruments made for a valuable consideration. Whether the plaintiff was in this case a purchaser for valuable consideration or not is not now under our consideration.

(97) We concur with his Honor that the facts disclosed in the case constituted a gift to James Green, if true. For the error in the admission of the deposition of Nathaniel Hunt there must be a

PER CURIAM. New trial.

Cited: Moore v. Ragland, 74 N. C., 347; *Taylor v. Taylor,* 83 N. C., 118; *Brem v. Lockhart,* 93 N. C., 194; *McArter v. Rhea,* 122 N. C., 615.

EDMUND D. SAWYER v. THE HEIRS AND DISTRIBUTEES OF MARGARET DOZIER.

1. Where an executor offered a will for probate in the county court, an issue of *devisavit vel non* there made up and tried, and an appeal to the Superior Court: *Held,* that in the Superior Court the executor might by permission of the court renounce all right to the executorship and withdraw from the suit, one of the legatees having intervened as a party and agreeing to be responsible for all the costs.
2. *Held,* that the executor, under those circumstances, became a competent witness in support of the will.
3. The proceeding in relation to the probate of the will is a proceeding *in rem,* and every party in interest has a right to become a party in the cause at any time before the decision.
4. An executor has an absolute right of refusal at any time before he undertakes the office or intermeddles with the estate; and he does not definitely assume the office by propounding the will for probate.

APPEAL from CAMDEN Fall Term, 1843; *Bailey, J.*

In the county court of Camden Haywood S. Bell propounded (98) a script as the last will and testiment of Margaret Dozier, de-

ceased, in which he was nominated executor. It purports to devise both real and personal estate to Edmund D. Sawyer, and is duly attested by two competent witnesses. The heirs and next of kin of the party deceased contested the probate, and an issue of *devisavit vel non* was made up under the direction of the court. On trial the jury found, and the court pronounced, against the instrument; and from the sentence Haywood S. Bell prayed an appeal, which, by consent of the other parties, was allowed without an appeal bond.

In the Superior Court Edmund D. Sawyer intervened, and was allowed also to propound the same paper, as the devisee and legatee therein named. Bell then moved that he might be dismissed from the office of executor of the said will and be allowed to withdraw from the case; and, to that end, Bell in open court executed under his hand and seal an instrument in which he renounced the said office and released all rights to him given or accruing by the said will, and deposited the same with the clerk of the court, and prayed that his said renunciation might be entered; and the said Sawyer consented that the said Bell might be dismissed from the case, and undertook to carry on the same instead of Bell, and at his own expense. The court thereupon allowed the motion of the said Bell by accepting his refusal of the office of executor and dismissing him from the cause.

Afterwards the issue of *devisavit vel non* came on to be tried between Sawyer and the heirs and the next of kin of the deceased, and, to maintain the same on his part, besides the two subscribing witnesses, Sawyer offered as a witness the said Haywood S. Bell. He was objected to on the other side upon the grounds that he was liable for the costs in the county court, and also that he had not effectually renounced the office of executor. But the court admitted him, and the jury found and the court pronounced for the paper; and thereupon the other party appealed to this court.

A. Moore for plaintiff. (99)
Kinney for defendant.

RUFFIN, C. J. If the acts of the Superior Court on which Bell's competency as a witness depends had been those of the county court it would hardly be a question that he was effectually discharged from both his office and the cause, so as to be admissible as a witness. The proceeding is *in rem,* and the object of the court of probate ever is to have all parties in interest cited to see procedings: When cited they may either stand by passively or take an active part on either side, according to their interest or inclination. Thus, every party in interest may become a party in the cause at any time before the decision. The

admission of Sawyer, therefore, would certainly have been proper in the court of the first resort.

Ordinarily, too, every one may withdraw from a cause when he chooses. This will not be denied in a case in which the party desiring to withdraw claims an interest under or against the script for himself merely. Such withdrawal by one named a devisee or legatee may cause the court to condemn him in costs, and, no doubt, generally would; but it can affect the rights of no other person. He leaves the script in the possession of the court, and the cause still pending, and the instrument must still be proved in the way required by the court of probate. *St. John's Lodge v. Callender,* 26 N. C., 335. By his withdrawing, indeed, the court of probate may vary the form of its acts according to circumstances. But when he is not the only person propounding the instrument, but there is another who is also liable for the costs, and undertakes to pay all the costs that may be incurred, or have been incurred, and secures them to the satisfaction of the court, in case they should be adjudged to the opposite party there seems to be no reason why the court of probate should not dismiss a party from a cause without condemning him in costs or holding him liable therefor. Even in cases strictly at common law, if the purposes of justice require it, the court will discharge a person who is bound for the costs; as if one who (100) is a surety for an appeal be needed as a witness, the court will cancel the bond in which he is bound and allow another to be substituted for it. *McCulloch v. Tyson,* 9 N. C., 336. Here Bell had no personal interest in the matter, or, at all events, only as executor, and that he was willing to give up; and being thus willing, there was no reason why he might not retire from the cause without responsibility for the costs, so far as that responsibility was dependent upon the rights of the opposite party, or upon Bell's private interest in the motives for instituting the suit, since the opposite party was fully secured in the costs, as we must assume. At all events, the court did discharge Bell from the cause, without holding him liable for the costs and without objection thereto by the opposite party, upon the score of his right to look to Bell for the costs. Therefore, whether that order in the cause was right or wrong, if it had been opposed it is clear that Bell's liability for the costs, as an objection to his competency when subsequently offered as a witness, had no foundation in fact. Although it might have been proper at one time to have kept him liable for the costs, if it had been required, yet he had been discharged, and there was no method by which he could be again subjected to the costs.

The other objection to his competency arose out of his relation to the cause, and the court by reason of the office of executor conferred on him by the will. That circumstance certainly distinguishes him from

those who claim but a personal benefit under the instrument. As executor, it was his duty to exhibit the will in the court of probate, as its proper depositary. That duty he performed. It was also his duty to propound it for probate, preparatory to his ultimate duty of obtaining the probate, when made, by taking the oath of an executor, or else to renounce the office, so that the will might not be unexecuted, but letters of administration with the will annexed granted to some other person. An executor has the absolute right of refusal at any time before he has undertaken the office or intermeddled with the estate. In this case there is no suggestion of such intermeddling; and we think he has not assumed the office definitely by propounding the will, so as to preclude him from the right of renouncing, or, at all events, so (101) as to preclude the court of probate from the power of dismissing him. The probate of a will, and the granting of a probate to, or taking the probate by the executor are distinct things. The former is the act, as it is technically called, of the court, recording the proof of the script and pronouncing in favor of it as a will; and the latter is an official copy of the will, and of that *act,* with a certificate, or open letters thereon, under the seal of the proper office, that the executor has taken the oath of office. He is then executor complete of an established will. Sometimes the probate is before one tribunal, and those letters issue from another. Thus, by Laws of 1715, ch. 10, the Governor, the general court, or the precinct court, had cognizance of the probate of wills, while the letters testamentary could only issue out of the secretary's office, under the seal of the colony, and signed by the Governor, and countersigned by the secretary, after the executor's taking the oath for performing the will before the secretary or a justice of the peace. That the executor does not assume the office by propounding the will is clear from the power exercised of granting letters *ad colligendum* or *pendente lite.* It is not an act which made him responsible to creditors, unless he also intermeddled with the effects; and it is upon the ground that the recourse of creditors should not be divided that the law will not allow an executor, after intermeddling, to renounce at his pleasure. But after the probate of a will it has always been usual in this State to allow an executor to refuse the office, and much more pending a contest about the probate. Indeed, merely swearing in and taking probate by the executor do not debar the court from dismissing the executor. *Mitchell v. Adams,* 23 N. C., 298.

As to the sufficiency of the executor's refusal in this case, if made in the proper court, there can be no doubt. It is true, the refusal must be by some act recorded in the court of probate. But the court may treat several matters as refusals, though they be not expressly so; as if the executor refuse to take the oath when convened, that may be recorded as

(102) a refusal to take the office. Toller's Ex., 42. Here both by personal declaration in court and by a written instrument executed in court he renounced, and the court, as its act, accepted and recorded them as a refusal.

The chief doubt in the case, if there be any, is as to the authority of the Superior Court to allow of the executor's refusal as the ground of dismissing him both from his office and the cause. By the act of 1777 the county court is to "take the probate of wills" and order them to be recorded in proper books, and make orders for the issuing of letters testamentary, and all original wills shall remain in the clerk's office of the county court, except when removed before any other court, upon any controversy. That act also provided for an appeal for any person thinking himself injured by order of the court for letters testamentary, or letters of administration, and declared that the Superior Court should have cognizance thereof, and determine the same, and upon such determination should proceed to grant the letters to the persons entitled to the same. Under that act the probate was upon allegations and proofs directed to the court alone, as to the spiritual court in England, and without the intervention of a jury. By the words of the act the whole case was removed by appeal into the Superior Court, which determined who should be executor or administrator, or, in other words, whether there was a will or not, and consequently had all incidental powers necessary to the exercise of the general powers of the ordinary in those respects. Laws 1789, ch. 308, afterwards defined the method more particularly of the probate of wills, and among other things directs that if a will be contested, its validity shall he tried by a jury, on an issue to be made up under the direction of the court. This act is silent upon the subject of an appeal; but, undoubtedly, either under the special provision of section 58 of the act of 1777, before quoted, or under the general provision in section 75 for an appeal from every sentence, judgment, or decree of the county court, parties were entitled to, and have
(103) always obtained appeals in testamentary causes, since the act of '89, as before. The whole case was taken up by the appeal, so that the Superior Court had plenary jurisdiction to proceed to trial *de-novo* and decide the whole matter. Hence, in a contest between two persons which of the two were entitled to administration, upon appeal it was held in the Superior Court that there was a general jurisdiction in that court, and that administration should not be granted to either of the applicants in the county court, but to a third person, who applied for the first time in the Superior Court. *Blunt v. Moore,* 18 N. C., 10. And it has also been held, where upon petition the county court had allowed a script to be repropounded, and, accordingly, an issue *devisavit vel non* was made up and tried, and an appeal taken, that the whole case

was taken up, and the petition was dismissed in the Superior Court for its insufficiency. *Harvey v. Smith*, 18 N. C., 186. It is true, that Revised Statutes, ch. 122, sec. 5, retains only the provision of the act of '77, that any person claiming a right to execute a will, who shall think himself injured by an order of court for letters testamentary, may appeal; and it omits the words which expressly confer the cognizance thereof and the power to grant letters testamentary and of administration. But the omission is not material, we think. Directing the appeal in itself confers a jurisdiction of everything involved in the cause; and when the proceeding is *in rem* it naturally carries the whole subject, inasmuch as that is necessary to a full and final determination of the controversy. It is probable the omission in the Revised Statute was occasioned by the established usage of the Superior Courts, under the act of 1777, not to grant letters of administration or letters testamentary in those courts, but to determine the question of right to them by trying the issue and pronouncing thereon for or against the will, and then remitting the cause and the will to the county court, to the end that the will should be recorded and the original kept there, as proved in the Superior Court, and that letters testamentary or of administration should issue therefrom. This practice grew up from the provisions of the (104) act of '77, that all original wills should be kept among the records of the county court, and from the greater convenience of granting letters testamentary or administration there, inasmuch as the justice would be better qualified than a judge to determine upon the sufficiency of the sureties for administration, and also inventories and accounts current would be more accessible. *Ritchie v. McAuslin*, 2 N. C., 220; *McNeill v. McNeill*, 13 N. C., 393. By an examination of the record in *Hodges v. Jasper*, 12 N. C., 459, we perceive that the original will was there also remitted to the county court of Tyrrell. Indeed, no member of the Court remembers but one exception from that practice, which was in *Harper v. Gray*, 4 N. C., 416, where it was, doubtless, an oversight. But even there the letters of administration were granted in Randolph, and the Superior Court expressed no approbation of the will's having been kept in the Superior Court, but only held that such an irregularity could not be reached in the way there attempted. The omission in the Revised Statutes if intended to curtail the powers of the Superior Court, really cuts off only a jurisdiction of granting letters of administration or testamentary in that court, which was never in fact exercised, but leaves the whole power of determining conclusively the right to such letters, namely, by deciding whether there be a will or not, and by determining to whom in particular the letters shall be issued. That necessarily involves the power to accept the renunciation of the executor, and thereupon ordering an administration to be granted by the county court,

either to some particular person or to some fit person. But in truth, the general grant of jurisdiction of the appeal includes the authority to decide upon the whole case *de novo,* and, with that view, to perform or allow whatever the original and inferior court of probate might have done or allowed.

Our conclusion, therefore, is that there was no error on the trial of the issue or the sentence of the court for the will. This judgment will be certified to the Superior Court, to the end that the said court may (105) remit to the county court the original will there remaining, with a transcript of the proceedings and probate thereof in the Superior Court, that the said will may be recorded in the county court, and that further proceedings may be had thereon according to law.

PER CURIAM. No error.

Cited: *Hutson v. Sawyer,* 104 N. C., 3.

THE STATE ON THE RELATION OF WILLIAM JORDAN ET AL. V. JOSHUA A. POOL ET AL.

1. Where an equity of redemption is sold under an execution against the mortgagor, the purchaser is bound to pay the money secured by the mortgage in the same manner as the mortgagor was; and the surplus of the proceeds of such sale beyond the amount of the execution belongs to the mortgagor and those who represent him.
2. Where the sheriff himself, who sold such interest, was the mortgagee or trustee, his sureties on his official bond are liable for such surplus.
3. A plaintiff cannot be nonsuited after a judgment by default against one of the defendants.
4. A bond given by a sheriff for the discharge of his official duties, though void, according to the previous decisions of this Court, because those who accepted it had at the time no legal authority to do so, yet will become valid *ab initio* from a subsequent act of the Legislature declaring that such bonds should be considered as having been legally delivered.
5. And this consequence will follow although the act of Assembly (as our act of 1844) was passed not only subsequently to the institution of the action, but also to the determination in the court below and the appeal to this Court.

APPEAL from PASQUOTANK Fall Term, 1843; *Nash, J.*

Debt on bond of the defendant Pool, as sheriff of Pasquotank, (106) and of the other defendants as his sureties.

In 1840 Joshua A. Pool was elected sheriff of Pasquotank for two years, and at September Term of the county court he gave the usual

bond for the performance of his duties. At September Term, 1841, he and the other defendants, as his sureties, entered into another bond payable to the State, in the sum of $10,000, with a condition, after reciting his election by the qualified voters of the county for the term of two years, that "If the said Pool, sheriff as aforesaid, shall well and truly execute and due return make of all process or precepts to him directed, and pay and satisfy all fees and sums of money by him received by virtue of any process, to the proper person to whom the same by the tenor thereof ought to be paid, or to the proper person or persons to whom the same shall become due, and in all things well and truly and faithfully execute the said office of sheriff of Pasquotank during his continuance therein, then this obligation to be void; otherwise, to remain in full force and effect."

At the time the bond was accepted by the court there did not appear from the record that there were more than three justices of the peace in court, and that number was less than a majority.

An action of debt was brought on the foregoing bond by William Jordan and Louisa Jordan, as relators; and the breach alleged was that Pool, the sheriff, refused to pay to the relators certain sums of money belonging to them which he received under the following circumstances: On 28 October, 1840, Josiah Jordan conveyed by deed of bargain and sale to the said Pool a certain tract of land in fee, in trust to sell the same and out of the proceeds of the sale to pay certain debts in the deed mentioned, and in case the debts should be paid without selling the whole of the land, in trust to convey such part as should not be sold to the said Josiah Jordan or his heirs. Afterwards a judgment was obtained against Josiah Jordan for a debt not secured by his deed, and a fieri facias thereon was delivered to Pool, and he levied (107) the same on the equity of redemption of Jordan in the land so conveyed to him in trust; and then Jordan died, and before the return of the writ Pool sold the equity of redemption under it for a sum which paid the debt on the execution and left a surplus of $1,284.52; which sum Pool sued for as sheriff and recovered from the purchaser, and is that for the nonpayment of which this suit is brought by the relators, who are the heirs at law of Josiah Jordan. The pleas were, *non est factum, conditions performed,* by the sureties. Pool himself suffered judgment by default.

On the trial the relators offered to prove that a majority of the justices of the county were on the bench when the bond was accepted, but the court rejected the evidence.

For the defendants it was insisted that there was not a proper acceptance of the bond, and, therefore, that it was not in law the bond of the defendants.

It was further insisted for them that the excess of money received by the sheriff over and above the sum due on the execution was received and held by him in his natural and not in his official capacity, and was not in the condition of the bond; and that, as he was the trustee, he had a right to it as the legal owner.

It was agreed by the parties that if the court should be of opinion that the defendants would be liable to the plaintiffs upon the bond, if it had been properly accepted by a sufficient number of justices, then a judgment should be entered against one of the parties, who is named, for $428.17. But the court held that none of the defendants were liable, and nonsuited the plaintiff, who appealed.

A. Moore for plaintiff.
Kinney for defendants.

RUFFIN, C. J. Although arising, no doubt, merely from inadvertence, there is a sufficient error for which the judgment would, at all events, be reversed. The court nonsuited the plaintiff after a judgment by (108) default against one of the defendants, upon which the case was standing for an inquiry of damages from the alleged breaches. The relators had established a cause of action against the defendant, and could not be nonsuited.

But we think there was also error on the merits. Even if the bond had been held to be valid, the court decided that the relators were not entitled to an action on it. We think they are entitled to the money, and could maintain an action for it on the sheriff's *bond,* if duly executed.

Such an interest as remained in Josiah Jordan after his deed to Pool was liable to execution as an equity of redemption, under the act of 1812. *Pool v. Glover,* 24 N. C., 129. Now, the sale of an equity of redemption is in its nature a sale subject to the mortgage debt. It is the interest of the mortgagor in the land, over and above the mortgage debt, that is sold; and the estate of the mortgagee is not touched. Consequently the sum bid on any part of it does not belong to the mortgagee; but it is first to satisfy the execution, and, secondly, the surplus goes to the mortgagor as the owner of the interest sold. *Camp v. Cox,* 18 N. C., 52. If another person, instead of the sheriff, had been trustee or mortgagee, he could not, then, have demanded this surplus from Pool; so neither can Pool as trustee retain it. This is the necessary result from the provision of the statute that an equity of redemption, as such, may be sold on a legal execution, and from the adjudications that a conveyance in trust for sale to pay specified debts stands upon the same footing as a mortgage, properly speaking. Then, if Josiah Jordan had lived until the sale of the land this money would have been his. If so, it follows that it belongs to his heirs, and that they may recover it by law. Therefore, the court

of law must recognize the interest therein of the mortgagor himself, as the owner, and, in like manner, recognize the rights of those who succeed in point of title to the mortgagor. This land descended to the relators subject to the lien of the levy. It was to satisfy that debt, but the surplus belonged to the heirs. And as the surplus of land, if any had been unsold on the execution, after satisfying the mortgage (109) debt would have gone to the relators, by parity of reason the surplus of the money arising from a sale in the heirs' time goes to them also.

As we are not aware on what point his Honor's decision against the plaintiff was founded, it is our duty to consider each of them. Having held that the relators are entitled this money, we are to consider, next, whether they can recover it in this form of proceeding and from these defendants: that is, supposing the bond to have been duly delivered. Upon this point, also, our opinion is with the relators. A purchaser must undoubtedly pay his whole bid to the sheriff, after getting enough to discharge the execution; must see that the purchaser satisfies the surplus to the owner of the property before he can make a conveyance to the purchaser. Otherwise, the defendant in the execution loses his property and is without any security for a part of the price. That the law never intends. Then, how does the sheriff receive this surplus? It is true that he does not make that money by direct mandate of the writ, nor is he bound by the tenor of the process to return the surplus into court with the writ; for the writ only commands him to make the sum recovered by the plaintiff and bring that into court. Yet as he is obliged by the law to receive the surplus, as a duty to the defendant, it is necessarily to be regarded as a duty of office resulting from the prior duty imposed by the writ, of making the sale. The money in the sheriff's hands, therefore, may not be deemed *in custodia legis,* so as not to be stopped by attachment or other means which may prevent the sheriff from paying it into court with the writ, yet his only authority to receive it arises out of his office, and for all money received *virtute officii* the sheriff's bond is a security, whether it belong to the plaintiff or defendant in the execution. We think this within the words of the bond in this case. It is money "received by *virtue* of process"; not payable, indeed, to the relators "by the tenor thereof," but payable to them "as the proper persons to whom the same is due." Even if those words in the bond did not cover this liability, the general terms, "in all (110) things well, truly, and faithfully execute the said office," would be sufficient; and it is the duty of the Court to interpret the obligation so as, if possible, to secure all money which the sheriff can rightfully receive for the citizen.

As the Superior Court did not give judgment against that surety who submitted to a judgment for $428.17, upon the proviso there could have

been a recovery upon a good bond, it must have been his Honor's opinion that the relators had no cause of action against the sheriff for an official default; and for the reasons given this Court holds that to have been erroneous. It would not, however, be necessary to send the cause back to another trial if the omission to give the plaintiff judgment for that sum were the only error; because this Court is authorized to render such judgment as the Superior Court ought to have rendered, and, consequently, judgment might ordinarily be given here for that sum of $428.17, as agreed on. But we cannot give it in this case, because there is no method in which this Court can dispose of the judgment by default against one of the defendants, which makes it absolutely necessary to reverse the whole judgment and send the case to the Superior Court for further proceedings. That, however, we should not feel bound, or even authorized to do, however erroneous the opinion of the court might have been on the other points of law, if the bond sued on were so radically defective that no action could be sustained on it against any person, since it would be useless to send a case to another trial if the record itself showed that the plaintiffs never could recover.

It becomes our duty, then, to inquire whether this bond be thus defective. In pursuing that inquiry, and applying the result of it to the case, we find that the cause is brought into a singular state in consequence of the manner in which it was concluded in the Superior Court, and the legislation of the recent Assembly pending this appeal. We think the bond is made good and effectual by the acceptance of it for the State by the Legislature, though at the time of the institution of the writ, and the decision in the Superior Court, no judgment could have been rendered on it. By the Revised Statute, ch. 109, secs. 8 and 9, a majority of the justices, or, if not, nine at least, are required to take the sheriff's bond, and being taken by a lesser number, this bond was not duly delivered, and did not then legally become the instrument it purports to be. *S. v. Shirly,* 23 N. C., 597; *S. v. Wall,* 24 N. C., 267, 272. We think, also, that the parol evidence was properly rejected which was offered to prove that the requisite number of justices was present. The record of the court alone is competent evidence on that point. *S. v. McAlpin,* 26 N. C., 141. If the Superior Court had, upon those grounds, instructed the jury that the bond had not become complete by an acceptance by the State, or any person authorized by law, and the jury had found that it was not the deed of the defendants, we should not have disturbed the judgment. We could not have done it, because the instructions and verdict were right in point of law at the time, and should not be disturbed by any.

(111)

But unfortunately for the defendants, they caused the case to go off by way of nonsuit, when, owing to the condition of the suit, the plaintiffs

could not legally be nonsuited; which makes it our duty to reverse the judgment and order the issues of fact to be tried by another jury. Therefore, we are not now to look to the question whether this was the bond of the defendants when the case was before tried or attempted to be tried; but we are to see whether in law this instrument must be held to be their bond upon the trial that is to take place according to our judgment of reversal. If it must be so held, the plaintiff may recover, and, therefore, there should be a *venire de novo*. Now, we think the act of 1844, ch. 38, sec. 2, accepts this bond and makes it effectual from the beginning. There is no doubt of the capacity of the State to take a bond; and the only question is whether the assent of the State has been given to this bond. If taken in the case prescribed by law by those appointed by law to take bonds on behalf of the State, then we have held that the bond is good, because delivered to and received by those who had authority from the State to accept the delivery for her. But when the delivery is not made under those circumstances, and to those thus pre- (112) viously authorized, then we have held that the instrument is not effectual, unless "the want of precedent authority be supplied by a subsequent ratification." *Shirly's case, supra.* By whom can such ratification be given, and what shall be the effect of it? Whatever doubts may be entertained as to the authority of any other person or body to ratify the delivery to a third person of a deed in the name of the State, there can be no question that such power resides in the Legislature. That is the lawmaking branch of the Government, with which it rests to collect and declare the public will within the limits of the Constitution and make contracts for the State, or appoint and empower other persons so to do. Here the bond was not delivered to the persons appointed by law to receive it, and, therefore, it was necessarily to be treated as if it were a bond made to the State, when there was no law to authorize any person to accept it for the State. But it is not, for that reason, so absolutely void as that it can never become the deed of the party who made it, and as if that person had no capacity to make it; for there was an actual sealing and an actual delivery of the instrument by competent obligors; indeed, a full execution of it in all respects, except that it was not delivered to the State or to any agent of the State, but the delivery was to a stranger for the State. If in such a case the bond had been to a natural person, it would have been the deed of the party instantly, though delivered to a stranger, for it is good until the obligee refuse it; but then it is void *ab initio*. *Butler v. Baker,* 3 Rep., 26; per *Gould, J.*, in *Wankford v. Wankford,* 1 Salk., 301. But in the case of deeds to the State the rule is otherwise, as was held in *S. v. Shirly, supra,* with much hesitation (and, I own, against my impression), the rule being that they do not become the deeds of the party unless they be

accepted by the State. But that has been done by the act of 1844, ch. 38. It enacts that all persons who shall be admitted by the county court, and sworn into office of sheriff, coroner, or constable, shall be held and deemed to be rightfully in office until ousted by due course of law; and (113) that all bonds *which have been* or may hereafter be *taken by any court of pleas and quarter sessions upon admission of any person* in either of the said offices shall be held and deemed to be valid and effectual to all intents and purposes, notwithstanding any defect, insufficiency, or irregularity in the election, appointment, or admission of such person, or in any of the proceedings of the court in relation thereto." This is as absolute an acceptance of all such bonds as could be declared. It does not, indeed, profess *simpliciter* to accept the bonds; but there is a necessary implication of such acceptance from the enactment that all such bonds shall be held to be effectual in law, since they could not be effectual unless the State accepted the delivery to the stranger as the delivery to the State. This, then, supplies the *desideratum* that was wanting in *Shirley's case*. The bond has been accepted, and, therefore, is is now an effectual bond of the obligors.

The remaining question is as to the time from which the bond becomes effectual: Is it from the passing of the act by which the acceptance of the Legislature was declared, or from the execution of the instrument? It would seem that for the like reason on which a bond is void *ab initio*, which is delivered to a stranger and refused by the obligee, it must become good *ab initio* when accepted by the State upon such a delivery to a stranger. It must be so upon the intention of the parties; and, at all events, that must be the presumed intention in relation to official securities of this kind, and was unquestionably the actual intention of the Legislature in the act of 1844. As has been before remarked, the bond, though not effectual by the delivery, because to a stranger, was not absolutely void in the sense that it would have been if there had been no delivery at all, but the obligor had kept it in his own pocket; for if that were so, there could be no operative acceptance by the State subsequently, as it requires the concurrence of the obligor in tendering and of the obligee in accepting the delivery to render the deed complete and effectual. But it is sufficint that there should be such concurrence in asenting to the contract, though there may not be a concurrence as to the time of expressing that assent. The actual delivery, therefore, has some effect; and the effect, as the delivery (114) was not absolute and final, is to be deemed a conditional delivery, and must be in the nature of a delivery as an escrow. It can mean nothing less than this, that the obligors delivered the deed to the justices, to be their deed to the State if the State would vouchsafe to receive it. It might have been held, as it once seemed to me, that

by allowing the party to remain in the office, upon his admission into which he gave the bond as a security for the faithful performance of its duties, instead of ousting him because he was improperly admitted without having given bond, the sovereign sufficiently manifested an acceptance of the official bond. But supposing an express assent to be necessary, it is here given: and the question is as to the operation of it as given. Such a conditional delivery is binding on the obligor, and he cannot recall the deed. It is true that when a deed is delivered as an escrow it is of no more force, until the conditions be performed, than if he who made it had kept it. Yet when the conditions are performed the deed is thereby made good without any further delivery, unless such second delivery be prescribed as one of the terms of delivery. Of that position a question, it seems, has been made, and some have thought that to make the deed perfect the person to whom it was delivered by the maker should make a second delivery of it to the party himself. But the contrary is laid down for law in Shepherd's Touchstone, as deduced from 5 Rep., 84, and 3 Rep., 36; and it is there said that if the party that doth make the deed be not, at the time of making thereof, disabled to make it, the first delivery is good, "for if either of the parties to the deed die before the conditions be performed, and the conditions be afterwards performed, the deed is good; for there was *traditio inchoata* in the lifetime of the parties; and *postea consummata existens* by the performance of the conditions, it taketh effect by the first delivery, without any new or second delivery." Touch., 59. The truth, however, probably is that a second delivery will be required or dispensed with according to the nature of the case, (115) and as it may best comport with the intention of the parties and the purpose they had in view to hold the deed, upon the performance of the conditions, to be a deed only from a second delivery, or from the original delivery by relation; for in the same book, p. 72, it is said that escrows "shall take effect from and have relation to the time of the first delivery, or not, as circumstances may require, and *ut res valeat;* for if relation will hurt and make the deed void (as in some cases it may), then it shall not relate; but if relation will help it, as in case where a *feme sole* deliver an escrow and before the second delivery she is married or dieth, in this case, if there were not a relation, the deed would be void, and, therefore, it shall relate. So, if one disseize me of an acre of land in D., and I release him all my right in my lands in D. and deliver it to a stranger as an escrow until a time, and before that time he disseize me of another acre there: in this case this release shall not by relation extend to this other acre, to bar me of that also. But as to collateral acts, there shall be no relation at all in this case. And, therefore, if the obligee release before the second

delivery, the release is void, and will not bar the obligee of the fruit of his obligation." Upon the passage quoted, Mr. Preston, the learned editor of the work, remarks that the relation depends on the nature of the transaction and the presumable intention of the parties. In point of title (admitting the parties, who are grantors, are competent as to ownership, and free from disability), the deed will take effect from the first delivery, so as to overreach all intermediate encumbrances. These principles and authorities seem to settle this case. There can be no hesitation as to the intention to be presumed in the obligors in making and in the Legislature in accepting this bond. This is a sheriff's bond, given upon entering into that valuable office, in which he may serve for one year, if the State will accept his bond and allow him. But he is liable to be ousted at any moment, as having been admitted without lawful warrant, inasmuch as he failed to give such a bond as the law required, and he cannot expect the sovereign (116) will allow him to remain in office without any security for the discharge of his duties. Therefore, by giving this as his official bond, there is an irresistible implication of an intention of the sheriff, and, by consequence of his sureties, that in case it was not a proper official bond according to the statute, it should, nevertheless, be the bond of the obligors for the purposes expressed in it, if the State would accept it as such, and allow this person to serve in his office accordingly. There being such an intention, it is the plain duty of a court to give effect to it and uphold the obligation, if it can be done consistently with the law, as the bond is not for any immoral or unlawful purpose, but is for the beneficent purpose of securing the public and the citizen from any injury by the malversation of the principal obligor in an important office. It cannot be, in such a case, that it was intended the deed be delivered the second time or that it should operate only from the time it was expressly accepted; for, being given to *the State*, there can be no actual delivery *to the obligee*, and the intention was that the State, by accepting it, should make it a security for the whole term of office, as well the past as that to come. So, too, it is clear that, with that view, the Legislature accepted it. The provision that all bonds which *have been taken* shall be held to be good is conclusive as to the legislative intention. If it be said that those words refer to bonds taken from persons before the passing of the act who were in office at the making of the act, which *prima facie* would be the proper construction, as statutes are not to be deemed retrospective but from necessity, the answer is that such an interpretation cannot be received, forasmuch as it would render those words, "have been taken," altogether inoperative; for, as soon as the inconveniences were understood which would arise from the principle of *Shirly's case*,

the Legislature proceeded to provide a remedy by enacting in 1842, ch. 61, "that whenever *thereafter* any instrument shall be received under the sanction of a court of record, purporting to be a bond to the State for the performance of any duty of any office, such instrument, notwithstanding any irregularity or any variance in the conditions or penalty from the provisions prescribed by (117) law, shall be valid, and may be put in suit for the benefit of any person injured." That act, therefore, covered every case that might happen after 1842, in terms still more conclusive, if possible, than those of the act of 1844. Now, the offices of sheriff, coroner, and constable are but from year to year, as their bonds are to be renewed annually. Consequently, there could not be at the end of 1844 any person in either of those offices whose bond had not been given under the act of 1842; and, therefore, the act of 1844 must have been directed solely to such bonds as had been given by such officers before 1844, and must be held to embrace them. There was no other occasion for the act but to embrace them.

Then we have the case in which the obligors delivered their bond to a stranger, payable to the State, on the condition that the delivery should be deemed absolute, and the instrument be their deed, if the State would accept it, with an intention on their part that the instrument, if accepted, should cover a whole official term, as the same is, indeed, expressed in it, and in which the State has expressly accepted it, through the Legislature, with the same intention plainly declared: In such a case we think it our bounden duty not to defeat the intention, but to give effect to it, upon the principle, *ut res magis valeat quam pereat,* which can only be done by holding it to be the deed of the parties by relation *ab initio.* Consequently, the judgment must be

PER CURIAM. Reversed.

Cited: S. v. King, post., 205; *S. v. Reed, post.,* 358; *S. v. Read,* 28 N. C., 81; *S. v. McMinn,* 29 N. C., 345; *S. v. Jones, ib.,* 360; *Hall v. Harris,* 40 N. C., 306; *S. v. Bell,* 61 N. C., 83; *Barnes v. Lewis,* 73 N. C., 140; *Tabor v. Ward,* 83 N. C., 294; *Comrs. v. Magnin,* 86 N. C., 289; *London v. R. R.,* 88 N. C., 591; *Mayo v. Staton,* 137 N. C., 678; *Mason v. Stephens.* 168 N. C., 371; *Parrott v. Hardesty,* 169 N. C., 668.

(118)

JOHN D. COLLINS v. THOMAS BENBURY.

1. All waters which are actually navigable for sea vessels are to be considered navigable waters under the laws of this State.
2. No one can be entitled to a several fishery or the exclusive right of fishing in any navigable water unless such right be derived from an express grant by the sovereign power, or, perhaps, by such a length and kind of possession as will cause a presumption of such grant to arise.
3. The mere circumstance of fishing the waters at any particular place, no matter for how long a time, raises no presumption of such a grant, because the person so fishing exercises, *prima facie*, only a right which belongs to him in common with all others.
5. For the purpose of presuming a grant of an exclusive right in any person, it should appear that all others have been kept out by him and his grantors, not only from fishing with a seine, but from fishing in any manner in the waters to which he lays claim.
6. It is not competent to examine a witness as to the meaning of a plain word in a contract, for that is a question of law determinable by the court.

APPEAL from CHOWAN Fall Term, 1844; *Settle, J.*

This was an action on the case brought by the plaintiff for the purpose of recovering damages which he alleged he had sustained by the interference of the defendant with his seine whilst he was enjoying his exclusive right of fishing in the waters of Albemarle Sound. The plaintiff proved and read in evidence a lease of an undivided half of the premises from Benbury, one of the defendants, to H. W. Collins. He then showed a conveyance of the term from H. W. Collins to Josiah Collins, and a conveyance from Josiah Collins to the plaintiff. The plaintiff then called upon Joseph B. Skinner, who stated that in 1807 he, in connection with another gentleman, established the first large fishery on the waters of Albemarle Sound; that at the place which the plaintiff fished a small seine was employed in 1798, but was after that time discontinued; that in 1817 a company of gentlemen em-
(119) employed a seine at the same place about 1,300 yards long, but which was small in comparison with the length of the seines now used on the waters of the Albemarle; that a seine of about the same length was employed at this beach for several years in succession, but how many he could not state; that for several years no person fished, with a seine, the waters opposite this beach, when another seine was hauled there; but whether a seine had been regularly hauled at that place since, he could not state. The witness further stated that he had always understood that the owners of the land upon the Albemarle Sound had the exclusive right to fish the waters opposite the land, but he did not know whether they proceeded out, at right angles to the shore, to the channel or not; that many years ago a difficulty arose between

several fishermen on the Chowan River about the rights of fishing, which was adjusted between them, but in what way he did not state.

Upon cross-examination Mr. Skinner stated that according to the usage by which the right of fishing was enjoyed on the Albemarle Sound, if the owner of any part of the land on the sound wished to establish a fishery, and he found it necessary to his interest to fish water opposite the lands of the next proprietor, he had a right to do so, provided the fishery was then established and used by such proprietor. But if the owner of the adjacent lands afterwards established a fishery on his lands, then the owner of the land had the right to fish the water opposite his lands, though the water had been before occupied by the seine of another person; that in the case of two fisheries established near the line dividing two tracts of land, each one of them had a right to shoot his seine into and fish the water opposite the lands of the other whenever it became necessary to do so by reason of the current running up or down; that in the case last mentioned, when the current was running down, the owner of the lower fishery would shoot his seine into and fish the water opposite the land of the owner next above; and, also, when the current was running up the owner of the upper fishery would shoot his seine into and fish the water opposite the land below; that until the owner of land lying on the Albemarle Sound established a fishery by building the necessary houses, clearing (120) the water of stumps, logs, etc., and providing a seine, every citizen of the State had a right to fish the water opposite the land, and betwen the shore and the channel; and after a fishery had been thus established, whenever the owner ceased to fish it the citizens of the State had a right to fish the waters which had been occupied by the seine. The witness was inquired of if he knew any custom regulating the rights of fishing where two fisheries were so situated upon an indented position of the shore of the sound that each would be obliged to occupy the same water in fishing the water opposite their respective shores. He said he did not know of any custom regulating the rights of fishermen whose fisheries were so situated, as he knew of no fisheries so situated. In such a case he supposed they would have to come to some understanding. He further stated that many years ago, during a very dry summer, the waters of Albemarle Sound at the Edenton bay were so brackish that stock would not drink it; that about 22 miles below Edenton, on the Albemarle Sound, where he was born, he knew the waters of the sound were quite brackish, and they then afforded an abundant supply of sea fish and oysters; but whether the water at that point ebbed and flowed at regular intervals of time he did not know; that since his recollection several inlets through which the water flowed from the sea into the sound had closed up. The plaintiff then

read to the witness part of the lease from Benbury to Collins, and which has been made a part of this case, and inquired of him whether the words in that lease do or do not include the privilege of using the the houses and the beach, and the exclusive right of fishing in the waters opposite the beach, and whether fishermen do not so understand them *ex ri termini*. The defendant's counsel objected to the question, and his Honor ruled that the question was improper.

Cullen Capehart proved that he was and had been a fisherman for many years upon the Albemarle Sound; that his fishery was so situated that no seine would interfere with his, and that, as respects (121) seines, he knew of no usage except that the owner of the land fished the water opposite his land; that many years ago he had some acquaintance with the custom of fishing in the Cashie River; that on that river the owners fished the waters opposite their lands, but when the current was running down, as it sometimes did in that river with considerable rapidity, then the fishermen would shoot their seines up the river, so as to draw them by the time the current would drift them down to the place of landing; that in thus shooting them up, each would sometimes go above the land line dividing the fisheries; that on one occasion he knew of a person who was about to establish a seine on Salmon Creek, which is a narrow stream emptying into the Albemarle Sound, and that Mr. Tredwell, who owned the land opposite the shore, and who himself had a fishery already established where the fishery was about to be established, objected to it, and the business was abandoned.

John H. Leary stated that he had been a fisherman on the Albemarle Sound for several years; that one of his fisheries was just above a fishery owned by the defendant Benbury; that when the water was calm, and there was little or no current, both he and Benbury shot their seines in the water directly opposite their land; but if the current was running up, he, the witness, would lay out his seine in water opposite Benbury's land, and Benbury would lay out his seine below his landing; and so, when the current was running down, the witness would shoot his seine higher up the sound, and Benbury, whose fishery was below that of the witness, would shoot his seine up the sound and opposite the land of the witness. His testimony as to the time when Sandy Point fishery was established, and the years for which it has been occupied as a fishery, was the same with that given by Joseph B. Skinner.

The witness further stated that he had no doubt that the establishment of the fishery by the defendant injured the value of the fishery at which the plaintiff fished, as the establishing a fishery just below another must in all cases have the effect to divert the fish in (122) greater or less quantities from the fishery next above it; that

there was a fishery still lower down than the fishery occupied by the defendant, which was established by Mr. H. W. Collins whilst he occupied the fishery of the plaintiff, which the witness thought injured the Sandy Point fishery; that it was usual for persons owning land on the waters of the Albemarle to fish the water opposite their land; that he knew of no particular custom regulating the rights of fishing where from the indented form of the shore each one would necessarily, in fishing the water opposite his land, be obliged to fish the same water.

The witnesses all proved that when a fishery was established on the shore of the Albemarle Sound the value of the land was greatly increased; that the fishing beaches when rented out yielded large rents to their owners, and were valued at high prices upon the tax list. One of the witnesses purchased a farm on the Albemarle Sound for $22,000, upon which there was a fishery, and he stated he would not have given more than half that sum if it were not for the fishery. The witness also stated that in consequence of the facility of shipping produce, all the lands on the Albemarle Sound were more valuable than lands of the same fertility at a distance from the sound. Exum Newby proved that he had made a survey of the beaches occupied by the parties to this suit, and stated that if Collins' seine was to be laid out in the most direct course for the channel of the sound it would not occupy the water which the defendant fished with his seine, but that in laying it out in this direction it would reach, and probably cross, a sandbar, and that they would take very few fish; that from the form of the shore of the Sound where these two fisheries were, it was impossible for them to shoot their seines at right angles with their beaches without intersecting before they reached the channel of the sound; that the shore of the sound upon which the fisheries were established was curved, and that the water fished by the plaintiff lay opposite the defendant's land, as did the water fished by the defendant lay opposite the plaintiff's land.

The evidence proved that the plaintiff laid out his seine in the same direction in which the seines used at that fishery had (123) been laid out by the persons who had occupied the same fishery previously, except that the plaintiff had increased the length of the seine at that place to 1,800 yards, and that the fishery occupied by the plaintiff had been occupied by Benbury immediately before his lease to H. W. Collins. The evidence proved that the defendant sometimes shot his seine in a portion of the water which the plaintiff fished, and that the plaintiff was thereby hindered in laying out and hauling in his seine, whereby his number of hauls were lessened. There was no evidence that the defendant occupied the water for any other purpose than that of fishing, or that he interfered with the plaintiff's seine when it was in the water.

The plaintiff's counsel here closed the case, and a motion of nonsuit was submitted. It was insisted on the part of the plaintiff:

1. That though the waters of the Albemarle Sound have sufficient depth to float sea vessels, yet it is not navigable in the common-law sense of that term.

2. That as the defendant leased the fishery to the plaintiff, he has no right to diminish the value of it by his own acts.

3. That there was evidence to be left to the jury from which they might infer a legislative grant.

4. That the evidence of Messrs. Skinner, Capehart, and Leary should be left to the jury as tending to show the universal usage of the fishermen upon the waters of the Albemarle Sound, and that such universal usage has the force of law.

His Honor expressed an opinion against the plaintiff upon the questions raised; whereupon the plaintiff submitted to a nonsuit, and judgment was rendered in favor of the defendant, from which the plaintiff appealed to the Supreme Court.

Badger and Kinney for plaintiff.
A. Moore and Iredell for defendant.

RUFFIN, C. J. This case, which was before the Court at (124) December Term, 1842, *Collins v. Benbury,* 25 N. C., 277, has been brought up again, with some additional facts which came out on a second trial. But they do not seem to vary the case materially.

It was not competent to examine a witness as to the meaning of a plain word in the contract; for that is a question of law determinable by the court.

There are no sufficient grounds for the presumption of a grant by either the executive officers of Government or by the Legislature; even if one could be presumed under any circumstances. To say nothing more, the present plaintiff has much enlarged his seine, so that his use and that of his grantors is not the same. But there really has been no continued and exclusive use of the fishery, as claimed by the plaintiff. He and those under whom he claims fished the waters at this place, it is true. But in so doing they only exercised a right which, *prima facie,* belonged to them in common with all other citizens; and their fishing is referable to that right, and cannot, of itself, be a ground for presuming an exclusive right. To this latter purpose it is necessary it should appear that all other persons have been kept out by the plaintiff and his grantors, not only from fishing with seines, but fishing in any manner in the waters to which the plaintiff lays claim. In that respect the case is not made out at all. It appears that it has been the common habit of those who chose to fish in any waters of the Albemarle Sound

before a seine ground was cleared and "a fishery established," as it is called, by the owner of the beach; and it has never been thought that such fishing was an usurpation. Now, the owner of a several fishery has *the property* in the fish, and may maintain trespass for taking them. *Smith v. Kemp*, 2 Salk., 637. Yet it does not appear that any one was ever sued by any owner of his land for catching fish there, nor, indeed, that such an action was ever brought by any owner of land on Albemarle Sound, either before or after he began to fish the waters to which his land was adjacent. The fact seems to be nothing more than that there has been some kind of understanding among contiguous riparian proprietors, for their own convenience, how they could and would exercise the right of fishing to the greatest advantage (125) of, and with the least likelihood of interfering with, each other. But the interference which they contemplated was not an interference with a right, which one of them had as an exclusive right against all the world, but only an interference with his practical operations in the exercise of the public right of fishing in this great water. The rest of the community has had very little to say or do in the matter, because, as they had no beach, they could fish to little profit, and did not fish to the detriment of the riparian owner to any serious extent. But it is clear that the public at large have not yielded up the sound to the owners of the shore. The universal custom of fishing in any part of the sound before the owner of the adjacent shore had there cleared out fishing ground, and doing so without a single action being brought, demonstrates that everybody considered the right of such owner to the land to be stopped at the water's edge; and the forbearance, after the establishment of such fishery, to disturb the operations during the fishing season is thus shown to be merely the deference of one neighbor to the convenience and greater interest of another; for it is impossible that any one could think that one who did not, as owner of the adjoining land, also own the land covered by the water, and, consequently, have the right at all times to exclude persons from fishing within his waters, could, long after his grant for the shore, *acquire* the right to the land covered by the water, or the right of fishing there, by merely clearing out a bottom for the more speedy and secure fishing by a seine to be hauled up to his own beach. Such a mode of acquiring a several fishery is novel and untenable. The case, therefore, is, as it was before, dependent upon the question whether the plaintiff is the owner of the land over which he hauls his seine, by virtue of his property in the shore adjoining.

That is the proposition laid down in the case before, and we endeavored to show that the plaintiff was not such owner, because both the common law forbade the grant of property in land covered by a stream

(126) of water which in that law was called navigable, and the statutes of this State, in like manner, forbid a grant of land covered by water which in those statutes is denominated navigable, and because Albemarle Sound must certainly be deemed navigable in the sense of either the one or the other of those laws, if not of both of them. It has been argued that the court reasoned illogically by treating things essentially different as having the same incidents merely because they have the same name, though the name has different significations. But that is a misapprehension of the argument on which the judgment rests. It did not turn on the force and effect of the term "navigable" alone and standing by itself; but upon the fact that at common law *the land* covered by navigable water, that is to say, an arm of the sea, or a river in which there is a flow and ebb of the tide, *could not be granted,* and that by the statute law of North Carolina *the same rule was enacted* in respect to streams that were actually navigable by sea vessels, though they might not have a tide. In other words, our judgment was given and plainly expressed to be given because, to constitute a several fishery, *there must be right of soil,* and that no person has in Albemarle Sound. There are rights of fishery without a right of soil. There is a right of fishery upon the high seas; but that is public, and belongs equally to all nations, and can be granted or restrained by no one in particular. There is also the right of fishing in navigable waters within the jurisdiction of a particular nation; and this right is *prima facie* public and common to all people of that nation. But it seems that in England exclusive rights of fishery (merely, and without the right of soil) might be granted in such waters by the king at one time; but it is said, not since Magna Carta. *Duke of Somerset v. Fogwelt,* 5 Barn. and Cres., 875. But the right of several fishery, not derived by a special grant from the crown as above, or by prescription (which supposes a grant), cannot exist independently of the right of soil. It was for *that* reason that at common law there could not be a several fishery in a navigable stream.

(127) Lord Male makes the right of fishing *the consequence* of "the propriety of the soil," and Coke and Blackstone agree therewith. This plaintiff does not show a grant either for the fishery by itself or for the land over which he fishes. He shows only a grant for the land up to the water's edge, as we must take it. Now, if there be a tide in the sound, the grant confessedly cannot be carried into the water beyond the special butts and bounds mentioned in the grant. That there is a tide from the sea into the sound and back is extremely probable, nay, mathematically speaking, is certain, upon the evidence of the respectable gentleman who was called by the plaintiff to testify on this point. He proves the water to have been salt at Eden-

ton, and that at a short distance below, within his memory, it was commonly so. Though not ordinarily perceptible to a common observer, it is unquestionable that those must have been the effects of some tide; and any is sufficient within the rule of the common law. Tide is the ebb and flow of the sea; then, as high as salt water is found, so high the tide, the flow of water from the sea, ascends. It could get there in no other way but from the sea. Indeed, we know that although the rise of the water on the bars of our inlets is comparatively much less than in many other parts of the globe, yet there is a regular alternation of high and low water at all of them, varying at different inlets. That water, by the law of nature which makes it seek its level, will pursue its interior course until it meets with land of an elevation greater than its own at crossing the bar. Its flow through narrow and shallow inlets may not always or generally be obvious, because, before it reaches its final obstruction, it may be, and, it seems, is merged from observation in the contrary currents in these immense masses of waters produced by winds and large quantities of water discharged by long rivers with considerable descent. But the fact that the salt water from the ocean sometimes reaches Edenton, without an eastern storm, shows mathematically that that point is not above, but is below, the level of the rise of tide at the bar over which the waters of the ocean and of the sound intermingle. We say this is sufficient within the rule of the common law, which only requires a regular ebb and flow (128) of tide, without distinguishing between the greater or less rise; as of 100 feet in the Bay of Fundy, 25 or 30 at Bristol, or of 4 to 6 over the bars of North Carolina, or any less rise and fall. But we do not deem it important to insist on that point, because the statute of this State enacts "that the water shall form one side of the survey," when an entry is made on a navigable water; and, therefore, the same effect follows as to the right of soil, as if the sound were navigable in the sense of the common law, provided it be such a water as is called navigable in the statute. That it is navigable, as that term was used by the Legislature, is beyond doubt; for if it be not, then, as was asked in *Wilson v. Forbes*, 13 N. C., 30, what navigable waters have we which the Legislature could have meant? The act prohibits the entry and survey of the land covered by the sound; and if it cannot be included in the survey and expressly granted, it must follow that it will not pass as an incident to the ownership of the adjacent soil. Therefore, it is not the court that has transferred to waters in which there is no tide a quality or incident that at common law only attached to waters in which there is a tide; but it is the statute itself which affixes to the waters which it deems navigable, and the land covered by them, the quality of not being grantable as private property. But it was said at the bar

that the Legislature only meant by this provision to prevent an entry of land covered by such a water, by itself, and not to interfere with the principle that the owner of the adjoining land goes to the thread of a stream in which there is no tide. But that is clearly wrong; for the very subject of the enactment is the survey of land lying on navigable streams and "running back from the water," and *Wilson v. Forbes, supra,* was that of a survey of a tract of land which called for a navigable creek as a boundary, and for that reason it was held that the land stopped at the water's edge, or did not go to the thread of the stream.

Whether, then, Albemarle Sound have or have not a regular tide, or whether we be guided by the rule of the common law or by the (129) injunction of the Legislature, we must say that there is no exclusive property in that great water, or in the land under it; and, therefore, that the plaintiff cannot recover, and the judgment must be

PER CURIAM. Affirmed.

Cited: Fagan v. Armistead, 33 N. C., 434; *Lewis v. Keeling,* 46 N. C., 306; *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; *S. v. Baum,* 128 N. C., 605; *Land Co. v. Hotel,* 132 N. C., 535.

DEN ON DEM. OF E. V. KELLY ET AL. v. JANE CRAIG.

1. The mere delivery by a clerk to a sheriff of a book purporting to be a tax list, unauthenticated by the official certificate of the clerk, is not competent evidence that such was the tax list.
2. Where the clerk's office had been burnt and the records destroyed, and it was proposed to establish the assessment of a particular lot for a certain year, and the sheriff was offered to prove that he had seen either in the clerk's office the original list or in his predecessor's hands an authenticated copy of the tax list, and to show its contents, it not appearing that the latter was lost or destroyed: *Held,* that the evidence was incompetent, and could not be left to the jury.
3. It is always a question of law whether the best evidence in the party's power and of which the nature of the case admits has been produced.
4. It is essential to the validity of a sale for taxes that the sheriff shall have returned to the county court, at its term next preceding the sale, a list of the lands on which the taxes are unpaid, and which he purposes to sell, with the names of the owners, if known, etc., as required by law. The statute is not merely directory, but a sale made without complying with its provisions is void.

KELLY *v.* CRAIG.

APPEAL from NEW HANOVER Special Term in January, 1844; *Manly, J.*

Ejectment for one-fourth part of a lot of ground, No. 231, in the town of Wilmington, which was sold by the sheriff in September, 1838, for the tax due thereon for 1836, as the property of (130) one Sneed, and unlisted in 1836. The lessor of the plaintiff became the purchaser by agreeing to pay the double tax demanded by the sheriff for one-fourth part of the lot, and they had it duly laid off by the surveyor and a plat made, and took a deed from the sheriff.

To show that the land was liable to a double tax because it was not listed for taxation in 1836, the sheriff produced a book which he swore had been delivered to him by the celrk of the county court of New Hanover as the copy of the tax lists returned to the court, on which he was to collect the taxes for that year. To that book the counsel for the defendant objected, because it was not autheticated as a copy of the tax list by a certificate of the clerk thereon or otherwise. But the court admitted it; and upon inspection it appeared that lot No. 231 was not contained in the copy furnished by the clerk, as stated by the sheriff, but had been entered in another part of the book by the sheriff himself, as property not listed by the owner, and liable to double tax.

The plaintiff, as proof of the amount of tax due on the lot for 1836, offered the sheriff to prove that in 1837 he saw, either in the county court clerk's office an original tax list for 1835 or in the hands of his own predecessor a paper purporting to be a copy of that tax list made out by the clerk of the county court, in which the lot No. 231 was listed by Sneed, but that he was not certain whether it was the one or the other of those papers which he saw and from which he ascertained at what value the lot had been assesed for 1835. It further appeared that the clerk' office had been burned in 1840, and that the original tax list of the year 1835 had not been since seen. The defendant then objected that the witness ought not to be allowed to state the contents of the paper which he had seen, as he was uncertain where he had seen it or what paper it was. Nevertheless, the court permitted the witness to give the evidnce, and in the instructions to the jury the court directed them that they must be satisfied that the document of which the witness spoke was the list of taxable property for 1835; otherwise, they should disregard (131) it altogether; but if they were so satisfied, it was immaterial whether that document was an original list returned by the justice of the peace or the record thereof by the clerk, or an official copy thereof, as either was sufficient for this purpose.

The defendant then moved the court to instruct the jury that the plaintiff could not recover, because the sheriff did not return to the county court, before the sale, this lot as property upon which the tax was un-

paid, and which he proposed to sell for the tax. But the court held that such a return was not necessary to the validity of the sale, and refused the instruction.

Many other points were raised at the trial which it is unnecessary to state, as the opinion of the Supreme Court does not turn on them. The jury found for the plaintiff, and from the judgment the defendant appealed.

Strange and Warren Winslow for plaintiff.
No counsel for defendant.

RUFFIN, C. J. The Court is of opinion that the objection to the admissibility of the paper said to be a copy of the tax list for 1836 ought to have been sustained. It was not sufficiently authenticated. It was not a sworn copy, as the sheriff did not pretend to have compared it with the original, nor was the clerk called to that point. Indeed, it may be doubted whether an authentication in that way would suffice, and whether it must be by the certificate of the clerk on the transcript, attested by his signature, as in other transcripts of records; for, as has been said several times, the tax list is the warrant of the sheriff to collect taxes. *Slade v. Governor,* 14 N. C., 365. The list ought to be so authenticated as not only to satisfy the sheriff that it is a copy of the original, but also appear, upon inspection, to the citizens to be official evidence of their liability. It is true, they may ascertain their liability by going to the clerk's office; but that was not intended by the Legislature, as it is inconvenient and expensive; it was meant that when
(132) the tax is demanded the sheriff should show by a document, purporting to be authentic and to be a copy of the recorded list, on what property the tax is laid and the amount of it. Hence, the clerk is required to *record* in alphabetical order the annual returns, and, by the acts of 1819 and 1822, Rev. Stat., ch. 102, sec. 41, to deliver to the sheriff a fair and accurate *copy* of the returns in alphabetical order, designating in such copy the separate amount of taxes accruing from each species of property, and extending the aggregate amount due from each individual. It would seem, of necessity, that a mere copy of the list, not purporting to state what it is nor whence it comes, nor by whom made, would not answer the purposes intended by the Legislature, but that the nature of the document should be stated under the hand of the clerk, at least. But, at all events, it was insufficient here, as it was not authenticated either by the certificate of the clerk or by the oath of a witness, as a copy; nothing more appearing, but that the clerk delivered the book to the sheriff and said it was a copy.

We likewise think the Superior Court erred in letting the testimony of the sheriff go to the jury to establish the contents of the tax list of

1835, and that the error was not corrected by the instructions given to the jury upon the point. The question is not on the sufficiency of evidence, but on the competency of secondary evidence as to the contents of a written document, and is to be decided exclusively by the court. By the act of 1791, Rev. Stat., ch. 102, sec. 45, the sheriff is to collect the public tax from every person, whether mentioned in the tax list furnished by the clerk or not; and one who has not given in his property is made liable to pay double the tax he would have been liable for if his property had been given in at the proper time; and if any dispute should arise as to the amount of the tax for which any person may be thus liable, "the papers and the records in the clerk's office shall be held and deemed sufficient authority on the part of the sheriff to entitle him to distrain, provided the party hath within the two years preceding given in a list of his taxable property." By the same act, and by that of 1819, the sheriff may also have the land valued by a freeholder; but it (133) is not material to consider that, as nothing of the kind was done here. It was, therefore, indispensable to prove the assessment on the lot in 1835; and the question is whether enough was shown to let in parol evidence of the contents of the tax list of that year. Now, it is incumbent on one who wishes to be let into such evidence to show affirmatively, and not dubiously or as a conjecture of the witness, that the document itself is destroyed; for if it be in existence and not suppressed by the opposite party, the paper itself must be produced, and the want of it cannot be supplied. It is obvious that if the witness is entirely uncertain whether the document which he saw, and of which he is offered to prove the contents, was a certain paper which has been destroyed, or was a certain other paper which has not been destroyed, he fails to establish the very *substratum* on which the admissibility of the parol proof depends, namely, the loss or destruction of the instrument. It will not do to refer that question to the jury, for the law requires the court to decide on the competency of the evidence, lest the jury should be misled by a tale too easily fabricated to be entitled rationally to the confidence necessary to found a judicial decision. It is always a question of law whether the best evidence in the party's power and of which the nature of the case admits has been produced, and inferior evidence is not admissible. If, in this case, the sheriff's copy of the tax list had been offered, it would have been competent, as there was sufficient proof of the destruction of the original. So, if it had appeared that the sheriff's copy had also been lost, then the parol evidence might have been given, since the paper the contents of which were proved was certainly lost, whether it was that in the clerk's office or that in the sheriff's office. But as the sheriff's copy is yet in existence, for anything we see to the contrary, and that might have been the

paper which the sheriff saw in 1837, he could not speak of its contents, because they would best appear from the paper itself.

The next objection the court thinks still more fatal to the plaintiff's title, since it is our opinion that the court ought to have given
(134) the instruction prayed by the defendant. The act of 1819, Rev. Stat., ch. 102, sec. 52, requires that the sheriff shall, at the term of the county court next preceding the day of sale of land for taxes, return a list of the land upon which the taxes are unpaid and which he proposes to sell for taxes, therein mentioning the owners of each parcel, and if the owner be unknown, the name of the last reputed owner, and the amount of the tax due thereon; and that the list shall be read aloud in open court, recorded by the clerk upon the minutes of the court, and that a copy shall be set up by the clerk during the term, in the courtroom. It seems to us that this provision is not merely directory, but that it is to be observed by the sheriff as a part of his duty; and as far as making of the return and having it recorded, it is essential to his authority to sell the land. It was known that notice by advertisement was a very uncertain method of informing the owner, and especially of unlisted property, that his land was to be sold; and, moreover, that on account of the difficulty of a purchaser proving due advertisement at remote periods, and of the necessity, nevertheless, of supporting fair purchases, the courts had held that sales made without advertisement and without the knowledge of the owner should stand, notwithstanding the prejudice that might arise to the owner. The intention of the act of 1819 was to provide a more certain or probable notice to the owner of the intended sale of his land, and of the reason therefor, by requiring it to be given in open court at the term next preceding the sale, and to be recorded, so that the rumor thereof, at least, might reach him, and that, upon investigation, he might find at a known place a permanent and certain evidence of the truth of the matter. So, too, the bidders cannot be deceived by any false representations, as they can respecting advertisements in the country or in a newspaper, as the evidence is of record and at home, and if they choose to look they must know whether the sheriff has done his duty by the owner or not. If he has not, his sale ought not to pass the title, more than if it were by private contract, or was not made at the courthouse, or on a wrong day of the week; in all which cases the wrongful conduct of the officer *must* be
(135) known to the bidder, and, therefore, the purchase ought not to stand. *Mordecai v. Speight,* 14 N. C., 428. Indeed, the proceeding directed by the act of 1819 is very much in the nature of a judgment; and a purchaser can as readily search for and find one of record as the other, and, therefore, there is as little reason to dispense with the one as with the other. The Legislature meant to give the citi-

zens an effectual protection against surprise in the sale of their land for taxes, but, at the same time, to do so without exposing bidders to the danger of paying their money and not getting the benefit of their purchases, provided they would take the reasonable and not inconvenient precaution of availing themselves of the means here provided for informing themselves whether the sheriff had a right to sell or not. No person can be hurt by this construction but one who willfully keeps his eyes shut against the light the law supplies to him. We think the sale to the lessors of the plaintiff was, therefore, radically defective, and passed no title.

PER CURIAM. *Venire de novo.*

Cited: S. v. Woodside, 30 N. C., 107; *Hair v. Melvin,* 47 N. C., 62; *S. v. Lutz,* 65 N. C., 504; *Morrison v. McLaughlin,* 88 N. C., 253; *S. v. Gouge,* 157 N. C., 608.

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(136)

CHRISSEY BROWN v. JOHN S. BROWN, EXECUTOR, ETC.

1. Though it is otherwise in England, yet by our statute any testamentary provision for a wife in either real or personal property excludes her from any other share of her husband's estate of either kind, unless she dissent from the will in the manner and within the period pointed out by the statute and thereby elect to take according to her legal rights, independent of the will.
2. This case happened before the act of 1835, ch. 10, but that act refers only to the case of personal estate, giving the widow the same share of a residue of personal estate as if the husband had died intestate, but has no provision as to real estate.

APPEAL from PITT Fall Term, 1844; *Caldwell, J.*

The case was heard upon the pleadings, and according to them the case is this: Benjamin Brown died in September, 1822, having made his will in October, 1821, and therein provided for his wife by gifts of both real and personal property, and appointed the defendant executor. In November, 1822, the defendant proved the will, and delivered to the plaintiff and other specified legatees their legacies. The will contained no residuary clause, and there was a considerable surplus of personalty not disposed of, which the executor then divided among the children of the testator as his next of kin.

In March, 1844, the plaintiff, who is the testator's widow, instituted, under the statute, the present suit against the executor by petition in

the Superior Court, and therein claims a child's part of the surplus. The answer insists that the plaintiff was never entitled to a share thereof, and, if she had been, that she is now barred by her laches in not sooner claiming it.

On the hearing the Superior Court dismissed the petition, and the plaintiff appealed.

(137) *J. H. Bryan and Biggs for plaintiffs.*
Mordecai for defendant.

RUFFIN, C. J. According to the rule as finally established in *Pickering v. Stamford,* 2 Ves., Jr., 272, 581, and 3 Ves., 332, 493, the plaintiff would be entitled to a decree in England. It is there settled that a testamentary provision in lieu of thirds of the testator's real and personal estate does not exclude the widow from a share of the surplus undisposed of, or that turns out not to have beeen effectually disposed of, but that she shall have the same share thereof as if the husband had died intestate. But the rule does not prevail in this State. The Court has not dissented from the rule, as one arising out of the general equitable doctrine of election, applied to persons claiming under the statute of distributions. But the Legislature, in the act of 1784 and 1791, have enacted a different rule of election. It is unnecessary to go through their provisions in detail, because it has already been distinctly and repeatedly held that they clearly import that any testamentary provision for a wife in either real or personal property excludes her from any other share of her husband's estate of either kind, unless she dissent from the will in the manner and within the period pointed out by the statute, and thereby elect to take according to her legal rights, independent of the will. In *Craven v. Craven,* 17 N. C., 338, it was so held in respect of dower, where the provision in the will was entirely of personalty. In *Redmond v. Coffin,* 17 N. C., 437, the widow took both land and chattels under the will, in which there was a disposition of certain slaves of the residue of the estate, which was illegal and ineffectual; and it was held, as to them, that there was a resulting trust for the next of kin, excluding the widow. In *Ford v. Whidbee,* 21 N. C., 16, there was a gift to the wife of certain personalty, and also a piece of land
(138) for two years, and then a further gift of $1,000 in lieu of dower; and there were also legacies to two (out of six) of the testator's children, expressed to be in satisfaction of all their portions of the testator's estate, and there was a residue of personalty not disposed of. We decided that the two children, notwithstanding the words of exclusion, were entitled equally with the other four to the surplus, inasmuch as the law gave it to them unless the testator gave it to some one else.

But at the same time we held that, notwithsanding the will only mentioned that the wife's dower was satisfied thereby, she could not claim any part of the residue, because the statute shut her out unless she would dissent. These adjudications are conclusive, the more especially as they are sanctioned by a just inference from the subsequent action of the Legislature. In the next session after the decision of *Ford v. Whidbee* it was enacted that whenever a testator shall leave a residue of personal estate undisposed of in his will, and shall leave a widow, she shall be entitled to the same share of the residue as if the husband had died without leaving a will. This act, 1835, ch. 10, purports to change the law in respect to the personal estate, and to that only. Consequently it leaves the rule enacted in the previous statutes of '84 and '91 in full force as to dower, and the adjudications thereon unquestioned. But the recent act has no operation in this case, as the testator died in 1822.

PER CURIAM. Affirmed.

(139)

STATE v. HARDY CARROLL.

1. In sending a transcript of record in pursuance of a *certiorari* from one court to another, it is not necessary that the transcript should be affixed to the writ of *certiorari* (though it is most proper it should be so), provided enough appears to show the court into which it is certified that it is in truth the proper transcript.
2. To a tender of an issue to the country by the prisoner in a plea of "not guilty" (in a capital case) the Attorney-General always replies the *similiter, ore tenus;* the record need not show it.
3. Where the prisoner prays the benefit of his clergy, a counter-plea may be filed in the name of the prosecutor "for and in behalf of the State," if the same be adopted by the Attorney-General, though it should properly be in the name of the Attorney-General.
4. If the prisoner contends that the offense for which he now prays his clergy was committed before his allowance of clergy for a former offense, he must avail himself of that defense by a plea of pardon when brought up for judgment or by a special replication to the counter-plea.

APPEAL from FRANKLIN Fall Term, 1844; *Caldwell, J.*

The defendant was indicted for burglary and grand larceny in Johnston Superior Court at Spring Term, 1844, and on his affidavit the cause was removed to FRANKLIN, where he was tried at Spring Term, 1844, and convicted of grand larceny. When brought to the bar of the court to receive his sentence the judge then presiding refused to pronounce judgment because of a defect of the record certified from Johnston Superior Court, and ordered a *certiorari* for a more perfect transcript.

At Fall Term, 1844, of FRANKLIN he was again brought to the bar for judgment, and asked why sentence of death should not be pronounced. His counsel objected because there was no sufficient return to the *certiorari* to identify the record sent by the clerk of Johnston Superior Court; and the objection alleged was that the return of the clerk (140) to the *certiorari* ought to have been appended by him to the transcript. It appeared that a transcript of the case in proper form, under the seal of the court and duly certified, had been sent up to the Superior Court of Franklin under cover of the *certiorari* which had issued, on which the clerk had made his return. The court overruled the objection. The defendant then prayed the benefit of clergy, to which the Attorney-General filed a counter-plea, setting forth the former conviction of the defendant in three clergiable felonies, in which he had been allowed the benefit of clergy, and produced the records to support the allegations in the counter-plea. The counter-plea was filed in the name of "John McLeod, prosecutor, for and in behalf of the State," and concluded thus: "Wherefore, the said John McLeod, for and on behalf the State, prays judgment," etc. The defendant replied *nul tiel record,* and denied that he was the same person named therein. The court passed upon and adjudged that there were such records. A jury was then impaneled to try the issue as to the identity of the defendant, and at the instance of his counsel and of the Attorney-General the records were read to the jury, and the sheriffs of Wake and Franklin, being examined, testified that the defendant was the same person mentioned in the records, and who had been convicted in their respective courts. The jury found that the defendant was the same person mentioned in the records set forth in the counter-plea, and who had been theretofore convicted. A new trial was moved for on the finding of the jury because it was not proved at what time the offenses set forth in the counter-plea had been committed. The motion was overruled. Sentence of death having been pronounced against the defendant, he appealed to the Supreme Court.

In this Court, in addition to the objections urged in the court below, it was moved in arrest of judgment that it did not appear from the records that the State had taken issue upon the prisoner's plea of "not guilty," and also that the counter-plea was defective, as it was filed in the name of John McLeod, whereas it should have been filed in the name of the State, or of the Attorney-General in behalf of the State.

(141) *Attorney-General for the State.*
H. W. Miller for defendant.

DANIEL, J. The prisoner, at Fall Term, 1844, of Franklin Superior Court was convicted on an indictment for grand larceny. When he was brought up for judgment he moved in arrest, *first,* because, as he said,

the said court had no jurisdiction to try him on the said indictment. The prisoner had been indicted at Spring Term, 1844, of Johnston Superior Court. He then pleaded "Not guilty"; and the record has this entry: "and the Attorney-General takes issue." The prisoner then made an affidavit to remove the cause for trial from the Superior Court of Johnston. The court thereupon ordered the cause to be removed into the Superior Court of Franklin for trial. At Spring Term of said court he was tried and convicted. The Attorney-General then suggested a diminution of the record, and, thereupon, the court ordered a writ of *certiorari* to issue to the Superior Court of Johnston to send up a complete transcript of the record of the case. In pursuance of the said writ a complete transcript of the record was made out by the clerk of Johnston Superior Court, under his proper certificate and the seal of the said court. This transcript was by the clerk aforesaid inclosed in the paper on which the writ of *certiorari* was written, and was then by him personally delivered into the Superior Court of law for Franklin County, with a return on the writ in these words, "*Sent up,* 24 September, 1844," and signed by the clerk. But the said transcript was not otherwise attached or fastened to the said writ of *certiorari.* The prisoner insisted that it did not sufficiently appear that the transcript then read did contain the true record of the indictment and proceedings in Johnston Superior Court. The judge was of the opinion that it did sufficiently appear from the return of the writ and the certificate of the clerk that it was a true and correct transcript of the said record, and that the Superior Court of Franklin had jurisdiction.

We think that the opinion of his Honor was correct. The law (142) demands that a true transcript of the record should be sent up in pursuance of the writ of *certiorari,* but it does not absolutely require that the transcript should be wafered to, or sewed to the writ, or annexed in any particular way, provided enough appears to show the court into which it is certified that it is, in truth, the proper transcript. It is, however, best and most certain to annex the writ and transcript, as we said in *S. v. Martin,* 24 N. C., 101, though it is not indispensable. The court, upon the above evidence, could not reasonably doubt that it was the transcript mentioned in the return made by the clerk to the writ of *certiorari.*

Secondly, the prisoner here assigns for error that the record does not show that any legal issue was made up to be tried on his plea of *"not guilty."* He says that the record shows that he, in the conclusion of his plea, tendered an issue to the country, but it does not show that the Attorney-General accepted the tender by entering a *similiter.* To the tender of an issue to the country by the prisoner in a plea of *"not guilty"* (in a capital case) the Attorney-General always replies the *similiter,*

ore tenus; the record need not show it. And the usage seems to be to award the *venire* without any express joining of issue in the record on the part of the king. 2 Hawks P. C., ch. 38, sec. 3.

Thirdly, the prisoner prayed the benefit of clergy. To this prayer John McLeod, the prosecutor, entered three counter-pleas, "for and on behalf of the State," that the prisoner heretofore, and before the commission by him of this felony and grand larceny, had been by the court allowed his clergy, to wit, on three several convictions of him for grand larceny, as appears by the three several records of said convictions and allowances of clergy, as set forth in the said counter-pleas respectively. Each counter-plea concludes thus: "Wherefore, the said John McLeod, for and on behalf of the State, prays judgment," etc. The prisoner replied, *first, nul tiel record* as to each of the three cases; *secondly,* that he was not the same person mentioned in the said recited records who had been heretofore convicted and had received his clergy. The court adjudged that there were such records. The jury, on the issue of (143) identity, found by their verdict that the prisoner was the very same person who had heretofore been convicted, and had received his clergy as mentioned in the three several records recited in the State's counter-pleas. The court then refused to allow the prisoner his prayer for clergy, and gave judgment of death against him. We see no error in this.

Fourthly, in England counter-pleas in cases of this kind are filed either in the name of the Attorney-General, clerk of the Crown office in the King's Bench, or the clerk of the Court of Assizes on the circuits. The said plea is always filed in the name of some person whom the court judicially knows to be an officer of the Crown. Starkie C. L. 376. The plea here is not in the name of the Attorney-General, as it more correctly should have been, but it is in the name of the prosecutor, John McLeod, "for and on behalf of the State." Prosecutors on indictments are persons taken notice of by our laws; the plea was filed on behalf of the State, and the Attorney-General had adopted it, and he has been prosecuting it, ever since it was filed, in behalf of the State. We think that the irregularity, if any, in the frame of the counter-plea is not fatal to it. It is a counter-plea for the State, and insisted on by the highest law officer.

Fifthly, where clergy has once been regularly allowed to a person, it operates as a pardon to him of all clergiable felonies committed by him anterior to the time of such allowance of clergy. Rev. Stat., ch. 34, secs. 25 and 28; 2 Hale P. C., 385. The prisoner had before been allowed his clergy on a conviction for grand larceny in the Superior Court of Franklin, held on the second Monday after the fourth Monday in September, 1843. This indictment was found against the prisoner at Supe-

rior Court of Johnston, held on the fourth Monday of March, 1844. The day set forth in the indictment when this felony was committed by the prisoner was on 20 February, 1844. But we know that the time set forth in an indictment when a crime is charged to have been committed is not traversable, and is seldom truly stated. But if the crime stated in this indictment had in fact been committed before the (144) time the prisoner had been allowed his clergy in the above mentioned case, he might have availed himself of the said allowance by the way of a plea of pardon (2 Hale, 388) when he was brought up for judgment, or by special replication to the counter-plea. If the prisoner had, by any means, been pardoned this offense, it seems to us that it lay on him to show it.

We have considered all the objections taken by the prisoner against the judgment against him in the Superior Court, and we are unable to find any ground why the judgment should be reversed, or why a new trial should be granted him. This Court is, therefore, of the opinion that the judgment was correct, and should, therefore, be affirmed.

PER CURIAM. No error.

Cited: *S. v. Charis*, 80 N. C., 357; *S. v. Swepson*, 81 N. C., 575.

(145)

IMRI SPRUILL, GUARDIAN, ETC., v. FREDERICK DAVENPORT AND WIFE, EXECUTORS, ETC.

1. Where A. by a penal bond stipulated that he would, by his last will and testament, devise a certain tract of land to C. S. in fee, and in fact such will devised the said land as follows, to wit. "I give and devise to my grandson C. S., agreeably to the bond which I executed, the land (here describing it), and in case C. S. shall die without leaving a child or children living at his death, then I give, etc., the said land to my grandson W. S. and his heirs and assigns forever": *Held*, that this not being a devise of the land in absolute fee simple, the condition of the bond was broken.
2. Secondly, that the proper measure of damages was the difference in value between an estate in absolute fee simple and the defeasible fee here devised, though the damages could not exceed the penalty of the bond.

APPEAL from TYRRELL Fall Term, 1844; *Settle, J.*

Covenant on the obligation of the defendant's testator, which obligation is in the following words, to wit:

STATE OF NORTH CAROLINA, Tyrrell County. } *ss.*

With interest from the date, I promise to pay to Imri Spruill, guardian to Colin Spruill, the sum of $585.76, for the payment of which I bind myself, my heirs, executors, and administrators. Witness my hand and seal 30 January, 1834. WILLIAM SPRUILL. [L. S.]

The condition of the above obligation is such that if said William Spruill devises, at his decease, the plantation whereon Uzziah Spruill lived last, to Colin Spruill in fee simple, then this bond to be void; otherwise, to remain in full force and effect; or in case of the decease of the said Colin Spruill before said William Spruill, then said William Spruill is to devise said plantation to William Spruill, son of Imri Spruill. WILLIAM SPRUILL. [L. S.]

(146) The defendant pleaded, "General issue, conditions performed and not broken." The plaintiff proved the due execution of the bond and the death of the obligor. The defendant produced in evidence the will of the said obligor, dated 3 March, 1840, which had been duly proved, and which contained the following devise: "I give and devise unto my grandson, Colin E. Spruill, agreeably to the bond which I executed, the plantation whereon my son Uzziah Spruill lived, which is known by the name of the Ansley land, with all the lands that are attached thereto on the eastward side of the road; but on the westward side of the road he is not to reach or go; and in case Colin E. Spruill shall die without leaving a child or children living at his death, then I give, devise, and bequeath the said plantation to my grandson, William Spruill, son of Imri, and his heirs and assigns forever. I further give to my grandson, Colin E. Spurill, a negro man named Squire, now in the possession of his guardian, to him, the said Colin E. Spruill, and his assigns forever." It was proved that Colin E. Spruill, the person for whose benefit the bond was given, had arrived at full age, and had under the devise in the will of said his grandfather taken possession of the land mentioned in the said devise, and that it was the same tract of land mentioned in the condition of the obligation; that the land was of the value of $2,000, and that the interest taken by the devisee Colin in the land under the devise in the will was of the value of $1,000. And it was insisted by the defendant's counsel that the devise was a performance of the condition of the obligation, and that the plaintiff was, therefore, not entitled to recover, or, if entitled to recover anything, he was only entitled to recover the difference between the value of the estate devised to him and the amount of money named in the obligation and interest; or, as the estate devised was equal to half the value of the land,

the plaintiff was not entitled to recover beyond half the sum and interest mentioned in the obligation.

The court charged the jury that the devise was no performance of the conditions of the obligation; that the measure of damages to which the plaintiff was entitled was the difference between the (147) value of the estate devised by the defendant's testator and an estate in fee simple, but that the jury could not render damages beyond the amount of the bond and the interest thereon.

The jury returned a verdict for the amount of the bond and the interest thereon to the time of the verdict. Judgment being rendered pursuant to this verdict, the defendants appealed.

No counsel for either party.

NASH, J. The only question presented in this case is as to the nature and extent of the estate taken by the plaintiff in the land devised him by William Spruill, the defendant's testator. Is it such an estate as is described in the bond on which the action is brought? The condition of the bond is, if William Spruill devises at "his decease the plantation on which Uzziah Spruill lived last, to Colin Spruill in fee simple," etc. The words are precise and unaccompanied by any others calculated to obscure or throw doubt upon their meaning. William Spruill bound himself, under a penalty by his will, to give the specified land to Colin Spruill in fee simple. There is no dispute as to the land devised being that mentioned in the contract. Justice Blackstone defines a tenant in fee simple to be he who hath lands, tenements, or hereditaments to hold to him and his heirs forever, generally, absolutely, and simply. 2 Bl. Com., 105. So that upon his death, intestate, it shall go as the law directs, to his heir. Such was the estate which William Spruill contracted to devise to the plaintiff. Has he done so? The first part of the devise is to Colin Spruill of the land generally, and would, under our act of Assembly, assuredly pass the fee simple in the land to the devisee. Rev. Stat., ch. 122, sec. 10. But the statute in the same section provides that such shall not be the case when the devise shall show, or it shall plainly appear in the devise, or in some other part of the will, that the testator intended to convey an estate of less dignity. If the devise had stopped at the word "road," as there is no other clause in the will controlling the meaning of the preceding part, a fee simple would (148) have been conveyed to Colin Spruill. But the testator goes on to provide: "If Colin E. Spruill should die without leaving a child or children living at his death, then I give the said plantation to my grandson, William Spruill, his heirs and assigns forever." These words control and limit the preceding devise to Colin, so as to make that which would

have been absolute, conditional upon the event of his dying leaving a child surviving him. Colin Spruill, under the devise, takes an estate in fee, defeasible upon the event of his death without leaving a child. If he die leaving no child, the inheritance does not descend to his heirs, but by the express provisions of the will it is taken from them and given to William Spruill. This devise to William Spruill is a good executory devise, and upon the occurring of the contingency transfers the estate to him and his heirs. *Sheers v. Jeffery,* 7 Term, 589; *Eastman v. Baker,* 1 Taunt., 174; *King v. Frost,* 3 Barn. and Al., 54. In the language of *Chief Justice Abbott* in the last case, it appears to me to have been the plain intention of the testator that at the period of the death of Colin E. Spruill it should be ascertained whether the estate devised to him by the will should then vest in him in fee absolutely, or pass on to some other person—his grandson, William Spruill. This is not the estate which the obligor William Spruill had bound himself to convey to the plaintiff. The condition of the bond, therefore, has not been by him performed. The plaintiff is entitled to his action.

The case further states that upon the death of William Spruill, the testator, the plaintiff took possession of the land devised to him, and that his interest in it is equal to the penalty of the bond. It appears likewise from the will that the testator bequeathed to the plaintiff a negro. It is not for us to decide, sitting as we are as a court of law, what a court of equity could or would do. We have no power here to put the plaintiff to his election to take either his bond or the land and negro. Nor does it make any difference, so far as the decision of the case is concerned, that Colin Spruill is still alive, and may have
(149) or leave a child or children surviving him, in which case his estate, which is now defeasible, will become indefeasible. Our only inquiry is, Has the condition of the bond been broken? We are clearly of opinion that it has, and that a present right of action on the bond has accrued to the plaintiff.

We entirely agree with his Honor, who tried the case in the Superior Court, both as to the true construction of the devise and as to the principle upon which the plaintiff's damages are to be assessed.

PER CURIAM. No error.

EX PARTE CHARLES L. SUMMERS.

1. Though the law says that the officer who has arrested a person on a *ca. sa.* and taken bond for his appearance at court shall return the process and bond *on or before* the second day of the term, yet the court may, if they think proper, order him to return them on the first day.

2. The officer who refuses obedience to such an order, and sends a contemptuous message to the court when by their direction he is informed of it, may be fined by the court for a contempt.
3. Where a court imposes fine or imprisonment for a contempt, if the order does not state the facts constituting the contempt, and the court is not bound to set them out. no other tribunal can reverse their decision.
4. But if the court does state the facts upon which it proceeds, a revising tribunal may on a *habeas corpus* discharge the party if it appear plainly that the facts do not amount to a contempt.

APPEAL from IREDELL Fall Term, 1844; *Manly, J.*

Charles L. Summers applied for a writ of *certiorari* to bring up to the Superior Court of Iredell an order made by the county court fining him $50 for contempt, that it might be recondsidered and (150) reversed or set aside.

In the affidavit on which the application was made the party stated that the fine was imposed on Monday, the first day of the term in May, 1843, and a copy of the order is set forth as follows:

Theophilus Falls
v. } *Ca. Sa.*
James Freeland.

Charles Summers, the officer in this case, is fined the sum of $50 for a contempt of court and for failing to return the papers. Therefore, the said Summers prays an appeal to the Superior Court, which is refused by the court.

In his affidavit the party further states that he was a constable of Iredell, and that Theophilus Falls had put into his hands a *capias ad satisfaciendum,* issued by a justice of the peace in his favor against James Freeland, and that he had arrested Freeland and taken a bond from him, according to the statute for the relief of insolvent debtors, for his appearance at the county court at May Term, 1843. That on the first day of the term he was directed by Falls not to return the execution and bond on that day, as he expected to settle the matter with Freeland; that, shortly afterwards, the attorney of Freeland applied to him in court to return the process immediately, and that he refused to do so; but that he refused because he was not bound to make the return before the second day of the term, and with no intention to show any contempt or disobedience to the court, and without any knowledge that the court required him to make the return; that he then left the courthouse, and the fine was imposed as above. Notice having, by direction of the court, been given to the county officers, they opposed the application, and offered the affidavits of the crier of the court and of the justices who presided in the county court at the time, and others, which stated that after Sum-

mers refused to make a return as requested by Freeland's attorney, the latter informed the court of the request and refusal, and moved the court that he should be ruled to make a return, and that, with the view (151) of disposing of that motion, the court ordered Summers to be called into court, and the crier immediately called him aloud at the door of the courthouse, and that Summers was then standing within a few yards of the crier, but took no notice of the call, and that the crier, by direction of the court, went to Summers in the court yard and informed him that the court required him to come into court and return the said *ca. sa,* or give the reason for not doing so; that Summers replied, he would not return the papers nor go into court, and that the crier might tell the court that he knew his own business, and the court might do as it pleased; and that upon receiving that message the court imposed the fine for the insult offered to the court and the contempt of its authority. The Superior Court refused the motion on the part of Summers, but allowed him to appeal to this Court.

No counsel in this Court.

RUFFIN, C. J. If this case be considered upon its merits, as disclosed in the affidavits, which, taken altogether, explain the case fully, the Court would be little inclined to help the applicant, unless compelled by clear and strict law. There is no doubt that every court must have power to control its officers by process of contempt, attachment, fine, and commitment. It is the peculiar duty of a court to the public and to every suitor to prevent the officers of the court from misbehavior in office to the prejudice of the citizen, the scandal of the administration of justice, and detracting from the character of the court. Attorneys of a court, clerks, sheriffs, and all officers having the returns of process to the court and the custody of prisoners under mesne or final process of the court, must of necessity be thus amenable to the summary control and punishment of the court; else the administration of the law would fail altogether at the option of subordinate ministerial officers, often not actuated by the best motives nor very capable judges of what is proper. The conduct of this person was such as to call for severe animadversion from the court. It was injurious to the suitor, disrespectful and (152) insolent, personally, to the gentlemen then on the bench, and grossly contemptuous to the court in its judicial capacity. It is true, indeed, that the act, Rev. Stat., ch. 48, sec. 7, allows until the second day of the term to return the *ca. sa.* and bond. It says: "It shall be the duty of all officers to return *on or before* the second day of the court." But that only means that he may postpone his return to the second day, unless required by the proper authority to make it earlier. He may

make it on the first day, and, for sufficient reasons, the court may require him to make his return on that day. And there is no doubt that if a rule had been formally drawn up and served on this person, requiring him to show cause why he should not make a return immediately, and he had failed to appear, that an attachment or commitment would have been as regular a sentence as any court of justice could have passed. So far, then, as the court has any discretion to grant or withhold this extraordinary remedy by *certiorari*, it would be but leaving the party to the just consequence of his folly and default by refusing the writ; for, as we are now considering the case, although the party was not formally laid under a rule duly entered, yet substantially, and for all the purposes of answering this application, he must be regarded as having a full opportunity of showing cause, and that he refused through contumacy. But had there been no legal default, and admitting that this person might have insisted before the court on the delay of the return to the next day as his absolute right, yet the message to the court, in its terms and manner, and while he was within the verge of the court, was as offensive and disrespectful as it could be, and in itself justified the fine.

But, in truth, this is not, we think, the proper method of contesting the propriety or lawfulness of this order, if there be any such method. From the very nature of contempts, and in order that the punishment may be efficacious, the punishment must be immediate and peremptory, and not subject to suspension by appeal at the mere will of the offender, nor by any proceeding in the nature of an appeal. Suppose one to come into court and curse and abuse the judge on the bench. Or suppose a sheriff with a writ in his hand, in the presence of the court, (153) positively refuses to return it, so that the party's action will be discontinued. What would sentences for these contemps be worth if the culprit could supersede them by appeal, *certiorari*, or writ of error? Manifestly, nothing; and the authority of the court would really be contemptible if it could be thus eluded and prostrated. There is no instance, therefore, of the reëxamination of an order committing or fining a person for a contempt, with the view of hearing the evidence and trying the question *de novo*, nor directly to reverse or quash an order of commitment, or imposing a fine for an intrinsic insufficiency. If there be such insufficiency upon the face of the order, the party has his remedy by *habeas corpus*, and by action against those who act on the order, either against his person or property.

We own, however, that we cannot hold out to this person much hope of redress in that way. It does not seem to us at present that this order can be impeached. It was, indeed, suggested that it might, because it does not sufficiently set out the facts on which the contempt arose; and it was supposed that an order is void in which a case of contempt is not

made out by a statement of proper facts and finding of the contempt by the court upon those facts. But we do not hold such to be the law. The question has often arisen in England, and recently it has undergone in that country very elaborate, anxious, and learned discussion both in Parliament and in the courts; and it is now given up that the facts constituting the alleged contempt need not be stated. If, indeed, they be stated and be insufficient, that is, are such as manifestly cannot amount to a contempt, it seems properly agreed that it must be disregarded, and the party discharged from an unlawful imprisonment, as in *Bushell's case,* Vaugh., 135, where he was committed "for giving a verdict against full and clear evidence." Therefore, it befits every court which has a proper tenderness for the rights of the citizen and a due respect
(154) to its own character, to state the facts explicitly, not suppressing those on which the person might be entitled to be discharged more than it would insert others which did not exist, for the sake of justifying the commitment. A court which knows its duty, and is not conscious of violating it, will ever be desirous of putting upon the record or in its process the truth of the case, especially as thereby a higher court may be able to enlarge a citizen illegally committed or fined. But if the commitment or fine be in a general form for a contempt, all other courts are bound by it, and the party can only free himself by purging the contempt before the court that has adjudged it. It is so laid down by *Lord Ellenborough* in *Burdett v. Abbot,* 14 East, 1, and by *Justice Bayley.* That case went to the House of Lords, 5 Dow., 199, and in reply to the question whether, if the court of common pleas had adjudged an act to be a contempt of court, and committed for it, stating the adjudication generally, the Court of King's Bench, on a *habeas corpus* setting forth the warrant, would discharge the prisoner because the facts and circumstances of the contempt were not stated, all the judges replied in the negative; and, in consequence of it, the judgment was affirmed unanimously. It is true, that case was upon a commitment by the House of Commons; but it was sustained expressly because it would have been valid if done by a court of record. The subject has since been most diligently considered and learnedly argued in *Hobhouse,* 3 B. and Ald., 420, in the cases which grew out of the recent contest between the courts and the House of Commons, of *Stockdale v. Hansard,* 9 Adol. and El., 1, and *Sheriff of Middlesex,* 11 Adol. and El., 273; and all the judges say, in a distinct manner, that if a warrant merely state a contempt in general terms, it is conclusive, and that another court cannot go into the question of contempt on affidavit, nor discuss the motives which may be alleged for suppressing the facts. If, then, a court has competent authority to adjudge a contempt, the adjudication stands of itself,
(155) and the grounds of it need not be stated, though certainly, in fair-

ness, and to prevent the imprisonment of a citizen, it may be, upon an unjust or frivolous pretense, the court ought to state them.

In the case before us the order is loosely expressed, but is, we think, sufficient. If the failing to return the execution be the ground for the alleged contempt, it is not an absurd or inadequate ground. A contempt may be committed by such an omission or refusal, and we do not see the particulars on the order to show that it was not in fact a contempt. But if that is not to be taken as the ground of the adjudication, because it is not shown how it became a contempt, then there is no ground stated, but merely the contempt in general terms is found, and that binds. In every point of view, therefore, the decision in the Superior Court was right, and must be

PER CURIAM. Affirmed.

Cited: Cuthbertson v. Long, 49 N. C., 450; *Robins v. Ex parte,* 63 N. C., 312; *S. v. Queen,* 91 N. C., 662; *In re Deaton,* 105 N. C., 62; *In re Briggs,* 135 N. C., 129, 142; *Ex parte McCown,* 139 N. C., 104.

ABNER MORGAN v. RICHARD ALLEN.

1. A judgment of dismission is a proceeding unknown in courts of common-law jurisdiction .
2. Where a magistrate gives a judgment against a defendant for a sum beyond his jurisdiction, the defendant may have an action for any act done under it, or he may resort to a writ of false judgment to have it set aside. If he chooses to appeal to the county court, he can there take advantage of the objeciton only by plea in abatement. or, according to the established course of our courts, under the general issue.
3. A single magistrate has jurisdiction of debts, though above $60, founded upon a former justice's judgment.

(156)

APPEAL from HENDERSON Fall Term, 1844; *Battle, J.*

The suit was commenced by warrant "in plea of debt for the sum of $75 due by former judgment," and a judgment was given for the plaintiff for $65 principal money, with interest from a certain day, from which the defendant took an appeal to the county court, which was entered at March Term, 1842. At June Term, 1843, the defendant moved the court to dismiss the suit because the subject-matter was not within the jurisdiction of a justice of the peace; and it was so ordered. The plaintiff then appealed to the Superior Court, and at September Term, 1844, the defendant made the same motion in the Superior Court, and it was again allowed, and the plaintiff appealed to this Court.

No counsel for either party.

RUFFIN, C. J. The judgment, if it be proper so to call it, which was given in this case is a novel one to us. We do not know exactly what it means; nor do we understand, precisely, the grounds on which the Superior Court proceeded. The decision was made without plea or trial, on a motion of the defendant to dismiss the plaintiff's
(157) suit. The term "dismiss" is appropriate to a court of equity, which, upon a decision against a complainant, dismisses his bill. It is also inartificially used by the Legislature in the act of 1826, wherein it is enacted that if a suit be brought in the county court for a less sum than $100, due by bond, note or liquidated account, "the same shall be dismissed by the court." In construing a statute it is the duty of the court to put on the language, however inaccurate, such an interpretation as will, if possible, effect the end of the Legislature by legal means. And upon that principle it would, no doubt, be held that under this act there should be judgment as upon a nonsuit, and for costs against the plaintiff. But a judgment that a suit in a court of law be "dismissed" is unknown. It is said to be no judgment at all. 3 Salk., 213. There is, moreover, no statute in relation to appeals from a magistrate in cases beyond his jurisdiction, and directing the suits to be dismissed, similar to that of 1826, which makes it the duty of the court to dismiss suits improperly commenced in those courts for sums below their jurisdiction. On the contrary, the cases stand on different principles. If a magistrate exceeds his jurisdiction, his judgment is, no doubt, void, *Jones v. Jones,* 14 N. C., 360; and it will not justify acts under it. The defendant may choose to rely on redress by action for any such acts. He may also have it annulled by writ of false judgment. It is also a settled usage in this State to appeal on that ground as well as on the merits or any other point. And the question is as to the proper mode, on an appeal, of insisting on that point. By the law as it at first stood in the act of 1777 appeals were from a single justice out of court to the justices' court, who reheard and determined the cause in a summary way, without a jury, ch. 115, sec. 68. But the act of 1794, Rev. Stat., ch. 31, sec. 110, which extended the jurisdiction to £20, enacted that upon an appeal to the county court "an issue shall be made up and tried by a jury in the same manner as other jury cases are tried"; and from that time there have been pleadings in
(158) appeals as in other actions. The court cannot dispose of them sumarily, more than other cases. Regularly, then, there should be a plea in abatement for the want of jurisdiction. But we perceive that the point has been often made on the general issue, by way of objection to the evidence of a demand not within the jurisdiction, and sustained in that form. Of course, we would not disturb the established course of the courts in this respect. But we have not been aware of any

such proceeding as the present, hitherto. It is not seen how the court ascertained or could judicially ascertain upon motion that the magistrate had not jurisdiction. The warrant, it is true, demands $75 "due by former judgment," and the judgment rendered on it was for $65 principal, besides interest. But the judgment established nothing, as it was annulled by the appeal. And the demand in the warrant is also inconclusive. It may be admitted, for the present, that a magistrate has not cognizance of a sum due by justices' judgment exceeding $60 in principal. Yet it does not follow that the first judgment, here, was for more than $60 merely because the warrant demands $75. The statute requires the warrant to "express the sum and how due." Certainly a plaintiff may recover a less sum than he demands; and the words "how due" are satisfied by stating the money to be due on bond or note or judgment, or the like, without proceeding to describe the security more minutely, as would be done in a declaration, by its tenor, or its date, or the particular sum mentioned in it, or the day it fell due. Therefore, there is no departure from the warrant by giving in evidence any security of the kind specified in the warrant, provided it be for the sum mentioned, or a less sum; and it has been the constant course to warrant for a certain sum, within the jurisdiction, as due on a bond, for example, and recover any less sum. In this case, then, it could not be assumed before the plaintiff offered his evidence on the trial of an issue that the judgment on which he is suing is not for $60, or less. Indeed, if it were for $60 principal, and by interest subsequently accrued, it exceeded that sum at the time of the second warrant, still the magistrate would have jurisdiction, as incidental to his power to give the judgment originally, and enforce it by execu- (159) tion, as was laid down in *Bryan v. Washington*, 15 N. C., 479. Now, we cannot say that the $75 demanded be not due thus: the sum of $60 or less for principal and $15 or more for interest. There is, then, nothing in the record which judicially establishes that the former judgment was for more than $60. If the court proceeded on extraneous proofs, it was erroneous, as they could be heard only upon the trial of an issue.

The case has been treated as if a debt of $75 principal money, due on a justice's judgment, was not within the jurisdiction of a magistrate. But although the point is far from being free from doubt, we hold such a case to be cognizable before a justice, or, rather, that it may be. It is not objected here that the magistrate had not cognizance of the original case on which the first judgment was given. If that had been the objection, the proper method of taking it would have been on the plea of *nil debet*. We are, then, to assume that the first judgment was lawfully given, for example, on a bond for $75; and, if so, we think a new war-

rant may be brought thereon at all events, if the plaintiff does not hold the debtor to bail. The opposite position originates in an oversight in drawing the act of 1820, and consolidating the acts in the Revised Statute, ch. 62, sec. 6. The act of 1803 gives a jurisdiction of all debts of £30 or under, due by obligation, note, or assumpsit, "or for any judgment which may have been granted over twelve months by a single justice of the peace, and no execution have issued thereon." When the act of 1820, ch. 1045, extended the jurisdiction to $100, it mentions only debts "due on bond, note, or liquidated account," leaving out "former judgment"; and the Revised Statutes pursues the same phraseology, enacting in one section that debts due on bonds, notes, and liquidated accounts, when the principal does exceed $100, and that debts of $60 or under, for goods sold and delivered, or for work and labor done, "or for any judgment granted by a single magistrate," shall be cognizable before a justice of the peace. Taken literally, the act confers only a (160) jurisdiction of $60, due by judgment; and, merely as being due on a judgment, the jurisdiction must be held strictly to that sum. But when the first judgment is, for instance, on a bond for more than $60, which is clearly within the jurisdiction, and the magistrate can enforce the judgment by execution, such judgments on bonds must, by necessary construction, be exceptions to the provision which limits the jurisdiction generally to judgments for $60 and under. There can be no danger in allowing the justice to give a judgment for a sum for which he might issue execution. Indeed, the warrant, when bail is not demanded, is merely a summons in the nature of a *scire facias* to show cause why execution should not issue on the first judgment. In *Bryan v. Washington* it did not appear on what the first judgments were given, and the suit was brought by attachment on two judgments, which together exceeded $60. We thought that not allowable; for they could not be united, although each might singly be within the jurisdiction. But here we can only suppose one judgment, and that must be assumed to be lawful, and that the magistrate might have granted execution on it. Such a case, if not within the words, seems to us to be within the meaning and spirit of the act.

PER CURIAM. Reversed.

Cited: *McKee v. Angel*, 90 N. C., 63.

(161)

ELIZABETH TUCKER ET AL. v. JOHN TUCKER ET AL.

1. A devise of a power to an executor to sell land, or a devise of the land to him in trust to sell, does not give him such an interest in the land as disqualifies him from being an attesting witness to the will.
2. The act of 1840, ch. 62, requiring wills of personal property to be executed with the same formalities as wills of real estate, is to be construed to mean that they shall be attested by two subscribing witnesses, no one of whom at the time of attestation is interested in the bequest of personal estate. It does not confine the interest of the witnesses to the devise of lands as in the case of wills devising lands.
3. Therefore, where the will disposes of both real and personal estate, so far as the attestation of the subscribing witnesses is concerned, it may be good as to one species of property and not as to the other.
4. One who is named executor in a will is so far interested, by reason of the commissions to which he is by law entitled, as to render him an incompetent attesting witness as regards the disposition of the personal property.
5. Therefore, where a will was made devising real and bequeathing personal estate, and it was attested by two witnesses, one of whom was named executor, it was *Held*, that it was a good will as to the lands, but not good as to the personalty.

APPEAL from STOKES Fall Term, 1844; *Pearson, J.*

Devisavit vel non upon an instrument propounded as the will of Robert Tucker, deceased, of his real and personal estate, dated 3 September, 1842.

By it he gives to his wife 100 acres of land, two slaves, and some other chattels.

To his son John he gives 5 shillings, and to Sarah, the daughter of John, he gives a negro girl.

To his sons, Anderson, Paul, Silas, George, Robert, and Daniel, he gives certain slaves each; and to his daughter Sarah and his granddaughter Sarah Priddy he also gives certain negroes.

To his daughter Susannah he gives $50, "to accrue by the sale of my land," and to her daughter Sarah he gives 50 acres of land, (162) part of the Heath tract.

To his daughter Elizabeth he gives the sum of 5 shillings, and to her children he gives two parcels of land, to be equally divided between them.

The paper then concludes thus: "The balance of my land and other property I appoint and ordain to be sold, and the money arising from the sale thereof not given away, to be applied to paying my debts; the balance, if any, to be equally divided among the herein named legatees."

Silas Tucker and John Preston are appointed executors, and the instrument is attested by Robert Coleman and the same John Preston.

When the will was exhibited in the county court, John Preston renounced the office of executor, and it was propounded by Silas Tucker, and by the widow and the grandchildren, and by some of the children provided for in it, and opposed by the other heirs and next of kin.

The case came by appeal to the Superior Court, and on the trial, John Preston and Robert Coleman, the subscribing witnesses, proved the execution and publication of the instrument, and the jury found in favor of the paper, as a will of real estate, and also as a will of personal estate, subject, however, to the opinion of the court upon the question whether, as the said Preston is nominated one of the executors and is also one of the two witnesses, the paper is duly attested, so as to be good in law as a will of real and personal estates, or either, and which.

The court was of opinion that it was sufficiently attested to pass both real and personal estate, and pronounced accordingly on the verdict, and the party opposing the probate appealed.

J. T. Morehead for the plaintiffs.

(165) *Kerr for defendant.*

RUFFIN, C. J. There is no doubt that Preston was competent as a witness to testify at the trial. Between the heir and devisee, the executor is competent to support the will. 2 Stark. Ev., 758. And he had divested himself of all interest in the personal estate by renouncing, and the competency of a witness depends on his interest when he is called to give evidence. *Perry v. Fleming,* 4 N. C., 344.

But the question on the verdict is not whether Preston was competent to testify at the trial, but whether he was competent to attest the paper as one of the two witnesses required by law to a will of real estate, and, now, also to a will of personal estate, for the competency of a person to attest a will depends upon his not being interested at the time of his attestation. *Allison v. Allison,* 11 N. C., 141.

We do not see anything to prevent this person from being a good witness to this paper as a will of land. That depends entirely on the act of 1784, Rev. Stat., ch. 122, sec. 1. With respect to attested wills, the provision is that they "shall be subscribed in the testator's presence by two witnesses at least, no one of which shall be interested in the devise of the said land." It has been already observed that, merely as executor, Preston has no interest in the will as a will of land.

But here there is a direction to sell land, and as no person is appointed to make the sale, and the proceeds are to be applied to the payment of debts and legacies, it is a duty that devolves on the executors. *Ferebee v. Proctor,* 19 N. C., 439. Still we do not think that gives the executor an interest in the land. The will does not charge any commission in favor of the executors, as was done in *Allison v. Allison, supra.* Nor

does the law give it to them. The statute, Rev. Stat., ch. 46, sec. 29, is confined to the personal estate, as is shown by its making the commission a subject of retainer against creditors, legatees, and next of kin. But upon a power to sell land, or a devise of it to him in trust to (166) sell, the executor is a mere trustee, entitled in England only to his expenses, and here to nothing more, except as the court of equity may, in its discretion, think proper to allow. Of strict right he is entitled to nothing; and, therefore, cannot be said to be interested in the devise.

It was said at the bar, however, that this could not be a good will of the land unless it be also good as to the personal property, because the act of 1840 places them on the same footing. But we do not perceive anything in that which at all affects, or can be supposed to have been intended to affect, a will of lands. If this be not a good will of personalty, as we suppose it not to be, yet that is owing entirely to the act of 1840; and that act is strictly confined to wills of personal estate, and has no allusion to wills of real estate, for the purpose of adding any new requisite to their formal execution, but merely to require wills of personalty to be thereafter executed with the same formalities as were then required by law in respect to wills of lands—leaving the latter just as they were before.

But we think this paper is not duly attested as a will of personalty. It is insisted that it is, because the act of 1840 makes a will sufficient to pass personal estate if it be executed with the same formalities as are required by the first section of the Revised Statutes concerning wills of land; that is to say, by two witnesses not interested in the devise of the land. But though that be the literal reading, it cannot be the sense of the act; for it would render it absurd, and defeat the obvious purpose of the Legislature; for, as just observed, that act does not touch a will of land, as making any alteration in the law as to its execution; but it is confined strictly to wills of personal estate. There was no motive to alter the law as to wills of land, as it was already enacted that they should be attested by two witnesses not interested in the land at the time of attesting. The sole object of the act of 1840 was to establish the same guards in relation to the personal estate against fraud and perjury in fabricating and sustaining wills. The construction of the act must be to require two witnesses at least to a will of personal estate, no one of which shall be interested *in the personal estate* bequeathed in it. That (167) must be the meaning; otherwise, the act will be nugatory in the very case and only case mentioned in it, which is that of a will disposing of personal estate only; for the act does not provide for the case of a will disposing of both real and personal estate, and add any ceremony to be observed in the execution of such a will; but it speaks of a will of personalty as distinct from one of land, and recognizes them as instruments

relating to different subjects. But it applies to wills of personalty the same provisions as to their formalities that were before required for wills of land. Therefore, there must be two witnesses to it; and the only question is, What are to be their qualifications? Certainly, the Legislature did not mean that if a will disposed of nothing but personalty it should be good without any witness; for that would be against the very words of the act. In such a case, then, it means that the witnesses should be persons taking nothing by the instrument—that is, no part of the personal estate, which is the sole subject of the instrument. If so, it follows, when the instrument purports to dispose of both real and personal estates, it must be attested as to each in the several manners required to make a good will of the two kinds of estates separately. There is nothing in the act to show that the Legislature meant that a will should be good as a will of personalty merely because it was good as a will of realty, more than that it should be good as a will of land merely because it was good as a will of personality. In fine, the law treats the two kinds of estates as different subjects, and often going to different persons. It does not deem the one fund or the other the more worthy, so as to make a will that is good as to one fund good as to the other; nor is there anything to raise a presumption that the Legislature meant that a will disposing of the two kinds of estates should operate as a whole or not at all; for, as we have already said, the case of a will of both kinds of estates is not within the purview of the act, but it simply prescribes a new method of attesting a will of personalty. Here (168) the jury have found the *animus disponendi* as to both estates, and that was their province. *Robinson v. Kea,* 15 N. C., 301. So that the only question is as to the sufficiency of the paper in respect of its formal execution as a will of each kind of estate. If the Legislature had intended that a will of real estate, attested by witnesses not interested in the devise, should not be good as a devise, if it should not also be good as to the bequests of personalty contained in it, or *vice versa,* the language would have been simply, "that no will should be good to pass any estate unless it be subscribed by two witnesses, neither of which should be interested in any gift in the same contained." But as the act of 1784 only requires that witnesses to a will of land should not be interested in the land, we can add nothing to the qualification of the witnesses to such a will. And as the act of 1840, as it must be understood, requires two witnesses to a will of personal estate not interested in the bequests thereof, we can take nothing from their qualification. If, indeed, we could see a reason why the Legislature should have intended that the gifts of *land* or its proceeds to this person's *widow* and *grandchildren* should not take effect because the parents of those grandchildren (to whom the testator did not think it safe to give anything) are able to

defeat the gifts of personalty to the same persons for the want of a mere formality required by the law in the execution of the paper as a will of personalty, while it has every formality required for it as a will of land, we should most willingly declare it not good for one purpose, because not good for all. So we should most gladly, under the verdict, support it as a will of personalty, if we were at liberty to do so, merely because it is good as to the land. But we cannot do so, because that is not the act of 1840, which requires it, as a will of personalty, to be attested by persons not interested in the personalty. It is to be regretted, indeed, that the Legislature has not adopted the policy of the act of George II and destroyed the interest of the subscribing witnesses by making void all gifts in the will to them; and the want of such a provision is severely felt in this case, as it defeats the most beneficent provisions for the families of the very persons who contest this will. But we cannot act on such considerations, but must administer the law as it is; (169) and as that requires an attestation of a will of personalty by two persons not interested in it at the time of their attestation, this is not a good will of that kind. The witness Preston was interested, because the act of 1799 gives an executor a legal right, over and above his charges and disbursements, to commissions on the personal estate.

Therefore, upon the verdict, the court should have pronounced for this as a sufficient will of the real estate, and against it as a will of personal estate; and, consequently, the judgment must be reversed and the case remanded with instructions so to pronounce and to certify the same to the county court in order that the will and probate may be there recorded and other proceedings had according to law.

PER CURIAM. Reversed.

Cited: Morton v. Ingram, 33 N. C., 370; *McCorkle v. Sherrill,* 41 N. C., 177; *Williams v. Williams,* 44 N. C., 274; *Kirby v. Kirby, Ib.,* 456; *Huie v. McConnell,* 47 N. C., 456; *Gunter v. Gunter,* 48 N. C., 442.

JANE M. BUIE v. JOHN B. KELLY.

1. Where a daughter placed in the hands of her father $550, and also an order from her uncle for $122, which the father owed, for the purpose of enabling the father to purchase for her a negro woman at public sale, and the father purchased for her and in her name, and took a bill of sale in his own name, taking possession of the negro and giving his bond, according to the terms of the sale for the purchase money, but immediately afterwards conveyed the negro to his daughter: *Held,* that this conveyance could not be considered fraudulent against the father's creditors.

2. The father would at least have been compelled by a court of equity, under those circumstances, to make the conveyance to the daughter. But in fact a conveyance from the father was unnecessary, as by the sale and delivery the father purchasing for and in the name of his daughter, an absolute legal title immediately passed to the latter.

APPEAL from MOORE Spring Term, 1844; *Nash, J.*

Detinue for a female slave and her two children, which the (170) defendant claimed under a purchase made by him at the price of $102 at a sale made by the sheriff of Moore, in December, 1840, on a *fieri facias* against Malcolm Buie, the father of the plaintiff. The plea is *non detinet.*

The plaintiff claimed the slaves under a bill of sale for the woman and one of the children, then born, made to her by her father, bearing date 9 June, 1838. The defendant contended on the trial that the conveyance was fraudulent against the creditors of Malcolm Buie, who was largely indebted at the time he made it, and, indeed, was admitted to have been then insolvent.

To establish the fairness of the transaction, the plaintiff released her father from the warranty in his bill of sale and called him as a witness. He stated that he administered on the estate of a deceased relation, of whom he and his brother, Dr. Buie, were the next of kin, and that in that manner he became indebted to his brother in a sum exceeding the whole value of the negroes in controversy; that the negro woman and her eldest child belonged to the estate of his deceased mother-in-law, and were sold for distribution among the next of kin, and that his share of that estate also exceeded the value of the negroes in controversy.

