ANNOTATIONS INCLUDE 169 N. C.

NORTH CAROLINA REPORTS
VOL. 28

CASES AT LAW ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1845
JUNE TERM, 1846

BY
JAMES IREDELL
(6 IRE.)

ANNOTATED BY
WALTER CLARK

RALEIGH
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CASES AT LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1845

THE STATE v. SOLOMON HOYLE.

1. In an indictment for perjury it is not necessary to set forth the pleadings in the former case in which the perjury is alleged to have been committed; our act of Assembly of 1842, ch. 49, having altered the common law in that respect.
2. There is but one statute in this State punishing the crime of perjury, Rev. Stat., ch. 34, secs. 50 and 52, and therefore an indictment for that crime which concludes against *the statute* is right.

APPEAL from BURKE, at Fall Term, 1845; *Bailey, J.*

The defendant was convicted upon an indictment for perjury, and moved in arrest of judgment; but the Court overruled the motion and passed sentence on the defendant, and he appealed.

The indictment states, by way of inducement, "that at the court of pleas and quarter sessions for the county of Burke, holden at the court-house in, etc., on etc., before, etc., justices, etc., a certain issue between the State and one James York, in due manner joined (2) upon a bill of indictment then and there pending against the said James York for an assault and battery in and upon the body of one Solomon Hoyle, came on to be tried, and was then and there in due form of law tried by a jury, etc.; and that upon the said trial Solomon Hoyle, the defendant, did then and there appear, etc. The indictment concludes "against the form of the statute in such case made and provided."

Two objections were taken to the indictment. One, that it does not set out the former indictment against York nor the plea of York therein, upon the trial of which the perjury is alleged to be committed; and the other, that the indictment does not conclude against the form of the statutes, in the plural.

Attorney-General for the State.

No counsel for defendant.

RUFFIN, C. J. The Court deems neither objection tenable. At common law, in order to show that the false oath was taken before a court having jurisdiction of the matter, and in a judicial proceeding touching the same, it was necessary that the indictment should set forth the pleadings in the former case, as the declaration, or indictment, the issue joined, and all the proceedings at the trial. But this rendered the indictments for this crime so prolix and complicated that there was always danger of failing to obtain judgment, even after conviction. The inconveniences were remedied in England by the statute 23 Geo. II., which enacted that it should be sufficient to set forth the substance of the offense and by what court or before whom the oath was taken (averring such court or person to have competent authority to administer the same), together with proper averments, etc., "without setting forth" (among other things) "the indictment or any part of any record or proceeding in law, other than as aforesaid." Since that time indictments (3) have not gone more into detail in England than that now under our consideration, which, indeed, conforms to the best precedents. It appears to have been taken from that given by 2 Chitty Cr. L., 452, which, the author says, was settled with great care by a late eminent lawyer, and on which there was a conviction. In other instances, the matter is stated yet more generally, thus: "that a certain indictment then depending in the said court against A. B. came on to be tried, and was then and there in due form of law tried by a certain jury," etc.; or, "that J. C. was in due form of law tried by a certain jury of the said county, and there duly sworn and taken, between the King and the said J. C. upon a certain indictment then and there depending against the said J. C. for," etc. 2 Chit. Cr. L., 460-463. Upon an indictment in that form *Dowlin's case* turned, 5 Term., 311, and it was held sufficient in that respect. The statute 23 Geo. II. was reënacted in the same words in this State in 1791, ch. 7; but it was repealed in 1837, Rev. Stat., ch. 1, sec. 2. That caused the decision in *S. v. Gallimore,* 24 N. C., 372; but at the succeeding Assembly the inconveniences arising from that state of the law were obviated by a second enactment of the act of 1791. Laws 1842, ch. 49. That, therefore, dispenses with those statements, the omission of which is the foundation of the first objection.

There is but one statute punishing the crime of perjury, that which is contained in Revised Statutes, ch. 34, secs. 50 and 52; *S. v. Ball,* 25 N. C., 506; and, consequently, the conclusion of this indictment is right. The act of 1842 relates only to the forms of prosecuting, and not to the creating, defining, or punishing the offense.

PER CURIAM. No Error.

Cited: S. v. Roberson, 98 N. C., 753; *S. v. Murphy,* 101 N. C., 701.

(4)

REBECCA LAMB AND OTHERS v. LEWIS CARROLL, ADMINISTRATOR, ETC.

The value of an advancement is to be estimated as of the time the advancement was made, and not as of any subsequent time.

APPEAL from an interlocutory order made by *Caldwell, J.*, at Fall Term, 1845, of SAMPSON, overruling certain exceptions made by some of the plaintiffs to the report of the commissioner appointed to divide the negroes which were the subject of the petition.

John Lamb made partial advancements of slaves to several of his children, and then died intestate, leaving other slaves and other personal estate. Upon a petition for an account and distribution against his administrator by his widow and all his children, those who had been advanced submitting to bring their advancements into hotchpot, it was decreed that the slaves should be valued and equally divided, taking into the division the several advancements; and a commissioner was appointed to make the valuation and division. He did so, and made a report, to which the advanced children took several exceptions, which, however, only raised this question, whether the advancements are to be valued as of the time they were made or as of the time of the division.

Warren Winslow for plaintiff.
Strange for defendants.

RUFFIN, C. J. Those parties who except would take a very different view of their equity if the advancements to them had consisted of female slaves, and they had been at the expense of bringing up numerous families of children from them. There is, however, no doubt of the law upon the question. It has been long settled, *King v. Worsley,* 3 N. C., 366; *Stallings v. Stallings,* 16 N. C., 298; and the cor- (5) rectness of the rule seems to us to be evident. His Honor was, therefore, right in overruling the exceptions and decreeing according to the report; and his decision is

PER CURIAM. Affirmed.

THE STATE v. SAMUEL LEDFORD.

1. When the perjury on which an indictment is founded is alleged to have been committed on the trial of a cause at a special term of a Superior Court it is not necessary to set forth in the indictment the order of the judge directing such special term to be held, nor the appointment by the Governor of the particular judge who is to hold it.
2. Nor is it necessary to prove either of these facts on the trial of the indictment.

3. A judge who by the general law and a permanent commission holds a Superior Court is not to require evidence that he is the judge of the court; and the record made by him establishes to those who succeed him that he held the court at the terms at which, according to the purport of the record, he appears to have held them.
4. The regularity of the proceedings of a Superior Court in point of time, as in other things, is to be presumed, unless the contrary appears.

APPEAL from YANCEY, Fall Term, 1845; *Bailey, J.*

The defendant was convicted in the Superior Court of Yancey of perjury, upon an indictment which charges "that at a Superior Court of law for the county of Yancey held at, etc., on the second Monday after the fourth Monday in June, 1845, before the Honorable David F. Caldwell, one of the judges of the Superior Courts of law for the State, a cer-
(6) tain issue between one Marcus L. Penland and one John Ledford in a certain plea of trespass on the case, wherein the said Marcus L. Penland was plaintiff and the said John Ledford was defendant, came on to be tried in due form of law, and was then and there tried by a jury," etc. The indictment then states that the defendant appeared as a witness for John Ledford, and was duly sworn, etc., "before the Honorable David F. Caldwell, so being judge as aforesaid; that the evidence, etc. (he, the said David F. Caldwell, judge as aforesaid, then and there having sufficient and competent authority to administer the said oath to the said Samuel Ledford in that behalf"). It then states the materiality of certain questions, the evidence given by the defendant relative thereto, and assigns the perjury in the usual form.

For the purpose of showing on the trial of the present indictment that the evidence of the prisoner was given in the Superior Court of law for Yancey, and upon the trial of an issue joined in a suit between the persons mentioned in the indictment, the solicitor for the State offered to read the records of the Superior Court of law for Yancey, showing that the trial took place in that court, as charged. But the counsel for the prisoner remarked that "it was unnecessary to read them, as the prisoner admitted that a special term of the court was held and that Judge Caldwell presided, and that the prisoner was sworn on the trial, as set forth."

In the defense it was admitted that the prisoner swore falsely, but it was insisted that he did not swear corruptly. On that point the court left the case to the jury, who found the prisoner guilty.

The prisoner's counsel moved for a new trial because *Judge Caldwell's* commission was not proved on the trial, and because it was not proved by the record that the judge who held the Superior Court of Yancey at the preceding Spring term had ordered the term of the court to be held on the second Monday after the fourth Monday of June, 1845. The court overruled the motion.

The counsel then moved in arrest of judgment because the indictment did not set forth an order of the court at the preceding (7) term for the term held in July, nor charge that *Judge Caldwell* was appointed by the Governor to hold it. This motion was also overruled and sentence passed on the prisoner, and he then appealed.

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

RUFFIN, C. J. The objections will be most conveniently disposed of by first considering those to the indictment. It is certainly necessary the indictment should show that the false oath was taken in a judicial proceeding, and, in order thereto, it must show a matter pending in some court having competent jurisdiction and held by a person authorized to do so.

Those matters must be truly laid, because the proof must establish them in order to constitute the imputed perjury. Here the indictment lays the trial of a certain suit in the Superior Court of law for Yancey County at a certain term of that court which was held on the second Monday after the fourth Monday of June, 1845, by and before *Judge Caldwell*, one of the judges of the Superior Courts of law for the State, and lays the perjury to have been committed on that trial. This we hold to be sufficient. Laws 1842, ch. 49 (being the act of 1791, ch. 7, reenacted), expressly makes it sufficient for the indictment to set forth "by what court or before whom the oath was taken (averring such court or person to have competent authority to administer the same), without setting forth any part of any record, and without setting forth the commission or authority of the court or person before whom the perjury was committed." There is no doubt that on the trial the evidence must establish that the particular court was held, and duly held, at the time and place, and by the person or persons stated in the indictment. How those facts are to be proved is another ques- (8) tion, which is hereafter to be considered. We are at present inquiring whether there are adequate averments on those points in the indictment. We think there are; for the indictment is according to the precedents under the act of 1791, and the statute 23 Geo. II., from which ours was taken, mentioning the court, the term, and the judge presiding therein. That would not be contested had the term been an ordinary semiannual term, held on the day designated in the public statute. But the court was held on this occasion, by way of special term, under the "Act for the more speedy administration of justice," 1842, ch. 16; and it seems to have been supposed that makes a difference. The act provides that when the business of a Superior Court cannot be done at the regular term, the judge holding the court may, by an order made at the regular

term next preceding, appoint a special term, which shall be held at the time appointed, and all civil causes may be tried under the same rules as are prescribed for holding the regular terms of the court. The judge appointing a special term is required to notify the Governor of it, and it is the duty of the Governor to designate one of the judges (other than the one appointing the special term) to hold the court, and notify the judge of his appointment. And the act provides that witnesses, suitors, and officers of the court shall attend at the time appointed, as at a regular term of the court. This is the whole scope of the act. It creates no new court, but it is still the Superior Court of law, held by a judge of the Superior Courts of law, and having the same jurisdiction in trying civil actions. It is true, there is to be a special term of the court; but that does not change the style of the court. It is clear, too, that the special term is not a part of the preceding regular term, continued by adjournment from the regular term, and to be so stated in pleading. It is an original term, and is properly stated as beginning on such a day,
(9) since the act distinguishes it from that at which it was ordered by calling the one the special term of the Superior Court and the other the "preceding term." The court is, therefore, properly described in the indictment, and the particular term is sufficiently shown by the period at which it is stated to have been held.

Nor was it necessary the indictment should set forth that the judge was designated by the Governor to hold the court; for that comes within the reason, if not the words, of the act dispensing with a statement of the judge's commission. The truth is, however, that such designation or appointment is not in the nature of a special commission or authority to hold a court created by the act; but the powers of the judge are derived from his election and commission as a judge of the Superior Courts, and the designation directed by the act serves only to make it the duty of the particular judge to hold the particular term. This is clear from the provisions of the Constitution which allow the Governor to commission only judges appointed by the General Assembly, or, temporarily, those appointed by himself with the advice of the Council of State. The provision of the act of 1842, ch. 16, is nothing more than a mode by which the judge is assigned to the duty of holding a particular term of a Superior Court by the Governor, as the judges were formerly to their circuits, and as they are now allotted to the circuits by themselves. Such an allotment was never stated in any indictment for perjury, nor, indeed, proved on the trial. All persons must take notice of the judicial character of the persons who are the judges of the highest courts of original jurisdiction, civil and criminal. *S. v. Kimbrough,* 13 N. C., 431. It is, therefore, sufficient that the indictment should set forth a Superior Court of law held by one of the judges of those courts, because that constitutes a tribunal of competent jurisdiction.

The motion in arrest of judgment was, therefore, properly (10) overruled.

The preceding observations will have served in a great degree to show that the Court also thinks the conviction was on sufficient evidence. In reference to the judge's commission, we have already said, upon authority, that his official character is to be judicially noticed. There can be no such absurdity in the law as that the judge who by the general law and a permanent commission holds a Superior Court is to listen to evidence that he is the judge of the Court. The record made by him establishes to those who succeed him that he held the court at the terms at which, according to the purport of the record, he appears to have held them. Besides, even in the case of an inferior officer, it is sufficient, in the first instance, to establish his capacity, for example, to administer the oath, that he was acting as an officer that legally hath such capacity. *Rex v. Verelst,* 3 Camp., 432; 4 Term, 366.

As to the other point, that it was not shown by the record that there had been an order for a special term, it might be sufficient to answer that the prisoner admitted the fact. He expressly admitted that the special term was held, and by *Judge Caldwell,* which, under the circumstances, must be deemed to be an admission of a lawful special term. By dispensing with the reading of the records, everything is to be inferred that could have been established by the records. But, in reality, no such proof was requisite. As a Superior Court, the regularity of its proceedings in point of time, as in other things, is to be presumed, unless the contrary appear. Inasmuch as the special term might lawfully be held, the fact that it was held on a particular day, at the proper place, establishes, at least *prima facie,* that it was the due and proper time for holding it. We cannot assume that the special term was held when none was ordered, nor that it was held at a different time from that ordered.

PER CURIAM. No error. (11)

Cited: Sparkman v. Daughtry, 35 N. C., 170; *S. v. Harvell,* 49 N. C., 56; *Gudger v. Penland,* 148 N. C., 600.

STATE v. ISHAM HAILEY ET AL.

1. In the absence of any special regulations by the county court, no act of a patroller in the discharge of his patrolling duties can be valid unless a majority of the patrollers in the district be present and a plurality of these sanction the act.
2. The office of a patroller is both judicial or *quasi judicial* and executive.

APPEAL from ANSON Fall Term, 1845; *Caldwell, J.*

The defendants were indicted for a forcible resistance to a part of a patrol in entering a negro house belonging to them, and preventing their searching it. The jury found the following special verdict: "That in the captain's district in which the defendants live there were eight persons appointed patrollers for 1844, by the committee of patrol, and they also find that three of the eight persons so appointed went to the house of the defendants in the night as patrol, and made themselves known as such; that they went to the cook-house or kitchen, a house within the curtilage; that they were met at the door of it by the defendants; that the entrance of said persons was resisted and the entry prevented by threats and weapons used by the defendants; and by reason of such resistance (12) they did not search the house; and they also find that the defendants' negroes slept in said house, and also that the county court of Anson had not made any rules or regulations for the government of the patrol. If in point of law the defendants be guilty, then they so find; but if in point of law not guilty, then they so find."

On this finding the presiding judge was of opinion that the house in question was the subject of search, but as the county court of Anson had made no rules or regulations for the government of the patrols, less than a majority could not act; that the resistance made by the defendants was not criminal, and rendered judgment in their behalf. The State by her solicitor appealed.

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

NASH, J. With the question decided by his Honor in the first part of his judgment we have nothing to do. It does not arise here, and we express no opinion upon it. It is an important point, and leads to very interesting results. We entirely, however, coincide with the presiding judge in the judgment in favor of the defendants. The patrol in every county, when duly appointed, is a public body, invested with powers highly important to the community at large, and to be exercised for the public good. These powers partake of a judicial, or *quasi* judicial, and executive character. Judicial so far as deciding upon each case of a slave taken up by them; whether the law has been violated by him or not, and adjudging the punishment to be inflicted. Is he off his master's plantation without proper permit or pass? Of this the patrol must judge and decide. If punishment is to be inflicted, they must adjudge, decide, as to the question; five stripes may in some cases be sufficient, while others may demand the full penalty of the law. All these acts (13) upon the part of the patrol require consultation and agreement, and a less number than a majority of the whole cannot act. Not

that it requires a *majority* of the whole to agree in the decision of each case, but it does require that number to constitute (if the expression may be allowed) a court or tribunal for the performance of these duties, and when so constituted a plurality of those present must agree, or no punishment can be legally inflicted. We do not mean that the law requires, on the part of the patrol, any formalities in the discharge of their duties, or that any formal judgment must be pronounced, but that a majority of the patrol properly constituted must sanction each sentence passed. If a minority can act, then each individual patroller may act by himself, and every man's property would be subject to the uncontrolled judgment or passion of a single individual. This cannot have been the scope and meaning of the act. Where powers of a public nature, though not judicial, are conferred on several, it is a general rule that a majority can discharge them, Co. L., 181, b; *Grindley v. Barker,* 1 Bos. & Pul., 229; and it follows as a corollary, that less than a majority cannot, unless the act conferring the power gives to a minority the authority so to do. This principle as applicable to patrols was decided in *Richardson v. Saltar,* 4 N. C., 505. So, also, in the familiar instance of our court of pleas and quarter sessions, but for the clause authorizing three magistrates to hold the courts, a less number than a majority of all the magistrates of the county would be incompetent to hold the terms of the court.

In *Tate v. O'Neal,* 8 N. C., 418, the judge who tried the cause below decided that it required a majority of the patrol to be present, to enable them to act legally, and the Supreme Court affirmed his judgment. The indictment, as well as the special verdict, shows that a majority of the patrol in this case were not present, and the county court of Anson had passed no rule authorizing a less number to act. (14)

PER CURIAM. Affirmed.

THOMAS DAVIDSON v. JOHN M. SHARPE.

1. Where a decree or judgment in another State is produced in evidence in one of our courts it is not necessary to show by any extrinsic evidence that the judgment or decree was warranted by the laws of the State in which it was pronounced. The judgment or decree itself is the highest evidence of that fact.
2. A judgment or decree pronounced in any State against an inhabitant of another State upon whom process in the suit has not been served is only binding in the State in which such judgment or decree has been rendered.
3. Where a bond is offered in evidence, and the obligor offers to show that the bond has been declared fraudulent by a court of equity, and that it should

be surrendered, the evidence is inadmissible, because the bond, being uncanceled, is still good at law, and the obligor can only proceed in equity to enforce the decree by process of contempt.

APPEAL from IREDELL Special Term, November, 1845; *Dick, J.*

Debt on a bond, and the plea is a set-off of a larger sum, due on a bond of the plaintiff to the defendant. On the trial, the defendant proved the latter bond as pleaded; and the plaintiff then offered to give in evidence the transcript of the proceedings in a suit, instituted in a court of equity in Tennessee, upon the bill of the present plaintiff against the
(15) defendant, in which the court declared that the bond now pleaded as a set-off was obtained by the defendant from the plaintiff fraudulently, and decreed that the defendant should deliver the same into that court to be canceled.

The defendant objected to receiving the evidence, because it appeared in the transcript that the defendant did not appear in the cause, and had not been served with a process in the suit, and that he was not a citizen or resident in Tennessee, but was a citizen and inhabitant of North Carolina; and that the court proceeded to make the decree upon an order, taking the matter of the plaintiff's bill as confessed by reason of the default of the defendant in not appearing therein, after a notification to do so, which was published for a certain period in a newspaper printed in Tennessee.

The presiding judge was of opinion that it was necessary, to the admission of the evidence, that the plaintiff should otherwise prove that by the law of Tennessee the court was authorized to make a decree against a nonresident person upon such publication. The plaintiff did not offer any further evidence, and was nonsuited; and he appealed.

No counsel for the plaintiff.
Boyden for the defendant.

RUFFIN, C. J. The Court thinks the defendant's objection good, though not precisely on the ground taken by his Honor. Regularity of judicial proceedings in another State, according to the law of that State, cannot be inquired of here. If an attempt were made to prove that law here, what evidence as high could be adduced as those proceedings themselves? They are the solemn official acts of judges, whose peculiar province it is to administer and expound the laws of their country. No witnesses could be more relied on for their knowledge of the subject,
(16) nor the sanctions under which their opinions would be declared.

Our courts cannot set themselves above the courts of Tennessee in determining what is her law. Therefore, as it was said by the Court in *Irby v. Wilson*, 21 N. C., 568, every judgment, whether final or interlocutory, proves itself to be the regular and right one, according to the

law of the country in which it was given. Consequently no other evidence was requisite on that point.

But, although the proceedings and the decree are to be deemed strictly correct, according to the law of Tennessee, the Court holds, according to the case just cited, that they have no validity here, because the defendant was not in fact made a party to the suit. The State cannot pass a law to operate out of her territory, or to authorize her courts to act on things or persons not within her jurisdiction. Such a statute may bind her own courts, but the courts of other States cannot acknowledge its obligation or aid in executing it, even indirectly.

There is, however, another ground on which the objection ought to have been sustained. The evidence was irrelevant, and for that reason ought to have been rejected, had it been a decree of a court of equity of this State. It established no fact material to the issue in this suit. The decree operates *in personam* only, and professes to do no more. It is to be enforced only by process of contempt. It does not render this bond less the obligation of the plaintiff in law than it was before the decree. While it is in existence, unpaid and uncanceled, a court of law is obliged to hold it to be the party's deed, leaving the court of equity to act on its suitors, as it is quite able effectually to do. As decree of a court of equity of another State, not for money, but requiring acts by the defendant personally in court, it is plain that a court of law here is not competent to enforce it, but the application should be to that tribunal that has a like jurisdiction *in personam,* and could compel the performance of the specific act decreed and restrain the defendant (17) from any unconscientious use of the instrument in the meanwhile.

PER CURIAM. Affirmed.

Cited: Sloan v. McDowell, 71 N. C., 368; *Miller v. Leach,* 95 N. C., 231; *Harris v. Harris,* 115 N. C., 588; *Rainey v. Hines,* 121 N. C., 321; *Arrington v. Arrington,* 127 N. C., 197.

JOSEPH W. ALLEN, QUI TAM, ETC., v. JAMES FERGUSON.

1. In an action *qui tam,* etc., for usury, where the count was that the defendant had corruptly taken, on 20 April, 1844, etc., usurious interest on a contract for forbearance, etc., from 21 April, 1843, to the said 20 April, 1844, and it appeared in fact that the usurious interest was taken for forbearance, etc., from 21 April, 1843, to 21 April, 1844: *Held,* that there was a fatal variance between the count and the proof, and, therefore, the plaintiff could not recover.

2. Although it is not requisite in a declaration for usury *qui tam*, etc., as it is in a plea, to describe the usurious contract specially, but it may be done generally, yet the declaration must be precise and accurate, in the statements of the sum lent and forborne, the time of forbearance, and the excess of interest; and these facts must be proved as laid.

APPEAL from CALDWELL Fall Term, 1845; *Bailey, J.*

Debt for $350, founded on the statute against excessive usury. The declaration contains two counts.

The first count purports to set out the contract specially, and states it thus: that on 21 April, 1843, upon a corrupt agreement, etc., the defendant lent and advanced to Hawkins Kirby the sum of $175 and agreed to forbear and give day of payment therefor for the space of twelve calendar months next ensuing, and that for such loan and forbearance Kirby then agreed to pay to the defendant $200 at or before the
(18) expiration of twelve calendar months as aforesaid; and that to secure the said sum of $200 Kirby on 21 April, 1843, executed a deed of conveyance to the defendant for certain lands, therein mentioned, in fee simple, which was absolute and without condition expressed in the deed, but that it was then and there further agreed between the defendant and Kirby that the said deed should become void and be surrendered upon the payment of the said sum of $200.

The count then proceeds to state that in pursuance, etc., Kirby on 20 April, 1844, paid to the defendant the said sum of $200, and that the defendant "then and there did corruptly take, accept, and receive of and from the said Kirby the sum of $25 by way of corrupt bargain and loan for the said Ferguson forbearing and giving day of payment, and having forborne and given day of payment of the said sum of $175, so lent and advanced as aforesaid, from 21 April, 1843, until and upon the said 20 April, 1844, which sum of $25 exceeds the rate," etc.

The second count states that on 21 April, 1843, the defendant lent and advanced to Kirby $175, and that afterwards, that is to say, "on 20 April, 1844, the said Ferguson did, at, etc., corruptly take and receive of and from the said Kirby the sum of $25 by way of corrupt bargain and loan for the said Ferguson forbearing and giving day of payment, and having forborne and given day of payment of the said sum of $175 so lent and advanced from the said day and time of lending and advancing the same as aforesaid until and upon the said 20 April, 1844, aforesaid, which sum of $25 exceeds," etc.

The cause was tried on the general issue; and the plaintiff having given notice to the defendant to produce on the trial the bond of defeasance hereafter mentioned, called as a witness the borrower, Kirby.
(19) He stated that on 21 April, 1843, he borrowed from Ferguson $175 for one year, and that he was therefor to pay the sum of $200 at the end of the year, and that, to secure the payment of the $200,

he at the same time executed an absolute deed to Ferguson for two tracts of land, in which the consideration was expressed to be $200, and Ferguson executed to him a bond with condition to reconvey the land or surrender the deed upon the payment of the said sum of $200 at expiration of the year. He further stated that on 20 April, 1844, he paid the sum of $200 to the defendant, who thereupon surrendered the deed of conveyance to Kirby, and the latter gave up to Ferguson the said bond which Ferguson had given to him as aforesaid.

The defendant then produced the bond itself. It purported to be an obligation in the penal sum of $1,200, to be void on condition that Ferguson should convey the land to Kirby in fee simple in consideration of the sum of $200 to be paid by Kirby to Ferguson therefor, provided Kirby should pay the sum of $200 on or before 21 April, 1844.

The counsel for the defendant thereupon contended that there was a variance between the contract thus appearing in evidence and that set forth in either count of the declaration, and moved the court to instruct the jury to find for the defendant. But the court refused and directed the jury that the matter was for them to decide, and that if they believed that Kirby had stated the contract truly, then the plaintiff was entitled to recover; but that if he was mistaken, and the bond set forth the contract truly, then there was a variance that was fatal to the plaintiff's case.

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

Guion for plaintiff.
Dodge for defendant.

RUFFIN, C. J. The Court agrees with his Honor that, ac- (20) cording to the contract as appearing on paper, there is a substantial variance from those stated in the declaration. Although it be not requisite in a declaration, as it is in a plea, to describe the usurious contract specially, but it may be done generally, inasmuch as the action is given to a stranger who may not be able to ascertain all the particulars, 1 Saund., 295, note, yet the precedents and authorities show that the declaration must be precise and accurate in the statements of the sum lent and forborne, the time of forbearance, and the excess of interest, because those three points are indispensable to enable the court to see, on the record, that the interest received according to the sum lent and time was at a rate forbidden by law. And those points must be stated according to the fact; for, as *Lord Kenyon* said in *Rex v. Gillham,* 6 Term, 265, they must be proved as laid.

That being so, the Court holds that there was error in refusing the instructions the defendant asked. The first count alleges the loan to

have been on 21 April, 1843, "for twelve calendar months next ensuing," which would end on 20 April, 1844; and it subsequently alleges that on 20 April, 1844, the defendant received, under that corrupt bargain, the principal sum so lent and the further sum of $25 for the forbearance of the sum of $175 "from 21 April, 1843, until and upon the said 20 April, 1844." Now, the day of payment agreed on, as appearing in the written instruments, is not 20 but 21 April, 1844, and consequently the sum of $25 was agreed to be paid, and was paid, not for the forbearance for twelve months or until and upon 20 April, 1844, but for the forbearance until and upon the day following.

In this respect the second count, though not descending to as many particulars of the contract, stands upon the same ground with the first. It, however, states the three essential matters before spoken of, namely, the sum forborne, $175; the excessive interest, $25; and the time
(21) of forbearance, that is to say, "from the said day of lending and advancing the same as aforesaid until and upon the said 20 April, 1844." This count does not allege any usurious contract originally, but it alleges merely that the defendant lent Kirby $175 on 21 April, 1843, and the principal not being paid, nor even due, as far as appears in the count, the defendant received, on 20 April, 1844, the sum of $25 by way of usurious interest for the forbearance of the principal money "until and upon the said 20 April, 1844." Now, clearly, that is not true; for, although the $25 was paid on that day, it could not have been paid as for the interest up to that day only, but it was as and for the interest that would accrue until and upon the next day, since the defeasance allows the borrower to pay the money on 21 April, 1844. If Ferguson were to sue Kirby for the debt now, he could certainly not recover interest on $175 from 20 April, 1844, but only from the 21st of that month, which shows that the count is inaccurate in laying that the $25 was received *"for* the forbearance *until* and *upon 20* April, 1844," inasmuch as, though paid on the 20th, it was *for* forbearance *until and upon 21* April, 1844.

The attempt to turn the point into a question of credit cannot be sustained. In the treaty the terms may have been used which were used by the witness on the trial; but all that was put an end to by the reduction of the contract to writing. There is no pretense that the parties falsified their contract when they put it on paper as a device to evade the statute of usury, or that Kirby did not know the contents of the written instruments, and accepted the bond under a misrepresentation of its contents. On the contrary, he was produced as a witness, not for the purpose of proving the agreement to have been different in its terms from what it appeared in the writing, but to prove the contents of the written
(22) instrument as itself constituting the agreement. He could not have been examined at all to that point if he had not first stated

that he had surrendered the bond to the defendant and if the plaintiff had not given the defendant notice to produce it. His evidence, therefore, was not competent, except as secondary evidence of the contract, under those circumstances. Now, when the writing itself was produced, its identity not being questioned, it proved its own contents, and, consequently, put that part of Kirby's testimony out of the case, instead of raising the point of the superior credit of the instrument or the witness. As a question of evidence, it is clear the writing, when produced, became the only competent evidence under the circumstances stated.

PER CURIAM. *Venire de novo.*

Cited: Jones v. Herndon, 29 N. C., 85; *Taylor v. Cobb,* 48 N. C., 140.

GEORGE W. WRIGHT v. JAMES MOONEY.

A judgment in one court is a set-off against an action of assumpsit in another court.

APPEAL from HAYWOOD Spring Term, 1845; *Manly, J.*

Assumpsit, upon an agreement to pay a certain sum *per diem* for work performed in building a mill, in which the defendant offered, as a set-off, the record of a judgment obtained by him against the plaintiff in Macon Superior Court. The legality of this set-off was denied and the evidence objected to, but the court overruled the objection and admitted the evidence of the set-off. After verdict the plaintiff having failed in a motion for a new trial, and judgment being rendered against him, appealed to the Supreme Court. (23)

Francis for plaintiff.
No counsel for defendant.

DANIEL, J. Set-off is only allowed in actions of assumpsit, debt, and covenant, for the nonpayment of money, and for which an action of debt or *indebitatus assumpsit* might be maintained; and the debts to be set-off must be due at the commencement of the action. Babington on Set-offs, 8. The only question made by the exception is whether in assumpsit pending in one court the defendant can set-off a judgment recovered by him against the plaintiff in the court of another county. There is no doubt that he may, for the debts are mutual, though of different dignity, and are within the words of the act.

PER CURIAM. No error.

THE STATE v. JOEL ROBBINS.

1. It is not necessary to the validity of a marriage that the parties should have obtained a license from the clerk of the county court. The omission of the license only subjects the minister or justice performing the ceremony to a penalty.
2. It is sufficient proof of a marriage that the ceremony was performed by one who was in the known enjoyment of the office of a justice of the peace and notoriously acting as such. It is not necessary to produce his commission from the Governor.

APPEAL from RANDOLPH Fall Term, 1845; *Dick, J.*

The prisoner was indicted for bigamy in marrying Elizabeth
(24) Robbins, a wife to whom he had been some years before married being still alive. To show the previous marriage, a witness proved that he was present, some thirty years before that time, when the defendant was married to his daughter, Elizabeth Williams, by one Michael Harvey, and that she, the said Elizabeth, was still alive; that the parties lived together for several years, when they separated, and the wife returned to her father's house. The defendant Robbins had obtained no license from the clerk of the county court for his marriage with Elizabeth Williams. It was further proved that Michael Harvey, for several years before the marriage of the defendant with Elizabeth Williams, and for many years thereafter, was an acting justice of the peace for Randolph County, and was known and acted as such, and the records of the court of pleas and quarter sessions of that county proved that, five years before the marriage, he had, in open court, taken the oaths of office as a magistrate. It was then proved by persons who were present that the defendant was married to Elizabeth Robbins in Randolph County in 1832, and that the ceremony was performed by one James Hodgins, who, it was proved, was an acting justice of the peace of Randolph County at the time he performed the ceremony.

The defendant offered evidence to show that he acted in ignorance of the law, and that he was advised by several persons that his marriage with Elizabeth Williams was void for the want of the clerk's license. This testimony was rejected. He further contended that there was no legal evidence to show that either Michael Harvey or James Hodgins was a justice of the peace for Randolph County at the time they respectively performed the ceremony; that the only evidence which could be received of the fact was the Governor's commission.

The court charged the jury, if they believed the testimony, the
(25) defendant was guilty. He was convicted, and appealed.

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

NASH, J. We see no error committed by the presiding judge. The testimony tendered by the defendant to show that he thought and believed his first marriage to be void for the want of a license was properly rejected by the court. The law of this State, Rev. Stat., ch. 71, sec. 2, authorizes and empowers the clerks of the several county courts to grant marriage licenses, upon the applicant's giving bond and security agreeably to its provisions; but if a marriage is solemnized by a minister of the gospel or a magistrate, without a license, though he may subject himself to a penalty, the marriage is, notwithstanding, good to every intent and purpose. There can be no doubt, then, that the marriage between the defendant and Elizabeth Williams was legal and valid, although no license had been obtained from the clerk. It is a well settled principle that ignorance of the law excuses no criminal act. It is a maxim, *Ignorantia juris, quod quisque tenetur scire, neminem excusat.* Every person is presumed and bound to know the law. Thus *Justice Blackstone* states, if a man thinks he has a right to kill an excommunicated or outlawed person wherever he meets him, and does so, it is murder. 4 Bl. Com., 27. In this case the testimony was properly ruled out. The defendant's ignorance, if it really existed, might well be addressed to the court in mitigation of the punishment, when any discretion was given by the law.

We agree with his Honor in his charge. It was necessary for the State to prove a legal marriage between the defendant and Elizabeth Williams, and the performance of the ceremony between him and Elizabeth Robbins by a person duly qualified. It is not denied that the ceremony in each case was performed by the individual it is (26) alleged did perform it, but it is contended that there was no legal evidence that Michael Harvey and James Hodgins were justices of the peace at the time they officiated, and that the only competent evidence to prove the fact was the commission from the Governor. It was proved that both those individuals, at the time they performed the ceremony and before and after for a length of time, were and had been acting justices of the peace for the county of Randolph. To prove a general allegation that a person holds a particular office or situation it is usually sufficient to prove his acting in that capacity, 2 Star. Ev., 218. In the case of peace officers and justices of the peace it is sufficient to prove that they acted in those capacities, even in a case of murder. *Berryman v. Wise*, 4 Term, 366, per *Justice Buller: Gordon's case*, Leach, 581; *Rex v. Shelby*, Leach, 381; *Rex v. Biggs*, 3 P. Will., 427; *Rex v. Verelst*, 3 Camp., 432. In *Gilliam v. Reddick*, 26 N. C., 370, the principle is by the Court stated to be that the acts of an officer *de facto* acting openly and notoriously in the exercise of an office for a considerable length of time must be held as effectual, when they concern the rights of third persons or the public, as if they were the acts of rightful officers. Here

the two individuals, Michael Harvey and James Hodgins, had been notoriously and for a considerable time, both before and after performing the marriage ceremonies in this case, acting as justices of the peace for Randolph County, and it must be taken that they were at that time justices of the peace, until the contrary be shown. The marriage was proved by persons who were present, and in *King v. Allison,* 1 Eng. Cr. Cases, it was decided that a marriage so proved was valid, although there was no proof of the registration of the marriage or of any license or publication of banns. That was a prosecution for bigamy.

The objections made in behalf of the defendant cannot avail (27) him.

PER CURIAM. No error.

Cited: Holmes v. Marshall, 72 N. C., 40; *S. v. Parker,* 106 N. C., 713; *S. v. Davis,* 109 N. C., 782.

LEROY SPRINGS v. BAKER IRWIN.

1. The county court has no right to appoint an administrator with the will annexed, when there is an executor, laboring under no disability, until the renunciation of the executor, and such renunciation must appear of record.
2. Such an appointment is not merely voidable; it is absolutely void.

APPEAL from MECKLENBURG Fall Term, 1845; *Pearson, J.*

This case, which was an action of detinue for a negro named Moses, was as follows: A man by the name of Flinn died in 1840, having duly made and published in writing his last will and testament, in which one Williamson was appointed executor. At May Term, 1840, of Mecklenburg court of pleas and quarter sessions this was duly proved, and at October term of said court in the same year administration with the will annexed was granted to the plaintiff. The letters set forth the death of Flinn and his leaving a will. Immediately upon the death of Flinn, Williamson, the executor, took into his possession the stock and farming utensils of his testator, and sold them at public auction, before the term at which the will was proved. The letters of administration did not show that Williamson, the executor, ever had renounced his right (28) to execute the will, nor did the record of the county court, which is made a part of the case, so state. But parol evidence was offered by the plaintiff to show that he was at court during the session of October, at which the administration was granted, and that he did

actually renounce his right, though it did not appear upon the record. This testimony was objected to by the defendant, but was received by the court, subject to the objection.

No more of the case is stated than is necessary to show the ground upon which the Supreme Court proceeds in its judgment. The defendant objected that the plaintiff could not maintain his action because his appointment as administrator with the will annexed was absolutely void. His Honor who tried the case was of opinion that the plaintiff's appointment as administrator with the will annexed, being a special administration, was not void, but voidable, and, until repealed by the proper authority, invested the plaintiff with all the rights and powers of such an administrator. The jury found a verdict for the plaintiff, and the defendant appealed.

Osborne and Boyden for plaintiff.
Alexander for defendant.

NASH, J. In the opinion of this Court, the presiding judge erred in deciding that the letters of administration granted to the plaintiff are merely voidable; we consider them void. We so believe for the reason that while the facts remained as they were when the court acted, the latter had no legal power to grant any species of administration upon the estate of Flinn; the case was not within their jurisdiction. The executor to a will, laboring under no disability, alone has the power and authority to administer the assets of the testator. If he be a minor or a lunatic, or beyond the jurisdiction of the court, the latter may appoint a temporary administrator, but not a general one. The powers of the one are essentially different from those of the other, and (29) if the latter be granted in such a case the letters are void. In the language of the Court in *Slade v. Washbourn*, 25 N. C., 562, they are a nullity. There the letters were declared void because they were general and were granted during a contest on the probate of the will. In the case now before us the letters of administration recite the existence of the will of Flinn, and are silent as to whether it had been admitted to probate or not, nor do they show that there was no executor appointed in it, or, if there was or had been one, his death or renunciation. The law empowers the court to grant a general administration only in cases of intestacy, and provides that where a person shall die "having made a will, and the executor shall refuse to prove the same or qualify as such, administration shall be granted," etc., 1 Rev. Stat., ch. 46, sec. 2; and the letters upon their face must show the reason of their being granted. It appears from the case that there was an executor, and that he was still in existence at the time the plaintiff was appointed administrator with the will annexed. Although it is the duty of a person appointed

to the executorship of a will to bring it forward to the proper tribunal for probate, he cannot be compelled to accept the office, but may renounce his right to qualify. This renunciation may be made by the executor in open court or by letter or other writing addressed to the court and proved to their satisfaction. In either case it must be made a matter of record, and the letters of administration, which are but a transcript of the record, must set it forth, as showing the power and authority of the court to grant them. In subsequent proceedings the letters constitute the only evidence of the fact; parol evidence cannot be received. 1 Will. Exrs., 153; *Slade v. Washbourn,* 23 N. C., 561; *Stabbins v. Lathrop,* 4 Pick., 23; *Commonwealth v. Mather,* 16 S. & R., 416. If, therefore, the letters show that there is a will, and the existence of an execu-
(30) tor be unknown, or before his renunciation, the court cannot grant letters of administration with the will annexed. If they do, the letters are void and confer no authority or power upon the administrator. *Abram v. Cunningham,* 2 Lea., 182; *Graysbrook v. Fox,* Plow., 276; *Mitchell v. Adams,* 23 N. C., 302. His Honor received parol evidence, subject to the objection made, that Williamson had renounced. Of his error he evidently became aware, for he does not notice it in his opinion, but places his decision upon the ground that, though the court could not grant a general administration, they might a special one. If by special his Honor meant a limited one, it *might* be so. But the Court in this case does not grant a limited but a general administration, to administer the assets according to the disposition of them by the testator.

We are of opinion that the letters of administration with the will annexed, under the circumstances of this case, are null and void.

PER CURIAM. *Venire de novo.*

Cited: London v. R. R., 88 N. C., 588; *Shober v. Wheeler,* 144 N. C., 407.

DEN EX DEM. JESSE HARPER v. HENRY BURROW.

1. A deed of trust for land need not be proved, on the trial of an action of ejectment, by a subscribing witness. The registration is sufficient *prima facie* evidence of its execution.
2. The testimony of a witness on a former trial, where the present plaintiff and defendant were not parties, cannot be given in evidence, though that testimony was against his own interest.
3. A witness may be compelled to testify in a civil suit, though his evidence may militate against his own interest.

APPEAL from DAVIDSON Fall Term, 1845; *Dick, J.* (31)

Ejectment. The plaintiff claimed title under a deed of trust made by the defendant to Jesse Harper, the lessor in one of the demises contained in the declaration. To support his title, the deed, which had been duly registered, was offered in evidence, and its reception was opposed on the ground that, before it could be read in evidence, it ought to be proved by the subscribing witnesses. The objection was overruled by the court, and the deed was read to the jury. The defendant objected to the plaintiff's recovery, for the alleged reason that the defendant at the time he executed the deed of trust was *non compos mentis,* and the deed, therefore, void. To sustain his objection it was alleged that, several years before, the defendant had been tried in Superior Court of Rowan upon a charge of murder, and that General Gray, on the trial, was introduced as a witness and proved his insanity; and he offered to prove, by witnesses who were present and heard General Gray examined, what he swore to. The testimony was rejected by the court, and the jury, under the charge of the presiding judge, returned a verdict for the plaintiff.

The defendant moved for a new trial, first, because the deed of trust was improperly admitted in evidence; and, secondly, because of the rejection of the evidence to show General Gray's testimony in the former trial.

The new trial was refused, and judgment being rendered against the defendant, he appealed.

Iredell for plaintiff.
No counsel for defendant.

NASH, J. The Court concurs with the presiding judge on both points. The deed of trust, so far as this case is concerned, is a conveyance of land, and, under the provisions of the act of Assembly, Rev. Stat., ch. 37, sec. 2, can be read in evidence on its registration without (32) producing the subscribing witnesses. Such has been the uniform construction given to the act by our courts, and such their uniform practice. With respect to slaves the law is different. Section 21 provides that on all trials at law for a slave, when a written transfer is offered in evidence its due and fair execution shall be proved by a subscribing witness. *Andrews v. Shaw,* 15 N. C., 71. In this case the deed was duly proved, and has been duly registered, and is properly certified by the proper officer. We think the testimony offered to show what had been testified to by General Gray upon the trial of the indictment against the defendant was properly rejected. It is a general rule of evidence that the best which the nature of the case admits of, and which is in the power of the party, shall be produced; and the jury trying a cause

cannot, without the consent of parties, listen to any evidence except it be given on oath. These two rules exclude all hearsay evidence but in a few excepted cases. Among these are general reputation and pedigree. So, also, what a witness has sworn on a former trial between the same parties, on the same subject-matter, may, in case of his death, be proved in chief by any person present and who heard his testimony; so, what a party to the record has said concerning the matter in controversy is always evidence against him, but not against a third party when uttered in his absence; nor does this come within any of the excepted cases. But a full and complete answer to the proposition of the defendant is that General Gray is alive and could have been called by the defendant to the fact he wished to prove, and neither of the parties claim under him. We say he is alive because the case does not state that he is dead. In looking into the deed of trust, we find that a debt due to him from the defendant is secured in it, and he is a party to the deed. He could not, then, perhaps, have been called by the plaintiff to sustain the (33) deed, because he would have been securing a fund to which with others he was entitled; but he was unquestionably a competent witness to attack the deed, because he would be swearing against his interest. In England, up to 46 George III., ch. 37, it was a vexed question whether a witness was bound to answer a question when the answer might expose him to civil liabilities. Contradictory decisions were made. To remove the doubt and declare the law, that act was passed. 1 Stark. on Ev., 141. In *Jones v. Lanier,* 13 N. C., 481, this Court declare such was the law before the passage of that statute, and so decide. General Gray, then, if called as a witness, could not have protected himself from answering the defendant's questions on the ground that the answer might subject him to pecuniary loss. Nor is the principle of its being hearsay evidence weakened by the fact that what was said by General Gray was on oath on the trial of the defendant. If General Gray had been dead, the testimony offered would not have been competent, because the real plaintiffs in this case were not parties to that suit; it was *res inter alios acta.* The testimony of a witness given in a case after his death can be proved in chief only between the same parties when the same matter is in litigation, for the reason that it would otherwise be made to affect others who had no opportunity of cross-examining the witnesses, which is one of the ordinary tests provided by law for the ascertainment of truth in courts of justice. 1 Stark. Ev., 34.

PER CURIAM. No error.

Cited: *Wilder v. Mann,* 58 N. C., 67; *Bryan v. Malloy,* 90 N. C., 510.

(34)

JOHN H. JACKSON v. HENRY G. HAMPTON.

A sheriff was bail for A. and B., against whom there was a joint action. A *ca. sa.* issued upon the judgment against them. B. was not to be found, but the *ca. sa.* was executed on A., and then the sheriff voluntarily permitted him to escape, but afterwards retook him. *Held*, that this recaption was unlawful, and that the assent of the plaintiff, after such recaption, that A. should not be held in custody did not operate as a satisfaction of the judgment, nor did it deprive the plaintiff of his remedy against the sheriff as the bail of B.

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

The plaintiff recovered a judgment against Dabney Walker and Samuel Forkner, in which case the defendant became the special bail of each of those persons by reason that he was the sheriff who served the writ and failed to return a bail bond. The plaintiff sued out a *capias ad satisfaciendum* and placed it in the hands of the defendant, who returned it "Not executed on the defendant Dabney Walker, and the defendant Samuel Forkner not found." Thereupon the plaintiff commenced this suit by a *scire facias* against Hampton as special bail of Forkner, and the defendant pleaded, among other things, that one of the debtors, Dabney Walker, was taken by the sheriff on the *ca. sa.* and was discharged by the plaintiff, and thereon issue was joined.

On the trial the defendant offered Thomas B. Wright as a witness, and he deposed that he, as the defendant's deputy, arrested Walker on the *ca. sa.* and very soon thereafter let him go at large in order that he might procure sureties in a bond for his appearance at the return of the writ to take the benefit of the act for the relief of insolvent debtors; that on the same day he informed the plaintiff of what had been done, and the plaintiff then instructed him not to take the bond, and told him that he did not wish the *ca. sa.* executed on Walker. He further (35) deposed that, at the return of the writ, he had Walker again in custody, and would have returned "Executed" as to him had not the plaintiff and his attorney then directed him to discharge Walker; whereupon he did so, and made the return as before set forth.

Upon that evidence the counsel for the plaintiff insisted that the escape of Walker was a voluntary one, and that it could not protect the defendant from his liability as the bail of Forkner, upon his return of *non est inventus* as to him; and that the directions of the plaintiff given after such voluntary escape, that the writ should not be then executed upon Walker, or that Walker should be detained in custody on that writ after he had been retaken thereon by the sheriff, did not amount to a satisfaction of the debt nor exonerate the defendant from liability as the bail of Forkner. But the court held, and instructed the jury, that, notwithstanding the previous escape of Walker, whether it was negligent

or voluntary, the directions of the creditor, after the sheriff had taken the debtor again into custody, that he should not be detained, and the discharge of the debtor by the sheriff in obedience to those directions, worked a satisfaction of the debt, and was a bar to this action against the bail of the other joint debtor, Forkner. There was, accordingly, a verdict and judgment for the defendant, and the plaintiff appealed.

Morehead for plaintiff.
Boyden for defendant.

RUFFIN, C. J. It is very true that if a creditor discharge one joint debtor from arrest on execution the debt is thereby satisfied, and he can neither proceed against that or any other debtor on the judgment, nor their bail. *Bryan v. Simonton,* 8 N. C., 51. But that, necessarily, supposes the debtor to be under a lawful arrest; for the creditor cannot be held to be satisfied of his debt because he will not persist in nor (36) sanction an illegal and false imprisonment. Now, in this case, several propositions are very clear which constitute the imprisonment of Walker one of that character. There is no doubt that letting Walker go at large after having first taken him was an escape; and, being by the express assent of the sheriff's deputy, Wright, it was a voluntary escape. Therefore, the sheriff could not retake him, and was liable to Walker's action for false imprisonment for so doing. *Spencer v. Moore,* 19 N. C., 264; *Atkinson v. Jameson,* 5 Term, 25. It is true, the creditor may, if he chooses, have another *capias ad satisfaciendum,* or have debt on the judgment. *Jones v. Pope,* 1 Saund., 34, note 1. But certainly he is not bound thus to proceed, but may at once look to the sheriff on his liability for the escape, or look to any other security he may have; and his omission or refusal to retake the debtor who escaped, either on the same or another execution, cannot amount to discharging him from lawful arrest. If it did, it would discharge that debtor as well as the other. Then, inasmuch as the sheriff had no power of himself, and merely by force of the writ, to retake Walker, and inasmuch as the creditor was not obliged to do it, and might, as he did, direct the sheriff not to arrest him again, the conclusion must be that the creditor had a right, without affecting any other remedy for his debt, to declare to the sheriff, after the second and unlawful *arrest* of Walker by the sheriff of his own accord, that he was acting without the creditor's authority, and that he did not mean to legalize the imprisonment by giving to it his assent. Supposing, therefore, that the plaintiff, either upon the return of Walker into custody or after his being a second time taken by the sheriff, might have admitted him to be in execution, so as to make the sheriff liable for an escape subsequent thereto, yet, to have that effect, some act in recognition of such second imprisonment on the part of the

creditor was indispensable to give it the force of a legal imprisonment as respected the rights of the creditor; for in an action for (37) a voluntary escape it is no answer that the sheriff retook the debtor before suit. His refusal, merely, to allow the sheriff in such a case the advantage of his authority as creditor cannot be construed into a turning and discharging the debtor out of custody by the creditor himself. Far from it, for the law forbade the sheriff to retake the debtor, and he was entitled to his discharge by law, without the creditor's saying or doing anything. The plaintiff, it appears, then, did no wrong to Walker, nor to the other joint debtor, Forkner, nor to the defendant as the bail of the latter. Nor would the defendant's liability as bail of Forkner (as to whom *non est inventus* was returned) be affected by any return the sheriff could have made, under the circumstances, as to Walker; for if he had returned *Cepi corpus*, and actually committed Walker to prison, still the plaintiff might demand the body of his other debtor and take judgment against his bail for the want of producing him. And if he had returned the voluntary escape of Walker, according to the truth of the case, there would be the same reason why the creditor might enforce the payment from Forkner or from the sheriff, who, while bail for Forkner, voluntarily let Walker at large. The plaintiff might, indeed, have sought his remedy by an action for the escape, but he is not confined to that; and if he had sued for the escape, it would have been just as good an answer to that action that the plaintiff might have raised his money out of Forkner or out of the defendant as his bail, as it is an answer to the present action against him, as bail of one debtor, that he was liable for the escape of the other debtor. The whole wrong in this case is on the side of the defendant, according to his own evidence, which distinguishes this case from those of *Trice v. Turrentine,* 27 N. C., 236, and *Waugh v. Hampton, ibid,* 241, according to the grounds of decision stated in those cases. There the creditor ordered the sheriff originally not to take one of the debtors, and the majority of the Court thought he was bound to seek payment from all the debtors (38) before he could go on the bail of either. Here the creditor directed by his process all the debtors to be taken, as he was bound to do, and one of them was taken and turned loose by the sheriff of his own accord, and without the knowledge of the creditor. Certainly, the creditor is not bound to go against the debtor a second time before resorting to the other; for, if so, he would by successive voluntary escapes of one debtor be delayed indefinitely as against the other. Instead of the creditor ordering the sheriff not to take one of the debtors originally on the *ca. sa.* in this case, he only directed him not to take him a second time, after the sheriff had once let him go out of custody.

It is very clear that the plaintiff did not, as pleaded, discharge Walker from lawful imprisonment on his execution, and, therefore, that the

verdict on that issue should have been for the plaintiff. And it is equally clear that the whole wrong in this case is on the side of the defendant, and that in justice and law he is chargeable to the plaintiff as the bail of Forkner.

PER CURIAM. *Venire de novo.*

Cited: Kelly v. Muse, 33 N. C., 187.

THOMAS ROWLAND, JR., v. DOCTOR F. MANN ET AL.

1. In an action of replevin, if the defendant wishes to put in issue the title of the plaintiff, he must plead that the title is in himself or some other person by whose authority he took the property. Where the plea is only *non cepit*, etc., the plaintiff's title is not denied.
2. In an action of replevin for slaves the jury, if they find for the plaintiff, must in their verdict assess the value of each slave.

APPEAL from STANLY Fall Term, 1845; *Caldwell, J.*

(39) This was an action of replevin for negroes Mary and Bill. The defendants pleaded the general issue, and, on the trial below, the jury found a verdict for the plaintiff on the issue joined, "and assessed his damages to $500." The plaintiff had not shown any title to the negroes in controversy. From the judgment rendered on the verdict, the defendants appealed.

No counsel for plaintiff.
Iredell for defendants.

NASH, J. This is an action of replevin to recover two negroes. The only plea, the general issue, which is *non cepit modo et forma*. On the trial below it was insisted by the defendants that the plaintiff had not shown any title to the negroes in himself. If it had been his intention to put in issue that question, he ought to have pleaded title in himself, or some other person by whose authority he took the negroes. Under such a plea it would have been incumbent on the plaintiff to show he had the title. In this case it was not necessary. The defendant had not denied it by his plea. Under the plea of *non cepit*, all that the plaintiff has to do is to prove the taking or having the goods, or part of them, in the place specified. As the defendant, under this plea, merely denies the taking, he cannot controvert the plaintiff's title. 2 Stark. Ev., 714, 715; 1 Ch. P., 482; 1 Saun., 347, note 1. The jury by their verdict have found that the defendants did take the negroes *modo et forma*.

In looking into the record, however, we find that the verdict, from inadvertence, is not so taken as to authorize any judgment upon it. The

jury say "they find for the plaintiff, and assess his damages to $500." The writ has set forth the value of each of the slaves, and the jury in their verdict, as in an action of detinue, should have found the value of each slave separately. The act of 1828, 1 Rev. Statutes, ch. 101, sec. 5, directs that when the plaintiff shall recover, "final judgment (40) shall be rendered against the defendant, and his sureties on his bond, for such *value* as shall be assessed by the jury upon such slave or slaves demanded by the writ," etc. It is manifest, then, that upon this verdict the court can render no final judgment, because *that* must be for the value of the slaves as fixed by the jury. We should not disturb such a verdict, but direct a writ of inquiry to ascertain the value of the negroes, *Key v. Allen,* 7 N. C., 524, if we were satisfied that the want of an assessed value by the jury was the only error in the verdict; but we cannot believe that the verdict as it appears on the record before us expresses the real finding of the jury. Six hundred and fifty dollars is the value of the slaves, as sworn to by the plaintiff. We say the sworn value, because the law requires that the clerk in issuing the suit shall annex to the description of each slave a value double to that *sworn to,* and in the writ the value of both is stated to be $1,300. The case states that the negroes, *shortly* before the bringing of the writ, went into the possession of the defendants. Section 6 of the act of 1828 requires the court, when the plaintiff shall effect a recovery in a writ of replevin, to give him a judgment for double the real damages assessed by the jury for the taking and detention. If the verdict were permitted to stand, the court, in obedience to the act, must give judgment for the plaintiff for $1,000, and that for the damage sustained by the plaintiff for the detention of two negroes whose real value is but $650. We cannot believe that such was the understanding or intention of the jury. It may, however, have been so; but as they have omitted an essential part of their duty, we prefer ordering a *venire de novo* to directing a writ of inquiry.

PER CURIAM. *Venire de novo.*

Cited: Vinson v. Knight, 137 N. C., 412.

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(41)

JAMES F. ARNETT AND WIFE *v.* ANTHONY A. WANETT.

1. A voluntary deed is not void as to creditors when the donor retains sufficient property to pay his debts, and out of which the claims of the creditors may be satisfied.

2. The act of Assembly of 1840, ch. 28, secs. 3 and 4, applies to voluntary deeds made before the passage of that act as well as to those made subsequently.

APPEAL from BRUNSWICK Fall Term, 1845; *Caldwell, J.*

Trover to recover from the defendant the value of a negro man named Abram, belonging to the plaintiffs, as they allege, and converted by the defendant. The facts are as follows: In 1839 Hannah Locke gave by deed to the plaintiffs, her grandchildren, eleven negroes, and among them the one in controversy. The deed bore date in May, 1839, and at that time Hannah Locke owed to the defendant a debt of about $300, and owned, over and above the eleven negroes so conveyed, a tract of land and eight or nine negroes, the whole worth between $2,000 and $3,000. In December, 1840, the defendant obtained a judgment in the court of pleas and quarter sessions of Brunswick County upon his claim against the donor Hannah, and the execution, by his direction, was levied on the land, which was worth $600. The sale of this land was postponed by order of the plaintiff in the execution, the present defendant, and a *venditioni* issued, which was also by him postponed; the levy was then discharged, and a *fi. fa.* issued, and was levied by the sheriff on the negro Abram. At the sale the defendant purchased. The debt due the defendant was the only one at that time or at any other, as far as the case shows, which was owing by the donor. On behalf of the defendant it was insisted in the court below that the deed under which the plaintiff claimed the negro was fraudulent and void in law as to creditors
(42) and purchasers; and he being a creditor at the time of the gift, and purchaser, it was void as to him. He further insisted that the deed being made in May, 1839, the act of 1840-41 did not affect the question, but left it at common law. The presiding judge being of opinion that the act of 1840-41 did operate upon the deed, it was submitted to the jury as a question of fact, to be decided by them, as to the intent with which it was made. The jury found a verdict for the plaintiff, and from the judgment thereon he appealed.

J. H. Bryan and Warren Winslow for plaintiff.
Badger and Strange for defendant.

NASH, J. The case has been argued before us upon the same grounds upon the first point. Counsel for the defendant has urged upon us *O'Daniel v. Crawford*, 15 N. C., 197, as establishing the doctrine that a voluntary gift is void by the common law against all debts of the donor existing at the time. We do not agree with the counsel in this construction. The error has been occasioned by some strong expressions used by the judges deciding the case, without properly attending to others intended to qualify and apply them. Thus *Gaston, J.*, at page 204, adopts the language of *Lord Hardwicke* in *Townsend v. Windham*, 2 Ves., 10: "I know of no case on the 13 Elizabeth where a man, indebted at the time, makes a voluntary conveyance to a child and dies, but that

it shall be considered a part of his estate for the benefit of his creditors." But in the preceding part of the sentence the judge shows in what sense he intends to apply it: "If in truth there be prior creditors yet unsatisfied, *and who have no means of satisfaction except out of the property attempted to be given away.*" That was precisely the state of facts in the case then before the Court. O'Daniel, the father, had given to his children the tract of land in question, being at that time (43) in debt. He reserved property to the amount of $500, all of which had been exhausted in payment of debts, leaving one small obligation undischarged. To satisfy this, the land was sold under execution, and the defendant Crawford purchased it. There was no other property of the donor out of which the debt could be satisfied, and the deed to the plaintiffs, when offered in evidence as conveying the title to them, if sustained, left the creditor without redress. The voluntary donees were seeking to enjoy the property of the debtor, the donor, leaving unpaid a just debt and one which was in existence at the time of the gift. Against such a result all the argument of the Court is directed. Thus, too, as further illustrating the leading idea of *Gaston, J.*, on page 205 he says: "But where the controversy is between a prior *creditor* and a voluntary donee, *when the prior creditor must lose his debt if the gift be held valid, then* the established rule is, if the deed be voluntary, the law says it is fraudulent." So the *Chief Justice*, in speaking of a voluntary conveyance generally: "It must be founded upon a design to exempt the estate from the claim of the creditor, for the act of making the conveyance can arise from no other intent, *and, inasmuch as no other fund replaces* the property so intended to be exempted, that intent is injurious to the unsatisfied creditor, and amounts to covin within the statute." It is evident, then, that *O'Daniel v. Crawford* does not justly bear the construction placed upon it by the defendant's counsel. But it does decide that when another fund replaces the property so conveyed, and remains subject and liable to the claim of the creditor in law, the voluntary conveyance is not fraudulent and void, for the creditor is not delayed or hindered in the collection of his debt; it is not *necessary* to take the property given to prevent an injury to the creditor. We should not have observed so minutely upon *O'Daniel v. Crawford* if it had not appeared from the argument of the counsel that it had been mis- (44) apprehended. That case was decided in 1833; and, in 1835, the same judges being on the bench, *Jones v. Young*, 18 N. C., 352, came before this Court, and they then put upon *O'Daniel v. Crawford* the same construction that is now given. The language of *Daniel, J.*, who delivers the opinion of the Court, is: "The creditor would have been entirely *hindered in getting his debt satisfied* if he could not have reached the fund covered by the voluntary conveyance." In the latter case the principle we are now considering was more distinctly announced. The

Court say: "The conveyance of the slave by Reuben Jones to the plaintiff, being by *deed of gift,* is not necessarily an act fraudulent and void as to the creditors of the donor, if he had at the time of the gift, and left at the time of his death, other property sufficient to pay all his debts due and owing at the date of the deed of gift." This decision covers the whole ground occupied by the defendant upon this point. Hannah Locke, at the time she made her conveyance to the plaintiff, retained a tract of land worth $600—nearly, if not entirely, double the amount of her then indebtedness, and eight or nine negroes. The land still continued hers at the time the defendant attempted to collect his debt, for his execution, by his direction, was levied upon it. What had become of the eight or nine negroes retained by Hannah Locke we are not informed, nor has the defendant informed us why he withdrew his levy from the land, nor why he did not levy it on the retained negroes or some of them. It was incumbent on him to show they were not in her possession or not amenable to his execution. In accordance, then, with the decision in the cases referred to, the conveyance of Hannah Locke to the plaintiffs was not in law fraudulent and void.

(45) Whatever doubt, however, might have rested on this subject is removed by an act passed by the Legislature at their session of 1840-41, ch. 28, secs. 3 and 4. The preamble to section 4, which is the enacting one, is contained in the 3d. It declares: "Whereas it hath lately been made a question, where a person making a gift or voluntary settlement of property is at the time thereof indebted, whether the same is not in law and of itself fraudulent," etc., "and whereas upon such question conflicting judicial opinions have been pronounced, and it is highly expedient that the law should be certainly *declared* and future doubts prevented," therefore, etc., "it is enacted that no such gift or settlement by one indebted, etc., shall *hereafter be held or taken,*" etc. It is admitted, if this act has a retroactive operation, the defendant has nothing to complain of. But it is contended that its operation is prospective, and does not affect gifts made previous to its enactment; and the argument rests upon the proper construction to be given to the word *hereafter.* It is obvious to us that the word *hereafter* does not apply to gifts or settlements, but to the *judgments* to be pronounced upon them. Different and conflicting judicial opinions, according to the preamble, had then been pronounced, and doubts were entertained how the law was. *Hereafter,* says the act, no such gift or settlement, etc., "shall be held or taken to be fraudulent." How held or taken? Obviously, judicially—that is, shall not be pronounced so by a judge acting officially. We do not, therefore, think that the act of 1840-41 introduced any principle which the Legislature considered new, but was intended to remove all doubts as to what the law was, and to prevent, thereafter, conflicting opinions in our courts of justice on the subject.

In this view the judge was justified in pronouncing it a declaratory law. The charge of his Honor was intended to apply to the case before him, and not to lay down any rule to govern other cases not similarly situated; and, so viewed, we see no error in it.

Upon both points raised in the case we think the law is with the plaintiff, and has been by the presiding judge properly ad- (46) ministered.

PER CURIAM. No error.

Cited: Houston v. Bogle, 32 N. C., 503, 505; *Thacker v. Saunders,* 45 N. C., 146; *Taylor v. Eatman,* 92 N. C., 606.

SAMUEL DWIGGINS v. JOHN M. SHAW ET AL.

1. In construing an agreement there are no technical rules to determine whether its stipulations are dependent or independent, but every agreement is to be judged of according to its own terms and the nature of the transaction to which it relates, so as best to effectuate the intention of the parties.
2. The order in which the provisions are found in the instrument does not control the construction, but they will be transposed so as to effectuate the intention, which is to be collected from the order in point of time in which the several acts of the different parties are to be performed.

APPEAL from GUILFORD Fall Term, 1845; *Dick, J.*

Covenant on the following instrument, executed by the defendants to the plaintiff:

"On or before 1 August, 1844, we promise to make the number of fifty wheat fans after the Lomax model for Samuel Dwiggins, value received of him. Witness our hands and seals, this 30 January, 1844.

"The above-mentioned fans are to be made in a workmanlike manner. The said Dwiggins agrees to furnish the materials for the above mentioned fans on or before 20 February, 1844."

The breach alleged is that the defendants did not make the fans by 1 August, 1844, and the declaration does not aver that the plaintiff furnished materials for them. After *oyer,* the defendants pleaded (47) *non est factum,* performance generally, and also that the defendants had requested the plaintiff to furnish to them the materials for making the said fans, and that he refused and failed so to do; and thereon issues were joined.

On the trial the plaintiff offered, of course, no evidence that he furnished any materials, and the defendants moved the court to instruct the jury that for the want of it the plaintiff could not recover. But the court

was of opinion that the covenant of the defendants bound them to make the fans absolutely, and that the plaintiff need not show that he furnished the materials, and, therefore, refused the instruction.

The defendants then proved by a witness that in April, 1844, the defendants made for the plaintiffs ten fans out of materials furnished by him, and commenced several others, and were ready to make the number, but that they could not complete those which were begun nor make any others, for the want of materials, which the plaintiff failed to supply. The defendants then moved the court to instruct the jury that if they believed the witness they ought to find for the defendants. But the court held that such failure on the part of the plaintiff would give to the defendants an action on the covenant against the plaintiff, but did not excuse the defendants for not making the fans by the time appointed, and, therefore, that the plaintiff was entitled to recover. Verdict and judgment for the plaintiff for $113, and the defendants appealed.

Kerr for plaintiff.
Morehead for defendants.

(48) RUFFIN, C. J. The Court is of opinion that the instructions were erroneous. It seems impossible to mistake the meaning of the parties. In construing their agreement its stipulations are to be held to be dependent or independent, as will effect the apparent intention. Although the books are overloaded with adjudications upon the question, there are really no technical rules to govern us, but every agreement is to be judged of according to its own terms and the nature of the transaction to which it relates. Here it is clear that the engagement of the defendants was not absolute that they would make the fans at all events. Possibly, it might have been so held upon the words as the instrument seems at first to have been drawn, in which the defendants bind themselves "to make for" the plaintiff fifty fans. But that does not constitute the whole agreement, for before executing it the defendants added after the words of formal conclusion, these others: "The said Dwiggins agrees to furnish the materials for the above fans on or before 20 February, 1844"; and that addition modifies most materially the indefinite terms in which the agreement had been before concluded. Those words could not have been intended as a covenant on the part of the plaintiff, for the breach of which the defendants might have their action, since the plaintiff did not, in truth, execute the deed, but only accepted it. They were, therefore, intended to qualify the preceding engagement of the defendants, which from the generality of its form was susceptible of misconstruction, and to make it more specific in two particulars. The one was that, although the defendants were

"to make" the fans, that should not be held to mean that they were to make them out and out, but that they should make them out of the plaintiff's own materials—that is to say, that they construct them merely. The other was that, inasmuch as the plaintiff required the fans to be done by the 1st of August following, and it would require a considerable period to construct that number, they would only bind themselves to do the work by that particular day if the plaintiff would put the materials in their hands long enough to enable them to work them up by the day; and they fixed on 20 February, (49) 1844, as the latest day of delivery. Such is the plain common sense of the transaction, and a fair interpretation of the instrument. What is said about the acts of the plaintiff was not intended to give the other party an action against him, but to modify the engagements of the defendants themselves; and it so qualifies it as necessarily to amount to a condition precedent. The order in which the provisions are found in the instrument does not control the construction; for it is a trite observation that they will be transposed so as to effectuate the intention which is to be collected from the order in point of time in which the several acts of the different parties are to be performed. Now, as the plaintiff chose to furnish his own materials, and, therefore, to pay the defendants for making only, and as the defendants were to make the fans out of the plaintiff's materials, it follows, of necessity, that before the defendants could do anything, or be intended to do anything, the plaintiff must first find the materials with which the work was to be made.

But it was said at the bar that this construction must be wrong, inasmuch as it is to be collected from the agreement that the defendants had been paid, and that they ought not to keep the price without doing the work. With that we have nothing to do at present, as the only question now is whether this action can be sustained on the covenant. But suppose the defendants may retain the sum paid them, who is in fault? For if a person will hire another to work for him, and then will not give him any work to do, the employer has himself alone to blame. And if the defendants have been paid, it was for making fifty fans out of the plaintiff's materials, and for nothing more; and that they were ready to do. But the plaintiff wishes to recover from them as if they had been paid for making and had covenanted to make the fifty fans out of their own materials. Surely nothing could be more unjust or opposed to the meaning of the parties. The defendants were not to do a stroke of work but upon materials furnished by the plaintiff, (50) and as he furnished none, they have not broken their covenant.

PER CURIAM. *Venire de novo.*

Cited: Stafford v. Jones, 91 N. C., 195.

WILLIAM CLARK v. MARVEL M. EDNEY ET AL.

1. Where a plaintiff in a petition claims to be an assignee by a written instrument, whether he is so or not is a question of law for the court, not of fact to be submitted to a jury.
2. Where a paper under which a plaintiff in a petition claims to be an assignee does not on its face purport to be an assignment, but only an order for money, it is necessary that the alleged assignor or his personal representative should be a party to the petition, either plaintiff or defendant.
3. On a petition against administrators for a distributive share of an estate all persons entitled to distribution should be made parties.

APPEAL from HENDERSON Fall Term, 1845; *Bailey, J.*

The petition sets forth that Jane M. Townsend died intestate in the year ....., leaving a considerable personal estate; that administration was granted to the defendants, who took into their hands all the personal property; that James M. Townsend was one of the children of Jane M., and that he, for a valuable consideration, assigned to the petitioner all his interest as one of her next of kin; that more than two years (51) had elapsed after the qualification of the defendants, and that the petitioner had demanded of the defendants a settlement of the estate and a payment to him of the distributive share due to James M. Townsend, who is dead. He prays that the defendants may be decreed to account with and pay over to him what is due as such assignee of James M. Townsend, and prays process against the said defendants.

The defendants file a joint answer, admitting the death of Jane M. Townsend, and that they have been duly appointed her administrators, and have taken into their hands her personal property to the amount set forth in their inventories. They deny that the petitioner is the assignee of James M. Townsend, who is admitted to be one of the next of kin of Jane and entitled to a distributive share, and claim in their answer that the other children of Mrs. Townsend should be made parties. The assignment to Clark, under which he claims the distributive share of James M. Townsend, as set forth in his petition, is as follows: "Mr. Marvell M. Edney and R. R. Townsend: Please to settle with and pay over to William Clark all the amount in your hands belonging to me, and this shall be your receipt for the same." This paper was presented to the defendants by a person sent by the petitioner, and they refused to take it up or to recognize it as addressed to them in their representative characters, or as authorizing them to pay over to the petitioner the distributive share of James M. Townsend. At the time of filing this petition James M. Townsend was dead. The petition was filed in the court of pleas and quarter sessions of Henderson County, and, upon the coming in of the answer, was dismissed. Upon appeal to the Superior Court, replication having been taken, issues were made

up to be tried between the parties. At the Fall Term, 1845, issues were made up and tried. The issues were, Was William Clark the proper assignee of James M. Townsend? (2) Has the petitioner called on the defendants, as administrators, to pay his claim? These issues were tried by the jury and found for the plaintiff, whereupon the court decreed that the defendants should pay the plaintiff the sum of $33.14, and the defendants appealed. (52)

No counsel for either party.

NASH, J. Many orders and decrees are made in the hurry of business on the circuits which will not bear a strict scrutiny and which the Judge himself would not make if he had time for the least reflection. This case furnishes an instance. The presiding judge submits to the jury the question whether the petitioner was the assignee of James M. Townsend's distributive share. This was a question of law to be decided by him. After the jury had responded to the issues submitted to them, without any reference to the master to ascertain the situation of the assets and the amount due for the distributive share of James M. Townsend, the court decrees that the defendants should pay the plaintiff a certain sum. We think this was erroneous. But the proceedings are in themselves defective. At the filing of the petition James M. Townsend was dead. His representative is not made a party, nor are the other children of Mrs. Townsend, nor is any reason given why they are not. The petitioner claims to be the assignee of James M. Townsend. The paper which he alleges contains the assignment does not purport to be an express assignment of the drawer's distributive share; there are no words of conveyance in it; it is not addressed to the defendants in their representative character; it is but an order for the payment of what money of his might be in their hands. It is true, an order by one of the next of kin upon the administrator, such as the one in this case, may, under the circumstances, be held to be an equitable assignment of his distributive share. But when it is, as here, not upon its face an assignment, the person claiming under it, in order to recover, (53) must make the alleged assignor a party in order to ascertain its character. *Polk v. Gallant,* 22 N. C., 395; *Thompson v. McDonald, ibid.,* 463. But it was equally necessary to make the other children of Mrs. Townsend parties. It is ever the aim of a court of equity to do complete justice by deciding upon and settling the rights of all parties interested in the subject of the suit in order to prevent future litigation and to make the performance of the orders of the court perfectly safe to those who are compelled to obey them. Calvert on Parties, in Eq., 3. All persons, therefore, who are interested in the question, or concerned in the demand, ought to be made parties. *Ibid.,* p. 10. The other dis-

tributees of Mrs. Townsend are directly interested in the question and concerned in the demand. The fund sought to be divided is a joint one, in which all the next of kin have an interest. The other children ought to have been parties, and no reason is assigned why they are not. *Hobbs v. Craige,* 23 N. C., 339; *Hewson v. McKenzie,* 16 N. C., 463; Calvert on Parties, in Eq., 3, 10. This objection can as well be taken on the hearing as by plea. The case is before us for final hearing upon an appeal, and we must decide it as it is.

PER CURIAM. Reversed, and petition dismissed.

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(54)

THOMAS SIZEMORE v. SAMUEL C. MORROW.

1. The construction of a written document is purely a matter of law, in all cases, where the meaning and intention of the parties are to be collected from the instrument itself.
2. Where A. sold a tract of land to B., made him a conveyance and took his bond for the purchase money, and afterwards B. reconveyed to A., who entered into bond that he would convey to B. whenever the purchase money should be paid, and it was further stipulated that if the purchase money were not paid B. should pay a certain rent: *Held,* that this latter contract rescinded the first, and that the bond given under the first contract was discharged at law.

APPEAL from PERSON Fall Term, 1845; *Dick, J.*

Assumpsit on the following case: The plaintiff was the owner of a house and lot in the town of Roxboro, which he sold and conveyed to the defendant at a stipulated price, to secure which the defendant gave him his bond for $350. This bond Sizemore, for valuable consideration, transferred by indorsement to the Messrs. Webb. Afterwards, and while the above bond was the property of the Messrs. Webb, these parties entered into a new agreement. It had been a part of the original contract that the defendant Morrow should give Sizemore a surety on his bond. This he failed to do, and becoming embarrassed in his circumstances, the plaintiff became uneasy lest his other creditors, who were pushing him for their claims, should levy upon and sell the house. He proposed to the defendant to give him a deed of trust upon the premises, which he refused. It was thereupon agreed between them, upon the suggestion of their legal adviser, that the defendant Morrow should reconvey the premises to the plaintiff, and that the latter should give him a bond to make title when the purchase money was paid by the defendant. Morrow, accordingly, reconveyed the premises to Sizemore, who at the same time executed to him his bond for title, which

contains the following stipulation: "It is further understood between the parties, and is a part of this contract, that if the said (55) Morrow fails to pay the purchase money, he is to pay $35 a year rent, and if he pays the rent, he is to pay no interest on the bond. The rent to commence from the time said Morrow took possession." The Messrs. Webb brought suit against these parties on their bond, and recovered judgment thereon, on which execution issued, and the property of the defendant was sold and the sum of $200 raised. The plaintiff paid $175, and this action is brought to recover that sum, as paid to the use of the defendant.

On the part of the defendant it was insisted that, in law, the bond held by the Messrs. Webb, as between these parties, was discharged by the second agreement. The judge charged the jury that if by the arrangement of the 15th of October it was the intention of the parties that it should be a satisfaction of said bond, then in law it was a satisfaction. It was a question of fact for them to determine, whether such was the "intention of the parties."

The jury found a verdict for the plaintiff, and the defendant appealed.

E. G. Reade for plaintiff.
Venable for defendant.

NASH, J. We think in his instruction to the jury his Honor erred. The construction of a written document is purely a matter of law in all cases when the meaning and intention of the parties are to be collected from the instrument itself. Thus the construction of records and deeds, and other express contracts, is matter of law for the court, and not of fact for the jury. *Macbeth v. Holdiman,* 1 Term, 180; 1 Stark. Ev., 463. If the intention of the parties in making a contract is a matter of fact for the jury, then that intention, being out of the deed, could be proved by parol, and parol evidence would be receivable to alter (56) the legal construction of the instrument. This cannot be. See 2 Stark. Ev., 553; *Hoar v. Graham,* 3 Camp., 57; *Hogg v. Smith,* 1 Taun., 347.

We might satisfy ourselves by stopping at this point, and for this error send the cause back to another jury; but as we are of opinion that the plaintiff cannot recover in this action, we will proceed to state our reasons. The first contract, made on 3 March, 1842, was an executed contract. Sizemore had made his conveyance to Morrow, and the latter had executed his bond for the purchase money. The lot and houses were the property of Morrow, to every intent and purpose, free from any lien in favor of Sizemore. In October following the parties enter into a new contract. Morrow conveys the same premises back to Sizemore, the latter giving him a bond to make title when the purchase

money shall be paid. If the bond had stopped here, it might well be questioned whether the first contract in all its parts was rescinded, and whether the transaction was not merely in the nature of a mortgage. But it goes on, and by the latter clause alters the character of the original contract entirely; for if Morrow does not pay the purchase money, it is made a part of the contract that he shall pay rent for the premises from the time he took possession. This puts it in the power of either to repudiate the contract of purchase at law, and makes Morrow the tenant of Sizemore. This latter contract is so essentially different from the first that the two cannot, in any of their parts, *stand together,* and the bond of 2 March, being a part of the first contract, must be considered, as between these parties, discharged at law. What may be the equities of these parties we cannot, sitting in a court of law, decide.

PER CURIAM. *Venire de novo.*

Cited: Miller v. Hahn, 84 N. C., 229; *S. v. Poteet,* 86 N. C., 614; *Harris v. Mott,* 97 N. C., 106; *Wilson v. Cotton Mills,* 140 N. C., 55.

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(57)

THOMAS D. BENNEHAN v. JAMES WEBB ET AL.

1. In the construction of bonds, if the bond be a single one it is to be taken most strongly against the obligor; but when a condition is annexed to it which is doubtful, as that is for the ease and favor of the obligor, it is to be taken most strongly in his favor.
2. In the construction of the conditions the court will look to the meaning of the parties so far as it can be collected from the instrument itself, and, when the intention is manifest, will transpose or reject insensible words and supply an accidental omission in order to give effect to the intention of the parties.
3. When the condition of a bond is preceded by the recital of a particular fact, the recital will operate against the parties to the bond as a conclusive admission of the fact recited; and this recital will frequently operate as a restraint of the condition, though the words of it imply a larger liability than the recital contemplates.
4. The State, under the act of 1840-1841, entitled "An act to secure the State against any and every liability incurred for the Gaston and Raleigh Railroad Company, and for the relief of the same," cannot recover upon any bond given under the said act, unless it is proved that the whole amount of $500,000 had been secured by bonds.

APPEAL from ORANGE Spring Term, 1845; *Caldwell, J.*

This is a case agreed, and is as follows: The plaintiff brought an action of debt on a bond executed by the defendants and Archibald Yarborough, deceased. The defendant Yarborough pleaded fully admin-

istered, and, to sustain his plea, showed that Archibald Yarborough, on 30 March, 1841, executed to the State his bond for the sum of $5,000, and on 15 April executed another bond to the State for $1,600, each having the same condition. From the condition of the bond as set forth in the case agreed it appears that by an act of the General Assembly ratified 7 January, 1839, and entitled "An act for the relief of the Gaston and Raleigh Railroad Company," the president and directors were authorized to issue their bonds for a sum not exceeding $500,000, payable to the Public Treasurer, who was authorized to indorse them upon condition that the president and directors, before (58) they were received, should execute a mortgage to the State, conveying all the property of the company, both real and personal, and pledge the profits of the road, or so much thereof as might be necessary, for the semiannual payment of the interest on the bonds; all of which was done. It was further agreed that the General Assembly, by an act ratified 12 January, 1841, entitled "An act to secure the State against any and every liability incurred for the Gaston and Raleigh Railroad Company and for the relief of the same," authorized the stockholders to execute to the State a bond for an amount in proportion to the stock respectively held by them and other individuals to subscribe such an amount as they should choose, secured by bond to the State, to indemnify the State against her liability, as stated, "provided such bond or bonds shall, in the whole, amount to the said sum of $500,000." Under this last act Archibald Yarborough executed the bonds set forth in the case, and upon which a suit was instituted against the defendant, Richard F. Yarborough, his executor, and which is now pending in the Superior Court of Franklin. "If, upon the facts agreed, the State has a prior right of satisfaction as against the plaintiff, then the defendant has no assets; if not, then he has," etc. The presiding judge rendered judgment upon the case according to the case agreed, but in favor of the defendant Yarborough, upon his plea of fully administered. The plaintiff appealed.