He further stated that his daughter, the plaintiff, desirous to purchase the woman and her child, requested him as her agent and on her behalf to bid for her and make the purchase at the sale, and at the same time placed in his hands the sum of $550 to pay for the negroes, if he should purchase them for her, and also procured an order from Dr. Buie to the witness, in case he should have to give more for the negroes than $550, to apply, in discharge of the excess, as much as might be sufficient of the money the witness then owed Dr. Buie, as before mentioned. He then stated that he attended the sale with his daughter, and in her presence made known publicly that he was bidding for her, and accordingly purchased the negro as the agent and in the name of his daughter, at the price of $672; that he did not (171) actually pay the same, because he was entitled to a dividend of the estate to a greater amount, and, therefore, he gave his own bond to the administrator for the price, and then used the money he had received from the plaintiff; that he did not pay his bond when it fell due, but that he filed a bill for an account and for his distributive

share, and thereon obtained an injunction against the bond. He further stated that he did not take a conveyance for the negroes, but that, some time afterwards, and on 7 June, 1838, he did apply for one and the administrator offered him one in his own name, which on that account he objected to receiving, as he had made the purchase for the plaintiff and in her name. But being told that a return of the sale had been made in his name, and that it would cause some inconvenience to alter it, and that it would answer as well for him to make a deed to his daughter, he finally accepted the conveyance to himself; but that he returned home two days afterwards, and immediately executed and delivered to the plaintiff the bill of sale to her, dated 9 June, 1838, and registered in May, 1839.

Upon his cross-examination this witness was asked whether, at the sale under the execution, in reply to a question by one C. Dowd, he had not stated that he executed the deed to the plaintiff after the *teste* of the execution under which the negroes were sold, and he replied in the negative.

The defendant then showed a suit commenced in November, 1837, against Malcolm Buie, as the surety of one McIntosh in a bond in which a judgment was obtained in February, 1839, for upwards of $9,000; and that execution issued therefor, and was regularly kept up until the sale at which the defendant bought in December, 1840.

The defendant then called a witness who testified that, at the sale, C. Dowd asked M. Buie when his deed to the plaintiff was executed, and Buie replied that it was either after the writ was issued, or after the suit was instituted, or after the *teste* of the execution; but which was the particular expression the witness was unable to say, though he was inclined to think it was the last.

The defendant then offered to prove that a gentleman of the bar, who is since dead, but was present and heard Buie's reply (172) to Dowd, said, "Then I will bid," and immediately bid the sum of $50 for the negroes. But the plaintiff objected to the evidence as irrelevant, and the court rejected it.

The defandant called other witnesses to contradict and discredit Malcolm Buie; and the plaintiff supported his evidence by the concurring testimony of the person who made the sale of the negroes at which he purchased for his daughter, and of the witness to the bill of sale from him to the plaintiff. Also, the defendant's witnesses, and several others called by the plaintiff, united in stating that Malcolm Buie's character was good as an honest man and a creditable witness.

The defendant's objection to the plaintiff's title, on the score of fraud, was presented in a number of forms, not easily to be distinguished from each other, but which it is unnecessary to notice, as in this Court

the defendant's counsel insisted on only a single position. The defendant at the trial moved the court to instruct the jury that, supposing the testimony of Malcolm Buie to be true, and that he had the money, as stated by him, to purchase the negroes for the plaintiff, and, with the money in his hands, made the purchase as the agent of the plaintiff, yet, as he did not pay that money for them, but gave his own bond for the price, and took a deed in his own name, he was merely a debtor to the plaintiff for the money, and the slaves became his property, and his subsequent conveyance to the plaintiff was fraudulent and void as against the judgment creditor.

The court refused the instruction, and directed the jury that if Malcolm Buie was the plaintiff's agent to make the purchase, and the money put into his hands for that purpose was her money, and Dr. Buie had in M. Buie's hands money sufficient to cover the balance of the price, and had ordered M. Buie to apply it to that purpose, and the latter had agreed to do so, and in fact made the purchase for the plaintiff, the plaintiff was to be considered a purchaser for a valuable consideration, and the deed to her was not fraudulent, notwithstanding Malcolm Buie did not pay the said moneys for the negroes, but gave his bond
(173) for the price.

The jury under this instruction having found a verdict for the plaintiff, and judgment being rendered accordingly, the defendant appealed.

Strange and Mendenhall for plaintiff.
Winston for defendant.

RUFFIN, C. J. It has been insisted here that the instruction was erroneous, at least, in this respect, that as to the excess of the price above the sum of $550 which the plaintiff put at the time into her father's hands, viz., $122, the conveyance was voluntary from the father to the daughter, and, therefore, void; and, being void in part, is, under the statute, void altogether. But we think the position entirely untenable in reference to this case. The sum of $122 spoken of was as much in the father's hands for the purposes of the plaintiff as that of $550. It was not exactly in the same form, indeed; but it was the same in substance. The larger sum the plaintiff then delivered in cash; the smaller the father before had in his hands as the money of Dr. Buie, which he transferred, as far as it might be needed, to the plaintiff. As soon as the purchase was made, therefore, and Malcolm Buie had settled for the price by giving his bond for it, he thereby paid to the plaintiff her advance of $550 and to Dr. Buie the other sum of $122, and the plaintiff became debtor to Dr. Buie, therefore, instead

of Malcolm Buie. It was not material that the very identical money furnished by the plaintiff should be used in paying the price. It was only requisite that the father should not give the negro to his daughter, or, it may be, any part of her; and, therefore, it is sufficient if she furnished to the father a fund to pay the price in full, though he may have kept that fund to himself and applied other means to an equal amount, of his own. He was nothing out of pocket, and, therefore, his creditors had no ground to complain that his property had been covinously conveyed for an inadequate consideration. In thus speaking, it is supposed that the negoes once belonged to Malcolm Buie, and that the plaintiff derived her title from or through him. (174) Admitting that to be so, it is plain that he was bound in conscience to convey under these circumstances to the daughter, and that a court of equity would have compelled him to do so; and, therefore, it could not be fraudulent in him to do it of his own accord. But the truth is that the plaintiff did not derive title from her father, and the case was unnecessarily embarrassed by being so considered. Assuming the testimony of the father to be true—and the instruction prayed for so assumes—the title never was in the father; for the purchase was made by him as the agent of his daughter and in her name, and as soon as the purchase money was paid to the vendor (and to that purpose the bond for it was the same as payment), the right of property was in the plaintiff, and the title became complete by the possession received by the daughter. *Woods v. Fuller. ante,* 26. When the vendor afterwards made a bill of sale to Malcolm Buie he did what he had no authority to do; for the title was not in him then to convey, but had by the sale and delivery before vested in the plaintiff. There was, therefore, no ground whatever on which the creditors of Malcolm Buie could treat these slaves as his property. They never had been his.

For this last reason, also, the evidence that was rejected was totally immaterial. The object was to show that the deed from her father to the plaintiff was in fact executed after the *teste* of the execution. If that was so, it would make no difference, since the plaintiff had title by the original purchase, made before June, 1838, and long before the judgment against the father. But even supposing that the deed from the father to the plaintiff constituted her title, the evidence was properly ruled out. The remark of the deceased bidder carried the evidence no further than the testimony of the witness, who said he was uncertain whether the declaration of M. Buie was that he conveyed after the original writ issued or after the *teste* of the execution. The declaration, simply, of the bystander, "then I will bid," does not tend to establish that the declaration of Buie was the one or the other; (175) as he might have thought a conveyance after the suit brought

evidence of fraud. Indeed, that is most probable; for, as a member of the profession, he must have known that if the conveyance was posterior to the execution the slave was undoubtedly liable on the execution, and he would have offered more than $50 for three slaves. The declaration, in truth, proved nothing.

PER CURIAM. No error.

WILLIAM R. CLARK v. JAMES QUINN.

1. An attachment before a justice of the peace, not made on its face returnable within thirty days from the isuing thereof, is *void* by the express provisions of our act of Assembly concerning attachments.
2. So attachments from a justice, like other original process, not made returnable on a certain day, are void.

APPEAL from LINCOLN Fall Term, 1844; *Manly, J.*

Trover to recover damages for the conversion of a stage coach, harness, and eight horses, which the plaintiff claimed a property in by virtue of levies which he had made as a constable of the county of Lincoln, under six several attachments issued at the instance of six several creditors of one Trice, an absconding debtor. Each attachment was for the recovery of a sum of money within the jurisdiction of a justice of the peace. After the levies were made by the plaintiff under the said attachments, and the property taken into his possession, there came to the hands of the defendant (who was sheriff of Lincoln) a *fieri facias,* issued from Buncombe County Court in favor of
(176) one James Patton against the said Trice. And the defendant, by virtue of this execution, levied on the aforesaid property, which then was in the hands of the plaintiff, took it away and converted it to the payment of the said execution. Neither of the six attachments that were in the hands of the plaintiff was made returnable at any certain day within thirty days from the *teste* of the same, nor within thirty days from the issuing of the same. The court was of the opinion that the attachments were *void* and that the levies made under them by the plaintiff on the property in controversy vested no title in him. The plaintiff then suffered a nonsuit, and appealed.

Guion for plaintiff.
Boyden and H. W. Miller for defendant.

DANIEL, J. We concur with his Honor in opinion: all and each of the said six attachments under which the plaintiff claimed title to the property in dispute were *void.* Neither of the attachments was returnable at any particular day, nor within thirty days after the

issuing of them, nor were they, or either of them, returnable within thirty days from their *teste*. The act of Assembly requires that such attachment, returnable before justices of the peace, should be made returnable before the justice issuing it, or some other justice, on or before thirty days from the date thereof, to be proceeded in, etc. Rev. Stat., ch. 6, secs. 13, 17. In *Washington v. Saunders,* 13 N. C., 343, this Court decided that original process (which these attachments are), without any certain day mentioned in it to which it is returnable, is *void. Ibid.,* 346. The plaintiff, therefore, had no right or title to the property as against Trice. The property of Trice thus being in the possession of the plaintiff, was, nevertheless, subject to Patton's execution.

PER CURIAM. Affirmed.

Cited: Houston v. Porter, 32 N. C., 175; *Symons v. Northern,* 49 N. C., 243; *McLane v. Moore,* 51 N. C., 524.

ALPHEUS WALL v. JOSEPH HOSKINS.

1. To charge a man with having stolen bank notes in South Carolina is not actionable in this State, unless it be shown by proof that by the laws of South Carolina such stealing is subject to an infamous punishment.
2. No such presumption can be made by the court, as by the common law the stealing of bank notes was not indictable, nor was it indictable in this State until the passage of a statute in 1811.

(177)

APPEAL from RANDOLPH Fall Term, 1844; *Battle, J.*

This was an action for words spoken charging the plaintiff with taking—*innuendo,* stealing—some bank notes from the defendant at a place in the State of South Carolina. Plea, not guilty. On the trial the speaking of the words both in South Carolina and this State was proved, and the counsel for the plaintiff contended that they were actionable of themselves in the courts of this State. But the court held that the action could not be sustained unless the plaintiff proved that by the law of South Carolina stealing bank notes was a crime which subjected an offender to infamous punishment. Under that instruction the jury found for the defendant, and from the judgment the plaintiff appealed.

Badger and Mendenhall for plaintiff.
J. T. Morehad for defendant.

RUFFIN, C. J. The Court is of opinion that the judgment should be affirmed. Every imputation derogatory to the character of another

is not actionable. A rule as loose as that could not be tolerated. It would be the fruitful source of frivolous litigation, and supply a notable example of the uncertainty of the law, or, rather, of the results of lawsuits. It is indispensable that a rule having more precision should be laid down, by which the rights and liabilities of persons may be learned with some reasonable certainty. And it is highly proper that a rule, once adopted, should be observed, that as much uniformity as possible may be attained in the administration of the law. We think the principle has been expressed by the Court with sufficient precision to be easily understood, and that, as expressed, it is conformable
(179) alike to authority and reason. Following *Lord Holt* in *Ogden v. Turner,* Salk., 696; the Court said in *Brady v. Wilson,* 11 N. C., 93, "that although the acts charged upon a person might be such as flow from a wicked and depraved heart, and involve great guilt *in foro conscientiæ,* yet if the words did not impute to him a felony or other crime the temporal punishment of which is legally infamous, the action of slander could not be supported at common law." In *Skinner v. White,* 18 N. C., 471, the cases in England and this country are reviewed, and the rule, "that the words, if true, must subject the party to an infamous punishment," is declared to be the settled law of this State: the punishment to be such as involves social degradation by occasioning the loss of the *libera lex.* That rule is fatal to the plaintiff's case. Unless the stealing of bank notes be a crime in South Carolina, and an infamous crime, the words imputed to the plaintiff no act required by the rule; and upon that point the law of that State is the subject of proof to us here. It was, indeed, said at the bar that it was an act of such turpitude, so pernicious to individuals and to the committing of which, if not punishable, there is such strong temptation, that the Court should presume that, like murder, it is punishable in every civilized nation of this age, and especially in each of the States of the Union, in which so much of that which circulates for money is bank paper, as imperatively to call for this kind of protection. But we cannot venture on such presumption. In *Shipp v. McCraw,* 7 N. C., 466, the law of Virginia was given in evidence. It is not a case for presumption, or if it be, it is for a contrary presumption; for we know that by the common law of England stealing bank notes was not indictable. In this State it was first made an offense in 1811—the same year that stealing growing corn and some other crops was created a felony. If taking bank notes be a larceny in South Carolina, it must be by statute, and of that the courts here can take no notice without proof.

PER CURIAM. No error.

Cited: *Stokes v. Arey,* 53 N. C., 68; *Sparrow v. Maynard, ib.,* 196; *Harris v. Terry,* 98 N. C., 134.

(180)

STATE v. JAMES PATTON.

1. On the trial of an issue of bastardy, the examination of the woman being made by act of Assembly *prima facie* evidence, the defendant can only introduce evidence to show that *he is not guilty*. He cannot attack the credibility of the woman.
2. Nor can he even show, on the trial, that she was an incompetent witness at the time of her examination before the magistrates, as that she was a colored woman, or had previously been convicted of some infamous offense which disqualifies her from taking an oath.
3. If he wishes to avail himself of such defense, he must do so on a motion to quash the order of filiation, as being founded on incompetent evidence.
4. If the woman, after her examination, becomes incompetent, this subsequent disability will have no other effect than to exclude her from being a witness before the jury.

APPEAL from ORANGE Fall Term, 1844; *Pearson, J.*

This was a proceeding under the act relating to bastardy. The woman, Nancy Wicks, had been regularly examined on oath before two justices of the peace, and charged the defendant with being the father of her bastard child then lately born. On the return of this examination to the county court an issue was made up, on the application of the defendant, to try whether he was or was not the father of the child. From the verdict given on that issue in the county court an appeal was taken to the Superior Court. On the trial in the Superior Court the solicitor for the State offered in evidence the examination of the woman before the justices, and rested his case.

The defendant then introduced two witnesses to impeach the character of the mother, and, among other things to show that her oath was not true, they deposed to her having signed a paper-writing denying that the defendant was the father of her child.

The solicitor for the State then introduced the mother as a witness. She swore that the defendant was the father of her child; admitted that she had signed the paper-writing deposed to and (181) exhibited by the other witnesses, but swore that she was induced to sign, though knowing its contents to be untrue, through the threats of the defendant, as communicated to her by one of the last mentioned witnesses. These witnesses being again introduced, swore that no threats were used, but that she signed the paper freely and of her own accord.

Other testimony was offered on both sides which it is unnecessary to recapitulate.

The defendant's counsel contended that although by the act of 1814 the woman's oath was *prima facie* evidence, yet if from her contradictory statements, her admission in writing, her general character,

and the other circumstances the jury were not satisfied that the defendant was the father, they should find a verdict for him. Secondly, that if the jury were satisfied that the woman had willfully and corruptly sworn falsely on the trial in any particular, the rule of *falsus in uno falsus in omnibus* would apply and have the effect of so far invalidating and avoiding the effect of her examination before the magistrates as to entitle the defendant to a verdict.

The court charged that before the act of 1814 the oath of the woman was conclusive evidence as to the paternity of the child; that by that act the Legislature so far altered the law as to allow an issue to be made up, but provided that on the trial of the issue the examination, although not conclusive, should be *prima facie* evidence of the fact. The effect of this act is not to submit the issue as an open question of fact, and require the State to satisfy the jury that the defendant is the father, but to put the *onus* on the defendant and allow him to satisfy the jury that he is not the father—as, for instance, if he can show that the child is black, or that he was in a situation to have no access, as by being out of the country, when the child by the course of nature was begotten, or that he is impotent, or if he can show in any other way that he is not the father. So that if the evidence saitsfy the jury in this case that he is the father, or if the evidence leaves it uncertain whether he is or is not so, the State would be entitled to a
(182) verdict. And in determining the fact the jury should weigh the facts of her character, her admission that he was not the father, the defendant's being a young man not long married, and the other matters to which their attention had been called by the counsel on both sides, and the evidence offered. As to the second point, the court charged, in substance, that although the woman might have committed perjury on the trial, that only went to her credit, but did not avoid the effect given to her examination by the statute; that, indeed, if she were incompetent at the time of her examination, as by being a colored woman, or by having been disqualified from taking an oath by a conviction for an infamous offense, then the examination could not be read. The court further remarked that even supposing her credibility on the trial to have been weakened or destroyed, that did not show that he was not the father, but might aid in connection with other circumstances.

The jury under this charge of the court found a verdict for the State, and the usual order for a *procedendo* to the county court having been made, the defendant appealed to the Supreme Court.

(183) *Attorney-General and McRae for the State.*
Venable for defendant.

NASH, J. As we understand the charge of the presiding judge, we entirely agree with him. The defendant had been charged on oath by Nancy Wicks, a single woman, before two magistrates, with being the father of her bastard child. When the papers were returned to the county court the defendant demanded an issue to be made up, as by the act of Assembly he was entitled to do. Upon the trial the examination of Nancy Wicks was read to the jury. The defendant, in order to show he was not guilty of the charge, gave in evidence a paper-writing, drawn up by one Faucett and witnessed by one Crawford, in which Nancy Wicks acknowledged that the defendant was not the father of the child. Both Faucett and Crawford swore that the paper-writing was read over to the woman by each of them before she signed it, and Faucett swore no threats were used to induce Nancy Wicks to execute it. *She* was then examined on behalf of the State, and admitted that she had signed the paper, and that it had been read over to her by Faucett before she did so, but not by Crawford, who did not have the paper in his hand; and said she had signed it through terror of the threats of the defendant as told her by Faucett. In behalf of the defendant it has been urged here before us that, notwithstanding the act of 1814, if from the general character of Nancy Wicks—and it is shown not to be good—and the contradictions to her testimony on the trial, the jury were not satisfied the defendant was not the father of her child, he was entitled to an acquittal, and, secondly, that if the jury were satisfied that Nancy Wicks had sworn corruptly false on her examination before them, they were bound to acquit the defendant, upon the principle of *falsus in uno falsus in omnibus*, and that the court ought so to have instructed the jury. We do not (184) accede to either proposition. By the act of 1741, when a man was charged on oath by a woman, as directed therein, with being the father of her bastard child, and the county court had made the necessary orders, the defendant was absolutely bound to maintain the child, and no mode was provided whereby he might escape the odium or avoid the burden. The oath of the woman was made plenary proof. Any and every man, under the construction given to the act, was absolutely at the mercy of the most abandoned portion of the community. To avoid this manifest evil, the act of 1814 gives the putative father the right, upon the return of the proceedings to the county court, to demand that an issue shall be made up to try whether he be the father of such child; and the act provides that upon such trial the examination of the woman, taken on oath before the magistrates, shall be *prima facie* evidence against the person so accused. The object of that act was to give to the party accused an opportunity to show he was not the father—not to shift the burden of proof. The error on

the part of the defendant consists in not properly distinguishing between presumptive evidence, properly so called, and *prima facie* evidence. The former is defined to be that which does not directly prove the controverted fact itself, but how it is to be inferred from circumstances which usually or necessarily attend such fact. If the circumstances are such as may afford a fair and reasonable presumption of the fact to be tried, they are to be received and left to the consideration of the jury, to whom it belongs to determine upon their precise force and effect and whether they are sufficiently satisfactory and convincing to warrant them to find the fact in issue. It is, in truth, an act of reasoning on their part, 1 Phil. Ev., 155, 156, and the jury are not only at liberty, but it is their duty, to weigh the circumstances, and to determine how they stand in connection with the fact to be established. *Prima facie* evidence differs in this: it is such evidence as, in judgment of law, is sufficient to establish the fact in controversy; and, if not rebutted, remains sufficient for the purpose. The jury is
(185) bound to consider it, and in the absence of controlling evidence it becomes conclusive of the fact. *Kelly v. Jackson,* 6 Peters, 632; *Carver v. Jackson,* 4 Peters, 1. The act of 1814 makes the examination of the female, taken as the act directs, *prima facie* evidence of the fact in the controversy, to wit, the paternity of the child—not only such evidence as the jury are at liberty to obey, but which they are bound to obey, as a part of the law of the case before them. Such also, is the law with respect to the trading with slaves. If a slave is permitted to remain in a store, after night, for fifteen minutes with the door shut, or shall be seen after night to carry anything into a store for sale and not bring it out, it shall be presumptive evidence of an illicit trading. Rev. Stat., ch. 34, sec. 78.

Here the law has said these facts, when proven, shall be sufficient of themeslves to show a violation of the law, when unexplained. In each case the labor of showing innocence devolves upon the accused; nor does this violate the principle that every man is to be considered innocent of a criminal charge until the State has shown his guilt. The law has a right to prescribe what shall be sufficient to put the accused on his defense. In the case now before us the severity of the act of 1741 is mitigated by that of 1814. The Legislature has said the affidavit of the woman shall not, as formerly, be conclusive; the individual may, if he can, show that *he is not guilty;* but evidence less than this shall not prevail to set aside her oath. If, therefore, only doubt is excited by the evidence for the defense, the evidence of the affidavit must prevail. The defendant has not done what he undertook to do, that is, shown that he is not guilty. The act of 1814 did not intend so far to alter the provisions of that of 1741 as to shift the labor from the defendant

to the State. This view is strongly confirmed by that portion of the act which compels the defendant to pay the costs of the trial of the issue, wheher he is successful or not. It cannot, therefore, be sufficient for the defendant to show that at the time the accusation was made, or at the time of the trial, the woman was of bad character. The lawmakers knew the instances would be few, if any, in which that would be the case.

Nor do we see that the second objection can avail the defend- (186) ant. We understand his Honor as instructing the jury that if they were satisfied Nancy Wicks, upon her examination before them, had sworn corruptly false, it would in this case go only to her credibility, and if she were set aside, it would not, of itself, invalidate the examination taken before the magistrate. The question would still remain for them to answer, Has the defendant shown to their satisfaction he was not the father of the child? That was the issue he had undertaken to establish. In this opinion we concur. If at the time she made her affidavit she was an incompetent witness against the defendant, as if she was a colored person, or had before then been convicted of perjury, the defendant might have the order of filiation quashed, as being founded on incompetent evidence. But upon an issue that question cannot arise, and the examination would be evidence by force of the act. But if at the time she was examined before the magistrates she was competent, a subsequent disability, as by a conviction of perjury, would have no other effect than to exclude her from being a witness before the jury. The examination before the magistrates would still remain and be legal evidence of the alleged charge.

His Honor winds up his charge by again succinctly bringing before the jury the issue they had to try. After enumerating the several modes by which the defendant could show positively his innocence, he observes that if in any other way he had shown *he was not* the father of the child, they ought to find the issue for him; but if from the evidence they were satisfied he was the father, or if the evidence produced by him left the question in doubt, they were bound to find the issue against him. We think the charge placed the question fairly and fully before the jury.

PER CURIAM. No error.

Cited: *S. v. Lee,* 29 N. C., 268; *S. v. Long,* 31 N. C., 490; *S. v. Goode,* 32 N. C., 50, 52, 54; *S. v. Floyd,* 35 N. C., 383, 385; *Clark v. R. R.,* 60 N. C., 112; *S. v. Britt,* 78 N. C., 440; *S. v. McDonald,* 152 N. C., 807.

(187)

BYRD MOORE v. LITTLETON A. GWYNN.

1. What is the law of another State (not contained in a statute) is, like the law of foreign countries, a matter of fact to be tried by the jury, and cannot be determined by the court.
2. Where a case arises under a statute of a sister State, the statute being properly authenticated under the act of Congress or proved under our act of Assembly, it is the province of the court to decide both upon the existence of the statute and its proper construction.
3. So where the plea of *nul tiel record* is pleaded to a judgment or other proceeding in a court of record in another State, from necessity the court to whom it is exhibited decides not only upon the legal existence of the supposed record, but upon its effect.

APPEAL from CASWELL, Fall Term, 1844; *Pearson, J.*

This case was before this Court at the last term, *Moore v. Gwynn,* 26 N. C., 275, upon a motion for a new trial because the judge then presiding had improperly rejected the testimony of Mrs. Gwynn, the widow of the deceased. She had been introduced to testify as to conversations between herself and her father, the present plaintiff, relative to the negroes, before they were sent to her husband. No objections were made either here or in the Superior Court as to the propriety of the charge given to the jury, and the attention of this Court was confined to the rejected testimony. In the opinion expressed as to that point this Court believed there was error. A new trial was directed, and the case is now sent up upon exceptions to the charge delivered on the last trial. The action is detinue, and brought to recover several slaves. The defense, that on the marriage of defendant's intestate with the daughter of the plaintiff he had given to the defendant the negroes in question; that this took place in the State of Virginia, where the parties then all

(188) lived, and that the defendant had been five years in the possession of the slaves, one year in Virginia and the remainder of the time in this State. There was no proof of any express gift; but it was shown that shortly after the marriage the negroes were sent by the plaintiff to the intestate, and remained in his possession to the time of his death. No more of the facts of the case are stated than are necessary to bring into view the relevancy of the instructions given, and which are complained of. The charge of the judge stated, "that as this matter had taken place in Virginia, it was to be decided by the laws of that State. It was admitted that a parol gift of slaves was valid in Virginia, if the donee took and remained in possession. But the question of law contested was whether by the law of Virginia the presumption is that it was a gift or a loan. If the *law* presumed a gift, then the burden of showing it was a loan rested upon the supposed donor. If the *law* presumed it a loan, then the burden of showing it was a gift rested upon the sup-

posed donee." The court further charged, "that the jury was to be instructed by the court what the law of Virginia was; that by the law of Virginia, when, soon after a marriage, a father sends negroes to a son-in-law, the presumption is that it was a loan."

Under the charge of the court the jury found a verdict for the plaintiff, and judgment being rendered accordingly, the defendant appealed.

Kerr for plaintiff. (189)
Morehead for defendant.

NASH, J. Our only inquiry is as to the legal correctness of the charge. Was his Honor correct in stating to the jury that they were to be instructed by the court what the law of Virginia was, and in stating to them what was that law? In other words, was it a question of law for the decision of the court, or one of fact for the determination of the jury? We think that his Honor erred, and that it ought to have been left to the jury as a question of fact. The case does (190) not arise under any statute of Virginia, but under the common law of that State. And we are scarcely at liberty at this day to consider the question as an open one. Repeated decisions of this Court have settled it. In *Knight v. Wall* 19 N. C., 129, the Court say: "The *court* in this State do not know the law of other States, and a controversy respecting that law is ordinarily one of fact, which must be decided on evidence by the jury, under the instruction of the court. The only exception we are aware of is to be found when the plea of *nul tiel record* is pleaded to a judgment or other proceeding in a court of record in another State, where from the necessity of the case the court to whom it is exhibited must pass not only on the legal existence of the supposed record, but upon its effect." Here, then, is an express adjudication establishing the law governing this case, and the cases referred to fully sustain it. *S. v. Jackson,* 13 N. C., 563, and *Carter v. Wilson,* 18 N. C., 364. In the first it is decided that the *existence* of a foreign law is a fact. The court cannot judicially know it, and, therefore, it must be proved, and the proof, like all other, necessarily goes to the jury. What was the law of Virginia in this case, the existence of which was to be proved? The statute, which was read in evidence, speaks of gifts and loans, so far as the rights of creditors are concerned—in other words, a statute of frauds; it makes no regulations whatever as to the rights of the donor and donee, of the bailor or bailee, as between themselves. It is entirely silent as to any presumptions arising from the possession of the son-in-law. What was the presumption of law arising from such a possession was the question governing the case—in fact, the law of the case. The first thing to be done was to prove the *existence* of the law, and, according to the opinion in *S. v. Jackson,* it was a question of fact

to be decided by the jury. How was it to be done? In this case by the testimony taken, and that consisted of the opinions of three gentlemen learned in the laws of that State. In one of these opinions it was (191) stated that from such a possession of a son-in-law a gift was presumed; and in another, that from such a possession a loan was presumed; and the third, that no presumption arose of either kind, but that it was a matter of fact to be determined by the jury, in view of all the circumstances attending the possession in each case. Here, then, was a conflict of testimony upon the point in controversy, the existence of the law in Virginia—not contained in any statute or record, but to be found, if at all, in the common law of that State. The existence of such a law could be proved only by the opinions of persons learned in that law. Instead of leaving that testimony to the jury to be weighed by them, and directing their attention to the circumstances attending the possession of the intestate, the presiding judge, considering it a question of law for the court, decides it himself, and informs them that by the law of Virginia such a possession by a son-in-law is presumed to be a gift. In so charging the jury we think his Honor erred.

We do not mean to say that when a case arises under a statute of a sister State it is not the province of the court to decide both the existence of the statute and its proper construction. In such a case, the statute being authenticated in the manner pointed out by the Constitution of the United States and the act of Congress, both the fact of its existence and its proper construction is matter for the court. So, also, when the existence of such a statute is proved in the manner directed by the act of our Assembly, to the satisfaction of the jury, its exposition belongs to the court as entirely, in both the last cases, as if it were a statute of our own State. To the cases already cited from our own Reports as sustaining the view we have taken of the question involved in this case may be added *Brockett v. Norton,* 4 Conn., 517, and *Thrasher v. Gill,* 3 Gill and Johnson, 234, 242.

PER CURIAM. *Venire de novo.*

Cited: Hooper v. Moore, 50 N. C., 134, 136; *Hilliard v. Outlaw,* 92 N. C., 269; *S. v. Behrman,* 114 N. C., 808; *Lassiter v. R. R.,* 136 N. C., 98; *Hall v. R. R.,* 146 N. C., 351; *Carriage Co. v. Dowd,* 155 N. C., 317.

(192)

ELI BARHAM v. JOHN MASSEY.

1. An execution under which an officer takes actual possession of the personal property levied on has precedence over one previously levied on the same property, but under which no actual possession has been taken and retained by the officer levying it.
2. Where a slave belongs to one for life, and to another in remainder, and an execution was against both, but the remainderman, prior to the lien of the execution, had conveyed his interest in the slave to a trustee to sell for the payment of debts: *Held*, that only the interest of the tenant for life was subject to the execution, the remainderman having parted with his legal estate, and having no such certain resulting trust as was liable to execution.
3. And although in the same deed of trust a tract of land was conveyed for the same purposes, and the debts were all satisfied by the sale of this land, after the institution of an action for the slave founded on the levy, yet this did not enlarge the interest in the slave which was obtained by the levy.
4. Where an action of replevin is brought to recover possession of a slave, in which an estate for the life of another is claimed, and the tenant for life dies pending the action, the plaintiff is only entitled to recover the value of the life estate and damages for the detention.

APPEAL from ROCKINGHAM, Fall Term, 1844; *Pearson, J.*

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

Morehead for plaintiff.
Kerr for defendant.

DANIEL, J. This is an action of replevin (under the act of Assembly, Rev. Stat., ch. 101) to recover a slave named Lindsey, and damages for his detention. The defendant avowed that he had title. The said slave had belonged to Elizabeth Lanier for her life, remainder to her son Andrew J. Lanier. The plaintiff was a constable, and had in his hands several justices' executions to an amount exceeding the value of the slave; some of them against Elizabeth Lanier and Andrew J. Lanier and some against A. J. Lanier alone. By virtue of these (193) executions he, on 11 May, 1842, levied on the slave Lindsey, and took him into his actual possession, and kept him there until the day of sale (27 June, 1842), when the defendant seized him and carried him away from the plaintiff's possession. The defendant was also a constable, and had in his hands justices' executions against the very same defendants (E. L. and A. J. L.), under which executions he, on 15 April, 1842, had levied on the said slave Lindsey; but he did not remove him, but left him in the possession of the defendants in those executions.

Andrew J. Lanier, who owned the remainder in the slave, on 1 March, 1842, executed a deed to one King for the slave and a tract of land, in trust to secure one Reed a debt for $700; Reed, on 24 May, 1842, assigned all his interest in the deed in trust to Hill and Lomax, two creditors of the Laniers, in consideration they would pay him his debt. In September, 1842, King sold the land mentioned in the deed of trust, and out of the purchase money he satisfied all the debts covered by the deed in trust. Elizabeth Lanier, the tenant for life of the slave, died pending this action.

The judge was of opinion, *first*, that the levies made by the plaintiff under the executions in his hands had priority to those levies made by the defendant under the executions in his hands, although they in fact were first made, because the property levied on by the defendant was left by him in the possession of the debtors in the said executions.

Secondly, the judge thought that the plaintiff, by force of the said executions in his hands, and the levies under them, obtained only the title or special property in the slave which the tenant for life had, as at the time of the levy the remainderman had neither a legal nor equitable interest in the slave subject to the said executions. The deed to King carried the legal estate in remainder, and it was dated before the levies were made by the plaintiff. And the fact of the trusts in the deed being subsequently satisfied by the trustee selling the land (194) (to wit, in September, 1842, and after this suit brought) did not enlarge the plaintiff's interest in the slave which he obtained by the levy. The trusts in the deed to King being complicated, there was no resulting trust in A. J. L. of the slave, at the date of the levies, upon which they could attach under our act of 1812.

Thirdly, the judge charged that the plaintiff's title to the slave was coextensive only to that of the tenant for life, Mrs. Lanier; and as she had died before the trial, he was now entitled to recover, not the possession of the slave, but the value of the life estate, and damages for the detention. If he had brought trover, or trespass, which he might have done (Watson on Sher., 191), the damages must have been only for the value of the life estate and interest; and if he had brought detinue, he could not have recovered the slave, as Mrs. Lanier died before the trial. The plaintiff had a verdict and judgment according to the charge of the judge, and we do not see any error in it.

PER CURIAM. No error.

Cited: Anderson v. Doak, 32 N. C., 297; *Woodley v. Gilliam*, 67 N. C., 240; *Penland v. Leatherwood*, 101 N. C., 515.

JESSE COX, ADMINISTRATOR, ETC., *v.* JOHN R. BROWN, ADMINISTRATOR, ETC.

1. Where a widow files a petition for a year's provision under the statute, and dies before any allotment is made, the administrator has no right to revive the petition, but it is abated.
2. Nor have the children any right to claim any allotment of a year's provision. This right is only given to the widow, and expires by her death before a final decree for the allotment.

APPEAL from RANDOLPH, Fall Term, 1844; *Pearson, J.*

Petition of Losada Elliott, widow of John Elliott, deceased, for a year's allowance. Upon the trial it appeared that she filed (195) her petition at February Term, 1843, of Randolph County Court, at which term the court appointed a justice of the peace and three freeholders to lay off and allot to her one year's support out of her husband's personal estate; that in a few days after the filing of the petition she died, and after her death, to wit, on 8 April, 1843, the justice and freeholders proceeded to view the estate of John Elliott, deceased, and, there being no crop, stock, or provisions on hand, they assessed, "for the provision of the children of the deceased," $175, and reported their proceedings to the next county court, May Term, 1843; at which time Jesse Cox, administrator of the estate of Losada Elliott, came into court and by leave of the court, made himself party plaintiff to the proceedings, and moved that the said report be confirmed, which motion was opposed on behalf of certain creditors of the said John Elliott, to wit, Isaac White and others. The court refused to confirm the report, from which judgment the plaintiff appealed; and the case coming on to be heard before the Superior Court, his Honor declared that the county court erred in refusing to confirm the said report, and ordered that the said report be in all things confirmed; from which judgment, under leave of the court, Isaac White, one of the creditors of John Elliott, deceased, appealed to the Supreme Court, it being made appear to the satisfaction of the court that the said White had indemnified the administrator of John Elliott against the costs of the appeal and had given bond, etc.

No counsel for either party.

DANIEL, J. The plaintiff's intestate was the widow of the defendant's intestate, John Elliott, of the county of Randolph. After the interlocutory order had been made on her petition, appointing commissioners to allot to her a year's allowance, she died before the allotment was made by them. We think that her administrator had no right to revive and prosecute the said petition. The Legislature cer- (196) tainly did not intend that the year's allowance out of the stock,

crop, and provisions of the intestate's husband should be assets for any purpose in the hands of *her* administrator. The intention was, as appears by the preamble to the first act on the subject (that of 1796), to provide subsistence to the *widow herself* and her family. The second section of the said act declares that the allotment to be made by the commissioners is to be the *support* of the widow and her family for the space of one year. The third section declares that such allotment then made shall vest in the widow an absolute right therein, to her own use and the use of her children. But it seems to us that if she be dead before the commissioners make the allotment, the necessity for it would of course cease, as her house and her table only, whilst she was alive were intended by the Legislature to be supported for one year out of the assets of her husband. She, alone, can sue for the allotment. The children are not authorized to sue for any allotment. They were not intended to participate in the allotment in any other way than as members of the widow's family whilst she was alive. The children, therefore, must stand upon the same footing as the infant children of an intestate father who leaves no widow, in which case the children certainly have no year's allowance. It seems to us that the petition and proceedings under it were abated by the death of the widow, before a final judgment was rendered. The judgment rendered in the Superior Court must, therefore, be reversed, and the judgment rendered in the county court must be affirmed.

PER CURIAM. Reversed.

Cited: Kimball v. Deming, post, 419; *Dunn ex parte,* 63 N. C., 138; *Moore ex parte,* 64 N. C., 92; *Simpson v. Cureton,* 97 N. C., 116.

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(197)

DEN ON DEMISE OF FREDERIC SMITH v. JOHN LOW.

The return or certificate of a ministerial officer as to what he has done out of court is only to be taken as *prima facie* true, and is not conclusive; it may be contradicted by any evidence and shown to be false, antedated, etc.

APPEAL from GUILFORD, Fall Term, 1844; *Pearson, J.*

Ejectment. The lessor of the plaintiff claimed under a justice's execution, returned to May Term, 1839, with a levy indorsed as having been made on 3 May, 1839. The case was continued to the next August term. The notice required by law was given and returned to August Term, 1839, and the order of sale was entered at November Term, 1839, under which the sheriff sold the land.

The defendant claimed under a deed of trust executed on 18 May, and registered on 20 May, 1839, which was the Monday of May term of the county court. The defendant offered to prove that, in fact, the levy was not made on 3 May, as returned by the officer, but was made on 21 May, being Tuesday of May term, and was then indorsed by the officer, and antedated. The plaintiff's counsel objected to the evidence, insisting that the time of the levy was a matter of record. The court admitted the evidence. The jury having returned a verdict in favor of the defendant, and judgment being rendered pursuant thereto, the plaintiff appealed to the Supreme Court.

J. H. Bryan for plaintiff.
J. T. Morehead for defendant.

DANIEL, J. We are of opinion that the decision of the judge was right. The records of a court, professing to state the judicial transactions of the said court itself, cannot be contradicted by parol evidence or any other proof, for they import verity in themselves. But the acts and doings out of court of a ministerial officer, as the clerk in issuing writs, constables and sheriffs in making returns on warrants, writs, etc., although required by law to be returned into a court of record, are only *prima facie* to be taken as true, and are not conclusive evidence of the truth of the things they write; they may be contradicted by any evidence, and shown to be false, antedated, etc.

PER CURIAM. No error.

Cited: Patterson v. Britt, 33 N. C., 390; *Simpson v. Hiatt,* 35 N. C., 472; *Walters v. Moore,* 90 N. C., 47; *Curlee v. Smith,* 91 N. C., 179; *Forbes v. Wiggins,* 112 N. C., 125.

(199)

STATE v. JOHN W. WOODFIN.

1. There can be no revision, either by appeal or *certiorari*, of the judgment of of a court of record for imposing a punishment for a contempt of the court declared by the record to have been committed in open court.
2. The power to commit or fine for a contempt is essential to the existence of every court, and must necessarily be exercised in a summary manner.
3. The punishment for a contempt, and a conviction on an indictment for the same act, when a crime, are *diverso intuitu*, and will stand together.

APPEAL from YANCEY, Fall Term, 1844; *Battle, J.*

The defendant and another were fined by the county court of Yancey for a contempt of the court "by fighting in the yard of the courthouse,

before the courthouse door, and in the presence of the court." The defendant appealed to the Superior Court, where it was agreed by the solicitor for the State that the case should be presented to the court as upon a *certiorari*; and on the motion of the solicitor to dismiss the case, on the ground that the matter was wholly in the discretion of the county court, and not subject to the supervision of the Superior Court, the defendant's counsel contended that, although the *quantum* of punishment for contempt may be a matter entirely in the discretion of the county court, yet, whether the act of the defendant was a contempt or not might be inquired of by a court of appellate jurisdiction. It was further proposed to be shown to the court that the act complained of was not done either in the presence or hearing of the court below, and that for the said act the defendant had been indicted and punished in the Superior Court.

The court was of opinion with the solicitor, and ordered the case to be dismissed, from which judgment the defendant appealed to the Supreme Court.

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

RUFFIN, C. J. The power to commit or fine for contempt is essential to the existence of every court. Business cannot be conducted unless the court can suppress disturbances, and the only means of doing that is by immediate punishment. A breach of the peace *in facie curiae* is a direct disturbance and a palpable contempt of the authority of the court. It is a case that does not admit of delay, and the court would be without dignity that did not punish it promptly and without trial. Necessarily there can be no inquiry *de novo* in another court as to the truth of the fact. There is no mode provided for conducting such an inquiry. There is no prosecution, no plea, nor issue upon which there can be a trial. Indeed, the person is conclusively fixed with the act, for the record declares it to have been done in court, and the record is entitled to as much faith in that statement as it is as to any other matter appearing by the record to have been transacted by or before the court. It makes it as certain, judicially speaking, that this person and another fought in the presence of the court as that the court fined them therefor; and the fact cannot be controverted.

S. v. Yancy, 4 N. C., 133, establishes that punishment for a contempt, and a conviction on an indictment for the same act, when a crime, *diverso intuitu*, and will stand together. Besides, the fine for the contempt was here the first laid, and, therefore, could not be affected by the subsequent proceeding by indictment.

Admitting, then, that this writ of *certiorari* would lie in any case of the kind, it was properly refused in this.

PER CURIAM. Affirmed.

Cited: S. v. Mott, 49 N. C., 450; *Robins ex parte,* 63 N. C., 312; *Baker v. Cordon,* 86 N. C., 120; *In re Deaton,* 105 N. C., 61, 64; *In re Briggs,* 135 N. C., 129; *Ex parte McCown,* 139 N. C., 104.

(201)

THE STATE v. ALFRED HOOPER ET AL.

A marriage between a colored and a white person, contracted in 1842, was void by force of the statute passed in 1830. Though this latter statute was repealed by the Revised Statute, passed in 1836, ch. 1, sec. 2, repealing all previous statutes, yet that statute provided that such repeal should not affect rights or actions, crimes, or prosecutions arising before the repeal.

APPEAL from RUTHERFORD, Spring Term, 1842; *Bailey, J.*

The defendants were tried in May, 1842, on an indictment for adultery; and their defense was that they were man and wife. The jury found a special verdict that the defendant Hooper is a free man of color, and the defendant Suttles, a white woman, and that they intermarried with each other in this State about ten years before that time, and had, from the time of their said marriage up to the time of the indictment found, lived together and cohabited as man and wife in the county of Rutherford; and the jury referred to the court to determine whether the marriage was valid or void—in the former case finding the defendants not guilty, and in the latter finding them guilty. The court held that as the marriage was before the act of 1838, ch. 24, which prohibits marriages between colored and white persons, the marriage between these parties was not unlawful, and, therefore, gave judgment for the defendants, from which the solicitor for the State appealed to the Supreme Court.

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

RUFFIN, C. J. His Honor overlooked the previous statute of 1830, ch. 4, which makes it unlawful for a free negro to marry a white person and declares the marriage void. The oversight probably arose from the circumstances that the act of 1830 was not reënacted among the

(202) Revised Statutes of 1836. Its omission induced and rendered necessary the act of 1838 to the same effect, as by Revised Statute, ch. 1, sec. 2, all prior statutes were repealed. But the same act declares such repeal should not affect rights or actions, crimes or prosecutions arising before the repeal; and, therefore, the marriage between these persons which was celebrated while the act of 1830 was in force is void. We say the marriage took place while that act was in force because the act went into operation on 3 February, 1831, and the trial was in May, 1842, and the verdict finds the marriage to have been "about ten years before trial"; that is to say, in May, 1842, being a year and three months after the act was in force. There ought, therefore, to have been judgment for the State on the special verdict.

PER CURIAM. Reversed.

(203)

THE STATE ON THE RELATION OF JOHN HUGHES v. G. H. KING ET ALS.

1. A court of record may amend its records at any time *nunc pro tunc*.
2. It must appear upon the records of every county court that at least three justices were present to hold the court, as a less number are not competent to constitute a court.
3. If it appear that three justices opened the court, it will be intended that they continued to hold it notwithstanding the adjournment, unless others be specially named as being present on subsequent days.
4. A certificate from a clerk of a county court simply stating that "A. B. came into court and qualified as constable," etc., "having been duly elected by the people," etc., without setting forth whether there were three or more justices on the bench on that or any preceding day, cannot be received as a transcript of the record of the court, because it does not appear that there were justices enough to constitute a court, and, therefore, having no authority to make or cause to be made a record of the court.

APPEAL from CHEROKEE, Spring Term, 1844; *Settle, J.*

Debt on a bond given by Harrison King as a constable in Cherokee County, and by the defendants as his sureties. It is in the penalty of $4,000, with the usual condition for the performance of his duties as constable, and bears date 14 January, 1840. The breaches assigned were the failure of King to collect certain claims placed in his hands by the relator, and applying the same to his own use. The pleas were *non est factum* and conditions not broken. The execution of the instrument was proved by the subscribing witness, who stated that it was given in the county court when King was admitted into the office of constable. To show that King had been duly elected and admit-

ted, and, so, the bond duly taken, the plaintiff read in evidence (204) a paper purporting to be a transcript of a minute from the records of the county court at January Term, 1840, of the tenor following: "Harrison King comes into court and enters into bond according to law, and gives for sureties, J. W. King (and the other defendants), and is sworn in; it appearing to the court that said King was duly elected constable according to law." It was objected by the other defendants that the said minute had been altered, and it was admitted by the counsel for the plaintiff that the words, "it appearing to the court that the said King was duly elected constable according to law," had been added as an amendment by order of the county court sitting on the day previous to this trial. It did not appear upon the said record what justices or what number of them were holding the court when the said King was admitted and gave the said bond, or during that day. The entries being, "The court met according to adjournment," and then follows the above minute.

It was thereupon insisted for the defendants that the court had no power to alter the record, and that without such alteration it did not appear that King was duly elected; secondly, that it did not appear that King was sworn in as a constable; and, lastly, that the whole proceeding was void, because the transcript does not mention by whom the court in question was held nor show a sufficient number of justices present. But his Honor held the objections insufficient, and there was a verdict for the plaintiff and judgment, and the defendants appealed.

No counsel for either party.

RUFFIN, C. J. This Court has so frequently had occasion to declare that the power resides in every court to amend the entry on its minutes or the record of its orders and judgments *nunc pro tunc,* and that no other court could incidentally question the verity of the record as amended, that we supposed the point would be no more made. We must take the record as it is, because duly certified to us, and we are not at liberty to inquire how it came to be as it is.

We think it does sufficiently appear upon the minutes and bond taken together that King was elected, admitted, and sworn (205) into office as constable. *S. v. Fullenwider,* 26 N. C., 364, shows that the entry, "it appearing to the court that said King was duly elected according to law," must be understood to mean that he had been elected by the legal popular vote; and it is necessarily to be inferred that he was sworn into the office of constable to which he had been thus elected.

We believe, however, that the remaining objection, as the case now appears, ought to have been sustained for the plaintiff's reliance is

placed, on this point, on the act of the last session of the Assembly, 1844, ch. 38, which enacts that all bonds which have been taken by any court from one admitted into the office of constable shall be good; and it is supposed that thereby the objection to the sufficiency of the delivery or acceptance to the bond is removed. Upon that ground we would willingly support this bond, if we could; as may be seen from our judgment in *S. v. Pool, ante,* 105. But the question still remains whether this bond was "taken by any court" as required by the act of 1844. We think it does not so appear from the record that was read in evidence, because it does not set forth that the court was held by three persons or more who were justices. In *Ludlow's case,* Cro. Eliz., 738, a presentment in the quarter sessions was *quashed* upon *certiorari* because it did not state the justices before whom it was taken. It would seem that every record must set forth before what person or persons the proceedings were had and by whose authority that record was made. Sergeant Hawkins Cr. L. B. 2, ch. 255, sec. 23, states that it seems generally agreed that if the caption of an indictment at a session of the peace do not mention before whom it was holden, or if it set it forth generally as holden before justices of the peace without naming them, it is insufficient; and for that he cites *Ludlow's case* and several other adjudications which, we find, fully support him. The objection, when taken in *S. v. Lewis,* 10 N. C., 410, and *S. v. Kimbrough,* 13 N. C., 431, was overruled, not because it was deemed untenable in law, but be-
(206) cause it was untrue in point of fact. There the records showed that the court was held by a gentleman whom this Court knew *ex officio* to be a judge of the Superior Courts of Law, being the courts of the highest criminal jurisdiction in the State. Therefore, the Court held that the record was sufficient in stating his presence, without setting forth his office. But it is plain it was thought necessary that it should be, at least, stated that the court was held by one that was a judge of the court, although it need not set out that he was such judge, as that was otherwise sufficiently known. Now, by law, three justices of the county court at least are requisite to constitute a court, Rev. Stat., ch. 31, sec. 5; and, therefore, it must appear by the record they keep of their proceedings that such number was present. If it be said that here the record purports to be the memorial of the acts of Cherokee *County Court,* and that, as three justices are necessary to form a *court,* the implication is a fair if not a necessary one that such court was held by three justices, the answer is that still it must appear that there were three justices, in order that we may see that the record was really made up under the authority of those who were competent to make it or have it made. It is arguing in a circle when it is said there were three justices because the record says it is the record of *the court;* for

it must first be seen who made the record before we can tell whether it be the record of the court or not. We, therefore, think the judgment erroneous, and that it must be reversed. We, however, give this judgment very reluctantly, because we are almost sure that enough does, in fact, appear on the record of the county court to sustain the proceeding in that court. The case sent here confines the statement of the record to the entries *on the day on which King qualified,* as if that were conclusive on the point. But it is not. The court is but one court, from beginning to end, and the term but the first day, though actually lasting through several; and the adjournments are nothing in this respect, whether stated or admitted of record, *S. v. Martin,* 24 N. C., 101; and so, also, in the period of doing any act in the term, unless the law requires it to be done at a particular time; and the number (207) of justices present beyond three is immaterial, unless a certain number be requisite on special occasions. *Foster v. Deans,* 11 N. C., 299. We have never known the clerks of the county courts so extremely ignorant or negligent as not to set forth, at least the names of the justices before whom the court was begun for the term; and we have but little doubt that as much as that appears on the minutes of the term in question. If so, that would have done, for by intendment of law, for the purpose of sustaining any act appearing to have been done during the term, those persons held the court until it appear that others sat with them or took their place; and in making up the record in each case it may with propriety be stated that the court was held before them. However, that is matter for the next trial, when it will be seen how the fact in that respect is.

PER CURIAM. *Venire de novo.*

Cited: Jones v. Lewis, 30 N. C., 72; *S. v. George, ibid.,* 329; *S. v. Ward, ibid.,* 531; *S. v. Corpening,* 32 N. C., 60; *Freeman v. Morris,* 44 N. C., 289; *Link v. Brooks,* 61 N. C., 500; *Leak v. Com'rs,* 64 N. C., 135; *Com'rs v. Blackburn,* 68 N. C., 408; *S. v. Davis,* 80 N. C., 389; *S. v. Swepson,* 83 N. C., 589; *S. v. Swepson,* 84 N. C., 828; *S. v. Butts,* 91 N. C., 525; *S. v. Warren,* 95 N. C., 676; *S. v. Harrison,* 104 N. C., 731.

STATE v. MARK D. ARMFIELD ET AL.

1. In an indictment for a forcible trespass for taking away goods it is not absolutely requisite to use the words "against his will." It is sufficient to use words which necessarily convey the same meaning.
2. To constitute a forcible trespass it is not necessary that actual force be used. Acts which *tend* to a breach of the peace may amount to it.

3. Where three persons took away a slave from another, an old and feeble man, in his presence and against his will, and he was restrained from insisting on his rights by a conviction that it would be useless, and for want of physical power to enforce them: *Held*, that this was a forcible trespass for which the party was liable to indictment.

APPEAL from DAVIE, Fall Term, 1844; *Manly, J.*

(208) Defendants were tried upon the following indictment, to wit:

The jurors for the State upon their oath present, that Mark D. Armfield, Martin Booe, and William H. Martin, all late of the said county, laborers, on the 8th day of August, in the year aforesaid, with force and arms and with a strong hand in said county, from and out of the possession of one John Myers, a certain negro man named Baal, unlawfully, forcibly, violently, and with a strong hand did take and carry away, he, the said John Myers, then and there being personally present and forbidding the same, against the peace and dignity of the State.

The facts proven on the trial were that John Myers had been in the peaceable possession of the negro slave Baal for seven years; that on 20 March, 1843, the three defendants went to the dwelling-house of John Myers, after dark, and asked permission to stay all night; Myers consented that they should do so, and ordered the slave Baal to take their horses and put them in the stable; the defendants went to accompany the slave; a few minutes afterwards the slave was heard to cry out as if in distress— that Myers, with one Henry Armsworthy, his stepson, who was there by accident, immediately set out in the direction of the noise; Armsworth first came up with the party, Myers being very old and a cripple; shortly afterwards Myers came up to them also, when they found Baal tied and in custody of the three, about an hundred yards from the house. They both demanded to know what the meaning of this conduct was. Either Booe or Armfield said they had a process against Baal for stealing, and they meant to take him to a neighboring blacksmith's shop for trial. Both Myers and Armsworthy demanded to see their process, but they refused to show it; they both then demanded the liberation of the negro, which was refused; the defendants then went off with the negro, and Armsworthy, at the instance of Myers, went along to see what they were going to do. Before they got to the
(209) place mentioned for the trial, Martin told Armsworthy that they had no process against Baal; that this was all a sham. Armsworthy then again demanded the negro from Martin, and was again refused; Booe and Armfield were at this time a little in advance of the other two, and not within hearing; Booe and Armfield had shortly before this told Armsworthy that they did not mean to stop at the black-

smith's shop. Myers was very old and infirm, and Armsworthy was also weak from bad health; Myers had no other assistance. The defendants, on the other hand, were strong and abled-bodied young men. It was also proven that the defendants had no process against Baal.

The court, after explaining to the jury in general terms the doctrine of indictable trespasses (to which there was no objection), proceeded to say that it was not a necessary constituent of such an offense that the individual whose rights were violated should oppose the seizure or taking away of his property by force, provided he were overawed and prevented from doing so by a superior force and a disinclination to engage in a breach of the peace; nor was it necessary that he should in express language *forbid* the trespassers, provided the jury be of opinion that it was against his will; that wherever property is taken by a superior force from the presence of one who is in peaceable possession, and contrary to the will of the possessor, the offense is consummated. The court, going on further to instruct the jury, called their attention to the state of facts when the old man Myers came up to the parties and told them that, as neither of the defendants was a known officer of the law, the prosecutor Myers had a right to see their warrant for the arrest of his slave, and was not bound to submit without its being shown; and if he were restrained from insisting on his rights by a conviction that it would be useless, and a want of physical force to maintain them, and the defendants carried off the slave under the circumstances in proof, from his presence and against his will, they would be guilty. The defendants' counsel asked the court to instruct the jury that if Myers was deceived by the representations of the defendants and assented to the taking away of the slave under the impression that they had a valid process against him, they would not be guilty. The court (210) told the jury that every citizen was presumed to understand his legal rights, and it should be assumed by them for granted that Myers knew he had a right to see their process; and if, in connection with this presumption, they found upon the evidence sufficient to justify them in the conclusion that he consented to waive his rights, and was willing that the negro should go with them, they ought to acquit the defendants; if the case was otherwise, however, and according to the hypothesis already presented, they ought to convict them.

The jury found the defendants guilty. The defendants then moved, in arrest of judgment, that the indictment did not charge that the taking was *against the will* of the prosecutor. This motion was overruled, and judgment having been rendered against the defendants, they appealed.

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

DANIEL, J. *First*, the defendants moved in arrest of judgment because the indictment did not charge that the taking of the slave was against *the will* of the prosecutor. It is true that the indictment must contain an averment of some greater force being used by the defendants than is expressed by the ordinary words *vi et armis*. But we think that the averments made in this indictment, that the defendants took the slave unlawfully, forcibly, and resolutely, and with a strong hand from and out of the possession of the prosecutor (he, the said John Myers, then and there being personally present and forbidding the same), are sufficient averments that the taking was against the *will* of the prosecutor, without stating *in totidem verbis* "that it was against his will." *S. v. Mills*, 13 N. C., 420.

Secondly, we are not able to see that the charge of the judge to the jury was erroneous. The prosecutor was not compelled to prove that the defendants used actual force before they could be guilty of the
(211) offense charged; for if the acts of the defendants in the taking of the slave *tended* to a breach of the peace, they were as much guilty of a forcible trespass as if an actual breach of the peace had taken place. We know the law to be that where a person enters on land in the possession of another, and then, either by his behavior or speech, gives those who are in possession just cause of fear that he will do them some bodily harm if they do not give way to him, his entry is considered forcible, and, therefore, indictable. *S. v. Pollok*, 26 N. C., 305. In *S. v. Fisher*, 12 N. C., 504, it was held that the number of actors (three) by whom the prosecutor was overawed and prevented from resisting made their acts an indictable trespass; and that the civility with which they apparently demeaned themselves, while in truth they intended at all events to take by force, if necessary, the proprty from the possessor, would not diminish their guilt, since acts of extreme violence, as robberies and burglaries, are often committed under civil appearances or fraudulent pretenses. The defendants here take possession of the slave in the manner mentioned in the case; the prosecutor (an old enfeebled man) demanded of the defendants that the slave should be given up to him, which they refused to do, and carried him away by means of their superior force. The judge told the jury that if Myers was restrained from insisting on his rights by a conviction that it would be useless, and from a want of physical power to enforce them, and if the defendants carried the slave away from his presence and against his will, they should find the defendants guilty. We think that the charge was correct; the prosecutor must have had a just ground for fear. The judgment must be affirmed.

PER CURIAM. No error.

Cited: *S. v. King*, 74 N. C., 178; *S. v. Barefoot*, 89 N. C., 568; *S. v. Gray*, 109 N. C., 793; *S. v. Davis, ib.*, 811; *S. v. Robbins*, 123 N. C., 738; *S. v. Lawson, ib.*, 743; *S. v. Tuttle*, 145 N. C., 489; *S. v. Jones*, 170 N. C., 755.

(212)

CALED SETZAR AND WIFE v. LUCIUS Q. C. BUTLER.

If a bailee misuses the thing bailed, an action on the case lies; if he refuses to deliver the property bailed, when properly demanded by the bailor, an action of trover is the remedy. But trespass *vi et armis de bonis asportatis* will not lie unless the property has been destroyed by the bailee.

APPEAL from DAVIE, Fall Term, 1844; *Manly, J.*

Trespass vi et armis to recover damages for taking a bed and bedclothing.

The proof was that the female plaintiff was the daughter of the defendant's testatrix, Rachel Boswell, and had for several years prior to her mother's death lived separately from her; that a short time before her decease the mother expressed dissatisfaction with the provision she had made in her will for her said daughter to two or three witnesses, and in her conversations with them, explaining how she was not quite as destitute as might be supposed, said "that her daughter was the owner of a good bed and furniture; that it was at Samuel Patterson's and would be left there for her, and nobody could take it away." The testatrix lived at Samuel Patterson's, called that her home, and kept possession of the bed to the time of her death. The defendant, as her executor, then took possession of it and sold it, the sale being forbidden.

The plaintiffs having closed their testimony, the court intimated an opinion that trover, and not trespass, was the proper remedy, and that the latter could not be maintained upon the proofs in this cause. In submission to this opinion the plaintiffs suffered a judgment of nonsuit to be entered, and appealed to the Supreme Court.

No counsel for plaintiffs.
Boyden for defendant.

DANIEL, J. This is an action of trespass *vi et armis de bonis* (213) *asportatis* in taking and carrying away a bed and its furniture, the property of the plaintiffs. Plea, *not guilty*. The judge in his charge to the jury assumes that trover would lie for the plaintiffs, and, therefore, that the plaintiffs must have had not only the title to the bed, but

also the right to the immediate and exclusive use and possession of it. It seems that the mother of Mrs. Setzar was the bailee of the bed, and the defendant, when he took possession of it as her executor, stood in the same relation. The bailor demanded of him the bed, and he refused to give it up. This refusal turned him into a wrong-doer, and was in itself evidence of a conversion. The defendant, however, went on and sold the bed to some third person. Can an action of trespass be sustained by the bailor for these acts done by the bailee? If a bailee misuses the thing bailed, an action on the case lies; and if the bailee, on demand, refuses to deliver up the thing bailed, or sells it, but does not destroy it, then trover might be brought. But if the bailee destroys the thing bailed, as if sheep or cattle be bailed and the bailee kills them, then trover or trespass may be maintained by the bailor against the bailee, as the bailment is determined by the act. Co. Lit., 57 (a), 58, 200 (a); 3 Stephens, N. P., 2637. It does not appear from the case that the bed is destroyed or out of reach of the plaintiffs, and trover may often be brought when trespass cannot, 2 Saund. 47 (p.); as if goods are lent or delivered to another to keep, and he refuses to return them on demand, trespass does not lie, but the proper remedy is trover. The judgment must be

PER CURIAM. Affirmed.

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(214)

RICHARD W. TAYLOR v. ELIZABETH WILSON, ADMINISTRATOR, ETC.

1. A. by a deed under seal "gave and granted unto B., to take effect at my (the grantor's death), the sum of $500, to have, hold, and enjoy all and singular the said sum of $500 to the said B., his executors, etc., to the proper use and behoof of the said B., his executors," etc., and then warranted the said sum of $500 to take effect at his death to the said B., his executors: *Held*, first, that this is not a remainder in a personal chattel, after a reservation of a life estate, no particular chattel being designated.
2. Secondly, that an action of covenant on this instrument against the administratrix of A. was well brought, though debt would also have lain.
3. Debt and covenant are concurrent remedies for the recovery of any money demand, when there is an express or implied contract in any instrument under seal to pay it.

APPEAL from NORTHAMPTON, Fall Term, 1844; *Caldwell, J.*

Covenant on the following instrument executed by the defendant's testator to the plaintiff:

"To all to whom these presents shall come: I. William Wilson, of the county of Northampton and State of North Carolina: Know ye that I, the said William Wilson, for and in consideration of the natural love

and affection which I have and bear unto my friend Richard W. Taylor, of the county and State aforesaid, and for divers other good causes and considerations me hereunto moving, have given and granted, and by the presents do give and grant, unto the said Richard W. Taylor, to take effect after my death, the sum of $500, to have, hold, and enjoy all and singular the said sum of $500 aforesaid unto the said Richard W. Taylor, his executors, administrators, and assigns, to the proper use and behoof of him, the said Richard W. Taylor, his executors, administrators, and assigns forever. And I, the said William Wilson, all and singular the aforesaid sum of $500, to take effect at my death aforesaid, to the said Richard W. Taylor, his executors, administrators, and assigns against all person whatsoever shall and will warrant (215) and forever defend by these presents. In witness whereof," etc. Dated 23 January, 1837, and signed and sealed by William Wilson.

The said Wilson died some time before this suit was brought, having made a will in which he appointed an executor, who refused to qualify, whereupon the defendant was appointed administratrix with the will annexed. On the trial it was urged that no recovery could be had on the instrument in question. The jury, under the instructions of the court, returned a verdict for the plaintiff. Judgment having been rendered pursuant to this verdict, the defendant appealed to the Supreme Court.

B. F. Moore for plaintiff.
Bragg for defendant.

DANIEL, J. This is an action of covenant on the deed mentioned in the case. It is very clear that, in many cases, a liability may arise against the executor or administrator after the death of the testator or intestate, upon a contract made in his lifetime, although the executor or administrator be not named therein; for the executors or administrators of every person are implied in himself, and they are liable upon any contract of the deceased, although they are not named, when the contract is not personal to the testator or intestate; thus they are liable upon a bond or note payable subsequently to the death of the testator or intestate. Williams on Ex., 1060; Toller, 463. The objection raised by the defendant, that it is a remainder in a personal chattel after a life estate reserved to the donor, and, therefore, void according to the rules of the common law, it may be answered that it is not any specific chattel, as a particular horse or a flock of sheep, etc.; it is an obligation, a chose in action, to pay $500 in money, or in the currency of the country; it has no earmarks, and, therefore, it is not within the rule supposed. *Secondly,* it is said that debt and not covenant is the proper remedy, if it is to be considered as a

(216) contract for money. The answer we give is that debt and covenant are concurrent remedies for the recovery of any money demand, when there is an express or implied contract in any instrument under seal to pay it; but in general debt is the preferable remedy, as in that form of action the judgment is final in the first instance, if the defendant do not plead. See 2 Stephens N. P., 1057.

PER CURIAM. No error.

GEORGE McKAY v. HUGH W. BRYSON ET AL.

In an action for enticing away an apprentice the plaintiff is entitled to recover damages as for a total loss of his services, if a total loss had in reality been the consequence of the acts of the defendant; if not, then the damages should be estimated according to the chances the plaintiff had of regaining his apprentice.

APPEAL from IREDELL Fall Term, 1844; *Manly, J.*

Action on the case, brought to recover damages for enticing the plaintiff's apprentice from his service and conveying him out of the State. It was in evidence that the lad, George W. Sharp, was bound in 1833, then of the age of 9 years, to learn the business of a tailor, and that he continued in the service of his master until 1840, when the defendant conveyed him away. He has not since returned to this State, but when last heard from was in Tennessee.

The court, in instructing the jury as to the rule of dam-
(217) ages, informed them that in general terms the plaintiff was entitled to compensation for the injury inflicted upon him by the wrongful conduct of the defendants, and by the usual and natural consequences thereof. Supposing the defendants to have enticed away and conveyed the boy beyond the limits of the State, and that he had not yet returned to his master's service, the injury would be equal to the value of his services to the present time, added to such sum, ranging between the full value of his services for the remainder of the time and a mere nominal sum, as the jury might think proper to give on account of the plaintiff's risk of regaining his apprentice or again realizing any benefit from his services. This additional sum would seem to be damages consequential upon the conduct of the defendants directly and necessarily, and should be assessed in a case of this sort; but, of course, it ought to be governed by the character of the risk, and be more or less in amount as the chances of further benefit from the apprentice were fewer or greater, more improbable or probable.

The jury found a verdict for the plaintiff, and judgment being rendeed pursuant thereto, the defendants appealed.

No counsel for plaintiff.
Boyden for defendants.

DANIEL, J. The charge of the judge was, in substance, as follows: that if the services of the apprentice had become a total loss to the plaintiff in consequence of the acts of the defendants, then he was entitled to recover damages for such loss up to the expiration of the term of apprenticeship; but if there were any chances for the plaintiff again getting his apprentice, then the damages should only be for the injury he had actually sustained up to the time of the trial, with such additional damages as the said chances and contingencies indicated of a total loss. It seems to us that the charge is within the decision of *Hadsall v. Stallbrass*, 38 Eng., C. L., 35, where the plaintiff, a watchmaker, sent his apprentice on business to the defendant's house, who kept a dog known and accustomed to bite mankind; the dog bit the hand of the boy and rendered him incapable ever after of (218) doing his duty as a watchmaker: *Held*, that the jury might award damages for the loss of the master up to the end of the term of apprenticeship. In the case now before us the judge charged that the plaintiff was entitled to recover as for a total loss, if a total loss had in reality been the consequence of the acts of the defendants; if not then the damages should be reduced in proportion to the chances the plaintiff had of regaining his apprentice. It seems to us that the rule reaches the plaintiff's actual loss as nearly as it can possibly be ascertained, and is, therefore, reasonable.

PER CURIAM. No error.

Cited: *Moore v. Love*, 48 N. C., 221.

JOHN HAMILTON v. EPHRAIM HENRY ET AL.

1. When an execution from a justice has been levied on personal property, and is afterwards stayed according to law, the levy is released and the owner may sell the property to whom he pleases.
2. When an execution issued by a justice is returned to the county court levied on land, no execution against the goods and chattels of the defendant can issue from that court unless on application of the plaintiff a judgment has been there previously rendered for the amount of the recovery before the justice. If such execution issues, it is void.

APPEAL from HENDERSON Fall Term, 1844; *Battle, J.*

Trespass for seizing and taking away a quantity of corn which the plaintiff alleged was his property. Under the instructions of (219) the court, the jury found a verdict for the plaintiff, and judgment being rendered accordingly, the defendants appealed.

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

No counsel for either party.

NASH, J. In this case it appears that the plaintiff purchased from one Robert Orr a parcel of corn, the subject of this suit, before February Term, 1843, of Henderson County Court. At the time this purchase was made by the plaintiff the corn had been levied on to satisfy an execution issued by a single magistrate, which execution had been stayed by Orr, the defendant, according to law, before he sold to the plaintiff. By the defendants it was admitted that the corn was originally the property of Orr, but that they had purchased it at a sale made by the sheriff of Yancey under two executions issuing from the February Term, 1843, of Henderson County Court; and, further, that the plaintiff acquired no title by his purchase from Orr, because the corn had been levied on to satisfy the magistrate's execution. Upon this last point the judge decided that after the defendant Orr had stayed the judgment the levy was removed and the corn was restored to the possession of Orr, and he had the right to sell it to whom he pleased. In this opinion we concur with his Honor, from the plain and manifest meaning of the act of assembly authorizing the stay; and for the additional reason that if it were not so it is a question in which no one had an interest but the plaintiff in that execution; and that the present defendants could not avail themselves of it. To support their second objection, the defendants offered in evidence two executions which had issued from February Term, 1843, of Henderson County Court, founded upon alleged judgments upon executions issued by a magistrate, levied upon land and returned to the court. The plaintiff objected that there were no judgments upon which the executions could issue. This objection was sustained by the court and the (220) papers not permitted to be read to the jury. These papers are made a part of the case. If we were to take the exception simply as it is stated, we should at once say that the objection on the part of the defendants cannot be sustained. They claim title to the corn under a sale made by the sheriff by virtue of two executions which issued from the February Term, 1843, of Henderson County Court. But before that term the case states the plaintiff had purchased the corn from the owner, Robert Orr. But it is obvious that the question

the parties intended to submit is whether by the proceedings in the county court previous to February Term and the executions issuing from September Term, 1842, taken in connection with the executions from that term, the power of Robert Orr to sell the corn at the time he did was not taken away, and whether in that case the plaintiff had by his purchase acquired any to it. The case states that two judgments had been obtained before a magistrate, one at the instance of Ephraim Henry and the other at that of Robert Henry, against Joseph Wood and Robert Orr. These executions had been levied on the same tract of land, and the land sold and return made to September Term, 1842, of Yancey County Court, showing a balance due upon each execution. From September Term *fi. fas.* issued in the case of Ephraim Henry against both the defendants, and in the case of Robert Henry against Robert Orr alone. These executions were returned to February Term, 1843, and indorsed by the sheriff, "No goods"; and from that term *fi. fas.* again issued, the one in the case of Ephraim Henry against Orr alone and the other as the execution had issued from September Term. Under these executions the corn was sold, and the defendants purchased and took possession. These executions were not alias *fi. fas.*, nor do they profess so to be, and have no connection with those which had issued from September Term. If they had been alias *fi. fas.* they would have kept up and continued any lien upon the corn created by the original *fi. fas.* But the executions from September Term were void, because there were no judgments authorizing them. *Borden v. Smith*, 20 N. C., 27; *Irwin v. Sloan*, 13 N. C., 351. And the *fi. fas.* which issued from February Term, 1843, were clearly void for the same reason. They were executed against Robert Orr alone, and there were no judgments in that (221) court against him. At the time, then that the plaintiff purchased the corn the title to it was in Robert Orr, unincumbered by any liens of any kind, as far as the case shows, and he had an unquestionable right to sell it to the plaintiff, and who by his purchase acquired the title. We agree with his Honor on all the points decided by him.

PER CURIAM. No error.

THE STATE v. CLARISSA, A NEGRO SLAVE.

1. An indictment charging that a certain negro slave did "hire her own time, contrary to the form of the statute," etc., is defective and must be quashed because it omits to charge one essential part of the offense, that is, that she was permitted by her master to go at large.

2. Under the first clause of section 31, chapter 111 of Revised Statutes, prohibiting masters from hiring to slaves their own time, the master is not indictable; he is only subject to the penalty of $40. Nor is the master indictable under the second clause of that section; the process is against the slave, not against the master.
3. The act of 1794 was not repealed by that of 1831 on the subject of slaves going at large They were intended to punish different offenses, and they are both now retained in the Rev. Stat., ch. 111, secs. 31 and 32.
4. To constitute the offense under the latter section, it is not necessary that the slave should have hired his time. It is sufficient if the master permits him to go at large as a freeman.
5. Presentment and indictment are considered the same in construing section 31.

APPEAL from PASQUOTANK Spring Term, 1843; *Pearson, J.*

The defendant was indicted in the following words, to wit:
(222) "The jurors for the State upon their oaths present, that Clarissa, a slave, late the property of one Arthur Q. Butt, with force and arms in the county of Pasquotank on 1 July, 1842, and on divers other days and times, as well before as afterwards, up to the day of taking this inquisition, unlawfully did hire her own time, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State."

The defendant's counsel moved to quash the indictment, (1) Because the act of 1831, reënacted in the Revised Statutes, relative to slaves being permitted to have the use of their time, and making the master indictable and subject to a fine, had the effect to supersede the act of 1794; otherwise, the master would be punished three times for the same act: first, by a penalty of $40; secondly, by the loss of the slave's time for one year, under the act of 1794, and, thirdly, by indictment and fine of $100, under the act of 1831. (2) Because the act of 1794 required the slave to be tried on presentment and hired out by the county court, and did not give the Superior Court jurisdiction.

The court directed the indictment to be quashed, and from this judgment the solicitor for the State appealed to the Supreme Court.

Attorney-General for the State.
Kinney for defendant.

NASH, J. This is an indictment or presentment of the grand jury of Pasquotank County against the defendant under section 31, chapter 111, Rev. Statutes.

The indictment sets forth "that Clarissa, a slave, late the property of one Arthur Butt, with force and arms, etc., unlawfully did hire her own time, contrary to the form of the statute in such case made and provided." The first clause of the section under which these proceed-

ings are instituted is as follows: "It shall not be lawful, under any pretense whatever, for any person or persons to allow his or her or their slave, or any slave under his, her, or their command or direction, to hire his, her, or their time, under the penalty of forfeiting the sum of $40 for each and every offense, to be recovered be- (223) fore any justice of the peace, for the sole benefit of the party prosecuting." The succeeding clause declares: "It shall be the duty of the grand jury, both in the county and Superior Court, to make presentment of any slave who shall be permitted by his or her master or mistress to go at large having hired his or her time." The clause then goes on to provide for a trial by jury, the owner having received ten days notice before the sitting of the court; and if the jury shall find that the presentment is true, the slave shall be hired out by the sheriff at public auction for the space of one year, he taking bond for the hire, payable to the State of North Carolina for the use of the poor of the county. It will be perceived that by the first clause a pecuniary fine is inflicted on the owner of the slave for hiring to him his time and that the Legislature has said by whom and to whose use the penalty shall be recovered, to wit, by any person prosecuting or suing for the same, and to his own use before any magistrate. For the offense contained in this clause no indictment can be sustained against the master; *his* personal liability is for the penalty of $40. *S. v. Clemons,* 14 N. C., 472. Nor is the slave subject to any proceedings. The succeeding clause points out when the criminal process shall issue, and against whom—not against the master, but the slave. It is under this part of the action that this indictment or presentment has been framed; and we are of opinion it cannot be sustained, because it does not set forth the offense the statute intended to punish. The crime consists not alone in the slave being permitted to hire his or her time, but also being suffered by the master to go at large. Both circumstances must exist, and both must be charged. Every indictment must contain on its face a complete description of such facts and circumstances as constitute the crime. This is necessary, as well for the individual charged, to enable him to prepare his testimony and to protect him against any future liability to a prosecution for the same offense, as for the court, to enable them, in looking into the record to decide whether the facts charged are sufficient to support a conviction of the par- (224) ticular crime stated and, also, in some cases, to guide them in inflicting the appropriate punishment. Starkie Crim. Pl., 73, 266. The indictment in this case simply charges a hiring of her time by the slave, Clarissa. For aught that appears on it, she never was permitted to go at large which is, indeed, the *gravamen* of the offense—in other words, the overt act—and essentially necessary to its completion. For

this reason the indictment is defective. A motion was made in the Superior Court to quash the indictment for two reasons: the first, that the act of 1794 was repealed or superseded by that of 1831, and, second, that by the act of '94 the proceeding ought to have been by presentment and not by indictment, and that the Superior Court had not jurisdiction. We should not notice these objections, as we sustain the judgment on other grounds, but from the apprehension that from our silence it might be supposed we concur in them. We do not accede to the correctness of either proposition. Both the act of 1794 and of 1831 are embodied in ch. 111, Rev. Statutes, the former constituting section 31, and the latter section 32; and each act or section was intended to punish different offenses. The act of '94 intended to punish the master with the loss of the time of his slave for permitting him to go at large, and having hired his time; section 32 was directed to another offense, considered by the Legislature more pernicious to the community than the former, the permitting slaves to act as freemen; and if any owner "consent or connive at the commission of such offense he shall be subject to indictment, and on conviction be fined by the court not exceeding $100." To constitute this offense it is not necessary that the slave should hire his time; on the contrary, it supposes that the master has abandoned all control of the slave, and in this way endeavored to emancipate him or her without observing the requisitions of the law. Under the act of '94, or sec. 31, ch. 111, Rev. Statutes, the master is not liable to any indictment. Under that of 1831 he is.

The act of '94, it is true, uses the word *presentment;* we (225) consider it here the same as indictment; and section 31 expressly extends the jurisdiction of the Superior Court to the offense.

PER CURIAM. Affirmed.

Cited: S. v. Nat, 35 N. C., 156.

DEN ON DEM. OF THOMAS BRANTLEY ET AL V. WILSON C. WHITAKER.

A., by will executed in 1803 (in which year he died) devised land to his two daughters H. B. and S. B., to them and their heirs, "and if they should die without an heir, then to his wife, B." The daughters died without issue: *Held*, that the limitation over was too remote, the will having been made before our act of 1827.

BRANTLEY *v.* WHITAKER.

APPEAL from HALIFAX Fall Term, 1844; *Caldwell, J.*

Ejectment, in which, under the instruction of the court, the jury found a verdict for the plaintiff. Judgment being rendered accordingly, the defendant appealed.

The facts are stated in the opinion delivered in this Court.

B. F. Moore for plaintiff.
Attorney-General for defendant.

DANIEL, J. In 1803 Robert R. Brantley made his will and died. He devised the land in controversy to his wife, Bethur Brantley, during her widowhood, and on the event of her marriage (which event happened), then over to his two daughters, Harriet Brantley (226) and Sarah Brantley, to them and to their heirs; "and if they should die *without an heir,* then to return to my wife, Bethur Brantley." The two daughters have died without issue, and the lessors of the plaintiff are their heirs at law. The defendant claims title under Bethur Brantley. The two daughters took a fee simple in the land as tenants in common, and the question is whether the executory devise over to Bethur Brantley, on the death of the two daughters *without an heir,* is or is not too remote and void. If the limitation over had vested on the event that the two daughters died without children, it would have been a good limitation, as that event must necessarily have been known during the life or lives of persons in being, or twenty-one years thereafter. But the word *heir,* used by the testator, cannot be construed *children,* as there is nothing in the will to authorize us to change its technical signification. By the will Bethur Brantley was not to take the land as long as there was a person or persons to be found who could entitle himself or themselves to the character of heir or heirs to the two deceased daughters. Such persons may perhaps be found long after the death of the two daughters, for the collateral relations of the two daughters would be their heir or heirs *ad infinitum;* and until such collateral stocks should become exhausted, Bethur Brantley never could take, by the very terms of the will. The present lessors of the plaintiff are now heirs to the two daughters. The limitation over to Bethur Brantley is too remote, and is, therefore, void. The will was made before our act of Assembly on the subject.

PER CURIAM. No error.

Cited: *Cox v. Marks, post,* 363.

(227)

C. DUDLEY'S EXECUTORS TO THE USE OF THE WARDENS, ETC., v. LEWIS T. OLIVER ET AL.

It must appear on the record that a majority of the justices were present in the county court when the poor tax was laid, otherwise the sureties in the sheriff's bond will not be bound for it.

APPEAL from JONES, Spring Term, 1844; *Manly, J.*

Debt on a sheriff's bond to which the defendants were sureties. Under the instruction of the court the jury found a verdict for the plaintiff, and judgment being rendered accordingly, the defendants appealed to the Supreme Court. The facts are stated in the opinion delivered in this Court.

J. H. Bryan for plaintiff.

J. W. Bryan and Iredell for defendants.

DANIEL, J. This was an action of debt on the sheriff's bond mentioned in the case, given at May Sessions, 1828, of Onslow County Court, by Brice Fonville, sheriff, and the defendants as his sureties on the same. The breach assigned was that Fonville failed to account for the taxes intended to support the poor of said county, laid on the list of property for 1828. The defendants pleaded *"conditions performed"* and *"conditions not broken."* The plaintiff, to show that the tax for the poor of the county, on the list of property for 1828, had been laid by the court at May Sessions, 1829, produced a copy of the record of the said Court of May Sessions, 1829; and the said record showed that the said court was composed of James Thompson, William Jones, William Mitchell, Luke Huggins, and other esquires, without stating that they composed a majority of the justices of the county. The act of Assembly (Rev. Stat., ch. 89, sec. 9) declares that the county court must be composed of a majority of the justices of the county when
(228) a tax for the poor is laid. The judge instructed the jury that the plaintiff was entitled to recover. We are of a different opinion. The defendants are sureties; they are not liable for the failure of the sheriff to collect and pay over any tax not laid by a court having a majority of the justices on the bench, as no other court had authority to lay a lawful tax. The defendants were only bound that Fonville should collect and pay over all lawful taxes. There must be a

PER CURIAM New trial.

Cited: S. v. McIntosh, 29 N. C., 69; *S. v. Long*, 30 N. C., 419.

DANIEL WILKINSON ET AL. v. JOHN GILCHRIST ET AL.

1. All of the plaintiffs or all of the defendants, must join in an appeal from an inferior court, or the appeal will be dismissed.
2. Where there are several plaintiffs in an action of *tort*, and after the pleadings are made up one of the plaintiffs comes into court and enters a *retraxit*, the proper course for the court is to permit his name to be stricken from the writ and declaration, and suffer the other plaintiffs to proceed with the suit. In such a case the court should not suffer the defendant to amend his pleadings by pleading in abatement the want of the proper plaintiffs.
3. If one of the plaintiffs release to the defendant, the defendant may plead this release in bar since the last continuance, and in England the other plaintiffs may reply *per fraudem*, and have this issue tried at law. But in our State the practice has been to leave the parties to their remedy in equity.

APPEAL from RICHMOND, Fall Term, 1844; *Bailey, J.*

Trespass quare clausum fregit, brought by nine persons as plaintiffs, styling themselves "Elders and Trustees of the Church of Center Congregation." The suit was returnable to Fall Term, 1843. At Fall Term, 1844, Daniel McKinnon, one of the plaintiffs, came (229) into court in proper person and prayed leave to enter a *retraxit*, and moved to dismiss the suit, as having been instituted without his knowledge and against his will, and thereupon directed the said suit to be dismissed. Daniel Wilkinson, and all the plaintiffs except McKinnon, objected to the motion of McKinnon, and opposed the dismission of the suit, claiming title to the *locus in quo* by proving that it was embraced in the boundaries of the said deed; but the court permitted the said Daniel McKinnon to enter a *retraxit*, and ordered the suit to be dismissed. The other plaintiffs prayed an appeal from this order to the Supreme Court, which prayer for an appeal was opposed by the said McKinnon, he dissenting therefrom and protesting against it. The court, yielding to the earnest entreaty of the other defendants, permitted the appeal to be taken; Gilchrist and McKay, the defendants in the suit, opposing the said appeal, and insisting that there was nothing to appeal from; that the suit to which they were defendants could not be carried up by appeal in the way proposed.

Strange for plaintiffs.
No counsel for defendants.

DANIEL, J. This Court has heretofore decided that all the plaintiffs or defendants in a suit must assent before an appeal can be taken from the order, judgment, or decree of an inferior court. If one or more of

the parties plaintiffs or defendants dissent an appeal cannot be taken by the others. The reason for this rule of law will be found in *William v. Hicks*, 15 N. C., 217. We have no jurisdiction over this case, and, therefore, we must dismiss the appeal out of this Court.

But we will say that we think the judge erred in extending the effect of McKinnon's *retraxit* to all the plaintiffs against their will. It does not appear that McKinnon ever acted as a trustee to the said (230) church; he might, therefore, have released to the defendants, which release they might have pleaded since the last continuance in bar of the action. *Emery v. Mucklaw*, 10 Bingh., 23. In England to such a plea the plaintiff might reply *per fraudem*, and try it at law (*ibid.*, 23), but in this State the practice always has been to leave the parties to a court of equity, to decide whether such a release was fraudulently obtained. But the more proper course on this motion, it seems to us, would have been to permit McKinnon to strike his name out of the writ and declaration; and then, if the other plaintiffs could have gone on in the action without him, they should have been permitted to do so. In this case it is probable that the other plaintiffs might have proceeded in the cause without McKinnon, as it is not to be presumed that the court would have permitted them to have pleaded in abatement that McKinnon, one of the tenants in common of the land, was not made a party plaintiff, as by his *retraxit* he was forever barred from bringing another action for the same cause, 2 Arch. Prac., 250; and it being an action in *tort*, the defendants could not have taken advantage of the nonjoinder of McKinnon on the general issue. However that may be, we must dismiss the appeal from this Court for the reason first mentioned.

PER CURIAM. Appeal dismissed.

Cited: Jackson v. Hampton, 32 N. C., 604.

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(231)

WILLIAM NEWMAN v. WILLIAM TABOR.

1. In an action of assumpsit for goods sold and delivered, brought in the county court, the damages were laid at $200. The evidence in support of the action was on the following instrument: "22 April, 1840. Received 1,500 (hundred) weight of bacon at 6 cents, and 128 lbs. of lard. William Tabor." On the back was endorsed, "Credit $36, paid April 22d." The jury found a verdict for $76.20: *Held*, that this instrument was neither a promissory note nor a liquidated account, and, therefore, the case did not come within the provisions of the act

of 1826, Rev. Stat., ch. 31, sec. 40, prohibiting the courts from taking jurisdiction of any sum less than $100 due by bond, note, or liquidated account.

2. *Held*, also, that if this were not so, yet the court could not dismiss the suit on motion, as the action was "commenced" for more than $100. The defendant's objection should have been urged by a plea in abatement.

APPEAL from RUTHERFORD Fall Term, 1844; *Battle, J.*

Assumpsit, brought in the county court, in which the plaintiff declared in a single count for goods sold and delivered, and laid the damages at $200. Issue was joined on *non assumpsit*, and the plaintiff had a verdict for $60.60, and from the judgment for that sum and costs the defendant appealed. On the trial in the Superior Court the plaintiff gave in evidence, amongst other things, a writing under the hand of the defendant in the following words and figures:

22 April, 1840. Received 1,500 (hundred) weight of bacon at 6 cents, and 128 lbs. of lard. WM. TABOR.

The paper had also on it this memorandum: "Credit $36, paid 22 April." Thereupon the defendant moved to dismiss the suit because the county court had no jurisdiction of the case; but the court held that the motion came too late, and refused it, and gave judg- (232) ment for the plaintiff on the verdict, and the defendant appealed.

No counsel on either side.

RUFFIN, C. J. The judgment, in the opinion of the Court, ought to be affirmed. We do not think the period at which the motion was made material; for the motion would have been properly refused, no matter at what time it might have been made. We suppose it to have been founded on the act of 1826, which provides that "if any suit shall be commenced in any county court for any sum of less value than $100 due by bond, promissory note, or liquidated account, signed by the party to be charged thereby, the same shall be dismissed by the court." Here the plaintiff's demand was not due by bond, promissory note, nor even liquidated account. It does not appear in the paper from whom the defendant received the bacon and lard, nor the price of the latter, nor whether they were received as a payment to Tabor or on a purchase by him. The instrument is so imperfect as not to constitute, in itself, a cause of action or amount to plenary evidence in this action of assumpsit, without the aid of other evidence to supply its defects. It does not purport to be a liquidated account, at least, between these parties. Therefore the county court had jurisdiction, and if the objection had been taken by plea in abatement the plaintiff would have been entitled to judgment.

But if that had been otherwise the defendant could only have taken advantage of the want of jurisdiction in the county court by plea of abatement, and not on a motion to nonsuit the plaintiff, or, as it is called, dismiss his suit. The case is precisely that of *Clark v. Cameron*, 26 N. C., 161, in which we held that under the act of 1826 a plea in abatement is the only method by which the want of jurisdiction in the county court can be insisted on, unless the suit be "commenced" for less than $100; that is, unless the plaintiff demand less than that sum in his declaration. The common law requires a plea to the jurisdiction, so as to show that the defendant objects to it and declines going into the merits by an issue to a jury. Our statutes have enacted two ex-
(233) ceptions to the rule. One is, that if it appear in the declaration in a suit brought to the county court that it has been "commenced" for less than $100, the court shall "dismiss" it; which, we suppose, means shall give judgment against the plaintiff for the costs as upon a nonsuit. The other is, that if the plaintiff demand in his declaration a greater sum than $100, but recover less than that sum, "the verdict shall be set aside, and the plaintiff shall be nonsuited and pay costs." But this last is expressly confined to the Superior Courts, Rev. Stat., ch. 31, sec. 42; and does not, therefore, embrace this action, which was brought in the county court.

PER CURIAM. No error.

Cited: *Midgett v. Watson*, 29 N. C., 145.

DEN EX DEM. CALVIN EDNEY ET AL. v. JAMES WILSON.

1. The lessors of the plaintiff claimed under a sale by execution, tested in March, 1832, against one Lewis. The defendant showed that Lewis had only an equitable title, and that by bond, bearing date in January, 1832, he had contracted to sell the same to the defendant: *Held*, first, that the title of Lewis having been equitable, the defendant could not, therefore, be estopped from insisting thereon.

2. *Held*, secondly, that Lewis by his bond had conveyed all his equitable interest to the defendant before the teste of the plaintiff's execution, and, therefore, there was nothing on which that execution could be levied.

APPEAL from YANCEY Fall Term, 1844; *Battle, J.*

The lessors of the plaintiff claimed the premises in dispute as
(234) the purchasers thereof at an execution sale of the property of William J. Lewis. The plaintiff alleged that the defendant also claimed under the said Lewis, and gave him notice to produce on the trial the contract or instruments under which he claimed; and, accord-

ingly, the defendant produced the bonds hereinafter mentioned, and the plaintiff read them to the jury. The one is an obligation dated 3 January, 1832, given by William J. Lewis to the present defendant, in the penalty of $800, with condition that he would, on request, convey or cause to be conveyed to Wilson the premises in dispute, which are therein described as being part of a tract of land which Blake Piercey had before agreed to sell to James Wilson (the defendant), and bound himself (Piercey) by bond to convey to said Wilson, and which land the said Wilson had sold to the said Lewis, and transferred by assigning to Lewis the said bond so given by Piercey. The other bond produced by the defendant was that referred to in the one just mentioned, and is an obligation, dated 14 November, 1828, given by Blake Piercey to James Wilson in the penalty of $1,000, with condition that he would convey to said Wilson, or his assigns, a certain tract of land therein described, which, it is admitted, includes as a part of it the premises in dispute. On this bond is an indorsement, dated 23 January, 1830, purporting to be a contract of sale from Wilson to Lewis of the land mentioned in the bond, and to be an assignment of the bond to Lewis.

In March, 1832, judgment was rendered against William J. Lewis, and execution issued thereon in July following, on which the premises were sold, and the lessors of the plaintiff bought them; the present defendant being then in possession under his contract of repurchase.

On the trial the counsel for the plaintiff contended that the defendant, claiming under Lewis, was estopped to deny a legal title in him, or, at all events, that Lewis had such an equitable title as was subject to be sold under execution, so that the legal title would pass to the purchaser. But the court held otherwise, and the plaintiff submitted to a nonsuit and appealed. (235)

Francis for plaintiff.
No counsel for defendant.

RUFFIN, C. J. The title of Lewis appeared, upon the plaintiff's own evidence, to have been but equitable at any time, and, consequently, the defendant could not be estopped from insisting thereon.

If Lewis be considered as the *cestui que trust* in fee, then the land was not subject to the execution under which it was sold, because, before execution sued, Lewis had contracted to sell to the defendant, which amounted to an assignment of the trust and took the case out of the act of 1812. *Hall v. Harris,* 38 N. C., 289. Indeed, Lewis's sale to the defendant was some months before the *teste* of the executions, and even the rendering of the judgments against Lewis, and it is not impeached for fraud; so that there could be nothing in him, either at law or in equity, liable to execution.

PER CURIAM. Affirmed.

(236)

ZACHARIAH TRICE v. JAMES C. TURRENTINE.

When a joint judgment is obtained against three, and a *ca. sa.* issued against all, and the sheriff is directed by the plaintiff not to execute the *ca. sa.* on two, and he accordingly forbears to do so, the plaintiff cannot proceed against the bail of the third defendant, although as to him the *ca. sa.* is returned *non est inventus.*

APPEAL from ORANGE Special Term in June, 1844; *Bailey, J.*

Scire facias against bail. The plaintiff sought to subject the defendant, who was the sheriff of Orange County, as the special bail of one Nathaniel J. King, to the payment of a judgment which he had recovered in Orange County Court against the said King, and Henderson, Norfleet, and Durham. The defendant, among other pleas, pleaded "*nul tiel record,* no *ca. sa., ca. sa.* void as against principal." The plaintiff offered in evidence a copy of the record of his suit and judgment against the said King and others, and also the *ca. sa.* issued upon the judgment. On the return of the original writ it appeared that the defendant, then sheriff of Orange, had taken no bail from Nathaniel J. King, and it was admitted that the plaintiff had directed him not to take bail from the other defendants. The return on the *ca. sa.* was as follows: "King not to be found. I am directed by the plaintiff's attorney to execute this process on King only. See indorsement hereon." This indorsement was: "I am instructed by the plaintiff to direct the sheriff to execute this *ca. sa.* upon King only. 17 January, 1842." Signed, "J. W. Norwood, Atty." For the defendant it was contended that the plaintiff was not entitled to recover for the following reasons: *First,* that the *ca. sa.* issued to the sheriff did not correspond with the judgment, for that the judgment was against Henderson, Norfleet, Durham, and King, and the *ca. sa.* only against the three last, and was, there-

(237) fore, void; and in support of this objection he offered in evidence the original entry of the judgment on the records of the county court, which corresponded with that recited in the *sci. fa.*, being against Norfleet, Durham, and King only, except that it had this caption in addition, viz.: "*Trice v. Henderson, et al.*" *Secondly,* that the *sci. fa.* charged that the defendant was the bail of Norfleet, Durham, and King, when he had been instructed to take no bail of the two first, which fact was admitted. *Thirdly,* that the sheriff was not permitted to execute the *ca. sa.* upon Durham and Norfleet by the plaintiff, but was directed to serve it on King only. The defendant called upon J. W. Norwood as a witness to prove some payments upon the judgment. He stated that the obligation upon which the judgment had been obtained was assigned to him by Trice for the benefit of certain of his creditors; that he had had the management of the judgment; that the defendants had

received the full benefit of all payments made by them or any of them, at the time the judgment was rendered, and nothing had since been paid to his knowledge. He further stated that the defendants Norfleet and Durham were insolvent at the time the judgment was obtained, and had continued to be so, and for that reason the sheriff had been instructed not to execute the *ca. sa.* upon them.

His Honor overruled all the objections of the defendant and decided all the issues to the court in favor of the plaintiff, and the jury found all the issues of fact in his favor. Judgment being rendered accordingly, the defendant appealed to the Supreme Court.

Norwood, Venable, and Iredell for plaintiff.
Badger and Waddell for defendant.

DANIEL, J. Is the bail of King liable to satisfy the plaintiff's joint judgment against King, Norfleet, and Durham upon a return of *non est inventus* against King only? The act of Assembly, Rev. Stat., ch. 10, sec. 3, declares that the plaintiff shall not have execution against the bail until a *ca. sa.* be first returned that the defendant is not to be found in his proper county, and no *scire facias* shall issue against (238) the bail until such *ca. sa.* shall have been returned *non est inventus.* The execution must be in the joint names of all the plaintiffs or defendants, and must in other respects pursue the judgment. 1 Ld. Ray., 244; 1 Salk., 319; 2 Lord Ray., 808. And did not the Legislature require that the return of the sheriff should be as broad as the execution before *any* of the bail of the defendants should be subjected to the plaintiff's demand? We think that the Legislature considered all the defendants in the execution as principal debtors, and the bail of all or any of the defendants as *quasi* sureties only. And before these sureties (the bail) should be looked to for the debt by the plaintiff in the execution he should show that he had, by a *ca. sa.* returned *non est inventus* against all the principals been unable to get his debt. In England the the law is that the *ca. sa.* is not intended to be executed by the sheriff; it is there required only to remain in the sheriff's office four days, which is considered to be notice to the defendants to surrender themselves, and likewise notice to the bail that if their principal do not surrender they (the bail) will be looked to for the debt. In England, after the four days, the sheriff returns *non est inventus* as to *all* the defendants in the execution, although he well knows they are all in his county. This being the law, the bail here, as there, are not to be called upon by a *scire facias* to pay the judgment or surrender their principals until the plaintiff has had his *ca. sa.* returned *non est inventus* as to *all* the defendants in it, or put in jail those defendants in the execution who may be found by the sheriff and arrested under the *ca. sa.* Were not this the

law, the plaintiff in a *ca. sa.* might discharge a solvent defendant and pursue the bail of an absconding defendant in the same execution, and get the debt out of him, and leave him remediless as to the solvent defendant; for we have decided in this Court that the bail of one partner who has paid the debt cannot bring assumpsit for money paid against the other partner. *Ferrall v. Brickell* (bail of Lowe), *ante,* 67, does not conflict with this case; for Hawkins, the codefendant with
(239) Lowe in the *ca. sa.*, had been in fact arrested under it, and would have been put in jail had he not discharged himself from the *ca. sa.* by giving bond and bail under the insolvent law. The said bail under the insolvent act afterwards surrendered Hawkins in open court, and Ferrall did not then move the court to commit him to jail. Here we see that Hawkins had been discharged from the imprisonment under the *ca. sa.*, not by Ferrall, but by force of the law (the insolvent law), and, therefore, the bail of Lowe, the other codefendant in the *ca. sa.*, had no right to complain of the conduct of the plaintiff in the execution. But that is a very different case from the one now before us; for in law it was, as to the bail of Lowe, tantamount to Hawkins having been put to jail. But in this case Norfleet and Durham are not, by the law, taken out of the custody of the sheriff under the *ca. sa.*, but they are by the active management of the plaintiff in the *ca. sa.* prevented from ever being arrested by the sheriff under that execution.

It is further urged that the sheriff, by not taking bail from the defendants in the original action, has thereby made himself special bail for all, yet that the contract by him is several, and the same as if bail bonds had been taken by the sheriff from each of the defendants with separate and distinct bail—in which case the bail of each would be answerable only for the appearance of his principal. And it is asked for what purpose shall a *ca. sa.* be returned as to any but the one for which the bail who is sought to be charged is answerable? If he pays the debt for his principal, he has no claim upon any of the other principals for contribution.

We acknowledge the correctness of the latter principle, but not the conclusion drawn from it. It is true, in the case put, the bail is not entitled to contribution, but his interest in the appearance of the others is not confined to that view. He has an interest that the defendants shall all be before the court. If one of them has paid the debt or has been released by the plaintiff, the payment or release will operate to the benefit of all the defendants and their respective bail; or if they
(240) have not paid the money or been released, if arrested on a *ca. sa.* they may find means through the interference of friends, or from secret resources, to discharge it. Upon a contrary practice, the protection which the law intended for the bail may often prove entirely illusive.

There are two defendants—one of them pays the debt; it is a private transaction between him and the plaintiff; the other is insolvent and has left the country. A *ca. sa.* issues against both. The one that is solvent and has paid the debt is here, and the sheriff is directed not to arrest him; the execution is returned not found as to the insolvent who has absconded—and the bail is fixed. It is asked why arrest the other defendant—he did not undertake for him. The answer is, if arrested, the fact of the payment by him would at once be made to appear, and the responsibility of the bail of the other be discharged. We believe the act of Assembly was intended for the benefit of the bail, and requires on the part of every plaintiff good faith in his efforts to recover the debt from the principals.

We think the judge erred when he instructed the jury that the evidence produced warranted them in finding the issues in favor of the plaintiff.

PER CURIAM. *Venire de novo.*

Cited: Jackson v. Hampton, 28 N. C., 37; *s. c.,* 32 N. C., 580; *Blue v. McDuffie,* 44 N. C., 134.

(241)

HARRISON M. WAUGH v. HENRY G. HAMPTON.

A *ca. sa.* issued on a judgment against several persons must be returned as to all before the bail of any one can be subjected.

APPEAL from SURRY Fall Term, 1842; *Nash, J.*

Scire facias against the defendant as bail of one Samuel Falkner and Joseph M. Richardson. The defendant pleaded *nul tiel record,* no *ca. sa.*, etc. The court found the issue as to *nul tiel record* in favor of the plaintiff; and the jury, under the instructions of the court, found the issue of fact as to the *ca. sa.* in favor of the defendant. Judgment being rendered accordingly, the defendant appealed.

The facts are stated in the opinion delivered in this Court.

Morehead for plaintiff.
J. H. Bryan and Boyden for defendant.

DANIEL, J. The defendant was sheriff of Surry, and on a writ at the instance of the plaintiff he arrested the six defendants mentioned in the writ, and returned no bail bond with the writ. There was judgment against the said six persons, on which first a *fi. fa.* and then a *ca. sa.*

issued. The sheriff returned the *ca. sa. non est inventus* as to Richardson and Falkner, two of the defendants in the execution, and made no return as to the other four, whose names were in the execution. The plaintiff made no motion to the court against the sheriff on account of his defective return, but issued his *scire facias* against him to subject him under the statute as special bail to Richardson and Falkner. The sheriff pleaded, first, that there was no *ca. sa.* returned *non est inventus;* and, secondly, that the plaintiff had issued a *fi. fa.* before he
(242) issued his *ca. sa.* The court was of opinion, and so instructed the jury, that the *ca. sa.* produced by the plaintiff in evidence did not sufficiently support his side of the first of the above issues; and we are of the same opinion. The *ca. sa.* in England is generally but a formal writ, not intended to be executed, but to be simply lodged in the sheriff's office, to remain there four days and then to be returned *non est inventus.* It is placed there only as notice to the bail that they are looked to on their bail pieces. But it has been repeatedly decided in this State that a *ca. sa.* here is intended to be an effectual execution, and to be enforced against the defendants, if to be found in the county; and that for the benefit of all the persons concerned—the plaintiff, the defendants, and each of them, and their bail and each of them. The law requires that the *ca. sa.* should be as broad as the judgment. Should not the return, then, be as broad as the execution before the bail is liable? We believe that there is not an authority to be found, either in the English or American law books, to support the plaintiff in his demand. We find that where one of the defendants in a *ca. sa.* has been arrested and returned by the sheriff to be in prison, and the other is returned *non est inventus,* the plaintiff may then have *sci. fa.* against the bail of him that has fled the country. But in said case the plaintiff had procured a full return of the *ca. sa.* to be made as to all the defendants in it. If the defendants lived in different counties, still, if the plaintiff thought proper to take a joint judgment against them all, he would be compelled to make his *ca. sa.* to each of the several sheriffs, if he chose so to proceed, as broad as his judgment. And before he could be able to proceed against the bail of any one of such defendants, the sheriff should, as it seems to us, make his return as broad as the *ca. sa.* It may be asked what right has the bail of one of the defendants to demand anything more of the plaintiff than to show a *ca. sa.* as to *his* principal, and a return on it of *non est inventus.* The answer seems to be at hand: it is because the bail, by law, has a right to see that a proper *ca. sa.* against *all* the defendants has been issued and placed in the hands of the sheriff to be effectually executed by him. If he has a right to
(243) demand of the plaintiff to do all this as a preliminary step in pursuing him as bail, would it not be absurd, and apparently

trifling with the forms of judicial proceeding, for the plaintiff to be then permitted to turn round to him and tell him, "Sir, you now have no right to demand that the sheriff shall make any other return on the *ca. sa.* to save you from liability, except as against your own principal"? We must again say that we think that the evidence was not sufficient in law to support the issue. Secondly, although a *fi. fa.* has first been issued, the bail are not thereby discharged, but are still on a *ca. sa.*, being subsequently returned *non est inventus,* subject to be proceeded against. Petersdorff on Bail, 335.

PER CURIAM. No error.

Cited: Jackson v. Hampton, 28 N. C., 37; *s. c.,* 32 N. C., 580; *Kelly v. Muse,* 33 N. C., 189.

(244)

GEORGE WILLIAMSON ET AL v. WILLIAM CHILES.

A., B., and C. agreed on 11 January, 1842, to indemnify D. and E. for advances made by the latter to F. during 1842, each (including D. and E.) to be responsible for a sum not exceeding $500 each. On 6 January, 1843, the said parties, together with G., the defendant, covenanted "to continue their responsibility for F. for and during 1843, upon the same terms and for the same purposes set forth in the foregoing covenant for 1842," with the same limitation as to the responsibility of the parties to $500. One of the parties proved to be insolvent: *Held,* by the court, that the defendant G. was only responsible for advances made in 1843. *Secondly,* that neither of the guarantors was responsible for more than $500 in either of the years, and that it was a several contract, so that none were responsible for the share to be contributed by one who proved insolvent.

APPEAL from CASWELL Fall Term, 1844; *Pearson, J.*

Covenant, in which the following case agreed was submitted to the court. On 11 January, 1842, certain persons, of whom the defendant was not one, entered into the following covenant, viz.:

"This agreement witnesseth, that whereas we, the undersigned, together with George Williamson, Hiram Henderson, and Nathaniel M. Roane" (who are the plaintiffs in this suit), "are desirous of lending our assistance and encouragement to Mr. Wyatt Walker, coachmaker in Yanceyville, to enable him to sustain himself and carry on his business of coach making in the said town of Yanceyville, and to this end we have entered into an arrangement with the said Williamson, Henderson, and Roane, by the terms of which arrangement the said Williamson, Henderson, and Roane have undertaken and agreed to become indorsers for the said Wyatt Walker to enable him to raise funds to carry on his

coach-making business in the town of Yanceyville for the year
(245) 1842; and we, the undersigned, have on our part agreed to indemnify the said Williamson, Henderson, and Roane, on account of the liability which they have agreed to assume as aforesaid, to the extent herein set forth, viz., the said Williamson, Henderson, and Roane have agreed to lend their names as indorsers to the said Walker, at any time when he may desire it, during 1842, to enable him to raise funds to carry on his said business; and we bind ourselves, in the event the said Williamson, Henderson, and Roane should sustain loss by reason of their liability aforesaid, to bear each of us in equal proportions with the said Williamson, Henderson, and Roane any loss which they may thus sustain: *Provided, nevertheless,* and it is hereby expressly understood and agreed by and between all parties concerned in this agreement, that we, the undersigned, are not to be held responsible to an amount exceeding $500 each. In testimony whereof," etc. Dated 11 January, 1842, and signed and sealed by the parties. On 6 January, 1843, the defendant, with the same parties, executed the following covenant, viz.:

"We, the undersigned, covenant to continue their responsibility for Mr. Wyatt Walker for and during the year 1843, upon the same terms and for the same purposes as set forth in the foregoing covenant for 1842; but it is understood by all parties concerned that Messrs. Williamson, Henderson, and Roane are only in any event to be responsible to the amount of $500 each, and the parties whose names are undersigned are to be responsible only to the amount of $500 each." (Signed and sealed by the defendant and the other parties.) The plaintiffs indorsed for Walker in 1842 to the amount of $2,329.07, and in 1843 to the amount of $3,435.77; and Walker failed in business, and is completely insolvent, so that the plaintiffs have had to pay the whole amount for which they became responsible as indorsers. A statement was exhibited showing the amount of their liability and the amount paid, including interest for each year. After the failure of Walker, Henry Willis, one
of the covenantors, also failed and became insolvent, and the plain-
(246) tiffs used due diligence to collect from him the amount of his liability, but failed to collect anything.

If the defendant is liable for his ratable part of the responsibilities of the plaintiffs incurred in 1842, and not renewed in 1843, and also liable for his ratable part on account of Willis' failure, then judgment is to be entered up against him for the sum of $615.79. If the defendant is liable for the responsibilities of the plaintiffs incurred in 1842, and not renewed in 1843, and not liable for any part of the loss by Willis' failure, then judgment is to be entered for the sum of $559.82. If the defendant be only responsible for his ratable part of the responsibilities of the plaintiffs incurred by actual indorsements in 1843, and not respon-

sible for any part of Willis's failure, then judgment to be entered for $312; and if his ratable part of the loss by Willis is to be added to his part of the liability for 1843, then judgment to be entered for the sum of $355.05. Judgment to be entered against the defendant according to the opinion of the court upon the facts stated. But it is agreed that the defendant has already paid the plaintiffs the sum of $100; so that that sum is to be deducted from the amount for which he may be held to be liable.

The court was of opinion that the defendant was liable for the responsibilities of the plaintiffs incurred by reason of their indorsements for Walker, as well in 1842 as in 1843, although the indorsements made and responsibilities incurred by them in 1842 were in no way renewed in 1843, the creditors forbearing to collect their claims by reason of the old indorsements until some time in or after 1843. But the court held the defendant's liability to be limited to $500. The court also held that the defendant was liable for his ratable part of the loss by Willis's failure; so that judgment was directed to be entered up for the sum of $572, which sum is made up of the $500 and the defendant's share of the loss by Willis, including interest on both sums—this amount to be subject to a deduction for the $100, paid by the defendant to the plaintiffs, leaving the amount of the judgment to be entered $472.

From this judgment the defendant appealed.

Morehead and Norwood for plaintiffs. (247)
E. G. Reade and Iredell for defendants.

RUFFIN, C. J. The Court is of opinion that the defendant is bound for the indorsements of the year 1843 only. The terms of the agreement, as it seems to us, expressly confine it to that period, being that the parties "covenant to continue their responsibilities for Wyatt Walker for and during 1843." The instrument adds, indeed, that this responsibility was "on the same terms and for the same purposes as set forth in the foregoing covenant for the year 1842." This is not an adoption by the parties to the second agreement of the engagements of the first. It is apparent that both instruments were written on the same paper; and the object of naming the prior in the latter was not to transfer the obligations of the one into the other, but merely by a reference to its terms for 1842 to give the terms of the agreement for 1843, without taking the trouble to write them *in extenso* in the same words with the former—saving only the change of the year from 1842 to 1843.

The counsel for the plaintiffs relied on the words "continue their responsibilities" as denoting an intention in the parties to the second agreement to assume all the liabilities of both years. But we do not

perceive the force of the argument; and, certainly, not that there is enough in it to do away with the express restriction to 1843. The paper was probably so written when it was expected it would be executed by the same persons only who gave the first. But even as to them, it could only mean that they would "again bind" themselves for indorsements to be made in 1843, as they "had been bound" for those that had been in 1842, by the instrument referred to in and annexed to the new agreement. It could not mean that *they* should *thereby* assume the liability for the transactions of 1842, because they were already fully bound therefor by the agreement of 1842. Still less could that word "continue" apply to the present defendant, in the sense insisted on by the (248) plaintiff; for, not being a party to the agreement of 1842, *he* could not *continue* to undertake the engagements made in it by others. In fine, whatever may have been the actual intention of the parties, the two instruments as framed relate to different subjects and different years. He who executed but one bound himself for but one sum of $500, while each person who executed both bound himself to the extent of two sums of $500, namely, one for each of the years 1842 and 1843.

It is further stated that Henry Willis, who is one of the covenantors in each instrument, has not paid any part of his proportion of the loss for either year, and is insolvent; and another question is whether the defendant is liable for a ratable share of Willis's aliquot part. We think not. As to his deficit for 1842, that is already disposed of in the first point. And for that of 1843 the defendant is not bound, because this is not a joint undertaking by the covenantors as the sureties for Walker or for each other, but it is an undertaking by each one, for himself, to pay to the plaintiffs his aliquot part of the loss that should arise to the plaintiffs by putting their names on Walker's paper—limiting his liability, however, to the sum of $500. The insolvency of Willis can make no difference, for this is an action on the covenant, and that instrument has no stipulation in reference to that event, nor any allusion to it. If the parties be bound for each other, then each would be liable for the others, whether they were solvent or not; and if each be bound only for himself, then the insolvency of another cannot add to his engagements. It is clear, we think, that the engagement of each of these persons is strictly several and not joint, nor joint and several. The instrument begins, indeed, in the terms of a joint undertaking by all the covenantors for a full indemnity to the plaintiffs. It says, "*We*, the undersigned, have on *our* part agreed to indemnify the said Williamson, Henderson, and Roane." But immediately those general words are qualified and restrained by others which, in the first place, limit the indemnity, and in the second place sever the responsibilities of the several covenantors. After setting out the agreement to indemnify the plaintiff,

it adds the words, "to the extent herein set forth," and then proceeds under a *videlicit*, thus: "We bind ourselves, in the event the (249) said W., H., and R. should sustain loss by reason of their liability aforesaid, *to bear, each of us, in equal proportions* with the said W., H., and R., such loss: *Provided, nevertheless*, that we, the undersigners, are not to be held responsible to an amount exceeding $500 *each*." It seems clear from these words that a joint undertaking by the covenantors, or for each other, could not be intended. If it had been, the plaintiffs would have been at liberty to sue one of the covenantors for the whole loss, to the extent, at least, of as many sums of $500, as there were covenantors. But, instead of that, the stipulation is that the loss shall be borne by each one of the parties in equal proportions with the plaintiff; which shows that the loss was to be *divided*, and each covenantor was to pay his own *share*. Consequently, the plaintiffs can look to each one for no more.

The judgment must, therefore, be reversed, and judgment be entered for the plaintiffs, according to the case agreed, for the sum of $312, that being the separate share of the defendant of the loss arising on the indorsements made in the year 1843. But that is subject to the payment of the sum of $100 mentioned in the case. There must also be judgment for the plaintiffs for their costs in the Superior Court, but there must be judgment against them for the costs in this Court.

PER CURIAM. Judgment accordingly.

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(250)

THE STATE v. ELIJAH NEWSOM.

1. The act of Assembly passed in 1840, ch. 30, entitled "An act to prevent free persons of color from carrying firearms," is not unconstitutional.
2. It is the settled construction of the Constitution of the United States that no limitations contained in that insrument upon the powers of government extend or embrace the different States, unless they are mentioned or it is expressed to be so intended.
3. Free people of color in this State are not to be considered as citizens in the largest sense of the term, or, if they are, they occupy such a position in society as justifies the Legislature in adopting a course of policy in its acts peculiar to them—so that they do not violate those great principles of justice which lie at the foundation of all laws.

The following is a copy of the act:

Be it enacted, etc. That if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife, unless he or she shall have obtained a license therefor from the Court of Pleas and Quarter Sessions of his or her county, within one year preceding the wearing, keeping or carrying thereof, he or she shall be guilty of a misdemeanor, and may be indicted therefor.

STATE *v.* NEWSOM.

APPEAL from CUMBERLAND Fall Term, 1844; *Bailey, J.*

The defendant, a free person of color, was tried upon the following indictment, viz.:

"The jurors for the State upon their oath present, that Elijah Newsom, a free person of color, late of the county of Cumberland, on 1 June, 1843, at Cumberland aforesaid, unlawfully did carry about his person one shotgun, without having obtained a license therefor from the court of pleas and quarter sessions of the county of Cumberland afore-
(251) said within one year preceding the carrying thereof, to the evil example of all others in like manner offending, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

Upon the trial, the jury found the defendant guilty; whereupon, on motion of the defendant's counsel, the court arrested the judgment, and the solicitor for the State appealed to the Supreme Court.

Attorney-General for the State.
W. Winslow and D. Reid for defendant.

NASH, J. We are of opinion there was error in the judgment pronounced by the presiding judge. On the argument here it has been urged that the act of 1840 (ch. 30) under which the defendant was prosecuted is unconstitutional, being in violation of Article II of the amended Constitution of the United States, and also of articles 3 and 17 of the Bill of Rights of this State. We do not agree to the correctness of either of these objections. The Constitution of the United States was ordained and established by the people of the United States for their own government, and not for that of the different States. The limitations of power contained in it and expressed in general terms are necessarily confined to the General Government. It is now the settled construction of that instrument that no limitation upon the power of Government extends to or embraces the different States, unless they are mentioned, or it is expressed to be so intended. *Barrow v. Baltimore,* 7 Peters, 240; *R. R. v. Davis,* 19 N. C., 459. In Article II of the amended Constitution the States are neither mentioned nor referred to. It is, therefore, only restrictive of the powers of the Federal Government. Nor do we perceive that the act of 1840 is in violation of either of the articles of our Bill of Rights which have been referred to. The 3d article forbids the granting of exclusive privileges or separate emoluments but in
(252) consideration of public services. Its *terms* are certainly not violated. Is it so in spirit? If it is, we are as much bound to declare the act unconstitutional as if in terms it was so—where the violation is plain and palpable. The act of 1840 imposes upon free men of

color a restriction in the carrying of firearms from which the white men of the country are exempt. Is this a violation of the 3d article in spirit, or is it such a palpable violation as will authorize the court to declare it void? If so, then is the whole of our legislation upon the subject of free negroes void. From the earliest period of our history free people of color have been among us as a separate and distinct class, requiring, from necessity in many cases, separate and distinct legislation.

The relation of master and servant, of free and bond, of white and colored, excluded the idea that the latter ought or could be safely admitted to testify against the former. Accordingly, in 1762 an act was passed which excludes all colored persons within the fourth degree from being heard as witnesses against a white man; and in 1777 it is in almost so many words reënacted, and still remains upon our statute book unrepealed. This was the Code at the time our Constitution was formed, and the statute of 1777 was framed by many of the men who aided in forming the Constitution. From the time of the first enactment to the present innumerable cases have been tried in our various courts in which white persons and colored have been parties litigant, and in which the testimony of colored witnesses would have been important; and yet, in no instance has the constitutionality of the act of 1777 been questioned. It is admitted that if the act of 1840 does violate the spirit and meaning of the 3d article, it cannot be sustained because the Legislature have passed other acts equally infringing it; but it is believed that the long acquiescence under the act of 1777 by all classes of society—legislative, judicial, and private—has given an exposition to the 3d article of the Bill of Rights which is obligatory on the courts. The extent and operation of this article were brought under the consideration of this Court in *S. v. Manuel*, 20 N. C., 144. That case underwent (253) a very laborious investigation, both by the bar and the bench. In 1831 the Legislature passed an act providing that when a free person of color was convicted by due course of law of a misdemeanor, and was unable to pay the fine imposed on him, the court should direct the sheriff to hire him out at public auction to any person who would pay the fine for his services for the shortest space of time. Manuel was a free man of color, and being convicted of an assault and battery, and unable to pay his fine, was ordered by the court to be hired out. The case was brought here by appeal, and was felt to be one of great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which gave it a controlling influence and authority on all questions of a similar character. The act of 1831, it was urged, was unconstitutional, as violating, among others, this 3d article of the Bill of Rights. The Court decided that it did not conflict with that article; yet it cannot be denied that it introduced a different mode

of punishment in the case of a colored man and a white man for the same offense. If the law in that case, in which one class of citizens is condemned to lose their liberty by being hired out as slaves, while another class is exempt from that ignominious mode of punishment, and subjected to one much less revolting to the feelings of a freeman, is not a violation of the 3d article under consideration, much less can the act of 1840 be so. Other acts of the Legislature might be pointed out equally liable to the constitutional objection. The act of 1840 is one of police regulation. It does not deprive the free man of color of the right to carry arms about his person, but subjects it to the control of the county court, giving them the power to say, in the exercise of a sound discretion, who of this class of persons shall have a right to the license, or whether any shall. This brings us to the consideration of the 17th article of the Bill of Rights. We cannot see that the act of 1840 is in conflict with it. That article declares "that the people have a right to bear arms for the defense of the State." The defendant is not indicted for carry-
(254) ing arms in defense of the State, nor does the act of 1840 prohibit him from so doing. Its only object is to preserve the peace and safety of the community from being disturbed by an indiscriminate use, on ordinary occasions, by free men of color, of firearms or other arms of an offensive character. Self-preservation is the first law of nations, as it is of individuals; and while we acknowledge the solemn obligations to obey the Constitution, as well in spirit as in letter, we at the same time hold that nothing should be interpolated into that instrument which the people did not will. We are not at liberty to give an artificial and constrained interpretation to the language used, beyond its ordinary, popular, and obvious meaning. Before and at the time our Constitution was framed there was among us this class of people, and they were subjected to various disabilities from which the white population was exempt. It is impossible to suppose that the framers of the Bill of Rights did not have an eye to the existing state of things, and did not act with a full knowledge of the mixed population for whom they were legislating. They must have felt the absolute necessity of the existence of a power somewhere to adopt such rules and regulations as the safety of the community might from time to time require. "Constitutions are not themes for ingenious speculations, but fundamental laws ordained for practical purposes." As a further illustration of the will of the people as to the light in which free people of color are to be considered as citizens, the present Constitution of the State entirely excludes them from the exercise of the elective franchise. Rev. Stat., 21. Nor does the new Constitution in any of its provisions overrule or contravene the preceding legislation on the subject we are considering. We *must*, therefore, regard it as a principle settled by the highest authority,

the organic law of the country, that the free people of color cannot be considered as citizens in the largest sense of the term, or, if they are, they occupy such a position in society as justifies the Legislature in adopting a course of policy in its acts peculiar to them, so that they do not violate those great principles of justice which ought to lie at the foundation of all laws. In conclusion, we would adopt the (255) language of the Court in *Manuel's case:* "Upon full consideration of all the objections urged by the prisoner's counsel, we do not find such clear repugnancy between the Constitution and the act of 1840 as to warrant us in declaring that act unconstitutional and void." We are, therefore, of opinion there was error in rendering judgment against the State.

This decision must be certified to the Superior Court of Cumberland County, with directions to proceed to judgment and sentence thereon agreeably to this decision and the laws of the State.

PER CURIAM. Reversed.

Cited: S. v. Glen, 52 N. C., 324; *Johnston v. Rankin*, 70 N. C., 555.

THOMAS H. McGEE v. EDWARD E. HUSSEY.

1. Where A. conveyed negroes to B. in trust "to be kept, hired out, or otherwise disposed of for the maintenance and support of C.: *Held*, that C. had no such equitable interest as was the subject of execution under the act of 1812, Rev. Stat., ch. 45, sec. 4.
2. The principle, well established by our courts, is that the legal estate is not to be transferred or divested out of the trustees by an execution, unless that may be done without affecting any rightful purpose for which that estate was created or exists. Where the *cestui que trust* has not the unqualified right to call for the legal estate, and to call for it immediately, as where the nature of the trust requires it to remain in the hands of the trustee, who, by the terms of the deed, is to do acts from time to time, the act of 1812 authorizing the sale of equitable interests does not apply.

APPEAL from DUPLIN Fall Term, 1844; *Dick, J.* (256)

Detinue, brought to recover five negro slaves. The plaintiff in support of his title offered in evidence a deed from Elizabeth McGee to himself for the negroes in question, by which these negroes were conveyed to him in trust for her brother William McGee, "to be kept, hired out, or otherwise disposed of for the maintenance and support" of the said William McGee. The plaintiff then proved that he had the said

slaves in his possession for six months; that the defendant then came to his house, seized them and took them off. The plaintiff further proved a demand upon the defendant for the slaves.

The defendant Hussey showed that he was a deputy sheriff of Duplin County, and that he levied an execution in favor of Samuel Houston against the said William McGee, on the said negroes, and took them into his possession by virtue of such levy. The defendant contended that William McGee had such an interest under the deed referred to as was the subject of execution, and, therefore, they had a right to levy on and sell the negroes.

The court instructed the jury that the interest of William McGee under the said deed was not the subject of execution; and the jury accordingly returned a verdict for the plaintiff. Judgment having been rendered pursuant thereto, the defendant appealed to the Supreme Court.

D. Reid for plaintiff.
Strange and W. Winslow for defendant.

NASH, J. The only question presented by the case is, Had William McGee such an interest in these negroes as rendered them, in the hands of the trustee, liable to be seized and sold for the debts of William McGee, under the process under which the defendant acted? The judge who tried the cause was of opinion he had not; and in this opinion we entirely agree with his Honor. Questions of a similar kind have so often been before this Court that the principle governing this case is well established. It is not necessary we should go through a labored argument, or review the numerous cases bearing on the question, to show that William McGee had no such interest in the slaves as could be reached by a *fieri facias* at law. *Gillis v. McKay*, 15 N. C., 174, furnishes us precisely with the rule governing this. In all cases within the act of 1812 subjecting equitable interest to be sold under execution the sale of the property by the sheriff divests the legal title of the trustee, and transfers it to the purchaser, who holds the property "freed and discharged" from the trust. Rev. Stat., ch. 45, sec. 4. In *Gillis v. McKay* the Court say: "The principle that the legal estate is not to be transferred or divested out of the trustee unless that may be done (258) without affecting any rightful purpose for which that estate was created or exists. Wherever the *cestui que trust* has not the unqualified right to call for the legal estate, and to call for it immediately, the act does not apply. If it did, the sheriff could confer upon the purchaser a larger estate than the *cestui que trust* had or could have." The Court proceeded to say "if the nature of the trust requires it to remain

in the hands of the trustee, who, by the terms of the deed, is to do acts from time to time," as to receive and apply the profits annually to the maintenance of another for life, or if the profits are to accumulate until a particular period, the case is not provided for by the act. In *McKay v. Williams*, 18 N. C., 406, the case of *Gillis v. McKay* is noticed, and the principle established by it approved. We think this is such a case. The deed conveyed to the plaintiff the legal estate in the negroes, in trust for William McGee. Had William McGee an unqualified right to have the legal estate taken from the trustee and transferred to him, and to have it transferred immediately? He had not, because it was necessary the legal title should remain in the trustee to enable him to perform the trust. He had acts to do from time to time; he had to keep the negroes hired out for the maintenance and support of William McGee, or he was otherwise to dispose of them for the same purpose. It was evidently not the intention of the donor that William McGee should have the management or the possession of the negroes. She was unwilling to entrust him with them. Her object was to provide for his support during his life. To permit him, then, to take the legal estate from the trustee would be to defeat the intention of the donor and the purpose for which the trust was created—a rightful and legal purpose; and if he was not entitled to call immediately for the legal estate, according to the principle established by *Gillis v. McKay*, the case is not within the operation of the act of 1812. He had no such interest in the slaves as could be reached by an execution at law. The defendant was, therefore, not justified in seizing them.

PER CURIAM. No error.

(259)

ROBERT P. WILLIAMSON ET AL. v. STEPHEN M. DICKENS.

1. The provision in the bankrupt law which prevents a debtor from being discharged under the commission of bankruptcy when the debt is of a fiduciary character extends only to special trusts, but does not extend to implied trusts, such as those of agents, factors, etc.
2. When a creditor has a claim which he might enforce, either by an action of assumpsit or in *tort*, if he sues in *tort* his action shall not be barred by a discharge under the bankrupt law.
3. The creditor is not barred by this discharge when, although he *might* have proved his claim under the commission, he was not *bound* to do so.
4. In every such case the *form* of the action brought is decisive of the question, whether the discharge is a good bar or not.

APPEAL from PERSON Fall Term, 1844; *Pearson, J.*

This was an action on the case in which the plaintiffs declared in *tort* for breach of contract, and also in *trover* for the conversion of certain

bonds, notes, and attorneys' receipts which the plaintiffs had placed in the hands of the defendant, to be by him collected for them. The breaches assigned in the first count were, first, failure to use due diligence in collecting; secondly, failure to pay over moneys collected. The defendant relied upon the pleas of the general issue and his certificate of discharge under the bankrupt law, which he obtained in January, 1843. The facts as disclosed upon the trial were as follows: In 1836 the plaintiffs placed in the hands of the defendant the bonds, notes, and attorneys' receipts referred to, which were then due to the estate of the plaintiffs' intestate from persons living in the State of Alabama, which bonds, notes, etc., by his receipt for the same he agreed to collect or return. The defendant proceeded to the State of Alabama in the autumn of 1836. While there, he collected a part of the said bonds, etc., and left a large residue in the hands of his brother Robert M. Dickens, who was a partner in trade in that country with the defendant and (260) others. Of the notes and bonds so left in his hands, Robert M. Dickens by his deposition proves that he collected a large amount, which in part he paid over to the plaintiffs' agent, but leaving a balance unaccounted for by him to the plaintiffs of about $900. It further appeared that this balance of $900 was used by Robert Dickens for the benefit of the firm of Dickens, Webb & Co., of which the defendant, as above stated, was a member; and upon the failure of the said firm, which took place in 1839, a general assignment of the effects of the firm was made for the benefit of their creditors, and this balance of $900 was, by a schedule annexed to the said assignment, admitted to be due the plaintiffs for claims left in the hands of Dickens, Webb & Co. for collection. It was also proved that the assets of the said firm were not sufficient to pay the said sum of $900. The plaintiffs also proved a demand before action brought.

On behalf of the defendant, the testimony of John A. Hogan was introduced. Mr. Hogan stated that in February or March, 1837, at the request of one of the plaintiffs, he had an interview with Mr. Robert Dickens in regard to the funds above mentioned. In that interview Mr. Robert Dickens told him that he, Dickens, would visit North Carolina in the course of the ensuing summer, and would adjust the matters in regard to these funds with the plaintiffs and the defendant. Mr. Hogan further stated that in the course of the winter of 1838 he had another interview with Robert Dickens in Alabama in relation to these funds, and Dickens then informed him that a portion of the funds was in the hands of Colonel Irving (an attorney), and that he, Hogan, could call on Mr. Irving and obtain them. Mr. Hogan accordingly obtained from Mr. Irving the amount of $2,175, or thereabouts. Mr. Hogan further stated that Mr. Robert Dickens, previously to his obtaining this sum

from Irving, informed him (Hogan) that the funds which were to be collected by Stephen Dickens for the plaintiffs were collected or were *considered* by him (Robert Dickens) as collected; that one of the debts was not actually collected, but was due to the plaintiffs from his overseer, and that he would at the end of the year retain his debt (261) out of the overseer's wages. The amount of this debt was $400 or $500, and soon after the first of January, 1839, Mr. R. Dickens sent Mr. Hogan a draft for $500, which was duly paid on presentment. Mr. Hogan further testified that Mr. R. Dickens said that he ought to pay the funds he had collected to the plaintiffs, but that he had no funds at the time which were available for that purpose; that his northern debts were pressing him, and that the payment he could make to Mr. Hogan depended upon what arrangement he could enter into as to his northern debts, and what collections he could make as to the debts due to the firm. In the first interview between Hogan and R. Dickens, the latter spoke of having made remittances to the defendant, and stated that what he owed the plaintiffs would depend upon the application the defendant had made of those remittances. Mr. Hogan further stated that when the plaintiff Williamson first requested him to give his attention to these matters in Alabama, he stated, after showing Mr. Stephen Dickens' receipt, that Stephen Dickens had placed the debts mentioned in the receipt in the hands of Robert Dickens for collection. In one of his interviews with Robert Dickens, Mr. Hogan told him that his brother Stephen would probably be sued by the plaintiffs for the debts he had to collect. To this suggestion R. Dickens replied that he regretted, or that his brother ought not to be sued, for that he, Robert, had the funds in his hands. The plaintiff Williamson authorized Hogan to treat with Mr. Robert Dickens in regard to these debts.

On the part of the plaintiffs it was contended that they had made out their case against the defendant, and had a right to recover, notwithstanding his discharge in bankruptcy: first, because the defendant, by his undertaking to collect as the agent of the plaintiffs, established between himself and the plaintiffs a fiduciary relation which, under the bankrupt law itself, precluded him from the benefit of his discharge; secondly, the plaintiffs having declared in *tort*, as they had a right to do under the facts of this case, the discharge in bankruptcy (262) was no bar to the action. But his Honor having intimated an opinion against the right of the plaintiffs to maintain their action, the plaintiffs submitted to a nonsuit and appealed to the Supreme Court.

Kerr and Venable for plaintiffs.
E. G. Reade and Iredell for defendant.

NASH, J. The plaintiffs' declaration contains two counts, one in *trover* and the other in *tort*, for breach of contract. The case was: the plaintiffs put into the hands of the defendant a number of notes and bonds which they held upon sundry persons in Alabama, and in his receipt the defendant bound himself to collect or return them. The defendant being one of a firm in Alabama engaged in merchandising, placed the papers in the hands of Robert Dickens, another partner, who collected the money and appropriated the amount now claimed from the defendant to the payment of the partnership debts. The firm is insolvent, and so is Robert Dickens. Mr. Hogan, as the agent of the plaintiffs, applied to Robert Dickens in Alabama for the money collected by him, and received a considerable sum. The defendant pleaded the general issue and his discharge as a bankrupt under the bankrupt law of the United States. The right of the plaintiffs to a recovery is resisted, first, upon the ground that they had recognized Robert Dickens as their agent in the collection of the debts, and thereby discharged the defendant. We do not agree to this proposition; we see nothing in the transaction as disclosed by Mr. Hogan showing that they had so recognized Robert Dickens. They did receive from him, by their agent, a part of what he had collected, and to that extent have discharged the defendant, but no further. In so doing, they did not thereby substitute Robert Dickens for the defendant as their agent. Moreover, this point was not raised on the trial, and is not open here. The second plea is that the defendant has been regularly discharged under the bankrupt law, which is a bar to the action. The fact of his discharge is not controverted by the plaintiffs, but its effect in protecting the defendant from this
(263) claim is denied: first, because the defendant was acting in a fiduciary character; secondly, because the demand of the plaintiffs is not such a debt as he was bound to prove under the defendant's commission. The first section of the bankrupt law provides that "all persons whatever residing in any State, Territory, or District of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer, or as an executor, or administrator, or trustee, or while acting in any other fiduciary capacity," shall on compliance with the requisites of the bankrupt law be entitled to a discharge under it. The argument here is that the defendant was acting in a fiduciary capacity, and is, therefore, expressly within the exception of the statute. We do not think so, and if that alone were in his way, we should unhesitatingly give him the benefit of his plea. What is the fiduciary character or capacity embraced by the act? Does it extend to all classes in which money has been received to the use of another? If so, few debts would be left on which the law would operate; for in all such cases the money is received in faith or trust to be paid over; in other

words, in a fiduciary capacity. Surely, it could not have been the intention of the National Legislature, in passing the act with a view to the relief of bankrupt debtors, so to restrict its operation. But the act shows us itself what was meant in the use of the words "other fiduciary capacity." Taken in connection with the words preceding them, it is evident that only such trusts were meant as are special, and not simply implied, as "the defalcation of a public officer" or of an "executor" or an "administrator." Upon the principle, then, of *redendo singula in singulis*, the words "other fiduciary capacity" must refer to trusts of the same class, to wit, special, and not implied trusts. In *Chapman v. Forsythe*, 2 Howard, 206, the Supreme Court of the United States decided that the words do not embrace a factor; and *Mr. Justice McLean*, in his able opinion, repudiates the idea that they can apply to (264) agencies. I repeat, then, if this were the only obstacle in the defendant's way, the judgment of the court below would very readily be affirmed. The important inquiry here is, Did the defendant at the time of his discharge owe such a *debt* to the plaintiffs as *compelled* them to prove it under the commission? If so, then, very clearly, the certificate of the defendant is a clear bar to the plaintiffs' action; if it was not such a debt, but a claim, for the securing of which the law gave them a choice of actions, and they were at liberty to sue either in tort or in debt, and their damages would not necessarily be the same in each form of action, their election of the former will deprive the defendant of the protection of his discharge as a bankrupt. In this case the plaintiffs have not declared on the contract, but have brought action in tort, making the neglect of duty on the part of the defendant the *gravamen* of their claim. This, then, is not a suit to recover, strictly speaking, a debt, and is, therefore, not within the words of the bankrupt act. *Parker v. Norton*, 6 Term, 695, is in strong analogy with this. It was an action of trover. The plaintiff had placed in the hands of the defendant a bill of exchange to be presented to the drawer at maturity and the money to be paid over. The defendant, before the day of payment, discounted the bill with the payee and delivered it up, taking less than the bill called for, and applying the money to his own use. The plaintiff had his election either to sue the defendant in assumpsit or bring trover for the bill. He chose the latter; and on the trial the court refused to give defendant the benefit of his discharge as a bankrupt, because the plaintiff had an election, and had sued in tort, and the damages would not be the same necessarily. In this case the Court recognizes the correctness of the rule laid down by *Lord Mansfield* in *Goodtitle v. North*, Doug., 583, that the form of the action in that case was decisive as to the effect of the certificate in bankruptcy. *Mr. Justice Grose*, in delivering his opinion, declares the question is not whether the plaintiff *might* have proved

his debt under the defendant's commission, but whether he was
(265) *bound* to do so. And all the Court agree that when a plaintiff has an election as to the *form* of his action, the choice of the action is decisive of the question. So in *Parker v. Crole*, 2 M. and P., 150, and 5 Bing., 63, it was decided that when the defendant, a broker, sold out the stock of the plaintiff contrary to his orders, the plaintiff had an election either to affirm the sale and sue the defendant for the money received by him or to bring an action of tort, and as he had brought the latter action, the defendant was not protected by his certificate of bankruptcy. These cases abundantly prove that when the plaintiff has an election, he is not *bound* to prove his claim as a debt under the defendant's commission, though he may; and when he sues in *tort*, the defendant cannot avail himself of the protection of the bankrupt law. In this case the form of the action is not objected to; it is not controverted but that the plaintiff can sue in *tort;* see *Govett v. Radnidge*, 3 East, 62, and it was important to them to adopt this form of action, not alone as to the present question. The defendant was their agent to collect a variety of claims put into his hands. He had wrongfully transferred them to Robert Dickens, who had received the whole of the money, and applied a portion of it to the payment of the debts of the firm, of which the defendant was one. It is this misapplication of their funds of which the plaintiffs complain and for which they bring their action. It is by no means certain, if they had sued in debt, that they could have recovered. There is nothing to show that this misapplication was made by Robert Dickens with the knowledge of the defendant, or that he, after it was done, assented to it or took any benefit from it, and if he had he would have been liable to the claim of the plaintiff under a different contract than the one we are now considering. Be this, however, as it may, the plaintiffs have made their election to sue in *tort;* they claim, not the money, but damages from the defendant for a breach of duty in the management of his agency. These damages are unliquidated, and can be ascertained only by a jury.

(266) They may give the full amount of the sum misapplied by Robert Dickens, or they may give less, if they should be satisfied the plaintiffs are entitled to less. We are of opinion that the defendant's discharge under the bankrupt law is no bar to the plaintiffs' action, and that there is error in the judgment of the Superior Court.

PER CURIAM. Reversed.

Cited: Ledbetter v. Torney, 33 N. C., 295; *Bond v. Hilton*, 44 N. C., 311; *S. c.*, 47 N. C., 150; *Froelich v. Express Co.*, 67 N. C., 4; *Hervey v. Devereux*, 72 N. C., 467; *Solomon v. Bates*, 118 N. C., 315; *Peanut Co. v. R. R.*, 155 N. C., 166; *Mule Co. v. R. R.*, 160 N. C., 220.

(267)

HENRY HYMAN, EXECUTOR, ETC., v. HENRY GASKINS.

1. A will of personal property must be executed according to the law of the country where the domicil of the testator was at the time of his death.
2. It is, therefore, most proper that such a will should be first submitted to the forum of the domicil at the time of the death; but that course is not absolutely necessary.
3. The court of probate in this State does not inquire into the validity of a will of personalty proved in the State where the domicil was, but looks only to the probate, and thereupon grants letters of administration or letters testamentary, as the case may be. Or, perhaps, the probate had and letters granted in another State, duly authenticated according to the provisions of the Constitution of the United States, may authorize the executor or administrator to sue in our courts.
4. The county in which there are *bona notabilia* of one who was domiciled abroad is the proper county in which probate of the will is to be had or letters of administration granted.
5. If under any circumstances the court of probate, in the particular case, has authority to grant letters testamentary or of administration, though they may be *voidable*, they are not absolutely *void*. If the court, in no possible state of things, could grant the letters, than they are void and convey no authority to any one to act under them.
6. If the grant is void, the defendant who is sued may plead *ne unques executor;* otherwise if it be only voidable.
7. A payment made by a debtor to one who has obtained letters testamentary or letters of administration from a court of competent jurisdiction is a good discharge to him, although the grant be afterwards declared null and void.
8. Where a testator had his domicil in Florida at the time of his death, and had *bona notabilia* in the county of Edgecombe in this State, a probate of the original will in the court of this county and the grant of letters testamentary to the executor are not void.

APPEAL from EDGECOMBE Fall Term, 1844; *Caldwell, J.*

Action on the case brought by the plaintiff as the executor of Theophilus Hyman, to which the defendant pleaded, among other pleas, the general issue and *ne unques executor*. On the trial it appeared (268) that Theophilus Hyman, the testator, resided in the county of Edgecombe till 1839, during which time he made a last will and testament, in which he named the plaintiff his executor, and deposited it with a friend. He then removed to the county of Leon in Florida, where he died in the Spring of 1841. Previous to his removal he had been engaged in merchandise in Edgecombe, and at his death had debts due to him in that county. At May Term, 1841, of Edgecombe County Court, Henry Hyman, the plaintiff, and the executor named in the will, caused it to be duly proved, qualified, took out letters testamentary, and instituted the present suit against the defendant, a resident of Florida,

but who happened to be on a visit to North Carolina. It also appeared that the note on which the suit was brought was executed in Florida; that the parties then resided there, and that the defendant still resides there. And it also appeared that the said last will and testament of the testator had never been proved in the county of Leon in Florida, the place of residence, nor had any proceeding been there taken in relation thereto, nor did it appear that it had been proved in any other county in the said territory.

It was insisted for the defendant, among other things, that the suit could not be sustained in Edgecombe, nor anywhere in this State, unless it first appeared that the will in question had been duly proved and letters issued thereon in the county of Leon in the territory of Florida.

The question was reserved, and upon the other pleas the jury found for the plaintiff, subject to the opinion of the court. On consideration, the court was of opinion that the suit was rightfully brought, and rendered judgment for the plaintiff. From this judgment the defendant appealed.

B. F. Moore for plaintiff.
Mordecai for defendant.

NASH, J. The decision of this case rests, in our opinion, entirely upon the question whether the letters testamentary granted to the plaintiff by the county court of Edgecombe are entirely void or merely
(269) voidable. If the former, the plaintiff cannot maintain his action; if the latter, he can.

The act of 1789 of our General Assembly, Rev. Stat., ch. 122, sec. 6, provides "that all wills shall be proved in the county where the testator had his usual place of residence at the time of his death"; and on behalf of the defendant it is urged that Theophilus Hyman had no residence in this State at the time of his death, and, therefore, no county in this State had any original jurisdiction to take probate of his will. It is not denied, if the will had been first proved in Florida, where the testator died, agreeably to the laws of that Territory, that a copy of it, properly authenticated, might have been admitted to probate in this State, and, in that case, Edgecombe County Court would have had jurisdiction of the case, and letters testamentary issued by it would be valid. We agree that this would have been the proper course. Though long a vexed question, it is now well settled in England, as well as in this country, that a will must be executed according to the law of the country where the domicil was at the time of the death of the testator. But as late as 1828 the contrary was holden by *Sir John Nicholl*, in *Curling v. Thornton;* and again it was ruled by him in *Stanly v. Barnes*, 3 Haggard Exch., 273. This latter case, however, settled the doctrine in England; the opinion of *Sir John*

Nicholl being overruled by the High Court of Delegates upon appeal, and the doctrine fully established that the law of the actual foreign domicil of a British subject is exclusively to govern in relation to his testament of personal property as it would in the case of a foreigner. The same doctrine was held in Pennsylvania in *Desistat v. Berquins,* 1 Binney, 336. That was the case of a foreign testator, domiciled abroad, disposing of property in that State. From the many adjudications in the American courts, it may, we presume, be considered the settled doctrine in this country. *Holmes v. Remsen,* 4 John. C., 469; *DeSobry v. DeLaistre,* 2 Harris and Johnson, 224; *Dixon v. Ramsay,* 3 Cranche, 319. There is, then, a manifest propriety in submitting the will in the first instance to the forum of the domicil at (270) the time of the death, but we can find no case deciding that course to be absolutely necessary. In Larpent v. Lindsy, 1 Haggard, 382, decided in 1828, certain papers of a testamentary character were left by Thomas Barnes, who died in India. These papers were proven there as his will, and, exemplification of the probate in India being transmitted to England, a motion was submitted in the Prerogative Court of Canterbury, where there were *bona notabilia* of the deceased, for administration with the exemplified copies of the papers annexed as the will of Thomas Barnes. *Sir John Nicholl,* after observing that the probate in India was not exactly according to the English practice, proceeds: "But the court in India, which, as the deacesed died domiciled there, is a court of competent jurisdiction, has considered them as a will and codicil, and this Court is *perhaps* bound to follow it. The question how far this and other courts of probate are to be governed by the decision of the court of probate where the deceased was domiciled has never been expressly decided. He then observes it is the general practice, and he should not depart from it unless in a strong case of inconvenience. In the opinion, then, of *Sir John Nicholl,* the practice of proving the will first in the forum of the foreign domicil may in a strong case of inconvenience be departed from, and, as I understand him, the probate be first had in the jurisdiction where *bona notabilia* are found. But though the will be proved, or letters of administration be granted, where the foreign domicil was, yet they confer upon the executor and the administrator no rights, beyond the territory of the government where granted. Any right which they may enjoy beyond such limits or jurisdiction is not *de jure,* but conventional, and depending upon the comity of nations; or, rather, is acknowledged *ex comitate.* Every nation has a right to prescribe the mode in which it shall be enjoyed, and no nation is bound to enforce foreign laws prejudicial to the rights of its citizens. Hence it is the doctrine of the common law that no suit can be brought by an executor or administrator upon foreign letters. 1 Will. Ex., 205.

(271) He must apply to the proper court of the country where the action is to be brought, and obtain there letters of administration or testamentary, and his right to do so is considered as a matter of course. In this State the court of probate in such a case does not inquire into the validity of the will, but looks alone to the probate; and, upon being satisfied upon that point, directs letters to issue to the executor or administrator, as the case may be. *Helme v. Saunders,* 10 N. C., 563.

The law will not permit a foreign administrator or executor to collect the assets, because it is the duty of the Government to take care of its own citizens, and their right would be materially injured by permitting actions to be brought or recognizing foreign letters, as the assets might be carried beyond the limits of the State and beyond the reach of the creditors. This new administration, however, is but ancillary to the original, and imposes upon the executor or administrator the obligation to pay over, when they are obtained by different persons from the executor or administrator of the domicil, whatever of the assets may remain after discharging the debts and legacies due to persons resident within the country where obtained. *Harvey v. Richards,* Mason, 381; Story Conf. of Laws, 423. In *Helme v. Saunders, supra, Judge Henderson* observes that the Court were of opinion that when a probate was obtained in a sister State, and was authenticated as the laws of the United States direct, it is, under the Constitution of the United States, in such an authentic form as to supersede the necessity of any probate in the courts of his State, and that such authentication may be given in and sustain a suit. Be this, however, as it may, either new letters must be obtained in this State, in such a case, before an administrator or executor can sue in our courts or he must produce his letters so authenticated in another State; and either, according to *Judge Henderson's* opinion, will answer. The power of our county courts to grant letters testamentary or of administration where a person has died beyond the State, being domiciled there, is fully established by *Smith v. Munroe,* 23 N. C., 345,

(272) and that the county where *bona notabilia* of the testator or intestate are found is the proper tribunal to grant them. This can fully answer the verbal objection as to the letters in the present case growing out of the language of our act concerning probates. Theophilus Hyman had been a merchant in Edgecombe County and at the time of his death had many debts due to him in that county. These debts so due constituted *bona notabilia,* and gave to the county of Edgecombe power to take probate of the will in some way, as by ordering the letters granted in another State to be recorded and new letters to issue. *Owings v. Ulery,* 4 Bibb., 450, and *Carmichael v. Elmendorf,* 4 Bibb., 484. The question then returns. Are the letters testamentary granted to the plaintiff void? If so, he is not the executor of the will of Theophilus Hyman,

and cannot support the action. If, however, the letters are merely voidable, the defendant cannot avail himself of his plea of *ne unques executor*. Mr. Chitty, 1 Pleading, 486, states that when letters testamentary have been granted by an *inferior* diocese the defendant may plead *ne unques executor*, and give in evidence the fact that there were *bona notabilia*. And why could he do so? Because the probate was void as granted by an incompetent authority. Toller, 120, and cases there cited. The proper person before whom, according to the law of England, a will is to be proved is the ordinary of the place where the testator dwelt, that is, generally, the bishop of the diocese; and, if all his goods lie within that diocese, the probate before the bishop thereof, or his proper officer, is the only proper one; but if he have *bona notabilia* lying within that diocese, and some other, then the probate must be had before the metropolitan of the province in consequence of his special prerogative; and if otherwise granted it is void, because of the want of jurisdiction. 1 Will. on Exrs., 167. It is sometimes difficult to distinguish between such acts or judgments of a court as are void and such as are merely voidable; but it may be safely said in reference to granting letters testamentary or of administration that if under any circumstances the court of probate could grant them, then it would have jurisdiction of the subject and its act is not void; if, on the contrary, (273) in no possible state of things it could grant the letters, then are they void and conveyed no authority to any one to act under them. Thus it has been decided in this State that when a citizen of North Carolina dies, letters of administration granted by the court of a county where he never resided nor had any assets at the time of his death were absolutely void, being a mere nullity. *Collins v. Turner*, 4 N. C., 541. So if administration be granted before probate or refusal, or where there are two executors, and one proves the will and dies, and administration is granted before the refusal of the survivor subsequent to the death of his coexecutor—in all these cases the administration is not simply voidable, but absolutely void, because in neither case could the ordinary by any possibility, while the facts so continued, have authority or power to grant administration. Toller, 120. But where he has, in the particular case, a right to act, then his act may be voidable, but is not void; he has the jurisdiction of that particular case. He may mistake his duty, or act upon insufficient testimony; what he does may be wrongfully done; but it is not a nullity—as if he grants letters of administration to a wrong person, or if he grant it *non vocatis, fure vocandis*. This doctrine is treated by *Chief Justice Marshall* in his usual clear and forcible manner in *Griffith v. Frazier*, 8 Cranche, 5, in which he had occasion to examine the doctrine of void and voidable letters of administration. The case, so far as this point is concerned, was, shortly, as

follows: A man by the name of Salvador, a citizen of South Carolina, made his will and appointed three individuals executors. Two of them were out of the State, and Da Costa, the third, had the will proved, and qualified as executor. He afterwards left the State, and, while he was alive, administration with the will annexed was granted to one Lamoth, and the question was whether the letters to the latter were void. The Supreme Court ruled them to be so, because in no possible state (274) of things, during the life of Da Costa, could the ordinary grant letters of administration; his letters testamentary to him had exhausted his power. Let us test this case by the principles established. Theophilus Hyman died in Florida, a foreign government. According to the rules of the English courts, his will ought to have been proved there, in the first instance, and if the executor wished to collect the assets in this State he ought to have procured a copy, duly authenticated, and upon presenting that before the proper court of probate in this State have it proved and deposited as if it were the original, and upon such probate obtain letters testamentary. I Will. on Exrs., 205; Toller, 70. Under some circumstances, then, to wit, such as Mr. Williams points out, the court of probate in this State, where there were *bona notabilia*, might grant letters testamentary. If it be correct, as stated by *Judge Henderson*, that in such case our court of probate goes into evidence of the fact only of the foreign probate, and, if satisfied of that fact, grants letters testamentary, that is, gives documentary evidence, which our courts recognize as genuine, then the result is that the court of Edgecombe County has granted letters testamentary, not in a case in which they had no jurisdiction, but upon improper and mistaken testimony. Instead of requiring a copy, duly authenticated under the laws of Florida, to be filed among their records as evidence complete of the existence of the will, they have caused the original to be proved and filed, and upon that have granted letters testamentary. It is to be regretted that the court has inadvisedly pursued this course. A proper respect for the laws and institutions of Florida should have led to the adoption of the accustomed mode. It is an unnecessary departure from that comity which ought ever to exist between the courts of different nations. We cannot, however, therefore, declare the letters granted by that court void. Nor do we perceive any serious mischief or inconvenience likely to ensue from sustaining the letters. It was absolutely necessary, in order to collect and secure the assets and to pay the creditors and legatees of the testator, if there were any such in this State, (275) that letters testamentary should be issued from some authority here; and though this appointment is only ancillary to the one to be made in Florida, yet so far as the assets in this State are concerned it is plenary to every purpose. It will be the duty of the executor to

take the will to Florida and have it proved there according to the laws of that State; otherwise, he may subject himself to a *devastavit*. *Helme v. Saunders*, 10 N. C., 563. Nor is the defendant materially interested in the determination of this question. The jury by their verdict have said he owes the money, and it must be to him a matter of indifference to whom he pays it, provided, when he does so, it shall be to him an effectual discharge; and that if paid under the judgment in this case he will be protected is very certain; the letters testamentary being granted by a court of competent authority and having jurisdiction, and binding upon all other courts, both of law and equity, until duly and properly repealed. 1 Will. on Exrs., 340. If, however, the grant of letters be void, all the acts of the executor done under them are void, so far as the rightful executor is concerned. Thus, in *Graysbrook v. Fox*, Plowden, 276, 1 Will. Exrs., 368, administration having been granted by the ordinary before the executor had proved the will, was declared void, and the administrator having sold some of the goods of the testator to the defendant, the plaintiff (the executor) sued him in detinue for them and recovered, because the letters of administration were void. With respect to payments, however, made to an executor or administrator by a debtor of the estate, the rule is different. If the grant be made by a court of competent jurisdiction, whether the letters be void or only voidable, a *bona fide* payment of a debt due to the estate will be a discharge to a debtor. In *Allen v. Dundass*, 3 Term, 125, it was held that a payment made to the executor of a forged will, who had obtained probate of it, the supposed testator being dead, was a valid discharge to the debtor, although the probate was afterwards declared null by the Ecclesiastical Court on the principle, says Mr. Williams, 1 Wills. Exrs., 371, that if the executor had brought suit against the debtor, the latter could (276) not have controverted the title of the executor as long as the probate was unrepealed, and the debtor was not obliged to wait for a suit, when he knew no defense could be made to it. See *Woolly v. Clark*, 5 Barn. and Ald., 746; *Phillips v. Byron*, 1 Sh., 509; *Appeal of Peebles*, 13 Serg. and Rawle, 39. There cannot, then, be a doubt that a payment by the defendant to the present plaintiff, made either voluntarily or under process of law, would be to him a full discharge.

It is to be observed that it does not appear that the will was offered for probate and admitted as the will of a citizen of Florida, and not as the will of a citizen of North Carolina.

PER CURIAM. Affirmed.

Cited: *Stamps v. Moore*, 47 N. C., 82; *Townsend v. Moore*, 55 N. C., 149; *Alvany v. Powell*, 55 N. C., 60; *Syme v. Broughton*, 86 N. C., 157; *London v. R. R.*, 88 N. C., 590; *Garrison v. Cox*, 95 N. C., 355; *Springer v. Shavender*, 116 N. C., 16; *Shields v. Ins. Co.*, 119 N. C., 384; *In re Bowman*, 121 N. C., 375; *Holshouser v. Copper Co.*, 138 N. C., 258.

JOSEPH SIMMS v. LUNSFORD A. PASCHALL.

1. The obliteration by the holder of a bond of a payment indorsed on it does not destroy the validity of the bond. Such an entry is no more than a receipt, and constitues no part of the bond.
2. Whatever weight the jury may give to the fact of such obliteration in making up their verdict on the question of payment, there is no legal or technical presumption of payment in such a case of more than appears to have been in fact paid.

APPEAL from FRANKLIN Fall Term, 1844; *Caldwell, J.*

Debt upon a bond given to Martha Webb for $185, dated 5 March, 1833, and endorsed after it was due to the present plaintiff. Pleas, *non est factum, payment.* On the bond two credits were entered before the assignment: the one for $86.18, dated 27 August, 1834; the other (277) for $25.75, dated 14 March, 1835. On the trial it was alleged on the part of the defendant that a third payment had been made, for which a credit had also been entered by the obligee on the piece of paper on which the bond was written, but that the entry had been torn off or obliterated by one Anderson H. Walker, who had the possession of the bond as the agent of the obligee to collect the money, and that he so tore off or obliterated the entry for the purpose of destroying the proof of such payment. Upon this there was contradictory evidence.

Thereupon the counsel for the defendant prayed the court to instruct the jury that if they should believe that a payment was made and credited on the bond, and that said Walker obliterated it or tore it from the paper for the purpose of destroying the evidence of such payment, the bond itself was thereby in law canceled and destroyed, and this action could not be supported.

But the court instructed the jury that if the obligee had obliterated the credit entered on the bond, it would amount in law to proof of payment in full; but that the case was different if the act was done by an agent; and if the jury believed that Walker, the agent as aforesaid, had made such obliteration with the intention alleged, it did not amount to proof in law of full payment of the bond, but only raised a strong presumption of such full payment, which they must weigh in connection with the other evidence, and say upon the whole, whether the bond was paid or not. The jury found the two payments of $86.18 and $27.75, and no others; and from the judgment for the residue of the debt the defendant appealed.

Saunders, Miller, and Venable for plaintiff.
No counsel for defendant.

RUFFIN, C. J. The proposition contended for by the defendant must be too broad. It amounts to this: that if any credit, for even a small and known sum, be entered on the paper on which the bond is written, and be fraudulently expunged, the debtor is not to take credit for the true sum paid, but that in law, the whole debt is deemed to have (278) been paid or the bond annulled. We are not aware of any such rule. If the bond itself be altered, it is destroyed; and the argument assumes that the entry of the credit becomes part of the bond, so that its obliteration is a destruction of the whole instrument. But the credit is not part of the deed. It is only written evidence of a payment on it, like a receipt. If expunged, the debtor would still have the benefit of it, if he could establish its contents. And if he could not positively show the precise contents, but there should be a doubt as to the amount or period of payment, there is a natural presumption arising from such conduct, of which the jury will always feel the just influence in making up the verdict upon the question of payment. But we do not know of any legal or technical presumption of the payment, in such case, of more than appears to have been in fact paid. If there be an error in the instructions to the jury, it is not one of which the defendant can complain. Indeed, the verdict puts the whole instruction out of the case, for it is not only that he whole debt was not paid, but that there was no third payment whatever. If there had been such third payment, the jury would have found that, although they might not have found full payment. Therefore, by finding only two payments, as entered on the bond, and still appearing there, the jury must have believed that no other payment was either entered or made.

PER CURIAM. Affirmed.

Cited: *Wicker v. Jones,* 159 N. C., 110.

(279)

H. G. PARISH v. JOSIAH TURNER ET AL.

1. An execution from a justice of the peace issued against a defendant in his lifetime. After his death, and before the return day of the execution, it was, for want of chattels, levied on his lands, the levy returned to the county court, and, after due notice to the heirs, the court ordered the lands to be sold and that a *venditioni* issue for that purpose. *Held*, that the levy was good, the proceedings under it regular, and that when the sale took place it should have relation back to the levy, and the proceeds should be applied to that execution in preference to executions subsequently issued from a court of record on a judgment against the heirs upon a *sci fa.*

2. Where a party is dead at the time of the levy on lands under a justice's execution, notice to his heirs is as effectual as if given to the party himself when living.

APPEAL from ORANGE Fall Term, 1844; *Pearson, J.*

This was a motion to the county court to direct the application of $\$\ldots\ldots$, which was raised from the sale of the real estate of Thomas D. Crain, deceased, and paid into the office of the clerk of the county court.

Thomas D. Crain died in April, 1842. At the time of his death justices' executions in favor of H. G. Parish and others, the present plaintiffs, against the said Crain were in the hands of one E. G. Mangum, a constable, all being tested 16 or 17 March, 1842. The personal property of the said Crain having been all seized by the sheriff of Orange by virtue of an execution issuing from the February term preceding of the county court, the said Mangum, on 1 June, 1842, levied the justices' executions in his hands on a storehouse in Hillsboro belonging to the estate of the said Crain, and returned them, with the levies indorsed, to August term of the county court of Orange, when (280) they were placed on the docket. On the last day of that term, on motion of the counsel of the administrator of the said Crain, the court directed all the said execution cases to be dismissed. At November term following, on affidavit filed, the court directed the cases to be reinstated on the docket *nunc pro tunc*, and ordered notice to issue to the heirs at law of the said Crain of the levies aforesaid. The causes were continued on the docket until May Term, 1843, when, notices having been served, orders were made in three of the cases that writs of *ven. exp.* issue. In the other two cases, for want of the papers which should accompany the executions, orders were not made, but the cases continued until August term, when, the papers being filed, orders were made in these also. Writs of *ven. exp.* issued in all these cases from August to November term, when the property was sold.

The defendants obtained judgments at February Term, 1843, against the administrator of Crain, the plea of fully administered being found in his favor; and they severally issued writs of *sci. fa.* to the heirs at law to show cause why the real estate should not be sold to satisfy their recoveries. These having been returned served to May term following, judgments were entered according to the *sci. fas.* From August term following executions against the real estate of Crain were issued on these judgments to the sheriff, and he sold the house and lot levied on under all the process in his hands, and brought the money into court. It was ordered by the county court that the moneys raised by the sale should be applied, in the first place, to the satisfaction of the justices' executions of the plaintiffs' *pro rata*, and, if there should be a surplus, then to the satisfaction of the executions of the defendants in like manner. From this order the defendants appealed to the Superior Court.

On the appeal coming up to the Superior Court, his Honor declared his opinion to be that the levy of the justices' executions, the order of

sale, and the sale were invalid. At common law, lands of a deceased debtor were not subject to the payment of his debts in the hands of the heir unless the heir was specially bound. The act of 1784 provides that *sci. fa.* to subject the lands may be issued after a judg- (281) ment against the administrator. The act of 1794 authorizes justices' executions to be levied upon land, and returned to court for an order of sale; and the act of 1828 requires that notice shall be served upon the defendant in the execution before the order of sale is made. The proceeding in this case does not conform to the provision of either act. The act of 1784 is out of the question. The act of 1794 directs a levy upon the land of the defendant in the execution. The act of 1828 directs notice to the defendant in the execution. There is no provision for a levy upon land in the hands of the heir or for notice to the heir. This proceeding would be valid as to personal property, but there are many distinctions between them. Personal property, when levied on, may be sold, even after the execution was out, without an order of sale. As to real property, there must be an order of sale. Personal property was the appropriate fund for the payment of debts at the common law, and the common law provides modes to subject it. Real property was not liable, except by statute, and the mode to subject it must be provided by statute. A court has no authority to adopt, in reference to real property, a mode applicable at common law to personal property.

The court, therefore, adjudged that the order of the county court be reversed, and that the sheriff be directed to apply the money to the satisfaction of the executions of the defendants *pro rata;* the excess, if any, to be paid over to the heirs at law.

From this judgment the plaintiffs appealed to the Supreme Court.

J. H. Bryan for plaintiffs.
A. W. Venable for defendants.

DANIEL, J. The plaintiffs' justices' executions were issued in the lifetime of Crain, and they were levied on the land after his death, but before the return days of the said executions. Were the said levies by the constable good in law? If a sheriff have in his hands a *fi. fa.* issued from a court of record, tested before the death of the defendant in it, he may both levy and sell the land after the death of the defendant, if he do it before the return day. *Bowen v. McCullough,* 4. N. C., 684; *Wood v. Harrison,* 18 N. C., 356. But if the sheriff levies on land, and does not sell it before the return term, and the defendant dies, then a *venditioni* cannot issue to sell it before the heirs are made parties by *scire facias. Samuel v. Zachery,* 26 N. C., 377. But it is said that under a justice's execution the land is bound only from the time of levy by the constable.

That is true. *Lash v. Gibbons*, 5 N. C., 266; *Ellars v. Ray*, 9 N. C., 568. But by the act of Assembly, Rev. Stat., ch. 268, sec. 16, the *personal* property of the defendant, in a justice's execution, is bound only from the levy. Yet this Court has decided, *McCarson v. Richardson*, 18 N. C., 561, that if the defendant die after the *teste* of such execution and before the levy, his administrator is bound thereby, and the goods in his hands may be levied upon and sold without a *scire facias* to revive the
(283) judgment. The court furthermore said that the act of 1828 was passed *only* for the protection of purchasers from the defendant in the execution. In this State the rule of the common law as to the lien of a *fi. fa.* upon chattels has been extended to land, when sought to be subjected by that writ. *Ricks v. Blount*, 15 N. C., 128. But in favor of purchasers from the defendant in the execution, and also in favor of other execution creditors, who may first levy on it, the land is not bound until the levy is actually made by the officer under a justice's execution. If the defendant in a justice's execution die after the issuing thereof, and before the return day, then his heir at law cannot stand in a better situation to resist the constable's right to levy on the land (which was the defendant's at the *teste* of the execution) than the administrator can since the act of 1828, as to the chattels. When in such cases the land is levied on, and the proceedings are returned into court for an order of sale, as the act of Assembly of 1828 requires the officer to serve the defendant with notice in writing at least five days before the term to which the execution is returnable, although the act has not in so many words declared that if the defendant in the execution should die the said notice should then be served on the heir or devisee; still we think it is so clearly within the meaning of the Legislature that the heir should be notified that we must construe it as if such words were actually inserted in the act, in order to carry out the evident meaning of the Legislature. The notice to the heirs was in the nature of a *scire facias*, and *perhaps* on the return of it into court they might have shown that there was personal property which the constable knew of and might have levied on sufficient to satisfy the debt; or they, as heirs, might have shown that they had a right to retain their own debt against the land, or any other proper matter to induce the court to stay the order of sale. In England, by the statute of frauds, 29 Car. II, it is enacted that no writ of *fieri facias* or other writ of execution shall bind the property or the goods of the party against whom such writ of execution issued forth but from the time that such writ shall be delivered to the
(284) sheriff. But, notwithstanding, the courts of that country decided that the statute was passed solely to protect purchasers, and that the goods are bound against the defendant and his representatives, as they were at the common law from the teste; and, therefore, goods of a

testator in the hands of his executor may be taken on a *fi. fa.* against his testator bearing *teste* before his death. *Bragner v. Langmead,* 7 Term, 20; *Wagborne v. Langmead,* 1 Bos. and Pul. 571; Watson on Sheriffs, 176, 177.

We have seen that in this State the general rule as to the lien under a *fieri facias* upon chattels and lands stand upon the same footing. Then, as the act of 1828 binds personal property only from the levy in favor of purchasers, and not in favor of the executor or administrator, so we must now declare that the decisions which have heretofore been made in this State, that a constable's levy on the land under a justice's execution bound the land only from the levy, were made only to protect purchasers from the defendant in the execution, and also such execution creditors as had made a prior levy, although under a junior execution. The heir must stand as his ancestor, the defendant in the execution, did, with the exception of the privilege of pleading a retainer, etc., on the return into court of the notice to him to show cause why the order of sale should not be made. The argument for the defendant is founded on the omission in our statute to give a *scire facias* against heirs, except upon a judgment first had against the administrator, and on the further circumstance that at common law an action of debt would not lie against the heir on a justice's judgment. But the inference does not follow that, therefore, there is no direct remedy against the lands of the deceased debtor, but only through the circuitous route of a suit on the judgment against the administrator. Why should the administrator be sued? It is only for the protection of the heir by having the personal estate applied first to the satisfaction of the debt. Now, the very levy by the constable implies and affirms that there is no personal estate; and, being made in the lifetime of the ancestor, either actually or, in legal contemplation, by relation, that fact is established against the heir, because it was established against (285) the ancestor. But suppose the return of the constable not to be conclusive on that point, and that it is open to the heir to show that there are personal assets in the hands of the administrator—a point not now necessary to be decided, and on which we express no opinion—it does not follow that the administrator *must* be sued in the first place, but only that the heir may plead that there are personal assets, and, if it be so found, that the creditor cannot have execution of the lands. It is true that in such case he would not have execution against the administrator, as provided by the statute upon a verdict on the issue taken by the heir upon the point of assets, because the administrator would not be a party in any way to the proceeding. To proceed in this way against the heir would, therefore, be at a risk to the creditor of paying cost; whereas, if he brought in the administrator, and then the

heir, according to our statute, he must have execution against the administrator, or the land descended for both debt and costs. Then, no possible injury can be sustained by the heir by such a proceeding; for either he may avail himself of the prior liability of the personal estate or, if not, it is only because his ancestor was concluded on that point. Therefore, the creditor by judgment against the ancestor ought not to be compelled to go through all the forms of an original writ before he can touch the debtor's land. And although our acts do not give any original action against the heir, and at the common law he is only liable *in debt* upon the ancestor's obligation, in which he bound the heir, and not on a judgment, yet the creditor is not remediless upon such judgment against the heir and all others, the terre-tenants, to subject the lands to execution (*Sir William Hobart's case,* 3 Rep., 12; 2 Saund., 7, Note 4); for the law will not deprive the creditor of the benefit of his lien on the land by the death of the debtor. Such would be the case if the judgment were in a court of record. Within the same reason is the lien created by the levy of a justice's execution
(286) in the ancestor's lifetime. Suppose, for example, that this levy had in fact been made and returned before Crain died, and that notice had been given to him: what reason, founded in justice or law, can be assigned for putting a full stop to that suit, annulling the levy and lien on the land, and turning the creditor back to a new suit against the administrator, and leaving him no better off than a simple contract creditor? It stands precisely on the principle on which the common law gives the *scire facias* on a judgment against the terre-tenants; and the creditor is entitled to have satisfaction out of the lands levied on, as a fund specially appropriated, as against the ancestor and the heir, to that purpose. It is not material whether the heirs could have pleaded personal assets or not. If they could, they did not; and judgment was taken against them to sell the land levied on, and the execution refers to and enforces that levy; and it is not for another creditor to dispute its propriety, who comes in afterwards.

We are of opinion that the judgment of the Superior Court should be reversed and that the judgment of the county court should be affirmed.

PER CURIAM. Reversed.

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(287)

THE STATE v. ANDERSON HARRIS.

1. On an indictment for passing a forged bank note a witness is competent to prove that the note was counterfeit who had for ten years been employed as cashier of a bank, who in that capacity had received and paid out a great number of the notes of this bank, without ever

having had one returned as a counterfeit, and who swore that he believed he could readily distinguish between a genuine and a counterfeit note, not only from the handwriting of the signatures, but also from the paper, engraving, and general appearance of the note.

2. Knowingly passing a counterfeit bank note for the sake of gain to any other person, whether the latter knows it to be forged or not, is a crime under our act of 1819, Rev. Stat., ch. 34, sec. 60.

3. In the second section of the act of 1819, Rev. Stat., ch. 34, sec. 60, making it indictable to pass counterfeit bank notes, "purporting to be a bill or note issued by order of the president and directors," etc., the Legislature did not use the word "purporting" in its strict technical sense, as meaning that these words should appear on the face of the counterfeit bill or note, but in its popular signification to denote a bill or note presumed to have been issued by order of the president and directors of a bank. On indictment, therefore, which sets out the purport of the counterfeit note as it really appears on its face is sufficient.

APPEAL from PERSON Fall Term, 1844; *Pearson, J.*

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

"The jurors for the State upon their oath present, that Anderson Harris, late of the said county of Person, laborer, on 18 March, 1844, in the county aforesaid, unlawfully, fraudulently, deceitfully, and feloniously did attempt to pass, and did pass, for the sake of gain, to one John Y. Parker, of the said county, a certain false, forged, and counterfeit bank note, purporting to be a bank note issued by the Planters and Mechanics Bank of South Carolina, the same being a corporation chartered by an act of the General Assembly of the State of (288) South Carolina, of the denomination of $10, he, the said Anderson Harris, at the same time well knowing the said bank note to be falsely forged and counterfeited; the tenor of which false, forged, and counterfeited bank note is as follows, to wit:

	TEN.	TEN.	
10	No. 431	No. 431	TEN.
	B.	B.	
	10	10	

The Planters and Mechanics Bank of South Carolina will pay to Henry F. Heriott, or bearer, on demand, $10.

Charleston, 28 May, 1842.		Charleston, 28 May, 1842.	
10 S. H. ROBINSON, *Cash'r.*		DAVID RAVENEL, *Pres.*	
TEN	TEN	TEN	TEN

against the form of the statute in such cases made and provided and against the peace and dignity of the State."

Upon the trial of the indictment the following evidence was given: John G. Parker swore that on Tuesday of March court, 1844, at Roxboro, the defendant offered to lend him $1,000; witness said "he did not like to give security"; the defendant observed he would take a note without security; witness declined accepting the loan; the defendant then said, "I have four $10 South Carolina bills which I will let you have for $35 in North Carolina money"; witness asked where he got the money; the defendant said he got it from one Scales as the price of a horse; witness looked at the money and agreed to the proposition, and accordingly gave the defendant $35 in North Carolina bills and received from the defendant the four $10 South Carolina bills, one of which he identified, and the solicitor offered it in evidence. It is correctly set forth in the indictment. Witness stated further that at the time he received the money from the defendant South Carolina bills were just as good and as current as North Carolina bills, and he suspected from the defendant's purposing to lose $5, and other circumstances, that the bills were counterfeit, and was induced to
(289) take them because, if they were good, he would make $5, and, if counterfeit, he could get his money back and have the defendant punished. Soon after he received the bills he caused the defendant to be arrested upon a civil warrant and also upon a State's warrant. To prove the bill a counterfeit, the State called John Norwood, Esq., and Nathaniel Palmer, who, being asked the preliminary questions, and being considered competent, were examined without objection on the part of the defendant's counsel, and stated that they were satisfied that the bill was counterfeit. The State also called William R. Hill. He swore that for several years he had acted as notary in the city of Raleigh; he was then appointed agent of the State Bank at Leaksville, where he remained several years, when he was appointed agent of the State Bank at Milton, which place he still fills. He has been acting as the bank agent at Leaksville, and at Milton for the last ten years; as agent, he is responsible for any counterfeit money he may receive, and this has induced him to pay close attention to the subject of counterfeit bills. He stated that much South Carolina money circulated in the county where he acted as bank agent, and although the rule of his bank did not allow him to receive South Carolina bills in payment or on deposit until the last year or so, yet, when a considerable payment was made, and a small part offered was South Carolina money, he usually received it; he has on several occasions received bills on the Planters and Mechanics Bank of South Carolina, and sent them to the State Bank at Raleigh, and received a credit therefor. He also, in his private business, has frequently received the bills of said bank, passed them, and they were never returned. He considered himslf a good

judge of money: he judged more by the paper and the plate and general appearance of a bill than by the handwriting of the signers; he noticed that the Planters and Mechanics Bank, in 1842, and since, used a new plate for their $10 bills; he received and passed off several bills of this new plate, and thinks he sent one or two of them to the State Bank at Raleigh; the bills which he had seen of this plate, and (290) which he had no doubt were genuine, were on much better paper than the bill offered in evidence, and the engraving on the former was neatly executed by steel plate, so as to show the features of the faces, and even the hair, very distinctly marked, whereas the engraving of the bill offered was badly executed and the faces blotched; he considered that in this way he was able to tell any genuine $10 bill issued by that bank in 1842, and since, and had no doubt, from the inferior paper, bad engraving, and general appearance of the bill offered, that it was a counterfeit. This evidence was objected to by the prisoner's counsel, but was received by the court.

The State also swore several other witnesses who proved circumstances tending to show that the defendant knew the bills passed to Parker were counterfeit. The defendant's counsel moved the court to charge that if Parker believed the bills were counterfeit at the time he received them, the defendant was not guilty. The court charged that if the jury were satisfied that the defendant had passed the bill to Parker, that the bill was counterfeit, and that the defendant knew it to be counterfeit, they should find him guilty, notwithstanding they were satisfied that Parker, when he received it, believed it to be counterfeit, and took it under the circumstances deposed to by him.

The jury found the defendant guilty. The defendant's counsel moved for a new trial because the court admitted the testimony of Hill and because the court refused to charge as requested in reference to Parker's belief. The motion was overruled. The counsel then moved in arrest of judgment because the act of Assembly makes it indictable to pass a counterfeit bill, "purporting to be issued by the president and directors," etc., but not by the bank of another State, as set forth in this indictment. This motion was also overruled, and judgment pronounced against the defendant, from which he appealed to the Supreme Court.

Attorney-General for the State.
A. W. Venable for defendant. (291)

RUFFIN, C. J. We think the witness Hill was competent. In *S. v. Allen*, 8 N. C., 6, the only ground on which the witness judged was the handwriting in the signatures to the note; and the court thought their opportunities of gaining a correct knowledge of that were not sufficient. That case went very far in restricting the evidence, as it seems to us

Many persons, indeed, pay very little attention to handwriting, and handle bank notes without retaining any exemplar in the mind, and such persons may well say they are not well acquainted with the handwriting, and ought not to be allowed to testify to it. But it would seem to be otherwise as to those who, under such circumstances, do attend to the signatures and other properties of the notes, so as to give a correct knowledge of them; for one who has been in the habit of receiving large sums in bank notes and passing them off at
(292) periods, from which every one must know that in the course of trade, many if not all of them *must* long ago have been presented at the bank whence they were issued, and who has no reason to suppose that payment of a single one of them was refused, may well be considered in the light of one who has carried on a correspondence with the officers of the bank, in which the latter recognize the letters addressed in their names to the witness to be genuine, or paid bills of exchange drawn on them by the witness. 2 Stark. Ev., 372. And such a person, appearing not to have been imposed on by a bad note among so many, may justly be deemed a competent judge of good and bad notes of that bank. But that is not all in the case before us. The witness likewise stated that he formed his opinion also upon the paper, engraving and general appearance of the bill, as much or more than from the signatures. Now, in point of fact, the handwriting it not the *sole* nor chief criterion by which persons of business judge whether notes are genuine or counterfeit; but they rely much on the circumstances mentioned by this witness, and by them can often determine the point at a glance, as one person is known from another upon sight. Those who are old enough cannot but remember that the paper currency emitted by this State in 1783 and 1785 became so worn in use that few bills retained the signatures perfectly, and that on most of them they were nearly obliterated. Yet, forming, as they did, the principal part of the stinted currency of that day, many persons of business acquired such an accurate knowledge of the paper and engraving of both the genuine and counterfeit bills as to be able at once to detect the counterfeit. No doubt that with regard to bank notes the same is true now of many persons who as merchants and bankers are daily engaged in handling the notes of particular banks, and have become thoroughly acquainted with their whole appearance. Indeed, in a case which not infrequently happens, the form and printing of the bill is the only method of detecting a counterfeit, which is, when a genuine bill of one denomination is altered by extracting by a chemical process one sum and inserting a higher. Here the witness had been engaged in the pursuit of a cashier of a bank for ten years, which must have
(293) made him as familiar with the faces of these notes as with

those of his personal friends, and he swore that he believed that he possessed a correct knowledge of them. We think, therefore, that his testimony properly went to the jury, to be judged of by them.

Under the first section of the act of 1819 the crime consists in passing as true "a note which the party knew to be forged." But by the second section the passing or attempting to pass by one person *"to any other person"* a forged note, knowing it to be forged, constitutes the offense. It is putting spurious paper into circulation, and not defrauding the individual who takes it, that the statute has in view. Hence, upon a similar statute, it was held that delivering a forged note to an agent, that he might dispose of it in buying goods, was a passing within the act. *Palmer's case,* R. and R., 72. And where the prisoner sold a forged note to a person, employed as an agent by the bank itself to buy it from the prisoner, with the view of detecting him, it was held that the offense was complete. *Holden's case,* 2 Taunt., 334.

The Court is, therefore, of opinion that there is no ground for a *venire de novo.*

We have more hesitation on the sufficiency of the indictment. The act of 1819, Rev. Stat., ch. 34, sec. 60, enacts that if any person shall pass any forged bill or note "purporting to be a bill or note issued by order of the president and directors of any bank or corporation within this State or any of the United States," he shall be guilty of a felony. The indictment describes the note as a false and forged note, "purporting to be a bank note issued by the Planters and Mechanics Bank of South Carolina, the same being a corporation chartered by an act of the General Assembly of the State of South Carolina"; and then it sets out the tenor of the note, whereby it appears to run in the name of "the Planters and Mechanics Bank of South Carolina," and not "to be issued by order of the president and directors" of that bank.

The term "purport," when used in pleading, has a settled signification, which is, that an instrument, when produced, will (294) *appear upon its face* to be the thing it was described as purporting to be. The note, therefore, is, in point of pleading, correctly stated in the indictment to "purport" to be a bank note "issued by the Planters and Mechanics Bank of South Carolina"; and if the indictment has described it as "purporting to be issued by the president and directors of the Planters and Mechanics Bank of South Carolina," or "by the order of the president and directors," there would have been a fatal variance between the allegation and the proof, and, indeed, a repugnance between the alleged "purport" or the note and the "tenor" thereof as subsequently set forth. *Rex. v. Reading,* 3 Leach, 590; *Rex. v. Jones,* 1 Doug., 300.

If, then, the term "purporting" be used in the statute in the same sense in which it is in the indictment, no judgment ought to be passed on the conviction; for the indictment does not state the "purport" to be, and it is seen from the tenor of the note that the "purport" is not, that it was issued "by order of the president and directors" of the bank. But notwithstanding some doubt to the contrary, we have, after reflection, come to the conclusion that the word is used by the Legislature in an inaccurate and popular acceptation rather than in its technical sense. It is exceedingly difficult to suppose that the Legislature did use it in a strict legal sense; for there never has been a bill or note issued by a bank in this State which purported to be, that is, *upon its face expressed*, that it was issued *"by order* of the president and directors." Many of them have run in the name of the president and directors, thus: "The president and directors of, etc., promise to pay, etc." Others have been couched in terms similar to those of the note set out in this indictment; as, for example, "The Bank of the State of North Carolina promises to pay," etc. But we have no knowledge of any bank in this country whose notes have been issued in that form, "by order of, etc." The Legislature must have been aware of the terms in which the whole paper currency of the country was expressed; and it is not to be presumed that the intention was to make the passing of (295) the notes in a certain form, which had never been used, punishable, while the passing of counterfeits in the form universally adopted should be dispunishable. Hence the act ought not to read in this last sense if any other meaning can be given to the language which will prevent it from being, in effect, inoperative. The definition of "purport" by lexicographers is not so precise and restricted as the meaning affixed to it as a term of art in pleading. It is defined generally, "to mean, to import, to imply." The sense is not, therefore, necessarily, *what is expressed on the face* of an instrument; but what is to be understood or implied from it. That it was used in that meaning in this section of the act is to be inferred not only from the considerations already adverted to, but from the manner in which the same word is used in another part of the same act. The first section is, "That if any person shall forge any bill or note in imitation of, or purporting to be, a bill or note issued by order of the president and directors of any bank, etc., he shall be guilty of felony." Now, it is obvious that the phrases "in imitation of" and "purporting to be" are not set in contrast to each other, as meaning different things and constituting two crimes—the one consisting of forging a note "purporting" to be a note "issued by the order of the president and directors," etc.; and the other consisting of forging a note "in imitation of a note issued by order," etc.; but they are different modes of expressing the same

thing, probably intended (by mistake, indeed) to express the same thing the more emphatically by repetition. "In imitation of" is used as equivalent to "similitude or likeness" in the act of 1811 respecting counterfeiting coin. In that act an exact similarity is certainly not meant; for that would include such a sameness of appearance and material as would amount to good money, and thus be inconsistent with the idea of counterfeiting, which implies an injurious fraud. But such coin is meant as is not of the value of genuine coin, but resembles it so much as to show it was intended to pass for it. So the meaning of the first section of the act of 1819 is to punish forging a note "in imitation of" or "like" bank notes, which, in the common (296) popular understanding, are issued by order of the president and directors, because those officers are the managers of the bank. And if that is thus found to be the sense in which "purporting" is to be received in the first section of the act, we may, with equal reason, conclude that it was introduced into the second section to convey the same idea. We admit that it was, as a legal term, very inaccurately used in the act. Indeed, there was no necessity for its introduction into the act, in any sense of it, as it would have been sufficient to say, simply, "forge a bank note," or "a note of any bank incorporated in this State or in either of the United States, commonly called a bank note," or the like; and we should be better satisfied with our judgment if such had been the frame of the act. But, for the reasons already given, we think the language was intended to convey the same sense; and, therefore, the indictment describes the offense, though not in the very same words, according to the legal effect of the act, and that is sufficient.

PER CURIAM. No error.

Cited: Gordon v. Price, 32 N. C., 387; *S. v. Cheek*, 35 N. C., 120; *McKonkey v. Gaylord*, 46 N. C., 97; *S. v. Jacobs*, 51 N. C., 287; *Tuttle v. Rainey*, 98 N. C., 516.

(297)

THE STATE v. FRANCIS E. RIVES.

1. When an act incorporating a railroad company declares that after the assesment and payment of the damages for the land to be used for the construction of the road the company may enter upon the said land, etc., "and hold the said land to their own use and benefit for the purpose of preserving and keeping said railroad during the continuance of their corporate existence" (sixty years), "and in all things to have the same power and authority over said land so laid off, during their existence as a corporation under the laws of this State, as though they

owned the fee simple therein": *Held*, that by this clause the corporation, after assessment and payment of damages, became the tenant of the land, as the owner of the legal estate for the term of sixty years, subject to the earlier determination of the corporation from any cause.

2. *Held, further*, that the provision in this section that the said company "shall hold the said land for the purpose of preserving and keeping up the road" does not make a condition upon the performance of which their estate depends, but these words only assign the reason why the law vests the estate in the corporation.
3. From the nature of things, as for instance, from the absolute necessity of giving such a corporation a right to trespass *q. c. f.* or ejectment, to protect its enjoyment of the road, it follows that an estate must be vested in the corporation, unless it be clear that the contrary was intended.
4. And such interest in the land may be sold under an execution against the corporation, although the corporate franchise itself cannot be sold under an execution.
5. The right of transporting persons or things over the land of another for toll is but an easement united with a franchise, and is not distinguishable from other franchises.
6. A railroad corporation is not dissolved by the sale of its road.
7. Only the real estate which remains in a corporation at the moment of its dissolution reverts to the original proprietors; what has been divested out of the corporation by its own act or the act of the law does not so revert.
8. Land, therefore, which has been vested in a railroad company for the use of the road, if sold by execution, belongs to the purchaser until the charter of the company would by the limitation of its charter have expired.
9. A railroad is not in all respects a highway *publicis juris*, but it is the subject of private property, and in that character is liable to be sold, unless the sale be forbidden by the Legislature; not the franchise, but the land itself constituting the road.

APPEAL from NORTHAMPTON Spring Term, 1844; *Pearson, J.*

(298) The defendant was tried upon an indictment containing two counts: one under section 7 of the act of 1832, incorporating the Portsmouth and Roanoke Railroad Company (2 Rev. Stat., 311), which provides that "if any person shall willfully injure, impair, or destroy, or cause to be injured or impaired, any part of the said railroad," etc., he "shall be subject to indictment" in either the county or Superior Court, and "upon conviction shall be punished," etc. The other count was at common law for obstructing a public highway, meaning the said Portsmouth and Roanoke Railroad. The defendant pleaded not guilty, and the following case agreed was submitted to the court:

Spier Whitaker, Esq., the Attorney-General, who in this behalf prosecutes for the State, and the said Francis E. Rives, agree to submit and

do hereby submit the above issue to the judgment of the court upon the following state of facts:

At Fall Term, 1842, of HALIFAX Clement Rochelle and Henning T. Smith recovered against the Portsmouth and Roanoke Railroad Company a judgment for $16,846.81, with interest on $16,180.98 from 24 October, 1842, and $8.50 costs. Under the *fi. fa.* to the sheriff of Northampton, issuing on this judgment and returnable to Fall Term, 1843, he went to and upon the road at Garysburg and declared his levy, which was as follows: "Levied on the Portsmouth and Roanoke Railroad from Roanoke to the depot at Margarettsville and Concord depots, together with the land on which they are placed.

E. J. PEEBLES, *Sheriff.*

And that he did nothing but this towards making a levy. When he sold, he sold at the road, near Garysburg, and was on the road itself; but although he sold the whole, yet he did not take up and, by manual delivery, deliver to the purchaser, C. Rochelle, any part of the structure of the road, either rails, iron, or other materials in (299) the name of the whole, no did he either then or at the time of the levy pass along and see the whole line of the said road or any part thereof, except what was visible at the place where the sale was made. When the sale was concluded, the sheriff said to Rochelle, "the property was his." The president of the Portsmouth and Roanoke Railroad Company was present at the sale, and had knowledge of Rochelle's purchase. Shortly after his purchase Rochelle notified the company thereof, and some attempted arrangement with the company having failed, Rochelle sold and assigned his bid to the said Francis E Rives, who, on 1 December, 1843, obtained a deed from the sheriff. The said Rives then made a proposition to the company for an adjustment of his claim, but the parties not being able to agree, and the company having decided that nothing passed under the said sheriff's sale, and their counsel having given an opinion to this effect, the said Rives submitted his case to counsel in this State and to eminent counsel in Virginia, and was advised that, under his purchase, he had a clear right to enter on the line of the railroad and take up and remove the rails, iron, and other materials of the structure. The said road was composed of wooden rails with bars of iron spiked to them, and the rails were inserted into transverse sills partly imbedded in the soil. The said Rives, acting under the advice which he had received, on 6 January, 1844, went upon the line of the said road and caused certain portions of the iron, rails, and sills, thereof, near Margarettsville, in the county of Northampton, and between that place and the bridge at Weldon, to be taken up and removed, thereby making a breach in the track of the said road, so

as to prevent the passage of the usual train of cars on the said day and the two succeeding days.

The taking up and removing of the rails, etc., was commenced early in the morning of 6 January, near Margarettsville, at which, there is a regular watering and wood station, and within sight thereof. Soon after commencing the removal, the agent of the defendant, who
(300) was superintending the same under instructions from the defendant, made known to the company at Margarettsville that he was taking up the rails, etc., and that he desired him to inform the captain or engineer of the train in order that he should not attempt to pass the station, and desired that he would be particular in giving the notice, as the defendant did not wish any accident to occur; and with this request the agent of the company promised to comply. The train from Portsmouth, to which this communication referred, was not expected to arrive until the afternoon of the day, and there was no train at Weldon.

From the time of the sale to Rochelle up to the said 6 January the said company used the portion of the railroad from Margarettsville to Weldon as they had done before the sale. The distance from Garysburg to Margarettsville is about 15 miles.

If upon the foregoing facts the court shall be of opinion that the defendant is guilty upon either of the counts in the indictment, judgment is to be entered against him accordingly; otherwise, judgment is to be for the defendant.

S. Whitaker, Attorney-General, for the State.
Thomas Bragg, Jr., for defendant.

The presiding judge delivered the following opinion and judgment:

This case turns upon the question whether the railroad which has been obstructed is a public highway, for if it be a public highway it is indictable to obstruct it, as well when the obstructon is made by the company or by one succeeding by purchase to the rights of the company as where it is made by a third person. That the road is a public highway I consider settled by *R. R. v. Davis*, 19 N. C., 451. The right of the Legislature to condemn private property for the purposes of the road, as the land on which it runs, the wood, stone, gravel, and earth required for its construction and repair, can only be derived from the facts that the road is for the public benefit and is to be used as a public highway. To consider the road as mere private property is to
(301) suppose that the Legislature has taken the property of certain citizens without their consent and vested that property in certain other citizens for their individual benefit; whereas, to consider it

a public highway with certain *incidental private interests* fully sustains the authority of the Legislature to make the condemnation. It is a principle of the common law, which expands and adapts itself to new cases as they arise, that wherever the public has a right and that right is invaded, the offender is liable to indictment; and in the case of a railroad, constructed, like the one under consideration, by a joint-stock company, although the company has a private interest, that interest is incidental and secondary, and must be enjoyed so as not to defeat the paramount object, and one which is essential to the creation and existence of the road—*the public right*. If, therefore, the company should take up the whole or a part of the road, not with a view to repair or replace it by better materials, but with a view to obstruct and hinder the public in the use of it, it would fall within the principle, and the individuals offending would be liable to indictment. This is decisive of the question. To advert to the several counts: One count is at common law for obstructing a public highway; upon this, the court decides against the defendant. The first count is under a clause in the charter which provides a remedy for a willful injury to the road. By giving the company the right to recover a penalty, and also making the offender liable to indictment, this remedy will not reach the company, or one acting under the authority of the company, and it is insisted that the defendant, having succeeded to the rights of the company by purchase at sheriff's sale, is not liable under the claim. Waiving all the objections to the mode in which the sale was made, the court is opinion that no title passed, because the superstructure, that is, in its use and constituting the road, was not subject to execution sale. It is clear that nothing can be sold under execution which the debtor himself cannot sell. The company may sell the materials before they are laid down, but as soon as they become a part of the road the public right attaches, and neither the company nor (302) a purchaser can tear up and ruin that part of a public highway without violating the law. Admitting that the president and directors, if they see proper to violate the charter and subject themselves to indictment, *have power* to tear up the road, and can then pass a title to the materials, it by no means follows that the title can pass before the severance, still less that the law will lend its aid and pass title by a judicial sale to property which the debtor cannot sell without being liable to indictment, and which in this instance the company cannot sell without violating its duty to its creator and thereby forfeiting its existence.

But it is said that the company, having incurred debts, will not by the principle of our law be permitted to hold property which creditors cannot reach. The company at the time of its creation agreed to

perform certain services to the public. After its creation it incurs liability to individuals. As both cannot be discharged, the right of the public must be preferred, because it is first in time and first in importance, and because the individuals who gave credit did so with a full knowledge that the company had this public duty to perform; and one claiming under a creditor has no right to complain because he is not permitted to do that which would prevent the performance of this public duty. The court, therefore, upon the first count, also decides against the defendant.

The court then pronounced judgment against the defendant, from which he appealed to the Supreme Court.

The case was argued at great length at June Term, 1844, by the *Attorney-General, B. F. Moore,* and *Iredell* for the State, and by *Badger* and *Bragg* for the defendant.

The Court took time to advise, and now, at this term, delivered the following opinion:

RUFFIN, C. J. This case was treated at the bar as depending upon the question whether the defendant gained a right of property by the sheriff's sale and conveyance in the part of the road purchased or in the materials of which it was constructed. We think that a proper view of the subject, because the statutes which make it an (303) offense to obstruct the road or destroy its materials have in view the acts of a person who is not the proprietor of the road or materials, but acts wantonly and not in the exercise of a right. Section 7 of the charter, for example, provides that if any person shall willfully injure the road he shall forfeit the sum of $500 to the company, to be recovered by the company in an action of debt, and shall also be subject to an indictment. So it is seen that the indictment is given where the penalty is incurred to the incorporation, and that cannot accrue when one enters under the corporate conveyance, or under a sale on execution against the corporation, provided such sale passes the property and the purchaser peaceably enters upon his right of property.

The inquiry, then, is whether by the law of this State the writ of *fieri facias* lies against the land on which a railroad is laid out. It might be material to distinguish between the road itself and the materials, such as the iron and timber, laid down on it, if the corporation had a mere easement or right of way over the land; for in that case the law would probably, in favor of creditors, regard those materials as mere fixtures of an occupier of land, which might be severed and sold by the sheriff if, as the property of a privileged corporation, they were not altogether exempted from execution. But the Court does not

deem it needful to enter into that question here, for two reasons: the first, that the materials were not severed, nor were they sold as distinct from the land; and the second, that we think the corporation had an estate in the land, at least for a term extending far beyond the duration of those materials, and, therefore, that they had lost their distinct character as personal chattels and were sunk into the reality.

We have said that the corporation had an estate in the land laid off for the road. Both the express provisions of the charter and the necessity of the case lead to that conclusion. Section 3 enacts that after the assessment and payment of the damages the company may enter upon the land condemned and hold it to their use and benefit for the purpose of preserving and keeping up the road during the continuance of the corporate existence by the act given to them (304) (which is sixty years), and declares that in all things the company shall have the same power and authority over the said land so laid off during their existence as a corporation under the laws of this State as though they owned the fee simple therein. This language can signify nothing less than that the corporation is the tenant of the land, as the owner of the legal estate for the term of sixty years, subject to the earlier determination of the corporation for any cause.

Most of the railroad charters in this State give an estate in the land in fee. Some estate, indeed, is necessary to the preservation or protection of the road. It is true, the act gives a penalty of $500 for destroying any part of the road. But that is an inadequate protection; for an evil-disposed person might burn a valuable bridge or do some other injury far beyond that penalty in value, or might intrude on the land without actually obstructing the road, and in such cases the company ought to have, and no doubt has, remedy by action of trespass or ejectment, as the tenants or owner of the soil. It is true, the act says the company shall hold the land "for the purpose of preserving and keeping up the road," and it is contended that these words, at least, make the estate conditional, and that the condition is of such a nature as to defeat the estate, if not performed; and thence it was inferred that there could be no sale of it, inasmuch as that would prevent the company from performing the condition. As far as respects the rights of the company, or the private interest of its stockholders, those considerations, if true, could avail nothing; for the debtor has no interest in the question to whom the property shall go after the sale of it for the payment of his debts. That is a question which, in this case, may arise between the reversioner and the purchaser, or between him and the public. An estate upon condition is not necessarily exempted from sale by execution. But we do not regard those words as creating a condition, in its proper sense. They only assign the reason why the law

vests the estate in the corporation. The object in view was to
(305) have the road, and that is stated as the justification of taking private property and vesting it in the corporation. After being thus taken at the full value paid to the former owner and vested in the corporation, we see no reason why it should not be considered as absolutely vested in the corporation during its existence, or in its assigns during the whole period for which it was taken. In the case of common and free highways the public have only an easement, and, therefore, the remedy for obstructing the passage over it is by indictment merely. But the estate, the right of soil, remains in the original proprietor, who has an action for injury to the land as the owner of the soil, as he might have in respect to any other part of his land. But in the case of a railroad it would be manifestly incongruous not to give to the corporation the action for destroying embankments and the superstructure of the road which the company erected with its funds, but to give such action to the original owner of the land. From the nature of things, therefore, the necessary construction of a charter for such a corporation must be to vest an estate in the land in the company, unless it be clear that the contrary was intended.

Having ascertained that the corporation has an estate in the land and not a mere easement, it seems to follow that such estate is liable to execution. In reference to corporations generally, it certainly is true that in our law their estates, real or personal, are subject to sale on *fieri facias* in the same manner as those of natural persons. By the act of 1820 the plaintiff, in a judgment against a corporation, is entitled to either a *distringas* or a *fieri facias*, and they may be levied on the money, goods, chattels, lands and tenements of the corporation. Rev. Stat., ch. 26, sec. 5. Therefore, it is clear that this land is liable to execution unless it be exempted therefrom either by the express provision of a statute or the necessary inference of a legislative intention to that effect. There is no such express enactment. If there was it would be conclusive; for, doubtless, the Legislature can prescribe what shall or shall not be the subject of execution. But it was con-
(306) tended for the State that such exemption arose from the nature of the property vested in the company and its purposes, and from the interest of the public in the road. It was urged in reference to the interests of the corporation that the preservation of their franchise of receiving toll, which depended on their remaining in possession of and keeping up the road, and their liability to penalties and pains for not keeping up the road, presented considerations of so much more weight than any which the mere satisfaction of a debt to an individual does that the law ought not to take from it the land to which that franchise is annexed. We agree that the franchise itself cannot be sold.

It is intangible, and vested in an artificial being of a particular organization, suited, in the view of the Legislature, to the most proper and beneficial use of the franchise; and, therefore, it cannot be assigned to a person, natural or artificial, to which the Legislature has not committed its exercise and emolument. We admit, also, that the right of passing or of transporting persons or things over the land of another for toll is but an easement united with a franchise, and is not distinguishable in this respect from other franchises. Yet it will not follow that if the grantee of a franchise, whether a natural person or a body politic, has a vested property in a tangible, personal, or real thing, that such thing may not be taken in execution, although it be useful or indispensable to the most beneficial or even any enjoyment of the franchise; unless, indeed, it be declared by the Legislature not to be liable to distress or sale. It may be very unfortunate, and cause much loss in a pecuniary sense, to arrest the exercise of a franchise by depriving its proprietor of an estate or thing needful to its exercise, when, of the two, the franchise or the tangible thing, the former is much the more valuable. We regret, sincerely, that it has hitherto escaped the attention of these companies, and of the Legislature, that some act was necessary in order that such sales, when unavoidable, might be made with the least loss to the debtors and the greatest advantage to the creditors and purchasers by providing for the keeping of the franchise with the estate. Or, if it so please the Legislature, an act might provide for putting the road into the hands of a receiver, and subjecting the income to the creditors, instead the estate in the land, stripped of the franchise. But nothing (307) of either kind has been done, and those are conditions for the Legislature as to their future action, and cannot influence the decision of the Court as to rights of the creditors of these corporations under a different state of the law. The question for us is between the necessity, on the one hand, of subjecting the tangible property of this corporation to sale for its debts, although at the expense of the suspension or loss of its franchise, or, on the other hand, of saying that the creditor has no remedy whatever, and that the corporation may keep its property and enjoy its profits in defiance of moral right and the process of the law. Between these alternatives a court of justice cannot hesitate. If the corporation has means to pay its debts and will not, or if it has contracted debts which it is not able to pay without a sale of its property, we can only say that it is the duty of the court to enforce payment by a sale of the corporate property, be the consequences to the pecuniary interests of the corporation what they may. The law is not responsible for those consequences; but they have been brought on the corporation by the want of integrity or prudence in its manage-

ment. It is a sacred principle of justice and law, applicable alike to all persons, natural and corporate, that the obligations of contracts should be enforced and debtors prevented from retaining their property to the disappointment of the creditors. And it is likewise a principle of equity and policy that all debtors should be placed on the same footing; and, consequently, that what one is compelled to yield up to his creditor another shall not be allowed to keep to his own use. Against the operation of those sound and salutary maxims of morals and law it requires much more to be opposed than an argument of inconvenience, that the debtor loses much more than the creditor gets. Still, it is to be replied that the creditor is entitled to his debt at all events, and that he ought to have it, even at that expense rather than not at all. Therefore, an execution against the property of a corporation, which (308) the law expressly gives against all corporations, must be satisfied out of its property, provided only that such property be within the description of goods, chattels, lands, or tenements. When the law awards an execution of that kind, how can the court say, without a direction from the Legislature, that it shall not be served on chattels or certain lands of the corporation, because it would be a detriment to the corporation to be deprived of them? There is no mischief in the case comparable to that of leaving just debts unpaid—debts necessarily contracted for the labor or property of the creditor employed in constructing the road. That would be the view properly to be taken of the law if there were no special provision in the charter of this company denoting an intention that its property should be liable to execution. But there is an express provision of that kind. By the charter the company has the faculties of suing and being sued, and is to enjoy all the rights, privileges, and immunities of a body politic; and by section 4, for the damages assessed for entering on land and taking stone, earth, and timber for making the road, the execution is expressly given against this, "as against other corporations." It is true that the act specifies but one case in which it gives execution. But there is no reason why a peculiar preference should be given to that demand above all others as to the mode of obtaining satisfaction. That case was particularly mentioned, because it was proper to give a summary assessment of the damages and speedy satisfaction of them as a justification for the taking of private property. But when another debt is reduced to judgment by the regular course of law, that ought also to be satisfied in like manner; and, hence, the particular case mentioned in the act is not to be looked on as one to which a peculiar remedy is annexed, but, rather, as an example of the mode in which payment of the debts of this corporation was to be obtained, that is, by making its property, including, of course, all its property, liable to execution for

its debts as the property of corporations generally is liable on execution for their debts. In other words, it was not intended to discriminate between railroad corporations and other corporations as to their duty of paying debts, or the modes of coercing them to the performance of their duty. It was admitted by the counsel for the State that (309) this proposition must be received as true in respect to all the other property of the company except the land on which the line of road runs, such as the cars, locomotives, supply of wood, timber, and iron not laid down, and land purchased for depots; but it was insisted that it was different with respect to the land forming the road itself. The exemption of that was claimed upon the ground that by the sale of it the corporation itself ceased, so that *eo instanti* the land reverted to the former owner, and, consequently, the purchaser got nothing; and so, as the law does nothing in vain, and especially when attended with such destructive consequences, it was inferred that there could be no such sale. But the position is not true that the corporation is dissolved by a sale of a part of the road, nor, indeed, immediately upon the sale of the whole road, as it seems to us. It may because of forfeiture, if insisted on by the State; and without any prosecution it may, in process of time, amount to a forfeiture. But by the express provision of the statute it requires the disuse of the corporate privileges and powers for two years to amount, of itself, to a forfeiture. Now, although it be generally true that upon the expiration of a corporation or its dissolution, unless otherwise provided by statute, the real estate undisposed of will revert to the donor or original owner; yet that is only true as to such estate as remains in the corporation at the moment of its dissolution, and does not apply to such as had been divested out of it either by its own act or by the act of law. In this case, therefore, the sale was not vain, but the purchaser got the estate in the land which belongs to the company. If that was not so by the common law, it would, we think, necessarily be so upon the construction of our statute which gives the writ of *fieri facias* against the company; for, instead of arguing that there should be no sale because the purchaser gets nothing, the argument is the other way, that the purchaser does get the estate, because the sale of it is authorized; and, therefore, even upon a subsequent dissolution of the corporation, the land would not revert until by lapse of time the charter (310) would have expired. But, really, there is no more ground for exempting the line of the road than the other property of the company: for its operations, the beneficial use of the road either to the company or the public, is as effectually suspended by the sale of all its other effects as by that of the road itself. Indeed, it must be supposed, under our law, that its personal effects have been sold or purposely withheld

and concealed by the company, because the sheriff cannot rightfully sell land while there are personal chattels. If so, then the creditor is reduced to the last resort, namely, on the lands for his debts, and for the reasons already given, it must go rather than he should be defrauded of his debts.

The question has thus far been considered in reference to the conflicting claims of the creditor and the corporation to the protection of the law. The counsel for the State, however, interposes, as a further and distinct objection to the sale of the road, the right of the public to the use of it as a highway, and the *necessity* that the company should retain the road to enable it to perform its duty to the public by keeping it up as a highway. This position rests on the assumption that, because the road is a highway, it is *ex vi termini* not liable to execution. Now, we cannot assent to that proposition in the extent here laid down. Its correctness depends on the sense in which the term "highway" is used and on the legislative intention as to the liability of the property of railroad companies for their debts. The Court said in *R. R. v. Davis*, 19 N. C., 451, that a railroad is a highway; but it does not follow, and certainly it was not intended, that it should be understood to be a common public highway on which all citizens were free to pass, and which, from necessity, could not be the subject of execution, because there is no estate in the public, and because the easement is *exclusively* in the public. In that respect there is an essential difference between the one kind of roads and the other. Railroads, although *publicis juris* in some respects, are the subjects of (311) private property, and it is in the latter character that they are liable to be sold, unless forbidden by the Legislature—not the franchise, but the estate of the corporation in the land, which is a distinct thing from the franchise. In the sense that the land and other things taken for its construction are taken for a public use, inasmuch as it is a mode of opening avenues of communication between different parts of the State, and with other States, and, therefore, that it was a proper exercise of the right of eminent domain, we think the expression was correctly used. We have no doubt, too, that it is so in some respects as to the modes of enforcing its due reparation and punishing its obstruction. The latter is expressly made an indictable offense, as is shown by the case now under consideration. The State may compel the company, by *mandamus*, to make calls on the corporators to the full amount of their subscriptions, and lay out the whole capital and profits in constructing the road and keeping it in repair, if adequate and necessary to that end. *In re R. R.*, 2 B and Ald., 646. So, while the company is in possession and using the road, it must be indictable for nonrepair, upon the settled principle that they are bound to

repair by their engagement to the public in accepting their charter and occupying the road. But that it is a highway in the sense that it is not the subject of execution is quite a different thing. That depends upon the Legislature, and the silence of the Legislature as to the liability of it to execution necessarily leaves it thus liable. Roads of this kind have peculiar properties—having a double aspect, the public service and private profit. But both must necessarily yield, in honesty and justice, to the consequences of the impracticability of constructing and keeping up the road by the means provided by the charter, and without contracting debts for those purposes. The public does not obtain an absolute right to require the corporators to construct the road by the acceptance of the charter and entering on the work. The engagement of the company is only to lay out the capital assigned them and subscribed; and to that extent they may be compelled to proceed. If that be not ade- (312) quate, it is simply a case of miscalculation of estimates by both sides and the public loses the use of the road on its side, and the corporation loses its purchase and capital, unless there be a new agreement granting further facilities to the corporation. But suppose the road to be completed or kept up by contracting debts—and for such purposes only can the corporation contract debts—or suppose the company to incur a liability for damage to an individual: it is plain, we have seen, that the corporation ought to pay those debts or damages.

Now, can it be imputed to the Legislature that it intended in passing this charter that such debts should not be paid, and that in order to prevent the payment of them the public prerogative to a right of way should be asserted, and under cover of it the road should be preserved to the corporation as its private property? We think, clearly, not. If such a thing had been asked for in the charter, it would have been thrown out of either house of the Assembly with disgust and scorn. If the Legislature were making the road on the public account alone, the public faith would be the guaranty that all demands for labor or materials laid out on it should be fairly paid. So it was not the intention of the Legislature that this road should not be paid for or that it should be built at the expense of any person but the corporators. The public would not have it on any such terms; and if persons who have laid out their money or labor on it cannot otherwise obtain satisfaction but by a sale of the road, there can be no doubt that the public ought to give up, and intended to give up, the convenience of the road rather than do the injustice to the citizen of denying him compensation for making it. If the public cannot have the road and the creditor of the company also be paid, if one must yield, there can be no hesitation in saying that the ppublic ought and would promptly yield. If the public should insist upon its rights, then it is bound to make compensation to the creditor out of the treasury; for

it ought not to suffer him to remain unpaid for executing what is claimed as a public work. But no such obligation has ever been supposed to lie in the State, simply for the reason that the corporation was (313) properly liable. But that cannot be rendered effectually liable unless through the instrumentality of an execution served upon its property. We do not know wherefore the company did not pay the debt for which this sale was made. But whether it arose from want of inclination or ability, the fault or misfortune is theirs; and the State never could have intended to impose and screen either a solvent or insolvent company from the payment of its debts. If the corporation be insolvent, it must, like every other insolvent debtor, give up its property, unless the State either assumes its debts or by a plain and unequivocal act declares the exemption of its property. If the State chooses still to have a railroad, it may either enable this corporation to enter on the land again, making compensation for it, if it be not already endowed with the power, or a new charter may be granted to another company, or it may be executed by the State directly. But by constituting a corporation to execute this work, and to have property in it; by enacting that the *fieri facias* shall run against the property of corporations generally; by not exempting the property of the railroad company from the general liability of corporate property to execution; and by declaring in some cases that execution should run against *it* "as against other corporations," the legislative intention must clearly be understood to have been that the public right to the use of the road should be dependent upon the ability of the corporation to meet the just demands of its creditors without a sale of the road. Paying the debts for making the road is the first and highest duty of the corporation. The element of that duty is moral, and precedent to any mere duty of police; and the Legislature cannot be supposed to have intended a violation of that first of duties upon any evidence less than its explicit enactments.

The Court is, therefore, of opinion that this land was liable to be sold on the execution, and that the purchaser would have obtained a good title had the sale been duly made. It was not, however, duly made. By the statute, Rev. Stat., ch. 45, sec. 10, it is enacted that all sales of (314) land and slaves shall be made at the courthouse on Monday of the county court, or the corresponding Monday in every month. The sale in this case was on the premises and on a different day of the week. We have more than once said that this is a substantial part of a sheriff's sale, because the regulation is for a sale of all the property at one place and at the same time which may be offered for sale in the county in any one month, under the expectation that there will be numerous bidders and fair prices had. Of such a regulation every one must be cognizant; and, therefore, we have held that a purchaser gets

no title by a sale at an improper time and place. *Mordecai v. Speight,* 14 N. C., 428; *Avery v. Rose,* 15. N. C., 554. For this last reason the judgment must be affirmed. We regret that result, as we have just been informed that there is a private act regulating sales in Northampton County, and that the sheriff observed its provisions in this sale. If so, it is unfortunate that the act was not stated in the case; for, being a private act, we cannot judically notice it, and, indeed, we have not seen it.

PER CURIAM. Affirmed.

Cited: S. v. Johnson, 33 N. C., 660; *Taylor v. Jerkins,* 51 N. C., 318; *Carrow v. Tollbridge Co.,* 61 N. C., 121; *Navigation Co. v. Costen,* 63 N. C., 267; *Gooch v. McGee,* 83 N. C., 61; *Mayers v. Carter,* 87 N. C., 147; *Asheville Division v. Aston,* 92 N. C., 584; *McCanless v. Flinchum,* 98 N. C., 377; *Dula v. Seagle, ib.,* 461; *Loudermilk v. Corpening,* 101 N. C., 650; *Hughes v. Comrs.,* 107 N. C., 608; *Bass v. Nav. Co.,* 111 N. C., 446; *Pipe Co. v. Howland, ib.,* 624, 633; *Logan v. R. R.,* 116 N. C., 945; *Wilson v. Leary,* 120 N. C., 92; *Coal Co. v. R. R.,* 144 N. C., 746; *Williams v. Dunn,* 163 N. C., 213.

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(315)

ATTORNEY GENERAL ON THE RELATION OF CALDWELL A. GILLESPIE v. THE JUSTICES OF GUILFORD COUNTY.

1. The justices of the county court are not bound to grant a license to retail spirituous liquors to every one who proves himself of good moral character; nor have they, on the other hand, the arbitrary power to refuse, at their will, all applicants for license who have the qualifications required by the statute. Rev. Stat., ch. 82, sec. 7.
2. They have the right to exercise only a sound legal discretion, referring itself to the wants and convenience of the people, to the particular location in which the retailing is to be carried on, and to the number of retailers that may be required for the public accommodation.
3. The justices having a discretion to a certain extent in granting licenses to retail, a mandamus will not lie to compel them to grant a license to any particular individual, though he may have been improperly refused a license.
4. But if magistrates, fully informed that they have discretion to regulate a branch of the public police (as, in this case, in granting licenses to retailers), perversely abuse their discretion by obstinately resolving not to exercise it at all, or by exercising it in a way purposely to defeat the legislative intention, or to oppress an individual, such an intentional, and, therefore, corrupt violation of duty and law must be answered for on indictment.

APPEAL from GUILFORD Fall Term, 1844; *Pearson, J.*

The relator, Caldwell A. Gillespie, obtained a writ of *mandamus*, directed to the justices of the court of pleas and quarter sessions for Guilford County, and commanding them to make an order that he should receive from the sheriff of that county a license to retail spirituous liquors by the small measure at his shop in the town of Greensboro, in that county.

The writ was granted on the affidavit of Gillespie, in which he stated that he was a free white inhabitant in Greensboro, of good moral character, and, as such, had been licensed by the county court for (316) several years next preceding February Term, 1844, to retail, and that he had during that period retailed spirituous liquors at a shop in Greensboro; that at February term aforesaid the justices of the court, a majority of them being present, resolved that the retailing of spirituous liquors was a practice injurious to good morals and against the public policy, and, therefore, that they would not pass an order for a license to any person. He further stated that at May term following he moved the said court, more than seven justices being present, to grant him an order for a license to retail spirituous liquors at his shop as aforesaid, and in support of his motion produced more than two credible witnesses of known respectability, to whom his character had been known for a number of years preceding, who deposed and satisfactorily proved to the court on oath that he, the relator, was a man of good moral character; but that the said court refused the motion, resolving to adhere to the said resolution of the preceding term, and holding that it was at their choice whether they would order a license to any person or in any case. Nevertheless, the court ordered the said motion to be entered of record, and also that relator was duly proved to be a person of good moral character, and also that the court refused the motion, and the reason therefor, as above stated. To this writ many of the justices (upwards of thirty) returned that the relator had applied to the court, ten magistrates being present, and was refused, as stated in his affidavit, and that he had then duly proved that he was a person of good moral character, and that the court had ordered the whole matter to be entered of record so as to facilitate his remedy in the premises; that the reasons for the refusal of the application were as follows: that the court had resolved at February Term, 1844, a majority of all the justices being present, that thereafter no license should be granted to any person, as the said justices entertained the opinion that the retailing of spirituous liquors was against the public policy and a hurt to the morals of the people, and especially to the young, and had observed many evil effects from tippling houses in the county, and particularly in the town of Greensboro, in which (317) there is a flourishing grammar school that is much resorted to

by the youth from many parts of the State; and although the relator had shown himself to be of good moral character, yet the justices thought that the business of retailing would, of itself, in that place produce the same evil effects that would occur if men of bad character were licensed to carry it on; and, moreover, the inhabitants of Greensboro had generally petitioned the court to refuse orders for retailing in that place; and they insist that they are advised that, by the law, the granting of orders for such licenses or refusing them is a matter entirely in the discretion and free choice of the justices of the county court, and submit whether they could be compelled to grant a license to one, though of good moral character, for a tippling shop at the door of a church or an academy.

On the foregoing return a motion was made on behalf of the relator for a peremptory mandamus, and each side, waiving all error and irregularity in the proceedings, desired that the motion should be decided on its merits, as depending upon the question whether the justices have or have not the right to enter into a *resolution* that they would *not* grant a license to *any* person, and, upon the ground of that resolution, refuse a license to a person admitted to be, otherwise a proper person and entitled to a license if one were to be granted at all. The court held the justices had no right to refuse to license any free white person who proved a good moral character in the manner prescribed by the statute; and that as the relator had established those qualifications in the county court, he was entitled to a license, and therefore, the peremptory mandamus was awarded. From that judgment the justices appealed.

Morehead and Iredell for the plaintiff. (319)
J. H. Bryan for the defendants.

RUFFIN, C. J. The conduct of those gentlemen who have brought up this question seems to have been fair and honorable throughout, for they have not covered their refusal to license this man under any unfounded suggestion of personal objections, but, with the candor of persons conscious of an intention to do right, they put the truth upon their own record, with the view, if they were wrong, that there should be no improper impediment to any redress the law would afford. They have returned the same matter in substance to the alternative mandamus, in order that the question in its most general form might obtain the opinion of the court of the last resort as to their powers and duties, with the view assuredly, to their due exercise and performance when known. For the sake, too, of the character of the law, as being everywhere equal and uniform in its administration, it is fit this case should have been brought here, that an end may be put to a conflict of opinion and

(320) action on this subject among this respected body of magistrates in different parts of this State; for, while in the greater part of the State the justices license tippling houses, according to the demand by those who discreetly resort to them, and according to the probability of an interference with each other, so that none may yield a livelihood, yet we learn that in some few countries they consider themselves bound to license every one who comes with the requisite qualifications, and that in some few others, of which Guilford seems to be one, they hold that they are not bound to license any person, but may refuse every one, without giving any reason for the refusal but their own will, or their opinion that it is mischievous to allow of the sale of spirituous liquors by the small measure.

Upon the proper construction of the statute the Court entertains no doubt. The two opposite extremes—that there is an absolute right in every person to follow the calling of a retailer, if he chooses, and that the justices are bound to license him, with only the condition that he be free, white, and of a good moral character, and, secondly, that there is an absolute and arbitrary authority in the justices to refuse all persons, however unexceptionable in their lives, and however much such accomodations may be desired by the public or any considerable portion of the public for their convenient refreshment, are, like most extremes, both erroneous, as it seems to us, are founded on a mistake of the intention of the Legislature. We cannot say that they are equally mischievous; for we should, if acting as legislators, much prefer to allow no tippling house, rather than multiply them to the enormous extent of giving a license to every one who could make out to find two men who would give him a good character. But we think the Legislature meant neither extreme, but the mean between them.

The claim of the justices of an unlimited and uncontrollable power to grant or refuse a license is founded on the idea that the act confers on them a discretion; and then they hold that discretion, in its nature, is the liberty of those to whom it is confined of acting according to their personal pleasure. It is to be noted that the part of the act which (321) relates to retailers has not the word "discretion" in it. But for the present we will assume it to be meant; and such is our opinion. Yet it remains to be considered what kind of discretion is conferred—a partial, absolute, and arbitrary personal discretion to refuse *all* applications, or a legal, regulated, and reasonable discretion to grant the applications of such persons as the Legislature declares fit to possess the privilege, as far as the necessity or convenience of the public require such places as accommodations allowed by the Legislature, and beyond *that* to refuse them. The very stating of the questions furnishes their proper answer. The law abhors absolute power and arbitrary

discretion, and never admits them but from overruling necessity. And there is no arbitrary power that would be felt to be more unreasonably despotic and galling than that under which a small body of inferior court magistracy should undertake, upon their mere will, without any plain mandate from the lawmaking power, to set up their taste and habits as to meat, drink, or apparel as the standard for regulating those of the people at large. For ages past sumptuary laws have been abandoned. The Legislature does not affect to assert that policy. On the contrary, the Legislature allows the indulgence of the inclinations of individuals in the use or disuse of spirituous liquors, as of other articles of sustenance; and for those who choose to use them it further allows of the vending of them in such quantities and at such places as may be suitable to their convenience. The toleration of ordinaries and tippling houses is conclusive that the Legislature does not deem them evils in themselves, or, if so, that they are deemed necessarily evils. They are not against the legislative policy; and that is the only thing courts can look at as the public policy. By the Legislature, therefore, they are permitted, authorized, and approved, at least to some extent. It requires but little thought to perceive that it could not be otherwise. In the act under consideration, Rev. Stat., ch. 82, the first part is a regulation of ordinaries, and it is express that licenses for them may be ordered "at the discretion of the court." Now, every one sees that the Legislature could not but know that the public necessities (322) absolutely require ordinaries or inns for the accommodation of wayfaring people, those called from home by private business or public duty, who *must* have some fit place for lodging, and where they may, for a reasonable price and without injurious delay, procure their accustomed refreshment of meat and drink, and then proceed on their business. Can anybody believe that in giving the justices a discretion in licensing ordinaries the intention of the law was that they might in the form of refusing all licenses, arbitrarily *suppress all* such needful establishments, leaving the travelers to sleep out of doors and to buy and cook his victuals as he could? If not, then that shows the kind of discretion that is conferred in such cases. It is a reasonable, salutary, discretion to be exercised as appears in the act, by not licensing any person who is grossly immoral, or in such poor circumstances that he cannot, probably, keep such a house as will accommodate the public, and as we think, from the nature of the subject, by also not licensing more ordinaries than custom or probable number of guests will justify, so that they shall not interfere with and break each other down, and, for the want of good company, the keepers be driven, for a livelihood, to entice the unwary into idle courses, and entertain the dissolute in their houses, not maintaining good order and rule therein.

Although keepers of ordinaries are not obliged by their bond to provide liquor for travelers, as they are diet and lodging, yet there is no doubt they were expected to do so, so as a matter of course, to subserve their own interest, and, moreover, the act of 1755 requires the justices once a year or oftener to rate their prices of liquor, diet, lodging, and corn, fodder, and pasturage for horses. We say, then, that it is impossible the Legislature meant to trust any body of men with the uncontrollable power of putting down all such ammodations. The people, for instance, are called, not only from all parts of Guilford County, but from different parts of the State to the town of Greensboro six times a year, in attendance upon the courts of that county; and did the Legislature intend they should have no place of rest, recreation, or refreshment, or (323) to put it in the power of the justices of the county absolutely to deny them such accommodations? And here it may be proper to notice an argument contained in the return—for we do not understand it literally to state, as a fact, that the relator's shop is at the door of a church or a schoolhouse. But it is asked whether the law obliges the justices to license an ordinary or tippling house at the door of a church or academy? We answer, certainly not; for, although not necessarily evil or disorderly, yet, probably, all sorts of persons would be drawn there in such crowds as would disturb a congregation in their devotions, or draw off the boys from their books, and lead them into disorder, when of an age at which they have neither the capacity nor the right to judge or act for themselves. But, on the other hand, it is certainly not a reason why an ordinary should not be licensed in a town that there are a church and a school in the town. It is to be hoped that there are a church and school in every town, at least in every one of much size; and their existence there, instead of increasing the ills to which ordinaries tend, are the very best means of correcting them. If the place be of sufficient population to maintain a church and a school, it will commonly be of sufficient extent to allow of places of accommodation in situations not so contiguous to either church or school as to interfere with the proper avocations at either. There is no doubt but the young may be led astray at such places. But the Legislature has not, for that reason, thought proper to suppress them altogether, because they are needful to many citizens, but relies on the authority, diligence, and discipline of the parents and teachers of the young, and of the pastors of the people, to restrain them from the abuse of such establishments, and on the punishment inflicted by law for actual excesses and disorders.