Waddell for plaintiff.
Badger, Haywood, and Norwood for defendants.

NASH, J. We are of opinion that there is error in that part of the judgment affecting the assets of Archibald Yarborough in the hands of his executor.

The members of this Court upon whom has devolved the responsibility of deciding this case greatly regret that in the performance of this duty they have not been aided by an argument at (59) the bar, and still more that they have been deprived of the assistance of the *Chief Justice,* who, being connected with some of the parties,

has declined to sit in the cause or interfere in its decision. Under these circumstances we consider it not only our privilege, but our duty, to place our judgment upon that ground which will be the least comprehensive in its operation. We, therefore, express no opinion as to the extent of the prior right of the State, as against other creditors, to have its claims against a joint debtor first satisfied, but confine ourselves strictly to the case now before us. Does that prior right exist in this case? We think it does not, for the reason that the State cannot, in our opinion, upon the facts set forth in the case agreed, enforce, against the estate of Archibald Yarborough, the collection of the bond given by him, and which is now in suit in Franklin Superior Court.

In the construction of bonds and obligations the rule of law is, if the bond be a single one, it is to be taken most strongly against the obligor; but when it has a condition annexed to it, which is doubtful, as that is for the ease and favor of the obligor, it is to be taken most strongly in his favor. Hurlston on Bonds, 9 Law Lib., 17; Shep. Touch., 375, 379.

In the construction of conditions the Court will look to the meaning of the parties so far as it can be collected from the instrument itself; and when the intention is manifest, they will transpose or reject insensible words and supply an accidental omission in order to give effect to it—that is, the intention of the parties. *Coles v. Hulme,* 8 B. & C., 568; 1 Saun., 66, a. note; Hurlston on Bonds, 9 Law Lib., 17.

The condition of a bond is frequently preceded by a recital of certain explanatory facts, and in such case, if a certain particular thing
(60) be referred to, the recital will operate against the parties to the bond as a conclusive admission of the fact recited; and these recitals will frequently operate in restraint of the condition, though the words of it imply a larger liability than the recital contemplates. *Pearsall v. Summersett,* 4 Taun., 523; *Payler v. Homesham,* 4 Maule & Sel., 425; Hurlston on Bonds, 9 Law Lib., 17, 18.

In the latter case *Lord Ellenborough* observes that the general words of a clause may be restrained by the particular recital. "Common sense," he says, "requires it should be so; and in order to construe any instrument truly, you must have regard to all its parts, and most especially to the particular words of it." These cases are cited to show that the meaning of the parties as gathered from the instrument itself is the governing rule in the construction of obligations, and that in those accompanied with a condition, where the meaning is doubtful, such a construction must be put upon them as is most favorable to the obligors. What, then, was the meaning of the parties in entering into the bond upon which the executor of Archibald Yarborough is sued, to be gathered from the instrument itself? The State had, by indorsing, guaranteed the bonds of the Raleigh and Gaston Railroad Company to the

amount of $500,000, and they had authorized the stockholders of the company to give bonds to the amount of their stock, and individuals, who might be disposed to assist them, their bonds to any amount they pleased, for the purpose of further indemnity of the State, over and above the property of the company already conveyed for that purpose, "provided such bond or bonds shall, in the whole, amount to the said sum of $500,000."

The State, then, it is obvious, did not intend to receive the bond or bonds of the stockholders or of individuals, unless, altogether, they should amount to the sum guaranteed by her; and, on the other hand, it is equally clear that the several obligors did not intend that their several bonds should be obligatory upon them but upon the same condition. Nor is this view of the case weakened by the fact that (61) the bond was delivered to the Treasurer, who was the agent of the State to receive it. The delivery was full and complete, and not a conditional one. But it was the delivery of a bond with a condition upon its face. We consider it the same as if the bond had stipulated, in so many words, that it should have upon the obligors no obligatory force unless the whole of the $500,000 was secured by the bonds of other persons; and in order to enable the State to recover upon the bond now in suit against the executor of A. Yarborough it must be made to appear that the whole of that sum, before the bringing of that action, had been so secured. In the case now under consideration it does not so appear, and it is as if it did not exist, upon the principle, *De non apparentibus, et non existentibus, eadem est lex.* From the nature of the condition it could be enforced only by the State through its agents, and through them alone could it be made known to the defendant that it was complied with. The different bonds were necessarily executed by the different obligors in each, at different times and different places. The convenience of all parties required there should be some common repository where they might be delivered or placed until the requisite amount was acquired. That common repository in this case was the Public Treasurer. Their being placed with him is no evidence, under the circumstances, that they were received by the State. The latter was not bound to receive them until the required amount was raised, nor were the various obligors bound to their payment until such event. Our opinion is formed exclusively upon the case as it is before us. We know nothing about it, and can, judicially, know nothing concerning it that is not in the record. According to our view, the making up of the whole $500,000 by the stockholders and subscribers, by bonds, was a condition precedent, to be shown by the State before there could be any breach of the bond in the case against the defendant Yarborough. The question (62) therefore, of the State's priority does not arise in this case.

PER CURIAM. Judgment of the court below reversed; and the Court proceeding to give such judgment upon the whole record as ought to have been given below, gives judgment for the plaintiff against all the defendants, which, as to the said defendant Yarborough, is for the assets confessed to be in his hands.

DEN ON DEMISE OF ELISHA KING v. THOMAS MURRAY.

1. Where A. is the legal owner of a tract of land and leases it to B., though the agreement for the lease may be usurious, yet B. is estopped, in an action of ejectment against him by A.'s heirs, from denying the title of A.
2. The usury could not be relied on as a defense in an action for the rent reserved by the usurious contract of lease.

APPEAL from BUNCOMBE Special Term in June, 1845; *Caldwell, J.*

Ejectment. From the case it appears that Benjamin King, who was the owner of the land in dispute, leased it to the defendant, and that the lessors of the plaintiff are the heirs at law of Benjamin King, he being dead. The plaintiff relied upon the lease as an estoppel to the defendant. On the part of the defendant it was denied that it would have such effect, as it was void and of no effect, because made upon an
(63) usurious consideration. In order to sustain his defense, he showed that the land once belonged to him, and as such had been sold by the sheriff and purchased by one Smith, who, at his instance, sold it to Benjamin King for $600. The defendant at the same time was indebted to King $400, and it was agreed between them that he might redeem the land by paying the $1,000. In the meantime it was agreed that the defendant should keep possession of the land as the *tenant* of King at an agreed rent, which was more than legal interest upon $1,000. It was denied on behalf of the plaintiff that the lease was usurious, but, if it were, it nevertheless operated as a complete bar to the defendant's denying the title of his lessors; and if it did not have that effect, the plaintiff could recover on the title of Benjamin King, as set forth and proved by the defendant. The presiding judge charged the jury that if the lease was infected with usury, it was no estoppel, but was completely annulled by the statute against usury; and to entitle the plaintiff to recover on the title of Benjamin King under the sheriff's sale, if he had any, he must show, as against this defendant, a judgment, execution, and sheriff's deed. There was a verdict for the defendant, and plaintiff appealed.

No counsel for plaintiff.
Francis for defendant.

NASH, J. We differ with his Honor. Although two questions were decided in this case, there is in truth but one, and that is the estoppel. In his directions upon that point we think there is error in not drawing the proper distinctions between the contract for rent and the legal principle growing out of the fact that the defendant was in possession of the land under the title of Benjamin King. By accepting the lease and holding possession, in an action to recover it he was estopped to deny his title, and it was not necessary for the plaintiff to show any other. But it is said the lease is usurious. We cannot see (64) wherefore. According to the defendant's own showing, Benjamin King had purchased the land in good faith; it was his, and he leased it to the defendant. If the lease was usurious, it did not affect the principle upon which the estoppel is founded, which is that the defendant is in possession under it; and while it continues he is not at liberty to deny his landlord's title. This doctrine is too familiar to need support upon authority. Even where an individual takes a lease of his own land, and, under it, gets into possession, he is estopped. *Dunwoodie v. Carrington,* 4 N. C., 355. If, then, the lease was usurious, the only effect the usury would have would be to make void the contract for rent, and if this were an action for the rent, the plaintiff could not recover, because, in that case, the contract would be in violation of the act. The defendant attempts to avoid the natural effect of taking a lease from the lessor of the plaintiff by alleging that it was usurious. Now, that can only be shown by going back to the conveyance from Smith to the lessor of the plaintiff, and claiming an interest in that conveyance for the defendant. But when we thus go back, it results from the defendant's own showing that Smith had the legal title, and that title he conveyed to the lessor of the plaintiff. How is that title to be divested out of him? A person cannot gain any new rights by an usurious contract; but he does not thereby lose those previously vested in him. So far from showing that the lessor of the plaintiff had not the title which he claimed by estoppel against the defendant, the defense shows that he actually had it by conveyance from Smith.

PER CURIAM. *Venire de novo.*

Cited: Davis v. Cunningham, 32 N. C., 160; *Wilson v. James,* 79 N. C., 352.

(65)

DEN ON DEMISE OF THOMAS R. TATE v. GEORGE B. CROWSON.

1. Where a lease was given upon condition that the lessee at the end of each year should give bond and surety for the rent of the succeeding year, and at the expiration of one year the lessee failed to give such bond and surety, but the lessor was absent and did not demand it: *Held*, that no forfeiture was incurred, it being the duty of the lessor to make the demand.
2. The law leans against forfeitures; and when the agency of the landlord is involved in any way in the act, which is to work or prevent a forfeiture, he ought so to act as to make it appear clearly that he means to insist upon the forfeiture.
3. The lessee shall not be punished without a willful default, which cannot be made to appear unless an actual demand be proved and that it was not answered.

APPEAL from GUILFORD Fall Term, 1845; *Dick, J.*

Ejectment for a house and lot in Greensboro on the forfeiture of a lease. The demise is laid on 11 December, 1843, and the declaration was served the day next succeeding.

On 18 November, 1841, the lessor of the plaintiff executed a lease of the premises to the defendant and one Bushe for four years, to commence on the 1st of December following, "subject to the following conditions, that is to say: the said Bushe and Crowson are to pay to the said Tate at the end of each year, for rent, the sum of $80, to be secured by bond with a surety yearly; that sum due at the expiration of each year. Should the said Bushe and Crowson keep the said house and lot but for one year, they are to pay for that year the sum of $100; or should they fail to comply with this contract to keep it for the whole four years, for the last year they keep it, in that event, they are to pay $100. The said Bushe and Crowson at the commencement are to secure the payment of the first year's rent with bond and good security; and this lease to commence on 1 December, 1841, provided the rent
(66) for the first year be thus secured; and the said Bushe and Crowson are, at the end of each year, to secure, by bond with a surety, the rent for the next year; and in case they should fail, at the end of any one year, to give such bond and security, then the lease to cease and terminate, and the said Thomas R. Tate shall have the right to enter into the premises and take the same into his possession."

The lessees entered and occupied two years. At the end of the second year the lessees did not tender a bond with surety for the rent of the next year, commencing on 1 December, 1843; and it is for that breach of the conditions of the lease this action was brought. It appeared that the lessor of the plaintiff resided also in Greensboro, but that at the end of the second year he was absent from home and in another

county, and it did not appear that the lessees were informed where he was. It was admitted by the defendant that the lessees had no bond for the next year's rent ready on the day, nor before this suit was brought though afterwards they offered one.

The foregoing is the substance of the case stated in the exception, and thereon the counsel for the defendant moved for various instructions; the only material one, however, being that the lessees were not bound to follow the lessor to another county to tender a bond in order to save their lease, and that in order to work a forfeiture it was necessary the lessor should have made a demand of the bond on the day on which it ought to have been given. The court refused to give the instruction, and told the jury that, as the lessees had no bond prepared on the last day of the second year, nor at any time before this suit was brought, the plaintiff was entitled to recover. The jury rendered a verdict accordingly and from the judgment the defendant appealed.

Morehead for plaintiff.
No counsel for defendant.

RUFFIN, C. J. The instructions given to the jury are errone- (67) ous. The error probably arose from not adverting to the difference between a right to a forfeiture of the term by the breach of a covenant or condition contained in a lease, and a right to the rent, or to damages or other things secured by the lease. No doubt, the rent remains, though not demanded at the day, and may be recovered by distress or an action; and to save himself from the costs of those proceedings the lessee must be active in paying or tendering the sum due to the lessor. But the law leans against forfeitures, and is very strict in requiring a lessor to do everything literally at the time and place needful to work it. The lessor is not compelled to avail himself of a forfeiture, but he may waive it; and, therefore, where the agency of the landlord is involved in any way in the act which is to work or prevent a forfeiture, he ought so to act as to make it appear clearly that he means to insist upon the forfeiture, and thereby enable the other party, by compliance in time, to save his land. We have no statute upon the subject, but the common law in all its rigor is in force here. The rules upon this point are distinctly stated by *Lord Coke*, and the first is that if the feoffor do not demand the rent behind, he shall never reënter, Co. Lit., 201; and the annotator on that passage adds: "So it is, if there be a *nomine pœnæ* given to the lessor for nonpayment, the lessor must demand the rent before he can be entitled to the penalty; even if the clause be that, if the rent be behind, the estate of the lessee shall cease and be void, because the presumption is that the lessee is attendant on

the land to save his penalty and preserve his estate, and, therefore, he shall not be punished without a *willful* default, *which cannot be made appear without a demand be proved,* and that it was not answered." 2 Thomas Coke, 92, note 2. The idea of his Honor was that where it was clear that the lessee was not ready, it amounted to a default,
(68) and that a demand is dispensed with when it is seen that, if made, it would have been ineffectual. It is true, there was a default in the lessee, but not such an one as worked a forfeiture without a demand by the lessor, for it cannot be told that the lessee or some friend for him, if required, would not have given the requisite security. But the law on this point is so very strict against inflicting a forfeiture upon any implication whatever that it has been held that the demand for the rent must be made *in fact,* although there should be no person on the land to pay it, and, therefore, it was manifest that the demand would be ineffectual. *Kilwooly v. Brand,* Plow., 70; 1 Wms. Saund., 287, a, note 16.

It is true, this is not a forfeiture for the nonpayment of rent arrear; but it stands upon the same reason, being partly of the term for not securing rent as stipulated and partly a forfeiture of an additional sum of $20, *nomine pœnæ* therefor. There are other covenants for the breach of which forfeitures have been enforced without any demand or other act of the lessor, such as covenants not to assign, to repair, or to insure. But in those cases no further agency of the lessor in anything to which the covenants relate is involved, but the matter is wholly between the tenants and third persons. No interposition of the lessor could prevent or hasten the action of the lessee more than was done in the lease itself. But here the pecuniary penalty of $20 is to accrue to the lessor, and, therefore, according to the authorities cited by M. Hargrave, there must be a demand before that is incurred. Precisely for the same reason, the bond with surety for the rent to accrue for the ensuing year, which was to be given to the lessor, ought by him to have been duly demanded on the day when it was to have been delivered, before he can insist upon a forfeiture of the term. Indeed, in New York it has been held, where the condition was that the lessee should pay all taxes, that the lessor could not reënter for the failure of the tenant to
(69) pay a direct tax to the United States, without showing a demand of payment, although there was an express clause that if any tax should be behind and unpaid twenty days after it ought to have been paid the lessor might distrain or reënter. *Jackson v. Harrison,* 17 John., 66.

PER CURIAM. *Venire de novo.*

WILLIAM P. TAYLOR v. STEPHEN W. COTTEN.

In every declaration for money paid for the use of another it must be laid to have been paid at his request; but this request may be express or implied, and it is always implied in law where the payment is subsequently recognized by the person for whom it is made.

APPEAL from CHATHAM Fall Term, 1845; *Dick, J.*

Assumpsit upon a special contract; in addition to which the declaration contained the usual money counts. The case was as follows: A constable of the name of Cook had in his hands two executions against the defendant Cotten, to the amount of $...., in favor of one Curl. At the same time the plaintiff, who is the sheriff of Chatham County, had in his hands for collection claims in favor of one Burnett to an amount exceeding the executions against Cotten, who had obtained from Burnett an order upon the plaintiff for $300, payable out of such claims. This order had been presented to the plaintiff and accepted by him. Cotten, and Cook, the constable, went to Taylor, and it was agreed (70) between the three that as soon as Taylor collected all Burnett's money he would take up the judgments against the defendant, who would thereupon give him credit upon the order and indemnify him against all damage he might sustain in consequence thereof. Cook gave up the Curl judgment to the plaintiff, but never, received from him any money therefor. The latter, as sheriff, had in his hands two executions against the constable, Cook, and his two sureties, one of whom was Benjamin Curl, the plaintiff in the executions against Cotten, and to a larger amount than they called for; and it was agreed between Taylor and Cook that the money to be collected for the defendant should be applied to the executions against Cook, which was accordingly done. Curl brought an action of trover against Taylor, the plaintiff, to recover the value of his two executions, and recovered a judgment for $281, which was paid, and to recover which this action was brought. During the pendency of this suit against Taylor the defendant declared that if he had got Taylor into difficulty he would save him harmless, and that he had always intended so to do. His Honor who tried the cause instructed the jury, "that if they should believe that the plaintiff agreed to satisfy the said judgment (that is, the judgments against the defendant in the hands of Cook) with the funds of the defendant in his hands, and that such were the instructions of the defendant when he proposed to him to take them up and he would give him credit on the order, and if they should believe the plaintiff did not perform this agreement, but departed from such instructions, that the defendant would not be liable for any loss the plaintiff should sustain. But if they should, from the evidence, believe that the plaintiff sustained loss while acting as agent

of the defendant and according to his instructions, that then he would be entitled to recover." The counsel for the plaintiff requested the court to charge the jury that there was no evidence whatever of
(71) any instructions from the defendant to the plaintiff as to the particular way in which he should act in the matter "as his agent." To which his Honor replied "that he had not told the jury that there were any instructions," but declined giving the particular instructions prayed for. The counsel for the plaintiff then asked the court to charge the jury, "that if, from the evidence, they believed that the defendant knew how the plaintiff had applied the money for the judgments taken up, that his subsequent acknowledgements and his promise of indemnity after such knowledge amounted to acquiescence in and ratification of the acts of the plaintiff as his agent, and in that point of view the defendant would be liable." This instruction the court also declined to give, but charged "that if the plaintiff had taken up the judgments before a request by the defendant, and that, afterwards, the defendant had promised to indemnify him for having done so, that such promise would not be binding upon the defendant, as it would be without a consideration, and, therefore, void; that when one man did an act for another, to make that other liable there must have been a request previous to the act."

The jury rendered a verdict for the defendant, and the plaintiff appealed from the judgment thereon.

No counsel for plaintiff.
Manly and McRae for defendant.

NASH, J. We see no error in the first part of his Honor's charge. He certainly did not instruct the jury that the plaintiff was acting under any specific instructions from the defendant. The agreement between the parties was that the plaintiff, out of the money in his hands, or shortly to be, should take up the two executions against the defendant, and which were then in the possession of Cook, the constable —that is, should pay them off. If he had done so—had paid their amount to the constable—the defendant Cotten would have been
(72) discharged from all further liability upon them, and the plaintiff Curl could not have recovered their value from him. Instead of so doing, he discounts them with Cook, thereby leaving them still in full force against the defendant, and the title to them still in Curl; but he subsequently did pay them, and would have been entitled to a credit on his acceptance—and we cannot conceive why it was not stated in the case whether or not he had paid it, as upon this ground the whole merits of the plaintiff's claim turned; and it was the duty of the plaintiff to have drawn up his exceptions so that this Court could see whether there

was any error committed by the presiding judge to his injury. As the case is stated we cannot say whether there is error in the charge or not. We differ from his Honor upon the second branch of his charge. He instructed the jury "that when one man does an act for another, to make that other liable there must have been a request previous to the act." In this opinion there is manifest error; and we should without hesitation, grant a new trial if from the case as it is before us we could see that any injury had been sustained by the plaintiff in consequence of it. In every declaration for money paid for the use of another it must, it is true, be laid to have been paid *at his request;* but this request may be express or implied, and it is always implied in law where the payment is subsequently recognized by the person for whom it is made. The promise to pay, made after, is sustained by a sufficient consideration. Com. on Cont., 591, 2. We cannot, however, see in what way this error has acted to the injury of the plaintiff. The case declared on and approved was one of express previous request, and the opinion had no application to it. The defendant's engagement was, if the plaintiff would pay off the Curl judgment, not that he would repay him the money, but that he would credit him on his accepted order. What has became of the order the case does not disclose. We are not informed whether the plaintiff ever collected the Burnett money, (73) though it may well be presumed that he has done so, and *that* before this action was brought, as he said, at the time the agreement was entered into, "that he had not collected *all* the money, but would in a day or two." If the money *was* collected by him, then most clearly he cannot maintain this action, because, to the amount of the Curl executions, it is his money. If he has not collected it, the fact should have been shown. In that case the subsequent declarations of the defendant would have supported his count for money paid to his use.

This is not a case of agency, but simply an agreement between the parties that the plaintiff should, of the funds of the defendant, pay off the executions in the hands of the constable, Cook, and he would credit him on his acceptance. The case is so obscurely made out that we cannot say we fully understand it.

PER CURIAM. No error.

THE STATE v. JOSEPH BROOKSBANK.

1. Keeping an open shop and selling goods on Sunday is not an indictable offense in this State.
2. Profanation of Sunday is only punishable here by certain pecuniary penalties imposed by the Legislature and to be recovered before justices of the peace.

STATE *v.* BROOKSBANK.

APPEAL from CUMBERLAND Fall Term, 1845; *Caldwell, J.*

The indictment in this case charges that the defendant, being
(74) a common Sabbath-breaker and profaner of the Lord's day, commonly called Sunday, on 1 September, 1844, being the Lord's day, and on divers other days, etc., in the town of Fayetteville, in Cumberland County, did keep a common, public, and open shop, and in the same shop did then, etc., being the Lord's day, openly and publicly expose to sale and sell spirituous liquors to divers persons to the jurors unknown; and concludes to the common nuisance and at common law.

On not guilty pleaded, there was a verdict for the State, but the court arrested the judgment, and the Solicitor appealed.

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

RUFFIN, C. J. The acts imputed to the defendant are lawful, and constitute no offense unless it may be in respect of the time at which they were done; for it is lawful for the defendant to keep an open shop in Fayetteville and sell thereat spirituous liquors. The question is whether it is criminal to do so on Sunday.

The indictment is framed upon the precedent, in 2 Chit. Cr. L., 20, which is taken from the Crown Circuit Companion. Notwithstanding the precedent, and what is said by some writers on the law, it may be doubted whether, in the Superior Courts in England, the profanation of Sunday, merely as such, would be held to be indictable; and this, for the reason suggested in *S. v. Williams,* 26 N. C., 400. If this indictment would lie there, how can the act of 29 Car. II., ch. 7, be accounted for, which forbids the working on Sunday under a penalty of 5 shillings, and the selling of goods on Sunday under the pain only of forfeiting them. However, if such an indictment be sustainable in England, it must be, as we conceive, and stated in the case referred to, because working or trafficking on Sunday is, according to the doctrine of the
(75) established church, a profanation of that day; and, as it is thus criminal according to the law of the church, it becomes criminal against the civil government, which established the church. But that reasoning is entirely inapplicable here. With the theological question the Court disclaims the intention to concern. We have no right nor purpose, as municipal judges, to decide or discuss it, even if we were competent to handle a point which has been so much controverted among learned and pious men of almost all periods. But our duty is strictly limited to the inquiry whether the law of North Carolina, as the law of the State, and not of a religious establishment, has made the profanation of Sunday, by keeping open shop, an indictable offense. And

upon it we must say, as we said in *S. v. Williams,* that it has not, and for the reasons given in that case. We have no established church, with authority to prescribe duties in reference to this or other religious tenets, to which all the citizens are bound to render obedience; and, merely as the violation of a duty of religion, we cannot punish the profanation of Sunday. When the Legislature made it criminal, the courts became bound to hold it a crime to the extent enacted, and to punish it as prescribed in the statute, which gives penalties to be recovered before justices of the peace, and does not declare it an indictable misdemeanor. In other words, we think the courts cannot go before the Legislature on this point, and, therefore, that the judgment was properly arrested in this case.

PER CURIAM. Affirmed.

Cited: S. v. White, 76 N. C., 16; *Rodman v. Robinson,* 134 N. C., 507.

(76)

JOHN M. KINZEY v. MITCHELL KING.

A witness who is summoned in this State while casually here, but who resides in another State, cannot be amerced for nonattendance if he has returned to his own State and is there at his domicile, where his presence as a witness is required in one of our courts.

APPEAL from HENDERSON Fall Term, 1845; *Bailey, J.*

Scire facias against the defendant, to show cause why he should not be fined $40 for not attending as a witness in the Superior Court of law of Henderson County at Spring Term, 1845, in a suit, *David Blythe v. John M. Kinzey,* in which he had been subpœnaed, his default having been recorded at that term. It was agreed that the following statement of the defendant should be received as evidence of the facts therein contained, to wit: Mitchell King, in answer to the rule, etc., respectfully showeth that he has no recollection that he was ever regularly served with a subpœna or summons to appear before this court at any former term or to testify in this case; that he remembers he was spoken to by some person or persons on the subject, and he then said, as he now says, that to the best of his knowledge and recollection he did not know anything of the matter in dispute between the plaintiff and the defendant; that since the rule has been served on him he has got a friend to procure for him an inspection of the subpœna alleged to have been served on him, and he observes that it requires him to appear and testify in

this case at the court to be held in this county on the fourth Monday of September, 1843, now two years ago, and that on making inquiry of the officer by whom he understands it is alleged the subpœna was served on him, he has been informed that while he, the said Mitchell King, was sitting in a room in Hendersonville, in conversation with a gentleman, the said officer called him to a window in the room and told him
(77) that he was requested to attend as a witness for the defendant, or words to that effect, and the respondent did not then, nor until a copy of this rule was delivered to him, imagine that any legal process was served on him; and this respondent further says that he did attend upon this court during the whole of the term of September, 1843, not because he was aware that he was under any legal process to attend, but because at the time he happened to be in this county. And this respondent further shows that he is, and for many years has been, a citizen of the State of South Carolina, and a domiciliated resident in the city of Charleston in that State, and not a citizen of the State of North Carolina; and he believes and alleges that, at the time the said *subpœna* is alleged to have been served on him it was well known to the said John M. Kinzey that this respondent was a citizen and resident of Charleston, and that he would return to his home within a short time after the said *subpœna* is alleged to have been served; and this respondent further says that even had he been aware, as he was not, that a legal *subpœna* in this case had been served on him, he was so engaged and bound at home in Charleston by his previous professional engagements for some time, as a judge in a court of common law, and afterwards as a member of the bar, that it would not have been in his power, or consistent with these previous obligations on him, to attend at the regular terms of this court; and it was, as this respondent understands and believes, competent for the said John M. Kinzey to have procured, had he thought it important, the evidence of this respondent by a commission for that purpose, or to have had him, while in this county, examined *de bene esse,* as a person certainly about to leave this State.

The court being of opinion upon this state of facts that there was not a sufficient justification for nonattendance, directed that judgment should be entered for the plaintiff in the *scire facias.* From this judgment the defendant appealed.

(78) *Francis for plaintiff.*
Badger for defendant.

DANIEL, J. The facts set forth in the defendant's affidavit are admitted by the plaintiff to be true. We then see that he was, at the time the subpœna is alleged to have been executed on him, a citizen of South Carolina, and had his domicile in Charleston, and was but casually and

temporarily in this State, and that at the time he was called out on the subpœna he had returned to his home in Charleston and was attending to his usual business. We think *Meredith v. Kent*, 1 N. C., 52, is conclusive for the defendant. It decides that where the residence of a witness is in another State there can be no forfeiture for nonattendance, though summoned. We think this decision to be good law, if the witness be out of the State at the time he is called out on his subpœna; but if he be in the State at that time, he is subject to the same rules as the citizens of the State; in such a case he receives the protection of our laws, and it will be his duty to obey the mandates of our process. The plaintiff might have taken the deposition of Mr. King, and it would have been read in evidence for him. We think that the judgment must be reversed, and a judgment rendered for the defendant.

PER CURIAM. Reversed.

Cited: Cantrell v. Pinkney, 30 N. C., 440; *Stern v. Herren*, 101 N. C., 519.

(79)

THE STATE v. DANIEL THORNBURG.

Falsely, wittingly, and corruptly rubbing out, erasing, or obliterating a release or acquittance on the back of a note or bond, or elsewhere, does not, according to the law of North Carolina, amount to the crime of forgery.

APPEAL from LINCOLN Fall Term, 1845; *Pearson, J.*

The defendant was tried upon an indictment for forgery. Upon the first count in the indictment he was acquitted. The second count was in the following words, to wit: "And the jurors, etc., further present that the said Daniel Thornburg, on the day and year aforesaid, with force and arms, in the county aforesaid, did purchase of one Henry Wright, and did then and there have in his possession, a certain bond for the payment of money, which said bond is as follows, to wit: '$18. Against 25 December next I promise to pay Henry Wright $18 for value received of him. 2 June, 1843. C. Lineberger.' On which said bond, at the time the same came into the possession of the said Daniel Thornburg as aforesaid, to wit, on the said 10th day of February, there was duly entered an acquittance for the sum of $11; and that the said Daniel Thornburg then and there wittingly and falsely did commit forgery by falsely, wittingly, and corruptly rubbing out, erasing, and obliterating the said acquittance for $11, with intent to defraud one Caleb Lineberger, against the form of the statute," etc.

The defendant was convicted upon this count; but, on motion, the court arrested the judgment, and from that decision the solicitor for the State appealed to the Supreme Court.

Attorney-General for the State.
Guion and Miller for defendant.

(80) DANIEL, J. The defendant was convicted on the second count in the indictment. He then made a motion in arrest of judgment, and the motion was sustained. The solicitor for the State appealed. Forgery is a false making—making *malo animo*—of a written instrument, for the purpose of fraud and deceit, the word *"making"* being considered as including every alteration of or addition to a true instrument. 2 Russell on Crimes, 317; 2 East P. C., 852, 965; 2 Leach, 785. The charge against the defendant in the second count is for falsely, wittingly, and corruptly rubbing out, erasing, and obliterating an acquittance for $11, which acquittance had been indorsed on the bond mentioned in the indictment with an intent to defraud one Caleb Lineberger, the obligor, against the form of the statute, etc. We have no statute making the act of erasing, rubbing out, and obliterating an acquittance forgery; and the intentional destruction of an acquittance, in whatever way, cannot be either a making a written instrument or the alteration of or addition to a truly written instrument, so as to bring the act within the definition of forgery. The judgment was, therefore, correct, and it must be

PER CURIAM. Affirmed.

THE STATE ON THE RELATION OF J. S. GRAVES v. NALEY READ ET AL.

A purchaser at a constable's as well as at a sheriff's sale is bound to pay the whole amount of his bid to the officer selling, and the latter, and his sureties in his official bond, are liable to the person whose property is sold for the excess beyond the amount required to satisfy the execution in the officer's hands.

(81) APPEAL from CASWELL Spring Term, 1845; *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 for 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.

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 were not, therefore, liable, and directed the verdict to be set aside and a nonsuit entered. From this judgment the plaintiff appealed.

Badger for plaintiff.
Kerr and Morehead for defendants.

DANIEL, J. In *S. v. Pool*, 27 N. C., 109, this Court said that a purchaser at a sheriff's sale must undoubtedly pay his whole bid to the sheriff, and, 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 (82) thereon received, unto the persons to whom the same is due. On the bond the act of Assembly, Rev. Stat., ch. 115, 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.

THE STATE v. NELSON COZENS.

An indictment against a free person of color which charges that he did "buy of, traffic with, and receive from a certain negro slave, etc., one peck of corn," etc., is good, although the act making the offense of a free person of color dealing with a slave only uses the words "if he shall trade with any slave, either by buying of or selling to him," etc. The other words used in the indictment are mere surplusage.

APPEAL from PERSON Spring Term, 1839; *Settle, J.*

Indictment against the defendant, a free negro, commenced in the county court of Granville, which charged "that he did buy of, traffic

with, and receive from a certain negro slave, Lewis, the property of Fleming Beasley." Upon the trial it was proved that the defendant bought and received from the said slave, Lewis, a peck of corn. (83) It was also proved that the corn was the property of Fleming Beasley. The court charged the jury upon the evidence. The jury found the defendant guilty. A motion was then made in arrest of judgment, which was overruled, and the defendant appealed.

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

NASH, J. The defendant, a free man of color, was indicted for trading with a slave. The indictment charges that he, "on 11 February, 1837, in the county, etc., did buy of, traffic with, and receive from a certain negro slave named Lewis, the property of Fleming Beasley, etc., one peck of corn," etc. Under the charge of the presiding judge, the jury convicted the defendant. A motion was made to arrest the judgment, but for what cause is not set forth. We have carefully looked into the record, and can perceive no reason why the judgment of the law should not be pronounced upon the defendant. The indictment is preferred for a violation of section 5 of the act of 1826 which declares that "if any free negro or mulatto shall trade with any slave, either by buying of or selling to him," etc. The act forbidden, and made indictable, is sufficiently obvious. It is the trading of such persons with a slave; and the section contains two specifications of the offense, to wit, either buying of or selling to; either act is within the section, and constitutes an offense of a criminal nature. In this case the words "traffic with and receive from" are connected with the words "buy of." They are not found in section 5, but are in section 1 of the same act, and it is probable the pleader, who drew the indictment, was misled by not adverting to the fact that the first section extended to all citizens, and inflicted a pecuniary fine or penalty, and that the fifth was confined to a particular class of (84) individuals, and punished the offense in a different manner. The insertion of those words, however, does not vitiate the indictment; they are mere surplusage, for they may be stricken from the indictment, and still the description of the offense charged is full and complete. *Utile, per inutile, non vitiatur.* Thus, if an act punishable by the common law is charged in an indictment as contrary to a statute, and there be no such statute, the individual may be convicted and punished as at common law.

We see no error in the record, and the judgment below is

PER CURIAM. Affirmed.

BENJAMIN C. MAYO ET AL. v. JAMES MAYO ET AL.

A man having several children advanced to each of his five eldest children, the children of a first wife, property, real and personal, which he valued at $2,000. He then made his will as follows: "If it should so happen that any of my children by my last wife should marry, etc., the county court shall appoint some three or more persons to set apart to him or her such part of my estate on hand as may be most for their advantage and the advantage of the heirs at large, without a draw, which allotment so made shall be binding on all the heirs, provided that each allotment so allotted shall not exceed in value the sum of $2,000, so as to make them all equal. All the valuations are to be made on the same scale or principle as the valuation I put on the property I have heretofore given my sons, etc., a schedule of which they or some of them can produce of property they have received on which is a valuation of $2,000 I then put. And at a final division of the property among my children it is my desire it should be equally divided among all my children." No such schedule as that mentioned in the will was produced. *Held*, that the commissioners appointed by the county court did right in fixing the valuation of the property for the younger children at $2,000 each at the time the allotment was made to them.

APPEAL from EDGECOMBE Fall Term, 1845; *Settle, J.* (85)

The plaintiffs and the defendants are the children, or their representatives, of John W. Mayo, deceased. The testator had been twice married, and had children by each venter. And he advanced, in his lifetime, $2,000 worth of property, at different times, to each of five of his eldest children, as they married off. To each of the three sons he advanced land, slaves, and perishable property, in different proportions, but the aggregate amount to each he valued at the sum of $2,000. And as to the two daughters, the advancement to one was entirely in slaves, and to the other in slaves and perishable property, making each advancement of the value of $2,000 according to his estimate. His object, as he expressed it in his will afterwards, was equality in value of property among all his children. It appears that the father, in 1816, took a receipt from one of his sons, expressing in it the particular property, real and personal, which had been advanced to him, and the valuation of each article received by him, as computed by the father. That this valuation of the father was not less than the market value of the property is not shown by any evidence in the cause.

The father, afterwards, in July, 1824, made his will, and devised and bequeathed that his property should be kept together by his executor and his wife for certain purposes not now necessary to mention; and then he provided as follows: "It is my wish that if it should so happen that any of my children by my last wife should marry, or it should become necessary to have his or her part, the county court shall appoint some three

or more persons to set apart to him or her such part of my estate on hand as may be most for their advantage and the advantage of the heirs at large, without a draw; which allotment, so made, shall be binding on all the heirs, provided that each allotment so allotted shall not (86) exceed in value the sum of $2,000, so as to make them all equal. All the valuations are to be made on the same *scale or principle* as the valuation I put on the property I have heretofore given my sons Lawrence, James, and Frederick, and my daughters Maria and Nancy, *a schedule of which* they, or some of them, can produce of property they have received, on which is a valuation of $2,000 *I then* put. And at a final division of the property among my children, it is my desire it should be equally divided among all my children." In 1836 a petition was filed in the county court for a division of the estate among all the children, according to the will. All the persons that were interested were made parties to the said petition. The court made an interlocutory order in the cause that the estate should be divided according to the prayer of the petition, and appointed commissioners for that purpose. The estate was large, consisting of some thirty slaves and money and bonds to about $4,000. The commissioners, in performing their duty, valued the slaves according to their then market value, without reference to any *scale or principle* which the testator had before made in any *schedule* left with any of his five eldest children, if, in fact, any such schedule ever was left by him; and after allotting to the unadvanced children their $2,000 in slaves at the then market value, and in money, they proceeded to divide the residue of the estate equally among *all* the children of the testator. The report was returned into court, and no exception being made to the same, it was there confirmed, and a decree made in conformity to it.

The plaintiffs, some of the younger children, filed this petition in the county court, it being in the nature of a bill of review, complaining of the said decree; and they assign for error in the same that in making the allotment to them of slaves to make up their respective amounts of $2,000, the valuation of the same was not made by the commissioners or decreed by the court according to any scale or principle men- (87) tioned in a schedule which the testator had made in his lifetime, and referred to in his will. The plaintiffs in their petition do not set forth any such schedule. The defendants, in their answer, deny any knowledge of such schedule, other than the receipt mentioned in the case. The proofs in the cause do not show that the testator ever left with any of his children a schedule of property containing any particular scale or principle of valuation, other than the receipt above mentioned.

Upon the hearing of this petition in the Superior Court, it was dismissed, and the plaintiffs appealed.

J. H. Bryan for plaintiffs.
B. F. Moore for defendants.

DANIEL, J. This petition of review has traveled from the county court of Edgecombe to this Court, and, after examining it, we are unable to discover any error in the original decree. There was no other rule of valuation of the slaves to make up the $2,000 each for the younger children, as directed by the will, than the then market valuation. If the younger children had preferred money, then their respective allotments in property would each have commanded $2,000.

The advancements which had been made by the testator to his five eldest children to make up each of their $2,000 were composed of very different kinds of property, and were also made at considerable intervals of time, as his said children settled off in life. It seems to us that it would have been very difficult for the testator to have framed a different scheme of valuation from the market value of his property, which was left to accumulate in the hands of his executor, so as to have effectually carried out what seemed to have been his general intention—equality among all of his children.

But it does not appear that the testator ever left with any of (88) his said five eldest children a schedule containing a scale or principle of valuation of his property for the purposes of division among all his children. It, therefore, becomes unnecessary for us to discuss the question, if he had done so, whether it would have been made by, what is said in the will, a testamentary paper requiring probate.

PER CURIAM. Affirmed.

JOHN MILES ET AL. V. JOSEPH ALLEN.

1. A bequest of slaves to A., and "after her death to be equally divided between the heirs of A.'s body," is a good limitation over to the children of A.
2. Where the person in possession of this property after the death of A. claimed it as his own, it was not necessary for the remaindermen to make any demand on him before they commenced their action; and they are entitled to damages for the detention of the property from the time of A.'s death.

APPEAL from CASWELL Fall Term, 1845; *Dick, J.*

Detinue for certain slaves mentioned in the declaration. The plaintiffs claimed the slaves under a bequest in the will of John Lea, who died in March, 1803, and whose will was admitted to probate at April Term, 1803, of Caswell County Court. The bequest was in the following words: "My will is that my daughter, Betsy Evans, shall have

negro Hannah during her lifetime, and at her death I leave Han-
(89) nah and her increase to be equally divided between the heirs of my daughter Betsy's body. Betsy Evans was the wife of Elisha Evans, and the plaintiffs were her children and the representatives of her children. It was proved that more than forty years ago the slave Hannah was delivered by the executors of John Lea to Elisha Evans, husband of Betsy, and that the said Elisha sold the said slave to the defendant Allen about forty years since, and that the slaves in controversy are the children of Hannah, born while she was in possession of the defendant. Betsy Evans died in April, 1843, and this action was commenced in May, 1844. A demand of the slaves, before action brought, was proved, and also their value and the value of their services per annum. The defendant relied on the pleas of the general issue and the statute of limitations, and insisted that the limitation over in the will of John Lea was too remote; secondly, that he was protected by the statute of limitations; and, thirdly, that if the plaintiffs were entitled to recover, they could only claim damages from the time they made their demand. But the court ruled that the limitation over was good in law, that the statute of limitations did not bar, and that the plaintiffs were entitled to recover damages for the detention of the slaves from the time of the death of Betsy Evans. Under these instructions the jury found a verdict for the plaintiffs, and judgment being rendered accordingly, the defendant appealed.

Kerr for plaintiffs.
Morehead for defendant.

DANIEL, J. The limitation over in the bequest in the will of John Lea of the slave Hannah and her increase, after the death of his daughter, Betsy Evans, "to be equally divided between the heirs of my daughter Betsy's body," is in law a good limitation over. That was held by this Court in *Swain v. Rascoe,* 25 N. C., 200.

(90) The remaindermen had no right to commence their action until the death of their mother; and three years had not run from that time before they brought their action. The statute of limitations, therefore, was no bar. As to the damages, it appears that the defendant held and claimed these slaves as his own property. It was, therefore, not necessary for the plaintiffs to have made any demand before the commencement of their action. *Knight v. Wall,* 19 N. C., 125; and damages were consequential upon the things sued for, from the commencement of the plaintiff's right of action, which was on the death of their mother.

PER CURIAM. Judgment affirmed.

Cited: Evans v. Lea, 40 N. C., 172.

DEN EX DEM. MARY ROBERSON ET AL. *v.* RANDOLPH WOOLLARD.

1. Although a *scire facias* against the heirs and *terre*-tenants need not name them, but leave it to the sheriff to summon and return them, yet the judgment is always against particular persons, and the writ of execution must name the same persons.
2. An execution commanding the sheriff to sell the lands of A. B., deceased, "in the hands of his heirs," without naming the heirs, is void, and a sale under it confers no title.

APPEAL from MARTIN Fall Term, 1845; *Settle, J.*

Ejectment. The declaration contains four counts. The first is on the joint demise of Mary Roberson, Jesse Barnes and his wife, Nancy, Joseph E. Blount, Joshua Smithwick, Julius Robbins and his wife, Susan, and Martha Ann Smithwick; the second, on the de- (91) mise of Mary Roberson; the third, on that of Jesse Barnes and his wife, Nancy, and the fourth, on the joint demise of the other parties named in the first count. Joseph Roberson died seized of the land, leaving the above named parties, together with Martha Cherry, the wife of Alfred Cherry, his heirs at law. Mary Roberson, the tenant for life, is dead. After the death of Joseph Roberson, Mary Roberson administered upon his estate. Two warrants were issued against her, one at the instance of John Hoyt and the other at that of James Slade; and upon their return before the magistrate, judgments were obtained to the amount of the claims of the respective plaintiffs. The defendant, the administratrix, having suggested to the magistrate the want of assets, the cases were by him transferred to the county court, according to the provisions of the act of the General Assembly. There the defendant in each case pleaded that she had fully administered the assets of the intestate which had come to her hands, and that she had none wherewith to satisfy the demands of the respective plaintiffs. The truth of the plea was admitted by the plaintiffs, and upon the suggestion that real estate had descended to the heirs of Joseph Roberson, and, on motion, the court ordered that a *scire facias* should issue in each case against the heirs. *Scire facias* accordingly did issue against the heirs, naming them individually, to show cause why executions should not issue to subject the lands descended to the satisfaction of the judgments; and upon their return, executed, judgments were obtained according to the *scire facias,* and executions ordered to issue. Under this order of the court the process issued which is alleged to be an execution, and under which the land in question was sold by the sheriff, and the defendant became the purchaser and took possession. To these judgments the plaintiff Jesse Barnes, and his wife, are not parties. The process under which the land was sold commanded the sheriff "that of the lands and (92) tenements of the *heirs* of Joseph Roberson, descended, you cause

to be made," etc. The introduction of the executions and deed from the sheriff was opposed by the plaintiff, on the ground that the executions were void, and conferred no authority on the sheriff to sell. The objection was overruled, and under the charge of the presiding judge the jury found a verdict for the defendant on the first, second, and fourth counts, and for the plaintiff on the third.

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

NASH, J. We think his Honor erred, and that the executions were void, conferring on the sheriff no power to sell, and, of course, that the defendant acquired no title to the land under the sheriff's deed. The title of Joseph Roberson is a common starting point both to the plaintiff and defendant; both parties claim under him, and there is no controversy as to the plaintiffs being his heirs. The defendant claiming under an execution sale must show not only a judgment against the heirs, but also an execution.

Until the act of 1784 there was no law in this State by which the lands of a deceased debtor could be subjected, in the hands of his heirs or devisees to the payment of his simple contract debts. That act directs that when in an action at law an executor or administrator should plead fully administered, no assets, or not sufficient assets to satisfy the plaintiff's demand, and such plea should be found in favor of the defendant, the plaintiff may proceed to ascertain his demand, and sign judgment; but before taking out execution against the real estate of the deceased debtor a writ of *scire facias* shall issue, summoning the heirs or devisees to show cause why execution shall not issue against the real estate
(93) of such debtor for the amount of such judgment, or so much thereof as the personal assets were not sufficient to discharge; and if the judgment should pass against such heirs or devisees, or any of them, execution shall issue against the lands of the deceased debtor in their hands. Hoyt obtained a judgment against the administratrix of Joseph Roberson, but upon her denial of assets, under the provision of the act of the General Assembly, the magistrate returned the proceedings to the county court, when the plaintiff, instead of putting the defendant to the trouble of showing she had no assets, admitted the fact to be so, and suggested that real estate had descended to the heirs of the debtor. It is objected that the state of the assets was not passed on by the jury; that they have not found there were no assets. It is sufficient if the record shows that such proceedings were had in relation to the assets as authorized the court to give judgment against the land, and we think it does. The finding of the state of the assets between the creditor and the administratrix is conclusive only between them. The truth of that

finding may be controverted by the heirs, when called in. It is, therefore, a matter of mere form how their state is found, whether by a jury or by the admission of the party.

The court ordered a *scire facias* to issue to the heirs, which was done, and they failed to make any defense; judgment was taken against them for the amount of the debt, and an execution ordered by the court to issue to sell the descended lands. The record of the suit in the county court is very scant and defective and the *scire facias* very inartificially drawn; but enough of substance appears in each to warrant the judgment against the heirs and the issuing of an execution. Had the paper produced in this case, and called an execution, been such as the law so regards, the title of the defendant would have been, under the sale and sheriff's deed, good against all the parties to the *scire facias;* but it is not. An execution is the fruit of the law, *fructus et effectus* (94) *legis.* But in order to have that effect it must pursue the judgment. In the case of Hoyt the judgment on the *scire facias* is against Mary Roberson, Joshua A. Roberson, Alfred S. Cherry and his wife, Martha, Mary Emily Smithwick, Martha Ann Smithwick, Joshua E. Smithwick, and Susan Smithwick, heirs of Joseph Roberson. And against these individuals the court ordered an execution to issue to sell the lands descended to them. The execution does not so issue. It commands the sheriff "that of the lands and tenements *of the heirs* at law of Joseph Roberson, descended, you cause to be made," etc. Every execution must issue in the *name* of the plaintiff, and against the defendant *by name,* otherwise it will not be warranted by the judgment, because the latter is against the defendant as he is *named in it.* 2 Tidd's Prac., 1121; 2 Saund., 72, i; 1 Lord Ray., 244; *Pennoyer v. Brace,* and the same case, 1 Sal., 319. It is not, then, sufficient for the execution to issue against the defendants as heirs, or by the name of heirs; they must be named in it; otherwise, it is void, and conveys no authority to the sheriff to sell. *Newsom v. Newsom,* 26 N. C., 387.

RUFFIN, C. J. The lessors of the plaintiff claim the premises as the five coheirs of Joseph Roberson, who died seized in fee; and the defendant claims by a sheriff's sale under a *fieri facias.* The facts are these: A creditor of the deceased confessed the plea of *plene administravit* by the personal representative, and took judgment ascertaining his debt, and sued out a *scire facias* against certain persons as heirs of the deceased. The persons against whom the writ issued were four only of the heirs, omitting Jesse Barnes and his wife, Nancy, who was one of the heirs; and there was judgment against the land descended to the four persons named in the process. A writ of *fieri facias* then issued, commanding the sheriff that "of the lands and tenements of the heirs at law of Joseph Roberson, deceased, you cause to be made the (95)

sum, etc., which was lately adjudged by, etc., in a suit in which J. S. was plaintiff and they defendants," etc. The question is whether the sheriff's sale under those proceedings is valid or not.

It is very clear that the sale passed nothing. Of course, we are not to enter into the inquiry whether the proceedings in the suit were regular or the judgment erroneous, for it cannot be questioned collaterally, however erroneous it might be. But the point is whether what was done under the judgment was properly done. Now, although a *scire facias* against heirs and *terre-tenants* need not name them, but leave it to the sheriff to summon and return them, yet the judgment is always against particular persons; and it was so in this case. And the writ of execution must name the same persons, first, because it is necessary that it should conform to the judgment in all respects, and, secondly, that the sheriff may know certainly whose property he is to sell. This writ runs against the lands descended "to the heirs of Joseph Roberson," without saying who they are, and thus leaving it to the sheriff to judge thereof, which is often a difficult point, and is one on which there is no opportunity for the person to be heard in court. Moreover, if the general description were sufficient in a judgment and execution, this writ would be void, because it purports to issue on a judgment rendered against "the heirs," who are in fact five in number, whereas the judgment actually was against four persons by their respective Christian and surnames, who were some of the heirs. The *fieri facias* was, therefore, void, and the plaintiff ought to have recovered the whole premises.

PER CURIAM. Judgment reversed, and *venire de novo*.

Cited: Smith v. Bryan, 34 N. C., 16; *Johnson v. Maddera,* 44 N. C., 55; *Morrison v. McLaughlin,* 88 N. C., 255; *Frye v. Currie,* 91 N. C., 438.

(96)

STATE v. JAMES UNDERWOOD.

1. On the trial of an indictment for murder, the prisoner offered a witness who was so much intoxicated as to be incapable of understanding the obligation of an oath. The court refused to permit him to be sworn, but told the prisoner he might recall him when he was sober. The prisoner examined other witnesses, but did not recall this one. *Held*, that this was no cause in law for a new trial. Granting or refusing a new trial on this ground was a matter of discretion for the judge.
2. A new trial was moved for on the ground that the grand jury had been drawn by a boy of 13 years of age, and that such illegal drawing might have affected the composition of the petit jury. *Held*, that this objection, if a valid one at any time, came too late. It should have been made before the petit jury was sworn, in the form of a challenge to the array.

APPEAL from IREDELL Fall Term, 1845; *Pearson, J.*

The prisoner was indicted in WILKES, as principal, with one Duncan as accessory before the fact, for the murder of one Peden. Both of the accused joined in a motion to remove the trial, and it was removed to IREDELL.

In forming the grand jury at Iredell, at the term at which the trial took place, the jurors were drawn by a boy of 13 years of age.

The court allowed the prisoner, Underwood, a separate trial, and he offered as a witness a person who was so drunk that he was incapable of understanding the obligation of an oath or giving testimony. For that reason the court refused to allow him to be then examined, and informed the prisoner that he might recall the witness when he should become sober; the witness was in the meanwhile committed to jail. The prisoner thereupon examined several other witnesses, and closed his case without recalling the above mentioned witness, or requesting so to do.

The prisoner was found guilty, and then moved for a new trial, upon two grounds: one, that he was deprived of the benefit of the witness who was intoxicated; the other, that if the grand jury had (97) been drawn by a boy of the proper age it might have consisted of different persons, and, consequently, the petit jury by which the prisoner would have been tried would have been different from that by which he was tried. The court refused the motion, and also a motion in arrest of judgment, and passed sentence of death, from which the prisoner appealed.

Attorney-General and Boyden for the State.
Guion and Miller for defendant.

RUFFIN, C. J. The Court is of opinion that no error appears in the record. As far as the first reason was addressed to the discretion of the court, it was exclusively for the judge who presided at the trial. Had he been made satisfied that the prisoner was surprised by the state of his witness, or that his evidence was material, he would doubtless have suspended the trial until the witness should be in a proper condition to take an oath, or would have granted a new trial. This Court cannot grant a new trial, properly speaking, as for surprise, or because the verdict is contrary to the evidence, but can only grant a *venire de novo* for error in law upon the first trial. There is certainly no error in the court refusing to administer an oath to a person, tendered as a witness, who is so drunk as not to understand its obligation, and to postpone swearing him until he may become sober enough for that purpose.

Upon the second point, it may be a question whether the provisions of the statute as to the mode of forming the grand jury be not merely directory. But we do not think it necessary to consider that question

on this occasion, because, allowing them not to be directory merely, and that the objection might have been sufficient if taken in due time, the Court holds that it came too late in this case. The matter does (98) not appear in the record, in a legal sense, but was properly the subject of a challenge to the petit jury, as being illegally constituted, by reason of a collateral thing. The prisoner's objection goes to the formation of a petit jury, and should, therefore, have been taken as a challenge to the array. He did not choose to take it in that form, but elected to waive his privilege and to be tried by the persons returned in the array; and he cannot, afterwards, take exception to it upon such collateral ground.

We do not perceive any reason for arresting the judgment.

PER CURIAM. No error.

Cited: *S. v. Douglass*, 63 N. C., 501; *S. v. Parker*, 132 N. C., 1015.

STATE v. BENJAMIN DUNCAN.

1. On the application of a prisoner to remove or continue his case, the discretion to do either rests with the judge of the Superior Court, and cannot be reviewed in this tribunal.
2. A witness for the State on the trial of an accessory before the fact in a capital case, being asked by the defendant whether he had stated before the examining magistrate certain facts he was then narrating, replied that he had not, having been deterred by the threats of the principal, and was proceeding to state the conversation between himself and the principal when the defendant objected to this evidence. *Held*, that the evidence was admissible.
3. Where a principal and an accessory are tried separately, though on the same indictment, evidence of the conviction of the principal is not admissible on the trial of the accessory, unless judgment has first been rendered against the principal.

APPEAL from IREDELL Fall Term, 1845; *Pearson, J.*

The prisoner was indicted in WILKES, as accessory before the fact, with one Underwood as principal, for the murder of one Peden. (99) After a plea of not guilty by Underwood, the prisoner, Duncan, also pleaded not guilty, and they united in obtaining a removal of the trial to Iredell. When brought to the bar in Iredell, the two stated that they were ready for trial; but they prayed to be tried separately, and it was allowed by the court. Underwood was then put on his trial, and found guilty by the jury; and after his conviction Duncan was put on his trial, and was also found guilty.

At that term of Iredell the grand jury was drawn by a boy above the age of 10 years, and for that reason the prisoner, after his conviction, moved for a *venire de novo*.

After the conviction of Underwood, the prisoner, Duncan, moved that his trial should be removed to some other county, upon an affidavit in which he stated that several persons named therein had used great exertions to produce a prejudice against him in Iredell, and had succeeded in doing it by certain means specified in the affidavit. The court refused the motion.

The prisoner then moved, on his affidavit, for a continuance for the want of a witness, who had been summoned and was absent, whose absence, the prisoner, as he swore, did not know when he said that he was ready for trial. The court refused this motion also.

On the trial of Duncan the State offered in evidence the conviction of Underwood on the same indictment. It was objected to by the counsel for the prisoner, because judgment had not then been given on the verdict; but it was admitted by the court.

The prisoner then controverted the propriety of the conviction of Underwood, and examined witnesses upon the point. The State then produced witnesses who proved facts tending to establish Underwood's guilt, and that Duncan hired him to commit the murder. Among them was one who swore that about a month before Peden was (100) killed he heard Duncan say to Underwood that he would kill Peden, or have him killed, for preventing him from obtaining a certificate of bankruptcy; and that Underwood replied that he wished Peden was in hell, for he was breaking up all the poor people, and had denied a debt of $100 he owed him; and that Duncan then said to Underwood, "I will give you $250 and my roan mare if you will kill him." On cross-examination the witness was asked if he had told all this when he was examined before the magistrate who committed Underwood and Duncan; and he replied that he had not, because he was afraid of Underwood, who had threatened him. The prisoner's counsel then objected to his stating what Underwood said to him. But the court allowed him to proceed; and he stated that in the evening after Peden was killed, Underwood told him that he expected to be taken up for it, and he wished him, the witness, not to tell what he knew; and said that if he did he would kill him, for the jail was not sufficient to hold him, and when he got out he would kill him. For that reason, the witness said he did not tell the whole to the magistrate; but when he was subsequently before the grand jury, which was after the prisoner had been confined in the jail several months, he told all he knew, as he then told it in court.

The prisoner's counsel insisted before the jury, amongst other things, that if Underwood killed Peden, he did it of his own malice, which

rebutted any presumption that he did it at the instigation of Duncan. As to that, the court instructed the jury that although Underwood might have a grudge of his own against Peden, which might have rendered it easier to operate on him, yet if they were satisfied that Duncan had hired, incited, and procured him to commit the murder, he, Duncan, was accessory before the fact.

After the verdicts against both, the court proceeded, first, to pass sentence of death on Underwood, and then on Duncan. From the sentence against him, Underwood appealed to this Court, and at the present term the Court has adjudged that there was no error therein.

Duncan, also, at the same time appealed from the judgment (101) against him.

Attorney-General and Boyden for the State.
Guion and Miller for defendant.

RUFFIN, C. J. The points raised by the exceptions appear to the Court to be all clearly against the prisoner, except that upon the admission of the conviction of Underwood before judgment.

The objection founded on the manner of drawing the grand jury has been disposed of in the case of Underwood, who also insisted on that matter. It might have been a cause of challenge, but, after having been waived and the petit jurors accepted by the prisoner, he cannot urge it as an error for which he can claim a *venire de novo.*

The refusals to remove the trial a second time, and to continue the case, are decisions in the discretion of the Superior Court upon the matter of fact, which, it has been often held, this Court cannot review. The act of 1808, Rev. Stat., ch. 31, sec. 120, requires the affidavit to "set forth the facts whereon the deponent founds the belief that justice cannot be obtained," and expressly states the reason therefor to be "that *the judge* may decide *upon such facts* whether the belief is well grounded."

It was proper to allow the witness to state what Underwood told him, for two reasons: If, as the declarations of Underwood, they would not have been competent original evidence against the prisoner, yet the witness had a right to explain his reason for not giving the whole truth in evidence upon the occasion to which the prisoner's counsel referred.

The interrogatory was meant to draw out an answer to the dis- (102) credit of the witness, by showing that he had committed perjury, and he had a right to palliate his conduct, as far as he could, by showing that he acted under a species of duress—the fear of losing his life. Besides, it is now settled that the accessory may controvert the propriety of the principal's conviction by the testimony of witnesses: *McDaniel's case,* Fost. C. L., 121, 365; *Smith's case,* 1 Leach, 288; and in this case the prisoner did so. That necessarily opened the case to

evidence, on the other side, of the principal's guilt; and to that point any evidence must be admissible which would be against the principal were he on his trial. *S. v. Chittem*, 13 N. C., 49.

There cannot be a doubt that, however much inclined Underwood might have been, of himself, to take Peden's life, any acts or words of Duncan inciting the other to action are sufficient to make him an accessory before the fact. Hawkins says that one who, by showing an express liking or assent to another's felonious design of committing a felony, encourages him to commit it, is an accessory. Bk. 2, ch. 29, sec. 16.

But on the remaining point, which is whether the conviction of Underwood was, before judgment thereon, evidence against Duncan, the Court differs in opinion from the learned judge who presided at the trial. We have no statute upon this subject; and at common law an accessory cannot be indicted as for a substantive felony, but only together with the principal, or after the conviction and attainder of the principal. They may be tried together. *Mr. Justice Foster* deems that the most eligible course; and if it be so in England, it is yet more conducive here to a due execution of justice. When tried together, the guilt of the principal is established, as against him and the accessory, by evidence given to the jury. But even when tried by the same jury, the jury is charged to inquire first of the principal, and if they find him guilty, then to inquire of the accessory; and even in that case judgment must be first given of the principal; for, says *Lord Hale*, if anything obstruct judgment, as clergy, a pardon, etc., the accessory is to (103) be discharged. 1 Hale P. C., 624. The attainder of the principal is indispensable at common law in all cases; where the trial of the two is by the same jury, it must precede judgment of the accessory; and where they are tried separately, whether they be indicted by one or several indictments, it must precede the conviction of the accessory. Hawkins, following Hale, lays it down as settled before the St. 1 Anne, that wherever the attainder of the principal was prevented by his death, or standing mute, or being admitted to the benefit of clergy, or he was pardoned, whether before or after conviction, the accessory could not be arraigned: though, if the principal was actually attainted, whether on conviction or outlawry, his death or pardon subsequent, or any error in the record against the principal, would not avail the accessory. 2 Hawk. P. C., ch. 29, secs. 41, 42. These authors were well warranted in the passages quoted, by the Resolution of the whole Court, given by *Lord Coke*, 4 Rep., 43: "That if principal and accessory are, and the principal pardoned, or has his clergy, the accessory cannot be arraigned, for the maxim of the law is, *Ubi factum nullum, ibi sortia nulla; et ubi non est principalis, non potest esse accessorius.* Then, before it appears there is a principal, one cannot be charged as accessory. But none can be

called principal before he is so proved and *adjudged* by the law, and *that* ought to be *by judgment* upon verdict or confession, or by outlawry; for it is not sufficient that in *rei veritate* there was a principal, unless it so appears by judgment of the law; and that is the reason that when the principal is pardoned or takes his clergy before judgment, the accessory shall never be arraigned; for it doth not appear *by judgment* of law that he is principal, and the acceptance of the pardon or praying of the clergy is an argument, but no judgment in law, that he is guilty. But if the principal, after attainder, is pardoned, or has his clergy,
(104) then the accessory shall be arraigned, because it appears judicially that he was principal." That such was the rule at common law further appears from St. 1 Anne, ch. 9, sec. 1, which recites as a mischief that, as the law then was, no accessory *could be convicted* or suffer punishment when the principal was not *attainted,* and for remedy it enacts that if any principal shall be *convicted* of a felony, or stand mute, etc., it shall be lawful to proceed against an accessory in the same manner as if such principal had been *attainted,* notwithstanding such principal should be pardoned, or *otherwise delivered before attainder.* The object in using the proceedings against the principal is to excuse the prosecutor from producing to that jury substantive evidence of the guilt of the principal, because that has been duly established against the principal himself. Now, that cannot be said without the solemnity of a judgment against the principal in any but two cases: the one, where the accessory, as he may do, consents to be tried before the principal; and the other, where they are tried together. But even in those cases, as we have seen, there can be no judgment of the accessory before there is judgment of the principal; which shows that the accessory is entitled, unless he voluntarily renounces it, to the benefit of the principal's exertions in his own behalf throughout, and that the principal's guilt must be solemnly and conclusively established against himself before the proceedings can be used in the next step against the accessory. Hence, where the trials are separate, the attainder of the principal must precede not only the sentence of the accessory, but his trial. Where there is an attainder of the principal, that is sufficient, though erroneous, as has been already mentioned; and hence it follows, also, that though they may be tried by one inquest, the rendering of judgment against the principal can be contested by the principal only, and the accessory cannot object to the sufficiency of the indictment against the principal or the like, but is conclusively bound by the judgment, though he may, as
(105) *particeps in lite,* make full defense with the principal before the jury. It is not, therefore, the joint indictment which enables the State to offer the conviction of the principal, by itself, against the accessory, though it occurred to us at one time it might be, as it probably appeared likewise to his Honor upon the trial. Indeed, it expressly

appears by a subsequent passage in *Lord Hale,* 2 P. C., 222, that it is not the form of the indictment, but the mode of trial, which dispenses with the production of the attainder of the principal on the trial of the accessory; for he says that they, "being indicted by one or several indictments, and both appearing, may be arraigned together at the same time, and both pleading not guilty, the same jury shall be charged with both, and directed to inquire of both, viz., first of the principal, and, if they find him guilty, then to inquire of the accessory." It is true, the modern precedents of separate indictments against the accessory charge only "the conviction in due course of law" of the principal. But that is well justified by the statute of Anne, which expressly authorizes the trial of the accessory upon the "conviction" of the principal, as it had been before upon his "attainder"; and upon that ground the courts have put it. *Hyman's case,* 2 East, 782; 2 Leach, 925; *Baldwin's case,* 3 Camp., 265; R. and Ry. C. C., 240. Indeed, that might have been also the form of the indictment at common law; for whether the principal was "*duly* convicted," it might well be held, could only appear by judgment of the court on the conviction. We have not taken the trouble to search the old precedents on the point, because the question here concerns the mode of proving, and not the form of charging the conviction; and it is very clear that at common law the attainder of the principal was indispensable evidence on the separate trial of the accessory. It is true that those rules of the common law have been often complained of, and they certainly have not infrequently stopped the course of justice against great offenders—for the contriver and instigator (106) is generally the real principal in the guilt, though not in the legal felony. In England it has been remedied by several statutes; as first, by the statute 1 Anne, 2, already quoted, and then, following out *Judge Foster's* idea of the defects of that statute, Fost. C. L., 363, it has been since provided by St. 7 Geo. IV., ch. 64, for the more effectual prosecution of accessories before the fact, that an accessory may be indicted and convicted of a substantive felony, whether the principal shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and that he may be prosecuted after the conviction of the principal in the same manner as if the principal were attainted, notwithstanding the principal shall die, or be allowed clergy, or pardoned, or otherwise delivered before attainder, and be punished accordingly.

Probably similar reforms may be found by the Legislature to be necessary in our law, especially as peculiar provisions in it, such as the absolute right of appeal in capital cases whereby the judgment is temporarily vacated, and others, greatly multiply the impediments to justice against accessories, by appeals of the principal. But the courts cannot deny to them the benefit of the law, as it was anciently settled, until it shall be altered by the Legislature. More inconveniences may, indeed,

and probably will, induce the judges who preside at trials, in their discretion, to refuse separate trials where the principal and accessory are both amenable, *S. v. Smith,* 24 N. C., 402, as in some slight degree facilitating the trial and punishment of accessories. But we are obliged to hold that when the accessory is not tried with the principal, judgment against the latter is indispensable evidence against the former. Therefore, the judgment against the prisoner, *Duncan,* must be reversed. It is true that we now know that the conviction of the principal was a due conviction, as the judgment against him has been affirmed by
(107) ourselves; and if this were addressed to our discretion, as on a motion for a new trial, we might refuse it, as not advancing the justice of the case. But the question is one of strict law—whether there was error in admitting incompetent evidence upon the trial of the prisoner; and if there was an error committed in that respect, we are obliged to award a

PER CURIAM. New trial.

Cited: *S. v. Ives,* 35 N. C., 341; *S. v. Ludwick,* 61 N. C., 404; *S. v. Hill,* 72 N. C., 352; *S. v. Lindsey,* 78 N. C., 500; *Kendall v. Briley,* 86 N. C., 58; *S. v. Johnson,* 104 N. C., 784; *Albertson v. Terry,* 109 N. C., 9; *S. v. Smarr,* 121 N. C., 671.

ABRAM REDDICK v. DANIEL JONES ET AL.

1. Taking negotiable paper in payment of a precedent debt constitutes a purchase of it for value; and the *bona fide* indorsee will hold it unaffected by any equities, if he take it without notice of any facts which implicate its validity, as between the prior parties.
2. Where a note was executed in this State, not payable at any particular place, and was afterwards indorsed in the State of Virginia: *Held,* that whatever might be the law in Virginia, the indorsee could maintain his action in this State against both the drawer and indorser.

APPEAL from CAMDEN Spring Term, 1845; *Battle, J.*

This is an action of debt, brought under the statute, by the plaintiff as indorsee of a sealed note bearing date 19 October, 1841, for $300, payable six months after date, which was given in this State by Daniel Jones to the defendant Taylor, and by Taylor indorsed to James Owens, and then by Owens indorsed in Virginia to the plaintiff, before the note became due, in payment of a debt which Owens owed the plaintiff.
(108) On *nil debet* pleaded, the case was this: The obligor, Jones, was indebted to Owens in the sum of $300, and executed the note

therefore, but made it payable to Taylor in order to get his indorsement as additional security. Jones and Owens requested Taylor to indorse the note, but he refused; and then Owens told him that his indorsement would not make him liable for the money mentioned in the note, but he wished it in order to enable him, Owens, to pass it off; and thereupon Taylor, being an unlettered man, did indorse the note to Owens, who then carried it to Virginia and indorsed it to the plaintiff.

The counsel for the defendant thereupon insisted that as his indorsement had been fraudulently obtained without consideration, the plaintiff could not recover, though he took the note *bona fide* from Owens, because the plaintiff was not a purchaser for a valuable consideration, but took the note in payment of a preëxisting debt from Owens to him.

The counsel further insisted that the plaintiff could not recover because the indorsement was made to him in Virginia, and he had not shown that the note was negotiable and would pass by indorsement by the laws of that State.

The court refused to give the instructions, and directed the jury that the plaintiff was entitled to their verdict. The jury found for the plaintiff, and from the judgment the defendant appealed.

A. Moore for plaintiff.
No counsel for defendant.

RUFFIN, C. J. As it would be impossible for a purchaser to ascertain all the latent defects or equities that might be set up against a bill or note, it was early found indispensable to the credit of negotiable instruments to hold that a person who takes them *bona fide* for a valuable consideration, before they are due and without notice of their infirmity, is not affected by the failure or the want of a considera- (109) tion, or even a fraud between previous parties, but may recover the money due thereon. This has been long held in this State, *Black v. Bird*, 2 N. C., 273; and it is needless to cite other authorities, as every treatise on Bills and Notes thus lays down the doctrine. The only exceptions are founded upon the positive enactments of statutes which forbid the making of certain contracts, and declare the securities void: as, for example, gaming and usurious contracts. Those the law must of necessity hold void in the hands of the most innocent; otherwise, the statutes would always be evaded by assignments. But that is altered in this State, as to usury, by the act of 1842, ch. 2; and, with the exceptions of the character, the rule is uniform. It may, probably, be found that receiving negotiable paper merely as a security for a preëxisting debt will not make the creditor a purchaser, as he gives up nothing therefor, unless there be a stipulation for forbearance as a new consideration, or the like. We do not, however, enter into that question. We

believe that it has been always understood in this State that taking paper in payment of a precedent debt constitutes a purchase of it for value. What is a valuable consideration? It is generally defined to be a benefit to one party, or labor or loss on the other; and they both concur in this case; for the holder gives up his debt on one man as the price of a debt on another transferred to him, and the former debtor of the holder pays his debt therewith and gives up the securities by which he had before been bound. We are not aware of any cases to the contrary in England, or in any respectable courts of this country, except some in New York at one period, which were opposed to those that were earlier and others that are more recent. Notwithstanding those intermediate decisions, not being, indeed, those of the Court of Errors, *Chancellor Kent,* in the latest edition of his valuable Commentaries, sec. 44, p. 80, lays the rule
(110) down, as we hold it here, and in conformity with his own previous opinion, judicially delivered, in *Bay v. Coddington,* 5 John. C. C., 54, that a preëxisting debt is a valuable consideration to sustain a note in the hands of an indorsee, who will hold it unaffected by any equities, if he take it without notice of any facts which implicate its validity as between the prior parties. He is fully sustained therein by the cases on which he relies, and particularly by the elaborate reasoning and review of all the previous adjudications on the subject to be found in *Brush v. Scribner,* 11 Conn., 388, and *Swift v. Tyson,* 16 Peters, 1. Those decisions seem to us conclusive of the point, and relieve us from the necessity of entering into a further discussion of it.

Upon the other point, the opinion of the Court is also against the defendant. As the note was made in this State, and is not expressed to be payable at any particular place, and is negotiable by our law, that property, it would seem, became inherent in it as a part of its nature, so as, perhaps, to make it negotiable everywhere. But if that be not so, it is, at all events, negotiable in every country whose laws do not forbid it. Therefore, the *onus* was on the defendant to show the law of Virginia, if that makes it unlawful to negotiate these notes made in another country, which are negotiable by the law of the country of their origin; for no such want of comity can be presumed in one sister State towards another. But if such an indorsement would not be sustained in a forum of Virginia, in deference to the law of the place of the origin of the contract, and also of the place of its performance, yet clearly such an indorsement must by our courts be understood to have been made in reference to the law of this State, and, therefore, be held to entitle the holder to a remedy here against all persons, who here became parties to the instrument. But of *De la Chaumette v. Bank,* 2 Barn. & Adolp., 385, thus decides the point, as a mere matter of construction of the
(111) statute of Anne, and is directly applicable here, as our acts of

1762 and 1786 are taken from the English statute. It was there held that on a note made in England, and transferred in France, the holder might have an action in England, although by the law of France it was not negotiable there. The words of the acts do not restrict the negotiability to any particular place, and their object is to enlarge the credit and circulation of paper of this kind; and, therefore, the courts of the State ought to uphold the fair transfer of it anywhere, as advancing the policy of the statutes as well as conforming to the original nature of the contract.

PER CURIAM. No error.

Cited: Grace v. Hannah, 51 N. C., 96; *Baggarly v. Gaither,* 55 N. C., 82; *Potts v. Blackwell,* 57 N. C., 67; *Toms v. Jones,* 127 N. C., 466.

SAMUEL F. PATTERSON v. WILLIAM H. MARTIN ET AL.

One partner made an advance of $808.12 to the firm, and took a memorandum therefor in the shape of a note signed by the other partner and payable to the first. Afterwards the firm was dissolved, and, no actual account of the partnership being taken, the partner who had made this advance agreed to take a certain amount as his share, and the other partner was to take all the remainder of the effects of the firm and also "to pay all the debts due from the firm." *Held,* that by this settlement the partner who made the advance was precluded from claiming the sum advanced as one "of the debts of the firm."

APPEAL from WILKES Fall Term, 1845; *Pearson, J.*

The case was as follows: On 1 October, 1837, the plaintiff and the defendant Martin entered into partnership as merchants in Wilkesboro, with a capital of $6,000; whereof the plaintiff put in (112) $4,000 and Martin the residue. The business was to be continued five years, unless sooner dissolved by consent. In October, 1839, the plaintiff advanced for the use of the firm the sum of $808.12, and Martin gave him a memorandum thereof in the form of a note of "Patterson & Martin," to the plaintiff for the money. On 9 January, 1840, the parties agreed by articles to dissolve the partnership upon the following terms: Patterson was to take certain merchandise (some of which had been shipwrecked and had not arrived) at certain rates on the cost, to the amount of $6,000, and if upon an inventory thereof it should not amount to that sum, the deficiency was to be made up by any debts due to the firm which he, Patterson, might select; and Martin was to have all the residue of the effects of the firm, of whatever kind, consisting of

notes, accounts, judgments, county claims and property of every other description, amounting, as per inventory, to the sum of $17,000, or thereabouts—he, Martin, further agreeing and obliging himself "to pay all the just debts and liabilities of whatever kind soever now due or owing by the firm of Patterson & Martin, within two years thereafter, and to indemnify and save harmless the said Patterson against loss or damage on account of the debts or liabilities of the said firm."

On the same day Martin and the other defendants, as his sureties, entered into a bond to Patterson in the sum of $12,000, in which, after reciting the agreement for a dissolution, on the terms above mentioned, the condition was that it should be void in case Martin should not perform the agreement on his part, and pay all the debts and liabilities of the said firm within two years thereafter, and indemnify and save harmless the said Patterson from the same, according to the tenor and effect of the said agreement on the part of Martin.

The plaintiff was compelled to pay several debts of the firm, which he demanded from Martin, and also the payment of the sum of
(113) $808.12, advanced by him in October, 1839, as before mentioned; and, Martin having failed to pay the same, the plaintiff brought this suit in July, 1844, on the bond, suggesting as breaches the nonpayment of the said sum of $808.12, and also the other sums so paid to certain other creditors of the firm. On the pleas, of conditions performed and no breach, the jury found for the plaintiff, and assessed his damages to the sum of $3,782.18, subject to the opinion of the court upon the point, reserved on the foregoing facts, whether the said sum of $808.12 constitutes a debt of the firm within the meaning of the said bond, judgment to be entered for $3,782.18 if the opinion of the court was in the affirmative, and, if in the negative, the damage to be reduced to $2,683.44.

The court was of opinion with the defendants on the point reserved, and gave judgment for $2,683.44, and the plaintiff appealed.

Badger and Boyden for plaintiff.
Dodge for defendant.

RUFFIN, C. J. The manner of closing this partnership was so loose that it is probable one of the parties may have had this sum in his mind as still being due, and not the other, so that the former may, with a good conscience, demand payment, while the latter may, in equally good faith, refuse it. But from the terms of the agreement of dissolution, and the circumstances of the case, the Court is of opinion that the $808.12 is not legally to be considered as continuing to subsist as a debt of the firm. It constitutes a part of the plaintiff's interest in the joint effects, and it

must, consequently, be supposed to have been included in the demands on those effects for which the plaintiff took a part of them, to the value of $6,000. On what account did the plaintiff get that sum? In order to entitle him to that now in dispute, he must say that the $6,000 was for his stock and profits exclusively. But how is that shown? If (114) it had been declared so expressly in the articles, or if it could be seen that a statement of the firm had been made up, and that upon it there would be due to the plaintiff about that sum for his part of the capital and the gains, then this sum might appear to be still due, as a debt for an extra advance of money.

Indeed, a statement of the firm, if truly made, must have shown this as an outstanding debt, with the others. But nothing of the kind was prepared. It appears, indeed, that an inventory of the debts to the firm and of the other effects (except the merchandise) had just been taken; but it is obvious that was a mere list of debtors, and of the amount of the debts on their face, and it did not ascertain the good and bad debts and compute the true value. It was not an estimate of the assets of the concern or an account of the respective partners in company. This is put beyond doubt by the fact, stated in the articles, that the goods in which the plaintiff was, as far as they would go, to be paid the $6,000, had not been inventoried nor their value determined. No list of the debts owing by the firm appears to have been taken. The conclusion, then, seems certain that this was a bargain for a dissolution without striking a balance, and at a venture on each side. The inference follows that when the plaintiff took out of the common property $6,000 for his share, it was for his whole share thereof, and not merely for his original stock and conjectural profit. The memorandum given to the plaintiff by his partner can make no difference in law. It is only one evidence of the advance, and is no better than an entry in the books to the plaintiff's credit. We suppose that this sum of $808.12 was, of course, to the credit of his account; and the difficulty is to distinguish and say that the $6,000 did not extinguish that credit as well as one for the plaintiff's original share of the capital. In fine, when the plaintiff, one of the partners, took a large sum, exceeding all his advances of (115) every sort, and took it without computing either profit or loss, and without saying on what accounts in particular he received it, the legal conclusion must be that it was meant to cover his entire share and extinguish every demand he had on the effects of the firm; for one item of his demand can be no more said to survive than another. Therefore, although third persons might have debts against the firm, the partner, thus provided for on dissolution, could not be said to have them.

PER CURIAM. Affirmed.

THOMAS A. PERSON, EXECUTOR, ETC., v. THOMAS T. TWITTY.

Where a father had made a parol gift of slaves to a daughter, and afterwards died, leaving a last will and testament by which he only devised lands and appointed executors, but made no disposition of his personal property: *Held*, that this was not such an intestacy as was meant by the proviso of the act of 1806, Rev. Stat., ch. 37, sec. 17; that the daughter, therefore, acquired no title to the said slaves as an advancement in the case of an intestacy, and the executors were entitled to recover them from her or her assignees.

APPEAL from FRANKLIN Fall Term, 1845; *Settle, J.*

This was an action of detinue for certain slaves, in which the defendant pleaded *non detinet*. On the trial the following statement, as a case agreed, was submitted to the judgment of the court:

The negro slaves mentioned in the plaintiff's writ and declaration were the property of the late Presley C. Person, who by parol gave the
(116) same to his daughter Mary C., wife of William C. Montgomery, and delivered the same to the said William, who continued in the possession thereof until after the death of the said Presley C. Person, in February, 1845; and a judgment being entered against the said Montgomery, at the instance of one of his creditors, execution was issued thereon, the slaves were taken by the sheriff and sold, and at the sale the defendant became the purchaser, took possession, claiming the slaves as his own, and so continues to hold them. The said Presley C. Person left a will in writing, which after his death was duly proved, and the plaintiff, one of the executors therein named, duly qualified as such, the other executor therein named being dead. The will of the testator disposed only of his real estate, the personal estate being entirely undisposed of. It is insisted by the defendant that the said Presley C. Person died intestate within the meaning of the proviso to sec. 17, ch. 37, Rev. Stat., inasmuch as the said will is, at most, only a devise of the testator's lands and does not bequeath any of his personal estate. While the plaintiff insists that the said Presley C. Person died intestate, within the meaning of the said proviso, because the proviso contemplates only the case of an absolute intestacy as to any of his estate, whereas the mere appointment of an executor is a disposition by the testator of all of his personal estate. And it is agreed, if the opinion of the court shall be for the plaintiff, judgment for the slaves, to wit, Jacob of the value of $500 and Ritta of the value of $700, and $37.50 for the detention, and for the costs, shall be for the plaintiff; otherwise, judgment to be entered for the defendant.

Upon the consideration of this case agreed, his Honor declared himself to be of opinion for the plaintiff, and judgment was entered accordingly. From which judgment the defendant appealed.