Precisely of the same character are the powers and duties of justices in licensing persons to retail without keeping ordinaries. There is no distinction in the act, supposing the discretion as to ordnaries to extend also to retailing. Unless it does, there is an end of this pretension of the

justices; for, instead of their having the arbitrary power to refuse all licenses, the citizen would have the absolute right to a license, (324) if of good character. But we admit the license rests in the discretion of the justices; yet we say it is a discretion of the same nature and to be exercised on the same grounds and to the same extent as in the case of ordinaries. It is not arbitrary, but must have some reason for its exercise. It is not a case in which *voluntas stat pro ratione.* One may act on that maxim in his private affairs; but for one acting under public authority, and as a minister of the law, it is no answer to the citizen, to the community or the Legislature. It is said there is a great difference between the utility of places for repose and the supply of food, and of tippling shops; for the former are requisite for the comfort and subsistence of the guests, while the latter are often so abused that it is a kindness to the people to suppress them. The answer is, it may so; but it is for the Legislature exclusively to determine it. As the Legislature allows ordinaries for the accommodation of travelers in all their wants, so it authorizes and, in effect, directs that there shall be places of convenient resort for people in humble circumstances to assemble for business, conversation, and refreshment, if they choose. Because persons may not be able to keep house, or lay in large supplies, the law did not intend to deprive them of the social enjoyments that are usual among men; and, therefore, it provides places for their gathering and for the sale of the accustomed liquors in such quantities as are suitable to the occasions and the means of the people who generally resort thither. That there may be as little prejudice to those persons as possible, and as little disturbance of the public peace, the Legislature established such guards as to it seemed meet by requiring an annual license from seven justices upon the annual proof of a good moral character. Now, it is not for the justices to say that the Legislature has guarded the public morals inadequately, and improperly allows a nuisance, and, therefore, that they will step forward to supply the shortcoming of the Legislature, and, contrary to the intent of the Legislature, suppress such accommodations altogether. That would be not only to make the law instead of administering it, but to make a law in opposition (325) to the one enacted by the Legislature. The first restraint upon retailing by all who choose was by the act of 1825, which requires a license from seven justices, upon proof of good character. Under that act the justices seem to have gone beyond the intention of the Legislature in too liberally licensing improper persons, including, it may be inferred, free negroes; for in 1828 they passed "an act to *restrain* the justices of the country courts in granting licenses to retail spirituous liquors" which alters the act of 1825 in two particulars only—the one, that none but free white persons should be licensed, and the other, that

the good moral character should be known by at least two witnesses of known respectability, to whom the charcter of the applicant had been known at least one year. It is clear, therefore, from these acts that the practical evil apprehended by the Legislature was that licenses would be granted to irresponsible and loose persons, and that the main object was to prevent that evil. But the Legislature did not intend, of themselves, to put down the sale of spirituous liquors, and still less did they intend that the justices should do it, or expect that they would ever think of doing it; for the scope of the Legislature is to guard against the opposite error of licensing unfit persons. Upon the whole, then, we conclude that the justices have not, under their discretion to regulate the retailing of spirituous liquors by granting licenses, the arbitrary power of prohibition. They ought not to have it. No body of men ought to possess it that is inferior to that body which can make, modify, and abrogate the law at their pleasure, and through which the general popular will propagates and exhibits itself. There are good persons who think it would be conducive to the happiness of men to refrain from the use of spirituous drink; and no one can dispute the shocking evils often produced by the excessive use of them. Therfore, it is very fit that benevolent persons who entertain that opinion should by persuasion, example, forming associations, and other moral means endeavor to induce men to renounce it; and in that all may wish them success, however, much many may despair of it. But that is very different from an attempt by a court arbitrarily, and without the injunction of the Legislature, to compel mankind to desist from even the moderate and accustomed use of it as an enjoyment of life, by suppressing all places for the convenient sale of it. However much we may desire to promote the virtue of temperance—and it is, certainly, a noble object of Christian benevolence—we cannot use as a means to that end, even if it were likely to effect it, a discretionary power conferred by the law for a purpose totally different. The justices cannot convert a discretion to refuse a license to unfit presons, or, after enough have been already granted, to refuse further applications, into an arbitrary discretion and despotic resolution to grant a license to no person under any circumstances.

(326)

We are not without judicial precedents as to the proper construction of statutes vesting justices with discretionary powers, and, indeed, with this very discretion of licensing tippling houses. The statute, 5 and 6 Ed. VI, ch. 25, recites that "forasmuch as intolerable hurts and troubles to the Commonwealth of the realm do daily grow and increase through such abuses as are used in ale houses and tippling houses," enacts that none shall keep such houses but such as shall be allowed in open sessions of the peace, or by two justices, as by their discretion shall be thought necessary and convenient; and that the said justices

"may put down the selling of ale or beer, in any ale house or tippling house, where they shall think it meet or convenient." Now, before that act all might in England keep a tippling house, as here before 1825, for it was a means of livelihood which every one was free to follow. And under the act it was held that the discretion vested in the two justices was so far personal and peremptory that no appeal would lie from them to the sessions. *Stephens v. Watson,* 1 Salk., 45. And a mandamus has since been often refused, as we shall have occasion hereafter to state more particularly. Yet, it was held, notwithstanding the express grant of a discretion to the justices, that they had not the arbitrary discretion of refusing an applicant. In *Young v. Pitts,* 1 Bur., 556, upon an application for an information against justices for refusing a (327) license, the Court said "that it must not be permitted to them to exercise an arbitrary and uncontrolled power over the rights of the people; that if they had no *reasonable* objection against the applicant, they *ought* to license him; and if they had, they ought to give it." *Lord Mansfield* disclaimed any power to review the reasons of the justices by way of *appeal* from their *judgment* (in the particular case) or overruling the discretion intrusted to them; yet held that if they were partially, maliciously, or corruptly influenced in the *exercise* of their discretion, and *abused* the trust reposed in them, they were liable to prosecution by information, indictment, and, possibly, even by action. It is true, in that case the rule for an information was discharged, but it was because the justices had exercised their discretion honestly and likewise correctly, as regarded the fitness of the person and the necessity of his ale house, there being one already in a small place. But the principle is clearly declared that the discretion of the justices is not merely personal and arbitrary. And in the subsequent cases, *Rex v. Williams* and *Rex v. Davis,* 3 Bur., 1317, informations were sustained against justices for refusing to license persons because they would not vote in an election as the justices wished, not merely for refusing the license, which was in their sound discretion, but for the unjust and oppressive abuse of their discretion in refusing for that reason.

So it is clear, as it seems to us, that the justices have not, by the just construction of the law, the arbitrary power of suppressing all places for the retailing of spirituous liquors.

On the other hand, we hold that they are not so entirely without discretion as to be bound to license every applicant, though he be qualified. It is true, there is no express grant of discretion, *eo nomine,* in section 7, Rev. Statutes, nor is it to be found in the acts of 1825 and 1828, which are combined in that section. But the very requiring a license, and the presence of so many magistrates at the granting of it, (328) imports a duty of judging whether the supply of retailers is ade-

quate to the accommodation of the public. Not, indeed, upon the arbitrary principle that the people ought not to be allowed any, but upon the principle of the legislative policy, that they shall have those accommodations according to the demand the justices really believe will be made by those of the people who repair to such places "for their relief," as the statute of Edward expresses it. So, too, there are situations in which it would be so unseemly that a tippling house should be set up that all men would be shocked at one's being licensed there: as, literally, at a church door or schoolhouse, or, even, so near a courthouse as to incommode the court in the dispatch of business. Besides those considerations, which tend to show that in some cases there must be a reasonable discretion lodged in the justices, the incorporating the acts of 1825 and 1828 with that of 1798, in the Revised Statutes, under the general title of "An act for regulating ordinaries," and the different parts of the act in relation to the two subjects of ordinaries and retailing being so completely *in pari materia*, compels us, upon every principle of construction, to carry forward the discretion expressly given in reference to ordinaries and apply it to retailing likewise. Why should there be discretion in one case and not in the other? Immorality of the applicant is equally a positive bar in either case. Then, to what is the discretion directed in respect to ordinaries? There are but two things upon which it can be exercised. They are the place where the ordinary is situate and the demand and need for it there. A like discretion is requisite as to licensing a retailer; for, in reality, the mischief principally to be apprehended from licensing an ordinary arises from the retailing at it. Besides, there may be already a sufficient number licensed for the occasion of those who resort to such places. We, therefore, think the justices have a reasonable discretion to deny a license upon those grounds, as well as for the unfitness of the person.

But we cannot affirm the judgment, although all objection to the form of proceeding was waived in the Superior Court, and the justices
(329) put their case upon the simple point of their power being absolute. But the consent of parties cannot confer a jurisdiction on the court to proceed in a manner forbidden by the law, more than to decide the matter of right contrary to law. Now, a mandamus lies only for one who has a specific legal right, and is without any other specific remedy. 1 Chitt. Genl. Pr., 790; *S. v. Justices*, 24 N. C., 430. If in this case the sheriff were to refuse to give a license after the court had made an order for it, the redress would be by mandamus as the specific remedy, as well as by action for damages; for the party has a positive right to it from the sheriff. But when we decide that the justices have a discretion, under circumstances, to refuse a license to the relator, although he be a fit person, we, in effect, decide that he cannot have a man-

damus; for it is the nature of a discretion in certain persons that they are to judge for themselves; and, therefore, no power can require them to decide in a particular way, or review their decision by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the justices would not, then, be their own, but that of the court under whose mandate they give it. Therefore, in *Rex v. Young* the Court would not act on a rule on the justices to show cause "why they should not grant the license," but the rule was to show cause "why an information should not be granted against them for refusing the license." It has been already noticed that in the case of *Salkeld* it was held that no appeal lies from the order of justices under the statute of Edward. For the same reason it was held *Giles' case*, 2 Str., 881, that a mandamus to justices to grant a license for an ale house would not lie, the Court saying that there never was an instance of such a mandamus, for it was within the discretion of the justices. In *Rex v. Nottingham*, Say., 217, it was refused, though in the same case Bur., 561, an information was granted for the gross abuse of the discretion. And more recently, in *Rex v. Farmingdon*, 4 Dowl. and R., 735, and *Rex v. Surrey*, 5 Dowl. and R., 308, although the refusal of the license proceeded from a mistake of the justices as to their jurisdiction, a mandamus to rehear the application was refused. (330)

Yet it is not to be supposed that there is no redress in such a case. What redress the party may have by action in a case of gross malice towards him, as suggested by *Lord Mansfield*, it is not our province how to determine. This is not a proceeding of that sort, and it is very clear that these gentlemen were actuated by no ill-will towards the relator personally. But the occasion is a fit one to say that there is no doubt the justices would be amenable to the law *criminaliter*, by indictment, for obstinately persisting in refusing to license any person whatever, after being informed of their mistake of the law hitherto, as also for a refusal to license a particular person from corruption, or with a view to oppress him from spite. The cases have already been adverted to on this point. *Rex v. Nottingham, Rex v. Young. Rex v. Williams* and *Rex v. Davis*. The distinction between the different methods of proceeding is perfectly intelligible. The mandamus will not lie, because by law the justices, with local knowledge, are to judge for themselves, and the judges of a higher court are not to dictate to them. But the indictment will lie, because, although the law allows the justices to judge for themselves, it requires an *honest* judgment, in *subordination to the law*, and punishes a dishonest one, that is, one given in opposition to the known law. If it be said these gentlemen really believe that there ought to be no spirituous liquors retailed, the reply is that they are not to be guided in their decision by their own belief on that point, but they are to

found their judgment on what they believe the Legislature intends on it; in other words, they are to act on what they believe the law to be, and not what they think it ought to be. It is a criminal perversion of power to use it for a purpose for which the Legislature did not confer it and with the view of defeating the end the Legislature had in intrusting the power to them. In fine, in this case, it would amount to an attempt by a few individuals to set up their will against the general sentiments and habits of mankind and the legislative authority of the country.

There are other cases of discretionary power which stand on the
(331) same legal reasons with this, about which there would be no difference of opinion as to the question of criminality or mode of redress. For example, before the act of 1813 the whole subject of roads vested in the discretion of the county courts; and no appeal lay from their decision. *Hawkins v. Randolph,* 5 N. C., 118. The subject was placed exclusively in their discretion, because the Legislature deemed them the most competent judges what roads were useful and could be opened and kept in repair by the strength of the county, and supposed, as a matter of course, that they would have the necessary roads laid out and kept up. Now, suppose the justices were, upon some notion of their own, to resolve that they would discontinue all existing roads, and would not establish any others, would it not be plain *that* was not a sound exercise of the legal discretion—not an honest judgment, but was really setting up arbitrary discretion of their own in contradiction to the law? It would be a willfully wrong exercise of their discretion, which, legally speaking, amounts to malice and corruption in a public officer, and is, therefore, punishable by indictment. The present is a similar case, for although tippling houses are far less useful than roads, *yet the Legislature intends* that one shall no more be entirely suppressed than the other, and that those citizens whose limited means do not enable them to buy spirituous liquors except by the small measure, or who do not choose to purchase it but as they use it, may have the opportunity of thus buying at convenient seasons and places.

The above observations are not made in reference to any expected action of the gentlemen now before the Court, for it is obvious their conduct arose from the belief that they were acting according to law, and from no actual corruption. But they will now know that they mistook the law; and if magistrates, fully informed that they have a discretion to regulate a branch of the public police, should perversely abuse their discretion by obstinately resolving not to exercise it at all, or by exercising it in a way purposely to defeat the legislative intention, or to
(332) oppress an individual, such an intentional, and, therefore, corrupt violation of duty and law must be answered for on indictment.

But because this is not a case for a *mandamus*, the judgment of the Superior Court must be reversed, and the motion of the relator for a peremptory *mandamus* refused, with costs.

PER CURIAM. Reversed.

Cited: *S. v. Moore,* 46 N. C., 280; *Muller v. Comrs.,* 89 N. C., 177; *Mathis v. Comrs.* 122 N. C., 419; *Barnes v. Comrs.,* 135 N. C., 33, 35; *Edgerton v. Kirby,* 156 N. C., 351; *Key v. Board of Education,* 170 N. C., 125.

(333)

BENJAMIN WADDY v. WILLIAM JOHNSON.*

1. None but a person whose land is overflowed by a millpond can have the remedy to recover damages by petition for the injury sustained by the erection of the mill, as provided by our statute concernnig mills. Rev. Stat., ch. 74, sec. 9 *et seq.*
2. When the land is so overflowed the owner may recover *full* compensation for all the injury he has sustained thereby, whether it be more or less direct, whether it affect his dominion in the land by taking away its use or impair the value of that dominion by rendering the land unfit or less fit for a place of residence, or whether the injury, reaching beyond its immediate mischief, extends also to the person or the personal property of the petitioner.

APPEAL from WARREN, Spring Term, 1843; *Manly, J.*

This was a petition by the plaintiff to recover damages for injury to the petitioner's land and the health of his family, occasioned by the erection of a mill by the defendant.

The petition sets forth that the petitioner is the owner in fee simple of a tract of land lying on the west prong or fork of Lynche's Creek, on which he is, and for several years before the filing of the petition has been, residing with his family; that the defendant has erected a public gristmill and dam on the said west fork or prong of Lynche's Creek, below the land of the petitioner, "whereby the waters of the said west fork or prong of said creek have been thrown back upon a part of the said land of the petitioner, and, by drowning the same, materially diminish the value thereof, and, further, that the stagnant water in the pond made by the erection of the said mill and dam has materially and very injuriously affected the health of the petitioner's family, by reason of the miasma and other noxious exhalations arising from the said

*This opinion was delivered at June Term, 1843, but the papers did not reach the reporter's hands until the present term.

stagnant pond of water." The prayer of the petitioner is that a (334) writ issue to the sheriff of the county, commanding him to summon a jury to meet upon the premises and say "what damages the petitioner hath sustained by reason of the grievances above complained of." After various proceedings upon the matter of the said petition, which it is unnecessary to state, a jury was impaneled at the last term of the Superior Court of Warren, to inquire whether any damage had been sustained by the petitioner by reason of the erection of the mill complained of, and, if any had been sustained, to assess the amount which the petitioner ought annually to receive from the defendant on account thereof. Upon that inquiry it appears from the case made a dispute of fact arose whether any part of the petitioner's land was covered by the defendant's pond, and it was contended for the defendant that if no land owned or possessed by the petitioner was covered by the defendant's pond. the petitioner was not entitled to recover any damage; but his Honor, leaving to the jury the determination of the disputed question of fact, instructed the jury that if they found that fact against the petitioner, he was nevertheless entitled to recover such damages as he had sustained by reason of the injury done to the health of his family. The jury found that the petitioner had sustained an annual damage of $241.60, and a judgment having been rendered for the petitioner, the defendant appealed to this Court.

Saunders for plaintiff.
Badger and W. H. Haywood for defendant.

GASTON, J. It is not very clear, upon the allegation in the petition, whether the complaint therein set forth of injury to the health of the petitioner's family because of the miasma and other noxious exhalations arising from the stagnant water of the defendant's pond is a substantive distinct *gravamen*, independent of the complaint that the petitioner's land has been overflowed by the waters of the defendant's pond, or is brought forward as a further and incidental injury consequent upon the wrong of overflowing the petitioner's land. If we were bound to regard it in the latter point of view, we should be obliged to (335) hold the instruction of his Honor herein set forth erroneous; for supposing the petitioner's land not overflowed by the defendant's pond the wrong complained of did not exist. *Bridges v. Purcell*, 23 N. C., 232. But the petition may be understood as charging two wrongs distinct from each other, whereof one might exist and not the other, viz., that the defendant's dam threw back the water of his pond upon the petitioner's land, and, also, that the stagnant water of the defendant's pond injuriously affected the health of the petitioner's family. If the petition

can be thus interpreted, the instruction complained of brings directly before us a question, which we feel to be not free from difficulty, which has more than once been the subject of conference amongst us, and on which we have heretofore sedulously abstained from pronouncing because heretofore it has not been necessary to pronounce any authoritative opinion.

Chapter 74, Rev. Statutes, "on mills and millers," puts together in a condensed form all the enactments contained in the acts of 1809, ch. 773; 1813, ch. 863, and of 1833, ch. 6. In describing the "person" authorized and directed to prosecute his complaint in the manner herein prescribed, the language of the Legislature is very broad. "Any person who may conceive himself injured by the erection of any public gristmill, or mill for domestic manufactures or other useful purposes, and be desirous of recovering damages from the owner or proprietor of any such mill, shall apply by petition to the court of pleas and quarter sessions of the county in which the land to which the damage is done is situate, setting forth in what respects he is injured by the erection of said mill." It can scarcely be questioned, however, notwithstanding the generality of this description, that it does not embrace every person who may sustain an injury by the erection of a mill. The petition must be brought in the court of the county wherein is situate "the land to which the damage is done." The *complaint,* therefore, and the only complaint to be redressed by the special mode of proceeding pointed out in the statute is a complaint by the owner of the land of damage done thereto by the erection of a mill. In all other *cases* of injury to individuals from the (336) erection of mills the statute is silent; and whenever such injuries exist the remedy therefor must be pursued as it might be pursued before the Legislature interfered with the subject.

Considering this interpretation of the statute *so far* undoubtedly correct, we proceed to inquire what, within the meaning of the Legislature, is the case of "damages done to the land" by the erection of a mill. Is it the case of damage done to the land by the overflowing thereof with the water of a millpond, or does it embrace also every case of injury to the proprietor of land by reason of the proximity of such mill? There are many reasons which induce the majority of the Court to hold that the statute applies, and the statutory remedy is given, *only* in the case first mentioned.

Such appears to us the fair inference from the ordinary sense of the words, "damage done to the land." In technical language, the injury *to the proprietor* resulting from throwing upon his land the water from another's pond is but indirect and consequential. But as *the land* is immediately injured by the water thus thrown upon it, such injury is very properly termed damage *done to the land* itself. Whereas, the mis-

chievous consequences that may result to the health, comfort, or convenience of the citizen by reason of the nearness of a mill to his place of residence, although because of such consequences the value of the land as a place of residence may be impaired, are, assuredly, not aptly or usually described as "damage done to the land." The peculiar provisions as to the mode of trial directed by the statute seem to strengthen this view of the question. It is made the duty of the court to order a jury to be summoned to meet on the premises, who shall view and examine the premises, and hear all the evidence which may be produced on both sides, and then make up their verdict as to the sum which the petitioner is to receive as an annual compensation for the damage he sustains by reason of the erection of the mill complained of. In every instance of a complaint under this statute there *must* be a jury
(337) summoned to meet upon the premises; this jury *must* view and examine the premises; and the verdict of this jury, rendered upon such view and examination and the testimony of the witnesses brought before them by the parties, is conclusive in the county court. Where the wrong complained of is the drowning of the petitioner's land, the propriety of a jury to view and examine the place damaged is obvious. They see the wrong done, and examine into its nature and extent, and nothing is more certain than that we apprehend more strongly and clearly what is subjected to our senses than that which is communicated by others as having been learned through the medium of their senses. But when no *visible* wrong has been committed, a jury to "view and examine the premises" is an incongruous and a needlessly troublesome and expensive proceeding. It is true that the jury is also to hear the witnesses which the parties may bring before them. This, in *every* case, is a necessary provision. It may be needed to show the boundary of the petitioner's land, or the value of the timber destroyed, or many other facts not obvious on the view, and yet very important to be also considered in determining the verdict. But, above all, it is essential in enabling the jury to estimate the *incidental* damages which the petitioner sustains as consequent or likely to follow upon the wrong done; for we regard it as settled that when *the case made* is one fit for the determination of the special tribunal constituted by the statute, that tribunal is to determine the whole extent of the *petitioner's* injury in the case so made. It is their duty, in the language of the statute, "to inquire whether *the petitioner* has sustained *any* damage by reason of the erection of the mill," and, if he has, "to make up their verdict as to the sum which the petitioner is to receive as an annual *compensation* for the damage *he* sustains by reason of the erection of the mill complained of." If the petitioner's land is overflowed by the water thrown upon it by reason of the defendant's mill, he is entitled and obliged to seek his compensation in

the manner directed by the statute. And when he does seek it before a tribunal competent to award it, that tribunal is bound to (338) give a *full* compensation for all the injury he has sustained *thereby,* whether it be more or less direct; whether it affect his dominion in the land by taking away its use, or impair the value of that dominion by rendering the land unfit or less fit for a place of residence, or whether the injury, reaching beyond its immediate mischiefs, extends also to the person or the personal property of the petitioner.

It will be seen, too, on examining the statute, that it is provided that the verdict rendered by the jury of view shall be binding between the parties for the term of five years, unless the damages be increased by raising the waters, or otherwise "*if said mills are kept up.*" Now these last words are not to be understood in a strictly literal sense, for, assuredly, the legislative will is not to put down mills which *do no damage.* It is not the keeping up of a mill *as such* whereof the petitioner complains and for which he is entitled to compensation, but the keeping up of a mill which does damage to his land—or, at all events, does damage to him. It is the keeping up of the *water* of the pond or stream on which the mill is erected which does all this damage. This provision, therefore, clearly indicates that in the contemplation of the Legislature there was a certain height of water which might be kept up without causing the damage, for which the annual sum stated in the verdict was given as a compensation—and that whenever the water was permanently reduced below this height the collection of more money thereafter by reason of the verdict ought to cease. In the interpretation of the statute which we adopt there is a practical and easy standard by which to ascertain whether the water be above or below this legal height the moment the alleged reduction is made, that is to say, has or has not the water been so brought down, as no longer to overflow any part of the petitioner's land? But if we suppose the statute embraces the case where no land of the petitioner has been overflowed, but his health or that of his family has been affected, because of the nearness of the defendant's pond, it is impossible to ascertain, *a priori,* how low the water of the pond must be reduced, and how far the pond itself removed, before the (339) damage for which the annual compensation is given ceases. Until there shall have been some definite information collected by experience, the ascertainment of this matter must be purely conjectural.

Nor do we deem it irrelevent, in the prosecution of this inquiry, to notice that in the act of 1813, ch. 863, wherein the Legislature extended to persons injured by the erection of mills for manufacturing or other purposes the benefit of the enactments in the first act of 1809, ch. 773, in behalf of those injured by *public mills,* the language used shows explicitly what they suppose to be the *case embraced in the original act.* That

language is, "That the owners of lands which shall be *overflowed* by reason of the erection of mills for domestic manufactures or other useful purposes shall have the *same remedy* against the person erecting such mills, or the owners thereof, as is given by the said act against the person or persons erecting gristmills, or the owners thereof."

It is conceded on all hands that if the case of overflowing land by reason of the erection of a mill was not the only one intended by the Legislature to be provided for in the peculiar remedy given by the statute, it was the one *principally* within their contemplation. Suits were common between the owners of adjoining lands and the proprietors of mills because of the lands of the former being drowned by the millponds of the latter. For the slightest as well as the most serious injury of this kind the remedy was the same, an action on the case repeated time after time until the nuisance were put down or one or the other of the parties ruined in the controversy. It was unquestionably because of the mischiefs, real or supposed, which were disclosed by suits of this decription that the Legislature interfered by providing a new remedy which it was their will should be pursued instead of the former one. Now, when we take into consideration the fact that no suit, as far as our knowledge or information extends, had ever been brought in this State to recover damage because of injury from the erection of a mill except where there had been an overflowing of the plaintiff's land, *or some part there-*
(340) *of*, this furnishes a strong reason, in addition to those already mentioned, to compel the conviction that no other case than one of a damage to land so occasioned was in the contemplation of the Legislature, or can be construed by us to be within the purview of their enactments.

It is the opinion of the Court that there is error in the instruction given.

PER CURIAM. New trial.

Cited: Howcott v. Warren, 29 N. C., 23; *Johnston v. Roane*, 48 N. C., 524.

At the session of the General Assembly of 1844-5 the HONORABLE FREDERICK NASH, of Hillsboro, who had been previously appointed to that office by the Governor and Council, was elected a JUDGE of the Supreme Court, in the place of the HONORABLE WILLIAM GASTON, deceased.

At the same session the HONORABLE DAVID F. CALDWELL, of Salisbury, who had previously received the temporary appointment from the Governor and Council, was elected one of the judges of the Superior Courts of Law and Equity to supply the vacancy occasioned by the promotion of JUDGE NASH to the Supreme Court Bench.

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1845

THOMAS WALTON, ADMINISTRATOR ETC., v. JAMES ROBINSON'S ADMINISTRATOR, ETC., ET AL.

1. An act or acknowledgment of one partner, after the dissolution of the partnership, which prevents the operation of the statute of limitations as to that partner will also prevent its operation as to the other partners.
2. Making a payment on a note repels the statute. It is assuming the balance anew.

APPEAL from BURKE, Spring Term, 1845; *Manly, J.*

This was an action on a promissory note, given by the firm of J. Robinson & Co., which did business in Macon County, and was composed of the defendant Siler and of James Robinson, the intestate of the other defendants. It was given to Walton, who was a merchant in Charleston, in South Carolina, for goods sold to the firm, and fell due on 8 September, 1837. The action was commenced on 15 February, 1843, and the pleas were the "general issue and the statute of limitations," and also, by Robinson's administrators, "fully administered." The (342) partnership was dissolved in 1838. For the purpose of taking the case out of the statute of limitations the plaintiff proved by a witness that he, the witness, was in Charleston in the Spring of 1842, and that Walton showed him this note, and remarked that it would be soon out of date, according to the law of South Carolina, and that something ought to be done with it; and that, thereupon, the witness told him that as the friend and neighbor of the makers he would make a payment on it, and, accordingly, then paid $5 on it; and in a few days thereafter the witness returned home and informed Robinson what had passed between Walton and himself, and Robinson replied thereto: "It is all right, and I will refund the money to you." The plaintiff also proved by the same witness that after the death of Robinson, and since the suit

was brought, in conversation about the debt and suit the defendant Siler said "the debt ought to have been paid long ago by Robinson, who was bound to pay it; that at the dissolution of the partnership Robinson took the stock on hand and the debts due the concern, and continued the business, and agreed to pay all outstanding demands against the firm; that it was a just debt, and ought to be paid by Robinson's estate, but that he did not think that he ought to pay it."

Upon this evidence the counsel for the plaintiff prayed the court to instruct the jury that if they believed it they ought to find for the plaintiff against all the defendants, upon the statute of limitations. But the court refused the prayer, and instructed the jury to find for the defendant Siler upon the plea of the statute of limitations; and they did so accordingly. They further found the debt, but that the other defendants, Robinson's administrators, had fully administered. From the judgment rendered thereon the plaintiff appealed to this Court.

No counsel for plaintiff.
Francis for defendants.

(343) RUFFIN, C. J. If the case against Siler depended upon his own acknowledgment only, there might be some hesitation in saying whether it was or was not sufficiently explicit as to his legal liability for the debt to repel the statute. The language is very strong as to the justice of the debt, and that it ought (*then*) to be paid. It is true, he added that it ought to be paid by Robinson, and that "he did not think" that he ought to pay; which was, certainly, no distinct refusal, any more than no distinct promise to pay the debt, but rather the expression of an opinion that Robinson ought to pay it, because, between themselves, it had been agreed that Robinson should do so. But upon a point of such consequence the Court is not disposed to decide the case, if there can be any doubt on it, when there is another point on which the decision must be for the planitiff.

It was settled to be the law of this State, in *McIntyre v. Oliver*, 9 N. C., 209, that an act of acknowledgment of one partner, after the dissolution of the partnership; which prevents the operation of the statue of limitations as to that partner will also prevent its operation as to the other partners. That case only followed the doctrine of the English courts in *Whitcomb v. Whitney*, Doug., 652; and it has been recognized as law in many subsequent cases in this State as well by the courts of other States. *Willis v. Hill*, 19 N. C., 231. Nothing is plainer than that making a payment on a note repels the statute. It is assuming the balance anew. That was substantially done in his recognition of the payment made by the witness expressly with the view of preventing the operation of an act of limitation. He went further,

by saying, after the note and the whole transaction in Charleston had been mentioned to him, "that was all right." Surely that is plenary evidence from which the jury might infer that the speaker meant to acknowledge not only that he gave the note, but that it was still a just debt, and that he was obliged and willing to pay it. Indeed, it was so felt and admitted to be on this trial; for the verdict was not in favor of Robinson's administrators, on the plea of the statute of limitations, but against them. Now, according to *McIntyre v. Oliver* and *Whitcomb v. Whitney,* if the case be taken out of the statute (344) as to one of the joint makers of the note by his acknowledgment, it is so as to the other; and, consequently, the verdict being, by Robinson's acts and declarations, rightly rendered against him, it ought legally to be rendered gainst the other joint maker and partner. Upon the evidence given, the verdict is legally inconsistent. Upon this ground we think there was error in the instructions to the jury.

PER CURIAM. New trial.

Cited: Lane v. Richardson, 79 N. C., 161; *Green v. Greensboro College,* 83 N. C., 452; *McDonald v. Dickson,* 87 N. C., 406; *Wood v. Barber,* 90 N. C., 79; *Wells v. Hill,* 118 N. C., 908.

DEN ON DEMISE OF JAMES R. LOVE ET AL. v. ISAAC WILBOURN ET AL.

1. At a sale for taxes on land made after 1 October of the year in which the taxes are payable, the sheriff has no authority to bid off the land in the name of the Governor.
2. A plaintiff in ejectment may declare upon the same title against as many persons as are in possession of the land claimed, though their possessions may be several and distinct of different parcels of the land.
3. The defendants in such a case may defend separately, each for the part in his own possession; or, if they defend jointly, each defendant may require that the jury shall find him separately guilty as to that part of the premises in his separate possession and not guilty as to the other parts, so as to confine the judgment, and also the action for *mesne* profits against each defendant, to the parcel possessed by him.

APPEAL from BUNCOMBE Fall Term, 1843; *Dick, J.*

The facts of the case are stated in the opinion delivered by (345) the *Chief Justice.*

Francis for plaintiff.
J. H. Bryan for defendant.

RUFFIN, C. J. This is an ejectment, brought in 1840, for 100 acres of land which the lessors of the plaintiff claim under John

Gray Blount by a conveyance in 1834. The defendants contended that Blount's title had been before divested by sales for taxes. A verdict was given for the plaintiff, subject to the opinion of the court on a case agreed; and on it a judgment was entered for the plaintiff *pro forma*, and an appeal allowed by consent to the defendants.

The case agreed is very defectively stated, particularly in setting forth, in several instances, the testimony of the defendants' witnesses instead of the facts themselves as proved by them. But it is not deemed material to set out the whole particularly, as the opinion of the Court proceeds upon the radical defects in the alleged sales for taxes, as appearing in the case agreed, if taken most favorably for the defendants. It is sufficient, therefore, to state so much of the case as is needful to the understanding of the judgment of the Court.

For that purpose, the material parts are as follows: The premises are part of a tract of land lying in Buncombe County, containing 320,640 acres, which was granted to John Gray Blount on 29 November, 1796. Blount had other land in different tracts, in the same county, amounting in the whole to 1,074,000 acres.

(346) On 18 September, 1797, the sheriff of Buncombe put up the whole quantity of 1,074,000 acres at one time for sale for the taxes claimed to be due thereon for 1795, and John Strother, being the highest bidder, became the purhaser of the whole at a less sum than the tax, and took a conveyance from the sheriff. On 26 November, 1800, the sheriff of Buncombe, after due advertisement, offered the said contract containing 320,640 acres, for the tax assessed and due thereon for 1799. No person offered to pay the tax for a smaller quantity than the whole, and the sheriff struck off the same to the governor, and signed, sealed, and delivered a deed therefor in open court at the next court of pleas and quarter sessions for the county after the sale, and had the same recorded in the clerk's office, and filed it in the office of the Secretary of State in April, 1801.

The case agreed further sets forth that Wilbourn, one of the defendants, never occupied, personally, any part of the premises, but that his wife (from whom he had separated) lived on a part of the land as a tenant of the other defendant, Lunsford, who was in possession of the other part of the premises.

The original title of Blount is admitted, and, therefore the lessors of the plaintiff derived a good title from him, unless it had been previously divested by the sales for taxes. The provisions of the statutes upon the subject of such sales and the principles of their construction have been often considered, and seem to be well understood. According to them, there are several objections to these sales apparent in the case agreed which are fatal. They will be considered in their order.

Of that of September, 1797, it is to be remarked, in the first place, that it was made for the tax of 1795, on the tract of 320,640 acres, and other tracts; and that no tax seems to have been due on this tract for that year. If so, the sale of it was void. *Martin v. Lacy,* 5 N. C., 311. It was not granted until 29 November, 1796, and there is nothing to show that it was entered before that year, and, therefore, the Court cannot assume it. But admitting that it was entered in 1795, (347) or before, it was not subject to tax; for entries were first made liable for a tax by the act of 1795, ch. 1, sec. 6, which was passed on 9 December, and was, therefore, posterior to the period of listing or assessing land for taxes for that year. In the next place, if the tax had been due, the mode of making the sale vitiated it. Not to advert to the circumstance of setting up in one lot a number of distinct tracts of land, containing the enormous quantity of 1,074,000 acres, as an act of fraud and oppression, the positive provisions of a statute commanded a different mode of sale. The sale was on 18 September, 1797, and the act of November, 1796 (Rev. Code, ch. 449, sec. 2) forbids the sheriff from putting up for sale at one time for taxes more than one-tenth part of the land on which the tax was due, allowing him to proceed by tenths until the tax should be raised or all the land sold. The policy of the provision and the interest of the citizen in its observance are too obvious to need explanation, and from its nature bidders as well as the sheriff are to be affected by the consequences of its violation, since it cannot but be as well known to the former as the latter. *Avery v. Rose,* 15 N. C., 554. This disposes of the first sale.

That of November, 1800, stands on no firmer foundation. Supposing everything else regular, it was made too late. The Court gave the opinion in *Avery v. Rose* that under the act of 1798 the sheriff had no authority to use the name of the Governor as a bidder for the State unless at a sale made prior to the period at which the sheriff settled or ought to have settled for the public revenue. After that perior the sale is made exclusively for the benefit of the sheriff, without any interest in the State; and, therefore, the State does not allow the sheriff to buy for her, but it is at his risk to find some other purchaser. Now, by the act of 1787, ch. 12, the sheriff was required to settle and pay the tax into the treasury on or before 1 October in each year, or have judgment taken against him for its amount. For the purpose of enabling that officer to raise the taxes, he was authorized by the act of 1796 to make sales after 1 August, and then, by the act of 1798 itself, to make them after 30 March in each (348) year. Here he omitted to sell before 1 October, 1800, and made his sale on 26 November of that year; and, consequently, he could not purchase in the name of the Governor.

The counsel for the defendants contended in argument that their possessions were several and of distinct parcels, and that the plaintiff ought not to have judgment on this declaration, because it supposes a joint ejectment and possession. But a single authority, *Jackson v. Hazen,* 2 John, 438, is cited for the position, which is certainly in opposition to the practice which has hitherto prevailed in this State. The course here has been to declare upon the same title against all the persons in possession, or as many as the plaintiff chose. It is true, he will not be compelled to declare against them jointly where they have separate parts, as he might thereby be sometimes delayed in the trial. Yet it has been thought commendable so to declare, as it avoids a multiplicity of suits and prevents the accumulation of costs. It would certainly be wrong to refuse the plaintiff a judgment upon such a declaration merely upon its turning out on the trial that the defendants severally possessed distinct parts; for, when the owner sets two or more persons in possession of his land, how is he to know that they do not possess jointly—and especially when one of them is the tenant of the other? If it be an injury to the defendants to be treated as joint possessors, they may defend separately, each for the part in his own possession; or, in a fit case, the court might perhaps compel the plaintiff to deliver several declarations. Neither course, however, seems to be necessary; for even where they defend jointly it is competent to each defendant to require that the jury shall find him separately guilty as to that part of the premises in his separate possession, and not guilty as to the other parts, so as to confine the judgment and also the action for *mesne* profis against each defendant to the parcel
(349) possessed by him. But that is entirely different from the position here taken, which is that, although the plaintiff claims the whole land upon the same title, and both the defendants also claim on the same title and defend jointly, and did not ask to be severed in the verdict, yet no judgment can be rendered against both or either of the defendants simply because they did not possesss the whole. Even *Jackson v. Hazen, supra,* is opposed to that, for there, in ejectment against five, the plaintiff was permitted to take judgment against three who were jointly possessed of a part of the premises, though the other two defendants had judgment for them, because they were severally possessed of other parts of the premises. But that case is not contrary to our course, but is also opposed by several later cases in New York. *Jackson v. Woods,* 5 Johns., 278; *Potter v. Scoville,* 5 Wend., 96; *Jackson v. Andrews,* 7 Wend., 152. And in conformity with these last cases is the rule in Kentucky. *Abney v. Barnett,* 1 Marsh., 107.

PER CURIAM. Affirmed.

Cited: Needham v. Branson, post, 427; *Lenoir v. South,* 32 N. C., 242; *Bryan v. Spivey,* 106 N. C., 99.

(350)

STATE v. MARMADUKE MITCHELL.

1. In the statute to punish the burning of jails, etc. (Rev. Stat., ch. 34, sec. 7), the word "or" before "maliciously" should be construed "and," so that the burning must be both willful and malicious to constitute the offense provided against.
2. If a prisoner burn a part of a jail merely for the purpose of effecting his escape, and not with the intent to destroy the building, he is not guilty under the statute.
3. But although his main intent may be to escape, yet if he also intends to burn down the building in order to effect his main design, he is guilty.
4. If an intent to burn the building exists the offense is completed, as in arson at common law, however small a part may be consumed.

APPEAL from FRANKLIN, Spring Term, 1845; *Dick, J.*

The defendant was indicted for burning the public jail of Franklin County. The indictment charged that "he feloniously, willfully, and maliciously did set fire to the public jail belonging to the said county, and the said public jail then and there being by such firing aforesaid feloniously, willfully, and maliciously did burn and consume, contrary to the statute," etc. The prisoner pleaded not guilty. On the trial the State proved that the defendant was confined in the jail of Franklin County, in one of the upper rooms, no other person being in the same room; that the door of the room in which the defendant was confined was partially burned; also a part of the facing of the door and a part of the ceiling of the room were burned. The State further proved that the prisoner had got out of the room in which he was confined, and was in the room below when the jailer reached the jail. The Attorney-General admitted that the prisoner set fire to the jail for the purpose of enabling him to escape from the same. The prisoner's counsel moved the court to charge the jury that if they believed the prisoner set fire to the jail for the purpose of burning off the lock and thereby enabling him to escape from prison, and not to burn down the jail, he (351) was not guilty.

The court refused the instruction prayed for, and charged the jury that if the evidence satisfied them beyond a reasonable doubt that the prisoner did willfully set fire to the jail, no matter with what intent, and any part of the jail was consumed by the fire so set to it by the prisoner, it was their duty to find him guilty of the charge set forth in the bill of indictment.

The jury found the prisoner guilty, and judgment being pronounced against him, he appealed to the Supreme Court.

Attorney-General for the State.
Busbee for defendant.

DANIEL, J. The act of assembly was first passed in 1830, ch. 41, and was as follows: "That if at any time hereafter any person or persons shall willfully *and* maliciously burn the State-house, or any of the public offices of this State, or any courthouse, jail, etc., he or they shall be deemed guilty of felony." When the acts of the General Assembly came to be revised, by some mistake the word *or* was inserted in the statute in the place of the conjunction *and*. And it may be that this is the reason that induced the judge to decline to charge the jury as he had been requested by the prisoner's counsel. The first branch of the clause in the statute as it now stands had been literally violated by the prisoner; he had *willfully* burnt the jail. But we think that the word *or*, to effectuate the intention of the Legislature, and in favor of life, must be construed as if it were *and*. And before the prisoner should have been convicted the jury should have been satisfied that he not only willfully put fire to the jail, but that he did it likewise maliciously, with an evil and wicked intent to destroy and consume the jail by the means of fire. If it was not the intention of the prisoner to burn down and destroy the jail, but he put fire to the lock to burn it off, merely to effect his escape, and not to destroy the jail, the felony was (352) not completed. The case cited by the prisoner's counsel, *People v. Cotteral*, 18 Johns., 115, is an authority for this position. We, therefore, think that the judge erred in refusing to charge as he was requested by the prisoner's counsel. But we will say that if the prisoner willfully put fire to the jail with the intent to effect his escape by consuming or destroying it he would be guilty under the statute, if the jury should be of opinion that his secondary intent was to burn down and destroy the jail, although his main intent was thereby to effect his escape. This doctrine is supported by *King v. Coke*, 6 State Trials, 212. The primary intent of the prisoner in that case was to murder Mr. Crispe; they terribly hacked him and also disfigured him by slitting his nose with a hedge bill, and they left him for dead. Now, the bare intent to murder is no felony; but to disfigure, with an intent to disfigure, is made a felony in England by the Coventry act. The prisoners were indicted under that act, and the court said it shall be left to the jury whether it was not a design to murder by disfiguring, and consequently a malicious intent to disfigure as well as to murder. The jury found the prisoners guilty of such previous intent to disfigure, in order to effect their principal intent to murder, and they were both convicted and executed. The same doctrine is to be found in *King v. Gillow*, 1 Moody C. Cases, 85. In an indictment against the

statute for cutting and maiming with intent to do grievious bodily harm, a prisoner was convicted whose main and principal intent was to prevent his lawful apprehension which is also an offense against the statute if, in order to effect the latter intention, he also intended to murder or do grievious bodily harm, etc., which the jury found he did. We have made the above remarks in order to prevent our being misunderstood in the construction of our statute on the subject of burning public buildings. General malice is sufficient to satisfy the words of the statute. 1 Moody C. Cases, 93.

If the prisoner put fire to the jail, not with an intention of destroying it, he is not guilty under the act of Assembly. But if he put fire to the jail and burnt it with an intent to burn it down and de- (353) stroy it, he is guilty, notwithstanding the fire went out, or was put out by others before the intention of the prisoner was completed by burning down the jail; and this is the law, although his main intention was to escape.

The two intentions of escaping and of burning down the jail are perfectly consistent with each other as both existing in the mind at the same time, as it may be the purpose of the party to escape by means of burning the jail.

If a person from without set fire to the jail with the view of enabling prisoners confined in it to escape, the case is clearly within the words and mischief of the act; for it must be against such deeds, upon such an intent, that the enactment was chiefly directed. In like manner, if a prisoner himself set the jail on fire from within, to enable him to escape, the same consequence must follow. And in cases under the statute, as well as in arson at common law, the setting fire to the building constitutes the offense, no matter how little may be burned, provided there was an intention to destroy the building; and such an intention is to be inferred, unless the contrary is clearly established, since fire set to combustible materials will naturally consume them. Therefore, *prima facie,* this prisoner was guilty. But all inference of his guilt is repelled by its being found, or rather assumed by the presiding judge, that he did *not* intend to burn down the jail, but intended to escape by burning a small hole through the door, *and nothing more.* It may be extremely difficult for a prisoner, especially a solitary prisoner, to establish, as he must do affirmatively, that he did not intend to consume the jail when he set fire to it, but only to burn a slight opening in it. But that difficulty does not lie on this prisoner, according to the case as now appearing, because it is yielded by the State that he had no such intention. His innocence does not arise from *an* intention of the prisoner having been to escape, but from the intention to escape by means of burning down the jail being expressly negatived; and, therefore, the presumption before

(354) spoken of must yield to the fact found. We speak of the fact as found because the judge told the jury to convict the prisoner, although they might find the fact to be that he did *not* intend to burn down the house, or no matter what was his intent.

PER CURIAM. *Venire de novo.*

Cited: *S. v. Walters*, 97 N. C., 490.

ROBERT LOVE v. NINIAN EDMONSTON.

1. When a contract is once made between parties it binds and is legally presumed to subsist until it be shown to have been performed or rescinded.
2. Therefore, where A. covenanted with B. that he would pay him rent for a certain tract of land, provided B. continued a contract respecting the said land then subsisting between him and C.: *Held*, that before A. could discharge himself from the payment of this rent he must show that the contract between B. and C. had been rescinded.

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

This was an action upon a covenant, of which the following is a copy:

Robert Love and Ninian Edmonston agree thus as respects the tract of land on which said Edmonston lives, called the Probe Bottom, which has been valued to the said R. Love under a contract with James Lockhart, and said Edmonston agrees thus with the said Love, that in case the said Lockhart will unencumber the said tract of land from a mortgage to James Greenlee, he will well and truly pay to the said R. Love, agreeably to the said valuation, $600 in three annual payments, with interest on the same; but if otherwise, that the said James Lockhart will not come forward and unencumber the said land, then the (355) said Edmonston will relinquish all claim from any agreement between the said Love and Edmonston, and that the said Edmonston will pay the said Love rent for the present year, provided the said Love hold on to his agreement with James Lockhart. In witness whereof, the said Robert Love and the said Ninian Edmonston have hereunto set their hands and seals this 11 April, 1829.

R. LOVE, [SEAL]
N. EDMONSTON, [SEAL]

The pleas were, "Covenants performed, and no breach." The sole question on the trial was whether there was a condition precedent which

the plaintiff was bound to perform before he could bring his action, in that part of the covenant which says, "provided he hold on to his agreement with said Lockhart."

A verdict was taken for the plaintiff, subject to the opinion of the court upon this point reserved. The court refused to set aside the verdict, and rendered judgment for the plaintiff, from which the defendant appealed.

Francis for plaintiff.
Iredell for defendant.

RUFFIN, C. J. The question is rather one of evidence as to the side from which it should come, than of pleading or of the construction of the contract. As far as these parties bargained for a sale of land to the defendant, it is to be understood that the bargain was at an end by the failure of Lockhart (Love's vendor) to remove his encumbrance on the land; for the rent, now sued for, was to be due only in the event that Edmonston's purchase was not completed, and the case states that the only objection to the plaintiff's recovery of the rent was that the plaintiff did not show he and Lockhart still held to their bargain for the land. With a view to that question, the case may be thus stated: The plaintiff, having made an executory contract with Lockhart for the land, leased it to the defendant for one year at a certain rent, with a stipulation, however, after reciting the nature of the plaintiff's title, that the rent was to be paid to the plaintiff, "provided the said Love hold (356) on to his agreement with Lockhart." The plain meaning of that stipulation is that, as the rent ought not to belong to Love, but ought to go to Lockhart in case their contract should be rescinded, the defendant should not be bound to pay it to Love, notwithstanding he took his lease from him, if in fact and truth Love's purchase should be rescinded. Then the question is whether it be incumbent on the plaintiff to show by affirmative or substantive proof that the contract between him and Lockhart still subsists, or whether, if such be the fact, the defendant ought not to show that it had been rescinded by the act of one or both of the parties. Upon that point our opinion accords with that of his Honor, that the *onus* was on the defendant, for the reason that when a contract is once made between parties it binds and is legally presumed to subsist until it be shown to have been performed or rescinded. Without something appearing to the contrary, the plaintiff must be assumed to have held on, and to have been held on, to his agreement with Lockhart.

PER CURIAM. No error.

(357)

THE STATE ON THE RELATION OF J. L. GRAVES, ADMINISTRATOR, *v.* NOEL REED ET AL.

Where a sale of property under execution is made by a sheriff or constable, and the property brings more than the amount of the execution, it is the duty of such sheriff or constable to see that the excess is paid to the owner of the property. If he fail to do so, he is liable on his official bond.

APPEAL from CASWELL, Spring Term, 1945; *Caldwell, J.*

Debt upon a constable's bond, executed by one Hooper in 1837, with the defendants as his sureties. It appeared in evidence that during that year the constable levied an execution in favor of one Gunn, amounting to about $30, on a slave, the property of Anderson, the relator's intestate, and sold the same or about $584. The constable paid Gunn's debt, and also another execution levied subsequently to Gunn's, amounting to about $305. And this suit was for the excess in the constable's hands after paying those two claims. A judgment was taken for the plaintiff for the amount of the excess, subject to the opinion of the court as to the liability of the sureties.

On consideration the court was of opinion that such excess in the hands of the constable was not held by virtue of his office, and that the defendants, therefore, were not liable, and directed the verdict to be set aside and a nonsuit entered. The relator appealed to the Supreme Court.

No counsel for plaintiff.
Kerr and Morehead for defendants.

DANIEL, J. *S. v. Pool, ante,* 109, this Court said that a purchaser at a sheriff's sale must undoubtedly pay his bid to the sheriff, and, (358) after getting enough to discharge the execution, the sheriff must see that the purchaser satisfies the surplus to the owner of the property before he can make a conveyance to the purchaser. He (the sheriff) receives the surplus money by virtue of his office; and for all money received by virtue of his office his bond is a security, whether it belong to the plaintiff or the defendant in the execution. The bond of a constable stipulates that he should diligently endeavor to collect all claims put in his hands for collection, and faithfully pay over all sums thereon received unto the persons to whom the same is due. On this bond the act of Assembly (Rev. Stat., ch. 24, sec. 7) declares that suits may be brought and remedy may be had in the same manner as suits may be brought and remedies had upon the official bonds of sheriffs and other officers.

The above decision was made by this Court at the last term, and it is probable was unknown to his Honor when he gave judgment in this case. The judgment of nonsuit must be reversed, and a judgment rendered on the verdict for the plaintiff.

PER CURIAM. Reversed.

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(359)

A. TARKINTON v. THOMAS S. HASSELL, EXECUTOR, ETC.

1. Where a deputy sheriff received money on an execution in his hands, and failed to indorse it on the execution or give credit for it, but afterwards collected the whole amount, without deducting the sum so paid, and afterwards promised to pay the defendant in the execution if such mistake had been made: *Held*, that an action will lay against the deputy upon such a promise, and that the party was not bound to sue the sheriff for a breach of his official duty.
2. In such a case the statute of limitations only began to run from the time of the promise, not from the time of the money received or from the time of the failure to pay it over.

APPEAL from TYRRELL, Spring Term, 1845; *Battle, J.*

Assumpsit, to which the defendant pleaded the general issue and the statute of limitations.

Upon the trial it appeared that the defendant's testator was acting as the deputy of the sheriff of Tyrrell County, and as such had an execution in his hands against the plaintiff, and under it raised about $16, which was indorsed upon it. He, then, in the early part of 1840, levied upon and sold other property of the plaintiff to the amount of $20 or $25, which did not appear as an indorsement on the execution. A *ca. sa.* for the same debt was afterwards taken out and satisfied by the plaintiff. The plaintiff alleged that the $20 or $25 which had been received by the defendant's testator had never been applied towards the execution in his hands, and called upon him to repay it. He replied that he did not know that there was any mistake, but if there was, he would settle it. This was in 1842, and the action was commenced in 1843, more than three years after the money had been received by the defendant's testator. The defendant objected that the action ought to have been brought against the principal sheriff and not against the deputy; and, if that were not so, yet it was barred by the statute of limitations. The court (360) instructed the jury that if the money was received by the defendant's testator, and never applied in satisfaction of the execution against the plaintiff, but remained in the testator's hands, and the testator promised that if such were the case he would settle it, the action might be sus-

tained against the defendant, and the bar of the statute was removed by the promise to settle.

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

No counsel for plaintiff.
Heath for defendant.

DANIEL, J. If the defendant's testator had not made the (361) promise to pay and settle the debt in case the mistake could be pointed out to him, the plaintiff could not have recovered, but would have been driven to the high sheriff for satisfaction for an injury done by his deputy in the execution of his office. The mistake or negligence was made to appear; and there was an express promise by the testator, in that event, to settle and pay the debt. The action is brought on this promise, and he consideration to sustain it is the plaintiff's money then in the party's hands, and that the testator then became discharged from the high sheriff for the same debt. The promise did not remove the bar of the statute of limitations, as the judge supposed; for no bar had ever been created by force of the statute. The judgment must be affirmed.

PER CURIAM. No error.

SAMUEL COX ET AL. V. H. W. MARKS ET AL.

1. A. bequeathed as follows: "I do *lend* to B.'s four children C., D., E., and F., all my estate, real and personal," and then directs that the estate shall be kept together until C. arrives at 21 years, and then to be equally divided among the children, to them, their heirs and asigns forever: *Held*, that the word *lend* did not tie up the estate to the time of the death of the children.
2. A. bequeaths certain personal estate to four brothers and sisters, to them, their heirs and assigns, and then added: "If either of them should die without any *heir in marriage*, then their legacy to their own brothers and sisters": *Held*, that the remainder over was too remote, and, therefore, void.

APPEAL from MECKLENBURG, Special Term, May, 1845; *Pearson, J.*

Detinue, brought by the plaintiffs as administrators of one John Cheek to recover certain slaves. The principal question made in the (362) case was upon the construction of the will of Silas Cheek, which was made in 1808, and of which the following are the material parts: "I do lend to Mary Smart's four base-born children, namely, Robert T. Smart, Sarah B. Smart, Rebecca Armstrong, and John S.

Smart, all my estate, real and personal; and it is my will that my estate should be kept together until the said Robert T. Smart arrives to 21 years of age, and then equally divided, share and share alike, with the said four children, to them and their heirs forever, and that said children be raised well and given good learning. If either of them should die without any heir in marriage, then their legacy to their own brothers and sisters, and the profits that should arise from this estate, while kept together, as yearly incomes, to be laid out to the use and benefit of the said children." The negroes in controversy were admitted to be those, or the descendants of those, owned by the testator and intended to be passed by the will. It was admitted, also, that on the coming of age of Robert T. Smart, about 1823, the negroes were divided among the devisees according to the terms of the will, and they so held them until the death of John S. Smart, who died in May, 1844, without having had children. The defendants then took possession of his part of the negroes, and still hold them. It was agreed that if, under the construction of the will, the negroes vested absolutely in the plaintiff's intestate (he being the John S. Smart mentioned in the will), then they were entitled to recover. But they were not entitled to recover in case the court should be of opinion that, on the death of John Cheek, the estate went over, by way of executory devise, to the defendants, who are his sisters.

The court instructed the jury that the limitation over in the will of Silas Cheek was too remote, and that the absolute estate vested in the plaintiffs. In pursuance of this instruction the jury found a verdict for the plaintiffs and, judgment being rendered thereon, the defendants appealed.

Boyden for plaintiffs. (363)
Alexander and Osborne for defendants.

DANIEL, J. Is the executory devise of John S. Smart's share over to his brothers and sisters upon an event too remote, and, therefore, void? This is the question now for our decision. The word *lend,* made use of by the testator in the beginning of his will, which we are requested by the counsel to notice, when taken in connection with the phraseology of the whole clause in question or the whole will itself, does not denote an intention in the testator to tie up the estates devised and bequeathed to the time of the death of any of the several legatees or devisees. What the testator might have meant by the word *lend* in case any of the children had died before the time of division it is now useless to inquire, because it is clear that he intended they should have, in the first instance, an absolute property in their several shares *after* the division should take place. John S. Smart outlived the period of division. He,

therefore, took his share absolutely, which on his death would go, the land to his heirs and the personal estate to his administrator, in case the limitation over to his brothers and sisters is void in law. "If he should die *without any heir in marriage*" is the event upon which the estate of John S. Smart is by the terms of the will to go over to his brothers and sisters. The word is *nomen generalissimum*, and may include all kinds of heirs. That word by itself, therefore, will clearly make the executory devise to the brothers and sisters rest on an event too remote, and, therefore void. *Brantley v. Whitaker, ante,* 225. And if we take the whole sentence together, it cannot, by any common-sense interpretation, be construed to mean if he die *without leaving children or leaving issue,* then over. It was contended by the counsel that "heir in marriage" meant children, so as to tie up the event within the proper period. But that is inadmissible, since it would exclude grandchildren of the first taker; and certainly the testator did not mean that if one of the devisees had a child, and that child had issue and died in the lifetime of the first (364) taker, that the estate should go over to the brothers and sisters of the first taker, and exclude the issue of the dead child. The most extended construction that we can give the sentence in favor of the defendant is the following: If he die without heirs of his body born in lawful wedlock, then over. And we know that such words would only reduce the estate in fee in the land which John S. Smart had vested in him by the former part of the will to an estate tail, and would leave the personal estate just where it was before, to wit, absolute in him and his administrators, as it is a rule of law that any words in a will that will create an estate tail in the land will, when used in a bequest of chattels, create an absolute interest in them to the legatee. We, therefore, are of opinion that the judgment must be affirmed.

PER CURIAM. No error.

Cited: Sessoms v. Sessoms, 144 N. C., 124; *Robeson v. Moore,* 168 N. C., 390.

THE STATE v. CALVIN HELMES.

1. An indictment for "unlawfully, wickedly, and maliciously" cutting and destroying a quantity of standing Indian corn cannot be supported.
2. An indictment for malicious mischief will only lie for the maicious destruction of personal property.
3. Growing corn, except in a few cases, is regarded as a part of the realty.

STATE *v.* HELMES.

APPEAL from MECKLENBURG, Spring Term, 1845; *Bailey, J.*

The defendant was convicted on an indictment for "unlawfully, wickedly, and maliciously" cutting and destroying a quantity of standing Indian corn, the property of, etc. His counsel moved in ar- (365) rest of judgment on the ground that standing Indian corn was not such personal property as could be made the subject of malicious mischief. The motion was disallowed by the court, and judgment being pronounced for the State, the defendant appealed.

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

NASH, J. The indictment charges "that the defendant unlawfully, wickedly, and maliciously did cut and destroy a quantity of Indian corn," and concludes at common law. The defendant was convicted by the jury and, upon a motion to arrest the judgment, the motion was overruled and judgment given in favor of the State. We are of opinion there was error in the judgment pronounced. It is too late, in this State, to question whether an indictment lay at common law for malicious mischief. The point has been several times before the Supreme Court, and it has uniformly been decided that it would. *S. v. Landreth,* 4 N. C., 331; *S. v. Simpson,* 9 N. C., 460; *S. v. Scott,* 19 N. C., 35; *S. v. Robinson,* 20 N. C., 129. In each of these cases those preceding it have been referred to and approved. It may then be considered the settled law of this State. In the case last cited the court gave a definition of malicious mischief which is decisive of this case; it is said "to consist in the willful destruction of some articles of personal property from actual ill-will or resentment towards its owner or possessor." The property destroyed must be personal property. The charge against the defendant is that he cut and destroyed a quantity of *standing* corn. Standing corn, that is, corn attached to the land and not cut, is not personal property, but savors of or rather is a part of the realty. It is true that to certain purposes and to a certain extent growing or standing corn is considered by the common law as personalty. It is liable to be taken and sold under execution, and, as between the executor and the heir, it belongs to the executor; and in each of these cases it is considered as personalty for the (366) same purpose, that is, of subjecting it by *fi. fa.* to the debts of the owner. In no other case does the common law view it as personalty. Our Legislature have, for another object, given it the same character. It is made the subject of larceny. Rev. Stat., ch. 34, sec. 24. For no other purpose, either civil or criminal, is that character impressed upon it by the act referred to. And, assuredly, it is not in the power of this Court to make the act criminal to any other or different purpose. It was ob-

jected by the defendant that the indictment charges the cutting and destroying of *standing* corn. Were this an indictment under the statute for stealing, the distinction between growing corn and corn standing and unsevered from the earth might be a very important one. In this case, for the reasons above given, it is not.

PER CURIAM. Judgment arrested.

Cited: S. v. Hill, 79 N. C., 658; *S. v. Martin,* 141 N. C., 838; *S. v. Frisbee,* 142 N. C., 675.

THE STATE v. WASHINGTON H. THOMAS.

Where a woman has been examined on oath under the Bastardy Act, before two justices, and one of them omits to sign the examination, the court to which the proceedings are returned may permit the justice *then* to sign the examination.

APPEAL from GRANVILLE, Spring Term, 1845; *Caldwell, J.*

The defendant was charged on oath, before Peterson Thorp and J. Hester, two of the justices of the peace for Granville County, (367) where all the parties lived, by Martha Day, a single woman, with being the father of her bastard child. Whereupon, a warrant was issued against the defendant to bring him before the examining magistrates, and upon his appearance he was bound over to the county court. Upon the return of the papers a motion was made by the defendant, through his counsel, to quash the proceedings, for the reason, as set forth in the record, "that the examination of the woman, although appearing on its face to have been taken before two justices, was signed by only one, the other having *forgotten* to sign it at the time." This motion was refused, and the magistrate who had so neglected his duty, being in court, was, on motion of the officer prosecuting in behalf of the State, then permitted to sign the examination. An issue was made up in the county court and, being submitted to a jury, a verdict was returned in favor of the State, and upon judgment being rendered, the defendant appealed to the Superior Court, where the issues were again tried, with a similar result, and the defendant appealed to the Supreme Court.

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

NASH, J. No counsel appears here to represent the defendant, and we are not informed on what ground he expects the aid of this Court. The

record does not show us that in the Superior Court any objection was made by the defendant, except as to the fact of his being the father of the child sworn to him by Martha Day. With this question we have nothing to do; the jury have decided it, and we cannot disturb their verdict. We have carefully looked through the record, and perceive but one question presented by it, and that is the permission given to the magistrate in the court then to sign the examination taken before him and the magistrate whose signature was affixed. Unfortunately for the defendant, if this be the only question upon which he has brought his case here, the question is no longer an open one. At June Term, 1844, of this Court, the very question was presented in *S. v. Ledbetter,* (368) 26 N. C., 243. The Bastardy Act, as it is termed, requires all examinations to charge a man with being the father of a bastard child to be taken within three years after the birth of the child. Rev. Stat., ch. 12, sec. 6. In that case the examination did not upon its face show the fact. Upon the return of the proceedings to the county court a motion was made to quash them for that defect, which was refused. The Supreme Court say, "Upon the refusal to quash, the party might submit to an order of filiation, and then take the case to the Superior Court by a *certiorari.* But we think, likewise, a direct appeal from the refusal of the county court to quash is a convenient and proper method of proceeding." An appeal in that case was taken to the Superior Court, with the examination still so defective, where the proceedings were quashed. The Court in commenting on the case say: "If, indeed, the supposed father moves the county court to quash for any defect which may, consistently with the truth, be supplied at the instance of the State, it is competent to allow the necessary amendment." That is precisely the case here. The only defect to which the attention of the county court was drawn was the absence of the signature of one of the examining magistrates to the examination. That the amendment allowed was according to the truth is verified by the record itself, and the court had full power to allow the amendment.

When the case appeared in the Superior Court the examination was complete, and the verdict of the jury has fixed the defendant as the father of the child.

PER CURIAM. No error.

Cited: *S. v. Higgins,* 72 N. C., 227.

(369)

THE STATE v. JASON H. HUNTER.

1. Where a road has been used by the public for twenty years without obstruction or hindrance, a grant from the owners of the land over which the road passes may be presumed.
2. Where a person who occupies a tract of land over which a public road runs keeps up a fence across the road, though he did not originally erect it, he is liable to an indictment for a nuisance .

APPEAL from MACON, Spring Term, 1845; *Manly, J.*

The defendant was indicted for the obstruction of a road in Macon County leading from Franklin towards the Tennessee line. A witness was called to testify that he had lived near the road for fifteen years, and during that time it had always been used as a public road, and that it was reputed to have been so used from its construction. The nature of the soil rendered it difficult for the witness to make up any accurate opinion of its age, but he thought it might have been used for ten years or more before he knew it, or it might have been only five. Another witness testified to the same, in substance. The evidence further established that the defendant was resident upon and the owner of a plantation over which the road ran, and that his servants, when he was not actually present, constructed a fence in the road so as to prevent the passage thereon.

It was objected by the defendant's counsel that he could not be convicted: first, because the road was not sufficiently shown to be a public road; secondly, because he was not present at the construction of the nuisance.

The court instructed the jury that it was not necessary in all cases to show a proceeding in court for the purpose of laying off and
(370) dedicating a road for the public use; that if it had been in point of fact used by the public for twenty years or more, it would be sufficient. A grant from the owner of the land might be presumed after that lapse of time. And it was submitted to them to inquire, from the evidence, whether the road had been used that length of time as a public road, without obstruction by the defendant or any under whom he claimed. On the second point the court told the jury that the defendant might be convicted, although he was not present, aiding or assisting in the erection of the nuisance, provided they should find from the evidence that he had either commanded it to be done or, after it was done, had kept it up, using the field for the purpose of agriculture and continuing the fence around it for that purpose.

The jury found the defendant guilty, and judgment having been pronounced accordingly, he appealed to the Supreme Court.

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

DANIEL, J. The court charged the jury that if the road had been, in point of fact, used by the public without obstruction or hindrance for twenty years or more a grant from the owners of the land over which the road ran might be presumed after the lapse of that time. This part of the charge, we think, was correct; and it was as favorable to the defendant as he had any right to expect. *S. v. Marble,* 26 N. C., 318. Secondly, the court charged the jury that if the defendant had either commanded the nuisance to be erected or, after it was done, he had kept it up, using the field for agriculture, and continued the fence around it for that purpose, he was guilty. This part of the charge, we think, was also correct. In *S. v. Pollok,* 26 N. C., 303, the proprietor of the land (where a gate had unlawfully been erected across a public road) sold it to A., who never actually entered into the land, but leased it to others as his tenants, who kept up the gate. This Court said that the tenants who used the gate by keeping it closed and impeding the travel were no doubt guilty. (371)

PER CURIAM. No error.

Cited: *S. v. Cardwell,* 44 N. C., 248; *Askew v. Wynne,* 52 N. C., 24; *S. v. McDaniel,* 53 N. C., 286; *S. v. Godwin,* 145 N. C., 464.

STATE v. WILLIAM G. DEBERRY.

1. It is only when the act or acts done by a person, or the omission to act by one who ought to act, operate to the annoyance, detriment, or disturbance of the public at large that the offender is liable to indictment at the common law.
2. A single act of drunkenness, though it be in the presence of a crowd, is not indictable, if the persons assembled were not thereby annoyed or disturbed.

APPEAL from MONTGOMERY, Spring Term, 1845; *Pearson, J.*

The indictment in this case charged that the defendant "on, etc., in the county of Montgomery, did become drunk and intoxicated with spirits, and being so drunk and intoxicated, did go out and exhibit himself in the streets of Lawrenceville, during the sitting of the Superior Court of Law for the county of Montgomery, in the town of Lawrenceville, the good citizens of the State being then and there assembled for

the transaction of business, and passing and repassing, etc., and in the presence of said citizens did then and there so exhibit himself, and in the hearing of the said citizens did then and there in a loud voice curse and swear, and use divers profane and blasphemous expressions, and take in vain the sacred name of the Almighty, to the common nuisance," etc.

The defendant having pleaded not guilty, the jury on the trial found the following special verdict:

"The jury find that the defendant, on 1 March, 1844, in the coun-
(372) ty of Montgomery, during the sitting of the Superior Court of Law for that county, at Lawrenceville, became drunk and intoxicated with spirits; that he was not so drunk as to be unable to walk or to stagger, but it was apparent from his conversation, looks and gestures that he was excited by and laboring under the effects of spirits; that, in this condition, he went to a cart standing on or near the edge of one of the public streets, where some twenty or thirty persons were assembled, talking and drinking, and in their hearing abused the judge then holding court, in a vulgar manner, and also abused the grand jury. He then went off, but afterwards returned to the cart and repeated what he had before said. His tone of voice was louder than is usual in conversation between two persons, but was not so loud as to be heard at a greater distance than twenty or thirty steps, although the persons there, if they had listened, could all have heard him. The people there assembled were not disturbed in their business or conversation by what he said, and did not assemble or draw up around him, and his language excited no particular attention among the bystanders. It was 100 yards from the place where the court was sitting, and did not disturb the business of the court. And whether upon these facts the defendant is guilty," etc., the jury submit to the court.

The court being of opinion that the facts found in the special verdict did not amount in law to a common nuisance, and did not sustain that allegation in the indictment, a verdict of not guilty was entered; and judgment for the defendant being rendered, the solicitor for the State appealed.

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

DANIEL, J. The special verdict in this case found is that the defendant was slightly intoxicated *one* day, near a public street in the town of Law-
renceville, during the sitting of the Superior Court. He was
(373) 100 yards from the courthouse, and did not disturb the court. For this act of drunkenness he might have been, by force of the

act of Assembly, fined 25 cents by a judgment of a justice of the peace. It is also found by the verdict that the defendant, at the same time and place, made use of profane language, cursing and swearing, and also abusive and vulgar language, when he was speaking about the judicial conduct of the judge then holding the court, and also the grand jury. The defendant was liable, under the act of Assembly, to a conviction before a justice, and to have been fined 25 cents "for every oath or curse." But it is only when the act or acts done by a person or the omission to act by a person who by law ought to act, operate to the annoyance, detriment, or disturbance of the public at large that the offender becomes amenable to the public by way of indictment at common law. So far from either of the two facts found by the verdict, or both combined, coming up to the above definition of a public nuisance, the verdict expressly finds that the people were not disturbed in their business or conversation by him. There are many immoral acts and vicious conduct of persons which bring down the indignation of every virtuous man, in regard to which the Legislature have not thought society would be much aided by having the delinquents indicted; they are left to the correction of the religious and moral influence of society itself. We think that the judgment was right.

PER CURIAM. Affirmed.

Cited: S. v. Jones, 31 N. C., 40.

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(374)

THOMAS DEAVER v. JAMES KEITH ET AL.

1. Under the attachment law a judgment taken against a defendant who has not appeared or some of whose property has not been attached is utterly void.
2. Where a note payable in specific articles has been given by A. to B., then assigned to the defendant in the attachment, and afterwards by him transferred to C., who is summoned as a garnishee, this note is not the subject of attachment in the hands of C., and he is not bound on his garnishment to answer for its value.
3. In no case where the claim of the defendant against the garnishee in a suit by attachment rests in unliquidated damages can the demand be attached.

APPEAL from BUNCOMBE, Fall Term, 1844; *Battle, J.*

The plaintiff took out an attachment against one James Keith, an absconding debtor, returnable before a single magistrate. This attachment is dated 10 November, 1836. On 12 November a notice is issued

by the plaintiff, Thomas S. Deaver, to John A. Sorrell, summoning him as a garnishee in the case. And on 21 November another notice for the same purpose is issued by John G. Blackwell, a constable, to the same John A. Sorrell, to appear on 26 November before one Hunt, a justice of the peace. Those notices are indorsed by the constable as follows: "*Returned* a true copy of the within by me, J. G. Blackwell." The magistrate, Mr. Hunt, dismissed the proceedings on the day of trial, 26 November, and the plaintiff appealed to the county court. And at the February Sessions, 1837, of the court, being the return term, an order was made directing a *scire facias* to be issued to Joseph M. Rice, the administrator of Sorrell, he having died in the meantime, "to make him a party to the suit as defendant." At February Term, 1839, the court ordered publication to be made against Keith,
(375) as a nonresident, for six weeks, and publication was made, agreeably to the order. At February Term, 1840, the suit was, by order of the county court, dismissed, and an appeal taken by the plaintiff to the Superior Court. In this court, at September Term, 1842, the cause was submitted to a jury, but without any pleas, and against both, when the jury returned a verdict against Keith. The court gave judgment in favor of the plaintiff against James Keith for the amount of the claim against him, and judgment in favor of Rice, as the administrator of Sorrell, upon the ground that Sorrell owed nothing to Keith. At the same term of the Superior Court an order was made that J. M. Rice shall be summoned to show whether he has in his hands any property belonging to James Keith. The notice issued to him as the administrator of John A. Sorrell, and, in the character of such administrator, he rendered his garnishment, in which he stated that "as administrator of John A. Sorrell he has collected a certain note for the amount of $170 in *trade*, for which in cash he received $108; that this note was made by one William R. Gillespie to one Stephen Griffiths, and was assigned by him to one James Keith, who assigned it to John A. Sorrell, among whose papers, after his death, it was found," etc. Upon this statement of facts, the issues, whatever they may have been, were tried at September Term, 1844. The presiding judge gave judgment against the plaintiff, and he appealed.

Francis for plaintiff.
No counsel for defendant.

NASH, J. We cannot perceive with what propriety his Honor could have given any other judgment. In fact and in truth, the cause was out of court, both as it respected Keith, the defendant in the action, and Sorrell, the garnishee. The judgment against Keith, obtained in the

Superior Court at September Term, 1842, was an entire nullity. He was not in court, either by his person or his property. The record shows that he was not an inhabitant of this State, and no property of his had been attached to answer as a foundation for any proceedings against him. The judgment against him, then, was (376) not merely voidable, but was absolutely void. *Armstrong v. Harshaw*, 12 N. C., 189. If it were not so, the first principles of justice would be violated. An individual might be stripped of his property, without being heard or having an opportunity to be heard, or driven to expensive litigation to maintain his rights. In this case Keith was not and never had been in court. The attachment is only intended to compel an appearance. *Hightower v. Murray*, 2 N. C., 21. At the time this singular judgment was obtained against Keith the court gave judgment in favor of Joseph M. Rice as the administrator of John A. Sorrell, that he, Sorrell, at the time he was summoned as a garnishee, and when he made his garnishment, was not indebted to James Keith, and had not in his hands any property or effects of said Keith liable to the attachment. The cause would then have been entirely out of court, but for an order made simultaneously, that notice should issue to Joseph M. Rice to answer, as garnishee, as to his indebtedness to Keith. A notice was issued to him, and he was summoned in his character as administrator of Sorrell, to make his garnishment. He answered that among the papers of his intestate he found a note originally given or made by one Gillespie to a man of the name of Griffiths for a certain sum of money to be discharged *in trade;* in other words, to be discharged in *specific articles,* which note had been assigned to Keith and by him to Sorrell. As administrator of Sorrell, Rice was not bound to answer as a garnishee. He had already in this case had a judgment pronounced in his favor that his testator neither owed Keith anything nor had he any property or effects of Keith in his hands, and this judgment was pronounced in relation to this identical Gillespie note, and was at that time, and still is, in full force and unreversed. There is, however, another objection to the proceedings in this case, so far as Rice, the garnishee, is concerned, or as he is concerned in his representative capacity. It is not pretended that either Sorrell or Rice had anything in their hands as the property of Keith, except the Gillespie note. That note was not an assignable in- (377) strument, not being for money absolutely, but for so much money to be discharged in trade. Was it the subject of attachment? We think it was not. *Hugg v. Booth*, 24 N. C., 282, contains a full statement of the doctrine on this subject. By the act of 1777 no provision is made for the case where the garnishee is indebted for specific articles. This omission is supplied by the act of 1793. This act provides:

"When a garnishee shall declare that the money or specific articles due by *him* will become payable or deliverable by *him* at a future day," etc. The act leaves us in doubt as to the nature of the obligation for the delivery of the specific articles embraced and meant by it. It is confined to the obligation or assumption of the garnishee *himself* to the defendant in the attachment, either to pay a particular sum of money in specific articles, or absolutely to deliver a certain quantity of specific articles, as a horse or cow, or 100 bushels of corn. In either case debt would lie at the common law if the obligation was not complied with. And in no case,where the claim of the defendant in the action against the garnishee rest in unliquidated damages, can the demand be attached. This principle is fully established by the case last cited. The instrument upon which this question arises was not given by either Sorrell or Rice to Keith, but was given by Gillespie, and came by assignment to Keith, and by him to Sorrell. It is not, therefore, such an obligation for the delivery of specific articles as comes within the attachment law. Neither Keith nor Sorrell had any title in law to it, and neither could maintain any action on it in his own name. When Rice received the money on it he received it not for the use of Keith, but as administrator upon the estate of Sorrell, for the use of his estate, or for the use of Griffiths. But the estate of Sorrell was already discharged by a judgment of that court, and in the same case, from all liability to the plaintiff on account of Keith. *Qua cumque via data,* therefore, the judge who tried (378) the cause was guilty of no error in setting aside the verdict of the jury and giving judgment for Rice, which put the whole cause out of court.

PER CURIAM. Affirmed.

Cited: Cameron v. Brig Marcellus, 48 N. C., 84.

WILLIAM W. BATTLE v. EVAN S. HOWELL.

The court takes nothing for a declaration but a declaration, and takes no notice of any practice to the contrary, farther than that the knowledge of such an understanding between the parties or their attorneys, in a particular case, may induce the court in which the suit pended to be very liberal in allowing the attorney of the successful party to make up the record, after the trial, in respect to the pleadings as well as the other matters, so as to effectuate the justice of the case as it appeared in truth to be on the trial.

BATTLE *v.* HOWELL.

APPEAL from HAYWOOD, Spring Term, 1845; *Manly, J.*

This was an action for slanderous words spoken. It is stated, in an exception taken by the defendant, that the pleadings were not drawn out at large before the trial, but that by consent of the attorney an *incipitur* was filed instead of a declaration, and a memorandum entered on the docket, instead of the pleas, as follows: "General issue, statute of limitations." The memorandum by the plaintiff's attorney was in these words: "That the defendant said of the plaintiff: 'He swore to a false account. He swore to a false account against me. He raked up a false account and swore to it against me. He is a dangerous man, and raked up a false account against me, and swore to it'—being a charge of perjury, with the necessary innuendoes, and in the different forms."

On the trial it was objected on the part of defendant that the memerandum of the words was not sufficient because it did not contain a colloquium and proper innuendoes. On the part of the (379) plaintiff it was contended that this was according to the practice, when a formal declaration was not required before the trial. The court permited the trial to proceed; and, upon the evidence, the jury found for the plaintiff on all the issues, as if they had been formally joined. The plaintiff's attorney then had the record made up in due form, inserting therein a proper declaration, and he entered a judgment according to the verdict. From that the defendant appealed.

Badger for plaintiff.
Francis for defendant.

RUFFIN, C. J. Whether the memoranda, which were delivered and accepted instead of the declaration and pleas, conformed to the practice or not, the court does not undertake to determine. If there be any practiceupon the point, it is a practice, not established by the court, but by the attorneys, and it is entirely between them. The court takes nothing for a declaration but a declaration, and it takes no notice of any practice to the contrary, farther than that the knowledge of such an understanding between the parties or their attorneys, in a particular case, may furnish an inducement to the court in which the suit pended to be very liberal in allowing the attorney of the successful party to make up the record, after the trial, in respect to the pleadings as well as other matters, so as to effectuate the justice of the case as it appeared in truth to be on trial. If the defendant's attorney was not satisfied with the memorandum, as a declaration, he had nothing to do but to require a declaration. But, declining to do that, he insisted that the court should determine whether the *incipitur*, as such, was good, according to the

understanding between the attorneys themselves, which was a thing with which the court had nothing to do, and, legally, could have nothing to say.

Still less can this Court act upon any such ground. As an appellate tribunal, our view of the pleadings is restricted to the record as
(380) made up. According to the transcript sent here, the plaintiff did file a declaration, with a proper *colloquium* touching a judicial proceeding before a justice of the peace upon a warrant between the present parties, and the examination of the plaintiff as a witness upon the trial thereof under the book debt act, with *innuendoes,* pointing the words of the defendant to the plaintiff, and an averment that he intended thereby to charge the plaintiff with having committed the crime of perjury on his examination. To the declaration in the record the defendant's counsel here takes no exception, and, indeed, he admits that none can be taken. Therefore, as it appears to this Court, everything was regular from the beginning; and there was no ground in fact for the objection taken in the Superior Court for the defendant. Consequently, the judgment must be affirmed.

PER CURIAM. No error.

SAMUEL J. WHEELER v. PHILIP DUNN.

When upon a contract for work to be done the party who is to do the work agrees to be answerable for lost time, the demand for this lost time is in the nature of unliquidated damages, and cannot be set off; but when the party afterwards acknowledges in a letter how much he owed for such lost time, *indebitatus assumpsit* may be brought for it.

APPEAL from LINCOLN Spring Term, 1845; *Bailey, J.*

The case was that the defendant had been in the employment of the plaintiff, and that it was the understanding or agreement of the parties that the former should make up to the latter the time he should lose.

Upon the termination of the service, the defendant sued the plain-
(381) tiff for the work done, and recovered a judgment, which Wheeler paid. This action by warrant is brought by the plaintiff to recover the value of the time that was lost by the defendant during his employment. The defendant, among other things, pleaded set-off and former judgment. The only evidence produced by the plaintiff was the record of the case, in which Dunn, the present defendant, sued the present plaintiff, and a letter from the former to the latter. In the suit, *Dunn v. Wheeler,* the latter pleaded a set-off, and filed his account, containing many items of articles furnished Dunn, and money paid him, which ac-

count is set forth in the record. Dunn obtained his judgment at November Term, 1840, of Hertford County Court, and the letter of Dunn to Wheeler is dated January, 1841. In this letter Dunn writes: "Yours of 20 December is at hand. You say you were surprised I had sued you. If you recollect, you told me to sue you. I told you at the time I did not wish to do so. The bill I let you have of work done amounted to $146.18. What I received, *lost time,* board at Carter's while I was sick, amounted to $41.49, besides the $10 bill I got since that, *reduced my account* to $95, with interest. I would prefer it should be sent by mail." The defendant introduced no testimony, but relied upon the account exhibited by the plaintiff to show that the claim of Wheeler against him for time lost had been settled in the former suit. It was urged by him that the sum of $8 paid Carter for board, and the $10 charged as cash in Wheeler's account, were offered as sets-off upon the trial in Hertford County Court, and could not be recovered in this action, and that there was evidence of a set-off for *time lost.* The jury were instructed that the letter of the defendant was *evidence* that the defendant was indebted to the plaintiff $51.49, unless the same had been allowed Wheeler in the former suit, or had been offered by him as set-off and passed on by the jury, and that the account exhibited by him was evidence that the money paid Carter and the $10 paid Dunn had been offered by him, under his plea, and could not be recovered; but that there was *no evidence* of any set-off for loss of time, and that the plaintiff (382) was entitled to recover the amount of his claim, deducting those two items. The jury returned a verdict for the plaintiff.

The defendant moved for a new trial upon two grounds: (1) That there *was* evidence of a set-off, for loss of time, as well as for the money paid Carter and the money paid Dunn. (2) That loss of time sounded in damages, and could not be set-off, and if any recovery could be effected in this case, it could not be by warrant.

Judgment being rendered for the plaintiff, the defendant appealed.

Iredell for plaintiff.
Alexander and Boyden for defendant.

NASH, J. We perceive no error in the charge. The only contest between the parties is as to the time lost. The case sufficiently shows it was a part of the contract that Dunn, the defendant, should account for the time he should lose. This is evidenced by Dunn's letter, and is indeed admitted by the defense in claiming that a charge for it was contained in the account filed by Wheeler in Dunn's suit against him. We are at a loss to perceive upon what ground the defendant can contend there is any evidence that the time lost by Dunn had constituted any portion of the set-off claimed by Wheeler in the suit. The only evidence

in the case is the letter of the defendant and the record of the suit in Hertford. It is impossible to read the former without seeing at once that the judgment against Wheeler had been obtained without allowing for the time lost, and in the account filed there is no such charge. We rather agree with the defendant in his second objection, that for the time lost Dunn was answerable in damages, which, at the time of the trial were unascertained, and could not be given in evidence as a set-off. We think, therefore, the presiding judge was entirely justified in telling the jury there was no evidence that the charge for the time lost was offered to the jury as a set-off on the former trial. We entirely agree with his Honor that the letter of Dunn was evidence to the jury (383) of what was due from him for the time lost by him. He says: "My account against you for my work was $146, and after deducting what I received, *lost time* and money paid Carter, which amounts to $41.49, besides the $10 received since, my account against you is $95." This letter is written after the judgment is obtained against Wheeler, in Hertford County Court, and in reply to one written by him, complaining of the suit, as the defendant in answer says. We are inclined to think it complained of more than simply being sued for a just debt, and, if exhibited, would have shown that he was also dissatisfied with the amount recovered. Be this as it may, we consider this letter as containing a sufficiently distinct admission on the part of Dunn, not only as to his liability to account with Wheeler for the time he had lost, but also that it had not been allowed him in the previous suit. No other construction can be placed upon it. It further sufficiently for the plaintiff's purposes, ascertain the amount due. What, therefore, might have been and, for aught that appears to us, was, at the trial of the suit of Dunn against Wheeler, unliquidated damages was no longer so. After the writing of this letter Dunn had himself made that sufficiently certain which was before uncertain, and *indebitatus assumpsit* could be obtained for the sum due. That letter was evidence to the jury that the parties had accounted together and ascertained the sum due from the defendant for the time lost, which the plaintiff had not set off or offered to set off in the former action.

PER CURIAM. No error.

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(384)

JOHN W. TAYLOR & CO. v. CONSTANT W. BUCKLEY.

A nonresident creditor cannot, under our attachment laws, attach the property of his debtor in this State when the latter has not absconded nor removed to avoid the ordinary process of law.

FROST *v.* ROWLAND.

APPEAL from SURRY Spring Term, 1845; *Bailey, J.*

This was a suit commenced by attachment. The defendant pleaded in abatement that both the plaintiffs and the defendant were nonresidents of this State, and were residents of another government, to wit, the plaintiffs of New York, and the defendant of Texas. To this plea the plaintiffs demurred. The court overruled the demurrer and dismissed the attachment, from which judgment the plaintiffs appealed.

Boyden for plaintiffs.
Morehead for defendant.

DANIEL, J. The plaintiffs are citizens of New York, and the defendant is a citizen of Texas. In *Broghill v. Wellborn*, 15 N. C., 511, this Court said that a nonresident creditor cannot, under our attachment laws, attach the property of his debtor in this State whenthe latter has not absconded nor removed to avoid the ordinary process of the law. It is not necessary here to repeat the reasons of the decision in that case. The case is in point and supports the judgment rendered in the Superior Court, which must, therefore, be

PER CURIAM. Affirmed.

Cited: McCready v. Kline, 28 N. C., 247.

(385)

FROST, TOWNSEND & MENDENHALL v. JOHN A. ROWLAND.

1. A return of a sheriff to a *fi. fa.* that "he had made a levy on personal property and taken a forthcoming bond, but had not sold it; that the obligors did not deliver the property on the day, and that after the day it was too late to make a sale," is not such a "due return" of the process as well exempt the sheriff from amercement.
2. The act allowing the sheriff to take a forthcoming bond operates only between the sheriff and the debtor and his sureties. The creditor is left to all his rights and remedies against both the debtor and the sheriff.

APPEAL from ROBESON, Spring Term, 1805; *Pearson, J.*

The defendant was the sheriff of Robeson, and the plaintiffs delivered to him, three months before the return day, a writ of *fieri facias* on a judgment recovered by them in the Superior Court against one MacLean. The defendant returned the same that he had levied it on certain property therein mentioned, "but that he had not sold it and made the

money, because he had taken a forthcoming bond, and the property was not delivered at the day, and that, after that day, it was too late to make a sale." On this return the plaintiff moved for an amercement *nisi* of $100, which the court ordered, and this is a *scire facias* to the defendant to show cause.

The counsel for the defendant insisted that his return was "a due return," inasmuch as he was authorized to take a forthcoming bond, and he was, therefore, in no default, and might return the truth of the case. But the court made the order absolute, and the defendant appealed.

No counsel for plaintiffs.

(388) *Strange for defendant.*

RUFFIN, C. J. The judgment must be affirmed. It is not disputed that the return was no answer to the writ at common law. Therefore, the amercement was proper under the acts of 1777, ch. 118, sec. 5, and of 1821, ch. 1110, standing by themselves. But it was contended, as the act of 1807, Rev. Stat., ch. 45, sec. 17, makes it lawful for a sheriff to leave property in the debtor's possession and to take a forthcoming bond, that it follows he may return that matter as his excuse for not selling the property and bringing in the money. Even if that were true, this return would be radically defective, in not setting forth the bond as to the obligors, penalty, and the particular effects mentioned in it, and the day for their delivery; so that it might be seen that a proper and effectual bond had been taken. But the whole position is, in the opinion of the Court, erroneous. The purpose of the act of 1807 was merely to declare such bonds valid, notwithstanding they are given as indemnities to the sheriff, for postponing the execution of his writ. The act operates between the sheriff and the debtor, and his sureties, and between them alone. The creditor is left to all his rights and remedies against both the debtor and the sheriff. The act has been always so understood; and, indeed, the provision is express, "that the said officers shall, nevertheless, remain liable as heretofore, in all respects, to the plaintiff's claim." The creditor has no concern with the bond. He is neither

(389) bound, nor allowed to take an assignment of it. It is purely an indemnity to the sheriff; and that it may be an effectual indemnity, both as to the amount and the period of the recovery on it, the act of 1822 gives a summary remedy, by motion, for all such damages as the officer may have sustained or be liable to sustain. If taking a forthcoming bond would exonerate the sheriff from the duty of selling, or authorize him to return that matter as an excuse, it is obvious that the creditor would lose his remedy by an amercement and, indeed, could never enforce a sale, since the sheriff might take and return such bonds *in perpetuo*, as successive executions should be delivered to him.

But it was further argued, that, as the act, Rev. Stat., ch. 31, sec. 61, makes the sheriff subject to indictment as well as to amercement, for not duly executing and returning process, the amercement ought not to be imposed but for some criminal act; and, therefore, not for a thing which the law authorized the sheriff to do. To this argument, there are several answers. In the first place, the amercement was first given by the act of 1777, of £50 to be paid to the party grieved, by order of the court on motion. That act neither provided for an indictment, nor even for a penalty to be recovered by any person suing for it to his own use, in whole or in part. It did not treat the act as an offense against the public, for which there should be a proceeding *criminaliter,* properly speaking. But the provision was made for the better administration of the law in actions between citizens, and in advancement of the justice due to the suitor, by giving to the suitor such sum as, it was supposed, would be, in general, a compensation for the inconvenience and loss arising from the delay in the discharge of the sheriff's duty. It was really, therefore, remedial in its character, and not to be interpreted with any such strictness, as is proper in respect to penal statutes, in the ordinary sense of those terms.

Then came the act of 1821, which was rendered necessary by several considerations. From the depreciation of the currency of 1777, the £50 was found inadequate to compensate the party, or to cause diligence by the officer. Indeed, it was known that debtors often (390) prevailed on sheriffs to omit doing execution, by paying down to them the trifling fine. To prevent such scandal to the law and such injury to the suitor, the Legislature enlarged the amercement to the party grieved to £100. But, as even that in some cases would be advanced by the debtor, and it was intended to enforce effectually the execution of process in all cases, it was added in that act, "that said sheriff shall for every such neglect be further subject to indictment." Now, whether the defendant would, under the circumstances of this case, be liable on indictment, need not be considered. It might probably turn on the good faith of his acts and his intentions, as found by a jury. But, admitting that he might not be, it does not follow, that he ought not to be amerced at the instance and for the benefit of the suitor. If the provisions for amercement and indictment were parts of one and the same original statute, they would not necessarily be coextensive in their application, as they were enacted *diverso intuitu.* But they are not so to be regarded; for the first is but reënacted from a former statute, and its remedial character in the first is not lost by its conjunction with a new provision in the latter act, which makes the defaulting officer *further* subject to indictment. The Legislature did not mean, by creating additional guards against official defaults, to diminish the redress to the suitor for

his private loss, to which he was before entitled. This is placed beyond all doubt by the Rev. Stat., ch. 109, sec. 18; for although the Rev. Stat., ch. 31, sec. 61 reënacts the act of 1821 simply, and gives both the amercement and the indictment; yet in chapter 109, everything about an indictment is omitted, and the acts of 1777 and 1821, are combined and reënacted in respect of the amercement alone; which shows that the amercement is merely a measure of redress for the suitor, and, therefore, that he is entitled to it in every case in which the officer fails to make "due return" of a writ.

PER CURIAM. Affirmed.

Cited: Yeargin v. Wood, 84 N. C., 328.

(391)

THE WILMINGTON AND RALEIGH RAILROAD COMPANY v. JOHN A. ROBESON.

1. Where the defendant by an agreement in which, after reciting that the State had resolved to take two-fifths of the stock of the corporation (which is the plaintiff in this suit), when three-fifths had been taken by private individuals, became bound, among others, to take certain shares of the stock, with this proviso, "*Provided, however*, that if a sufficient subscription is not obtained to secure the subscription of the State within twelve months from 1 February, 1837, each of us may, if we think proper, withdraw his subscription and be entitled to receive back whatever sum may have been advanced thereon within twelve months from the said date," and where the defendant had paid a part of his subscription after 1 February, 1838: *Held*, that the defendant was bound to pay the remainder of his subscription unless he could show that the required amount had not been subscribed to entitle the company to the State's subscription, and that, in consequence thereof, he had elected, within a reasonable time after the expiration of the twelve months, to withdraw his subscription.
2. A proviso is the statement of something extrinsic of the subject-matter of the contract which shall go in discharge of the contract, and, if it is a covenant, by way of defeasance.
3. A proviso, therefore, need not be stated in a declaration, but, if the defendant wishes to avail himself of it, must be averred in his plea.
4. In this case the defendant, by paying a portion of his subscription after the expiration of the twelve months, has shown that he had made his election to continue a member of the company.

APPEAL from NEW HANOVER, Fall Term, 1844; *Bailey, J.*

This action is brought to recover from the defendant the amount due upon his subscription to the stock of the company. The charter of this company was granted by the Legislature in 1833, and in 1835 the

capital stock was increased, and at the session of the Legislature, 1836-'37, a joint resolution was passed, authorizing the Public Treasurer to subscribe for two-fifths of the stock, when three-fifths had been taken by private individuals. In consequence of this pledge on the part of the State, the books were opened again, and new stock created, and the defendant subscribed for thirty shares. The contract between (392) the company and the new subscribers was as follows: after reciting the promise on the part of the State to take two-fifths on the condition specified, the subscribers take each the number of shares annexed to their names, agreeably to the terms of the charter: *"Provided, however,* that if a sufficient subscription is not obtained to secure the subscription of the State within twelve months from this date, each of us may, *if we think proper,* withdraw his subscription and be entitled to receive back whatever sum may have been advanced thereon within twelve months from this time—1 February, 1837." Between February, 1837, and February, 1838, the defendant paid several installments on his stock, and one in March, 1838, and was, from time to time, notified to pay other installments, which he neglected to do, and this suit was commenced in 1843, to recover the balance due on his subscription. The writ issued 30 March, 1843. The plaintiffs produced no evidence to show that within the twelve months, as specified in the articles of subscription, three-fifths of the stock had been taken by private subscribers, so as to insure the taking by the State of two-fifths. The presiding judge was requested, on behalf of the defendant, to charge the jury that the true construction of the terms of the subscription was that in case the requisite amount of subscription to the road, to secure the State's subscription was not obtained within twelve months from 1 February, 1837, then the defendant was not *bound* by his subscription, and was entitled to their verdict. His honor refused so to charge the jury, but instructed them that by the terms of the subscription, if the State's subscription was not secured within the twelve months specified, then the defendant was at liberty, at any time before 1 February, 1838, to dissent from his subscription, but not after that time.

The jury found a verdict for the plaintiff, and the defendant appealed.

W. H. Haywood and Iredell for the plaintiff.
Strange and Warren Winslow for the defendant.

NASH, J. This is not a case of pleading, but its rules will throw much light upon the question submitted to our decision. (393) The instruction prayed for is based upon the supposition that the procuring the three-fifths subscription within the twelve months was a condition precedent to the defendant's being bound to pay for the stock

he took. If it was a condition precedent, then the plaintiffs were bound to set it forth in the declaration, and aver its fulfillment or show some cause for its nonperformance. 1 Chit. Pl., 310. It is true that in every action upon a contract, whether under seal or by parol, the contract must be substantially set forth, that is, it is sufficient to show the substance and legal effect: 1 Chit. Pl.; *Lent v. Pendleford,* 10 Mass., 230. Nor is it requisite to set forth more of the contract than the portion the breach of which is complained of. 1 Chit. Pl., 299; 4 Taunt., 285; *Tempest v. Ranling,* 13 East., 18. In the latter case *Lord Ellenborough* says: "It is enough to state that part truly which applies to the breach complained of, if that which is omitted, do not qualify that which is stated." *Howell v. Richards,* 11 East., 638, is to the same effect. If the portion of the contract omitted is important to the plaintiffs' case, the defendant may take advantage of it under the general issue, as a fatal variance. The part of the contract here omitted neither qualifies the contract nor discharges, of itself, the liability of the defendant. The contract is not that the failure to secure the State's subscription of two-fifths should make void the defendant's liability; but it gives him the right, if he choose to exercise it, of discharging himself by withdrawing the subscription within a limited time and demanding the money he may have paid. The failure of the State's subscription does not discharge him; he must discharge himself. The error consists in not distinguishing between a proviso and an exception. A proviso is properly the statement of something extrinsic to the subject matter of the contract, which *shall* go in discharge of the contract, and, if it is a covenant, by way of defeasance. An exception is the taking some part of the subject matter of the contract out of it. A proviso need not be
(394) stated in the declaration, for this, says Mr. Chitty, ought to come from the other side. 1 Saunders, 334, n. 2. *Sir Richard Hotham v. East India Company,* 1 Term, 645. In the latter case, *Ashurst, J.,* in speaking of the circumstance which was omitted in the declaration, observes, "This, therefore, being a circumstance, the omission of which was to defeat the plaintiffs' right of action, once vested, whether called by the name of a proviso, by way of a defeasance, or a condition subsequent, it must in its nature be a matter of defense, and ought to be shown by the defendants." How stands this case? The defendant had subscribed for thirty shares of stock, and had neglected to pay up the installments as they fell due. This was admitted. Here then was a breach on his part, and a right of action vested in the plaintiffs. How was this vested right to be divested? By its being made to appear that the subscription of the State had not been secured in the required time. And, according to *Justice Ashurst.* it was either a proviso or condition subsequent, to be shown by the defendant, and could

not be a condition precedent. Neither is it an exception, according to the definition of Williams, in his note to Saunders, 334, n. 2. It is not a taking out of the covenant or contract some *part* of the subject matter. Thus, in *Tempany v. Burmand,* 4 Camp, 20, the plaintiff declared upon an absolute covenant in a lease to return the premises at the end of the term, in as good plight and condition as they were at the time of making the indenture. Upon the production of the indenture, the covenant was qualified by the words, "fire and all other casualties excepted." The plaintiff was nonsuited on the general issue, for the variance. So in *Langston v. Corney,* 4 Campbell, 177, the plaintiff declared upon an absolute acceptance on a bill of exchange. The evidence showed a conditional acceptance. *Gibbs, Chief Justice,* declared the plaintiff could not recover on that count. Now in each of these cases, a part of the subject matter was taken out of the contract. In the first case, the destruction of the premises by fire or other casualty, was taken out in fixing the defendant's liability; and in the other, the condition upon which the defendant gave his acceptance; and it was neces- (395) sary for the plaintiff in his declaration, as there were exceptions, to allege and show that they did not exist. We are of opinion, then, that the court could not have given the instruction requested, because procuring the subscription of the State was not a condition precedent to the liability of the defendant; and, therefore, he was not *discharged,* because it was not secured in the time specified. It was a condition subsequent, or rather a proviso, the benefit of which could have been claimed by the defendant, if he had thought it to his interest to do so and availed himself of the privilege in proper time.

The proviso is, if the subscription of the State is not secured in twelve months from 1 February, 1837, then, not that the defendant's subscription shall be null and void, but that the defendant shall be at *liberty to withdraw* his subscription within the same time. The charge of his honor upon this part of the case, we think erroneous, and, if it was or could be, under the circumstances, injurious to the defendant, we should feel ourselves constrained to grant him a new trial. The company, the plaintiffs, had until the close of the last day of the twelve months to secure the subscription of the State, and although, by the terms of his contract, the defendant was called on to withdraw his subscription within the same period, yet the law will allow him a reasonable time after the lapse of the year to avail himself of it. He could not immediately ascertain the fact. One month after the expiration of the time, to wit, in March,1838, he paid up another installment. Five years thereafter, he is sued for the installment still due, and in all this time he has not exercised the right he had reserved to himself, of withdrawing his subscription and demanding of the company the money he had

previously paid, nor has he yet done it; but, from anything disclosed in the case, is now in the enjoyment and exercise of all the rights and privileges of a stockholder. The proviso was inserted for his benefit; there is nothing in it compulsory on him. He was at liberty to
(396) take advantage of it, if he chose. He has not done so. He has made his election to retain his stock, as being his interest, and comes now too late, to ask to be discharged.

RUFFIN, C. J. In my view of this case it is totally immaterial whether the State subscribed for stock in the company or not, or whether there were private subscriptions enough to secure the State's subscription. For, by the agreement, the defendant's subscription was not to be void, unless the State subscribed within twelve months; but the agreement was, that in case the State's subscription was not then made or secured, the defendant might, *if he thought proper,* withdraw from the company and demand the money he might have previously advanced. In other words, the defendant reserved an election to himself to hold, or to renounce, his subscription, in a certain case. It laid on him, therefore, to show that the event had happened in which he might elect to withdraw, and, secondly, that he had elected not to remain in the company, but to retire. That he failed to do; but, on the contrary, it appears, that, after the time specified in the agreement and when he could have ascertained whether the State had subscribed or was bound to do so, the defendant acted as a stockholder and paid a call made by the company, as a member of it. So far, therefore, from electing to withdraw, the defendant then made a contrary election; and thereby his engagement became absolute to pay the whole price of the stock which he had taken. Therefore I concur that the judgment should be affirmed.

PER CURIAM. No error.

Cited: Gorman v. Bellamy, 82 N. C., 500; *Wadsworth v. Stewart,* 97 N. C., 120.

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(397)

HUBBARD, GARDNER & CO. v. GEORGE WILLIAMSON ET AL.

1. A. drew a bill, which was indorsed by B. at the request of the drawee and for his accommodation, and acepted by the drawee. A. being desirous of having the bill discounted at bank, requested C. to indorse the bill as it then stood. *Held*, that on the dishonor of the bill and its payment by C., C. had a right to recover the amount from B., the prior indorser.

2. An accommodation bill drawn for the purpose of being discounted at a bank, and at the foot of the bill was a memorandum, signed by the last

indorser, directing the proceeds of the bill to be credited to the drawer. On the trial of a suit on the bill by the last against a prior indorser it appeared that this memorandum had been cut off. *Held*, that the memorandum was no part of the bill, and that its being taken off in no way affected the rights of the parties to the bill.

APPEAL from CASWELL, Spring Term, 1845; *Caldwell, J.*

This is an action by the plaintiffs, as the holders, against the defendants as endorsers, of a bill of exchange for $253.92, drawn by James C. Crane, at Richmond, Va., in favor of the defendant, Williamson, on Wiatt Walker, of Yanceyville, in this State, at 90 days, which was accepted by Walker, payable at the branch of the Bank of Virginia, at Danville, and was endorsed by Williamson to the other defendant, Roane, and by the latter to the plaintiffs. Upon *non assumpsit* pleaded, the evidence was that Walker had before drawn a bill on Crane for $250, payable in Richmond, in favor of Williamson, and that Williamson and Roane endorsed it, and Crane accepted it for the accommodation of Walker, who procured it to be discounted, and received the money to his own use; and that the bill now sued on was drawn by Crane for the purpose of raising money to meet the first, and was endorsed by the defendants at the request of Walker and for his accommodation, and was by him transmitted, accepted and thus endorsed to Crane, that he might procure it to be discounted and raise the money as aforesaid. In order to give it credit at bank, Crane requested the plaintiffs to (398) endorse the bill, and they did so, as they were in the habit of endorsing Crane's paper for his accommodation. The bill was then offered by Crane for discount at a bank in Richmond, and was discounted, and the proceeds paid to Crane; and the bill was then sent to the bank at Danville for collection, and not being paid at maturity, it was duly protested, and notices given to the drawer and endorsers, and the plaintiffs took it up and instituted the present action on it. It appeared from the copy of the bill, set forth in the protest, that when it was proested it had a note or memorandum at the foot of it as follows: "Cr.: J. C. C. —K. G. & C." which, upon the production of the bill on the trial, did not appear on it, but the same had been obliterated and cut off.

The defendants contended that the plaintiffs were cosureties with Crane and themselves for Walker, and, therefore, that an action against the defendants jointly could not be sustained; and, secondly, that there had been such a mutilation of the bill, as to destroy it and prevent a recovery by the plaintiffs. Upon the first point the court instructed the jury that the plaintiffs did not endorse the bill with the intention of being the sureties of Walker with the defendants and Crane, and that he could recover against the defendants as the prior endorsers. Upon the second point, the instruction was that if the jury believed the plain-

tiffs made the mutilation with a fraudulent intent they could not recover; but if it was done by a stranger, or by the plaintiffs accidentally, it did not affect the instrument. Under these instructions the jury found for the defendnats; and from the judgment the plaintiffs appealed.

No counsel for the plaintiffs.
Kerr and Norwood for the defendants.

RUFFIN, C. J. As there was no evidence that the note or letters below the bill had been taken off by a stranger, or by any accident or mistake of the plaintiffs, there was no ground for submitting the case to (399) the jury in those respects. It is to be assumed, therefore, that the plaintiffs themselves, or some holder of the bill did the act, and that they did it of purpose, at least; if not, in the language of the charge, fraudulently. Thus viewing the case we should concur with his honor and deem the bill destroyed, provided the words or letters in question formed a part of the bill, so as to make their removal a mutilation of that instrument, as it is called. But we cannot so regard those letters. In themselves they are insensible, and cannot be understood as in the least degree varying the terms of the bill as expressed at large on its face, nor the legal rights or liabilities of the party to the bill. But to persons conversant in business, the object in making the note and its meaning are very intelligible. When the plaintiffs put their name on the paper it was to give it credit at bank that it might be discounted. Now, in a regular business transaction, as every one is to be supposed *prima facie* to be, the plaintiffs, as the immediate endorsers to the bank, were to be treated as the owners of the paper and its offerers, to whose credit the proceeds of the discount were to be passed. But as this was not real paper belonging to the plaintiffs, as upon the face of things it seemed, but was a wind bill, on which the object was to raise money for Crane to meet his previous acceptance for Walker's accommodation, the parties, that is, Crane and the plaintiffs, did not wish to go through the needless trouble of having the money paid first by the bank to the plaintiffs, and then by them to Crane; but, rather, that Crane should receive it in the first instance. No doubt, therefore, that the letters marked at the bottom of the paper meant that if the note should be discounted, the proceeds were not to be entered to the credit of the plaintiffs, as the apparent offerers. It was an order signed with the initials of the plaintiffs: "Credit James C. Crane," who is the real offerer. It was nothing more, in fact, than a memorandum to enable the bank officers to pay the money to the proper person, as between the plaintiffs and Crane. It was well understood at the bank, and the money was paid to Crane; (400) and when that was done the note had answered its purpose and

was no longer of any use when the bill came again into the plaintiffs' hands. It was a mere note, to serve instead of a check for the proceeds of the bill by the plaintiffs in favor of Crane, and was exclusively, therefore, between those parties and the bank. It formed no part of the bill itself, did not modify its terms or legal operation, or concern the acceptor or prior endorsers; and, therefore, there has been no mutilation in the case, that is, of the bill. It is pecisely the same as if the memorandum had been on a different piece of paper; and the removal of it has not altered the tenor of the bill in the least.

Upon the first point we fully concur with his honor. The demand of the plaintiffs on the defendants arises naturally and legally out of the order in which their names appear on the bill; and there is nothing to vary it. The plaintiffs did not endorse at the request or for the accommodation of Walker, but at the request and for the benefit of Crane. They endorsed the bill with the names of Williamson and Roane on it for the purpose of giving it additional credit in the market for the accommodation of Crane, and not for the purpose of sharing in the risks assumed by the defendants for Walker. They have just as much right to look to the prior endorsers for payment as to the acceptor himself. The Court is of opinion the plaintiffs were clearly entitled to a verdict; and, therefore, the judgment must be reversed, and

PER CURIAM. *Venire de novo.*

(401)

THE STATE v. TOBIAS GODWIN.

1. Where a motion is made in the court below, even in a capital case, to set aside a verdict upon the ground of improper conduct in the jurors, or other matters extrinsic of the record, and this motion is founded on affidavits, the Supreme Court will not look into the affidavits. They can only decide upon the record presented to them, and, therefore, if such a motion is designed to be submitted to their revision, the facts must be ascertained by the court below and spread upon the record.
2. Where, in a capital case, when one of the jury, on their coming into court and being polled, said "that when he first went out he was not for finding the prisoner guilty, but that a majority of the jury was against him, and that he then agreed to the verdict of guilty as delivered in by the foreman," and when, being again asked, "What is your verdict now?" he replied, "I find the prisoner guilty": *Held*, that there was no objection in law to the verdict.

APPEAL from JOHNSTON, Spring Term, 1845; *Dick, J.*

The prisoner was tried for murder; and, upon the return of the jury into court, they were polled at the prisoner's request. Eleven of them, each for himself, answered simply that he found the prisoner guilty. The remaining juror answered that when the jury first went out he was not

for finding the prisoner guilty, but that a majority of the jury was against him, and that he then agreed to the verdict as delivered in by the foreman. He was further asked, "What is your verdict now?" and he replied, "I find the prisoner guilty."

A motion was then made for the prisoner to set aside the verdict, upon the ground that it thence appeared that the jury had agreed to decide according to the majority; and upon the further ground that the constable who had the charge of the jury during their retirement, left the jury for the space of half an hour, and thereby afforded an opportunity for the jury to be tampered with.

In support of the latter ground it is stated in the record that (402) the prisoner read his own affidavit and those of two other persons, which stated, that the jury room opened from the court room, and that the jury retired about 9 o'clock at night and the judge then left the bench; that the court room was crowded with persons, while the jury was out, who were talking about the case, and that the son-in-law of the deceased and other enemies of the prisoner were often near the door of the jury room; and that it was several times opened, but by whom the witness could not state; and that the officer having charge of the jury was several times absent from the door for some minutes at a time. The prisoner swore that he believed there was opportunity to tamper with the jury, although he could not say that any person actually attempted to do so.

On the other side the constable himself swore that when the jury retired he immediately locked the door of their room, and that, until the jury came out to deliver their verdict, it was not opened, except to enable him to supply the jury with water and candles, and then only as long as was necessary for those purposes. That he generally stood at the door, as well as kept it locked; but that he left it when the jury wanted water or candles and went for them; and that he also once went to the judge to ask permission for the jury to have food. That whenever he left the door he took the key with him, after locking the door; and that he believed it impossible that any communication could have been had with the jury through the door.

The record states that the court refused the motion and passed sentence of death on the prisoner, who appealed. The presiding judge ordered the affidavits which have been read to the court, to be sent up as a part of the case.

Attorney-General for the State.
Saunders for the defendant.

RUFFIN, C. J. It is not in the power of this Court to look into the affidavits, or, at least to act on them. One would think this must be

understood upon a moment's reflection on the nature of the jurisdiction of the Court. In matters of common law, it is strictly (403) a court of error, and can only review the matters of law. We therefore, cannot go out of the record, or pay any regard to affidavits; for the evidence forms no part of the record. A record is constituted of the pleadings, the acts of the parties in court, and the acts and doings of the jury and court thereon. If advantage is sought of any extrinsic matter which occurs at the trial or in the course of the proceedings, it must be put into the record, *as a fact,* or be stated in an exception, and and not left to be collected by this Court upon evidence. This evidence is directed exclusively to the judge who tried the cause; and his determination on it is conclusive. He ought not to state, therefore, the evidence submitted to him, but his judgment as to the fact itself which the evidence was offered to establish. It is true that in an exception to an instruction to the jury the evidence is set forth; for that is necessary, that it may be seen that the instruction was not upon an abstract question of law, but on one applicable to a state of facts, which might upon evidence, be hypothetically assumed; and, then, the verdict, in accordance with the instruction, affirms the facts to be as supposed. In such a case both the facts and the law are distinctly found in the record by the several proper persons. But on occasions like the present the evidence is addressed to the judge and he is to determine as well the matter of fact as of law. His decision in respect to the latter point only is subject to review. We can no more interfere with his decision upon the question of fact before him than we can with the decision of the jury upon an issue. When, therefore, a motion is made to vacate a verdict for certain alleged causes the first thing is to ascertain whether the alleged causes really exist; for, until the facts be found, no question of law can arise, and, as this Court is confined to the consideration of the matter of law only, we can in such a case do nothing. For there is no fact found in the record to impeach the verdict, which is apparently regular; and, therefore, acting judicially, we must assume that the application was unsupported in point of fact, though we might, in our private judgment, think there was evidence before the judge (404) on which he might or ought to have found the facts, that the verdict was given according to the opinion of the majority of the jury, or that the jury was tampered with, or might have been.

We find ourselves constrained to make these extended observations because the point may in some cases be of immense consequence, and it would seem, that our repeated attempts hitherto to make ourselves intelligible, have not been as successful as we had hoped. Lord Hale, 2 P. C., 306, says, if a juror be guilty of misconduct, and this appears by examination, "the judge *before whom the verdict is given* may *record*

the special matter," or, as he says in the next page, "he may endorse it on the record or *postea*, and thereupon the verdict shall be set aside. In *S. v. Miller*, 18 N. C., 500, both of the judges who delivered opinions referred to those passages as containing the proper directions as to the mode of proceeding, and declared their opinion that if the judge who tried the cause had caused the proofs to be annexed to the records (as here) this Court could not examine them, in order to determine the fact, but that it was absolutely necessary that it should be found in the record. In *S. v. Ephraim*, 19 N. C., 163, the same positions were repeated as explicitly as possible, and the Court refused to consider the evidence. Since that time the facts have generally been stated by the judge, as in *S. v. Lytle, ante*, 58, and others; and we express the hope that hereafter that course will be invariably adopted.

The conclusion thus announced, though unavoidable, would be a source of sincere regret, if, in our opinion there was really any ground for the prisoner's motion. But if we could look into the affidavits we should be obliged to say that they present no reason, either of fact or law, for disturbing the judgment.

There is nothing to raise a suspicion that the verdict was not the result of the conscientious and unanimous conviction of the jurors. One of them hesitated at first, as any man may upon so solemn a (405) question; but, upon consultation with his fellows and deliberation he united publicly and of his own accord in the verdict.

So far from establishing improper conduct in the jury, none is even imputed to them. It is only said that the jury was left in such a situation by the constable as to afford an opportunity for tampering with them. But that was only bare suspicion and seems to have been wholly unfounded. The jury was kept constantly together, and, likewise, separate from other persons, by being locked up in the usual jury-room in the court house by the constable, who remained at the door except for short intervals, during which he was absent for the purposes of the lawful accommodation of the jury, and to carry to the judge a request from the jury. If anything improper had occurred during those absences, the officer might have been punished. But his constant presence at the jury-room was not requisite to the validity of the verdict, seeing that he kept the jury together the whole time, and took care that no one else had or could have access to them.

PER CURIAM. No error.

Cited: Bowman v. Thompson, 28 N. C., 224; *S. v. George*, 29 N. C., 326; *S. v. Langford*, 44 N. C., 442; *S. v. Norton*, 60 N. C., 298; *S. v. Smallwood*, 78 N. C., 562; *S. v. Best*, 111 N. C., 643; *S. v. DeGraff*, 113 N. C.,695; *Lowe v. Dorsett*, 125 N. C., 304; *Cressler v. Asheville*, 138 N. C., 484.

THE STATE v. ADAM B. HOPPISS.

After a witness on a trial has been cross-examined it is in the discretion of the presiding judge to permit or refuse a second cross-examination. Counsel cannot demand it as a right.

APPEAL from BUNCOMBE, Spring Term, 1845; *Manly, J.*

The defendant was indicted for an assault with intent to commit rape. On the trial of the indictment Mary A. Caldwell, a girl of fourteen or fifteen years of age, upon whom the assault was alleged to have been committed, was introduced as a witness for the State, and proved the forcible attempt to violate her person, as charged in the bill. She was then subjected to a scrutinizing and protracted cross-examination by the defendant's counsel, which proceeded without interruption until they expressed themselves satisfied, and returned her to the officer for the State. Upon her reëxamination she did not *vary* her evidence in any respect, or make any addition thereto, but in reply to a question by the solicitor, stated that she "was so scared she did not know all that the defendant said and did to her." The defendant's counsel then insisted that he had a right to examine the witness again, as in her reply above stated she had disclosed new matter, but the court overruled the counsel, and directed the witness to retire.

Other evidence being introduced and gone through with, the cause was argued at length on both sides, during which much was said about the respectability of the defendant, and the lowly condition of the girl and her mother, who brought forward this prosecution. The court after submitting the evidence on both sides to the consideration of the jury, and stating such propositions of law as arose thereon, with other remarks which seemed appropriate (nothing of which is com- (407) plained of), wound up the charge with these words: "It will be the duty of the jury, should they believe the story of the girl to be substantially true, to pronounce the defendant guilty, whatever may be the disparity of rank between the accuser and the accused. No female, however *base,* more certainly none however *humble,* falls beneath the protecting power of our laws." The jury found the defendant guilty. There was a motion for a new trial: 1. Because of the refusal of the court to allow counsel to cross-examine the witness again. 2. Because the language used by the court, as above set forth, violates the statute, which forbids the judge to intimate an opinion upon the facts. The court overruled the motion, and judgment being pronounced against the defendant, he appealed to the Supreme Court.

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

RUFFIN, C. J. The Court does not perceive in either of the reasons assigned in the exception a ground for reversing the judgment.

If, in the excitement and hurry of the trial, the defendnat's counsel had, through inadvertance, omitted to cross-examine to any particular point material to the defense, it is almost certain that the presiding judge would have allowed him to resume the cross-examination as to the omitted matter. Such indulgences are usual, when needful to the advancement of truth and justice. But the counsel did not ask it as a favor to be allowed to cross-examine this witness, nor submit to be confined to any particular point, stated to be essential to the defense. On the contrary, the counsel insisted on taking up anew a general cross-examination as his absolute right. We think his honor properly denied it. He ruled according to the established order of proceeding in the trial of causes; and were it otherwise, and counsel had the arbitrary power of resuming cross-examinations as often as they chose, it (408) is obvious it would lead to great abuses in harassing witnesses and protracting trials.

The act of 1796 forbids a judge from giving to the jury an opinion, whether a fact be fully or sufficiently proved. But in the observation of his Honor, which is excepted to, there is no expression of opinion upon any fact whatever. It is stated in the case that according to the terms of her testimony, the witness proved the assault to have been made on her as charged in the indictment. Then, the only question must have been on her credibility. That, if disputed, the court distinctly left exclusively to the jury. They were told that "should they believe the story of the witness it would be their duty to find the defendant guilty." The observation which followed affirms no fact and gives no intimation as to any fact. It is a mere truism in law; in substance, that no one is so high as to be above obedience to the law, nor any so low as not to be entitled to its protection. We cannot discover that the remark could have had any operation in the minds of the jurors in making up their verdict, except, perhaps to deepen the salutary impression, so generally prevalent among the citizens of this State of the duty of the impartial administration of justice. It insinuated to the jury no bias upon the questions of fact.

PER CURIAM. No error.

Cited: *S. v. Rash*, 34 N. C., 386.

(409)

HARDIN H. GORDON v. ANDREW K. ARMSTRONG.

Where land is rented for a share of the crop an execution cannot be levied on the lessor's share until it has been allotted to him by the lessee.

APPEAL from SURRY. Spring Term, 1845; *Bailey, J.*

Trover for a parcel of corn, in which a verdict was found for the plaintiff, subject to the opinion of the court on the following facts: On 1 January, 1840, Iredell Armstrong was seized in fee of a tract of land, which he then leased to one Levi Fisher for one year, at a rent of one-third of the corn and oats that should be made on the land during the year. At that time one Peter Simmons had a judgment in the county court of Surry against Iredell Armstrong, and in February, 1840, he sued out a *fieri facias*, under which the land was sold by the sheriff in May, 1840, to Peter Simmons, who took a deed in May, 1842. In July, 1840, a constable levied a *fieri facias*, issued on a justice's judgment against Iredell Armstrong, on his share of or interest in the crop of corn then growing, and in August following sold it to the plaintiff. When the crop was gathered Fisher, the tenant, allotted one-third for the landlord, and the defendant took it under the authority of said Simmons, and the plaintiff then brought this action in April, 1841. If the court should be of opinion for the plaintiff, then the verdict was to stand and judgment to be entered accordingly; if for the defendant, then the verdict was to be set aside and a verdict and judgment entered for the defendant. His Honor was of opinion for the defendant, and from the judgment the plaintiff appealed.

Morehead for the plaintiff.
Boyden for the defendant.

RUFFIN, C. J. Without considering what interest a purchaser of the lessor's reversion at sheriff's sale could acquire in this (410) rent, or whether, if he got any, he could act on it before he took a deed from the sheriff, the Court is of opinion that this action must fail, for the want of property in the plaintiff. *Deaver v. Rice*, 20 N. C., 567, is decisive upon the question. The estate in the land during the term was in the lessee, and the property of the crop growing on it was therefore exclusively in him. The contract on his part to pay the *landlord* one-third of the crop as the rent was merely an executory contract; and, notwithstanding such contract, the whole crop might be disposed of to another person by the lessee, or be sold on execution against the lessee. Consequently it could not be sold as the property of the lessor; and the present plaintiff acquired, under his purchase, no interest in the thing

and cannot maintain the action of trover. If the act of 1840, ch. 37, which exempts the share of the crop to be given for rent from execution against the lessee until the end of the year, could affect this question, it is to be remarked that, in this case, it cannot, inasmuch as this transaction occurred the year preceding the enactment of the statute.

PER CURIAM. Affirmed.

Cited: *Kesler v. Cornelison*, 98 N. C., 385; *Howland v. Forlaw*, 108 N. C., 569.

(411)

THE STATE ON THE RELATION OF JOHN DICKSON v. JOHN G. ESKRIDGE.

1. Where the words of the record of a county court were, "The court appointed J. G. E. constable, he having been elected in captain J.'s company": *Held*, that this was evidence of an election by the people, and not of an appointment by the court.
2. When in 1835 notes the makers of which were proved to be solvent were put in a constable's hands for collection, and on the trial of an action for the breach of his bond, which action was brought in 1840, he failed to account for or produce the notes: *Held*, that the court did right in instructing the jury that they might give in damages the whole amount of the notes.

APPEAL from CLEVELAND, Spring Term, 1845; *Manly, J.*

This was an action upon a constable's bond for the year 1835, whereon it was insisted that a recovery could not be had, because there was not sufficient evidence of the appointment of the defendant Eskridge to the office of constable, and, if there were, yet no more than nominal damages could be recovered. The following is a copy of the record of Rutherford County Court at April Term, 1835: "Present (here the names of seven justices are mentioned). The court appointed John G. Eskridge constable till next January court, upon its appearing that he had been elected in Capt. Abraham C. Irwin's company. He gave bond to the State, etc." On the trial it was in evidence that promissory notes on three several persons were placed in the constable's hands for collection—that the makers of the notes were solvent and continued to be so up to the time of the trial (in 1845), and that the moneys might have been made out of them during the official year to which the bond belonged. There was no evidence on either side of what had become

(412) of the notes, nor were they produced on the trial.

Upon this state of facts the court was of opinion that the plaintiff was entitled to recover, and that the jury might give the full

amount of the notes as damages, and so instructed the jury. A verdict, in pursuance of these instructions was found for the plaintiff for the whole amount of his demand, and judgment being rendered accordingly the defendant appealed.

No counsel on either side.

NASH, J. This is an action of debt brought against the defendants upon a constable's bond. Upon the records of Rutherford County is the following entry: "The court appointed John G. Eskridge constable until next January court, upon its appearing that he had been elected in Captain C. Irwin's company." He gave bond to the State of North Carolina.

From the same record it appears there were seven magistrates on the bench when the bond was taken. We see no objection to the bond or the appointment, as it is called. John G. Eskridge made it appear to the satisfaction of the court that he had been elected a constable in or for Captain Irwin's district or company, and we are to understand by the voters of that district, and the court has done, and done properly, what devolved on them by law, namely, taken the bond of the constable, the requisite number of magistrates being on the bench. The word *appoint,* used as it is in the record, is sufficiently explained by what follows, to show that, in fact, the court did not appoint the constable, but that he had been duly elected by the people of the district, and they did no more than take the bond. The bond is good in law. The whole doctrine on this subject is embodied in the following cases: *S. v. Washburn,* 26 N. C., 19; *S. v. Fullenwider, ib.,* 364; *Harris v. Wiggins, ib.,* 273. On the trial in the Superior Court it was further urged by the defendants' counsel, that if the plaintiff was entitled to a verdict at all, it would be for nominal damages only. The writ issued on 5 July, 1840, and, according to the case, the papers were put into the hands of the (413) constable Eskridge for collection, in 1835. The debtors were all solvent and able to pay, and were so at the time of the trial. The notes were not produced on the trial, nor was there any evidence to show what had become of them. The court instructed the jury that under such circumstances they were at liberty to give in damages the full amount of the moneys due on the notes, which they accordingly did. It was not questioned, but that the defendant Eskridge had broken his covenant; it was not pretended that he had made any effort to collect the money due. He had had the notes for five years before the bringing of the action, and ten before the trial, and, when called on for the money, neither paid it or gave any account of the notes whatever. The fair presumption is, that he had collected the money and appropriated it to his own use. I

say, this is a fair presumption, because, by the law, as established by this Court, if he had tendered the papers to the relator, or had brought them into court and then surrendered them to his use, the damages to which he would have been subjected would have been but nominal, if the debtors were still solvent and still able to pay. *Governor v. Matlock,* 8 N. C., 425; *S. v. Skinner,* 25 N. C., 465. These cases have extended the immunity of collecting officers as far as it ought to go. To protect the officer from paying substantial damages for the failure to perform his duty he must place the plaintiff in the same situation, in every respect, that he was when the agency was assumed. We do not see how the judge could have instructed the jury differently from what he did.

PER CURIAM. No error.

Cited: Harris v. Harrison, 78 N. C., 217.

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(414)

EDMUND B. SKINNER ADMINISTRATOR OF ALFRED S. BARROW, v. MARTHA BARROW.

A., having four children, devised, since the act of 1827, certain slaves to his daughter Nancy, then a married woman, and if she died without issue one half to her husband and the other half to her brothers and sisters. The executor assented to the legacy, and Nancy died without issue, leaving a brother and two sisters, one of whom was then a married woman, but her husband died soon afterwards. *Held,* that the husband had a vested legal interest in one-third of the moiety of the said slaves, which passed on his death to his administrator.

APPEAL from PERQUIMANS, Spring Term, 1845; *Battle, J.*

Detinue for slaves, in which the following case agreed was submitted for the decision of the court. The negroes in controversy formerly belonged to Eri Barrow, who died in 1832, having previously made his will, of which he appointed his son Joseph W. Barrow, and his two sons-in-law, John Mardree and Alfred S. Barrow, executors, all of whom qualified. In clause 4 of the will the testator bequeathed as follows: "I lend to my daughter Nancy E. Barrow (now Moore) the following property (enumerating slaves and other personal property); also if my said daughter Nancy should depart this life without issue, then it is my will and desire, that her husband, William C. Moore, should have one-half of the property that I have lent to my daughter Nancy, but the property is to be held in trust by my executors until the death of my daughter Nancy, and then the half of the property is to be equally divided between her brother Joseph and her two sisters, Martha

Barrow and Rachel Mardree." William C. Moore, the husband of Nancy, departed this life in February, 1838, without issue, and his widow Nancy in July, 1839, without issue. After the death of the testator, the executors delivered over to William C. Moore the negroes mentioned in the clause of the will referred to, of whom the negroes in controversy were a part. Shortly after the (415) death of Nancy E. Moore the other legatees of the testator of whom the said Alfred S. Barrow, in right of his wife Martha, a daughter of the testator, was one, divided the said negroes among themselves, in which division two of the negroes now sued for were allotted to Joseph W. Barrow, in whose possession they continued until after the death of Alfred S. Barrow in February, 1842. The administrator of William C. Moore commenced a suit against the three executors of Eri Barrow for an undivided half of the negroes and other property mentioned in the said Clause 4 of the will, in which a recovery was effected. Alfred S. Barrow, the plaintiff's testator, died before the decision of that suit, which was continued against the other executors. Under an interlocutory order in that suit, the negroes mentioned in the said Clause 4 were divided by commissioners, in which division one-half the negroes were allotted to the estate of William C. Moore and one-half to Joseph W. Barrow, John Mardree, and the estate of Alfred S. Barrow. Of this latter half the negroes in controversy were a part. After this division had been made the same commissioners, on the same day, divided the negroes that had been allotted to Joseph W. Barrow, John Mardree and the estate of Alfred S. Barrow between said Joseph, John and the defendant, who is the widow of the said Alfred. After this the three negroes now in controversy went into the possession of the defendant and continued in her possession up to the commencement of this suit. At the last mentioned division the executor of Alfred S. Barrow was present and made no objection to it. The plaintiff is the administrator *de bonis non*, etc., of Alfred S. Barrow.

Upon this agreed case his Honor decided that the plaintiff was entitled to recover, and judgment being pronounced accordingly, the defendant appealed.

A. Moore for plaintiff.
No counsel for defendant. (417)

DANIEL, J. We agree with his Honor who tried this cause below. Alfred S. Barrow, the husband of defendant, was alive when Mrs. Moore died without issue. The executory devise over of the slaves had then become vested bequests to her brother and two sisters. Alfred S. Barrow, in right of his wife Martha, was then a tenant in common in possession

of the said slaves with those claiming under Joseph Barrow and the other sister, Rachel Mardree, and, on his death the slaves constituted a part of his personal estate and belonged to his administrator, and not to his wife. The fact of the administrator being present when the commissioners divided the slaves and put this share in the possession of the defendant, does not destroy his title to the same. It does not amount to either a gift, a sale or a release of the title to the slaves, as the defendant was but a volunteer and not a purchaser of the slaves. The judgment must be

PER CURIAM. Affirmed.

(418)

SARAH J. KIMBALL'S ADMINISTRATOR ET AL. v. GURDON DEMING, ADMINISTRATOR OF AMOS KIMBALL.

1. The administrator of a widow has no right to claim the year's provision to which she would have been entitled out of her husband's estate under the act (Rev. Stat., ch. 121) if she had lived till the allotment had been made. Before such allotment she has no interest transmissible to her administrator.
2. Nor, after the death of the widow before such allotment is made, can her children claim any provision under that statute.

APPEAL from CUMBERLAND, Spring Term, 1845; *Pearson, J.*

Petition for a year's allowance to a widow and her family out of the personal estate of her deceased intestate husband. It states that the husband died in September, 1844, leaving a widow and two infant daughters; that the widow died intestate in November following; and that at December Term, 1844, of the county court, administration of the estate of the husband was granted to the defendant, and at the same term adminisraion of the estate of the widow was grantd to one of the plaintiffs. The petition was filed at the same term by the widow's administrator and by the two daughters, jointly, for the year's allowance of the widow. Upon demurrer, the petition was dismissed by the county court, but the petitioners appealed, and in the Superior Court that was reversed and a decree was made that the petitioners recover a year's allowance as prayed for, to be laid off and allotted out of the said Amos Kimball's estate, according to their respective rights; and commissioners were appointed to lay it off. From that decision, the husband's administrator appealed.

No counsel for plaintiffs.
Warren Winslow for defendant.

RUFFIN, C. J. Until *Cox v. Brown, ante,* 194, was brought up, at the last term, we had never heard that anybody supposed that (419) if a widow died her creditors or children were entitled to claim out of the husband's estate as much as would have supported her for a year if she had lived. It seemed to us to be a complete perversion of the act, which makes the provision for the temporary maintenance of the widow and her family. There is no necessity for any such construction; and, indeed, it is opposed to the plain purpose of the Legislature. For until administration, that is, up to the next court after the husband's death, the widow is expressly authorized to take possession of the whole estate, and use as much of it as she may need for herself and family; and, after administration, a summary remedy is given to her for an allowance for a year, provided she apply for it immediately. All this shows that the purpose was to make provision for the pressing wants of the widow, personally, and to enable her, at that mournful juncture, to keep her family about her for a short season, and prevent the necessity of scattering her children abroad, until time were allowed for selecting suitable situations for them. That was the sole object of the law, and not to give to the widow an additional interest in the personal estate of the husband, in the nature of a distributive share, transmissible to her executor. It is true that by the allotment to her the property in the things necessarily vests in the widow, and that it will not be divested by her not consuming them, or dying within the year. But it requires the allotment to have that effect; and, until it be made, she has no just right, that can pass to her representatives; for the law did not intend to provide for her creditors or next of kin against those of the husband. Still less can the children claim through their mother. For, if she have any right, it must go to her executor or administrator, and not directly to her children; for, as children, they would be entitled to distribution of the mother's estate after payment of her debts, and no provision is made for a widow's children against her creditors. As children of the deceased husband they cannot claim; for they are included in the act only under the general name of the "widow's family." Indeed there can be no reason why the infant children of one intestate (420) father should not be provided for against his creditors as well as those of another; and it could not be meant that their right should depend on the accidental circumstance of their father's leaving or not leaving a widow, or her claiming or not claiming the allowance. Besides, the act gives the same right to a year's allowance to a widow who dissents from her husband's will; and this shows clearly that the children can have no distinct right in the allowance. For, if the gifts in the will be to the children, as they generally are, it is idle to make to them an allowance out of their own estate; and if they be to strangers, it is a

plain violence to the legislative intention to defeat the gifts of the will, *pro tanto* and transfer the property to the testator's children, because the widow dissents from the provision made for her. Indeed, the impossibility of supporting the construction, insisted on for the plaintiffs, is clear from the inability of the judge of the Superior Court to designate the several intrests of the widow's administrator and of the children in the event that has happened. The decree is that the allowance shall be allotted to those parties "according to their respective rights." The statute gives no rule upon that point; and as no such determination could be made, it is proof that they have no such rights at all.

The judgment of the Superior Court must, therefore, be reversed and that of the county court affirmed, with costs in this court and in both courts below.

PER CURIAM. Reversed and judgment for defendant.

Cited: Dunn, ex parte, 63 N. C., 138; *Simpson v. Cureton,* 97 N. C., 116; *In re Hayes,* 112 N. C., 78; *In re Stewart,* 140 N. C., 30.

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(421)

SAMUEL LANCASTER, EXECUTOR ETC., v. LYDIA MCBRYDE.

1. When the probate of a will has been obtained in a sister State, and is authenticated as the laws of the United States direct, it is in such an authentic form as to supersede the necessity of a probate in the courts of this State, and such an authentication may be given in evidence to sustain a suit.
2. Where there were two coexecutors, and one of them died, and afterwards the other died, the executor of the last may recover at law from the executor of the coexecutor who first died a bond belonging to the estate of the first testator.

APPEAL from MOORE, Fall Term, 1844; *Bailey, J.*

Detinue brought to recover possession of a bond which, it was alleged, belonged to the estate of William Martin, of whom the plaintiff was the executor, being the executor of Atlas Jones, who was the surviving executor of the said William Martin.

The case is as follows: William Martin died in the year ....., having previously made and published in writing his last will and testament and therein appointed Atlas Jones and Archibald McBryde, his executors. They proved the will. Archibald McBryde died in the year ..... and, by his will, appointed the defendant his executrix. Atlas Jones survived him, and, having removed to the State of Tennessee, there

died in the year ....., and after the institution of this suit. The bond in question, and for detinue of which the action is brought, is a part of the assets of the estate of William Martin, and came to the hands of Archibald McBryde, and, after his death, was taken possession of by the defendant as his executrix. The bond was demanded by Atlas Jones of the defendant and, upon her refusal to deliver it, this action in detinue was brought. Pending the suit, Atlas Jones died, and a motion was made to make Samuel Lancaster, alleged to be his executor, (422) the plaintiff. In support of the motion, two papers were produced; the one purporting to be a copy of the last will and testament of Atlas Jones from the records of the court of Pleas and Quarter Sessions of Madison County, in the State of Tennessee, and the other a copy of the probate of the said will and of the qualification of Samuel Lancaster as the executor therof. To the introduction of these papers as evidence, several objections were urged: first, that the paper called the copy of the will, did not appear to have been proved in any court in Tennessee, not having any certificate of probate endorsed thereon; and, second, that it would receive no aid from the other papers, as they in no way referred the one to the other, and, if they were so connected, they were not so authenticated as to authorize the court to consider them as evidence. It was admitted they had been transmitted to the counsel of Atlas Jones by his son, and were contained in the same envelope. To each of these papers is attached a certificate, under the seal of Madison County Court, and attested by a person subscribing himself, "Jas. D. McClelland, Clerk," and to each a certain certificate signed by Wyatt Mooring, as chairman and presiding justice of the county court of Madison County, in which he certifies that James D. McClelland, whose name appears to the foregoing certificate, is now and was at the time of signing the same the clerk of said court; that the court is one of record and the attestation in due form of law." The presiding judge overruled the objections, and Samuel Lancaster, as executor of Atlas Jones, was made plaintiff and permitted to prosecute the suit.

Mendenhall for plaintiff.
Strange, Winston, and J. H. Haughton for defendant.

NASH J. We perceive no error in this action of the court. It is objected that the papers are not attached to each other nor do they so refer to each other as necessarily to connect them. It would have been more satisfactory if the papers had been so connected, but we know of no principle of law requiring it and the circumstances accompanying them sufficiently, we think, connect them to enable us to see that (423) they do mutually refer to the same transactions and prove that

this is a true copy of the will of Atlas Jones and its probate. It is further objected that we have no evidence that Wyatt Mooring was the presiding magistrate of Madison County Court, as the record states there were other magistrates on the bench. It is sufficient for us that the *papers* are authenticated in one of the modes required by the act of Congress. We cannot require more evidence of the fact than the law demands, and, in the absence of all contradictory testimony impeaching its truth, it would have been a matter of fact to be decided by the presiding judge, and which could not be reviewed by us. It is further objected that before Samuel Lancaster could be permitted to carry on the suit, as the executor of Atlas Jones, the will of the latter ought to have been proved in some competent county court in this State, and letters testamentary issued to him here. In *Helme v. Saunders,* 10 N. C., 563, the Court decides that when a probate is obtained in a sister State, and is authenticated as the laws of the United States direct, it is, under the constitution of the United States, in such an authentic form as to supersede the necessity of any probate in the courts of this State; and such an authentication may be given in evidence to sustain a suit, and was certainly sufficient to authorize the court to make Samuel Lancaster a party plaintiff, as the representative of Atlas Jones.

It is contended that the action cannot be maintained, and that the only redress open to the plaintiff was a suit in equity to call the defendant to an account for the assets of William Martin, which came to her hands as executrix of Archibald McBryde. No authority has been cited for this position, and, indeed, it is admitted none can be found. In support of it, however, it is said it would expose the defendant to great litigation and much cost. We cannot perceive how this can be. She is not liable at law to the demands of the creditors of William Martin, for she is not his representative. If no case can be found to sustain (424) the defendant's objection, the cases are numerous which, on principle sustain the action. Coexecutors at law are regarded as one person, all having a joint and entire authority over the whole property of their testator (Wentworth Exrs., 213, 2 Williams Exrs., 620) and upon the death of one, the whole power and authority rests with the survivor, although the deceased executor may have left an executor. *Flanders v. Clark,* 3 Atk., 509; 2 Williams Exrs., 723. It is the duty of the surviving executor to take possession of the personal estate of the deceased, and this bond, it is admitted, forms part of the estate of William Martin. He alone can maintain an action at law for the money or the property, and he alone is answerable to the creditors. Nor, in equity, can a creditor sue the surviving executor and the representative of the deceased executor except upon the ground of fraud and collusion. *Brotton v. Bateman,* 17 N. C., 119. It is a general rule of pleading

that when one of several parties having a joint legal interest dies, the right of action survives, and the action must be brought in the name of the survivor. The representative of the deceased joint party cannot be joined. 1 Chit., pl., 12. Atlas Jones and Archibald McBryde, as executors of William Martin, had a joint legal interest in the bond in controversy; and, on the death of McBryde, that interest survived to Atlas Jones. The defendant could not maintain an action on it against the obligors. Jones alone could do that, and he, of course, was entitled to its possession. It is true, for the reason before given, one executor cannot maintain an action at law again his coexecutor; and this case does not raise the question. The plaintiff and the defendant do not jointly represent William Martin; the former is the sole representative.

These were the only points passed in argument before us, but, as the counsel claimed another, which is stated in the case, it is our duty to examine and decide it. When the executor of Atlas Jones was made a party plaintiff, the defendant was permitted to plead, since the last continuance, that one Kenneth McCaskill had by a decree in equity, recovered from her, as executrix of Archibald McBryde, $2,500 as money due from the estate of William Martin, and that she retained this bond as assets of Martin's estate, purchased by her for the benefit (425) of her testator's estate. The case states that the suit of McCaskill was brought by him against Atlas Jones and Archibald McBryde, for an account of money received by them as his agents from the estate of Martin, and that he had recovered the sum mentioned in the plea, of which the defendant had paid an amount equal to the bond in dispute. The court was requested to charge the jury, if they believed the testimony, they ought to find for the defendant. This instruction was refused, and, certainly, with great propriety. The decree was obtained against the defendant, Jones having in the meantime died without any representative in this State, not as the representative of William Martin, but as the executrix of A. McBryde, one of the agents of McCaskill, in which character the money had been received by him and Atlas Jones. Martin's estate was discharged from the claim. The money, then, which the defendants paid under that decree, was not paid by her for and on account of Martin's estate. She can, of course, have no claim in this Court to hold the bond in dispute to answer for it, against the legal claim of the plaintiff.

Atlas Jones was the surviving executor of William Martin; the bond in dispute is a part of the estate of his testator, in the hands of the defendants; having no legal claim to its possession, the action, after a demand, was rightly brought and the plaintiff was entitled to a verdict.

PER CURIAM. No error.

(426)

DEN EX DEM. SUSANNAH NEEDHAM v. LEVI B. BRANSON ET AL.

1. Where a conveyance of land is made to husband and wife they do not take interests either as joint tenants or tenants in common, but they take estates in fee by entireties and not by moieties. The husband cannot, by his own conveyance, divest the wife's estate, and, on her surviving him, she is entitled to the whole estate.
2. A declaration in ejectment may be against several defendants holding different parcels of the same tract.

APPEAL from RANDOLPH Spring Term, 1845; *Caldwell, J.*

Ejectment. The plaintiff introduced a deed from the executors of William Cox to John Needham and his wife Susannah, the lessor of the plaintiff, bearing date 24 March, 1823, conveying in fee the land set forth in the declaration. A deed of trust was also produced, executed on the same day by the said John Needham and his wife Susannah to Hugh Maffitt, conveying the same lands; but as to this deed the said Susannah had never been privily examined. By the provisions of the deed of trust, Maffitt had power to sell the tract conveyed in several parcels, and the plaintiff showed, by deeds of conveyance, that the defendants held directly or by mesne conveyances from the said Maffitt, who had sold the tract according to his power in several parcels. It appeared that the defendants held these respective parcels under separate and distinct conveyances, though circumscribed by the lines of the original tract conveyed to the said Maffitt. The plaintiffs also showed that the defendants were separately in possession of three several parcels of the said tract so conveyed to them, and were so when this action was brought. And the plaintiff also showed that John Needham, above mentioned, had died some two or three years before the commencement of this suit.

Upon this evidence a verdict was returned for the plaintiff, subject to the opinion of the court whether the defendants could be joined in the same action and the plaintiff maintain this suit. The court being of opinion that the action could not be maintained, set the verdict aside and entered a judgment of nonsuit, from which the plaintiff (427) appealed.

Morehead for plaintiff.

Mendenhall and J. H. Haughton for defendants.

DANIEL, J. The deed from the executors of Cox, dated 24 March, 1823, conveyed the land to John Needham and Susannah, his wife, and their respective heirs. The husband and wife did not take interest in the land, either in joint tenancy or as tenants in common, but they took estates in fee, by entireties, and not by moieties. The husband alone

could not, by his own conveyance, divest the wife's estate or interest. So that, on her surviving him, she was entitled to the whole estate. Co. Lit., 187. *Freestown v. Parrett,* 5 Term, 652; *Doe v. Wilson,* 4 Barn. & Alder., 303; 1 Roper, Husband and Wife, 51, 52. The deed to Maffitt did not convey Mrs. Needham's interest in the land, as she was not privily examined, as the law directs.

On the second question raised by the defendants, and on which the judge nonsuited the plaintiff, to wit, that the interest in the land claimed by the defendants was not a joint interest, but was a several and distinct interest in several distinct portions of the whole tract, as described in the declaration, the judge erred, we think, because the defendants pleaded jointly and were tried jointly. *Love v. Wilbourn, ante,* 344, settles the law upon this point of the case in favor of the plaintiff. The judgment must be reversed and a judgment rendered for the plaintiff against those defendants against whom the jury found.

PER CURIAM. Reversed and judgment for the plaintiff.

Cited: *Hodges v. Little,* 52 N. C., 146.

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(428)

JOHN D. GRAHAM v. H. C. HAMILTON ET AL.

Where a paper-writing is deficient in punctuation, and its sense may be varied as the punctuation is one way or another, extrinsic evidence may be introduced to explain its meaning.

APPEAL from LINCOLN Spring Term, 1845; *Bailey, J.*

This is the same case which was at this Court at June Term, 1843, in which the judgment was reversed and a *venire de novo* awarded. *Graham v. Hamilton,* 25 N. C., 381. Upon the second trial, the plaintiff again offered Owen Clark as a witness to establish that the articles which the defendants had sold as the property of Clark were not his property, but belonged to the plaintiff, and were delivered by him to Clark to sell as the plaintiff's agent. The defendants objected to Clark's competency upon the ground that there was a contract in writing between the plaintiff and Clark respecting the castings in dispute, and, in support of the objection, produced the letter from the plaintiff to Hamilton, dated 16 November, 1839, which is set forth in the former report. The plaintiff then proved clearly that the written agreement mentioned in the letter related exclusively to certain other property of Clark, and did not embrace any part of the castings, which are the subject of this action; and, thereupon, the court admitted Clark to be sworn and ex-

amined, and by his testimony he made out the case for the plaintiff, as stated above; and the court instructed the jury that, if they believed him, the plaintiff was entitled to a verdict for the value of the articles sold by the defendant.

The defendants excepted to the opinion of the court as to Clark's competency, and appealed.

Boyden for plaintiff.
Alexander for defendant.

(429) RUFFIN, C. J. The decision of his Honor was perfectly correct; and, indeed, was in conformity with the opinion given by this Court upon the former appeal. We thought that the natural and grammatical sense of the last sentence in the plaintiff's letter imported that the "written agreement" extended both to Clark's property (as admitted to be by the plaintiff) that was sold and, also, to these castings, which the plaintiff claimed to be his own property; and, therefore, that, without some explanation, parol evidence could not be given of the contract between the plaintiff and Clark, touching the castings. But it is obvious that the sense of that part of the letter would be much varied by punctuation, in which it is deficient; for by a semicolon after the word "sold," it would be made to mean that the writing concerned certain other property of Clark; and, as to the castings, the latter branch of the sentence would be simply an affirmation that they were sent by the plaintiff. For that reason it was distinctly intimated by the Court, that the question was open to evidence of the true nature and extent of the writing, and that, if it really did not extend to the castings, then Clark's testimony would be competent. Such evidence was given on the second trial, probably by the production of the writing itself, or by some other sufficient means; and the court was satisfied that, in point of fact, there was no written agreement respecting the castings, and, consequently, it was competent to prove the parol contract.

PER CURIAM. No error.

(430)

VIOLET ALEXANDER v. H. B. CUNNINGHAM ET AL.

1. A devise as follows, "I will to my son M. W. A. all my estate, real and personal, for his use and benefit, and then to be divided off and distributed among his children as he may think proper. That is to say, my land to be used by him, and the profits thereof to be to him; but the lands to be by him divided and distributed among his children as he may think proper. My negroes are to be used by him in any way he may

think proper, and to be to his own use, for defraying their expenses for raising the younger ones, clothing, etc.; but the said negroes and the increase thereof to be by him divided among his children as he may think proper. My notes and money (now about $30,000) to be by him kept on interest in good hands, and the interest accruing thereon to be to the use and benefit of the said M. W. A. and the amount of the said notes and money to be divided among his children as he may deem proper. And I hereby appoint my son M. W. A. the executor of this will": *Held*, that under this will M. W. A. took but an estate for life in the lands, with the power of dividing it, either in his lifetime or at his death, among his children, and that until such appointment the remainder in fee either vested in the children or descended to the heirs of the testator. The widow of M. W. A., therefore, had no right to dower in the land.

2. Where there is an express estate for life to one, and a power to him to appoint the estate among certain persons, the first taker gets but an estate for life.

3. Where the estate is not given expressly for life, but indefinitely to a devisee, with power to appoint, as his discretion or as he pleases, among certain named persons, or to a certain class, the better opinion in England is that the devise should be construed to be a devise for life, with a power to appoint the inheritance, unless the words of the will clearly negative such a construction.

4. The law is the same in this State, notwithstanding our act of 1784, Rev. Stat., ch. 122, sec. 10, which declares that devises of lands are to be construed in fee unless by express words of the will or by plain intendment it may be held to be of a less estate; for the only purpose of that provision was to establish a rule between the heir and the devisee in respect to the beneficial interest of the latter.

APPEAL from MECKLENBURG Special Term in May, 1845; *Pearson, J.*

This is a petition for dower brought by the widow of Moses W. Alexander against his children and heirs at law. The only question in the case is with respect to a tract of land, of which Joseph (431) McKnitt Alexander died seized in fee, and of which the petitioner alleges her late husband was, in his lifetime and at his death, in February of the present year, also seized in fee, under a devise thereof to him in and by the will of his father, the said Joseph McKnitt Alexander.

The petition states generally a seisin in fee of the husband, of several other tracts of land described in the petition. With respect to the tract derived from Joseph McKnitt Alexander, the petition states the title of the husband specially to be under the will of his father, and sets out the will itself. It was made in 1838, and is thus expressed: "I do hereby will to my son Moses W. Alexander all my estate, real and personal, for his use and benefit; and then to be divided off and distributed among his children as he may think proper. That is to say: My land to be used by him and the profits thereof to be to him; but the lands to be by him divided and distributed among his children, as he may think proper:

My negroes are to be used by him in any way he may think proper, and to be to his own use for defraying their expenses for raising the young ones, clothing, etc., but the said negroes and the increase thereof to be by him divided among his children as he may think proper: My notes and money (now about $30,000) to be by him kept on interest in good hands, and the interest accruing thereon to be to the use and benefit of the said Moses W. Alexander, and the amount of said notes and money to be divided among his children, as he may deem proper. And I hereby appoint my son Moses W. Alexander the executor of this will." Upon the death of the said testator, his son entered into the land devised, containing about 2,000 acres, and resided thereon until his death; and he died intestate and leaving children, and without having made any appointment among his children of the said land or any other part of his father's estate. The petition insists that, by virtue of the said devise,

(432) the said Moses W. Alexander became seized of the said last-mentioned tract of land in fee, and that the petitioner, as his widow, is dowerable thereof, as well as of the said other lands; and it prays that her dower may be accordingly set off and allotted to her in the said several premises.

The facts stated in the petition were admitted by the defendants; and, upon the hearing, the court decided that the widow was not entitled to dower in the land devised in the will of Joseph McKnitt Alexander, but was entitled to dower in the other lands mentioned in the petition; and the petitioner appealed.

Badger for plaintiff.
No counsel for defendants.

RUFFIN, C. J. The question in the case is, whether the plaintiff's husband got the legal estate of the land in fee, or for life only, under his father's will. It would really seem to be of very little consequence to the plaintiff which way it is. For, if, upon the construction of the will, it should be held that, by the strict legal limitation he was the tenant in fee, he, immediately, took beneficially but an estate for life, and as to the remainder in fee he took the estate in trust to appoint and divide it among his children. Consequently, if the plaintiff could recover dower at law it would answer her no purpose: for she would come in of the estate of the husband, and be, herself, a trustee for the children, and, therefore, equity would restrain her from enforcing her recovery by law. But we are of opinion that the son took but an estate for life, with the power of dividing the land and the other property, either in his lifetime or at his death, among his children, as purchasers from the testator, and that, until such appointment, the remainder in fee either vested in the

children or descended to the heirs of the testator. It is very clear that when there is an express estate for life to one and a power to him to appoint the estate among certain persons, the first taker gets but an estate for life. Indeed, a devise to one for life expressly, with remainder to such persons, generally, as he shall appoint, does not confer on the former the absolute property, though he may get it by exercising his power. *Barford v. Street,* 16 Ves., 135. Of course the same (433) result more clearly follows when the power is to appoint to or among particular persons. When, however, the estate is not given expressly for life, but indefinitely to a devisee, with power to appoint, in his discretion, or as he pleases, among certain named persons, or a certain class, it is not equally clear, at least upon authority, what estate the devisee takes: whether a fee simple conditional, or the fee upon trust to make the appointment, or an estate for life with power to appoint the fee. Anciently, when the jurisdiction in equity was not so fully established and understood as now, these limitations were treated as conditions, for the sake of the remedy by the entry of the heir for failing to appoint or appointing contrary to the will.

But, at this day, that view of a devise would, probably, be seldom taken, as the remedy is much more convenient in equity, by considering the fee absolute, and the direction to appoint a trust, rather than a condition at common law. Between the alternative of a life estate with power to appoint the inheritance or that of a fee simple in the devisee upon trust to appoint, the authorities and the reason of the thing are favorable to the former. Such was the decision ultimately in *Daniel v. Utley,* 1 Johns., 137. Noy, 80, and Mr. Sugden on Powers, 121, says, "the better opinion certainly is, the devise is for life, with a power to appoint the inheritance, *unless the words of the will clearly negative such a construction.*" But it is said that the rule is different in our law, because, by the act of 1784, Rev. St., ch. 122, sec. 10, devises of land are to be construed to be in fee, unless by the express words of the will or by plain intendment they may be held to be of a less estate. But we think the purpose of that provision is to establish a rule between the heir and the devisee in respect to the beneficial benefit of the latter. Undoubtedly, the son took a life estate, at most, to his own use; for the will is express, that the land shall be divided among his children, with only the qualification that such division shall be in such mode, and shares, as the devisee may choose. Then why should the son (434) have a larger legal estate than for his own life? What interest would it subserve? None whatever; for the appointments would get the same in either instance, whether the appointment operate on the inheritance vested in the son as devisee, or in the testator's heir at law, or on the inheritance limited in the will to the son's children, as a remainder

after the previous life estate of the son. There are, therefore, the same reasons, drawn from convenience and the presumed intention of the testator, in our law as in that of England, upon a provision of this kind, that the devisee should not have a greater legal estate than one commensurate with his beneficial ownership, namely, for his own life. This conclusion is fortified, too, by the circumstance that the language of the bill is not that the son may *dispose* of the residue of the estates, real or personal, after the termination of his own enjoyment, but merely that he shall *"divide and distribute"* them among his children. If that be so, it is not material that we should determine in the present case whether the inheritance is, as a reversion, in the testator's heirs at law, or, as a remainder in the children of the devisee and son. In either case, the fee was never in the plaintiff's husband; at least, it does not so appear upon these pleadings.

Moses W. Alexander is called in the will the testator's son, it is true; but he is not stated to be his heir or one of his heirs, nor his son born in lawful wedlock, whereby he would appear to be his heir. On the contrary, the petition, by implication, excludes any such inference, by specially setting out the will and claiming the fee to be in Moses W. Alexander by virtue of the devise, and that only. As we think he took only a life estate by the will, it follows the petitioner is not entitled to dower on this land, even at law; and, therefore, that the judgment must be affirmed. But, as was mentioned at first, if our opinion were otherwise and the petitioner could recover at law, it would be of no value to her; as equity would certainly not allow the gifts to the children to fail, but would supply the want of the execution of the power by their father,

and restrain the present plaintiff from insisting on her right to
(435) dower at law.

There was not more an intention by the testator that the land should be absolutely the property of his son than that the money and bonds should be, and the plaintiff might as well claim a distributive share in the personalty, as the estate of her husband, as to claim dower in the land.

Judgment affirmed with costs in this Court; and this will be certified to the Superior Court that further proceedings may be had in allotting the dower recovered by the plaintiff in the other lands.

PER CURIAM. Affirmed.

Cited: Patrick v. Morehead, 85 N. C., 66; *McKrow v. Painter,* 89 N. C., 439; *Chewning v. Mason,* 158 N. C., 583; *Mabry v. Brown,* 162 N. C., 219, 223; *Griffin v. Commander,* 163 N. C., 232.

FLEETWOOD WALTERS, ADMINISTRATOR, ETC., v. WILLIAM WALTERS.

On the trial of an issue it was incumbent on the defendant to show that he had given to his father a valuable consideration for a slave, and he produced a bill of sale the execution of which he proved by a subscribing witness, and which expressed a consideration of $300. The plaintiff's counsel asked the witness if he saw any money paid, and the witness replied that he did not, but that he saw a bond delivered by the defendant to his father, and being asked by the same counsel what bond, he replied, "The defendant's bond to maintain his father and mother during their lives": *Held*, that this examination on the part of the plaintiff did not dispense with the necessity of the defendant's producing the bond or showing that he had used the proper means to procure its production and then proving its contents.

APPEAL from ROBESON Spring Term, 1844; *Nash, J.*

The evidence given at the trial of this cause and the various positions of the parties are set forth at much length in the case sent up; but, as the decision of this Court turns on a single point, it is (436) only material to state so much of the case as may be useful in understanding that point.

The action was replevin for a slave named Hagar which the plaintiff claimed as the administrator, *with the will annexed,* of William Walters, the elder. The defendant is a son of the deceased, and claimed the slave as having been sold and conveyed to him by his father. The sale and conveyance were impeached upon the grounds that the father from age and mental infirmity had not the capacity to contract, and that in fact the conveyance, if any, was obtained from him without a valuable consideration, and that the negro had never been delivered to the defendant. For the purpose of showing the sale to him, the defendant offered in evidence a written bill of sale, (not under seal), from the father to himself for the slave in question, (among others), expressed to be for the consideration of $300, in hand paid, and the defendant offered to prove how the payment of the said consideration had been made. Thereupon, the subscribing witnesses to the bill of sale were examined as to its execution by the deceased, and deposed that he did execute it by signing and acknowledging it and requested them to attest it, and that he had, at the time, capacity to contract. The counsel for the plaintiff then asked one of the witnesses, if he saw any money paid by the defendant to his father, and the witness replied, that he did not, but that he saw a bond delivered to him; and being asked, "What bond?" he said, "The defendant's bond to maintain his father and his mother during their lives." The plaintiff's counsel objected that the contents of that instrument could not be proved by the witness, but that it must be produced in evidence, or its nonproduction accounted for, before the parol evidence was

admissible. But, in reply, the counsel for the defendant insisted, that the parol evidence was admissible, because it had been brought out by the plaintiff's own cross-examination. The court then allowed the witness to state that he heard the bond read and knew its contents, and that they were as before stated. There was evidence given on both sides as to the capacity of the father; and upon it the jury found a verdict
(437) for the defendant, and, judgment being rendered thereon, the plaintiff appealed.

Strange for plaintiff.
No counsel for defendant.

RUFFIN, C. J. It is obvious, that it was material to the defendant to establish, upon the trial, a bargain for the slave for a valuable consideration paid or secured, as there was no conveyance by deed and no delivery. For, although a consideration was acknowledged in the bill of sale, yet that was not conclusive, as the instrument was itself but a parol contract, and it was open to the plaintiff to show that the consideration had not been given. It was, moreover, very material to the defendant's case in another point of view. A principal point in contest was the capacity of the father to contract, and it would be no light evidence on that point that the bargain he made was for a fair price duly secured, and was discreet under all the circumstances, or that the conveyance was obtained in the form of a fair sale without really paying or securing a fair price, or, indeed, any price. The defendant, therefore, undertook to go beyond his bill of sale and prove the valuable consideration and the mode of its payment. The only question is as to the mode of proving the consideration which the defendant alleged on the trial he gave, namely, an undertaking by him to maintain his parents during their lives, secured by his obligation made and delivered at the time he got the bill of sale. Of course the obligation is the only legal evidence of its contents, until it be proved to be destroyed or to be in the plaintiff's possession, and notice given to him to produce it. It is said, indeed, that the plaintiff dispensed with its production by asking the witness a question, which enabled him to state the contents. But we cannot so regard what occurred. The very object of the plaintiff's inquiry was to show that the defendant's undertaking to his father was in writ-
(438) ing, in order that he might require its production. He did not draw out the contents as evidence before the jury; for, at the time he insisted that the contents could not go before the jury. His questions were preliminary questions and, in their nature, intended for the information of the court, in order to ascertain whether the agreement on which the defendant insisted was in that form which precluded oral testimony of it. If it were otherwise the very objection that an agree-

ment is in writing, and therefore ought not to be proved but by the writing, would place the contents before the jury. As it was, the defendant got the benefit of his agreement with his father, without its production and against the objection of the plaintiff; which we think was erroneous. Therefore, the judgment must be reversed.

PER CURIAM. *Venire de novo.*

SAMUEL R. HAYWOOD v. STANFORD LONG, ADMINISTRATOR, ETC.

1. The owner of a slave who is hired out is not answerable to a physician for medicine or medical services rendered the slave at the request of the hirer and without the request or knowledge of the owner.
2. What may be the rights or liabilities in such a case, as between the owner and the hirer, *quære.*

APPEAL from GRANVILLE Spring Term, 1845; *Caldwell, J.*

The defendant, being an administrator, hired to one P. F. Long, for 1843, a slave belonging to the estate of his intestate. During the year the slave was taken sick, and P. F. Long, without the consent or knowledge of the defendant, called on the plaintiff, who is a physician, to attend the slave, and he did so. Upon application to the de- (439) fendant for payment he refused it, upon the ground that he was not liable therefor; and the plaintiff then brought this action for his bill for medicines and attendance, which is admitted to be reasonable. Upon *non assumpsit* pleaded, the court nonsuited the plaintiff, and he appealed to this Court.

McRae for plaintiff.
E. G. Reade for defendant.

RUFFIN, C. J. We think the decision of his Honor good at law. It need not now be decided which of the two, the person by whom a slave was hired out or the person to whom the slave was hired, as between themselves, is bound to provide or pay for the requisite medical attendance during the term. The only question in this case is, whether the physician is to look to the person who employed him for his bill, or is at liberty to charge another person, who did not employ him or have any knowledge of the sickness of the slave or of the plaintiff's attendance. We think very clearly the former. If, indeed, the slave had not been hired out the owner would not be liable for the physician's bill unless there was a request of the owner or a subsequent promise to pay. At least that must be the general rule; though it may be liable to an exception, that where it is a case that may be called one of life and death, or there is a pressing necessity for immediate assistance, the master would be liable for the attendance that was indispensable before there was

a reasonable time and opportunity for notice to the master. But, unless in a case of that kind—if even in that the services of the physician without the request of the owner, and at the instance of the slave or any one else, must be deemed gratuitous in respect to the master. So it was decided in New York, in *Dunbar v. Williams,* 10 Johns., 249. And even the exeception just stated, which is admitted in that case, is very far from being established by authority, as will be seen by the cases cited in *Dunbar v. Williams* and by *Newby v. Wiltshire,* 2 Esp., 739.

(440) *Lord Kenyon* held, indeed, at *nisi prius,* in *Scarman v. Castill,* 1 Esp., 270, that the master was liable for medicine for his servant while in his service, upon the same ground that he was bound to provide food and lodging for him. But surely, if liable at all, he ought not to be until notice of the necessity and his refusal or neglect to provide proper attendance and medicines. But the very reasons given in that case show, that the plaintiff cannot recover; for the liability is confined to the case in which the servant is under the master's roof as a part of his family, and put upon the same footing as that for necessary food, thus placing the legal liability in this case upon the person in possession of the slave, who was also the employer of the plaintiff. In this court there has been no case of this kind before, for we believe it has never been suggested hitherto that the reversioner, if he may be so called, merely as such, was liable for medical services to the slave more than for his food while hired out, where they had been rendered, not at his request, but at that of the possessor. The question, however, we find has been made in an adjoining sister State, whose social condition is similar to our own. In *Wells v. Kennerly,* 4 McCord, 122, the court of appeals in South Carolina held that the general owner was not liable for the doctor's bill, either by the rules of law or the policy of the country, for that person had no more right to throw the expenses of the negro's sickness upon the general owner than to an abatement of the hire during the period of sickness.

It is said, however, here it is different, because by the act of 1798, Rev. Stat., 89, secs. 18 and 19, the support of the slave is imposed on the owner. But that act cannot affect this question, for it is confined to provisions of food, raiment, and lodging, and these are unquestionable charges upon the possessor, unless in a case of a fraudulent hiring by a solvent to an insolvent person with a view to throw the expense of support on the wardens of the poor. Besides, the act expressly requires the wardens to give the owner ten days notice to provide for (441) the slave himself before they can do so and charge him. So in no point of view is the act applicable here.

PER CURIAM. Affirmed.

Cited: Jones v. Allen, post, 474; *Haden v. R. R.,* 53 N. C., 365.

THE STATE v. JOHN INGRAM, ADMINISTRATOR, ETC.

1. When a bond is upon its face exclusively for the use of the State, an express acceptance by an agent for the State need not be shown.
2. In an action on a bond payable to the State and conditioned for the building and keeping in repair of a public bridge evidence that the bond was signed and sealed by the obligors, and was afterwwards found among the official papers of the clerk of the county court, which appointed the commissioners to let out the building of the bridge is sufficient proof of a delivery.
3. When a contractor for keeping a public bridge in repair commits a breach of his contract, and the county court has caused the necessary repairs to be made, the rule of damages in an action for the breach is the value of the repairs needed, and not the sum the county might have paid for them.

APPEAL from ANSON Special Spring Term, 1845; *Battle, J.*

Debt upon a bond, executed by the defendant's testator, Erasmus Ingram, and payable to the State of North Carolina. The substance of the condition of the bond was that the said Erasmus should build a public bridge in the county of Anson, the location of which was described, and for the building of which he had contracted with certain commissioners appointed by the county court for that purpose, and also that he should keep the same in repairs for seven years from 10 October, 1838. The breach alleged was that he neglected to (442) keep the bridge in proper repair. The pleas were *non est factum*, conditions performed, conditions not broken.

Upon the trial the subscribing witness swore, that he attested the bond and believed it was signed by the obligors in his presence, though he had no distinct recollection of the transaction. The clerk of the county court stated that he found the bond filed away among the records of his office. Another witness then deposed that in the year 1842 the bridge referred to in the bond was so much out of repair that the county court found it necesary to have it repaired and appointed for that purpose a committee, who let out the repairs to the lowest bidder, when the witness undertook it and received therefor the sum of fifty-five dollars and ninety- eight cents. Counsel for the defendants insisted that the action could not be sustained as there was no authority to take the bond payable to the State; and, futher, that if it could be sustained the repairs might have been made for a less sum, and proposed to examine testimony for the purpose of showing that fact. But the court was of opinion that the bond, being for the public benefit, might be supported as a voluntary bond; and the proper measure of damages was the sum the county was compelled to pay in consequence of the failure of the defendant to keep up the bridge according to his obligation.

There was a verdict for the plaintiff and, judgment being rendered pursuant thereto, the defendant appealed.

Alexander for the State.
No counsel for defendant.

DANIEL, J. In *S. v. McAlpine,* 26 N. C., 148, this court said that the capacity of the State to take a bond could not be denied. A bond payable to the State for the benefit of the body politic stands upon ground essentially different from one thus payable for the benefit of private persons, as *S. v. Shirley,* 23 N. C., 597. In the latter case there is no presumption of acceptance of the bond by the sovereign, unless there be an actual delivery in the cases and to the persons (443) authorized by the Legislature to take it. But such express acceptance by an agent for the State need not be shown when the bond is, upon its face, exclusively for the use of the State. To such a bond the rule that, from the benefit to the obligee, acceptance is to be presumed, applies with as much reason as if the obligeee was a private person. That the erecting and keeping up of a public bridge are for the use and benefit of the State is not to be questioned. The subscribing witness swore that he believed that the obligors executed the bond in his presence. And the bond was afterwards found in the possession of the clerk of the county court among the papers of the office, which court appointed the commissioners to let out the building of the bridge. This was evidence of a delivery for the State, either to the commissioners or to the clerk of the court.

Upon the next question this court does not concur in opinion with his Honor. The defendants contracted "to keep the bridge in constant repair for seven years"; and for a breach of that part of the contract, the rule of damages is the *value* of the repairs needed, and not the sum the county might have paid for them. The county very properly laid before the jury evidence of the modes of letting out the repairs and the price paid for them, as the means of enabling the jury to say what they were worth. But that did not preclude the defendant from giving evidence that they were *worth less,* according to the usual prices of such labor and materials, so as to let the jury have full information on both sides as to the true value. We think, therefore, that the evidence offered by the defendant was improperly rejected, and, for that reason, the judgment must be reversed.

PER CURIAM. New trial.

(444)

JOHN BAILEY, SR., v. THOMAS MILLER, EXECUTOR, ETC.

1. Where a father made a fraudulent conveyance of slaves to his son, an infant of tender years, and then died, and the slaves were taken possession of by the grandfather of the infant for the use and benefit of the infant: *Held*, that the grandfather was liable to be sued by a creditor of the deceased father as executor *de son tort*.
2. If a fraudulent donee of goods disposes of them to another, who accepts them *bona fide* upon a purchase, or even to keep for the donee, the vendee or bailee would not be executor *de son tort*. But an infant of tender years can neither accept such a gift nor constitute an agent to keep possession of it for him.
3. An infant of tender years cannot be an executor, nor be sued as such.
4. It is not the paper title merely that makes one an executor of his own wrong, but it is the disposition, or the possession and occupation, of the effects that do it.

APPEAL from CAMDEN Spring Term, 1845; *Battle, J.*

Debt against the defendant, to charge him as executor *de son tort* of Francis Ackiss, upon a judgment obtained against the latter in his lifetime at June Term, 1840 of Pasquotank County Court. Upon the trial the evidence was that the slaves, with the intermeddling with whom the defendant was sought to be charged as executor of his own wrong, belonged to and were in the possession of the said Ackiss in 1840; that, afterwards and in the lifetime of Ackiss, the said slaves went into the possession of the defendant, who held and still continues to hold them for his infant grandchild, under a deed of gift, executed by Ackiss to the said child, who was his son, then of very tender years in the arms of a nurse; that his deed bore date 5 February, 1840, and was witnessed by the defendant and kept and exhibited by him, as the title by which he claimed the possession of the slaves; that some five or six weeks after the date of this deed Ackiss sold all the other (445) slaves which he owned, as he said, for the payment of his debts, and from that time he had no other property besides the slaves embraced in the said deed; that at the June Term of the county court of Pasquotank next following, he confessed the judgment upon which this suit is brought, for a debt due by a note given in 1839; and that he afterwards died insolvent, and no administration has been taken out upon his estate.

The defendant object to a recovery upon the ground, (1) That he could not be charged as executor of his own wrong, because he did not claim the slaves in question for himself, but for his grand child under a deed to the latter; (2) That there was no fraud in the deed of gift to the donee.

The court instructed the jury that, however it might be if the donee were of sufficient age to take charge of the slaves and hold them him-

self, yet in this case, where he was a mere infant of such tender years as to be entirely incapable of acting for himself, the defendant, his grandfather, might be charged, as executor of his own wrong, for intermeddling with the slaves, if the deed of gift was fraudulent as against the plaintiff. The question of fraud was then submitted to the jury, who found that the deed was fraudulent and gave a verdict for the plaintiff. Judgment being rendered pursuant thereto, the defendant appealed.

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

RUFFIN, C. J. The conveyance of the father to his son was voluntary and made when the donor was insolvent or on the brink of insolvency, and was clearly void as to debts existing at the time. It has been so found by the jury. Therefore, as respects the present plaintiff, the slaves are still regarded as the goods of the deceased debtor. There is no doubt that a fraudulent donee is liable as executor of his own wrong. *Edwards v. Haskin,* 2 Term, 587. But it is said, that, although that be true, yet one who takes possession as the agent of the fraudulent donee (446) does not become executor, as he has a fair color for his possession, which gives a character to it and shows that he did not intend to administer the goods or in any manner to treat them as the effects of the deceased, which is said upon the authority of *Turner v. Child,* 12 N. C., 25. That case, in which the doctrine held by the majority of the Court seems to us to be caried to the utmost extreme, does not, we think, apply to the present. There, everything was assumed to be *bona fide,* and that the agent continued to act under a sense of duty, and without being aware that the authority which he derived from his principal ceased at his death. His acts had a lawful beginning, and that was sufficient to excuse him, as the court thought. But the contrary is the case here. The origin and continuance of the defendant's possession are tainted with fraud, and without color of authority from any one. If indeed the fraudulent donee disposes of the goods to another, who accepts them *bona fide* upon a purchase, or even to keep for the donee, the vendee or bailee would not be executor *de son tort.* Com. Dig. *Administrator.* C. But that is because there is apparently no wrong in any one in that transaction, and that the possessor has no reason to consider the goods as being of the estate of the deceased. In this case, however, it is begging the question to call the defendant the agent of the donee. He is not his agent. He was never constituted his agent by any act of the donee, who had no capacity for that purpose. The defendant is in no way the agent, except so far as he made himself so. His authority was not conferred on him, but was officiously assumed by him, and but pretended. There-

fore he cannot protect himself under the allegation that he derived the goods under a person who claimed title to them, and, being in possession, assumed to dispose of them. On the contrary, the donee here was incapable of assenting to the gift, and did not take possession and could not take it, and was of such tender age that he could not be executor, nor be sued as such. If, then, the defendant be not liable in this action, no one would be; which is another reason why the case is not within the rule that a bailee of an executor of his own wrong does not also become such executor, since in such case there is a person liable (447) to the creditors. But here there is none unless the defendant be. For if the grandchild were of age to assent to the deed and even to fill the office of executor, he could not be sued by the creditor; as it is not the paper title merely that makes one an executor of his own wrong, but it is the disposition or possession and occupation of the effects that do it. Here the infant sets up no title and has no possession; but the defendant takes it upon himself to set up title on behalf of the infant, to take possession and to defend it for him, although the infant, if a donee at all, is a fraudulent donee. Such unasked interference must be at the defendant's risk; for he had no right or duty to take charge of these negroes as the property of his grandson unless they should turn out to be the grandson's. His possession renders him liable to the deceased's creditors, as executor *de son tort,* in the same manner as it would enable the true owner of the slaves, if a third person, to maintain detinue for them. If this were not so, every insolvent might by collusion with his near relatives, defeat his creditors by conveyances to his infant children.

PER CURIAM. No error.

(448)

JAMES HOLLAND'S HEIRS v. JOHN CROW ET AL.

A *scire facias* to repeal a patient should set out particularly the patent of the plaintiff, or his title derived from a patent, with its boundaries and location; also a copy of the patent, with its boundaries, granted to the defendant or the person under whom he claims, with all their correct names, and also how the two patents conflict; and the *scire facias* should also aver the reasons why the defendant's patent should be canceled. If the defendant denies any of the plaintiff's allegations, issues upon those allegations and denials must be found by a jury; otherwise, the court will not give judgment.

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

This was a petition and *scire facias* by the heirs of an elder against a junior patentee, to vacate a grant, under the act of 1798, Rev. Stat., ch. 42, sec. 31. The petition set forth the plaintiffs' ancestor's and the

defendants' grant, describing them, and alleging that the defendants' grant covered the land previously granted to the plaintiffs' ancestor, and that the defendants and those who claimed under them, were continually harassing them with suits, and praying that the defendants' grant might be declared void. The defendants, in their answer to the petition, insisted that, for certain reasons there mentioned, the plaintiffs' grant was void. The *scire facias* merely recited that "a petition had been filed *by the heirs of James Holland, deceased,* under the act of 1798, praying that the grant to John Crow for certain lands may be repealed and vacated," and commanded the sheriff "to make known to John Crow (and others named as assignees, that they should be and appear, etc., then and there to show cause, if any they have, why such grant or patent to the said John Crow should not be repealed and vacated." Upon the return of the *scire facias* executed, the following issues were submitted to a jury: (1) Was James Holland, the ancestor of the plaintiffs in this case, the senior patentee? (2) Did the defendant, John Crow, know of the existence of the plaintiff's
(449) grant, at the time the said Crow obtained his grant? The jury found both of the issues in favor of the plaintiffs. On the trial a witness on the part of the plaintiffs proved that, in a conversation with Crow, he informed the witness that he had made an entry on the Holland old field: when the witness observed: "Why did you do so? Do you not know that Holland long since obtained a grant for the said tract?" Crow answered: "I do, but understand the title is not good, and it will not cost me much anyhow; I will try it." The jury having found the issues as above stated, his Honor, believing the defendants' grant was obtained by fraud and upon false suggestions, ordered, adjudged and decreed that the defendants' grant be vacated. From this judgment the defendants appealed.

Francis for plaintiffs.
J. G. Bynum for defendants.

DANIEL, J. The Act of Assembly, originally passed in 1798, Rev. Stat., ch. 42, sec. 31, declares that, when any person claiming title to lands under a patent shall consider himself aggrieved by any patent issued to any other person against law, or obtained by false suggestions, surprise or fraud, such person so aggrieved may file his petition in the Superior Court of Law of the county in which the land may lie, together with an authenticated copy of the said patent; which petition shall briefly state the grounds wherefore such patent should be repealed and vacated. Whereupon, a writ of *scire facias* shall issue out of the said Superior Court to the claimant under such patent, re-

quiring him to show cause why such patent, thus improperly issued and obtained, should not be vacated. The *scire facias* shall be the leading process, and all the proceedings thereon shall conform to the general rules of practice at law in such cases, except that, when the *scire facias* cannot be personally made known, then the court shall order publication in the newspapers for the defendant to appear and plead, or judgment by default on the *scire facias* (450) would be rendered against him. When the defendant appears he will demur or plead and make up issues and try them by a jury, according to the practice on *scire facias* at law. In England, the King's patents are enrolled on the common law side of the Court of Chancery. And when the King, or any person, is aggrieved by the issuing of a patent for any of the causes before mentioned, the Attorney General causes a *scire facias,* in the name of the King, to issue to vacate it, which *scire facias* contains proper averments of the causes on which it is founded. The *scire facias* issues out of the Court of Chancery. The judgment is that the patent be vacated and brought into the Court of Chancery, that the Chancellor, who has affixed the great seal to it, may take off the seal. In this State patents are not enrolled in the Superior Courts of law; therefore the Legislature required the person aggrieved to file a petition in the Superior Court in his own name, as a foundation for the *scire facias.* The plaintiff's petition first, and then his writ of *scire facias,* founded on it, should set out with particularity his own patent, or his title derived from a patent, with its boundaries and location; and also a copy of the patent, with its boundaries, which had been granted to the defendant or those under whom he claims title to the land, with all their correct names, and also how the two patents conflict. And the writ of *scire facias* should not only recite the patent of each party, but should also make all the material averments why the defendant's patent should be canceled. When all these things have been done by the plaintiff and the defendant brought into court by a proper service of the *scire facias,* the latter will be enabled to demur or plead understandingly; and if any issues are made up the jury can plainly see what they are to try, and the court will know from the record what judgment to render. In the case now before us there are no plaintiffs mentioned in the *scire facias* by their Christian and surnames, no description of Crow's patent by its date, boundary, location or interference with Holland's patent. The defendants have not put in any pleas to the writ and action, which are material (if their answers were to be considered by us as pleas) except that part which states that the lands patented by Holland was not (451) by law subject to entry, and that therefore the patent to Hol-

land was *void,* and not *voidable.* Upon the plea no issue has been made up and found by a jury. The plaintiffs' petition states that the land patented by Crow was identically the same land which had been patented by Holland; but there was no averment of this fact by the *scire facias;* and the verdict, which has been found by the jury, does not show to the court that there was any interference in the two patents, or that there was any lawful cause or ground for the court to vacate the patent to Crow. We therefore think that the judgment must be reversed and the cause remanded to the Superior Court, when a repleader may be allowed, or such other steps taken as may be agreeable to right and law.

PER CURIAM. Reversed and remanded.

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(452)

THE STATE v. WILLIAM TOLEVER ET AL.

1. Where the prosecutrix was in the peaceable possession, with her family, of a dwelling-house and its appurtenances, and four persons entered the yard of the house with hostile or unkind feelings and manner, against the will of the prosecutrix, to injure and insult her, and refused to go away when she bade them, and they had a common purpose in so doing, and abetted each other: *Held,* that such acts and purposes rendered the parties liable to an indictment for a forcible trespass.
2. An indictment for forcible trespass will lie at common law if the facts charged amount to more than a bare trespass.
3. When the name of the county is mentioned in the margin of the indictment, and it is stated that the dwelling-house on which the forcible trespass is alleged to have been committed was "*there* situate and being," this must refer to the county mentioned in the margin.

APPEAL from ASHE, Spring Term, 1845; *Bailey, J.*

The defendants, William Tolever and Caroline Tolever, were tried upon the following indictment, to wit:

State of North Carolina, } *ss.* Superior Court of Law,
Ashe County, } Spring Term, 1843.

The jurors for the State, upon their oaths, present that William Tolever, late of the said county, laborer, Elizabeth Tolever, Caroline Tolever and Louisa Tolever, all late of said county, spinsters, on 1 April, 1843, with force and arms into a certain yard and dwelling house, then situate and being, and then and there in the possession of Polly Long, unlawfully, violently, forcibly, and with a strong hand, did enter into, and then and there unlawfully, violently, forcibly, and with a strong hand, did throw certain filth and dead carcasses into

the said house, she, the said Polly, then and there being therein, and then and there did remain cursing, abusing and threatening the said Polly for a long time, to wit, for one half hour, and other wrongs then and there did, to the great terror of the said Polly Long, then and there being, and against the peace and dignity of the State. (453)

It is unnecessary to detail the testimony introduced on the trial, as the instructions of the presiding judge sufficiently indicate its general nature. The judge instructed the jury that if the defendants, now on trial, together with Elizabeth, the mother, and Louisa, the other daughter of William, went into the space that had been enclosed as a yard in a peaceful and friendly manner they would not be guilty; but if the four went into the said space with hostile or unkind feelings and manner, against the will of Polly Long, to injure or insult her, and there remained against her will and refused to go away when she bid them, and they had a common purpose in so doing and abetted each other, although there was no fence around the said space, yet such acts would constitute a forcible trespass and the defendants would be guilty. The jury found the defendants guilty. A motion was then made in arrest of judgment, for that the offense is not charged to have been in the county of Ashe. This motion was overruled and judgment being rendered pursuant thereto, the defendants appealed.

Attorney General for the State.
Boyden for defendants.

DANIEL, J. The prosecutrix was quietly in possession of the premises under a parol lease then expired. She was personally present in the house with her family of children when the defendants entered the yard of the house. The judge told the jury that if the two defendants, with Elizabeth Tolever and Louisa Tolever (the two latter of whom were not tried), entered the yard with hostile and unkind feelings and manner, against the will of the prosecutrix, to injure or insult her, and there remained against her will and refused to go away when she bid them, and that they had a common purpose in so doing and abetted each other, such acts would make them guilty of a forcible trespass. An indictment will lie at common law for forcible entry, if it contain such a statement as shows that the facts charged amount to more than a bare trespass; as by violently (454) taking and keeping possession of lands with menaces, force and arms, without the authority of the law, 1 Rus., Crimes, 283. Four persons entered the yard of the nearly defenseless prosecutrix, with

a common intent (as the jury have found) to abet each other in injuring and insulting, and actually insulting her with abusive language and gestures, and thrusting from the yard, through her broken door, the carcass of a dead animal. These facts show that it was more than a bare trespass. They had a tendency to alarm some, and cause others to commit breaches of the peace. We think that the charge of the court was correct.

Second. The defendants moved in arrest of judgment, because the offense is not, as they say, charged to have been committed in the county of Ashe. The answer is that the county of Ashe is set forth in the margin of the indictment; and the body of the indictment then proceeds to mention the defendants by name "of said county," and that they "into a certain yard and dwelling house, *there* situate and being, and then and *there* in possession of Polly Long, unlawfully did enter, etc." The words *"there situate and being"* must refer to the county mentioned in the margin of the indictment. *S. v. Bell,* 25 N. C., 506. This motion was properly overruled by the court.

PER CURIAM. No error.

Cited: S. v. Whitfield, 30 N. C., 317; *S. v. Bordeaux,* 47 N. C., 244; *S. v. Caldwell, ibid.,* 471; *S. v. Tuttle,* 145 N. C., 488; *S. v. Jones,* 170 N. C., 755.

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(455)

CHARLES DUFFY v. JOHN A. AVERITT.

1. An objection to the process by which a defendant is brought into court comes too late after he has appeared and pleaded in bar of the action.
2. A warrant from a justice in a civil case need not on its face be returnable on a certain day or at a certain place, but only within thirty days. The day and place are to be notified by the constable who serves the warrant.
3. A warrant from a justice in a civil case requires no seal.
4. A warrant from a justice in a civil case must name the proper parties and state a cause of action within the justice's jurisdiction, both as to the nature and the amount of the demand.
5. The overseer of a road may recover in his own name the penalty for hands not working on the public road. He is not bound nor required to sue "for himself and the county," since the fine is to be applied by the overseer to the keeping up of the road.
6. Judgment on a warrant by an overseer of a road for $30 for thirty hands not working on a public road, when the jury find only $28, will not be arrested. As there are no declarations on a warrant, the court will

intend there were thirty counts for $1 each per hand, and then there may be judgment on the twenty-eight counts proved, and not on the other two.

7. The warrant for the penalty for not working on a road need not show on its face that the road was in the county in which the warrant issues. Warrants never have a venue. The objection, even if the case had been in a court of record, must have been taken advantage of by a plea in abatement.

8. A warrant for a penalty must set forth the acts which give the penalty to the plaintiff in order to show "how the sum is due," and this is a matter of substance. But the plaintiff may amend by agreeing to claim no costs from the defendant.

APPEAL from ONSLOW, Spring Term, 1845; *Settle, J.*

This action commenced by a warrant, returnable before a justice of the peace, for a penalty or forfeiture of thirty dollars, incurred by the defendant for refusing or neglecting to send thirty hands to work one day on the public road, lying between Doctor's Bridge and the Dark Entry in Onslow County. The warrant was as (456) follows, to wit:

State of North Carolina,
Onslow County.

To any lawful officer of said county to execute and return within thirty days from the date (Sundays excepted). Whereas, Charles Duffy, overseer of the public road leading from the Doctor's Bridge to the Dark Entry, complains that John A. Averitt justly owes him the sum of thirty dollars for his nonattendance on said road for thirty hands, which said Averitt is entitled to send on said road, and failing to do so, after being duly sworn according to law. These are therefore to command you to bring the said Averitt before me or some other justice of this county, to answer said complaint. Given under my hand, etc. J. M. FRENCH, J. P.

The defendant, in the county court, pleaded general issue. On the trial it appeared in evidence that the defendant was the owner of twenty-eight hands liable by law to work on this district of road, and had been duly notified by the plaintiff, who was the overseer of the said district of road, to send all his hands liable to work on the road at a certain time and place, for the purpose of repairing the same. After the jury was impaneled in this case, and before a verdict was rendered on the same, the defendant's counsel moved to dismiss the suit or nonsuit the plaintiff, on the ground: (1) That the warrant was defective, because it did not refer to the statute, which gave the penalty sued for, and that omission was fatal; (2) That there was no seal annexed to the name of the justice of the peace who granted the

warrant. By the consent of the parties, his Honor reserved these questions; and the plaintiff then proved that the defendant, after being duly notified, failed to send twenty-eight hands to work on the road for one day, and a verdict was rendered by the jury in favor of the plaintiff for the sum of twenty-eight dollars. Upon the rendition of the verdict the defendant's counsel moved in arrest of
(457) judgment: (1) That the warrant did not conclude against the form of the statute, which gave the penalty or forfeiture sued for, nor did it refer to any statute; (2) On account of the variance of the sum demanded in the warrant, and that found by the jury; (3) That the warrant does not appoint some certain time and place within thirty days for the defendant's appearance before a justice of the peace; (4) That the warrant does not set forth that the district of road of which the plaintiff claims to be overseer is in the county of Onslow; (5) That the action for the forfeiture for not working on the road is *qui tam* in its character, and is so declared to be by the Revised Statutes, ch. 104, sec. 39, and that the plaintiff could not maintain this suit under this warrant.

His Honor overruled all these objections, refused to arrest the judgment and rendered judgment in favor of the plaintiff, from which the defendant appealed.

Attorney General for plaintiff.
No counsel for defendant.

RUFFIN, C. J. Most of the numerous points in this case seem to have been taken with but slight consideration.

A warrant is both the process to procure the defendant's appearance, and is in the place of the declaration, to inform him of the nature of the demand. Several of the objections in this case are for defects in point of form in the warrant, considered as process merely. Were they good, if taken in proper time, they come too late here. That for the want of a seal was taken pending the trial, upon the idea, apparently, that the defect might be cured by the verdict. But, in respect of the time of making the objection, the case is necessarily the same, whether it be made after the case is submitted to the jury on the issues, or after the jury returns a verdict; for, after the trial has begun the court will not suspend it for the sake of letting in technical objections, but will proceed with the trial with a view to a determination on the merits. But the objections to the process, as such, had been before waived by the plea in bar; for, as the defendant
(458) may appear without process, his appearance and plea admit him to be in court on sufficient process. The truth is, however, that both of the objections of that kind are altogether unfounded.

A warrant need not contain any special day or place of return. This turns entirely on the act of Assembly. That, Rev. Stat., ch. 62, secs. 7, 8, provides that warrants shall be made returnable before some justice of the peace of the county, on or before thirty days from the date thereof, Sundays excepted. To that, this warrant conforms. It further provides that, upon serving a warrant, the constable, if required, shall take from the defendant a bail bond, "conditioned for his appearance at a certain time and place, *therein to be specified,* before some justice of the county, where the warrant issued"; and then it adds, that the warrant "shall be determined on the day *appointed by the officer* serving the warrant as aforesaid." The day and place for the return are, therefore, not to be designated in the warrant, but by the constable.

Nor is a seal requisite to a warrant. It is requisite to a State's warrant for a criminal charge. *Welch v. Scott, ante,* 72. That is at common law. But warrants in civil cases owe their origin to the legislation of this State exclusively. The provisions of the acts respecting the jurisdiction and proceedings before justices of the peace out of court, render it plain that the process and proceedings are to be in writing, and, of necessity, verified by the signature of the justice. But there is nothing in the acts from which it can be inferred that the warrant, judgment, or execution is to be under seal; and it has not been the practice to affix a seal to any of those proceedings. Indeed, neither of the judges of this Court remembers to have seen a seal to a civil warrant.

But, as has been mentioned, a warrant is not merely process, but it is intended to serve the purpose of a declaration, as far as a declaration is deemed necessary in petty causes. For the act, after specifying the subject of a justice's jurisdiction (including a penalty incurred under a statute), requires that "the sum claimed, and how due, shall be expressed in the warrant." Consequently, that instrument must name the proper parties and state a cause of action within the justice's jurisdiction, both as to the nature and amount of (459) the demand. To the warrant, viewed in this aspect, several of the defendant's objections are taken; and they will now be considered.

The plaintiff is Charles Duffy, "the overseer of the public road leading from the Doctor's Bridge to the Dark Entry"; and the suit is for a penalty claimed for the neglect of the defendant to send his slaves to work on that road, after due summons. It is said that the plaintiff cannot maintain the suit in his own name alone, because the statute, Rev. Stat., ch. 104, sec. 39, makes all the forfeitures, incurred under it, recoverable, the one-half to the use of the prosecutor, and the other half to the use of the county. We believe the objection

would be well taken if it depended on that section of the act. But we hold that the whole act and the subsequent one of 1842, ch. 65, taken together, remove the objection and sustain the suit in its present form. The first act on the subject was that of 1784, ch. 227, sec. 7, which, among many penalties, gave one of five shillings a day, "to be recovered by warrant and paid to the overseer and by him to be expended in hiring other hands to work on said road." Then, in 1786, ch. 256, it was enacted, that all forfeitures under the act of 1784 should be recovered by action of debt, one-half to the use of the person suing, and the other half to the use of the State, unless otherwise provided for in the said act of 1784. In relation, however, to the particular kind of forfeiture, now under consideration, acts passed in 1817, ch. 935, and in 1825, ch. 1287, which, after increasing the penalty to ten shillings, provided that in all cases where "overseers of roads are compelled to warrant their hands" for neglect to work, the overseers shall be competent witnesses to prove the notice, and the county shall pay the costs if the defendant be unable. These several provisions make it very evident that this penalty on a hand for not working was not intended to be within the general provisions of the act of 1786, and to be recovered, one-half to the use of an informer and the other half to the use of the State, but was specially provided for and made recoverable by the overseer for the
(460) purpose, exclusively, of being expended on the road. In digesting those acts into the Revised Statutes, ch. 104, the forfeiture of one dollar a day for each hand is reënacted; but the provisions for a recovery by warrant, and for the payment to the overseer, and the appropriation of it in his hands to hiring other hands on the road are omitted. But enough is retained to show the omission to have been mere oversight; for in sec. 11, the acts of 1817 and 1825, as just quoted, are incorporated—whereby an overseer, "who shall be compelled to warrant his hand," is yet made a competent witness and exonerated from the costs of the warrant. That makes it apparent that it was understood the overseer was still to sue. But it must be admitted that, by reason of the express provision of sec. 39, it was at least doubtful whether he could sue. But the difficulty is entirely removed by the act of 1842, which was, doubtless, intended to supply the omission in the Revised Statutes and restore the old law of 1784; for it enacts "that all fines *recovered* and collected *by the overseers* of public roads from persons who fail to work on the same shall be applied by the *overseers* to keeping their roads in repair." Here the right of *recovery* is expressly given to the overseer, officially. This objection therefore fails.

The debt demanded in the warrant is $30 for the nonattendance on said road of thirty hands, which the said Averitt was bound to send on the said road, and the jury found a verdict for the plaintiff for $28. This formed another ground for the motion in arrest of judgment. There is no doubt, that, when a statute gives a penalty a sum certain, the declaration must claim that precise sum, and the recovery be accordingly; otherwise, there would be a variance between the pleadings and the evidence and verdict. But that does not determine the present question. If this statute gave a single penalty of $30 for the neglect of a hand, the suit could not be sustained for $28 for such neglect of one hand. But that is not our case. The penalty here is $1 for each hand, and it cannot be denied that were this a proceeding in a court of record, the whole sum of $30 might (461) be demanded in the commencement of the declaration, and that, yet there might be thirty separate counts, each for a penalty of $1, for the absence of one hand, and the plaintiff would be entitled to a verdict on as many of the counts as he proved and could have judgment on them. It is precisely like the common case of a suit on two bonds, where each is declared on separately in which each count is, to this purpose, in the nature of a separate action. But this being a warrant, there could of course be no such thing as several counts. Yet there is no reason why two or more penalties should not be included in the same warrant; for the principle of precision in pleading which requires separate counts in declarations, has never been applied to warrants. In the first place, the act of 1794, Rev. Stat., 62, sec. 21, makes a warrant good without regard to form, if the essential matters be set forth in it. In the next place, the act requires that the warrant should only express the sum demanded and "how due," and, according to the universal usage, those words are satisfied by stating the debt to be due by bond, note, statute, or the like, without a more particular description as to time, place, or other circumstances necessary in a declaration. The warrant, therefore, must be supported, if by any intendment, it can be fairly taken as demanding what might be demanded in a declaration, although it might, in a declaration, be necessary to declare for different parts of the demand in separate counts. This may be done here, and it is, indeed, according to the truth of the case, by considering this warrant to be for thirty distinct penalties of one dollar each. Upon proving the defendant liable for twenty-eight of them, there is no reason why there should not be judgment for them, although he had not incured the other two.

It is furthermore objected, that the jurisdiction of penalties is local and, therefore, that the warrant ought to have shown that the road

was in the county in which the suit was brought. But the parts of the act respecting proceedings before justices, already quoted, clearly dispense with such a statement. Warrants never have a *venue.*
(462) Besides, the fact must have been proved on trial; for, without such proof, the jury could not have given their verdict; and for that reason, the defect, if one, would be cured by the amendment act. Rev. Stat., ch. 3, sec. 5. Indeed, had this been an action in a court of record the objection ought to have been pleaded in abatement. *Greene v. Mangum,* 7 N. C., 39.

Lastly, it is objected that the warrant does not set forth the acts which give the penalty to the plaintiff, nor refer to them by the conclusion, *contra formam statutorum.*

And this, we admit, the warrant ought to have done, in accordance with the provision that it must express the sum "and how due," and we also admit that the defect is in a matter of substance, and is therefore fatal, unless removed by an amendment.

An amendment has been moved for, and the case last quoted is in point, both as to the power and propriety of allowing it in this Court, and as to the terms on which it should be allowed. The defendant could only take advantage of it in arrest of judgment; and then he would not recover costs, but only prevent the plaintiff from recovering them from him. The Court will not deprive him of any part of that advantage. But as the suit is brought to enforce a public right, and the justice of the case, as found by the jury, will be promoted by the amendment, we feel bound to allow it on condition that the plaintiff shall give up all claim to costs, and each party shall pay his own costs, in the same manner as if the judgment were arrested.

PER CURIAM. Judgment accordingly.

Cited: Hiatt v. Simpson, 35 N. C., 73; *Williams v. Beasley, ib.,* 113. *Lincolnton v. McCarter,* 44 N. C., 431; *London v. Headen,* 76 N. C., 74; *Allen v. Jackson,* 86 N. C., 322; *S. v. Jones,* 88 N. C., 685; *Butts v. Screws,* 95 N. C., 219; *Caldwell v. Wilson,* 121 N. C., 453; *Parker v. Express Co.,* 132 N. C., 130.

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(463)

DEN ON DEMISE OF DAVID T. CALDWELL AND WIFE v. JAMES M. BLACK.

1. The court below should not present to this Court for its determination points which did not arise from facts proved on the trial, but from alleged facts made the foundation of a motion for a new trial.
2. Where one who was seized in fee of lands, which she took by descent from her father, died before the passage of the act of 1808, Rev. Stat., ch. 38,

sec. 1, intestate, leaving no issue, nor brothers nor sisters, but a mother and paternal uncles: *Held*, that the mother took no estate in this land, but that it descended immediately to the uncles.

3. *Held, further*, that upon the subsequent birth of half-sisters of the *propositus*, the estate of the uncle was divested and became vested in such half-sisters as the heirs of the *propositus*.

4. *Held, further*, that although a half-brother was born subsequently to the passage of the act of 1808, yet, as his sisters were born before that period, and the estate of the uncles had thereby become divested, the last born son was equally entitled with his sisters to a share of the inheritance. If the estate of the uncles had not been divested by the birth of the sisters before the act of 1808, it would not have been divested by the birth of the son subsequent to the passage of that act, which alters the course of descent as regards the half-blood.

5. Although the statute of limitations in such a case might have run so as to bar the first heir who took, yet this shall not affect the preferable heir who comes in subsequently, for the latter does not come in under the first heir, but above him, and defeats his estate, and, therefore, is not bound by his acts.

6. A person suing in ejectment, who was under a disability which prevented the statute from running against him, is entitled to recover his share, although there are tenants in common with him whose right of action is barred by the statute.

7. An action of ejectment by husband and wife is not barred by the statute of limitations, although the defendant may have been seven years in possession under color of title, the possession having commenced during the disability of the wife.

APPEAL from MECKLENBURG, Special Term in May, 1845; (464) *Pearson, J.*

EJECTMENT for 749 acres of land in Mecklenburg; and upon the evidence the case was this: Thomas Davidson was seized of the premises, and devised them to his only child and heir, Mary L. Davidson, in fee simple, and died in 1801. The said devisee entered and died in 1802, intestate and without leaving issue, or brother or sister, or the issue of such, and leaving her mother surviving her. Just before her death her mother intermarried with William Davidson, and by that marriage she had issue four children: Margaret, born in 1803 (and eleven months after the death of Mary L. Davidson) and married to one Blake in 1822; Sarah, born in 1804, married one Johnson in 1824, and divorced *a vinculo matrimonii* 1830; Harriet, one of the lessors of the plaintiff, married in 1825 to David T. Caldwell, the other lessor of the plaintiff, by whom she has issue living; and William F. Davidson, born in 1810.

Upon the death of Mary L. Davidson, William Davidson entered into the premises, claiming them in right of his wife, as having descended to her from her deceased daughter. Mrs. Davidson, the

mother, died in 1812. But William Davidson continued in possession of the premises up to 1823, when he sold and conveyed them by deed of bargain and sale in fee to John Black, who immediately entered thereupon and continued in possession until his death, and then the defendant entered, claiming as the son and heir of said Black, and has been in possession ever since. In May, 1833, Blake and his wife, Sarah Davidson, and William F. Davidson, by a deed of bargain and sale (purporting to be made by those persons, and by David T. Caldwell and his wife, Harriet, of the first part, but which was never executed by Caldwell and his wife), conveyed the premises in fee to the said Black, then in possession. William Davidson is still living. This action was brought on 29 August, 1844.

Thereupon, the counsel for the defendant insisted, that the land descended from Mary L. Davidson to her mother in fee whereby her husband, William Davidson, became entitled as tenant by the (465) curtesy, and that the plaintiff cannot recover during the life of the said William. But the court instructed the jury that, although the premises might have descended from Mary L. Davidson, immediately on her death, to her mother, yet upon the subsequent births of the lessors of the plaintiff, Harriet, and her sisters and brother, they took as the preferable heirs, to the exclusion of their mother; and, therefore, that William Davidson never was tenant by the curtesy of the premises.

The defendant's counsel further insisted that, although the lessor of the plaintiff, Harriet, would have three years after the coverture ended to enter or bring her action for the premises, yet the present action, upon the demise of David T. Caldwell and his wife, could not be sustained, because the husband was under no disability and he had suffered the defendant to continue in possession for more than seven years since his intermarriage. But the court refused to so instruct the jury and instructed them that the plaintiff was entitled to recover, notwithstanding such lapse of seven years.

The counsel for the defendant insisted thirdly, that the right of entry of the lessors of the plaintiff was barred because two of the coheirs were barred by the adverse possession of the defendant and his father for more than seven years after their disability ceased; namely, Sarah, who was divorced in 1830, and William F., who came to full age in 1831. But the court refused to give that instruction to the jury, and instructed them that, admitting the legal position taken for the defendant to be correct, yet by taking the deed in 1833 from Blake and wife, Sarah, and William F. Davidson, the defendant made himself tenant in common with the lessor of the plaintiff, Harriet, and his possession ceased to be adverse to her.

Under the foregoing instructions the jury found for the plaintiff. To the exceptions taken to the opinions of the court upon the foregoing points is added this further statement: That the defendant moved for a new trial, and thereupon made it appear that Mary L. Davidson left, surviving her, two paternal uncles and (466) the issue of a third, who was then dead; and thereupon it was insisted that Mary L. Davidson came to the land by descent from her father, and that upon her death it descended to her said uncles and cousins in fee, subject to a life estate therein of her mother; and, therefore, that the possession of William Davidson and his alienees was adverse to those persons, and that the statute of limitations began to run against them, and so continued to run against the sisters and brother of Mary L. Davidson, even if they, as they came in *esse,* succeeded to the inheritance in the place of the uncles and cousins. But the court was of opinion that it was not material in this case whether the estate descended to Mary L. Davidson or not, for if it did, as she had no paternal brother or sister of the whole or half blood, her maternal brethren would take in preference to the more remote collateral relations on the part of the father; and, that, although the uncles and cousins, if they had continued to be the heirs, might have been barred by the adverse possession against them, yet the possession could not operate against the preferable heirs, who were afterwards born; and, as the brother, William F. Davidson, was not born until 1810, he succeeded to no part of the premises, but the whole belonged to the three sisters. The court therefore refused to disturb the verdict; but, being willing that every question that could be raised should be presented for the decision of the Supreme Court, his Honor consented to annex this matter to the exception. From the judgment the defendant appealed.

Alexander and J. H. Bryan for plaintiff.
Boyden & Osborne for defendant.

RUFFIN, C. J. The Court must protest against all attempts to raise points for decision here which did not occur on the trial of the cause. The rights of the parties are to be determined on the facts proved, and not on any supposed or suggested on a motion for a new trial. Such is the state of this case; for after the verdict, no further evidence, properly speaking, could be heard, and therefore the Court could not judicially know that Mary L. Davidson left uncles and cousins. That fact might, it is true, have been brought (467) forward as a reason for a new trial; but that would be on the ground of surprise or oversight of counsel, and would be exclusively for the determination of the presiding judge. If, then, there was any

force in the last point made this Court could not act on it, but would, notwithstanding, be obliged to affirm the judgment. As we think, indeed, there is nothing in it, we have no objection in this case to express our opinion on it, as it may prevent further litigation.

We think all the points taken for the defendant extremely plain.

First. With respect to the title of the *femme* lessor of the plaintiff. It is immaterial whether the *propositus* took by purchase or descent, for that could only affect the right of succession of the mother and the paternal relations as between themselves; and in either case, that is to say, whether upon the death of M. L. Davidson, the land descended to the mother or the uncles and cousins, that descent was but temporary, and her posthumous brethren became entitled upon their births and divested the previous descent. This was undoubtedly a principle of the common law, Co. Lit., 11 b., and it prevailed in this State, and was adapted to the course of descent established by statutes here, until altered in 1823. *Cutlar v. Cutlar,* 9 N. C., 324. In that case, not only the general doctrine was acknowledged, but it was declared that it must prevail in a case of half-blood, where they are entitled to inherit. There is no doubt, however, that the *propositus,* being the sole heir of her father, took by descent and not by devise, as the will gave her the same estate precisely that she would have taken without it. Therefore, under the acts of 1784, the mother in this case was not entitled to a life estate, but the descent was immediately in fee to the *paternal relations. University v. Holstead,* 4 N. C., 289. But, in such a case, it was finally established in *Ballard v. Hill,* 7 N. C., 410, that the half-blood of the maternal line, in nearer de-

(468) gree, was preferred by the acts of 1784 to the more remote collaterals of the paternal line; and, whatever doubts may have been formerly entertained or really existed on that question, it would be impossible for us, after that decision and the abrogation of the acts of 1784 by the legislation of 1808, to disturb it without producing the most serious evils. Consequently, according to *Cutlar v. Cutlar,* the birth of a child by the mother's second marriage displaced the estate of the uncles and cousins; and upon the subsequent birth of other children of that marriage, at least up to 1808, the inheritance opened to admit them as coheirs with those previously born, of whom the lessor of the plaintiff, Harriet, was one. The only remaining question upon her title is, as to the extent of her interest, in respect to the share of the land belonging to her, as raised upon the motion for a new trial. Upon that his Honor held, as the three daughters only were born before 1808 and the son, William F., was born in 1810, the latter was entitled to no part of the land, because by the fourth rule of the act of 1808, where the inheritance comes by descent to the

propositus, it descends to the next collateral relations of the person last seized, who are of the blood of the ancestor, from whom it first descended; and, therefore, in this case, the uncles and cousins were preferable as the heirs to William F., and the estate vested in them at the death of the *propositus* would not be displaced for him. And we should think so too, if the question were between the brother and the paternal relations; for it is certainly competent to the Legislature, before a person comes *in esse,* to change the course of descent so that such a person shall not succeed as heir, although, but for such change of the law, he would have been heir at his birth. The heir takes, not by contract or any inherent right, but by law; and therefore the right of succession is subject to be modified as the Legislature pleases until some person comes into being in whom it vests. But in this case the question is not between those persons, but is between the sisters and the brother; for the right of the paternal relations had been divested by the birth of the first daughter, who took the whole, as against them, and subject not to be defeated, but only to open (469) for the benefit of afterborn brothers and sisters, and the inquiry is whether, according to the true construction of the act of 1808, such of those persons as were born before that time can insist on keeping the whole and excluding a child born afterwards. We think not. The principle of *Bell v. Dozier,* 12 N. C., 333, is directly in point. There is nothing in the statute which gives a preference to one brother or sister over another, according to the periods of their respective births. That is not the ground of the argument for the plaintiff against the admission of William F. Davidson. But it is that by the letter of the act he cannot inherit as a maternal brother of Mary L. Davidson because she left relations of the blood of her father, from whom the land descended to her. But it is manifest that he is excluded in that case, not on the ground of any unfitness that he should inherit, but on the ground that the paternal relations are the more proper heirs of land descended from the father. In other words, his claims are postponed to those of the paternal relations solely for the sake of the latter. Therefore, when the paternal relations, though existing, cannot inherit, it is the same thing within the purpose of the act as if they did not exist. Hence, it was said in *Bell v. Dozier,* the words "capable of inheriting" must be understood as added to the description of the paternal relations who are to exclude other nearer relations. And this principle is even the more applicable to the fourth and fifth canons than to the sixth; for the fifth canon is express that, when the inheritance is transmitted by descent and the blood of the ancestor from whom it descended is extinct, it shall then descend to the nearest collateral relations of the *propositus* of either line. So it

is clear that, under the act of 1808, William F. Davidson, though born in 1810, would inherit with his sisters, if there had been no brothers of Thomas Davidson; and therefore, as they do not take, the accident of their existence at the death of Mary L. Davidson ought to form no impediment to his participating in the inheritance with his sisters. We are therefore of opinion that Mrs. Caldwell is en-
(470) titled to one undivided fourth part of the premises, and the defendant to the other three.

We should have been of opinion with his Honor upon the question, whether William Davidson was tenant by curtesy, even upon the supposition, that the *propositus* took by purchase, and that the descent was at first, to the mother. For the wife had but a defeasible fee, and the very fact necessary to constitute him tenant by the curtesy, namely, the birth of issue, defeated his title by the coming in *esse* of a preferable heir. But that is put entirely out of the case by the defendant's admission that the uncles and cousins were the heirs, and not the mother.

The objections founded on the statute of limitations are next to be considered. In relation to the possession of the premises by William Davidson, it is to be observed that it could not put the statute in motion even against the uncles, as he held without color of title. But if it had been otherwise, it would not have affected the after-born children, for a preferable heir does not succeed to the heir who first took, in the sense of coming in under him, and, therefore, to be bound by his acts. On the contrary, he comes in above him and defeats his estate altogether. Suppose the uncles had sold the estate before Mrs. Davidson had a child by her second marriage; clearly such a child, when born, would nevertheless take. Therefore the *laches* of the uncles cannot bar the infant heir if their acts could not.

Upon the point that the lessors of the plaintiff are barred because two of the coheirs were under no disability and would be barred by the possession of the defendant since 1823, under the deed of William Davidson, it is unnecessary to advert to the reasoning on which his Honor answered the objection—on which we give no opinion; nor to recur to any general reasoning from the positions that, although tenants in common must join in personal actions, yet that generally they must sever in real or mixed actions, because they have several freeholds and different titles. It is thus unnecessary because we have an adjudication of this Court upon the very point, in *McRae v. Alexander*, 12
(471) N. C., 321; in which it was held that in ejectment upon the demises of all the heirs, there should be judgment against the plaintiffs as to the shares of his lessors, who were under no disability, and for him as to the share of one who was under disability.

The remaining ground, that the action by the husband and wife cannot be sustained because seven years have run during the coverture and the female plaintiff must now wait until the coverture is ended before she can enter or sue, we must say is altogether new to us, and seems to be wholly untenable. In general, the husband and wife must join in actions for the recovery of the wife's lands. The freehold is hers, and the right of entry also, and an action brought by them survives to her. The object is to regain her seizin. Where they are in possession the husband cannot in pleading, allege the seizin to be in him, even though he adds that it is in right of his wife (*Polybank v. Hawkins,* Doug. 329; *Took v. Glasscock,* 1 Saund. 250, e); but it must be stated that the husband and his wife were seized in their demesne, as of fee, in right of the wife. Such is the case, even when the husband and wife have been at one time seized during the coverture. Much more must the wife be joined when the object is to recover land of the wife of which there was an adverse possession at the time of the marriage and has been ever since; for the husband gains no estate in those lands by his marriage, nor until he enters and reverts the seizin. *Gentry v. Wagstaff,* 14 N. C., 270. Consequently, the husband could not bring an action in his own name alone, nor make a lease. It was said, indeed, at the bar, that the action was essentially that of the husband exclusively, as the wife had no capacity to make the supposed lease stated in the declaration, but the husband alone. But that must have been said without much research, as surely the capacity to convey in fee includes that of leasing for years. Besides, the Stat. 32 Hen. VIII, ch. 28, sec. 2, has been reënacted here, Rev. Stat., ch. 43, sec. 9, and that expressly enables husband and wife to make leases of her lands; and the lease set forth in the declaration, being a fiction,
is always supposed to be good, if the lessors had capacity to (472)
make any lease and had the right to enter into the premises,
there to make the lease. But we need not further consider the question on principle; for this point also is concluded by the authority of adjudications. The same case of *McRae v. Alexander,* 12 N. C., 321, involves also the point before us, as more than seven years elapsed during the coverture of Mrs. Henderson, and the only demise, on which a recovery was had, was that by her husband and herself for her share; this being still a stronger case, because here the adverse possession began before the marriage, whereas there it commenced during the coverture. Besides, were it in action for personal things, which, when recovered, belonged wholly to the husband, the action of the husband and wife is saved from the operation of the statute against the husband by the disability of the wife. *Allen v. Gentry,* 4 N. C., 411; *Davis v. Cook,* 10 N. C., 608. Both of those cases also give to the plaintiff in

this action the cumulative disabilities the female lessor of the plaintiff labored under, of infancy and coverture, from the commencement of the adverse possession to the bringing of this suit.

PER CURIAM. No error.

Cited: *Williams v. Lanier*, 44 N. C., 35, 36; *Johnson v. Prairie*, 91 N. C., 163; *Cameron v. Hicks*, 141 N. C., 36.

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(473)

WILLIE JONES, ET AL. v. THOMAS T. ALLEN.

1. The hirer of the slave, and not the general owner, is liable in an action for medicine and medical services rendered the slave while the term of hiring continued, the services and medicine not being rendered at the request of the owner, but at the request of the hirer.
2. A particular custom in a county, that the general owner shall pay these expenses, does not vary the law.

APPEAL from PERSON, Spring Term, 1845; *Caldwell, J.*

Assumpsit for $60 commenced by warrant. The facts appearing on the trial were these: The plaintiffs are physicians, practicing in partnership, and declared for professional services, rendered in 1843, to a female slave, the property of the defendant. The plaintiffs proved that Mr. Samuel Watkins hired the said slave for the year 1843 from the defendant's agent, and that while the slave was so in his possession she was ill and required medical aid, and that he, at the instance and request of the said Mr. Samuel Watkins, rendered the services for which this action was brought. The plaintiffs then offered to prove by the same witness that, in the section of country (Caswell County) where the hiring took place, it was the universal custom for the owners of the slaves to pay the expense of the medical attendance requisite for the slaves, while hired out, without charging the hirer with it. This evidence was objected to by the defendant's counsel and excluded by the court. The court charged the jury that upon the testimony submitted to them the plaintiffs were not in law entitled to recover. There was a verdict and a judgment accordingly for the defendant, from which the plaintiffs appealed.

(474) *Kerr for plaintiffs.*
Venable for defendant.

RUFFIN, C. J. The question in this case is the same that was decided in *Haywood v. Long*, *ante*, 438, except that the plaintiff offered

to prove "that in the section of the country where the hiring took place it was the custom for the owner, and not the hirer, to pay for medical attendance on a slave," which was rejected by the court.

No doubt the liability of the general and temporary owners of hired slaves for the expenses of their maintenance and medicine during sickness is often and, perhaps, generally the subject of special contract between them. But, without some stipulation on that point, the general rule of law, as we have held it in the case mentioned, must operate, and cannot be controlled by any understanding to the contrary in particular neighborhoods. There is no established general custom on the point; for, if there was that would, in truth, be the law. But a mere local usage in a small part of the country cannot change the law, and give the plaintiffs an action against one man, when they were employed by another.

PER CURIAM. No error.

Cited: Cooper v. Purvis, 46 N. C., 143; *Long v. Davidson*, 101 N. C., 175.

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(475)

WILLIAM T. ALEXANDER v. ALEXANDER SPRINGS.

1. Where one has a deed of trust for personal property, other than slaves, to secure a debt, and he admits the debt has been paid, and permits the person who made the deed to keep the possession of the property and sets up no claim: *Held*, that the title to this property is revested in the person who had conveyed in trust, without any formal reconveyance.
2. A *fieri facias*, although it creates a lien on property which prevents the owner from selling it, unless subject to the lien, yet does not divest the property out of the debtor until a seizure, and, even after the seizure, the sheriff gains but a special property such as is necessary for the satisfaction of the debt, and leaves in the original owner the general property, which is an interest that he may convey and sell at law.
3. Therefore, where the plaintiff received a *bona fide* conveyance of property, which was subject to the lien of a *fi. fa.*, and the defendant, after the date of such conveyance, levied executions from a justice on the said property, and the same was sold by the sheriff and constable jointly, the plaintiff is entitled to recover from the defendant, who caused the property to be sold under the justice's execution and received the amount of such sale, the excess beyond what was sufficient to satisfy the sheriff's execution.

APPEAL from MECKLENBURG, Special Term, May, 1845; *Pearson, J.*

Trover for a wagon, four horses, and other articles of personal property, which the plaintiff claimed under a deed made to him on

29 April, 1843, by one Hunter, in trust to secure the payment of certain debts therein specified. On 10 May, 1843, the defendant seized the goods, and on 20th of the same month, in conjunction with the sheriff of Mecklenburg, sold them for the price of $650, of which the defendant received the sum of $306 and the sheriff the residue.

On not guilty pleaded, the defendant showed judgments before a justice of the peace against Hunter, and writs of *fieri facias*
(476) thereon, dated 20 March, 1843, and then delivered to the defendant, who was a constable. The executions, each, had a levy on these articles endorsed by the defendant, bearing date 3 April, 1843. After the seizure by the defendant, by his consent, the sheriff levied on the same goods a *fieri facias,* issued on a judgment rendered in the county court, and bearing *teste* in February, 1843; and, when the sale was made the defendant received out of the proceeds a sufficiency to discharge the executions in his hands amounting to the sum of $306, as above mentioned, and the sheriff retained the surplus on account of the execution he held. Among the articles sold were five bales of cotton, which were not conveyed to the plaintiff, and produced the sum of $83; and that is part of the said sum of $306 received by the defendant. The [redacted]dant also gave in evidence a deed of trust for most of the articles [redacted]eyed to the plaintiff, which Hunter made to one Williamson in April, 1841, for the purpose of securing certain debts. But the plaintiff showed that those debts had been paid before any of the judgments were rendered, and that Williamson so admitted at the time of the sale by the defendant, and also declared that he had no claim to the property under the deed to him.

The plaintiff alleged that the executions in the hands of the defendant had not been levied before the conveyance from Hunter to the plaintiff, and that the levies endorsed thereon were antedated. Upon that question much evidence was given on both sides, which it is unnecessary to state, except the following: A witness for the defendant deposed, that on 7 April, 1843, the defendant went to the house of Hunter and informed him that he was obliged to raise the money before May court, as the creditor threatened to sue him, to which Hunter replied: "I can do nothing before my crop is made, and you might as well advertise and sell"; and the defendant then said: "I dislike to do so, as you are in such low health." Hunter then remarked that he had five bales of cotton which he could sell, and the defendant agreed to take them in payment at $4.50 per 100 lbs., which is the same cotton before mentioned. The defendant did not then take anything into his pos-
(477) session, but said he would send for the cotton in a few days.

The counsel for the defendant insisted that he had levied the executions before the making of the deed to the plaintiff, and that the

testimony of the last witness, if believed, was evidence that he made a levy on 7 April, and moved the court so to instruct the jury. But the court refused to instruct the jury that the said witness proved any facts which in law amounted to a levy on 7 April; but left it to the jury to determine upon the whole evidence whether there had been a levy by the defendant at any time before 29 April, with directions if they should find affirmatively to give a verdict for the defendant.

Counsel for the defendant further insisted that the plaintiff had no title to the articles which had been conveyed to Williamson in 1841, and prayed the court so to instruct the jury. But the court refused, and informed the jury that as the articles were not slaves, but chattels, that pass by parol, the payment of the debts mentioned in the deed, the subsequent possession of the property by Hunter, and the declarations of the trustee, as proved, were evidence from which they might, if they thought proper, infer that Williamson had abandoned to Hunter his claim to the property.

Counsel for the defendant further insisted that the *fieri facias* in the hands of the sheriff, tested in February, 1843, defeated the operation of Hunter's deed to the plaintiff. But the court refused to [redacted] that instruction, and instructed the jury to the contrary.

Counsel for the defendant further insisted that as the sheriff acted under a *fieri facias* of a *teste* prior to the deed to the plaintiff, the plaintiff could not have an action of trover against the sheriff for seizing or selling any or all of the articles in question, and that, as the defendant, by taking them into his possession, gained a right superior to that of the sheriff, the plaintiff could not maintain this action against him. But the court refused to give the instruction as prayed for, and instructed the jury that after as much had been sold as was sufficient to satisfy the debt to the sheriff the residue was wrongful, unless the defendant had levied before to the plaintiff, and as the de- (478) fendant made the sale of the residue or concurred in the sale thereof by the sheriff, that the plaintiff would be entitled to recover in this action.

The jury found a verdict for the plaintiff, assessing the damages to $223, that being the sum of $306 received by the defendant, deducting therefrom the sum of $83 produced by the sale of the cotton. From a judgment accordingly the defendant appealed.

Alexander and Osborne for plaintiff.
Boyden for defendant.

RUFFIN, C. J. In the argument here the counsel has not contended for the first point made at the trial. The witness certainly did not prove a levy on 7 April, there being nothing more than the expression

of Hunter's willingness for a sale and the defendant's reluctance to advertise one. There was no actual seizure of anything, nor any other act or declaration of the debtor or of the defendant amounting to a present appropriation of property for the satisfaction of the debt. So far as that conversation could be evidence of an understanding of the parties to it that there had been a levy made at that time or before, it was left with other evidence to the jury, and they have found that there was none. It was, however, argued that the court ought to have instructed the jury that the defendant's return was *prima facie* evidence of a levy on 3 April. The answer is, that the court did probably so instruct the jury; but that, of course, is not stated in the case, because no exception was taken on that point. But if the court did not give such instruction it would not be erroneous, for it does not appear that it was asked, and a party cannot complain that the court did not do a thing which he did not ask to be done.

Upon the second point we think the reasons given by his Honor conclusive of the correctness of the opinion that the jury was authorized to find upon the evidence, that the property conveyed to Williamson
(479) had been revested in Hunter, although there was no written conveyance.

As to the next question, it is very clear that a *fieri facias,* although it creates a lien on property, which prevents the owner from selling it, unless subject to the lien, yet does not divest the property out of the debtor until a seizure, and even after a seizure the sheriff gains but a special property, such as is necessary for the satisfatcion of the debt, and leaves in the original owner the general property, which is an interest which he may sell and convey at law. *Payne v. Drew,* 4 East 523; *Popelston v. Skinner,* 20 N. C., 290; *Jones v. Thomas,* 26 N. C., 12.