Saunders and Gilliam for plaintiff.
Badger and W. H. Haywood for defendant. (117)

RUFFIN, C. J. In the recent case of *Richmond v. Vanhook,* 38 N. C., 581, the opinion of the Court was given that the proviso to section 3 of the act of 1806 had in its purview only the case of a total intestacy. In that opinion, and in what was said upon the point in *Hurdle v. Elliot,* 73 N. C., 176, there has been an entire concurrence between the four judges who have last sat in the Court; and it is not known that any one who ever sat here entertained a doubt on it, excepting only from what fell, as a dictum, from *Judge Henderson* in *Stallings v. Stallings,* 16 N. C., 298. It seems manifestly impossible to apply the proviso to a case of partial intestacy. A parol gift of a slave cannot be called an advancement for the purpose of making it a good gift, unless, also, it is to be treated as an advancement by bringing it into hotchpot. This last is the distinguishing property inherent in an advancement. It was not meant, by the act of 1806, to change the law of distribution at all, neither in a case of total nor partial intestacy. So far from that, it expressly refers to the law of distribution, and makes it, as then existing, regulate, as an advancement, the parol gift that was the subject on which the proviso operated. Now, the statute of distribution only makes gifts to children by an intestate, in his lifetime, advancements; and the intestate there spoken of is unquestionably one who is wholly so. That is perfectly settled. *Cowper v. Scott,* 1 Pr. Wms., 119; *Edwards v. Freeman,* 2 Pr. Wms., 440. Then, a father makes a will, and there is a residue not disposed of by it, neither a gift in the will nor one by deed or otherwise is to be accounted for in the distribution of the residue; not the legacy, because the act only speaks of gifts in the father's lifetime, and not the other gifts, because the act speaks of gifts by an "intestate," without qualification; and, further, because the law could not intend that a gift by a father, (118) in one mode, should be brought into hotchpot while a gift by him, in another mode, should not; since, if it were so, it would prevent that equality between children which the law means to establish where the father has not himself created an inequality. If, then, this were a gift of anything else but a slave, or if it were a gift of a slave by deed, the donee would hold the thing given, and also have an equal share of the personalty not disposed of, as one of the next of kin; for such a case is not within the statute of distributions, properly speaking, but the division is made by equity, upon its maxim of equality, and the statute is taken for a guide only in ascertaining the persons who may share; and they take as if the residue had been actually given to them in the will. *Walton v. Walton,* 14 Ves., 318; *Brown v. Brown,* 37

N. C., 309. It follows, necessarily, that a gift of a slave by parol cannot be within the act when there is a will, because there is no mode of making the donee account for it as an advancement; for it is impossible the Legislature should mean to exclude him from a share of the surplus while a donee of slaves by deed, or of any other thing without deed, and a donee by the will, would be admitted. On the contrary, the proviso merely meant that the gift in writing, as provided for in the body of the act, and a parol gift, followed by possession of the child until the death of the parent, should stand on the same footing as advancements in the divison of the estate not disposed of by the parent. Therefore, if the parol gift be not so made as to render it an advancement which is to be accounted for, it cannot be an advancement at all.

The peculiar provisions of the will in this case cannot alter the law. Although the testator only directs a sale of land, and applies the proceeds of the sale to his debts, and does not dispose of his personal property expressly, yet he does so by implication of law. He did not (119) die intestate. No administration could be granted of the estate.

By appointing executors he gives the whole to them for the payment of his debts, and then for division among his next of kin as the court of equity may direct; that is to say, equally. If this child had held by deed, he could not have been compelled to bring the slave into hotchpot; and, consequently, the gift by parol never became effectual, and the property vested in the executors.

PER CURIAM. Affirmed.

DAVID L. WRIGHT, ADMINISTRATOR, ETC., *v.* SAMUEL ROBERTS, ADMINISTRATOR, ETC.

1. Where a debtor has been arrested on a *ca. sa.* and given bond for his appearance at court under the insolvent debtor's act, and the sureties surrender him and he is ordered into custody, the *committitur* is in execution, and the sheriff has no power to discharge the debtor out of prison of his own will and without the order of the court.
2. The act of 1777, ch. 118, sec. 11, Rev. Stat., ch. 190, sec. 20, alters the law as it was under the Statute 4 Ed. III., by giving the action of debt for escape against the executor of the sheriff, as well as to the executor of the creditor.

APPEAL from ROCKINGHAM Fall Term, 1845; *Dick, J.*

This was an action of debt against the sheriff of Rockingham, for the sum of $285 for the escape of one John F. Lane. It was brought originally against the sheriff, and upon his death revived against his

administrator. It was tried upon the plea *nil debet,* and on trial, the plaintiff produced the record of his suit and judgment against Lane in Rockingham County Court; a *ca. sa.* returned *cepi cor-* (120) *pus,* and a bond with sureties executed for the debtor's appearance to take the benefit of the act for the relief of insolvent debtors. By the record it further appeared that at the return of the *ca. sa.* the sureties for Lane surrendered him in discharge of themselves in open court, and that on the prayer of the plaintiff he was committed by order of the court into the custody of the sheriff of the county, who, thereupon, took Lane again into actual custody. The plaintiff then proved by a witness that the order was made, and the sheriff took Lane into his custody about noon, and that in the evening of the same day the said Lane was going at large.

The defendant then proved that before he let Lane at large one Joseph Washburn, in open court, entered into a recognizance "whereby he acknowledged himself indebted to the plaintiff in the sum of $560, to be void on condition that John F. Lane make his personal appearance at the next term of this court and stand to and abide by the order and judgment of the court."

The defendant thereupon insisted that Lane was not committed to his custody as in execution, and, secondly, that, if he was, he was entitled to be let at large upon the security of Joseph Washburn's recognizance. But the court refused so to instruct the jury, and directed them that if they believed the witnesses the plaintiff was entitled to a verdict. Verdict and judgment for the plaintiff, and the defendant appealed.

No counsel for plaintiff.
Kerr and Morehead for defendant.

RUFFIN, C. J. It is very clear that the *committitur* to the sheriff was in execution, and could be in no other way. The debtor had been already arrested on a *ca. sa.,* and discharged out of custody upon giving bond with sureties. The sureties surrendered him, according to the power given to them in section 9 of the insolvent act; and (121) the question is, In what manner and for what purpose, when the creditor prays him in custody, is he to be deemed in custody? Certainly not in mesne process, for there is none such in the case; and, therefore, he must be in on the execution, and there remain under the order of the court until a full and fair disclosure of his effects, and his discharge upon taking the oath of insolvency after the necessary notice, according to sections 10 and 11 of the act. That seems to be the clear meaning of the statute, and so the Court held in *Williams v. Floyd,* 27

N. C., 649. It follows that the sheriff had no power to enlarge the debtor out of prison, of his own will and without the order of the court. If, indeed, he might have done it at all he could not in the way he did. The act requires a bond, with good and sufficient sureties, conditioned for the debtor's appearance at the court to which the execution shall be returnable; and in each particular this security is different.

It is to be noted that the act of 1777, ch. 118, sec. 11, alters the law as it was under the statute 4 Edw. III., by giving this action against the executor of the sheriff as well as to the executor of the creditor.

PER CURIAM. No error.

Cited: Veal v. Flake, 32 N. C., 420.

WILLIAM L. CHESSON v. JOHN C. PETTIJOHN.

Where one consideration is mentioned in a deed, and others referred to, though not specified, the latter may be proved by parol.

APPEAL from WASHINGTON Fall Term, 1845; *Manly, J.*

This was an action of covenant brought by the plaintiff against the defendant upon a covenant of quiet enjoyment contained in a (122) deed from the defendant to Franklin F. Fagan for an undivided half of a tract of land on the Roanoke River. The consideration recited in the deed was more than sufficient to cover the amount of damages claimed in this suit. The plaintiff, after producing in evidence the conveyance from the defendant to Fagan, showed a deed in trust from Fagan to David C. Guyther, reciting the consideration of $1 and the indebtedness of the said Fagan to divers persons, amounting to about $4,000, as the consideration of the conveyance by which deed the said land and other real and personal estate were conveyed in fee to Guyther as a trustee for the benefit of the creditors of Fagan. Guyther, the trustee, conveyed the same fund by a deed to the plaintiff, in which it was recited that the deed was made "for the consideration of $1 and for other considerations me thereunto moving." The plaintiff then showed a valid title to the same land outstanding in the heirs at law of one Enoch Rayner, by whom he had been evicted previously to the commencement of this suit. The plaintiff offered to prove that, in addition to the considerations mentioned in the deed from Guyther to him, he paid the sum of $625 by crediting that amount upon a judgment he had against Fagan. This evidence was objected to on the part of the defendants, but was received by the court. The evidence then proved

that other land besides that conveyed by the defendant Fagan with warranty was conveyed by the deed from Chesson, and there was conflicting evidence of the nature of that which was conveyed by the defendant to Fagan which it is unnecessary to state. The defendant's counsel insisted that the deed from Guyther to Chesson showed that Chesson had obtained the title to the land which was sold to Fagan, under an execution sale of the property of Fagan previously to the conveyance from Guyther to him, and that, therefore, the consideration paid by Chesson when he took the deed from Guyther constituted no part of the consideration which was paid for the title; and that, if it did, recovery for a larger amount than the pecuniary consideration mentioned in (123) the deed to the plaintiff could not be effected.

His Honor overruled the objection and directed the jury to assess damages for the plaintiff not exceeding the considerations paid by him; that these damages should be commensurate in amount with the value of the premises conveyed by the defendant to Fagan, from which the plaintiff had been evicted.

There was a verdict for the plaintiff, and a rule for a new trial on the ground of improper testimony admitted to prove the considerations in Guyther's deed to Fagan. The rule was discharged, and judgment being rendered for the plaintiff, the defendant appealed.

Heath for plaintiff.
A. Moore for defendant.

DANIEL, J. The defendant obtained a rule for a new trial in this case because the court permitted the plaintiff to prove by parol that the consideration of the conveyance of the land from Guyther to him was for more than $1. The consideration mentioned in the deed is $1 "and for other considerations me thereunto moving." In *Jones v. Sasser,* 18 N. C., 452, this Court said that if one consideration is specified in the deed, and others referred to in general terms, it is competent to show them forth in evidence. We think that the testimony was properly admitted, and that the judgment must be

PER CURIAM. Affirmed.

Cited: Credle v. Carrawan, 64 N. C., 425.

(124)

DOE ON DEMISE OF JOSEPH HARPER ET AL. V. WILLIAM HANCOCK ET AL.

1. It is a well established rule that the loss or destruction of a conveyance may be proved by a party to the suit as a ground for letting in to the jury the secondary evidence of a copy or other inferior evidence.
2. But the court never intended to relax the general rule that the best evidence must be produced beyond the plain necessity of the case, or where it did not appear clear that the higher evidence was not accessible to the party.
3. The loss must, therefore, be proved by the person in whose possession the conveyance is presumed to be.
4. But if a party who is *prima facie* presumed to have possession of the original deeds of his grantor, because he bought with special warranty, swears that he never did have the originals, his evidence is not sufficient to establish the loss, as the presumption is, in that case, that the grantor has them, until rebutted by such grantor's oath.

APPEAL from CHATHAM Fall Term, 1845; *Dick, J.*

Ejectment, in which the plaintiff declared on the demises of John O'Rorke and Elizabeth, his wife, John Louis Guthrie and Joseph Harper. On the trial the plaintiff gave in evidence a grant made in 1788 to one William Finley and a certified copy of a deed made in the same year to one Samuel Guthrie, and proved that Samuel Guthrie died about forty years ago, leaving three children—William Guthrie, John W. Guthrie, and Elizabeth Guthrie, his heirs at law; that the said William Guthrie died many years ago, leaving two infant daughters, who shortly afterwards died unmarried and without issue; that afterwards, in 1821, the said John W. died, leaving the said John Julius Guthrie, then an infant of tender years, his only child and heir at law, and that more than twenty years ago the said Elizabeth intermarried with the said John
(125) O'Rorke. The plaintiff then gave in evidence a power of attorney by which the said John O'Rorke and Elizabeth, his wife, and the said John Julius Guthrie appointed Robert W. Haywood their attorney to sue for and take possession of all lands belonging to them in Chatham County, and to sell and convey to Joseph Harper, one of the lessors of the plaintiff, the premises mentioned in the declaration, which he did, by deed dated 22 March, 1843. This last deed contained only a covenant of special warranty against the grantors and their heirs and those claiming or to claim under them.

The defendant objected to the admissibility of the copy of the deed from Finley to Samuel Guthrie. Upon this objection being made, the said Joseph Harper swore that the original was not in his possession or power, and that it never had been; that when he purchased the land of Haywood, the attorney of the other lessors, he received from him the copy now produced, and which he then supposed to be the original deed;

that he did not discover it was only a copy until the last term of the court; that he then requested Haywood to search for the deed; that he, himself, had endeavored to find it by inquiring of a person with whom Samuel Guthrie was well acquainted and used to transact business respecting his lands, but could not discover it. Mr. Haywood being also sworn, deposed that when he received the power of attorney he received also from the parties, as he supposed and as they alleged, all the papers relating to their lands, and, amongst others, the said copy, which at the time was supposed to be an original deed; that the contrary was not discovered till the last term of the court; that since then he had applied to Mr. O'Rorke and his wife, and with them had searched their papers for the deed, but it could not be found, and he had no doubt the deed was either lost or destroyed; that John Julius Guthrie had entered early in life into the naval service, and was still an officer in the navy, and absent from the State; that he had written to the said Guthrie, and had procured a friend to apply personally to him, for information on (126) the subject, and had received for answer that he had no such deed, and knew nothing of it; that the said Guthrie was on his way to this State since the last term of the court, when he was met at Norfolk by orders from the Department which compelled him to go to sea; but that he, Haywood, had not made any personal application to the said Guthrie. The plaintiff also called Mr. Gunter, the register of the county, who produced the register's book, containing the registration corresponding exactly with the copy. By the book and the copy it appeared that the deed was proved before Judge Williams on 21 June, 1788. Mr. Gunter also deposed that he had made diligent search for the deed in his office, and it was not to be found. The copy was, on its face, a very old paper, and was certified by John Thompson, who was the register many years ago.

The defendant's counsel still insisted that the plaintiff had not sufficiently accounted for the nonproduction of the original, and moved for a nonsuit. His Honor reserved the question, and a verdict having been rendered for the plaintiff, the court, upon the matter reserved, set aside the verdict and directed a nonsuit to be entered. From this judgment the plaintiff appealed.

Badger for plaintiff.
Manly and McRae for defendant.

RUFFIN, C. J. It is a well established exception to the general rule which requires the production of the original as the best evidence that the loss or destruction of an original deed of conveyance may be proved to the court by the party to the suit, as a ground for letting in to the jury the secondary evidence of a copy or other inferior evidence.

The cases cited by the plaintiff's counsel show that the exception was early allowed in this State. *Blanton v. Miller,* 2 N. C., 4; *Park*
(127) *v. Cochran, ibid.,* 410; *Nicholson v. Hilliard,* 6 N. C., 270. In the later case of *Smith v. Wilson,* 18 N. C., 40, the principle of those cases was explained and fully recognized, and, moreover, a decision by the Supreme Court of the United States cited, by which it appears probable that the same exception is held to be law throughout this country. *Taylor v. Riggs,* 1 Peters, 591. The registry laws which prevail universally, we believe, in the United States, tend very much to diminish the danger of imposition under these decisions.

But the courts have never lost sight of the sound general rule, nor intended to relax it beyond the plain necessity of the case, or where it did not appear clear that the higher evidence was not accessible to the party. Hence, the same old cases require that the destruction or loss of the supposed deed should be proved by the oath of the person in whose custody it is presumed it is, and that the party to the suit should swear that he has it not in his power, and does not know where it is. Nothing less can raise a reasonable belief in the mind of the judge that the instrument is not in the party's power; that is to say, either in his possession or that of some person from whom its production could be coerced. One person cannot swear for another that he has not the deed. There are here three several demises, and the verdict is taken generally for the plaintiff; and only one of the lessors of the plaintiff, Harper, made an affidavit, and he states merely that he never had the original deed, and does not know where it is. To the same effect is the statement of the attorney in fact of the other lessors. He can only say that he was informed by his principals that they did not know where it was, and that he believed from that information that the deed was lost. But although the witness may so believe upon such information, the Court cannot judicially declare it upon the strength of such declarations, inasmuch as they were not made on oath. The cases require that those persons should swear for
(128) themselves. But it would make no difference even if Harper's were the only demise. It is true, inasmuch as the conveyance to him is with special warranty, that he is entitled to the original, and, therefore, presumed, in the first instance, to have it. His oath, consequently, is, *prima facie,* sufficient to prove the loss, as it is indispensable for that purpose. But when he swears that in fact he did not receive it from the persons from whom he purchased, who had the right to the custody of it before him, the presumption then remains that those persons have it, until rebutted by their oaths. Therefore, the Court agrees with his Honor, that the absence of the deed from Finley to Guthrie was not sufficiently accounted for, and the judgment must be

PER CURIAM. Affirmed.

Cited: Wylie v. Smitherman, 30 N. C., 239; *Harven v. Hunter, ibid.,* 466; *Justice v. Luther,* 94 N. C., 798; *Gillis v. R. R.,* 108 N. C., 448; *Avery v. Stewart,* 134 N. C., 291.

DEN ON DEMISE OF RICHARD DAVENPORT ET AL. v. JOSEPH WYNNE.

1. A covenant by one for himself and his heirs to stand seized to an use *in futuro*, as, for instance, on his death, is good in law.
2. A., by deed poll, in consideration of love and affection, conveyed to his son B. and grandson C. certain lands, with the usual *habendum and tenendum* clause, and then follow these words: "and furthermore, we, the said B. and C., their heirs and assigns, are not to interrupt the said A. during his lifetime on the said premises, by them terms I have hereunto set my hand and seal," etc. *Held*, that this was a covenant by A. for himself and his heirs to stand seized to the use of B. and C. and their heirs on his death, and that, therefore, the statute of limitations could not commence running against B. and C. and their heirs until the happening of that event.

APPEAL from TYRRELL Fall Term, 1845; *Manly, J.*

Ejectment. The plaintiff showed the title in his lessors, Thomas Weatherly, Jr., and Thomas Weatherly, son of John, under a deed from Thomas Weatherly, Sr., executed in January, 1821. It was admitted that the defendant was in possession. (129)

The defendant relied upon a color of title and seven years actual occupation of the premises in dispute, between 1828 and 1839. Thomas Weatherly, Sr., died in the latter part of 1838. It was admitted that Thomas Weatherly, the son of John, was protected by infancy from the operation of the statute of limitations, and that a moiety of the lands had been heretofore recovered in his behalf; but it was insisted that, under the deed of January, 1821, the grantees would have a right of possession, at least against all except the grantor himself, and that Thomas Weatherly, Jr., being under no disability, was barred by the possession of the defendant.

A verdict for the plaintiff was submitted to, subject by agreement to be set aside and judgment for the defendant to be entered, as upon a nonsuit, in case the Court should think, in construing the deed of 1821, the said Thomas Weatherly, Jr., was barred by the statute of limitations.

The following is a copy of all the parts of the deed material to be recited in this case:

This indenture, made this day and year of our Lord between Thomas Weatherly, Sr., of the county of Tyrrell, of the one part, and Thomas Weatherly, Jr., and Thomas Weatherly, son of John, of the other part,

witnesseth: The said Thomas Weatherly, Sr., as well for and in consideration of the good-will and love and affection which I have and beareth unto the said Thomas Weatherly, Jr., my son, and Thomas Weatherly, my grandson, as also the better maintenance and preferment of the said Thomas Weatherly, Jr., and Thomas Weatherly, my grandson, hath given and granted, aliened, enfeoffed, and confirmed unto the said Thomas Weatherly, Jr., and Thomas Weatherly, my grandson, all that messuage," etc. (here the land is described) "containing 100
(130) acres, more or less, to be equally divided between Thomas Weatherly, my son, and Thomas Weatherly, my grandson" (here follows some limitations in case of the death of the grantees without issue), "and all the estate, right, title, interest, property, claim and demand whatsoever, of him, the said Thomas Weatherly, Sr., of, in, and to the said messuage, tenements, land and premises, and every part and parcel thereof, with the appurtenances, and all deeds and writings concerning the said premises, now only in the hands and custody of the said Thomas Weatherly, Sr., or which he may get or come by without suit in law. To have and to hold the said messuages or tenements, lands and premises hereby given and granted, or mentioned, or intended to be mentioned, given and granted unto the said Thomas Weatherly, Jr., and Thomas Weatherly, my grandson, their heirs and assigns" (then follows a clause of warranty); "and, furthermore, we, the said Thomas Weatherly, Jr., and Thomas Weatherly, my grandson, their heirs and assigns, are not to interrupt the said Thomas Weatherly, Sr., during his lifetime on the said premises. By them terms I have hereunto set my hand and seal, this 14 January, 1821. THOMAS WEATHERLY. [SEAL.]

The court was of opinion that the deed in question did not contain a reservation to himself by the grantor of a life estate, or, indeed, any estate whatsoever in the land, but a mere engagement on the part of the grantees, upon accepting the deed, that they would not molest the grantor in his occupation. The court was, therefore, of opinion that the statute of limitations began to run, as against Thomas Weatherly, Jr., with the beginning of the defendant's occupation, and that the said Thomas was barred by the statute.

In conformity to this opinion, a judgment as upon a nonsuit was rendered, and the plaintiff appealed.

(131) *Heath for plaintiff.*
No counsel for defendant.

DANIEL, J. In construing the deed mentioned in the case, the judge was of opinion that Thomas Weatherly, Sr., covenanted to stand seized of the land to the use of his blood relations, the lessors of the plaintiffs;

and that the possession was immediately transferred to the use by force of the statute of uses; and that, therefore, the statute of limitations began to run, by the adverse possession of the defendant, in 1828, which being continued for more than seven years, under a color of title, before this action was brought, tolled the entry of the lessors of the plaintiff. We do not agree with his Honor. It seems to us that it is a covenant by Thomas Weatherly, Sr., for him and his heirs to stand seized to an use, *in futuro,* to wit, on his death. Such a covenant is good in law. *Doe v. Whittingham,* 4 Taunt., 20; *Roe v. Traumars,* Willes, 682, 2 Wilson, 75. The following clause in the deed poll, made by the covenantor, induces us to say that the use to the covenantees was to be a future one: "And, furthermore, we, the said Thomas Weatherly, Jr., and Thomas Weatherly (my grandson), their heirs and assignees, are not to interrupt the said Thomas Weatherly, Sr., during his lifetime on the said premises. *By them terms* I have hereto set my hand and seal." The deed is obviously one executed by a person *inops consilii.* It is ungrammatical and inartificial from beginning to end, and in the clause quoted, the language changes the person of the speaker four times. But being a deed poll, the covenantor in truth is the only speaker; and the plain meaning is that he declares that although he covenants to stand seized to the use of his son and grandson, he is not to be so seized during his life, but that for that period he is to stand seized to his own use. That is the obvious intention of the parties, and, therefore, it is to govern in the construction of the deed. The covenantees never before had a right of entry, for it did not exist until the death of the covenantor, as the use (132) then sprung to them, and the statute then executed the possession to it and converted it into a legal estate in fee, if there was at that time any person seized of an estate of inheritance to serve the use. The inheritance, in the meantime, remained in the covenantor, his heirs and assigns, who were to answer to the *precipe* of others and perform the feudal duties until the use sprung up for the benefit of the covenantees. Watkins on Convey., 145. An use can never be turned into a legal estate by force of the statute, unless there be a person at the time the use springs up, seized of an estate in the lands to serve the said use. 1 Saunders on Uses, 231. And there must also be privity of estate; for he who comes in in the *post,* as the lord by escheat, disseizor, abator, intruder, or one who comes in paramount the person limiting the use, as a disseizee, or a person entering for a condition broken, shall not be subject to the use. And there must, also, it seems, be a privity of person, for a purchaser without notice of the use shall not hold charged with the future use. 1 Fearn, 479; Watkins (ed. by Preston), 141; Cornish on Uses, 130; 1 Co., 122, 139. But this last principle or doctrine (privity of person), says Mr. Preston, is only applicable to trusts as distinguish-

able from uses, and possibly to future uses to arise by means of a covenant to stand seized, or a bargain and sale as distinguished from a conveyance to uses. *Ibid.* It is stated in this case that the defendant is in possession under a color of title; but it is not stated how or from whom he derived his title. It may be that he, by an innocent conveyance, derived it from Thomas Weatherly, Sr., his heirs or assigns; if he did, he is privy in estate with the original person who was seized to the future use of the covenantees. It may be that he is also privy in person, that is, had knowledge of the future springing use to the covenantees; if (133) he is placed in this situation, he cannot be heard to raise, in his defense, the act of limitations, but the future use in the covenantees would be so knitted to his seizin as that the statute would operate and execute the said use when it arose. It may be that the defendant derives his color of title in the *post,* and then he, of course, can never be considered to be seized to the use of the present lessors of the plaintiff. But, like every other person who sets up the statute of limitations, it laid on the defendants to show the facts which put it in motion. So, likewise, if he claims any benefit from being a disseizor, he must establish clearly that he was a disseizor; for the court ought not at any time to presume a disseizin, and much less will it be done now, when we know that seldom, if ever, any other mode of conveyance is used than an innocent one operating under the statute of uses. We think, therefore, the judgment should be reversed, and judgment should be entered for the plaintiff on the verdict.

PER CURIAM. Reversed.

Cited: Cobb v. Hines, 44 N. C., 347; *Kincaid v. Perkins,* 63 N. C., 283; *Savage v. Lee,* 90 N. C., 323.

JOHN LIGON, ADMINISTRATOR OF GREEN W. LIGON, v. JEREMIAH DUNN.

1. In an action on a bond, one who is an obligor, but who is not a party to the action, may be examined as a witness for the defendant, his coöbligor, and more especially when the defendant had executed a release to the witness.
2. A plea of accord and satisfaction to an action on a bond is not good unless it avers an acquittance under seal.
3. The acceptance by the obligee of a bill of exchange in discharge of a bond will, in an action on the bond, support the plea of payment.

(134) APPEAL from WAKE Fall Term, 1845; *Settle, J.*

Debt on a single bond, in which the defendant relied on the plea of payment. There was a verdict for the defendant, on which judg-

ment was pronounced, and the plaintiff appealed. The case is presented by the following bill of exceptions:

Be it remembered, that on the trial of the issues between the parties aforesaid, before the Honorable Thomas Settle, judge as aforesaid, the plaintiff produced, proved, and gave in evidence a writing obligatory of the defendant and one Allen D. Dunn, dated 20 February, 1836, whereby they became bound to pay Green W. Ligon, the plaintiff's intestate, six months after the date thereof, $1,000.

And thereupon the defendant, in support of his plea of payment, offered to prove that in May, 1836, the said Allen D. Dunn procured in Mobile, from a bank there, a bank check or draft on the Merchants Bank of New York for $1,000, and sent the same to the defendant for the purpose of discharging the said bond; that the said check was received by the defendant, and by him, in the month of June following, was delivered to the said Green W. Ligon in payment of the said bond, and was by the said Green so received and accepted, and that the said Green afterwards, on the 20th of the same month of June, negotiated the said draft or check with one Richard Smith, at par, and received the cash therefor; whereupon the plaintiff objected to the said proof, because, if made, it would not establish a payment, but an accord and satisfaction only, and, therefore, was inadmissible and irrelevant under the defendant's plea of payment; which objection his Honor overruled, and allowed the said proof to be offered, and the plaintiff, by his said counsel, excepted.

Amongst other witnesses then called by the defendant was the said Allen D. Dunn, to whom the defendant had executed and delivered a full and general release, when the plaintiff's counsel objected that the said Allen, although released by the said defendant, was not (135) a competent witness in his behalf in support of the said plea; but the judge overruled the said objection and allowed the said Allen to be sworn and examined, and the plaintiff, by his said counsel, excepted.

And thereupon the defendant, having proved the said matters by him so offered to be proved, the plaintiff's counsel prayed the judge to instruct the jury that the matters so proved did not support the said plea of payment, and that the jury should find the issue joined thereon against the defendant, which instruction the judge refused to give, but, on the contrary, instructed the jury that the said matters did support the said plea, and that they ought to give their verdict on the said issue for the defendant; to which refusal and instruction, so given, the plaintiff, by his said counsel, excepted.

And at the request of the plaintiff's said counsel, the said judge did sign and seal this bill of exceptions, containing the said several matters

and the exceptions so taken as aforesaid, pursuant to the statute in such case made and provided, on the said first Monday after the fourth Monday of September, 1845. THOMAS SETTLE, [SEAL]

W. H. Haywood for plaintiff.
Badger and Saunders for defendant.

NASH, J. We concur with his Honor on all the points to which the plaintiff has excepted. Allen Dunn was a competent witness. Although an obligor to the bond on which the action is brought, yet he is no party to this suit. If the plaintiff fail, it leaves him still open to his action, and if he succeeds he might be liable to the defendant either for contribution or for costs. But the release removes that difficulty, and renders him a competent witness, being entirely without any interest in the matter, except his responsibility to the plaintiff. This point is
(136) directly decided in *Moffit v. Gaines,* 23 N. C., 159.

We see no error in the receiving of the evidence relative to the bank draft nor in the charge as to its effect. We think the evidence was both relevant and sufficient to sustain the issue on the plea of payment. The objection on the part of the plaintiff cannot be sustained. The evidence could not have supported the plea of accord and satisfaction. If it could not avail the defendant under that of payment, it could not avail him at all under any other. The action is on a specialty—a bond for the payment of so much money. It is a rule in pleading that as the plaintiff's action must have all things that are necessary and essential to support it, so the defendant's bar must be substantially good, and if the gist of the bar be bad, it is not cured by a verdict in favor of the defendant. At common law a single bill could not be discharged by payment alone; the *obligation* still remained in force, for it could be dissolved only by an instrument of as high character as itself. *Eadem ligamine, quo ligatur,* was the maxim of the common law. Platt on Covenants, 591. If, then, a defendant to a suit on such a bond had pleaded payment, without setting forth an acquittance, and the jury had found a verdict for him, he could have had no judgment, because the acquittance being the gist of the plea, it was bad without it. 2 Tidd's Pr., 921; 6 Coke, 43. And the rule is the same in pleading accord and satisfaction; and for the same reason, it must be pleaded to be by deed. Platt on Covenants, 592; 2 Will., 86. *Preston v. Christmass.* That was an action of debt on a single bill; the plea, accord and satisfaction. The plaintiff demurred, and for cause of demurrer showed that the plea did not set forth it was by deed. On the argument, the Court sustained the demurrer, and say: "This being an action of debt, on an obligation without any condition, satisfaction must be pleaded by deed." They rely upon 6 Coke, 43.

The common law, as to the plea of payment, remained until
(137) the fourth year of the reign of Queen Anne. In that year the

right to plead payment to such a bond was established by an act of Parliament. Section 12 of that act gives that plea. Before the passage of that statute the acquittance under seal was the discharge; the money paid, the consideration for it. The statute of Anne, however, makes no mention of the plea of accord and satisfaction; it still remains as at common law, and must be pleaded with an acquittance. Here, there was no acquittance; the defendant could not have pleaded accord and satisfaction, and could avail himself of the matters in discharge only under the plea of payment, and that under the statute of Anne. The evidence, then, was pertinent to the issue joined under the plea of payment. Was it sufficient to sustain the plea? Did the matters found amount to a payment of the bond? We think they did. The bond is a single one, dated 20 February, 1836, and payable six months thereafter. In the month of June, before the obligation became due, the defendant, with a view to discharge, transferred to the plaintiff a bank draft, which was received by him in payment of it, and in the course of a few days the holder negotiated it at par, and received the cash in amount equal to the bond. Why is this not a payment? A payment, it is said by 2 Stephens, Pl., 716, may be made in money or its equivalent. And Mr. Chitty, in his treatise on Contracts, 750, states that payment may be in money or in goods when the latter are received at an agreed value. Thus if A. hold a bond on B. for $100, and the latter deliver to the former a horse, valued by the parties at that sum, and the horse is received in discharge of the obligation, it is a payment, although the horse may die the day after the delivery. Payment may be made, also, in a bill of exchange, or a promissory note, though the receipt of neither is in itself a payment, for neither is money. But if received, and the creditor do not use the necessary diligence to get it paid, the defendant will get discharged. 2 Steph. Pl., 232, and the cases there referred (138) to. When at the time of the transfer it is agreed between the parties that the draft shall be received in payment, it will discharge the debt as a payment. *Mayer v. Nias,* 1 Bing., 311; Chit. on Con., 767. And that whether the creditor receives any money upon it or not, provided the note or draft be what it purports to be, genuine, and there be no fraud. 2 Starkie, 186. Nor is it necessary to show, in so many words, that the creditor did receive it as payment. In the case from 1 Bingham the agreement was inferred from circumstances. The action was brought by the plaintiff, as assignee of a bankrupt, against the defendant, to recover the value of goods sold and delivered, and which were to be paid for in cash. A brother of the bankrupt called on the defendant for payment, who paid him some money and a dishonored bill, upon which the bankrupt was acceptor. This the brother at first refused to take, but upon its being thrown down by the defendant, he

took it up and carried it to the bankrupt, who received and never returned it. The Court observed "Was the bill accepted in payment? It was thrown down and perhaps rejected, but it was then taken up and carried to the bankrupt, who retained it; it was, therefore, a payment."

But the case before us does not rest simply upon the fact that the draft was received in payment by the plaintiff; there is this additional and most important one: The plaintiff actually received the full amount in cash. It is true, the money was received by him before the bond fell due, and it was not, strictly speaking, a payment at that time. The bond does not, by its terms, authorize a payment before 20 August. The money, when received by the plaintiff, was received to his own use, and when the bond came to maturity, the money being in his hands, the obligation was discharged.

PER CURIAM. No error.

Cited: Godfrey v. Leigh, post, 396; *Carraway v. Cox,* 30 N. C., 80; *Curtis v. McIlhenny,* 58 N. C., 291; *Pritchard v. Meekins,* 98 N. C., 247; *Delafield v. Construction Co.,* 118 N. C., 110.

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JOSEPH GREEN v. JACOB COLLINS, ADMINISTRATOR, ETC.

1. The Superior Courts, when an appeal is taken to the Supreme Court, should only state so much of the evidence as raised a question of law at the trial, and then the opinion prayed and given thereon, with simplicity and precision. A report of the whole trial below is out of place in the case to be sent to the Supreme Court.
2. Where a devise or bequest is, after sundry devises and bequests, "all the remainder of my estate I leave to my wife, Elizabeth, to be divided among my children as she thinks proper," and she is appointed executrix of the testator's will: *Held*, that no beneficial interest passed to her by this bequest or devise, in the remainder so disposed of, but she only took it in trust for the benefit of her children and to be divided among them.
3. The court before whom the case was tried erred in declining to advise the jury, unequivocally, as to the proper construction of the will upon which construction a material question in the cause necessarily arose.
4. Only those things in which a person has a beneficial interest are assets, and not those which he holds in trust for another.
5. An agreement between counsel that, in an action at law against an executor or administrator, the jury may inquire as to equitable as well as legal assets, must be inoperative at law, as the court cannot assume a jurisdiction which the law does not confer; and, moreover, there is an essential distinction between the nature and application of legal and equitable assets.
6. A court of law knows nothing of trusts, except so far as they are brought within its jurisdiction by statute.

7. An executor or administrator is not answerable in a court of law as for a *devastavit* in relation to equitable assets, unless so far as these are affected by the act of 1836, Rev. Stat., ch. 46, sec. 22.
8. If an executor or administrator refuse to call upon the trustee of a legal estate, the equity of which is alleged to be in their testator or intestate, the only tribunal to decide upon the default is a court of equity.

APPEAL from LINCOLN Fall Term, 1845; *Pearson, J.*

Debt upon a bond of the defendant's intestate. The case sent up to this Court is very minute in its statement of the evidence on the trial and the opinions of the judge on the various points raised by the counsel. But as the Supreme Court has, in giving its opinion, stated more succinctly all the material evidence and the points insisted on, so far as principles of law were concerned, it is not deemed necessary to copy the case sent up. The question was on the liability of the (140) defendant for assets which, it was alleged, he had of his intestate. A verdict having been rendered for the plaintiff in pursuance of the charge of his Honor, judgment was rendered accordingly, and the defendant appealed.

Badger and Boyden for plaintiff.
Guion and Alexander for defendant.

RUFFIN, C. J. The record sets forth, apparently, a report of the whole trial, including all the evidence and all the views his Honor thought it proper to submit to the jury in his charge, with reasons assigned to the jury for entertaining the opinions delivered to them. It would be much better to state only so much of the evidence as raised a question of law at the trial, and then the opinion prayed and given thereon, with simplicity and precision. That is the mode provided in Rev. Statutes, ch. 31, sec. 103, which is taken from the St. 13 Ed. I., and it would greatly promote the convenience of the judges who preside at trials and the appellate courts to adhere to it. This Court does not enter the original judgment, and, therefore, cannot consider a motion for a new trial; and a report of the whole trial is out of place in the case to be sent to us. Our province is to inquire, merely, whether there was any error in law committed on the trial by refusing a proper instruction when prayed for, or giving an improper one. Hence, it is only necessary or proper to put down what one or the other party complained of and excepted to, and to do that with directness, in the affirmative or the negative, so that it may be distinctly known what error is alleged, and the parties not be surprised by decisions in this Court on points different from those intended. We have so often experienced inconveniences from this cause that we deem it proper to present the subject to the attention of the gentlemen of the bar, and especially to our brethren who

(141) preside on the circuits. A party has no right to ask the judge to go beyond the matter of his exception in drawing up the case, and, certainly, all dissertations to the jury upon a doctrine of the law at large are out of place in an exception, since the matter for the consideration of this Court is the instruction refused or given, as applicable to the particular case in hand, and nothing more.

As we collect from the report set out in the record, the dispute is of this nature: The action is debt on a bond against the administrator with the will annexed, of Timothy Chandler, deceased, and the defendant pleaded *plene administravit* and no assets *ultra*. The plaintiff endeavored to charge the defendant with certain slaves as assets, which consisted of two classes—one of them made up of a woman named Sue and her son Phil, and the other of a woman named Maria and several of her children. None of the slaves were ever in the actual possession of the defendant, and consequently he was not, *prima facie,* chargeable with them. But the counsel of the parties had previously agreed in writing that if by any suits against any of the persons who had possession of them the negroes could be made liable for the debts of Chandler, they should be considered liable to the plaintiff's recovery in this action, it being the object of the parties to try the question of assets in its broadest sense. The effect of this agreement the Court understands to be that the defendant is to be liable in the same manner as if the negroes were actually in his possession. In other words, the decision turns upon the question, whether the negroes were the property of Chandler at his death so as to constitute a part of the assets for the payment of his debts.

The case as to Sue and Phil appears to be as follows: In 1804 Arthur Graham, after devising some of his land to two of his sons and giving a negro to a sister, and some small legacies to other persons, made in his will the following bequest: "All the remainder of my estate I (142) leave to my wife, Elizabeth, to be divided amongst my children as she thinks proper"; and he appointed his wife executrix and his son John executor thereof. The widow took possession of the residue of the estate, which consisted in part of a number of slaves, and before the year 1814 she appointed to several of the testator's children certain slaves under the will, though to what particular value to each, or in the whole, does not appear; and the appointees took them into possession. On 24 September, 1814, Elizabeth, the executrix, and Timothy Chandler, with whom she had before intermarried, made a further allotment of slaves among the five remaining children of Graham, assigning certain negroes to each of them in severalty and conveying the same: to one of them to the value of $1,200; to three to the value of $900 each; and to the fifth child to the value of $700. This distribution was made in a writing, headed as follows: "A division of negroes belonging to the

estate of Arthur Graham, deceased," and, after setting forth the names and values of the negroes allotted to the five children respectively, comes this entry: "To Timothy Chandler and Elizabeth Chandler the negroes Frank, old Sue, and young Sue, and 300 acres of land, $1,000." At the foot of the statement is the following declaration and covenant under the hands and seals of Chandler and his wife: "We, Timothy Chandler and Elizabeth Chandler, bind ourselves to make up to the above named heirs property to make the negroes valued to the above heirs to the value of $1,000; out of the estate of Arthur Graham, deceased." From that period until his death in 1832 Chandler had possession of the said negroes, old Sue and young Sue, and the negro Phil is the son of one of those women; and, after Chandler's death, Mrs. Chandler continued in possession of them until after this suit was brought, when she conveyed him to one of her daughters. Upon the foregoing facts, after some dissertion upon three various constructions of which the (143) will of Arthur Graham was supposed to be susceptible, and after stating an inclination to adopt the construction that the widow took an absolute estate in all the property, with an expectation of the testator that she would divide with her children, that is to say, by keeping for herself such part and giving to them such parts as she thought proper, his Honor finally declined giving the jury any opinion on the will. And he stated that he did so because, "if the jury were satisfied that as far back as 1814 Mrs. Chandler made a division with her children, giving them all a share, which they have enjoyed, and keeping for her share Sue and the other property, and this claim of hers had been acquiesced in, and the property kept by the husband as his own up to his death, then Chandler had, either by the will or by these subsequent circumstances, a good title to the negroes, and they would be assets in the defendant's hands." The jury found their value as assets.

The Court is of opinion that there was error, both in declining to advise the jury of the legal meaning of the will and in leaving it to the jury to find that in 1814 anything was kept by Chandler and wife as her share of her former husband's estate, that is to say, for her own benefit and as her property, otherwise than as given in the will.

We cannot but understand that the defendant insisted to the court that, by the true meaning of the will, Mrs. Chandler got no beneficial interest in the residue, and prayed an instruction accordingly. Certainly, that question arose directly in the cause, as it concerned the title to the negroes, which the plaintiff contended were assets of Chandler. Therefore, the party had a right to the opinion of the judge on it; and, to be useful to the jury, it should have been given unequivocally, either in the affirmative or negative. Indeed, the proper construction was very material to the point on which the court did leave the case to the jury;

for if, under the will, Mrs. Graham took nothing for herself, it
(144) would require some new consideration to authorize the position that, by dividing some of the negroes among some of her children, she acquired an estate to her own use in those which she kept undivided. Now, the construction of the will seems to admit of no doubt. The counsel for the plaintiff in the argument here admitted that the authorities on the point could not be resisted. The whole legal interest is certainly given to Mrs. Graham. There are no words nor implication to cut her estate down to one for life. But it is equally clear that she takes as trustee of the whole. There are no words which give her anything for a period to her own use, while there are express words that she takes for the use of her children. It is simply the case of a testamentary gift of land and negroes to A., to be divided between B. and C. as A. may think proper. It is difficult to state a plainer trust. The gift is to Mrs. Graham, *to divide*. No terms could be more explicit. Then, among whom is she to divide? "Amongst my children," says the testator; and not amongst my children and my wife. The words, therefore, create an express trust, which carries the capital and the profits, until a division, to the children in such proportions as the mother may appoint. To language so unequivocal it is vain to oppose suppositions that, as the testator ought to have provided for his wife, and as he left it to her discretion to make a division among their children, therefore, he might have intended to leave it also to her discretion to keep a part or all for herself. If he had such an intention, it is not to be found in the will, but the contrary very plainly.

Then, as Mrs. Graham was not entitled to any share of the estate for herself, what is there on which it could be left to the jury to find that in 1814 there was a division in which anything was allotted *as her share,* to hold afterwards for herself, instead of holding upon the trusts of the will? As far as the Court can perceive, there is nothing what-
(145) ever. It does not even appear that she or her second husband then preferred such a claim. No controversy about her rights under the will is shown between her and her children, and, consequently, there could be no compromise—much less is one established affirmatively, as is incumbent on one who insists on Chandler's title as acquired by division. It is possible that she might have claimed a distributive share and dower, upon the principle of the decision in *Miller v. Chambers,* which is mentioned in *Craven v. Craven,* 17 N. C., 341, wherein it was held that a widow to whom the husband left nothing by his will might thus claim, though she did not dissent from the will. But there is no evidence of a claim of that kind more than of the other. There is nothing but an apportionment among some of the children, according to the will. Several of the children were not even parties to it, which

shows that it could not have been a compromise of the nature suggested. Now, unless the contrary appear, it is presumed that the executrix and trustee still held in that character the property which had not been divided; and, as it had been originally divisible, that it was still divisible among the children. And that seems to have been the actual intention in this case; for the agreement at the foot of the allotment is express that the sum of $1,000 is to be made up to each child "out of the estate of Arthur Graham, deceased"; and it is not stated that there was any such estate, except the three negroes and the land then retained by Mrs. Chandler and valued at $1,000. It was, therefore, erroneous to submit the inquiry to the jury without evidence relevant to it. Consequently, Sue and Phil were not assets of Chandler, for, if his legal interest had not terminated with his life, they would, yet, not have been assets, because only those things in which a person has the beneficial property are assets, and not those which he holds in trust for another. *Deering v. Torrington,* 1 Salk., 79.

The question concerning the slave Maria and her children is (146) next to be considered. She and a girl named Peggy were, in March, 1824, purchased by Mrs. Chandler, in the absence of her husband, at the price of $670, which was then and afterwards paid in securities and cotton belonging to Chandler. By her directions the bill of sale was made to her son William Graham, in order, as they said, to keep Chandler, who was a drinking old man, from spending the property. The negroes went immediately into Chandler's possession. In 1827 William Graham proposed to sell Peggy to one of his sisters, and, upon her requiring that Chandler should join in the bill of sale, he said, "It is not necessary, as the negroes are William's"; but he did join in the deed. At the same time, as one witness stated, Chandler said that "he owed William Graham $600 by notes, and that he would let him keep the two girls for the debt, and because he had not got a full share in the division of his father's estate, and his mother had lived on the land willed to him." William Graham also then said he would let his mother keep Maria and her children as long as she lived. The witness saw no notes, and did not know that any had ever been given. Another witness stated that transaction differently, and said that Chandler had sold Peggy to one Lewis Graham, and the latter let William Graham have her. It appears by the division of September, 1814, before mentioned, that William Graham was one of the children who got negroes to the value of $900.

The foregoing is the substance of this part of the case. Upon it the court left it to the jury to find whether the purchase of Maria by William Graham was to his own use, or in trust for Chandler. And upon the supposition that he took the bill of sale in trust for Chandler, the

court instructed the jury, first, that Chandler could not give his equitable interest in the negroes to William Graham, except by deed of gift, meaning, we suppose, by writing signed and attested according to the (147) act of 1806; and that he could not sell the negroes to him without a bill of sale or an actual delivery; and, secondly, "that at the death of Chandler it was the duty of his administrator to reduce the negroes into possession, and call for the legal title; and, as the negroes were in the possession of Chandler at his death, the administrator could not say the legal title was in another, nor, that he could not be charged with the value in a suit at law, upon the ground that they were not legal assets, but only such assets as could be recovered in equity; for it was his duty, having the negroes in possession, to call in the legal title, and, not having done so, he was liable for the value as assets, under the agreement of the counsel."

This instruction the Court holds to be erroneous, also.

We do not understand the agreement referred to as meaning anything more than the defendant should be charged with slaves as assets, though out of his possession, provided they would, if in his possession, be assets in this action. In other words, it was not intended to open the inquiry in this suit whether the defendant did not hold equitable assets, and, if he did, that he should be liable therefor as if they were legal assets. We suppose his Honor had the same understanding of the agreement, inasmuch as he held that the value of the negroes was legal assets, either because the defendant was estopped by the possession of his testator to deny that the legal title was in him or because his failing to call in the legal title amounted to a default which made him liable at law. But if the meaning of the parties should be mistaken by us, and it really was, that upon this trial equitable as well as legal assets should be the subject of inquiry, then the agreement must be inoperative at law, inasmuch as the court cannot assume a jurisdiction which the law does not confer. Equitable assets do not differ from those that are legal in the circumstance that the consideration of them belongs to the different courts more than in the other property of being administered (148) upon principles essentially different; legal assets being applied according to the dignity of the debts, while there is no precedence among debts as to equitable assets. Consequently, our inquiry is whether Maria and her children, if actually in the hands of the defendant, would be assets in this suit at law.

The Court is of opinion that they would not be. It is very probable that a court of equity would declare the purchase to have been made with the funds of Chandler and in trust for him. It would be hardly possible for William Graham, when called to answer, to deny it. But assuming that to be the fact, that trust would not be the subject of legal

cognizance in a proceeding of this kind more than in any other. A court of law knows nothing of trusts, except so far as they are brought within its jurisdiction by statute. For example, it is a common method of defrauding creditors for a debtor to convey property upon a trust for himself; and to prevent fraud, the court is obliged to hear evidence of the truth. But that is not for the purpose of executing the trust or giving the creditor the benefit of it, but merely to determine the intent of the conveyance, and avoid it under the St. 13 Eliz. But the St. 29 Car. II., ch. 3, and our act of 1812, make land, of which another is seized or possessed in trust for a debtor, liable to be taken in execution, and provides that the purchaser shall get the estate of the trustee as well as the interest of the *cestui que trust*. The consequence of that enactment is that, to certain purposes, the courts of law are obliged to inquire of the trust—its existence and extent. But the acts, as far as yet quoted, extend only to the case of an *elegit* or *fieri facias* executed. Therefore, when the *cestui que trust* died, before execution, his interest descended in equity and would not become assets at law in the hands of the heir or executor merely upon its liability to execution against the person from whom it descended or came; for it was necessary, by distinct clauses in the acts, to provide expressly that certain trusts descended should be legal assets. Now, in the St. 29 Car. II. the beginning of section 10 makes the trust of a term as well as of a freehold sub- (149) ject to execution; yet, when it makes trusts assets, it confines them to trusts in fee simple descended to the heir; and even as to them provides, sec. 11, that the heir shall not be chargeable by reason of any plea, or any default, or any other matter, to pay out of his own estate, but execution shall be sued of the estate, so made assets in his hands by descent, in the same manner as it is to be at the common law when, the heir pleading a true plea, judgment is prayed against him thereupon. Thus is exhibited in a remarkable degree the ease with which, while the creditor is secured, the heir is protected from injury; for, as it may be difficult for him to establish the trust, and impossible for him to do it speedily, he is not obliged personally to do it for the benefit of the creditor, but the latter is at liberty to go against the trust itself, or the land out of which he alleges it is to arise, and then he and the person seized, as he says, may contest the question of trust or no trust. In other words, the act gives the creditor of the ancestor remedy *in rem* only, and does not involve the heir in the litigation with the alleged trustee. Now, the liability of executors is different from that of the heir; for an executor cannot confess specific assets in hand and require the creditor to take his judgment and execution against them; but, to the value of the assets found, the executor may be made liable *de bonis propriis*. Therefore, with proper caution, the St. 29 Car. does not interfere with

the trust of a term coming to an executor, and make that legal assets; for, besides the difficulty on a jury to try the question of trust or no trust, which in many cases is very nice, wherein conveyances are held upon the most artificial equity to be but securities, there may be, in every case almost, delays in getting in the legal title, so as to enable the executor to sell the estate to advantage. Therefore, the English statute,

which is confined to lands, carefully omits to interfere with the
(150) liability of an executor of the *cestui que trust* of a term, while it

makes the land descended from the *cestui que trust* in fee to the heir, though not the heir himself, liable to the creditor. Now, in our act of 1812 the experiment is tried of extending the liability to be sold under execution to a trust of goods as well as lands. But that is only so far as to authorize the trust of goods to be sold under execution against the *cestui que trust* himself, and does not alter the law which previously determined their character as assets in the hands of the executor. It is probable that, by the latter part of the first section the writer might have intended to convert the trust of goods into legal assets, since there is a strange confusion of terms, and the words convey some intimation of such an intention. But upon examination it is found that the act is only that "if any *cestui que trust* shall die, leaving a trust *in fee simple*" (not even a term) "to descend or come to his heir, or executor, *such trust* shall be deemed and is thereby declared to be legal assets in the hands of such an heir or executor," thus using the very words of the St. 29 Car. II. as to the subject out of which the trust arises, namely, a fee simple, and, therefore, including land only, and then adding "executor or administrator"—which, in that connection, is senseless. It is true, the Legislature, becoming aware of the inefficiency of the act in this respect, supplied the omission in 1836 by providing in Rev. Stat., ch. 46, sec. 22, that if any *cestui trust* shall die leaving *any equitable interest* in any estate, real or *personal*, which shall come to his executor, every such equitable interest shall be personal assets in the hands of the executor for the benefit of creditors. Every person, much versed in the subject, will readily perceive the difficulties in administering this late enactment. A jury and court of common law, before whom the alleged trustee cannot be called to his oath, will probably be found very incompetent to determine the existence, extent, and value of all

equitable interest in chattels, so as to know how to charge the
(151) executor. Take, for example, *Hauser v. Lash*, 22 N. C., 212, and

of *Lash v. Hauser*, 37 N. C., 489, in the former of which the trust was denied altogether by the mortgagee and executor of the intestate, and only established after a tedious litigation, and in the latter of which the equitable interest of the intestate, after having been established in the former suit, was duly applied as equitable assets to the debts. But if that

had been legal assets, it would have been lost forever to the creditors; for after a verdict at law upon the question of assets, it necessarily follows that the parties are concluded, and there can be no relief in equity in respect to legal assets. At law, the issue, when joined, is to be tried at once and finally; while in equity the assets will be the subject of account from time to time, and applied as got in; and if there be, or be supposed to be, an equitable interest, directions may be given to institute proper proceedings to determine it. It is to be feared, then, that the only course by which executors can keep themselves secure will be to sell all such equitable interests as they stand, and the consequence will be that they will always be sold under the disadvantage of the trust being denied or the amount of the encumbrance being disputed, and they will, therefore, yield neither creditors nor legatees anything. It is highly probable, we are apprehensive, that it will turn out that the statute requires practical impossibilities from judges and juries. But, however that may be, it is unquestionable that the act of 1836 does convert these interests into legal assets; and they, of course, retain that character, although it may, in particular instances, be necessary to seek an account of them, and satisfaction in a court of equity. Nevertheless, this case is not affected by that act, since Chandler died in 1832, when the act of 1812 was the only modification of the common law. Therefore, if this were an express trust, the assets would not be legal, and be chargeable to the defendant in this action. That the trust was a secret one, and created with the purpose of keeping off (152) Chandler's creditors—supposing him to have known and assented to it—makes no difference, as it did not arise upon a conveyance by Chandler of his own property, but upon a purchase for him. *Gowing v. Rich,* 23 N. C., 553. It would be impossible to hold, independent of the express enactment in 1836, that these slaves were legal assets, for that would, in truth, make a trustee or executor *de son tort,* if he took possession or recovered the property from a wrong-doer, after the death of the *cestui que trust,* while, on the other hand, he would be guilty of a breach of trust by not preserving the property. Something of this sort seems to have been in the mind of his Honor, and hence he had to treat the defendant as being guilty of a *devastavit* in not getting in the trustee's title, and for that default hold the defendant liable for the value of the negroes. But that is manifestly erroneous. No doubt, an executor who omits to get in and dispose of a trust fund violates his duty as much as one who abandons a legal interest. But the point is, where he is to answer for it; and certainly it can only be in that court which has a jurisdiction of the trust and can determine that he has been guilty of the default. Besides, it would change the course of the administration of the fund; for how can the court of law ascertain what other

debts of the testator remain unpaid and what proportion of the fund ought to go to this plaintiff? The character of the assets depends upon their state at the death of the testator; and if the executor gets in equitable assets, they remain equitable. They can be nothing more, when the executor is charged for his omission to get them in. Consequently, these assets could not be inquired of in this action.

The plaintiff's counsel insisted in the argument that as Chandler took possession of the negroes and held them so long and dealt with (153) them as his own, and there was no evidence that he assented that the deed should be made to W. Graham, or that he knew that it had been, the title of Chandler became perfect at law by his possession; and, therefore, that the other points were immaterial. It may, indeed be that Chandler's possession was adverse, and so he got a title under the act of 1820, ch. 1055. But that point was not taken on the trial. At least, it does not appear to have been taken; and, at all events, the case was decided on the other and, as we think, erroneous ground. Therefore, this verdict should be set aside and the case sent to another jury, before which the plaintiff may, in any manner he can, show a legal title to the negroes in Chandler.

The court concurs with his Honor that the presumption of payment is rebutted fully by the circumstances stated, and the prayer of the defendant on that point was properly refused.

PER CURIAM. *Venire de novo.*

Cited: S. v. Secrest, 80 N. C., 453; *S. v. Hinson,* 82 N. C., 598; *Howell v. Ray,* 83 N. C., 560; *Robinson v. McDiarmid,* 87 N. C., 464; *S. v. Glisson,* 93 N. C., 509.

JOHN McRAE, QUI TAM, ETC., v. JACOB WESSELL.

The act of Assembly passed in 1800, imposing a penalty on persons retailing spirituous liquors by the small measure in the towns of New Bern and Wilmington without the permission of the commissioners of those towns respectively, is a private act, and was not repealed by the general law upon the subject of retailers, passed in 1825, nor by the act passed in 1836.

APPEAL from NEW HANOVER Fall Term, 1845; *Caldwell, J.*

Action to recover a penalty of $50 for retailing spirituous liquors, contrary to the provisions of an act passed in 1800 in relation to (154) the towns of New Bern and Wilmington. This act imposed a penalty of $50 upon any person retailing spirituous liquors in either of the said towns without having first obtained permission from

the commissioners of the said towns respectively, as well as a license from the county court. The act was offered in evidence as a private act, and the retailing by the defendant fully proved. It was insisted for him, in the first place, that the act in question was a public act, and, therefore, repealed by the act of 1836; and, in the second place, that if it were a private act, it was repealed by the general act of 1825 upon the subject of retailers. The jury found a verdict for the plaintiff, subject to the opinion of the court on these questions. On consideration, the court was of opinion that the act of 1800 was a private one, and, therefore, not affected by the act of 1836, and that it was not repealed by the general law passed in 1825 on the subject of retailing.

Judgment being rendered on the verdict, the defendant appealed.

Badger for plaintiff.
No counsel for defendant.

Daniel, J. So much of the act of Assembly of 1800 is to be considered a private act which prohibits any person, under the penalty of £25, from retailing spirituous liquors by the small measure in the towns of Wilmington and New Bern without first having obtained permission by a certificate from the commissioners of the said towns and also, thereafter, a license from the county court, because it did not relate to all the citizens of the State. No judge could be expected *ex officio* to take notice of it. By section 6 of the public act passed in 1825, entitled "An act to direct the manner in which licenses shall be hereafter issued to retailers of spirituous liquors," it is declared that this act (of 1852) shall not affect the mode in which licenses (155) are now by law directed to be issued in any of the incorporated towns in this State. We do not think that this section of the act of 1825 turned all the then private acts upon this subject into public acts, so as to be noticed and acted upon by the judges, *ex officio*. We, therefore, think that the private character of the act of 1800 on the subject now before us was not affected by the public act of 1825. And in 1836 the Legislature declared that no act of a private or local nature shall be considered repealed by ch. 1, sec. 8 of Rev. Statutes. Therefore, the private act of 1800 is unrepealed, and now in force, so far as relates to the question before us. The judgment of the Superior Court must be

Per Curiam. Affirmed.

EX PARTE WILLIAM G. DAUGHTRY.

1. The county court is constituted the tribunal to determine contested elections of clerk, and neither an appeal nor a *certiorari* can be supported to revise their decision.
2. Nor is the party against whom the decision has been made entitled to a *mandamus* unless he swears that if the county court had made the proper inquiry as to the validity of the votes given to the respective candidates, or, if it should be made now, there is good reason to believe that the person complaining, and not the other candidate, was duly elected.
3. If a person thinks himself elected clerk of a county court, instead of the one pronounced by the said court to have been duly elected, his remedy, if he has any, is by a writ of *quo warranto*.
4. Where an election for clerk of the county court is contested, the party contesting should be confined to those objections of which he has given the legal notice to the opposite party.

APPEAL from GATES Fall Term, 1845; *Manly, J.*

The case was as follows: Rufus K. Speed and the present rela-
(156) tor were opposing candidates at the election for clerk for the county court of Gates in August, 1845. Speed received a majority of the votes, and was returned by the sheriff as elected. Some days before court the relator served on Speed a written notice that at the next county court he would contest his election and move the court to set it aside, because fifteen persons, therein named, had voted in the election who were not entitled to vote. Accordingly, the relator appeared and opposed Speed's admission into office on the ground stated in the notice. But the court held that the ground was insufficient, and adjudged that if the facts were as stated by the relator the court could not therefore avoid the election. The relator then offered to prove that some illegal votes had been given in the election for Speed, and that they amounted in number to so many that if they were deducted from the whole number of votes given to Speed, and, also, if all the illegal votes which it might be made to appear had been given to the relator were deducted from the whole number given to the relator, then of the remaining and good votes given at said election Speed would not have the majority, but the relator would. But the court refused to hear the evidence thus offered by the relator, because he had given notice that he would contest the election upon a different ground, and Speed had no reason to expect the latter objection would be taken, and could not be supposed to be prepared to oppose the application by evidence on his side, and, thereupon, the court admitted Speed into office.

At the next Superior Court the relator moved for a *certiorari*, which was refused. He then moved for a *mandamus* to the county court, com-

manding them "to purge the polls of the illegal votes which had been given in the said election, and to declare, after such purging of the polls, who was duly elected." That was also refused, and the relator appealed.

Saunders for relator.
A. Moore contra. (157)

RUFFIN, C. J. The Court concurs with his Honor that it was right to refuse both motions. There was no ground for a *certiorari*. The county court is constituted the tribunal to determine contested elections of clerk, and the decision cannot be reviewed on appeal and the matter gone into *de novo*. The State is, indeed, not concluded where the county court admits one who was not elected, or had not the requisite qualifications; and an inquiry may be instituted touching those matters by *quo warranto*. But it is not the proper subject of an appeal, nor for a *certiorari* in the nature of an appeal to bring up the case in order that the judge of the Superior Court may in a summary way, as the county court did, decide the election. Nor ought the *mandamus* to have gone. The relator does not show yet that *he* was elected and is improperly kept out of office. It is nothing to him, as a private person, whether Speed is qualified or not, or why the court has admitted him. That is no injury to the relator's rights. It may be true that, upon a scrutiny, it might appear that the relator had a majority of the good votes. But that possibility does not entitle him—supposing a *mandamus* a proper remedy at all, in such a case—to ask for this extraordinary and remedial writ. He merely says the county court would not inquire into the fact. That may be admitted to have been wrong in the county court. But that alone will not authorize a proceeding of this sort unless the relator goes further and makes it appear upon his oath, when he makes the application, that if the county court had made the inquiry, or if it should be made now, there is good reason to expect that it would result in showing that the relator, and not Speed, was in fact and law elected, and, therefore, that the decision was actually to his prejudice. The writ was, therefore, properly refused, upon the supposition that the (158) county court ought, at the time, to have heard the evidence. But the Court is far from thinking that the county court did err. That court may reasonably adopt such rules for proceeding in such cases as will bring the facts fully out on both sides on which the election depended, and, therefore, should guard against surprise by the one party on the other. When the relator took, as the opposing candidate, one ground of objection to the election of the person returned, it would be a complete surprise if he were allowed to abandon that and put it upon another. The county court might, of their own accord, have gone into

the other inquiry; and their not doing it may be a good reason for the public to complain; and in a regular proceeding the undue election and admission of Speed may be insisted on, and then that person can take issue on the alleged objection, and meet it by proof. But as the court must have some one to attend to the public business as clerk, it was necessary to make a decision at that term; and, as between these two persons, as parties to that contest, and in reference to their several personal rights, the court acted properly in holding down the relator, who had given notice, to the particular points which he had selected, and to which exclusively he pointed the attention of the other candidate. If, in truth, the relator, and not Speed, was elected, the decision of the court on the point specified might not conclude the relator upon a *quo warranto;* and, at all events, the court could not err in deciding on the points raised by the relator, and leaving him to his remedy by that proceeding, in which issues might be taken to the country on the several facts, which would establish the election of the one or the other of these parties.

It can hardly be necessary to add that the admission of an illegal vote does not necessarily vitiate an election, for it may have been for the relator himself. The number of illegal votes given to the person
(159) returned must be so great as, after deducting them, will not leave him a majority of good votes: and then the election is not voided, but that person is turned out and the other person, who had the majority of good votes, admitted.

PER CURIAM. Affirmed.

Cited: Patterson v. Murray, 53 N. C., 279; *Saunders v. Gatling,* 81 N. C., 300; *Riggsbee v. Durham,* 99 N. C., 350.

DEN ON DEMISE OF NANCY CLARKE v. RILEY DIGGS.

1. A plaintiff in ejectment can only recover upon the strength of his own title, as being good against all the world or as good against the defendant by estoppel.
2. Grants from the sovereign, when enrolled in the office from which they emanate, are there records, and copies of them may be used in evidence by all persons except those who would be entitled to the originals.
3. Copies of abstracts entered in Lord Granville's office are evidence.
4. Though the party against whom the judge in his charge commits an error obtains a verdict, yet, when the principle so erroneously laid down might have prevented the defendant from making his full defense, a new trial will be granted.

APPEAL from ANSON Fall Term, 1845; *Caldwell, J.*

The plaintiff claimed the land in controversy under an alleged grant from the Royal Government to one John Slay, who conveyed the whole to one Auld. By mesne conveyances the land in dispute, consisting of 20 acres, came to a man by the name of Field, who conveyed it to Joseph Clarke. The latter conveyed to his three daughters, of whom the plaintiff was one, a tract containing 187 acres, the deed reciting that it was part of a tract granted to John Hamer. In order to make out her title, the plaintiff offered in evidence a paper-writing certified by the Secretary of State as being the copy of a grant for 300 acres of land to John Slay. This was rejected by the court as not being what it was (160) alleged to be, but merely a copy of boundaries. The plaintiff, failing by this decision to make out a title by a regular and connected chain, then offered in evidence, by deeds of conveyance, to show that the defendant was estopped by recitals in them to deny the title of the lessor of the plaintiff. It was shown that the land in controversy was a part of the Slay tract, and that the deed from Joseph Clarke to his daughters covered it, and that the defendant was in possession. But it does not appear that the plaintiff or any person under whom she claimed ever had been in possession.

The jury found a verdict for the plaintiff, and judgment being rendered thereon, the defendant appealed.

Badger for plaintiff.
Strange for defendant.

NASH, J. We are spared the trouble of examining the doctrine of estoppel as applicable to this case, in the argument before us; that ground has been very properly abandoned. There certainly is no estoppel. But it has been argued that although there is no technical estoppel, yet the deed from Auld to Curtis, which conveyed to the latter 280 acres of the Slay tract, and recited the deed from Slay to Auld, and the deed from the latter to Field, for 20 acres, together with the deed from Curtis to Marshall Diggs of the same 280 acres, and the deed from the latter to the defendant, was good *prima facie* evidence of title against the defendant, who was a mere wrongdoer. We do not accede to the proposition, nor, indeed, is it in this State an open question. The rule here is a plain and simple one. The plaintiff in ejectment must recover on the strength of his own title, either as being in itself good against all the world or good against the defendant by estoppel. *Duncan v. Duncan,* 25 N. C., 317. In this case it is admitted there is no estoppel, and (161) it is apparent the legal title, according to the evidence before the jury, was not in the plaintiff. The first link in her chain was wanting, to wit, the grant from the State.

In rejecting the paper certified by the Secretary of State, as a copy of the grant to John Slay, his Honor erred. It escaped his observation that this very question was decided by this Court in *Candler v. Lunsford,* 20 N. C., 142. It is there ruled that grants or patents from the sovereign are enrolled in the office from which they emanate and are then records. Like all other records, copies of them, by the common law, may be used as evidence by all persons except those who would be entitled to the originals. The Legislature, by an act passed in 1748, recognizes this principle, and goes further, and makes the abstracts entered in the office of Lord Granville, or exemplifications of them duly proved, evidence as if the originals were produced. The paper offered in evidence is an abstract containing the courses and distances of the lines and the date, and is signed by the then Governor of the colony, and the Secretary of State has certified it as a true copy of the record of the grant. We believe the practice has been uniform to record abstracts, and though the act of '48 is not brought forward in the Revised Statutes, we are of the opinion that act merely recognized the rule of the common law, and by the latter the copy was evidence. The jury, however, gave the plaintiff a verdict, notwithstanding this error against him; yet, as this erroneous opinion may have prevented the defendant from relying upon other testimony in his power, we think it proper, upon the authority of *Jones v. Younge,* 18 N. C., 354, that the case should be again submitted to a jury.

PER CURIAM. *Venire de novo.*

Cited: Taylor v. Gooch, 48 N. C., 468; *McLenan v. Chisholm,* 64 N. C., 324; *Farmer v. Pickens,* 83 N. C., 551; *Tolson v. Mainor,* 85 N. C., 238; *Strickland v. Draughan,* 88 N. C., 319; *Aycock v. R. R.,* 89 N. C., 324; *Ray v. Stewart,* 105 N. C., 473; *Cheatham v. Young,* 113 N. C., 166; *Alexander v. Gibbon,* 118 N. C., 807; *Marshall v. Corbett,* 137 N. C., 557.

(162)

THE STATE v. ABEL H. SHUFORD.

1. The county court has no authority to discontinue any public road but upon the petition of one or more persons filed in the court, and the other necessary proceedings prescribed by the act of assembly, Rev. Stat., ch. 104, sec. 2. And any order for discontinuing a public road made otherwise than as the act directs is void.
2. A person who erects a fence across a public road so attempted to be discontinued is liable to an indictment therefor.

APPEAL from CALDWELL Fall Term, 1845; *Bailey, J.*

The defendant was indicted for obstructing a public highway in the

county of Caldwell. On the trial the jury found the following special verdict, to wit: "That for many years a public highway existed, running from Morganton to Wilkesboro, by way of Harper's store and the sign-post mentioned in the indictment; that after the county of Caldwell was established, in 1841, the town of Lenoir was located in the vicinity of Harper's store and the said sign-post; that the county court laid off and opened a new road from Harper's store to the said sign-post, passing through the village of Lenoir, which road has been used ever since as a part of the public highway; that it appears from the records of the county court of Caldwell County, October Term, 1843, that the following order was made by the court, to wit: "Road: Ordered by court, that the road from James Harper's to the Scott old field, near the town of Lenoir, be disannulled—the part from Waugh and Harper's store to the sign-post near the town of Lenoir." And the jury further find that the road mentioned in the order and that mentioned in the bill of indictment are one and the same road, not different roads, which said road was used as a public highway until the making of this order. But they also find that there is no evidence that the order disannulling the said road was made upon any petition, and accordingly say there was no petition filed praying that the said part of the said road should (163) be disannulled. They further find that the defendant, some time after the said order of the court at October Term, 1843, was made, ran a fence across a part of the road mentioned in the bill of indictment; that the same was upon his own freehold, he being owner in fee of the land over which the road passed. The jury, being unable to decide, refer the matter to the court, and if the court, upon this statement of facts, thinks the defendant is guilty in law, they then find him guilty; otherwise, not guilty."

Whereupon, the court, being of opinion that the said road was discontinued by the county court, gave judgment for the defendant; from which judgment the solicitor for the State appealed.

Attorney-General for the State.
Guion and Miller for defendant.

DANIEL, J. The act of Assembly (Rev. Stat., ch. 104, sec. 2) declares the county courts shall not discontinue any public road unless upon the petition in writing of one or more persons in said court filed; and that the petitioner or petitioners shall make it appear that the persons over whose lands the said road may pass shall have had twenty days notice of the intention of filing the said petition. If the said notice is not given, the petition shall be filed in the clerk's office until the succeeding court, and notice posted at the courthouse door; at which court the justices shall

hear the allegations set forth in the petition and shall have full power and authority to order the discontinuance or alteration of the road. And if any person shall be dissatisfied with the judgment such person may appeal to the Superior Court on entering into an appeal bond with two or more sureties, which bond shall be made payable to the person or persons who shall have filed the said petition, or to such person or persons who shall have opposed the same.

(164) We here see that if the county court could discontinue a public road without a petition as aforesaid, no person could appeal from such judgment, because there would be no person to whom, lawfully, an appeal bond could be given; or if he could be permitted to appeal, and he should succeed in the Superior Court, there would be no person against whom he could recover his costs. The county court had discontinued the road in controversy without any person ever having filed a petition for that purpose, and thereafter the defendant ran his fence across it. He is not much to blame; but he cannot be permitted to say that he was ignorant of the law.

The order made by the county court discontinuing the road, without any petition having been filed for that purpose, was void in law as being beyond their jurisdiction, which, in this case, is special and limited by the act of Assembly. The judgment must be reversed. The Superior Court may proceed to judgment against the defendant on the special verdict.

PER CURIAM. Reversed.

(165)

THE STATE v. JOHN P. CRATON.

1. Where it was suggested to the Court, on behalf of the State, that there were errors in the transcript of the case sent up, and it was also suggested that these errors existed in the original record below, and that they were mere misprisions of the clerk of that court, on motion of the Attorney-General it was ordered that a *certiorari* issue, and, although it was a capital case, that the *certiorari* be made returnable at a day posterior to the next term of the court below, in order that that court might, if they thought fit, make the proper amendments in their record before the return of the *certiorari*. The errors consisted in mistaking the name of the judge who held the court when the indictment was found, and omitting altogether the name of the judge before whom it was tried.
2. Although it is more correct, in making up the record of a criminal trial, that the presence of the accused should be expressly affirmed, yet it is sufficient if it appear by a necessary or reasonable implication, as where it is stated that the accused, who had been before committed to the custody of the sheriff, was ordered to be brought to the *bar*, and immediately thereafter he is called, by the jury in giving and by the clerk in

recording the verdict, the prisoner at the *bar*, and next, the court, in passing sentence, adjudged that the prisoner be *taken back* to the prison.

3. On a trial for murder, the question of provocation is proper for the decision of the court; for whether certain facts amount to a sufficient provocation to palliate a killing from murder to manslaughter is entirely a question of law.
4. When one man is *unlawfully* restrained of his liberty and kills the aggressor, the offense is only manslaughter, unless attended with circumstances of great cruelty and barbarity. But when the restraint is upon one man by another so far as to prevent the former from doing what the latter may lawfully resist his doing, and the person restrained in that manner and for that cause kill the other, it is murder.
5. A husband has a right to use compulsion, if necessary, to enable him to regain the possession of his wife from one in whose society he finds her, and who, he has good reason to believe, either has committed or is about to commit adultery with her.
6. Whether an instrument by which death is occasioned, if it be in fact as described by the testimony, be one by which death may or may not be probably caused is a question of general reason, and, therefore, proper for the court; and if it be doubtful whether it would probably cause death, the court should direct a conviction for manslaughter only.
7. The court has a right to excuse jurors who have been summoned upon a *venire* in a capital case, upon their application, for any reasonable cause.
8. The State's challenge to a juror for cause need not be decided on immediately, but it is in the discretion of the court to let it stand until the panel be gone through.

APPEAL from CABARRUS Fall Term, 1845; *Pearson, J.*

The defendant was indicted for the willful murder of Thomas F. Harrison, and, being convicted and judgment pronounced against him, appealed to this Court.

According to the transcript filed by the prisoner in this Court, (166) the indictment was found in Cabarrus Superior Court on the third Monday of February, 1845, which was held by *William L.* Bailey, one of the judges of the Superior Court, and it did not appear by whom the court was held at August term following, at which term the prisoner was tried. On those accounts the Attorney-General, early in this term, moved for a *certiorari*. On that the clerk returned a second transcript, in which it set forth that the February term was held by his Honor, *John L. Bailey,* and August term by his Honor, *Richmond M. Pearson.* But, accompanying the transcript, there is a written statement of the present clerk that in fact the original record purports that William L. Bailey (and not John L. Bailey, as it should be) presided at February term, and that it does not state who presided at August term. Upon this statement, the truth of which was not contested by the Attorney-General, a motion on behalf of the prisoner was made for another *certiorari,* with directions to the clerk to send an exact transcript of the record as re-

maining in his office. The Attorney-General did not oppose the motion, but requested that the writ might be made returnable to some day in the present term, posterior to the next term of Cabarrus Superior Court, which will be on the third Monday of February, so as to enable that court by proper entries to correct the mistake and supply the omission of the clerk.

RUFFIN, C. J. Possibly the Court, under the liberal language of the statute, might amend here in the particular points in which this transcript is defective, as there could be no mistake as to the judges who held the court at the terms mentioned. But, for the reasons given in *Ballard v. Carr,* 15 N. C., 575, it is more convenient that it should be done in the Superior Court, so as to make the records of the two courts consistent. The corrections may be made by changing in the original record the name of *Judge Bailey* and by inserting that of *Judge*
(167) *Pearson,* at August term; and there is no doubt that it is competent to the Superior Court to make such corrections. *S. v. Reid,* 18 N. C., 377. It is with great reluctance that, in a matter affecting life, the Court allows such an indulgence. Indeed, it is done only under the constraint of the absolute necessity of the case. The defects are mere misprisions of the clerk, and unless faults of that kind be cured in this manner it is apparent that crimes are to go unpunished. Since the recent alterations in the mode of appointing clerks, and the tenure of the office, there has been so rapid and so great a falling off in the skill and diligence of those officers as leads those who have to look into all the records that come to this Court to entertain serious apprehensions for the security of rights founded on judicial proceedings, by reason of the want of records, merely, in due legal form. It is to be regretted that persons not practically connected with the administration of the law are not aware of the importance of orderly entries according to settled precedents, and that they cannot be duly impressed with the truth that it is a task of real difficulty to draw up such entries and engross a proper record, requiring abilities which few possess, and indeed none but those who, with good capacity, have been trained to it as a profession by good instruction and long practice. But in point of fact, we have not now officers possessing such proficiency; and it is our duty to execute public justice as well as we can in the circumstances actually existing. We must endeavor to overcome the evils of unfit clerks by correcting their misprisions, as far as the known and certain truth may enable us in any case to do so. There are defects which are beyond the reach of any correction, and to them we must submit. But those now under consideration are, from their nature, so easily corrected by putting the record into proper form, and, at the same time, make it certainly speak the truth,

that we cannot refuse to the State the opportunity of applying to the judge of the Superior Court for that purpose, if it should deem it proper to allow the corrections. The writ will, therefore, (168) be made returnable on 25 February in the present form.

A new transcript was returned in obedience to the *certiorari,* containing a copy of the record as amended in the Superior Court of Law of Cabarrus County at February Term, 1846.

The case sent up contains in detail all the evidence given on the trial, the charge of the presiding judge, and the various objections urged by the prisoner's counsel. These matters are so fully set forth in the opinion delivered in this Court that it is thought superfluous to repeat them here.

Attorney-General and Saunders for the State.
Badger for defendant.

RUFFIN, C. J. The counsel for the prisoner assigned as an error in the judgment that it does not appear by the record that the prisoner was personally present in court at the time of the trial and sentence passed. The record sets forth the indictment found at February Term, 1845, and then "the prisoner, John P. Craton, appearing at the bar and pleads not guilty," and he is thereupon committed to close custody. At August term following, the record states that "It is ordered by the court that the prisoner, John P. Craton, be brought to the bar," and immediately thereafter it states that the jury were sworn and impaneled, and that they "find the prisoner at the bar guilty," etc., and, thereupon, the judgment of the court that the prisoner, John P. Craton, be taken back to the prison, etc., from which judgment the prisoner prays an appeal and gives bond, etc."

It is admitted that it is the privilege of the accused to confront his accusers, and be present in his proper person to make defense by pleading and before the jury, and also to make objection to sen- (169) tence being passed. But we think it sufficiently appears that this person was present in all those stages of the case. We agree that it would be much better to state it directly. It is a very simple thing to write down what is done in court in the present tense, as the acts occur, and, one would think, it would be easier to adhere to settled forms than to rely upon every variety of mode of framing entries being sufficient. It is greatly to be regretted that the clerks will not be guided by precedents in such matters; and that quoted at the bar from Blackstone, 4 Com., Appendix I, is well framed. But although it is the more correct that the presence of the accused should be expressly affirmed, yet we conceive that it is sufficient if it appear by a necessary or reasonable implication. Here, John P. Craton, who had been before committed to the custody of

the sheriff, was ordered to be brought *to the bar,* and immediately thereafter he is called by the jury in giving, and by the clerk in recording, the verdict, the prisoner *at the bar,*" and, next, the court, in passing sentence, adjudged that the prisoner, John P. Craton, *be taken back* to the prison. It seems to us that there can be but one intendment as to the facts, whether the prisoner was present or absent upon the several occasions of the trial and judgment.

The prisoner's counsel next objected to the instructions given by the presiding judge to the jury. It was insisted that his Honor erred in the manner in which he left it to the jury to find whether the killing was murder or manslaughter; and also in holding that there was no legal provocation to the prisoner to mitigate the offense to manslaughter.

As every intentional killing is murder, unless justified, excused, or palliated by a provocation, the natural order of investigation is by considering, first, whether there was here a legal provocation. Upon (170) that point the facts seem not to have been disputed, and appear to be as follows: The deceased and the prisoner lived in the same neighborhood, and the latter had for some time indulged an illicit affection for the former's wife, avowed to the witness Archibald, to whom the prisoner said he could elope with her. On the night before the catastrophe in this case, Harrison saw the prisoner lying on a bed with his wife, and in her embraces. He remonstrated against the familiarity; but the woman persisted, and the prisoner also continued his position. The next evening, when the parties were about leaving the courthouse, Harrison's wife told him, in the presence of the prisoner, that she would ride home behind Craton. The deceased objected, and told her that she could ride in a wagon with her mother, and, upon her refusing that, he proposed that she could ride behind on his horse. She refused that, also, and then he offered to walk and let her have his horse; but she still replied that she would not. Afterwards, Harrison's wife again came to him in company with Craton and with her brother's wife, Mrs. Garman, and said to him: "It is time to start; Mrs. Garman will ride behind Hartswell Jones and I will ride behind Craton"; and Harrison replied: "You can go on, and I will overtake you." She then got up behind the prisoner and they went off; and soon afterwards Harrison himself followed. It does not distinctly appear how far he went before he overtook the other two. But when he did overtake them, he did not find them with Mrs. Garman and Jones, but by themselves. The three continued on the road in company some distance, and when they were first seen (by the witness Murphy) the prisoner and the deceased were in a high quarrel, and upon an inquiry by the witness, what was the matter, Harrison said: "She is my wife, and he keeps her; I'll kill him"; and he then drew his knife. The prisoner and the woman still went on, she saying, "This (the Camden

road) is my road." After some dissuasion from the witness, the deceased again swore he would kill the prisoner, and followed on. They were afterwards overtaken on the road, about 4 miles from the (171) courthouse, by the witness Wilson Biggers, when the three were together and by themselves. Harrison repeatedly demanded of the prisoner to give up his wife, and forbade him from getting on his horse with her behind him. The wife said her husband was too drunk and his horse too small for her to ride with him, and refused to get down; and Harrison repeatedly declared he would kill the prisoner, or lose the last drop of his own blood, before his wife should ride further with Craton. Neither party then made an assault on the other. But at the instance of a neighbor, Bost, who was passing by, Harrison went on, and the prisoner remainded behind with his wife. The two then proceeded slowly on the road, and after they had gone some distance—how far does not certainly appear—Harrison was seen returning, and he came up, meeting them. With his knife in his hand, he turned his horse immediately across the road, before Craton's horse, and said: "You must give up my wife." The prisoner said, "I don't want to hurt you," and he turned his horse, and was going back towards the courthouse, when Harrison rode past him and again turned his horse across the road in front of Craton, and, having his drawn knife still in his hand, he repeated, "You must give up my wife, or I will kill you." The prisoner then said, "I will leave you," and turned his horse out of the road, and went into a field about ten steps, when Harrison turned his horse before him again. Thereupon the prisoner got down from his horse and said to Harrison, "If you don't leave me, I'll give you a beating," and then pulled off his hat and coat, broke off a dead old-field pine, and went to Harrison as he sat on his horse and gave him a blow with the billet which fractured his skull and killed him. At the time the blow was given Harrison held the bridle with one hand and his knife with the other, as the witness W. Biggers swore, resting on or near the pommel of his (172) saddle, with the blade appearing between the thumb and forefinger, or, as a witness said Biggers had stated before the coroner, with the blade coming out at the little finger, and the arm somewhat elevated.

Upon these facts the court held that no legal provocation appeared for the killing, which, for the purpose of this question, is to be considered as having been intended. It is not denied by the counsel for the prisoner that the question of provocation is proper for the decision of the court; for, undoubtedly, whether certain facts amount to a sufficient provocation to palliate a killing from murder to manslaughter is entirely a question of law, as the inquiry is not whether the passion of the prisoner, in particular, was actually inflamed, but whether in those circumstances a man ought, and men in general would, because of the infirmity of our

nature, be moved beyond the government of reason so far as to have designedly killed the person who gave the offense. It is said, however, that there was here a provocation constituted by the deceased's stopping the prisoner repeatedly on the highway, which amounted to an assault, or, at least, to a false imprisonment. The Court agrees that if Harrison either assaulted or imprisoned Craton unlawfully it would amount to a legal provocation. The question is whether that was the case. There was no actual assault in this case. There was no attempt to strike. There was a mere threat that the deceased would kill the prisoner if he did not give up the other's wife, and, accompanying the threat, the prisoner drew his knife. But he made no attempt to use it, unless it be that he raised his hand with the knife drawn as the prisoner approached him. But if he did so that would not be an unlawful assault; for, as the prisoner got from his horse, stripped himself and declared that he would beat the deceased if he did not leave him in possession of his wife, and then went at the deceased for the purpose of beating him, with an instrument apparently, from its size, sufficient to give a heavy blow,
(173) and with the instrument raised, and the deceased still sat on his horse and did not move from his place, an attempt, if made by the deceased to strike under those circumstances, and supposing the deceased was *not* wrong in stopping the prisoner from carrying away his wife, would have been justifiable in self-defense. The prisoner was in the act of making the first assault, and that, probably, of a grievous kind, and the deceased would have had a right to prevent him if he could. But it cannot be denied that the deceased stopped the prisoner several times on the road, and that he was preventing his going on at the time the prisoner got from his horse and gave the fatal blow; and if that was an unlawful restraint, that would extenuate the killing to manslaughter. Mr. East, as quoted by the counsel, lays down the rule that "If a man be injuriously restrained of his liberty, and he, at the time, kill the person who does it, he is but guilty of manslaughter—that is, when the killing is not effected by any great cruelty or barbarity." And he gives as examples of the rule the cases of *Buckner* and of *Withers*, in the former of which a creditor went into his debtor's chamber, having put a man at the door with a sword to prevent the debtor from escaping while he sent for a bailiff to arrest him, and the debtor killed the creditor while talking with him in the chamber; and in the latter a sergeant put a common soldier under arrest, who thereupon killed the sergeant with a sword, and on the trial it was not shown by the articles of war, or by the usage of the army, that the sergeant had authority to arrest; in those cases it was held that the killing was extenuated. 1 East P. C., 233. But it is manifest that the ground for so holding was that the restraint on the liberty of those two persons was "injurious," as Mr.

East calls it, or, as Mr. Russell says, in speaking of the same cases, the men "had been injuriously and without proper authority restrained of their liberty." 1 Russ. Cr. L., 487. In those cases there was no color of right for the imprisonment, either of the debtor or sol- (174) dier; for a creditor cannot, himself, detain his debtor, but only through an officer with process; and the sergeant's authority was not proved. But if a person be lawfully arrested by a precept and kill the officer, it is clearly murder. And where there is not such a plain and direct authority to arrest, and an arrest made under it, but only a restraint upon one man by another, so far as to prevent the former from doing what the latter may lawfully resist his doing, the reason is the same; and if the person, restrained in that manner, and for that cause, kill the other, it is murder. Thus Russell says, "Such personal restraint and coercion as one man may lawfully use towards another will not form any ground of extenuation." 1 Russ. Cr. L., 437. For this position he cites *Willoughby's case,* in which a landlord had refused to admit two soldiers into his house to get beer at a late hour of the night, and, afterwards, when the door was opened to let out some company, one of the soldiers rushed in and demanded beer, the other remaining without. The landlord still refused to furnish the beer, and the other refused to depart, and demanded it, and offered to lay hold of the landlord, and the latter at the same instant collared him, the one pushing and the other pulling each other towards the door; and there the landlord received a violent blow from a sharp instrument, from the other soldier, which caused his death; and it was held to be murder in both soldiers, notwithstanding the struggle between the landlord and one of them; "for the landlord did no more in attempting to put the soldier out of his house, at that time of night and after the warning he had given him, than he lawfully might, which was no provocation for the cruel revenge taken." The question, then, in this case turns upon the right of the deceased to coerce the prisoner to surrender to him his wife, and that depends much on the authority of a husband over his wife. There is no suspicion that the prisoner detained the wife against her will. If that had been the case, the husband could have justified a battery (175) in her defense and for her rescue. But, though she was detained by the prisoner with her consent, the Court is of opinion that under the circumstances the deceased had a right, after demanding his wife, to stop the prisoner as he did, until he should give her up. In general, a man has a right to the exclusive custody of his wife. It may be true that any person has a right to protect her from the violence of her husband, and to take her from cruel usage under his hand. And it may also be true that the husband would not have a right to take her by force from the house of a parent or any proper protection during a difference between

them, nor, indeed, to confine her, where there is not plainly a sufficient reason for imposing the restraint upon her. But, in *Lister's case*, 8 Mod., 22, 1 Str., 478, it was agreed by all the Court that where a wife makes an undue use of her liberty, as by going into lewd company, it is lawful for the husband, in order to preserve his honor, to lay his wife under a restraint, though when nothing of that appears he cannot justify the depriving her of her liberty. Now, that is a full authority, and founded, as we think, upon the very best reason, that Harrison might have restrained his wife by force from criminal conversation with the prisoner, and, by consequence, that he might compel her to leave the society of the prisoner, if he had any reasonable grounds to suspect that those persons had perpetrated or that they were forming the guilty purpose of perpetrating a violation of his rights and honor, or were contracting those regards towards each other which would probably result in that stigma. That such was the state of the case between these parties there is very strong ground to affirm. The avowal by the prisoner of an affection for this woman—the inference that she returned it, to be deduced from numerous circumstances, as that he said that he (176) could elope and leave the country with her, and the familiarity with which she laid on the same bed with the prisoner, with her arm around his neck, and they both refused to change their situation, though the husband remonstrated; her pertinaciously insisting to ride home behind the prisoner, and refusing to go in any other manner; her being found by the husband on the road with the prisoner alone, and not also in the company of Mrs. Garman, her sister-in-law; and the oft-repeated refusals of both the wife and the prisoner to let the husband take her, after he overtook them, and after he had explicitly stated, as proved by the prisoner's witness, Murphy, that the reason why he insisted on having her was that the prisoner kept her; these circumstances leave no room to doubt that the husband entertained the belief, and that upon strong grounds of presumption, that it was essential to his wife's purity and his honor that he should separate her from the company of the prisoner. Such a cause would justify the husband in effecting that end by compulsion on his wife, for it was obvious that nothing short of it would be effectual. And it would seem necessarily to follow that he might use actual force towards the paramour, also, in order to regain his wife from him. But we need not consider that, as we have already seen that there was no actual assault by the deceased. There was merely a stopping of the prisoner by the deceased—drawing up his horse in front of the prisoner several times, accompanied by a demand for his wife, and a declaration that the prisoner should not go on unless he gave up the wife. Those acts, we think, were not an injurious restraint on the prisoner's liberty, but only a lawful impediment to his carrying

away the deceased's wife, to her ruin and the husband's dishonor. There was, consequently, no provocation to extenuate the killing of Harrison.

After the foregoing observations, we need not notice particularly the suggestion that Harrison's consent, at the courthouse, that his wife might ride behind the prisoner might make a difference; for (177) there is nothing to raise a suspicion of connivance on the part of the husband at his wife's forming an improper connection with the prisoner, as it is obvious that he was stung at the suspicion of it, and that he did everything that he could decently do in public to prevent her from going with the prisoner, and he did not, at last, consent until he had reason to believe they were to go in company with other persons, and particularly with her sister-in-law. Besides, there was much in the conduct of the parties after he gave his consent to induce him to retract it, as their traveling alone, and their peremptory refusal to be separated, even by the deceased's threat to take the prisoner's life if he did not give her up.

We are next to inquire whether the killing, thus appearing to be without provocation, was murder or not. As to this point, the facts, in addition to those stated in reference to the former point, are these: The stroke was given with a pine stub, which had been killed by the cutting off the top, and was rotten at the ground, was about 3 feet in length and about 3 inches in diameter, with the bark on, and had absorbed so much water from a rain that had just fallen that it would not burn by having a pine torch put to it. With that weapon, the prisoner standing uphill, above the deceased, gave the latter a blow with both his hands, which fractured the skull 6 inches across the direction of the blow, and also broke the billet itself square off into two pieces. Such is the description of the instrument and the act, given by the only witness who was present at the homicide; and he says that when he went away he left the prisoner with the body, and also that the torch, which was then burning, was setting on one of the pieces of the stick. No other witness saw it; but John W. Biggers states that next morning the prisoner came to his house, and, after inquiring of him whether his son, Wilson Biggers, had not told him what had happened, and learning that he had not, (178) the prisoner said: "I fear I struck him harder than I intended; I thought it was a rotten old-field pine, eaten by bugs and worms, and gave him a two-handed lick." The witness then went with the prisoner to the place, and found the man dead, and saw his hat and knife lying by him, but did not see either piece of the stick, and another witness says it could not be found. The prisoner was a much larger and stronger man than the deceased.

Upon this evidence, supposing the witnesses to be believed as to the fact, and the manner of killing, the opinion of the Court is very clear

that it was, in law, murder. In the beginning of his treatise on homicide, *Judge Foster* lays down the true rule upon this subject in few words, but very clear. "In every charge of murder," says he, "the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, *unless they arise out of the evidence produced against him;* for the law presumeth the fact to have been founded in malice, until the contrary appeareth." In the next section he adds: "In every case where the point turneth upon the question whether the homicide was committed willfully and maliciously, or under circumstances justifying, excusing, or alleviating the matter of fact, viz., whether the facts alleged by way of justification, excuse, or alleviation are true, is the proper and only province of the jury. But whether, upon a supposition of the truth of the facts, such homicide be justified, excused, or alleviated must be submitted to the judgment of the court; for the construction the law putteth upon facts, stated and agreed or found by a jury, is in this, as in all other cases, undoubtedly the proper province of the court." He afterwards says that neither words of reproach nor indecent and provoking actions and gestures, without an assault upon the person, are a sufficient provocation to free the party killing from murder. "This rule," he says, "governs every case (179) where the party killing upon *such* provocation maketh the use of a deadly weapon, or otherwise manifest an intention to kill or to do great bodily harm; but if he had given the other a box on the ear, or had struck him with a stick or other weapon not likely to kill, and had unluckily and against his intention killed, it had been manslaughter." From these positions it appears clearly that the law presumes every willful killing murder, until it appear, either upon evidence by the accused or upon the evidence produced against him, that he did not intend to kill or to do any great bodily harm. And it further appears that unless the stroke which produced the death be shown to have been one from which death was not likely to ensue, as a box of the ear or with a weapon not likely to do great bodily harm, the law adjudges that the presumption of malice, which consists of a wicked, vindictive disposition, is not repelled. Of course, the implication that there is or is not malice, from the nature of the instrument and the mode of using it, being made by the law, it is the proper province of the court to declare it. Now, with these principles in our minds, it seems that this killing can be no less than murder. It does not appear that the prisoner killed unluckily against his intention. It may be true that he did not design actually to take the other's life. We cannot tell. But what we mean is that the instrument used does not appear to have been such that it was not likely to have done great bodily harm when wielded by the prisoner, a very strong man, and having the advantage of giving a fair blow from

the position above the deceased. On the contrary, from the description of the instrument and from the effect it had, the presumption *prima facie* is that it was calculated to do a grievous injury. It was 3 feet long and 3 inches through, and heavy from moisture absorbed, and was so sound as to break into only two pieces by a blow which fractured the skull of a man, 30 years old, for 6 inches. It, therefore, can- (180) not be viewed in the light of the "small cudgel" with which Rowley struck the boy who had beaten his son, from which circumstance it was properly held that he was guilty of manslaughter only. Fost., 294. It is true, the prisoner said, next morning, "that he thought it was a rotten old-field pine, eaten by bugs and worms," and he gave that as an excuse for having struck, with all the force he was master of, with both hands. But that is not sufficient. The prisoner ought to have shown the fact to be, as he said he thought it was, namely, that the stick was not likely to produce great harm, but was worm-eaten and light. Now, it is remarkable in this case that the prisoner did not produce the weapon in court, so that the court and jury might judge of the danger of a stroke with it, nor could it be found next morning on the ground. One witness left it there with the prisoner the night of the homicide, and the next person who was there the next morning did not see it, nor could it be found, though searched for around the place. How, then, could the prisoner ask the benefit of the law, inferring innocence of an intention to do the person killed great harm, upon the ground that the instrument was not likely to do such harm, when, in point of fact, it did it, and when he would not produce it, but appears to have been particularly anxious that it should not be judged of either by inspection or by its size, weight, and actual strength, but by his declarations of what he thought it was when he was about to strike, and not what he found it to be after he had done the mischief. The defense, therefore, fails in point of law. The legal presumption exists in full force, that the prisoner intended to do great harm to the deceased by striking with an instrument that did produce death; it not appearing that the weapon was of that size, strength, and weight which is not likely to produce death, but it appearing from those circumstances, *prima facie,* to the contrary, and that presumption being greatly fortified by the circumstance that the prisoner destroyed the weapon to prevent it from being (181) brought up in evidence against him. It seems to the Court, therefore, that his Honor should properly have stated to the jury that the prisoner was guilty of murder simply upon the ground that the presumption of malice was not repelled by anything which showed that the weapon was not a dangerous one. It clearly was; and, therefore, like the case stated in the books, where a person, upon slight provocation, knocked out another's brains with a hedge-stick, this was, in law, murder.

His Honor, however, did not think proper to assume so much; but he left it to the jury to say whether the weapon was a deadly one, and told them, as they should infer from that circumstance that the prisoner did or did not intend to kill, they should find him guilty of murder or manslaughter. Of this instruction the prisoner, we think, has no cause to complain. If it appeared from the instrument that it was not a deadly one, as a riding-switch, for example, a convicted prisoner would have just cause to complain that the court had left to the jury to say whether that was such an instrument as the law calls deadly. So, when the instrument appears, *prima facie*, capable of taking life or grievously hurting, in like manner, it seems to be proper the court should say that such an instrument is called in law a deadly weapon. But whether the court was right or wrong in this case in leaving to the jury to say whether this was a deadly weapon, there cannot be any prejudice to the prisoner, unless it appear to this Court that upon the evidence it was not an instrument of that character; for, by the verdict, we must see that the jury found it to be a deadly weapon, and, therefore, in so doing they only found according to the law. Being established to be a deadly weapon, either because it is to be so held in law or because it has been found by the jury to be so in fact, the legal consequence follows that an intention to kill is established, and that, being without provocation, consti-
(182) tutes the killing murder. Thus we understand the views delivered by the judge to the jury in this case.

After some preliminary observations respecting the different kinds of homicide, which have nothing to do with the case here, nor, indeed, before the jury, the judge stated that inquiry was narrowed down to the point whether the killing was murder with malice implied or manslaughter. And he then said that depended on the question whether the prisoner, when he gave the blow, intended to kill or do great bodily harm; and he stated that if the prisoner intended to do great bodily harm, though the effect exceeded his actual intention, he was liable for the consequences. As to the prisoner's intention, he stated that it had been properly insisted for the State that a man is presumed to intend to do what he does, and that he also intends the natural consequences of his act; and, therefore, that if the prisoner killed Harrison, it is to be presumed that he intended to kill him, unless, from the circumstances, the jury be satisfied that such was not his intention. It was said for the prisoner that there is error in that instruction, because it lays down the rule as an isolated proposition, that every killing without provocation is presumptively murder, without the established qualification that if it be with an instrument not likely to produce death it is only manslaughter. If that construction of the charge were true, we do not see that it would be an error of which the prisoner can complain; for the proposi-

tion, as laid down, is the general rule of the law, and the qualification is only the exception. Therefore, the prisoner, as the ground of his exception to the instruction, must make out that the facts bring him within the exception and qualification to the rule, which the judge omitted to lay before the jury; and here, as has been already said, it cannot be seen that the instrument was not a deadly one, and, therefore, the prisoner could crave no benefit of the qualification now insisted on. But, in realty, his Honor did explain that point to the jury, and (183) gave the prisoner all the advantage of it that he could possibly be entitled to; for, in the first place, we must understand that when the judge spoke of a killing in that part of his charge he did not mean every killing, but the killing in the manner proved in that case; and he states that it was to be presumed that he intended to kill, unless, *from the circumstances*, the jury were satisfied that such was not his intention. The truth is that the law implies the intention from the circumstances, and it is not for the jury; and thus far the error was on the side of the prisoner, unless the circumstances show here that in law it was not murder. But letting that pass for the present, it is clear that his Honor stated to the jury that if they were satisfied from the circumstances that it was not the prisoner's intention to kill, they should acquit him. Then, it is stated that it was further insisted for the State that, upon this evidence, the stick used was a deadly weapon, and, consequently, that it was murder, there being no legal provocation; and his Honor was so requested to charge the jury; while, on the other hand, the counsel for the prisoner urged that he did not intend to do great bodily harm, inasmuch as, among other reasons, the prisoner alleged his mistake as to the danger of the weapon, and it had broken off so easily at the ground; and thereupon the court, leaving the consideration of all those arguments to the jury, refused to give the instruction prayed for by the State, and, after assigning several reasons (with which we have nothing to do) why the judge thought it proper to refuse the instruction, it is stated that he left the case to the jury, as they had just been charged. Now, how had they been charged? Why, if from the circumstances (including, of course, the nature of the weapon, upon which the counsel on each side had argued) the jury were satisfied that it was not the prisoner's intention to kill or do great bodily harm, they should find him guilty of manslaughter; and if they should not so find, then the law im- (184) plied malice, and he was guilty of murder. In this we see no error, upon the supposition that the jury were to judge whether the weapon was deadly or not; for the charge distinctly leaves that question to them, and it seems to have been the plain purpose of the judge to inform them that, as they found that fact the one way or the other the case would be one of murder or manslaughter, inasmuch as the law in-

ferred therefrom that the intention was or was not to kill. And that proposition is unquestionably correct; and, therefore, it can afford no ground for reversing the judgment, although the judge may have erred in leaving it to the jury, and not telling them that the prisoner had not sufficiently established that the instrument with which he did kill was not likely to kill. The prisoner then prayed the judge further to instruct the jury that if they had a reasonable doubt of the intent, the prisoner was entitled to the benefit of it; which was refused. And in that refusal his Honor was right; for the intent in this case was of that kind which is implied by the law, and, therefore, was not proper to be left to the jury at all, and, by consequence, the doubts of the jury upon it could not be material. We are not sure, indeed, that the meaning of the prisoner's counsel, in praying the instruction, is understood by us, as in itself it is not perfectly intelligible. We cannot suppose that the purpose was for directions in favor of the prisoner in case the jury had doubts as to the fact of the instrument being a deadly weapon or not, because the terms are "a reasonable doubt of *the intent*," and that expression cannot by any interpretation of which it is susceptible embrace the inquiry respecting the nature of the instrument. We must suppose, then, that the instruction asked meant that, although the jury should find that the weapon was deadly, yet, if they, notwithstanding, doubted of the actual intent to kill, the prisoner should be acquitted; and, thus understood, the Court conceives the instruction was properly re-
(185) fused, for the reasons just given—that the intention was an implication of law, and not an inference of fact by the jury from the nature of the weapon and the absence of legal provocation. Indeed, if the instruction had been prayed in reference to doubts about the instrument being a deadly weapon, as we conceive, the court ought not to have given it to the jury, because, whether an instrument, if it was in fact as described by a witness, be one by which death may or may not be probably caused is a question of general reason, and, therefore, proper for the court; and if it be doubtful whether it would probably cause death, the court, we think, should direct a conviction for manslaughter only, as was insisted on in the case stated by *Lord Hale,* 1 P. C., 456, in which a man who was called "a son of a whore" by a woman took up a broomstick and threw it at her at a distance, and it hit her upon the head and killed her, and it was submitted to the judges, after a conviction of murder, whether that striking, which was so improbable to cause death, was murder or manslaughter; and they not agreeing on it, the prisoner was pardoned.

The Court is, therefore, of opinion that there is no ground in either of the objections for reversing the judgment. The counsel here did not insist on either of the points made by the special instructions prayed for

by the prisoner; and we have considered them without discovering any force in them.

So, also, is our opinion with respect to the objections taken to forming the jury. The court has a right to excuse persons upon their application for any reasonable cause, and, certainly, by the consent of the prisoner, given by himself or his counsel. In *S. v. Benton,* 19 N. C., 196, it was held that the State's challenge for cause need not be decided on immediately, but that it was in the discretion of the court here, as in England it is in the crown officers, to let them stand until the panel be gone through. If we were to undertake to revise the exercise of his Honor's discretion on this subject we should not differ from what (186) he did in this case.

PER CURIAM. No error.

Cited: S. v. Collins, 30 N. C., 412; *Marshall v. Fisher,* 46 N. C., 117; *S. v. Ramsey,* 50 N. C., 200; *S. v. Starling,* 51 N. C., 367; *S. v. West, ibid.,* 509; *In re Spivey,* 60 N. C., 543; *S. v. Blackwelder,* 61 N. C., 39; *Glenn v. R. R.,* 63 N. C., 514; *S. v. Matthews,* 78 N. C., 532; *S. v. Chavis,* 80 N. C., 357; *S.* v. *Swepson,* 83 N. C., 589; *S. v. Jenkins,* 84 N. C., 814; *S. v. Swepson, ibid.,* 828; *S. v. Paylor,* 89 N. C., 541; *S. v. Anderson,* 92 N. C., 755; *Thornburgh v. Mastin,* 93 N. C., 265; *S. v. Hensley,* 94 N. C., 1029; *S. v. Kelly,* 97 N. C., 410; *S. v. Phillips,* 104 N. C., 789; *S. v. Surles,* 117 N. C., 723; *S. v. Sinclair,* 120 N. C., 605; *S. v. Capps,* 134 N. C., 628; *S. v. Lipscomb, ibid.,* 695; *S. v. Archbell,* 139 N. C., 539; *S. v. Sandlin,* 156 N. C., 627.

JONATHAN J. LINDSAY v. ASA ANESLEY.

1. The omission of the word "penal" in stating the damages which either party might recover for the breach of a covenant, as, for instance, a covenant for conveying title, does not necessarily make the sum mentioned liquidated damages.
2. Whether the sum mentioned be merely a penalty or liquidated damages must depend upon the circumstances and nature of each case.
3. The *quantum* of damages in an action of covenant may be assessed by the jury, when the precise sum is not the essence or substance of the agreement.

APPEAL from WASHINGTON Fall Term, 1845; *Manly, J.*

This was an action for debt for $1,000, upon the following instrument, to wit:

"Know all men by these presents, that I, Asa Anesley, do contract and agree to and with Jonathan J. Lindsay that I will execute to the said

Jonathan J. Lindsay, his heirs or assigns, a deed of bargain and sale for a tract of land lying in Washington County, containing by estimation 165 acres, more or less, it being a tract of land recently conveyed by me to Thomas B. Myers for the sum of $651, the said Thomas B. Myers (187) having executed to me, the said Asa Anesley, a contract to reconvey the said land to the said Anesley whenever he, the said Anesley, should pay back to the said Myers the said sum of $651: now, when the said Jonathan J. Lindsay shall furnish the said Anesley with the said sum of $651, with which the said Anesley is to pay the said Myers and redeem the said land bargain and sale by him, the said Anesley, to him, the said Myers, then the said Anesley doth contract and agree with the said Lindsay that he, the said Anesley, will execute to the said Lindsay a firm deed of bargain and sale in fee simple for the aforesaid premises, the said Lindsay agreeing to pay the said Anesley the sum of $950 for the said land; and it is agreed by and between the parties that the following shall be the modes of payment: that the said Lindsay, after furnishing the said Anesley the aforesaid sum of $651 to redeem the said land, shall be permitted to pay the balance in good notes (that is to say, notes of hand, which the said Lindsay agrees to guarantee), and, for the faithful performance of the covenants contained in this agreement, the parties to this agreement do bind themselves in the sum of $1,000, to be collected out of either party refusing to comply with the terms of this agreement." (Signed and sealed by the parties.)

A breach of the agreement on the part of the defendant having been proved, the sole question presented to the court was whether the damages for the nonfulfillment of the obligation were liquidated or otherwise. The court held they were not liquidated, the $1,000 mentioned in the instrument being in the nature of a penalty, and instructed the jury to assess the actual damages. The jury returned a verdict in favor of the plaintiff for the sum of $87.27. The court refused, on motion of the plaintiff, to grant a new trial, and judgment being rendered according to the verdict, the plaintiff appealed.

(188) *Heath for plaintiff.*
A. Moore for defendant.

DANIEL, J. The defendant was the owner of a tract of land lying in the county of Washington, encumbered with a mortgage to one Myers for $651; he contracted, by the instrument of writing mentioned in the case, to sell it to the plaintiff for $950; and in the said deed is this stipulation or condition: "For the faithful performance of the covenant contianed in this agreement the parties to these presents do *bind* themselves in the sum of $1,000." The defendant refused to convey, and the plaintiff brought this action of debt against him; and under the statute he, in his

declaration, assigned as a breach the refusal of the defendant to convey after he had been requested to do so, and stated his damages to be $1,000. The defendant pleaded "Conditions performed" and "Conditions not broken." On the trial the plaintiff prayed the court to charge the jury that they should give him $1,000 in damages, as he contended that the damages had been liquidated by the parties themselves. The court refused to comply with this prayer, and the jury gave damages to the amount only of $85.27, for which sum the court gave judgment, and the plaintiff appealed. The word "penal" is omitted in the sentence in the deed next before the words, "sum of $1,000," and from that omission the plaintiff now construes the instrument of writing to stipulate for liquidated damages. That word being left out of the deed will not, it seems to us, make the sum of money inserted stand as liquidated damages in case of a breach of the covenants by either of the parties to them. From a view of the whole instrument, the sum appears to have been inserted as for a penalty. Suppose that Anesley had tendered a deed of conveyance, and Lindsay had refused to accept it and pay the purchase money, would it for a moment be supposed that Anesley could have kept (189) the land and also recovered of Lindsay 1,000 as liquidated damages? Such a construction would at once shock common sense. We see that each party to the instrument is bound in it under the same identical sum ($1,000) to keep his covenants, and if it would not have done to have enforced it against Lindsay as liquidated damages in case he had failed to comply with his covenants, neither will it now be right to make such a construction against Anesley on his failure to comply with his covenant. The *quantum* of damages in an action of covenant may be assessed by the jury when the precise sum is not the essence or substance of the agreement. The $1,000 was not the essence of this contract; the substance of the agreement was that one should convey the land and the other should pay the stipulated purchase money. The $1,000 was intended to cover, as a penalty, all such actual damages as either party might sustain in consequence of any breach of their respective covenants. We have examined the cases cited by the plaintiff's counsel, and they by no means, as we think, establish the doctrine he contends for. In *Lowe v. Peers,* 2 Burr., 2225, Peers covenanted as follows: "I do hereby promise Mrs. Catherine Lowe that I will not marry with any other person beside herself; if I do, *I agree to pay* to the said Catherine Lowe £1,000 in three months next after I marry anybody else." Peers afterwards married Elizabeth Gardner. The breach assigned upon the covenant was in the nonpayment of the £1,000. The court held that the payment of this sum was the very substance of the agreement. There was no other standard by which the intention of the parties as to the damages for a breach of the covenant could be measured. So, if a lessee covenants with

his landlord not to plough up meadow, and, if he does, he will *pay* £5 an acre for every acre ploughed up: this sum is liquidated damages—it is the essence of the agreement. In *Fletcher v. Dyche*, 2 Term, 32,
(190) the covenantor agreed to repair a church for a certain sum of money; and he furthermore agreed to do and find all the necessary smith's work and ironmonger's work in six weeks from the date of the covenant, for £118, 18s; and he agreed in the deed that if the smith's and ironmonger's work was not done within the time mentioned, he would *pay* to the covenantee the sum of £10 for every week after the expiration of the time agreed upon until the said smith and ironmonger's work should be completely finished. The court held that such weekly payments were not in the nature of penalties, but were liquidated damages; the object of the parties in naming this weekly sum was to prevent any altercation with respect to the question of damages; it would have been difficult for a jury to have ascertained what damages the covenantee had really sustained by the breach of the agreement; therefore, it was proper for the contracting parties to have ascertained it themselves by their agreement. It was like demurrage, so much specifically per week. *Slosson v. Beadle*, 7 Johns., 72, was a covenant to convey land, "or in lieu thereof *to pay* the plaintiff $800." So in *Tingley v. Cutler*, 7 Conn., 291, there the language was, "If Elisha Cutler does not perform according to the within instruments, *he shall pay* the sum of $150," and this was held a case of liquidated damages. It is, therefore, seen that in all the cases brought to our notice the defendants had agreed in the covenants to *pay* a certain sum to the other party in case of a breach by them, as a compensation for the breach—a sum bearing some proportion to that which a jury probably would have given if it had been submitted to them. Pecuniary punishment for the breach is, in all the cases cited, out of the question. How stands the case now before us? Why, the jury have said that the real damages which the plaintiff has sustained are but $85.27; and yet the plaintiff insists that because the adjective word "penal" hap-
(191) pened to be omitted to be inserted in the written agreement next before the words "sum of $1,000," that he is entitled to $1,000 as liquidated damages.

Not so, we think; and the judgment must be

PER CURIAM. Affirmed.

Cited: Wheedon v. Bonding Co., 128 N. C., 71; *Disosway v. Edwards*, 134 N. C., 256.

ARCHIBALD CODY v. JAMES QUINN.

1. Where a sheriff returned an attachment levied on certain property, and was afterwards permitted by the court to which the attachment was returned to amend his return by stating that the property had been levied on by executions having priority to his attachment: *Held*, that he could not be held responsible on his first return; but the record, as amended, must be taken to be true.
2. Where a writ from a court of competent jurisdiction is delivered to a sheriff, he is bound to execute it, according to the exigency of the writ, without inquiring into the regularity of the proceedings on which the writ is grounded.
3. Where, after a judgment, a memorandum was made on the docket by the parties that execution should not issue before a certain day, as this forms no part of the judgment, if the execution issue before that day no one can complain of it but the parties. As to all other persons, the execution is not even voidable.

APPEAL from LINCOLN Special Term in June, 1845; *Pearson, J.*

Case commenced on 1 July, 1842, against the defendant as sheriff of Lincoln. Plea, *not guilty*. The plaintiff, on 19 August, 1839, issued an original attachment against one True for a debt of $131.80, and placed it in the hands of the defendant, who, on the same day, caused it to be levied on a coach and eight horses, the property of True. (192) The plaintiff obtained a judgment against True on his attachment at July Sessions, 1840, of Lincoln County Court, and issued a *venditioni exponas*, tested on the second Monday after the third Monday in February, 1842, returnable to June Sessions, 1842. At this term the court permitted the sheriff to amend his return on the original attachment by stating in it that the levy on the coach and horses was subject to James Patton's execution against True, tested before the levy under the said attachment.

The coach and horses were sold by the sheriff and the proceeds applied to Patton's execution, which absorbed the whole sum raised by the sale. Patton's execution was tested of July Term, 1839, of Buncombe County Court.

When Patton obtained his judgment a memorandum was made, by consent of parties, "No *fi. fa.* to issue until October." After the term there was an addition made to the memorandum by Patton and the clerk, in these words: "until ordered." These facts being admitted, the judge charged the jury that the plaintiff could not recover. There was a verdict and judgment for the defendant, and the plaintiff appealed.

Guion for plaintiff.
Boyden for defendant.

DANIEL, J. *First.* After the amendment in the sheriff's return to the plaintiff's attachment against True was permitted to be made by the

county court of Lincoln, at June Sessions, 1842 (which the court had a right to permit to be made, *Smith v. Daniel,* 7 N. C., 128; *Dickinson v. Lippet,* 27 N. C., 560), the record in that case showed that the plaintiff's lien on the property of True was postponed to Patton's execution; the latter was valid as to the sheriff.

Secondly. It was contended for the plaintiff that Patton's execution did not correspond with his judgment, and that the sheriff ought to show a judgment and an execution corresponding with it. To this ob-
(193) jection the answer is that when a writ from a court of competent jurisdiction is delivered to the sheriff, he is bound to execute it according to the exigency thereof, without inquiring into the regularity of the proceedings whereon that writ is grounded. And although the process under which the sheriff takes the goods of a defendant may be voidable or erroneous, and of which the defendant might have availed himself in the original action, yet such a writ is a sufficient justification for the sheriff in an action against him; for the sheriff is a ministerial officer in the execution of writs, and is not bound to examine into their legality. 2 Saund., 100; Cro. Jac., 280, 289; Watson on Sheriffs, 54.

Thirdly. The memorandum made with the consent of the parties by the clerk of Buncombe County Court in Patton's suit—"No *fi. fa.* to issue until October, or until ordered"—did not annul or suspend the judgment so as to avoid a *fieri facias* issued on it. And although the execution was issued by Patton, in contravention of this memorandum, bearing teste of the term the judgment was rendered, it was not void, but was sufficient justification to the sheriff of Lincoln in proceeding under it as if no such memorandum had ever been made. True, the original defendant might have complained to the county court of Buncombe, on a motion to set the execution aside, but the present plaintiff, who was no party to that suit, certainly has no right in law to complain of the conduct of Patton or of the sheriff.

PER CURIAM. No error.

Cited: Wood v. Bagley, 34 N. C., 89; *Shelton v. Fels,* 61 N. C., 179; *Jacobs v. Burgwyn,* 63 N. C., 197; *Clifton v. Wynne,* 80 N. C., 148.

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JOHN COCHRAN v. JAMES R. WOOD.

1. One who complains of a nuisance to his land by the erection of a milldam is not obliged to wait until the expiration of a year before he files his petition to recover damages under the act of Assembly, Rev. Stat., ch. 74.
2. When the suit is brought within the year, the damages are necessarily limited to the time the injury has existed.

COCHRAN *v.* WOOD.

APPEAL from ANSON Fall Term, 1845; *Caldwell, J.*

Petition, filed under Rev. Stat., ch. 74, in March, 1841, to recover damages for overflowing the plaintiff's land by the erection of a water grist-mill. Upon the hearing in the county court, the writ of *ad quod damnum,* as prescribed in the act, was awarded, and the jury assessed damages, and from the judgment thereon the defendant appealed. Upon the trial in the Superior Court it appeared that the defendant's mill had been erected forty or fifty years, so as to raise the presumption of a grant of the privilege as to the land then covered. But, in August, 1840, the defendant raised his dam about 7 inches, which ponded the water so as to overflow more of the plaintiff's land, which is the injury complained of in this suit. The court was of opinion that the suit, having been brought before the expiration of a year from the raising of the dam, was instituted too soon, and directed the jury to find for the defendant. From the judgment the plaintiff appealed to this Court.

Strange and Winston for plaintiff.
No counsel for defendant.

RUFFIN, C. J. There is no express provision of the act that the party grieved shall not sue sooner than a year. We think it could not have been meant, for it would often compel the person injured to give up part of his damages, since he dare not sue before the year ended, and he might not know the precise time of its ending, so as to sue at the exact day. Besides, if we suppose the nuisance to be abated by the (195) party himself, who erected it, before the expiration of a year, all remedy would be taken away upon this construction of the act, which is altogether inadmissible. The provisions in sections 14 and 15 which limit the operation of the verdict and judgment to "one year's damage preceding the filing of the petition" do not restrain a person from suing within a year after the cause of action arose, but restrain the jury from giving damages for more than one year for suit brought, although the injury may be of longer standing. It is in the nature of a statute of limitation, which was indispensable, as applied to the new remedy introduced by the act; for the act of 1715 applied only to actions on the case for the nuisance; and if there had been no restrictive clause of this kind the juries must have gone back to an indefinite period, which would have defeated the whole policy of the act. It is not, indeed, precisely a statute of limitation, to be pleaded and passed on by the jury; for as the proceeding is merely an inquiry of damages on the premises, and the jury has not the aid of the court, no other duty is imposed on them than simply to assess the damages, and, since there could be no plea of this matter for the jury, the act imperatively confines their inquiry to the one year previous—it being the plaintiff's folly to wait longer, and it being the

intent of the Legislature to encourage the building of mills and factories. But to deny an action for a year after an injury is an anomaly in jurisprudence which only express words or a very clear intention of the Legislature would justify the court in holding. On the contrary, the law favors diligence. If it be said that a year might be useful to the estimation of the extent of the injury, the answer is that the plaintiff may judge of that risk, and, further, that there is almost always a
(196) lapse of time pending the petition which will make up a full year from the injury done before the jury is called to the premises to make their assessment. When the suit is brought within the year, the damages are necessarily limited to the time the nuisance has existed; and, therefore, the jury should find the time, and confine the damages to it, so that the judgment may be for the actual injury, which it is always the object of the law to redress.

PER CURIAM. *Venire de novo.*

DEN ON DEMISE OF WILLIAM B. WISE v. JOHN H. WHEELER.

1. The landlord has a right to be made defendant in an action of ejectment in which the declaration has been served on his tenant as tenant in possession.
2. No other person has a right to be so made defendant without the consent of the plaintiff; and if the plaintiff consents, the person made defendant must not only enter into the common rule, but must also admit that he was in actual possession at the time of the service of the declaration.
3. When a new defendant is thus substituted, the declarations of the tenant on whom the declaration was served cannot be given in evidence against him.
4. A deed conveying "the storehouse wherein A. B. had a store, now occupied by himself as a postoffice, with the outhouse and office adjoining," conveyed also the lot on which the houses were, there being nothing in any other part of the deed to control the description and exclude the lot.

APPEAL from HERTFORD Fall Term, 1845; *Manly, J.*

Ejectment, to recover the premises mentioned in the declaration. The notice was duly served on Samuel J. Wheeler, the tenant in possession, who failed to appear. At the term of the county court to which
(197) the declaration was returned John H. Wheeler was, by an order of the court, made defendant, and entered into the common rule. On the trial of the case the plaintiff, to establish his title, showed in evidence several judgments and executions against Samuel J. Wheeler, a sale under them of the premises, and a sheriff's deed to him. He then proved that at the time his suit issued and the notice was served, Samuel

J. Wheeler was in actual possession. The defendant, John H. Wheeler, then gave in evidence a deed of trust, executed by Samuel J. Wheeler, which it was alleged conveyed the premises in question to him to secure the payment of certain enumerated debts. This conveyance was executed and registered before the rendering of the judgments under which the plaintiff claimed. The plaintiff alleged this deed was fraudulent, and, to prove it, offered in evidence the declarations of Samuel J. Wheeler while in possession, and made a short time before the execution of the deed, to show that the deed was made to avoid paying certain debts which he owed. The testimony being objected to on the part of the defendant, was, by the court, rejected. The plaintiff then contended that the deed was void at law, for matter appearing on its face: first, because none of the debts recited in the deed of trust were *proved* to be due, except one; second, because none of the debts recited, but two, corresponded in amount with the notes and evidences offered to establish them; third, because, although the deed conveyed to the trustee, the defendant, all the property of Samuel J. Wheeler, it authorized a sale of only a portion, as enumerated in a certain paper-writing exhibited and marked A; and, fourth, because the deed directed the trustee to sell for the payment of certain debts, and to return to the said S. J. Wheeler the residue of the fund, without appropriating it to the other enumerated debts, and was, therefore, made in ease and favor of the grantor. It was further contended by the plaintiff that the deed of trust, in conveying "the storehouse wherein the said Wheeler had a store, (198) now occupied by him as a postoffice, with the outhouse and office adjoining," did not pass the lot of land upon which the houses were, and that a field of 5 acres adjoining the tanyard did not pass by the description of the houses and lot known as "the tanyard, with all its fixtures."

His Honor, the presiding judge, instructed the jury that the deed of trust was not, *in law,* fraudulent and void for any or all the reasons assigned, but called their attention to those several circumstances as being proper for them to consider in coming to a conclusion whether the deed was fraudulent or not. He was of opinion, and so decided, that the description in the deed was sufficient to pass both parcels of land referred to.

The jury found a verdict for the defendant, and judgment being rendered thereon, the plaintiff appealed.

A. Moore for plaintiff.
Badger for defendant.

NASH, J. We concur with his Honor in the opinions expressed and in the charge given. The latter might have been, and doubtless was,

more at large and explicit than contained in the case, but it is sufficient to satisfy us the law has been correctly administered.

The declarations of Samuel J. Wheeler were properly rejected, and for the reason assigned by his Honor he was no party to the record. He was the tenant in possession, and the notice had been served upon him. There was, however, no obligation upon him to defend the suit. It was at his pleasure to do so or not. Upon his declining to be made the defendant, the plaintiff, upon the proper proof of the service of the notice, was entitled to a judgment by default against the casual ejector. The consequence of which proceeding would be that the plaintiff would be subjected to the payment of the costs incurred, leaving him to (199) recover them in an action for the mesne profits against the defaulting tenant. If, however, the tenant in possession be in possession as tenant to any other person, the landlord has a right, upon making that appear to the court in the proper manner, to be made the defendant either in the place of the tenant or with him. *Fowler v. Shamtitle,* 2 Burr., 1310; Adams on Ejectments, 228. It is the right of the landlord, at common law, to come in and be made a party defendant. No other person has this right; and if a party should be permitted to defend, as landlord, whose title is inconsistent with that of the tenant, according to the English practice, the plaintiff may apply to a judge at his chambers, or to the court, and have the rule discharged with costs. Adams, 232. But if he neglect to do so, and the party continue on the record as defendant, *he* will not be permitted to set up such inconsistent title as a defense at the trial. *Knight v. Lady Smythe,* 4 Maule & Sel., 347; Adams, 232; *Belfour v. Davis,* 20 N. C., 443; *Davis v. Evans,* 27 N. C., 525. But, although no one but a landlord can be made defendant, against the will and pleasure of the plaintiff, yet the latter may consent to any person coming in as defendant, and upon any title, when the tenant in possession has made default. In such case the service of a new declaration would be admitted by the defendant. As, however, the party so made defendant was not the person actually in possession, it is not sufficient he should enter into the common rule, but he must consent to be considered in actual possession. This is rendered necessary by the rule adopted in our courts, that, notwithstanding the confession of lease entry and ouster by the defendant, in entering into the common rule, the plaintiff, at the trial, must *prove* the defendant to have been in possession at the commencement of the action. If the new defendant were not obliged to admit himself in possession, the plaintiff (200) could not recover. It is to be remembered that, in form, the action of ejectment is nearly throughout a fiction, and the courts have exercised the privilege of molding it to suit the purposes of justice. The court, therefore, ought in no case to permit a stranger to defend

wthout his agreeing to be considered in possession, and without the consent of the plaintiff. Originally, after the tenant was brought into court by the service of a declaration and notice, another declaration was served upon him. The latter is now dispensed with, but, as before stated, if the parties agree, another declaration may still be served upon another party at the time; all, indeed, is by consent. The only person who is compelled to appear is Richard Roe. Adams, 357-8. In the case now before us we are to presume all the regular steps were taken in order to make John H. Wheeler the defendant. He defended alone. The presumption is that he was admitted by consent, as it does not appear to have been opposed, and it is probable that all parties wished to try the validity of the deed of trust as soon as possible. Samuel J. Wheeler was no party, and his declarations were not evidence against the real defendant. They were not offered to explain his possession.

We think his Honor was correct in his decision as to the construction of the deed. The court was called on by the plaintiff's counsel to put a construction on it. By a conveyance of the storehouse and the other houses the lot upon which they stood was also conveyed, as there is nothing in the deed to control the description and exclude the lot, and because the deed does convey all of the grantor's property of every kind.

We concur with his Honor in his charge with respect to the allegation of fraud. The circumstances all combined did not, in *law,* amount to fraud, and were properly left to the jury for their consideration; and whether they have found correctly or not is not for us to say. The judge drew their attention to them, with the remarks he thought proper. No complaint is made on account of those remarks; but the plaintiff complains that the question was improperly left to the (201) jury, and that the court ought to have decided it as one of law. We do not think so. It is to be remarked that among the objections to the deed of trust, as appearing on its face, there are only two, and they are the two last; the third and fourth. The third is that the deed professes to convey all the property to the trustee, but authorizes the sale of but a portion for the payment of debts. The answer is, *all* was conveyed to the trustee for the payment of the debts, and he had power by the deed, therefore, to sell *all* for that purpose. The fourth objection is susceptible of the same answer; there could be no surplus to be handed over or returned to the plaintiff while any of the debts enumerated in the deed remained unpaid. The trustee held *all* the property for these purposes, and was answerable to all the enumerated creditors for the faithful discharge of his duties. If it required all to pay the debts, and he had sold all, he would not have been answerable to Samuel J. Wheeler that he had paid more than the debts set forth in the schedule. But that, evidently, was not the meaning of the parties.

PER CURIAM. No error.

Cited: Lee v. Flannagan, 29 N. C., 479; *Wiggins v. Reddick,* 35 N. C., 381; *Atwell v. McLure,* 49 N. C., 377; *Rollins v. Rollins,* 76 N. C., 266; *Colgrove v. Koonce, ibid.,* 364; *Hilliard v. Phillips,* 81 N. C., 106; *Maddrey v. Long,* 86 N. C., 385; *Bank v. Levy,* 138 N. C., 278.

J. COLLINS ET AL., ADMINISTRATORS, ETC., v. MORRIS ROBERTS.

One who sues as administrator or executor is not liable for costs *de bonis propriis* if he fails in his suit.

(202) APPEAL from LINCOLN Fall Term, 1845; *Bailey, J.*

The plaintiffs, as administrators, sued the defendant in debt, by way of warrant, before a justice of the peace. The suit went by successive appeals, taken by the defendant, to the Superior Court of Cleveland, where it was tried, and the plaintiffs were cast.

The defendant then issued an execution *de bonis propriis* against the goods and chattels, lands and tenements of the plaintiffs to recover his costs. The plaintiffs then moved the court to set aside the execution as having been improvidently issued. The court refused the motion, and the plaintiffs appealed.

Alexander for plaintiffs.
No counsel for defendant.

DANIEL, J. Our act of Assembly declares that in all cases whatsoever the party in whose favor judgment shall be given shall be entitled to full costs. But it has been decided, as long ago as the year 1806, that when executors and administrators sue *in auter droit,* they are not liable *de bonis propriis* for costs when they are cast. *Arrington v. Coleman,* 5 N. C., 102.

The rule appears to be the same here as it is in England. There, by the Statute 23 Hen. VIII., ch. 15, it is enacted that "If the plaintiff be nonsuited, or a verdict pass by lawful trial against him, the defendant shall have judgment to recover his costs, and shall have such execution for the same as the plaintiff should have had in case the judgment had been for him." And in that country it had always been held that an executor or administrator was not within the operation of the statute: so that when they are plaintiffs they pay no costs, for they sue *in auter droit,* and are but trustees for the creditors, and are not presumed to be sufficiently conusant in the personal contracts of those they represent. And this is by an equitable construction of the statute, for there are no express words in it to exempt them. 2 Bac. Ab. (Cost), D. and E.,

and the cases there cited. So, in our act, there are no express (203) words to exempt executors and administrators, but it was early held that they could not have been intended by the Legislature to be included in it, because they do not sue for themselves. The Superior Court will order that the execution be set aside. The appellant must pay the costs of this Court.

PER CURIAM. Reversed.

Cited: Christian v. R. R., 136 N. C., 322.

CHRISTOPHER C. BATTLE v. THE PRESIDENT AND DIRECTORS OF THE LITERARY BOARD.

1. The President and Directors of the Literary Board have no right to allow, and are not bound to pay, their secretary a *per diem* compensation for a greater number of days than they are actually in session.
2. Where the board passed a resolution that their secretary should be allowed so much *per diem* while he was employed, the construction is that he was allowed the *per diem* pay only while the board itself was in session.

APPEAL from WAKE Fall Term, 1845; *Settle, J.*

This was an action of assumpsit, in which the plaintiff declared on a special contract, and also for work and labor done at the request of the defendants. On the trial the plaintiff offered to prove that in March, 1837, he was appointed secretary of the literary board by the following resolution: *"Resolved,* that Christopher C. Battle be and he is hereby appointed secretary to this board, and that he be allowed a compensation at the rate of $3 *per diem* for each and every day he may be employed: *Provided,* that the whole of his compensation shall not exceed $500 *per annum"*; that, in pursuance of this appointment and under the faith of this resolution, the plaintiff entered upon the duties (204) of the said office and continued to discharge them until 1 January, 1841; that the said board was directed by an act of the General Assembly to loan out, or otherwise invest, the fund belonging to the board; that the board accordingly loaned out to individuals a large amount of money, to wit, $200,000 or upwards, taking from such individuals notes with sureties, payable in three months, which, at the end of every three months, might be renewed on paying the interest and certain installments, as might from time to time be required; that the duty of keeping a proper register of the said notes, and of attending to their renewal and receiving the interest and installments thereon (amounting to $100,000 and upwards) as they might become due, was assigned by the

board to the plaintiff; that, besides the responsibility incurred, the rate of pay at $3 per day, during the time he was actually employed in the discharge of the duties, amounted to at least $500 per annum from 1 March, 1837, to 1 January, 1841, when his office ceased; that in the execution of these duties he was necessarily employed during far the largest portion of the time, when the board was not actually in session, and that the board had paid him only at the rate of $3 while they were actually in session, being for about 68 days per annum, on an average, while the plaintiff was actually employed more than 200 days per annum, thus leaving a balance due to the plaintiff of upwards of $1,100; that the board, after the plaintiff's retirement from office, declined to pay this balance, on the ground that they had no authority by law to pay the plaintiff more than $3 per day while the board was actually in session.

The defendants objected that they had no authority to pay more than at the rate of $3 per day while the board was in actual session. They also objected that the defendants could not be sued at all, as they were the mere agents or representatives of the State.

(205) The court *pro forma* nonsuited the plaintiff, and he appealed.

Iredell for plaintiff.
Manly for defendants.

RUFFIN, C. J. The plaintiff accepted the appointment of secretary on a special agreement as to his compensation, which was to be $3 for "each day he was employed," that is to say, as secretary. The nature of his duty is not particularly stated, but from the denomination given to his place it is to be inferred that it was to record the acts of the board and, in relation to loans made by it, to keep the requisite accounts of them, like other acts of the board. It is probable that the most convenient form of doing that was to make a register of the notes as they were given or renewed, and accepted by the board, and to preserve them among the papers belonging to the board. If the plaintiff did his duty promptly and properly, it must, from its nature, have been or might have been performed when the acts of the board were adopted; in other words, on the days when the board was in session; for every clerk or secretary ought, as a public or corporate body adopts acts, to record them. If he chooses to take minutes of them at the time and record them afterwards it is for his own convenience. It is stated, indeed, that the plaintiff offered to prove that the duty was assigned to him of attending to the renewal of notes and receiving interest and payments thereon, and that the execution of this duty was, for the most part, when the board was not in session. We do not comprehend this part of the case; for, certainly, those acts, if done without the knowledge and direction of the board, are beyond the function of a mere secretary, and

belong rather to a cashier, treasurer, or general agent. Besides, this board could delegate no such authority to any one. Their (206) trust is a public one, and they, the board, are empowered to lend the money belonging to the fund on good security and short credit; and it is plain it was not intended that power should or could be delegated, and, we presume, it never was. However that may have been, it is the obvious meaning, as it seems to the Court, of the resolution under which the plaintiff was appointed and his compensation fixed that whatever he did should be paid for in this manner, namely, by paying the sum of $3 for every day he was actually engaged as secretary, which is naturally to be understood as embracing the days in which he was employed as the servant of the board in recording their acts, and not in doing the acts which they ought to have done. And we have the more confidence in this construction of the resolution or contract because it was acted on by the board and the plaintiff throughout his employment of four years. During that time he must have received annually, or quarterly, or oftener, his wages upon the principle against which he now complains, though he did not then. This is a practical proof of the sense in which all parties understood the subject; and the true principle of construction is to effectuate the intention of the parties. No doubt, the gentlemen of the board made the plaintiff a full compensation, as they considered, for his services; and if the plaintiff then claimed no more, or if, after claiming more and having his claim refused, he continued in the service of the board, there can be no other conclusion than that no more was intended from the beginning, according to the natural import of the terms used in the resolution. The plaintiff has received the sum he contracted for. For this reason the Court thinks the nonsuit was right, and the judgment must be

PER CURIAM. Affirmed.

(207)

WILLIAM SLADE v. ROBERT H. BURTON'S EXECUTORS.

1. Where the county court, upon affidavits, ordered an amendment of their records, and the party aggrieved appealed to the Superior Court, it was the duty of the Superior Court to have decided upon the question of amendment; and if the Superior Court dismissed such appeal without deciding upon the merits, their judgment must be reversed.
2. The Superior Court may, upon such appeal, not only review the decision of the county court on the affidavits there filed, but may hear further evidence as to the propriety of the order of the county court.

APPEAL from LINCOLN Fall Term, 1845; *Pearson, J.*

The case appeared upon the record to be this: At February Sessions, 1845, the county court of Lincoln, on affidavits filed by the plaintiff,

made a rule upon the defendants to show cause at the next term why the record in a suit between the same parties, made at June Term, 1842, should not be amended in the manner stated in the said rule. The defendants, on the return of the rule, appeared and filed counter affidavits and resisted the motion. The county court, on hearing the affidavits and proofs in writing made in the cause, made an order to amend the record as prayed for by the plaintiff. The defendants appealed from this order to the Superior Court. The transcript of the record of this rule, and copies of all the affidavits and proofs in the case, were sent up to the Superior Court. The judge, on the case being there called, dismissed the appeal without deciding upon the questions of fact or law made by the case and sent to him for his determination. From this judgment the plaintiff appealed.

Guion and Boyden for plaintiff.
Alexander for defendants.

DANIEL, J. There is no doubt that such an order is the subject of an appeal from the county to the Superior Court. It is true that (208) when a record is once amended by an order of the same court made at any subsequent term it cannot afterwards ever be called in question; for the record then appears on its face as if it had always been perfect; and then it cannot be contradicted. But when an order is made by the county court to amend the record of its proceedings at any antecedent term, such order may be appealed from, and the appeal instantly vacates the order; and the record sought to be amended remains in *statu quo* and without amendment. From the sentence, judgment, or decree of any county court the party dissatisfied may appeal. Rev. Stat., ch. 4, sec. 1. We think the judge ought not, therefore, to have dismissed the appeal, but should have decided the question of amendment. Although this Court cannot review the decision of the Superior Court upon the question of amendment, either in refusing or allowing it, because it is a matter of discretion upon evidence, yet the Superior Court can review the decision of the county court, and, to that end, hear further evidence; and the appellant had a right to the judge's opinion as to the propriety of the order of the county court, and therefore, it was error to refuse to entertain the appeal. *Dickinson v. Lippet,* 27 N. C., 560. If he had been in favor of the plaintiff, he should have affirmed the order and issued a writ of *procedendo;* if he had been against the order, he should have reversed it and given the defendants judgment for costs.

The judgment dismissing the appeal must be

PER CURIAM. Reversed.

Cited: Williams v. Beasley, 35 N. C., 113.

(209)

DEN ON DEMISE OF BARCLAY G. BORDEN v. ROBERT THOMAS.

1. A., by deed dated in 1790, in consideration of natural love and affection, etc., conveyed certain lands to his son B., "to have and to hold, etc., unto the said B. his natural life only, and then to return to the male child or children of the said B. lawfully begotten of his body; for the want of such, to return to the male children of my other sons, C. and D., to their proper use, benefit, and behoof of him, them, and every one of them equally, and to their heirs and assigns forever; and the said A., for himself, etc., doth covenant and grant to and with the said B., his lawfully begotten male heirs, and, for want of such as aforesaid, with my other two sons, C. and D., and each and every of their male heirs, etc., that he, the said B., and his heirs as above mentioned, if any, or, otherwise, his two brothers above named, during their natural lives or life, and after them unto their male heirs, etc., shall and may lawfully, peacefully have, hold," etc.: *Held*, that this was a covenant by A. to stand seized to the use of B. for his life, and for any son or sons of his after his death. If B.'s son was born at the time the deed was executed, the remainder was then vested in him; if born afterwards, the seizin remaining in the covenantor was sufficient to feed the contingent use when it came into *esse*, and enabled the statute of uses to transfer the equitable use into a legal estate in fee in remainder, B. having had a son who survived him.
2. A warranty by a tenant for life is void against all persons claiming in remainder or reversion; and so are collateral warranties by an ancestor, as against his heirs at law, the ancestor having no estate of inheritance in possession.

APPEAL from CARTERET Fall Term, 1845; *Battle, J.*

Ejectment for the premises claimed in the declaration. The defendant entered into the common rule, and pleaded not guilty. The following case agreed was submitted to the court: Both parties claimed under William Borden, Sr. William Borden, Sr., in the year 1790 made a deed, of which the following are the substantial parts: By this deed, in consideration of love and affection, etc., he conveyed the premises in dispute to his son, William Borden, Jr., "to have and to hold the same to the said William Borden, Jr., during his natural life only, and then to return to the male child or children of the said William Borden, Jr., lawfully begotten of his body; for the want of such, (210) to return to the male children of his other sons, Benjamin and Joseph, to their proper use, benefit, and behoof, of him, them, and every of them equally, and to their heirs and assigns forever." The will then goes on with clauses of warranty, etc. William Borden, Jr., died intestate on 15 October, 1843, leaving him surviving the lessor of the plaintiff, Barclay D. Borden, his only son and heir at law, he having been the only male child of the said William Borden, Jr., born in lawful wedlock.

William Borden, Jr., in his lifetime, to wit, on 16 September, 1815, by deed of that date, conveyed the premises in dispute to one James

Porter, from whom the defendant deduced a regular paper title. This deed contained a covenant of general warranty against the grantor and his heirs. It was admitted that the defendant and those under whom he claimed had been in possession of the premises in dispute from the time of the date of the deed to James Porter to the time of the institution of this suit, and that the defendant still holds and claims title to the farm under the said deed.

It is agreed that the main question in this cause arises upon the construction of the deed from William Borden, Sr., to William Borden, Jr.; the plaintiff contending that by the express terms and conditions of the said deed William Borden, Jr. only took a life estate in the premises, and, upon his death, the limitation over to the lessor of the plaintiff, Barclay D. Borden, he being the only male child of the said William Borden, Jr., took effect, and that, therefore, the said William Borden, Jr., could only convey a life estate to the purchaser from him. On the contrary, it is contended by the defendant that the limitation in the said deed is too remote, inoperative and void, and that the lessor of the plaintiff took no estate whatever under the said deed. It is further agreed that if his Honor should be of opinion, upon this statement, that the plain-
(211) tiff is entitled to recover, judgment is to be entered for him; otherwise, for the defendant.

His Honor being of opinion that the deed from William Borden, Sr., to William Borden, Jr., conveyed only a life estate to William Borden, Jr., and that the limitation in the said deed to the lessor of the plaintiff was good and not too remote, and that, therefore, the plaintiff was entitled to recover, judgment was accordingly entered in favor of the plaintiff. From this judgment the defendant appealed.

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

DANIEL, J. The deed, executed in 1790, by William Borden, Sr., inured as a covenant to stand seized of the land to the use of his son William Borden for life, remainder to all the sons of William Borden in fee. If the lessor of the plaintiff was born at the date of the deed, his remainder was vested. If he was not then born, the ulterior *use* was contingent, and became vested in him immediately he was born; for the fee, remaining in the covenantor, William Borden, Sr., or his heirs, was a sufficient seizin to feed the contingent *use* whenever it came into *esse*, and enabled the statute of uses to transfer the equitable use into a legal estate in fee in remainder.

The above estates are to be found in the premises and *habendum* clauses of this very inartificially drawn deed. What follows the *habendum* in the deed does not affect the extent of the estates before created;

all that is, as to this party, but a covenant for quiet enjoyment. William Borden, the tenant for life, in 1845 made a deed of bargain and sale in fee of the land, with a general warranty, to James Porter. This warranty descending upon the lessor of the plaintiff, the heir at law of the bargainor, is made void by sec. 8, ch. 43, Rev. Stat., which declares that all warranties which shall be made by any tenant (212) for life of any lands, the same descending or coming to any person in reversion or remainder, shall be void and of no effect; and, likewise, all collateral warranties of any lands by any ancestor who has no estate of inheritance in possession in the same shall be void against the heirs. The lessor of the plaintiff had no right to enter until the death of the father, which happened in 1843.

We see no error in the opinion of his Honor, and the judgment must be

PER CURIAM. Affirmed.

Cited: *Brown v. Ward,* 103 N. C., 176.

WESLEY M. ENLOE ET AL. v. UTE SHERRILL ET AL.

1. A petition was filed for the reprobate of a will on the ground that the supposed testator was *non compos mentis.* A., and B., his wife, joined in the petition, she being one of the next of kin. Afterwards A., the husband, caused himself to be joined with the executors in propounding the will, leaving his wife still one of the caveators. *Held,* that on the trial of the issue *devisavit vel non* the declarations of A. were not admissible in evidence to prove the incapacity of the supposed testator.
2. An issue to try the validity of the will is not an adversary suit; there are strictly no parties to it.
3. Where a will is propounded, if the executor decline to prove it, or if there is ground for believing that the executor will not faithfully perform his duty, the court will permit any person who is interested in supporting the will to join with the executor in propounding it, or to propound it alone. But the party applying for such an order must show that he is not a mere intruder, but that he either has or believes he has an interest in establishing the will.
4. When the declarations of any party to an issue *devisavit vel non* are admitted in evidence, it is because of the rule that the declarations of any one against his interest is legal testimony as against him.

APPEAL from HAYWOOD Fall Term, 1845; *Bailey, J.* (213)

At Spring Term, 1843, of the court of pleas and quarter sessions of Haywood County a paper-writing, purporting to be the last will and

testament of Abraham Enloe, deceased, was by the executor therein named brought forward and propounded to the court for probate. It was admitted to probate in the common form. At the same term some of the next of kin of Abraham Enloe filed a petition for reprobate, which was ordered by the court. Among the petitioners were John Mingus and his wife, Mary, the latter being one of the children of the deceased, and entitled, if the paper was rejected as the last will and testament of Abraham Enloe, to a distributive share of his estate. Upon setting aside the probate first had, the court ordered an issue to be made up of *devisavit vel non,* and the petitioners, including John Mingus and his wife, Mary, were made coveators. After the case had been so pending for some time John Mingus came into court and had *himself* made a party as one of the propounders with the executors, his wife still remaining a caveator. Upon the trial of the issue in the Superior Court the defendants contended that the paper-writing was obtained from the deceased by the undue influence of his wife, and in order to show it offered in evidence the declarations of John Mingus, who wrote the will, which declarations were made immediately after the death of A. Enloe. The evidence was objected to on the part of the executors, but was received by the court. A verdict having been rendered for the defendants, the plaintiffs appealed.

Guion for plaintiffs.
Francis for defendants.

NASH, J. John Mingus and his wife were among the petitioners to set aside the probate of the will. When the order is made, and the issue made up, they take their position on the record as opponents (214) of the will; shortly after, without any reason assigned, he is transferred from the opposing to the propounding side of the issue. For what purpose is this done? No reason is assigned, but it lies too near the surface to be hidden. It became necessary to use his declarations in evidence to defeat the will. While he continued a caveator, this could not be done, and the bungling device is resorted to by him of taking his place among those who were endeavoring to establish the script. But why, if his testimony was so important, did he not represent himself as a witness in the case in behalf of the caveators? They, doubtless, would have been willing. But it did not suit the purposes or views of the parties. It was much more convenient to take his declarations than to subject him to a cross-examination upon oath, which might have shown that his opinion in the matter was worth nothing. By transposing his name he was enabled to obtain the benefit of his own testimony to subserve his own interest. He was a party to the issue in no other light than as the husband of his wife; as John Mingus,

he had no concern with it. His wife was still a caveator. But the court erred in permitting his declarations to be used at all. An issue to try the validity of a will is not an adversary suit; there are strictly no parties to it. When the will is propounded by the executor, he represents all whose interest it is to establish the paper, and no one can be joined with him and against his will except by order of the court. If it is made to appear by one who is interested, that there is danger that the executor will not faithfully perform his duty, as that he is interested to oppose the probate, the court may and will associate such party in interest with the executor, but not otherwise. And should the executor, upon propounding the will, decline to prove it, as he may do, or to qualify as executor, the court may admit any one as a propounder who is interested in so doing and who establishes his interest by his affidavit. 1 Wil. on Eq., 126; 1 Godol. Pr., ch. 20, sec. 2. The party applying must show that he is not a mere intruder, but that he (215) either has or believes he has an interest in establishing the will. No one, therefore, ought to be permitted to propound a will for probate or join an executor who is not, in good faith, interested in so doing. Nor could a case be imagined in which the necessity of the rule is made more apparent than in the present. By a manifest trick Mr. Mingus places himself in a position wherein his own declarations can be used to subserve his own interest, in palpable violation of one of the fundamental rules of evidence, and yet apparently under the sanction of the law itself.

Where a will is brought into court in obedience to its order, or in compliance with his duty by an executor, it is in the possession of the court; its jurisdiction is over the thing itself, and it cannot be withdrawn by any one, but remains among the records of the court. If contested, it is the duty of the court to cause an issue of *devisavit vel non* to be submitted to a jury. In this issue there are strictly no parties; both sides are equally actors, in obedience to the order directing the issue. *St. John's Lodge v. Callender,* 26 N. C., 343. And when the declarations of any party to the issue are admitted as evidence, it is because of the rule that the declarations of any one against his interest is legal testimony as against him. It has, therefore, been ruled in this State that in an issue of *devisavit vel non,* when the parties are regularly constituted, their declarations are evidence against them. *McRainy v. Clark,* 4 N. C., 698. But in order to render these declarations evidence, they must appear to be made by a party interested in the matter, and against his interest. Here, Mingus, as far as appears to us, was interested in setting aside the will. His wife, through whom alone he could appear in the cause, was a caveator, because, as we presume, interested to set it aside. Separated from her, he had not the (216) shadow of an interest. He ought not to have been permitted by

the court, in the first instance, to associate himself with the executor as a propounder. And when the issue was submitted to the jury, the presiding judge ought to have ordered his name to be stricken out and restored, as it originally was, to the position of a contester of the will. It would be a reproach to the administration of justice to suffer the law to be perverted from its due course by so flimsy a device. The transformation of John Mingus from an opponent into a friend of the will took place in the county court, and when the issue was presented for trial in the Superior Court he was apparently in his regular and proper position on the docket. The Court, then, might well suppose the evidence of his declarations came within the rule of *McRainy v. Clark*. Should this attempt of Mr. Mingus succeed, it will be an easy thing, hereafter, for any person interested in defeating a will to do so.

PER CURIAM. *Venire de novo.*

Cited: Love v. Johnston, 34 N. C., 358, 365; *Pannell v. Scoggin,* 53 N. C., 409; *Hutson v. Sawyer,* 104 N. C., 3; *Medlin v. Board of Education,* 167 N. C., 243.

ANNIS SHELTON v. HENRY G. HAMPTON.

1. A party is never permitted to produce general evidence to discredit his own witness; but if a witness prove facts in a cause, which make against the party who called him, yet the party may call other witnesses to prove that these facts were otherwise.
2. One who has made a mortgage of property to secure a debt may afterwards convey the same property to the mortgagee absolutely, in satisfaction of the debt, provided the conveyance be *bona fide* and for a fair price.

APPEAL from SURRY Fall Term, 1845; *Pearson, J.*

Trover. The only material questions that arose on the trial were:

First, when the plaintiff had introduced a witness who swore (217) against her interest, whether she could offer other witnesses to disprove what the first had sworn to. His Honor decided that the plaintiff could not be allowed to discredit her witness by showing that he was a man of bad general character, but that she might prove by other witnesses that the facts were different from those sworn to by the first witness.

Secondly, whether when a man had given a mortgage to secure a debt, he could afterwards, for the consideration of the same debt, and no other, convey the same property absolutely to the mortgagee. His Honor decided that he might, provided the conveyance was *bona fide.*

A verdict having been rendered for the plaintiff, the defendant moved for a new trial upon the ground of error in his Honor's opinion upon the two points above stated, and also upon the ground that, in charging the jury, his Honor did not recapitulate all the testimony. A new trial being refused and judgment rendered pursuant to the verdict, the defendant appealed.

Boyden for plaintiff.
Kerr for defendant.

DANIEL, J. 1. A party never shall be permitted to produce general evidence to discredit his own witness; but if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise. The other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only. Bull. N. P., 296. *Lord Ellenborough* (in *Alexander v. Gibson,* 2 Camp., 556) said: "If a witness is called and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, and that, in this manner, his evidence may be entirely repudiated." In *Friedlander v. Land,* 4 B. & Ad., 193, *Parke, J.,* (218) said that a party can contradict his own witness, if he speaks to a material fact in the case against the interest of those who called him. On a collateral fact he cannot be contradicted, not only because such evidence goes to the credit of the witness, but because a multiplicity of issues ought not to be introduced.

2. It is a rule in equity not to allow the mortgagee to enter into a contract with the mortgagor, *at the time of the loan,* for the absolute purchase of the estates for a specific sum in case of default made in the payment of the mortgage money at the appointed time, justly considering it would throw open a wide door to oppression and enable the creditor to drive an inequitable and hard bargain with the debtor, who is rarely prepared to discharge his debt at the specified time. But even in equity the mortgagee at a subsequent time may purchase the equity of redemption, as well as a stranger, for then the mortgagor is not so much in his power, as he may himself redeem the mortgage or sell the estates mortgaged to another person and raise the money and discharge the mortgage. Coote on Mortgages, 27; 2 Freem., 258; 1 Vern., 448. And a subsequent contract of sale by the mortgagor to the mortgagee of the property in mortgage, if *bona fide,* is good at law against a creditor of the mortgagor. *King v. Cantrel,* 26 N. C., 251. An additional sum of money is not necessary to be given to make the sale *bona fide.* The price of the property may have fallen, and the mortgagor discharges his person from the arrest of his creditor on the mortgage debt. The sub-

stance is whether the bargain was fairly for a sale at a just and reasonable value of the property; and the question of *mala fides* or *bona fides* was fairly left to the jury in this case. The mistake made on the trial, if any, was that of the jury, and that this Court cannot correct.

(219) 3. We see no error in the manner in which the Court summed up the evidence given in the cause. If the defendant's counsel wished a more particular charge on that portion of the evidence which the judge adverted to in general terms, he should have called his attention to it by a special prayer.

PER CURIAM. No error.

Cited: Strudwick v. Brodnax, 83 N. C., 403; *Gadsby v. Dyer,* 91 N. C., 314.

WILLIAM IRWIN, AGENT, ETC., v. MILES D. KING, ADMINISTRATOR, ETC.

A petition was filed in the county court, and order made for the partition of certain slaves among the tenants in common. The plaintiff was the agent of one of the petitioners. The commissioners made a division, and awarded to the petitioner, as agent, certain slaves, and also a sum of money to be paid by another of the petitioners to him as agent, to equalize the shares. The report was returned and confirmed by the court, but no formal decree was drawn. The agent cannot, by a notice in his own name, call upon the other petitioners to have the decree entered in his favor, or to pay the sum so awarded.

APPEAL from ROCKINGHAM Fall Term, 1845; *Dick, J.*

John Moore, the plaintiff, Joseph Lemmon (the defendant's intestate), and five other persons were tenants in common of a parcel of slaves. They, under the act of Assembly, filed a petition in the county court of Rockingham to have them divided. The court decreed accordingly, and appointed commissioners to make the division. Moore, being unable to attend the commissioners, when they proceeded to perform their duty, appointed William Irwin his agent to attend and see to his interest in the partition of the said slaves. The commissioners proceeded to make partition, and, in their report, they charged some of the petitioners, who had the more valuable dividends, with certain sums of

(220) money, to be paid to those who drew dividends of less value, in order to make each petitioner's share equal. Joseph Lemmon was charged in the report as follows: "Joseph Lemmon must pay to William Irwin, agent of John Moore, $107.60." The report was returned by the commissioners into court, and no exceptions being taken by any of the parties, it was confirmed. There was no formal decree drawn out by

the court in conformity to the report. The plaintiff afterwards issued a notice, in the nature of a *scire facias,* to Joseph Lemmon to pay the money reported against him or show cause why execution should not issue for it. To this notice the defendant pleaded *nul tiel record,* as if the proceedings were at common law. The cause came to the Superior Court by appeal, where the judge decided that there was no such record, and gave judgment against the plaintiff for costs, and the plaintiff then appealed to this Court.

Morehead for plaintiff.
Kerr for defendant.

DANIEL, J. The proceedings were not at common law, for partition by tenants in common of chattels could not be had in the common-law courts; they had to go into the courts of equity to effect that object. The expense and delay in chancery being great, the Legislature gave the county courts chancery jurisdiction in the partition of slaves among tenants in common. In this case, whether the commissioners acted right in charging the owners of the most valuable dividends with the payment of sums of money to the owners of the less valuable dividends, in order to equalize their shares in the slaves, is a subject not now necessary to inquire into, as the report was returned, and no exceptions being taken to it by any of the parties, it was confirmed by the court. The decree, strictly speaking, should have been drawn out by the court in conformity to the report, as if the proceedings had been in the (221) court of chancery. No doubt, that would have made the money payable to Moore, the party, and not to his agent. The judgment of the Superior Court was, therefore, upon an immaterial matter, and it must be reversed. The error consisted in treating this as a judgment of a court of common law, and the notice as process to revive it; whereas the proceeding is as in equity, and the notice was merely to ground a motion for drawing up the decree or attaching the party for not complying with it, or to enable the party interested to take any other step as in equity. It is impossible to regard it as a suit at common law, for there were not even adversary parties, but all the claimants were petitioners. The Superior Court will issue a writ to the county court to proceed in the cause. There ought to be no costs of this proceeding in the county court, for it was but a motion in the original cause there. But the appellant from the county court, that is, Lemmon, should pay the costs both of the Superior Court and this court.

PER CURIAM. Adjudged accordingly.

JOHN PARKER v. PENIL GILREATH.

1. The writ of *recordari* is the foundation of all the proceedings in a case of *false judgment.*
2. Therefore, where a *recordari* was returned and heard upon affidavits, the court had a right to order the cause to be placed on the trial docket and stand there as on a writ of *false judgment.*

APPEAL from HENDERSON Fall Term, 1845; *Caldwell, J.*

The defendant had issued an original attachment against one Cagle, returnable before a justice of the peace. The plaintiff had been (222) summoned as a garnishee, and the justice had rendered a judgment against him on his garnishment. The plaintiff afterwards made the affidavit mentioned in the case, and obtained from a judge a writ of *recordari,* and removed the proceeding on the said attachment and garnishment into the Superior Court of Henderson County. In that court affidavits were filed by both parties; and, after argument on them, the court made the following order: "Ordered that this cause be placed on the trial docket and stand there as on a writ of *false judgment.*" From this order the defendant appealed to this Court.

De Choiseul for plaintiff.
Badger for defendant.

DANIEL, J. The defendant insists that the writ of *recordari* was sued out by Parker only to obtain a new trial on his garnishment. And as the affidavit filed in the cause satisfied the court that he was not entitled to a new trial, the *recordari should* have been dismissed. It was, therefore, error in the court to have made the order that it did.

When we, however, look at the affidavit on which the *recordari* was granted, we see that Parker prayed a *recordari* and supersedeas; and, further, that the court would "grant such other and further relief as may be necessary for him." The judgment rendered by the court, in effect, to have the case spread upon the records of the Superior Court to enable Parker to assign errors on it if he thought proper to do so, and proceed as in a case of *false judgment,* was, we think, within the scope of his application for the writ of *recordari.* This writ is the foundation of all the proceedings in a case of *false judgment.* 2 Sellons Prac., 544, 248. We think the judgment should be

PER CURIAM. Affirmed.

Cited: Webb v. Durham, 29 N. C., 133; *Bailey v. Bryan,* 48 N. C., 358; *Hartsfield v. Jones,* 49 N. C., 310; *Hare v. Parham, ibid.,* 413; *S. v. Swepson,* 83 N. C., 588.

(223)

MORRIS ROBERTS v. JACOB COLLINS.

Where a deposition is read in evidence, the opposite party may contradict the witnesses by showing that he has subsequently made different statements without having put to the witness the usual preliminary questions, as such could not be put from the nature of the case.

APPEAL from CLEVELAND Fall Term, 1845; *Bailey, J.*

This action was for slander, and in order to prove the defamatory words charged, the deposition of one Green was read in evidence by the plaintiff. To contradict Green, two witnesses were examined by the defendant to prove that, subsequently to the taking of the deposition, he had made to them a statement different from the one he had deposed to. This testimony was objected to by the plaintiff, for the reason that the usual preliminary questions had not been put to the witness, whereby all opportunity to explain himself was cut off. The objection was overruled by the court, and the witnesses examined. There was a verdict for the defendant, and from the judgment thereon the plaintiff appealed.

Guion for plaintiff.
Alexander for defendant.

NASH, J. The general rule is as stated by the plaintiff, but, like all others, it is subject to exceptions. In the nature of things, it could not apply to this case. The declarations of Green offered in evidence to contradict him were made after his deposition was taken. How, then, could the previous questions be put to him? Surely, it could not be required of the defendant to take the deposition of Green over again, and thereby make him his witness. In such a case it might well be questioned whether the subsequent declarations could have been used by the defendant.

PER CURIAM. No error.

Cited: Hooper v. Moore, 48 N. C., 429.

(224)

SARAH BOWMAN v. THOMAS THOMPSON ET AL.

The Supreme Court cannot look into affidavits filed in the court below upon the question whether dower was properly admeasured or not; they form no part of the record.

APPEAL from GUILFORD Spring Term, 1845; *Settle, J.*

The plaintiff filed a petition in the county court of Guilford to have

dower assigned to her in the lands of which her husband died seized in fee. The jury made an allotment of land for her dower. The defendants (the heirs at law) contended that the jury had given her more land in value than she by law was entitled to. The cause came by appeal from the county court to the Superior Court, where affidavits for and against the verdict of the jury were filed. The Superior Court gave judgment for the plaintiff, and the defendants appealed to the Supreme Court.

Morehead for plaintiff.
No counsel for defendants.

DANIEL, J. The evidence by affidavits offered to the Superior Court on the question of admeasurement of dower by the jury composes no part of the record of the case, and, of course, this Court cannot judicially see it. *S. v. Godwin,* 27 N. C., 401. There is no case sent here from the Superior Court which raises any point of law for our revision. We do not see that any error in law has been committed by the Superior Court, and the judgment must be

PER CURIAM. Affirmed.

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(225)

BURWELL DAWSON v. JOHN R. TAYLOR ET AL.

Where a person takes a bond, and includes in it usurious interest, it is *prima facie* evidence that he knew what he was about, that there was no mistake, and that he did it knowingly, and, therefore, corruptly. If he relies upon there being a mistake in the calculation of interest, he must show it.

APPEAL from CUMBERLAND Fall Term, 1845; *Caldwell, J.*

The plaintiff declared in debt on a bond executed to him by the defendants for $175.50, with interest from its date, and dated 10 May, 1839, and payable on 1 January, 1840. Plea, *Usury.* The defendants relied on the testimony of the witness McAlister to prove that the bond was given by them only in consideration of the surrender by the obligee of the two justices' judgments mentioned in the case, the principal and interest on which, up to the date of the bond, was only $156.66. The bond was, therefore, for something more than double the legal rate of interest on the money loaned. The plaintiff insisted that the bond was given in consideration of the said two judgments being surrendered, and also a loan of $13, as he insisted was proven by the witness Fin; and also some balances due him from the defendant Taylor, from former transactions, as he insisted was to be collected from the testimony of the witnesses Strickland and Jackson. The court charged the jury that it

was incumbent on the defendants to establish their plea; that if they gathered from the testimony of McAlister that the bond was given for the two judgments produced, and for forbearance and giving day of payment, and for nothing else, they should find for the defendants; if otherwise, for the plaintiff. The plaintiff's counsel now contends that there was no evidence in the cause to support the plea, and that the judge ought so to have charged the jury.

The jury found a verdict for the defendants, and judgment being rendered thereon, the plaintiff appealed.

Strange for plaintiff. (226)
Henry for defendants.

DANIEL, J. We think that the testimony of McAlister was some evidence that the plaintiff took the bond for and in consideration of the surrender of the two judgments only. There is nothing in the case to show that the jury understood the judge as directing them to disregard the other evidence given in the cause. *Secondly,* it is insisted for the plaintiff that the judge should have informed the jury that if the excess in the bond arose from any mistake in calculating interest, adding up sums, or from any other cause, it would negative corruption, and then they should find for the plaintiff. The answer to this is that the plaintiff offered no evidence of any such mistakes to call for such a charge, and such an instruction was not even asked. The plaintiff *having* taken the bond for the sum mentioned in it, was *prima facie* evidence that he knew what he was about, and that he did it knowingly, and, therefore, corruptly.

PER CURIAM. No error.

Cited: Pritchard v. Meekins, 98 N. C., 247; *Webb v. Bishop,* 101 N. C., 102.

WILLIAM P. CHAMBERS ET AL. v. JOHN C. MCDANIEL ET AL.

If a testator in his will refers expressly to another paper, and the will is duly executed and attested, that paper, whether attested or not, makes part of the will; but the instrument referred to must be so described as to manifest distinctly what the paper is that is meant to be incorporated; and the reference must be to a paper already written, and not one to be written subsequently to the date of the will.