The law upon the fourth point results necessarily from that just stated, for if the plaintiff gained by the conveyance to him the legal property, subject to a lien for the satisfaction of the execution from court, when that execution was satisfied the absolute property, freed of all lien, in the residue of the goods was in the plaintiff. The sheriff had no right to proceed to sell them after he had been already satisfied; and if he had done so he would have been answerable for it, and the defendant with him, for having procured him to act thus and receiving the proceeds of the illegal sale. But we do not understand that to have been the case, in point of fact. On the contrary, the true transaction was that both officers sold; each upon his own process, and they divided the money according to their relative priorities. They adopted the course of acting in conjunction for the sake of the ingenious puzzle, as it seemed to them, in which it would involve the plaintiff. They argued

speciously that the sheriff had a right superior to that of the plaintiff; and the defendant's right was preferable to that of the sheriff: *Ergo*, the defendant's title must be paramount to the plaintiff's. Now, that would be true if their several priorities arose out of the same fact or depended upon the same principle. But that is not the case. The preference of the sheriff to the plaintiff is given because the *teste* of his execution was before the execution of the deed; whereas the preference given or denied to the defendant as against the other two parties respectively depends upon the date of his levy: Rev. Stat., ch. (480) 45, sec. 16; *Jones v. Judkins*, 20 N. C., 591. Therefore the defendant might get a priority over one of those parties and not over the other; and, by levying before the sheriff, he postponed the court execution and got the preference for his own; while, by not levying before the deed was made, the property was effectually conveyed as against him. The defendant has no connection with the execution in the sheriff's hands, and therefore, cannot set it up for the purpose of defeating the plaintiff's deed. It is his own levy, which determines the defendant's right against each of the other parties, but it operates against each of them severally. Therefore, the defendant's syllogism fails. The truth is that, as far as the amount of his execution, the sale by the sheriff was lawful and is to be regarded as having been made by him; and for the purpose of satisfying the justice's executions, the sale was made by the defendant.

The defendant had the right, in virtue of his preference over the sheriff, to sell the cotton under his executions and take the money; and, as that was not converted to the plaintiff, he has no cause to complain of that application of it. As the defendant had the benefit of that fund, he got all he was entitled to, and the judgment must be affirmed.

PER CURIAM. No error.

Cited: *Murchison v. White*, 30 N. C., 53; *Penland v. Leatherwood*, 101 N. C., 515.

(481)

WILLIAM BROOKS v. DRURY MORGAN.

1. In the case of a petition for the condemnation of an acre of land for the site of a public mill, under our act of Assembly, Rev. Stat., ch. 74, sec. 2, where the county court ordered a condemnation of the land, and refused an appeal from that order to the party owning the land: *Held*, that the Superior Court was right in ordering a *certiorari* to bring up the proceedings before them.
2. Although an appeal which is in the nature of a new trial on the facts and merits cannot be sustained unless expressly given by statute, the

Superior Court will always control inferior magistrates and tribunals in matters for which a writ of error does not lie, by *certiorari* to bring up their judicial proceedings to be reviewed in the matter of law; for, in such case, the *certiorari* is in effect a writ of error, as all that can be discussed in the court above are the form and efficiency of the proceedings as they appear upon the face of them.

APPEAL from UNION, Fall Term, 1844; *Manly, J.*

The present defendant, Morgan, filed his petition in the county court of Union County at July Term, 1843, setting forth that he owned a tract of land lying on Rocky River, in the county of Stanly, and also a quarter of an acre on the opposite side of the river, and situate in Union County, and that, except the said quarter of an acre, the present plaintiff, Brooks, was the proprietor of the land lying on the river in Union and opposite to the land of Morgan, situate in Stanly, as aforesaid. The petition stated that he wished to build a public grist mill on the said stream, and that he could not do so, unless he could get one acre of the said land of Brooks, opposite his own as aforesaid. The prayer was for a summons to Brooks, and that the court would order four freeholders to lay off, view and value on oath, an acre of the said land of Brooks, and also an acre of the land of the petitioner opposite, and report their opinion and proceedings to the court.

At October Term, 1843, Brooks appeared by attorney, but
(482) put in no answer, and the court made an order appointing four persons "to lay off and value an acre of the land of the defendant in the petition mentioned and report."

At January Term, 1844, the transcript of the record states that the report of the commissioners was filed, but it does not set it forth. The transcript then proceeds as follows: "In this case it is ordered and adjudged that the report of the commissioners be confirmed. Whereupon, it is further ordered that the said report be recorded; and that said Drury Morgan have leave to erect a mill, as prayed for in his petition, on said acre of land, and that he pay the costs of the suit; and thereupon the said Morgan pays down in court for the use of the said defendant, Brooks, the sum of ten dollars, the valuation of the acre of land condemned by the said commissioners." From that order Brooks prayed an appeal, which was refused by the court.

At February Term, 1844, of the Superior Court Brooks moved for and obtained a *certiorari* to bring up the proceedings, upon his affidavit, in which he stated, besides the refusal of the court to allow him an appeal, that Morgan owned on the Union side of the river, not only one-quarter of an acre, but eighteen acres of land, on which he had erected a mill, which was in full operation at the filing of the petition. In an affidavit exhibited by Morgan, in answer to that of Brooks, he admits that he owned eighteen acres of land on the south or Union side of the

river, and that he had a mill on it, the race of which ran through it; but he says he was not able to erect a mill thereon that would be of public benefit or of profit to himself, for the want of some way to get the water off from the wheels into the river again, and that an acre of Brooks' land, as laid off, was essential for that purpose.

Upon the case being called in the Superior Court counsel for Morgan moved to quash the *certiorari,* because it had improvidently emanated, inasmuch as no appeal was given by law in this case, and therefore the Superior Court could not take jurisdiction of it in any way. The court refused the motion, but allowed the defendant, Morgan, to appeal, and ordered the affidavits and proceedings, hereinbefore (483) stated, to be sent up as presenting the question between the parties.

Osborne for plaintiff.
Alexander for defendant.

RUFFIN, C. J. The Court is of opinion the decision was right. We agree that no appeal lies in such a case for the purpose of a rehearing in the Superior Court, but that the decision upon the facts by the county court and freeholders is final. It was undoubtedly so under the act of 1777, ch. 122, which gave this peculiar proceeding, and which is silent as to allowing an appeal; and the general provisions for appeals in the act of that year, ch. 115, secs. 75 and 77, we have held, do not apply to summary and peculiar proceedings, not according to the course of the common law, but prescribed by statute under particular circumstances. *R. R. v. Jones,* 23 N. C., 24; *Collins v. Haughton,* 26 N. C., 420. It is insisted, however, for the appellee in this Court, that under the Rev. Stat., ch. 74, sec. 17, appeals are given "in all cases arising under that act," and that, consequently, this case is included. But we think that section is, by necessary construction, to be confined to those parts of the act which relate to the overflowing of land by mill ponds and the recovery of damages therefor. By the act of 1809, upon the petition of a person aggrieved by the erection of a mill, the damages were to be assessed by a jury on the premises, and an appeal was expressly given to the Superior Court in that case; but it was not provided how or where the trial should be, whether in court, or on the premises by a second jury, convened under order of the Superior Court —which, indeed, would be but appealing from one jury to another, each being unaided by the advice of the court. To remove doubts on that point and effectuate what was no doubt the intention from the first, the act of 1813, ch. 863, was passed "to amend the act of 1808," and, by the second section, it was provided that in cases arising *under the said act,* the trial of the appeal should be at bar. That is the origin

(484) of section 17, chapter 74, Revised Statutes, and shows its true sense. Besides the very nature of the provision shows that it cannot embrace such a proceeding as that now before us; for the act contemplates only the case of an assessment by a jury of damages from the overflowing of land, which requires no view, while the principal duty of the freeholders under the act of 1777 is to lay off an acre of land on opposite sides of the stream, as well as to value them, and to that it is indispensable to be on the spot. The direction, therefore, for a trial at bar by a jury is altogether inapplicable; and it could not be intended that there might be an appeal, in order merely, that the Superior Court should appoint four other freeholders to go on the premises, who would not be more likely to decide there according to the law and right of the case than the first set. And this is put before all cavil by Rev. Stat., ch. 4, sec. 4, which in enumerating the cases, in which there may be appeals, confines the appeal, in cases of controversies about mills, to the single one of dissatisfaction with the verdict of a jury on a petition for an injury by the erection of a mill. We are satisfied, therefore, that Brooks was not entitled to an appeal with the view of entering into the merits of this dispute in the Superior Court; for the Legislature does not contemplate that the decision of the freeholders nor of the justices as to the matter of fact should be annulled by an appeal. And if the only purpose of the *certiorari* was that of being a substitute for an appeal of that kind, we should hold that it ought to have been quashed upon the appellant's motion, since the county court did no wrong by refusing the appeal. That is, indeed, the ordinary use of the writ in this State, because in almost every case our law gives an appeal, upon which there is a trial *de novo* or a rehearing in the appellate court, and, when deprived of the right of appeal, the party has a right to a *certiorari* as a substitute for it. But that is not the only application of this remedy in use here; much less allowed by the common law. It has often been used as a writ of false judgment, to correct errors in convictions and judgments of justices of the (485) peace out of court. But it is not restricted even thus far; for at common law it is, as Mr. Chitty observes, 2 Genl. Pr., 374, "a legal maxim that all *judicial* proceedings of justices of the peace, upon which they have decided by conviction or *order* (such as an illegal order for turning the highway or the like) whether at general or special sessions, or individually, and either by general or particular statute, are of *common right* removable into the King's Bench by *certiorari*, unless that remedy has been expressly taken away by particular enactment." It is stated that even when a statute says that particular cases shall be finally determined in the quarter sessions, yet that does not oust the jurisdiction by *certiorari*, because the court understands

therefrom that it was meant merely that the facts should not be reëxamined. Therefore, although an appeal, which is in the nature of a new trial on the facts and merits, cannot be sustained unless expressly given by statute, the Superior Court will always control inferior magistrates and tribunals in matters for which a writ of error lies, not *by certiorari*, to bring up their judicial proceedings to be reviewed in the matter of law; for in such case "the *certiorari* is in effect a writ of error," as all that can be discussed in the court above are the form and sufficiency of the proceedings, as they appear upon the face of them. The Superior Court, being our highest court of original jurisdiction, has always exercised the superintending control which the King's Bench has in England, as far as necessary to the preservation of the common right of the citizen. Such a jurisdiction is indispensable in a free country where the principle of arbitrary decision is not acknowledged, but the law is held to be the true and only standard of justice. It never could be intended by the Legislature that summary adjudications of justices out of court, or in session, should, however erroneous in point of law, conclude the citizen; and although the party affected by them may, perhaps, insist that they are void and resist them *in pais*, or sue those who act under them, it is much better to allow him at once and directly to subject them to revision and reversal if found to be against law. It was, doubtless, upon this ground that the prin- (486) ciple came to be incorporated, as a maxim, into the common law of England. It is equally essential to the uniformity of decision and the peaceful and regular administration of the law here that there should be some mode for correcting the errors, in point of law, of proceedings not according to the course of the common law, where the law does not give an appeal; and therefore, from necessity, we must retain this use of the *certiorari*. Suppose, for example, that the county court had ordered that the original petitioner should have leave to erect a mill on Brooks' land without paying the valuation, or that the order was that the freeholders should lay off and value an acre of the defendant's land, and not one of the petitioner's also, whereby the defendant would be deprived of the privilege given to him by law of getting from the court leave to build a mill, instead of the petitioner; or that the petitioner should pray for the condemnation of an acre of land of the defendant, not lying on the opposite side of the river from the land of the petitioner, but containing a good mill seat on the same side with the petitioner, above or below, and that court should so order; in all these instances it is plain that the order would be in direct violation of the act and of common right, and, therefore, as no appeal is given, it must be the duty of the Superior Court to correct the wrong by superseding and quashing the order. Whether there be any such error

in this case we have not the means of judging, nor, indeed, is it open to this court upon the present appeal to say. For the appeal is from an interlocutory order on a collateral motion, upon which the whole record is not necessarily sent up, but only such parts as his Honor thought useful to the question presented for our decision, which is, therefore, confined to that single question. We have not even, in this case, the report of the freeholders, on which the order of the court was founded; so that it is clear it was intended the action of the court should be restricted to the naked point whether the *certiorari* ought to be quashed *quia improvide emanavit,* or ought to be allowed for any purpose. And, as we think, clearly it is a proper remedy to correct (487) any error in the matter of law in this proceeding, though in that respect only is it proper, we hold that the decision of the Superior Court appealed from, was right.

PER CURIAM. Affirmed.

Cited: Webb v. Durham, 29 N. C., 132; *S. v. Saluda,* 30 N. C., 491; *Britt v. Patterson,* 31 N. C., 201; *Commrs. v. Kane,* 47 N. C., 291; *Hartsfield v. Jones,* 49 N. C., 311; *Minor v. Harris,* 61 N. C., 323; *Biggs, ex parte,* 64 N. C., 205; *S. v. Swepson,* 83 N. C., 588; *Porter v. Armstrong,* 134 N. C., 450; *S. v. Tripp,* 168 N. C., 154.

JAMES GATHINGS, ADMINISTRATOR, v. ENOCH WILLIAMS.

1. The record sent up to this Court should not state the points of law arising on the trial which were decided by the judge below against the party in whose favor is given the final judgment, from which the other party appeals.
2. Where a marriage is between persons, one of whom has no capacity to contract marriage at all, as where there is a want of age or understanding, or a prior marriage still subsisting, the marriage is void absolutely and from the beginning, and, as between the parties themselves and those claiming under them, no rights whatever are acquired by such marriage.
3. And whether a marriage was void or not may be inquired into by any court in which rights are asserted under it, although the parties to the marriage be dead.
4. In the trial of an action for a slave, a party was permitted to prove by parol the contents of a bill of sale under which he had claimed and held possession of the slave for more than thirty years, the bill of sale having been destroyed by the burning of the register's office.

5. The uninterrupted possession of a slave for a long time, even before the act of 1820, Rev. Stat., ch. 65, sec. 18, affords a strong presumption of a good title in the possessor, unless reasonably rebutted by a fiduciary relation, an acknowledged bailment, disability of the one alleged to be the real owner, or the like.

(488)

APPEAL from MONTGOMERY, Spring Term, 1845; *Pearson J.*

Detinue for a slave, Dick, the issue of a female slave named Olive; and the plaintiff claimed him under a sale by one Henry Williams, and the defendant claimed as the administrator of Joseph Herring and as the administrator of Nancy Williams. Upon the trial the case appear-to be this: Joseph Herring owned the negro Olive (the mother of the slave in controversy), and in 1796 made a deed of gift of her to his daughter, Nancy Herring, but reserving therein the use of the negro to himself for life; and in that year Joseph Herring died, and Henry Williams and Nancy Herring intermarried. After the death of the said Joseph, his widow and children divided his property among them, and Williams and his wife took possession of Olive as her property, and from that time (the latter part of the year 1796), up to October, 1836, Henry Williams was in possession of the said Olive and her issue, claiming and treating them as his own. It, however, appeared that in 1789 Henry Williams intermarried with Sarah Parker, who shortly afterwards eloped and never lived with him again, but she lived up to 1825. From the intermarriage of said Williams and Nancy Herring they were reputed and lived together as man and wife, and had a large family of children, among whom was the present defendant. She died in 1818, intestate, and during her life never set up any title in herself to the negroes, nor claimed the possession, but acquiesced in the exclusive possession held by Williams and the title claimed by him. In 1836 the defendant obtained administration of the estate of his mother, and claimed the negroes and got them out of the possession of Henry Williams, and while they were so out of his possession Henry Williams made a contract of sale of the slave Dick to the plaintiff and executed a bill of sale, and in a few days afterwards the said Henry regained possession of Dick and delivered him to the plaintiff and received the purchase money, $600. The defendant again got Dick into his possession and, after a demand and refusal, the plaintiff brought this action in February, 1837. The defendant subsequently took out administration also on the estate of Joseph Herring. For the purpose of showing the conveyance from Herring to his daughter the plaintiff (489) produced a copy of the deed, which purported to be made by said Herring to his daughter and to be attested by two witnesses, and he showed that Henry Williams had been in possession of the original from 1796 until after this suit was brought, and claimed the said

negroes under it, and that it had been subsequently burnt in the court house, and that the subscribing witness had been long dead. The defendant objected to the reading of the said copy, without proof of the execution of the original, but the court admitted it.

Counsel for the plaintiff moved the court to instruct the jury that upon the evidence they might presume a valid conveyance from Joseph Herring or his administrator to Henry Williams or to Nancy Williams, alias Herring; and the court gave the instruction that such conveyance to the said Nancy might be presumed.

Counsel for the plaintiff also moved the court to instruct the jury that, after the death of the said Nancy, the validity of the marriage, which was in fact celebrated between her and Henry Williams, could not be questioned by the defendant, but as her administrator he was concluded thereby; and, further, that the jury might presume upon the evidence, if necessary to the plaintiff's title, a conveyance from the said Nancy to the said Henry. And the court gave the instruction as prayed for in respect to the presumption of a conveyance; but, as that rendered the other part of the instruction unnecessary the court declined giving the same, though his Honor deemed it correct in point of law.

There was a verdict for the plaintiff, and judgment being rendered accordingly, the defendant appealed.

Strange, with whom was Winston, for plaintiff.

(493) RUFFIN, C. J. If it were admitted that the instruction prayed for as to an estoppel on the defendant to deny the marriage of his parents, was correct, and that it was erroneous to refuse it, the judgment rendered in favor of the person against whom the error operates could not be affected; for that would be no ground for reversing it, nor could it for that reason be affirmed if, for some other error against the appellant, it ought to be reversed. It is to be regretted, therefore, that such points should be stated in the record, as they almost necessarily draw the Court into discussions not material to the decision of the cause, in order to avoid an inference from our silence of an approbation of the position. Such is the case on this occasion, as counsel for the plaintiff has pressed this point in the argument here. We have therefore to say that we think that part of the instruction was properly refused, not because it was immaterial, but because it was entirely erroneous. The death of one of the parties to this marriage makes no difference as to the power of inquiring into its validity for any and all purposes. There is a distinction in the law between void and voidable marriages where, even, they were regularly solemnized. The latter, which are sometimes called marriages *de facto*, are such as are contracted between persons who have capacity to contract marriage,

but are forbidden by law from contracting it with each other, as to which, therefore, there was a jurisdiction in the spiritual courts to declare the nullity of the marriage. But until the nullity was thus declared, as an existing marriage it was recognized as valid both in the canon and the common law; and, as there can be no proceeding in the ecclesiastical court against the parties after their death or that of one of them that event virtually makes the marriage good *ab initio* to all intents, and the wife and husband may have dower and curtesy and the issue will be legitimate. Co. Lit., 32, 33. But where the marriage is between persons, one of whom has no capacity to contract marriage at all, as where there is want of age, or understanding, or a prior marriage still subsisting, the marriage is void absolutely and from the beginning, and may be inquired of in any court. For, although (494) in such case there may be a proceeding in the ecclesiastical court, it is not to dissolve the marriage, but merely, for the convenience of the parties, to find the fact and declare the marriage thereupon to have been void *ab initio*, and no civil rights can be acquired under such a marriage. It is said to be no marriage, but a profanation of marriage, and the *factum* is a nullity. Thus, "if a man seized of land take a wife, and, during the marriage he taketh another wife, and the husband die, leaving both wives, the latter shall not have dower, because the marriage between them is void. And if a woman take a husband, and, living the same husband, she marrieth another, who is seized of land, and the second husband dieth, she shall not have dower of his land: *causa patet.* Perk. 3, 304, 305." The same doctrine is laid down by *Lord Holt* in *Hemming v. Price,* 12 Mod., 432, and is found in *Riddlesden v. Wogan,* Cro. Eliz., 858, and in many other cases. Bigamy repels the right to administer on the estate of the husband or wife and to a distributive share, and to the acquisition by the husband of the personal property of the wife by the marriage. Upon these points there are numerous cases in the English books; and we have acted on the same principles in this State. *Irby v. Wilson,* 21 N. C., 508; *Brinegan v. Chaffin,* 14 N. C., 108. As to the manner of inquiring into matters of this sort, it cannot be doubted that it must be by the jury, as of any other question of fact or mixed question of fact and law. Owing to the peculiar division of jurisdiction between the ecclesiastical and common law courts in England it was held in early periods that no special matter avoiding a marriage, as bigamy for example, could be specially pleaded in a real action, but that the plea must be in the general form of *ne unques accouple in loyal matrimonii,* and that, upon issue joined thereon, a writ was sent to the bishop of the diocese within which the other party alleged the marriage to have been celebrated, and his certificate in return was conclusive both of the fact and legality of the

marriage. Dyer, 368; *Robins v. Crutchby*, 2 Wils., 122. But that necessarily could only extend to marriages within England, for (495) the bishop had no better means of inquiring into the fact of marriage in another country than the civil judge, and had no more authority to pronounce on its legality. Hence it is clear law in England that as to foreign marriages the plea must conclude to the country and the trial be by the jury and not by certificate. *Ilderton v. Ilderton*, 2 H. Bl., 159. *A fortiori* it must be so here, as we have no bishops who have a legal ecclesiastical jurisdiction to determine on marriages and certify them. Of course this conclusion is a complete answer to the notion of an estoppel, for what the law pronounces void cannot estop. It may be true that, as respects third persons, people who hold themselves out to be man and wife may be responsible, as if they were what they profess to be, as a man may be liable for articles furnished to a woman he calls his wife and lives with. But it cannot affect the right of property as between themselves.

With respect to the opinions given against the defendant, which alone are properly before us, as the defendant is the appellant, we concur with his Honor. If the doctrine of admitting an ancient deed, that is, one more than thirty years old, without proof of execution, is to apply to any conveyance of a chattel, it ought to do so to this; as the possession of the property and the custody of the deed have been, during the whole time, in the same hands under a notorious claim of title, and it is actually proved that the witnesses have both been long dead. If then the original had been produced it would seem that, under the rule, it ought to have been read. If that be so, as its destruction while in the custody of the law has been clearly established, a copy is necessarily evidence, for the copy is sufficient to establish the contents of the original in such a case, and that is the whole purpose for which the original would be produced. But, without determining that point, we think it was evidence, and very strong evidence, in aid of the length of time and other circumstances, on which the jury might and ought to presume a conveyance from Joseph Herring, the original owner of the slave. Here a man has been in exclusive possession of a female (496) slave for forty years, taking her immediately upon the death of the former owner, and raising a number of children from her, and all the time claiming them under a deed from the former owner, which he had in his possession and showed, under which a life interest was reserved to the maker of the deed, and the absolute property given to a person under whom the possessor claimed. The unqualified possession for so great a period, by itself, affords a high presumption of a title; but when to it is added the fact that the possessor really had an instrument purporting to be a deed from the former owner, that never

was impeached by any relative or representative of the former owner, it amounts to plenary evidence on which to found a presumption that there was a conveyance by this instrument, as a genuine one, or by some other.

In like manner, as between themselves, we think the actual possession of Henry Williams, which is stated in the case to have been exclusive and on a claim of right by him against every person—including, therefore, Nancy Herring—continued from 1796 to 1818 in the lifetime of Nancy Herring, without any claim of title by her, and with acquiescence in his claim of title and possession; and such possession of Williams continued farther to 1836, without any question of its rightfulness by any person claiming under her, does afford a very strong presumption in fact and law that in some manner he had acquired her title, whatever it was. It is true that those two persons lived together, and that, though not man and wife, they were reputed and acted as such; and, therefore, it might be a question in which of them the possession was, as *prima facie* it would be deemed to be with the title. But that point is not left to inference, as it is stated affirmatively that Henry Williams had the possession, and that it was claimed exclusively by him, and that in that claim the other party acquiesced without setting up any in herself. Under such circumstances the character of the possession is not dubious, but clearly in Henry Williams upon an assertion of right in himself adverse to all others. As Nancy Herring was then *sui juris*, she is affected by such possession, as any other person would be; and there can be no (497) doubt that her action for the slave would have been barred by the statute of limitations. So, too, the possession for the great length of time is ground for presuming a conveyance from her as from any other person. That we ought in this State to apply such a presumption to slaves in a peculiar manner is clearly to be deduced from the act of 1820, which makes a possession that would protect the possessor from the action of the owner under the statute of limitations, that is, three years adverse possession, the owner being under no disability, amount in itself to a title. That act does not reach the present case, because Nancy Herring died two years before it passed. But the policy which dictated it requires the court to adopt and apply the doctrine of the presumption of a conveyance to the case of slaves in a peculiar manner. So much of the substance of our citizens consists of slaves, and the right of property in them is so vigilantly guarded, and the inconveniences arising from divesting the possessors of female slaves after long possession and the charge of bringing up their families are so manifest, that the Legislature felt bound to make the short adverse possession of three years constitute a good title; and in like manner calls

upon the courts and juries to presume a good title upon long possession, unless reasonably rebutted by a fiduciary relation or an acknowledged bailment, disability of the owner, or the like.

PER CURIAM. No error.

Cited: Williams v. Brawley, post, 536; *Calloway v. Bryan,* 51 N. C., 571; *Koonce v. Wallace,* 52 N. C., 197; *Sims v. Sims,* 121 N. C., 299.

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(498)

DOE ON DEMISE OF SUSANNAH CRISSMAN v. AARON CRISSMAN.

1. A testator devised as follows: "I give to my wife a life estate in the land and plantation whereon I live," etc. After other provisions, he proceeds: "To my son Aaron I give a horse, etc., my land and plantation that I have before mentioned in this will, with all the farming utensils, etc., with all the implements of husbandry; and it is my will that he take care of his mother and smooth the pillow of her age." The will adds: "It is my desire, if there should be any misunderstanding about any parts of my will, that the persons concerned select two discreet and disinterested persons to decide it, and, if they cannot agree, to choose a third person, whose decision shall be final."
2. *Held,* that the devise of the land to the son in the subsequent part of the will must be construed as subject to the devise of the life estate to the wife in the first part, and not as revoking or controlling it.
3. A submission to an award respecting the title to land, though made according to the recommendation of the testator, who devised it, must be by deed between the parties, and cannot be by parol.
4. Where arbitrators undertake to decide according to law, and they mistake the law, the award is void; unless the whole question submitted was a dry question of law, and not involving any controversy of fact, in which last case, it seems, the decision is conclusive, whether right or wrong in point of law.

APPEAL from SURRY, Fall Term, 1844; *Manly, J.*

Ejectment, in which the evidence was that Charles L. Crissman, being seized of the premises, made his will on 19 August, 1833, and therein devised as follows: "First, I give unto Susannah, my wife, a life estate in the land and plantation whereon I now live, with the two tracts adjoining, containing in the whole 560 acres on the Yadkin River. I also give her one bureau, two beds and furniture, with the household and kitchen furniture, except such as may be hereinafter disposed of, and my riding carriage and harness, with one horse, which she may choose, two cows and calves, which, with six sheep and as many hogs, are at her own disposal, with $100 in money to get her necessaries."

After several intervening provisions of personal estate for other (499) children and for grandchildren, the testator further devises as follows: "To my son Aaron, I give a horse, saddle and bridle, my land and plantation that I have before mentioned in this will, with all the farming utensils, smith's tools, carts, wagons, and one yoke of oxen, with all the implements of husbandry; and it is my will that he take care of his mother and smooth the pillow of her age. And as I have not given him any money, which a person cannot well get along without, I give him $500." He then gave to another son, Moses, some small specific legacies, and the sum of eight thousand dollars; and directs the residue of his land and other property to be sold, and the proceeds, with its outstanding debts, to be equally divided among all his children. The will adds: "It is my desire, if there should be any misunderstanding about any parts of my will, that the persons concerned select two discreet and disinterested persons to decide it, and if they cannot agree, to choose a third person, whose decision shall be final."

Thereupon counsel for the defendant insisted, that the devise to the lessor of the plaintiff of an estate for life in the prior part of the will was revoked by the subsequent disposition therein of the premises to the defendant; or, at least, that it was so modified thereby that the defendant became entitled to an immediate estate in the premises on the death of the testator and to a joint possession with her. But the court held otherwise and instructed the jury that the lessor of the plaintiff was entitled, under her husband's will, to an exclusive life estate in the premises.

The defendant then offered in evidence an award in writing made by two persons in the following words: "We, the subscribers, being called on to settle some misunderstanding between Aaron Crissman and his mother and family, in compliance also with the will of C. L. Crissman, deceased, after looking at said will, are clearly of opinion that Susannah Crissman is entitled to a home during her life, at the place she occupied at her husband's death. We are further of opinion that (500) agreeably to said will, Aaron Crissman is clearly entitled to peaceable possession of land and premises; and we consider said Aaron bound to support his mother with such necessaries as are sufficient to make her comfortable for life. As respects Miss Polly Crissman, we think she is the proper person (as long as she may see proper) to attend to the infirmities of her mother; but, inasmuch as her father has left her a very handsome estate, we think Aaron is not bound to find her a support. Mrs. Crissman is to have the garden and a reasonable portion of ground for potatoes and such vegetables as she may choose to raise for her support." The defendant then offered further to prove that the said award was made under an oral submission, made by the lessor of the plaintiff and the defendant to the abitrament of the said arbitrator of the matter now

in controversy, and insisted thereupon that the award was conclusive against the right of the plaintiff to recover in this action. The plaintiff denied that the submission embraced the matter of this controversy, and proposed also to offer evidence upon the point. But the court was of opinion that it was not material what matters were submitted, as the award did not bind the title of the lessor of the plaintiff in the premises; and accordingly directed the jury to find for the plaintiff, which they did, and from the judgment the defendant appealed.

Morehead for plaintiff.
Boyden for defendant.

RUFFIN, C. J. On both points decided the opinion of this court is the same with that of his Honor. The gift to be the wife is expressly of a life estate in the manor plantation and the adjoining tracts, containing in the whole 560 acres. Now, although it be true that a will is not to be construed by detached items, but by the entire instrument, and also true that, where here are prior and subsequent inconsistent clauses, the latter shall control the former, yet it is also a rule of construction that no contradiction is to be allowed of, unless the several provisions (501) are absolutely irreconcilable, and further, that the words of the will in an express disposition cannot be controlled by inference from other parts, unless such inference is plain and indubitable. *Hester v. Hester,* 37 N. C., 330; *Roach v. Haynes,* 8 Ves., 590; *Barker v. Lea,* 3 Ves. & Bea., 117; *Thackery v. Hampson,* 2 Sein. and Stu., 217; *Wainewright v. Wainewright,* 3 Ves., 558. Now, the natural import of a gift of land in a will to one person for life, and afterwards of a gift of the same land to another person, is that the latter takes in remainder, and, therefore, that the first gift remains in full force. In that way there is nothing incongruous in the two dispositions, but each operates in its natural order. In this case there is nothing to induce the supposition that this interpretation is not according to the true intention of the testator. In the gift of the land to the son the testator does not give it by a description from its situation, boundaries or other *indicia* of that kind, but by the terms "my land and plantation that I have before mentioned in this will." Now, this land was all that he had previously spoken of and he had only spoken of it by giving it to his wife for her life. So far, therefore, from intending an immediate gift to the son, overruling that to the wife, the testator, by that reference to the preceding gift, shows that he meant it still to subsist and that the second gift was to be subject to it. But it is agreed that some present interest must have been intended for the son, otherwise the testator would not have given to him his farming utensils and implements of husbandry, including all his carts and wagons, nor charged him with the duty of attending personally to the

succor and comfort of his mother. It is not improbable that some vague or even confident expectation was entertained by the testator that the mother and son would reside together in his mansion house and cultivate the plantation upon joint account. But if so, it must have been upon the idea that they would naturally be led to do so by their mutual affection and interest. He, no doubt, supposed that the mother would wish some one of her sons, and he clearly expected that she would prefer this one, to reside with her and take care of her property (502) and herself; and also supposed that, as the land was to come to the defendant ultimately and as he had the requisite implements for its cultivation and had no other land, he would be particularly inclined to remain with his mother, upon terms that would be satisfactory to her and at the same time much to his own interest. But that would be by the agreement of those parties, and not by force of his will. Such expectations on the part of the testator naturally account for his gifts to the wife and son severally. But they furnish no inference that the gift to the wife was to be revoked or modified. Such inference is rested by the defendant on the single circumstance that some of the personal things given to the son could be more beneficially used on this plantation than elsewhere. But the inference from that circumstance, so far from being necessary and beyond doubt, is a very remote one, and can, at best, be but a possible conjecture. It cannot be admitted to overthrow the explicit gift of a life estate to the lessor of the plaintiff, to which, according to the rule already mentioned, it must appear to be totally opposed, either expressly or by an unavoidable implication.

With respect to the award, the defendant has a right, upon this exception, to assume that the title to the premises was within the submission to the arbitrators. But admitting it to be so, we hold nevertheless, that the award neither divests the title of the lessor of the plaintiff, nor in any manner bars this action of ejectment. If needful to the plaintiff's case, it may be remarked that the award would be open to observation on several points. It really, in the first place, seems much more difficult to construe than the will, on the meaning of which it professes to decide. For the arbitrators certainly mean to adjudge that Mrs. Crissman has some estate in the premises; yet to what part of the premises it shall extend, it is not very easy to understand from the finding "that she is entitled to *a home during life in the place* she occupied at her husband's death"; nor to tell of what part of this land the son is adjudged to be the owner by the award "that he is entitled to peaceable possession of *land and premises.*' Next, it might be questioned whether (503) the arbitrators do not say upon the award, that they mean to decide according to law, as it operates upon the will of the testator; and therefore, whether, as they clearly mistook the law, the award is

not void, according to the rule in *Kent v. Estab,* 3 East., 18, unless, indeed, the whole subject submitted was a dry question of law and not involving any controversy of fact, in which last case, it seems, the decision is conclusive, whether right or wrong in point of law. *Young v. Walter,* 9 Ves., 365. But, admitting that these objections could be answered, there remains one that we deem insuperable. It is that the submission was not by deed or in writing, and therefore that the award, so far as it affects the title to the land, is void under the act of Assembly of 1819. Rev. Stat., ch. 505, sec. 8. The doctrine that an award upon the right to land, though it cannot operate as a conveyance, shall conclude the party against whom it is made, by way of estoppel against disputing the other party's title, as laid down in *Morris v. Rosser,* 3 East., 15, has not been hitherto acted on in any case in this Court. Whether it would be adopted, we are not prepared to say. Certainly we do not mean at present to deny it, as it has undoubtedly received the sanction of other adjudications in England and of many in the States of the Union. The defendant's counsel referred in the argument to not less than a dozen cases in Massachusetts and New York, following the leading one of *Morris v. Rosser,* and it may be, when the question shall come up directly, that we shall find the array of authorities too strong to be resisted, even if they had less reason on their side than they have. But this case does not present the question of the operation of such an award as was upheld in the cases cited; for here the submission was oral, and in every one of those cases, with but a single exception, it was by deed or in writing, and thus, within the statute of frauds. The excepted case in that of *Jackson v. Gayer,* 5 Cowan, 383, in which there was a parol submission as to the boundaries of a piece of land,
(504) which two tenants in common, by their deeds of partition of a larger tract—of which this piece had formed part—declared should still remain in common. But, there, to the objection that the submission ought to have been in writing, the court replied that the submission was not as to the title at all, for that was admitted to be in both parties; but that the reference was merely as to the boundaries, according to the description in the deeds of partition. It was upon that ground expressly, that the court whether right or wrong is immaterial to the point here—though the case might not fall within the statute of frauds; but even to that extent the opinion of but one judge was expressed, and that not definitely, for the case went off on another point, leaving that undecided. It seems, however, from *Jackson v. Dysling,* 2 Caines, 198, to be considered that a parol agreement as to a particular line being the boundary between coterminous tracts, is not within the statute of frauds, and consequently, that a parol submission, as to boundary merely, is subject to the like law. However that may be, the submission here

was of the title to the land; for so we are obliged to understand the expression in the defendant's exception, "that the submission embraced the matter of this controversy." That could be nothing less than a dispute between the lessor of the plaintiff and the defendant, to which of them the premises, now sued for, belonged as his or her freehold, and an oral submission of that question is plainly, we think, within the mischief intended to be remedied by the eighth section of the statute of frauds. The direction in the will, for a reference to arbitration of any dispute arising under it, can have no effect, for the submission is still to be made by the parties disputing, and must in each case be made in the manner required by law, according to the nature of the point in dispute. For this reason, without adverting to any other, we hold that the award has no operation in this suit.

PER CURIAM. Affirmed.

Cited: Gaylord v. Gaylord, 48 N. C., 369; *Pearsall v. Mayers,* 64 N. C., 551; *Steadman v. Steadman,* 143 N. C., 352; *Cutler v. Cutler,* 169 N. C., 484.

CHARLES BALDWIN v. JOSIAH MAULTSBY.

1. A. signed and sealed a deed conveying certain slaves to B., called upon witnesses to attest it, and acknowledged that it was his act and deed, the deed was left on the table and was not again seen until after A.'s death, about a month after this transaction, when it was found in A.'s trunk with his valuable papers. A. had previously said he intended to give this property to B., and just before his death said "he was satisfied with the way he had disposed of the negroes, the deed of gift was in his trunk, and he wished it delivered to B. immediately after his death." *Held,* that these circumstances did not constitute a delivery of the deed, nor even afford any evidence tending to show a delivery which could be submitted to a jury.
2. Where there has been no delivery in the lifetime of the grantor, a delivery after his death, though at his request, is void.

APPEAL from COLUMBUS, Spring Term, 1845; *Pearson, J.*

Trover for six slaves. The defendant admitted the conversion, and the only question was whether Warren Baldwin, under whom both parties claimed, had duly executed a deed of gift to the plaintiff.

To prove the execution of the paper, the plaintiff called one Toon, who swore, that on 21 November, 1842, the day the paper bears date, at the house of the said Warren Baldwin, he was asked by Baldwin to become one of the subscribing witnesses to the paper, which had been

previously drawn by one Wooten and was lying on the table; he assented; Baldwin then signed his name, the seal being already made, and got up to make room for the witness. The witness said to Baldwin, "Do you do this as your act and deed?" Baldwin replied, "I do." Whereupon the witness signed his name as a witness and left the paper on the table. The other subscribing witness then signed his name, the paper was left on the table, and the witness did not see it again until after Baldwin's death, when it was found in a trunk with Baldwin's deeds for land and other papers. Wooten swore (506) that Baldwin requested him to write a deed of gift for the negroes, saying that these negroes had come by his wife, and he had promised her to leave them to her brothers and sisters. The plaintiffs were his brothers and sisters. The witness accordingly wrote the paper. After Baldwin had signed it and Toon had become a witness, he also put his name as a witness, folded it up, and wrote on the back, "Warren Baldwin to Charles Baldwin and others—Deed of Gift," and dropped it on the table. He and Toon went away, leaving it on the table. He next saw the paper in Baldwin's trunk, after his death, which was on 20 December, 1842. After Baldwin signed his name he did not touch the paper in the presence of the witness. It remained all the time on the table except while the witness was folding it. Neither of the plaintiffs was present. One Mithin swore that a short time before the death of Baldwin, in speaking about his property, he said: "I am satisfied with the way I have disposed of the negroes; the deed of gift is in my trunk, and I wish you to deliver it to Charles Baldwin immediately after my death." One Taylor swore that Baldwin said to him, talking about his property some short time before his death: "I have given the negroes, which came by my wife, by deed of gift to her brothers and sisters, and did it by deed of gift to keep any fuss from being made after my death, and I wish them to take possession of the negroes at my death." The defendant offered no evidence, but moved the court to charge the jury that there was no evidence of a delivery of the paper.

The court charged that, to constitute a delivery, the law required the maker of a deed to part with the possession, by passing it to the donee or some other person, with an intent to make it his deed. If the maker thus parted with the possession for an instant, although he then took it back, still having made it his deed, it would remain so. But unless he did so part with the possession of the paper, an essential ingredient to constitute a deed was wanting; and although the jury were satisfied that Mr. Baldwin was under the impres- (507) sion that the paper would be sufficient to pass the negroes after his death, as a deed of gift, yet if, in point of fact, the paper

had not been delivered so as to become his deed, the title did not pass to the plaintiff, and the defendant was entitled to their verdict. The plaintiff's counsel moved the court to charge the jury that there was evidence from which the jury might infer a delivery. The court declined so to charge, but, on the contrary, instructed the jury that it was necessary they should be satisfied from the evidence that Baldwin had, at least for an instant, parted with the possession of the paper and put it out of his control, with the intent that it should thereby become his deed; otherwise there would not be such a delivery as the law required.

There was a verdict for the defendant, and, judgment being rendered accordingly, the plaintiff appealed.

Strange for plaintiff.
J. H. Bryan for defendant.

DANIEL, J. The only question in the case was whether Warren Baldwin, the owner of the slaves, ever delivered as his deed the paper-writing under which the plaintiff claimed them. It is admitted by the plaintiff's counsel that the signing and sealing of the paper-writing would not make it the deed of Warren Baldwin, but that delivery was also necessary. He contends, however, that what took place at the time the witnesses attested the paper, to wit, Baldwin's signing, sealing, acknowledgment and preservation of the paper, made it in law his deed and was tantamount to a delivery. *Parkes v. Meares,* 2 Bos. and P., 217, and *Grillier v. Niel,* Peak, 146, have been cited. In the first case the plaintiff's attorney had possession of the deed signed and sealed, and he asked the witness to attest it in the presence of the obligor, which he did. The witness also knew (510) the handwriting of the obligor. The court left it to the jury, upon this evidence, whether the defendant had not sealed and delivered the deed to the plaintiff's attorney, which in law would be a good delivery to the use of the plaintiff. In the second case the court held that the proof by the witness of the handwriting of the obligor was evidence to go to the jury that he also sealed and delivered it, and, there being nothing to the contrary, it was sufficient evidence. We think neither of these cases aids the plaintiff. In *Jakes v. Methodist Church,* 17 Johns., 548, the deed of marriage settlement was duly executed by the parties and laid on the table, and the wife, as *cestui que trust,* took it up and kept it in her possession for the trustee until her death. It was held in equity, under the circumstances of the case, to be a good and valid delivery of the deed. The contest was with the husband, Mr. Jakes, by those claiming under the deed of settlement,

which had been made agreeably to an antenuptial parol contract. And the husband had in a variety of instances acknowledged the validity of the deed; and he had been appointed by his wife executor to her will, and he had qualified and acted as such. The court said, after all these circumstances, they would not now hear him to allege that the deed had never been delivered to the trustee; so we see that case turned upon its own peculiar circumstances, and that it is no authority for the present plaintiff. In *Garnons v. Knight,* 5 Barn. & Cress., 671, the lessor of the plaintiff claimed the property, as being the mortgage of Mr. Wm. Wynn, deceased. The mortgagor on one day signed, sealed and acknowledged the deed, and procured his niece to witness it. He did not tell her the contents of it, and he then took it away with him. On a subsequent day he went to the house of his sister, Miss Elizabeth Wynn, he brought to her a brown paper parcel, and said, "Here, Bess, keep this, it belongs to Mr. Garnons." He came again and asked for the parcel, and she gave it to him. He returned it to her, saying, "Here, put this by." He send word to Garnons that he would take care to make him perfectly secure for (511) all the moneys due from him. Miss Wynn received the said parcel, which contained the mortgage deed, and retained it until the death of her brother, which happened in August, and she then delivered it to Mr. Garnons. *Baron Garrow,* who tried the cause, told the jury that the question for them to decide was whether the delivery to Miss Wynn was, under all the circumstances of the case, a parting with the possession of the deed, and of the power and control over it, for the benefit of Mr. Garnons, and to be delivered to him either in Mr. Wynn's lifetime or after his death; or whether it was delivered to Miss Wynn merely for safekeeping as the depository, and subject to his future control and disposition; if for the latter purpose, they should find for the defendant; otherwise for the plaintiff. A verdict was rendered for the plaintiff. And a rule to show cause why a new trial should not be granted was obtained on the ground that there had not been a sufficient delivery of the deed. The court said: "Can there be any question, but that delivery to a third person, for the use of the party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery?" The rule for a new trial was discharged. We see nothing in the above case to support the plaintiff's motion. For a delivery in tht case had in fact been made to a stranger to the transaction, for the use of Garnons. In the case now before us Warren Baldwin did not deliver the paper to the plaintiff or his agent, or to a stranger for his use. And the case shows that he never intended to deliver it, or that it should in fact be deliv-

ered in his lifetime; for he told a witness that the paper was then in his possession; and he requested that the witness should, after his death, take it from among his other papers and deliver it. The delivery of a deed, a transmutation of the possession, is an essential ceremony to the complete execution of it, and if Warren Baldwin had then delivered the paper writing to the witness, with a request that it should be delivered to the plaintiff after the death of the grantor, it would have been a good deed from the time of the (512) delivery to the witness. But he did not deliver the writing to the witness, and the parol authority given to the said witness, even if good in law to deliver a deed, was in law instantly revoked by the death of Warren Baldwin. It was argued that, although there was actually no delivery or parting with the possession of the instrument, yet it was operative as a deed, if the party intended it should be good without more doing. But that is inconsistent with the very definition of a deed, which is a writing sealed and delivered. The argument is that the deed shall be good without delivery if the party so intended, though the law says that delivery is essential to the constitution of that instrument. Such an intention cannot overthrow the rule of law. But, in truth, there was no intention that this instrument should presently operate, for the plaintiff's own evidence was that the grantor did not intend it should have any effect until after his death; and, as he retained the instrument until that event, no person could then deliver it. The plaintiff's counsel has labored this case very much, and he has cited many authorities, but they do not satisfy us that the judge who tried this cause erred in the law he laid down. *Moore v. Collins*, 15 N. C., 384, supports him. Secondly, the plaintiff's counsel insists that the court should have left it to the jury to say, from all the evidence given in, whether the fact of delivery of the deed was proved to their satisfaction. The case does not show that the plaintiff offered any evidence tending to prove that fact. The Court might therefore say that there was no evidence on that point.

PER CURIAM. No error.

Cited: Roe v. Lorick, 43 N. C., 91; *Newlin v. Osborne*, 49 N. C., 159; *Phillips v. Houston*, 50 N. C., 303; *Bailey v. Bailey*, 52 N. C., 45; *Levister v. Hilliard*, 57 N. C., 15; *McBee ex parte*, 63 N. C., 334; *Tarlton v. Griggs*, 131 N. C., 221, 223; *Wetherington v. Williams*, 134 N. C., 281; *Craddock v. Barnes*, 142 N. C., 96; *Fortune v. Hunt*, 149 N. C., 360, 361; *Buchanan v. Clark*, 164 N. C., 63.

(513)

LOUIS D. WILSON v. A. H. COFFIELD ET AL.

1. In an action by warrant against a constable's sureties under the act, Rev. Stat., ch. 81, sec. 3, to recover moneys collected by a constable by virtue of his office, proof that the constable had received goods or labor in satisfaction of the claim he had to collect is sufficient to entitle the plaintiff to recover. It is not requisite that he should have received the actual money.
2. An action under that statute can only be barred by the same length of time that bars an action on the bond.

APPEAL from MARTIN, Spring Term, 1845; *Dick, J.*

This action commenced by a warrant, and the plaintiff declares therein that the defendant owed him the money therein claimed. The case is: One Fielding P. Turner was in 1838 duly appointed a constable in Martin County, and, on 9 January of that year executed his official bond with the defendants as his sureties. On 22 February, 1838, the plaintiff put into the hands of Turner, as such constable, two several judgments for collection, both against John Wilson, one for $23.78¾ and the other for $20.47. During 1838 John Wilson sold to Turner furniture, the value of which, it was agreed, should be credited on the said claims, and during the said period performed for him work and labor which, together with ninety cents in cash, amounted in all to a sum more than sufficient to discharge the judgment for $23.78¾, and accordingly, in the latter part of 1838 they, the said Wilson and Turner, came to a settlement, and the claim for $23.78 was surrendered up to the said John Wilson, as being discharged, leaving a small balance in Turner's hands, which he promised to apply as a credit to the other judgment. In 1842 John Wilson paid the amount of the other judgment to one Gardiner, who had possession of it, but how he came by it was not proved. The warrant is-
(514) sued in March, 1844, and the demand for the money was made a month or two before Turner left the State in 1839.

On behalf of the defendants it is contended that the claim for the smaller judgment could not be sustained, because there was no proof of any money being received for it by Turner during 1838, for which year alone the defendants were his sureties, and the judge so decided. It was further contended that the plaintiff could not recover the other claim, because the act of Assembly gives this peculiar remedy only in cases where the constable has received money, and not where he has received labor or property, and, secondly, because more than three years elapsed before the beginning of the suit after the right of action had accrued. The court charged the jury that the statute of limita-

tions was no bar and that the plaintiff was entitled to recover the amount of the judgment for $23.78.

Heath for plaintiff.
No counsel for defendants.

NASH, J. If the judge committed any error it was one of which the defendants have no right to complain. We are disposed to think the plaintiff was entitled to a verdict, as well upon the judgment for $20.47 as for the other. It is true, the act of Assem- (515) bly under which these proceedings have taken place gives the remedy before a single magistrate where money has been received. But we must consider the Legislature to use the term money as it is known to the common law, not, as in all cases, implying the thing itself, but something received in the place of it. Thus an action for money had and received to the use of the plaintiff will not be against the defendant for stock, bills of exchange, notes or checks, unless they were received by him for the plaintiff as money, and so considered at the time; the principle being, in all cases, that if a thing be received as money it may be treated and sued for as money.

In this case the claim which Turner, the constable, had against Wilson was for money due on a judgment. Instead of levying on the property of Wilson and selling it, as he might have done, he receives from him, in the place of the money, property and labor. At the time the property was transferred to Turner and the labor performed, it was considered by both parties as so much money, paid by Wilson to the constable for the use of the plaintiff. We are of opinion his Honor committed no error in so charging the jury. But there is another ground upon which we think the plaintiff is entitled to recover this amount. It is well settled that when an agent receives goods to sell, while they remain in his hands the action for money had and received will not lie against him. But in some cases a sale and receipt of the money will be presumed, as when the property is readily convertible into money and a considerable time has elapsed since their reception, and no proof is given to the contrary, or when the agent, when called on, refuses or declines to give any account of the goods. In these cases a sale and receipt of the money will be presumed.

Here the judgment was put into the hands of Turner in February, 1838, and the action is brought in 1844. We think the judge might, in analogy to the principles established in the above cases, have instructed the jury that, from the length of time which had elaspsed, the law presumed Turner had received money upon this judg- (516) ment.

We concur with his Honor on the statute of limitations.—The defendants are charged by virtue of the act of Assembly, on their bond as sureties for the constable, Turner, and the time of limitation is six years, whereas not more than five years and one month had elapsed.

PER CURIAM. No error.

Cited: *S. v. Wall,* 30 N. C., 14; *Cavaness v. Troy,* 32 N. C., 318; *Rogers v. Nuttall, ib.,* 349.

THE PRESIDENT AND DIRECTORS OF THE BANK OF CAPE FEAR v. JAMES EDWARDS.

The Cape Fear Bank is subject to the payment of no public taxes, either State or county, except the payment of 25 cents on each share of the stock owned by individuals.

APPEAL from WAKE Spring Term, 1845; *Dick, J.*

Assumpsit for money had and received, in which the case appeared to be thus:

The defendant is the sheriff of Wake, and as such demanded from the plaintiffs the sum of $100, as the amount of taxes, both State and county, assessed upon the house in the city of Raleigh, used and occupied by the plaintiffs as their banking house, and upon the lot on which it stands. It was agreed the said house and lot were necessary to enable the corporation to carry on its business, and that the sum claimed was not more than would be due if the property was liable to pay the taxes claimed. The plaintiffs denied that they were by law bound to pay them, and the defendant, conceiving it his duty to collect the sum mentioned, threatened to levy the same by sale if it was not paid.

(517) The plaintiffs paid the amount claimed under protestation. The action is brought to recover it back. A case agreed was submitted to the court, and if, in its opinion, the plaintiffs could not recover a nonsuit was to be entered, if otherwise, then judgment for the amount against the defendant. The court being of opinion that the plaintiffs were bound to pay the tax, a nonsuit was entered, and the plaintiffs appealed.

Wm. H. Haywood for plaintiffs.

G. W. Haywood and Miller for defendant.

NASH, J. The Bank of Cape Fear was incorporated by the Legislature, at their session 1833-'34, 2 Rev. Stat., 50. By section 11 of the act it is provided "that a tax of twenty-five cents on each share of stock

owned by individuals in said bank shall be annually paid into the treasury of the State by the president or cashier of the said bank on or before the first day of October, in each year—and the said bank *shall not be liable to any further tax.*" It is difficult to conceive language more expressive of the meaning intended. The Legislature, about to incorporate a company with banking privileges, to induce individuals to invest their private funds in its stock, engage, in so many words, that the bank shall not be liable to pay any tax but one of twenty-five cents on each share, and it is now contended, that, in violation of this express declaration, the property of the bank, that is of the individual stockholders, shall, in addition to the twenty-five cents, payable on each share of stock owned by them, be subjected to the operation of the general revenue law, and to the payment of the taxes imposed for county purposes. This cannot be. It would be in direct violation of the plighted faith of the State. This act exempts the property of the bank from the payment of all public dues, in the character of taxes of every kind and description, as well county as State, except that specified. To place the question beyond all doubt, section 19 contains a clause repealing "every other act or parts of acts" coming within the meaning and purview of that act. The power of the Legislature to pass the act is not questioned, and they have expressed their will in language too (518) plain to admit of a doubt. The plaintiffs paid the money under compulsion, with a protest as to the defendant's right. There can be no doubt of their perfect right to recover it back. Brown on Actions, 364, and the authorities there cited. The judgment of nonsuit is set aside, and judgment must be entered for the plaintiffs.

PER CURIAM. Reversed.

Cited: Bank v. Deming, 29 N. C., 58; *Attorney General v. Bank,* 57 N. C., 295; *Huggins v. Hinson,* 61 N. C., 130; *S. v. Cantwell,* 142 N. C., 616.

ANN SMITH v. RAYMOND CASTRIX.

1. Marriage settlements must be proved within six months after their execution, before a judge either of the Superior or Supreme Court or before a court of record, or otherwise they will be void as to creditors. Probate before the clerk of the county court, as in the case of deeds in trust, will not be sufficient.
2. An unauthorized registration is not even notice.

APPEAL from CRAVEN Spring Term, 1845; *Settle, J.*

Detinue to recover a number of negroes, under the following circumstances. John F. Smith died in the year .... leaving three daughters,

his only children, and entitled, as his next of kin, to his personal estate. A petition was filed in the county court of Craven, the proper tribunal, to have partition of the slaves. The daughters, of whom Laura M. was one, were the plaintiffs, and stated in their petition that they were tenants in common of the slaves. During the pendency of the
(519) petition a marriage settlement was made between Laura M. and James Shackleford, whereby the whole of her estate, both real and personal, was conveyed to the plaintiff in trust for the sole and separate use of the said Laura M. This deed was executed by James Shackleford, Laura M. Smith and the plaintiff, on 6 January, 1841, and on 16 February ensuing, was proved before James G. Stanly, clerk of the county court of Craven, and registered 1 March. It was again proved 23 March, 1842, before a judge of the Superior Courts, and under his fiat registered the following day. After the execution of this deed Laura M. Smith and James Shackleford were duly married, and upon a division of the negroes under the decree of the court, those now in controversy were allotted to Mrs. Shackleford, and were taken possession of by the plaintiff as her trustee. James Shackleford having become largely indebted to different persons, judgments were obtained against him and the executions levied on the negroes claimed in this case. At the sale made by the sheriff the defendant purchased them and took them into his possession. His Honor, being of opinion that the plaintiff was not entitled to recover upon the conveyance from Laura M. Smith, judgment was rendered for the defendant, from which the plaintiff appealed.

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

NASH, J. The parties have, unfortunately for their interests, considered the marriage settlement as a mere deed of trust, and accordingly had it proved before the clerk of Craven County Court, under the provisions of sec. 25, ch. 37, Rev. Stat. That section gives the clerks of the several county courts full power and authority to take the probate or acknowledgment of all deeds of trusts and mortgages at any time. This became necessary in consequence of the preceding section having limited the legal operation of such deeds, as to creditors, to their registration, and when registered they have, and can have, no relation back.
(520) Great injustice, it was evident, must be done to persons endeavoring to secure their debts in this way, if they were compelled to go before a judge or wait the regular terms of the several courts, before they could have deeds registered. To make the law consistent, section 25 was incorporated into the act. The deeds of trusts therein mentioned are such only as are intended as securities for debts in the

nature of mortgages, with power to sell. The deed we are considering, though a deed of trust, is not one for the securing of a debt, and is not embraced in that section, as is evident from the act itself. In section 29, provision is made for the probate and registration of marriage settlements. By it, all marriage settlements and other marriage contracts, whereby any money or other estate is secured to the wife or husband, are directed to be proven in the same manner as other deeds, within six months after the making thereof and registered within one month thereafter, and it declares all such contracts and settlements not so proved and registered void as against creditors. It is manifest, the Legislature intended in section 25 to create a special tribunal for taking the probate of the deeds therein mentioned, and as to marriage contracts and settlements, they are left, as to their *mode* of probate, to the general laws upon the subject of probate of deeds. That is, they must be proved, either before a judge of the Superior or Supreme Court, or in a court of record. *Saunders v. Ferrell,* 23 N. C., 101, is full authority in this case. The probate before Mr. Stanly, clerk of Craven County Court, was of no effect in law, and his fiat did not authorize the registration. Not until December, 1842, was the deed properly proved and registered, and this was near two years after its execution. It may be that the registration of the deed under the probate before the clerk was calculated to give as full notice as if it had been under a probate before a judge of the Superior or Supreme Court, at his chambers, but the Legislature has thought otherwise. They have pointed out the manner in which public notice shall be given. We have no power or authority to depart from that mode. To do so would be to legislate and not adjudicate. We have no discretion in the matter. (521) An unauthorized registration is not even notice. *Latouche v. Duhaney,* Sch. and Le Froy, 137. *Frost v. Bucknam,* 1 Johns. Ch. 288, and notice as to creditors in this court would be of no effect. *Davidson v. Cowan,* 16 N. C., 470. The marriage settlement is void as to the creditors of James Shackleford, and the slaves therein conveyed to the plaintiff are liable to his debts.

PER CURIAM. Affirmed.

Cited: Justice v. Scott, 39 N. C., 112; *DeCourcy v. Barr,* 45 N. C., 186; *Long v. Crews,* 113 N. C., 257; *Barrett v. Barrett,* 120 N. C., 130.

DEN ON DEMISE OF IRWIN & ELMES v. JAMES COX.

1. A purchaser of land at a sheriff's sale is not bound to produce the original deeds under which the person whose land was sold claimed title. Not being entitled to the custody of the originals, he is at liberty to read copies in evidence.
2. Six months notice to quit must be given to a tenant from year to year before an action of ejectment can be commenced against him.

APPEAL from MECKLENBURG, Special Term in May, 1845; *Pearson, J.*

This action is brought to recover possession of the tract of land described in the declaration. The facts as disclosed in the case are as follows: William Davidson was the owner of the land, and in 1830 conveyed it to W. Morrison to secure certain creditors and to make title to such persons as Davidson might effect a sale with, for the purpose of discharging the debt set forth in the deed. In 1834 Da-
(522) vidson conveyed the land to Curtis, Hyde and Tallmage, in trust to convey the land to a gold mining company, thereafter to be incorporated. The company was afterwards incorporated, by the name of the Franklin Gold Mining Company. Against this corporation a judgment was obtained, and the execution was levied on the land in dispute, and at the sale Irwin & Elmes became the purchasers and procured a sheriff's deed to themselves. In order to show that Curtis, Hyde and Tallmage had performed their duty by conveying the land to the company the plaintiffs offered in evidence a copy of the deed made to the company, properly certified by the register. The reading of this paper was objected to by the defendant and the objection sustained by the court. The defendant went into possession of the land under Davidson, as his tenant, paying rent, and was continued in the possession successively by Morrison and by the Franklin Gold Mining Company. The case states that no evidence was given of any notice to him before the action was brought. The defendant insisted that he was a tenant from year to year, and entitled to six months' notice to quit. His Honor, without deciding the exact character of the defendant's tenancy, ruled that he was entitled to notice to quit, and the jury returned a verdict for the defendant.

Iredell for plaintiff.
Alexander for defendant.

NASH, J. We think his Honor erred in rejecting the evidence offered by the plaintiffs of the conveyance of the land by Curtis, Hyde and Tallmage, to the gold mining company. The plaintiffs claimed as

purchasers at a sheriff's sale and, as such, were entitled to the custody of the original deeds. It is a general rule that a copy of a paper-writing cannot be given in evidence without accounting for the absence of the original, upon the general principle that the best evidence of the nature of the case admits of and which is within the power of the party, shall always be produced. With respect to deeds conveying realty, as to the introduction of copies, the question always (523) is, who is entitled to the custody of the originals. If the plaintiff is, he must produce them or satisfactorily account for not so doing before he can be let into secondary evidence. If he is not entitled to the custody he may read a copy without giving any account of the original. In *Buckhurst's* case, 1 Rep., 1, many instances are given where the title papers do not pass with the land. One of them is, when land is sold with general warranty, which bound the feoffor to render to the feoffee in value upon his eviction, the feoffee is not entitled to the custody of the deeds, because they are necessary to the feoffor in defending the title, and he must have the custody of them, and the feoffee may read copies. A purchaser at a sheriff's sale is only privy in estate with him whose land is sold, and is not supposed to have the custody of the title deeds; he is, therefore, when called on to support the title of the defendant in the execution, at liberty to read copies instead of giving any account of the originals. This was expressly decided in this Court in *Nicholson v. Hilliard,* 6 N. C., 270. The court erred, therefore, in rejecting as evidence the copy of the deed from Curtis, Hyde and Tallmage. We concur with his Honor, that the defendant was entitled to notice to quit before he could be made a trespasser; and until he stood in that relation to the plaintiff, an action of ejectment could not be maintained against him. If the case had stated that *no notice in fact* had been given to the defendant we should not disturb the verdict, because in that case the plaintiff could not recover. But it only states that there was *no evidence of any notice.* Now it may be, we cannot say it is not so, that when the plaintiff's evidence as to the conveyance of the legal title to the company by Curtis, Hyde and Tallmage, was rejected, he considered his case at an end (as it was on the account on the demise of Irwin & Elmes), and that it was not necessary for him to go any further with it, and declined producing evidence of notice. We find this principle recognized by the Court in *Jones v. Young,* 18 N. C., 355. The Court says, that although the plaintiff obtained a verdict (524) against the defendant, notwithstanding the error committed by the judge on the first point made in the case, yet as the opinion delivered may have prevented the defendant relying upon other evidence, we think it proper the case should be retried. We cannot say the error

of the judge in rejecting the copy of the deed from Curtis, Hyde and Tallmage did not affect the rights of the parties on the question, on which the cause was decided—the want of notice.

PER CURIAM. New trial.

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(525)

DEN ON DEM. OF WILLIAM DAVIS v. ASA EVANS.

1. A delay of a mortgagee to enforce the payment of his debt is not fraudulent, so as to make his mortgage void, but the creditor may have his remedy in equity or promptly at law by a sale of the equity of redemption.
2. Whatever relation to the time of the sale a conveyance from the sheriff may have for some purposes, it cannot be used to prove title in an action brought after the deed was made.
3. A purchaser at a sheriff's sale of an equity of redemption may recover in an action of ejectment against the mortgagor who was in possession.
4. The mortgagee who is subsequently permitted to come in and defend the action can make no defense which the original defendant could not make, and is, therefore, like him, estopped from denying the plaintiff's right to recover.
5. The act of 1812, Rev. Stat., ch. 45, sec. 5, makes the equity of redemption, when sold under execution, a legal interest, to the extent, at least, of enforcing it by a recovery from the mortgagor himself.
6. The act of 1812, Rev. Stat., ch. 45, sec. 5, includes not only express mortgages, but also those that were intended to be securities in the nature of mortgages, and so held to be by construction of a court of equity.

APPEAL from CUMBERLAND, Spring Term, 1845; *Pearson, J.*

EJECTMENT for 1100 acres of land in ROBESON, commenced 15 September, 1836, against John Campbell, then the tenant in possession. The demise is laid 1 March, 1836. Campbell appeared, entered into the common rule and pleaded not guilty. In March, 1838, his daughter, Mary Ann Campbell (who has since married Evans), procured herself to be made defendant instead of John Campbell.

On the trial the plaintiff showed, as his title, a judgment obtained by one Johnson and one Davis in September, 1833, against John Campbell for $780.26, and a *fieri facias* thereon and a sale of the premises to the lessor of the plaintiff by the sheriff in January, 1834, and a return on the execution of the sale of the legal and

(526) equitable interest of John Campbell in the land. The plaintiff then showed two sheriff's deeds to the lessor of the plaintiff: The one, dated 26 May, 1834, which recites that under the execution the sheriff seized and took into his hands "a certain tract of land, that

is to say, the equitable interest of the said John Campbell in the same," etc., and then conveys the land in dispute: the other, dated 26 March, 1837, is in all respects like the former except that it does not refer to any equitable interest of Campbell in the premises, but purports merely to be a conveyance of the legal estate.

Counsel for the defendant then stated the defense to be that, before the judgment was rendered under which the lessor of the plaintiff purchased, the premises had been *bona fide* sold under another judgment and *fieri facias* and purchased by and conveyed to the State Bank of North Carolina, who held the same subject to an agreement for the redemption of the premises by the said John Campbell upon the payment of the sum of $144 and interest thereon and certain costs; that under said agreement, the said Campbell was permitted by the bank to remain in possession; that he had no other interest in the premises; that a part of the said sum of $144, namely, the sum of $88, remained due to the bank at the time of the sale to the lessor of the plaintiff, and still remained due and owing from the said John Campbell to the bank or its assignees. Counsel for the plaintiff insisted that he had shown conclusively a title against John Campbell and that it was not competent for him or the present defendant to deny it; and therefore he objected to any evidence in support of the defense, as stated. But the court overruled the objection and allowed the defendant to go into the evidence.

Upon the evidence the case was thus: In 1821 the State Bank got a judgment against John Campbell, and the premises were sold upon an execution thereon and purchased by the bank and a sheriff's deed executed. The bank and Campbell then agreed that Campbell might redeem by paying the debt and costs, and that in the meantime he might retain the possession and use of the land. Campbell sold (527) several parcels of the land between 1821 and 1833 and the bank conveyed to the purchasers. In 1833 the debt had been reduced by Campbell to $88—which was stated on the books of the bank to be "secured by mortgage of land"; and at that time one Tuton, at the request of Campbell, his wife and his said daughter, paid that sum to the bank upon an agreement that, when it should be repaid, the premises should be conveyed to the daughter, as they stated that Johnson & Davis had their judgment against John Campbell, and therefore it would not do to have the conveyance made to him, John Campbell, as the land would be sold immediately for his debt. At that time Mary Ann Campbell was about sixteen years of age, lived with her father and had no property at all. In 1836 Mary Ann Campbell repaid to Tuton his debt and interest, and in 1837 a deed was made to her in fee. John Campbell continued to live on the premises and his daughter with him, until her

marriage in 1841, when the father left the possession to her and her husband.

The presiding judge thereupon instructed the jury that there was nothing to be left to them, but that the questions in the case were all matters of law which it was his duty to decide; and that, although it was a general rule that a debtor whose land has been sold cannot, in an action of ejectment by the purchaser, dispute his title or show the title to be in a third person, yet in this case the debtor, John Campbell, had but an equitable right of redemption, which might lawfully be sold, and which was purchased by the lessor of the plaintiff; but that would not enable the plaintiff to maintain this action, which must be founded on a legal and not an equitable title. And his Honor proceeded to state to the jury, in an argument of considerable length, his reasons for thus laying down the law to them, and allowing the defendant to show that John Campbell had not the legal title at the time of the purchase by the lessor of the plaintiff; which reasons it is not material to state in order to a proper understanding of the points decided.

(528) In submission to the opinion of the court the plaintiff suffered a nonsuit, and appealed to the Supreme Court.

Strange, with whom was Henry, for plaintiff.

(531) *Badger and Warren Winslow for defendant.*

RUFFIN, C. J. Counsel for the plaintiff moved for a great number of instructions in succession, but all presenting different views of the position that it was fraudulent against Campbell's creditors in the bank and Tuton to indulge Campbell so long for the debt, so as to keep the mortgage on foot, to the hindrance of creditors, all of which we think his Honor properly refused, because the *bona fides* of the debt to the bank was not contested and the delay of the mortgagee to enforce payment is not fraudulent so as to make his mortgage void, but the creditor may have his remedy in equity or promptly at law by a sale of the equity of redemption. Counsel also moved the court to instruct the jury that if the money paid to Tuton by Mary Ann Campbell was furnished by her father then the transaction was fraudulent, and she held the legal title in trust for him and the plaintiff might recover. But the court refused to so instruct the jury, and very properly refused, inasmuch as that transaction occurred several years after this suit was brought.

But upon the principal point in the case, that respecting the right of the defendant to show that John Campbell was but a mortgagor in answer to this action, this Court holds a different opinion from that of his Honor. We understand his Honor as not admitting the present de-

fendant to any defense the original defendant could not make, according to *Gorham v. Brenon,* 13 N. C., 174, and *Balfour v. Davis,* 20 N. C., 443. But he ruled that Campbell himself might insist on that matter, and therefore the defendant might. Now, we think the point was not open to Campbell, and for that reason that the evidence was improperly received.

It is proper to make the preliminary admission that the second sheriff's deed to the lessor of the plaintiff can have no operation in this action. For, although it has been held that the provisions of the act of 1812, respecting the form of a sheriff's deed for an equity of redemption, are but directory, and although we have no (532) doubt that a sheriff may make a second deed if the first be not effectual to pass all he sold, this deed was not evidence in this suit, as it was made a year after the suit was brought. Whatever relation to the time of the sale a conveyance from the sheriff may have for some purposes, it cannot be carried to the unreasonable extreme of proving the title in an action that was brought before the deed was made.

The question, then, is whether the purchaser at sheriff's sale of an equity of redemption may not recover in an action of ejectment against the debtor himself? We think he may. It seems to us to stand on the same reason with the other cases in which is held that the debtor in execution cannot set up a want of title, legal or equitable, in himself. That has long been settled as the law in numerous cases. *Thompson v. Hodges,* 7 N. C., 546; *Gorham v. Brenon,* 13 N. C., 174; *Duncan v. Duncan,* 25 N. C., 317. The grounds on which the doctrine rests are that, as he has had the benefit of the sale in the payment of his debts, he ought not to say that he had nothing in the premises, and that he cannot with truth say so, as he had, at least, the possession and enjoyment of the land, and those he ought to give up, and to recover them is the object of the ejectment. Now, it would seem that precisely the same principle applies equally to a case in which the debtor has, in fact, no title—nothing but the possession—and to one in which he has nothing more at law, but has also an equitable interest. Why should his real ownership of the land in equity defeat a recovery from him at law, when without such equitable ownership the recovery could not be resisted? There might be some reason in the defense, perhaps, if the debtor's equitable interest was not subject to be sold under execution. But when the act of 1812 authorized the sale of an equity of redemption under a *fieri facias,* it added tenfold to the reason for holding that the mortgagor and debtor should immediately surrender the possession to the purchaser, and that the courts of law should uphold the sale, made under their process, in an action against the debtor (533) himself. Why should the mortgagor be allowed to resist the

recovery of the purchaser and retain the possession? Although, while he was a mortgagor he was not bound to pay rent or account for the profits to the mortgagee (who is only entitled to his interest), yet undoubtedly, as between the purchaser and the debtor in execution, the latter is bound to pay the profits to the former from the time of the sale. Then, why allow him to continue a possession, which must be wrongful, and cannot be otherwise? If it be said that the plaintiff cannot recover because upon his own deed he appears to have only an equitable title, the answer is that it is idle to make a distinction which may be so readily rendered nugatory by the purchaser taking a deed containing no admission of the mortgage. If there really be a mortgage nothing more in fact passes than the equity of redemption, whatever may be the form of the deed, and, therefore, the form ought not to change the respective rights of the parties. We consider that the act of 1812 makes the equity of redemption, when sold under execution a legal interest to the extent at least of enforcing it by the recovery of possession from the mortgagor himself. It may be admitted that, if the mortgagor were to assign his equity of redemption, the assignee could not recover from the assignor in ejectment because at law the equity of redemption is not known as an interest which may be the subject of a conveyance, but the assignment operates only in equity. But suppose a statute to be passed expressly recognizing that interest as the subject of conveyance by the mortgagor and authorizing him to sell and convey it by deed of bargain and sale, could there be any doubt that, as against him, the assignee would have the right, and that it would be upheld in a court of law? Now, that is the substance and effect of the act of 1812, in its operation upon a sale of an equity of redemption by the sheriff, and therefore we perceive no real difference between the application to this and all other cases, alike, of the rule which concludes the debtor in execution from disputing the pur-
(534) chaser's title, and his right to recover the possession from him.

It is true the purchaser is obliged to resort to a court of equity to obtain redemption from the mortgagee, as, against the mortgagee, he is but the assignee of the mortgagor. But if he be obliged also to go into equity for redress against the mortgagor and to gain the possession from him, the act of 1812, instead of facilitating the redress of the creditors of mortgagors, will embarrass them, for it were better not to allow the sale at law at all, and require the creditor to apply to equity in the first instance. But it is no concern of the mortgagor how the purchaser and the mortgagee arrange their business. His interest has been terminated by the sale of it under execution, and he is bound in honesty to yield the possession to the purchaser. In New York it is a settled rule, that the mortgagor cannot set up the mortgage against

a purchaser under execution against him; and *Jackson v. Davis*, 18 Johns., 7, resembles the present exactly as the mortgagee was there also admitted to defend the action which was originally brought against the mortgagor, then in possession.

We have assumed all along that John Campbell had an equity of redemption, subject to be sold, because it was so considered in the Superior Court, and because we think that such was the truth of the case. If he had not that equity, but was a trespasser, the defense on this point fails altogether. But, as we held in *Thorpe v. Ricks*, 21 N. C., 613, the act of 1812 includes not only express mortgages, but also those that were intended to be securities in the nature of mortgages, and are so held to be by construction of a court of equity. The judgment against the plaintiff was, therefore, erroneous.

PER CURIAM. New trial.

Cited: *Wise v. Wheeler*, 28 N. C., 199; *Lee v. Flannagan*, 29 N. C., 477; *Presnell v. Ramsour*, 30 N. C., 507; *Hunsucker v. Tipton*, 35 N. C., 483; *Anderson v. Holloman*, 46 N. C., 170; *Richardson v. Thornton*, 52 N. C., 460; *Young v. Griffith*, 84 N. C., 721; *Black v. Justice*, 86 N. C., 512; *Reeves v. Haynes*, 88 N. C., 311; *Parrott v. Hardesty*, 169 N. C., 669.

(535)

LUCRETIA WILLIAMS v. BRAWLEY OATES, ADMINISTRATOR OF JOHN R. WILLIAMS.

Where there are husband and wife domiciled in this State, and the husband obtains a divorce from the bonds of matrimony on a petition against his wife, if the wife afterwards goes into another State, the first husband being living, for the purpose of evading the laws of this State, and there marries another person, such marriage is null and void to all purposes.

APPEAL from MECKLENBURG, Spring Term, 1845; *Bailey, J.*

The plaintiff, Lucretia, intermarried with one John N. Allen in this State, both being domiciled here. Her husband afterwards instituted a suit against her for a divorce for cause of adultery, on her part, in which there was a decree divorcing him *a vinculo matrimonii*. Afterwards the said Lucretia and John R. Williams, both being citizens of North Carolina and domiciled here, with the purpose of evading the laws of this State, which prohibited her from marrying again, went into South Carolina and there intermarried, according to the laws of that State, and immediately returned to this State, and continued to

live here for several years as man and wife, until the said John R. Williams died intestate.

The plaintiff then filed her petition in the county court for her year's allowance under the statute, as widow of the said intestate; and the administrator appeared and insisted that the marriage was void and that the petitioner was therefore not entitled. Of that opinion was the county court, and dismissed the petition. The petitioner appealed to the Superior Court, and upon the facts above stated the order of the county court was there reversed and the petitioner declared to be entitled; and from that the administrator appealed to this Court.

(536) *J. H. Bryan, with whom were Alexander & Osborne, for plaintiff.*

RUFFIN, C. J. At common law a valid marriage was indissoluble except by legislative action; and a second marriage, or rather pretended marriage, was and is, absolutely void. *Gathings v. Williams, ante,* 487. A statute in 1814 admits of judicial sentences of divorce from the bonds of matrimony in certain cases; and provides that, after such a sentence, all the duties and rights of the parties, in right of the marriage, shall cease, and the complainant or innocent person shall be at liberty to marry again as if he or she had never been married. It became a doubt upon this act whether the prohibition to marry, which arose out of the first marriage, continued as to the offending party or not; for, although capacity to contract a second marriage is ex-
(537) pressly given to the injured party alone and thence a highly probable legislative intention may be inferred, that the guilty party should not have such capacity, yet when the consequence of such a construction would be to involve that person in the guilt and pains of felony, a court would naturally hesitate, and perhaps feel bound to hold that the capacity to marry again legally resulted to both parties from the dissolution of the previous marriage, without some express negative words. It seems that the same doubts have been entertained, and caused much parliamentary discussion in England, where the offending party married after divorce by statute; which is usually drawn so as to declare the marriage dissolved and made void to all intents and purposes; but superadding authority to the injured party alone to marry again and making the issue of such marriage legitimate. But it is said to be the better opinion that such second marriage of each party is valid, and that opinion is sanctioned by usage. It is, however, concluded by all that, if the statute contain prohibitory words on the offending party, that party cannot marry, and the incapacity arising out of the first marriage continues, notwithstanding the divorce. Shelford on Marriage & Divorce, 476. To clear all doubts upon the point

in this State, and to express distinctly, what was, probably, the intention from the beginning, the act of 1827 enacts, that no defendant or party offending, who shall be divorced from the bonds of matrimony, shall ever be permitted to marry again; and if he of she shall offend against the act he or she shall be subject to the pains and penalties which are inflicted by law upon persons guilty of bigamy. It is clear, therefore, upon this latter act, that, notwithstanding the general terms in which a divorce *a vinculo* is expressed, as dissolving and annulling the marriage, its existence is continued, so far, at least, as it forms an impediment to the offending party's forming a second marriage, during the life of the divorced husband or wife. For, by a second marriage the offending party becomes, according to the words of the act, guilty of bigamy, in which the party is charged with (538) marrying a second time, "his or her former wife or husband being alive." It is sufficient to invalidate a second marriage to show a prior one and the parties still living, and it is for the parties to such second marriage to show a capacity to contract, newly acquired. That the party attempts by showing the divorce; but that confers the capacity on one of the parties only and expressly withholds it from the other. It is, then, unquestionable that if this second marriage, in this case, had been celebrated in this State it would have subjected the plaintiff to the pains of bigamy, and would have been void. The case stands as to her precisely as if there never had been a divorce; and, *pro hac vice,* the first marriage is still subsisting.

We conceive the second marriage acquires no force by the celebration of it having been in South Carolina. We have been at some loss to determine in what sense we are to understand the phrase in the case that the parties married in South Carolina "according to the laws of that State." We suppose it was meant to say thereby, merely, that the ceremony was duly celebrated with the formalities, and by the persons, and with the witnesses, there requisite to constitute a marriage. It would be great injustice to our sister State to assume that by her laws her own citizens can marry a second time, a former marriage not being dissolved by death or divorce; or that she makes it lawful for citizens of other States, who have married at home, and by their domestic laws cannot marry a second time, to leave their own State and go into South Carolina expressly to evade their own laws, and without acquiring a domicil in South Carolina, contract a marriage there. We cannot suppose that South Carolina allows of polygamy, either by her own citizens or those of any other country. Therefore we might cut the case short at that point, upon the presumption that, the contrary not expressly appearing, the law of South Carolina does not tolerate this marriage more than our own law does. Indeed, we believe that in

truth she does not so much, as we have been informed, that she grants no divorces. But if it were otherwise we should still hold the (539) marriage void. We do not undertake at present to say what might be the effect of a marriage of a person in the situation of this plaintiff, contracted in another State, in which she had become *bona fide* domiciled. It seems to be the settled law of England that an English marriage cannot be effectually dissolved by any proceeding in a foreign court, though the party be domiciled abroad. *Lally's case,* 1 R. and R., Cr. C., 236. Though that case was questioned by *Lord Brougham* in the House of Lords in *Warrender v. Warrender,* 2 Clark & Finn, 541, yet it was sustained by *Lord Lyndhurst,* as the advised judgment of the twelve judges; and was afterward acted on by *Lord Eldon* in *Tovey v. Lindsay* in the House of Lords, and its authority was fully admitted as the law of Westminster Hall, by *Lord Brougham,* himself, in *McCarthy v. Decaix,* 2 Russ & Mylne, 614. In this last case he held that, where a Danish subject married in England and carried his wife home and lived in Denmark, and was there divorced, and under the belief that it was effectual, the husband gave up to his wife's relations upon her death her personal property, the divorce was so utterly inofficious that the husband was not only declared to have been entitled to the personal property of his wife, but to set aside his previous voluntary assignment of it, as having been given under a gross mistake. That was certainly carrying the doctrine to the utmost extreme. We do not say it was not correct. But the Court is not inclined to go out of our case and volunteer an opinion upon a question that has been so much discussed and on which the tribunals of different nations have come to opposite determinations. The case before us is not one of a domicil out of North Carolina, but it is stated that the parties were domiciled here and went to South Carolina in fraud of our law. Now, if the law of South Carolina allows of such a marriage, and although it be true that, generally, marriages are to be judged by the *lex loci contractus,* yet every country must so far respect its own laws and their operation on its own citizens as not to allow them to be evaded by acts in another country purposely (540) to defraud them. It cannot allow such acts abroad, under the pretense that they were lawful there, to defeat its own laws at home, in their operation upon persons within her own territory. If a person contract marriage here, and, living the other party, he goes to Turkey, and marries half a dozen wives, contrary to the laws of this State, it would be impossible that we could give up our whole policy regulating marriages and inheritances, and allow all those women and children to come in here, as wives and heirs, with the only true wife and heirs, according to our law. And it would be yet more clear,

if two persons were to go from this country to Turkey, merely for the sake of getting married at a place in which polygamy is lawful, and then coming back to the place where it is not lawful. Our case therefore is like that of *Conway v. Beazly,* 3 Hagg., 639, in which persons domiciled in England were divorced in Scotland, and *then one of them married again in Scotland,* and upon coming again into England, that second marriage was declared null, though it was admitted to be good by the law of Scotland. It was so declared upon the grounds of the personal incapacity of one of the parties to contract, when his first wife was living, by the law of England, and of the fraud on the law of England by a subject of England, which is precisely our case. The ecclesiastical judge, *Dr. Lushington,* after admitting the general rule as to the obligation of the *lex loci contractus* and that the marriage was valid in Scotland, said, "there was a preliminary consideration—the capability of the party to contract marriage—and the true question is, whether that capability is to be determined by the law of Scotland or the law of England." And, carefully reserving his opinion upon the question, when a case should appear of a *bona fide* Scotch domicil, he afterwards decided the marriage to be void on the grounds, already stated, of the domicil in England and the consequent fraud upon the law of the party's own country. Certainly every country should be disposed to respect the laws of another country, but not more than its own. That ought not to be expected. If a Turk with two wives were to come here, we would administer to them the justice dule to the relations contracted by them at home. But an (541) American marries at home, where plurality of wives is excluded, and, then, contrary to his engagement with that wife, takes another, where a plurality of wives is tolerated, and the first wife claims the benefit of the law of her own country, from the courts of her own country, while the second wife claims from the same courts the immunities and rights conceded to her in the law of her original country. These claims are incompatible and one only can be granted; and it is easy to see that the obligations arising out of the first contract are to be sustained by the country in which they were assumed, and that our courts must hold the second marriage void in our law, which denied the capacity to contract it. For the same reason we must obey the positive injunction of our statute, which applies to this case.

The judgment of the Superior Court is reversed and that of the County Court, dismissing the petition affirmed.

PER CURIAM. Reversed.

Cited: Green v. Lane, 43 N. C., 78; *Calloway v. Bryan,* 51 N. C., 570; *S. v. Ross,* 76 N. C., 244; *S. v. Kennedy, ibid.,* 252.

(542)

ROBERT S. HUNTLY v. JAMES H. RATLIFF.

When A., in consideration of $200 paid to him by B., delivered to B. certain slaves to be held in trust for the use A.'s wife, from whom he had separated, and A. afterwards became reconciled to his wife and brought an action at law to recover the slaves: *Held*, that A. could not maintain the action, because, by the payment of the consideration and the delivery of the slaves, the legal title had vested in B.

APPEAL from ANSON, Special Term in May, 1845; *Battle, J.*

Detinue for several slaves, which, it was admitted had been the property of the plaintiff. Some difference having arisen between the plaintiff and his wife, she left him, and instituted legal proceedings to procure a divorce and alimony. Their friends interfered and caused a compromise to be effected, so that the legal proceedings might be abandoned. In pursuance of this compromise, a bond was executed by the defendant and McCall, to the plaintiff, in the penal sum of three thousand dollars, the condition of which, after reciting the facts above stated, goes on to say that "the said Robert S. Huntly has agreed to give to his wife, Elizabeth, a negro woman by the name of Mary and her two children, Louis and Joe, which negroes he agrees to warrant, etc., to her and her heirs, and that she may forever hereafter use, possess and enjoy the said negroes free from any control or liabilities on his part; and the aforesaid James H. Ratliff agrees in behalf of his sister, the said Elizabeth Huntly, to pay over to the said Robert S. Huntly $200 in cash, as a part consideration of the said negroes, and to pay all such costs and expenses as may have or shall accrue in consequence of any suit or suits commenced by the said Elizabeth against the said Robert S., and that the bond given by Elijah Huntly to the sheriff of Anson, for the delivery of the above mentioned negroes (on a sequestration), shall forever be null and void, and that the
(543) said Robert S. shall never hereafter be liable for the debts or contracts of his wife, Elizabeth, so long as she may live separate and apart from her husband." The defendant paid the plaintiff tho two hundred dollars mentioned in this agreement, and the plaintiff delivered to him the slaves. The plaintiff's wife then went to live with the defendant, who was her brother, and continued to do so, until she became reconciled to her husband, when she returned to him. Afterwards, and before this suit was brought, an agent of the plaintiff in his behalf made a demand of the slaves from the defendant, who refused to deliver them up. At a subsequent time, before this action was brought, the plaintiff sent his wife and another woman to the defendant, giving them the sum of three hundred dollars, to pay him whatever expenses he had incurred on account of the slaves, and the

advances he had made to or for the plaintiff. On arriving at the defendant's house, the plaintiff's wife asked her brother what he intended to do, to which he replied that he should do nothing; upon which he and his sister quarreled, and the money was not tendered nor mentioned.

The defendant's counsel objected to the plaintiff's recovery, upon the ground that from the terms of the written contract, and from what took place between the plaintiff and the defendant, at the time, in relation to the slaves, the defendant was constituted trustee for the plaintiff's wife upon her separation from her husband; and, having received the slaves from the plaintiff in that capacity, he had a right to retain them until the money, which he had paid the plaintiff, and all his expenses in relation to the slaves were reimbursed. The court was of opinion that the defendant received the slaves upon a bailment, which was afterwards terminated, and that he had no such lien at law as justified him in refusing to deliver up the slaves to the plaintiff when demanded by him.

The jury found a verdict for the plaintiff and, judgment being rendered thereon, the defendant appealed.

Winston for plaintiff.
Strange for defendant. (544)

DANIEL, J. It was in evidence that the plaintiff delivered the slaves in controversy to the defendant, in consideration of $200 in hand paid. This evidence showed that the legal title to the said slaves passed to the defendant by sale and delivery. The plaintiff then introduced in evidence the bond, stated in the case, executed to him by the defendant as an admission by the defendant of the terms on which he was to hold the said slaves. The condition of the bond states that the plaintiff "agreed to give to his wife, Elizabeth, the said negroes, that she may *forever* hereafter use, possess and enjoy them, free from any control on his part. And the aforesaid James H. Ratliff, agreed on behalf of his sister, Elizabeth (the wife of the plaintiff), to pay over to Robert S. Huntly (the plaintiff), two hundred dollars in cash, as part consideration of said negroes, and furthermore to pay all such cost and expenses as may have or shall accrue, in consequence of any suit commenced, etc., by Elizabeth Huntly against Robert S. Huntly." At the foot of the said deed, and standing independent of the above stipulations, the defendant further covenanted with the plaintiff as follows: "and the said Robert shall never hereafter be liable for the debts of his wife so long as she may live separate and apart from her husband." There is no condition or stipulation in the said bond, that

the plaintiff should have back the said negroes in case his wife should again become reconciled and return to live with him. It is impossible there could have been such an intention, as the defendant had paid $200, and the costs of several suits besides maintaining the plaintiff's wife, and it would be most unreasonable he should lose all security for it at the will of the plaintiff and his wife. It seems to us that the legal title to the slaves is in the defendant upon certain trusts. Whether a court of equity would permit the husband to call for the legal title, and upon what terms, or hold the defendant a trustee of the slaves for the *separate use* of the wife, is not for us to decide, sitting in a court of law. We think, however, that his Honor erred in holding that the defendant was a bailee of the said slaves for (545) the plaintiff, which enabled him to bring this action at law on a demand and refusal. There must, therefore, be a

PER CURIAM. New trial.

Cited: Huntly v. Huntly, 41 N. C., 517.

JAMES H. RATLIFF v. ROBERT S. HUNTLY.

1. Where the plaintiff offers to prove a contract by parol evidence, and it is objected that the contract was reduced to writing, the witness who is introduced to show that there was a written contract must state the contents of the instrument to the court, that the *court* may judge whether it relates to the same contract offered to be proved by the plaintiff. It is error to leave this fact to be ascertained by the jury.
2. Where a part of the charge of the court to the jury related to a matter totally immaterial, and benefited neither the plaintiff nor the defendant, this is no ground for a new trial.
3. In an action of trespass for taking a slave out of the immediate possession of the plaintiff, evidence of abusive language to the plaintiff at the time of the trespass is admissible to show *quo animo* the act was done and to enhance the damages.

APPEAL from ANSON, Special Term in May, 1845; *Battle, J.*

Trespass brought to recover damages of the defendant for beating the plaintiff's slave, Mary. Plea, *not guilty.* It was insisted by the defendant that the slave then belonged to him, and that he had a right to chastise her. Immediately after he had beaten the slave in the plaintiff's field, where she was then at work, and before he left the field, he cursed and abused the plaintiff (who was absent,) and

then threatened to shoot or otherwise injure him. This testi- (546) mony, as to the abuse of the plaintiff, was objected to by the defendant; but it was admitted by the court to show the *quo animo* the trespass was committed. The slave had before belonged to the defendant. The plaintiff paid the defendant (said the witness Gulledge) three or four hundred dollars, and the defendant agreed to deliver and did deliver the said slave Mary to the plaintiff. The witness was then asked whether the contract was put in writing. He said that Col. White prepared a writing relative to a difficulty then existing between the defendant and his wife, who was the sister of the plaintiff, but he did not know whether it related to the dealings between the plaintiff and defendant about the said slave. The defendant objected to the admissibility of parol evidence, to prove the sale of said slave, as the contract was proved (as he said) to be in writing. The court overruled the objection, as it did not appear that the contract spoken of by Gulledge had been put in writing by White. The defendant then called White, who said that he did write a contract between the plaintiff and defendant, in order to settle the difficulty between the latter and his wife; and he, the witness, was proceeding to state its contents, when the plaintiff objected and contended that the defendant should produce the writing if there was any, relating to this contract. The judge said that he could not ascertain whether the contract, spoken of by White, was the same as that spoken of by Gulledge, unless it was produced; but that he would instruct the jury that if they believed it to be the same, then the parol contract proven by Gulledge should be excluded from their consideration. "To which course of the Judge," the case states, "the defendant's counsel *assented.*" The defendant then proved that he and his wife became reconciled, that she went to live with him again, and that he claimed the said slave. The judge charged the jury that if Gulledge spoke of a different contract relative to the slave, from that mentioned by White, then the plaintiff had a title and a right to recover; but if it was the same contract, which had been reduced to writing by White, then the parol evidence of it, which has been given by Gulledge, must be by them excluded, and the plaintiff could not recover, (547) because he had not produced the writing containing the contract, which was the better evidence. The judge further told the jury that if they found for the plaintiff, that he was the owner or bailee, and the defendant had no right to determine it at the time, they might give smart money by way of damages, if the trespass was committed in a wanton manner, and from a spirit of malice towards the plaintiff. The jury found a verdict for the plaintiff—damages $100. The defendant moved for a new trial for misdirection as to the law, which

motion was overruled, judgment rendered, and the defendant appealed.

Strange for plaintiff.
Winston for defendant.

DANIEL, J. First: The judge erred when he stopped Col. White in his relating the contents of the writing which he had drawn up, and in deciding that he would submit it to the jury to say whether the contract spoken of by Gulledge was the same as that contained in the writing spoken of by White. It was, we think, a question for the judge to determine whether they were the same. And he should have let White inform him (not the jury) of the contents of the writing, that he might see whether the contract relative to the said slave was in it. If he had, from such testimony, been satisfied that the contract had been reduced to writing, he should have insisted on the plaintiff's suffering a nonsuit; and if he refused, then he should have charged the jury to give a verdict against him, as he had not produced the best evidence of his case that was in his power. The admissibility of evidence is a question of law, and to be decided by the court. But the defendant's counsel consented to the erroneous course of the court, and cannot now be permitted to take advantage of it, as consent takes away error.

Second. That part of the charge of his Honor, relative to a bailment of the slave to the plaintiff, was immaterial to the decision of the cause, as there was *no* evidence in the case on that point. And (548) as it did neither benefit to the plaintiff nor hurt to the defendant, it is not a ground for a new trial.

Third. The evidence given by the plaintiff, that the defendant, immediately after the trespass, and in the same field where he did the act, made use of abusive language relative to the plaintiff, we think was admissible to show the *quo animo* the defendant did the trespass; and it was properly left by the court to the jury, whether they would or would not give smart money in assessing the damages.

PER CURIAM. No error.

Cited: Costin v. Baxter, 29 N. C., 114; *S. v. Dick,* 60 N. C., 445; *Cherry v. Canal Co.,* 140 N. C., 426; *Bateman v. Lumber,* 154 N. C., 253; *Comrs. v. Indemnity Co.,* 155 N. C., 227 *Ewbank v. Lyman,* 170 N. C., 507.

RICHARD SMITH ON DEMISE OF WILLIAM WALL
v. THOMAS TOMLINSON.

When upon a survey in an action of ejectment the defendant admitted certain lines to be the lines of the plaintiff's land, and according to that boundary the defendant was in possession of part of the plaintiff's land without seven years possession under color of title, the court, upon the motion of the plaintiff's counsel, should have instructed the jury that the plaintiff was entitled to recover.

APPEAL from STANLY, Spring Term, 1845; *Pearson, J.*

Ejectment. The plaintiff claimed under a grant to William Whitfield, which was prior, in date, to that under which the defendant claimed, and deduced a regular title from the grantee to himself. The question, as it turned out, was one of boundary. The surveyor stated that certain lines, delineated on the survey, which constituted a part of the case, and beginning at a particular corner, and called yellow lines, were laid down by the direction of the de- (549) fendant, who said they were the boundaries of the land granted to Whitfield, under whom the plaintiff claimed. The defendant contended, although his was the junior grant, yet that he had been in the actual possession of the land on which the grants lapped for more than seven years, claiming it as his own and adversely to all the world, and such was the fact if the grant to Whitfield began where the plaintiff alleged it did. But upon the evidence it appeared that within the yellow lines, admitted by the defendant to be those of the Whitfield grant, was a slip of land cleared and enclosed by the defendant, not more than four years before the bringing of the action, and that he had no other possession within those lines. Upon this being made to appear, and upon the testimony of the surveyor as to the declarations of the defendant, the plaintiff contended that he had proved the defendant a trespasser and entitled himself to a verdict, and moved the court to charge to that effect. The course, however, did not here stop, but underwent a laborious investigation, nor does it appear how this objection of the plaintiff was disposed of, nor does the court in its charge notice it. There was a verdict for the defendant and the plaintiff appealed.

Mendenhall for plaintiff.
Strange for defendant.

NASH, J. From the fact that this motion was not noticed by his Honor we are to conclude that his Honor did not agree with the counsel of the plaintiff, and overruled his motion. We think, if this

were so, the court erred; and if it were not literally so, there was error in not charging as requested by counsel that the plaintiff was entitled to a verdict upon the point when made by the plaintiff's counsel. What an individual says concerning his own rights and interest is always evidence against him, and evidence of the highest character. When the parties went upon the land for the purpose of surveying it, in this as in every other similar case, the plaintiff's lines were first to be (550) run, to ascertain where the land was he claimed. The surveyor, ignorant where to commence, was directed by the defendant to begin at a particular spot, which he asserts is the beginning corner of the plaintiff's land, and the yellow lines are run by his direction, as being the lines of the Whitfield grant. Here, then, was his distinct admission as to the boundaries of that grant, and within them he had cleared and fenced in land, within four years before the bringing of the action. He had not had seven years' adverse possession of that strip, under title. We think, under the testimony, the plaintiff was entitled to a verdict for the land so cleared within the yellow lines, and that the court ought so to have instructed the jury.

PER CURIAM. *Venire de novo.*

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(551)

BENJAMIN RUNYON, CASHIER, ETC., v. THOMAS LATHAM ET AL.

1. Where a bank receives a bill of exchange from the drawer for collection, it acts as the agent of the drawer, and is entitled to no damages if the bill be protested; it can only claim expenses.
2. Where a debtor by note to a bank paid the full amount of the note to the cashier, declaring that the payment was intended to discharge that debt, the cashier was bound to make the application accordingly, and could not apply any part of the sum so paid to the payment of damages on a protested bill, which he alleged to be due to the bank from the debtor.

APPEAL from BEAUFORT, Spring Term, 1845; *Settle, J.*

Assumpsit. The plaintiff declared on a promissory note for $1,000, payable to him, as cashier, and negotiable and payable at the branch of the Bank of Cape Fear at Washington—the execution of which note was admitted. Thomas Hardenberg, a witness for the plaintiff, proved that the note became due on 10 November, 1840, when the defendant Latham called at the bank to pay it; that he handed to the plaintiff a letter from his agent in Philadelphia, and requested him to draw a draft for the amount due to the defendant, and handed him money, sufficient, with the draft, to make the sum of seven hundred

dollars. He also handed to the witness a note for three hundred dollars, which was to be offered to the bank, of which the plaintiff was cashier, for discount. The $300 note was not discounted by the bank, and the draft came back protested, in consequence of having been drawn for too much. Latham then told the cashier he would pay the debt, and requested him to draw another draft for the true amount, which draft was received by the cashier for collection, and paid at maturity. He also gave the cashier money enough to make up the sum of $1,000, as he supposed, the last draft and the money in bank constituting a part of that sum. He also paid all the expenses of the protested draft, except the damages, which he insisted (552) he was not liable to pay. At the time this took place and the calculation was made by the plaintiff as to what amount would pay the $1,000 note and the expenses of the protested draft, except the damages thereon; the defendant Latham declared his determination to pay the $1,000 note and the expenses of the protested draft, except the damages; and 69 cents change was handed him by the cashier. The calculation which the plaintiff had made was erroneous, as stated by the witness, being too little by $35.60, which sum the defendants had not paid at the bringing of this suit. The fact, in relation to the error, was never, to this witness's knowledge, communicated to the defendants. The witness further stated that there was in bank to the credit of the defendant Latham and had been ever since the settlement made by the cashier, the sum of $931, and that the damages on the protested draft and the error made by the plaintiff in his calculation would make up the sum due to the bank for the $1,000 note and all costs upon the protested draft, except damages; and the witness further stated that it was the practice of the bank not to receive partial payments.

The court charged the jury that the debtor had the right, in making payments, to direct their application, and the creditor was bound, in receiving payments, to apply them as directed by the debtor, and, on the failure of the debtor, at the time of a payment, to direct its application, it was the right of the creditor to apply the same as he thought proper. And the court left it to the jury to find from the testimony, whether the defendant, at the time of the payment and settlement, directed the creditor to apply the same to the discharge of the note now sued on, and, if he did so, the creditor was bound to make the application accordingly. The court further instructed the jury that, if they could collect from the testimony that the debtor directed the application at the time of settlement and payment, and the creditor refused so to receive it, on the ground that it was not a payment in full, or on any other ground or for any other reason, and

(553) the debtor paid the same under such circumstances, they might consider it a general payment by the debtor, and the creditor would have the right to make the application. The jury were further instructed that the usual and ordinary way to recover damages on a protested draft or bill of exchange was by an action on the draft or bill, but the plaintiff had a right to apply the funds of the defendant in the bank to the satisfaction of the said damages, if the defendant did not, at the time of payment or depositing the funds, expressly direct the application otherwise. In reference to a question asked by a juror, whether it was not a rule of the bank that settlements at the counter were final, the court instructed the jury that, whatever the rule of the bank might be, it could not alter the rule of law, by which mistakes in calculation were allowed to be corrected whenever they could be proved.

The jury found a verdict for the defendants. On a motion for a new trial the court informed the defendants' counsel that the verdict would be set aside and a new trial granted, unless the defendants paid the amount of the mistake in the calculation thereon; and, this being done by the defendants in open court, a new trial was refused, and judgment being rendered for the defendants, the plaintiffs appealed.

Badger for plaintiff.
J. H. Bryan for defendants.

RUFFIN, C. J. Under the instructions to the jury, it must be taken on this verdict that there was no mistake in reckoning the debt. But if there was a mistake it has been corrected, so that the only question now is whether any of the money paid by the defendant could be applied by the plaintiff to the damages on the protested bill of exchange.

The defendant contended that he was not liable for damages, and nothing is stated which shows that he was. It does not appear that the bill was discounted or, if it was, that the proceeds were put to the credit of the defendant in his general account, so as to give him the control of the money at his pleasure. It was understood, no (554) doubt, that the money produced by the bill was to cover the balance due on the note, and the bank would hardly have paid it for any other purpose. Now as the bank kept the note and interest was running on the whole amount of it, we cannot suppose that the debtor would have the bill discounted when the proceeds would be idle in bank, not stopping the interest on his debt, and yet not under his control or subject to his use in any other way than in the discharge at a future day of this debt on the note. It is not a natural

course of dealing, and the probability, upon the state of facts sent here, is that the first bill was taken for collection, as is expressly stated in reference to the second. If that was the fact no damages would have been due, for the bank would be but the defendant's agent, and could only claim expenses.

But, admitting that claim to have been well founded, the plaintiff has no ground to complain of the directions to the jury. His own witness proved expressly that the defendant positively refused to pay the damages, but was desirous of paying the note, and (after paying the expenses on the bill) did pay just what covered the note, or was supposed to cover it. Indeed, he paid a little more, and the plaintiff handed back a small sum in change, after retaining an amount equal to the principal and interest of the note. That, of itself, was strong evidence of the application of the money to that debt. *Roberts v. Garnee,* 3 Caines, 14. His Honor, therefore, went further to sustain the plaintiff's case than the evidence justified, when he told the jury they might find this a general payment, and consequently, applicable to these damages, provided the creditor refused to receive it as a partial payment of the note, for there is not the least evidence of any such refusal on any ground whatever. The witness said, indeed, that it was the practice of the bank not to receive partial payments. But that has nothing to do with this question, for no intimation was given of that to the defendants; and, indeed, this was not a case of partial payment. The defendants paid in the money as a full payment, and, except the corrected mistake, it was a full payment. It is only made to assume the appearance of being partial by an appli- (555) cation subsequently of a part of it to another demand, by that means leaving a balance due on the note. But there was an express refusal of the defendants, at the time, to let any of the money go to those damages, and a precise application of it to the note. Under those declarations, the plaintiff silently accepted the money, and it would be a most unfair trick on the defendants to divert the application from the only debt the defendants meant to pay, or acknowledged, to one which they utterly denied. It was the debtor's privilege, at the time they made the payment, to declare on what acount they made it, and they did so in a way not to be misunderstood. Therefore, the plaintiff could not change the appropriation of the money and the judgment must be affirmed.

PER CURIAM. No error.

SARAH DAVIDSON v. WILLIAM S. NORMENT.

Where the plaintiff alleged, as a proof of the *bona fides* of her purchase, that she had given a valuable consideration for a slave, and introduced a witness to prove that she had conveyed to him a tract of land as the consideration for the purhcase of the slave: *Held*, that the deed for the land must be produced, as the best evidence, and, the deed being in existence, though in another State, parol evidence of its execution and contents could not be received.

APPEAL from MECKLENBERG, Special Term in May, 1845; *Pearson, J.*

Detinue for a slave, named John. The slave in controversy once belonged to William Davidson. He being in insolvent circum-
(556) stances, a creditor of his obtained a judgment and execution against him. The slave was levied on and sold by the sheriff, as William Davidson's property, and the defendant became the purchaser. The plaintiff contended that her father, William Davidson, had sold said slave to her *bona fide* and for a valuable consideration, before the *teste* of the execution, under which the defendant claimed him. She offered her father as a witness to prove these facts. He stated that he had sold the slave to the plaintiff *bona fide* and for a valuable consideration before the *teste* of the execution under which the defendant claimed the said slave; that he had never made any actual delivery to the plaintiff of the slave, but that he had permitted her to hire out the mother and her boy John and receive the hires; that the consideration given to him by the plaintiff for the slave was a tract of land which belonged to her, lying in the State of Tennessee; "that she had executed to him a deed of bargain and sale for the said land." Neither the plaintiff nor the witness was able to produce the said deed, it being alleged to be in Tennessee. The court was of opinion that the deed would be the best evidence that the plaintiff had actually parted with her title and interest in the said land, and also given a valuable consideration for the slave, and refused to permit the witness to give parol evidence of his acquiring the title to the said land. Whereupon the plaintiff was nonsuited and appealed.

Alexander and J. H. Bryan for plaintiff.
Boyden and Osborne for defendant.

DANIEL, J. We think that the court was right. The best evidence of the fact, if it existed, that the witness had purchased the land *bona fide*, was the deed mentioned, executed in such manner as to pass lands in the State of Tennessee, as the witness said that the legal title had passed out of the plaintiff to him. The witness was the proper person

to have the custody of the deed, and his leaving it in Tennessee did not permit him to give parol evidence of its contents. (557) The judgment must be

PER CURIAM. Affirmed.

Cited: Threadgill v. White, 33 N. C., 595; *McCracken v. McCrary,* 50 N. C., 400; *Gillis v. R. R.,* 108 N. C., 448.

JOHN MASSEY v. JOHN LEMON.

Where upon the trial of a warrant before a justice for a bond of $10 he entered as his judgment, "Warrant dismissed and judgment for the officer for $1," and it was proved on the trial of a subsequent suit for the same bond that the merits of the case were examined by the justice who tried the first warrant: *Held,* that this would be a bar to the subsequent suit, unless the plaintiff could clearly show that the justice only intended to enter a nonsuit.

APPEAL from ROCKINGHAM, Spring Term, 1845; *Caldwell, J.*

Debt on a bond for $10, commenced before a justice of the peace, and brought by successive appeals to the Superior Court. The execution of the bond being proved, the defendant introduced and relied on a former judgment on a warrant for the same cause of action, which judgment was in the following words, to wit: "Warrant dismissed and judgment for the officer for one dollar. 30 April, 1844. Rob. M. Napier, J. P." To show that the merits had been examined, the defendant examined Napier, the justice, who testified that, on the return of the warrant before him the plaintiff and the defendant both attended, and that several witnesses were examined for the plaintiff as to the handwriting, some of them from the neighborhood of the parties, and one of them a brother of the defendant, some of (558) whom testified that they could not say that the signature was the handwriting of the defendant, that they did not know it.

The court was of opinion, from the showing of the judgment, that it was a nonsuit, and that the evidence did not repel this conclusion. There was a verdict for the plaintiff, and judgment being rendered accordingly, the defendant appealed.

Kerr for plaintiff.
Morehead for defendant.

NASH, J. We regret the necessity, in which we are placed, of granting a new trial. The sum demanded is very small, and no important principle of law is involved in the controversy. We think his Honor erred in the construction which he placed on the judgment by the magistrate on the former trial, and, of course, it is our duty to send the case back for a new trial. To the present action the defendant pleaded a former judgment between the same parties, upon the same subject-matter, and, in support of his plea, introduced a warrant in the name of the plaintiff upon this same bond. The magistrate who tried the case endorsed upon it, "warrant dismissed and judgment for the officer for one dollar." In order to show that the magistrate who tried the first warrant passed upon the bond now in controversy, the defendant produced the magistrate, who testified that on the return of the warrant, the plaintiff and defendant both attended, that several witnesses were examined by the plaintiff as to the handwriting of the defendant, some of them the neighbors and one the brother of the defendant, some of whom testified that they could not say the signature was the handwriting of the defendant, that they did not know it. His Honor was of opinion that the entries upon the back of the warrant did not amount to a judgment, but to a nonsuit, and that the parol evidence did not alter its effect. In this opinion we think there was error. The evidence shows that the only (559) matter in controversy between the parties was as to the execution of the bond; several witnesses were produced by the plaintiff to this point, none of whom established the fact—and, with this entire failure of evidence, the magistrate dismissed the warrant. The inference is irresistible, in the absence of contradictory or explanatory evidence, that the justice dismissed the warrant because he considered the plaintiff had failed to prove the bond. Not only, then, was there a judgment given against the plaintiff, but upon the very point in issue in this case, to wit, the validity of the bond declared on. It has not been the course of the Court to look too narrowly into the form in which justices of the peace do their official business, and it has now become a settled principle that the courts will be satisfied if enough appears to show what was done or intended to be done. In *Ferrill v. Underwood,* 13 N. C., 114, the Court decided that an entry by a magistrate, upon the trial of a warrant, "In this case the plaintiff to pay costs," was equivocal; it might be a judgment of nonsuit or on the merits, but, as there was evidence to show that the magistrate had gone into the merits of the case, it was a judgment which protected the defendant upon the trial of another warrant for the same subject matter. *Justice v. Justice,* 25 N. C., 58, affirms the doctrine in the case above. In *Justice v. Justice,* the entry on the warrant was,

"judgment against plaintiff for costs," and the Court say the judgment might well stand for a nonsuit or a judgment on the merits, and as there was no competent testimony to show that the merits had been gone into, it was considered a judgment of nonsuit. Here the entry made by the justice implies a judgment according to the practice of the justices of this State, and we think it was sufficiently shown that the merits were gone into. The plaintiff might have shown it, perhaps, a judgment of nonsuit, if he had chosen so to do. The evidence of the debt was his property, and, upon finding his witness could not prove its execution, he may have withdrawn it, and thereupon the magistrate may have endorsed it on the papers as a nonsuit. Upon the next trial the parties may show whether the plaintiff retained possession of the paper or the magistrate has (560) kept it.

PER CURIAM. *Venire de novo.*

Cited: *Davie v. Davis,* 108 N. C., 502.

P. K. DICKINSON v. WILLIAM H. LIPPITT.

The county court has a right to permit a sheriff to amend his return on an execution to that court by striking out a return of a levy and sale and returning *nulla bona.* If, upon an appeal from this decision, the Superior Court undertakes, without its appearing on their records that they had examined into the merits of the case, to reverse this order, it must be presumed to be done upon the ground that the county court had no legal authority to make such an amendment; and, therefore, the Superior Court was in error, and *their* decision must be reversed.

APPEAL from NEW HANOVER, Spring Term, 1845; *Pearson, J.*

Motion to permit the sheriff to amend his return on a writ of *fi. fa.* that he levied and sold certain property, and to substitute in lieu of said return a return that no property of the defendant could be found. It appeared that an execution in this case issued against the defendant, which was levied on certain goods as the property of the defendant, and these goods were subsequently claimed by one Benjamin Tyler. The sheriff sold the goods as the property of the defendant, Lippitt, when one George W. Davis became the purchaser. On this execution, returnable to March Term, 1835, of the Court of Pleas and Quarter Sessions for the county of New Hanover, the sheriff made the following return: "Satisfied by sale of turpentine (561) agreeably to the annexed account of sales; judgment and interest paid to the plaintiff, M. Costin, and costs paid into office. C. B.

Morris, Sheriff." The plaintiff gave notice to the defendant, twenty days or more before the March Term, 1843, of the said court, that he would move the court for leave, at that term, for the sheriff to amend his return by striking out the return just mentioned and inserting, in lieu thereof, *nunc pro tunc*, "no goods or chattels, lands or tenements of the defendant to be found in my county." At June Term, 1843, of the said court, the court directed the sheriff to amend accordingly, from which order the defendant appealed. The cause came on to be heard upon this appeal, at the Spring Term, 1845, of the Superior Court of Law for New Hanover County, when the plaintiff moved that the appeal should be dismissed, upon the ground that the order made by the county court was not one from which the defendant had a right to appeal. This motion was overruled, and the court proceeded to reverse the order of the county court and to refuse the application for leave to amend. From this judgment the plaintiff appealed to the Supreme Court.