APPEAL from CASWELL Fall Term, 1845; *Dick, J.*

A paper-writing purporting to be the last will and testament of William McDaniel, deceased, was offered for probate, and being contested,

an issue of *devisavit vel non* was made up. An appeal having
(227) been taken from the judgment below to the Superior Court, the following case agreed was then submitted to the court:

At the court of pleas and quarter sessions of Caswell County, at January Term, 1832, the original paper, of which the following is a copy, was duly proved and recorded as the last will and testament of William McDaniel, deceased, to wit:

"In the name of God, Amen. I, William McDaniel, etc., do make and ordain this to be my last will and testament, in manner and form following, viz.:

"First. It is my will and desire that after my decease all my just debts shall be paid out of my estate.

"Second. That it is my will and desire that, after my decease and the decease of my wife, Jane McDaniel, that all my property of every description, real and personal, which has not heretofore been deeded away by me, shall be sold by my executors and the proceeds thereof shall be equally divided between all the children of my son John McDaniel, and all the children of my deceased daughter, Elizabeth Darby, except the sum of $100, which said sum of $100 shall be equally divided between my two granddaughters, Matilda Leigh and Juliet Leigh, and my daughter Polly Leigh, wife of the said William Leigh.

"Thirdly. It is my will and desire that after the death of myself and wife, that my son Hiram McDaniel shall have two negro men, Ben and Ned, they having been before deeded to him; also, $100 to be paid him out of the proceeds of my estate in lieu of a negro girl named Eliza which I once deeded to my son, the said Hiram.

"Fourthly. It is my will and desire that my grandchildren, John J. McDaniel and Johnston McDaniel, sons of my son William McDaniel, deceased, shall have, whenever they apply for them, a negro woman, Tinney, and her three youngest children, namely, Delsey, Sarah, and the youngest boy, to them and their heirs forever."

The will then appoints executors, etc. This paper, in the case agreed, is called A.

(228) At October Term, 1845, a paper-writing, marked B in the case, was propounded for probate by the plaintiffs in this suit as a part of the last will and testament of the said William McDaniel, deceased. It is unnecessary to set forth this paper-writing in detail. It purported to be a deed of conveyance, dated in 1823, from the said William McDaniel to William W. Price for certain slaves and other personal property for the sole and separate use of Sally Price, daughter of William McDaniel, for and during her natural life, and, after her death, the property to be conveyed to her children. This deed had subscribing witnesses, and was duly proved at July Term, 1823, and subsequently registered.

The deed reserved to William McDaniel and his wife a life estate in the said property.

The defendants, by an order of the court, were summoned to the proceedings and were regularly made parties thereto. Whereupon an issue *devisavit vel non* as to this paper was submitted to a jury, who returned their verdict that the said paper-writing was not the last will and testament of William McDaniel, deceased, or any part thereof; the said court pronounced judgment accordingly, and the plaintiffs appealed to the Superior Court. And now it is agreed by the parties that the said paper-writing marked B was executed by the said William McDaniel as it purports to have been, and the same was executed as a deed, and was intended by the bargainor to operate as a deed, and was duly proven and registered as such. And it is further agreed that the said paper-writing was in law inoperative as a deed, as to the remaindermen, because of a reservation of a life estate in the property to the bargainor. And it is agreed that the said paper-writing marked B is no part of the last will and testament of the said William McDaniel, unless the same is made so by the last will and testament of the said William McDaniel, marked A. And it is further agreed that a deed conveying to the said Sally Price a certain tract of land, reserving the life estate of the grantor and his wife, was duly executed in January, 1821, and was subsequently proved and registered. The court decided, upon this case (229) agreed, that the paper-writing marked B was not a part of the last will and testament of William McDaniel, deceased, nor any part thereof, and pronounced judgment accordingly. From this judgment the plaintiffs appealed.

Morehead and Kerr for plaintiffs.
E. G. Reade and Norwood for defendants.

DANIEL, J. The question before us is whether or not the paper-writing, marked B in the case is to be taken as a part of the last will of William McDaniel, deceased, and to be incorporated with the paper marked A, which is admitted by all parties to be testamentary. The propounders insist that the paper B is to be now considered testamentary, although it was not intended so to be at its original making. And they reply on what is said by the testator in the second clause of the paper A. That clause is as follows: "It is my will and desire that after my decease and the decease of my wife, Jane McDaniel, that all my property of every description, real and personal, which has not heretofore been *deeded away by me,* shall be sold by my executors, and the proceeds thereof shall be equally divided between all the children of my son John McDaniel, and all of the children of my deceased daughter Elizabeth

Darby," etc. The law is that if a testator in his will refers expressly to another paper, and the will is duly executed and attested, that paper, whether attested or not, makes part of the will; but the instrument referred to must be so described as to manifest distinctly what the paper is that is meant to be incorporated, and in such a way that the Court can be under no mistake; and the reference must be to a paper already written, and not to one to be written subsequently to the date of the will. Lovelass on Wills (Barrows' ed.), 305. *Habergan v. Vincent,* 2 Ves., J., 228; *Smart v. Pujein,* 6 Ves., 565; *Hume v. Rundell,* 6 Madd., (230) 341; *Wilkinson v. Adams,* 1 Ves. & Bea., 445. Does the law as thus laid down support the case made by the propounders of this paper? We think it does not. If the property mentioned in the paper B passed to William W. Price, by force of the said paper B, as a deed, then it seems to us plain that the testator did not mean to dispose of it or to confirm the said paper by what he has written in the second clause of his last will; because he professes to dispose, by his said will, of that property only which he had not theretofore deeded away. If, on the other hand, the property mentioned in the paper B belonged to the testator, and had not before been deeded away by him, it then, by the very terms of the second clause in the will, was to be sold and the money divided among certain of his grandchildren. The propounders appear to be placed in a dilemma from which this Court cannot extricate them. The testator does not, in the second clause of his will, refer expressly to the paper B; it is not so described (if described at all) as to manifest distinctly to the Court, without mistake, that this paper was intended to be incorporated in his last will. It has been insisted by counsel in the argument that the testator intended by the words he has used to confirm and to incorporate in his said will all the deeds (and he made other deeds) and other papers in the nature of deeds which he before had ever executed. The answer to this is that we cannot, manifestly and without the danger of a mistake, see that it was the intention of the testator to incorporate all or either of them in his will. It rather seems to us that the testator used the words, "which has not heretofore been deeded away," to denote that his then will was only to operate (as the law would have made it operate) on that property of which he then was the legal owner; and to inform the reader that he had theretofore made deeds of some property which he had once owned, and which property he did not then intend to meddle with. We must, therefore, say that we see no error in the (231) opinion given by the Superior Court, and the judgment must be

PER CURIAM. Affirmed.

Cited: Bailey v. Bailey, 52 N. C., 45; *Siler v. Dorsett,* 108 N. C., 302; *Watson v. Vinson,* 162 N. C., 80.

BENJAMIN BROOKSHIRE v. SHADRACH VONCANNON.

A power of attorney, or other authority, is in general revocable from its nature; and the power of revoking an authority may be exercised at any time before its actual execution.

APPEAL from RANDOLPH Fall Term, 1845; *Dick, J.*

The defendant, in right of his wife, was entitled to a tenth part of the personal estate of one Clark, who had died intestate in the State of Alabama. He gave a power of attorney to the plaintiff (who was also one of the next of kin of Clark, and was going out to receive his share of the estate) to receive of the administrator his share also of the said estate, and bring it home. And the defendant agreed to pay one-sixth of the plaintiff's expenses, and also, as the plaintiff contended, agreed by parol to give him 10 per cent commissions on the value of his share which he should receive and bring to this State. The plaintiff made one trip to Alabama, and failed to get any part of the share of the personal estate due to the defendant. The defendant did not object to pay the one-sixth of the expenses of this trip, but he insisted that he was liable for no more, and, on the trial, offered evidence tending to show that he had revoked the power and agency of the plaintiff before he made the second trip. It was insisted on behalf of the plaintiff that if he, by the terms of the original agreement, was to be paid his expenses, and also 10 per cent for his time and trouble, then his power was coupled with an interest, and the defendant could not revoke it; and that let the evidence as to the revocation be either way, the plaintiff was therefore still entitled to recover his expenses of both trips, and, also, the 10 per cent on the value of the share brought by him, on a second trip, (232) to the defendant. The court charged the jury that if the original agreement was that the defendant was to pay one-sixth of the expenses and 10 per cent on the value of the share brought home to him, then the power of attorney was not revocable, and they should give the plaintiff damages for one-sixth of his expenses in both trips and also what they were satisfied was right for the per cent. The jury gave the plaintiff damages for more than the expenses of the first trip.

The defendant moved for a new trial for misdirection as to the law. The motion was overruled, judgment rendered, and the defendant appealed.

Iredell for plaintiff.
Morehead for defendant.

DANIEL, J. The charge of the judge was, as we understand it, in conformity to the prayer of the plaintiff's counsel; and, received in that

light, we think that it was erroneous. A power of attorney or other authority is in general revocable from its nature; and the power of revoking an authority may be exercised at any moment before the actual execution of it. Paley on Agency, 184, 185. Even if it be true at law that a power which is part of a security for money, or coupled with an interest, cannot be revoked, yet the doctrine has no application to this case. The plaintiff neither when the power was given to him nor when the defendant contended that it was revoked had any interest in the distributive share of the defendant. If he did the labor, he was then to be compensated as above mentioned; but there was no obligation on the plaintiff to go to the west for the property, and when the defendant insisted that he had made the revocation, the defendant had never received any of the said property. We think that there must be a

PER CURIAM. *Venire de novo.*

Cited: Abbott v. Hunt, 129 N. C., 405; *Trust Co. v. Adams,* 145 N. C., 164.

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1846

DANIEL McLEAN v. JOHN DOUGLASS.

1. In a proceeding by attachment, when an interplea has been filed the only issue submitted to the jury is as to the title to the property levied on. The jury have no right to assess the value of the property or damages for its detention or destruction.
2. After property is levied on under an attachment, it is, until replevied, in the hands of the officer, in custody of the law. When the issue as to the title is found in favor of the plaintiff in the interplea, the court, on motion, will make an order on the officer for its delivery, a disobedience of which on his part would be punishable as a contempt.
3. If the officer has voluntarily parted with the property, or by his negligence suffered it to be destroyed or injured, he is answerable in damages to the owner.

APPEAL from ANSON Fall Term, 1845; *Caldwell, J.*

The plaintiff sued out an attachment against the defendant, which was levied upon a carriage. Upon the return of the levy Thomas Waddill interpleaded and claimed the carriage as his property. (234) Upon executing the inquiry, evidence was given to the jury that since the institution of the proceedings in the case the article in dispute had been destroyed by the plaintiff, and the jury were directed by the court, if they found the fact to be so, to give Waddill a verdict for its value, which they did. Judgment being rendered accordingly, the plaintiff appealed.

Winston for plaintiff.
No counsel for defendant.

NASH, J. In the direction given to the jury by his Honor there was error. The only question submitted to the jury was as to the title to the

carriage—their only inquiry whether it belonged to Waddill, for if it did not belong to him, his claim to interplead was falsified, and the plaintiff was entitled as against him to a judgment for his costs in contesting it. The argument which has been submitted to us may be very satisfactory to show that the attachment law needs amendment in this particular, but it has failed to convince us that we have the power to apply the remedy. The proceedings are under the attachment law of this State. Rev. Stat., ch. 6, sec. 7, points out the mode of proceedings when property levied on is claimed by a third person, the inquiry that is to be submitted to the jury and the judgment that is to be pronounced by the court. It directs that the claimant may come in and "interplead and shall file his petition in writing, setting forth the particular property claimed and by what right or title he claims the same, and the court shall order a jury to be impaneled to inquire in whom the title is of such article or property as may be so levied on, and the finding of such jury shall be conclusive as to the parties then in court, and the court shall adjudge accordingly." Thomas Waddill by his interplea avers that the title to the carriage was in him, and upon this point, and this alone,

(235) the plaintiff in the attachment takes issue with him. It is the only question that was, or, under the act, could be submitted to the jury. Whatever else they found by their verdict was entirely immaterial. The object of the act, it is said, was to prevent a multiplicity of suits, and that denying to the jury the right at once to assess damages for the destruction of the property is to counteract this intention. If such was the object of the Legislature, they have not pointed out how it is to be done, further than by settling the question as to the title between the parties to the record. The only judgment the court is authorized to pronounce is upon the title and the costs incurred in bringing the interplea. A rightful verdict is the answer of a jury given to the court concerning the matters of fact committed to their trial and examination. Whatever they find beyond this is impertinent and immaterial and to be rejected. After property is levied on under an attachment, until replevied, it is in the hands of the officer—in custody of the law; and when the jury have by their verdict said it is the property of the plaintiff in the interplea, the court, on motion, will make an order upon the officer for its delivery. A disobedience on his part would be a contempt, and punishable by the court as such. If he had voluntarily parted with it or by his negligence, suffered it to be destroyed or injured, he is answerable in damages to the owner.

The presiding judge erred in directing the jury to inquire into the value of the carriage and the judgment for the damages assessed by the jury reversed; and the Court, proceeding to give such judgment as the Superior Court ought to have given, doth adjudge that the carriage

claimed by Thomas Waddill is the proper goods and chattels of the said Waddill, and that he recover his costs expended in his behalf in the Superior and county courts, from the plaintiff McLean. The appellant McLean is entitled to his costs in this Court.

PER CURIAM. Judgment accordingly.

Cited: Cameron v. Brig Marcellus, 48 N. C., 85; *Grambling v. Dickey,* 118 N. C., 989; *Dawson v. Thigpen,* 137 N. C., 468; *Forbis v. Lumber Co.,* 165 N. C., 407.

(236)

THE STATE v. BENJAMIN DUNCAN.

1. On the trial of one indicted as an accessory in the crime of murder, a transcript of the record of the conviction of the principal was received in evidence, it appearing in the transcript that after the conviction of the principal he appealed to the Supreme Court, from which the case was sent back to the Superior Court, but the decision of the Supreme Court not appearing in the transcript: *Held*, that notwithstanding this omission, and though the decision should properly have been entered on the record, yet the transcript was good evidence against the accessory, for at most the judgment against the principal was only erroneous.
2. An accessory cannot take advantage of error in the record against the principal, and the attainder of the principal, while unreversed, is *prima facie* evidence against the accessory of the principal's guilt.
3. Evidence on the part of a prisoner, indicted as an accessory in murder, that he was a man of violent passions and often in the habit of using threatening language, intended to rebut the presumption arising from his threats against the deceased, is irrelevant and inadmissible.
4. Threats of other persons against the deceased, or admissions by them that they had killed him, are only hearsay and cannot be received in evidence.
5. The court to which, on the removal of a cause, the transcript of record is sent is the sole judge whether the transcript is properly verified by the seal of the court from which it is sent, and all other courts are bound by its decision.
6. The words *vi et armis* in an indictment are now superfluous, and more especially so in an indictment against an accessory, as his offense tends only to a breach of the peace, and is not, of itself, an actual breach of it.

APPEAL from DAVIE Spring Term, 1846; *Caldwell, J.*

Indictment against the defendant for being an accessory before the fact to the murder of William W. Peden. On this indictment the defendant was tried and convicted, and sentence of death being passed, he appealed to this Court. The following are the facts upon which the points presented to this Court arose:

One Underwood was indicted in the Superior Court of Wilkes for the

murder of one Peden, and the prisoner, Duncan, was charged in the same indictment as accessory to the fact. At their instance the
(237) trial was removed to Iredell, and, on separate trials there, they were convicted and sentenced to be hanged, and each appealed. At December Term, 1845, it was decided by this Court that the judgment against Underwood was not erroneous, and ordered that the decision should be certified to the Superior Court of Iredell, to the intent that the said court should proceed to judgment and sentence accordingly. At the same term the judgment against Duncan was held to be erroneous and reversed, and a *venire de novo* was awarded, and the usual certificate of that decision was also directed. Those cases may be found reported 27 N. C., 96 and 98. At the succeeding term of Iredell court, as stated in the record, "the said James Underwood being brought to the bar, and being asked if he hath anything to say why sentence of death should not be pronounced upon him, and replying thereto that he hath not, the court doth thereupon, in obedience to the judgment and mandate of the Supreme Court to the court directed," etc., proceeding, then, in the usual form of a sentence of death. There was then a *venire de novo* awarded as to Duncan; and he obtained an order for the second removal of his trial to Davie. He was again convicted, and, after sentence thereon, he appealed to this Court.

On the trial there was offered in evidence on behalf of the State a transcript of the record of the court of Iredell in the case of Underwood, in order to show his conviction and the judgment. It was objected to for the prisoner, because it did not appear therein what decision the Supreme Court had made upon the appeal; and it was insisted that it should appear in the record, or at least be made to appear by the order from the Supreme Court. On the part of the State the certificate from the Supreme Court to the court of Iredell was then produced and read, and the court then allowed the transcript from Iredell to be read also. On the part of the State it was proved, amongst other things that the prisoner had threatened to kill Peden, or cause him to be killed.
(238) Thereupon the prisoner offered to prove that it was his habit when in a passion, to use violent and threatening language towards others, which, being objected to on the part of the State, the court refused.

The prisoner offered, further, to prove that certain other persons harbored ill-will against Peden and had threatened him; and also that certain others had been suspected and arrested upon a charge of having murdered him. This evidence was also rejected.

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

RUFFIN, C. J. The Court is of opinion that the transcript from Iredell was proper evidence of the judgment on Underwood, as principal in the felony. It would have been right to set out in the record, as finally made up, the certificate from this Court as having been sent by the clerk of this Court or brought in by the solicitor. But to the purpose for which it was offered we think the record sufficient as it is. It is true that after an appeal to this Court any subsequent proceedings in the Superior Court cannot be regarded by this Court, when the case is before us as between the parties directly affected by those proceedings, by the appeal of one of them. But as the subject-matter in this case, namely, a charge of murder against Underwood, was within the jurisdiction of the Superior Court, the ultimate judgment of that court, not reversed nor vacated by appeal, it would seem, could not be impeached collaterally by another person upon the ground that it did not appear that the cause, after the appeal from the first judgment, had not been remitted, and so was *coram non judice*. But, however that may be, the record here shows, informally, it may be admitted, that the court in passing sentence professed to act in obedience to the decision of the Supreme Court on the appeal before taken by the prisoner, which the law, Rev. Stat., ch. 33, sec. 6, directs shall be certified to the Superior Court, and (239) thereupon requires the Superior Court to proceed to judgment and sentence agreeably to the decision of the Supreme Court and the laws of the State. We cannot understand less from this than that a decision of the Supreme Court had been certified to the Superior Court which made it the duty of the latter court to proceed in the case in some manner, though it does not directly appear in what particular manner. The cause cannot, therefore, be deemed to be *coram non judice;* but, at worst, it is erroneous merely to pass sentence of death without setting out at large the decision of the Supreme Court as the authority for the judgment. If, however, it be admitted to be erroneous in that point, yet it will not avail this prisoner, for it seems to have been long agreed that the accessory cannot take advantage of error in the record against the principal, and that the attainder of the principal, while unreversed, is *prima facie* evidence against the accessory of the principal's guilt. 1 Hale P. C., 625; 2 Hawk., ch. 29, sec. 40.

The other points of evidence were, in our opinion, properly decided also. The evidence of the violence of the prisoner's passions and language would rather operate against than for him, as showing a malignity of heart. At best, it was irrelevant, and could profit the prisoner nothing.

The threats of other persons against Peden, or admissions by them that they had killed him, were but hearsay; and, moreover, could not tend to establish that Underwood and Duncan were not also guilty as

charged. *S. v. May*, 15 N. C., 328. Of the same character are the suspicions entertained by some people that other persons had committed or been concerned in the murder. Those matters were certainly consistent with the guilt of those parties, and could, therefore, serve no purpose but to mislead the jury.

(240) There was then a motion in arrest of judgment. One ground was that the transcript from Iredell (on which the trial was had in Davie) did not show the seal of the court of Wilkes affixed to that part of it which purported to set forth the transcript brought into the court of Iredell from the court of Wilkes. But it is manifest that the statement of the transcript from Wilkes, in the record of Iredell, as enrolled in Iredell, purports to be but a copy, and, therefore, could not have the impression of the seal of Wilkes. To the judge of the court in Iredell it belonged to determine, as a matter of fact, whether the transcript purporting to come from Wilkes was verified by the seal of that court and really came from it. Having been received as a transcript from Wilkes, and enrolled as such in making up the record in Iredell, it was conclusive in the court of Davie that the transcript which purported to come from the court of Wilkes actually came from it.

Another ground is that the indictment does not lay the offense *vi et armis*. In point of fact that part of the indictment which charges the assault and killing by Underwood lays them *vi et armis;* but in charging Duncan as accessory in the conclusion of the court, it finds that he "feloniously, wickedly, willfully, and of his malice aforethought did incite, move, procure, aid, counsel, hire, and command the said James Underwood," etc., omitting "force and arms." And this, we think, is sufficient. It is agreeable to the nature of the offense charged on the prisoner, which is not a crime of which force is a constituent, but merely that of inducing another person to commit such a crime. However it might be at common law or in England, under the statute of Hen. VIII., our act, Rev. Stat., ch. 35, sec. 12, must be deemed to dispense with those terms. As was said in *S. v. Moses*, 13 N. C., 452, the Legislature meant that it should be sufficient for the indictment directly to aver the facts and circumstances which constitute the crime, and

(241) that is done here in the words that the prisoner "feloniously procured, hired," etc., Underwood to kill and murder Peden. In the case just cited it was considered that *vi et armis et baculis* were but words of form, now rendered superfluous; and in reference to an indictment against an accessory they are plainly so, inasmuch as his offense tends only to a breach of the peace, and is not, of itself, an actual breach of it. Hawk P. C., B. 2, ch. 25, sec. 90; *Rex v. Busks*, 7 Term, 4.

PER CURIAM. No error.

Cited: *S. v. Patrick,* 48 N. C., 447; *S. v. White,* 68 N. C., 159; *S. v. Bishop,* 73 N. C., 46; *Churchhill v. Lea,* 77 N.C., 346; *S. v. Davis, ibid.,* 485; *S. v. England,* 78 N. C., 555; *S. v. Jones,* 80 N. C., 417; *S. v. Boone, ibid.,* 463; *S. v. Gee,* 92 N. C., 760; *S. v. Lambert,* 93 N. C., 622; *S. v. Harris,* 106 N. C., 688; *S. v. Lane,* 166 N. C., 337.

THE STATE v. ZADOCK ROLAND.

After a free person of color has been convicted on an indictment, under the act of Assembly, for marrying a slave before the passage of the act of 1845, it is too late for him to apply to the court to discharge him on the ground that the master of the slave had given his consent to the marriage. The defense should have been made on the trial.

APPEAL from GUILFORD Spring Term, 1845; *Settle, J.*

Indictment against the defendant, a free person of color, for marrying a slave contrary to the provisions of the act of 1830, Rev. Stat., ch. 91, sec. 77. The facts of the case are stated in the opinion delivered by the judge in this Court.

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

DANIEL, J. The defendant, a free negro, at Spring Term, 1844, of Guilford Superior Court was found guilty by the jury on an indictment for living and cohabiting with a certain female slave named Peggy, the property of one George Albright, contrary to the (242) statute (Rev. Stat., ch. 91, sec. 77).

He was then bound in a recognizance to appear at the next term; and at the succeeding term the entry on the record was as follows: "It appearing that he (the defendant) has complied with his recognizance entered into at last term, he and his surety are discharged." This discharge was certainly from his recognizance, and not from the indictment and verdict. At Spring Term, 1846, the defendant was brought into court, and the State then prayed judgment against him upon the said verdict. The defendant resisted the motion, because, as he then said, the master of the slave Peggy had originally given his consent to their marriage and cohabitation. If this assertion was true, the act of Assembly passed in 1845 repealed the first act, so far as it related to the defendant's case, and no judgment should have been rendered against him; for the last act declares that the first act shall not extend to cases

of intermarriage between slaves and free persons of color, had before the passage of the last act, where the consent of the owners of the slaves had been given. The last act was passed after the defendant was convicted. If his allegation had been true, and he had made it appear to the Superior Court by affidavits it is very probable the court might, in its discretion, have set the verdict aside and given him a new trial. But he did not take that course; and the verdict on the record precluded the court's listening to his evidence as a defense. The court could not try the fact. There is nothing that shows that the court erred in rendering the judgment.

PER CURIAM. No error.

(243)

THE STATE v. GEORGE W. CONOLY.

1. A justice's warrant in a civil case was dated in June, 1843, the judgment in June, 1844, and the execution in September, 1844, and the judgment and execution were on the same paper with the warrant: *Held*, that it did not appear on the face of these proceedings that the judgment was void so as to render the officer who served the execution guilty of a trespass.
2. If the judgment could be reversed by a writ of false judgment, yet it could not be impeached collaterally.
3. The continuances of a warrant need not be stated on the face of the proceedings.

APPEAL from WILKES Spring Term, 1846; *Caldwell, J.*

The defendant was indicted for violently resisting the service of a *fieri facias* by a constable, which was issued on the judgment of a justice of the peace against the defendant and another, for $14.58. The defendant justified his resistance upon the ground that the judgment was void, and also the execution. The warrant was dated in June, 1843, and the judgment in June, 1844, and the execution sued out in September, 1844; and both the judgment and execution were written on the same paper with the warrant. The return on the warrant did not state the time it was served, and the constable, though examined, was unable to state it, and the justice who rendered the judgment was also unable to state from memory when he rendered it. It did not appear that there had been any postponement of the trial. Upon these facts, it was agreed that the jury should find the defendant guilty, but subject, nevertheless, to be set aside and a verdict of not guilty entered, and judgment accordingly, in case the court should be of opinion that in law the judgment and execution were void. His Honor held them to be void, and gave judgment for the defendant, and the solicitor appealed.

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

RUFFIN, C. J. It is not objected that the subject-matter of the (244) suit was not within the jurisdiction of the justice; and it is not denied that a constable is justified in such case by the precept of the justice, apparently within his jurisdiction, unless he has knowledge of some matter which in fact makes it void. In this case it is inferred that the constable had such knowledge, from the fact that he had before him as well the judgment and warrant as the execution. But that supposes that those proceedings upon their face, when taken together, appear to be void. Therein, we think, consists the error in the Superior Court. It is true, we hold that it is contrary to law, and may produce great oppression, for a justice of the peace to take the return of a warrant a year after service of it, and proceed to judgment thereon; and no doubt that for that reason the judgment may be reversed on a writ of false judgment, unless, indeed, the defendant voluntarily appeared. But it does not appear upon these proceedings that this was the case; for they do not show when the warrant was served, and it may be that it was duly returned within thirty days from its date, and the justice has continued it from time to time. It is not, indeed, stated on the warrant that the case had been continued; nor need it be thus stated, that is, in order to prevent the proceedings from being void on their face; for the statute cures "a miscontinuance or discontinuance" in proceedings in courts of record, and much more are objections founded on those defects to be overlooked in respect to proceedings before a justice, as the statute of 1794 expressly provides that they shall not be set aside for any matter of form if the substantial matters required be set forth. Therefore, the constable could not know that the justice had not continued the trial from time to time, though he had not entered the continuances; and he had a right to assume that such was the case, as there is a presumption that, as to matters within its jurisdiction, every court has proceeded regularly, and that the judgment is right until it be in due course of law reversed. It is true that the justice was examined on this (245) trial and, it is stated, did not prove that what has been supposed was true; but he did not prove the contrary, and if he had, that did not appear to the constable upon the papers. That officer was, for aught he saw, obliged to execute the *fieri facias,* and, therefore, he ought to be protected in it. There may have been something very wrong in the case; but if there was, this is not the way in which the defendant should seek redress. He might have had the judgment superseded and reversed, but was not at liberty to resist the execution of the process, which the constable was bound to proceed to execute while the judgment remained in

force. It is to be remembered that it is not suggested that the subject-matter was not, either apparently or in fact, within the justice's jurisdiction. When that is the case a defendant cannot be allowed to pick holes in the proceedings collaterally, although they might be for defects which would be good cause of reversal. Until reversed they must be respected.

Judgment reversed, and judgment for the State on the verdict.

PER CURIAM. Reversed.

DENNIS A. McCREADY & CO. v. AARON P. KLINE.

Under our attachment law, a nonresident creditor may attach the property of a debtor residing in this State who has absconded or so conceals himself that the ordinary process of law cannot be served on him.

APPEAL from NEW HANOVER Spring Term, 1846; *Dick, J.*

The plaintiffs, who are nonresidents of this State, sued out an original attachment against the estate of the defendant, a resident and
(246) absconding debtor, returnable to the county court of New Hanover. The sheriff summoned one William Cook as garnishee. Kline, the defendant (we suppose by the consent of the plaintiff, for they never replevied), pleaded in abatement that the plaintiffs were not inhabitants of the State of North Carolina, and, therefore, had no right to sue him by an original attachment. The plaintiffs demurred to the plea, and the Superior Court (on the case coming there on appeal) overruled the demurrer and gave judgment that the defendant recover his costs. The plaintiff then appealed to this Court.

J. H. Bryan and Iredell for plaintiffs.
Strange for defendant.

DANIEL, J. The first section of the Attachment Act, Rev. Stat., ch. 6, authorizes any person to issue an original attachment against any person indebted to him who hath removed or is removing himself out of the county privately, or so absents or conceals himself that the ordinary process of law cannot be served on him. The attachment shall be returned to the court where the suit is cognizable, and it shall be deemed a leading process.

There is nothing in this section of the statute excluding a nonresident creditor from having the benefit of it against a resident debtor who has absconded or so conceals himself that the ordinary process of law cannot be served on him. To suppose that the Legislature did not intend

to extend this additional remedy to foreign creditors, to be exercised in our own courts against our own citizens who might abscond or conceal themselves so that the common-law process could not be served on them, is to suppose that the Legislature was willing to leave foreign creditors remediless in recovering their debts of our citizens, although they might fraudulently avoid the ordinary process of the common law to bring them before the court—a supposition which we cannot for a moment entertain. It is said for the defendant that the attaching (247) creditor is required by the act to give bond and surety to indemnify the debtor if the attachment is properly sued out, and, therefore, if a foreign creditor should be construed to be within the act, a citizen of our State would have a very poor chance of indemnity under such a bond, if he should become entitled to sue upon it. To this argument the answer is that the judge or justice who is to take the bond would, it is presumed, never take a surety to it who resided out of the State. The second section of the act, relative to nonresident debtors, and the decisions of this Court which have been referred to, *Broghill v. Wellborn,* 15 N. C., 511; *Taylor v. Buckley,* 27 N. C., 384, give us no aid upon the question now before us, which arises now for the first time. We are of opinion that the plaintiffs being nonresidents is not a ground to support the plea in abatement, and that the demurrer should, therefore, have been sustained. The judgment must be reversed, with costs of this Court and the courts below, and judgment of *responded ouster* entered, and the cause remitted, that further proceedings may be had therein accordingly to law and right. *Casey v. Harrison,* 13 N. C., 244.

PER CURIAM. Judgment accordingly.

THE STATE v. WESLEY CURTIS.

1. Where the jury find a general verdict of "Guilty," the court must either pronounce its sentence upon the verdict or grant a new trial.
2. It cannot set aside the verdict and direct a judgment of acquittal to be entered for the defendant.
3. Even where the jury find a verdict subject to the opinion of the court on a point reserved, the court cannot grant a judgment against the verdict, unless the jury say "they find such and such facts, and if, upon them, the court think the law is with the defendant, they find him not guilty; if otherwise, guilty," or words, in substance, to that effect.

APPEAL from McDOWELL, Spring Term, 1846; *Pearson, J.* (248)

Perjury. The solicitor, acting for the State, read in evidence a State's warrant and the proceedings of the committing magistrate

thereon. The warrant was against Archibald M. Hemphill, Benjamin C. Hemphill, Jesse Watkins, and John R. Hemphill, charging them with an assault and battery on the present defendant. These parties were all arrested, except B. C. Churchill, and brought before one Padget, a justice of the peace, when the parties were bound over, except Jesse Watkins, who was discharged. Some weeks afterwards Benjamin C. Hemphill was arrested and brought before the said Padget for examination, and bound over to court. The defendant was sworn on both examinations, and upon both occasions stated that "Archibald Hemphill struck him with an axe-helve." The defendant's counsel insisted that the proceedings before the said Padget did not correspond with the allegations of the bill of indictment, and that there was a fatal variance, because the bill of indictment charged that "an issue was joined and came on to be tried before the said Padget, wherein the State was plaintiff and Archibald Hemphill, John R. Hemphill, Benjamin Hemphill, and Jesse Watkins were defendants"; whereas it was contended that no such issue was joined or came on for trial, the proceedings being a mere examination before a committing magistrate, and if an issue was joined, it was an issue between the State and Archibald Hemphill, John R. Hemphill, and Jesse Watkins, and not between the State and these three and Benjamin Hemphill, who had not been arrested. Thereupon, the counsel for the defendant moved the court to instruct the jury to return a verdict of not guilty on account of the variance. The court reserved the question.

(249) Evidence was then given on the question of facts whether Archibald had or had not struck the defendant with an axe-helve, or struck him at all. The issue was then submitted to the jury, who returned a verdict of "Guilty," subject to the opinion of the court upon the question reserved. The court, upon that question, was of opinion with the defendant, and a verdict of not guilty was directed to be entered. From this judgment the solicitor for the State appealed.

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

DANIEL, J. The defendant was indicted for perjury. He pleaded "not guilty." By the verdict sent up it appears that the jury found a *general* record of guilty against the defendant. The judge, therefore, had either to pronounce the sentence of the law on motion or grant a new trial. The record then further states that the "question reserved coming on for consideration, the court was of opinion with the defendant, and a verdict of not guilty entered." The jury had not asked the advice of the court, in a special verdict, whether the defendant was guilty or not, or found a verdict subject to the opinion of the court upon any point of

law reserved; they had found a general verdict of guilty. The judge ordered this verdict to be set aside. He had power to do that; but he had no power to pronounce that the defendant was not guilty in the face of the general verdict of the jury, upon the record, that he was guilty. That the jury intended to find a verdict of guilty subject to the opinion of the court as to the law arising upon those facts which are set forth in the case sent up here for our review, it is stated by the judge in the exception to be a fact; but that is a statement inconsistent with what the jury have pronounced by their general verdict. Even if the verdict of "guilty" had been expressed to be "subject to the opinion of the court" upon a point of law reserved, the court would only have had the power, if the opinion on that point was for the defendant, to set aside the verdict. There would be no authority to go another (250) step, and change the verdict from one that the defendant was guilty into one that he was not guilty. That can only be done when the verdict is in that respect special, that is, when in a certain event the defendant is found guilty by the jury, and it is added, "otherwise not guilty," or the like. But here, in the record, the verdict is in no degree conditional or dependent, but it is a general and absolute verdict of guilty, and the court has no power to do more than either proceed to sentence on it or set it aside and award a *venire de novo* or grant a new trial. The case now stands as if no trial had ever been had. The judgment must, therefore, be reversed and the case tried again.

PER CURIAM. *Venire de novo.*

Cited: S. v. Branner, 149 N. C., 562.

THE STATE v. HIRAM ELROD.

No matter what an officer declares when he seizes property, if he has a lawful process authorizing him to seize the property, he is not guilty of a trespass.

APPEAL from ASHE Spring Term, 1846; *Caldwell, J.*

The defendant was indicted for forcible trespass in seizing a certain mare, and the case presented the following facts:

The indictment charged that the defendant with force and arms, and with a strong hand, unlawfully took and carried away a mare from the possession of one David Miller, against the will of said Miller, who was then and there present forbidding the same. The taking of the mare by the defendant was in August, 1843; and he, then being an officer, had in his hands an execution against Miller for about $4, dated (251)

1 August, 1843. The defendant, when he first took hold of the bridle which held the mare (which bridle was also held by Miller), demanded her as the property of his father, but he showed no authority from his father to make such a demand. Miller also claimed the mare as his property; a quarrel ensued between them, and during the dispute the defendant for the first time told Miller that he had an execution against him. The judge charged the jury that if the execution was not used by the defendant in good faith for the purpose of raising the money due under it, but was used as a mere instrument to get possession of the mare for his father, it was not a justification.

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

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

DANIEL, J. We think that the lawfulness of the seizure did not depend upon what the constable declared, but upon the sufficiency of the authority which he had. *S. v. Kirby,* 24 N. C., 201. Suppose an officer has in his hands a legal and an illegal warrant, and he arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for it is not what he declares, but the authority which he has, that is his justification. It was not material to have inquired what the defendant said when he seized the mare, but only whether he then had a legal authority to justify him. *Crowther v. Ramsbottom,* 7 Term, 658 (*Lawrence, J.*); *Dr. Grenville v. College of Physicians,* 12 Mod., 386. The declaration or intention of the defendant at the time he seized the horse thus appears to have been immaterial, and, as *Justice Lawrence* said, it was improper to leave it to the jury, since upon a plea and demurrer the execution was *"per se"* a legal justification.

(252) PER CURIAM. *Venire de novo.*

Cited: Meeds v. Carver, 30 N. C., 301; *Parish v. Wilhelm,* 63 N. C., 51.

JASON H. HUNTER v. SAMUEL Y. JAMESON.

1. Where an agent is appointed to sell articles of personal property, the law implies that he has a right to warrant their soundness in behalf of his principal.
2. If he sells the articles with such a warranty as binds him personally, and damages are recovered against him upon the warranty by the purchaser, he has a right to be reimbursed by his principal to the amount of such damages, as well as of the necessary costs incurred in defending the suit.

RUFFIN, C. J., dissentient as to the last point.

HUNTER *v.* JAMESON.

APPEAL from MACON Fall Term, 1845; *Bailey, J.*

Assumpsit. The plaintiff was the agent of the defendant to sell for him clocks in the county of Haywood. He sold one to Conrad Rhinehart, which he warranted. He was sued by the purchaser for a breach of the warranty in the county court of Haywood, and a judgment being obtained against him, he appealed to the Superior Court, and from thence removed the case to the county of Macon, where it was tried, and a judgment rendered against him, which he paid. This action is brought to recover the amount of that judgment and the costs. The defendant was present at the trial in the county court of Haywood, and treated the case as his.

The presiding judge instructed the jury that all contracts made by an agent within the scope of his authority were binding upon his principal; that if they were satisfied the defendant employed the plaintiff to sell clocks for him in Haywood, he had a right to warrant them, as being within the scope of his authority and connected with the (253) act of sale, and it was not, therefore, necessary for the plaintiff to show that he was expressly instructed by the defendant to warrant them; that if Hunter was the agent of the defendant, and did not disclose that fact to Rhinehart at the sale, *he* would be personally responsible to Rhinehart, and the defendant would be liable to him not only for the damages incurred, but for all which he incurred *bona fide* in the defense of the suit brought against him. A new trial was moved for upon the grounds, first, because of the admission of improper testimony; second, for misdirection as to the law, and, third, for the additional reason that if, when the clock was warranted, Rhinehart knew Hunter was an agent, or this was made known to him, he could not have recovered upon the warranty against Hunter, and it was the duty of Hunter to have shown that upon the trial. A new trial was refused, and the defendant appealed.

No counsel for plaintiff.
Francis for defendant.

NASH, J. As to the first reason assigned for a new trial, it is sufficient to say the case does not disclose what testimony the defendant objects to, nor does it show that there was any objection made to the reception of any testimony at the time it was offered. We are, therefore, to presume it was received by consent, and, after verdict, neither party can be heard in objection to it. Upon the questions of law, we see no error in the opinion of his Honor. The defendant prayed the court to instruct the jury that if he was bound by the warranty, then Hunter cannot recover in this action, because he was not liable in the suit brought against him, Jameson being alone liable to the purchaser.

The instruction prayed for naturally connects itself with the second objection taken by the defendant's counsel on the argument, which (254) is, if Hunter warranted the clock to Rhinehart, without instructions from Jameson, and a recovery was subsequently made against him by the purchaser, in law the present defendant is not liable in this action. It is also connected with the third reason assigned for a new trial, namely, that if, when Hunter warranted the clock to Rhinehart, the latter knew he was an agent, and who the principal was, he could not have made a recovery against Hunter, and it was the duty of the latter to have shown that upon the trial against him. These propositions will be considered together.

In order to show that an agent without special instructions cannot by a warranty bind his principal, our attention has been called to a passage in Viner's Abr., Tit. Master and Servant, Letter D, p. 313. It is there stated, if a servant sell a horse with warranty, it is the sale and contract of the master, but it is the warranty of the servant unless the master give him authority to warrant. If it is meant that the warranty so made does not bind the master, and certainly such must be its meaning, the principle is not sustained by the more modern authorities. In all cases where a person in his own right has power to do a particular thing, he may do it by another, and in every delegation of power to an agent is included the authority to use all the means that are usual and necessary to the execution of it with effect (2 H. Bl., 618), unless specially restricted in the mode. Thus, an agent employed to get a bill discounted may indorse it in the name of his principal, so as to bind him, unless expressly restricted. *Fen v. Harrison,* 3 Term, 757. So a servant intrusted to sell a horse may warrant him, unless forbidden. Brown on Actions, 174, 29 Co. Litt., 1299; Paley on Agency, 210, 28 Law Libr., 91. Nor is it necessary for the purchaser in such case to show that the agent had any special authority to warrant. The employment gave the power. *Hilyear v. Hawk,* 5 Esp. N. P. Ca., 75, 3 Term. 757; *Alexander v. Gibson,* 2 Camp., 555. These cases are at (255) war with the doctrine in Viner, and overrule it. They establish conclusively that in every general agency by parol the agent has authority to bind his principal by a warranty. We are not considering now, nor is it necessary in this case, how far the restriction put by the principal upon an agent's power in selling affects the purchaser. The question does not arise. The jury have found that Hunter was a general agent for the defendant in selling clocks for him in the county of Haywood, and it is not pretended that he had been forbidden to warrant. *Runquish v. Ditchell,* 3 Esp., 65. Nor does *Fen v. Harrison,* 3 Term. 757, aid the defendant in his position. There the agent, who was employed to get a bill discounted, was informed by his principal that he

would not indorse it, and the question was, he having done so, whether the principal was liable to the indorsee—not the case we are considering. But in that case *Lord Kenyon* doubted, or rather denied, the case cited at the bar, of a servant warranting a horse on a sale contrary to the instructions of his master, and says expressly the maxim of *respondeat superior* would apply, and the principal has his remedy against the agent. But, as before remarked, that is not the case here. *Fen v. Harrison* was before the Court of King's Bench three times. In the two first trials it was treated as the case of an indorsement by an agent who had been forbidden so to do, and the contest was whether under such a power the agent could bind the principal. On the third trial it was shown that the principals, the defendants, did not say they would not indorse the bill. The Court were unanimous in deciding that, as the defendants had authorized their agent to get the bill discounted, without restraining his authority as to the mode of doing it, they were bound by his acts. 4 Term, 178.

But it is said that although the defendant may have been bound to answer to the purchaser by the warranty made, he is not answerable to the plaintiff, nor bound to repay to him the money (256) recovered from him by the purchaser. In support of this proposition it is said, that if Hunter, at the time he sold the clock to Rhinehart, made known the name of his principal, the latter alone would have been bound, and the purchaser could have had no action against him. But, as he chose not to do so, the warranty was his own personal contract, and the money, paid by him on the judgment, was money paid on his own account, and not on that of the present defendant. Without stopping to inquire the extent to which the first branch of the proposition is true, because the question does not arise here, we cannot yield our assent to the second branch. We do not so consider the law to be. We admit that by not disclosing his principal he subjected himself to the action of the purchaser; but assuredly the purchaser had a good cause of action against the present defendant, the principal. When an agent in making a contract of sale does not disclose the name of the principal, the purchaser, when he discovers the principal, has his election which to sue, and if he can sue the principal, it must be because he is bound by the contract of warranty as well as of sale. *Patterson v. Grandasequi*, 13 East, 62. Although, then, it be true that by not disclosing the name of his principal the plaintiff subjected himself to the action of Rhinehart, it was upon a contract made by him for the defendant, which by his agency the defendant authorized him to make. The doctrine, it is likely, is founded upon what is said in Viner in the passage before referred to. We know of none other. It is there said that when a servant does so warrant a horse it is the sale and contract of the

master, but the warranty of the servant, and the master is not answerable upon the warranty, because not annexed to the contract. But we have seen that the leading principle of that case has been overruled, and with it must fall the incidents; the warranty is annexed to the contract. If the doctrine were as contended for, it would present a
(257) singular result. The purchaser, having his election to sue either, by bringing his action against the agent would throw the whole responsibility on him and the whole loss on him, for he would have no redress on his principal, for whom and by whose authority he was acting. This cannot be so; it would be unjust. Here is an unrestricted agency to sell, and it confers the power to sell in the usual and customary way, Paley on Agency, 212, 28 L. Lib., 91, and when such a contract exists the law implies a guaranty on the party of the principal to indemnify the agent from all the legal consequences that follow the sale. This principle is fully established by *Adamson v. Jarvis*, 4 Bing., 66, 13 E. C. L., 345. There the defendant had employed an agent to sell for him certain goods to which it subsequently appeared he had no title. The agent sold the goods, and was sued for their value by the true owner and a recovery had against him, and that action was brought by the agent to be indemnified. *Chief Justice Best*, in delivering the opinion of the Court, says: "It has been stated at the bar that this case is to be governed by the principles which regulate all laws of principal and agent. Agreed: every man who employs another to do an act which the employer appears to have a right to authorize him to do undertakes to indemnify for all such acts as would be lawful if the employer had the authority he pretends to have." This covers the principle of the case before us. The defendant Jameson not only seemed, but had the power, to authorize the plaintiff to make the warranty, and did so authorize him, as far as the case discloses the fact to us. As there observed, auctioneers, brokers, factors, and agents do not, generally, take regular indemnities. The consequences would, to them, be serious if, having sold goods and paid over the proceeds, upon being made to suffer in damages for a breach of a warranty they should find the loss must
(258) be theirs, and that they had no legal claim upon their principal for indemnity, for whom and at whose request they had acted. The doctrine of this case has been recognized both in New York and in Connecticut, *Powell v. Newburgh*, 19 John., 228; *Stocking v. Sage*, 1 Day, 522, and is perfectly in accordance with reason and justice.

We have examined the other cases relied on by the defendant's counsel, and perceive nothing at variance with those cited above.

We are of opinion, then, that the warranty made by the plaintiff Hunter was within the scope of his authority, and bound both himself and the defendant, and that the latter is bound to indemnify the plaintiff to the full amount of the recovery made by Rhinehart against him.

On the trial below, the plaintiff, under the charge of his Honor, recovered in damages $70.40. How much of this sum, if any, was allowed for his *expenses* in defending the suit the record does not state. Nor, indeed, does it show that anything was allowed on that ground, or for the costs of the suit against Hunter. But we have no doubt the latter were included, and we are of opinion he was entitled to recover them. In truth, the defendant's objection admits he was bound for the costs of the county court, as he only contests those incurred by the appeal and removal. He was present at the first trial, and, the case states, managed the defense. It is not to be believed that the appeal was without his approbation. If opposed to it, he might very easily have stopped it by paying up the judgment. He did not do so, nor does it anywhere appear that he made any effort to stop the case. From the record it does not appear that the plaintiff has recovered for his costs more than was taxed against him in the suit of Rhinehardt. The last three cases cited are authorities to show he was legally entitled to recover them.

As to the want of due form in the judgment against the plain- (259) tiff, the same remark applies as heretofore given. The defendant comes too late with his objection. It is not the foundation of this suit, but evidence of the amount of the plaintiff's claim.

We see no error in the opinion of the court below, and the judgment is

Affirmed.

RUFFIN, C. J., dissenting: The useful habit of free consultation between the members of the Court while I have had the honor of sitting here has generally resulted in a concurrence of opinion. When my own mind may not have been entirely satisfied with the result of a conference with them, or the reasoning by which my brethren reached it, yet I have been so much impressed with the public importance of giving to the judgments of the Court all the weight of unanimity, and have been so little wedded to any peculiar notions of my own, that I have willingly yielded to my brethren. I have, therefore, very seldom ventured to dissent from them; and I should with pleasure adhere to that course now, if what I conceive to be my duty to the law would allow me. Believing, however, that the decision of the Court is against principle, and not supported by any just reasoning, I feel bound to express my opinion against it.

I have to remark that, as far as my brethren are influenced by the part which Jameson is supposed to have taken in the management of the suit brought by Rhinehardt against the present plaintiff, they would find, upon a closer examination, there is some mistake of fact which

makes it unsafe to put any part of the case on that point. The *case,* indeed, states that the suit was brought in the county court of Haywood, and that Jameson was present at the trial and then instructed the counsel and treated the case as his own; and from a judgment against him in that court, Hunter appealed to the Superior Court, and thence removed the trial to Macon. That would be all plain enough if
(260) it were not contradicted by the record of that suit, which is annexed to the case and expressly made a part of it. From *that* it appears that the suit was brought by Rhinehardt originally in the Superior Court of Haywood, and that it was removed by the defendant Hunter, before any trial, to Macon; so that there was no trial in the county court or in any court before the final trial in Macon, at which the present defendant could have assisted or done anything to induce the belief that he treated the cause as his own, and thereby sanctioned what had been done by Hunter in warranting the clock, as having been done at his request. But this is a matter of little moment, as it affects only the present parties; and I should not advert to it were it not to let the parties see that I had duly ascertained the facts of their case as well as considered the matter of law. To the general question of law involved in the case I will now proceed.

The plaintiff declares upon a contract of indemnity, and also for money paid to the use and at the request of the defendant. He could money paid to the use and at the request of the defendant. He could declare in no other way; and both counts involve essentially the same matter both of law and fact. He alleges, in support of them, that the defendant employed him as an agent to sell clocks for the defendant, and that he sold one to Rhinehardt and warranted it to be of good quality, and has been compelled to pay thereon a sum of money as damages and costs, for which he brings this suit. The defendant raised objections, questioning in several forms the authority of the plaintiff to make a warranty upon a sale. But I agree clearly that it not appearing that the agent was forbidden, he had the authority to give the principal's warranty, both as between the purchaser and the principal, and the latter and the agent. I agree, moreover, that in such case, if the agent do not disclose the principal at the time of the sale, yet the purchaser may, upon discovering the principal, sue him; for it is the warranty of the
(261) owner, and is annexed to the contract of sale, which is made by the principal through his agent. Further, I yield that the purchaser may, in this last case, sue the agent on the warranty, because, although he was in fact acting as agent, yet the purchaser was not informed of it, but dealt with him as if he had been the owner, and, therefore, had a right to treat him as contracting for himself. Therefore, I am willing to say that the warranty was that of each—the prin-

cipal and the agent; and to treat the case precisely as if the agent had expressly given the warranty of the principal, and also expressly given his own, which, I think, is going as far as the plaintiff could ask. Certainly, nothing less will answer the plaintiff's purpose; for, if he was forbidden to warrant, although the principal might still be liable to the purchaser upon a warranty made by the agent, yet the agent would be answerable over to the principal for breach of instructions, and, consequently, could not recover for a loss upon a warranty which he volunteered of his own motion. So, if the agent had authority from the principal to warrant, and did warrant in the name of the principal, and not for himself, then he, the agent, would not be liable thereon, and there could have been no recovery in the action brought against him. It follows, then, that Hunter must be taken to have given his own warranty, either by itself or in addition to a warranty of his principal. It is for damages sustained by reason of a warranty of the properties of the clock which bound him personally that he brings this suit. Now, it is clear the defendant cannot be bound to indemnify him against the consequences of such a warranty unless the plaintiff entered into it at the instance of the defendant. In the same manner, a request from the defendant must be shown in order to support the count for money paid to the defendant's use; for if the plaintiff paid the money officiously, that is, without being bound for it, or became bound for it officiously, that is, without the defendant's request to him to become thus bound, he cannot recover from the defendant by reason of the (262) elementary principle that no man can make another his debtor without the consent of the latter. I have, then, to ask, Where is the evidence of such a request? I see none at all. And in this consists the difference between my brethren and myself. There is, unquestionably, no express evidence of a request to the plaintiff to give his, the plaintiff's, warranty to the purchaser as to any quality of the clock. That is not pretended. But it is said that the plaintiff subjected himself to the action of Rhinehardt upon a contract made by him for the defendant, which by his agency the defendant authorized him to make; in other words, that by appointing an agent to sell a personal thing, not requiring a deed, a request is implied in law to the agent to give *his* warranty as to the qualities of the article sold. For that position I know not of any authority whatever, excepting only the opinion of my two brethren in this case. I admit that by the appointment of an agent to sell a personal chattel an authority to warrant is implied; but it is an authority to warrant in behalf and *in the name of the principal.* The dispute in the cases is whether the agent had authority to bind the principal where the agency was special or there were instructions to the agent not to warrant. But in not one single case before this, that I

have seen, was it ever contended that from the appointing of an agent not only an authority is implied to give the warranty of the principal of the goodness of the article, but also a request to the agent is to be inferred to give his own warranty in lieu of the principal's, or upon the back of it. I believe if there was such a case my brethren would have found it. At all events, none such has been cited by them. It is true, *Adamson v. Jarvis,* 4 Bing., 66, is relied on for this purpose. But I must say that it strikes me with much surprise that it should be. Not that I deny that case; for I think it good law, and it has been recognized by this Court in *Ives v. Jones,* 25 N. C., 538. But while I
(263) admit that case to be law, I am surprised that it should be adduced on this occasion, because it relates to a totally different subject. There an auctioneer was requested by the defendant to sell certain goods as his property, and he did so, and paid the proceeds to the defendant, and then the owner recovered the value from the auctioneer, who thereupon brought that suit to recover back what he had lost. Clearly, he recovered properly, for the law implies a warranty of *title* from every vendor of personal chattels, and there was an *express request* from the defendant to the plaintiff there to do the act on which the plaintiff's liability arose, namely, to sell the property as the defendant's, which amounted to a conversion as against the true owner, though an innocent one on the part of the agent. *Chief Justice Best,* therefore, did not speak loosely, but well weighed his words, when he said "that every person who employs another *to do an act"* (which is not unlawful) "undertakes to indemnify him for that act." The defendant there *expressly* "employed the plaintiff to do *the act"* he did, and no more nor less; and, therefore, the defendant was bound to assume the burden of all the consequences of *that* act. But how that is an authority to show that employing an agent to sell goods, and giving him power to make the sale with the warranty of the owner as to the qualities of the goods, amounted to *an implied request* to the agent to give *his* warranty as to the qualities I am at a loss to conceive. The case cited from Connecticut cannot, I think, be law. It lays down this doctrine: that if an agent be sued on a contract made in the course of his agency, though the suit be without cause and he succeed in it, the principal is bound to refund all his expenses, and *indebitatus assumpsit* will lie for them. This is binding the principal for all the wrongful suits other people may think proper to bring against one who has been his agent, for an alleged, and falsely alleged, injury by some act done in the course of the agency.

Even the most express covenant, that of quiet enjoyment, for
(264) example, is by construction limited to wrongful disturbances, unless a particular person be expressly named. In the case of principal and surety, if the principal pay the debt and then the creditor

sue the surety for it also, and the payment by the principal be established, so that there is judgment for the surety, certainly there is no ground for compelling the principal to reimburse the surety's costs. It would be ruinous; for such groundless suit might be repeated over and over, and the principal by paying the debt did all that he contracted to do, or could be bound to do. But to return to the case of *Adamson v. Jarvis.* The objection there, and in *Betts v. Gibbons,* 2 Adol. & El., 57, was that the plaintiffs could not recover because they were *tort feasors,* and, therefore, that the most direct request or promise of indemnity by the defendant for the wrongful act would not sustain the action. But, here, the inquiry is whether the plaintiff gave his warranty, on which Rhinehardt recovered, at the request of Jameson. There being no such express request, it is said that it is virtually included in the unrestricted agency to sell, because, from it "the law implies a guaranty or promise on the part of the principal to indemnify the agent from all the legal consequences that follow the sale." Certainly this last position, that a contract of indemnity is inferred against *the consequences of making the sale,* is perfectly right, because the agent was *employed to make the sale.* I should never think of gainsaying that. But what are the consequences to an agent from making the sale—what can they be? Why, only a liability to the owner (in the case they were not the property of the principal) for the value of the things sold, either in trespass or trover, or an action for money had and received for the price, and that is all. In respect of the qualities of the things, the agent cannot be liable at all from the sale merely. He can only be made liable by something in addition to the sale itself; by a fraud in misrepresenting the quality or concealing defects knowingly, or by his own en- (265) gagement as to the quality. I think my brethren, when they say that from an agency to sell the law implies a promise of the principal to indemnify the agent "from *all* the legal consequences that follow from the sale," cannot mean all their words import; for, certainly, for a fraud in making the sale both principal and agent (as one of its legal consequences) would be liable to the purchaser as wrong-doers; and yet, between them, the law would enforce no promise of indemnity, nor contribution without a promise. Then, as to the remaining method by which an agent may become liable to suffer for a defect in the thing, as a consequence from the sale, which is by annexing his own warranty to the sale, I must say that my brethren have merely assumed or affirmed that the law implies a counter guaranty from the principal, and have not sustained it by adjudged cases nor proved it by argument. They say, indeed, that it would be unjust that the loss should fall on the agent instead of the principal, "for whom and by whose authority he was acting." But that seems to be plainly begging the question; for while it is

admitted that he is acting for and by the authority of the principal in making the sale and giving the warranty of the principal—because to that extent there are many cases—yet it remains to be proved by some one case that in giving his own warranty the agent was also acting by the authority or at the request of the principal. Wherefore should the law imply that the principal requested the agent to become his surety that the articles were of good quality? How can it be so implied? If such a request to an agent to sell shall be implied, why not imply also an authority to him to get a third person to give his warranty in aid, if the agent should happen to think it useful. The one is just as much as the other within the scope of a mere authority to sell, which is all
(266) that is given in words. That implies, indeed, a power to warrant for the owner but, as it seems to me, not to give the warranty of anybody else. It is to be feared that a notion of the justice of the case, as it is called, arising from the hardship of making the agent bear a loss when he could not derive a profit from his warranty, may render us forgetful that *the law* requires that there shall not only be a loss by one person for another, but also that such loss should be occasioned by some act done at the request of the other, before the latter will be bound to make the loss good. It is not sufficient that the agent should intend to promote the interest of his principal by giving his warranty, unless it be at the instance of the principal. That consideration may move a generous mind to step forward in exoneration of the man who designed to befriend him. That is equally true of many other cases of voluntary payments for the benefit of others. But still there can be no recovery unless there has been a request. Upon this very question of principal and agent, this Court held, in one of the hardest cases that ever came before a court of justice, *Hines v. Butler,* 3 Ired., 307, where an agent knew his principal was pressed for money, and, in order to raise it for him, he indorsed a note, which he had to collect, or indorsed a note for a debtor of the principal for the purpose of getting it discounted at bank, and thereby the agent sustained loss, that the principal was not bound to indemnify the agent, although, as the Court expressly says, the agent "did then believe he was doing the best for the principal's interest." Why was that? Because the principal had not given the agent authority to indorse, but only to collect the note payable to the principal, and had not requested him to indorse the debtor's note negotiable at bank. Therefore, that loss from the officious acts of the agent, though with the very best intentions, in reference, as he thought, to the wishes and interest of the principal, was thrown altogether upon the agent. How can this be distinguished from that case. Here the
(267) agent was authorized to give the warranty of the principal, and not his own, as in the other case he had power to collect the note,

and not indorse it. Upon the ground, then, that there was no request, the action must fail in point of law. But it is extremely probable that it ought also to fail in point of that sort of justice which, it is supposed, may be on the plaintiff's side; for how can we tell what might have been the result if the plaintiff had not given his warranty to Rhinehardt, so that the latter would have been compelled to sue Jameson on his warranty? In that case Hunter might have been called as a witness for Jameson, and might have proved that he sold without giving a warranty of the principal as to the quality of the clock, or that in fact and truth the quality was such as was warranted. There was, doubtless, a real contest upon one or both of those points in Rhinehardt's suit, as must be supposed from the pertinacious defense of it. A principal has a direct interest in the evidence, to that extent, of the agent, who is ever the most material witness to those points, as he best knows what verbal contract he did make, and also is, probably, best acquainted with the properties of the thing sold. At all events, this interest of the principal in the evidence of the agent furnishes a strong reason why the law should require direct evidence of a request to the agent to give his own warranty, and not imply it from the mere fact of agency; and as there is no adjudged case found in which it has been implied, it is very conclusive to my mind, and it ought not and cannot be implied.

PER CURIAM. No error.

Cited: Davis v. Burnett, 49 N. C., 73; *Alpha Mills v. Engine Co.,* 116 N. C., 802; *Mfg. Co. v. Davis,* 147 N. C., 270.

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(268)

LEWIS WHITFIELD v. THOMAS LONGEST ET AL.

The ordinance of the corporation of a town which is authorized to abate nuisances within the town, and which declares that hogs running at large are nuisances, operates as well upon nonresidents who suffer their hogs to run within the limits of the town as upon those who are actual residents.

APPEAL from CARTERET Spring Term, 1846; *Manly, J.*

Trespass, to recover damages for taking a parcel of hogs. On the trial below the following case agreed was submitted to the court:

The defendant Longest was the constable of the town of Beaufort in the county of Carteret, and the other defendants commissioners. The latter made and published an ordinance whereby the running at large of hogs in the streets was declared a nuisance, and forbidden; and it

was ordained "that each and every hog found at large in the town will be taken up and put in pound, and advertised to be sold on the third day, unless the owner thereof shall pay the charges for taking up such hog or hogs; and if sold, the money arising therefrom, after paying the charges, shall be paid over to the owner." The constable is authorized to charge 30 cents for the taking up and 10 cents a day for keeping each hog. The plaintiff does not reside within but adjacent to the town, and his hogs being found at large in the streets, were, by the defendant Longest, by virtue of the ordinance, taken up. Notice was duly given to the plaintiff, and he was informed that if he would pay the charges as established by the ordinance the hogs would be restored to him. This he declined, and after due advertisement they were on the third day sold, and this action brought. The presiding judge gave judgment for the defendants, and the plaintiff appealed.

(271) *Iredell for plaintiff.*
J. W. Bryan for defendants.

NASH, J. We perceive no error in the opinion of the presiding judge. The common law gives to every corporation power to make by-laws for the general benefit of the corporators, and the Legislature, by the private act incorporating the town of Beaufort, passed in 1825, authorized the commissioners to make ordinances for the removal of public nuisances. The ordinances so made must be reasonable and for the general benefit. The commissioners, then, are clothed with power to make laws to abate nuisances within the corporation. They have declared that the running at large of hogs in the streets of the town is a nuisance, and by their ordinance pointed out the mode by which it was to be abated. Their authority to pass the ordinance, so far as the inhabitants of the town are concerned, has not been directly denied; nor, indeed, is it an open question. The very point, upon this same ordinance, was before this Court in *Hellen v. Noe,* 25 N. C., 495, and then received a judicial exposition. The only question now submitted to us is, Does this ordinance bind the plaintiff, who is not an inhabitant of Beaufort, or his property? It is very certain that the legislative acts of the com-
(272) missioners of a town are and must be limited to, and can have no effect beyond, the limits of the corporation; but the proposition is not true that none are bound by them but those who, in common parlance, are inhabitants of the town. All who bring themselves within the limits of the corporation are, while there, citizens, so as to be governed by its laws. If this were not so, those town laws or police regulations, so absolutely necessary and useful, would be entirely nugatory. No matter how important and necessary, whether to the health or peace of the town or to the supply of its inhabitants with their daily provi-

sions, they might be set at defiance, so far as the police of the town was concerned, by any individual who was not a corporator. A citizen may not be at liberty to fire a loaded gun within the limits of the town, but a man whose yard adjoins those limits may do the same act; in him it is not punishable by the law of the corporation, because he is not a citizen. The law is not so. It is the act which the commissioners have a right to punish, no matter by whom done. But the principle does not rest alone on reason for its justification; it is sustained by legal authority. In *Pierce v. Bartram,* Cowp., 269, it is expressly recognized. The defendant was sued to recover a penalty inflicted by the ordinance of the city of Exeter upon any one butchering cattle therein. The defendant had so done, and rested his defense upon the fact that he was not a citizen of Exeter, and that the ordinance could apply to none but such. *Lord Mansfield* declared that the plaintiff, having come within the city, was, *pro hac vice,* an inhabitant, and bound by the same regulations as the other members of the corporation. So, also, *Buffalo v. Webster,* 10 Wendell, 99, recognizes and enforces the same doctrine. *Commissioners v. Pettijohn,* 15 N. C., 591, fully recognizes the principle of the cases from Cooper and Wendell, and establishes it as the law of this State. The action was brought to recover from the defendant, who was not an inhabitant of the town of Plymouth, a penalty (273) incurred, as it was alleged, by the violation of a by-law of a town which required owners of cattle to pen them every night, and some of those belonging to the defendant being found at night in the town unpenned, the penalty was considered as incurred by him. The Court say: "When an offense is made to consist of the omission to do an act in the town, he only is within the purview of the law upon whom by that or some other law the act is imposed as a duty to be performed within the town." They, therefore, held that the penalty did not attach to the defendant, not simply because he was not a corporator, but because of that fact and the additional one that it was for the omission of an act to be done within the town. The Court say that "there can be no doubt that one, not a corporator, but who comes within the limits of a town and there violates a police regulation sanctioned by a penalty, becomes as liable to pay it as if he were a member." But in this case the plaintiff has done no *act* within the corporation to bring him within the character of a corporator; that is true; nor is any penalty, as such, or any forfeiture, sought to be enforced against him by the corporation of Beaufort. If, however, he has not, in his own person, violated the ordinance of the town, his property has, and through his means. He has. as every other farmer does, turned out his stock to range upon the uninclosed land around him. His hogs were permitted to stray into the town of Beaufort, in violation of the ordinance. Had the defendants

a right to take them up and sell them as done in this case? *Pettijohn's case* puts things within a local jurisdiction upon the same footing as persons. "The cattle of a stranger," say the Court, "straying into a town and there becoming nuisances, or found damage feasant, may be removed by way of abating the nuisance, and may be distrained and impounded until the owner shall pay the expenses and such
(274) pecuniary mulct as may have before been imposed." As to the objection that there is no judicial decision condemning the property to be sold, we think it insufficient, since the owner may, if he chooses, have a full investigation of the case by bringing an action of replevin, as in any other case of distress.

PER CURIAM. Affirmed.

Cited: Wilmington v. Roby, 30 N. C., 254; *Comrs. v. Capeheart,* 71 N. C., 160; *Rose v. Hardie,* 98 N. C., 47; *S. v. Tweedy,* 115 N. C., 705; *Broadfoot v. Fayetteville,* 121 N. C., 420.

ELIZA HINTON v. JACOB HINTON, ADMINISTRATOR, ETC.

A widow cannot dissent from her husband's will by attorney. She must do so personally in open court.

APPEAL from GATES Spring Term, 1845; *Bailey, J.*

Thomas Hinton died in Gates County, having made a will which was proved in the county court at November Term, 1844. At that term the following minute was also made of record in that court: "Eliza Hinton, the widow of Thomas Hinton, deceased, appears in open court by her counsel, Augustus Moore, Esquire, and signifies her dissent to her said husband's will, proved at this term." The widow afterwards filed this petition for a year's allowance out of the testator's personal estate, under the statute. The petition states the making of the will and its probate in the county court as above; and then alleges, "that at that term the petitioner signified her dissent from the provisions made for her in said will, which was duly entered of record," and thereupon it prays that a year's allowance may be made and allotted to her in the usual form.

The county court denied the prayer of the petition because the dissent of the petitioner could not be made through counsel, but ought to have been made by the petitioner in proper person in open court.
(275) From that decision the petitioner appealed to the Superior Court; and there her counsel insisted on the sufficiency of the dissent

as entered of record in the county court, and also further proved that at the term at which the will was proved and at each of the terms within six months thereafter the petitioner was unable, from sickness, to travel to the county court. But his Honor, for the same reason, affirmed the judgment of the county court, and the petitioner appealed to this Court.

A. Moore for plaintiff.
No counsel for defendant.

RUFFIN, C. J. The act of 1784 gives to a widow who dissents from the will of her husband in the manner therein pointed out, dower and a distributive share of the personal estate. In 1776 the Legislature gave to the widow of a man dying intestate a year's provision for herself and her family out of his personal estate. And by the acts of 1827 and 1835, Rev. Stat., ch. 121, sec. 22, it is provided that where a widow shall enter her dissent from her husband's will within six months after the probate she may file her petition in the court where the probate was made, and shall recover one year's provision, as if the husband had died intestate, which the executor shall pay in preference to all other claims. There is no doubt, when the latter acts speak of the widow "entering her dissent from her husband's will within six months after the probate," that reference is had to the provisions of the act of 1784, which originally gave the widow the privilege of dissenting, and is incorporated into the same chapter of the Revised Statute, and forms the first section of it. We are, then, to look to the act of '84 for the time and manner a widow is to dissent from her husband's will. The words are, "that if any person shall make his last will and testament, and not therein make provision for his wife by giving or devising (276) to her such part of his real or personal estate, or to some other for her use, as shall be fully satisfactory to her, such widow may signify her dissent thereto before the judge of the Superior Court, or in the county court of the county wherein she resides, in open court, within six months after the probate of the said will; and then she shall be entitled to dower," etc. The question is whether, upon the construction of this enactment, a widow's dissent must be her personal act in court or may be declared through another person, as by an agent constituted by letter of an attorney, or, as in this case, by counsel or an attorney of the court. Upon that question this Court entertains the opinion held in the court below.

A very material observation, in the first place, is that ever since the act passed the course has been for the widow herself to come into court and declare her dissent, as her personal act. This shows very strongly how the act was in the beginning intended and understood, and what is the settled sense of the profession as to the proper construction; for it

is almost always opposed to the feelings of a widow, in the state of grief from her recent bereavement, to declare publicly her dissatisfaction with her husband's provision for her, after one of his last acts in relation to her; and there can be no doubt, if it had not been thought that her presence personally in court was indispensable, that the practice would have been as uniform to signify her dissent by letter, or by attorney, as it has, in fact, been for her to do it in her own person. We have inquired from the counsel in this case, and from others, whether the dissent of the widow has ever been received, unless declared by herself to the court, and all agree that it was never done. The construction must be conclusive, after having been so long and so uniformly acted on. It has been deemed so obviously the true one that the Court and the
(277) Bar have acted on it without any question having been made of its correctness until the present time.

But, independent of the precedents, we should think that the proper construction of the act, from its language and the nature of the subject. The thing to be done is the act of election by the widow, whether she will take under her husband's will or by the law, and, like other cases of election, it is, naturally, to be the act of the party herself. In this case, however, she is not merely to elect and signify to the heirs and executor that she has done so, in any manner that may be convenient to her, or after she may have had time, from the settlement of the estate, to ascertain whether it would be more to her advantage to abide by the will or not; but she is obliged at all events within six months, and to do so "in open court." The reasons for those instructions are plain. Before that time the wife had no absolute right in the husband's personal estate, but he might in his lifetime or by his will give the whole of it away from her. That was altered by providing that she should have a distributive share of it, provided she elected to take it as therein prescribed. But it is clear that the law leans against disturbing the husband's will except in cases of plain injustice to the wife, and, then, only so far as may be requisite to make the provision for her equal to that the law would have given her if there had been no will. Independent of the consideration that this provision in her favor is a new one, and, therefore, that she must be content with it as it is given, and strictly observe the terms upon which she is to be entitled to it, the business of the estate and the interest of creditors and other legatees made it proper that she should in some reasonable and short time make her election, and also so declare it as to furnish incontestable evidence of it, and conclude her and all persons having claims on or to the estate. Hence, she is limited to six months in point of time, and required to signify her dissent, either in the Superior or county court, "in open
(278) court." The object was to have record evidence both as to the

time and the fact, to which all persons might have access, and which could not under any circumstances be controverted. In its nature, therefore, the act is one to be done by the party herself. She could not be represented, as in this case, by counsel or an attorney of the court merely as such, for there was no suit or any proceeding of that nature, in which the widow, as a party, could appear by attorney. It is an act out of the scope of the ordinary capacity of an attorney or counsel. If it had been done by letter of attorney being *ex parte,* and in the absence of the widow herself, the executor and heir, it would be open to subsequent denial by her that she executed the power of attorney, and, thus, the other parties would be exposed to all those inconveniences, that would arise if the widow had the unfettered power of electing at any reasonable time or in any manner, express or implied, instead of the particular mode specified in the statute. The very terms, "such widow shall dissent in open court," import that she must appear *in propria persona.* And there are not only the reasons for it just adverted to, but it is proper as a wholesome restraint upon a woman against capriciously dissenting from the will of her husband, or doing so for uncertain or inconsiderable gains. It was so regarded by us in *Craven v. Craven,* 17 N. C., 338, 346, where it is said that "It is a check to the temptations to widows to dissent, where a sense of propriety ought to forbid them, that the dissent must be expressed while the memory of the deceased is fresh in their minds, and must be declared, not in a chamber, where the influence of public sentiment may be disregarded, but in open court of their county," thus clearly conveying the idea that the widow's dissent is her personal act in open court, and not *in pais.* We may add, in the language of that case, that "an interpretation upon these statutes is not commended to us by its tendency to remove *this check* upon the abuse of a power to which there is (unavoidably, perhaps) a (279) strong temptation."

The case has been hitherto considered merely as a question of law, upon the construction of the statute and without adverting to the particular circumstance of the petitioner's sickness, which is stated in this case. That, however, cannot affect the decision. If, in itself, it were material, it could not operate here, because it is not alleged in the petition as an excuse for omitting to dissent in the proper manner, but the petition states that she did duly dissent. But if the petition had been otherwise framed and had set out that excuse, it would have made no difference. The county court can only proceed on a dissent declared and entered according to the statute. If there be any equitable grounds on which a widow can claim still to have her election, any reason why she should be deemed not to have forfeited it, although it may be gone at law, the court of equity must be asked to consider and relieve upon

them. Whether that court would in any case interfere with the operation of the act, where there had been no fraud by the other claimants of the estate, or would do so upon this particular circumstance, we do not undertake to determine, or intimate. But we hold, for the present, that this proceeding will not lie and that the judgment must be

PER CURIAM. Affirmed.

Cited: Lewis v. Lewis, 29 N. C., 73; *Bell v. Wilson,* 41 N. C., 2; *Cheshire v. McCoy,* 52 N. C., 377.

MOSES GUESS v. KING BARBEE ET AL.

Under the act of Assembly, Rev. Stat., ch. 81, sec. 3, prescribing the remedy against sheriffs, constables, etc., when they have collected money and failed to pay it over, the party injured may have his action on the officer's bond against any one or more of the parties to the bond, without joining the principal or all the sureties.

(280) APPEAL from ORANGE Spring Term, 1846; *Settle, J.*

The defendants were the sureties for one Tilly in the office of constable, and he collected for Guess, the plaintiff, the sum of $23.02, and failed to pay it over. The plaintiff issued a warrant against the defendant for that sum thus due to him, and the interest, and recovered judgment before a justice of the peace. The defendants brought the case to the Superior Court by *recordari,* and they then objected that this proceeding would not lie against them, as Tilly was not a party, he having died before the warrant was issued. The objection was overruled, and the plaintiff had a verdict and judgment, and the defendants appealed.

Norwood for the plaintiff.

J. H. Bryan, McRae, and Iredell for defendants.

RUFFIN, C. J. The objection is founded on the terms, taken literally, of the statute, which, in case a constable fails to pay money collected by him, gives a warrant against him and his sureties, Rev. Stat., ch. 81, sec. 3; and it is insisted that this remedy can only be pursued against them jointly. It might be sufficient, even if there were nothing else in the act, to rely upon the authority of *Bank v. Davenport,* 19 N. C., 45, that the acts giving summary remedies against officers and their sureties are to be treated as remedial and beneficial, and liberally construed. Therefore, this act ought not to be considered as repealing the

general provision of the other statutes, that all contracts are joint and several, and may be sued on accordingly, against all or any one or more of the parties to them. But the subsequent parts of this act show clearly that it was not the intention of the Legislature to restrict this remedy within the narrow limits of the objection. For example, section 5, after giving 12 per centum interest to the creditor, when (281) a sheriff, constable, etc., detains money collected, adds that he may recover it, "pursuing his remedy against such delinquent or his representatives or his sureties, *whether suing in the manner by this act provided* or in any other way known to the law." It is plain, therefore, that the act gives this redress against the officer and his sureties, or any or either of them, in the same manner as if the suit were debt on the bond in a court of record.

PER CURIAM. Affirmed.

WILLIAMS & HIGH v. D. J. WILLIAMSON, ADMINISTRATOR, ETC.

1. The declarations and admissions of an agent, after his agency has ceased, as to past transactions are not competent evidence against his principal.
2. To make the acts of one person evidence against another as his agent, the creation of the agency must, in the first instance, be established by proper evidence, independent of such acts and declarations themselves.
3. A constable has no official authority to collect money except upon execution, and he and his sureties are only liable on his official bond, under the act of 1818 (Rev. Stat., ch. 24, sec. 1), giving a remedy to the creditor on that bond for notes, accounts, etc., put into his hands for collection, when it is proved that the constable was the creditor's agent for collecting the money due on the claims.

APPEAL from COLUMBUS Spring Term, 1846; *Dick, J.*

In October, 1835, the plaintiffs recovered a judgment before a justice of the peace against Bradley F. Yates, on an account for $16.65 and costs; and this is a suit commenced in July, 1842, against the defendant, as administrator of Yates, on the former judgment, and was tried on issues joined on *nil debit* and payment. On the trial the (282) defense was that Yates paid to one Caleb G. Money. On the part of the defendant it was found that Money was a constable in 1835, and served the first warrant on Yates, and that on the trial thereof he proved the assumpsit on which the suit was brought.

The defendant then further offered in evidence a written receipt from Money in these words: "Received from B. F. Yates $150 on account of notes and judgments put into my hands for collection." The counsel for the plaintiffs objected to receiving the same in evidence, but the court allowed it to be read to the jury.

The defendant then further offered witnesses to prove that in 1837, in a conversation between Yates and Money, the former alleged that he had paid to the latter all the claims that Money had as a constable against him, Yates, and that Money admitted it to be true. To this evidence the counsel for the plaintiff objected, but the court received it, and the witness further proved that among the claims thus spoken of were some in favor of the present plaintiff, but they could not say that the present was one of them.

The court, therefore, instructed the jury that if the evidence satisfied them that Money had the claim against Yates placed in his hands for collection, payment to Money bound the plaintiffs; and that Money's acts and declarations in relation to the claim were evidence against the plaintiffs, on which the jury might find that the claim was paid; for Money was the agent of the plaintiffs while he had their claims in his hands for collection.

There were a verdict and judgment for the defendant, and the plaintiffs appealed.

D. Reid and J. Winslow for plaintiffs.
Strange for defendant.

(283) RUFFIN, C. J. The receipt given by Money to Yates being without date, it does not appear that the payment was made while Money's office of constable continued. Supposing, then, he was constituted the agent of the plaintiffs by having their claim put into his hands while constable, for collection, with or without suit, there would be a question whether the agency thus created would last longer than the office by reason of which the constable was constituted the creditor's agent. There might also be an objection to the declarations of Money in 1837, that they were made after the expiration of his office and of his agency, and were admissions of past transactions merely, to which it was not competent to examine him. *Masters v. Abraham*, 1 Esp. Cas., 375; *Fairlie v. Hastings*, 10 Ves., 125. But without considering those points at all, the Court holds the case to be against the defendant upon the ground that there was no evidence that Money was the agent of the plaintiffs and had authority as such to collect the debt.

What an agent says or does within the scope of his authority, and in the course of its execution, binds the principal. But to make the acts and declarations of one person evidence against another, the creation of the agency must, in the first instance, be established by proper evidence, independent of such acts and declarations themselves. Now, a constable has no official authority to collect money, unless upon execution. His duty is to serve process, and not to act as the plaintiff's

attorney. But it was convenient and became usual for creditors to employ persons in that office as collecting agents, into whose hands were placed the evidences of debt, with authority to receive the money without suit. In consequence of that practice the Legislature passed the act of 1818, ch. 980, Rev. Stat., ch. 24, sec. 7, which requires a constable's bond to be both for the faithful discharge of his duty as a constable and "for his diligently endeavoring to collect claims put into his hands for collection, and faithfully paying over all sums (284) thereon received, either with or without suit." The act does not impose any new duties or powers on a constable, as such, but merely makes his sureties liable for his acts as agent, as he himself was before. The act creates a security for persons who employ constables as collecting agents; and that is the whole scope of it. *Governor v. Carraway*, 14 N. C., 436. If money be collected by him on execution and not paid over, the case is one of direct official delinquency. When there is no execution, the sureties will not be chargeable by this act, nor the debtor be discharged by law unless the creditor has made the constable his agent, with authority, like any other private agent, to receive the money without process. The act does not make the constable who serves the warrant the agent of the plaintiff in every case. He may still be employed in his official capacity alone, and the presumption is that he is thus employed, unless there be evidence of the agency over and above such acts as are appropriate to his office. The only evidence in this case was that Money served the warrant. That was an act purely official, and it cannot be thence inferred that the constable was the creditor's agent to collect the debt, more than that upon a *capias ad respondendum* a sheriff may receive the money as he might on a *fieri facias*. The other circumstance, that the constable was a witness for the creditors on the trial of the warrant, is manifestly material. Those were the only facts adduced to prove Money's agency, and they very clearly, by themselves, are altogether inconclusive upon the point, which it is laid on the defendant to establish affirmatively. The act of 1818 plainly points out the kind of evidence proper in such cases. It is such as shows that "the claim was put into his hands for collection, with or without suit." This may be made to appear by express proof of the delegation of the authority to collect as agent or by such acknowledgments or requisitions of it by the creditor as will be tantamount. It is usual in such cases for creditors to deliver to the constable the evidence of debt, (285) and take a receipt therefor expressing that the constable is to collect. But many other circumstances may likewise be sufficient to evince that the constable was not to act in his office simply, but had the authority of the creditor to receive payment without execution. But as there was nothing of that kind offered on the trial of this case, the very

foundation of the defense failed, and it was improper to leave it to the jury to find, upon this evidence, that Money had the claim in his hands for collection, and thereby became the plaintiff's agent to receive payment.

PER CURIAM. *Venire de novo.*

Cited: *Munroe v. Stutts,* 31 N. C., 51; *Royal v. Sprinkle,* 46 N. C., 546; *Smith v. R. R.,* 68 N. C., 114; *Grandy v. Ferebee, ibid.,* 361; *Francis v. Edwards,* 77 N. C., 273; *Gilbert v. James,* 86 N. C., 247; *Johnson v. Prairie,* 91 N. C., 164; *Taylor v. Hunt,* 118 N. C., 173; *Jackson v. Tel. Co.,* 139 N. C., 351; *Younce v. Lumber Co.,* 155 N. C., 241.

JAMES HUTTON v. JAMES SELF.

Where an insolvent debtor, in filing his schedule, only surrenders his interest in certain property conveyed by a deed in trust, and the jury, upon an issue, find the deed fraudulent, he must be imprisoned until he makes a surrender of the whole property so conveyed.

APPEAL from CHATHAM Spring Term, 1846; *Settle, J.*

This was an issue of fraud, made upon a *capias ad satisfaciendum* under section 10 of the act for the relief of insolvent debtors, Rev. Stat., ch. 58. It appeared that the defendant had filed a schedule and given notice as required by law, which schedule was in the following words: "All my interest, if any, in and to all the accounts on the blacksmith's book for work done for sundry individuals, and which is in the possession of and my interests therein assigned to Samuel Crutchfield. (286) Given under my hand," etc. The plaintiff filed the following specifications, which were the only issues submitted to the jury:

1. As a blacksmith, the defendant has many accounts due to him, on a book kept by S. H. Crutchfield, which he has not surrendered.

2. He had made a fraudulent transfer of these debts to defeat the plaintiff's claim.

Evidence having been offered on both sides as to the fraudulent nature or *bona fides* of the transfer of the accounts to Crutchfield, his Honor charged the jury that if they believed the plaintiff's evidence they would find for him; if the defendant's, for the defendant.

The jury found a verdict for the plaintiff, whereupon the court considered and adjudged that the defendant James Self be imprisoned until a full and fair disclosure be made. The defendant then appealed to to the Supreme Colurt.

C. Manly for plaintiff.
McRae for defendant.

DANIEL, J. The defendant's schedule was as follows: "All my interest, if any, in and to all the accounts on the blacksmith's book for work done for sundry individuals, which book is in the possession of and my interest therein assigned to Samuel Crutchfield." When the issue of fraud came to be tried, the plaintiff offered evidence to prove that the assignment to Crutchfield was made without any consideration. The judge charged the jury that if they believed the plaintiff's evidence they should find the issue in his favor. The jury thereupon found the issue in favor of the plaintiff. The defendant then insisted that the finding of the jury was altogether immaterial, and he was, notwithstanding the verdict, entitled to take the insolvent oath and be discharged, as he had, after his arrest, filed a schedule of all his interest in the said shop accounts, which interest he insisted would legally be transferred to the sheriff, as his assignee, by force of section 10 of the statute. The judge was of a different opinion; and he ordered that the defendant should be (287) imprisoned until he made a full and fair schedule of his property.

From this judgment the defendant appealed. The counsel for the defendant now insists that this case is distinguishable from *Adams v. Alexander,* 23 N. C., 501. He says that in that case only the resulting trust of a fund by a fraudulent deed of trust was included in the schedule. But here (he says) the defendant has scheduled *all* his interest (*if any*) in the shop-book and accounts. And the jury having found that the assignment of the book and accounts to Crutchfield were fraudulent and void, now the entire interest in the book and accounts would pass to the sheriff by force of this schedule and the statute, disencumbered of Crutchfield's claim. We do not think that this argument is solid. The statute does not merely, upon the finding of the fraud by the jury, vest in the sheriff the property in respect to which the fraud has been found. Only those interests particularly scheduled vest in the sheriff, or accrue to the benefit of the creditors, and hence the necessity of a new schedule, after fraud found. Alexander, in the case cited, made a new schedule after the verdict, in which he omitted to mention the assignment, which had been found by the verdict to be fraudulent. And we think that the defendant must make a new schedule, and include in it the shop-book and accounts, omitting the assignment to Crutchfield, which the jury have found to be a fraudulent assignment. The judgment must be

PER CURIAM. Affirmed.

Cited: Edwards v. Sorrell, 150 N. C., 717.

(288)

THE STATE TO THE USE OF WILLIAM JORDAN ET AL. v. JOSHUA A. POOL ET AL.

A sale of land under a *fi. fa.* bearing teste after the death of the defendant in the execution, where his heirs have not been made parties, is void.

APPEAL from PASQUOTANK Spring Term, 1846; *Bailey, J.*

The defendant Pool was the sheriff of Pasquotank, and the other defendants his sureties on his official bond. At March Term, 1841, of the court of pleas and quarter sessions of that county several judgments were obtained against Josiah Jordan, who died during the same week and after their rendition. Executions upon these judgments were issued from the same term, returnable to the succeeding one in June. One of them was levied upon all the property of Josiah Jordan, both real and personal, and together with the others, which were not levied, duly returned. From June term a *venditioni exponas* issued upon the one which had been levied, and *fi. fas.* upon the others. The property so levied on was, at September term of the court, sold under all the executions, and produced a sum sufficiently large to discharge them, and leaving in the hands of the defendant Pool a surplus of $1,200. To recover this sum the action is brought upon the sheriff's official bond by the relations who are the heirs at law of Josiah Jordan, and against whom no process had issued. At the sale made by the defendant Pool the personal property produced a sum sufficient to discharge the *venditioni exponas.*

The presiding judge charged the jury that under the facts of the case the sale of the land by the sheriff was void, as he had no authority in law to make it, and that the surplus was not in his hands in his official character, and the action could not be sustained.

(289) *Heath for plaintiff.*
Badger for defendant.

NASH, J. In the opinion of his Honor we concur. The only question sent here is as to the validity of a sale made under such circumstances. The land was sold under *fi. fas.* which bore teste after the death of Josiah Jordan without any *sci. fa.* against the heirs. The effect of a sale so made has already been declared by this Court in *Wood v. Harrison,* 18 N. C., 356. The action was to recover the land sold, and the Court decided that the plaintiff was entitled to a verdict, because it was sold by the sheriff under a *fi. fa.* which was tested after the death of the defendant in the execution, without having previously brought in the heirs. The same principle was decided in the prior case of *Bowen v. McCullough,* 4 N. C., 684. In this case the sale was made under like

circumstances; it is, therefore, void. The title to the land is unchanged —it is still in the heirs of Josiah Jordan. They have suffered no wrong or injury. As the land is yet theirs, they have no right to the money produced by the sale. The retention of it by Pool is no breach of his official bond. The plaintiff cannot sustain the action.

PER CURIAM. No error.

MARTIN A. GASH, EXECUTOR, ETC., v. PHEBE JOHNSON ET AL.

1. On the trial of an issue *devisavit vel non* the court may instruct the jury to find as to the validity or invalidity of the whole or any part of the will, and the declarations of a legatee against his interest will be good evidence on such trial, so far as his interest extends.
2. If the declarations of a devisee of land, who is not a party to the suit, be received, that is no cause for a new trial, as the interest of such devisee in the land devised will not be affected by the finding in that issue.

APPEAL from HENDERSON Special Term in 1845; *Caldwell, J.* (290)

This was a suit in relation to the validity of a paper-writing propounded by the plaintiff as the last will and testament of Reuben Johnson, deceased. He died in 1843, and by the said paper-writing gave all his property, of the value of $15,000, or thereabouts, except the remainder in one of his slaves, to Sarah Johnson, with whom he had intermarried some forty years ago, during the life of a former wife, who is still living. The caveators are his first wife, Phebe Johnson, and his son-in-law and daughter by his first wife. The remainder in said slave, after the death of said Sarah, is given to one Leander Gash, who wrote the will, and who is a relation of the deceased. The caveators on the trial insisted that the deceased had not capacity to make a last will, because of his great age and infirmities, and, if he had, that it was procured to be made by the importunity and undue influence of the said Sarah; and with a view to show her undue influence in procuring the said will to be made, they offered to prove her declarations, or what she said before the execution of the said will and after the death of the said Johnson. The testimony was objected to by the plaintiff, but was received by the court as evidence against the said Sarah. The jury, after being absent for some time, returned into court and through their foreman said that they found the issue in favor of the defendants, and said further that the jury believed that the deceased had capacity to make a will, but the one in question was made by persuasion. Their verdict, after being recorded, was read over to them, to which they assented. Rule for a new trial granted, and on argument discharged. Appeal prayed to the Supreme Court.

(291) *Badger and Avery for plaintiff.*
Francis for defendants.

DANIEL, J. The paper-writing which was offered to be proved as the last will of Reuben Johnson named Martin A. Gash and Sarah Johnson executor and executrix to the same. But it appears that Gash only offered the paper for probate to the county court of Henderson. The defendants appeared and caveated the paper-writing as a will. The court ordered an issue of *devisavit vel non* to be made up and submitted to a jury. The issue which was made up under the order of the court was probably framed in such a manner as to confine the response of the jury (will or no will) to the said paper *in toto*. Whereas the court might have directed the issue to have been drawn up specially for the jury to find whether the paper-writing propounded as the last will of Reuben Johnson, deceased, was in fact his will, or any part of it, and which part. Frequently this special mode of framing the issue will be found most advisable. Then the jury may respond that one or more of the legacies or devises mentioned in the paper is or are not any part of the last will; and that the residue of the paper-writing is the last will of the supposed testator. *Trembistown v. Alton,* 1 Dow. & Clark, N. T., 95. And when a paper-writing is propounded by an executor as the last will of a person deceased, and caveated, and a special issue is made up as above mentioned, then the acts and declarations of each legatee and devisee named in the paper propounded as a will may be given in evidence against the interest of that particular legatee or devisee. The acts and declarations of any one of such persons will not affect the interest of any other person or persons named in the paper as legatee or devisee, because the interest of each one of them is generally separate and distinct. But even upon the issue in this form, we think that his Honor was correct in admitting the declarations of Sarah Johnson to be given in evidence against her interest, as far as that interest
(292) extended, and his Honor expressly confines its operation to that; for the executor, fairly propounding and fairly acting, is the *legitimus contradictor* for all the legatees: the verdict of the jury and sentence of the court are conclusive as to them. *Redmond v. Collins,* 15 N. C., 430. A sentence for or against a will is not binding against those who are not parties or privies. But privies are those who claim through a party, as the propounding executor, or have notice of the proceedings. *Ibid.* The declarations of Sarah Johnson were, therefore, evidence against the will, certainly so far as those declarations affected her legacy under the will. But a devisee is not necessarily represented by the executor, and is not affected by a sentence against a will when propounded by him, unless the devisee is a party to the proceedings, or has notice of them; and he may afterwards establish the will

in an action of ejectment, if he is able to do so. So far, therefore, as Sarah Johnson stands as a devisee under this paper-writing, the evidence of her declarations, received by the court on the trial, were altogether immaterial, as she was not a party to the issue as devisee; and it is never considered a ground for a new trial that the judge admitted evidence which was immaterial to the interest of either of the parties to the issue. The will was attacked on the ground that the testator had not capacity, and also on the ground that it had been fraudulently obtained from Reuben Johnson by the undue influence and undue persuasions of Sarah Johnson, the principal legatee and devisee under the said paper-writing. The judge permitted the caveators to give her declarations in evidence to sustain the latter grounds. This had been objected to by Gash. And we understand from the case, it was the only point appealed from. The case states that the jury found against the will because it was made "by persuasion." This finding by the jury does not appear by the case to be objected to by the propounder of the will. A will certainly is not void because it has been obtained *"by persuasion."* To make it void, the persuasion must be undue and (293) fraudulent. The executors offered the evidence to show, as they stated to the court, that the will had been obtained by the importunity and undue influence of the said Sarah Johnson. We take it that the jury found the issue for the defendant generally, and the reasons they gave for it cannot be considered by us as a special verdict. Those reasons were given merely to show that the jury found upon the point to which the evidence was relevant, which was objected to, in order to raise the point of law on which the parties wished the opinion of this Court, namely, the competency of that evidence. The declarations of Sarah Johnson, certainly, were not evidence against the other legatees. But the whole of the evidence given on the trial is not pretended to be reported to this Court. There may have been other evidence beside the declarations of Sarah Johnson, sufficient to satisfy the jury that the will was obtained *in toto* by undue persuasion.

PER CURIAM. No error.

Cited: Osborne v. Leak, 89 N. C., 435; *Linebarger v. Linebarger,* 143 N. C., 235, 236; *In re Craven,* 169 N. C., 569.

STEPHEN ROGERS v. SAMUEL VINES.

Where, in a decree of divorce, alimony is assigned to the wife in certain specific articles, as, for instance, slaves, the wife's right to the enjoyment of this property only continues until a reconciliation or until the death of either party. And during the separation the provision for alimony may be altered, at the discretion of the court, upon any change of circumstances.

APPEAL from GREENE Spring Term, 1846; *Manly, J.*

Detinue for six slaves, which was decided upon the following case agreed: Elizabeth Rogers, then the wife of the plaintiff, upon
(294) her libel in the court of equity, obtained in 1837 a divorce from bed and board; and it was decreed further that she should have alimony and a separate maintenance of the estate of her said husband; and the court doth allot as her alimony and separate maintenance one-third of the rent of a certain tract of land and mill conveyed to the defendant by, etc., and the negroes Esther, Willie, and Mary; and for the purpose of securing the payment and enjoyment of the said alimony, the court doth further decree that the defendant deliver to the said Elizabeth the said negroes within five days"; and the decree then provided for receivers to lease the land and mill, and directed them to pay one-third of the rent annually to the wife and the residue to the husband. The wife received annually, during her life, the sum of $60 for her share of the rents. The negroes were delivered according to the decree; and being a woman and her two small children, they were, taken together, unprofitable to Mrs. Rogers, and she sold them to the defendant on 13 August, 1838, for $1,000, then paid to her. The other negroes sued for are the issue of Esther, born since the defendant's purchase. Elizabeth Rogers died in May, 1845, and after the defendant refused to give up the negroes, the plaintiff brought this suit. It was agreed that if the court should be of opinion the plaintiff was entitled to the negroes, there should be judgment for him for certain sums as the value of the several slaves and damages, and if he was not so entitled, then there was to be judgment for the defendant.

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

(296) *J. H. Bryan for plaintiff.*
Badger for defendant.

RUFFIN, C. J. The question is whether, when slaves, or other specific part of the husband's estate, are assigned to a wife for alimony, she has the absolute property in them. For the defendant it was contended that she had, by force of section 3 of the divorce act, Rev. Stat., ch. 39. That authorizes the court to allow her such alimony as her husband's circumstances will admit, not exceeding one-third of the annual income or profits of his estate or occupation, or to assign to her separate use such part of the real and personal estate of the husband as the court shall think fit, not exceeding one-third part thereof, as the justice of the case may require, which shall continue until a reconciliation shall take place between the parties." It was argued that as the profits of specific
(297) property are uncertain, and especially land in this State and an

increasing family of slaves, under the management of a woman, the Legislature must be supposed to have intended for her a greater benefit than the labor merely of the slaves and the products of the land during her life. This was insisted on the more as being supported by the terms in the act, "to her separate use," that being a phrase well known in the law, and to be received in the sense in which it would be if contained in a will or deed. And it was thence concluded that the wife had the property in the slaves, or, at least, the *jus disponendi.* But the Court cannot place that construction on the act. We think the wife had no estate in the slaves, but that the personal enjoyment of them only was secured to her during her life, at most, and subject to cease upon a reconciliation, or be defeated by the order of the court.

The act gives alimony. Now, "alimony" in its legal sense may be defined to be that proportion of the husband's estate which is judicially allowed and allotted to a wife for her subsistence and livelihood during the period of their separation. Poynter Marriage and Divorce, 246; Shelford on Mar. and Div., 586. In its nature, then, it is a provision for *a wife* separated from her husband, and it cannot continue after reconciliation or the death of either party. There is no occasion for it after the death of the husband, for she then becomes entitled to dower and a distributive share, though divorced *a mensa et thoro,* unless, indeed, she should lose dower by leaving her husband and living in adultery. Co. Lit., 32, 33. Moreover, the decree for alimony vests in the wife no absolute right to the allowance, whether it consist of money or specific things; for, besides that it ceases upon reconciliation, it may be changed from time to time, and reduced or enlarged, in the discretion of the court. *Otway v. Otway,* 2 Phill., 109; *Foulkes v. Foulkes,* 3 Hagg., Ec. 329. The phrase "separate use" was not, as we think very clearly, used in the technical sense imputed to it, but it means (298) merely the personal use or separate enjoyment of the wife while living away from her husband and, in that sense, having the separate use of the property. If it had been intended that, as to the property assigned for alimony, the wife should substantially be a *feme sole,* the intention would have been declared in language as clear and explicit as that in sections 11 and 12, touching her own acquisitions. Those sections expressly give the divorced wife the power of holding the acquisitions of her own industry, and donations to her, against her husband and his creditors, and of disposing of them; and upon her death without having disposed of them, they are transmissible as though she were unmarried. There is a marked distinction, therefore, in the manner in which the act speaks concerning the wife's rights in property made by her labor, or bestowed on her by friends, and in that the law assigns as alimony out of her husband's estate. The former is her property to all

intents and purposes—to be enjoyed, sold, or given, as if she were sole. The latter is a provision for her livelihood while she is the man's wife and lives apart from him. This is the construction from the legal signification of the term "alimony" by itself, and especially when contrasted with the precise provisions respecting her rights over her own property. But other parts of the act prove the correctness of this construction. Section 10, for example, treats "alimony" and "separate maintenance" as synonymous, and shows the sense in which "separate use" in section 3 is to be taken. The provision, too, that her separate use shall continue until reconciliation is absolutely inconsistent with a power of sale in the wife; for, either the sale would prevent the revesting of the property in the husband upon a reconciliation, which would defeat the policy of the Legislature, and, indeed, directly contradict the act, or the wife would have the power of defeating her sale by returning to her husband, which the Legislature could never intend. Be-
(299) sides, the second section goes a little beyond the third, as to the period for which the alimony shall continue, by saying that it shall be "as long as the justice of the case may require," thus fully preserving the idea of alimony as defined by the common law, that it may be varied as may seem meet to the judge from the change of circumstances, and thence showing that the wife cannot have the power of disposition of specific things. No doubt, the court is not restricted to a provision out of the income, though that is the usual mode of making it. A sum *in numero* may be decreed to be paid annually, and the husband's estate may, under section 10, be sold to make it. The circumstances, therefore, that the specific property may not yield adequate profits cannot be taken into consideration in interpreting the act, as it is in the discretion of the judge to assign property or a pecuniary allowance. There is another consideration arising out of the statute of distribution, which is strongly opposed to the argument for the defendants. Upon the intestacy of a husband, or the wife's dissent from his will, she is entitled to dower of one-third of his land and to a child's part of his clear personal property. Now, the court can, without regard to the number of children, assign the third of the real and personal estate as alimony, and might in some instances be the more inclined to assign a full third to her when the children are numerous, that she might keep house and provide nurture for the children, whom the father neglected duly to maintain. This is all very well, if alimony determines with the death of either party. But if an absolute property inures to the wife in the things assigned for alimony, her share of the estate, instead of being a child's part, might be thus made four or five times as much, and thus defeat the statute of distributions, which, likewise, could never have been intended.

The true principle, therefore, is that as the separate enjoyment (300) of the specific things is given as alimony, in lieu of money, it can indure only as long as an allowance in money would. There is no more reason for holding that the wife's right to the negroes was absolute than that one-third of the rent of the real estate should be paid to her *in perpetuo*. Her right is, by its nature and the terms of the statute, limited to the period of separation of the husband and wife, and it terminates by the death of either.

PER CURIAM. Affirmed.

Cited: *Taylor v. Taylor,* 93 N. C., 421; *Owens v. Phelps,* 95 N. C., 285.

BENJAMIN WALL v. ALEXANDER NELSON.

A justice of the peace has no jurisdiction of a question of guaranty.

APPEAL from BERTIE Spring Term, 1846; *Bailey, J.*

This was a warrant which came up, by successive appeals, to the county and Superior Courts. The plaintiff declared upon a parol contract. For the purpose of proving the contract, he introduced a witness who testified that he was present when the plaintiff sold a negro to the defendant; that when the money was paid the plaintiff remarked, "I suppose it is good," to which the defendant replied, "Yes; if it is not, I will make it good." He further stated that a part of the money paid was a bank note for $10, issued by the Alabama and Mississippi Railroad Company at Brandon; and he testified that the note produced on the trial was the same note. It was further proved that Nelson said in conversation that he had heard of this note before, and said that he understood that he had been threatened with a warrant, but (301) that he had not passed it, and knew nothing about it, and would not take it back. This conversation took place before the plaintiff sued out his warrant. The constable proved that he tendered back the note to Nelson before or after he served the warrant, but could not recollect which. It was in proof that the note, though a genuine bill in the opinion of the witnesses, was uncurrent and of no value here, though it was not proved that it was of no value in Mississippi or Alabama. It was insisted in argument by the plaintiff's counsel that he was entitled to recover on the original contract of sale, there being, as to this $10 note, no payment at all; and that if this was not so, it was a contract to guarantee, not only that the bank notes were genuine, but that they were cur-

rent, and that there was evidence of notice and demand from the defendant before the commencement of this warrant. It was insisted by the defendant's counsel that the true meaning of this contract was that the notes were genuine and not counterfeit, and truly due and owing from the bank which had issued them, and not a contract of guaranty that they were current or of par value. It was further insisted that before the plaintiff was entitled to any action whatever, it was necessary to prove a demand, and a refusal on the part of the defendant to take back this note and give other money in place of it. It was further insisted that inasmuch as this was a contract to guarantee the notes, and sounded in damages, it was one of which a magistrate had no jurisdiction. The question of whether a justice of the peace had jurisdiction of the subject was reserved, with an understanding that if the court should be of opinion that he had not, a nonsuit should be entered. The court charged the jury that if the defendant passed the note to the plaintiff and promised to make it good, and they were satisfied from the testimony
(302) that it was of no value, they should find a verdict for the plaintiff, provided a tender of the note had been made by the plaintiff before suit was brought, and there was evidence of a tender. The jury, under this instruction, returned a verdict for the plaintiff, and upon the question reserved, the court set aside the verdict and entered a nonsuit, from which the plaintiff prayed an appeal to the Supreme Court, which was granted.

A. Moore for plaintiff.
No counsel for defendant.

DANIEL, J. 1. If the 10 bank notes in question had been totally worthless, and that fact had been known to Nelson and unknown to Wall, the passing it would have been a clear fraud on the part of Nelson, and the original balance of the price of the slave sold by Wall to Nelson would still remain due; but upon this point the plaintiff made no proof.

2. If the note was worthless at the time it was passed, from the total insolvency of the bank, and the defendant was ignorant of that fact, did it operate as a payment of the debt to the amount mentioned in the face of the bank note? It seems that the plaintiff failed to make any such proof as would entitle him to call for the decision of the Court upon this point, attempted to be raised in the court below.

3. Whether the defendant had guaranteed the goodness of the note here (that is, in North Carolina). The court left it to the jury to determine the fact, subject to the question whether a justice of the peace had jurisdiction of such a case. The jury found for the plaintiff upon the guaranty. The court, after consideration, set the verdict aside and entered a nonsuit, because a single justice had not jurisdiction of a guar-

anty like this. The plaintiff then appealed. This Court has several times decided that an action, upon a promise of a guaranty, was not within the jurisdiction of a single magistrate. *Adcock v.* (303) *Flemming,* 19 N. C., 470, and cases there cited.

PER CURIAM. Affirmed.

WILLIAM BENBURY v. BURTON W. HATHAWAY.

Where an action of tort is brought against the owner of a vessel for not delivering a cargo intrusted to him, an alteration by the plaintiff in the bill of lading, in which there had been a mistake, does not in any degree affect his right to damages.

APPEAL from CHOWAN Spring Term, 1846; *Bailey, J.*

The facts of the case are fully stated by the judge delivering the opinion of the Supreme Court.

A. Moore for plaintiff.
Heath for defendant.

NASH, J. This was an action on the case, and the declaration contained two counts, one in trover and the other in tort for negligence.

This case is, the defendant was owner of a vessel, on board of which the plaintiff shipped 615 bushels of corn, to be delivered in Norfolk to his agent, for which the consignor was to pay an agreed freight. The agent or consignee was no further instructed than to receive and sell the corn and pay over the proceeds to the plaintiff. The agent of the defendant, who received the corn on board the vessel, gave a bill of lading, and through mistake stated the quantity to be 800 bushels. This mistake was rectified by the plaintiff, in the absence of the de- (304) fendant, by striking out the quantity mentioned in the bill of lading and inserting the true amount. The day after the corn was received the vessel sank, and the corn, having been gotten up by the defendant, was by him sold in its damaged state. The action is brought to recover the value of the corn at the place of shipment.

On the part of the defendant it was contended that the plaintiff could not recover, in consequence of the alteration by him, in the absence of the defendant, of the bill of lading, whereby it was destroyed; and his counsel requested the presiding judge to so instruct the jury. This he declined to do, but charged them, if the alteration was made in good faith, to make the bill of lading speak the truth, it was not thereby rendered void, and the plaintiff was entitled to a verdict. It is not neces-

sary for us to express any opinion of the correctness of this proposition of his Honor. The question on the alteration of the bill of lading did not arise in the case. The action is brought, not on the contract, but in tort. The bill of lading was no further of importance than to show that the corn had been received by the defendant; and the case states that such was the fact. The injury to the corn is not controverted, nor is it questioned that, by the law, the defendant is answerable in damages. The only point sent to us is as to the alteration of the bill of lading. In this case it is entirely unimportant. The plaintiff could maintain his action, and was entitled to his verdict upon his proofs, independent of the bill of lading.

PER CURIAM. No error.

(305)

THE STATE v. JEFFERSON, A SLAVE.

1. On a trial for rape the prisoner may give in evidence that the woman had been his concubine, or that he had been suffered to take indecent liberties with her.
2. But he cannot give in evidence, to prove her a strumpet, that she had criminal connection with one or more particular individuals. It is a question of character, and the evidence, as in other questions of character, must be of a general nature.
3. On a trial for rape the acts and declarations of the husband of the woman on whom the offense is alleged to have been committed are not admissible to discredit the wife, examined as a witness.
4. A confession made by a prisoner while in prison is evidence against him, provided it be the prisoner's own act, not unduly obtained by promises or threats.

APPEAL from MECKLENBURG Spring Term, 1846; *Caldwell, J.*

The following are the facts, so far as relates to the questions of law submitted to this Court:

The prisoner, a slave of one Wallace, was convicted of a rape upon one Elizabeth C. Rogers, a white woman. On the trial she was a witness, and proved the offense fully. On the part of the prisoner it was admitted that he had connection with the woman, but he alleged that it was by her consent, and that there had been a previous criminal intimacy between them. In order to establish it, the prisoner offered to prove by a witness that on a certain night, some time before the alleged rape, he and the prisoner went from Wallace's towards the residence of Harvey Rogers, the husband of Elizabeth C. Rogers, and that after having gone together some distance to a neighbor's house, the witness stopped and the prisoner went on, and, after having been absent some

time, the prisoner returned and told the witness that he had been to the house of Rogers, who was from home, and had been admitted by his wife. Upon objection from the solicitor for the State, the court rejected this evidence.

After an answer in the negative to a question put to Mrs. (306) Rogers on her cross-examination, whether she had not allowed the prisoner to put his hands on her in a free and familiar manner, it was proved by another slave of Wallace, on the part of the prisoner, that he had frequently seen the prisoner treat her in that manner; and the prisoner offered further to prove that the witness Rogers had permitted other negro men to kiss her and take other liberties with her. But upon objection by the solicitor, the court rejected this latter evidence also.

The prisoner offered further to prove that Harvey Rogers, the husband, had in the presence of his wife offered to compound this prosecution with Wallace, the owner of the prisoner. But the solicitor objected to this evidence, and the court refused to admit it.

It was then proposed on the part of the State to give in evidence the confession of the prisoner, and, for that purpose, one Springs was examined. He stated that on one occasion, after the prisoner had been committed to jail on this charge, he saw the prisoner and asked him to whom he belonged, and why he was in prison, to which the other replied that he belonged to Wallace, and was in jail for a rape on Mrs. Rogers. The witness, having heard something of the case, then said, "Yes, I have heard of you; and it is said you choked her and had your will of her"; and the prisoner answered that he did. The witness said that he then asked the prisoner why he did so, and the latter replied that he supposed he must have been drunk; and that, to the question from the witness, "Did you know it would hang you?" the prisoner replied that he did not. To this evidence the counsel for the prisoner objected, but the court received it.

After sentence of death upon conviction, the prisoner appealed to this Court.

Attorney-General for the State.
Alexander and J. H. Bryan for defendant.

RUFFIN, C. J. Upon all the questions of evidence the ruling (307) of his Honor was, in the opinion of this Court, right. It was not competent to establish that the woman was the prisoner's concubine, or any fact from which that relation might be inferred, merely upon the prisoner's own declaration of it, and especially when the declaration refers to a period and act different from those which enter into the particular offense charged in the indictment. A person cannot thus make evidence for himself.

That familiarities had occurred indicative of habitual criminal connection between those persons, as proved by the prisoner's fellow-servant, was properly left to the jury as tending to disprove the probability of the use of force or fear by the prisoner, and to discredit the witness for the State. No doubt, too, that it would have been proper to receive evidence that the woman was a strumpet, upon similar grounds; and, particularly, that she had illicit intercourse with other negroes. But that ought only to be done upon general evidence, for it is a question of character, and, as in other cases when that question arises, it would be a complete surprise if particular instances of such familiarity with a certain person, or with certain persons, were received to establish the character. The point, indeed, is not new, but was so ruled in a case of this sort by eight judges in 1811, *Hodson's case,* Russ. and Ry., 211; and was held, also, in *Rex v. Clarke,* 2 Stark., 241.

The offer of the husband to compound the prosecution was irrelevant, and, therefore, only calculated to mislead, and was properly rejected. His motives for instituting the prosecution, if he did so, which is not stated, may not have been good; but that does not tend to show that she was not creditable, or that the facts were not as she had sworn they were. The husband's acts and declarations are not evidence to discredit the wife. It is said, however, that the offer was made in her presence, and that, as she did not object, she is to be taken to have assented to
(308) it. But it is plain that she had no right nor power to interfere in the matter, and that her assent or dissent could avail nothing. If the husband had undertaken to state the facts as they occurred, or as they had been stated to him by his wife, and that statement had varied from the evidence given by her, and she suffered it to pass without notice and correction, it would have been proper evidence to contradict and discredit her. He did not, however, profess to relate the facts at all, but merely offered to compound the prosecution, which he might have done as well as if it was instituted for acts committed by the prisoner as if it were for acts falsely imputed to him by the wife. The evidence is too slight and vague to found any just suspicion of a conspiracy between the husband and wife to prosecute the prisoner upon a false accusation, since there is nothing but the silence of the wife on a point in which she had in law and fact no control over her husband.

The confession of the accused freely made is evidence against him; and, as far as appears, this was of that sort. There was no attempt to show that Springs induced the prisoner to make it by any impression of hope or fear, nor even a suggestion that such an impression had been previously made on him by any person from the influence of which this might have proceeded. All that is in the case are the circumstances that the prisoner was in jail when he confessed, and that he said he was not

aware of the punishment inflicted by the law for that offense. But there is no doubt that a confession made in prison is evidence, provided it be the prisoner's own act, not unduly obtained by promises or threats; and, certainly, a confession cannot be deemed the less voluntary or the less to disclose the truth because the person was not under the temptation to conceal or misrepresent the facts, which a knowledge that the offense was capital might have produced. If, indeed, the prisoner had been deceived on that point by the witness it would be different, as that would really be obtaining the confession by falsely exciting an (309) unfounded hope and belief. But the mere fact that the prisoner was not aware of the degree of his crime and, therefore, was not aware of all the consequences that might ensue from the confession is no objection to using it; for it affords no presumption that it was not a voluntary act of the prisoner or that he may have accused himself therein of some things of which he was innocent. Upon the whole, nothing is found in the exceptions or record on which the judgment ought to be reversed.

PER CURIAM. No error.

Cited: S. v. Wright, 61 N. C., 487; *S. v. Cruse,* 74 N. C., 492; *S. v. Needham,* 78 N. C., 476; *S. v. Efler,* 85 N. C., 590; *S. v Daniel,* 87 N. C., 508; *S. v. Howard,* 92 N. C., 777; *S. v. Parish,* 104 N. C., 691.

JAMES W. DOAK v. THE BANK OF THE STATE.

1. A pledge of personal property, as, for example, a pledge of bank stock, differs from a mortgage, and is not included within the words or meaning of the registry act.
2. A mortgage is a pledge and something more, for it is an absolute pledge, to become an absolute interest if not redeemed in a certain time.
3. A pledge is a deposit of personal effects, not to be taken back but on payment of a certain sum, by express stipulation to be a lien on it.
4. Generally speaking, a bill in equity to redeem will not lie in behalf of a pledger or his representatives, as his remedy is at law upon a tender of the money.
5. Per NASH, J. The Legislature clearly recognized the distinction between mortgages and pledges of property for the payment of debts to banks, in the act chartering the Cape Fear Bank in 1804, and in the act chartering the Merchants Bank of New Bern in 1834.
6. Per RUFFIN, C. J. The stock in the bank, pledged in this case, was not tangible property, subject to execution, and, therefore, did not come within the words or meaning of the registry act, nor within the mischief intended to be prevented by the Legislature in directing encumbrances on property to be registered. Pledges of personal property, tangible to legal process, are as much within the act as mortgages or deeds of trust.

(310) APPEAL from GUILFORD Fall Term, 1845; *Dick, J.*

Assumpsit in which the plaintiff declared upon the following counts, to wit:

First. James W. Doak, who sues to the use of Peter Adams, complains of the corporation known as "The Bank of the State of North Carolina," for that whereas one Dan Alexander, on .... day of....., 1840, was possessed, in his own proper right, of one hundred shares of capital stock in the said corporation, and, being so possessed, he, the said Dan Alexander, was arrested by a writ of *capias ad satisfaciendum,* at the suit of Peter Adams, returnable to Spring term of the Superior Court of law for Guilford County, begun and held at Greensboro on the third Monday after the fourth Monday in March, 1841, when and where, designing and intending to apply to the said court to be allowed the benefit of the act of the General Assembly of North Carolina passed for the relief of insolvent debtors, the said Dan Alexander afterwards, to wit, on 29 March, 1841, filed in the office of the clerk of the said court a schedule of his property and effects, and afterwards, to wit, at the term of the said Superior Court of law begun and held, etc., on the third Monday after the fourth Monday of September, 1841, filed an amended schedule of his property and effects of every description, by the filing of which schedule and amended schedule the interest of the said Dan Alexander in the one hundred shares of capital stock aforesaid was surrendered to and became vested in the said James W. Doak, who was then and still is sheriff of Guilford County aforesaid, for the use and benefit of all the creditors of him, the said Dan Alexander's creditors, according to the provisions of the act of Assembly in such cases made and provided, and the said Dan Alexander having, as aforesaid, filed his said schedule and amended schedule, and made thereby a surrender, as aforesaid, for the purpose aforesaid, of all his property and effects, including the said one hundred shares in the capital stock in the corporation aforesaid, was afterwards, to wit, at the term of the court aforesaid on the

(311) third Monday after the fourth Monday of September, 1841, by the said court allowed to take the oath by law prescribed for the relief of insolvent debtors, and was then and there discharged according to the form and direction of the act of Assembly in such case made and provided, by virtue of which said surrender and discharge, and by virtue of the said act of Assembly, the said James W. Doak, sheriff as aforesaid, became entitled to the said one hundred shares of capital stock in the corporation aforesaid for the benefit of the creditors of the said Dan Alexander, and to have the same transferred to him upon the books of the said corporation; but the said corporation afterwards sold and transferred the said shares of capital stock to other persons to the plaintiff unknown, and received to its own use the money arising therefrom,

whereby the said corporation became liable to account to the plaintiff for the sum of money so received, which sum of money the plaintiff avers to be the sum of $10,746.08; and although the said corporation is so liable, and on the day of the sale and the transfer of the stock aforesaid, at Guilford aforesaid, did promise to account with the plaintiff for the sum so received as aforesaid, yet, disregarding, etc., though often requested, hath refused, etc. (concluding in the usual form).

Second count—After the same premises. And that by reason of the premises aforesaid the said corporation became liable to transfer the said one hundred shares of capital stock to the plaintiff for the use and benefit of the creditors of the said Dan Alexander, he, the said plaintiff, so being the sheriff of Guilford County as aforesaid, and, being so liable, the said corporation afterwards, to wit, on .... day of ....., 1841, at Guilford aforesaid, undertook and promised the plaintiff, as sheriff aforesaid, to transfer to him the stock aforesaid when the said corporation should be thereunto requested, which said shares of stock the plaintiff avers to be of the value of $10,746.08; and though afterwards,
to wit, on .... day of ....., the said corporation was re- (312)
quested by the plaintiff to transfer to him the said shares, etc.,
yet, disregarding, etc., it refused so to do (with the common conclusion).

Third count—after reciting the premises as before, charged the defendants with the amount of the proceeds of the sale of the stock as so much money had and received to the use of the plaintiff (concluding in the usual form).

To this declaration the defendants entered the pleas of "The general issue, payment, and set-off," and issue was joined.

By consent of the parties, a verdict was rendered for the plaintiff for the sum of $10,695, subject to the opinion of the court upon the following case:

The plaintiff declares against the defendants in assumpsit in three counts, and on the trial proved that on 21 March, 1841, Peter Adams brought suit in this court against one Dan Alexander, and at Fall Term, 1841, obtained judgment in his said action for $3,750 debt and $461.50 damages, besides costs, etc.; that the said Adams sued out, upon his said judgment, a writ of *capias ad satisfaciendum*, returnable to Spring term of the said court, on which the said Dan Alexander was arrested and gave bond for his appearance at the said term, to take the benefit of the statute for the relief of insolvent debtors, and on 29 March, 1841, filed in the office of the clerk of the court a schedule of his property and effects, according to the said statute, in which (among other things) was included this entry: "One hundred shares in the Bank of the State of North Carolina, pledged to the said bank for the payment of $10,500, due by said Dan Alexander"; that at Fall Term, 1841, of said court the

said Dan Alexander obtained leave to amend his schedule, and in (313) the schedule filed 23 October, 1841, under the said leave, was this entry: "One hundred shares in the Bank of the State of North Carolina"; that the said amended schedule being filed, the said Dan Alexander was duly admitted to take the oath by the said statute in such cases prescribed, and was by judgment of the said court then and there duly discharged according to the said statute; and it was also adjudged that the property, effects, debts, claims, and choses in action were in the plaintiff, Doak, sheriff of Guilford, for the purposes and intents in the statute declared. And the plaintiff further proved that on 6 December, 1841, Charles Dewey, under a power of attorney from the said Dan Alexander dated 16 November, 1841, sold the said one hundred shares of stock for the sum of $10,695, and directed the agent of the bank at Charlotte to apply the same to the indebtedness of the said Dan Alexander to the bank, as the same was reported to him by the said agent, and that the same was applied to the use of the bank accordingly. And here the plaintiff stopped his proof.

The defendants then proved that on 9 September, 1839, the said Dan Alexander was indebted to the defendants, at their office in Charlotte, in several notes, amounting in the whole to $9,977, and on that day gave his bond for the said sum, payable eighty-eight days thereafter, secured by a pledge of the said one hundred shares of stock, the original certificate of which he then deposited with the agent of the bank at Charlotte, and made a power of attorney attached to the said bond, authorizing the said agent as his attorney to sell the said stock in order to pay the said bond should it not be paid otherwise; a copy of which said bond and power is attached, marked (A), as a part of this case. The defendants further proved that the said bond was not paid at maturity, but that on 6 January, 1841, the same was renewed in full by the said Alex- (314) ander giving a new bond payable eighty-eight days after date, for the same sum, on the pledge of the same stock and renewal of the power; a copy of which said bond and power, marked (B), is hereunto annexed as a part of this case. That the said bond was not paid or renewed at maturity, and, the same remaining wholly unpaid, the said Dan Alexander on 16 November, 1841, made the power of attorney hereinbefore mentioned, authorizing the said Charles Dewey to sell the said stock, who accordingly made the sale, as already provided; a copy of which said power of attorney, marked (C), is hereto annexed as a part of this case. And the defendant further proved that the said agent at Charlotte, having received, on 9 December, Dewey's account of the sale, and directions thereupon, he on that day applied $10,375.80 to the payment of the principal and interest then due on the bond for which the stock was pledged, and deposited the residue of the proceeds of the

sale of stock, $371, to the credit of the said Dan Alexander; and the said defendants further proved that in July, 1839, one William F. Alexander was indebted to the bank by a note at Charlotte for $700, with the said Dan Alexander as surety; that the said Dan Alexander had assumed to pay the said debt, and had, by sundry payments made between July, 1839, and August, 1841, reduced the same to $371, for which a note of said Dan Alexander was given, payable in November afterwards; that on 15 December, 1841, the said Dan Alexander applied in person at the agency in Charlotte, drew a check for the sum of $371, so deposited to his credit, received the money, and then applied it to the payment of the said note of $371, which was thereupon delivered up to him by the said agent.

Upon these facts the defendants contended that the plaintiff was not entitled to recover (amongst other reasons) because the facts proved did not support his declaration; because, as to the debt (315) for which the stock was pledged, the said Dan Alexander had therein no interest at the time of the schedule, except a right to the stock on payment of the debt, or to the surplus of the sale after paying the debt, and no other right could or did pass to the plaintiff therein; that, as to the surplus, the plaintiff could not recover, because the same was rightfully deposited to the credit of the said Dan Alexander, and neither the defendants nor their agent having any notice whatever of the filing of the schedule or other proceedings on or before 19 December, 1841, the same was rightfully paid to him and properly received in payment of the said note, which was then *bona fide* surrendered to him; and that the plaintiff could not recover for want of notice to and demand upon the defendants before the bringing of the action.

On the contrary, the plaintiff contended, among other things, that the proceedings upon the *ca. sa.*, the schedule, and the judgment, having taken place in a court of record having legal cognizance of the case, constituted notice to all the world, and the defendants were affected thereby; that the stock, when sold, was the property, not of Dan Alexander, but of the plaintiff, and the powers of sale made by the said Alexander were in law revoked, and hence the proceeds of the sale belonged wholly to the plaintiff; and, also, that as to the surplus which was not pledged, it was an illegal act of the defendants' agent, for which they were responsible, to allow the said Alexander to apply it to debt of the defendants for which the defendants had no lien on the stock whatever.

And thereupon it was agreed by the parties that the foregoing verdict should be entered for the plaintiff for the whole amount of the sale and interest thereon from the time of sale, subject to the opinion of the court upon the whole case, the sufficiency of the declaration, and the proof to support it, and of the rights of the parties upon the foregoing facts.

(316) And it is agreed that should the court be of opinion that the plaintiff is not entitled to recover at all, then the judgment shall be entered for the defendants. But if the court shall be of opinion that the plaintiff is entitled to recover, then judgment is to be entered for the plaintiff either for the whole amount found by the jury or for any other or lesser sum which the court shall think the plaintiff entitled to. Signed, "John Kerr for plaintiff; George E. Badger for defendants."

Upon the foregoing verdict, his Honor being of opinion that the plaintiff is entitled to recover the sum of $371, with interest from 13 December, 1841, thereon, and no more, it is considered by the court that the plaintiff recover the said sum, and have execution therefor. With which judgment both plaintiff and defendants, being dissatisfied, prayed an appeal to the Supreme Court, which was granted, security for the same being waived by both sides.

(A)

Eighty-eight days after date I promise to pay John J. Blackwell agent, etc., or order, $9,977, for value received, negotiable and payable at the agency of the Bank of the State of North Carolina at Charlotte; and to secure the payment thereof I have pledged one hundred shares belonging to me in the capital stock of said bank, contained in Certificate No. 207, issued in my name for one hundred shares, which certificate I have lodged with the agent aforesaid, whom I hereby appoint my lawful attorney to sell and transfer said stock in case of failure of payment.

In witness whereof, I have hereunto set my hand and seal this 9 September, A. D. 1840.

$9,977. DAN ALEXANDER. [SEAL]

(B)

Eighty-eight days after date I promise to pay to John J. Blackwell, agent, etc., or order, $9,977, for value received, negotiable and
(317) payable at the agency of the Bank of the State of North Carolina at Charlotte; and to secure the payment thereof I have pledged one hundred shares belonging to me in the capital stock of said bank, contained in Certificate No. 207, issued in my name for one hundred shares, which certificate I have lodged with the agent aforesaid, whom I hereby appoint my lawful attorney to sell and transfer said stock in case of failure of payment.

Witness my hand and seal this 6 January, 1841.

DAN ALEXANDER. [SEAL]

(C)

Know all men by these presents, that I, Dan Alexander, of the county of Mecklenburg and State of North Carolina, do hereby constitute and appoint Charles Dewey, Esq., of the city of Raleigh, my true and lawful

attorney to sell and transfer one hundred shares belonging to me in the capital or joint stock of the Bank of the State of North Carolina, contained in Certificate No. 207, issued in my name, and for that purpose to make and execute all necessary acts of transfer and assignment, and to pay over the amount of such sale of stock to the agent of the said Bank at Charlotte, North Carolina, to be applied by said agent to the discharge of my indebtedness to said bank.

This power is made in furtherance of one for the same purpose, dated 6 January last, appointing J. J. Blackwood my attorney.

In witness whereof I have hereunto set my hand and seal, this 16 November, 1841.

DAN ALEXANDER. [SEAL]

Test: T. M. ALEXANDER.

Kerr for plaintiff.
Badger and Morehead for defendants.

DANIEL, J. The plaintiff, as the assignee in law of all the (318) effects mentioned in the schedule of Dan Alexander, an insolvent debtor, dated 21 October, 1841, has brought this action of assumpsit against the bank to recover the amount of money which the one hundred shares of bank stock mentioned in the said schedule produced on the sale thereof made by C. Dewey, and by him placed in the possession of the bank. The plaintiff declares that the bank had and received the said sum of money to his use. The bank, under the plea of *non assumpsit,* resists the demand of all or any part of the moneys so paid in by Dewey. *First,* because D. Alexander, before the date of the assignment of his effects to the plaintiff, to wit, on 6 January, 1841, had pledged the said stock to one Blackwood, its agent, as collateral security to satisfy a debt of $9,977 then owing by him to the said bank. *Secondly,* that D. Alexander gave a check for $371, dated on 15 December, 1841, to apply so much of the money then standing in bank to his credit to the satisfaction of a debt to that amount which he then owed the said bank; and that the same had been applied accordingly without any notice at the time to the bank that Alexander had, before the date of the check, taken the benefit of the insolvent law in Guilford Superior Court. The evidence of the pledge to the bank of the aforesaid stock is to be found in the two deeds described in the case by the letters (A) and (B). The plaintiff insists that these two deeds are void as to him, by force of the act of Assembly, Rev. Stat., ch. 37, sec. 24, because they have never been registered. The answer to this objection is that the statute only declares that deeds of trust and mortgages shall not be valid against creditors or purchasers but from the registration. The instruments marked (A) and (B) are certainly not deeds of trust, and we think that they are not mortgages; they are what they profess on their face to be,

pledges of stock to secure the payment of the debt therein men-
(319) tioned. A mortgage of personal property in law differs from a pledge; the former is a conditional transfer or conveyance of the property itself; and if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in a mortgage of lands; the latter, a pledge, only passes the possession, or at most is a special property in the pledge, with the right of retainer until the debt is paid. A mortgage is a pledge and more, for it is an absolute pledge, to become an absolute interest if not redeemed in a certain time. A pledge is a deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation, to be a lien upon it. *Jones v. Smith,* 2 Ves., Jr., 378; 4 Kent Com., 138 (3 Ed.); 2 Story Eq., 227. Generally speaking, a bill in equity to redeem will not lie in behalf of a pledger or his representatives, as his remedy is at law, upon a tender of the money. 2 Story Eq., 298; 1 Ves., 298. We see that there is a very marked difference between a mortgage and a pledge of personal property; and, as the Legislature has not said that pledges, to be good against creditors and purchasers, must be registered, neither can we declare them to be within the meaning and operation of the aforesaid registry act. We cannot tell but what the Legislature designedly left pledges out of the act. It seems to us, therefore, that the deeds (A) and (B) are made at the common law, and do not require to be registered to give them effect. The receipt by the bank of so much of the proceeds of the sale of the said stock as was necessary to satisfy the debt for which the stock had been pledged had been received, not to the use of the plaintiff, but to the use of the bank.

Secondly. The $371, standing in bank to the credit of D. Alexander, was legally assigned to the plaintiff before the date of the check given by Alexander to the bank for that money. The bank alleges that it had no notice of this assignment to the plaintiff when the check was received
and applied in extinguishing D. Alexander's debt to that amount
(320) then in bank. The answer to this allegation is that a plea of a purchase for a valuable consideration, without notice, is not available against an adverse legal title to the thing, either in a court of law or equity. It is very plain that the stock was sold by Dewey and the purchase money received by the bank with the assent of Alexander, Blackwood, and the bank; and that the sale of the stock and receipt of the purchase money were legally made are facts obliged to be admitted by the plaintiff before he can be permitted to rely on either the first or third counts in his declaration. But to whose use the money was had and received by the bank is the question now to be decided. There was no evidence in the case applicable to the second count, even if *assumpsit* could be maintained against the bank for refusing to transfer stock to a

purchaser of it. We are of opinion, upon an examination of the whole case, that all the money received by the bank, over and above the sum necessary to satisfy the debt and interest mentioned in the deed marked (B), was money had and received to the use of the plaintiff, and no other sums of money. The check given by Alexander transferred to the bank no title to the money which was standing there in his name, because it had in law been assigned to the plaintiff before the date of the check. We think that the plaintiff was entitled to recover this money under the third count in the declaration.

We find no authority that a demand was necessary before the plaintiff could sustain his action; this objection, taken by the defendant, is therefore overruled.

NASH, J. The proceeds of the sale of the stock are claimed by the plaintiff upon the ground that the transfer to the bank was void because the deeds or bonds of September, 1839, and January, 1841, were not proved and registered agreeably to the provisions of the act of Assembly. Rev. Stat., ch. 37, secs. 23, 24.

I agree with my brother *Daniel,* that the deeds or bonds under (321) which the defendants claim the proceeds of the stock are valid at common law, and need not be registered to give them effect. I cannot see that the transaction came within the meaning of the act referred to, and certainly not within its words. The transfer of the stock by Alexander to the bank was neither a mortgage nor a deed, or conveyance in trust, but was simply what it purported to be, a pledge of the stock. The difference between a mortgage and a pledge, strictly as such, is well known and recognized by the most approved writers. The passages from Story's Equity, referred to in *Judge Daniel's* opinion, fully prove it. A mortgage conveys the entire property in the thing mortgaged conditionally, so that, when the condition is broken, the property, at law, remains absolutely in the mortgagee; but a pledge never conveys the general, but only a special property, to the bailee; and the effect of a failure on the part of the pawner to pay the money for which it is pledged is not to convey the entire property in the thing to the bailee, but to give him a power to dispose of it and pay himself. If he does not do so, but retains the property, the pawner at any time has a right to redeem it. If the debt is paid or the money tendered by the pawner, it is the duty of the bailee to return the thing pawned, and, if he does not, an action at law lies against him, as the whole property is revested thereby in the pawner. Jones on Bail, 91. So, also, it is essential to a pledge that the possession of the article should accompany it. My opinion, however, is not, in this case, formed so much upon the difference between a mortgage and a pledge as upon the nature of the property here put in pawn, namely, the certificate of stock—a mode of securing

debts to the bank, known to the Legislature and sanctioned by them. In the act chartering the Bank of Cape Fear, 2 Rev. Stat., sec. 8, p. 40, in pointing out in what things the corporation shall be permitted to deal, the act enumerates, "or in the sale of goods really and truly
(322) pledged for money lent and not redeemed in due time." This act was passed in 1804. The charter of the Merchants Bank of New Bern was granted in 1834, 2 Rev. Stat., p. 69. In section 5, among the fundamental articles of the corporation, it is provided: "In all cases, in addition to the usual personal security, the stock of directors shall be considered as a pledge for the repayment of the money they may borrow, either as principal or security." And there is the same restriction as to the subjects in which they shall deal, as in the charter of the Cape Fear Bank, expressly including articles *pledged*. The acts concerning mortgages, to which reference has been made, were passed in 1820. Both before and after the passage of these acts the Legislature recognized the right of the banks to receive in *pawn* or *pledge* its own stock as collateral security for money loaned; it is to be received not in mortgage, or in trust, properly speaking, but in pledge, and subject, of course, to the laws regulating pawns. Nor can any evil possibly result, from such an arrangement, to any creditor of the pawner, for the certificate of stock must in every instance accompany the transfer to make it effectual. I cannot, therefore, persuade myself that the Legislature intended to embrace within its provisions upon the subject of mortgages and deeds of trust such a transaction as this.

I concur with my brother *Daniel* in affirming the judgment.

RUFFIN, C. J. I concur in the opinion that the judgment should be affirmed. I think a pledge of stock in a corporation, or in the public funds, or of securities for a debt, whether by parol or in writing, is not within the act which requires deeds of trust or mortgages of estates to be registered in order to give them validity. It is neither in form or substance within the language of the act, nor within the mischief which it is sought to suppress. Had it pleased my brethren to
(323) allow the cause to be decided on this point—and it is the only one which is necessary to its decision—the judgment might, as far as I am concerned, have been entered immediately after the argument at the last term. But they have thought it proper not to confine their opinion to the facts of this case, and hold that a pledge of *stock* is not within the act, but place their judgment upon broader ground, that all *pledges*, whether of stock, choses in action, or *specific articles*, are without the act. In that part of their opinion I did not agree; and, with a view to a fuller consideration of the question, the case was left under advisement. But we have come no nearer together than at first, and it now becomes my duty to give the reasons for my opinion.

The act of 1829, ch. 20, is entitled "An act to prevent fraud in deeds of trust and mortgages," and it enacts "that no deed of trust or mortgage for real or personal estate shall be valid to pass any property as against creditors or purchasers from the donor or mortgagor but from the registration of such deed of trust or mortgage in the county where the land lieth, or, in case of chattels, where the mortgagor resides or the chattels are situate." My brethren say that a pledge or power is not mentioned in the act, but only deeds of trust or mortgages, and that there are certain known differences between a pledge and a mortgage of chattels, and, therefore, the Legislature may have designedly left out pledges, and, at all events, that the Court cannot construe the act as if they were in it. It is plain that the argument is merely verbal, turning upon the particular term "mortgage" and having no regard to the mischief within the purview of the act nor the means intended to suppress it. But that is not the principle of the construction of *remedial* statutes or those to prevent *fraud*. To stick to their letter is sticking in the shell and losing the kernel.

They are to be liberally construed in order to defeat fraud, prevent artful shifts and evasions, and protect fair dealers, and advance their remedies. I need not quote authority for that position. It is a maxim in the law, and is to my mind decisive of this question. (324) I do not dispute the distinction between pledges and mortgages, which are mentioned; though, in modern times, courts of equity have not hesitated to give relief on pledges as if they were pure mortgages, upon the ground that they were but securities for debt, and that the rights of the parties may involve an account. Certainly, in this State, in the instance of the most valuable of our chattels, namely, slaves, bills for redemption or foreclosure have been constantly entertained, as well when the slave was pledged by being put in the possession of the lender of the money without a written conveyance as when there was in terms a mortgage proper by deed. But let it be admitted that all those distinctions do fully subsist at the present day, still they are differences in no degree material to the purpose which we are now considering, namely, the reason why the Legislature requires mortgages to be registered, and to what conveyances or contracts those reasons extend. The object of the law was to prevent fraud, and to that end to require *all encumbrances upon tangible estates* to be registered, that purchasers and creditors might have notice of their existence, nature, and extent. It mentions "deeds of trust" and "mortgages," but it is not satisfied by applying it only to conveyances, which are, *technically* and *in form*, deeds of trust or mortgages. The intention of the Legislature can be fulfilled only by including within the scope of the act all other conveyances which the parties intended to have the same effect as if they were "deeds of trust"

or "mortgages" upon their face; in other words, were meant to be *securities for money,* and between the parties are but securities. If the construction is to be narrowed down so as to make it turn on the word "mortgages," and not include "a pledge," because a pledge is not a mortgage, why, for the same reason, an absolute deed with a
(325) separate parol agreement for a reconveyance or redemption is not within the act, since this is not upon *its face* a "mortgage," but is only held by a court of equity to be a security in the nature of a mortgage. Accordingly, in the first case that arose under the encumbrance registry acts, *Gregory v. Perkins,* 15 N. C., 50, it was held that the necessary construction of the act of 1820, by which instruments which in themselves are deeds of trust or mortgages were required to be registered within six months, was to avoid deeds which were intended to be securities, but do not profess upon their face to be so. The Court said: "It is not surprising that, with the experience of the evils of secret liens and pretended encumbrances, the Legislature should require, when the contract, in its terms, creates *an encumbrance,* that notice should be given of it, that other persons may know how to deal with the former owner. For the like reason, and as a necessary consequence, when nothing but *an encumbrance* was meant, the parties must frame the evidence of their contract accordingly. In the former case (that is, where there is a mortgage in form) the encumbrance is lost, because the owner will not register it. In the latter (that is, when upon its face the deed is absolute) because by his folly he cannot register it." And the Court then added that a case was brought within the act by the reservation of anything to the former owner, which, *if inserted in a deed,* would give him a valuable interest in the property, whether that interest was legal or equitable. It is very plain that it must in reason be so. There are two kinds of fraud practiced by means of these encumbrances. One is where the former owner remains in possession, using and enjoying the estate after he has conveyed it as a security to another, and thereby gains a false credit. Then the law requires that the conveyance should speak the truth in itself, as to its nature, and also that it should be registered in order that the world may see for what the encumbrance is created. Another is where the possession passes to the
(326) holder of the encumbrance, but still leaving an interest in the former owner. Then, also, the law requires that the conveyance should speak the truth, and be registered for the purposes of publicity, in order that the creditors of the former owner may not be baffled by his apparent departing with the property, but take their remedies, legal or equitable, directly against the debtor's remaining interest, whatever it may be. For that reason, in *Halcombe v. Ray,* 23 N. C., 340, it was held that an absolute deed, intended at the time as a mortgage, was void under the

acts of 1820 and 1829, because, if they were not thus held, it would make those acts a dead letter, as parties would have nothing more to do but leave out the condition or proviso for redemption, and the whole policy of the Legislature would fall to the ground. The language of the case is, "If the deed had truly expressed the contract of the parties, the mortgagor's creditors would have a plain *legal* remedy, under the act of 1812, against his equity of redemption in land, and *in equity* against that in chattels; and the Legislature, by the acts under consideration, intended to provide for those creditors such means of knowledge as would enable them to avail themselves promptly and cheaply of *those remedies.* Our duty is to receive and administer the statutes in a sense which will secure to the creditor the whole benefit intended for him; and we are obliged to hold the deed void, because, if allowed to stand, the creditor would be in the same condition as if such laws (the registry acts) had never passed." It is thus seen that this Court thought the meaning of this act was not to be found out by tying our attention down to the words "deeds of trust or mortgages," but that those words were used as examples or instances of encumbrances, and that the true sense of the act extends to every transaction that was intended between the parties to be an encumbrance. That is declared, in so many words, in *Newsom v. Roles,* 23 N. C., 179. The Court say: *"Gregory v. Perkins* has in view those conveyances which, *whatever be their form,* are (327) intended by the parties as *securities;* upon which, if the instrument had set forth the true and whole agreement, the property, in view of the court of equity, is deemed to be in the apparent vendor, though liable, as a security, for a sum of money due to the apparent vendee." In other words, that case treats of transactions "that appear to the world to be sales, but are, as between the parties, secretly mortgages, *or in the nature of mortgages.*" All these positions were laid down as the opinions of the Court, and not of the single judge who spoke for the Court; and I believe they were fully entertained by all the members of the Court at the time. To show how completely the doctrine was settled in my own mind as the doctrine of the Court, I will take the liberty of referring to what I said of it in *Womble v. Battle,* 38 N. C., 196, in using it in illustration of the positions I there took. It was, "that as the object of the acts of 1820 and 1829 is to suppress fraud by compelling persons to register encumbrances, the necessary construction of them is that *every encumbrance* not in writing, and so not capable of registration, *is within the mischief of the act,* and made void by it." I am aware that these registry acts have not been favorites of my brother *Daniel,* because they treat acts and avoid them as fraudulent when there may not be an actual or intended fraud; and in *Womble v. Battle* he refused to allow any weight to the argument drawn from them against

the vendor's or other secret equitable liens. But the act of 1829 is not directed against frauds actually perpetrated, as the St. 13 Eliz. is, but regards acts which tend to fraud. As it says, it really means "to *prevent fraud* in deeds of trust and mortgages" by making them void in the same manner as they would be by the statute of 1715, if they were actually fraudulent. That policy of the law a judge ought to further and not defeat by any opposite notion of his own. For my own
(328) part, however, I deem it a most wise policy to cause encumbrances to be published. And in the case last mentioned *Judge Nash* seems to have the same views of it. He says: "There can be no doubt of the policy of the Legislature in the enactment of this statute of 1829. It was to put an end to the *many frauds* which *might* be practiced on creditors and purchasers by secret deeds of trust and mortgages, by furnishing a convenient and sure mode in which might be discovered *all encumbrances* under which an individual held his property." Now, I would ask, is not a plege of a negro an encumbrance? If not a mortgage, is it not a security for debt, and, at all events, a security *in the nature of a mortgage?* Is it not, then, within the mischief of the act, and, therefore, to be remedied by so construing the act as to prevent its being evaded by means of the use of a pledge in the place of a mortgage, as contra-distinguished from it by an actual conveyance of the chattels? I think the cases I have cited, if they are to be allowed any authority as adjudications of this Court, decisively answer those questions; and that they as much forbid a resort to pledges to escape the necessity of giving notice of them by registration as they do a resort for that purpose to conveyances absolute upon their face. Neither is "a mortgage" in terms not appearing upon its face to be so. But the same reason which induced the Legislature to forbid the taking of absolute deeds when a security in nature of a mortgage is intended likewise forbids the taking "a pledge" instead of a mortgage, if by taking the pledge the transaction is to be by parol or unregistered agreement so as to be kept secret. I cannot but express exceeding regret at the thought that those cases should be overruled, both because it tends to subvert all certainty in the law and also to obstruct a most wise policy of the Legislature. Independent, however, of the authority of those cases and the reasoning on which, as declared in them, the resolutions were adopted, they are fully sustained by adjudications upon other statutes in their nature
(329) remedial or for the suppression of fraud. Take, for example, what *Lord Coke* says in *Irvin's case*, 3 Rep., 82, that if, contrary to St. 27 Eliz., avoiding, as to purchasers, a previous conveyance with power in the grantor to revoke it, a man make a deed and reserve to himself a power to revoke it *with the assent of another*, it is within the statute, "for otherwise the good provision of the act by a small addition

—an evil invention—would be defeated." So, it is a rule of law that an appointment is not a conveyance, and the estate of the appointee takes effect as if it had been created in the instrument which created the power. Yet *Lord Hardwicke,* notwithstanding the verbal criticism, held that the execution of a power *is a conveyance* within the meaning of the St. 13 Eliz., ch. 5, in favor of creditors, although the act uses the terms, "feoffment, gift, grant, alienation, bargain, and conveyance," ousting "appointment," or any word equivalent to it in its restricted sense of being the execution of a power. *Marlborough v. Godolphin,* 2 Ves., 60. *Scrafton v. Quincy,* 2 Ves., 413, is still more appropriate, because it was a decision upon a registry act. A deed of appointment was made for land lying in a register county, in pursuance of a power created in a deed not registered, and the appointee was postponed to a mortgage subsequently made but registered first.

It was contended the act did not apply because those deeds did not convey land, but only created a power to appoint, and the appointment. But what said the Chancellor? "Consider the intent and meaning of the act. The case is clearly within the mischief. It is said this deed is not to be considered as a separate conveyance, but only the execution of a power. If that construction was to prevail, there would be an end of the registry and of the act of Parliament, for by these means secret deeds" (not conveying the land, but creating and executing powers over it) "might be set up to defeat him who had registered. Being a conveyance actually affecting the land, though in virtue of a (330) proceeding power in another deed, *this is, within the intent of the statute and common understanding, such an encumbrance* as ought to be registered." One would think that those cases and observations were sufficient to prove the proper construction of our statute, and that a pledge of specific chattels is within the provisions, just as much as a mortgage proper. But I will add some others, that I may omit nothing that may serve to elucidate the point and give full efficiency to this valuable statute, if executed in the spirit in which it was passed. In *Saunders v. Ferrill,* 23 N. C., 97, there was an antenuptial marriage contract, and the husband fraudulently reduced it to writing, so as to omit a material provision in favor of the wife; but after the marriage a settlement was executed according to the original and true agreement. Yet the Court held that evidence of the contract, as far as it differed from the written agreement, could not be received in support of the settlement, notwithstanding the fraud on the wife, because it was in parol; for it was deemed "a self-evident position that those agreements must be in writing, as in that form alone do they admit of registration" —which ceremony the law requires as respects marriage contracts. It might have been said, then, that the Legislature knew that people some-

times made verbal marriage contracts, and, therefore, that in requiring marriage contracts to be registered, written ones alone were meant. But the answer was that secret encumbrances, in the form of marriage contracts, were the evils in view, and in order to prevent them the law required the registration of all marriage contracts, and, in so doing, required them by implication to be in writing, and made them void if they were not. The same reason applies here. Again, in *Thorpe v. Ricks*, 21 N. C., 613, a man contracted for the purchase of land, and, in order to pay for it, borrowed the money, and secured it by having the land conveyed by his vendor to the lender of the money, taking
(331) from the latter a written acknowledgment that the land was but a security. The act of 1812 enacts that "the equity of redemption in lands pledged or mortgaged" shall be liable to execution; and it was contended that the purchaser's interest was not subject to execution, because there was no "mortgage," and of course he had no "equity of redemption," as the deed was not a formal mortgage, with an express provision for defeasance. But notwithstanding the policy of selling such interests under execution instead of a decree of a court of equity did not accord with our views (as it never did, I believe, with those of any lawyer who gave the subject even a little thought), the Court held that we were bound to advance the policy approved by the Legislature, and, therefore, that an equity of redemption, raised by construction of the court of equity, was subject to execution as well as those expressly made so by the terms of a mortgage. This was so held because "it is obvious," said *Judge Gaston*, "that the great purpose of the enactment was to furnish an easy and expeditious remedy to creditors against debtors who held *redeemable interests actually of value;* and it is equally obvious that if we adopt the narrow construction contended for, every debtor, by a slight change of *form*, may secure to himself such valuable interests, and place them beyond the operation of the statute. Therefore, we feel bound to hold that whatever a court of equity holds to be an equity of redemption in land is, by force of the express legislation, liable to sale under execution." It was also held in *Harrison v. Battle*, 16 N. C., 537, that when one makes a deed of land in trust to sell to pay debts the resulting trust, though it cannot be sold as a trust, under the first section of the act of 1812, may be sold as an equity of redemption, within the second section. Why? there is no "mortgage," and that is the stronger because the act in two sections distinguishes between
(332) "trusts" and "equities of redemption." But the trusts there spoken of are of a different kind from that resulting to a debtor, on his conveyance upon a trust for payment of debts, and, therefore, the differences between those trusts and equities of redemption did not forbid the bringing of other trusts within the second section of the act,

that were within the reason of it. Therefore, *Judge Henderson* said: "We cannot distinguish his, the debtor's, right to have the lands again after the payment of the debt for which it *stood as a security* from an equity of redemption. It has all the essentials of that right, although it wants some of the formal parts. Its exemption from sale under a *fieri facias* is equally an evil with the exemption of equities of redemption. The mischief is precisely the same, and we, therefore, think it within the spirit of the section of the act." This doctrine came under review in *Pool v. Glover,* 24 N. C., 129, and the Court admitted that there were forcible objections to selling resulting trusts under legal executions, but said: "That cannot justify the Court in striving against the policy of the Legislature by putting such construction on the statute as will virtually repeal it by enabling persons to evade it by the simplest contrivance. The question is, What is a mortgage, and what an equity of redemption *within the sense of the act?* Is a deed of trust of that character Not a reason can be given against selling such a resulting trust which would not equally condemn the sale of a proper equity of redemption—one arising on "a mortgage" in the most appropriate sense of that term. When, therefore, such sale (of a resulting trust) is argued against, the fault is found with the policy of the act and not with its construction. The construction is unavoidable. The purpose of the act is to aid creditors by a sale of a valuable interest of the debtor under execution. It is remedial and to be construed so as to suppress the previous mischief and advance the remedy. Therefore, the Court could not allow the execution to be balked by the liberal impediment, that the debtor had not "an equity of redemption," because he had not conveyed the land to his creditor with a power to redeem (333) it, but had conveyed it to a third person, with power to call for a reconveyance upon payment of the same debt before a sale. Such an interpretation would be paltering with the sense of the Legislature. In substance, the debtor has the same interest in both cases; and, therefore, must be liable in both instances alike." So it seems to me here, that a debtor who gives a mortgage on his slave or horse, and he who pledges them, has *in substance* the same interest in value and reality, though not in form. In each case he is the owner of the property; in the one case he is so at law; in the other, indeed, he is not at law, but he is in equity; and that for the very reason that equity has respect to the substance without regard to the form; and in each case the property is liable, as a security, to pay a debt to another person. Is not this, then, precisely the case in which the Legislature intended that an encumbrance, *in whatever form,* as was said in *Newsom v. Roles,* should be put into writing and registered in order that the debtor should not, on the one hand, have a false credit, nor, on the other, have an interest

of value concealed from his creditors? What matters it to the creditors of the owners of the property, or how can it affect the policy which called forth these statutes that, as between the parties themselves, there may be some slight difference between mortgages and pledges in respect of the remedies on them? It is of no consequence whatever. In either case the creditors can have their remedy against the property, either as the legal or equitable property of the mortgagor or pawner for their satisfaction, if they can ascertain his interest; and, therefore, the courts ought so to construe the act as to afford the creditor all the light as to the debtor's interest which he would get under the act if the debtor had given the security in one of those usual forms which are men-
(334) tioned in the act, namely, a deed of trust or mortgage. Is it possible that all the anxious legislation "to prevent frauds" by encumbrances is to be rendered nugatory "by a slight change of *form,*" as was mentioned by *Judge Gaston* in *Thorpe v. Ricks,* by calling the encumbrance *a pledge* instead of a mortgage? If that be so, who does not see that debtors will seldom convey chattels by way of open and formal mortgage, hereafter, but will proceed by verbal pledge, especially in those hardest and most oppressive cases in which the money is advanced upon an agreement for usurious interest. It is to be feared that this would let in a flood of fraud. It seems to me, therefore, that if this were a pledge of a specific chattel, it would be void under the act of 1829, as being clearly within the mischief; and that this is the plain result of the numerous cases of this act, besides those upon other acts of the like kind. This brings me next to state more particularly the reasons why the present case is not within the act—as I think it is not, either in respect of the words of the act or the mischief. In the first place, the subjects of the conveyances mentioned in the act are "estates," real or personal, which term in itself denotes something corporeal. But the act is more precise upon this point when it comes to designate the place for the registration of the deed of trust or mortgage, by saying that it shall be in the county where "the land lieth," or, in case of chattels, the county where "the said chattels are situate." It is evident, therefore, that the Legislature contemplates a mortgage of chattels as well as of land. Encumbrances upon such property are usually called, and "in common understanding" are, mortgages or deeds of trust. But we do not call an assignment of a bond or a transfer of stock, or a power to transfer, as securities for debt, nor usually consider them to be, mortgages or deeds of trust. But I own these reasons would not satisfy my mind if they stood alone; for, if the bond or the stock, if unencum-
bered, or if the debtor's interest in it subject to the encumbrance
(335) could be rendered liable to the satisfaction of a judgment either upon execution or by decree of the court of equity, I should deem

the case within the reason of the act, and, therefore, subject to its operation. But debts, stock, and *choses* in action generally are not applicable to the owner's debts in either of the ways I have mentioned, nor in any way during the life of the owner, except by his own transfer of them, or a legal assignment of them in the cases of bankruptcy or insolvency. They are not goods or chattels, and as such subject to a *fieri or levari facias;* and there is no instance that I am aware of, except one, in England, in which the court of equity has laid hold of them for the satisfaction of judgments, for they are not equitable property, but are legal rights. In the administration of a dead man's estate the court of equity controls interests of this kind as part of the fund which the executor is accountable for as trustee; and when the law undertakes to discharge a debtor from his debts by taking his property for the benefit of his creditors it provides for an assignment of these as of other interests. Being in their nature legal rights, equity leaves it to the law to dispose of them; and no method has as yet been provided for that purpose but that of taking execution against the body, and thereby inducing the owner to pass them by his contract in satisfaction of the particular debt, or to surrender them as a bankrupt or insolvent for the benefit of all his creditors. The court of equity deems that an adequate remedy, and, therefore, sees no necessity for coming in aid of the law. The exception to which I allude is that established in *Edgell v. Davie,* 3 Atk., 352; and that proceeds on the very special ground that the person of the debtor who had been discharged under the insolvent debtor's act was protected against a *ca. sa.* by the act of Parliament which at the same time made his future effects liable for the debt. Even that case has been questioned by high authority—that of the Court of Exchequer in *Otley v. Lines,* 7 Price, 274. Though (336) questioned, it was not overruled, and it seems to me to be good law; and this Court acted on it in *Brown v. Long,* 22 N. C., 138, because, in those cases, the law intended the debtor's effects to be answerable for the debt, and there was *no possible remedy* at law, as the body was protected, and the only property he had was not tangible. That view is entitled to the more respect because it is taken by *Lord Redesdale,* who states that as a proper case for the court of chancery to exercise its extraordinary jurisdiction by enforcing a judgment against the debtor's legal effects. Mit. Plead., 115. Except that case of "very particular circumstances," as *Chief Baron Richards* call'ed it, I have met with no other in England in which the creditor succeeded in getting the court of chancery to interpose. In *Dundas v. Dutens,* 1 Ves., Jr., 196, *Lord Thurlow* asked if there was any case where a man having stock in his own name had been sued for the purpose of having it applied to satisfy creditors? He said: "Those things, such as stock,

debts, etc., being choses in action, are not liable. They could not be taken on a *levari facias*. It is quite new to me that this Court can touch it. I have not heard of such a thing." *Lord Eldon,* in *Nantes v. Corrock,* 9 Ves., 189, held that equity could not attach stock or *choses* in action on which there was no lien for the payment of debts. And in *Rider v. Kidder,* 10 Ves., 360, he repeated that "It is clear, stock cannot be attached in the life of the party." He added: "Such was the language of *Lord Thurlow* in *Dundas v. Dutens,* and also in the case of Sir Alexander Leith, when a bill was filed to try whether this Court would give execution in aid of the infirmities of the law, and it was held there was no jurisdiction." In *Gaillaud v. Estvick,* 2 Anstr., 381, upon *Dundas v. Dutens,* 1 Ves., Jr., 196, being referred to, *Chief Baron McDonald* said that he remembered applying, on behalf of the Crown,

(337) to have the assistance of equity in aid of an extent to get at stock in the funds, and it was rejected. Finally, *Otley v. Lines,* already mentioned, occurred in 1819, and was decided on demurrer, and seems to have settled it to be the law of England that debts or any *choses* in action cannot be applied by the court of equity to the payment of debts. In some of the States of this country I am aware that it has been provided by statute, and in others judicially decided, that they may. But there has been no decision to that effect in our courts, nor interposition as yet of the Legislature; and I cannot make the precedent.

Being brought to this conclusion, it follows that if there had been here the most formal assignment of the stock executed and registered, it would have availed the creditor nothing. Consequently, he could suffer no prejudice by the omission to make or register such an instrument; and the case is not within the acts requiring registry of incumbrances as the means of preventing fraud. It has also material weight with me that the banks in this State and in almost all others have been in the habit of taking pledges of their own and other stocks as securities for loans, and they have never thought of registering them—at least, not in this State; and we know that our banks have been generally under the management of able lawyers and other active and thorough men of business.

On taking assignments of bonds and other negotiable instruments, as securities, I believe, too, the universal course has been to take them by indorsement and delivery of the instrument, and not by deed of trust or other instrument to be registered. When debts due on accounts, or other choses not assignable at law, are taken as securities, deeds are taken generally, it is true; but that would be the case as evidence of the assignments and the usual mode of making them before the registry act. I believe that, when taken, they are commonly registered; for

they generally include other things, as land or specific chattels, (338) which render it necessary; and if they did not, they would probably be registered from habit. But the universal course with respect to negotiable securities is to transfer them to the creditor or one for him by indorsement, which is never registered; and that shows the sense in which the act has been received by the profession and the people generally from the time of its passage. Upon this ground, therefore, that this is not merely a pledge, but that it is a pledge of stock, I think the judgment should be

PER CURIAM. Affirmed.

Cited: *Barrett v. Cole,* 49 N. C., 41; *Owens v. Kinsey,* 52 N. C., 247; *Wallston v. Braswell,* 54 N. C., 141; *Burton v. Farinholt,* 86 N. C., 265; *Mayo v. Staton,* 137 N. C., 678; *Ball-Thrash v. McCormick,* 162 N. C., 474.

JOHN JONES TO THE USE OF G. W. BROWN v. PENIL GILREATH ET AL.

1. Courts of law in this State only recognize the *legal* claimant in a suit, and will not permit a set-off to be introduced against one who is alleged to have an equitable assignment of the claim.
2. Where a suit is brought by A. against B. and C., a claim by B. alone against A. will not be allowed to be set-off.

APPEAL from HENDERSON Fall Term, 1846; *Bailey, J.*

Debt on a bond for $239, given by the defendant to the plaintiff. Pleas, payment and set-off. On the trial the defendants proved that the defendant Justice executed the bond as surety for the other defendant. And they offered to prove, further, that the plaintiff had assigned the bond, without indorsement, to one Brown, and that this suit was brought for Brown's benefit, and that Brown was indebted to Gilreath, the principal debtor in this action, by promissory note made by Brown to Gilreath. But the court excluded the evidence thus offered, and there were a verdict and judgment for the plaintiff, and the defendant appealed. (339)

Avery for plaintiff.
No counsel for defendant.

RUFFIN, C. J. It was proper enough to receive the evidence that Justice was the surety of Gilreath, so as to give the surety the benefit of the act of 1826 by having the property of the principal seized and sold be-

fore that of the surety. But the evidence was competent to no other purpose, and all the other evidence was properly rejected. The courts of this State have steadfastly refused, for a great many years back, to look, upon any equitable principles, to the interests, rights, or duties of any persons but the parties of record. If the rights of one of the parties, or against one of them, depend on equities, it has been thought safest and most legal to leave those persons to their redress in the court of equity, in which the redress will be duly and by a regular proceeding administered. *Jones v. Blackledge,* 4 N. C., 342. For that reason Brown's note was not a set-off in this action.

But if Brown had been the indorsee of this bond, and as such the plaintiff in this action, his promissory note to Gilreath, one of the defendants, would not be a set-off. *Bank v. Armstrong,* 15 N. C., 519. How can it be told that Brown has not a separate demand against Gilreath, which he has held up to counterbalance his own note to him, and which, possibly, he might lose if Gilreath, instead of settling those separate debts against each other, were at liberty to use the notes to himself in bar of this joint action against him and Justice? The case does not come within the description of the statute, namely, where there are mutual debts subsisting between the parties of the action.

PER CURIAM. No error.

Cited: Walton v. McKesson, 64 N. C., 154; *Sloan v. McDowell,* 71 N. C., 365.

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(340)

STATE v. JOHN MAINOR AND LILLY WILKES.

Where upon a trial for fornication or adultery one party is found guilty and the other not guilty, no judgment can be rendered against the former.

APPEAL from ROBESON Spring Term, 1846; *Dick, J.*

The two defendants, a man and woman, were indicted for committing the crime of fornication, by bedding and cohabiting together without being married. They pleaded not guilty, and were put on their trial together, and the jury found Mainor guilty and Wilkes not guilty. Upon the motion of the defendant, Mainor, the judgment was arrested, and the solicitor appealed.

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

RUFFIN, C. J. The Court holds that after the acquittal of one of the defendants there could be no judgment against the other. The crime

charged on those persons could not be committed but by both of them, and upon a verdict, that one of them was not guilty, it appears conclusively that the other could not be. It is exactly like the cases of riots, conspiracies, and principal and accessory, which we find in the books. *Rex v. Sudburg,* Ld. Ray., 484; Salk., 493; *S. v. Tom,* 13 N. C., 569. The farthest the courts have gone is to allow one of the parties to be tried by himself and convicted, and then judgment is given against that party, because, as to him, the guilt of the other party is found as well as his own. But when the one has been previously tried or acquitted, or when both are tried together and the verdict is for one, the other cannot be found guilty, for he cannot be guilty, since a joint act is indispensable to the crime in either, and the record affirms that there was no such joint act.

PER CURIAM. Affirmed. (341)

Cited: S. v. Parham, 50 N. C., 417; *S. v. Ludwick,* 61 N. C., 405; *S. v. Gardner,* 84 N. C., 734; *S. v. Rinehart,* 106 N. C., 789.

Overruled: S. v. Cutshall, 109 N. C., 767, 768, 770, 771, 772; *S. v. Simpson,* 133 N. C., 679.

SARAH GRANT, ADMINISTRATRIX, ETC., v. JAMES WILLIAMS.

1. Where a person had agreed to purchase a horse, which was delivered to him and was to be his when he paid the full price, and he died before he completed the payment, this was a bailment coupled with an interest, which, on his death, vested in his personal representative.
2. Goods of a deceased person in the hands of an executor *de son tort* cannot be taken in execution for the personal debts of such executor, no more than in the case of a rightful executor or administrator.

APPEAL from DUPLIN Spring Term, 1846; *Manly, J.*

Trover for a horse. John Farrier had been the owner of the horse in question, and sold him to Hezekiah Grant, the plaintiff's intestate, upon an agreement that he should be the property of Grant upon the full payment of the purchase money. At the time of Grant's death $250 of the agreed price was still unpaid, but Farrier, who was a witness in the case, stated that he considered the horse as Grant's property at the time of his death. The widow, the present plaintiff, after the death of her husband, continued or took into her possession the horse, and kept him for twelve months. During this time an execution against her for her own debt was levied upon the horse, and at the sale the defendant became the purchaser. The plaintiff, who was present, forbade the sale and ex-

plained to the company that the horse belonged not to her, but to
(342) the estate of her husband. She subsequently was duly appointed administratrix on the estate of Hezekiah Grant, and brought this action.