Strange for plaintiff.
(563) *Badger for defendant.*

RUFFIN, C. J. In *Smith v. Daniel*, 7 N. C., 128, on a *fieri facias* against one person, the sheriff sold the slave of another and brought the money into court, and afterwards the owner of the slave recovered the value from the sheriff, and it was held that the sheriff might amend his return by striking out that which was made and inserting one of *nulla bona*. That is in point in the present case, to establish the power of the county court to allow the amendment. With the propriety of the exercise of that power in particular cases this court does not meddle, because, in general, it is a matter of discretion to allow or refuse the amendment, and, being a matter of discretion, the ground of allowing or refusing the amendment need not be set forth in the record. If, therefore, this were an appeal from a decision of the Superior Court, upon a motion originally made in that court, we should certainly not enter into it. But that is not the state of this case. This motion was made in the county court and granted, and from the order as it stood, simply and without any statement of facts, an appeal was taken to the Superior Court, where the order was reversed. If it appeared that, in the Superior Court, evidence was gone into for the purpose of showing that the amendment ought or ought not to have been made, we should have felt bound by the opinion of his Honor, founded, at it would be, partly upon matter of fact. But nothing of that kind appears. After stating a refusal of the appellee's motion to dismiss the appeal, the record states that "the court proceeded to reverse the order of the county court and refuse the applica-

tion to amend." This imports, not that the decision was on any merits made known by proof to the Superior Court, more (564) than they are to this Court; but merely that the order of the county court was reversed on its face, because it was erroneous in point of law, either because the county court could not, under any circumstances, make the order, or because the grounds of the order ought to have been stated in it. In that we think there was error; and viewing the case in that light, the error is one of law, and therefore cognizable by this Court. We can readily conceive that the amendment was very properly allowed. If, for example, the plaintiff in the execution or the sheriff was sued for the turpentine by some other person as owner, and after *bona fide* defense was compelled to pay for it, the defendant ought still to pay the debt, as it would thus appear that he never had paid it. But he could not be compelled while the original return stood as a bar to any proceeding on the judgment. Therefore it ought to be put out of the way, so that a *scire facias* would lie on the judgment, especially as it could not prejudice the defendant if the turpentine really was his, inasmuch as the return would not conclude him, but he might still plead the seizure of his goods of value sufficient as a satisfaction. It is to be observed that there is no contest between the plaintiff and the sheriff, but only between the defendant and those persons. Now, we do not know that the facts were, as before supposed; but we presume they must have been of that kind, as we can imagine nothing else that could make the amendment desirable. It is sufficient, however, if there can be a case in which the county court ought to have allowed the motion; for, as far as we can see, the Superior Court reversed the decision of the county court without reference to any merits made to appear to the Superior Court, but for a supposed error apparent in the record. In other words, the power of the county court to allow the amendment must have been denied, contrary to *Smith v. Daniel,* 7 N. C., 128.

The judgment of the Superior Court must, therefore, be reversed; and this Court, proceeding to give such judgment as the Superior Court ought to have given, doth affirm the order of the county court, and direct the same to be certified to the Superior Court, in order that a *procedendo* may there be issued to the county court (565) to allow of the amendment, according as the same was ordered in the county court.

PER CURIAM. Reversed.

Cited: Cody v. Quinn, 28 N. C., 192; *Slade v. Burton, ib.,* 208; *Bagley v. Wood,* 34 N. C., 91; *Freeman v. Morris,* 44 N. C., 288; *Atkin v. Mooney,* 61 N. C., 32; *Williams v. Weaver,* 101 N. C., 2.

JOHN M. INGRAM v. MARGARET G. SLOAN.

On a covenant by the defendant to pay the plaintiff $524, provided the title she acquired to her deceased husband's land by the sale of a sheriff under an execution against the heirs of her husband, in opposition to a sale made by the executor under a power in the will to sell for the benefit of volunteers, it was *Held*, that the plaintiff was entitled to recover, the creditors having a right to sell the land, in preference to the right of the executor under the will.

APPEAL from ANSON, Spring Term, 1845; *Pearson, J.*

Covenant on the following instrument executed by the defendant and delivered to the plaintiff, to wit: "I agree to pay John M. Ingram five hundred and twenty-four dollars, being the amount paid by the said Ingram as the security of Robert Ingram, deceased, as constable, on condition the sale of the house and lots in the town of Charlotte, made this day and purchased by me, proves, on a controversy with the purchaser at a sale made formerly by the executors to be good; and on condition that the executor had no right in future to make a sale, so as to defeat the purchase made this day by me, at sheriff's sale; the above sum to be paid as soon as the question settled."

The plea, "covenants not broken." It appeared that Rob- (566) ert Sloan, the late husband of the defendant, made his will and appointed John Sloan his executor. He proved the will and qualified. The testator, by his said will, gave his executor a *naked* power, to sell three lots of land, lying in Charlotte, and then to divide the purchase money among his wife and children. The executor, by virtue of his power, sold the three lots to Hiram Sloan. Afterwards, to wit, on 27 November, 1833, the sheriff sold the said lots, and executed to the defendant, as the highest bidder, the instrument in nature of a deed, mentioned in the case—in which is recited, "that an execution for $225, issued from Mecklenburg County Court against the heirs at law of Robert Sloan, which debt was recovered by Durham Combs and others against the said heirs, as on record may appear; that he (the sheriff) sold the said three lots on 25 January, 1832, at which time Margaret G. Sloan became the best bidder," etc. On 28 January, 1833, the defendant executed to the plaintiff the covenant now sued on; this action was brought on 28 July, 1840, and the defendant has been in possession of the lots, holding them adversely to the vendee of the executor, ever since her purchase at the sheriff's sale. On the trial, the defendant objected to a recovery against her, *first*, because the plaintiff did not produce the judgment and execution against the heirs of Robert Sloan, under which she purchased the land; and to support the sheriff's sale to her. The judge was of opin-

ion that the defendant, in making her covenant, took for granted that all the proceedings to support the sheriff's sale were regular, and that she conditioned and restricted herself only to a defect in her own title by reason of the sale to Hiram Sloan, then already made by the executor, or which he should thereafter make to any one, under the power in the will. And if a defect existed, she should show it. It was also in evidence that the defendant had had, under her deed from the sheriff, seven years' actual possession, adverse to the alienee of the executor.

The jury under the charge of the court, found a verdict for the plaintiff, and, judgment being rendered accordingly, the (567) defendant appealed to the Supreme Court.

Strange for plaintiff.
Winston for defendant. (568)

DANIEL, J. We think that the opinion of his Honor was correct, for the defendant conditioned against nothing else in the covenant but the acts of the executor under the power in the will. And, as the power given by the testator to his executor was to sell and convert the lots into money for the benefit of his wife and children, such a sale for mere volunteers was void by force of the statute of fraudulent devises, as to the creditors of the testator, under whom the defendant claimed. The deed, which the sheriff gave her shortly after the purchase at his sale, being defective, does not prevent her from applying now for a good deed from the old sheriff if alive, or the present sheriff, in case the old sheriff be dead, or is out of the State. (569) Laws 1799, ch. 538. We think that the judgment must be affirmed.

PER CURIAM. No error.

DOE EX DEM. JOHN W. THOMAS v. JOHN ORRELL.

1. A person who was in apparent possession of a tract of land when it was sold by the sheriff under an execution against him, and in like possession when an action of ejectment was brought against him, cannot, after entering a defense to the action, be permitted to allege that others, who were also in possession, had both the title and the sole possession.
2. If the person thus sued meant to disavow any possession in himself, he should not have entered any defense.
3. Upon a judgment by default against a casual ejector, if it be shown to the court that there are other persons in possession, holding different

parcels in severalty, judgment will not be allowed for the whole tract sued for, but only for the part of which the person was in possession on whom the declaration was served.

APPEAL from DAVIE, Spring Term, 1845; *Bailey, J.*

Ejectment. The title of the lessor of the plaintiff was a purchase and a conveyance of the premises from the sheriff, upon judgments and executions against the defendant, who was in possession of the premises at the time of the sheriff's sale, and also when this suit was commenced.

The defendant offered to prove that before the judgments rendered he had sold and conveyed the land to his two sons, one of whom lived in the house in which the defendant resided, and the other oc-
(570) cupied a separate and distinct portion of the tract, and that, in truth, the possession of the lands, as well as the title, was in the sons at the time of the suit brought. But the court refused to receive the evidence, and the jury returned a verdict for the plaintiff, and from the judgment the defendant appealed.

Clemmons for plaintiff.
Boyden for defendant.

RUFFIN, C. J. It being admitted that the defendant was actually an occupant of the premises, that is sufficient to sustain this action against him. The offer to give evidence of the possession of the sons, under the defendant's conveyance, was but a covert attempt to elude the rule that, in ejectment by the purchaser at sheriff's sale against the debtor himself, the latter cannot set up a title out of himself. If he meant to disavow any possession in himself, why did he defend? If the defendant had not defended, but it had been shown to the court that there were other persons in possession, holding different parcels in severalty, judgment would not have been allowed for the whole against the casual ejector, but only for the part of which the person was in possession on whom the declaration was served. Bul. N. P., 98. But after having defended for the whole, and when it is clear that the defendant is, at best, one of the possessors, it is no excuse to him to say that there are others also in possession. If the others be in possession, as he alleges, they cannot be prejudiced by the judgment against the present defendant, for every plaintiff in ejectment takes possession at his own risk, and must take care not to take more than he is entitled to, nor to turn out persons who have the title, on which there has been no judicial decision. The lessor of the plaintiff can, of course, have the defendant put out of the premises; but he will enter, himself, at the hazard of being a trespasser on the sons, pro-

vided they really are entitled to the land. If he wished to bind them by the judgment in this action he ought to have served them also with a copy of the declaration. As he did not, the sons are still at liberty to assert their title against the lessor of the plaintiff; but the defendant has no right to assert it for them, or rather, to set (571) up their title and their possession with them to protect himself from being evicted.

PER CURIAM. No error.

Cited: *Judge v. Houston*, 34 N. C., 112, 114, 115; *McClennan v. McLeod*, 75 N. C., 65; *Edwards v. Phillips*, 91 N. C., 358.

DEN ON DEM. OF NATHAN A. STEDMAN v. RODERICK MCINTOSH.

1. Where a person who had a lease until a day certain, having had notice to quit, held over, and an action of ejectment had been brought against him by the lessor, and pending this action he quitted the possession, and then the lessor sued him and recovered a certain sum for his use and occupation of the premises during the time he held over: *Held*, that this was not a waiver of the notice nor evidence of a new tenancy from year to year.
2. If the money recovered in the last action had been recovered or received as *rent* it would have been evidence of a new tenancy.

APPEAL from CHATHAM, Spring Term, 1845; *Caldwell, J.*

Ejectment commenced 19 November, 1842. On the trial the plaintiff gave in evidence an instrument of writing, executed by the plaintiff, in these words: "I have this day agreed with Roderick McIntosh to let him occupy the house now in his occupancy on my lot, at the rate of fourteen dollars per annum, to commence on 26 October, 1841, he having settled with me for the rent up to that time; in case Mr. McIntosh shall desire to remove the house before October, 1842, he is to pay me only for the time he occupies the house, while on my lot, at the rate above mentioned. I hereby acknowledge that I put no claim to the house; all I contend for is the rent of the land. In witness whereof, I have hereunto set my hand and seal." (572) This instrument was dated 9 September, 1841.

It was admitted that the defendant was in possession of the premises mentioned in the declaration and referred to in the instrument of writing set forth; and it was proved, on the part of the plaintiff, that, in July, 1842, the lessor of the plaintiff told the defendant that he wished him to leave the premises as soon as he could, and he must

leave at the end of his time, to which the defendant replied, that he was as anxious to get away as the lessor of the plaintiff was to get him away, and he would leave as soon as he could. It also appeared that the defendant did not leave the premsies in question until the Fall of 1843, pending the present action.

The defendant then offered in evidence a warrant, sued out by the lessor of the plaintiff against the defendant, on 4 November, 1843, and after the defendant had removed from the premises, for $30, on which the defendant confessed judgment for $22.25, on 7th of that month; and the defendant also proved that the same was sued out for the rent that had accrued in 1842 and 1843, on account of the occupancy of the premises in question by the defendant, and insisted, that it was evidence of a new tenancy created between the parties, and, therefore, the defendant ought to have had notice to quit, and further it was evidence of license for the year during which this suit was brought.

This being the only contested point in the case, the court charged the jury that, whatsoever the law might be between landlord and tenant, when notice was given to quit, and thereafter rent was paid by the tenant and accepted by the landlord, the tenant being still in possession, it did not apply to this case, it appearing that there was a suit pending to recover the possession when the warrant was sued out, and that the defendant had then left the premises.

The jury returned a verdict for the plaintiff, and, judgment being rendered accordingly, the defendant appealed.

(573) *Badger for plaintiff.*
J. H. Haughton for defendant.

NASH, J. When this was formerly before us, 26 N. C., 291, it was decided that the defendant had the premises under a special contract, which terminated his right to keep the possession on 26 October, 1842. The plaintiff had, in July, 1841, given the defendant notice to quit at the expiration of his time. On the last trial it appeared the defendant quitted the premises in November, 1843, after which the plaintiff warranted him for the sum of $30, and judgment was confessed by the defendant for the sum of $22.25, as rent accruing for the occupancy of the premises during 1842 and 1843. The warrant was dated November, 1843. The defendant contended that this was a waiver of the notice to quit and an acknowledgment, on the part of the plaintiff, that at the time this action was brought the defendant was his tenant.

The general principle is unquestionable, as stated by the defendant's counsel. Where a tenant, who has received notice to quit, holds on and his landlord receives rent *eo nomine* from him for the time for

which he does so hold over, it is a waiver of notice, and the relation of landlord and tenant continues. *Goodright v. Cordivent,* 6 Term, 219, 220. So in *Zouch v. Winingdale,* a distress for rent accruing after the term of lease had expired was adjudged to be a waiver of the notice. In each of the above cases the action in ejectment was brought after the waiver of notice and of course when the plaintiff had no right of entry. In the present case, at the time the action was commenced, the plaintiff had a clear right to enter. The term had expired and the defendant was holding over. Does his subsequent action and recovery by warrant waive the notice previously given and reinstate the defendant in his position of tenant? *Doe v. Batten,* 1 Cow., 243, is much like the present. There the defendant, who was tenant from year to year, held over after notice to quit, and the plaintiff brought his action of ejectment. Afterwards and while this suit was pending, the plaintiff received from the defendant a quarter's rent. Upon the trial this was ruled by *Lord Mansfield,* to be a waiver of (574) notice, and the plaintiff was nonsuited. Afterwards, upon a doubt suggested by his Lordship, the case was argued at length upon a rule for a new trial. After argument the court decided that as the plaintiff, at the time he brought his action, had a clear right so to do, the subsequent receiving of rent was not in law a bar to the action; but, if there were any doubt as to the intention of the parties as to whether the acceptance of the rent was mutually intended or understood as a waiver of notice, it was a matter of fact to be left to the jury. *Lord Kenyon* in the subsequent case of *Goodright v. Cordivent,* denies this doctrine, and that, upon a consideration of *Doe v. Batten,* and also *Onslow v. Eaton,* cited in the argument. But it is to be remarked, he does not deny the authority of the case cited by *Lord Mansfield,* tried at the Lancaster Assizes, when *Mr. Justice Gould* was at the bar. In that case an ejectment was brought, and an action also for use and occupation of the same premises, for rent which accrued subsequent to the time of the demise. In that case it was argued, as here, that the action for the use and occupation was founded on a supposed permission of the plaintiff to the defendant to occupy; therefore, it was an acknowledgment, on the part of the plaintiff, that the defendant was his tenant, and, consequently, a waiver of his notice. It was held, the actions were brought for several demands, to both of which the plaintiff was entitled; consequently the one was no waiver of the other, for, after the recovery in ejectment, the plaintiff was entitled to the profits for use and occupation. This case could not have escaped the notice of *Lord Kenyon,* and, though he has no hesitation in denying the main proposition, as decided by *Lord Mansfield,* he does not deny the authority of this case. In the case before us it is stated

that the money recovered by the plaintiff in his warrant was for *use and occupation* as in the anonymous case. The money here was not recovered as rent *eo nomine,* but for damages for use and occupation of the premises. This is further shown by the fact as disclosed in (575) the case, that at the time the warrant issued the defendant had left the premises. The sum paid was $22.25, due for the time he actually occupied the premises at $14 per annum, which is the rent mentioned in the agreement. This sum, then, was recovered by the plaintiff, not as rent, for he would have been entitled to $28 for two years, but as damages during the time the defendant did occupy the premises.

The argument for the defendant is that the receipt of this sum is evidence that there was a waiver of the notice and trespass, and that a new tenancy arose upon a lease from year to year. If the truth was that this money was received *as rent* we will not deny the legal conclusion. But we think it a clear mistake to consider it as rent, although the parties called it so, and properly enough for the purposes of common parlance. But it was not rent, and *could not* have been received as such; for *as rent* on *that* lease (if it existed, as supposed) it would not have been due until 26 October, 1843, and the sum would then have been $28, and not $22.25. This is conclusive that the money was not demanded and paid as rent, properly speaking, but as the damages which the owner of the land had sustained by the defendant's holding over for about 19 months.

We conclude, then, with the judge who tried the cause, that under the circumstances of this case the warrant brought by the plaintiff was not a waiver of his notice to the defendant.

PER CURIAM. No error.

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(576)

JAMES L. BATTLE v. WILLIAM D. PETWAY.

1. A *cestui que trust* is not entitled to call for the legal estate when, from the nature of the trust, his ownership is not immediate and absolute, and when it would defeat or put it in his power to defeat or endanger a legitimate ulterior limitation of the trust.
2. Where by will made since 1827 property is conveyed to A. in trust for the use of B., and that he will pay over to him annually the net income or interest accruing therefrom; but if B. should die without lawful issue, then the property to be held for others: *Held,* that B. could not compel A. to convey to him the legal estate.
3. The act of 1812, Rev. Stat., ch. 45, sec. 4, was not intended to embrace any case in which the trustee could not voluntarily convey to the debtor the

legal estate without incurring a breach of trust to other persons with whose interests he is also charged.

4. Where the court cannot decree a conveyance of the legal title at the suit of the *cestui que trust*, the trustee's estate cannot be divested by a sheriff's sale under an execution against the *cestui que trust*.

APPEAL from EDGECOMBE Spring Term, 1845; *Dick, J.*

Trespass, brought by James L. Battle against the sheriff of Edgecombe, for seizing certain slaves, the property of the plaintiff, which the defendant justifies under writs of *fiere facias* against the property of Jethro D. Battle, which came before the court on a case agreed.

Mary E. Taylor owned the slaves in question, and made her will in August, 1843, and died. By it she bequeathed one-third part of her estate to M. L. Battle, her heirs and assigns, and one-third to James L. Battle, his heirs and assigns. Then came the following clauses: "Item 3. I give and bequeath likewise to James L. Battle one-third of my estate, in trust for the use and benefit of my nephew, Jethro D. Battle, to him and his heirs forever; and that the said James L. pay over to him the said Jethro, annually, the net income or interest accruing therefrom. Item 4. My will is that should either of the (577) above legatees die without lawful issue of their body, then the other two shall heir the property of the deceased; but that Jethro D. Battle's portion shall be controlled, as in the third item directed."

The slaves belonging to the testator were divided into three shares, and those which are the subject of the present action were allotted to the plaintiff, as the trustee for Jethro D. Battle, and were held by him as such when the defendant seized them.

It was agreed that if the opinion of the court should be for the plaintiff there should be judgment for him for certain damages and the costs; and if for the defendant, then a nonsuit should be entered. The court gave judgment for the plaintiff, and the defendant appealed.

Mordecai for plaintiff.
B. F. Moore for defendant.

RUFFIN, C. J. The question is whether this is a case within the act of 1812, concerning equitable interests in real and personal estate. We may premise that we do not agree with counsel for the plaintiff, that there is an analogy between the cases under this act and those involving the inquiry what uses are, or are not, executed under the statute of uses. For the act of 1812 assumes that there was not only an intention that the legal and equitable estates should not coalesce, but that they are actually separate. The sole subjects of the act are trusts—uses not executed. We think, too, that this question does not depend

merely on the intention of the creator of the trust that the *cestui que trust* should have only the trust, and not be entitled to call for the legal estate. For, in truth, that is always the intention, and it can be no other in any trust. It is the very object of separating the legal and equitable ownership. But, although that be the intention, it cannot be respected, because it is inconsistent with the other express
(578) intention that the *cestui que trust* should have the whole profits and the entire beneficial ownership of the property. As it would be repugnant to the nature of legal property that it should not be subject to the debts and disposition of the proprietor, so it is equally repugnant to the entire equitable ownership that the owner should not be entitled to call for a conveyance from his trustee, and thus take the control of his own estate into his own hands. Trusts, in this respect, are governed by the same rules which govern legal interests. *Snowden v. Hales,* 6 Sim., 524; *Jasper v. Maxwell,* 16 N. C., 357; *Dick v. Pitchford* 21 N. C., 480. Still the intention is so far respected, that a *cestui que trust* is held not to be entitled to call for the legal estate when, from the nature of the trust, his ownership is not immediate and absolute, and when it would defeat or put it in his power to defeat or endanger a legitimate ulterior limitation of the trust. Hence, when the express purpose is that the trustee shall have the management of the trust property and shall receive and lay out the profits with his own hands at future periods in such cases the trustee cannot be compelled to give up his legal estate to the *cestui que trust.* So, if the trust is not for a particular person only, but it is limited over for other persons for whose protection the trustee's legal estate is necessary, or may be highly useful, it is plain that the duty of the trustee to those entitled *in futuro* requires him to retain his estate, and therefore the court would not decree him to convey it. Suppose a conveyance by deed of a slave in trust for one for life, and then in trust for another, which was formerly the only method by which personal property could, by an act *inter vivos,* be limited over after a life estate. Beyond doubt, equity would not compel nor allow the trustee to convey the legal estate to the tenant for life, but require him to retain it for the security of the remainderman. And so in any case of a contingent limitation over it would be the duty of the trustee to retain the title and the control over the possession of the trust property, and the court of equity will not take it from him, as was held in the case cited of *Dick v. Pitchford, supra.*

Now, the act of 1812 did not mean to change the nature of
(579) trusts, the relation between the trustee and *cestui que trust,* or the rights of the latter against the former. The sole purpose of it was to render the interest of the *cestui que trust* liable at law, as it was

below in equity, for the debts of the *cestui que trust* in certain cases, by transferring by a sale on execution against the *cestui que trust* the legal estate of the trustee, as well as the trust estate of the debtor. It is not a necessary construction of such a provision, that it was not intended to embrace any such cases as those just adverted to, in which the trustee could not voluntarily convey to the debtor without incurring a breach of trust to other persons, with whose interests he is also charged. As was said in *Gillis v. McKay,* 15 N. C., 172, "the principle is that the legal estate is not to be divested out of the trustee, unless it may be done without affecting any rightful purpose for which it was created; and, therefore, that if others had an equity in the same property, that is, in the debtor's particular share, the act did not operate on it. We need not in this case discuss the question on the third clause of the will, for whatever doubts might be suggested on that provision *per se,* it is clear upon that and the fourth clause, taken together, that it was both the intention of the testatrix that the legal title of Jethro D. Battle's share should be kept outstanding in the trustee, and that it is proper and needful so to keep it, as a shield against the acts of imprudence or injustice of that person, for the benefit of those that may be entitled under the contingent limitation over, upon his death without leaving issue—which is the construction of that clause under the act of 1827. It was probably one of the objects of interposing a trustee to vest in him the continued right of possession, so that the first taker (if he may be so called) should not be able by removal and alienation in distant parts, to defeat those to whom the property is limited over, of whom, indeed, the trustee is one. *Dick v. Pitchford* is directly in point, for the court there refused to decree even the possession to the tenant for life, much less a conveyance, as it was necessary to secure the contingent interest. As the court would not decree a conveyance at the suit of the *cestui que trust,* it follows that we must hold (580) that the trustee's estate would not be divested by a sheriff's sale, under execution against the *cestui que trust.* Therefore the judgment must be

PER CURIAM. Affirmed.

Cited: Forbes v. Smith, 43 N. C., 31; *Williams v. Council,* 49 N. C., 214; *Turnage v. Green,* 55 N. C., 66; *Swann v. Myers,* 75 N. C., 594; *Love v. Smathers,* 82 N. C., 372; *King v. Rhew,* 108 N. C., 703; *McKenzie v. Sumner,* 114 N. C., 428; *Cameron v. Hicks,* 141 N. C., 31; *Cherry v. Power Co.,* 142 N. C., 410.

DOE ON DEM. ROBERT ARMFIELD v. RUFFIN WALKER.

Where a deed ran thus, "this indenture made (the date inserted) between J. U. and J. S. both, etc., witnesseth, that I the said J. U., have this day bargained and sold a certain tract of land lying, etc. (here the boundaries are described), for and in consideration of the sum of $1,288 to me in hand paid by the said J. S., the right and title of the above described lands I will forever warrant and defend from me, my heirs and every of them, and every other person lawfully claiming, unto J. S., his heirs and assigns forever; to have and to hold, with all its profits and advantages appertaining. Given under my hand and seal," etc.: *Held*, that this deed, though informally drawn, was sufficient to convey the fee simple to J. S.

APPEAL from GUILFORD Spring Term, 1845; *Caldwell, J.*

Ejectment, in which both parties claimed under one Josiah Unthank. The plaintiff in order to show title in himself, offered in evidence a decree of the Supreme Court, made at December Term, 1833, in the case of *Redmond and others v.* the said *Unthank and others*, with sundry *fi. fa's.*, and *ven. ex.* issuing thereon, all duly certified. This was objected to by the defendant's counsel, on the ground that it ought to have been accompanied by an exemplification of the bill and (581) answer. The objection was overruled, because the decree recited the bill and answer and other proceedings had in the suit. The plaintiff then offered in evidence the sheriff's deed, made in pursuance of a sale under a *ven. ex.* issuing from June Term, 1835, and returnable to December Term, 1835, which covered the land in dispute; and he proved the defendant to be in possession of the premises. In order to show that both parties claimed title under Unthank the plaintiff also offered in evidence a deed of conveyance from the said Unthank to one Jesse Saunders, executed in 1830, and deeds of conveyance from the latter down to the landlord of the defendant, and proved that the said Saunders died about eight months before this suit was brought. The deed from Unthank to Saunders was thus expressed: "This indenture made (here the date was inserted) between Josiah Unthank and Jesse Saunders witnesseth, I the said Josiah Unthank have this day bargained and sold a certain tract of land lying (here the boundaries of the land are set forth), for and in consideration of the sum of twelve hundred and eighty-eight dollars, to me in hand paid by the said Jesse Saunders, the right and title of the above described lands I will forever warrant and defend from me, my heirs and every of them, and every other person lawfully claiming, unto Jesse Saunders, his heirs and assigns, to have and to hold with all its profits and advantages appertaining"; signed and sealed by Josiah Unthank. This deed, in the opinion of the court, only conveyed a life estate to Josiah Saunders.

The defendant offered to prove by a witness who wrote the deed that a fee simple was intended to be conveyed. This testimony was rejected by the court. The defendant then proved that himself and those under whom he claimed had been in the uninterrupted possession of the land from 1830 till the commencement of this suit, claiming adversely, and insisted, (1) That the deed from the said Unthank to Saunders conveyed a fee simple; and (2) If it did not, his title was made perfect by an adverse possession of more than seven years, under color of title; and (3) That it appeared from the return of the sheriff that two separate tracts of land, belonging to different defend- (582) ants, had been sold in mass. The court, as before stated, decided that the deed conveyed only a life estate, and was of opinion, from the return of the sheriff, that the sale was not in mass, but in separate tracts, and charged the jury that the adverse possession insisted on could not avail the defendant, as the plaintiff's right of action did not accrue till the death of Saunders, and, if the testimony was believed, the plaintiff was entitled to a verdict. The jury found a verdict for the plaintiff, and judgment being rendered thereon, the defendant appealed.

Morehead for plaintiff.
Mendenhall for defendant.

DANIEL, J. The judge, on the trial of this cause, was of opinion that the deed from Unthank to Saunders conveyed but a life estate in the land and that the clause, "I will forever warrant and defend for me and my heirs and every other person, unto Jesse Saunders and his heirs, *to have and to hold* with all its (the land's) profits and advantages appertaining," was to be construed only as a covenant of warranty of the title and quiet enjoyment to Jesse Saunders and his heirs of the land described in the preceding part of the deed, and that this case was, therefore, within the meaning of *Roberts v. Forsythe,* 14 N. C., 36, *Wiggs v. Saunders,* 20 N. C., 618, and *Snell v. Young,* 25 N. C., 389, where it had been held, that, when in a deed for land, a life estate only is mentioned in the premises and *habendum* clause, this estate cannot be enlarged into a fee by a distinct and separate covenant of warranty in the same deed to the grantee and *his heirs.* The deed in question is certainly very informally drawn, yet it does not want the essential parts of a deed, as the names of the bargainor and bargainee, the consideration, the certainty of the land intended to be conveyed, and, we think also, the estate in fee, intended to be had and held by the grantee. In the beginning of the deed, it is stated to be an indenture between Josiah Unthank and Jesse Saunders; and it witnesseth

(583) "I the said Josiah Unthank have this day bargained and sold (not saying to whom) a certain tract of land." Then the grantor proceeds in the deed to describe the land, mention the consideration, and insert the covenant of warranty of the right and title of the said land "*to Jesse Saunders and his heirs to have and to hold* with all its profits," etc. The warranty clause and the *habendum* clause are here blended together in the same sentence. The words "to have and to hold with all its (the land's) profits," must refer to and be governed by the next antecedent in the sentence, to wit, Jesse Saunders and his heirs. If the heirs are not "to have and to hold," neither can Jesse Saunders himself. It includes both or neither. And the sentence was so written to prevent tautology, in the estimation of the writer of the deed. If a deed for a valuable consideration, give land to another and his heirs, it is a good deed on delivery to pass the estate in fee, notwithstanding it be very informally framed. Co. Lit., 7 (a), 4 Kent's Com., 461, and it is a rule of law that if two constructions can be placed on a deed or any part of it, that shall be given to it which is most beneficial to the grantee. We think that there is enough in the deed to carry the fee to Jesse Saunders. Therefore it is unnecessary to decide the other points raised in the case.

PER CURIAM. *Venire de novo.*

Cited: Cobb v. Hines, 44 N. C., 347; *Register v. Rowell,* 48 N. C., 315; *Phillips v. Thompson,* 73 N. C., 545; *Allen v. Bowen,* 74 N. C., 157; *Vickers v. Leigh,* 104 N. C., 258; *Real Estate Co. v. Bland,* 152 N. C., 227.

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(584)

JOHN H. WHEELER v. THOMAS BOUCHELLE'S ADMINISTRATOR.

1. If a *ca. sa.* and *fi. fa.* are both issued, and, after the sheriff has levied the *fi. fa.*, and while he has the property undisposed of, he executes the *ca. sa.*, the court, upon the application of the debtor, will set aside the *ca. sa.* and discharge him from custody.
2. But where a *ca.* and a *fi. fa.* were both issued at the same time, and the latter was levied, and, while so levied, the sheriff returned the *ca. sa.* "ot found," the bail cannot avail themselves of this in a plea to a *scire facias* to subject them.
3. It is only an irregularity, and the bail cannot by plea take advantage of an irregularity in the process against the principal, as if the *ca. sa.* had been sued out more than a year and a day after the judgment.
4. The return of a sheriff upon a *ca. sa.* "Not found" is sufficient.

APPEAL from MECKLENBURG Spring Term, 1845; *Bailey, J.*

Scire facias against the administrator of Thomas Bouchelle, the bail of John E. Bouchelle. Among other pleas the defendant pleaded, (1) That no *capias ad satisfaciendum* had been duly sued out and returned, that the principal was not to be found in his proper county; and, (2) That at the same day the plaintiff sued out a *fieri facias* and *capias ad satisfaciendum* on the said judgment, and afterwards caused the *fi. fa.* to be levied on certain land of the principal and the said levy to be returned thereon, and that at the same term he also caused the *ca. sa.* to be returned "not found."

On the trial it appeared that at August Term, 1841, the plaintiff recovered judgment against John C. Bouchelle, and on 8 October following he sued out a *fi. fa.* and a *ca. sa.* thereon, returnable to February Term, 1842, and delivered them to the sheriff; that the sheriff levied the *fi. fa.* on a piece of land belonging to the defendant, and returned the same on the *fi. fa.;* and that, after such levy, and while it was in force, he returned the *ca. sa.* at the same term, "not (585) found." A *ven. ex.* issued from February, 1842, to sell the land, on which the sheriff returned the sale, and that he had applied the price to executions having prior lien. Then the present action was commenced.

The court instructed the jury upon this evidence to find for the plaintiff. They did so, and from the judgment the defendant appealed.

Alexander, Boyd and Iredell for plaintiff.
Osborne for defendant.

RUFFIN, C. J. Although the evidence supported the second plea, yet it is to be observed that, if that plea was immaterial and no bar in this case, there was no error in directing a verdict for the plaintiff on that as well as the other issue. For, as costs do not in this State go according to success on the several issues, but are given to him who has judgment in the action, it is manifest that no injury can arise to the defendant by a verdict against him on an issue joined on his immaterial plea, since, if the verdict were for him the plaintiff would still be entitled to judgment notwithstanding the verdict, for the debt and the same costs.

The point therefore is whether the matter of the second plea is a bar in this case. With his Honor, we think that it is not. The plea admits that the *ca. sa.* is in due form, and was duly sued out, according to the course of the court. Indeed, there is no doubt that the plaintiff might sue out a *fi. fa.* and a *ca. sa.* at the same time. *McNair v. Ragland,* 17 N. C., 42. The *ca. sa.* was, therefore, in itself, valid, and the fault

was not in the writ, but in the subsequent proceedings on it by the party. If, after seizing property on a *fi. fa.* and while it remained in the sheriff's hands undisposed of, the debtor had been arrested on the *ca. sa.*, it would have been irregular and improper; and, at the motion of the debtor, the court would have discharged him from custody and set aside the writ. *Miller v. Parnell,* 6 Taunt., 370. That would have exposed the creditor to the debtor's action for false imprison-
(586) ment, and enabled the bailee, if sued, to plead truly that there was no *ca. sa.* But, in the nature of things, a mere irregularity in the execution of process which is valid in itself cannot render it void, and until it was set aside the debtor could not have an action for his arrest. Perhaps, too, the court might set aside the *ca. sa.* upon the motion of the bail. That might in some degree depend on circumstances, as if the bail had funds of the principal in his hands or other indemnity. But with that we have nothing to do at present, as here the matter is brought forward as a bar. Now the statute, by requiring a *ca. sa.* to be sued out and returned *non est inventus,* necessarily gives the plea in bar that there was no *ca. sa.* But it does not make an irregularity in executing the *ca. sa.* also a bar, unless thereby the process is made void, so that the case may be treated as if none had ever issued. But that is not the case, for bail cannot thus take advantage of an irregularity, as if a *ca. sa.* be sued out after a year and a day. *Cholmondeley v. Bealing,* 1 Lord Raymond, 109. Suppose the writ in this case had been served on the debtor, and that he had not moved for his discharge, but was imprisoned on it; very clearly that would have been a discharge of the bail. That shows the writ was not void; and as the bail might derive the benefit of the writ, as a *ca. sa.*, so he must be charged by it while it remains in force.

It is then objected that the return of the *ca. sa.* is defective, because the act says "the execution must be first returned that the defendant is not to be found"—whereas this return is "not found." But the act does not profess to prescribe a return *in hac verba,* but only the nature and substance of it, namely, one of *non est inventus,* and there is no difference between "not *to be* found" and "not found" in this view.

PER CURIAM. No error.

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(587)

DAVID LENTZ ET AL., EXECUTORS, ETC., v. MAXWELL CHAMBERS ET ALS.

1. If a sheriff sell under an execution property which does not belong to the defendant in the execution, and the plaintiff in the execution, with a knowledge that the money was so wrongfully raised, receives it from the sheriff, he is guilty of the *tort* equally with the sheriff.

2. But where the real owner of the property is present at the sale and does not object, but acquiesces in it, he cannot support an action of *tort* against either the sheriff or the plaintiff in the execution who receives the amount raised by the sale.

APPEAL from ROWAN Spring Term, 1845; *Bailey, J.*

Trover, brought to recover the value of a negro woman, sold by the sheriff of Rowan by virtue of executions issued in favor of the present defendants against the executors of one Hileck. It was in proof, that various judgments had been obtained against the executors of Hileck by the defendants and other creditors, that executions were issued thereupon and placed in the hands of the sheriff by the clerk of the court, without any special instructions from the plaintiffs in those executions; that the executions were levied upon the negro in controversy, together with other negroes; that the property levied upon was sold, and the money arising from the sale paid to the defendants by the sheriff in satisfaction of their executions. The negro in controversy had been the property of the said Hileck, and was in his possession at his death. A short time after his death his family entered into an arrangement by which they agreed to divide the property among them, and each to pay a certain proportion of the debts of the estate. The widow of Hileck was a party to this agreement and the negro in question fell to her share, and she contracted to pay one-sixth part of the debts, which were then supposed to amount to about eighteen hundred dollars. In pursuance of this agreement a bill of sale was executed to the widow by (588) all the children, and also by the executor of Hileck. The widow afterwards intermarried with the plaintiff's testator, who took the negro into his possession and had her in possession at the time of the levy. It was further in evidence that the estate of Hileck was much more indebted than had been supposed at the time of the family arrangement referred to, and was in fact insolvent. It was also in proof that on the day of sale the negro was brought to the place of sale by the plaintiff's testator, that he was present and made no objection to the sale, and that he endeavored to borrow money, as he declared, with with a view to purchase her. A witness also proved that he believed the defendants were present at the sale, but he was not certain; that they received the money for their debt, knowing that it was raised by the sale of the negro in question; that the sale by the children and executor to the wife of the plaintiff's testator was before the commencement of the suits against the executors of Hileck. In the action against the executors of Hileck in favor of the defendants there was an admission of assets.

The defendant's counsel moved the court to nonsuit the plaintiffs, on the ground that there was no evidence on which the defendants could

be charged in this form of action, and, second, that as the plaintiff's testator brought the negro to the sheriff on the day of sale, was present when she was sold, and made no objection, they were estopped from setting up any title. The court charged the jury that there was evidence from which they had a right to infer a conversion, and that there was no estoppel. The jury found a verdict for the plaintiffs, and from the judgment rendered thereon the defendants appealed.

Boyden for plaintiffs.
Alexander and Osborne for defendants.

DANIEL, J. In this case it is admitted that the sale of the slave in controversy by the executors of Hileck to the widow was *bona*
(589) *fide*. When she afterwards married Lentz, the slave, by force of law became his property. The judgments, which the present defendants and others obtained against Hileck's executors, were all taken *de bonis testaoris*. The sheriff, therefore, had no right, under the executions issued on the said judgments, to levy them on the slave of Lentz. And as he did, and afterwards sold the slave under the executions, he was guilty of a *tort* and conversion, if he had no license from the owner of the slave to do the act. And if the present defendants received the money with a knowledge that it was so wrongfully raised out of the property of Lentz for their benefit, it was evidence of their assent to the *tort* of the officer, and would make them also guilty of the *tort* by relation. Sewell on Sheriffs, 248; I Maul. & Sel., 583, 599; Stra., 996; Brown on Actions at Law, 110, 113. And on this ground we suppose the judge considered the case to rest. But the evidence furthermore showed that, after the levy, Lentz continued in possession of the slave and on the day of sale he brought her to the place of sale and was present and made no objection to the sale, and that he, furthermore, then endeavored to borrow money, as he declared, with a view to purchase the slave himself. It seems to us that the bare levy by the sheriff, and then leaving the slave in the possession of the owner did not amount to a tortious conversion. And, as the subsequent sale of the slave was made by the consent of the owner and in his presence, that act was not such a conversion as to enable the owner to maintain an action of trover against the sheriff, and much less against the present defendants for receiving the purchase money, although they knew that the money was the price of the said negro. This is not upon the ground of his presence being an estoppel, but that his conduct amounted to an assent to the sheriff's acts. It is probable, when the testator's debts were found to be so much larger than was expected, and so the purchase by the widow turned out to be a hard bargain, her second husband was willing to give up the negro to be sold under the execution. At all events he gave the

sheriff every reason so to think, and, after concurring in the sale as he did, he cannot treat it as a wrongful conversion. The judge (590) refused to nonsuit the plaintiffs or to charge in favor of the defendants on this evidence.

PER CURIAM. *Venire de novo.*

Cited: *West v. Tilghman*, 31 N. C., 165; *Smith v. Chitwood*, 44 N. C., 448; *Biggs v. Brickell*, 68 N. C., 242; *Draper v. Buxton*, 90 N. C., 185.

JOHN ARRINGTON v. CHARLES J. GEE ET AL.

1. The rule as to interest payable on debts is regulated by the law of the country in which the contract is made, the law presuming that the contract is to be executed there unless the parties stipulate otherwise.
2. And this stipulation, to take the case out of the general rule, must appear on the face of the contract.
3. A contract payable generally, naming no place of payment, is to be taken to be payable at the place of contracting the debt, and not where the domicil of the creditor may be.
4. A bond taken simply to secure the performance of a contract, wherever it may be executed, must bear the same interest as the original contract, unless it be otherwise expressed on the face of the bond.
5. When A., a citizen of North Carolina, took a number of slaves to Alabama, and there sold them to B., a citizen of Alabama, who was to give him a bond with sureties for the price of the slaves, and this bond was executed by B. at Mobile (Alabama), where it bore date, and afterwards brought to North Carolina and here executed by two sureties, citizens of North Carolna, the bond not expressing any place of payment: *Held*, that the sureties, as well as the principal, were bound for the payment of interest according to the laws of Alabama.

APPEAL from NASH, Spring Term, 1845; *Dick, J.*

Debt upon a bond in the following words and figures, to wit: (591)

MOBILE, 6 January, 1837.

$12,000. Twenty-four months after date, we or either of us, promise to pay to Archibald H. Arrington or bearer, twelve thousand dollars, for value received.

CHAS. J. GEE, (Seal)
M. H. PETWAY, (Seal)
STER. H. GEE, (Seal)

The only question was as to the rate of interest this bond should bear. The following facts were agreed upon. The obligee, A. H. Arrington,

then and now a resident of this State, in the year .... took to the State of Alabama many slaves and sold them there to the first named obligor, Charles J. Gee, for the sum of $24,000, one-half of which was paid in cash, and for the residue of the purchase money he gave the bond, agreeing at the same time to give for his sureties the other two obligors, both of whom reside in this State, and their residences were well known to the obligee, Arrington. The slaves were delivered, and the bond written and signed by Charles J. Gee in Alabama, and delivered to the obligee, Arrington, who brought it to this State, where the other obligors executed it as sureties of Charles J. Gee, upon the facts aforesaid being represented to them. The rate of interest fixed and allowed by the law of Alabama, upon contracts after they become due, is 8 per cent. The defendants' counsel prayed the court to instruct the jury that, there being no place of payment designated by the terms of the bond, it was, in law, to be paid where the obligee resided, and therefore bore but six per cent interest. The court refused to give this instruction, but charged the jury that from the face of the bond and the facts agreed, the plaintiff was entitled to interest on the bond according to the laws of Alabama. The jury returned a verdict for the plaintiff, allowing Alabama interest, and from the judgment thereon the defendants appealed.

(593) *B. F. Moore for plaintiff.*
Badger, Whitaker & Busbee for defendants.

RUFFIN, C. J. The Court is of opinion that there was no error in refusing the instructions prayed by the defendants' counsel or in those which his Honor gave to the jury. The contract of sale, from which the bond sued on had its origin, was made and completed in Alabama; and the money, which the purchaser engaged to pay to the seller, would, if not paid when due, thereafter bear interest at the rate of 8 per cent; it not being stipulated by the parties that the payment should be in any other place. For it is an undoubted principle of law, that, not only the validity of a contract depends on the *lex loci contractus*, but its effects including the rights of the creditor to interest and its amount, depend also on it. The only question in this case, then, is which is the *locus contractus*, so as to apply to this transaction the above mentioned principle. We think clearly that it is Alabama. Beyond question that is true of the original contract, namely, that of the purchase, sale and delivery of the negroes. And "the *rate of interest* which the debtor should pay is *a part of that contract*," so that taking a new security here, expressing that the rate of interest should be at 8 per cent or included therein 8 per cent for interest accrued (unless it be a new contract for further forbearance granted here) would not be in violation of our law,

but would be valid. *McQueen v. Burns*, 8 N. C., 476. Such is even the case when a loan is made in one country and a sub- (594) sequent collateral security is taken on real estate in another. *De Wolf v. Johnson*, 10 Wheat., 367. Much more must that be true when the security taken in a foreign place is merely personal. For the original contract obliged the debtor to pay a particular rate of interest, and the new security is merely the means of more readily enforcing the performance of that obligation. If then, Charles J. Gee, the principal debtor, had executed his note for this debt in this State, that would not have altered the rate of interest, provided the note should become payable when the debt would fall due according to the original contract, and did not designate some other place of payment; in other words, if the note was but a security merely for the preëxisting debt and in no respect changed its character.

But, in truth, this security by bond was given by him in Alabama, as well as the debt originally contracted there, and the bond is dated at Mobile and specifies no other place of performance. Now, although it be true that the rule of the *lex loci contractus*, before stated, is subject to the modification that it must yield to the *lex loci in quo solveret*, yet that is so only in those cases in which it appears from the contract that the performance is to be at some other place. For, when a contract states that the parties had in view the law of another country when they made it then it is but right to say that the contract should be governed by the law the parties thus appear to have intended, rather than by that of the *loci contractus*. Thus notes made and dated in Dublin for £100, mean Irish and not English currency, unless they be payable on the face in England, in which latter case the money would be English. *Kearney v. King*, 2 Bern. & Ald., 301; *Sprowle v. Legge*, 1 Boon & Cres., 16; *Dow v. Lippman*, 5 Clark & Fin., 1. For debts have no *situs* and are payable everywhere, including the *locus contractus;* and, therefore, the law of that place shall govern, since it does not appear from the contract that the parties contemplated the law of any other place. There cannot be any other rule but that of the place of the origin of the (595) debt, unless it be that where the creditor may be found, since the debtor must find the creditor for the purpose of making payment. But, manifestly, this last can never be adopted, because it would vary with every change of domicil or residence of the creditor. Then, as was observed by *Lord Brougham*, in *Dow v. Lippman*, a contract, payable, generally, naming no place of payment, is to be taken to be payable at the place of contracting the debt, as if it were expressed to be there payable. Being payable everywhere, the rate of interest must be determined by the law of the origin, since there is nothing else to give a rule.

That being so, certainly Charles J. Gee is bound for Alabama interest. As to him, the contract is to be construed as if it said upon its face, this debt shall bear 8 per cent interest, if not paid when due, the contract being made in Alabama, and the money to be paid there. If he was sued on it in Alabama or here, there could be no hesitation in giving that rate of interest against him. Does it not follow that the other parties to the bond are liable for the same sum? We are to suppose that as to Charles J. Gee, the bond expressed that it was payable at Mobile. When the others executed it can it be also supposed that they insisted that, as to them, the bond should be payable in North Carolina? Certainly not; for to say nothing more, it cannot be presumed, that the same debt is payable at two different places, unless it be so expressed. It is said, indeed, that, as in our law the contract is several, it is the same thing, as if these parties had given distinct notes in this State for the debt. But it is to be recollected that the bond is also joint and therefore, that all three of the obligors obliged themselves jointly to do the same thing, that is to say, to pay a certain sum of money; and the only question is, whether we are to understand them as contracting to pay that sum at one and the same place. For, if we are so to understand, there can be no doubt from what has been already said, that place is Mobile; and then, according to the (596) rule, that the interest is to be regulated by the law of the place of performance, the bond would bear Alabama interest. There would have been nothing unlawful in taking a bond in this State for that interest, as we have before seen, as it would be merely a supplemental security for a previous lawful contract. Now, it is impossible to suppose these defendants could have contemplated the payment being made here by them, and not at Mobile by the principal. The very statement of the case is that they executed the bond as the sureties of Charles J. Gee; and in the nature of things, therefore, they expected to be only secondarily liable, and they were to be liable for what the principal had bound himself. If that were not so it would lead to endless confusion. For, suppose a principal in Alabama and three sureties, one living and executing the bond in Louisana, one in North Carolina, and one in New York, would there be four distinct contracts as to the rate of interest? It would be absurd to hold so. In reality, the contract of the sureties, in reference to the question under consideration, is one of guaranty of the performance of his contract by their principal; and therefore each surety, no matter where he lives, must be liable for precisely the same sum, which is that for which the principal is liable, neither more nor less.

From what has been said it follows that his Honor was right in deciding the question, as a matter of law, and not leaving it to the jury

as a question of intention of the parties as to the rate of interest; for the rate depended upon the question, what law governed the case, and that was a question for the court and not the jury. The intention of the parties can never be material in cases of this sort, except where contracts are made in one country and securities there taken *mala fide,* and expressed to be performed in another, with the purpose of evading the *lex loci contractus;* as if parties, in fraud of the law and to cloak usury, upon a loan in this State take, as a security, a bill of exchange on another State in the expectation that it will be protested, so as to accumulate interest under the name of damages, or under the pretense of a difference in exchange; then the jury must find the intention in order to apply the law to that shift and device. But here the *bona fides* is not questioned, and the only dispute, what is the legal (597) rate of interest on this contract which, of course, was for the court.

PER CURIAM. No error.

Cited: Davis v. Coleman, 29 N. C., 428; *Roberts v. McNeely,* 52 N. C., 507; *Houston v. Potts,* 64 N. C., 38; *Morris v. Hockaday,* 94 N. C., 288; *Bank v. Land Co.,* 128 N. C., 194.

JAMES BUCHANAN AND WIFE v. EZEKIEL H. PARKER.

1. A mother who had money belonging to her children advanced the money to the defendant for the purpose of his purchasing negroes in North Carolina and delivering them to her in Georgia, where she resided: *Held,* that she could maintain this action for the money so advanced, in her own name, the defendant never having bought the negroes, and not having been advised that a part of the money belonged to her children.
2. *Held,* secondly, that though the plaintiff admitted he had received a part of the money by an attachment in Georgia, the defendant could not say the contract was merged in a judgment unless he produced the record of the attachment in Georgia.
3. *Held,* thirdly, that in such a case as this the statute of limitations did not apply until after a demand by the plaintiffs on the defendant.
4. If the act of 1815 will not bar, by the lapse of three years, where the defendant is an agent, neither will the act of 1826, because there must be a cause of action subsisting before the time under either statute can commence running.

APPEAL from COLUMBUS, Spring Term, 1845; *Pearson, J.*

Assumpsit, for money had and received to the use of the plaintiffs. Pleas: "*Non assumpsit,* and the statute of limitations." The case ap-

peared to be this: In 1832, the plaintiff, Unicia, then the widow of one McCullough, and a resident of the State of Georgia, placed (598) in the hands of the defendant $700, that he might purchase for her two negro boys in North Carolina, where he was then going, and bring them out to her in Georgia. She told him that if the said sum of money should not be enough she would thank him to make up the balance, and she would repay him when he got back, to which he assented. The defendant came to North Carolina and never returned to Georgia. Mrs. McCollough married Buchanan in 1835. A demand was made on the defendant for $536, in the Spring of 1843; and this action was brought on 2 September, 1843. When the plaintiff, Buchanan, demanded the said sum of money, he admitted that he had received the residue of the $700, out of the effects of the defendant, by an attachment in Georgia. He said that the money belonged to his wife's two children, by a former husband, and that she had been obliged to account with them for it.

It was insisted by the defendant, on the trial (1) That the action should have been brought in the names of the two children, (2) That as the plaintiff admitted he had received a part of the claim, under an attachment in Georgia, the jury should infer that the whole simple contract debt was merged in the judgment on that attachment, (3) That the acts of limitation of 1815 and 1826 barred the plaintiff's claim. Under the charge of the judge the jury found for the plaintiffs, and the defendant appealed.

(601) *Warren Winslow for plaintiffs.*
Strange for defendant.

DANIEL, J. First. The charge of his Honor, as to the capacity of the mother to bring the action, we think was right. The defendant was the agent of the mother, and he received the money from her, as her money, to purchase slaves for her benefit. It does not appear, that the defendant, at that time he received the money, had any notice that the two children had any interest in it. It had no ear-mark and, therefore, he could not be held liable for it.

Second. The defendant insisted, that the jury should have inferred, as Buchanan admitted he received a part of the debt under an attachment in Georgia, that he had in fact and in law received the whole. The judge told the jury that there was no evidence from which they could make any such inference, and that the plaintiffs were entitled to a verdict for the balance not received. This, we think was right. The defendant did not produce any record of a judgment in an attachment suit in Georgia to show that the simple contract between the parties had been merged in the judgment.

Third. The defendant relied on the acts of limitation. The court charged that, although the plaintiffs might, after a reasonable time, have brought an action of *assumpsit* against the defendant for a breach of a special undertaking on his part to purchase the said two negro boys, that did not prevent them from considering the defendant as their agent, up to the demand of the money, which took place within less than three years before the bringing of this action; that until the demand, the act of limitations did not commence running, as the possession of the agent was not adverse, but was the possession of the (602) principal; and that the cause of action was not complete until a demand. All the judge said seems to us to be correct. If the defendant had purchased the two negro boys for the plaintiffs, as he had promised, they would not have been considered *his* negroes; they must in law have been held by him as the bailee of the plaintiffs, and, therefore, the act of limitations would not have run against the plaintiffs. So we think that the money with which he was to purchase the slaves, being placed in his hands as agent by way of trust, remained in the same way, unaffected by the statute of limitations until the demand, or the bringing of the attachment in Georgia, if any was ever brought there, which doth not appear in the cause by any proper evidence. If the act of 1715 does not bar, by the lapse of three years, where the defendant is an agent, neither will the act of 1826, because there must be a cause of action existing before the time when either of the said acts can commence running. And before the demand by parol in North Carolina, or by suit in Georgia, there was no cause of action existing in this case.

PER CURIAM. No error.

Cited: Northcot v. Casper, 41 N. C., 311; *Carroway v. Cox*, 44 N. C., 176.

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(603)

THE STATE v. AUGUSTA A. EVANS.

1. If an indictment sufficiently charge any offense, though not the one intended, it cannot be quashed.
2. A woman cannot be indicted for keeping a bawdy-house merely because she is unchaste, lives by herself, and habitually admits one or many to an illicit cohabitation with her.
3. The offense of keeping a bawdy-house consists in keeping a house or room, and therewith accommodating and entertaining lewd people to perpetrate acts of unchastity, meaning acts between the persons thus entertained.

STATE *v.* EVANS.

APPEAL from ROWAN Spring Term, 1845; *Bailey, J.*

The defendant was tried upon an indictment, which the Solicitor alleged to be an indictment for keeping a bawdy house, and which was in the following words, to wit:

North Carolina, } *ss.* Superior Court of Law,
Rowan County. } Fall Term, 1844.

The jurors for the State upon their oath present, that Augusta Ann Evans, late of the said county, spinster, on 10 August, 1843, and thence continually to the time of the finding of this bill, and before, in the said county of Rowan, with force and arms, unlawfully did keep and maintain a certain ill-governed and disorderly house, and in the said house then, and on the said other days there, did procure and cause and permit persons of lewd conversation and demeanor to frequent and come together, and then and on the said other days, there to remain drinking, whoring, cursing, swearing and misbehaving themselves, to the great damage and common nuisance of all the good citizens of the said State there inhabiting and living and passing, to the evil example of all others in the like case offending, and against the peace and dignity of the State."

The counsel for the defendant moved to quash the indictment upon the ground that there was no averment in the bill that the per-
(604) sons therein referred to were both men and women. The Solicitor for the State contended, that this was implied by the word "persons" taken in connection with the other averments. The judge refused the motion. It appeared in evidence that the defendant occupied an upper chamber in the east end of a house in the town of Salisbury, that there was a broad passage extending through the house above and below stairs, dividing the house into two parts, and that the entrance into the house from the street was by a door leading into the lower passage. A witness named Taylor testified that he occupied the west end of the house in question with his family, renting it from the owner who was not the defendant; that on several occasions he had known persons to pass up the stairs and go into the defendant's chamber, and afterwards to come out and leave the house; that generally this was before 9 o'clock, although sometimes they did not leave till a late hour of the night; that in most of the instances he observed that it was the same person, though upon some occasions he had known other men to visit the chamber occupied by the defendant; that he knew nothing further of any improper conduct on the part of the defendant, or any other person in her room; that there

was no noise or disturbance of any kind. Another witness, Long, testified that he lived near the defendant on the opposite side of the street; that her husband had left her and gone to reside in South Carolina, nearly twelve months before the filing of this bill; that the defendant's husband had visited her once or twice within that time to his knowledge, and might have been there oftener without his knowledge; that the witness had never visited the defendant, and knew nothing in relation to her conduct; that at one time he heard a noise in front of the house, in which the defendant lived, which appeared to him to arise from an altercation between some persons in the street, and a Mr. Beard, who lived in the west end of the house, and who, at the time referred to, was standing at the front door refusing their admittance; that upon that occasion he neither heard nor saw anything of the defendant. A witness, Overman, testified that he lived opposite to the house in question; that he knew of no noise or disturbance of any kind, either in or about the house; (605) that, upon one occasion, on a public day, he saw some bad women standing at the upper front window in the passage between the two parts of the house, but that he neither heard nor saw the defendant upon that occasion. Another witness, Gheen, testified, that, for some time previous to February, 1844, he occupied the chamber adjacent to that of the defendant, and on the same side of the passage; that he had known several persons to visit the chamber of the defendant, upon different occasions, in the night time; and that, upon some occasions, two or three had come together; that this was generally in the early part of the night; that he never knew any woman to be in the defendant's room; that he had never heard any noise or disturbance of any kind in or about the defendant's room; but that sometimes persons had called at his door, mistaking it for that of the defendant, and to that extent he had been annoyed. Another witness was examined, who swore that he had visited the defendant at her room, but that he witnessed no improper behavior on the part of the defendant, or in her room.

The testimony being here closed on the part of the State, the counsel for the defendant moved his Honor to instruct the jury that, although the testimony were all true, no case had been made out against the defendant. His Honor refused the instruction. The defendant's counsel contended that there was no evidence of the ownership or direction of the room being in the defendant; that, though the jury might believe that the defendant indulged in occasional or even frequent acts of adultery, yet, if this were done quietly and privately, she would not therefore be guilty of keeping a bawdy house, and moved for instructions to this effect. His Honor refused the instruc-

tions as prayed for, but directed the jury, that, while one or two acts of adulterous intercourse would not render the defendant liable, yet if this had become habitual and common, extending to any and every person who might choose to visit her, she would be guilty
(606) of the offense charged. The defendant's counsel submitted that there was no evidence upon which the jury could so find. His Honor refused to give this instruction, but on the contrary instructed the jury that there was evidence, of the weight of which they were to judge. The jury returned a verdict of guilty. The defendant's counsel then moved in arrest of judgment, on the ground that there was no allegation in the bill that the offense was committed in any house. The court sustained the motion, and the Solicitor for the State appealed to the Supreme Court.

Attorney General for the State.
Clarke for defendant.

RUFFIN, C. J. The motion to quash the indictment was, in the opinion of this Court, properly refused. For, although it may not sufficiently charge the keeping of a bawdy house, yet it is good, at least, as an indictment for keeping a disorderly house; and, if it sufficiently charge any offense, it cannot be quashed; as an indictment for a disorderly house it substantially agrees with the precedents. Cro. Cir. Com., 302, 2 Chitty Crim. Law, 40. The language of the indictment is that the defendant "did keep and maintain a certain ill-governed and disorderly house, and in said house did procure and permit persons of lewd conversation and demeanor to frequent and come together and there to remain, drinking, whoring, cursing, swearing and misbehaving." Now, although the averment as to whoring may be inapt, because the indictment does not state, that the parties, of whom the whoring is predicated, were of both sexes, yet that cannot impair the force of the other averments, that the defendant procured and permitted divers persons, though of but one sex, of lewd conversation to frequent and remain in her ill-governed and disorderly house, drinking, cursing, swearing and misbehaving, *ad commune nocumentum. Rex v. Higginson,* 2 Bur., 1232. Hence the indictment ought not to have been quashed; and the case was properly put to the jury, on the proof that might be offered of the offense thus charged.

But, as an indictment for a bawdy house, properly speaking—and in that light alone it seems to have been regarded in the Su-
(607) perior Court—it is, we think defective. A bawdy house is defined to be a house of ill fame, kept for the resort and conveni-

ence of lewd people of both sexes. The residence of an unchaste woman—a single prostitute—does not become a bawdy house, because she may habitually admit one or many men to an illicit cohabitation with her. The common law did not undertake the correction of morals in such cases, but left the parties to spiritual supervision and penances. No doubt, however, in such cases our act of 1805, Rev. Stat., ch. 34, sec. 46, would be applicable, if the criminal conversation was such as to amount to cohabitation. But a bawdy house was of criminal cognizance at common law upon different principles; which were that the public peace was endangered by drawing together crowds of dissolute, debauched and quarrelsome persons, and, also, that the morals of the people were corrupted by the open profession of lewdness. 1 Hawk. P. C., ch. 74. A bawdy house is not the habitation of one lewd woman, but the common habitation of prostitutes—a brothel. That such is the just notion of this offense is very clear from *Pierson's* case, 1 Salk., 382, 2 Lord Ray, 1197. It was there held that an indictment will not lie for being a bawd and unlawfully procuring evil disposed men and women to meet and commit whoredom and fornication, for it is but a solicitation of chastity, and, like a want of chastity in any individual, was a spiritual offense; and the indictment should have been for keeping a common bawdy house, which is there described as an offense committed by one who has a house or a room, *and therewith accommodates and entertains lewd people to perpetrate acts of uncleanness*—plainly meaning, acts between the persons thus entertained. Hence in the precedent given by Mr. Chitty, 2 Crim. Law, 40, which he says is that in common use, the house is laid to be "a common bawdy house," and it is averred that "in the said house for lucre and gain, divers evil disposed persons, as well men as women, and whores, there unlawfully and wickedly did receive and entertain, and in which said house the said evil disposed persons and whores by the consent and procurement of the said, etc., on (608) etc., then did commit whoredom and fornication, whereby divers unlawful assemblies, riots, affrays, etc., and dreadful filthy and lewd offenses were committed, to the common nuisance," etc. It is true that in the form found, for instance, in Archbold's Crim. Pr. and Pl., 481, the house is not, as in Chitty, described as "a bawdy house," *eo nominee*, yet all the constituents of the offense in other respects are specially averred, according to the definition of the offense already given and Chitty's precedent.

The foregoing observations have been made for the sake of a clearer understanding of the points on which the case turned on the trial before the jury. It was not pretended that the defendant's house was disorderly, as a tippling or common gaming house, or from noisy

and riotous assemblies, or otherwise than as a place in which the defendant received men into her own bed. In fact, every witness disproves any noise or disturbance in the defendant's room. It is not, therefore, what is called a disorderly house, according to this evidence. Neither was it charged in the indictment, nor proved upon the trial, to be a bawdy house, in the legal sense of that term. No female of any character, chaste or lewd, had been admitted into her room, as far as appears. Some women of ill-fame had been seen, upon a public occasion, at the window of a passage, common to all the lodgers, but not invited nor entertained by the defendant. Indeed, his Honor distinctly put the defendant's guilt, as the keeper of a bawdy house, upon her own personal prostitution, provided only that it was common and habitual with her, in which there was error, as we think. That is sufficient for the defendant on this occasion. We must own, though, for anything that we can discover in the testimony, there was no evidence of personal impurity in the defendant herself. There is not a word said in disparagement of the reputation for chastity of the defendant, nor derogatory to the morals of her visitors, whose ages, stations in life, condition in respect to being or not being married, or the like do not appear. All that is stated is that this female was temporarily separated from her husband, and that she lived quietly
(609) and retired in hired lodgings, where she was occasionally visited in day and of evenings, by male persons, for aught we know, of the best standing. In all this, we see nothing that is not quite consistent with innocence of life; and, therefore, whatever may be the fact, we cannot but think that the jury should have been told that there was no evidence of the crime of adultery being committed by the defendant. At all events, she was not guilty of the offense of keeping a bawdy house, or a disorderly house; and, therefore, the judgment must be reversed, and a *venire de novo* awarded.

We notice, that, after the verdict and the refusal of the court to set it aside, the judgment was arrested on the motion of the defendant, and the case comes up on the appeal of the Solicitor for the State. But the objections, arising on the proceedings at the trial, naturally present themselves first, and the counsel for the defendant has insisted on them primarily; and as we think there was error in these proceedings, we have felt bound to take such a course as will free the defendant from the conviction, and, therefore, the question of the sufficiency of the indictment, on the motion to arrest, does not present itself to us.

PER CURIAM. *Venire de novo.*

Cited: S. v. Calley, 104 N. C., 859; *S. v. Davis,* 109 N. C., 810; *S. v. Dunn, Ib.,* 840.

(610)

JAMES L. DENNY, CASHIER, ETC., v. LUKE PALMER.

1. When the drawer of a bill dates a note at a particular place, as, for instance, "Danville," notice to him of the dishonor of the bill, directed to him at that place, may be sufficient.
2. But it is otherwise as to the indorsee, who does not designate in his indorsement his place of residence, either generally or specially.
3. The general rule is that notice of the dishonor of a bill of exchange or promissory note indorsed, where the parties live in different places, must be sent by the next post, directed to the place of the party's residence; but if the holders of the bill or note are exempted in law, by any particular circumstances, from the operation of this rule, such circumstances must be shown by the holder.
4. Although at the time of the indorsement of a note the indorsers had reason to believe, and did believe, that the note would not be paid by the maker, this circumstance does not dispense with the necessity of a due notice.
5. A drawer of a bill who has no funds in the hands of the drawee is liable without notice, on the ground of fraud.
6. But if a bill be drawn for the accommodation of the acceptor, or a note indorsed for that of the maker, then the drawer of the bill or indorser of the note is entitled to notice, though the acceptor or maker be insolvent.
7. So if a note is made for the accommodation of the payee, and he receives the money for it, he is not entitled to notice.
8. So if a maker of a note places effects in the hands of the indorser to meet the note, the latter is not entitled to notice.
9. In every case in which notice is dispensed with there either must have been a fraud on the world in making the security or it would be a fraud on the party who, according to the form of the instrument, is legally bound, before him, who insists on notice, but where, in reality, and according to their actual liabilities, as between themselves, the relation of the parties is reversed, and he who appeared to be primarily liable was so only secondarily, and the other party was the real debtor.
10. When the maker of a note has secured all his property, for the indemnity of his indorser, it is not an implication of law from that circumstance that the indorser has agreed to take up the note, and, therefore, dispensed with the legal notice.
11. And this is more especially the case where the creditor is, by means of a trustee, a party to the deed of indemnity, and has a right to enforce it for the payment of his debt, and the indorser has not the absolute control over it for his own interest.
12. The acceptance by an indorser of an assignment to a third person, whether the maker be solvent or insolvent, or the assignment be partial or total, as an indemnity against existing or future indorsements of notes given in renewal as the maker may require in order to keep his paper from being dishonored, affords no presumption in law that

the indorser is under an obligation to take up the note when the maker shall fail to offer renewals and pay discounts; and such an obligation is the true test of the indorser's being entitled or not entitled to notice.

APPEAL from ROCKINGHAM, Spring Term, 1845; *Caldwell, J.*

Assumpsit against the endorser of a promissory note, upon (610) which, according to the statement of the presiding judge, the facts appeared to be as follows:

In 1837 Rawlins and Coleman, a mercantile firm in Danville in Virginia, were very heavily indebted to the Bank of Virginia and the Farmers Bank of Virginia, at their offices at that place, upon bills of exchange and promissory notes, drawn and made by Rawlins and Coleman, and endorsed by various persons, and discounted by the banks for the accommodation of Rawlins and Coleman. Being much embarrassed by those debts and others, to a very large amount, they, Rawlins and Coleman, on 6 May, 1837, executed a conveyance to the presidents of the branch banks for very large estates, real and personal, in trust to secure and satisfy those debts in the order therein specified. Among those debts were several due to the Bank of Virginia on notes of Rawlins and Coleman, endorsed by the defendant, Luke Palmer, for their accommodation. On the deed aforesaid the endorsers on the several bills and notes thereby provided for, including Palmer, on 8 May, 1837, executed an agreement or memorandum in writing as follows: "We, the endorsers for the within named Rawlins and Coleman, do hereby give and declare our full assent to the provisions of the within deed, so far as we are concerned as endorsers aforesaid, and hereby fully acknowledge our several liabilities for the within enumerated negotiable notes, drafts, and acceptances, upon which we appear as endorsers, as they shall respectively come to maturity, without the formality of a protest." The debts, as (612) they fell due, laid over, and the principal debtors and the trustees, as funds were realized, made payments upon the several debts as prescribed in the deed; and, after applying their due share of such funds to the debts on notes endorsed by Palmer, there still remained, in the Spring of 1842, four such notes held by the Bank of Virginia and unpaid; That is to say, one for $3,500; a second for the same sum of $3,500; a third for $2,700, and a fourth for $2,000, making in the whole, the sum of $11,700. The defendant, Palmer, being dissatisfied with the delay in disposing of the trust property, and with having his security in common with so many other persons, proposed, and it was finally agreed by the bank, Rawlins and Coleman, the trustees, and Palmer, that the trustees should reconvey to Rawlins and Coleman certain real estates in Danville,

Richmond, and Greenbrier County, in Virginia, estimated as of the value of $8,180, that Rawlins and Coleman should give new notes endorsed by Palmer, for the said debts (which had been suspended about five years), pay off the arrears of interest, and thereafter keep active the new notes by paying the discount regularly every 60 days, and from time to time pay installments until the debts should be fully paid; and that Rawlins and Coleman should convey the said estates and others to one William Lynn, of Danville, in trust to indemnify the said Palmer as endorser, and to secure the payment of the said notes, so to be given, and any others, that might be given in renewal of them, as hereinafter particularly mentioned. Accordingly the trustees in the deed of 6 May, 1837, reconveyed to Rawlins and Coleman the said several parcels of lands and town lots and houses by three deeds, bearing date 9 April, 1842. And by indenture bearing date 12 April, 1842, made by and between Rawlins and Coleman, of the one part, said William Lynn of the second part, and Luke Palmer of the third part, reciting the said four notes, then renewed, and that they were to be renewed as they should fall due from time to time, and that Rawlins and Coleman were desirous to save Palmer harmless, on account of his liability as endorser upon the said notes or any that should be given in renewal from time to (613) time for the said debts, they, Rawlins and Coleman, conveyed to Lynn the said estates, namely, a house and lot containing half an acre in Danville, another house and lot containing one-fourth of an acre in Danville, a house and lot in the city of Richmond, and a tract of land in Greenbrier, containing 1500 acres and also the following other effects, to wit, 1280 acres of land in Texas, 365 acres of land in Franklin County in Tennessee, a negro man slave, named Lernon, and two blooded mares and four colts, and also assigned to said Lynn certain debts due by notes and open accounts to the amount of $4,077.34, then delivered to said Lynn, upon trust, however, that Rawlins and Coleman should be allowed to retain possession of the houses and lots, lands, slaves, and horses, until it should become necessary or expedient to close the trust, which was to be at the discretion of Palmer or Lynn, after the lapse of nine months from the day of the date; that should Rawlins and Coleman then have failed to pay the said debts, the trustee might sell at public or private sale, for cash or on credit, such parts of the said estates as should be needful for the payment of the debts, and after the payment to convey the parts unsold to the grantors.

A gentleman, who was then the president of the Bank of Virginia, and one of the trustees in the first deed, was examined as a witness and stated that when the above arrangement was proposed by Palmer,

many persons (among whom, the witness thought, was Palmer) knew that Rawlins and Coleman would not be able to sustain their credit but a short time; and that, under those circumstances, the directors of the bank assented to the proposition, relying upon the credit of Palmer and the funds to be hypothecated by the makers as a security for the said notes. The foregoing arrangement having been made, notes were given for the several debts from time to time and the discount on all of them paid by Rawlins and Coleman, from April, 1842, to 28 October, 1843; when the two notes for $3,500 each, and that for $2,700, fell due, and not being paid, they were pro-
(614) tested. The other note for $2,000 was paid in part before, and the residue afterwards, by Lynn, with funds by him collected from the debts assigned to him. The residue of those debts are uncollected, and the slaves and all the real estate and the mares and colts are still unsold.

Afterwards Rawlins and Coleman failed and made a final surrender of all their effects, to other trustees, for other creditors, not providing further for Palmer or for these debts.

By the law of Virginia, notes, negotiable at banks, are placed upon the footing of foreign bills of exchange in the law merchant, as to the demand of payment, protest, and notice to endorsers.

When Palmer began to endorse accommodation notes for Rawlins and Coleman, out of which the present notes grew, he resided in Caswell County in this State about five or six miles from Danville, and the postoffice at Danville was that at which he usually received his letters. But in 1833 or '34, he removed to the County of Rockingham, and his residence was about 22 miles from Danville, on the main road from that place to Greensboro, and within three miles of a postoffice called Reidsville, situated further south on the same road, along which a mail coach passes from Danville to Greensboro, three times a week; and during his residence there, Reidsville had been his postoffice.

An accountant of the bank stated that he knew where the defendant resided and had been at his house several times in 1842 and 1843, before the present notes were protested, but that he did not know that his postoffice was at Reidsville.

Coleman, one of the makers of the notes, was postmaster at Danville, and knew the residence of Palmer and that Reidsville was his postoffice, and stated that those facts were notorious in Danville; that Palmer had a daughter married and living in that village, and that one of the directors of the bank was the editor of a newspaper printed in Danville, to which Palmer was a subscriber, and which was sent to him every week by mail, directed to Reidsville.

The notes were protested by a notary public, who was also teller in the bank, and he gave a notice in writing directed to the defendant at Danville, and put it into the postoffice at that place. He stated that previously the notes, of which the present were (615) renewals, had been sometimes protested and that he had never given Palmer notice, but had given the notice to Rawlins and Coleman, who attended to the renewals, and who therefore were as he considered the agents of Palmer for that purpose. He stated that the reason he put the notice in the postoffice at Danville was that he did not know where Palmer lived, and that he thought Coleman was his agent and would get it, and that Palmer had never attended to the reinstating of the notes, when protested from time to time; but that he made no inquiry as to Palmer's residence or postoffice, though he had heard that he had changed his residence.

On 12 December, 1843, this witness was sent by the bank to the defendant to get him to reinstate the notes or assume the payment of them; and he states that, upon mentioning the subject to the defendant, he said Coleman had sent him word that the notes were protested because the makers were unable at that time to pay the discount as heretofore; that he had been prevented by sickness from going to Danville, but that he would go down in a day or two and arrange the whole matter; that he had understood that Lynn had collected some money and he wished him to pay it on one of the notes, and Lynn did so on the note for $2,000. The witness stated further that Palmer told him that he had left with Lynn blanks with his endorsement on them, to be used, as needed, to renew the notes of Rawlins and Coleman, and that Coleman could have got them from Lynn. That the witness then suggested that he would tell Coleman to apply for them, but the defendant, after expressing his assent, at first, said, "never mind; I will be down in a day or two and arrange the matter."

A witness for the defendant states that he was present at the above mentioned interview between the last witness and Palmer, and that the former used many persuasions to the latter to renew the notes and endeavored to convince him that it was his interest to do so, as the bank would indulge him and allow him an oppor- (615) tunity of selling the property conveyed in trust, in which case he would not lose much; and that to all these applications, which were often repeated, Palmer always replied in substance, that he "did not want to pay anything."

Lynn, who was examined for the defendant, stated, and so did Coleman, that Coleman was not the agent for Palmer in any respect; nor was Lynn, except that he was trustee in the deed, and also that

Palmer had left in his possession his blank endorsements, for the purpose of enabling Rawlins and Coleman to renew the notes from time to time; and that those blanks were left with Lynn in order that they might be filled up for larger sums than those for which he, Palmer, was already bound. Palmer lived in Rockingham, but generally signed a number of blanks, when he came to Danville, and left them with the witness, that the notes of Rawlins and Coleman might be written on the other side, upon their paying the discount and renewing. He states that he was a director of the bank, and that two or three months after the notes were protested an officer of the bank applied to him for Palmer's blank endorsements, in order to have the notes reinstated, proposing, if he would let Rawlins and Coleman have them, that the costs of protest, back interest and discount should be charged to Rawlins and Coleman; but that he, the witness, declined doing so, as he thought it his duty not to do it until Palmer could be consulted, as so much time had elapsed since the protest; and the notes were renewed no more, and this suit was then brought on the three notes.

Upon this evidence, and *non assumpsit* pleaded, the court instructed the jury that the mere fact of the insolvency of the makers of the notes, and the further fact that the defendant had taken the deed of trust of their property as an indemnity, did not dispense with notice to the defendant of the default of the makers, in order to charge him as endorser; and that such notice ought to have been sent by the next post, after the default, to the postoffice where the defendant was in the habit of getting his letters and papers, or to one from (617) which he would get it as soon. But, if the jury believed that, from the defendant's intercourse with Danville, he would receive notice as early there as at Reidsville, the notice put into the postoffice at Danville, directed to him there, was sufficient to charge him. And the court further instructed the jury that, if they found that Coleman was the agent of the defendant to receive notice of the dishonor of the notes, and to renew them, then the notice to Coleman was sufficient. And the court further instructed the jury that if the defendant, with a full knowledge of the laches of the holders of the notes in not sending notice to him by the post, promised to pay the debts or give new notes, it would be a waiver of notice, and the plaintiff would have a right to recover.

Counsel for the plaintiff then moved the court further to instruct the jury that, if there was an understanding between the parties that the defendant should take on himself the responsibility of renewing and paying the notes, in consideration of the trust fund, and he did

so attend to it, either in person or by agent, notice was not necessary; and the court gave the instruction as prayed.

Counsel for the plaintiff moved the court further to charge, that, if the jury found, that by the deed of 12 April, 1842, Rawlins and Coleman conveyed to Lynn, as trustee, all their property as an indemnity to the defendant for his endorsements, a waiver of notice to the defendant was implied by law. This instruction the court refused to give.

Counsel for the plaintiff moved the court further to instruct the jury that, if they found that the defendant had reasonable grounds to believe that the makers would not renew the notes at maturity, notice was not necessary. This instruction the court also refused.

Counsel for the plaintiff moved the court further to instruct the jury that, if the defendant left the notes at Danville, and the whole transaction took place at Danville, the jury might infer that the defendant had received notice. This instruction the court also refused.

A verdict was given for the defendant, and from the judgment the plaintiff appealed. (618)

Kerr and Morehead for plaintiff.
Badger and Waddell for defendant.

RUFFIN, C. J. We think his Honor went much further than the occasion authorized, in leaving it to the jury to find that the defendant might have received notice directed to him at Danville and put into the postoffice there, as soon as if it had been directed to him at Reidsville; or that Coleman was the agent of the defendant to renew the notes and receive notice of their dishonor; or that the defendant had a full knowledge of the laches of the bank, in not duly giving him notice, and with such knowledge assumed to pay or renew the notes. For there was no evidence on which the jury could have found either of the facts thus left to them. It is true that Danville had once been the defendant's postoffice, but he had changed his residence eight or ten years before these occurrences, and, during that period, Reidsville had been his postoffice, from which he received letters three times a week, and it does not appear that he had received a single letter that was addressed to him at Danville, or that one had been thus addressed to him, except the notices of protest by the notary public, who protested these notes; or that the defendant was in Danville, except to make the arrangements with the bank and Rawlins and Coleman, in April, 1842, and when he gave blank endorsements to Lynn to be filled up from sixty days to sixty days for renewals.

There was nothing, therefore, to make Danville his postoffice or take the case out of the common rule, that notice must be sent to the endorser, addressed to the postoffice nearest to him, or that through which he usually conducts his correspondence, unless he designate some other. We say there was no evidence upon that point, because the statement of the notary public that he was ignorant of the defendant's new residence and that Reidsville was his postoffice, and that he thought Coleman was the defendant's agent to receive notice of protest, and attend to the renewals for the defendant, prove noth-
(619) ing, except that person's ignorance of facts which were notorious, even to several of the directors and other officers of the bank, and persons generally, and which he ought to have known or inquired about, and except, further, that he was grossly mistaken in supposing that Coleman was in fact the defendant's agent, and in supposing that he had any ground for thinking him the agent, in the circumstance that he attended to the renewal of notes of which he, Coleman, was one of the makers, and which were endorsed by the defendant for the accommodation of the makers. A maker is the last person that ought to be presumed to be the agent of the indorser. Indeed, it is impossible to believe that the board of directors should not have known the residence of a planter in the county, twenty-two miles from Danville, for so long a period as eight or ten years, to whose means they looked chiefly as securing so large a debt as one of $11,700, or could have thought, without express directions from the endorser, that the maker was the endorser's agent to receive notice of the maker's own default. There was as little evidence that the defendant was informd by this witness, at the interview of 12 December, 1843, that he had neglected, as notary public, to send him notice to Reidsville (which was the *laches* in the case), and that with that knowledge the defendant assumed the debt. The witness did not state that he gave the defendant that information, and, on the contrary it is clear that he did not, inasmuch as he says that he did not know that Reidsville was the defendant's postoffice; and therefore he would not have thought himself more bound to tell the defendant that he had not sent the notice to Reidsville than he had felt bound in the first instance to send it there. Neither was there anything said by the defendant that could be fairly construed into a promise to assume the debts—and a very explicit one should be required in such a case—for, although the defendant yielded for a moment to the insinuations of the witness that upon his return to Danville he might tell Lynn and Coleman to use the signatures of the defendant to blanks left with Lynn, for the purpose of reinstating the notes, he said
(620) in the same conversation that he would not allow it, but that

he would go down in a short time and personally arrange the business. It is true, he added that Lynn might apply the money which he had collected, as trustee, towards the payment of one of the notes; but that does not imply an assumpsit by the defendant, since that money was, as a fund provided by the principal debtors for the payment of these notes, applicable to them, in equity, at all events, whether the defendant remained liable for them or had become exonerated; and the defendant was therefore only expressing an assent to what he could not prevent.

Of the opinions given on the foregoing points, therefore, the plaintiff could have no cause to complain. But whether they were correct or not makes but little difference to the parties now; for the jury by their verdict have affirmed that Danville was not the postoffice of the defendant, and that he would not get notice as soon from that office as from Reidsville, and that Coleman was not the defendant's agent, and that the defendant did not, with a knowledge of the plaintiff's *laches,* assume the debt. So those points are not in the case that is to be decided by this Court, which can only review errors of law by the judge against the plaintiff, and not errors of the jury.

But it is said that the court erred in refusing the specific instruction prayed for, that, if the defendant left the notes in Danville, and the whole transaction took place at Danville, the jury might infer that the defendant received the notice, for that was but a reasonable presumption of fact. We are at a loss to discover any ground for such presumption. It is not understood clearly by us, what is meant by the expression, that "the whole transaction took place at Danville." Taking it in connection with the evidence and the argument at the bar, we presume it was intended to say, as the defendant left his name in Danville with Lynn in blank, and as Rawlins and Coleman wrote on the papers their notes, dated at Danville, and payable at the bank at Danville, to the defendant, who was thereby made the endorser of the notes thus expressed, that therefore notice was to be given to the defendant of the dishonor at that place, and (621) that notice through the postoffice there was sufficient, as he had no place of business or agent there. But the Court thinks that position untenable. The only case cited in support of it is *Mann v. Moore,* at nisi prius, 1 Ry. & Moody, 249, in which it was held, that, where a bill of exchange was dated "Manchester," it was sufficient to direct a notice of its dishonor to the drawer at "Manchester." without designating more particularly his street and number. That, we think, was clearly right, as the drawer had not given his address in the bill more specially, but by the general term, "Manchester"; for it is sufficient to follow the direction of the drawer himself,

as to his residence. But that has no application to a case of endorsement to which no place is annexed in the bill. The note being dated in Danville is no evidence that the payee lives there; nor is the endorsement by the payee in Danville any evidence thereof. If the note in its face had been expressed to be payable to L. Palmer, "of Danville," or if the endorsement had been rendered local by adding "Danville" to the defendant's name, and the residence of the defendant had not been known to the holder, then notice to him at Danville, through the postoffice, would have been sufficient. But the endorsement here was in blank, and therefore the notice ought to have been given at the proper office of the defendant. The difference between such an endorsement at large, and the drawing of a bill dated at a particular place, was held by *Chief Justice Abbott,* himself, who decided *Mann v. Moors.* For not a year before he held, in *Walter v. Hayney,* 1 Ry. and Moody, 149, that notice to an endorser of a bill, directed to him at "Bristol," was too general, as, in such a large place, his residence might not be known, or there might be others of the same name, and the endorser did not designate in his endorsement the place where it was made, or where he lived, as was done by the drawer of the bill in the other case.

It was further urged by the plaintiff's counsel that the court erred in laying it down peremptorily and without qualification, that
(622) notice must be sent by the next post, whereas there are many cases in which the holder may be excused from such strict diligence: as his other indispensable engagements, or that he is making inquiries concerning the endorser's place of abode and postoffice, or that the first post goes out so early after the default that notice could not with convenience be sent by it. But, certainly, "the general rule" is that, with regard to such persons as live at different places, notice should be sent by the *next* post. If there be any of the excuses that are above supposed, then the holder may have till a second post; but it is for him to show the matter of excuse. So the rule is expressed by *Mr. Justice Lawrence,* in *Darbishire v. Parker,* 6 East, 3, and we believe it is perfectly correct. Therefore, in reference to the case before the Court, in which no excuse was given, and in which, indeed, no notice was ever sent to the proper office, the rule was properly stated to the jury without qualification.

But the stress of the argument was that the court erred in refusing the instructions that if the defendant had reasonable grounds to believe that the makers would not renew these notes at maturity, or if the makers had conveyed to Lynn all their property as an indemnity to the defendant, notice was not necessary; and in giving the instructions that the insolvency of the makers and the fact that the

defendant had taken a deed of trust for property of the makers, as an indemnity, did not dispense with notice.

It may be observed, however, that counsel for the plaintiff took, in the argument here, a preliminary objection to requiring notice, which was not raised in the Superior Court; which is that the memorandum, signed by the defendant on the deed of 8 May, 1837, expressly dispenses with demand, protest and notice. It would be sufficient to say in answer, that the point was not taken on the trial. But that agreement is confined to "the notes within enumerated, and on which we appear as endorsers," which were secured by that deed. But those notes were not of that character; for these debts were taken out of that deed, and placed on a new footing of "activity," by (623) giving new notes, upon which the discount and curtailments were to be paid every 60 days. They were no longer subject to the agreement in question; but were to be regulated by the new agreement and the second deed of trust. It remains, therefore, to consider the other general errors alleged.

Although it was once held, in *De Berdt v. Atkinson,* 2 H. Bl. 336, that the known insolvency of the maker of a bill or note would prevent a person who lent his name to give credit to the paper from insisting on a demand and notice, yet the point was very soon ruled otherwise by three of the four judges who had decided it, in the case of *Nicholson v. Gouthit,* 2 H. Bl., 609, in which the endorser had guaranteed the payment of the debt for which the note was given, and the maker was in bad circumstances at the time and became insolvent before the note fell due, and it was the understanding of all parties that the maker could not pay the note and that the endorser should. Yet in that case, strong as the apparent justice of it was on the side of the holder, it was held that the note must be duly presented, in order to charge the endorser. And in many cases since, in which *De Berdt v. Atkinson* was cited, it has been disregarded, and a contrary principle established. As in *Smith v. Beckett,* 13 East., 187; *Esdaile v. Sowerby,* 11 East., 114; *Whitfield v. Savage,* 2 Bos. & Pul., 279. And the same doctrine has been held in this country. *French v. Bank,* 4 Cranch., 141; *Smith v. McLean,* 4 N. C., 509. For although the maker be insolvent there may be many other means by which the endorser might possibly, through the maker's friends, get security, if the holder had afforded him the opportunity. Therefore, although the makers were insolvent and the defendant had ground to believe, nay, all parties understood, that, by reason of the maker's insolvency, the defendant would have to pay the debts, *Nicholson v. Gouthit* and *Esdaile v. Sowerby* are conclusive authorities, that those circumstances are not equivalent to demand due notice of dishonor.

But it was said further that the court ought to have left it (624) to the jury to find that the conveyance to Lynn was of all the property the makers had, and to have directed them that, if such was the fact, the defendant was not entitled to notice. The proposition presents a very important question, which, assuming the fact to be as supposed, is novel to us, and does not appear, as far as we have been able to extend our researches, to have been decided by any court. No English adjudication has been cited in support of the position. It is supposed to be analogous to the rule of *Bickerdike v. Bollman,* 1 Term, 405, and certain cases decided upon what was deemed within the same principle, that the drawer of a bill who had no funds in the hands of the drawee was bound for the amount of the bill without notice of its dishonor. The judges who decided that cause founded their opinions on the ground that it was a fraud to draw the bill, and that the drawer was the real debtor, and "could not be prejudiced by the want of notice." This does not mean that, in every case, evidence may be gone into that a drawer or endorser was not in fact injured by the want of notice as the acceptor or maker was insolvent, for that would leave no rule as the law of the case and make every case one for the jury on its particular circumstances. But it means that, when it appears that a party to a bill has commited a fraud, as by drawing without funds or authority, he shall not call for notice; for, if he had it, by no possibility could it change his liability or give him recourse on another. But if he could have recourse over, as upon a bill drawn for the accommodation of the acceptor, or a note endorsed for the accommodation of the maker, then he is entitled to notice, althoughe the acceptor or maker be insolvent. *Corey v. Scott,* 3 Barn. & Ald., 619; *Ex parte Heath,* 2 Bos. & Bea., 240; *Norton v. Pickering,* 8 B. & C., 610; *Esdaile v. Sowerby, French v. Bank.* Again, if a note is made for the accommodaion of the payee, and he has it discounted and receives the money on it, he is not entitled to notice, because he is the real debtor, and, therefore, primarily liable, and could have no recourse on the maker. 4 Cranch, 64; 2 Chitty's Pl., 133; *Brown v. Maffey,* (625) 15 East., 216; *Legge v. Thorpe,* 12 East., 171. So, it is held, upon a plain ground of justice, that if a maker of a note places effects in the hands of the endorser to meet the note, the latter is not entitled to notice, because it would be a fraud in him to allow the maker to be called on for the payment when he had the amount in his hands, and, therefore, had become the real debtor. *Corney v. Da Costa,* 1 Esp., 303. In every case in which notice is dispensed with there either was a fraud on the world in making the security, or it would be a fraud on the party, who, according to the form of

the instrument, is legally bound before him, who insists on notice, but where in reality, and according to their actual liabilities, as between themselves, the relation of the parties is reversed, and he, who appeared to be primarily liable, was so only secondarily, and the other party was the real debtor. The principle governing those cases is an intelligible and just one. But does it embrace the present case? We think not, but that there is an evident distinction between them.

In the first place, it has been seen to be clearly settled that, as an endorser of an accommodation note, the defendant was guilty of no fraud on anybody, and was therefore entitled to notice. More especially was that the case here, as the nature of the paper was fully understood by the bank, upon a communication with the makers and the endorsers. Therefore, by taking the note in this form, instead of holding the defendant bound as a surety, simply by becoming a joint maker of the note, the bank must have intended, and perhaps was obliged by charter, to obtain a security liable, as was observed in *Nicholson v. Gouthit*, to all the legal consequences of an endorsement—among which is notice to the endorser in order to charge him.

In the next place, the defendant was not under any engagement to Rawlins and Coleman, or to the bank, in consideration of the trust fund or for any other fund, to take the debts on himself. The jury have so expressly found, as must be taken by their returning a verdict for the defendant under the instruction that, if there was an understanding between the parties that the defendant should, (626) on that consideration, pay the debt, notice was not necessary. There being, then, no contract, express or implied, of that nature, what else is there on which it can be held that the defendant has deprived himself of the right to notice that is incident to the contract of endorsement ordinarily? It is said that the taking an assignment to Lynn, as his trustee, of all the property of the makers as an indemnity to the defendant, is in law a waiver of notice by the defendant. For this, *Bond v. Farnham*, 5 Mass., 170, the leading case on the subject, is relied on. There notes were given in the ordinary course of business, as far as appears; at any rate, they were not to be renewed from time to time, as securities for a permanent loan from the holder to the makers, but were negotiated in the market and lodged in bank for collection at maturity. Before the particular note fell due, the maker became insolvent, and conveyed to the defendant, the endorser, for his security, all his property, which was not sufficient to pay all his labilities for the maker. It was held that the endorser waived a demand and notice thereby. *Chief Justice Parsons* gives as the reason, "That the endorser knew a demand would be fruitless, as he secured all the property the maker had; and, as he

secured it for the express purpose of meeting his endorsements, he must be considered as having waived the condition of his liability, and as having engaged with the maker, on receiving all his property, to take up his notes." There are other cases to the same effect. *Bank v. Griswold,* 7 Wend., 165, is one. The declaration contained two counts: the first, that, before the note fell due, the makers assigned to the defendant (the endorser) and another person effects to a greater value than the amount of all the debts mentioned in the deed, in trust to pay this note and others specified; the second, after stating the making and endorsing of the note and the assignment to the defendant and another, as before, avered that the effects assigned constituted all the property the makers had; each concluding in the usual form, that the defendant had not sustained any damage (627) by reason of no demand and notice. Upon demurrer to both counts, the plaintiff had judgment. *Mr. Justice Nelson,* after citing several of the cases already noticed, and relying particularly on *Bond v. Farnham* as the strongest, adds that, although insolvency is rather a reason for requiring than for dispensing with demand and notice, in order that an endorser may have an opportunity to save something out of the wreck of the estate, yet, "having anticipated that event and taken into his possession the whole of the estate, expressly to meet his responsibilities, the endorser has effectually secured every object which the law presumes would be the consequence of notice." It is obvious that the reasons given for the two judgments do not accord. In the latter case notice is dispensed with, because it is supposed to be of no use; that the endorser could not possibly be prejudiced, as he had already "secured *every object,* for which the law entitles him to notice," inasmuch as the maker has no more property. But it will occur to every mind that precisely the same argument is applicable to every case of total insolvency or bankruptcy. Yet in those cases the law requires notice, as, peradventure, some one else may be willing to engage for the debtor. We presume, however, that it was not intended in that case to go beyond the doctrine of *Bond v. Farnham,* especially as far as the language used might seem at first to carry it. Now, the case of *Bond v. Farnham* puts the doctrine explicitly upon a supposed engagement, to be inferred from the circumstance that the endorser took to himself a conveyance of all the debtor's property to meet the notes, and that he, the endorser, *would take up his notes.* Whether that inference of fact was right or wrong, is not very material to our present purpose. It shows, that the judge thought such an engagement necessary to the conclusion arrived at, and the case came on there upon a verdict subject to the opinion of the court on a case agreed, so that the court

was at liberty to draw reasonable inferences of fact. But here the jury has expressly found that the defendant did not undertake to pay these notes, and there is no reason for this Court to (628) make any such inference. But, supposing that point open, the two cases cited differ from the present in several essential particulars. Those were cases of the conveyance of *all* the debtor's property, as admitted in the case agreed by the demurrer. In the present, it not only does not appear that the deed to Lynn conveyed all the property the debtor had, but it appears that it did not. In the first place, the deed of May, 1837, conveyed an immense amount of property to secure, it is true, very large debts. But it is not stated that at the time of the deed of April, 1842, the value of the property mentioned in that of 1837, remaining unsold, did not exceed the amount of the debt with which it was incumbered; and, of course, the resulting trust in that fund was a property in Rawlins and Coleman. Again, the gentleman who gave evidence as to the negotiation and agreement out of which the deed grew stated explicitly that, although it was at the time generally expected that Rawlins and Coleman would fail in a short time, yet they had not failed then. He says, they failed soon afterward, and *then* "made a final surrender of *all* their effects to other trustees and for other creditors." But, above all, it does explicitly appear that, so far from the defendant agreeing to assume the debts, because he had the funds and all the funds the maker owned, the agreement was that Rawlins and Coleman should retain the possession of all the estates conveyed to their own use for nine months at least, and until a necessity for a sale after their default, and that among the property were two houses in Danville and one in Richmond, and a negro man; and, furthermore, that out of the profits of those estates, or other resources, they, the makers, actually paid in part of their debts, after the execution of the deed to Lynn, about $1,100, being the discounts upon the sixty days renewals for about twenty months on this large debt. This fact puts a negative at once upon the implication of an engagement of Palmer to pay Rawlins' and Coleman's notes, and that he had stripped them of all their property and left them no resources. His Honor was, therefore, right in refusing the second special instruction prayed for the plaintiff, because it assumed, as a fact, what was not true, namely, that Rawlins and Coleman conveyed all their property in trust for the de- (629) fendant; and, moreover, because it is not an implication of law, if the conveyance had been of all the property, that the defendant had agreed to take up the notes, when, upon the prayer of counsel of the plaintiff, it was submitted to the jury whether there was any such engagement or understanding between the parties, and the jury found

that in point of fact there was not. We do not question that an engagement by an endorser, upon any adequate consideration, though not a full one, to make the debts his own, will bind him, as in *Corney v. Da Costa,* and in *Brown v. Maffey.* So in *Bond v. Farnham,* the rule is right, if the inference of fact of the agreement by the endorser to take up the notes can be sustained, and we do not see that a jury might not draw that inference under the circumstances or upon a case agreed, that the court might not do it. But we cannot agree that the law will adjudge on a demurrer, that, if an endorser, in order to save himself as far as he can, take from an insolvent maker of a note a conveyance, by way of security, of property, even though it be all he have, the endorser thereby engages to make the debts his own, and that it is an act of bad faith to require the holder to make a demand and see if he cannot get something more. But here the conveyance was but for part of the maker's property, and the maker engaged with the creditors, and also with the endorser, not only to make the conveyance, but "to keep the notes active"; that is, regularly renewed every sixty days, and to pay the discounts; and they actually paid under that engagement about $1,100, to the exoneration of the defendant. This was a most important relief to the defendant; for who does not see that by thus keeping down the interest for ten years, for example, it would be equal to paying down half the debt, and in the meanwhile, the value of the assigned estates might increase? The inference sought to be drawn by the plaintiff from the deeds is absolutely opposed to the admitted fact.

(630) But it strikes us that there exists yet another distinction between this case and those cited, equally important in repelling the inference that the endorser had undertaken to pay the notes. In all the cases we have considered the funds were put into the hands of the endorser, or the conveyance made to the endorser, himslf, except in *Bank v. Griswold, supra,* and there it was to the endorser and another person. Here the assignment is to a third person, as a trustee, not for the endorser, merely, but for both the makers and the endorser, and the conveyance to him was upon an arrangement to which the bank, as the creditor, was a party, so as clearly to entitle the bank also to the benefit of the assignment, and, like other *cestuis que trust,* to interpose and call for the execution of the trust, or control the trustee. The difference is essential. Where funds are supplied to the endorser, or property conveyed to him, he has the absolute control in the matter, and can sell when and how he pleases. He may be supposed, therefore, to assume the debt immediately and absolutely. But in the other case, in the absence of direct evidence of an assumpsit, the inference is the other way. Can it

be supposed the endorser meant to take up the notes at the end of the first sixty days, as his own, if the makers should fail then to renew them, while they must be allowed by the trustee to retain possession of the property for nine months, and might be allowed by him longer? When a third person is interposed as trustee he must attend impartially to the interest of all parties. *Hunt v. Bass,* 17 N. C., 292; *Dowes v. Graysbrook,* 3 Meri., 208. And the very fact of interposing such third person, to the exclusion of the endorser himself, shows that the debtor and, in this case, the creditor also, required such a trustee as a protection against the haste, the imprudence, or irresponsibility of the defendant himself. Would this trustee be at liberty to sell this trust property at half price, in order to save Palmer from the sale of his at an undervalue at execution sale? Besides, the same gentleman, to whose important statement reference has been so often made, says that when Palmer and Rawlins and Coleman proposed to the bank that their trustees should reconvey some parts of the property to Rawlins and Coleman, it was a part of the (631) proposition that Rawlins and Coleman should convey those estates and others to Lynn, in trust to save Palmer harmless as endorser, and "to secure the payment of the debt aforesaid, for which Palmer stood bound"; and that in execution of that agreement the first trustees conveyed, and then Rawlins and Palmer conveyed and assigned to Lynn, not only the same estates, but also several other large tracts of land, a slave, debts to the amount of $4,077.34, and other things, from which debts alone considerably over $2,000 have been realized already. It is, therefore, clear that the bank had an interest in this conveyance, as well as the defendant; and it cannot be doubted that such interest, in the form of additional property, may have materially induced the bank to assent to the new arrangement. Indeed, that witness deposes "that the directors assented to the proposal, relying upon the credit of Palmer and the funds to be hypothecated by the makers as security for the said notes." As the creditor, the bank is to all intents a *cestui que trust,* as well as Palmer is; and so are Rawlins and Coleman. All three would have a right to make representations to the trustee of their wishes and interest, and he would be bound, not merely to protect Palmer from harm, but also to secure the debt and take care of the interest of the debtors according to the best of his judgment. It is not easy to perceive, in such a case, a reason why the endorser should be supposed to have become paymaster, as between him and the maker, more than that the bank agreed to look to the security of the property, and not to the persons. For, if the latter inference is repelled by the fact that the endorser's name is required on notes in renewal, as rec-

ognized in the deed, so, likewise, the former is repelled by the fact that the maker continues to give new notes, as maker, as the deed requires. In fine, we think that the acceptance by an endorser of an assignment to a third person, whether the maker be solvent or insolvent, or the assignment be partial or total, as an indemnity against existing and future endorsements of notes, given in (632) renewal, as the maker may require, in order to keep his paper from being dishonored, affords no presumption in law that the endorser is under an obligation to take up the notes when the maker shall fail to offer renewals and pay discounts; and such an obligation we conceive to be the true test of the endorser's being entitled or not entitled to notice. Therefore the judgment must be affirmed.

PER CURIAM. No error.

Cited: Runyon v. Montfort, 44 N. C., 373; *Long v. Stephenson,* 72 N. C., 570; *Bank v. Bradley,* 117 N. C., 530.

THE STATE UPON THE RELATION OF HIRAM HENDERSON v. OWEN MCALEER AND OTHERS.

1. The refunding bonds which executors and administrators are authorized to take from legatees or distributees are taken solely for the benefit of creditors.
2. Therefore, an executor or administrator who has paid to a legatee or distributee more than he was entitled to cannot for his own use recover the excess so paid by an action on the refunding bond given by such legatee or distributee.

APPEAL from CASWELL, Spring Term, 1845; *Caldwell, J.*

Debt on the defendant's refunding bond. The relator was the executor of the last will of Joseph Henderson, deceased, he paid to several of the legatees their legacies (and among others were the defendant's) and took refunding bonds, upon an understanding that, if the assets left in his hands should not be sufficient to discharge the outstanding debts of the testator, and also to discharge some outstanding pecuniary legacies, then the said receiving legatee should refund, etc.

The relator afterwards had to pay said debts and pecuniary (633) legacies and as that which was left in his hands and then supposed to be sufficient to discharge the same (to wit, a bond), proved of no avail, he demanded contribution. He then filed a bill in equity against the present defendants and others, to whom he had first

paid their legacies, to force them to refund to him their proportional parts of the amount so paid by him, and there was a decree for him ascertaining the proportions against the present defendants. The breach which the relator has assigned of the condition of the present bond is that the defendants have not paid to him the several sums decreed against them as aforesaid. The judge was of opinion that the plaintiff could not recover on such an assignment, and he was nonsuited and then appealed.

Kerr and Morehead for plaintiff.
Norwood for defendants.

DANIEL, J. We concur with his Honor that the decree could not be given in evidence on any breach that could be assigned by the relator on this refunding bond. The act of Assembly, Rev. Stat., ch. 46, sec. 18, declares that a refunding bond shall be and inure to the sole use and advantage of the creditors of the testator or intestate. The payment by the executor was his voluntary act, and, if he had chosen, he might have taken a bond to himself as an indemnity against future demands against him beyond his assets. He cannot have recourse to the refunding bond required by the statute; for, if he could, he might exhaust it and thus deprive other creditors of the benefit which the act gives exclusively to the creditors.

PER CURIAM. Affirmed.

Cited: Lowery v. Perry, 85 N. C., 134.

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(634)

DEN EX DEM. FAGAN & GUYTHER v. PRISCIA WALKER.

Where a husband sells land belonging to his wife, by a deed purporting to convey a fee simple, she not having joined in the conveyance so as to pass her title, and the bargainee takes and holds possession under such conveyance: *Held*, that neither she nor her heirs, if she died during the coverture, are barred from asserting her or their title by the statute of limitations until after the lapse of seven years from the death of the husband, the possession of the alienees not being adverse until the death of the husband.

APPEAL from WASHINGTON, Spring Term, 1845; *Battle, J.*

Ejectment for a tract of land, of which it appeared the defendant was in possession, claiming under a deed from Levi Fagan and his wife, Fanny, to Thomas Walker, and the will of the said Thomas giving her a life estate therein. The land belonged in fee to the said Fanny, the wife of said Levi. The deed to Thomas Walker was signed and sealed by the said Levi and his wife, Fanny, in December, 1811, but was not

so acknowledged by her, as by the laws of this State, to pass her legal interest. The said Fanny died about 1825, leaving Franklin L. Fagan, one of the lessors of the plaintiff, her only child and heir at law. Her husband, Levi Fagan, died in February, 1839. Thomas Walker took possession under his said purchase and so remained until his death, when his widow, the present defendant, continued the possession until this time. The possession of the said Walker and his widow was for more than seven years before the death of the said Levi, and this action was not commenced until November, 1843, more than three years after the death of the said Levi, the plaintiff's lessor being of full age at the death of Levi. The plaintiff insisted that there never having been any such probate or acknowledgment of the deed as passed the interest of the wife, the possession of Walker and his widow did not become ad-
(635) verse until after the death of the husband, Levi Fagan, and that he had seven years after that time within which to assert his title. The defendant contended otherwise. A verdict was taken for the plaintiff, subject to the opinion of the court upon the question of the statute of limitations. Upon this question the court, upon the authority of *Jones v. Clayton,* 6 N. C., 62, decided in favor of the defendant, and directed the verdict to be set aside and judgment of nonsuit to be entered. The plaintiff appealed from this judgment to the Supreme Court.

Heath for plaintiff.
Iredell for defendant.

DANIEL, J. Before the statute 32 H. VIII, ch. 28, when a husband discontinued, by fine or settlement, the freehold of the lands held by him in right of his wife, or when he was disseised of the same, and neglected to recover the possession of the same during the coverture, she or her heirs on his death, were driven to their action *cui in vita,* or *sur cui in vita,* to regain the said land. But the above statute gave the wife and her heirs a right of entry into her land on the death of the husband. And they thereafter were enabled to bring any of those real actions which another person could then bring who had a right of entry into the land. In all these actions, where the plaintiff declared upon his own seisin or possession therein, he or she was, by the statute 32 H. VIII, ch. 2, sec. 3, compelled to bring his or her action within thirty years, or be barred of his or her right of *entry,* and were thereafter driven to his or her *writ of right.* But under and since these statutes, if husband and wife had joined in a deed of *bargain and sale,* which was afterwards enrolled, the wife might *enter* after her husband's death, although she was a party to the deed, against which she might plead *non est factum.* 10 Rep., 42; 1 Roper on Husband and Wife, 60. This was the law, because the statute of uses (27 H. VIII)

transferred only that use to the possession which the husband had; and that could only be an estate during the coverture, unless he had a child born alive during the coverture, and then an estate by (636) curtesy during his life would pass. The bare signing and sealing of the deed by the wife was a perfectly *void* act. The husband has a particular estate in the lands of his wife, which he may alien, and the possession of his vendee, although held by a deed of *bargain and sale,* professing to transfer a fee from the husband and wife, is still in law no more or larger estate than the husband had a right to transfer, for the statute of uses transferred that and no more. Then the estate in the possession of such a vendee, and the remainder in fee in the wife, formed but different parts of one and the same entire estate, and the possession of the former will not be *adverse,* so as to bar the latter by force of the statute of limitations. The possession of the particular tenant is never adverse to the title of him in remainder or reversion (*Taylor v. Horde*, 1 Burr., 60; *Fisher v. Prosser,* Cowp., 218; 2 Roscoe on Real Actions, 504), and the possession of the husband's bargainee in fee is the same as if the deed were expressly for the husband's and wife's estate. The wife of Fagan had no right of entry during her life; nor did her heirs at law have any such right of entry until the death of Fagan in 1839, and the possession of the defendant and those under whom she derives title was not *adverse* until the death of Fagan in 1839. And then did a right of action of the land *first accrue* to Mrs. Fagan, had she been alive, or to her heirs. Had Mrs. Fagan been alive at the time of the death of her husband she would not have been driven to the necessity of invoking the saving *proviso* of three years in the act of limitations, because no time had ever commenced running against her, while she was covert, as, during the life of her husband she would not have had a right of entry. Time would have begun to run against her only from the period she had a right to enter, and that could not have been until the death of her husband, when she would have been a *femme sole.* And that being the first time an action could have been brought by her (as those in possession under Fagan could not say they, before that time, held adversely to her) she and her heirs, like all other persons, had seven years to com- (637) mence their action, before her or their right of entry would be tolled by force of the statute of 1715. That time had not run when this action was commenced, and of course the right of action still remained to the lessors of the plaintiff, who are the heirs at law of Mrs. Fagan. If Walker had entered into these lands as a disseisor or wrongdoer, and Fagan had then neglected to enter in right of himself and wife, and more than seven years had run while the wrongdoer had held an adverse possession, then, on the death of Fagan, she could have had

but three years, under the saving *proviso,* to have entered. Why? Because seven years had already run against her after her right of entry had first accrued. But this adverse possession shall not hurt her (says the statute), because she was, during all the time, a *femme covert;* she still shall have *three* years after the death of her negligent husband to bring her action. The *proviso* was intended to save the rights of entry of females who had been placed in this predicament by the *laches* of the husband, permitting seven years adverse possession to run from the time his wife had *first* a right of action for her land, and which action he had omitted to bring for her. But the right of entry of a person out of possession was not barred by the Stat. 21 James I, ch. 16, unless the possession of the party in possession was *adverse* to the party having the right to the reversion. And there could be no adverse possession where the party in possession held the estate consistent with that of the party entitled who was out of possession. Brown on Actions at Law 30. The only difference between the statute of James and our statute of limitations consists in the length of time mentioned in each. The English statute tolled the entry generally after twenty years; ours, after seven years adverse possession (with color of title, say the courts). Those persons who were under disability had ten years by the Stat. James; here but three years after disability removed. The second section of the original act of 1715 is not brought forward in our
(638) Revised Statutes, and the case before us rests on the law as it stood on the death of Fagan. And we think, by that law, that the lessors of the plaintiff had seven years from that period to make their entry; because the freehold life estate that was in Mrs. Walker was not adverse, but was consistent with the reversion in fee that was in Mrs. Fagan and her heirs. These two estates were but parts of one entire estate in fee simple; and the possession of Walker could not be adverse to the right of Mrs. Fagan and her heirs until the death of Fagan, the husband. And, as we have before said, the right of entry of the heirs of Mr. Fagan *then first accrued.* They therefore stand, like all other persons not laboring under disability, and have seven years to bring their suit from the death of the tenant by the curtesy. We have been the more lengthy in these remarks in consequence of a different decision which we find reported, *Jones v. Clayton,* 6 N. C., 62, which we cannot follow. The jury found a special verdict for the plaintiff subject to the opinion of the court; whereupon, the court gave judgment for the defendant and the lessors of the plaintiff appealed. We are of opinion that the said judgment must be reversed, and judgment rendered for the plaintiff upon said verdict.

PER CURIAM. Reversed.

Cited: Williams v. Lanier, 44 N. C., 32, 38; *Osborne v. Mull,* 91 N. C., 206.

(639)

HEZEKIAH DRAKE, QUI TAM, ETC., v. JESSE MCMINN

A declaration against a minister of the gospel or justice of the peace, under the statute of 1778 (Rev. Stat., ch. 71, secs. 1, 2, 3, 4), for a penalty in marrying two persons who had not complied with that statute, must state not only that they were married without a license, but also that no certificate of the publication of banns was produced to the minister or justice. A mere averment that there was no license and that there had been no publication of banns is not sufficient to support the declaration.

APPEAL from HENDERSON, Fall Term, 1843; *Dick, J.*

Debt, qui tam, against the defendant, to recover the sum of one hundred dollars, as a penalty for a violation of the statute (Rev. Stat., ch., 71, secs. 1, 2, 3, 4) for marrying two persons without a license or the previous publication of banns. In the Superior Court, under the instructions of the judge, the jury found a verdict for the plaintiff, and from the judgment thereon the plaintiff appealed.

The question submitted to this Court was one in arrest of judgment, upon the following declaration, to wit:

"Jesse McMinn was attached to answer Hezekiah Drake, who sues as well for the said county of Henderson as for himself, of a plea that he render to the said plaintiff, who sues as aforesaid, the sum of one hundred dollars, which he owes to and unjustly detains from him; and therefore the said plaintiff, who sues as aforesaid, complains for that the said defendant, being a justice of the peace, duly commissioned and acting in and for the said county of Henderson, after the first day of January, which was in the year of our Lord one thousand eight hundred and thirty-eight, to wit, on 1 March, 1842, at and in the said county of Henderson, unlawfully, willfully and knowingly did join together in matrimony one John Jones and one Eliza Smith without any publication of the banns of matrimony according to law, and without a license for the said marriage first had and ob- (640) tained from the clerk of the proper court of Pleas and Quarter Sessions in that behalf contrary to the form, force and effect of an act entitled 'an act concerning marriage,' whereby and by force of the said statute an action hath accrued to the said plaintiff, who sues as aforesaid, to demand and have of the said defendant for the said county and for himself the said sum of one hundred dollars above demanded: Yet the said defendant, although often requested so to do, hath not as yet paid the said sum of one hundred dollars above demanded, or any part thereof, to the said plaintiff who sues as aforesaid, but to do this he hitherto hath wholly refused, and still doth refuse, etc. And therefore the said plaintiff, who sues as aforesaid, brings suit," etc.

Alexander and Francis for plaintiff.
No counsel for defendant.

NASH, J. This is an action of debt, *qui tam,* brought against the defendant to recover one hundred dollars as a penalty secured for a violation of the law in marrying a couple. The declaration states that "the defendant being a justice of the peace for Henderson County on 1 March, 1842, did unlawfully, willfully and knowingly, join together in matrimony the man and woman (whose names are set forth in the declaration) without any publication of banns of matrimony according to law, and without a license for the said marriage from the clerk of the proper court of Pleas and Quarter Sessions, first had and obtained," etc.

The act constituting this Court renders it the duty of the judges "to render in every case, such sentence, judgment and decree, as, on an *inspection of the whole record,* it shall appear to them ought, in law, to be rendered thereon." Rev. Stat., ch. 33, sec. 7. The statute, for a violation of which this action is brought authorizes in sec. 2, the clerks of the several county courts to issue marriage license to any person applying for the same, first taking bond to the State of North
(641) Carolina, with sufficient surety, in the sum of $1,000, with condition that there is no lawful cause to obstruct the marriage for which such license is desired, etc., "which license shall be directed to any authorized minister or justice of the peace." In sec. 3 it is enacted, "every minister of the gospel, qualified as in this act before directed, or any other person appointed by their respective churches, as a reader, is hereby authorized and empowered to publish the banns of matrimony between any two persons requesting the same," etc., "and shall give a certificate of such publication when demanded, *directed to any authorized minister or justice.*" Sec. 4 is the one under which the action is brought. "If any minister or justice of the peace shall knowingly join together any two persons in any other way or manner," etc. The way or manner here mentioned is the requirement of the two preceding sections. It has ever been the practice, as far as our information extends, for the justice or the magistrate to require the production of the marriage license, signed by the proper clerk, before performing the ceremony. This license is, to the officiating officer, the *evidence* of the fact that the person to whom it is granted has complied with the law, that he has given the bond the law directs, and upon this evidence alone, is he authorized to act. For the license is to be *directed* to some minister or justice of the peace. If not intended to be his warrant for performing the cermony, to what purpose is it issued? This appears to have been the understanding of the draftsman of the declaration. A part of the charge is without "a *license* for the said marriage, first had

and obtained from the clerk of the county court," etc. Is there any difference in the evidence required by sec. 3, when the parties proceed by publication of banns? We can see none. The object of the law in each case is the same, to protect individuals and itself from imposition. In the one case, the party applying gives bond with surety, that "there is no lawful cause to obstruct the marriage." In the other, public notice is required to be given. It is public that any person may object who knows of any lawful impediment. Marriage, under publication of banns, is a very ancient custom in the Church of (642) England, and is still observed by its members in that country. In this State, when the ceremony is performed by one of its members, it is, by the formularies of the church, required of him to ask if any one knows of any good reason why the parties should not be joined in wedlock; if so, they are required to mention it then. The reason why these forms are required is, evidently, to guard against imposition, and the minister or magistrate is required to act under the same evidence, that the guards of the law may be enforced. When the parties proceed by publication of banns the minister making the publication is required to grant a certificate of such *publication,* when demanded, which certificate is to be directed to some minister or justice of the peace. In the latter case, then, as in the former, the certificate of the minister is, to the officiating magistrate or minister, his evidence that the banns have been published and his warrant for performing the ceremony. It is his warrant so far as to protect him against any forfeiture under the act. For, if a false certificate be sent to him from the minister he would not incur the penalty, although the banns had not been published. It may be said that the giving of the bond in the one case, and the publication of banns in the other, is the important matter required by the act. This is certainly true, but the law has required the certificate as the evidence upon which the ceremony is to be performed, and though the fact may be that the bond was given or the banns published, yet the penalty is incurred if the marriage license, or certificate of the publication of the banns is not produced or shown to have been actually granted. We are of opinion that the declaration filed in this case is defective, in stating that the marriage was solemnized without any publication of banns. It ought to have alleged that the marriage ceremony was solemnized without any *certificate* of such publication as required by law. We hold that the nonpublication of banns can no more be laid in the declaration as the *gravamen* of the defendant's offense in the one case than the not giving a bond can in the other. For, if a false certificate be sent to him from the minister, he would not incur the penalty, although the banns (643) had not been published. We do not mean to say that in all

cases, when a clerk grants a marriage license, or a minister a certificate, that, upon their production, the justice of the peace, or the officiating clergyman is bound to perform the service, or that he is not bound to proceed. All that we intend to say is, when he acts upon the evidence pointed out to him by the law he cannot subject himself to any penalty. We have nothing to do with the motives of the plaintiff in instituting these proceedings. He appears before us as a public informer, seeking to enforce against the defendant a forfeiture, incurred by the violation of law. He must be prepared to show by his evidence that by law he has a right to demand and receive the money forfeited. We think he has not done this, that there is in his declaration a defect fatal to his claim, and that his judgment must be arrested.

PER CURIAM. Judgment arrested.

Cited: *Turner v. McKee,* 137 N. C., 263.

(644)

ELIZABETH REA v. EZEKIEL W. ALEXANDER.

1. The retaining of the possession of slaves by a vendor, after giving a bill of sale absolute on its face, though not *per se* fraudulent, yet is a circumstance which with other facts and circumstances found or admitted would authorize the court to say that the transaction was void for fraud. Fraud is a question of law upon facts and circumstances found or admitted.
2. Where it is a part of the agreement of sale that, notwithstanding the absolute deed, the vendor shall have the possession and use of the property conveyed for an indefinite period, this amounts to an express secret trust for the vendor, and constitutes a fraud on creditors deceived or hindered by the transaction.

APPEAL from MECKLENBURG, Special Term in May, 1845; *Pearson, J.*

Detinue for a female slave named Caroline. The defendant admitted the detention. The plaintiff read in evidence a bill of sale for four slaves, of whom Caroline was one, executed by one Benjamin Boyd to the plaintiff, dated in April, 1840, and registered in October, 1841, purporting to be in consideration of the sum of $1,550. One Boyd, the father of Benjamin, was the subscribing witness. He stated that he was present when the bill of sale was executed by his son to the plaintiff, who was his son's mother-in-law, and saw the plaintiff execute and deliver to his son a note for $1,550, as the consideration. He also stated that the plaintiff, at the time the bill of sale and note were

executed, agreed to let his son keep possession of the negroes and have the use of them, but for how long a time, or whether for any definite period he could not recollect. He thought the agreement was that the plaintiff should give her note for $1,550 and let his son have the use and possession of the negroes, and his son was to make her the title. This took place at his son's house in Charlotte, no other person being present. His son kept possession of the negroes until he was broken up and sold out in January, 1842. A week or two before the negroes were levied on they were sent to the house of the plain- (645) tiff, who lived out of town.

The defendant read in evidence a judgment and execution against Benjamin Boyd, and proved that the negro was levied upon and sold by the sheriff under the execution. At the sale, which was in January, 1842, the defendant became the purchaser. The defendant proved that at the time the bill of sale was made by Boyd he was very much in debt and turned out to be hopelessly insolvent; that a few years before he had married a daughter of the plaintiff; that the plaintiff was herself in debt and had since been sold out; that at the time she had her dower in a tract of land owned a negro woman and two boys, the usual quantity of stock, etc., and had purchased a tract of land at the price of one thousand dollars, towards which she had paid $500; that her annual crops, which constituted her only income, were worth on an average, about $500, out of which she had to support herself, pay expenses, etc.

In reply, the plaintiff produced the note of $1,550 and proved that Benjamin Boyd, in October, 1841, had assigned the note to Dr. Boyd, his brother, to secure him for debts he had paid for him. Several witnesses stated that in 1840 the plaintiff's credit was good and she could have obtained credit in the purchase of negroes for $1,500, although she did not have much property and afterwards became insolvent. The plaintiff also proved that at February Term, 1845, Dr. Boyd having sued her on the note returnable to that term, she confessed judgment.

The court charged that although a man was in debt the law allowed him to sell his property at any time before there was an execution so as to create a lien; but the sale must be *bona fide* and for a valuable consideration; otherwise creditors have a right to object and to treat the transfer as a nullity. If, in this case, the jury was satisfied that the sale was made by Boyd, he being much in debt, with the understanding that he was not to collect the note, his object being to transfer the title to his mother-in-law to keep off creditors, then the bill of sale would be void. Or, in the second place, if the jury (646) came to the conclusion that Boyd did not intend to collect the note, but his object was to convert the negroes, which could be levied

on and sold under an ordinary execution of *fieri facias,* into a note, which could only be reached by a *ca. sa.* or in equity, and in this way to hinder and delay his creditors in the collection of their debts, while he could, from time to time, receive payments upon the note as might suit his convenience, and they were also satisfied that the plaintiff, at the time she purchased, was privy to this fraudulent intent, then, although there was a valuable consideration, there would not be the *bona fides* required and the transfer would be void. Or, in the third place, if the jury were satisfied that it was a *part of the contract* that Boyd should keep possession of the negroes and have the use of them, as long as he could do so without the interference of his creditors, or until the plaintiff was required to pay the note, it would present the case of a secret trust for the benefit of the debtor at the expense of his creditors, which would render the transaction fraudulent and void. If, however, the jury were not satisfied that either of these three views were sustained by the facts of the case, and the sale was *bona fide* and for a valuable consideration, although Boyd was in debt at the time, the plaintiff would be entitled to recover.

The jury found a verdict in favor of the defendant, and, from the judgment rendered on this verdict the plaintiff appealed.

Boyden and Osborne for plaintiff.
J. H. Bryan and Alexander for defendant.

DANIEL, J. The bill of sale for the slaves was absolute and was not registered for eighteen months after it was given. The slaves were left by the vendee in the possession of the vendor who was then very much in debt, and soon became insolvent. The vendee, much in debt, was the mother-in-law of the vendor. The sale was made in a secret manner, no person being present but the parties to it, except the
(647) witness, who was the father of the vendor, the law requiring at least one witness to it. The court told the jury that they must be satisfied that the sale was *bona fide,* and for a valuable consideration, otherwise the creditors of the vendor had a right to object and to treat the transaction as a nullity, and that if the vendor was much in debt at the time, and there was an understanding between them that he was not to collect the note given for the purchase money and the object was to transfer the slaves to her to keep off his creditors, then the sale was fraudulent and void. The court further said that if it was a part of the contract that the vendor should keep possession of the slaves and have the use of them as long as he could do so without the interference of his creditors, or until the plaintiff should be required to pay the purchase money, then it would present the case of a secret trust for the benefit of the debtor at the expense of his creditors,

which would render the transaction fraudulent and void as to them. It would enable him to obtain a false credit; and the vendee aiding in this, shall be postponed to the creditors. And if the sale was made by the parties to it for the purpose of turning the vendor's interest in the slaves into choses in action, which would not in law be liable to the *fieri facias* of his creditors, then it was fraudulent and void.

We do not discover from the case sent here that the court charged that the bare fact of leaving the slaves in the possession of the vendor was *per se* fraudulent, after he had made an absolute bill of sale of them. Such retaining the possession was a circumstance which, with other facts and circumstances found or admitted, might authorize the court to say that the transaction was void for fraud; for fraud is a question of law upon facts and circumstances found or admitted. If, said the court, by the arrangement of the parties, the vendor was to have the liberty to retain the slaves until the vendee was required by him or his assignee *to pay* the note given for the purchase money, then this would be a secret trust for the benefit of the debtor at the expense of his creditors, which would make the act fraudulent (648) and void as to his creditors. The truth and the force of the facts and circumstances were, as it seems to us, left fairly to the jury, with instructions from the court as to the law in case the jury found the facts to be true or not so. But in truth the court might have gone much farther; for the plaintiff's own witness expressly proved *that it did form part of the agreement of sale,* that notwithstanding the absolute deed the vendor was still to have the possession and use of the negroes as before for an indefinite period. Now, that amounts to an express secret trust for an insolvent vendor, and, upon every principle of law and fair dealing must constitute a fraud on creditors deceived or hindered by the transaction. The principles of law, as laid down by the court, are we think, correct, and therefore the judgment must be affirmed.

PER CURIAM. No error.

Cited: McCorkle v. Hammond, 47 N. C., 448; *Brown v. Mitchell,* 102 N. C., 375.

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(649)

WILLIAM A. WILLIAMS v. JOHN R. FLOYD ET AL.

1. Where a court in the exercise of its discretion directs that an order previously made by them should be stricken out, it is the same as if such order had never existed.
2. Where a person is arrested on a *ca. sa.*, and an issue of fraud is made up between him and his creditor in the county court, the issue is found

against the debtor and he appeals to the Superior Court, the sureties to the appeal are bound absolutely for whatever judgment may be rendered against their principal in the Superior Court.

3. Such sureties have no right to surrender their principal to the sheriff in discharge of themselves.
4. Under the insolvent debtor's law of 1822, Rev. Stat., ch. 58, sec. 10, the discharge of a debtor arrested on a *ca. sa.* at the instance of a creditor operated only against the creditors who had been duly notified under the provisions of that act.
5. Where a debtor is arrested under different *ca. sa.'s* at the instance of several creditors, he has a right under the act of 1836, Rev. Stat., ch. 58, sec. 20, if he applies for his discharge as an insolvent debtor, and fraud is suggested in answer to his application, to require that all the creditors he may notify shall join in the trial of *one* issue, and the court will so direct.
6. But this is for the ease of the debtor, and he may waive the privilege by joining issue with each creditor, and then a verdict in his favor in one case will not discharge him from the responsibility in the case of another creditor.

APPEAL from NEW HANOVER Spring Term, 1845; *Pearson, J.*

The plaintiff obtained a judgment before a justice of the peace, against the defendant, Floyd, and sued out a *ca sa.*, on which Floyd was arrested. He gave the usual bond, with sureties for his appearance at the next county court, to take the benefit of the act for the relief of insolvent debtors. A person by the name of Miller likewise had a judgment against Floyd, on which he was also taken, and he (650) gave bond, as in the other case, to appear at the same term of the county court. Floyd filed a schedule and gave a notice both to Williams and to Miller of his arrest in each of the cases, and of his intention to take the oath of insolvency and move for his discharge in each case. At the county court, Williams suggested, in his case, a fraudulent concealment of certain property by the debtor, and Floyd took issue thereon. In like manner, Miller also suggested in his case, a fraudulent concealment of property, and Floyd again took issue thereon. Upon separate trials of the issues the juries found the fraudulent concealments, as alleged by the creditors, respectively. This was at the same term, and from the judgments Floyd appealed and gave appeal bonds, with sureties, in each case. In the Superior Court the sureties in the bonds, taken by the sheriff for the debtor's appearance in the county court, surrendered him, in each case, in discharge of themselves, and he was thereupon committed to the custody of the sheriff, and was confined in prison. Subsequently the issue joined between Miller and Floyd, in the case between them, was tried, and a verdict was found for the defendant, that he had not concealed his property as suggested; and thereupon Floyd was admitted to take the oath of in-

solvency, and discharged, in that case, by order of the court. The same order for Floyd's discharge was made in the suit brought by Williams, without trying the issue therein, upon the ground that he had been discharged in the suit brought by Miller, and that Williams had notice that he intended to move to be discharged in that suit. But, during the same term, the court set aside and expunged the last order, namely, that made for Floyd's discharged in Williams' suit, and the case was then continued by consent. At the next term the plaintiff, Williams, desiring to proceed to trial of the issue, the defendant Floyd was called, and he failed to appear; and thereupon the plaintiff's counsel moved for judgment on the appearance bond against the debtor and his sureties therein, to be discharged by the payment of the debt and costs; but the court refused the same, because those sureties had discharged themselves by surrendering their principal. (651) The plaintiff then moved for judgment against Floyd for the debt and the costs of that proceeding. That motion was opposed upon the grounds, (1) That Floyd had been duly discharged, as an insolvent debtor, and that was conclusive upon all persons; (2) That, by the notice given to Williams in the case of Miller, and filed therein, the discharge of Floyd in that case exempted his body from further imprisonment by Williams; (3) That there could be no judgment against Floyd for the debt and costs, as the appearance bond had been discharged by his surrender, and the only judgment, that could be entered against him was that he should stand imprisoned; and, (4) That the discharge, which was entered in the case of Williams at the proceeding term, was executed and could not be recalled nor the debtor be further rendered liable in this proceeding.

But the court granted the plaintiff's motion and gave judgment against Floyd, upon his default in not appearing, for the plaintiff's debt and the costs incurred in the premises in the county and Superior Courts.

The plaintiff's counsel then further moved for a judgment on the appeal bond against Floyd and his sureties, to be discharged by the payment of the said debt and costs. That motion, the sureties for the appeal opposed, upon the same grounds urged before for Floyd, and also because they had (as was established) since the preceding term offered to surrender Floyd to the sheriff, and the sheriff refused to receive him as a prisoner.

But the court granted this motion also, and from the judgments Floyd and his sureties appealed.

Warren Winslow for plaintiff. (656)
Strange for defendant.

RUFFIN, C. J. It seems to this Court that the judgment of the Superior Court is right.

In the first place, as between Williams and Floyd, the Court can take no notice of the entry of the discharge of the latter, which was stricken out; for by that act it is the same as if the entry had never been made. It was exclusively for the court which made the entry to allow it to remain or to set it aside. The debtor is no worse off now, that it is set aside, than he would have been if it had never been made, and, therefore, he has not been injured thereby. This Court, therefore, is to regard the question presented to us, not in the light that Floyd was discharged by the entering of the order to that effect in the suit by Williams, but in this: whether what had been done in Miller's suit was in law and fact a discharge from imprisonment at the suit of Williams, so that no judgment could be had therein, on which Floyd's body could be further detained, or again imprisoned. If the answer be in the affirmative, then the judgments moved for by the plaintiff ought not to have been given, whether the discharge had been previously entered or not, or was properly expunged or not.

(657) It appears to us that it is not difficult to understand our legislation upon this subject, and that it is plainly the intention of the Legislature that in every case in which the debtor does not entitle himself to his discharge by taking the oath of insolvency, there is to be a judgment against him for the debt and all the costs incurred in the original suit and under the *ca. sa.* upon which judgment the debtor may be imprisoned; if rendered upon his default in not appearing, he may be imprisoned by process of execution, on which he shall not be entitled to the benefit of the act of 1822; and, if rendered when the debtor is in court, for fraud found against him, or for failing to give notice, or for refusing to be examined, by the judgment of the court that he be imprisoned—which is, necessarily, in execution for the debts and costs—until he make a full disclosure, give the necessary notice to the creditor, and take the oath of insolvency. It is clear that it must be so. The act, Rev. Stat., ch. 58, sec. 7, says expressly that in case the debtor shall fail to appear judgment shall be rendered *instanter* upon the bond given to the sheriff, against the principal and his sureties, to be discharged *upon the payment of* the debt and costs. But it is said that such a judgment cannot be rendered in this case because that bond was never forfeited, but saved by the surrender and imprisoning of the principal. Whether the sureties could surrender the principal after the court "to which the *capias ad satisfaciendum* is returnable," may, possibly, be a question upon sec. 9 of the act, but we assume that they may; still, if the debtor and creditor make up an issue and incur costs, and the principal is surrendered and imprisoned

a day or a week and then escapes, is the creditor to be put to a new *ca. sa.* upon his original judgment as at common law, and lose all those costs? Surely not. For if he were put to a new *ca. sa.* he would not only lose his costs in the first proceding, but the debtor might again avoid going into close prison, by repeating the process of giving bond to take the benefit of the act; whereas the act is precise, that where the debtor fails to appear and a judgment is rendered in court therefor, he shall not be entitled to the benefit of the act. When the act uses the language, then, that there (658) shall be judgment on the bond against the principal and his sureties, to be discharged by the payment of the debt and costs, it merely has a view to the responsibility of the sureties, as, probably, the best security for the creditor, and they can be reached only upon their bond, because, by that only have they made themselves liable. But there is no necessity for the bond to get at the principal debtor; for he was chargeable upon the original judgment for the debt and costs, and upon the proceedings in that court for the costs thereof; and, upon them, there must be judgment there for the debt and both sets of costs against the principal, as the only means of making the debtor liable for the costs and of subjecting him to the actual imprisonment, which, in such case, is imposed on him. This meets the case before us, which is one in which the debtor failed to appear personally, when lawfully demanded; which he is bound to do in the county and Superior Court. *Mooring v. James,* 13 N. C., 254; *Wilkins v. Baughan,* 25 N. C., 86. It is true, there the judgment was on the appearance bond, and the court, not wishing to go beyond the case, reserved an opinion upon the case when the debtor was present, as to the judgment then to be rendered against him and his sureties for an appeal. In this case he was not present, and therefore there could be no judgment that he be in custody immediately; but the judgment should be merely for the debt and all the costs, on which the creditor might take out any execution he chose. For that judgment, the sureties for the appeal are of course liable; as in every case of a judgment against an appellant for money the sureties are conclusively fixed therewith.

It would also be the same thing if the debtor had appeared and had refused to be examined, or fraud had been found against him, or he had refused to take the oath of insolvency; in all those cases there must be a judgment for the costs, and, consequently, for the debt also, and then a further judgment or order that the debtor be imprisoned, as in execution, until he should duly discharge himself, as an insolvent debtor, by a full surrender of his property, due notice to the creditor and taking the oath. That is the direct effect of sections 10 and 11 of the (659) act; and the correctness of the position is rendered still more

plain by the provision in section 19 that any debtor against whom an issue is found, or who for any cause is *adjudged to be imprisoned* until, etc., shall not be entitled to the benefit of prison bounds, but shall remain in close prison, until discharged by being permitted to take the oath of insolvency. For what is he to be *adjudged* to be imprisoned? Not for a contempt of court, for then there would be no security for the creditor for his debt, in case of an escape, since the creditor could not charge him in custody by another *ca. sa.* for the same debt. He is therefore committed in execution, and, necessarily, he is in execution upon the judgment then rendered by the court, for both the debt and the costs. When that judgment is rendered by the court to which the process was returnable the plaintiff can have nothing more; for the debtor's appearance discharged his sureties to the sheriff, and no one else but the debtor is bound for the debt or costs. But from that judgment the debtor appeals, which he may do, "as in other cases," his sureties for the appeal bind themselves that he will prosecute his appeal with effect, or that he will perform the judgment of the court, and the act of 1785 directs that where judgment is rendered against the appellant judgment may also be rendered *instanter* against the sureties for the appeal, for the sums adjudged against the appellant himself. Of course, then, if in the Superior Court the issue be found against the debtor, or for any cause judgment be then rendered against him for the debt and costs (though he be adjudged to be imprisoned thereon, until, etc.), his sureties for the appeal are liable for the payment of the money for which such judgment is given, and judgment may be rendered against them summarily, as in other cases.

In treating the subject hitherto, the case has been considered as if the proceeding by Williams were the only one against Floyd; for we (660) have been endeavoring to ascertain what is the proper judgment against the debtor himself, supposing him not to be duly discharged, and then what judgment is to be grounded thereon against the sureties for the appeal. It remains, however, to be seen whether this debtor had been fully discharged.

The first ground on which his discharge is rested is, that, in point of fact, he had been admitted to take the oath of insolvency by a court of competent jurisdiction in Miller's suit, and that is conclusive upon all creditors. This position is founded on *Burton v. Dickens,* 7 N. C., 103 and *Jordan v. James,* 10 N. C., 110. But those cases were decided on the act of 1773, which neither required nor provided for notice to any creditor but the arresting one, but divested all the debtor's estate; wherefore the Constitution discharged him altogether. But it has since been held in *Craine v. Long,* 14 N. C., 374, that, now the discharge operates only against those creditors to whom notice is given, because the act of

1822 authorizes the debtor to give notice to any or all of his creditors, and exempts him from imprisonment by those creditors only to whom notice was given.

But another ground is taken on which it is insisted that Floyd was discharged from arrest at the suit of Williams, which is that Williams had received notice of his application in Miller's case, and therefore was bound by the decision in it. This is founded on the provision, already quoted from sec. 10, for notice to all the creditors, and that those who receive notice shall not imprison the debtor again; and on that contained in sec. 20, which allows any creditor, who may have been notified, to suggest fraud and join in the issues, but prescribes that the debtor shall not be compelled to answer the suggestions of fraud but in one case. The cases to which those provisions apply may be either those in which there is but one arresting creditor, and where, consequently, there can be issues but in one case, or those in which several creditors arrest the debtor, upon distinct judgments in the same or in different courts. Now, in cases of the latter kind, "the debtor shall not be compelled to answer the suggestions of fraud but in one case," that he may not be harassed by attending at different places to (661) establish the same facts, or unnecessarily incur the costs of many issues, when one may serve the purpose of all. But this is manifestly for the ease of the debtor, and if he will voluntarily answer the suggestions of fraud made in several suits, it is his own folly, and he must abide by the result in each suit, as between him and the creditor in that suit. The contrary construction would lead to the grossest frauds on the creditors. For if the debtor can join issue in half a dozen different cases, pending in as many courts in distant places, and then insist that all the creditors are concluded by the verdict in any one of those cases, he would have his creditors going all over the State to attend on trials with him, or by concert with a friend in one suit might obtain his discharge as to all the creditors without any real trial.

The debtor might, therefore, in this case, have required the creditors to put all their suggestions into one, or to come to trial upon all at once, and as in one case, and, on suggestion of his wish, the court in which any one of the cases was pending would have taken order to have the act observed. But he would not insist on that right, but, it may be, for purposes of his own, took separate issues in the several suits; and, therefore, he has no right to treat a particular creditor as a party to any issue but that joined in his own suit. For, suppose Miller to have suggested the concealment of one article of property, and Williams another, upon which it might be the interest of Floyd not to combine the trial, as he might think he could establish his schedule in one particular so as to get a discharge from one creditor, when he might doubt as to

the other, and in case of failure he might be able to pay the one debt when he could not pay both, In fine, the act gives a privilege to the debtor in this respect, and it is in his power to renounce it, and he did so here.

It is unnecessary that we should speculate as to what would have been the effect of the debtor's appearing in court when demanded, although he had escaped and been at large after the preceding (662) term. It is sufficient that he was not in court when he ought to have been to found a judgment on his default for the debts and costs, for which the sureties for the appeal are liable. Their offer to surrender the principal to the sheriff cannot relieve them, for they are bound for his performance of the judgment and cannot discharge themselves by a surrender. If the debtor's reappearance could have availed him or them they should have prevailed on him to come to court instead of going to the sheriff. However, that is a matter not before us, and on which we do not pretend to have formed an opinion.

PER CURIAM. Affirmed.

Cited: Wright v. Roberts, 28 N. C., 121; *Underwood v. McLaurin,* 49 N. C., 18; *Mears v. Speight, ib.,* 421.

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(663)

IMRI SPRUILL v. FREDERICK DAVENPORT AND WIFE.

1. The act of 1826, Rev. Stat., ch. 65, sec. 13, making the lapse of ten years a presumption of payment, applies to simple contracts as well as to sealed instruments.
2. But this legal presumption arises only on the expiration of ten years from the time the cause of action accrued. Therefore, when the action was upon a receipt of the defendant's testator, who was a constable, for notes belonging to the plaintiff, to collect, and it did not appear by any actual proof that any demand had been made by the plaintiff until fifteen years after the date of the receipt, but this demand was made within three years before the bringing of this action: *Held,* that the judge below erred in instructing the jury that though there was no demand before the one proved, and, therefore, the ordinary statute of limitations could not run, yet that after the lapse of ten years from the date of the receipt the law presumed the claim settled unless the contrary appeared.
3. But the judge might very properly have left to the jury the great length of time which had elapsed, as a circumstance from which they might have inferred that either a settlement had been made or at least that there had been a demand for a settlement so long ago as to let in the operation of the the statute of limitations.

APPEAL from TYRRELL Spring Term, 1845; *Battle, J.*

Assumpsit, brought on 23 May, 1843, upon a promise of the testator of the defendants to collect certain debts due the plaintiff and pay over the money to the plaintiff or his order, and for money had and received. The pleas were the general issue, payment and the statute of limitations.

Upon the trial the plaintiff gave in evidence a receipt, dated 11 March, 1826, from the testator to the plaintiff, for upwards of forty small debts, due by bonds, notes, and accounts from sundry persons to the plaintiff, which the testator promised to collect and pay over to the plaintiff. The debts are of various amounts, from the sum of $50 down to 25 cents. The receipt is set forth at large in the (664) case sent up; and at the foot of it is a receipt given by plaintiff in the following words:

30 October, 1828. Then received of the within inventory, thirty-one dollars. IMRI SPRUILL.

The plaintiff proved by witnesses that nearly all the debtors were good for debts, and that the testator collected some of them soon after he had them, and might have collected the others. He also produced witnesses who deposed that the plaintiff was the son of the testator, and that, soon after the death of the latter in 1841, the plaintiff went to the house of the defendant, Amelia, who was the widow of the testator, and has since intermarried with the other defendant, and demanded of her a settlement of the receipt, and that she replied that she knew nothing of such a paper and was not prepared to settle it; but requested the plaintiff to leave it with Mr. Halsey, a gentleman in the neighborhood, to whose house she was going in a few days, and that she would then attend to it or settle it; but which of these two expressions she used the witnesses could not say. Another witness deposed that the defendant said she did not believe her husband owed the plaintiff anything, and that she would see Mr. Halsey respecting it.

The court instructed the jury that the statute of limitations did not bar, because the plaintiff had no right of action until a demand, and there was no demand in this case until 1841, and the suit was brought within three years thereafter. And the court further informed the jury that, although a case of this kind is not embraced in the statute fixing the time in which presumption of payment shall be made in certain cases, yet the court could not but think that a presumption of payment should arise from a long delay of a principal to call on his agent, and that the law would, for that purpose, fix upon ten years, in analogy to the time mentioned in the statute; that, after the lapse of ten years,

the law presumed the claim settled unless the plaintiff showed the contrary by an acknowledgment of the party or otherwise; and that if the jury thought the defendant Amelia meant to admit the justice (665) of the claim and promised to pay it, the plaintiff would be entitled to recover; but if she only meant that she would consult Mr. Halsey, and promised to pay in case he should advise her it was a just claim, it would not rebut the presumption. The jury found that the demand had been paid by the testator, and from the judgment the plaintiff appealed.

Heath for plaintiff.
No counsel for defendants.

RUFFIN, C. J. There seems to be so strong a probability that the verdict is according to the justice of the case, and indeed, the law also, that the court has been very reluctant to award a *venire de novo*. But, upon consideration, we believe we are obliged to do so.

Throughout the directions to the jury his Honor assumed that there had been no demand by the plaintiff on his father for the payment of the money received by the latter, or for a return of the evidences of debt; and, therefore, that the father bore towards the plaintiff the relation of receiver or bailiff up to his death. For that reason he held that the statute of limitations did not bar the action; and, if the assumption of fact be well founded, we concur in the position of law. For it was the duty of the agent not only to receive the money for his principal, but also to hold it for him until demanded; and therefore there could be no action against him until demand. Now, it seems to us that for precisely the same reasons no presumption of payment could arise; that is, upon the supposition made that there had been no demand before 1841, and that the relation of principal and agent continued to the death of the father. For the act of 1826 only follows the phraseology of the acts of limitation, and of the rule of the common law that the time on which the presumption is founded, is computed after the right of action accrued. When, therefore, the jury was told that a long delay of a principal to call on his agent raised a presumption of payment, and that ten years would, in this case, be long enough for that purpose, in analogy to the time fixed by the statute, (666) we conceive, that his Honor confounded two things that are entirely distinct in themselves—the presumption raised by the law, as a positive rule, from the mere lapse of a certain time, and the presumption of actual payment deduced by the jury from lapse of time, as a circumstance, with or without others, from which they conclude that satisfaction had in fact been made. There is, indeed no occasion

for the act creating a presumption of payment of a simple contract since the ordinary act of limitations bars in a shorter time. Nevertheless, the act of 1826 is in terms sufficient to embrace simple contracts, as well as specialities—being "all judgments, contracts, and agreements"; and, perhaps, it may have been so drawn for the benefit of those who would not be willing to plead the statute of limitations, but would rely on the legal presumption against a stale demand. But, although this be within the act in respect of the nature of the contract, yet it is not within it in respect to the state of things on which the presumption is founded; for the debtor here, it is assumed, had no cause of action until 1841, and, therefore there could be no presumption against him in analogy to that of the statute. *Bank v. Locke*, 15 N. C., 529. With repect to the presumption of actual payment, found by the jury as a fact really existing, the law lays down no rule, and can lay down none, as to any particular period of time, so as to enable the court to advise the jury that ten years, by itself, was sufficient. For it is but a circumstance addressed to the understanding of the jury, from which, according to its length and from the relation of the parties, their residences, opportunities of intercourse, correspondence, and respective pecuniary necessities, or ease, and numberless other incidents, the jury may presume a demand and payment also, or a release. It does not appear that in the present case any such circumstances were laid before the jury, or that the lapse of time was submitted to the jury, merely as evidence to be weighed by them. If it had been, we would have seen no reason for saying his Honor erred in thus leaving it to them, as the demand seems to be brought forward very singularly, after seventeen years delay and just after the father's (667) death. Indeed, it seems to us that a demand might very properly have been found by the jury upon the face of the testator's receipt itself. There is a credit given on it by the plaintiff nearly three years after its date, and, when according to the plaintiff's evidence, the father had collected much of the money and ought to have collected all. Under those circumstances the receiving a payment fairly implies an application for settlement, and if the jury had so inferred, then the demand requisite to set the statute of limitations in motion and the presumption of payment would be established. However, as the case was put to the jury upon the mere legal operation of ten years delay, without a demand, and in that we think there was error, the judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. *Venire de novo.*

(668)

WELDON HALL v. ROBERT C. PASCHALL, ADMINISTRATOR, ETC.

1. A man, under a decree of a court of equity directing certain slaves in his hands to be sequestered unless he gave bond, entered into a bond conditioned that the slaves (naming them) should not be removed away, but that they should be forthcoming upon the further order of the court. Among the negroes named was one who had been removed to Tennessee and sold three years before the bond was given or the decree made: *Held*, that the obligors in the bond were bound for the delivery of this negro as well as the others.
2. *Held, further*, that the condition of the bond was not broken until the court of equity made the order for the forthcoming of the slaves, notice thereof was given to the obligors, and then a failure to produce them.

APPEAL from WARREN, Spring Term, 1845; *Dick, J.*

Debt brought upon the bond of Thomas H. Christmas and the defendant's intestate, of which the following is a copy:

State of North Carolina, } *ss.*
Warren County. }

Know all men by these presents, that we, Thomas H. Christmas and John Paschall, of the county aforesaid, are held and firmly bound unto Weldon Hall, clerk and master of the court of equity of the county aforesaid, in the just and full sum of six thousand dollars, current money of the State aforesaid, to be paid to the said Weldon Hall, clerk and master, his executors, administrators and assigns; for the true performance whereof we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents, sealed with our seals, and dated 9 October, 1833.

The condition of the above obligation is such, that, whereas, by virtue of a decree of the court of equity for said county, made in a suit therein pending between Leonidas Christmas and others, complainants, and Peter R. Davis and others, defendants, it is ordered,
(669) "that the sheriff of Warren County forthwith take possession the negroes Cudge, Lucinda, Dilly, Dick, Little Summerset, a child of Mary, deceased, and their issue (if to be found in his county), late the property of Buckner Davis, deceased, together with the other personal goods of the said Buckner, which were left in the possession of Mrs. Betsey C. Christmas, for the support of herself and children, whenever the said negroes or any of the said goods shall be found in the county aforesaid, and that he proceed to hire out the said negroes until the first of January next, and sell the perishable goods, taking bonds for such hire or sales, payable to Peter R. Davis and Stephen Davis, and hold the same subject to the order of this court, taking care to provide for the safe return of the said negroes to the said sheriff, or

his successors in office, on 1 January next: *Provided, however,* if Thomas H. Christmas will give bond with good security, to be approved by the said sheriff, made payable to the clerk and master of this court, in the penal sum of double the value of the said slaves and other goods, conditioned that said slaves and other goods shall not be removed away, but that they shall be forthcoming upon the further order of the court at the next or any succeeding term thereof, then and in that case the sheriff is directed to permit the said Thomas H. Christmas to retain possession of the said negroes and other property, as he now does, under the said Peter R. Davis and Stephen Davis, executors of Buckner Davis, deceased"; and whereas, the said Thomas H. Christmas is desirous to retain the possession of all the property aforesaid, and is willing to comply with the above written decree: Now, therefore, the condition of the above obligation is such, that if the above bound Thomas H. Christmas do well and truly comply with all and each of the requisitions in the above written decree, by safely keeping, not removing away, and holding the same subject to the order of the aforesaid court of equity at the next or any succeeding term thereof, the above obligation to be void, otherwise to remain in full force and virtue. (Signed and sealed by Thomas H. Christmas and John Paschall.)

The cause came on before the court upon the following case (670) agreed:

The plaintiff seeks to recover on account of the nonproduction, under the order hereinafter mentioned, of Little Summerset, Dilly and Sally. Little Summerset was a child of Ally, and not Mary, deceased, mentioned in the condition of the bond, and was sold by Thomas Christmas as early as 1830, to one Richard Christmas, of Tennessee, and has not since been in North Carolina. He was sold for the sum of $250, which the parties admit to be his value. Dilly was sold by the said Thomas H. Christmas in 1833, (after the order of the court of equity mentioned in the said condition, and after the issuing and delivery to the sheriff of the process founded on the order) to some one beyond the State for $300, which is admitted to be her value, and has not been brought back. Sally was a child of the said Mary, and was sold by the said Thomas H. Christmas, in 1836, and was at the time of the sale of the value of $600. The sale was to some one beyond the limits of the State, and she has never been brought back. At December Term, 1839, the Supreme Court (to which the cause referred to in the said condition had been transferred, and in which the same was then pending) made the following order:

"On hearing the affidavits of Peter R. Davis and Joseph S. Jones, now here filed, and on motion of the plaintiffs, it is ordered by the court that Thomas H. Christmas (the father, and formerly the next friend

of the plaintiffs) do, immediately after notice of this order, deliver or cause to be delivered to the sheriff of Warren County, or to John H. Hawkins, the plaintiff's next friend, all the negro slaves and other property mentioned or referred to in the condition of a bond, dated 9 November, 1833, and given by the said Christmas and one John Paschall, as his surety, under an order made in this cause at October Term, 1833, of the court of equity of Warren; and on the failure of said Christmas to cause the said slaves, their issue, and the said other property to be delivered accordingly, it is ordered that the said bond be delivered out to the next friend of the plaintiff's, to be put in (671) suit." Notice of this order was duly given to the parties, but neither of the three negroes before mentioned was delivered to the sheriff or to John H. Hawkins, or to any other person for his use. At the time this order was made the negro Dilly was worth $500. It is admitted that the defendant has fully administered, except as to the sum of $1,067, which he has subject to the plaintiff's demand.

It is submitted to the court, whether the plaintiff is entitled to recover for, or on account of the nondelivery of the said three negro slaves or either of them; and whether, if he is entitled as to them or either of them, he is entitled to interest upon their values, and if so, whether from the time of sale, the issuing of the process, the giving of the bond, or the making of the order in the Supreme Court; and as to the negro Sally, whether her value is to be taken as of the time of the sale, or of the said order; and judgment to be entered according to the opinion of the court.

On consideration of this case his Honor was of opinion that the plaintiff was entitled to recover damages for the negroes Summerset, Dilly and Sally, the value of the latter to be taken as of the time of the sale, with interest from the time of the order in the Supreme Court. Judgment being rendered accordingly, both the defendant and the plaintiff appealed to the Supreme Court.

William H. Haywood for plaintiff.
Badger for defendant.

DANIEL, J. First. We are of the opinion that the slave called Little Summerset was not intended by the parties to the bond to be described as "a child of Mary deceased," but that he stands in the condition of the said instrument as one among many slaves therein mentioned, without any other description than his own name. The punctuation of the comma, at the termination of his name in the original bond, (which is made a part of the case), is in our opinion, conclusive evidence of the correctness of this construction. And we also think that the

words, *"a child of Mary deceased,"* follow next after the said (672) comma, describes another slave, whose name was unknown to the parties, but it was "a child of Mary deceased." That child of Mary deceased was proven on the trial to be named Sally. And we think that she was one of the slaves described in the condition of the bond sued on in this action.

Second. Little Summerset had been sold by T. H. Christmas as early as 1830, (the bond was dated in November, 1833,) to a man in Tennessee; and he has not been in Warren County since. The defendant insisted that Paschall, his intestate, did not covenant that Christmas would hold him, Summerset, subject to the order of the court; but that he covenanted for the surrender of those slaves only which then were in the county, and which the sheriff under his writ of sequestration could have seized, in case no bond had been given by Christmas. When we examine the condition of the bond, we see that it recites the order which had been made by the court of equity, which order commanded the sheriff of Warren forthwith to take into his possession the slaves, Little Summerset and others, wherever the said negroes, or any of them should be found in his county: *Provided, however,* that if Thomas H. Christmas will give to him a bond with security, made payable to the clerk and master, conditioned that the *said* slaves shall not be removed away, but that they shall be forthcoming upon the further order of the court, then the sheriff is to permit T. H. Christmas to retain said negroes. The bond in its condition recites that Christmas was desirous to retain the possession of *all* the property aforesaid, and is willing to comply with the above decree. It then proceeds as follows: "that if Thomas H. Christmas do well and truly comply with *all* and *each* of the requisitions in the above written decree, by safely keeping, not removing away, and holding the same (property), subject to the order of the court at the next term, etc., then the said obligation to be void." The decree certainly commanded the sheriff to take into his possession Little Summerset and all the other property, and have him and it forthcoming at the next term of the court, unless Christmas would give bond conditioned that the *said* slaves (Summerset and others) should not be removed away, but that (673) they should be *forthcoming* upon the further order of the court. The sheriff did not seize any of the property under the writ of sequestration. When Christmas was notified of the decree he executed the bond, well knowing that Little Summerset was one of the slaves named in the decree to be forthcoming when the court should demand him, and he makes no reservation in the bond as to him. The obligation, we think, covers Little Summerset and all the property mentioned in the decree, and not that only which was within reach of the sheriff.

Third. We concur with his Honor that the conditions in the bond were not broken until the court of equity made the order for the forthcoming of said slaves and notice thereof given to the obligors, and then a failure to produce them. And also that the said slaves should be valued as of that date, with interest on that sum to the rendition of the judgment as damages. It is not stated that the slave Sally was of greater or less value, at the time of the breach of the bond, than she was at the time of her sale; therefore that valuation, being directed by the court, is not a cause for new trial.

PER CURIAM. Judgment for plaintiff accordingly.

(674)

REBECCA J. WOOD v. LORENZO WOOD.

1. Where husband and wife are living in a voluntary state of separation, the court may in some cases grant a divorse *a mensa et thoro* for the cause of adultery committed during such separation.
2. But in no case will the court decree a divorce from the bonds of matrimony on the petition of a wife who has separated herself from and lives apart from her husband on the ground of adultery committed since the separation—unless she alleges, and proves on the trial of issues under her petition, that she was compelled to such separation by the violent or outrageous conduct of her husband, in which case it shall be deemed that he separated himself from her.
3. If a wife petitions for a divorce from the bonds of matrimony, and alleges in her petition that she separated herself from her husband, she is estopped by this averment, and a verdict that her husband separated himself from her will not be regarded by the court, unless, upon a proper issue, circumstances of outrage or violence justifying such separation be found by a jury.
4. In a proceeding for a divorce, the issues submitted and the verdict found should be as specific and certain as the facts alleged in the petition.

APPEAL from DAVIDSON Spring Term, 1845; *Caldwell, J.*

Suit instituted by Rebecca Wood against her husband, Lorenzo D. Wood, for a divorce *a vinculo matrimonii,* for the causes of cruelty and maliciously turning her out of doors, and adultery. The parties were married in 1836, and lived together until October, 1840, when the petitioner left her husband and went to reside with her parents, at some short distance off, and has remained there ever since. During their cohabitation they had issue two children. The parties appear to have been in much the same rank of life: the petitioner being the daughter of a respectable man, the sheriff of Davidson County, and the defendant a practicing physician.

The petition was filed in March, 1843, and charges that, very soon after the marriage the husband became addicted to intoxication, and was in that state two-thirds of the period they lived together; (675) that very soon he became unkind, and his treatment less and less affectionate, until it became cruel and barbarous in the extreme, and so continued for more than three years immediately preceding their separation. The petitioner then states that the defendant frequently struck her with his fist and choked her until she would fall, and, during her several pregnancies, that, with a knife drawn in his hand, he often threatened to kill her; and, that upon one occasion, in the last month of her pregnacy, he swore he would kill her, and seized her, and the petitioner states she believes he would have done so had she not with much difficulty escaped and saved her life by staying in the fields all night; that he often terrified her by threats of taking her life with a large dissecting knife, and compelled her to fly for safety and conceal herself by lying out for a day and night at a time, in winter and summer, exposed to snow and rain; that upon two occasions she was dangerously ill, and he attempted to poison her, as she believes, under the pretense of giving her medicine—at one time administering some article through a reed, in order the better to conceal it; and at the other, mixing up a large quantity of some drug in a bowl, and forcing her to take repeated doses through the day, although she could not do so without being made deadly sick, which latter drug she charges to have been sugar of lead or arsenic. The petition states several other specific acts of gross violence and personal indignity, and that during all that time the petitioner demeaned herself as a dutiful, affectionate and faithful wife: but that, finding that, instead of reformation on the part of the husband, he treated her worse and worse, and that her life was every moment in danger and her condition intolerable, she was at length "compelled by his conduct to a separation from him, and was forced, for safety, to go to her father's house, where she resided separate from her husband for more than two years."

By an amendment at September Term, 1843, the petition states that, during the time of their cohabitation, the defendant, without her knowledge, committed adultery with several women, as she (676) has since been informed. And that during their separation the said Lorenzo D. has lived in adultery and had adulterous intercourse with E. D. P., at New Salem, in Randolph, in July, 1841, and through the summer of that year. "And also he had adulterous intercourse with one Rebecca Watson in Randolph County, in March, 1842, and afterwards through that year, and continually afterwards up to that time, at the house of the said Rebecca Watson in Davidson County." The petition further charges adultery with two other named women,

besides adultery with divers women, whose names the petitioner alleges herself unable to state, and that the petitioner has at all times lived a chaste and virtuous life, and that she has not admitted her husband to conjugal embraces after she knew of his criminal acts of adultery, nor since she separated from him as aforesaid.

The prayer is for a divorce from the bonds of matrimony, to have the marriage dissolved and proper alimony allowed.

The answer admits the defendant's belief that the petitioner would have made an affectionate and prudent wife if she had been left to herself, and her parents had not officiously and injuriously intervened and alienated her affections and confidence from her husband, and induced in her a wish to leave him and return to them. The defendant states that in consequence of that state of things, his feelings were wounded and his temper, no doubt, more irritable than it would otherwise have been, and that there was not that harmony of sentiment and cordiality between them nor concert of action needful for the happiness of married life. But the defendant positively denies that it was in any degree his fault, or that he treated his wife with insult or indignity of any kind, much less with violence, or an offer or threat of violence. He denies generally and particularly every overt act of that kind stated in the petition, or that the petitioner was ever under the necessity of leaving his house for fear of him, or that she ever in fact left it and stayed out of doors all night or at night at all, or at any other time. The defendant denies, as a gross and unfounded
(677) aspersion, that he attempted to poison the petitioner, and says that he gave her such medicines as were proper in the treatment of diseases under which she at those times labored; the one article being nitric acid diluted and administered through a tube, in order to avoid injury to the teeth, as a tonic, when she was in a state of debility and also as a remedy for salivation; and the other being tartar emetic given in broken doses, to produce long continued nausea and relaxation of the system during fever, and not sugar of lead or arsenic, either of which would have produced death.

The defendant denies the several charges of adultery and declares that he does not know several of the females with whom criminal conversation by him is alleged. He says that, among other unhappy effects of the poison infused into his wife's mind by her parents against him, was jealousy, and that he was often unable to practice his profession among respectable females on account of her injurious suspicions and imputations. And he avers that during their cohabitation he was faithful to his wife and that he hath not lived in adultery since their separation.

The answer further states, "in regard to the prayer of alimony, that more than two years since, by request of mutual friends, the peti-

tioner and defendant agreed to live separately, and this defendant conveyed to trustees more than one-half of his property for the separate use of the petitioner and the maintenance of herself and the child which he permitted her to retain."

Upon issues to a jury it was found that the petitioner had been a citizen of this State for more than three years next before the filing of the petition; that the defendant Lorenzo D. Wood, separated himself from his said wife Rebecca, on 18 September, 1840, and is living in adultery with another woman; that the cause of complaint for a divorce existed for six months next before the filing of the petition; and that the petitioner has demeaned herself as a virtuous and chaste woman since the said separation.

The case states that, at the time of making up the issues, the defendant prayed to have an issue as to the agreement alleged (678) in the answer for separation and the settlement made on the petitioner and her child. But the court refused it, because those deeds were not disputed and the defendant should have the benefit of them, if they could give him any, upon motion on the part of the petitioner for a decree, should the issue be found for her.

The evidence as to the separation of the parties and the cause of it was that, when the petitioner left her husband a peace warrant was taken out against him, and when the constable served it, the defendant asked him what it was for, and the constable told him "for abusing his wife," to which the defendant made no reply. The parties have never lived together since.

On the trial evidence was given that the defendant had been guilty of adultery with Rebecca Watson (mentioned in the petition) before his marriage; that indecent conduct had been seen between them twice during the marriage and cohabitation of the parties, and that, since the separation, the defendant and the woman Watson have lived in adultery since the Spring of 1842. On the other hand the witnesses who gave that evidence were impeached by witnesses on the part of the defendant. No other evidence was given of any adultery. The petitioner declined having an issue upon any of the allegations of violence, asaults, threats, or personal indignities contained in the petition.

The petitioner's counsel then moved for a decree for a divorce from the bonds of matrimony. That was opposed on the part of the defendant upon two grounds: (1) That, upon the pleadings and verdict, the petitioner was not entitled to such a divorce; (2) That the agreement for a separation repelled her right thereto for any matter found here. The defendant then read to the court three deeds. One was an obligation by the defendant and a surety, reciting that the parties had concluded on a temporary, if not a final, separation, and obliging

Wood to leave his wife free to remain apart or return to live with him, as she should choose, and without constraint from him; (679) and, in the event of their continuing to live separate, that she should have and enjoy as her sole and separate property, free from any claim by him, whatever she might acquire by her own industry, gift or other means. A second was a deed to the petitioner's father, as a trustee, for one undivided half of a tract of 100 acres of land in fee in trust for the sole and separate use of the petitioner for life, and then in trust to convey the remainder to such persons as may be her heirs. The third was a deed to a trustee in fee for the other half of the same tract of land in trust, for John William Wood, a son of the parties, and his heirs; but in case the said John William should die under 21, without leaving a child, then in trust for the petitioner during her life, to her sole and separate use, and after her death, in trust, to convey the same to her next of blood.

All those instruments were dated 8 October, 1845.

The court pronounced for a divorce a *vinculo matrimonii,* as prayed for; but gave no alimony. From the decree the defendant appealed.

Mendenhall and Iredell for plaintiff.
Waddell and J. H. Bryan for defendant.

RUFFIN, C. J. The opinion of the Court is that the decree must be reversed, and the petition dismissed. The object and prayer of the petitioner is singly for a divorce *a vinculo,* and, consequent thereon, for alimony; and even the latter is now given up. We are not, therefore, to consider what effect adultery during a state of separation—whether arranged peaceably, merely for want of agreement of taste between the parties, or for their mutual happiness, or brought about by the fault of one or both of them—is to have upon an application for a divorce *a mensa et thoro.* There is an essential difference between the two kinds of divorce, and there ought to be also in the cases that justify them. For example, even if a husband maliciously desert his wife, or compel her to leave his house, she is not thereby licensed to debase herself to the disgrace of her issue by the marriage, and to the im- (680) posing on the husband a spurious issue who may legally succeed to inheritance as presumptively legitimate. It may be very proper, therefore, to relieve a husband in such a case from the obligation to maintain the profligate wife and her spurious issue, and from the danger of *pseudo* heirs, by a divorce from bed and board. An exemplary wife may in like manner be protected, by a similar divorce, from the coercion of a husband, whose vicious life during separation proves him unworthy of her conjugal society. But the question is very

different when an absolute divorce, in dissolution of the marriage, and destroying all prospect of reformation and reconciliation, is asked for. We have heretofore said that, upon the language of our legislative enactments, and having a due regard to the interests of families and the public morals, a divorce *a vinculo* cannot be maintained by a husband for adultery of the wife supervening a separation, occasioned by his fault. *Whittington v. Whittington,* 19 N. C., 64; *Moss v. Moss,* 24 N. C., 55. Independent of the words "where either party has separated him or herself from the other, and is living in adultery," as denoting a separation, involuntary and unavoidable, at least on the part of the *promoter,* as necessary to ground a divorce on, there is another consideration entitled to much weight. Divorces *a vinculo* are chiefly sought, in contradistinction to those *a mensa,* with a view to a second marriage by the party complaining. Now, the act, Rev. Stat., ch. 39, sec. 9, gives that liberty only to "the innocent person"; and the innocence spoken of is, we think, not merely in not living *in eodem delicto* with the adulterous defendant, but in being free from the fault of failing in the essential duty of marriage—that of cohabitation, conversation and comfort in health and sickness. Therefore, when the ground of the divorce sought is altogether posterior to separation, it is indispensable that the promoter of the cause should show that he or she did not separate from the other party or, if such was the fact, that it was an unavoidable separation, made necessary by the injurious conduct of the other party.

These principles, declared in previous cases, are decisive against this application. Here the wife, as she admits in her petition, separated herself from her husband. In point of fact, she de- (681) serted his bed and board, abjured her conjugal engagements, and returned to her paternal roof. It is true the jury have found that the respondent separated himself from his wife. But that is a finding for the petitioner contrary to an estoppel in the record—her admission in the petition, that, in point of fact, she separated from him, and not he from her, and therefore such finding has no force, and the party's admission of facts, adverse to the divorce, is binding on her. *Moss v. Moss, supra.* She states, indeed, that she was compelled to the separation by his cruel conduct, in the various acts of cruelty specifically charged, and that she was forced, from a regard to the safety of her life, to fly for shelter to her father's house. But it is an avoidance of the effect of her acknowledged separation which is wholly unsupported, and therefore cannot be taken into the case at all. If the petitioner had established the alleged enormities on the part of the husband we should not hesitate to hold the separation to have been his act and not hers; he would not let her stay, but made her go

away. But that is a most material part of the allegations, and therefore no decree can be pronounced for the petitioner unless upon a verdict of a jury finding the facts according to the fifth section of the act. There is no such finding. On the contrary, the petitioner expressly declined having an issue upon any single act of the long catalogue of cruelties. We must therefore consider not only that the charges were not established, but that they were falsely and wantonly made. It is a gross outrage upon the court to prefer a libel containing such serious charges, as the means of obtaining leave to file it and proceed to prove it, and then abandon the whole series of charges without attempting to prove one of them, as if such grave accusations were but empty words of course. Such scandalous aspersions ought not to be lightly made, as they seem to have been here. But, at all events, they are to be taken as untrue as the cause stands. Then we have a case in which a wife leaves her husband without any reasonable ground whatever, takes up her abode near him, falsely tra-
(682) duces him by imputations of the most unfeeling cruelty, including repeated threats and attempts to murder her in various ways—by exposure, by actual violence, and by poison; and then asks a divorce from the bonds of matrimony in order that she may have liberty to marry again, because the unfortunate husband, after her withdrawing from him, was unmindful of one of her rights, as a wife, and fell into one of the pits of human infirmity. Upon no principle or precedent can such a divorce be decreed. The distinction between the cases in England, where only divorces *a mensa et thoro* can be judicially decreed, and divorces *a vinculo matrimonii* under our law, must always be kept in mind. Certainly, such a woman can never be regarded as "the innocent person" in this family feud, and entitled to dissolve this connection and form a new one. More respect is due to the decencies of life, not to say to the solemn marital vow, than to countenance such an attempt. If it were successful, it would afford but too strong a temptation to a person, tired of one marriage and desirous of another, by separation to bring about that very *peccatum*, on which the dissolution of the marriage would be subsequently sought.

But it is said the husband subsequently concurred in the separation, and therefore has no right to complain of it. But that does not better the case. It only proves that neither of these parties could be entitled to a divorce *a vinculo;* for if the separation was not an injury to him, it was to society, and the welfare of the community is to be consulted more than the wishes of the parties. But, in truth, that matter is not before us; for it is not alleged in the libel as one of the grounds for a divorce nor found by the jury. It is merely brought forward in the answer, and even there it is not pleaded in connection

with the divorce directly, but is pleaded particularly in bar of alimony alone. Therefore, our opinion does not proceed at all upon the separation being by agreement, though, if we were to act on it, it would not help forward the petitioner's claim to this divorce at all. Our opinion goes upon the promoter's dereliction of duty in separating herself from her husband without any sufficient, indeed, without any cause in his conduct. Such *delictum* on her part is a bar to divorce *a vinculo matrimonii* for cause of adultery found by the jury. (683) A divorce *a vinculo matrimonii* was that granted in the Superior Court, and, indeed, was the only one that could have been granted; for the prayer in the libel and the motion for a decree were both confined to such a divorce specifically. Therefore the decree must be reversed, and the libel dismissed with costs.

Although we have not made it the ground of our judgment, we cannot but notice the extreme vagueness and generality of terms in which the issue is framed and the verdict expressed, as to the defendant's living in adultery with "another woman." For aught we can see, this "other woman" may not only be a different woman from the petitioner, but also a different one from either of those with whom the adultery is charged in the petition. As the libel must make specific allegations, so the issue and verdict must conform to the charges in the libel; else the *allegata* and *probata* might vary, and the party be completely surprised.

PER CURIAM. Petition dismissed.

Cited: Tew v. Tew, 80 N. C., 318; *McQueen v. McQueen,* 82 N. C., 473; *Steel v. Steel,* 104 N. C., 635; *Ladd v. Ladd,* 121 N. C., 120.

(684)

RACHEL SIMMS ET AL. V. JOHN SIMMS ET AL.

Where a will is offered for probate upon the ground that it was found among the valuable papers of the intestate, being all in his handwriting, it is proper in the judge to leave it to the jury to determine whether, from all the circumstances, they believe the paper-writing was deposited by the deceased among his valuable papers with the intention that it should be his will.

APPEAL from ORANGE, Spring Term, 1845; *Caldwell, J.*

Devisavit vel non. A paper writing dated in 1834, was exhibited for probate at the ..... term, 1843, of Orange County Court, as

the last will and testament of Herbert Simms, deceased, passing both real and personal estate, to which this caveat was filed, and the issues thereupon made up. The case was brought by appeal to the Superior Court. The paper writing exhibited was proved to be, in all and every part thereof, in the handwriting of the deceased, by three witnesses, as required by the statute, and the deceased's name was inserted in the body of the writing, but not subscribed to it. Evidence was then offered to show that it was found among the valuable papers and effects of the deceased. Upon this question there was conflicting testimony, but the weight of the evidence was in favor of its having been so found. The propounder of the paper writing also proved by a witness that he had several conversations with the deceased upon the subject of wills, and that, in one of these conversations, which occurred in 1841, the deceased told him that he had been informed by an eminent lawyer that a will, which was all in a man's own handwriting, found among his valuable effects, unattested, would be the strongest sort of a will and the hardest to break; that the witnesses to a will frequently caused it to be broken by their testimony as to the sanity of the testator; that a will was good, though it was not signed in (685) the usual place, if the testator's name was in any part of it, and though it did not dispose of all of a man's property, and did not appoint an executor or mention all his legatees.

On the part of the caveators it was insisted that the paper, upon its face, was imperfect, and showed it was not finished by the deceased. It also appeared in evidence that the deceased owned a valuable parcel of land, and two other small tracts, two negroes, bonds and notes to a considerable amount, and household and kitchen furniture, which were not mentioned in the writing. Evidence was also offered by two or three witnesses of conversations with the deceased, since the making of the paper writing, in which the deceased had repeatedly declared that he had no will. One of the declarations was made during his last illness and about three weeks before his death, which occurred in June, 1843; and in one of these conversations he said he intended to make a will and expressed a strong desire to provide for a granddaughter, who was dependent on him, and for whom, it was proved, he entertained a strong affection. It was also proved that, on the day when the will was found Rachel Simms, the widow, and one of the caveators, said they had found a piece of a will in a basket; that, if the deceased had finished the will he would have left her the household furniture, and that on the day when he was taken sick he declared that when he paid off the costs of a law suit and built his mill, he intended to make his will. The caveators were a part of his next of kin.

The judge, after stating the law relative to last wills and testaments, called the attention of the jury more particularly to the testimony in regard to the paper writing being found among the valuable papers and effects of the deceased. He stated to them that, if it was placed by the deceased among his valuable papers and effects, with the intent that it should be his will, and was so found at his death, then they ought to find for the plaintiffs; but though it was placed among his valuable papers and effects, and was so found at his death, yet, if they believed from the testimony that it was put there (686) by the deceased in an imperfect state, and with the intent that it should not be his will, intending to act further on the paper, then they ought to find for the defendants.

The jury found that the paper writing offered for probate was not the last will and testament of the deceased. From the judgment rendered on this verdict the plaintiffs appealed.

Badger, H. Waddell and Norwood for plaintiffs.
J. H. Bryan for defendants.

RUFFIN, C. J. The Court is of opinion that it was properly left to the jury to determine whether the script in this case was deposited by the party deceased among his valuable papers with the intention that his estate should thereby pass as therein expressed—in other words, as his will. The argument against that position is that the statute of wills makes a paper, all in the handwriting of the deceased, and with his name subscribed thereto or inserted in some part of it, and found among his valuable papers or effects after his death, a good will. So that when those circumstances are established the paper *is in law* a will, without more proof, and notwithstanding any presumptions of proofs to the contrary. For, it is said, if that be not so, then everything which the statute requires with respect to an holograph may exist, and yet the jury be at liberty to find the script not to be a will. The answer to the argument is that the statute does not make every paper, having the requisites mentioned, a good will, but it says that no last will or testament shall be good *unless* such last will be found, and so forth. After all, then, a paper written by a party deceased, with his name in it, and duly found, is not necessarily a good will. For what does the statute say shall be so found in order to its being a *good* will? Why a will in writing. Therefore, of necessity it must in every case be inquired whether that paper be the will of the party deceased; whether he had capacity to make a will and meant to dispose of his estate by the particular script propounded. Such is the law even as to attested wills; for it is competent to show, by

(687) subsequent declarations of the supposed testator, that he *never* assented to the instrument as his will, but that it was obtained by duress or fraud. *Howell v. Barden*, 14 N. C., 442. It is true that when a paper has been attested as a will, or lodged with another person for safekeeping, there is no occasion for further proof of publication; for those facts amount to express publication, of themselves. Therefore the instructions to the jury upon such evidence would not be that, in addition to the inquiry whether those facts were true, they should inquire whether the party deceased intended thereby to make the instrument his will. Such an intention is the necessary legal result from the facts proved, which amount to an express publication of the paper as a will. Hence the proper instruction would be simply, that, if the jury believed the witnesses they ought to find the publication, that is, that the party deceased declared *that paper to be his will.* But when there is no such express evidence of publication the Legislature did not mean to dispense with all evidence of it, or to make every paper testamentary in its provisions that should be found among the valuable effects of the deceased, conclusively a published and good will. For suppose half a dozen such papers, inconsistent in their dispositions and all found together—some perfect by being finished and executed, and others more or less imperfect—which is or are to be received as *the* will of the party deceased? The real object of that part of the act which relates to holographic papers, was merely to dispense with attestation, as evidence of publication, and leave the case open to other evidence of it, as testaments or personalty were before the Ordinary in England; not altogether, indeed, in the same full latitude, but in those cases in which the script was lodged by him with another for safekeeping or was thus kept by himself among his own papers and effects of value. In those cases the paper may be pronounced a good will. Without those requisites it cannot be, for they are rendered indispensable evidence of publication by the statute. *St. John's Lodge v. Callender*, 26 N. C., 335.

But, though indispensable, they are not conclusive evidence (688) of publication, under the statute, more than they before were as to wills of personalty in the ecclesiastical courts. It is *prima facie* sufficient, but it never could have meant that it should overrule everything else. The words do not import that, as has been already remarked. They are not that a paper of a certain description shall be deemed a good will, but that no paper, no matter how clearly the *animus testandi* and the actual publication may be proved by witnesses or other papers, shall be good as a will unless it be of the description given in the statute. If, indeed, it be of that character, then it is *prima facie* to be received as the party's will. But it must

be open to one in interest to show that the supposed testator had not capacity to make a will, that he did not put this among his papers, but that it was done surreptitiously by some one else, or that the party deceased, so far from treating the paper as his will, declared that it was not, and that he had no will. So there must be here, as in the cases before the ecclesiastical courts before alluded to, presumptions for or against a paper, according to its adaptation to the estate and family, or circumstances of the maker of it, or its state and degree of perfection or imperfection in point of form, or the circumstances which caused its imperfection. There is no doubt, for example, that a testament is good in England, though imperfect in that it was not executed, provided that it sufficiently appear that it expressed the wishes of the party deceased, and the execution was prevented by the act of God. Now, suppose a holograph will here, with an attestation clause, but not executed by signing and attestation, and it appeared that, when the party wrote it, he said he would execute it and have it attested the next day, and in the meanwhile he locked it up in his desk with his money and deeds, and died suddenly that night; it would seem, that this paper, with the party's name in it, and in other respects conforming to the act, must be a good will, notwithstanding that degree of imperfection which consists in the want of the party's signature and the attestation, which it was intended should have been added, and, no doubt, would have been added, but for God's visitation. So, if a person is in the act of writing his will, and (689) is taken suddenly ill, so as to stop in the middle of a sentence and before disposing of all his estate, as in the beginning he said he meant to do, and the paper is thus imperfect, in the broadest sense of the term, and he dies immediately, but after putting the paper in the hands of another person as his will, or locking it up in his desk with the declaration that it is his will as far as it goes, notwithstanding his inability to complete it, we see no reason why those things should not be deemed equivalent to publication proved by attesting witnesses. The statute does not require a holograph will to be a *perfect* will, in every and the strictest sense of the term. Neither did it mean that every paper which might contain any disposition in its nature testamentary should be deemed a good will, because in accordance with the letter of the act, although it might be imperfect, and so imperfect as, under the circumstances, to satisfy every reasonable person that the party deceased intended to make additions to it, and did not intend it to be his will unless such additions should be made, and, moreover, from the subsequent lapse of time or change in situation, that he had abandoned all purpose of making the additions, and, consequently, of disposing by that instrument. Hence, although an imperfect paper

may be *prima facie* within the statute, it cannot be deemed to be conclusively so, unless, under all the circumstances, the jury can be reasonably satisfied that the paper was not in progress, nor abandoned, but that the party deceased had come to a final conclusion to dispose, as far as the paper goes at all events, and continued in that mind. The ceremonies prescribed by the act are not conclusive of the *animus disponendi* in such cases; but all other facts and circumstances may be taken into consideration. When a paper is spoken of as an "imperfect" will, it means, strictly speaking, one which, in point of form, is not all the party intended to make it, as apparent from the face of the paper. But it is equally true that the term is frequently and properly—though not so properly as in the other sense—used to mean that it is not finished in the formal and complete manner in (690) which persons generally express their wills. For example, that no executor is appointed, as is usual; that, although it is to be presumed that every person who undertakes to make a will does not intend to die intestate as to any part of his estate, the particular paper leaves out a considerable portion of the party's property and makes no provision for many of his children; that there is no date, nor any formal conclusion to the paper, and that it never was executed; and the like. Now, it is obvious that either one of such imperfections or deficiencies argues something against a paper, as a will, as the final disposition of the supposed testator, though they differ greatly in cogency in themselves, and may differ still more according to other circumstances. But that very difference shows that it is a question of actual intention in each case. Here it might justly have been argued that, from the state of the family and the dispositions in the instrument, it was fair to infer that the great object was to provide, perhaps out of property gained by the marriage, for the second wife and a single child by her, and, therefore, that the party deceased intended the instrument to operate, as far as it goes at all events, whether he added anything or executed the paper or not. Indeed, it was said in the argument, that it was an error in the court not to put that point directly to the jury, as they might have found such a purpose; whereas, from the instruction, as given, the jury might have understood that they must find against the will if the party intended for any reason to act further on the paper, as by adding other dispositions or by execution. But the counsel did not ask that view to be taken on the trial, and a judge is not to be deemed as not doing his duty to a party by omitting an argument for him which neither he nor his counsel suggested. It is sufficient that the proposition, as stated to the jury, be not erroneous in itself, or in its application to the case; and if more precise instructions are wanted they must be prayed. Here the in-

structions given were in themselves correct, and relevant to the facts in evidence. For, certainly, an unexecuted paper is subject to some presumption against it (*Montefiore v. Montefiore,* 2 Add., 354) though that presumption may be rebutted by accounting for (691) the want of execution, as sudden death or the like. Yet such a paper, which takes no notice of several parts of the party's property and of several of his children, appoints no executor, but terminates abruptly, and was not executed, though the party deceased lived nine years after it was written and had the paper under his control, has pretensions, only the most questionable, to be or to have ever been regarded by that party as his will. And when to that are added his express and frequent declarations that he had made no will, the conclusion might well be drawn that the party *never* published or intended the instrument, in its actual state, to be his will to any purpose. *Scott v. Rhodes,* Phill., 12; *Montefiore v. Montefiore,* 2 Add., 354. At all events, that was a question of fact, and was fairly left to the jury.

It was further contended that the instructions were erroneous in saying that, in order to make the paper a will, it was necessary that the party deceased should have "placed" it among his valuable effects with an intention that it should be his will, whereas, the act is, that if it be "found" among those effects after the party's death, that shall be sufficient. But that is a mere verbal criticism, for the act plainly supposes that it was "found" among the party's valuable effects after his death, because he "placed" it there *as his will* before his death. The instructions, therefore, only expressed what the statute implied.

PER CURIAM. No error.

Cited: Hill v. Bell, 61 N. C., 125; *Alston v. Davis,* 118 N. C., 214; *In re Sheppard,* 128 N. C., 55; *In re Fowler,* 159 N. C., 207; *Spencer v. Spencer,* 163 N. C., 88.

(692)

THE BANK OF THE STATE OF NORTH CAROLINA v. CHARLES M. FORD.

Every attempt by a bank to put upon a borrower bank bills not its own, and below par at that time and place, is usurious, unless the bank by its contract of loan engage to make the notes good as cash.

APPEAL from PASQUOTANK Spring Term, 1845; *Battle, J.*

Debt, upon a promisory note for $4,400, dated 17 June, 1842. The defense relied upon was the statute against usury. Upon the trial it

appeared in evidence that Williams and Green, merchants, the principals in the note, had on 17 June, 1842, three notes in the branch of the bank at Elizabeth City, one for $2,000, and two for $1,200 each, and, at their instance, the cashier agreed to consolidate the said notes, and take the note in question in renewal thereof. The usury was alleged to have been committed in taking the $2,000 note above spoken of. As to this note the evidence was that it was offered for discount on 25 February, 1842, and was then discounted for $1,000, and on 4 March following, for the remaining $1,000, and that, when discounted, the proceeds were placed on the books of the bank, as a credit to the said Williams and Green, in Virginia bank bills. Williams and Green were then charged with the amount of several claims the bank had received for collection against them, and the balance was paid out to their checks in Virginia bills. There was evidence tending to show that the terms upon which the $2,000 note was discounted were that the borrower should receive Virginia bank notes and pay the notes when due in North Carolina bank notes or specie. It was also in evidence

(693) that on 25 February, 1842, and for two or three months afterwards, the notes of the Virginia banks were six or seven per cent below specie in the money market, and between two and four per cent below North Carolina bank notes; that on 2 February, 1842, the bank at Elizabeth City made a rule that all deposits in Virginia bank notes should be considered and entered as special deposits and paid out in the same kind of bills; that, on the 18th of the same month the bank adopted a resolution, which was entered on their books, that all notes discounted on that day and afterwards should be paid in North Carolina bank notes or specie. And, on the 25th of the same month, another resolution was adopted that one-half of the payment upon all notes discounted prior to the 18th inst. should be in North Carolina bank notes. A copy of these resolutions was posted up in the banking room. Several witnesses swore that, although in February there was a difference in the money market of two per cent, and, after the resolution of the bank, of four per cent in favor of North Carolina over Virginia bank notes, still the latter continued current and passed at *par* in the payment of debts and in the purchase of produce. The sheriff of Pasquotank testified that he had many executions to collect, returnable to March Term, 1842, and received Virginia bank notes, except in two cases, when he was instructed to require specie, but in these cases the instructions were withdrawn in a short time, and that, as far as he knew, Virginia bank notes were received at their nominal value in the payment of debts, and answered that purpose as well as North Carolina bank notes, except at the bank. It appeared further, that the board of directors, in February, 1842,

refused to take Virginia bank notes in payment of claims sent to them from the North to collect, but at that time took such notes in payments of notes discounted previous to February, 1842. The plaintiff introduced as a witness John C. Ehringhaus, cashier of the bank, who testified that when Williams applied for the loan of $2,000 the witness objected, stating that the bank was preparing to resume specie payments in May following, and did not wish to increase its circulation by making new discounts; that Williams replied that (694) the bank had a plenty of Virginia bank notes and might pay them out, and that they would be as good to him as North Carolina bank notes; that the witness still objected, upon which Williams urged it as a duty upon the bank to assist the merchants generally, and his house particularly, as it had had long dealings with the bank and had materially assisted the institution; that Williams then applied to the directors, and, urging upon them the same reasons, obtained from them (his partner, Green, being one of them) the loan as above stated. This witness testified further, that it was the practice of his bank to have quarterly settlements with the Virginia banks, and exchange to them such of their notes as his bank had received for the notes of his bank which they had received, and that the excess was entered to the credit of the bank having the largest amount; that, about the month of February, and for some time afterwards, the credit of excess was in favor of his bank for a considerable amount, and that this account did not draw interest from the debtor bank. He stated, also, that the Virginia notes were worth as much as the North Carolina notes to his bank, as it wished to use them to meet the probable demands of the Virginia banks on the resumption of specie payments in May, 1842.

The counsel for the defendant contended that it appeared from the evidence that the bank had made the loan of $2,000 to Williams in Virginia bank notes to be paid in North Carolina bank notes or specie, and that, as the Virginia notes were then worth less than the North Carolina notes or specie, the agreement was for more than lawful gain to the bank, and was therefore prohibited by the statute against usury, even though the parties may not have thought at the time that they were violating the statute. Counsel for the plaintiff contended, (1) That, if the Virginia notes lent by the plaintiff to Williams were *intrinsically* worth to him as much as the same numerical amount in cash or North Carolina bank notes, the loan was not usurious, and they argued to the jury that the declarations of Williams to Ehringhaus, the cashier, showed that such was the fact; (2) That, if the parties believed that the Virginia notes were intrinsi- (695) cally worth to Williams as much as the same numerical amount

in cash or North Carolina bank notes, though in point of fact they were of less value, the loan was not usurious; (3) That, if Williams represented to the bank that the Virginia notes were worth as much to him as the same numerical amount in cash or North Carolina bank notes, though in point of fact they were of less value, yet if the bank believed and acted upon the representation, the loan was not usurious.

The court instructed the jury that if nothing more appeared in the case than that the plaintiff lent to Wiliiams the sum of $2,000 in Virginia bank notes, upon an agreement to be paid in North Carolina notes or specie, and that Virginia notes were then at a discount below the North Carolina bank notes or specie, the agreement would be usurious under the statute, and the plaintiff could not recover in this suit upon the $4,400 note, taken in part for the renewal of the $2,000 note; but that, if the Virginia bank notes, though at a discount with all other persons, were *intrinsically* worth as much to Williams as the same numerical amount in cash or North Carolina notes, or the parties believed so, though in fact it were not so, or if Williams represented the fact to be so and the bank acted upon the representation, believing it to be true, though it were not so, the loan was not an usurious agreement and the plaintiff ought to have a verdict. The court further instructed the jury, that Williams's declarations to Ehringhaus, as to the value of Virginia bank notes to him, might be considered by them as evidence tending to show, that the Virginia notes were worth as much to him as the same numerical amount in cash, or North Carolina notes, but it was not conclusive evidence of that fact, and that the same declarations might be considered to the same extent in reference to the belief of the bank and Williams, or the belief of the bank alone, acting upon the representations of Williams as to the value to Williams of the Virginia notes.

Counsel for the defendant then requested the court to in-
(696) struct the jury that the Williams's credit was so bad as to induce his creditors to receive the Virginia notes from him at *par* in the payments of their debts, that circumstance would not be sufficient to establish the fact, that they were intrinsically worth to him as much as the same numerical amount in cash or North Carolina notes. The court declined giving the instructions as prayed without adding an explanation, to wit, that if the bank knew that the Virginia notes would answer answer as cash or North Carolina notes in the payment of the debt of Williams in consequence of his bad credit, and made the loan with that knowledge, then it would be usury; but if the bank did not know that such was the case, but believed that the Virginia notes were truly intrinsically worth to him as much as the

same numerical amount in cash or North Carolina notes, then the loan was not usurious.

The jury returned a verdict for the plaintiff, and judgment being rendered pursuant thereto, the defendant appealed.

Badger for plaintiff.
Kinney for defendant.

RUFFIN, C. J. The Court has sought to discover some ground on which this case can be distinguished from what it was when it was here before in the name of the cashier, Mr. Ehringhaus, against the same defendant (*Ehringhaus v. Ford,* 25 N. C., 522), but there does not appear to us to be any difference. The facts are substantially the same, and the legal result must also be the same.

There was a loan of $2,000 to Williams in the notes of the Bank of Virginia, when notoriously depreciated at the place where the loan was made; and it was made a condition of the loan that the borrower should receive the proceeds of his note in those notes, as if they were at par, and should pay his note at maturity in North Carolina bank notes, then at an average value above Virginia notes of 3 per cent. That agreement has hitherto been held by this court to be usurious, because to the extent of the depreciation, the lender had a gain over and above the lawful rate of interest, and got upon a 90 days note 4½ instead of 1½ per cent. (697)

The judge who presided at the first trial thought, as the borrower said "he was willing to take Virginia bills, as they would answer to pay debts at the then nominal amount for which purpose he wanted them," and as witnesses stated that they did pass at their numerical value in payment of some debts, that there was no unlawful gain made out of the borrower; therefore, that the contract was not usurious. But we were of opinion that the use to which the notes were actually applied by the borrower could not change the character of the agreement—which last was the criterion for determining whether there was usury or not. *By the agreement* the lender unlawfully gained 3 per cent besides interest for the time, and the borrower lost that *by the agreement,* and that could not be altered by the borrower subsequently throwing the loss on some one else; for the future disposition of them could have no influence in determining whether the borrower was compelled *to give the lender* above the rate of 6 per cent. At all events, unless some particular mode of application of the notes was in the contemplation of the parties by which they would certainly answer the borrower *all* the purposes of cash, or the lender engaged, *as a part of the agreement to make them worth to the borrower* as much as he took them at.

His Honor who presided at the last trial admitted the general principle that lending depreciated bills upon an agreement for the repayment in bills not depreciated—nothing else appearing—is usurious. But the cashier stated that when the borrower was urging for the loan and the cashier was objecting, on account of the condition of the bank and the danger of issuing its own notes, the borrower said "Virginia bills would be as good to him as North Carolina bills"—omitting now, what was stated before, that the borrower gave, as the reason why they would be as good, that he wanted them to pay debts, and they would answer that purpose. In other respects the (698) two statements are the same. Upon this evidence it was left to the jury to find that the Virginia bills were intrinsically worth to Williams as much as the same nominal amount in cash or North Carolina notes, with instructions that, if they should so find, then, though the bills were at a discount with all other persons, the loan was not usurious. Those instructions are, we think erroneous.

If there be blame upon any one for the error this Court must take to itself a due share of it, as, probably, the terms in which the directions to the jury were expressed were taken from the opinion given in the former suit. After deciding the point in that case, that the contract as there stated was usurious, *Judge Gaston* proceeded further to state that possibly there might be instances in which the lending of depreciated bank notes would not be usurious; and he then uses the language, adopted by his Honor, that if the notes, though depreciated in the money market, or even with all other persons, had been to the borrower intrinsically worth the value at which they were received, then there would be no usury." It is to be observed that this was an *obiter dictum,* and we must say, that like most others, it was not duly considered by us or the distinguished judge from whom it fell, and who was generally so clear in his perceptions and choice in his words as to reason accurately and express himself with uncommon precision. But it is obvious that the term "intrinsically" is not used in its proper sense, and in context with the admission that the Virginia notes were at a discount with all other persons, the whole position is not very intelligible. The "intrinsic value" of a thing is its true, inherent, and essential value, not depending upon accident, place, or person, but the same everywhere and to every one. Bank notes have, indeed, no intrinsic value. They only represent value, by being the promise to pay money (which has intrinsic value) by persons of undoubted ability or credit, which induces the world to take them in the stead and at the value of money. They are as good as money, though without its intrinsic value, because money can be had for them when the holder will, and they pass as money.

But that is in no sense true with respect to the notes of banks that will not redeem them, or which, from any cause, do not (699) pass as money, that is, so much current coin as is mentioned in them. They are then not only without intrinsic value, but they do not represent that which has such value, namely, as much money as they purport to promise. And when "intrinsic" is used in reference to persons, as it was in this case, it is misapplied in a way that misleads; for, when a note is at a discount in the market, and "all persons" refuse to buy it or take it at *par* but one,, and that one receives it at *par,* by way of loan, made upon the condition that he shall so receive it we cannot say that the "intrinsic value" of the note is thereby affected; but the fact merely is, that such single person was willing, in oder to get the use of the note, to take it at more than all other people would, and more than its true value. If, indeed, the bank says to the borrower, although we cannot lend you cash, nor our own notes payable here, on which you may immediately demand cash, and, therefore, cannot make the loan you desire unless you will take it in foreign depreciated notes, but the depreciation shall not be your loss, but ours, then we may agree there is no usury, as if the lender agrees to receive from the borrower the same kind of notes in payment of this or any other debts, or in deposit, as cash. There the gain and loss of the parties would be equalized by the two parts of the transaction. Or if the borrower inform the lender that he wishes to pay a debt at the place where the bank notes are payable, and the lender *engages* that they shall be there worth to the borrower their numerical amount in cash, the same consequence would follow. The risk of loss being that of the lender, there could be no unlawful gain made by the lender from the borrower. But when the whole risk is left on the borrower by the terms of the contract, the imposition of the depreciated notes on him, as good money, will not lose its character of usury by the borrower's *saying* that they *would be* as good as money to him. To have that effect, the fact that they were as good as money to him ought to be shown if, indeed, in the nature of things that be possible; or it ought to appear that it formed *a part of the contract* that the bank should make them as good, if they (700) should turn out not to be. In any other sense than this the "intrinsic value" of the notes to Williams can only mean that he *used* them at their nominal amount in certain transactions, and not that they were worth that amount. Now, that takes us back precisely to the error committed in the first trial, by endeavoring to search for evidence of the actual loss or gain to the borrower instead of abiding by the actual loss of the lender, *as contracted for.* Except in this last sense there is no evidence on which the jury could find the value,

intrinsic or nominal, of the notes to the borrower. He may not have lost on the transaction; for; perhaps, he bought property with them at half its value, or may have lent them to some one else at *par* and still higher rate of interest. But with money he could have done still better by the difference in value, because with money he could have bought these notes at their depreciation, and then with them made his other bargains. But such advantageous dispositions of them are his own acts and at his own risk, altogether distinct from the original contract of lending and borrowing, in which the lender made no engagement to bear the loss, but imposed it on the borrower. By *that contract* the lender got clear of the notes, knowingly reserving for the loan of them more than the lawful rate of interest; and thereby is its validity to be determined. It would be exceedingly dangerous, and break down all the guards provided by the Legislature for the protection of the needy against their own weakness in a time of distress, and against the exactions of money lenders, if a bank were allowed thus to bargain with men who are often ready to raise money, on almost any terms, to meet present emergencies. They always say, and it may be, often think, they can make an advantageous use of the money though obtained on hard terms. But the Legislature has said that the terms shall by no shift or device exceed a certain rate, or else the contract shall be void; and our duty is to administer the law with an even hand against as well as for lenders.

We have not overlooked the statement of the cashier, "that (701) the Virginia bills were worth as much as the North Carolina bills to the bank, as it wished to use them to meet the probable demands of the Virginia banks on the resumption of specie payments, which took place on 1 May, 1842." At first view that struck us as a singular statement, when it appeared from the cashier that he had large balances against the Virginia banks, on which they would not pay interest, and that, so far from those notes being as good as our own, the bank had refused to take them either in general deposit or payment, and that they could be purchased in the market for their own notes at an average discount of 3 per cent. But we cannot suppose the witness meant thus to contradict the acts of his bank and his own statements, and, therefore, we cannot understand him to say that the Virginia notes were, *at the time of this loan,* worth as much to the bank as the North Carolina notes. But we must understand him consistently with himself, to have meant that, if the bank kept the Virginia notes from that time (about the last of February) until 1 May following, and the banks of Virginia should then resume specie payments, they would *then* be worth as much as the North Carolina notes. But, besides the uncertainty of the event of resump-

tion, the delay, itself, of two months made a difference of one per cent, which was gained by lending them out. Indeed, disguise it as we may, every attempt by a bank to put upon a borrower bank bills, not its own and below par at that time and place, is *prima facie* usurious, and, as it seems to us, is conclusively so if the bank does not by the contract engage to make them good as cash, and requires repayment in a different and better medium. We are not aware of any other means of making such a contract consistent with the law. Here the case states that the lender required the borrower to accept these notes at par, and expressly refused to take them back at the same rate, and there was no obligation on the lender to make them of the full numerical value to the borrower, but he was to get them off on the best terms he could in the market, and the lender at the same time required payment in a medium worth one hundred cents in (702) the dollar. It is clear the bank could not lose, but must gain the amount of depreciation besides the discount, which is usury. There was no evidence on which it could be left to the jury to say that the notes were of greater value to Williams than the market value, and it was erroneous to give the instruction founded on that hypothesis.

PER CURIAM. *Venire de novo.*

WILLIAM A. LASH ET AL., ADMINISTRATORS, ETC., v. LEONARD ZIGLAR.

1. Where on a judgment recovered the defendant is committed in execution to the sheriff either upon a *ca. sa.* or upon an order of commitment on his petition for the benefit of the insolvent debtor's law and his failure to entitle himself thereto, and the sheriff *voluntarily* permits him to escape, the sheriff is liable for the debt, even though he may afterwards retake his prisoner.
2. The plaintiff in such a case may affirm the prisoner in prison at his suit; but such affirmation will not be presumed; it requires some positive act.
3. The plaintiff cannot, in his action against the sheriff for such voluntary escape, recover more than the amount of the debt, costs, and interest at the time of the escape.
4. Where the plaintiff had two judgments against the defendant, and it appeared from the records that the defendant was ordered into custody only on one, the sheriff is liable for the amount of that one alone.
5. Where a plaintiff, having two judgments against the same defendant, brought his action against the sheriff for an escape, and declared on both the judgments: *Held*, that though he could not recover on one, he might on the other judgment.

LASH *v.* ZIGLAR.

APPEAL from ROCKINGHAM Spring Term, 1845; *Caldwell, J.*

Debt for an escape, brought by the intestate of the plaintiffs (703) against the defendant, late sheriff of Stokes, for the escape of one Thomas S. Martin. The declaration contained two counts; one for a voluntary, and one for a negligent, escape. The defendant entered the following pleas: (1) *Nil debet;* (2) That Thomas S. Martin escaped from prison without the knowledge or privity of the defendant and against his will, and that the defendant freshly and diligently pursued Martin and retook him on 8 September, 1843, before the commencement of this action, and had him detained in execution for the debt of the plaintiff, then and there continually until December Term, 1843, of Stokes County Court, when he was discharged by the judgment of the said court; (3) That Martin escaped without the knowledge, etc., and the said Martin on 8 September, 1843, voluntarily returned into the custody of the defendant, before the commencement of this action, and that the defendant had him continually in custody in execution for the debt of the plaintiff then and there, from that day until December Term, 1843, of Stokes County Court, when he was discharged out of custody by the order and judgment of the said court. To these pleas replications were entered. It appeared from records, introduced by the plaintiff, that the plaintiff's intestate had obtained two judgments against one Thomas S. Martin, at December Term of Stokes County Court, 1841, one for $1,714.72, the other for $928.62½; and for the want of bail he was committed by the sheriff to the jail of the said county and was turned over to the defendant, when he came into the office of sheriff. Thereafter he gave notice to the plaintiff's intestate, and notice to other creditors, of his intention to avail himself of the insolvent debtors' act, having filed a schedule with that view. An issue of fraud was made up for the plaintiff's intestate in one case, the case of the larger judgment, and, the jury finding fraud on the part of the said Martin, he was, at June Term, 1843, of Stokes County Court, adjudged by the court to be imprisoned until the next county court or until he should make a full and fair disclosure of his property and effects. As (704) to the several acts of escape aleged, it appeared that, on the evening of the day when the said judgment on the issue of fraud was rendered, and after it was rendered, the said Martin was seen at a drinking shop in Germanton (county town) in a different direction from that leading from the courthouse to the jail, unaccompanied by any officer, but how long he remained there did not appear; that shortly afterwards the defendant, who had been sheriff from September, 1842, and was then sheriff, was heard to inquire for him, and in a short time was seen taking him to jail. It further apeared that the room of the

jail set apart for debtors was below stairs and that the door opened into a passage running through the jail, secured by two outer doors, and that the rooms upstairs called iron cages, having passages between them and the main walls, were set apart for criminals; that the said Martin, on the next day after his commitment, was seen upstairs, looking out of the window grates, which he could not have done had he been confined in either of the iron cages; that on Thursday night after the court he made his escape; that a deputy and some members of the defendant's family went in pursuit the next day and returned the same day without Martin; how far they went did not appear. It was further in evidence that some days thereafter the defendant went in pursuit of him, and, on his return, said he had been to Patrick Courthouse in Virginia, a distance of about thirty miles, where he had seen the said Martin, but was afraid to take him, as he was told it would be unlawful, and said further that the said Martin would be back, or had promised to be back by the next September court. The Friday or Saturday before September County Court the said Martin was brought to Germanton by a deputy of the defendant, and, after sitting some time in the family room of the jail, was committed to close prison.

On the part of the defendant it was insisted that the several escapes alleged, if escapes at all, were negligent; and for the purpose of accounting for the said escape from jail on Thursday night, he introduced witnesses who testified that there was some appearance of violence about the door facing of the debtors' room and also (705) to the guard over the bolt of the door, but none of them testified that the lock, or any door, or any part of the jail was actually broken. And for the defendant it was also insisted that there had been a fresh pursuit and recapture before suit was brought; it appearing that the said Martin was recommited on 11 September, and the suit was brought on the 14th of the month. And it was also insisted for the defendant, (1) That, under the judgment of the county court of Stokes, at June Term, 1843, the said Martin was not in execution; (2) That if in execution, it was only in one case or under one of the judgments offered in evidence, as to which the issue of fraud was made up and tried, and that the plaintiff could not recover for both, and, having joined them, he could not recover for either; (3) That, the judgment of the county court was not such a judgment as required the defendant to commit the said Martin to jail, and therefore, that the said Martin was not in custody.

The last points raised were reserved by the court. As to the several escapes alleged, the court charged, (1) That if the jury believed that, if Martin was in custody of the defendant after this judgment, and was permited by leave to go to the grog shop, as deposed to, such

conduct in law amounted to a voluntary escape; and (2) If there was a room in the lower story of the jail, set apart for the commitment of debtors, as deposed to, and the defendant allowed Martin to go out of such room and be upstairs, that such conduct would amount to a voluntary escape; and upon the third point the court charged that if Martin escaped from the jail on the Thursday, as deposed to, and did so by the connivance of the defendant, such conduct would amount to a voluntary escape. On this last point, however, the court left it to the jury to say whether the escape from jail was voluntary or negligent, and charged that, though the escape should be a negligent one, still it did not appear, if the evidence was to be believed, that the
(706) defendant had made such fresh pursuit and recapture as would excuse him. On the first question of law reserved, the court was of opinion that Martin was in execution, according to the spirit and intent of the act of Assembly, and that the judgment of the county court was such a judgment as required the defendant to commit the said Martin, and he was therefore in lawful custody. On the other question the court was of opinion that, in cases of escape, the sheriff became the debtor by assumption of law, and as both judgments had been sued on and an issue had only been made on one, and there being an escape in but one case, the plaintiff could not recover. The jury having found a verdict in favor of the plaintiff on his count for a voluntary escape, the court directed the verdict to be set aside and a nonsuit entered. From this judgment the plaintiff appealed.

Kerr and Iredell for plaintiffs.
Morehead and Waddell for defendant.

DANIEL, J. The plaintiff's intestate issued two writs in debt against one Thomas S. Martin, who was arrested and for want of bail was put in jail. Judgments were obtained on the said two writs against Martin, one for $1,714.72, the other for $928.62½, and costs Martin escaped from the sheriff's custody, and the plaintiffs have brought this action of debt against the defendant, the sheriff, to recover the amount of both judgments, for his permitting the said escape. The declaration contains two counts, one for *voluntarily* permitting Martin to escape, contrary to the statute; the other, for *negligently* permitting Martin to escape contrary to the statute. Plea—*nil debet*. As to the smaller judgment, there is no evidence that the plaintiffs ever moved the court, after the rendition of the same, that Martin should stand committed in satisfaction of it. We may, therefore, lay so much of the case as relates to that judgment out of our consideration, as there never was a commitment of Martin in satisfaction of it after it was rendered; and,

of course, an action of *debt*, under the statute, could not be maintained against the sheriff for Martin's escape as to that judgment. As to the larger judgment, it appears that Martin petitioned in this case to be relieved from his imprisonment by taking the oath of (707) insolvency. He filed his schedule of property, and the plaintiffs made up an issue of fraud as to the same in this case. On the trial of the issue Martin was brought into court by the defendant to see and aid in the trial of the same. The jury found the said issue against Martin and the court thereupon immediately made the following order in that cause in the presence of Martin and the sheriff, who then held him in custody: "It is considered and adjudged by the court that the defendant be imprisoned until the next term of this court, and thereafter until he make a full and fair disclosure and surrender of his money, goods, and effects." The judge was of opinion that the above order of the court was a commitment of Martin in execution for the satisfaction of the judgment which the plaintiff had recovered against him, and in which case Martin had petitioned the court to be relieved under the insolvent law. Martin was imprisoned by the defendant, as sheriff, in close jail, subsequent to the above order; and it must be taken that he was imprisoned under the said order, although a copy of it was not lodged by the plaintiffs with the sheriff after it was made. The sheriff was at the time the above order was made in court with Martin as his prisoner; and he must be considered as having legal notice that the character of the imprisonment was changed by force of the above order from that for the lack of bail to that of commitment in final execution on the said judgment. This Court agrees with his Honor upon this point, for the reasons aforesaid.

When a *committitur* is entered on the roll it does not recite the judgment, as the defendant's counsel insists. The prisoner is brought into court by the marshal of the prison; then the order is entered at the foot of the judgment in the presence of the prisoner, on the said roll. And it only refers to the judgment, by stating, that he is committed in execution for the debt and damages *aforesaid*, there to remain until the plaintiff be fully satisfied the said debt and damages. The entry of the *committitur* in the marshal's book, which is kept in the (708) judgment office, is not essentially necessary, although usually made; Arch. Forms, 474 The voluntary return of Martin to jail before this action was commenced does not prevent the plaintiffs from proceeding in debt against the sheriff, as the escape is found to be a *voluntary* one; and the sheriff had no power, as such, to retake or detain the prisoner. *Littlefield v. Brown*, 1 Wend., 398; 2 Wils., 295. The plaintiff might have affirmed the prisoner in prison at his suit; but such affirmation will not be presumed; it requires some positive act. *Ibid.*

The jury found a verdict in favor of the plaintiff; and they found also that the defendant voluntarily permitted Martin to escape from his jail; and they further found in the said verdict, that the defendant doth owe $.....; a sum covering both judgments, interest and costs, with interest up to the day of trial. This verdict was rendered, subject to certain points of law, which had been reserved by the court during the trial. The court, in deciding the reserved questions of law, was of opinion, that as the plaintiffs were entitled to recover against the sheriff for the escape, only the amount of the larger judgment, on which Martin had been ordered in execution, he could not have judgment for that sum, although the verdict was rendered subject to the opinion of the court as aforesaid, and although the plaintiff agreed to remit all the said verdict down to that *sum*. The court said that the plaintiffs in their counts demanded, as their debt under the statute, the amount of both judgments they had against Martin, and had failed on the trial in showing that they were entitled to demand anything for the lesser judgment, they in law, could not have judgment against the sheriff for the amount of the one on which Martin was in jail on execution and was by the sheriff voluntarily permitted to escape, and he set aside the verdict and nonsuited the plaintiffs; who therefore appealed. On this point we think that his Honor erred; and that the plaintiff, on remitting the verdict the amount only of his larger judgment against Martin, was entitled to have had a judgment in this action against the defendant for that sum. If an action of debt is brought on a single bond,
(709) a judgment, or (for) a penalty in a statute, or on a bond, the precise sum must be set out in the declaration, and the verdict must agree with that sum; for if a recovery of more or less allowed there would be a variance between the *allegata* and *probata* and the declaration would convey to the defendant no information of the cause of action. But in the action of debt the exact sum is not in all cases to be recovered; for if, from the nature of the demand, the true debt is uncertain, the sum may be set forth in the writ and declaration large enough to cover the real debt, and there shall be a verdict according to the truth and judgment thereon. It is to be observed that this action of debt, by force of the statute, is on the judgments, but is a demand for so much money as the plaintiffs have lost by the escape of their debtor, who was in custody under two several *committiturs*, made by the court, as the declaration alleges, on two several judgments against the debtor. The case is, therefore, like debt on two several bonds, in which each must certainly be described in the declaration correctly. But it is not essential to the recovery on one of them that a recovery should also be effected on the other. It is not a question of pleading in itself, but merely a question of agreement or variance between the demands de-

scribed in the pleadings and those given in evidence. There may be a recovery on one, if proved as laid, and not on the other, because not proved as laid. For there is no surprise on the defendant nor any discrepancy in the record. The only objection to such a declaration is duplicity, and that is a defect which can be taken advantage of by special demurrer. *Hancock v. Prowd,* 1 Saund., 336; Mansel on Demurrer, 2. The sum demanded in the declaration is large enough to cover the sums due on both executions; but the plaintiff, on the trial, failing to prove that his debtor was in execution on one of the said judgments, is not a reason, we think, why he should not have a verdict and judgment for so much of his demand as the other judgment against the debtor called for, on which the said debtor was committed in execution, and the defendant thereafter permitted him to escape. *Dowd v. Seawell,* 14 N. C., 185. We are of opinion that the judg- (710) ment of nonsuit must be reversed and a judgment rendered for the plaintiff for $1,714.72. This could be done by modifying the verdict according to the agreement for taking it, subject to the opinion of the court. But it is not necessary to do so, as the plaintiffs offer to remit the excess, and that is the simpler mode.

We are of opinion, from several decided cases in New York on statutes similar to our own, that the plaintiffs cannot have interest by way of damages after the date of the judgment against Martin, although he might have had interest against Martin himself, up to the payment of the judgment, *Thomas v. Weed,* 14 John., 255; 2 John., 453, 454; Wendell, 401.

We have not thought it necessary to inquire whether each of the several opinions given by his Honor, as to what constitutes voluntary escape, be correct or not; as the jury have expressly found that "the several escapes complained of were voluntary," and there can be no doubt that an escape from the jail "by the contrivance of the sheriff" is a voluntary escape, as well as suffering the prisoner to go out of the actual custody of the sheriff to a tippling house in a different direction from the prison, at his liberty, instead of taking him to prison.

The judgment of nonsuit must be reversed, and a judgment rendered for the plaintiffs according to this opinion.

PER CURIAM. Reversed.

Cited: Mabry v. Turrentine, 30 N. C., 210; *Curry v. Worth,* 48 N. C., 320.

(711)

DOE EX DEM. H. B. CALLENDER ET AL. V. BRADFORD SHERMAN ET AL.

1. Neither the tenant of land nor any person claiming title by or through him can dispute the right of the landlord to recover the premises in ejectment, after the expiration of the lease, upon the ground of a defect of title in the landlord.
2. A paper purporting to be a will of lands, which has but one subscribing witness and which has never been proved as a will, is not such a color of title as will ripen a seven years possession under it into a good title.
3. No length of possession of lands will in *law* amount to a presumption of title when the origin of the possession is shown; but such possession, with its attendant circumstances, must be left to the jury as a matter of fact, from which they may or may not infer that a legal conveyance of title had been made to the person claiming under the possession.
4. At any rate, the original consistency of relation between the possession and the opposite title must have been clearly dissolved and turned into an adverse possession for many years before suit in order to make it available as a ground of presumption of title.

APPEAL from NEW HANOVER, Spring Term, 1845; *Pearson, J.*

Ejectment for a lot in the town of Wilmington. The defendants admitted themselves in possession, and claimed to hold for St. John's Lodge, No. 1.

It was proved that the lot belonged to one Joseph Dean, who, previous to 1803, had rented it to a Mrs. Cook. Mrs. Cook went out of possession in the year 1802, and Dean rented the premises, consisting of a tavern and boarding house and out-buildings and lot, for 1803 and 1804, to a Mrs. Smith, at a yearly rent of $250. Dean died some time in 1804, while on a trip to the West Indies. He was a native of the State of Massachusetts, but had his domicil in the town of Wilmington, in this State, at the time of his death, and had resided there for many years. It was proved that the lessors of the plaintiff were the heirs at law of Dean.

The defendants claimed to derive title for the Lodge under the
(712) said Dean; and for this purpose read in evidence certain paper-writings, purporting to be the last will and testament of the said Dean, and to devise the premises to the Lodge. These papers were proved to be all in the handwriting of Dean, but there was only one attesting witness, and it was not shown that they had been placed in the hands of any person for safekeeping or that they were found among the valuable papers or effects of the deceased. The defendants proved that, soon after the death of Dean, the Lodge set up claim to the premises, under the papers purporting to be the last will and testament of Dean, and, after the lease to Mrs. Smith for 1804 had expired, to wit, in 1805, the Lodge, with the consent of the gentleman appointed execu-

tor of Dean, caused the premises to be put up at auction to rent for the term of one year, when Mrs. Smith, who had not moved out of the house, but did not object to the premises being thus exposed for rent at auction by the Lodge, became the last and highest bidder, and accordingly gave her note for the rent of 1805, to the Lodge. The premises were thus exposed to rent for one year, for each and every year afterwards, until the houses were burnt down in 1830, and Mrs. Smith thus rented the premises each year during that time, and paid the rent to the Lodge. After the fire the lot was not occupied for some two or three months, but another building was then erected, and the defendant Sherman went into possession as the tenant of the Lodge, and has occupied it ever since. The defendants also proved that the Lodge had paid the taxes upon the lot from 1805 up to this time, and for a good portion of the time had paid for the insurance of the premises. It was proved that the lessors of the plaintiffs were inhabitants of the State of Massachusetts, and it did not appear that either of them had ever been in this State. It was also proved that the Lodge always claimed the lot under the supposed will of Dean, and never alleged or asserted title in any other way.

The defendants' counsel insisted that the papers offered as a will constituted a devise of the said lots to the Lodge, and that the age of the papers and the possession consequent thereon super- (713) seded the necessity of any further proof of the execution of the papers as a devise. (2) That the papers were color of title, which was ripened into a good title by the possession of the defendant, Sherman, as tenant from 1830 to 1839. (3) That, as the Lodge had been in possession for 30 years, from 1805 to 1839, claiming the lots as its property, a presumption of property was raised, or the jury should be instructed by the judge to presume a title in the Lodge.

The plaintiffs' counsel insisted, (1) That the papers offered as a will were not color of title; (2) That the possession of Mrs. Smith was not the possession of the Lodge, as she held over after the death of Dean, but possession for the heirs at law of Dean, the lessors of the plaintiffs; that at least it was not such a possession as would raise a presumption of title in the Lodge from the lapse of time, as she had never surrendered possession to the heirs, nor had she gone out of possession and left the premises, nor had the heirs at law been notified, or otherwise informed, of her consent to become the tenant of the Lodge; (3) That if the possession of Mrs. Smith was otherwise, yet, upon the facts proved, the presumption of title in the Lodge, against the heirs at law, was not an imperative one; but the facts as proved might be sufficient to justify the jury in refusing to make the presumption.

The court charged that the paper-writing exhibited as a will did not constitute color of title. The court further charged that, when possession was held adversely for a great many years (say thirty-four) without interruption or claim made, the jury should presume a title. This presumption was to be made for reasons of policy and to quiet estates; and it did not depend upon whether the jury, in point of fact, believed that a proper deed or title had been executed or not. In this case, if the jury were satisfied that the Lodge had held adverse possession for thirty-four years, in the absence of any sufficient reason why the lessors did not make the claim during all that time; and (714) none had been proved, (for the fact that the lessors lived in Massachusetts and had never been in this State was not sufficient) the jury should presume title in the Lodge; and the fact that the Lodge never averred that a deed had been made, but always claimed under the paper supposed to be a devise, but which was not duly executed, would make no difference, because it was not an open question of fact, to be decided by circumstances, but the law gave to such long, uninterrupted possession a technical force over and beyond that which it would naturally have. This case fell under that class of presumptions which the jury were to make, with the instructions and advice of the court—which the court could not make, but on which it was their duty to instruct the jury, that, under a given state of facts, *they should* make the presumption.

As to the possession before 1830, by Mrs. Smith, the court charged that, had the proof been that Dean made a long lease to Mrs. Smith, say for 30 years, and after his death no alteration was made in the possession, except that she paid the rent to the Lodge instead of to the heirs of Dean, a different question might have been presented. But, as the proof was that Mrs. Smith rented of Dean year after year, paying an annual rent, and, after his death, the Lodge, claiming the lot under the supposed will of Dean, caused the lot to be put up at auction for one year, when Mrs. Smith, as the highest bidder, rented for one year, and continued so to rent until the fire in 1830, and at the renting Mrs. Smith became a bidder upon equal terms with others, claiming no preference from the fact that she had been the tenant of Dean in his lifetime, or from the fact that she had not actually gone out of his house and taken her furniture out, all of which facts were not controverted, the court was of opinion, that this state of facts made her the tenant of the Lodge, and her possession, after that, was the possession of the Lodge. So that, taking the evidence to be true, the Lodge had been in possession for some thirty-four years, and this authorized the jury to make the presumption of title. And the court instructed the jury that it was their duty so to presume from the facts stated.

The jury found a verdict for the defendants, and from the (715) judgment thereon the plaintiffs appealed.

Wm. H. Haywood for plaintiffs.
Strange for defendants.

DANIEL, J. The lot of land in controversy belonged to Joseph Dean. He leased it to Mrs. Smith for the years 1803 and 1804, and she entered thereon as his tenant. Dean died intestate in 1804, and before Mrs. Smith's lease had ended. She was in law, therefore, the tenant of the lessors of the plaintiffs, who are the heirs at law of Dean. And so long as she continued in the possession of the lot her possession was the possession of the lessors of the plaintiffs. It is a well settled rule of law that the tenant cannot be heard to dispute his landlord's title, on a supposed defect in the title. *Driver v. Lawrence,* 2 H. Black, 1259. Nor, when the tenant in possession had paid rent to the lessors of the plaintiffs, can a third person come in and defend as landlord without the tenant, and dispute the lessor of the plaintiff's title. Neither the tenant, nor any one claiming by him, can controvert the landlord's title; he cannot put another person into possession, but must deliver up the premises to his own landlord. *Wright v. Smythe,* 4 M. & S., 347; Stephens, N. P., 1377. If the lessors of the plaintiffs had given Mrs. Smith six months notice to quit, at any time during her possession, she could not have had any defense against their action of ejectment. She had the *possessio pedis,* and not the Lodge; and her possession could not in law be adverse to that of the lessors of the plaintiffs. The judge erred, we think, when he told the jury that in this action the possession of Mrs. Smith was the possession of the Lodge. After the house got burned down, Mrs. Smith left the place, and the defendant Sherman entered as a tenant of the Lodge in the year 1830, and he continued in adverse possession for the space of nine years, when this action was brought by Dean's heirs. But the judge said that his (Sherman's) possession was without color of title, as the two papers offered as a will of Dean did not on their face profess to devise the land, there being but one witness to it, and although it was in the (716) handwriting of Dean, it had never been proved as a will, nor was there any evidence that it had been lodged in the hands of a third person for safe keeping or had been found among Dean's valuable papers or effects, as the statute requires. We agree with his Honor that the two papers were not color of title to ripen Sherman's possession into a good title for the Lodge, by force of the act of limitations.

It was then insisted for the defendants, that the great length of time (35 years) which had elapsed since any rent had been paid to Dean or his heirs, and the constant receipt of the said rents by the

Lodge, and also other acts of ownership by it, raised a presumption that the heirs of Dean had made a conveyance of the lot to the Lodge. The judge said, "taking the evidence to be true, the Lodge had been in possession 34 years, and this authorized the jury to make the presumption of title. And the court instructed the jury that it was *their duty so to presume* from the facts stated." We think that the judge erred in the charge as applied to this case. If the heirs of Dean had *actually* made a deed of conveyance of the lot to the Lodge at any time since the death of their ancestor, of course it would defeat the plaintiffs' action. And to ascertain that fact the jury were the judges. That the 35 years' time which had elapsed since the Lodge set up claim to the lot was only to be taken as evidence, which was to go to the jury with and any evidence of circumstances in the cause, to enable them to find or not to find, whether any such conveyance had actually taken place. In *Fenwick v. Reed,* 5 Barn. & Ald., 232, where a defendant's ancestor came into possession of certain lands in 1752 as a creditor under a judgment obtained against the owner of the land, and the defendant's family had continued in possession ever since to 1821: *Held,* that the original possession having been taken, not under any conveyance, but as a creditor, and the possession being thus accounted for, the length of possession was only *prima facie* evidence, from which a jury might infer a subsequent conveyance by the original owner or some of his de-
(717) scendants, but that it might be rebutted, and that the jury must not presume such conveyance from that length of possession, unless they were satisfied that it had actually been executed. At any rate, the original consistency of relation between the possession and the opposite title must have been clearly dissolved and turned into adverse possession for many years before suit, in order to make it available as a ground of presumption. 1 Mer., 125. Here the possession ceased not in the lessors of the plaintiffs' tenant until 1830. There are many American cases to the point, as that of *Fenwick v. Reed.* They may be found collected in 2 Philips Ev., 365, c. Amer. ed. The judge, we think, mistook the class of presumptions to which this case belonged. It was only evidence to aid in raising a presumption of a fact, in the ascertainment of which the judge could not say it was their *duty* to presume the existence of the fact. In *Fenwick v. Reed* the jury found for the plaintiffs against 48 years possession by the *Reed* family, and the court refused to disturb the verdict. There must be a

PER CURIAM. New trial.

Cited: Sutton v. Wescott, 48 N. C., 284; *McConnell v. McConnell,* 64 N. C., 343; *Melvin v. Waddell,* 75 N. C., 367; *Davis v. Davis,* 83 N. C., 73; *Pate v. Turner,* 94 N. C., 55; *Springs v. Schenck,* 99 N. C., 558; *Lawrence v. Eller,* 169 N. C., 213.

INDEX