Under the charge of the presiding judge the jury rendered a verdict for the plaintiff. A new trial was asked for upon three grounds: first, that Hezekiah Grant was a mere bailee of the horse, and no right of property vested in his representative; second, that at the time of the conversion the plaintiff was an executrix in her own wrong of her husband, and the property in her hands was liable to the payment of her debts; and, third, the plaintiff, by her acts and claims in respect to this property, is estopped from claiming in any other right.

The presiding judge decided all these points against the defendant, discharged the rule for a new trial, and gave judgment for the plaintiff, from which judgment the defendant appealed.

D. Reid for plaintiff.
Warren Winslow for defendant.

NASH, J. We concur with his Honor in his opinion upon each of those points. From the evidence in the case the horse was not bailed to Grant; the right of property was in him by virtue of the contract. Although at the time of his death the whole of the purchase money was not paid, yet from the declarations of Farrier it is evident he had abandoned and given up any lien which he might have had on the horse, and that it belonged to Grant. If, however, Grant was but a bailee, it was a bailment coupled with an interest, which passed, upon his death, to his personal representatives. It cannot be necessary to cite authorities to prove that the goods of a deceased person cannot be taken in execution to satisfy the debts of his representative while in his hands as such representative. If it were, *McLeod v. Drummond,* 17 Ves., etc., and
Satterwhite v. Carson, 25 N. C., 549, would be sufficient. In the
(343) latter the Court do not so much decide the question as recognize it as established law. And, indeed, it has not been, in the argument here, denied; but while it is admitted, it is said that the principle is true only as respects rightful executors, and does not extend to executors in their own wrong. In other words, the shield which the law throws around the property of the deceased, while in the hands of him who has taken it into possession by permission of the law and under its sanction, is withdrawn when in the hands of a freebooter, who has taken them not only without the sanction of the law but in defiance of its authority. The cases to which our attention has been drawn upon this point do not sustain the argument. With one exception, they are all cases of rightful

administrations. The one in 1 Sal., 295, *Whitehall v. Squires,* as reported by him, is in point. The deceased had put a horse into the possession of the defendant to agist, and, after his death, the plaintiff had promised the defendant to bury him, and in part payment of his bill agreed he should keep the horse. Subsequently, he took letters of administration upon the estate of the deceased, and brought the action in trover to recover the value of the horse. The majority of the Court decided the plaintiff could not recover, but *Lord Holt* differed with them. No reason is given in *Salkeld* for the judgment of the majority, but in Carthew, 108, it was held that the defendant was guilty of a wrongful act in keeping possession of the horse, and had thereby made himself executor in his own wrong, and that the plaintiff, by assenting to his so doing, was a *particeps criminis,* and was not at liberty to take the property from him. The opinion of *Lord Holt* is sustained by the whole Court in *Mountford v. Gibson,* 4 East, 441. But the case before us is essentially different. Here the plaintiff never did assent to the sale or agree the defendant should take possession of the horse. On the contrary, she forbade the sale. Se was in no wrong in that particular. And it is further to be remarked that the claim of the de- (344) fendant was for a debt which the plaintiff, as the rightful administrator, would have been compelled to pay—being for the burial of the intestate. It was said by *Lord Ellenborough,* in *Mountford v. Gibson,* that *Lord Holt's* opinion was founded upon the fact that the plaintiff had been guilty of but a single act, not done in the character of an executor, and, therefore, he was not an executor in his own wrong. The defendant's counsel urges that the long continued possession and use of the horse by the plaintiff in this case constituted her an executrix in her own wrong, and thereby subjected the property to her debts. Here, too, the cases referred to are those of rightful executors or rightful administrators. In *Quick v. Staines,* 1 Bos. & Pul., 293, the wife of the plaintiff had been the widow of McPherson, and his executrix. She took possession of the goods in question and used them as her own for three months; she then married Quick and delivered over the goods to him; they were executed and sold for his debt, and the action was brought to recover them back. The Court decided the action could not be sustained, because the plaintiff, Mrs. Quick, had committed a clear *devastavit* in *delivering* the goods to her second husband after using them herself three months as her own. In remarking on this case, our object is to show it does not apply to the one we are considering, but not for the purpose of sanctioning the doctrine it contains. In *Gaskill v. Marshall,* 1 Mo. & Rob., 132, and also reported in 5 C. & R., 31, 24 E. C. L., *Lord Tenterden* ruled that an administrator who had taken possession of goods of the intestate and used them in the house of the intestate for

three months might, as administrator, maintain trespass against the sheriff for seizing and, after notice, selling them under an execution for the administrator's own debt. This case is cited and approved by *Lord Denman* in delivering the opinion of the Court in *Fenwick v. Laywick,* 2 Adol. & Ellis, 42 E. C. L., 590. His lordship observes:

(345) "In that case, it is true, he (*Lord Tenterden*) is *reported* to have said if the plaintiff had been in possession of the goods a *very long* time it might have been otherwise." What length of time will suffice to have that effect is not stated. And it may safely be laid down that no length of possession and use of the property of a deceased person by his personal representative, and which is not inconsistent with the trust by which he holds it, will subject the property to be sold under execution for the debts of the executor. In *Fenwick v. Laywick,* just referred to, *Lord Denman,* in remarking upon the length of time the goods had been in possession of the defendant, says: "Here the possession has been long, but then it is a possesion consistent with the will and necessary to the trusts reposed." That, it is true, was not the case of the sale of an intestate's or testator's property to pay the debt of his representatives; but he considers the principles as the same. If such be the law as regards a rightful executor or administrator, upon what sound principles can it be said that it is different with an officious and tortious intermeddler? A rightful executor may sell the personal property of his testator; the legal title is in him, and the *bona fide* purchaser will acquire a good title: and this notwithstanding a misapplication of the purchase money by the executor in the payment of his own debt. Not so with an executor in his own wrong; he cannot, as against the rightful executor, pass a good title by sale except in making such payment as a rightful executor might be compelled to make. And yet, it is contended, the same property may be taken by execution to satisfy his individual debts. This cannot be so. It is directly in the teeth of *Satterwhite v. Carson,* 25 N. C., 549, and *White v. Ray,* 26 N. C., 14. In the former it was decided

(346) that whatever doubts might have rested on the question as it respected a full executorship, it could never have been supposed that the testator's goods could be taken for the debt of an administrator *pendente lite;* and this because such an administrator has the right only to take care of the goods. But the *law* gives to the executor *de son tort* no such *right.* Is it possible a principle can be sanctioned whereby the estate of a deceased person is rendered less secure in the hands of an intruder than in those of him who is in the rightful possession of it? It cannot be. It would be offering a premium to fraud and violence, inconsisent with the good order and justice of the country. But *White v. Ray* fully answers the question. In substance, it is the same with the one we are now considering. Upon the death of Pierce Roberts,

his wife and children took possession of his personal property. The widow married Oliver, who lived with them and used the property for ten or twelve years as his own. The defendant, a constable, levied an execution, which he held against Oliver for his individual debt, upon the horse sued for. Administration was then granted to the plaintiff, who brought the action in trover for the conversion. The Court decided that the possession of the next of kin, though for such a length of time, where there was no personal representative of the deceased, gave them no legal title; and they acquired no such interest in the horse as was liable to execution for their debts, and that an administration granted after that lapse of time from the death of the intestate vested in the administrator the legal title, and he could recover. In that case, as in this, the long continued possession of Oliver and his use of the property were urged as a fraud upon his creditors; but it was held *that* did not divest the administrator of his legal title or prevent him from recovering. The only difference between that case and the present is that in the one we are now considering the plaintiff is the individual who was in possession of the horse and for whose debt it was sold; in the former, the administration had been granted to a third person. That surely (347) can make no difference; it is the right which appertains to the office of representative of the person who fills it that supports the action. And this is an answer to the last objection of the defendant. The doctrine of estoppel does not arise in the case; the plaintiff does not sue in her own right, but in *auter droit*. *Fox v. Fisher,* 3 Barn. & Ald., 243, has no application to the present case. That arose under the bankrupt act of 21 James I., whereby all the property in the possession, order, and disposition of the bankrupt pass into the hands of his assignee. The bankrupt was in the possession of the goods of the deceased at the time of her bankruptcy, and a creditor of the deceased was appointed administrator, and brought the action against the assignee, and judgment was given for the defendant upon the wording of the statute. But for the statute the defendant would have been entitled to recover.

PER CURIAM. No error.

THE STATE TO THE USE OF ROBESON COUNTY v. NEIL MCALPIN ET AL.

1. Under our statutes a second action may be brought on a sheriff's bond for money which he holds as county trustee, by any person who is injured thereby, *toties quoties*, until the penalty is exhausted.
2. But the party injured may, if he prefers it, recover what is due to him by a *scire facias* on the first judgment, setting forth other breaches.

APPEAL from ROBESON Spring Term, 1846; *Pearson, J.*

The case is stated in the opinion delivered in this Court.

(348) *Strange for plaintiff.*
John Winslow, Warren Winslow, and D. Reid for defendant.

NASH, J. This was an action of debt upon a sheriff's bond. On the trial below several objections were raised to the plaintiff's recovery. But a single one has been sent to us, and so much of the case agreed will be stated as is necessary to present it. In 1831 the Legislature, by a private act, authorized the county court of Robeson, with others, to abolish the office of county trustee and, in such case, devolving upon the sheriff of such county all the duties of such office. Under this act the bond was given on which this action is brought. After the institution of this suit an action was brought on the same bond, at the relation of one Davies, who was chairman of the board of commissioners for common schools in the county of Robeson, against the present defendants, and a recovery made to the amount of the money in the hands of the defendant McAlpin due to that fund, which did not exhaust the penalty of the bond. The judgment in that case was pleaded by the defendants in this as a plea since the last continuance. The jury found a verdict for the plaintiff, and his Honor being of opinion he could not recover, it was set aside and a nonsuit entered. In this opinion we do not concur. His Honor decided that the former judgment was a bar because, taking this to be an official bond, there was no provision by statute applicable to it authorizing a second to be brought. We do not agree with his Honor. We do not consider the judgment recovered by Davies a bar to this action, even if it had been obtained prior to its institution and duly pleaded. In assigning his reason, his Honor says: "The act in relation to official bonds contains a general provision for the institution of suits, by
(349) the persons injured, in the name of the State, without any assignment thereon. Rev. Stat., ch. 81, sec. 1. But there is no general provision authorizing a second action. This provision is made specially in the several acts relating to the bonds of constables, county trustees, and the bonds of sheriffs for execution of process, collection of money, etc.; but the act relating to bonds of sheriffs for the collection of county taxes contains no such provision (ch. 28, sec. 3). The private act of '31 contains no such provision in relation to the new sort of bond therein prescribed to be taken."

We are not certain we entirely understand his Honor. The act of 1777, Rev. Stat., ch. 109, sec. 13, in prescribing the form of the bond to be given by the sheriff for the faithful discharge of his duties in office, which is the one referred to in the opinion as given for the execution of process, collection of moneys, etc., contains the provision, "that no such bond shall become void upon the first recovery, but may be put in suit and prosecuted from time to time," etc. Now, this provision *in hæc*

verba is contained in none of the other acts. But yet they contain words which, in our opinion, are equivalent. Thus, in the act in relation to official bonds the words are: "Any person or persons injured may institute a suit or *suits*," etc. So that of 1818, Rev. Stat., ch. 24, sec. 7, directing the bonds constables shall give, authorizes *suits* to be brought and *remedy* to be had, and "under the same rules, regulations, and restrictions as suits may be brought and remedies had upon the official bonds of sheriffs," etc. A similar provision is made as respects the bonds of county trustees, Rev. Stat., ch. 29, sec. 3. It declares a suit may be brought on said bonds and recoveries had under precisely the same circumstances as constables' bonds. The language is the same. We hold, then, that under these various acts a second suit may be brought on the official bonds of these various officers, although the language is not the same as in the bonds of the sheriff, for the faithful discharge of his official duties. And this appears to be the opinion of his Honor who tried the cause. But the opinion proceeds that there (350) is no such provision in the act relating to the sheriff's bond for the collection of the county and poor tax, nor in the private act of 1831 under which the bond now sued for was taken. Upon examination it will be found that the same principle is held in view by the Legislature in each of these acts. Section 3 of the act of '98, Rev. Stat., ch. 28, sec. 3, to which his Honor refers, contains no such provision. Section 23, however, authorizes the several county courts to appoint a finance committee for their respective counties, and section 30 empowers the committee "to institute *suit* for the recovery of all moneys due the county from any person liable to account for them—which said suit or suits shall be brought," etc. It may be said this provision throws no light on the subject, as different persons might be indebted to the county. This is true; different persons may be so indebted, but the same officers might be indebted to the county for different sums of money, as applicable and appropriated to the different funds—as in the case of the county trustee. The words, we think, are sufficiently comprehensive to embrace the latter case as well as the former. The private act is, however, very explicit, and leaves no doubt, we think, on the question. This act authorizes the several county courts in the State to abolish the offices of county trustee and treasurer of public buildings, and in that case devolves upon the sheriff all their duties and responsibilities as to the collection of moneys and their disbursement. After prescribing the conditions of the bond so to be given under that act by the sheriff, it provides in section 3, "that where it is found necessary to bring *suits* in the name of the county trustee or treasurer of public buildings, such *suit* or *suits* may be brought," etc. We think this clause sufficiently plain. The sheriff retains in his hands all the funds which formerly he was required

(351) to pay over to the county trustee, and he holds them to be disbursed as that officer did. Their funds are raised for separate and distinct purposes, and are in fact the products of different taxes laid by the county court, and to be paid out by the sheriff to different and distinct persons, according to the order of the court. This the lawmakers knew, and have, therefore, adopted, in the section we are commenting on, a phraseology which recognizes the bringing of more than one action on the bond of different persons, and the existence of such actions at the same time. If in an action brought by any one authorized to sue, the penalty of the bond is exhausted, and another action should then be brought upon it, the first judgment might be pleaded in bar, setting forth the facts. If pleaded since the last continuance, it can only act as a bar to the further prosecution of the suit. We think, therefore, his Honor erred in holding that the judgment of Davies was a bar to the plaintiff's action. On the contrary, we are of opinion that under our statutes a second action, such as this, may be brought on a sheriff's bond for money which he holds as county trustee, by any person who is injured thereby, *toties quoties,* until the penalty is exhausted. But we are also of opinion that the parties aggrieved may avail themselves of the provisions of the statute of William, and recover what is due them by *sci. fa.* on the first judgment, setting forth other breaches. They have an option which course to pursue.

This is a case agreed, and we should not hesitate, under the view we have taken of it, to render judgment for the plaintiff; but this we cannot do without great injustice to the defendant. According to the record, the jury found a verdict for the plaintiffs, and assessed their damages for the breach assigned to $1,000. The case then states that the balance due from the defendant McAlpin, in September, 1841, as ascertained by a settlement between him and the relators in this action was $693. It then further shows that after allowing the defendants the amount of the

(352) Davies judgment, which he had paid, and also other payments, that the balance was $200. We regret the judgment was not so taken as to enable this Court now to act finally in the matter. As it is, the judgment is reversed.

PER CURIAM. *Venire de novo.*

JOHN McKAY v. BENJAMIN WOODLE.

1. Where an action is brought for a penalty imposed by a statute, or actions are brought founded on rights created by a statute, and for which there was no action at common law, the declaration, like an indictment, must be framed on the statute or statutes, stating not only the circumstances necessary to bring the case within the meaning of the act, but also expressly counting on it.

2. But this rule does not embrace the case where a statute is simply remedial, giving an easier or cumulative remedy for a wrong for which there was a remedy at the common law.
3. Therefore, in an action for worrying, maiming, and killing the hogs of the plaintiff while trespassing on the inclosed grounds of the defendant, the same not having a sufficient fence, according to the act of 1731, Rev. Stat., ch. 48, it was not a sufficient objection to the action that the declaration did not refer to the statute, for the plaintiff had a remedy at common law.
4. Although the inclosed land within the bounds of which this trespass was alleged to be committed belong to more than one person, yet the actual perpetrators of the act are, even under our act of Assembly, individually liable.

APPEAL from CUMBERLAND Spring Term, 1846; *Dick, J.*

The questions presented to this Court are stated in the opinion delivered by the Court.

Strange for plaintiff.
D. Reid and McRae for defendant.

RUFFIN, C. J. This is a proceeding to recover damages for (353) unreasonably worrying, maiming, and killing the hogs of the plaintiff while trespassing on the inclosed ground of the defendant, the same not having a sufficient fence. It was commenced by complaint before a justice of the peace according to the act of 1831, Rev. Stat., ch. 48, and he, together with two freeholders, viewed and examined the fence of the defendant and adjudged it to be insufficient, and assessed the damages to $20. For that sum the justice rendered judgment, and the defendant appealed to the county court, and then to the Superior Court, and to this Court. On the trial, on not guilty pleaded, the defendant gave evidence that the grounds on which the plaintiff's hogs trespassed and were killed were owned and cultivated by another person and himself jointly, and insisted, therefore, that this remedy did not lie. The court, however, instructed the jury that, notwithstanding that objection, the plaintiff might recover. In that opinion this Court concurs. The defendant, though not the sole proprietor of the field, was the sole perpetrator of the injury to the plaintiff. But even that is not essential to the plaintiff's remedy; for, if the other tenant had united in the wrong, the defendant would be liable by himself upon the ground that *tort feasors* are jointly and severally answerable. The defendant objected further that the plaint was substantially defective, inasmuch as it does expressly refer to the statute which gives this remedy. It is agreed that in actions for penalties imposed by statute, and other actions founded on rights created by statute, and for which, consequently, there was no action at law, the declaration, like an indictment, must be framed on the statute or statutes, stating not only the circumstances necessary to

bring the case within the meaning of the act, but also expressly counting on it. But we believe the rule extends no farther, and does not embrace the case in which a statute is simply remedial, giving an easier or cumulative remedy for a wrong for which there was an action at the (354) common law. It is true, the distinction has not been always observed in practice. But pleaders often introduce unnecessary allegations from abundance of caution; and we do not find the distinction anywhere judicially denied. Declarations on statutes, after alleging the facts which, according to the statutes, give the right to the plaintiff, usually add, "by means whereof, and by force of the statute in such case made and provided, the said A. B. became liable to pay it," or "whereby and by force of the statute an action hath accrued," etc. But they do not state that, by force of the statute, an action in particular, as debtor case, or the like, or in some particular court, has accrued to the plaintiff. As far as a statute constitutes an ingredient in the plaintiff's right, it is, upon principle, a necessary part of the declaration; and when the right is thus established, and the proper action is brought for the violation of it, the redress ought to be given by the law, though the act which gives the particular action be not specified in the declaration. A familiar example is suggested in the practice here. The jurisdiction of a justice of the peace out of court is created by statute. Yet a warrant never refers to the statute as giving that remedy when the demand is one for which there was an action at common law, as debt, or assumpsit on contract. This distinction mentioned, though not uniformly observed, is an ancient one. Thus Fitzherbert says that the form of the writ of waste against tenant in dower and guardian varies from that against other tenants. In the writ against tenant in dower the plaintiff "doth not rehearse the statute, which gave the writ of waste, nor the writ of waste against the guardian, because they were punishable at the common law before the statute by prohibition and attachment thereupon, if they did waste." N. B., 125. On that passage *Lord Hale* makes several annotations on the pleadings and process in waste; but he does (355) not question the distinction laid down in the text, nor the reason assigned for it. It appears, indeed, to have been a usual practice, in actions of debt on bonds to perform covenants, under the Statute 8 and 9 William III., ch. 11, to precede the assignment of a second or subsequent breach with the words, "and for further breach of the said A. B. according to the form of the statute in such case made and provided, says," etc. But it is seen now that that was *ex abundia cautelæ* and not requisite; for it is held in the modern cases that breaches are sufficiently assigned, although the declaration may not use the language, "according to the form of the statute." *Hardy v. Bem*, stated in *Roles v. Roeswell*, 5 Term, 539; *Tombs v. Painter*, 13 East, 1. It was

never supposed that a reference to the statute was necessary if but a single breach was assigned; and, indeed, when several breaches are assigned the precedents have no such reference in respect to the first breach, but only to the further breach or breaches. The reason for the difference probably was that, at common law, the plaintiff was obliged to assign a breach, and could not assign more than one; for a single one forfeited the bond, and adding another made the declaration void for duplicity. 1 Saund., 58 a. To remove that objection it seems to have been thought proper to rely expressly on the statute as the authority for the duplicity; for, at common law, although the plaintiff must assign a breach in order to show the land to be forfeited, *Hayman v. Gerrard,* 1 Saund., 101, yet the jury did not assess the damages therefor as the measure of the plaintiff's redress, but only a nominal sum for the detention of the debt, and the recovery was of the penalty, and the defendant had to seek relief in equity. But there is no doubt that the statute, which is now held to be compulsory on the plaintiff, applies as well to a case in which there is but a single breach as to one in which there are several; for in each case the object is to ascertain the real damages, whether arising from one or several breaches, and, by the (356) payment of those damages, to discharge the debtor's body and estate without resorting to a court of equity. The consequence would be that, in the case of but a single breach—that being within the act—it is as necessary to refer to the statute as the authority for assessing the true damages therefrom as it is in respect of a second or other breach; for if the plaintiff must in every case proceed under the statute, and if he be obliged in any case to count on the statute, he must be obliged in every case so to count. So the converse must be true, that if in one case he need not count on it, he shall not be obliged in any. And such is the conclusion adopted in the cases before referred to, and, instead of being a departure from the rule of Fitzherbert, or an exception to it, it is a confirmation of that rule.

The present case falls within the rule. This remedy, indeed, is given only against a person who injures stock in his grounds inclosed with an insufficient fence. But that is a trespass for which the common law gave an action as well as for a trespass in any other form: for, although the owner of land might take up or drive away beasts trespassing on his land, yet he could never unreasonably worry, maim, or kill them.

For these reasons the Court is of opinion that there is

PER CURIAM. No error.

Cited: *Wright v. Wheeler,* 30 N. C., 189.

WARDENS OF HYDE v. JORDAN SILVERTHORN, EXECUTOR, ETC.

An executor *de son tort* cannot be called upon to support a disabled slave of the deceased, under the act of Assembly, Rev. Stat., ch. 89, sec. 10.

APPEAL from HYDE Fall Term, 1845; *Battle, J.*

The following are the only facts upon which this Court thought it necessary to pronounce the law:

(357) *Assumpsit* to recover money paid by the plaintiff to the use of the defendant. The wardens had maintained an aged slave named Susan, belonging to the estate of Robert Silverthorn, deceased. The defendant pleaded *"Ne unques executor,"* and the plaintiff replied that he was an executor *de son tort.* Under the charge of the court the plaintiff had a verdict and judgment, and the defendant appealed.

No counsel for plaintiffs.
Shaw for defendant.

DANIEL, J. By law, Rev. Stat., ch. 89, sec. 19, the owners of old and disabled slaves shall provide for and maintain them; and if the owner will not, the wardens of the poor of the county are required to maintain them and charge the price to the owner, and may sue him for the same. Section 20 declares that if any owner shall be dead, the executor or administrator shall provide for such old and disabled slaves; and so with respect to the guardians of infant wards. And upon failure so to do, the wardens shall provide for such slaves and proceed against such executors, administrators, and guardians, as the owner; and such executors, administrators, and guardians shall be allowed the expense of making such provision for such slaves in their settlements. Section 21 declares that the wardens of one county may remove such old and disabled slaves to the owner or to the executors and administrators of a deceased owner residing in another county, or to any guardian of the owner, at the expense of such owners, executors, administrators, or guardians. We think that the wardens have no right to charge, for the maintenance of old and disabled slaves, any other person or persons than those who are the *owners* of such slaves by law. The defendant was not the owner (358) of the slave Susan; he never took her into possession or set up any claim to her; he, in law, had no right to her; and, therefore, the law throws no obligation on him to maintain her. The fact that the defendant wrongfully intermeddled with other parts of the personal estate of Robert Silverthorn did not make him liable under the statute to the wardens for the maintenance of the slave Susan. The clause respecting executors, we conceive, refers to rightful executors, not only

for the reason already given, but also because the disbursements of the executors for a disabled slave are to be allowed in their settlements—a provision not properly applicable to an executor *de son tort,* who is not called on to make the "settlement" in the provision of the act.

PER CURIAM. New trial.

ENOCH COBB v. GEORGE F. CORNEGAY ET AL.

1. Justices' judgments are not property in the plaintiff for which an action of trover will lie.
2. They are not records, but they are judicial determinations and muniments of the rights of both parties.

APPEAL from DUPLIN Spring Term, 1846; *Settle, J.*

The only material facts in this case are stated in the opinion delivered in this Court.

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

NASH, J. This is an action of trover, brought to recover the (359) value of a justice's judgment converted by the defendants to their own use. The plaintiff had recovered a judgment before a single magistrate, which he had placed in the hands of Summerlin, the deputy sheriff, and one of the defendants, for collection. He transferred it to Taylor, by whom it was collected, and the money divided between all the defendants, by previous agreement. Several points were raised in the argument below. We do not feel called on to give an opinion on but one, and that is the first. The court instructed the jury that an action of trover can be maintained for the conversion of a justice's judgment. Believing there is error in this opinion, as it lies at the foundation of the plaintiff's right of action, we have confined our attention to it.

His Honor was well justified in giving the opinion he did, as such had been declared by *Judge Hall* to be the law in delivering the opinion of the Court in *Hudspeth v. Wilson,* 13 N. C., 372. Upon examination of that case it will be found that the judgment was for the defendant, and the only point in the case was whether property, fairly won at gambling, and delivered by the loser to the winner, could, by the former, be recovered back. As the judgment below was in favor of the defendant on that point, and the Supreme Court coincided in its correctness, it

was unnecessary to decide the other. And believing it incorrect, we feel at liberty to revise it. To support the action of trover, the plaintiff must have in himself, at the time of the conversion, the right of property, either general or special, and also must, in general, have in himself the exclusive right of possession. Brown on Actions at Law, 433-4; 29 L. Lib., 309, 310. A justice's judgment is neither goods nor chattels, nor has the plaintiff a property in it, and, if he has, it is not an exclusive property. It is well established that trover will not lie for a record, Bro. on Ac., 435; 29 Law Lib., 311; 6 Ba. Ab., Trov., Letter D, 687; Hard., 111; because it is not private property. (360) So neither is a judgment given by a single magistrate. It is true, it is not a record, but it has one essential quality of a record—it concludes the parties from denying the facts it affirms. These judgments are the judgments of a court regularly constituted by law, and pointed out by the legislative will for their government. The acts of a court, so constituted cannot be private property. They are muniments, in which both parties to them have an interest, but neither an exclusive one. To the plaintiff it is the evidence of a legal obligation on the defendant to pay, and to the latter a protection from further liability on the original cause of action. In *Hamilton v. Wright,* 11 N. C., 286, *Judge Hall* calls a justice's judgment "a public writing," and *Judge Henderson,* while he argues to show it is not a record, treats it as an *act of a court,* having, in common with records, the quality of concluding the parties from denying their affirmation. If, then, a justice's judgment is not a record, it is *quasi one.* It is a public writing, which, from its nature, cannot belong to any one as a matter of property, but it belongs to the justice who gave it, as a public custodier, to be kept by him until drawn out of his hands by the regular requirements of the law.

Other questions are presented by the record, in some of which we do not concur with the presiding judge. It would, however, do the plaintiff no good to grant him a new trial, as the judgment must still be against him.

For this reason the judgment is

PER CURIAM. Affirmed.

Cited: *Platt v. Potts,* 33 N. C., 267.

(361)

JOHN HOLDFAST ON DEMISE OF JOHN A. SHAW ET AL. v. WILLIAM B. SHEPARD.

1. A plaintiff may recover in ejectment upon the demise of only one of several tenants in common, to the extent of his interest; and there may be a general verdict and judgment that he recover his term, as under the writ of possession the lessor of the plaintiff proceeds at his peril.
2. Where in an action of ejectment the defendant relied upon the statute of limitations, and the evidence was that the defendant and A., under whom he claimed, had had seven years actual possession, except for the space of four or five months, an interval that elapsed between the time when a tenant of A. left the premises and the time when the defendant entered under his purchase: *Held* by the Court, that the interval between these two occupations was too large to found a presumption on of a continued possession, in the absence of any intermediate act of ownership by A., or any one under him.

APPEAL from PASQUOTANK Spring Term, 1846; *Bailey, J.*

Ejectment for a house and lot in the town of Elizabeth City. One John King was seized of the premises in fee, and, on 4 September, 1834, they were sold under a judgment and execution against him, by the sheriff of Pasquotank, and conveyed to John C. Ehringhaus. On the same day Mr. Ehringhaus conveyed the premises in fee to Jeremiah M. King in trust for Margaret King, wife of the said John King, to her sole and separate use for life, and not subject to any control of her said husband; and upon a further trust, after her death, for such child or children as she might have by her said husband, and as might be living at her death, if any; and if there should be no such children or child, then in trust for certain other persons. After this conveyance John King and his family continued to reside on the premises; and other creditors of John King obtained judgments against him and had the same house and lot again sold upon their writs of *fieri facias*, and Charles R. Kinney became the purchaser and took a deed (362) from the sheriff. He thereupon brought an ejectment against John King and Jeremiah M. King, and recovered the premises in April, 1837. Kinney sued out a writ of possession, but did not have it executed; and a witness for the defendant proved that in October, 1837, he heard Kinney say to John King, who occupied the house, "You may stay here till I see you again"; and the said King did remain in the house the residue of that year. Another witness proved that in the latter part of 1837 Kinney directed the witness, if he knew of any person who wanted a house, and would make a good tenant, to lease the premises for him to such person. The defendant further proved by one Eslick that he entered into the premises on 10 January, 1838, and occupied the house as a tenant of Kinney until the following June or July, when he left the premises and surrendered them to Kinney. On 10 Novem-

ber, 1838, the present defendant contracted with Kinney for the purchase of the premises, and shortly thereafter took a conveyance and possession of the same, and has since occupied them to the present time.

In 1841 Jeremiah M. King died, having made a will and thereby devised "all his real and personal estate to his wife, Keziah," and made her executrix. He died without issue, but left five or six brothers and sisters, who were his heirs at law. John King also died before the suit was instituted, leaving his wife, Margaret, surviving. The present action was commenced on 23 October, 1845, and the declaration contains three counts: the first on the demise of two of the sisters of Jeremiah M. King; the second on the demise of his widow and devisee, Keziah, and the third on the demise of Margaret, the widow of John King. On the trial it was insisted on the part of the defendant that the plaintiff was not entitled to a verdict on the first count, because it was on the demise of two only of the sisters of Jeremiah M. King,
(363) whereas it should have been on that of all his heirs at law. But the court held that, supposing the legal title to have been in J. M. King, and have descended from him to his heirs, the jury might find for the plaintiff on that count, notwithstanding it was upon the demise of only a part of the heirs at law. It was insisted further on the part of the defendant that the evidence established that he and those under whom he claimed had been in the continued and peaceable adverse possession of the premises for seven years and more before this suit was commenced; and, therefore, that the rights of entry of the plaintiff's lessors were barred, and he moved the court so to instruct the jury. But the court refused to do so.

The counsel for the defendant then further moved the court to instruct the jury that there was evidence that the said Kinney had not abandoned the premises, but intended to retain and occupy them, which instruction the court also refused to give.

The counsel for the defendant further requested the court to instruct the jury that if the possession of Kinney during 1838 was consistent with the usage of landlords in the same community—renting out the house when he had an opportunity or had an application for it, and closing it up for short intervals only because he could not rent it to a suitable tenant—that would be sufficient. But the court declined also to give that instruction, and instructed the jury that in order to bar the plaintiff it was necessary that the defendant should show a continued possession in himself and Kinney, under whom he claimed, for seven years, at least. The jury found a verdict for the plaintiff, and from the judgment the defendant appealed.

A. Moore for plaintiff.
J. H. Bryan for defendant.

RUFFIN, C. J. On the first question *Bronson v. Paynter,* (364) 20 N. C., 527, is in point. It was there determined that a plaintiff might recover upon the demise of the tenants in common, to the extent of their right, though a third person did not join, and also in that case and in *Godfrey v. Cartwright,* 15 N. C., 487, that there might be a general verdict and judgment that the plaintiff recover his term, since under the writ of possession the lessors of the plaintiff proceed at their peril. The defense founded on the statute of limitations, we think, must also fail. The possession began "shortly after" 10 November, 1838; so that it wanted a month or thereabout of seven years when this suit was commenced, which was on 23 October, 1845. But the defendant insists that Kinney had been in possession, by his tenants or by himself, from October, 1837, or, at all events, from 1 January, 1838, which would exceed seven years. Eslick certainly held under Kinney from January to June of that year. But the question remains whether, after Eslick went away, there was any occupation or possession under Kinney's title until the defendant entered.

A defense of this nature admits the better right to have been in one or more of the lessors of the plaintiff. The *onus* is on the defendant to show a possession adverse to the other claimant and continued for the full term of seven years; and this ought to be established by evidence that does not leave the point of his possession doubtful, since the original right ought to prevail unless the bar plainly appear. Now, for a period of four and a half or five months—from June until at the earliest, about the middle of November—there was no actual occupation of the premises; and the point is whether it can be said that the possession then was legally in Kinney. The general rule is that where there is no actual possession by some person it is constructively in the owner. Therefore, the possession of Kinney, if existing, must, in order to answer the defendant's purpose, be deemed, in a legal sense, the actual possession. And here the remark occurs that the whole question turns on the first instruction prayed, and that the two others, as (365) expressed, and as far as they differ from the two first, ought, without doubt, to have been rejected; for an intention to occupy cannot amount to occupation unless denoted by actual occupation, prior and subsequent, so near together as to show an uninterrupted exercise of ownership or continued assertion of right, and liability at all times to the possessory action of the owner. And, secondly, as there was no evidence of "the usage of landlords" in the town of Elizabeth in particular, or of Kinney's motives for leasing or selling the premises before November, or of his closing the house for short intervals, the defendant could not demand an opinion of the court upon the hypothesis of a usage, or that Kinney closed the house, and much less that he did so for

want of a suitable tenant. The merits of the controversy, then, depend on the point first raised, which is, whether the defendant has shown that from June until some time in November, 1838, the possession is to be taken, in point of law, to have been in Kinney. We cannot undertake to say what interval between two actual personal occupations under the same claim of title will interrupt the possession in a legal sense. A day, or week, or month, or even a longer time between the outgoing of one tenant and the incoming of another may not of itself, perhaps, make a chasm in the possession, especially if in the meanwhile there be any use of the premises or liabilities incurred on account of the premises—as by listing by one, as owner or occupant, for taxes, or by putting or leaving property there, though of little value, as in the cases given in the books of beer in the celler or hay in the stable, or by locking up the house and keeping the key. But there is in this case nothing of that kind—nothing except that in June a tenant of Kinney left the premises, and four and a half or five months afterwards the defendant purchased from Kinney and went into possession. It is to be taken that Eslick leased only for the time he occupied, since nothing more appears,
(366) and, therefore, that Kinney might have immediately entered or leased to another person. Eslick says, indeed, that he surrendered the possession to Kinney, and it is insisted that Kinney is to be deemed thenceforward in possession. But that is not a just inference. It does not follow, because Eslick's lease and possession were determined, that Kinney then took, much less that he continued in possession for the next five months. It is argued that the case is within the reason of the rule, *Blair v. Miller,* 13 N. C., 407; that it is sufficient if an owner has a field in crop or under fence, as a part of his plantation, according to the general course of agriculture, or has tenants to make a crop on his land every year, though the one does not enter the day the other goes out. But the usual enjoyment of land employed in agriculture is to make an annual crop, which is not, ordinarily, the business of the whole year. But houses are not thus occupied for a part of the year by those who lease them for the whole year. On the contrary, the rent is usually according to the period of occupation, and owners commonly go in themselves or put in another tenant when a prior lease expires, so as to get the full enjoyment of their property. As there can be no presumption of possession under the lease to Eslick after June, it becomes necessary, in order to continue the possession afterwards, that something should have been done by Kinney denoting that he was acting as owner, and as owner in the enjoyment of the premises. It is said that some time must be allowed for getting a suitable tenant. Admitting that there may be some interval between the expiration of one lease and the granting of another during which it may not be necessary to show any actual

exercise of dominion by the landlord, yet it would be going much beyond the necessity for such indulgence, if allowable at all, to admit of so long an interval as occurred here. If a landlord be entitled to five months to find another tenant or a purchaser, how can we say that he shall not have twelve or double that number, if needed, (367) to get a person that he deems suitable. It would really reverse the rule of law, for, instead of holding that the possession is according to the title when there is no actual occupant, it would establish a rule that when one person has once been in actual possession he is to be presumed to continue so indefinitely, contrary to the fact, unless the owner enter and actually occupy. Without, then, going beyond the case before us, we hold it safe to say that the hiatus between the two occupations of Eslick and the defendant is too large to found a presumption on of a continued possession, in the absence of any intermediate act of ownership by Kinney or any one under him.

PER CURIAM. No error.

Cited: *S. c.*, 31 N. C., 222; *Reed v. Earnhardt*, 32 N. C., 524; *Dowd v. Gilchrist*, 46 N. C., 355; *Ward v. Herrin*, 49 N. C., 24; *Withrow v. Biggerstaff*, 82 N. C., 86; *Gudger v. Hensley, ibid.*, 483; *Malloy v. Bruden*, 86 N. C., 259; *Overcash v. Kitchie*, 89 N. C., 392; *Yancey v. Greenlee*, 90 N. C., 319; *Foster v. Hackett*, 112 N. C., 552; *Allred v. Smith*, 135 N. C., 449; *Monk v. Wilmington*, 137 N. C., 324.

ADOLPHUS JONES ET AL. V. ROBERT STRONG.

A conveyance of slaves is made to a trustee in trust for the sole and separate use of a married woman. The husband of this woman died, and she then by deed conveyed the slaves to A. *Held*, that A. acquired only an equitable title, and could not support an action at law to recover possession of the slaves.

Detinue for slaves. Plea, *non detinet*. On 14 February, 1824, John Sneed and Alexander Sneed conveyed the slaves in controversy to John C. Mingas, to hold them in trust for the sole and separate use of Elizabeth Sneed, the wife of Alexander Sneed. On 14 August, 1826, Elizabeth Sneed, then being a widow, made a deed of gift of the said slaves to the plaintiff, reserving a life estate in the same to (368) herself. The donor thereafter married the defendant, who took possession of the slaves. And notwithstanding the subsequent death of his wife, he now refuses to surrender them. The deed of gift to the

plaintiffs, reserving a life estate to the donor in the slaves, was executed subsequent to the passage of our act of Assembly, declaring such conveyances to be good and valid. The judge was of opinion that the donor of the plaintiffs had only a trust estate in the said slaves, and that her deed of gift operated only as an assignment to them of her equitable interest in the slaves, to take effect after her death; that the legal title to the slaves was in Mingas, the trustee, and that he was he person to sue at *law* for the recovery of them. The plaintiff suffered a nonsuit, and, a new trial being refused, he appealed.

Kerr for plaintiff.
Morehead for defendant.

DANIEL, J. The opinion of the judge, given on the point of law appealed from, was certainly correct. This Court decided a similar question in the same way in *Merritt v. Windley,* 14 N. C., 399.

PER CURIAM. Judgment affirmed.

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(369)

THE STATE TO THE USE OF J. AND W. PEACE v. JAMES M. MANGUM ET AL.

1. A person placed in the hands of a constable a note for $158.80 for collection, upon which the constable took out two warrants against the debtor, one for $80 and one for $78.80, as due by note, and the debtor appeared and confessed judgment before the justice according to the tenor of the warrants. Executions issued, and the constable failed to levy them on property subject to their satisfaction. *Held* by the majority of the Court, RUFFIN, C. J., *dissentiente.* that the judgments, confessed by the debtor in the manner stated, were valid judgments; that he was estopped to deny their validity, and the constable was bound to use due diligence in collecting the executions issued on the judgments.
2. *Held* by RUFFIN, C. J., that as no note was shown to have been in existence but the note for $158.80, of which the justice had no jurisdiction, the judgments were void, and that the confession of judgment by the debtor could not confer the jurisdiction or waive the want of it.

APPEAL from WAKE Spring Term, 1846; *Battle, J.*

Debt upon a bond given by one Fielding A. Belvin upon being appointed a constable for the county of Wake in February, 1841, in which the breaches assigned were for the failure of the officer to collect two executions which were placed in his hands for collection, and which, by the use of due diligence, he might have collected; for making a false return thereto, etc. The pleas were "*Non est factum,* conditions performed and not broken."

The relators, after proving, upon the trial, the execution of the bond by the defendants as sureties of Belvin, proved the receipt, of which a

copy, marked (A) is sent as part of this case. They then introduced and proved the warrants, judgments, executions, and returns thereon, of which copies marked (B) and (C) are also sent as part of the case. The magistrate who gave the judgments and issued the (370) executions testified that the judgments were confessed before him by Hinton, and that in entering them he acted upon that confession; that the constable had before him also a note, upon which, after the judgments were given, he wrote the word "Judgment," a copy of which note, marked (D), is made part of this case. The magistrate testified further that he handed the executions to the officer at the time they were issued, and that at that time Hinton was living upon a tract of land which he had owned several years; and it was proved by other witnesses that he then had in his possession about forty barrels of corn, three head of horses, and a small stock of cattle and hogs. The relators showed further that the land upon which Hinton lived was levied upon under an execution issued on a judgment obtained in the county court of Wake at November term following, and the sum of $100 was raised by the sale of it.

The defendants then introduced and read in evidence the deed, a copy of which, marked (E), is made part of this case. They also proved that the officer Belvin made sale of Hinton's personal effects the latter part of April or the first of May, 1841, and that he had then in his hands other executions besides those in favor of the relators, but the executions were not produced on the trial and there was no evidence given to show when they were issued.

The relators, in reply, introduced testimony to show that Nancy Ferguson, the grantee in the deed, was insolvent at the time it was given, and that she had never had any other property than the tract of land mentioned therein; and also that Hinton, before and at the time of making the deed, was greatly indebted and embarrassed, and so continued up to the time of the relator's executions, and soon thereafter was sold out and proved utterly insolvent; and that he always possessed and used the land after, as he did before, the execution (371) of the deed.

The defendants insisted that the magistrate who gave the judgments in favor of the relators against Hinton had no jurisdiction of the cause; that, therefore, the judgments and the executions issued thereon were null and void, and, consequently, that the defendants were not responsible for any failure by the officer to collect the amount called for therein. But if this were not so, then they insisted that the officer was not bound, for want or deficiency of personal property, to levy upon the land without an indemnity being given or offered him.

The court held that the judgments were not void, and that the officer

was bound to use due diligence in the collection of the executions; that no indemnity was necessary to require him to levy on the lands, and that if there were a want of due diligence in making the amount of the executions out of the land and personal property proved to have been in Hinton's possession at the time when the executions were handed to him, the relators were entitled to recover the whole amount of the executions, or such part thereof as might have been made out of such property.

The relators had a verdict and judgment, and the defendants appealed.

(A)

Raleigh, 12 April, 1841. Received of Joseph and William Peace, a note on Joshua R. Hinton in their favor for $158.80, bearing date 20 February, 1841, with interest from November, 1840, for the purpose of collecting the same by dividing it into two judgments. All which I promise to do and make due return thereof to the said Joseph and William according to law. F. A. BELVIN, *Const.*

$158.80.

(372) (B)

WARRANT.

STATE OF NORTH CAROLINA—WAKE COUNTY.

To any lawful officer to execute and return within thirty days from the date hereof (Sundays excepted).

You are hereby commanded to take the body of Joshua R. Hinton and him safely keep so that you have him before me or some other justice of the peace for said county, to answer the complaint of Joseph and William Peace for the payment of the sum of $80 due by note, bearing interest.

Herein fail not. Given under my hand 17 April, 1841.

E. CHAPPELL, J. P.

Indorsed thereon judgment and execution as follows:

By confession of the defendant judgment is granted for $80. Given under my hand this 17 April, 1841, with interest from 20 February last.

E. CHAPPELL, J. P.

NORTH CAROLINA—WAKE COUNTY.

To any lawful officer to execute and sell so much of the defendant's goods and chattels as will satisfy the above judgment and cost; for the want of goods and chattels, levy on lands and tenements.

E. CHAPPELL, J. P.

Officer's return indorsed in these words:

No property found. H. A. BELVIN.

(C)

The warrant, judgment, execution, and return exactly like (B), except that the amount of note in the warrant and judgment was $78.80 instead of $80.

(D) (373)

$158.80, with interest from 1 November, 1840. I, Joshua R. Hinton, promise to pay to Joseph and William Peace or order the sum of $158.80 for value received. Witness my hand and seal 20 February, 1841. J. R. HINTON. [SEAL]

Across the face of which this entry appears:

Judgment granted 17 April, 1841.

E. CHAPPELL, J. P.

(E)

Deed of conveyance in the usual form in fee with covenant of general warranty from Joshua R. Hinton to Nancy Ferguson, stating the consideration to be $50 paid. Dated 18 April, 1840; proved 17 June, and registered 22 June, 1840.

Badger for plaintiff.
McRae and Manly for defendant.

DANIEL, J. We have examined this case, and we concur with his Honor, that the judgments rendered and the executions issued by the justice against Hinton were good in law. Each of the warrants on its face appears to be for a debt due by note, and each note within the jurisdiction of a justice. The defendant in these warrants, being summoned, appeared and confessed that he owed the debts in manner and form as was stated in each of the warrants. After this confession the justice had nothing further to do but to render judgment against Hinton, upon his confession, that he was indebted to the plaintiff in the manner and form as stated in each of the warrants. It being a rule of law that what is admitted need not be proved, the justice was bound to give judgment for the plaintiff without any other proof of the execution by Hinton of the two notes mentioned in the face of the two warrants. How can it then be said that the justice exceeded his (374) jurisdiction? It is said that the consent of Hinton could not give the justice jurisdiction of a matter which the law did not. This is admitted. As, if the justice had issued his warrant in favor of the plaintiff for $158.80, with interest, and Hinton had then come before him and confessed a judgment for that sum, it would have been void, because the law did not give the justice jurisdiction of such a sum; and the assent of Hinton could not in such a case have conferred jurisdic-

tion. But what did Hinton consent to? He confessed to the justice, on trial, that he had executed to the plaintiff two notes, one for the sum of $80 and the other for the sum of $78.80, and he confessed judgments on the same. Was that not within the jurisdiction of the justice? And could the justice have refused to give the plaintiff judgment upon these admissions? It seems to us that there was no other evidence necessary to substantiate the truth of the allegations made upon the face of each warrant, and that the justice had jurisdiction and was bound in law to render the judgments he did. Hinton was forever concluded by these judgments and executions; he never could have been heard to allege that in fact he did not execute the two small notes which he confessed to the justice he had executed. The constable ought to have used due diligence in collecting these executions. It appears, however, that he did not levy on the personal property of Hinton then in his possession—no other execution having a lien on it. It did not appear that there was a deficiency of personal property to satisfy the plaintiff's executions, so as to render it necessary for the constable to levy on the land; and it did not appear that the constable ever refused to levy on the land Hinton then lived on unless he was indemnified; therefore, that part of the charge of the judge which ruled that no indemnity was necessary to require the constable to levy on the land was not called for in the evidence of the cause. We, however, are not disposed (375) to say that it was erroneous. We think that this case is within the principle of *Peace v. Stephens,* 25 N. C., 92. There the small notes which had been given by the obligor for the large one were produced in evidence by the plaintiff; here they are confessed to be *in esse* by Hinton, the alleged maker of them; therefore, their production was not demandable by the justice. The judgment must be affirmed.

RUFFIN, C. J., dissenting: Although the relators might have an action against Belvin on his engagement to divide the debt, so as to take two judgments for it, yet they could not recover on his official bond for neglecting to collect the note for $158.80; for the construction of the act, Rev. Stat., ch. 24, sec. 7, is that a constable's sureties are responsible for his faithfulness in such agencies, and such only, as relate to debts which might be recovered by suit before a single magistrate; which is not the case with this bond.

To get clear of that difficulty, the relators say that their debtor, Hinton, gave two new notes in the place of the old one, on each of which, the one for $80, and the other for $78.80, he confessed a judgment, and that it was the duty of the constable to collect those judgments, and that for his neglecting to do so his sureties are liable. Of that opinion are my brethren, and it is my misfortune again to think by myself.

The point depends upon the question whether the justice of the peace had jurisdiction in the cases; for, if he had not, they were *coram non judice,* and the judgments had no efficacy. It appears to me that the justice had no jurisdiction. In the first place, it is absolutely false that two new notes were given for sums within the jurisdiction of a magistrate, as supposed in the warrants. In point of fact two warrants were brought for different parts of the money, due on one bond, which, in the whole, exceeded the jurisdiction of the justice; though, if it had been divided and new notes taken therefor, as supposed (376) in the warrants, they would have been within the jurisdiction. Now, I think that which was actually done in the case could not legally be done. The rule of the common law was that judgments of inferior tribunals must appear affirmatively to be given on a case within the jurisdiction. In England it would have been necessary not only that the warrant would purport to be issued for a debt due on a bond, but also that the magistrate should adjudge that it was thus due; and then, if it turned out to the contrary, the judgment would not bind the party. *Moravia v. Sloper,* Will., 30; *Herbert v. Cook, id.,* 36, note; *Morse v. James, id.,* 122. That is now very much altered by statute in England, 2 Chitt. Gen. Prac., 130 *et seq.;* and I admit that it is otherwise here by force of the provisions in our statutes which sustain the proceedings of justices, notwithstanding defects of form, and give an appeal from them to the courts of record. If upon the face of the proceedings there is not an apparent defect of jurisdiction, we presume its existence until the contrary be shown. But the rule can be changed no further, as it seems to me; for I think it cannot be possible that a justice of the peace here can confer on himself a jurisdiction in a cause by adjudging that a debt is due on a bond for $80 when in fact the amount of it was $158.80, and it was due on a bond for that sum or on promises. Although there is a presumption in our law in favor of the judgments of justices, yet when it appears affirmatively, upon proof, that a judgment was rendered upon a case—the actual subject-matter not within the justice's jurisdiction—I hold it to be void, just as much as if the excess of jurisdiction appeared in the adjudication itself. If it be not so, it is in the power of an inferior magistrate to draw every case before him by untruly adjudging the facts necessary to constitute his jurisdiction, and the only remedy would be by appeal or writ of false judgment, upon which the party would be compelled to give security for (377) the debt. Thus it may be shown upon evidence that a judgment rendered upon confession by a justice of one county, which purports to have been rendered in the justice's proper county, was in fact given in another county; and thereupon it shall be adjudged void, so that no action will lie thereon. *Hamilton v. Wright,* 11 N. C., 283. It must

be so in respect of the jurisdiction; otherwise, it would be vain for the Legislature to attempt to limit it. The restriction can ever be evaded by bringing a case colorably within the jurisdiction, if that would do.

The act says that "Debts due on bonds, when the principal does not exceed $100, shall be cognizable and determinable before one justice of the peace out of court." Larger debts due on bonds are not cognizable before him; and if he assume a jurisdiction over such, his acts are void. On no proof that could have been offered in this case, consistent with the truth, could the justice have given a valid judgment for the relators. But it is said that proof was dispensed with by the confession of the judgments by the debtor, and that thereby he admitted that such bonds were given as were stated in the warrants, and concluded himself as to that point. But I think the confession makes no difference in respect of the point of jurisdiction; for it was still a judgment of the justice that the sum for which it was rendered was due upon a bond for that amount. The confession dispensed with *proof* of the bond by witnesses. But it could not dispense with the *production* of the bond—of some instrument purporting to be a bond—of Hinton for a sum within the justice's jurisdiction, as supposed in the warrant; for the jurisdiction is of debts of $100 or under *due on bonds*, that is, on bonds actually existing. An admission to that effect contrary to the fact, in order to give a jurisdiction to a justice, cannot enlarge the jurisdiction, be-
(378) cause it is limited by the law. To say, then, that Hinton was concluded by the judgments and estopped to deny their sufficiency is assuming the whole matter in debate; for if the subject-matter as in fact existing was not within the jurisdiction of the magistrate, he could not take the confession nor give judgment on it, and those acts are void; and void judgments, like other void acts, estop nobody. The restriction upon the jurisdiction is imposed as a matter of public policy and not as a privilege to the debtor. Therefore, the debtor cannot waive a defect of jurisdiction, and an attempt to do so by an admission that he had given two bonds, each for less than $100, when in truth there was but one, and that one for more than $100, and all this known to the justice of the peace, is a concerted fraud upon the law which ought not to be tolerated. Such an admission cannot shield the proceedings from an investigation into their validity, by any estoppel alleged to arise out of the proceedings themselves as to one of the parties to the fraud. Here one's eyes cannot be shut so as not to see that the fact is that the two warrants were brought for the debt due on the one bond for $158.80, notwithstanding the gloss put on it by the magistrate in saying that in entering the judgments he acted on the confession—meaning to insinuate that he took no note of the bond itself. Then, why did he take it? Why did he attempt to cancel it by writing, as usual, "Judgment" on the

face of it? Why did he not ask for the other bonds on which the judgments were rendered, if any such he supposed to exist, besides that one for the sum of $158.80? The act of 1794, Rev. Stat., ch. 62, sec. 16, requires, when a justice's execution is levied on land, that he shall return it, "with all the papers on which the judgment was given," to the county court. Why are the papers to be returned? No doubt, that it may appear therefrom that it was a case within the justice's jurisdiction, so that the court may order a sale thereon and the purchaser get a good title. I believe justices never give judgment on a bond (379) without having it produced and canceled, unless it may be in the case of a lost bond. That exception stands on peculiar grounds, which leave the general rule unimpaired; for the justice finds impliedly, if not expressly, the loss of the bond as well as its execution. But in other cases they ought to, and do, require the bond to be produced as the source of their jurisdiction. In this case the magistrate, no doubt, considered that he was doing so when he took the bond for $158.80; and, if so, he must have intended to give the two judgments on it. It seems to me that is not sustainable. The case has been compared to *Peace v. Stephens,* 25 N. C., 92, and said to be within the same principle. But it appears to me that no two cases could be more unlike. There a creditor put a bond for $125.25 into a constable's hands for collection, and he took a new bond for $80 and entered a credit therefor on the first one, and then took judgment on the new bond and for the balance due on the other. There the jurisdiction did not exist colorably, merely, but it existed in fact, as there were two bonds actually, and each was within the cognizance of a justice. But here there is no such bond as either of those set forth in the warrants. It was said, indeed, that the difference is merely a matter of form, and that it is useless to require new bonds to be actually given, as it is just as easy for the debtor to give two bonds as to confess two judgments. But surely that is not a lawyer's answer to an objection of the want of jurisdiction founded upon a statute which fixes a restricted jurisdiction of an inferior tribunal by the form of the securities for the debt and the just amount of the debt, according to the different kinds of securities, as bonds and notes, liquidated or unsettled accounts. It is easy to give notes for sums of less than $100. Then, let them be given, if the parties wish to go before a justice of the peace for judgment; for without them the law gives no authority to a single magistrate to take cognizance of them (380) Here they were *not* given, and, therefore, there was no jurisdiction. If a suit were brought upon the bond for $158.80, what defense could be made to it? It could not be pleaded that the relators took from the debtor his two bonds in satisfaction of it, for in fact there never were any such bonds. Nor could he plead the former judgments thereon;

for as judgments on it they were void. So that if their judgments are good by force of the form of the judgments, both that bond and the two judgments are subsisting securities for debts against Hinton, which I think cannot be. I am of the opinion, therefore, that the judgment ought to be reversed.

PER CURIAM. No error.

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

PHILIP BEEKER v. JOHN SAUNDERS.

A., on 21 August, 1841, transferred to B. certain promissory notes of C., which he at the time guaranteed. B. made no application to C. for the payment of the notes until 29 July, 1842, and gave no notice to A. that the notes were unpaid and he should hold him responsible on his guaranty, until 29 February, 1844. *Held,* that B. had been guilty of such *laches* as to discharge A. from his guaranty.

APPEAL from DAVIDSON Spring Term, 1846; *Settle, J.*

The plaintiff, on 23 April, 1841, received of the defendant, for bacon sold him, two notes then due on Alexander Shammell. The defendant guaranteed the notes to be good, and Shammell's estate was then considered to be good. The plaintiff did not, however, demand the money due on the notes until 29 July, 1842. The plaintiff gave notice
(381) to the defendant on 29 February, 1844, that he was looked to for the money. The defendant refused to pay, and the plaintiff brought this action of assumpsit upon the said guaranty. The jury found these facts in a special verdict: that the plaintiff had been guilty of *laches* and the defendant was discharged from his guarantee. Having pronounced judgment accordingly, the plaintiff appealed.

Mendenhall for plaintiff.
No counsel for defendant.

DANIEL, J. A guaranty is a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person who is himself, in the first instance, liable to such payment or performance. Fell on Guar., 1; Smith Mercantile Law, 277. The judge was of opinion that the *laches* of the plaintiff had discharged the defendant. And we concur with his Honor. It does not appear in the verdict that the plaintiff ever demanded the money due on the notes of Shammell's representatives for more than fifteen months after he had

received them. Nor did he give notice to the defendant of his inability to get the money out of Shammell's estate until February, 1844, almost three years after he had received the notes upon the guaranty, and when the law demanded of him to resort to a reasonable degree of diligence, and that, too, in such time as a prudent and discreet man would in like circumstances use to collect his own debts. And if he then fail to obtain satisfaction of his principal, he is entitled to resort to his guarantor, on his first giving him notice in a reasonable time that he is looked to for payment of his guaranty. *Towns v. Farrar,* 9 N. C., 163; *Grice v. Ricks,* 14 N. C., 62. The judgment must be

PER CURIAM. Affirmed.

Cited: Straus v. Beardsley, 79 N. C., 68.

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(382)

DEN ON DEMISE OF HIRAM WARD v. JOHN SAUNDERS.

1. In the case of the return of the levy of a justice's execution on land to the county court, though a notice is directed by law to be given to the defendant, no evidence is required of that notice but the record of the county court ordering the *venditioni exponas.*
2. The description in the return of a constable of a levy on land need not literally comply with the act of Assembly in such cases, its requirements being substantially that the land should be sufficiently distinguished and identified.
3. When the original records are offered in evidence in the court to which they belong they should be received, because the court is presumed in law to know its own proceedings; but in another court the proper evidence is a copy of the record, authenticated by the seal of the court.
4. In the case of a return by a justice of a levy on land, with the corresponding papers, it is not necessary that it should appear by a distinct certificate of the clerk that these papers have been enrolled in bound books, as required by the act of Assembly. The ordinary copy of the record, certified by the clerk under the seal of the court, is sufficient evidence of the enrollment.
5. The declarations of a person who has executed a deed, at a period subsequent to such execution, are not evidence against the grantee. But the declarations of a grantor between the time when the deed falsely bears date and the time when it was actually executed are evidence as to the fraudulent intent of the parties.

APPEAL from DAVIDSON Spring Term, 1846; *Settle, J.*

Ejectment for a tract of land which both parties claimed under Isham Doby: the lessor of the plaintiff under a deed from Doby to him

bearing date 23 April, 1840, and the defendant under a purchase at a sale under execution against Doby and a sheriff's deed dated 2 November, 1841, as hereafter mentioned.

The defendant alleged that the conveyance to the lessor of the plaintiff (who was the brother-in-law of Doby, and did not appear to have paid anything for the land was antedated, and was fraudulent as against Doby's creditors, and void. The defendant then gave in evidence (383) the records of four cases in the county court of Davidson, some at the instance of the defendant and others at the instance of other persons, against Doby, from which it appeared that in February and April, 1841, four warrants had been commenced against him, on which judgments were rendered and executions issued on 4 June thereafter, on each of which the constable returned, "No goods or chattels to be found; levied on the lands and tenements of Isham Doby, adjoining the land of Allen Newsom, Claiborne Newsom, and others, containing 190 acres." Upon that return, judgments were rendered and orders for sale made in the several cases at August Term, 1841; and thereupon writs of *venditioni exponas* were issued, under which the sale was made to the defendant. The plaintiff's counsel objected to receiving the records in evidence because it did not appear that the proceedings had been recorded in a well-bound book kept for that purpose. The plaintiff then produced the original warrants, judgments, justices' executions, and constable's return, with the indorsements thereon, "Recorded in minute docket, February, 1843," in the handwriting of the clerk of the county court. The counsel for the plaintiff still objected to the evidence, and insisted that it ought to appear by the minutes of the county court that the papers had been recorded therein. But the court received the evidence. The defendant then proved by one Smith, who is one of the subscribing witnesses to the deed from Doby to Ward, that it was not executed on 23 April, 1840, as it purports on its face to have been, and that, although the witness could not recollect precisely when it was executed, it was certainly not before September, 1840, as the witness knew from the fact that he attested the deed after he came to reside in Davidson County, which was not until September, 1840; and the defendant proved by other witnesses that the deed from Doby to (384) the lessor of the plaintiff was not made until April, 1841; and thereupon the defendant offered to prove declarations made by Doby between April, 1840, and April, 1841, that he was at the time of making such declarations the owner of the premises in dispute, but that he intended to convey them to the lessor of the plaintiff in order to defeat the defendant and his other creditors aforesaid of their debts, and in trust for himself. To the evidence thus offered the counsel for the plaintiff objected for the reason that it would tend to invalidate

the deed made by Dobby himself, which purported to be made on 23 April, 1840, and, therefore, ought not to be affected by his declarations made after that day. But the court received the evidence.

The counsel for the plaintiff then objected that the return of the levy by the constable was defective because it did not follow the words of the act of Assembly upon that subject. Thereupon the defendant gave evidence that there was not a water-course within the land in dispute, and that it would easily be identified and known by persons residing near it, from the description in the returns. The court instructed the jury thereon that it was not necessary the levy should be in the words of the act, and that if the evidence satisfied them that the description in the return identified the land as effectually, for the information of bidders and others, as if all the terms of the act had been used, it was sufficient.

The counsel for the plaintiff further objected that the orders of sale were void because the defendant had not proved that notice had been given to Doby of the several levies and the intention to move for judgments thereon. But the court held that the judgments and orders of sale in the county court were sufficient, without further proof of such notices.

The jury found for the defendant, and judgment was rendered thereon, and the plaintiff appealed.

Mendenhall for plaintiff. (385)
No counsel for defendant.

RUFFIN, C. J. That no further evidence of the service of notice as required by the statute, Rev. Stat., ch. 45, sec. 19, is requisite, besides that contained in the record itself, was decided in *Burke v. Elliott,* 26 N. C., 355, which disposes of the last exception.

Upon the other objection, as to the sufficiency of the return of the levy, *Smith v. Low,* 24 N. C., 457, and *Blanchard v. Blanchard,* 25 N. C., 105, are in point to sustain the opinion given by his Honor. It was held in those cases that the construction of the act did not imperatively require that it should be literally followed, provided it appeared upon evidence that the description given was equivalent to that prescribed as the means of distinguishing and identifying the parcels.

It is a very common practice for gentlemen of the bar, for the convenience of themselves and their clients, to use as evidence the original documents and minutes, instead of the record as finally made up or supposed to be made up from them, or a copy from it as enrolled. When the evidence is offered from the same court in which the proceedings were had, no difficulty can occur, because the court knows its own proceedings

and records and can *instanter* order the enrollment, and give the parties the benefit of it, in its complete state. When the proceedings are in one court, and they are offered as evidence in another, regularly the original documents or minutes, which may need evidence to identify them, are not evidence, but only the record made up or a copy from it, authenticated by the seal of the court. This we had supposed to be so perfectly understood that no one would think of objecting that it did not appear from the originals and minutes (when admitted by consent) that they were not enrolled or recorded, as it is called, or would absurdly require that it should be shown by the enrollment that they had
(386) been enrolled, when, in truth, those documents by consent are received instead of the regular roll itself. In this case the objection is that it did not appear in evidence that the proceedings had before the justice had been recorded by the clerk in a well bound book, as directed by the act of 1794, Rev. Stat., ch. 62, sec. 16, which it seems to have been supposed could only appear by the minutes of the county court. But whether the proceedings were recorded or enrolled could, in this case, as in every other, appear from the enrollment, or a copy duly certified under seal, and could not appear from the minutes.

The direction to record these proceedings in a well-bound book is nothing peculiar, but is only providing that they, although originating before a justice out of court, shall, when returned to court and made the foundation of an adjudication there, be enrolled for their preservation, as the process, pleadings, and other proceedings are in other cases. Therefore, when a copy of the record of the county court, or what purports to be such record, is produced, it establishes that everything therein appearing is enrolled; for that is in truth the copy of the enrollment in legal parlance. Hence, after reading in evidence the transcript from the county court in this case, it was superfluous to produce the originals with the clerk's memoranda on them, to let it be seen therefrom that they had been recorded, for they were not evidence at all of any such thing, whereas the other was the thing itself or a copy of it. But if only the originals and minutes were read, as they were not objected to on the grounds of their being such originals and not the record technically, it must be understood that they were received, by consent, as evidence of everything that would appear in the roll, when regularly made up from them; and the objection, as being incompatible with such consent, would then be properly overruled. In every point of view, therefore, the decision of his Honor was right.

It is a well settled rule of evidence that the declarations of a
(387) person after he has made a deed cannot be received to impeach it, because they were made when he had no interest in the subject, and it would be unsafe and unreasonable that the interests of another

person should be attacked by them. It is also true as there is, *prima facie,* to be a presumption of truth and fairness in all transactions, that the date of a deed is to be taken as the time of its creation until there be evidence to the contrary. But in the present case it is stated as a fact that the date of the deed was not that of its execution, but about one year prior to it, and it was contended that the declarations of Doby of a fraudulent purpose to execute to Ward a deed in trust for himself and give it a false date could not be received, because, though made before the deed was actually executed, they were made after the time the deed falsely purports to have been executed. Such a position is perfectly preposterous, as it would make fraud a complete protection in itself, and enable admitted falsehood to exclude the truth. If the deed had been dated truly, it would have afforded no pretense for excluded the declarations of Doby, during 1840, of the purpose to make a voluntary conveyance to his brother-in-law, because he was then the owner and possessor of the land. Then it is impossible that those declarations, thus made, while he was the owner and possessor, should lose their competency and effect by the subsequent execution of a deed in April, 1841, and giving it the false date of April, 1840. After the evidence as to the time of making the deed, the court properly received the declarations for the purpose of directing the jury to inquire of the true time of the execution of the deed, and, further, to disregard such declarations as were made after the day on which they should find the deed was executed, but to take into their consideration those made before the execution of the deed as evidence, to be weighed by them, of the *bona* or *mala fides* of the transaction.

PER CURIAM. No error.

Cited: Pendleton v. Trueblood, 48 N. C., 98; *Hodges v. Spicer,* 79 N. C., 229; *Hilliard v. Phillips,* 81 N. C., 106; *Farmer v. Batts,* 83 N. C., 389; *Lash v. Thomas,* 86 N. C., 315; *S. v. Voight,* 90 N. C., 745; *S. v. Hunter,* 94 N. C., 834; *Blow v. Vaughan,* 105 N. C., 210; *Perry v. Scott,* 109 N. C., 384; *Webb v. Atkinson,* 124 N. C., 454; *Bank v. Levy,* 138 N. C., 278.

(388)

DAVID C. GUYTHER v. JOHN C. PETTIJOHN.

1. When there are two part owners of a chattel, and one of them, without the assent of the other, *destroys* the chattel or renders it *useless by use,* the former is liable in damages to the latter for the value of his share.
2. In such case no demand is necessary before bringing the action.

APPEAL from WASHINGTON Spring Term, 1846; *Bailey, J.*

This was an action of trover, brought to recover damages for the conversion of two fishing seines. Plea, "Not guilty." In 1841 the seines belonged to John Bennett and F. Fagan, as partners in the business of fishing. In August, 1842, Fagan conveyed his interest in the two seines to the plaintiff. Bennett, who had the possession of the property, died in December, 1842, and his executor, on 31 January, 1843, sold one of the seines to the defendant at public sale, the plaintiff then and there objecting and setting up his title to a half of the said seines. The plaintiff, however, afterwards withdrew his objection, saying "that he would be entitled to his part." At a future day the executor sold to the defendant the other seine at private sale. The plaintiff was not then present, nor did he give any assent to this sale. The defendant used the seines in fishing up to the bringing of this action, which was on 1 May, 1845.

The defendant insisted, *first,* that he and the plaintiff were tenants in common, and that one tenant in common could not maintain an action of trover against his cotenant for an injury done to the property held in common; and, *secondly,* that the plaintiff should have made a demand before he commenced this action. The court charged the jury that if the plaintiff assented to the sale made by the executor of Bennett, he could not recover in this action of trover for a conversion of any of the *property then sold;* and that if there was no assent, then the
(389) plaintiff could not recover unless they further found that the defendant had in fact *destroyed the seines,* or that they had been rendered *useless by use,* before the bringing of the action; and if that fact was proved against the defendant, then the defendant would be entitled to recover one-half of the value of the seines in damages. The court further instructed the jury that a demand before the bringing of the action was not necessary. The jury found a verdict for the plaintiff; a motion was made for a new trial, and it was refused. Judgment was then rendered, from which the defendant appealed.

Heath for plaintiff.
No counsel for defendant.

DANIEL, J. The court told the jury that if the plaintiff assented to the sale of his interest in the seines, or either of them, then he could not recover in this action for a conversion of that property which he had assented should be sold. The jury have by their verdict negatived any assent to the sale of the plaintiff's interest in the seines. The case, then, it seems, turned altogether upon the ground whether the defendant had destroyed the seines, or whether he had rendered them *useless by use,*

before the action was brought. The original owners had been fishing as partners one or two years before the sale to the plaintiff by Fagan. But whether they had used either of these two seines during that time does not appear in the case. But the evidence does show that the defendant had in fact used these seines in fishing, for three springs, from the sale to him up to the bringing of the action. There was, therefore, evidence to be left to the jury as to the *destruction* of the seines by the defendant, or as to his rendering them *useless by use.* The law, we think, was correctly stated to the jury by the court. *Lucas v. Wasson,* 14 N. C., 398.

PER CURIAM. No error.

(390)

JOSEPH G. GODFREY v. JAMES LEIGH.

1. Under our statute of usury, Rev. Stat., ch. 117, the reservation of usurious interest makes the contract void, but it does not incur a forfeiture. The forfeiture is incurred only by taking usurious interest, as such.
2. Although there be a corrupt agreement for excessive interest when the money is advanced, yet no action lies for the penalty until some illegal interest has been received.
3. So, on the other hand, if the contract was not for excessive interest, but the lender afterwards receives it, he forfeits double the sum lent.
4. If a bond be given upon an usurious consideration, and a new bond of the borrower is afterwards substituted for it, the offense is not committed so as to subject the lender to the penalty until the second bond be paid.
5. But where the debtor does not give his bond merely as a security, but gives that of another person, payable to him and belonging to him, in payment, and it is accepted as a payment, it is a payment in law as well as in the common understanding of men.
6. A payment in money's worth, received as a payment, is considered in law to be the same as a payment in cash.
7. A contract for usurious interest may be laid, in a declaration for the penalty, as of the day when the illegal interest was paid.

APPEAL from PERQUIMANS Spring Term, 1846; *Bailey, J.*

This is an action of debt founded on the statute of usury. The declaration contained two counts, but all the evidence was directed to the first, and on that the judgment was rendered for the plaintiff. It demands $693.08 and lays the case thus: That on 23 March, 1842, at, etc., upon a certain corrupt contract then and there made between the defendant and the plaintiff, the said J. L. took, accepted, and received of and from the said J. G. the sum of $124.03 by way of corrupt bargain and loan for the said J. L. forbearing and giving, and having forborne and given day of payment, of the sum of $346.54 therefor, viz., on 1

January, 1841, at, etc., lent and advanced by the said J. L. to the said J. G. from the said 1 January, 1841, until the said 23 March,
(391) 1842, which said sum so taken, etc., exceeds the rate, etc. Pleas, *nil debet* and statute of limitations.

This action was brought on 1 March, 1845. On the trial the plaintiff produced one Sawyer as a witness, who stated that the plaintiff applied to the witness to assist him to borrow a sum of money; and that on 1 January, 1841, he applied, on behalf of the plaintiff, to the defendant to lend the plaintiff the sum he needed, and offered, if he would, to transfer to him a bond which he, the witness, then held from the present plaintiff to the witness for the sum of $382.70, bearing date 12 September, 1839, and due one day after date; and that the defendant agreed to take the said bond and advance the amount thereof to the plaintiff, deducting 16 per cent from the amount of the principal and interest thereon; that this was communicated to Godfrey, who consented to take up the money on those terms; and that, then, the witness and Godfrey and Leigh, being together, he, Sawyer, computed the sum due on the bond and ascertained that the net proceeds of it after deducting the 16 per cent was $346.54, and the defendant then handed to him that sum, and he immediately handed it to Godfrey, all three of them at the time sitting at the same table. The witness upon cross-examination stated positively that he did not borrow the money, nor sell the bond to the defendant, but that Godfrey did, and the defendant understood it so, though he said that if the defendant had not taken the bond and advanced the money he, the witness, would have carried the bond home as his own, as Godfrey only wished to borrow money on it. He also stated that the plaintiff again gave to the witness his bond for the sum due on the bond transferred to the defendant, and that on 23 March, 1842, the plaintiff repaid to the defendant the said sum of $346.54, and also the
(392) further sum of $124.03 in discharge of the said bond, which the defendant then delivered to Godfrey as satisfied. But he stated that the payment was not made in cash, but was made in a bond executed by one Reed to Godfrey for a larger sum, which Leigh accepted from the plaintiff in payment of the said debt, and the excess of Reed's bond above this debt was applied as a credit on another debt which Godfrey owed Leigh.

The counsel for the defendant insisted that as the bond of Godfrey was payable and belonged to Sawyer until the latter transferred it to the defendant, the transaction was a sale of the bond by Sawyer to Leigh; and, secondly, that if Sawyer lent the bond to Godfrey, the obligor, it thereby became extinguished; and that though Leigh might have lent the money to Godfrey, yet it would not be usurious, because the bond had ceased to be binding; and, thirdly, that as the bond of

Godfrey to Sawyer was good in its inception, the discounting it at the rate of 16 per cent constituted usury, and the offense was complete when the money was advanced on 1 January, 1841; and, fourthly, that if the last position should not be true, then no action had yet accrued, as it did not appear that the defendant had received payment of Reed's bond.

The court instructed the jury that if, in their opinion, the defendant purchased the bond from Sawyer, and paid him or the plaintiff the money, the plaintiff could not recover. But if, in their opinion, Sawyer applied to the defendant to borrow the money for Godfrey, and explained to him that he was willing to let Godfrey have the use of the bond, provided he could raise the money on it from the defendant, and that thereupon the defendant agreed to advance to Godfrey, as a loan, the amount of the bond, deducting 16 per cent, and did pay the same into the hands of Sawyer on 1 January, 1841, viz., the sum of $346.54, as a loan for Godfrey and to be paid to Godfrey, and took from Godfrey, through the hands of Sawyer, the bond of Godfrey for $382.70; and that on 23 March, 1842, Godfrey paid the defendant on the said contract (393) the sum of $470.50—being $124.03 for the use of the money from 1 January, 1841, to 23 March, 1842—it was usurious, and the defendant forfeited double the sum so lent by him.

The court further instructed the jury that the penalty was not incurred by making the loan to Godfrey, but only receiving usurious interest thereon, which was not until the payment on 23 March, 1842; and, therefore, the statute of limitations was not a bar.

And, lastly, the court told the jury that if the defendant took and accepted from Godfrey the bond of Reed, payable to Godfrey, and by him transferred to the defendant as payment of the sum lent by the defendant to Godfrey, and the usurious interest thereon, it was the same as if the payment had been made in money.

Heath for plaintiff. (394)
A. Moore for defendant.

RUFFIN, C. J. Whether the transaction was in fact a purchase of the bond of Godfrey by the defendant from Sawyer, or was a loan to Godfrey himself, was fairly left to the jury, and has been found against the defendant. Taking it, then, to have been a loan to Godfrey, it seems clear that all the opinions delivered by the court were (395) correct. That the bond was good in the hands of Sawyer, or that it was good or not good as a security in the hands of Leigh, can make no kind of difference as to the liability of the defendant; for there is a clear distinction between the part of the act which avoids the agreement or securities and that which gives the penalty. The reservation of

usurious interest makes the contract void, but it does incur a forfeiture. The forfeiture is incurred only by taking usurious interest as such. Therefore, although there be a corrupt agreement for excessive interest when the money is advanced, yet no action lies for the penalty until some illegal interest has been received. So, on the other hand, if the contract was not for excessive interest, but the lender afterwards received it, he forfeits double the sum lent. *Rex v. Allen,* 1 Mod., 69; Sir Tho. Raym., 169; *Floyer v. Edwards,* Cowp., 114; *Fisher v. Bearly,* Dought., 235. So if the bond could be supposed to be extinguished because Sawyer appeared to let Godfrey have the benefit of it in this manner, it would not be material, for every security for an usurious loan is void; and yet, if illegal interest is paid on it, the penalty arises.

As to the statute of limitations, it is clear that it did not begin to run until the payment of the debt on 23 March, 1842. However it might be if the bond had been discounted for Sawyer, and less than the sum due on it for principal and interest had been paid to him, yet as in this case the loan was to Godfrey of a certain sum of money, as found by the jury, and Godfrey's bond was transferred to Leigh by Sawyer merely as a security, no interest can be considered as having been kept back or as taken by Leigh, as such, before he received the payment in 1842.

It is true that if a new bond be substituted for one that is usurious, the offense is not committed so as to subject the lender to the penalty until the second bond be paid. But when the debtor does not
(396) give his bond merely as a security, but gives that of another person, payable to him and belonging to him, in payment, and it is accepted as payment, it is a payment in law as well as in the common understanding of men. Bullion, taken at an agreed price, may be stated in pleading as so much money lent or paid. *Barbe v. Parker,* 1 H. Bl., 283. So payment in money's worth, as a horse, bank notes, the note of a third person, and the like, was said in *Brisendine v. Martin,* 23 N. C., 286, to be the same as cash. And, lastly, in *Ligon v. Dunn, ante,* 133, the Court held that the acceptance by an obligor of a bank check in payment of a bond supported the plea of payment in debt on the bond.

It has been further objected in arrest of judgment that the declaration is defective in not setting forth the day of making the corrupt contract. But it seems to be sufficient in that respect, following literally, we believe, the precedent given in 2 Chit. Pl., 514, or the common count for usury under the St. 12 Anne. It omits all the transaction previous to 23 March, 1842, except the loan of the money on 1 January, 1841 (which it may be supposed was made fairly), and then it alleges that the defendant took, on 23 March, 1842, upon a corrupt bargain then made with the plaintiff, the sum of $124.03 by way of unlawful interest.

Now, we have seen that if, upon a good agreement, usurious interest be afterwards received, the offense is consummated, and, therefore, it is plain that the very fact of paying and taking the usurious interest constitutes an agreement for it, and that it may be laid as such, and, consequently, laid as of the day when the illegal interest was paid.

Judgment for the plaintiff on the first count of the declaration

PER CURIAM. Affirmed.

Cited: *Cobb v. Morgan,* 83 N. C., 215; *Pritchard v. Meekins,* 98 N. C., 247; *Rushing v. Bivens,* 132 N. C., 275.

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THE STATE TO THE USE OF JAMES MURPHY AND WIFE AND OTHERS v. WILLIAM MCKAY ET AL.

1. A single suit upon an administration bond may be brought by more than one of the persons entitled to distribution of the intestate's estate, as relators.
2. The court, when the suit is at the instance of more than one relator, will adopt such rules as may be necessary to prevent injustice to the defendants, either as to the mode of declaring, the breaches assigned, the pleadings, the trial, or the costs.

APPEAL from SAMPSON Spring Term, 1846; *Dick, J.*

Munroe Treadwell died intestate, leaving several next of kin, and the defendant McKay became his administrator, and, together with the other defendants as his sureties, entered into a bond for the due administration of the estate. The present action is debt brought thereon, and the declaration contains three breaches: the first, that the administrator refused to pay the relators, Murphy and his wife, the distributive share of the residue of the estate remaining in his hands after the payment of the debts of the intestate and making all just allowances to the administrator, which belonged to her as one of the next of kin of the estate. The second breach and the third were like the first, except that the one was for not paying the share of the residue belonging to Owen G. Treadwell, who is another of the next of kin and also one of the relators, and the other for not paying the shares of Shadrack Wooten, another of the next of kin and of the relators. The defendants pleaded *non est factum,* and, to each breach, payment of the sum specified in it to the particular relator. On the trial of the issues the counsel for the defendants objected that the action would not lie at the instance of the three relators for their several distributive shares, and moved the court to

nonsuit the plaintiff. The court did so accordingly, and from (398) the judgment the relators appealed.

MacRae for plaintiff.
Strange for defendants.

RUFFIN, C. J. Without regard to the form in which it is presented, the Court supposes the single question to be whether the action is well brought, and, therefore, has considered that alone.

Next of kin take distinct shares, and unequal balances may be due to the several persons who make up that class. The arguments for the defendants is that these three of the next of kin are separate creditors of the administrator, and, therefore, that one action cannot be brought for the benefit of all of them. There is no doubt that each creditor or next of kin may prosecute a separate action "and recover damages for the breach to his prejudice until the penalty of the bond be exhausted." It is the express purpose of the act, Rev. Stat., ch. 46, to give to any "person or persons" the right to prosecute "a suit or suits in the name of the State" on an administration bond, and "recover all damages which he, she, or they may have sustained by reason of the breach of its conditions." But while "suits may be brought on the bond" by several relators, the act, taken literally, allows "any persons" to bring "a suit" on it. The question is, whether the literal reading is the true sense of the act. The defendant's counsel contends that convenience and legal analogy require the interpretation that separate actions must be brought on separate rights, and that two persons cannot unite as relators unless they have a joint interest in all the damages that can be assessed under the declaration.

There is no doubt that in England any number of breaches may be assigned in an action on an administration bond. It is payable to the ordinary, who is authorized to take it as a security for the estate. (399) But there is no statute which provides any particular mode for suing on it, as by an assignee or a person or persons injured; and those matters are regulated by the general law. Therefore, the suit is necessarily to be instituted by the assent and in the name of the ordinary, who is a natural person; and but one suit can be brought on it, as it is merged in a judgment on it. Now, the statute 8 and 9 Wil. III., ch. 11, compels the plaintiff to assign a breach or breaches of the condition, and the jury to assess the damages arising therefrom, and at the same time authorizes him to assign as many breaches as he thinks fit. Although the ordinary really has no interest personally in any breach assigned, yet by force of the contract with him contained in the bond he recovers damages arising from a breach of the condition in not

paying a sum, for example, to A, in the same manner as if the condition had required the payment of that sum to the bishop himself. As the declaration might assign any number of breaches of the latter kind, that is, in the nonpayment of different debts to the ordinary, it follows that in like manner it may assign several breaches in relation to several duties to another person or to several persons—the bond, in truth, covering all of them. There is no legal reason why the bishop should recover for a breach in respect of one of the next of kin more than of another; nor why he may not assign two or more breaches of that kind as well as for matters affecting his private interest. No injury can result to any person from it, and but few inconveniences, if any. The suit is by order of the ordinary, at the suggestion of a person or persons injured; and several will not probably unite in the application, nor the bishop grant it, if the investigation of one claim will retard the trial as to another. It is true, the case may be much complicated by embracing many breaches in one declaration; but that is attributable to a statute which is held to be highly remedial, and to have been made for the benefit of defendants peculiarly. Every defense is open to (400) the defendant on each breach that would be if that were the sole breach, or if the action were covenant; for, in answering the declaration, the defendant may put in any number of pleas to each breach—though, indeed, it is otherwise when the breaches are assigned in the replication, as a rejoinder is confined to a single answer. It appears, then, that the suit is in England simply the suit of the obligee, who is the plaintiff of record; and he may, of course, assign any number of breaches on the condition of this, like any other bond.

But the counsel for the defendants argued that as our statute, Rev. Stat., ch. 81, sec. 2, requires the relator or relators to state in the declaration matter of inducement, showing at whose instance and on whose behalf the suit is brought, a relator is not only regarded as a person interested, but as really and legally the plaintiff; and, consequently, that none can sue as relators in the same action but such as have a joint and equal interest in the whole subject of controversy. The provision referred to is confined to suits on bonds of a sheriff, clerk, and other officers; and there is none such in the act of 1791, which relates to administrations bonds, and merely directs that they shall be put in suit at the instance of any person or persons injured, in the name of the chairman of the county court, to whom they were then made payable. But admit that the form of the declaration is to be the same in both instances, and that it must show that particular persons have put the bond in suit, and the interest of those persons in the breaches, the Court cannot agree, as an inference therefrom, that several breaches may not be assigned in respect of persons severally entitled. It is not like the

case supposed of several creditors joining in an action on several securities. Here there is a single security for each and all the duties, namely, a bond payable to a trustee for all persons interested; and the
(401) recovery ought to be coextensive with the security and the several rights of the respective persons interested. No reason was ever opposed to it but a technical one, as to a rule of pleading which prevented the assignment of more than one breach, and was, therefore, found to impede the administration of speedy and exact justice between the parties, and was abrogated by a statute which gives a remedy at once more enlarged and more precise and less expensive. And suits brought in the name of the State under a general provision of law by persons injured seem to stand on the same footing, as to this point, with those brought by the particular order of the obligee at the instance of such injured person or persons. We find, indeed, that an action was early brought and maintained on an administration bond for the distributive shares of two next of kin; and we believe that has since been the general practice. *Williams v. Hicks,* 5 N. C., 437. There is but one ground upon which it could be held that the law is different in England and here, which is, that there the costs of the trial go according to the results of the several issues, whereas here the party in whose favor judgment is given is by statute entitled to "full costs." It might then happen, if two or more persons have the absolute right of joining sundry demands in the same declaration, in the shape of several breaches of the conditions of a bond, that the defendant might have all the costs to pay, though the issues on the breach on which the controversy chiefly turned and the costs were incurred were found for him, which would, certainly, be very mischievous. But the danger that it might sometimes so happen is not sufficient to authorize a construction of the act of 1793 not required by its words, but, rather, contrary to them, which would prevent the wholesome reform enacted in the statute of William from applying at all to bonds of this character; for that is the point here—whether in any case one action can be maintained for the several demands of two or more. Instead of hold-
(402) ing that these suits are not within the statute because, in a particular instance it might produce an inconvenience, it is the rather our duty to devise means for avoiding the particular inconvenience, while the act is left to its salutary general operation. This, we think, may be readily and properly done by an exercise of that control over suitors, as to the manner of their using the process of the law, which every court must occasionally find necessary to guard against its abuse. As, on the one hand, a plaintiff who has brought several suits for matters which might have been joined in one has been often compelled to consolidate, so, on the other, if several persons artfully combine to make a defendant liable for all the costs of

a suit, because upon a breach in respect of one of them there must be a verdict against the defendant, though for him upon the other issues, there must be a similar power to prevent the evil by compelling the relators, in substance, to sever. That may be done by the common expedient of staying the proceedings in the joint suit, if it may be so called, at the instance of the defendant, upon equitable terms as to costs, and his accepting separate declarations from each of the relators or so much of them as he might prefer to contend with singly, and pleading to issue thereon. We think, indeed, that the court clearly has the power to order breaches to be struck from a declaration where it appears plainly that the right to put the bond in suit has been abused. Suppose, for instance, a relator, for the purpose of saving the costs, were to insert as one of the breaches a failure of the administrator to return an inventory within the ninety days; under the provision that the bond may be put in suit by any person injured, it must be competent for the court, upon its appearing that the relator had no interest in that provision or had not suffered from the omission for that period, to reform the declaration so as to confine the relator to matters out of which damages had been incurred by him. In the same manner, if it appear
that it may be to the prejudice of the defendant, in respect to (403)
the costs, or his evidence, or other matter, to be obliged to plead
to all the breaches in one action, and go to trial on them together, there ought to be a power to modify the proceedings so as to effect justice in those respects. If both sides choose to litigate all the matters together, as, in this case, they did by an union between the relators in bringing suit, and by the defendants pleading to issue on the merits, there is no reason for the interposition of the Court to prevent them. The relators must submit to any inconvenience that may arise to themselves from having brought one action; but they ought not to have the right conclusively to bind the defendants to go to trial upon all at once. If, therefore, the defendants had, before pleading to the several breaches in this declaration, moved to have the breaches in respect to each relator made the subjects of separate declarations, we should have thought the court would have acted properly in allowing it. It might be also right in a later stage of the cause to allow it, upon a proper case shown and upon just terms as to the prior costs. But it was too late to make any motion of the sort when the case was before the jury; and as an objection to the action itself it seems to the Court not to be well founded.

The judgment must, therefore, be reversed, and the issues tried upon a

PER CURIAM. *Venire de novo.*

Cited: *Hoover v. Berryhill*, 84 N. C., 137.

(404)

DUNCAN BUIE v. BROWNE & DEROSSETT.

An inspector of lumber, etc., in the town of Wilmington is, by the usage of trade in that town, the agent of both buyer and seller, and, by the same usage, it is the privilege of the purchaser to designate the place of delivery and the duty of the seller to deliver it there. Therefore, where lumber was placed with an inspector for inspection, and he was directed by the purchaser to deliver it on a particular wharf, and by mistake he delivered it on another wharf, and especially when after such deposit the purchaser informed the seller he would not receive it there, and the property was afterwards casually destroyed by fire: *Held*, that the seller was responsible for the loss, and the purchaser was not bound to pay him the price he had contracted to give.

APPEAL from NEW HANOVER Spring Term, 1846; *Dick, J.*

The action is brought to recover from the defendants the price of a quantity of lumber sold by the plaintiff, as he alleges, to them, and which was burnt in the town of Wilmington. The plaintiff brought the lumber to the town of Wilmington, where the defendants reside, and offered it for sale to the defendant DeRossett, who agreed to purchase it if, when he saw it, it proved to be good. It is the custom at that place, as proved by the witnesses, for the purchaser to direct where the lumber shall be delivered, and for the seller to deliver it there. Before delivery it is required to be inspected, and when the inspector takes possession for that purpose he is considered the agent of both parties; the inspection is at the expense of the purchaser. The inspector, Mr. Ashe, testified that Mr. DeRossett pointed out to him the place where the lumber was to be deposited, and he did deposit there. A witness who was present at the conversation between the inspector and the defendant stated that DeRossett directed the inspector to land the lumber on the wharf of Browne & DeRossett, near the stern of a ship then lying there; that the ship was subsequently moved to Stow's wharf, where the lumber
(405) was landed, and where it was burnt. If it had been placed on the wharf of the defendants it would not have been burnt. After the lumber was landed, and before it was burnt, the defendants told the plaintiff's agent for selling it and with whom the contract was made, that they would not take the lumber unless it were put on their wharf. The inspector swore that he was employed by the plaintiff to deliver the lumber.

The only controversy arising in the case as presented to this Court is as to the delivery. Upon that point his Honor instructed the jury "that if the inspector had not landed the lumber at the place pointed out by DeRossett, but by mistake landed it at a different place, yet he was the agent of the defendants from the time he took possession of the lumber by direction of the defendants for the purpose of landing and

inspecting it, and the property vested in the defendants, and the inspector having by mistake landed it at a different place than that pointed out by the defendants would not alter the case."

Under these instructions the jury found a verdict for the plaintiff, and from the judgment thereon the defendants appealed.

Warren Winslow for plaintiff.
J. H. Bryan for defendants.

NASH, J. In the opinion of the court below we do not concur. The different inspectors in the State are public officers, appointed by the courts of pleas and quarter sessions of the several counties where needed, and, except in the case of the inspectors of Wilmington, hold their offices during good behavior—they giving bond and security for the faithful discharge of their duties, and taking an oath of office; and a penalty is inflicted upon any one for acting as an inspector without being first qualified. For the purpose of inspection, then, the inspector is the officer of the law, and he is the agent of both parties by the usage of the trade of the town of Wilmington, after he takes (406) possession. By the same custom it is the privilege or right of the purchaser to designate the place of delivery, and the duty of the seller to deliver it there. This was a part of the contract between the parties. It is a right highly important to the purchaser. Where, as in this case, he is the owner of a wharf, it saves him much risk, as well as expense, to have it delivered there. If deposited elsewhere, at the election of the vendor, his risk would be increased, not having the control of the promises and not being able to watch and guard it properly and with his own servants. If the lumber in this instance had been landed upon the wharf of the defendants it would not have been destroyed by the fire. But be this as it may, it was a part of the contract, as assumed by the judge, that the lumber should be landed at the wharf of the defendants. The inspector was an agent, with special authority to deliver and receive at a specified place. The variation here, for the reasons before given, was in a matter of substance and very material; and it was fully known to the plaintiff. The defendants never adopted the act of the inspector, when apprised of the place where the lumber was landed; they informed Pipkin, the special agent of the plaintiff, that they would not take it unless placed on their wharf. The judge then erred in instructing the jury that if the inspector had, by mistake, not landed the lumber at the place directed by the defendants, they were still bound by his delivery; and for this error there must be a new hearing of the cause before another jury.

PER CURIAM. *Venire de novo.*

(407)

DEN ON DEMISE OF STEPHEN W. SAWYER ET AL. v. LYDIA SAWYER.

1. Tamar Sanderlin had issue a legitimate son, Isaac Sanderlin, and an illegitimate daughter, named Zelia, who intermarried with Lemuel Sawyer. They died, leaving an only child, who is the *propositus*, to whom the premises were devised in fee by her grandmother, Tamar. The *propositus* died without issue, leaving as her nearest relations a brother and sister of her deceased father, who are the lessors of the plaintiff, and also the said Isaac Sanderlin, under whom the defendant claims.
2. *Held* by a majority of the Court, RUFFIN, C. J., *dissentiente*, that no part of the land descended to Isaac Sanderlin, but the whole descended to the brother and sister of the father of the *propositus*.
3. *Held* by RUFFIN, C. J., that the land descended equally to Isaac Sanderlin, the uncle *ex parte materna*, and to the brother and sister, uncle and aunt, *ex parte paterna*.

APPEAL from CAMDEN Spring Term, 1844; *Bailey, J.*

The land to recover the possession of which this action of ejectment was brought belonged to Tamar Sanderlin, who devised it to her illegitimate daughter, Zelia Sanderlin, for life, and then to her children in fee. Zelia married Lemuel Sawyer, by whom she had one child, and then died, leaving her husband and child surviving. They are both dead. Besides Zelia, Tamar Sanderlin had one other child, Isaac Sanderlin, who was legitimate, and is dead. The lessors of the plaintiff are the brothers and sisters of Lemuel Sawyer, the father, and the defendant is the only child of Isaac Sanderlin. The child of Zelia died without issue.

The only question was, Who is the heir at law of the child Zelia Sanderlin? The presiding judge decided the plaintiffs were, and the defendants appealed.

This case was argued at a former term by

Kinney for plaintiffs.
A. Moore for defendant.

(408) NASH, J. The child of Zelia Sanderlin was legitimate, and derived the land by devise from her grandmother. She is, therefore, in law a purchaser, and the *propositus*. If this was a case at common law there can be no doubt the plaintiff would be entitled to the inheritance. But descents in this State are regulated not by the common law, but by our own statutes, Rev. Stat., ch. 38. The defendant contends that under a proper construction of the 4th, 5th, and 10th rules the land in controversy belongs to her as the heir of the *propositus*. The 4th rule provides: "On failure of lineal descendants, and when the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise, or settlement, from an ancestor, to whom the

person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, etc., the land shall descend to the next collateral relations of the person last seized who are of the blood of such ancestor." Under this rule the defendant can take nothing. She cannot avail herself of it for the reason that in no event could the child of Zelia Sanderlin have been the heir or one of the heirs of Tamar Sanderlin. The latter had two children, a son Isaac, born in lawful wedlock, and Zelia, who was illegitimate. Upon her death intestate, her real estate would have descended to Isaac, and Zelia, the daughter, would have taken nothing. *Flintham v. Holder,* 16 N. C., 347. The child Zelia could not have been an heir or one of the heirs of Tamar Sanderlin, and, therefore, the inheritance cannot descend to her next collateral relations on the part of her grandmother.

Nor do we think that under the 10th rule or canon the defendant's claim is rendered any better. She comes neither within its letter nor reason, certainly not within the former. The rule declares that "When any woman shall die intestate, leaving children commonly called illegitimate, and no children born in lawful wedlock, her real estate shall descend to such illegitimate children and their representatives in (409) the same manner as if they had been legitimate. And if any such illegitimate child shall die intestate without leaving any child or children, his or her real estate shall descend to his or her brothers and sisters born of the same mother, and their representatives." It is manifest the case before us presents no such state of facts as contemplated in this rule. The *propositus* here was not a mother, nor did she die leaving children, either legitimate or illegitimate. She herself was legitimate, and the inheritance is claimed by no brother or sister of hers, or by any one claiming to represent them, or any of them. Does the defendant come within the purview or reason of the rule we are considering? The general scope and meaning of the act, we are told in the case of Flintham, was to prevent escheats in cases where before they would take place, and, therefore, such a construction was to be put upon it as to carry out such intent—meaning such construction to be consistent with the act. In this we agree. Escheats are not favored by our system of laws. If the *propositus* here had died without leaving any one who could succeed to the inheritance but collaterals on the part of the mother, the land would have escheated to the University. But, in our opinion, this case does not present the difficulty. The plaintiffs are the next collateral relations of the *propositus* on the side of her father, and under the 5th rule or canon are entitled to the inheritance. That rule is, "On the failure of lineal descendants, and when the inheritance has not been transmitted by descent or derived as aforesaid from an ancestor, or when, if so transmitted or derived, the blood of such ancestor is extinct,

the inheritance shall descend to the next collateral relations of the person last seized, whether of the paternal or maternal line," etc. The words "derived as aforesaid" refer to the provision in the preceding rule, and we have shown that the child of Zelia could not be one of the heirs of her grandmother Tamar, and we have also shown that the defendant does not come within the operation of the 10th rule; neither is (410) she entitled to share in the inheritance with the plaintiff under the 5th rule. We are told by the Court in *Flintham v. Holder* that the common law altogether excluded bastards from the succession. "From an anxious wish to uphold the great social compact, matrimony, our Legislature (say the Court) has yielded *something* to natural affection, but not so much as to impair either to the parties or to the public the value of that important relation." With this view, the provisions in the 10th section were made. So far the Legislature has opened the door of succession to illegitimates. Further we do not feel inclined to open it, if we had the power. By so doing the result might be the entire prostration, in process of time, of the value of the great social compact. Let the bastard child succeed to the mother, where she has no legitimate child, the illegitimate to the illegitimate, for such is the Legislature's will; but there we stop. The case has occurred, as provided for in the 5th rule. The next collateral relations in the paternal line to the *propositus* are entitled to the inheritance alone, because those on the maternal line, though equally near, are excluded by the illegitimacy of Zelia, the mother. In the decision of the case of *Flintham v. Holder* the Court did not confine themselves to a literal observance of the act, but the case was clearly within its meaning, and to some degree within the words. The decision is confined to the succession of brothers, born of the same mother, and their representatives, and does not extent to other collaterals. That case was correctly decided.

RUFFIN, C. J., dissenting: Tamar Sanderlin had issue a legitimate son, Isaac Sanderlin, and an illegitimate daughter, named Zelia, who intermarried with Lemuel Sawyer. The *propositus* died without issue, leaving as her nearest relations a brother and sister of her deceased father, who are the lessors of the plaintiff, also the said Isaac (411) Sanderlin, under whom the defendant claims a share of the premises.

The question is, to which of these persons, if either, the premises descended. It seems to me that, being in equal degree, the paternal uncle and aunt and the maternal uncle are coheirs. It is to be premised that the question depends altogether upon our act of descents. The act not only professes to regulate the descent of inheritances, that is, of all inheritances, but it actually provides for every possible case. The first

section covers the case of lineal descents, and the fourth and fifty include every collateral descent, since all estates must be either descended or purchased. The common-law canons have, therefore, nothing to do with the subject save only to furnish the rule for counting the degrees of kindred, so as to ascertain who is "the next relation," as expressed in the 6th canon. I admit, next, that descents from and to legitimates are alone within the purview of the act, except so far as it may be curtailed by the 10th rule, taken from the act of 1799, and therefore, that this question turns upon the construction of that canon and its proper influence upon the construction of others, as applied to cases that may arise out of the provision of the tenth. Undoubtedly, then, the lessors of the plaintiff, if not the sole heirs, are some of the heirs of the *propositus,* for by the 10th rule the illegitimate child of Zelia, or her issue, could not inherit from Tamar Sanderlin, because she left a legitimate son. Then the land devised by Tamar to the *propositus* was purchased and does not descend exclusively to her next collateral relations on the part of the testatrix under the 4th canon, but descends to her next relations of both lines, if there be such, according to the 5th rule. Therefore, the inquiry here is, whether Isaac Sanderlin, the maternal uncle of the *propositus,* is one of her "relations" within the meaning of the act. The 10th rule provides for descents from, to, and through bastards. The first part of it enacts that the land of a mother not having legitimate children should descend to her (412) "bastard children and their representatives." That is the case with lineal descent, and includes the children and their legitimate issue *ad infinitum,* and thus the natural connection is made the legal one, in reference to lineal descents, to the most remote degree.

The remainder of the canon relates to collateral descents in the case of bastardy. It is thus expressed: "If such illegitimate child shall die intestate without leaving a child, his or her estate shall descend to his or her brothers and sisters, born of the body of the same mother and their representatives, in the same manner as if they had been born in lawful wedlock." It is obvious, upon the face of the act, that it is inartificially drawn and that it does not expressly cover all the cases that may arise out of the new principle it announces, that there may be collateral descents from and to bastard brethren and their issue. That is the principle of the canon; and a due respect to it should oblige the Court so to construe the act as to sustain the principle, notwithstanding particular cases may, from the imperfection of language, not be distinctly expressed as provided for in it. Thus, it does not expressly provide how it is to be when there are legitimate and illegitimate brethren. Yet it was held in *Flintham v. Holder,* 16 N. C., 345, as a matter of construction, that the legitimate inherit from the illegitimate. It was so held

because there was no reason for excluding them after the law had allowed of inheritable blood between a bastard and any child of the same mother; and, therefore, it was concluded that the Legislature *could not intend* that the property, real and personal, of a bastard should fall to the public as derelict while there was *any* brother or sister of such bastard to succeed to it. To exclude an escheat was a most material consideration in the construction there adopted; for, as was observed in that case, our law leans against them—and that, not merely as a principle of judicial exposition, but as plainly developed in the enactments
(413) of the Legislature. Thus there is no exclusion of half-blood; parents inherit from children, widows from husbands, and the nearest relation who is a citizen, although there be a nearer alien one; and bastard children inherit from mothers and from each other. By that case, then, Isaac Sanderlin would have been the heir of his illegitimate sister, Zelia, had she died without issue. Let that be fixed in the mind. Then let it be noticed that the act does not stop there. It not only says that land shall descend from a bastard to a brother born of the same mother, but it goes on and says if the brother be dead it shall descend to his issue, the words being, "to his or her brothers and sisters and their representatives." Thus it again makes the natural connection a legal one, not only in admitting of a descent from a bastard to a nephew or niece *ex parte materna.* The act is as clear that the nephew and niece shall succeed to a bastard as that the parents of the nephew or niece shall. Does it not follow, from the principle of the act, that, *e converso,* there shall be a descent from the nephew or niece to the uncle or aunt *ex parte materna?* It is to be remembered that there is no incapacity of half-blood; also, that the incapacity of bastardy is expressly and most materially modified—not so, indeed, as to abrogate it entirely; but still, so as to admit, as I think, the case before us. That incapacity excludes illegitimate children, when the mother leaves also legitimate; and it also excludes all collaterals, except when the *propositus* and the person claiming stand in the relation of brethren or the issue of brethren. More remote collaterals, I yield, are not admitted; but when they are brethren or their legitimate issue, it appears to me they are within the plain scope of the act. We have just seen that from a bastard there may be a descent to a nephew or niece *ex parte materna.* That is within the letter of the act by force of the words "their
(414) representatives." But let us suppose that those two words had been left out of the 10th rule, and that it had only provided, that is to say, expressly, that there should be a descent from a bastard to his or her brothers and sisters; yet it is clear that if a brother or sister had died before the bastard, and left issue, such issue would in that case have come in with the surviving brothers and sisters. That would have

been so by force of the third rule, which enacts that the lineal descendants of a person deceased shall represent their ancestor, and stand in the same place as the person himself would have done had he been living: and then the 10th rule would add that the lands should descend from a bastard, and be divided among his or her brothers and sisters "in the same manner and under the same regulations and restrictions as if they had been born in lawful wedlock." I can hardly think any one would contend that in the case supposed the Legislature could mean that the child of a deceased brother of a bastard should not come in with the bastard's brothers and sisters, or, in case there were no surviving brother or sister, that such nephew or niece should not come in rather than the land should escheat. It seems to me that, upon every sound principle of construction, the third rule is to be applied to descents under the 10th rule in the same manner as it is to those under the other canons. Then we have reached this point that by the act land owned by Zelia Sawyer would have descended from her to the child of her brother Isaac if it had not been intercepted by the *propositus*. And the question remains whether the brother Isaac or his child is not to succeed to any part of the land of the *propositus*, she being the issue of the same Zelia. It would seem very extraordinary if they are not. They can only be excluded by treating the statute as an act of merely arbitrary legislation in a particular case, and without reference to any principle whatever—at least, as it seems to me. In order to test the matter more distinctly, and see who is the heir of a bastard child, let us suppose such child—who is the *propositus* here—to have inherited land from (415) the mother. To whom does that go? Undoubtedly it would descend to the other children of the bastard mother, or their issue, if any. No one would say that it should escheat, to the exclusion of the issue of the person from whom it descended to the *propositus*. There then is a descent traced through a bastard, the common mother. But it is said that as brothers are by the common law in the first degree, the descent between them is immediate, and, therefore, that, claiming under the statute, they do not count through the bastard mother. That I admit to be true; but it does not remove the difficulty. The question is, to whom it is to go, under a fair interpretation of the act, when there is no surviving issue of the parent from whom the land descended. Now, it would seem, in reason and the nature of things, that it ought to go back, and that the Legislature would intend it should go back, to the person or persons who would have inherited it from the mother of the *propositus* had the latter not been in being. It is upon that rule of reason, and not as a substantive canon of descent, that the principle is founded in the common law, that, as respects descended estates, the line of the parent is the line of the child. It would appear to be an equally

sound rule to be applied to the construction of a statute which, though clear enough as to the principle of it, is defective in its details. *Wilkerson v. Bracken,* 25 N. C., 315. I am positively sure in my own mind that if this land had descended from Mrs. Sawyer to the *propositus* it would be the sense of the Legislature that it should return to the collateral maternal relations rather than escheat; not, indeed, to all the collateral relations, but to such of them as would have taken it from the mother herself, namely, her brother and his issue. What reason can be given why they should not take from the daughter land descended from her mother, when they would have taken from the mother herself?
(416) It is said, because the act provides, in its words, for a descent from the bastard mother but does not provide for one from her issue. But the object of the act is to gratify the feelings of nature, arising out of near kindred in blood, by admitting of descents between bastard brethren and their issue as far as it is consistent with the policy of preferring legitimates to illegitimates; and here both sides are legitimates, and we have been that the land might have descended from Mrs. Sawyer to her brother Isaac or to *his* child; and that it would have been so by force of the 3d rule, even if the words "their representatives" had not been inserted in the 10th rule. Then, why shall not the land descend from *her* child to the same brother, which land came from her to her child? Nay; we see that had Isaac Sanderlin been illegitimate and died without issue, land would have descended from him to the *propositus* or the issue of his sister Tamar; yet, notwithstanding that inheritable blood between them, it is contended that there could not, *vice versa,* be a descent *from her to him.* It is true, she could not have inherited from him in this case, because he was legitimate; but that does not impeach his claim to inherit from her, but rather strengthens it, as the act favors legitimates at the expense of illegitimates. It is said, indeed, by my brethren that this reason is inapplicable to the case before us because the *propositus* got the land by purchase from her grandmother, and not by descent from her mother, and because there cannot be an escheat, since there are paternal relations who can take. But with deference I must say that it appears to me to be directly inapplicable; for the subject of inquiry is the true construction of the statute, and, therefore, it is proper to consider it, not in reference to the narrow point of a particular case merely, but in reference to every case embraced in it. Therefore, it is indispensable to see how it would be if there were no paternal relations, and if the land had descended to the *propositus* from her mother. If in that case the land would
(417) escheat rather than go from Zelia Sawyer's child to Zelia Sawyer's brother, as it would have done from Zelia Sawyer herself, then I admit there is an end of the question. But if

it is true, as I conceive I have shown it to be, that in that case the law would find an heir for the *propositus* in the same person who would have been heir to the mother from whom the land came to the *propositus, rather than it should escheat,* then it follows, the same person must be a coheir of purchased land with the paternal relations, according to the 5th rule of descents; for, as before observed, the two rules, the 4th and 5th, govern all collateral inheritances—the former making descended estates go to the blood of the first purchaser, while there is any, and the latter making purchased land go to the blood of the *propositus* of both lines, and of the half as well as of the whole blood. Therefore, the case of a descent from the child of a bastard mother to a maternal uncle of land descended from the mother, to the exclusion of escheat, is by fair and almost necessary implication provided for as correlative to the express provision for a descent from a maternal uncle to the legitimate issue of the bastard sister, and, as the consequence of the reasonable rule that land which comes by descent to one shall go to the person who would be the heir to him or her from whom it came by descent. But this being purchased land, it goes alike to the legitimate relations on both sides, as I think; and, therefore, in my opinion, the judgment ought to be reversed and judgment given for the plaintiff for two undivided thirds of the premises and for the defendant as to the other third.

PER CURIAM. Affirmed.

Cited: Ehringhaus v. Cartwright, 30 N. C., 41; *McBride v. Patterson,* 78 N. C., 416; *Bettis v. Avery,* 140 N. C., 188.

(418)

THE STATE v. JAMES S. WHITE.

In an indictment for a libel the indictment must set forth matter on its face libelous, in which case the court is to judge whether it be so or not; or it must aver that the matter charged, though not on its face libelous, was intended in fact to be so, and then the question is to be submitted to a jury.

APPEAL from CRAVEN Spring Term, 1846; *Manly, J.*

The defendant was indicted in the following words, viz.:

STATE OF NORTH CAROLINA—CRAVEN COUNTY.

Superior Court of Law, Spring Term, 1846.

The jurors for the State, upon their oath, present, that James S. White, late of the county of Craven and State of North Carolina, on

the 7th day of December, 1844, with force and arms, at and in the county aforesaid, maliciously and falsely, intending to defame one Silas S. Stevenson and to bring him into hatred and contempt among the citizens of this State, did then and there a certain false, scandalous, and libelous writing of and against him, the said Silas S. Stevenson, falsely and maliciously frame and write and make and then and there did cause to be published in the form of an advertisement, the substance of which said writing is as follows, to wit:

NOTICE.—I have discovered in the public paper that Silas S. Stevenson says that I went to his house for some evil intention, to do him some private injury, or his stock. He is a base liar and scoundrel. I went for no other intention but to search for my stolen property, and his son John was with me all the time. On 26 November, at night, I lost some property. The next morning I got item that it was gone to Silas S. Stevenson's. I immediately pursued and found my property in one of his houses. I made no further plunder, but immediately returned home. The villain (meaning the said Silas S. Stevenson) forgot to say anything about John Dunn's pocketbook. He forgot to tell the people that he is a murderer and forsworn, and is beneath the notice of a gentleman. JAMES S. WHITE.

(419) 7 December, 1844. 76-77pd.

and that the said James S. White, with an intention to scandalize the said Silas S. Stevenson and to bring him into contempt and disgrace, the said false, scandalous, malicious, and libelous writing, as aforesaid, framed and written and made, afterwards, to wit, on the said 7th day of December and on divers other days and times between said day and the taking of this inquisition, in the year aforesaid and in the county aforesaid, to divers good citizens of this State then and there being present, falsely, maliciously, and scandalously did publish, to the great scandal, infamy, and disgrace of the said Silas S. Stevenson and against the peace and dignity of the State.

The defendant offered in evidence the publication contained in a newspaper published in the town of New Bern, in which the alleged libel appeared, signed by the prosecutor, and admitted by the State to have been published by the prosecutor, and which is the same referred to in the alleged libel, of which the following is a true copy, viz.:

CAUTION.

The subscriber hereby forewarns all persons from trespassing on any part of his land in any way whatever, as he is determined to put the law in force against any person who may be guilty; and particularly he

hereby forewarns James S. White and boys from hunting with guns or entering, upon any pretense whatever, inside his inclosed land. Said White and boys entered his premises this morning, well armed with guns, no doubt with some evil intention, either to do the subscriber some private injury or to injure his stock. Therefore, he forewarns him and boys, under the severest penalty of the law, from entering any part of his inclosed land. He hopes James S. White and boys will avail themselves of this notice, for if a trespass on his inclosed land should be proved on them, or either of them, the law will forthwith be put in force against them. SILAS S. STEVENSON.

24 November, 1844.

Upon that part of the libelous publication beginning "on 26 (420) November," and terminating "but immediately returned home," the defendant introduced his son, who proved that his father had lost some coleworts, and that he traced them to a place occupied by a tenant of Stevenson's, and found some of the greens in the houses; and the defendant's counsel urged that the proof amounted to a justification of that part of the libel.

In charging the jury upon this part of the case the court submitted the words in question, and told them to consider them in connection with *the whole* publication, and if the meaning conveyed thereby, according to the usual and most obvious interpretation, was that Stevenson had been concerned in a theft of his goods, the charge would be libelous of itself; and in that case no *innuendo* was necessary to help the meaning. It is not essential that a libel shall impute a crime in technical or even in precise terms. It is sufficient if such imputation be conveyed to the persons to whom the publication is made by hints and indirect modes of expression, having that meaning in their ordinary acceptation.

The jury found the defendant guilty. The defendant moved for a new trial, on the ground, first, of the admission of improper testimony, and, secondly, of error in the charge of the court, which motion was overruled. And then the defendant moved in arrest of judgment, which motion was likewise overruled by the court. And the judgment being pronounced, the defendant appealed.

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

DANIEL, J. The prosecutor, by an advertisement in a public newspaper, had forewarned all persons trespassing on his land, and particularly the defendant and his sons. The advertisement concluded thus: "Said White and boys entered his (Stevenson's) premises this morning, well armed with guns, no doubt with some evil inten- (421)

tion, either to do the subscriber some private injury or to injure his stock." The defendant a few days afterwards, through the same newspaper, answered the advertisement, and denied that he went to the prosecutor's house to do him or his stock any injury. "I went (said the defendant) for no other intention but to search for my stolen property, and his son John was with me all the time; on the 26th November, at night, I lost some property; the next morning I got item that it had gone to Silas S. Stevenson's; I immediately pursued and found my property in one of his houses; I made no further plunder, but immediately returned home." Does this, of itself, and without any averment to that effect in the advertisement, charge the prosecutor with stealing the property? We think it did not. As it stood upon the record, it contained no libelous matter. The indictment simply sets out the tenor of the advertisement, and does not aver that the defendant meant thereby to impute larceny to the prosecutor. Notwithstanding the defective allegation, the judge left it to the jury to say whether an interpretation was to be given to the publication as charged a larceny to Stevenson; and he told them, if they came to such a conclusion, then that portion of the publication amounted to a libel. We think that, as the indictment is framed, the import of the publication and its sense were to be judged of by the court, and that it was improper to leave it to the jury to find a meaning which was not charged upon the defendant in the indictment. If there had been an averment that the defendant intended, by this portion of the publication, to charge the prosecutor with stealing his property, then the remarks of the judge upon the evidence offered would have been proper. *Rex v. Watson,* 2 Term, 206. If a judge and jury, in any case, think that the publication is libelous, still, if on the record it appear not to be so, no judgment can be rendered. We must
(422) understand from the case sent up to this Court that the finding of the jury and the judgment rendered in the Superior Court were confined solely to this part of the publication. That there are in other parts of it libelous matter as set forth in the indictment is certainly true; but whether this verdict and judgment related also to them we are left totally ignorant from the case sent up here. Out attention is restrained to one point; and as that is against the State, the judgment must be reversed and a *venire de novo* awarded. For what we know, the libelous matter, which is well charged in the indictment, may have been justified by the defendant, or disposed of in some other way. There must be a new trial. If, indeed, the publication, directly and in express terms, impute to one a crime, the character of the publication, as being libelous, sufficiently appears from the tenor of it, which is set forth in the indictment, and no further averment is requisite. In the one mode or the other the indictment must show that the person was held

up to hatred, ridicule, and contempt. Now, this publication, by its words merely, does not impute larceny to the prosecutor, but rather the contrary; for the purport of it is that the prosecutor's own son attended the defendant in his search for the stolen goods on his father's premises, and that they were not found in the possession nor under the control of the prosecutor, but "in one of his houses," which turns out to have been true, as the articles were discovered in a house belonging to the prosecutor, and on his premises, but occupied at the time by a tenant. The defendant's publication *in this part* of it was in truth his defense against the charge of the prosecutor as to the defendant's ill motives for going to his premises, by a statement of his real purpose in going, namely, to find his stolen property, and not to accuse the prosecutor himself with being the thief. As this is the natural import of the defendant's language, and the indictment contained no averment of any particular and different intent, there was nothing to (423) leave to the jury on this point.

PER CURIAM. New trial.

GEORGE A. MEBANE v. C. G. AND P. W. SPENCER, ADMINISTRATORS OF J. H. SPENCER.

A contract was made with two partners for the keeping of certain horses. Afterwards one of the partners died and the surviving partner gave his notes for the amount due on the contract. These notes not being paid and being tendered back to the surviving partner: *Held*, that the original cause of action was not merged, and the suit might be brought against the representatives of the deceased partner, to recover damages for the breach of the contract.

APPEAL from ORANGE Spring Term, 1846; *Dick, J.*

This was an action on the case in assumpsit. The declaration contains four counts, the first and second upon promissory notes given by Daniel Murray and the intestate, Isaiah Spencer; and the third and fourth upon contracts therein set forth. The case is as follows: Daniel Murray and Isaiah Spencer were the owners of a line of stages and jointly concerned in running it between Raleigh and Greensboro. They contracted with the plaintiff to keep eight horses for the year 1841, as set forth in the third count, for the sum of $850, and the same number of horses for the year 1842 for the sum of $1,000. The action is brought to recover the amount due upon the notes and also upon the special contracts. On the trial it was admitted by the plaintiff that, in 1842 and after the death of Spencer, the defendant Daniel Murray, by

(424) agreement with him, removed four of the horses, and that he claimed upon the contract for that year only for the horses he did keep. It further appeared that on 19 May, 1842, the defendant, Murray, as surviving partner, executed to the plaintiff two promissory notes, one for the sum of $823.83, for the keeping of the horses for the year 1842. These notes were in the possession of the plaintiff and were produced on the trial and were tendered to the defendant. The case states that the notes stated in the first and second counts were proved, and the contracts stated in the third and fourth counts proved precisely as stated. Upon the closing of the testimony the defendant submitted to the court that the plaintiff should be called and nonsuited because of the alleged variance between the contracts as set forth in the third and fourth counts, and the contracts, as they contended, which had been established by the notes given on 19 May, 1842, and because of the removal of the horses, by agreement between the plaintiff and the defendant Murray.

The motion of the defendants was overruled, and a verdict and judgment having been rendered for the plaintiff, the defendants appealed.

Norwood for plaintiff.
H. Waddell for defendants.

NASH, J. The motion was properly overruled by the court. The plaintiff was unquestionably entitled to a verdict on his first counts, and from the *statement of the case* as little doubt can exist to the two last. The contracts as set forth were proved. How, then, could the plaintiff be nonsuited? If it had been proved that the notes of the 19th of May had been paid, or in any other manner their value had been made available to the plaintiff, the court might have been called on to instruct the jury that the defendants were entitled to a verdict on the third and fourth counts; and it would have been his duty so to (425) charge. But such was not the fact. They were given by a surviving partner, for debts due by the firm, and were unpaid. The original contracts were not thereby extinguished, but the plaintiff was at liberty to sue upon them, and recover what was justly due him, upon tendering back the notes. *Ex parte Hodgkinson,* 19 Ves., 291. Nor does the removal of the four horses, as stated, have any other effect than diminishing the amount which the plaintiff was entitled to recover.

PER CURIAM. No error.

CARROL BRADY ET AL. v. ISAAC BEASON.

Where upon a writ of *recordari* judgment was rendered against the plaintiff in the *recordari*, and the clerk entered the judgment against the sureties only for the costs, and the court at a subsequent term directed that the judgment should be entered *nunc pro tunc* against the sureties, for the *debt* as well as the *costs:* Held, that the court had the power to do so, if in their discretion they thought it right, and that this Court could not revise such discretionary power.

APPEAL from MOORE Spring Term, 1846; *Dick, J.*

Beason obtained a judgment against Brady before a justice of the peace, which the latter removed into the Superior Court by *recordari;* and there the judgment was affirmed. Under the statute which allows in such a case a summary judgment against them, the court, on the motion of Beason, then ordered judgment to be entered for the debt and costs against the plaintiff in the *recordari,* and the sureties in the bond given for the prosecution of it; but the judgment was (426) entered by the clerk, as a judgment against the plaintiff for the debt and costs, and against the sureties for the costs only. The mistake having been discovered, Beason moved, at the next term, to have it corrected; and the court then ordered that the entry of the preceding term should be corrected and made to read as a judgment against both Brady and the sureties for the debt and costs; and the same was accordingly done. Beason then sued out a *fieri facias,* in which the name of one of the sureties against whom the judgment was rendered was omitted. At the return of it the sureties moved to set aside and to vacate the entry of the judgment, upon the ground that the judgment as it now stood against them was void by reason of its alteration as before stated. The court set aside the execution for the variance from the judgment, but refused to vacate the judgment, and the sureties appealed.

Winston for plaintiffs.
Strange for defendant.

RUFFIN, C. J. The consideration of this Court is confined to the question of power in the Superior Court; for, if it exist, its exercise is within the discretion of the judge, which this Court cannot control. Perhaps it may be found mischievous if the judge should lend too ready an ear to such applications, on account of the tendency it might have to encourage inattention on the part of the counsel and attorneys to settling the proper judgments according to the right of their claims and the due entry of them by the clerk, for, as that officer is now chosen, the parties, counsel and the court, are to expect but little assistance from him in the

orderly conducting of the business. But those are points for judges on the circuits exclusively; for it is impossible that the proper grounds of decision can be laid before a court of error to enable it to re-
(427) vise amendments or other discretionary orders. As to the question of power, there cannot be a doubt. It is but supplying the default of the clerk in not entering the judgment as it was rendered by the court; and without such a power the court and suitors would be at the mercy of that officer. It was said at the bar that what was done was a reversal of the judgment of the preceding term. But it is quite the contrary, as the facts are represented in the case sent here, which, of course, is to be deemed entirely correct. It is not a reversal of the judgment, but an alteration in the original entry of it conformably to the truth and so as to make the record show the judgment as in fact the court gave it. Even if the judgment against the sureties for the debt had been omitted, that is, by the court, it might afterwards have been given and entered *nunc pro tunc*, since no third person can be injured. It is manifestly just between the parties. *Gregory v. Haughton*, 15 N. C., 422. But here the court was not supplying its own omission, but barely protecting itself and the suitor from the willful or negligent and, in either case, culpable misprision of the clerk, which is every day's practice. Instead of being a reversal by one judge of the judgment of his predecessor, it was doing what was absolutely necessary to prevent the clerk, a mere ministerial officer, from virtually reversing the judgment from the manner of entering it. Such acts of omission of the clerk must of necessity be under the control of the court.

PER CURIAM. Affirmed.

Cited: *S. v. Weaver*, 35 N. C., 206; *S. v. Johnson*, 75 N. C., 124; *S. v. Andrews*, 166 N. C., 351.

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(428)

THE STATE TO THE USE OF CHESTER ROCKWELL v. WILLIAM HANKINS ET AL.

1. If in reply to the plea of the statute of limitations the plaintiff wishes to avail himself of the pendency of a former suit, he must set forth the suit specially in his replication.
2. By the practice in this State, if no replication is actually entered, a general one is understood.
3. When the statute of limitations is pleaded to an action on the bond of a sheriff, clerk, etc., the plaintiff cannot reply that a former suit for the same cause of action had been brought within the proper period, in which there had been a nonsuit, discontinuance, etc. In suits of this kind there is no such saving against the operation of the statute.

APPEAL from BRUNSWICK Spring Term, 1846; *Dick, J.*

Debt, brought on the official bond of the defendant Hankins, as the sheriff of Brunswick County, and his sureties. Hankins was duly appointed sheriff, and his official year commenced 5 September, 1837, and ended 5 September, 1838. He appointed one Woodsides his deputy, to whom the relator Rockwell delivered, in time for collection, a number of notes and bonds upon solvent debtors. In October, 1838, Woodsides received upon these obligations $10, and did not receive upon them any money during the official year of the defendant Hankins. The writ in this case issued 24 October, 1844. The pleas are the general issue, and statute of limitations, and covenants performed. On the trial the plaintiff offered to prove a demand made on Woodsides in 1842. The court rejected the evidence. On 25 February, 1843, the plaintiff caused a suit to issue against the defendant for the same cause of action. At December term the defendant appeared, when the cause was put to issue, and at June Term, 1844, the plaintiff was called and judgment of nonsuit entered against him. His Honor instructed the jury (429) that the official year of the defendant Hankins ceased on 5 September, 1838, and the deputation of Woodsides ceased at the same time; and, therefore, the defendant was not liable on this bond for the $10 received by him in October, 1838; and as to the breach of neglect for not collecting, the defendants were protected by the statute of limitations.

Under these instructions the jury found a verdict for the defendants, and from the judgment thereon the plaintiff appealed.

Badger for plaintiff.
Strange for defendants.

NASH, J. In the instructions of his Honor we entirely concur. The office of the sheriff (Hankins) continued for one year, and ended on 5 September, 1838. *Keck v. Coble,* 13 N. C., 489; *Slade v. Governor,* 14 N. C., 365. The deputation to Woodsides ceased with the power creating it. The trunk falling, the branches necessarily fell with it. The defendant was not then liable for the $10 received by him in October, 1838, and the evidence of a demand of it was properly rejected by the court. Nor are they answerable for the breach of the bond in not collecting. The defendants are protected by the statute of limitations. The act provides that all suits on sheriffs' bonds and others "shall be commenced and prosecuted within six years after the right of action has accrued, and not afterwards." Rev. Stat., ch. 65, sec. 82. In the present case the sheriff's official year expired 5 September, 1838. The plaintiff's cause of action existed at or before that time, and the statutory bar became complete 5 September, 1844. In order to get rid of this

difficulty, the plaintiff relies upon the fact that he had brought a suit on this same cause of action in 1843, at which time the statute inter-
(430) posed no bar, and that this suit was instituted within twelve months after the termination of the first at June Term, 1844. Under the pleadings in the case the question does not arise. If the plaintiff intends to rely upon the previous suit in order to avail himself of it, he ought to have replied especially, setting out the former suit and showing where it was commenced and when it terminated. He has not done so. In practice, when no replication is entered actually, a general one is understood. *Worth v. Fentress,* 12 N. C., 419; and so it must be understood here. The evidence of the prior suit was altogether irrelevant. Had the question by proper pleading been brought before the court, the reason assigned by his Honor would have been an ample reply to the plaintiff's replication. In section 18 of the act we are considering, and under which the question arises, there is no such saving as is contained in section 4, allowing to the plaintiff a year after judgment arrested or reserved to bring a new action, and which, by an equitable construction, has been extended to nonsuit; nor is it *in pari materia* with the actions enumerated in the preceding sections of the act, and to which section 4 is by its terms limited. This is an action on a penal bond. *Brown v. Franklin,* 7 N. C., 213; *Clark v. Rutherford, ibid.,* 237.

PER CURIAM. Judgment affirmed.

Cited: Freshwater v. Baker, 52 N. C., 256; *Trull v. R. R.,* 151 N. C., 549.

PLEASANT JORDAN v. JOHN G. WILSON.

The plaintiff was a trustee in a deed of trust made by A. to secure a debt he owed to B. The defendant was also a creditor of A. Under these circumstances a promise by the plaintiff to forbear proceeding under the deed of trust would not amount to a good consideration at law, to uphold a promise of the defendant to pay to the plaintiff the debt due by A. to B. so as to enable the plaintiff to declare upon it in his own name.

(431) APPEAL from HERTFORD Spring Term, 1846; *Bailey, J.*

The facts are stated by the judge in delivering the opinion of this Court.

DANIEL, J. This was an action of assumpsit. Pleas, *Non assumpsit* and the statute of frauds. The case was as follows: One Spiers was indebted to one Wilson in the sum of $1,000. Spiers conveyed to the

plaintiff a lot of land, lying in the town of Murfreesboro, in trust to secure the payment of the debt he owed to Wilson. An execution against Spiers (to the use of the defendant) of a junior date to the deed of trust was levied on the lot by the sheriff of Hertford. He exposed the land for sale on 11 January, 1843, and the defendant Wilson purchased it. The plaintiff alleged in his declaration that the defendant promised to pay him the balance of the debt due under his deed of trust if he would not set up his title to the lot, and would not forbid the sale; and he avers that he did not set up his title or forbid the sale made by the sheriff. In addition, the plaintiff introduced a witness, one Henry Beale, who stated that on or about 16 February, 1843, he heard a conversation between the plaintiff and the defendant, when the defendant said to the plaintiff: "Hold on upon your claim against Spiers and I will pay it." The plaintiff then agreed to do so; the defendant asked him what the amount of the Spiers debt then was; the plaintiff said it was about $60.

The defendant on the trial insisted that the plaintiff had not proved any promise made by him before the day of the sale of the land made by the sheriff, and if he had, it was void by force of section 10 of Statute of Frauds, Rev. Stat., ch. 50, which declares that no action shall be brought to charge a defendant upon any special promise to answer the debt, default, or miscarriage of another person unless the agreement or some note or memorandum thereof shall be in writing." The plaintiff replied to this argument that he gave a new consideration, to wit, (432) a promise not to set up his title and not to forbid the sale, which new consideration took the past promise of the defendant out of section 10 of the statute. The defendant rejoined in argument and said that the promise if any, which was made by him was without any new consideration, according to the plaintiff's own admissions, to wit, that he had made the promise by parol that he would not set up his title under the deed in trust, and that a parol promise to part with any interest in or concerning land (except leases under three years duration) is void and of no effect by force of section 8 of the Statute of Frauds. The judge was of opinion that there was no evidence in the case to prove a promise made by the defendant before the sale of the lot of land by the sheriff. In this opinion we concur. And if there had been a parol promise proven that the defendant should pay the debt due by Spiers, it could not have been enforced for the reasons given by the defendant. The plaintiff then rested his case on the evidence given in by the witness Beale; and the judge charged the jury that if they came to the conclusion from his evidence that a promise had been made by the defendant to pay the debt of Spiers due to Wilson, in consideration the plaintiff Jordan forbore to sue for the land under the deed in trust

(both parties then believing the deed to be good in law), and such forbearance had been given by the plaintiff, that was a good consideration in law for the promise, and the plaintiff was entitled to recover. The jury found for the plaintiff on the evidence of Beale under the charge of the court, and the defendant appealed. We are of opinion that his Honor was wrong in this part of his charge, because there was no debt due from Spiers to the plaintiff, and his promise to forbear could not amount to a good consideration in law to uphold a promise of the
(433) defendant to pay a debt to the plaintiff due by Spiers to Wilson, so as to enable the plaintiff to declare upon it in his own name.

PER CURIAM. New trial.

DEN ON DEM. OF JOHN J. GRANDY v. MORDECAI MORRIS, SR.

1. The act of Assembly of 1823, ch. 74, relating to the sales of land under execution in the county of Pasquotank and other counties therein named, is a local and private act, and therefore not repealed by the act of 1836, Rev. Stat., ch. 1, sec. 2, being within the proviso in sec. 8.
2. By the operation of this act of 1823 sales of land under execution in the counties therein named are, as to the places of sale, put on the same footing as sales before the act of 1820, which directed them to be at the courthouse; and in those counties the sheriff may now sell lands under execution at such places as he in his sound discretion shall judge most expedient.

APPEAL from PASQUOTANK Spring Term, 1846; *Bailey, J.*

Ejectment for a tract of land lying in Pasquotank County. Spencer M. Meeds was seized of the premises, and by deed dated 2 September, 1842, conveyed them to the defendant, who entered into possession. At that time there was a judgment against Meeds, and a *fieri facias* thereon, under which the sheriff of Pasquotank sold and conveyed the premises to the lessor of the plaintiff. Both Meeds and the judgment creditor resided in Pasquotank, and the sheriff's sale was made at the residence of Meeds, from which the premises were 2 miles distant.

In order to sustain the sale, the plaintiff relied on an act of Assembly passed in 1823, ch. 74, entitled "An act to repeal an act passed in 1822, entitled 'An act directing the time and place of selling lands and
(434) slaves under execution,'" so far as relates to certain counties therein named, whereby it is enacted: "That the above recited act be and the same is hereby repealed so far as respects the counties of Perquimans, Pasquotank, etc.: *Provided,* that the repeal shall not affect cases where either of the parties in the execution is not a resident of the

county so exempted from the act aforesaid; and *Provided further,* that nothing in this act shall be so construed as to revive either of the acts of 1820 or 1821, authorizing the sale of land and slaves at the courthouses of said counties above named."

For the defendant it was insisted that the act of 1823 was repealed by that of 1836, Rev. Stat., ch. 2, sec. 2, and, therefore, that the sheriff's sale was void because it was not made on the premises. Both of those positions were denied on the part of the plaintiff; and it was thereupon agreed by the parties that if, in the opinion of the court, the sale might lawfully have been made as it was in this case, there should be a verdict and judgment for the plaintiff; if otherwise, then the verdict and judgment should be for the defendant. The court held that the act of 1823 was not repealed, and that the sale to the lessor of the plaintiff was valid, and according to the agreement of the parties there was a verdict entered for the plaintiff; and from the judgment thereon the defendant appealed.

A. Moore for plaintiff.
No counsel for defendant.

RUFFIN, C. J. The point is as to the legality of the sheriff's sale, in respect of the place at which it was made. To the clearer understanding of the subject it seems necessary to advert to the several statutes which provide for the sale of land under execution in the State generally, and also in this particular county of Pasquotank. By the act of 1777 executions were made to run against land as well as (435) goods. But the only regulation it contains respecting the sale of land is to require it to be advertised at least forty days; and in the subsequent act of 1794 it is provided at what hours of the day sales under execution shall commence. Thus stood the law until 1820, when an act passed, chapter 32, which directs all sales to be made at the courthouse of the respective counties on the last Thursday of every month. By an act of the succeeding year, 1821, ch. 19, it was enacted that sales shall be at the courthouse, and, instead of the last Thursday of the month, that they may be on any Monday in any week. Finally, the general law upon this subject was settled by the act of 1822, ch. 25, which alters the time to the same Monday in the month as that on which the county court is held in the several counties, and again enacts that the courthouse shall be the place of sale; and it concludes with a clause repealing all laws within its meaning and purview. If that law governed the present case, of course, the sale under which the plaintiff claims would be illegal and void. But in the next year the act, 1823, ch. 74, passed, which is set out in the case; and the object and effect of it was, as to the counties mentioned in it, to restore the law to the state

in which it was before the act of 1822. And, as it is a rule of construction that a statute, repealed by another, is revived by a repeal of the repealing statute, the act of 1823 goes on further, in a proviso, that it shall not be so construed as to revive the two acts of 1821 and 1820 which required the sale of land to be at the courthouse. It is thus seen that the act of 1823 clearly repeals the three acts of the three preceding years, as far as concerns Pasquotank and the other counties mentioned in it. Consequently, the sale of land there is regulated by the acts of '94 and '77, and the common law—unless, indeed, the act of 1823 is not itself in force, as contended on the part of the defendant. But upon that point the opinion of the Court is against the defendant. It
(436) is true that the second section of the Revised Statutes, ch. 1, repeals all the acts passed before the Session of 1836, and not there reënacted. But that is with the several provisos and exceptions contained in the six succeeding sections. among which is the following in section 8: "That no act of a private or local nature, and no act granting privileges or imposing duties in any particular county inconsistent with the general provisions of law, shall be construed to be thereby repealed." It is very clear that the act of 1823 is within that saving as intended by the Legislature. It had been printed and published among the laws passed that year, as a private act; and, besides, it is plainly local in its nature, being confined to particular counties and with provisions in respect to them different from the general or public law. Then, as the acts of '94 and '77 say nothing as to the place of sale, this controversy depends upon the inquiry whether at common law the sale of land under a *fieri facias* must be on the land itself or be made *bona fide* at any other fit place in the county.

It is certain, as we all know, that before the act of 1820 the constant course was for the sheriff to sell at the places and days which he judged best suited the convenience and interest of the parties. Sometimes sales were made on the premises. But often they were not. If there were several tracts of land to be sold, and the sale began on one of them, it proceeded there as to all, although the others might be in a different part of the county. Indeed, the most usual place of sale was the courthouse, and during term-time, and especially if the land was of much value, because generally that afforded the longest time to the debtor to raise the money without selling his property, and if the sale became unavoidable, it would be made when there would probable be the largest assemblage of bidders. *Lanier v. Stone,* 8 N. C., 329, furnishes an instance in 1809 of a sale at the courthouse at the return term of the execution; and it was the general practice. It was never under-
(437) stood that a sale of land was within the reasons of the rule which requires personal chattels to be present. The sheriff acquires

no property in the land. He does not seize it nor deliver the possession to the purchaser, but merely sells the right and leaves the purchaser to recover the possession by action, if not delivered to him by the debtor. Nor can bidders, during the short progress of a sale, judge by inspection of the extent, condition, or value of large landed properties as they can of the several articles of personalty. Until the present case we never heard it supposed that prior to 1820 the place of sale was not in the sound discretion of the sheriff, as he might judge best for the persons concerned. It was not contended that this sale was not fairly conducted; and, therefore, we hold it to be effectual, and affirm the judgment.

PER CURIAM. Affirmed.

Cited: *Humphries v. Baxter, post,* 438; *Bailey v. Morgan,* 44 N. C., 355.

DEN EX DEM. JOHN HUMPHRIES v. ISAAC BAXTER.

1. Under the acts of 1820, 1821, and 1822 the sales of land under execution in the county of Currituck are excepted from the general provisions of those acts directing the places where such sales should be made.
2. One part of a statute may be public in its nature, while another is local and private; and those parts of these acts which concern "particular counties" merely are to be taken to be of the latter kind, and are, therefore, saved from the general repealing clause of the act of 1836, ch. 1, sec. 2, by the proviso in sec. 8.
3. In Currituck County, therefore, lands may be sold under execution by the sheriff at any place which in his sound discretion he deems most proper.

APPEAL from CURRITUCK Spring Term, 1846; *Bailey, J.* (438)

Ejectment for a tract of land situate in Currituck County.

Both parties claim under sales made by the sheriff on writs of *fieri facias* against Jesse W. Doxey. That at which Baxter purchased was prior in time and was made on the premises in dispute. Afterwards, the sale under which the plaintiff claims was made at the courthouse, which was also the usual place of holding the petit musters of the militia company to which Doxey belonged. For the plaintiff, the acts of Assembly of 1820, ch. 32, 1821, ch. 19, 1822, ch. 25, were adduced; and it was thereupon insisted that the sale to Baxter was void, because it was made on the premises and not at the courthouse and the place of petit muster. The court, however, was of opinion that the sale to the defendant was lawful and valid, and the plaintiff was, therefore, nonsuited, and appealed.

A. Moore for plaintiff.
Heath for defendant.

RUFFIN, C. J. This Court concurs in the opinion given by his Honor. We have held in *Grandy v. Morris, ante,* 433, that until the act of 1820 the place for the sale of land under execution was in the discretion of the sheriff, whether it was the premises or elsewhere. Therefore, the sale to the defendant was good, unless avoided by one of the three acts mentioned. They all enact, as the general law for the State at large, that the courthouse shall be the place of sale. But the county of Currituck, doubtless from its situation and form, is excepted in the acts themselves from the operation of the general enactment. The act of 1820 provides, in section 3, that sales in that county shall be held at the usual place of holding the petit musters. It is upon this provision that the plaintiff insists that the sale on the premises was unlawful. So it would be if the act of 1820 was still in force. But the act of 1821, after re-
(439) enacting that the courthouse shall be the place of sale, and that the day may be any Monday, proceeds in section 4 to enact, "That the provisions of this act and the provisions of the act of 1820, entitled 'An act,' etc., shall not apply to the counties of Currituck, etc., and that, so far as regards the counties aforesaid, the before-recited act (that is, of 1820) is hereby repealed." The act of 1820 being thus repealed as to Currituck, and that county being in the act itself exempted from the operation of the act of 1821, the case is at common law, and is governed by the rule already laid down by the Court. But it is said that the meaning of the act of 1821 was, as far as respects Currituck, to repeal the general enactment as to the courthouse being the place of sale, but not the special provision which made the muster-ground the place of sale in that particular county. That, however, cannot possibly be so. There is an apparent absurdity in the idea that the enacting part of a statute is repealed, except a single provision, which is in the nature of a proviso to the general enactment. Besides, section 3 of the act of 1820 expressly exempts Currituck out of the operation of the previous part of the act, and, therefore, the act of 1821 could not have been intended further to exempt it. Moreover, section 4 of the act of 1821 not only says that its provisions and those of 1840, ch. 32, shall not apply to Currituck, but goes further, and says: "That the before-recited act," that is, the act of 1820, and the whole of it, "is hereby repealed as far as regards Currituck." It is very clear, therefore, that no place of sale is designated for this county in either of those acts; and the remaining one, that of 1822, ch. 25, again, in section 4, excepts Currituck and some other counties from its application. It is well settled that one part of a statute may be public in its nature while another is local and private, and we think that those parts of these acts which concern "par-

ticular counties" merely are to be taken to be of the latter kind, (440) and are, therefore, saved by the act of 1836, Rev. Stat., ch. 1, sec. 8.

PER CURIAM. Affirmed.

Cited: *S. v. Wallace,* 94 N. C., 828; *Durham v. R. R.,* 108 N. C., 401, 402; *S. v. Patterson,* 134 N. C., 615.

THE STATE v. IRVINE E. COX.

1. Where on the trial of an indictment the jury find a verdict of guilty generally, and that appears on the record, this Court cannot consider it as a special verdict, subject to the opinion of the Court, notwithstanding the statement of the case by the judge so reports it.
2. A presentment made within two years after the commission of a misdemeanor on which an indictment is founded is the commencement of a prosecution, within the meaning of our act of Assembly, and prevents the statute of limitations from attaching.
3. A presentment need not be signed by all the jury. It should be handed to the court by the foreman, who is the organ of the grand jury to and from whom communications are made with the court. It should be made in the presence of the jury, but when entered of record no further evidence is required of its authenticity.
4. Neither a presentment of a grand jury nor an indictment requires necessarily that it should be signed by any one.
5. It is the returning of the bill of indictment publicly in open court, and its being there recorded, that makes it effectual.

APPEAL from MOORE Spring Term, 1846; *Dick, J.*

The following facts appear from the report of the case by the presiding judge and from the record:

This was an indictment against the defendant for an assault and battery on one Kenneth Black. The assault and battery were fully proven, but the affair took place on 10 November, 1841, and the indictment was not found until the last week in February, 1844, and the defendant's counsel insisted on his acquittal upon the ground that the prosecution had not been commenced within the time pre- (441) scribed by law. The solicitor then offered in evidence a presentment of the grand jury made at the Fall Term, 1843, being the last week in August but one, a paper-writing in the words and figures following, to wit:

STATE OF NORTH CAROLINA—MOORE COUNTY.

Fall Term, 1843.

The jurors for the State, upon their oath, present Irvine E. Cox for an assault on one Kenneth Black in November, 1841.

Daniel McKinnon, Alex. McKenzie, State's evidence.

This paper was signed by none, but was entered as follows:

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And the words, "William Shaw, foreman," were in the proper handwriting of William Shaw, foreman of the grand jury at that term. It was in evidence that upon the paper being presented, the solicitor for the State directed witnesses to be summoned to the next term of the court, that a bill of indictmnt might be sent accordingly; all which was done.

The solicitor on the trial insisted that this paper was a presentment of the grand jury, authenticated by their foreman, and was a commencement of the prosecution in the terms of section 8 of chapter 35 of Revised Statutes.

On the part of the defendant it was objected that the said paper was not a presentment of the grand jury, because not signed by twelve of the body, and, if only the signature of the foreman were required, it was not in fact signed by him, but only indorsed, and, if a presentment, did not prevent the operation of the statute.

(442) The judge left the case to the jury, and by consent a special verdict was rendered, subject to the opinion of the court, as follows:

The jury said that the defendant did assault and beat Kenneth Black, as charged in the bill of indictment, on 10 November, 1841; that the paper-writing in the words and figures following, to wit:

STATE OF NORTH CAROLINA—MOORE COUNTY.

Fall Term, 1843.

The jurors for the State, upon their oath, present Irvine E. Cox for an assault on Kenneth Black in November, 1841.

Daniel Nicholson and Alex. McKenzie, State's evidence.

And endorsed as follows:

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v.
IRVINE E. COX. } Presentment by grand jury, William Shaw, foreman

was returned into the court by the proper officer at Fall Term, 1843, and that the signature of William Shaw, foreman, is in the proper handwriting of William Shaw, the foreman of the said grand jury at that term; that upon the return of the said paper the solicitor directed subpœnas to issue for witnesses, returnable to Spring Term, 1844, that a bill of indictment might be preferred; that accordingly, at Spring Term, 1844, the bill of indictment was sent and a true bill found by the

grand jury; and if upon these facts the court is of opinion that the prosecution was commenced in proper time, then the jury find the defendant guilty, and if otherwise, they find him not guilty. Whereupon, the court having rendered judgment for the defendant, the solicitor appealed on behalf of the State to the Supreme Court, which appeal is allowed.

The *record* showed the following verdict: "The following jury, sworn, etc., who find the defendant guilty."

Attorney-General for the State. (443)
No counsel for defendant.

NASH, J. The defendant was indicted for an assault and battery The record shows that he was convicted by the jury. The case sent up by the presiding judge, however, states: "The cause was committed to the jury, who, by consent, found a special verdict, subject to the opinion of the court." What is called a special verdict is then set forth, upon which judgment was rendered for the defendant. Between the record and the case, in stating the verdict, there is obviously a very essential difference—in the one it is general, in the other special, depending upon the opinion of the court. We have no doubt the case correctly represents the facts, and that it was the intention of the parties to convert the general verdict of guilty into a special verdict. But unfortunately it was not done. The verdict is still left upon the record as the jury pronounced it. They have not said that they found a special verdict. We have no power to alter the record, and by it we are informed that the defendant was found guilty. Upon such a verdict the court had no power to discharge the defendant. It was entirely within the power of his Honor to have ordered, if he had thought proper so to do, the general verdict to be set aside, and to award a *venire de novo,* or to have made the verdict on the record conform to the facts of the case. He has done neither—doubtless, from inadvertence. The judgment pronounced by him is erroneous and must be reversed.

Our labor, so far as this case is concerned, might here close. But other points are presented to us upon which it was obviously the intention of the parties to procure the opinion of this Court, and as they are questions of practice, occurring at every court and upon which it is believed much misapprehension exists, we think it our duty to examine and decide them.

The offense charged against the defendant was committed in November, 1841, and the indictment under which he was tried was found by the grand jury at Spring Term, 1844, of Moore Superior Court,
more than two years thereafter. On behalf of the defendant (444)

it was insisted that he was entitled to his acquittal because of the length of time which elapsed between the offense and the finding of the indictment. To meet the objection the prosecuting officer gave in evidence, as a presentment made by the grand jury at Moore Superior Court at Fall Term, 1843, a paper in the following words: "State of North Carolina, Moore County, Fall Term, 1843. The jurors for the State, upon their oath present Irvine E. Cox for an assault on Kenneth Black in November, 1841. Daniel McKinnon and Alexander McKenzie, State's evidence." This was indorsed, "State v. I. E. Cox. Presentment by the grand jury," and signed on the back, "William Shaw, foreman." It was contended that a presentment is not the commencement of a prosecution; but we are clearly of opinion that it is, and, when made within two years after the offense is committed, is in time. We think so from the nature of a presentment, and from the fact that the Legislature in limiting the period within which prosecutions for misdemeanors of the character of the one charged against this defendant shall be commenced uses the words, "presentment or indictment." Rev. Stat., ch. 35, sec. 8. It was further denied that in this case any legal presentment had been made; and two objections were urged why the paper offered in evidence is not one. The first is that it is not signed by all the jury; the second, that if that is not necessary, it must be signed by the foreman, while in this case it is not, his name being indorsed. It is true, the paper returned into court by the grand jury, as containing their presentment, is usually signed by all the jury; but it is merely a practice, not required by any law or principle we are acquainted with; nor is any form prescribed in any book of practice. *Justice Blackstone,* 4 Com., 304, says: "A presentment, properly speaking, *is the notice* which a grand jury takes of an offense from
(445) their own knowledge or observation." This must be made known to the court, and lays the foundation, when made, for the indictment. In passing upon the latter, "if the jury are satisfied of the truth of the accusation, they indorse it *Billa vera,* or true bill. It is then said to be *found.* So if they are not satisfied, it is indorsed *ignoramus,* or not a true bill, and the party is discharged." In both cases the bill is delivered in open court; but it was never known that the bill was signed by the jury, nor are we apprized it ever was conceived necessary. In all their intercourse with the court they act through their foreman. He delivers in the bill, and responds to the questions propounded to them, and indorses it as their presiding officer. The bill, however, being the act of the jury, they ought in every instance to be in court when one is returned, and so in making a presentment. And to ascertain that they are present, they ought always to be called by the clerk. But, as they never sign the bill of indictment, why should it be thought necessary to

sign the presentment? The latter is no more the act of the grand jury than the former, and, indeed, an indictment is a presentment. The language of the record is *"juratores presentant,"* 2 Inst., 123. When either a presentment or indictment is returned into court, the fact is recorded. In the present case the record from Moore Superior Court states that at Fall Term, 1843, a grand jury was duly impaneled and sworn and William Shaw appointed foreman. It then states as follows: "And be it further remembered, that at the said term of our said court William Shaw, foreman of the grand jury, returned into open court a paper-writing in the words and figures following," etc. It then sets out the paper before stated. The error then consisted in considering that paper as the presentment, when in fact it was but the usual evidence of what the jury had done, from which the clerk drew up his record showing that the jury had made the presentment.

The second objection is, in our opinion, equally untenable. (446) It is settled in this State that an indictment need not be signed by any one. It is good without it, because it is the act of the grand jury, delivered in open court by them. In *S. v. Collins,* 14 N. C., 11, the opinion is first suggested by the then *Chief Justice Henderson,* but as the point did not necessarily arise, it was not decided. But in *S. v. Colhoon,* 18 N. C., 374, it was. The custom of indorsing the bill is declared to be no further material than as it identifies the instrument, expressing the decision of the jury; when made, it becomes no part of the indictment. Yel., 99. It is the action of the jury in publicly returning the bill into the court as true, and the recording or filing it among the records, that makes it effectual. The same reasoning applies with equal or greater force to the presentment, which, altogether the act of the jury, requires less form in the thing itself than an indictment. We conclude, then, as signing a bill of indictment is not required to make it legal, so neither is it necessary to a presentment. In neither case is the indorsement set out in enrollment of the record, when properly made. In this case the record declares that a presentment was made by the grand jury, and no evidence was receivable to contradict it; and it was made up, not from the minutes alone of their proceedings, but from that and what the jury declared in open court.

The cause is remanded for further proceedings according to law.

PER CURIAM. Remanded.

Cited: S. v. Brown, 81 N. C., 571; *S. v. Mace,* 86 N. C., 670; *S. v. McNeill,* 93 N. C., 554; *S. v. Bordeaux, ibid.,* 563; *S. v. Ivey,* 100 N. C., 540; *S. v. Cooper,* 104 N. C., 892; *S. v. Arnold,* 107 N. C., 864; *S. v. McBroom,* 127 N. C., 529, 536; *S. v. Sultan,* 142 N. C., 573; *S. v. Williams,* 151 N. C., 661.

ENOCH D. FEREBEE v. JESSE W. DOXEY ET AL.

An assignment of a judgment is utterly void at law, and cannot be noticed in a court of law.

(447) APPEAL from CURRITUCK Spring Term, 1846; *Bailey, J.*

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

Heath for plaintiff.

No counsel for defendant.

DANIEL, J. The plaintiff obtained a judgment for $1,000 and interest against Samuel Ferebee on a bond executed by him and others to his intestate. There was an execution issued on it, which came to the hands of Isaac Baxter, the sheriff; and whilst it was in his hands the plaintiff assigned the said judgment and execution to him. The judgment became dormant; and this was a *scire facias* to revive it. The defendant pleaded *nul tiel record,* payment, and satisfaction. The judge pronounced that there was such a record; and from the case sent up here we do not discover any error in his judgment on this issue. On the trial of the other issues before the jury the defendant insisted that the fact of the plaintiff taking an assignment of the judgment from the plaintiff whilst he held the execution in his hands which issued on it was in law a satisfaction of the said judgment. The judge was of a different opinion, and charged the jury to find for the plaintiff, which they did, and he had judgment, from which the defendant appealed. We concur with his Honor. The assignment of the judgment to the sheriff was a thing void in a court of law. And we know of no authority which makes such a transaction amount to a satisfaction of the judgment. We have looked to the case of *Reed v. Stoats,* 7 John., 427, cited for the defendant, but do not perceive its relevancy. That was an application to set aside an execution upon which the sheriff had taken a bond from the defendant with a surety for more than the amount of the debt, and had paid the debt to the creditor. It was plain,
(448) after that the sheriff ought not to levy the debt on the execution, as he was about doing, for the purpose of raising the money for his own benefit. But here the sheriff does not take the law into his own hands, or serve his own process; but this is a *scire facias* to revive the judgment, and the issue is whether the defendant has paid the debt. Surely, he has not. The judgment of the Superior Court must be

PER CURIAM. Affirmed.

ENOCH D. FEREBEE v. JESSE W. DOXEY ET AL.

1. If an obligee make his will and appoints any one of his obligors his executor, it is a release or extinguishment of the debt as to all the obligors; but when the court appoints one of the obligors to be the administrator of the obligee, it only suspends the debt on the bond during the administration of that administrator, and it does not release nor extinguish it.
2. No matter which might have been well pleaded to the original action can be heard as a defense to a *scire facias* brought to revive the judgment rendered in that action.

APPEAL from CURRITUCK Spring Term, 1846; *Bailey, J.*

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

Heath for plaintiff.
No counsel for defendant.

DANIEL, J. The plaintiff obtained a judgment against Samuel Ferebee for $500, with compound interest from 7 June, 1832, on a bond executed to McPherson, the guardian of....., and the plaintiff's intestate, by the plaintiff himself, Enoch D. Ferebee, Samuel Ferebee, Isaac Baxter, and others. The judgment was confessed by (449) Samuel Ferebee, who was sued alone on the bond. Execution issued, and it came to the hands of the said Isaac Baxter, who was then the sheriff; and the plaintiff, while the execution was in Baxter's hands, assigned the judgment to him. The execution was never levied. The judgment became dormant, and the plaintiff issued this *scire facias* to revive it. The defendant pleaded to the *sci. fa.*, "*Nul tiel record,* payment and satisfaction." The judge pronounced that there was such a record. And it appears to us that the *sci. fa.* corresponds with the transcript, sent up here, of the record of the said judgment. We must, therefore, say that his Honor's opinion was correct upon this issue. On the trial of the other issues before the jury the defendant insisted that as the plaintiff Enoch D. Ferebee was a coöbligor with S. Ferebee in the bond on which judgment had been entered, the debt was, therefore, in law, suspended as to all the obligors. The judge refused to charge as the defendant prayed. We concur with his Honor in his refusal. If Samuel Ferebee, however, when originally sued, had pleaded specially the above facts his plea would have been sustained; for the law is well settled that if an obligor makes his will and appoints any one of the obligors his executor, it is a release or extinguishment of the debt as to all the obligors. But when the court appoints one of the obligors to be the administrator of the obligee it only suspends the debt on the bond during the administration of that administrator, and it does not release

or extinguish it. Williams on Ex., 811 to 815. But if the defendant had pleaded such a special plea to this *sci. fa.* (which he has not) it could not have availed him anything, for it is an established principle in pleading that no matter which might have been well pleaded to the original action can thereafter be heard as a defense to a *sci. fa.* brought to revive the judgment rendered in that action. Again, the de-
(450) fendant insisted that the assignment of the judgment to Baxter, whilst he held the execution in his hands as sheriff, and he also being one of the original obligors in the bond on which the judgment had been rendered against S. Ferebee, was in law a satisfaction of the debt. The judge held otherwise; and we think his Honor was right on this point of the case. The assignment of the judgment to Baxter was a mere nullity in a court of law, and it would not there be noticed. And the fact that he was then sheriff, and had the execution in his hands for collection, could not operate in law as a satisfaction. We think that the judgment must be

PER CURIAM. Affirmed.

Cited: *Rice v. Hearn,* 109 N. C., 151.

HIATT & JEAN v. J. A. GILMER ET AL., EXECUTORS OF JAMES McNAIRY.

Where a boy was bound by his father as an apprentice to a copartnership, to be taught a mechanical trade, and the father took away the boy before his time had expired, and soon afterwards the copartnership was dissolved, the period of apprenticeship being still unexpired: *Held,* by a majority of the Court, RUFFIN, C. J., dissenting, that the persons composing the copartnership could only recover damages for the loss of the boy's services during the time the copartnership continued, and not afterwards.

APPEAL from GUILFORD Spring Term, 1846; *Settle, J.*

This was an action of assumpsit brought by the plaintiffs against the defendants as executors of James McNairy, deceased. The plaintiffs proved that they were partners in carrying on the business of harness and saddle making in the town of Greensboro; that the defend-
(451) ant's testator contracted with the plaintiffs to take, as an apprentice, one of his sons, and to teach him the art and mystery of harness and saddle making, and that he was to remain with the plaintiffs five years; that, in pursuance of the said agreement, the testator's son went into the employment of the plaintiffs about March, 1837, and remained there until the latter part of December, 1839, when his father took him home and sent him to school.

The defendants offered evidence to prove that the plaintiffs dissolved partnership, some time early in 1840, the precise time not distinctly established.

The defendants' counsel insisted that although the father might have taken away his son before the term of apprenticeship had expired, yet if the plaintiffs dissolved partnership before the expiration of that term they could only recover damages up to the period of dissolution. The court entertained a different opinion, and charged the jury that if they should be of opinion that the father made the contract, as proven, with the plaintiffs, and took his son away from the plaintiffs contrary to their wishes and before the partnership was dissolved, they were entitled to recover damages for the loss of the services of the son for the unexpired time for which he had been bound by his father, although the partnership between the plaintiffs had been dissolved before the end of the term of service. There was a verdict according to these instructions, and from the judgment thereon the defendants appealed.

No counsel for plaintiffs.
Morehead for defendants.

DANIEL, J. This was an action of assumpsit, brought to recover damages for the breach of the special contract stated in the case. The plaintiffs' declaration avers that they had taught the boy, and were at all times ready and willing to teach the said boy, accord- (452) ing to the terms of the contract; but that the defendants' intestate, in breach of his said contract, had taken his son from the plaintiffs' service, to their damage, etc. The evidence on the trial showed that the plaintiffs were partners in the business of saddle and harness making. The partnership was by them dissolved but a very short time after the boy left the shop; and there was no evidence in the case to support the allegation in the declaration that they were at all times during the time of the contract ready and willing to teach the boy in the business of harness and saddle making. The contract had certainly been broken by the defendants' intestate. Then, what did the plaintiffs offer to show in evidence? That they had been injured beyond the loss of the services of the boy up to the dissolution of the firm. The boy was not partnership effects to be divided. The plaintiffs offered *no* evidence that *they* jointly were in a situation to instruct the boy, after the dissolution of the firm. They failed to prove an essential part of their declaration, to wit, that they were at all times ready and willing to instruct the boy. This was a condition precedent in the special contract which it behooves the plaintiffs to make out satisfactorily to the jury had been by them performed, or that they had been always ready to perform. Where was

the *quid pro quo* for damages ulterior to the dissolution? There was no consideration for such ulterior damages; and the jury would not probably have given them if the court had left them uninstructed on this point. There is no rule of law or ethics, that we know of, that could authorize the court to tell the jury that the plaintiffs were entitled to recover damages for the loss of the services of the boy during the time they, the plaintiffs, were unable by their own act to teach and instruct him in the business of saddle and harness making. If the plaintiffs had produced evidence that they jointly were at all times ready and willing to instruct the boy, notwithstanding the dissolution of the firm,
(453) the verdict might then be right. But no evidence was produced by the plaintiffs, on whom the *onus* lay, to show that the condition precedent, mentioned in the contract, had been performed *in extenso,* nor was any readiness by them to perform it shown. We think that there must be a new trial.

RUFFIN, C. J. The conduct of the defendant's intestate was a wanton and gross injury to the plaintiffs, who had received his son and faithfully maintained and taught him for two years. After they had incurred that expense and trouble with him, until he had, probably, learned enough to make his services of use and value, the father took him away, without finding the least fault with the plaintiffs. If any conduct can be inexcusable, it appears to me that such as that is, and that it ought to be left to the jury to give for such a breach of contract all the damages the plaintiffs really sustained: if not the full value of the boy's services for the residue of the period of apprenticeship, at all events to reimburse the plaintiffs for their expenditure of money, diet, lodging, and apparel upon him, and instruction to him. Surely, nothing less than that can be just. But I do not see any reason why the plaintiffs should not recover the value of their apprentice's labor for the unexpired term. It is opposed by the technical reason that the contract was made with the plaintiffs as partners, and that they cannot recover for the period after they ceased to be partners; and in support of the position the counsel cited *Weston v. Barton,* 4 Taunt., 673. But that case is really the other way. It decides that a bond given to a banking house bearing a particular name ceases to be obligatory as to transactions with the house after an old partner goes out or a new partner comes in, though the name of the firm continues the same, and the old assets and responsibilities were to be turned over to the new concern. And the reason given by *Sir James Mansfield* is that though it is generally con-
(454) sidered that such contracts are made with the firm as a kind of *political* body, yet in law they are made with the individuals composing the house. That case is an authority for the plaintiffs. The

truth is that the unincorporated partnerships are mere associations of individuals, and their contracts are made jointly by and to the partners as natural persons; and, hence, if a note be made payable to a firm, it is to be sued on, not in the name of the firm, but precisely as if it were payable to A., B., C., the individuals composing the firm. Therefore, this bargain was made with Joab Hiatt and William F. Jean, the plaintiffs, and not "Hiatt & Jean" as an ideal being. If the latter were the case, the plaintiffs could not recover at all, any more than a corporation after the expiration of the charter. Such being the law, I am at a loss to discover why the plaintiffs may not recover the whole value of the lad's services; for, the contract being with these as natural persons, and to be so stated in pleading, those two men were just as capable of teaching the apprentice the trade of the saddler, and profiting by his labor, after they ceased to be partners as before. Suppose the one to have carried on a shop, and the other to have attended to instructing the apprentice—they would have complied as literally with their engagement as if they had continued to be partners. But why should they show any readiness in that respect? The defendant's intestate had taken away his son and broken the *whole* contract before they dissolved. After he did so, he had no right to insist on the plaintiffs to renew it, or to execute it especially for the residue of the term. By the waste of his time the boy's capacity for service might have been impaired; and, at all events, his obedience and submission to discipline were rendered more doubtful. Suppose the father had been sued in *tort* for enticing away the plaintiff's servant: can there be any doubt that the jury might give all that the plaintiffs could have been profited by the apprentice's services? In *Gunter v. Astor,* 4 Moore, 12, such an action was brought by a pianoforte maker, and it was proved that one of the (455) defendants had invited the plaintiff's workmen to dinner, and induced them to agree to work for the defendant at advanced wages; and, although the workmen of the plaintiff were hired, not for a term, *but by the piece,* yet upon its being proved that the plaintiff's business yielded him, with those men in his employment, £800 a year, the jury gave £1,600 damages, under instruction from the judge to assess what damages the defendant's conduct occasioned the plaintiff. Upon a motion in bank for a new trial, it was refused; and the court remarked that it had been said the plaintiff only sustained damages for the value of half a day's labor of his workmen, when they visited the defendant's; but it is not for the court to ascertain the precise damages he is entitled to, and that was most properly left to the jury. So, I think that here it should be left to the jury to estimate the actual loss the plaintiffs, as natural persons, have sustained, and that if the jury should give such a sum as would tend to induce men to observe their engagements with

good faith, and not to violate them through mere self-will and wantonness, it would subserve the purposes of justice and morals; and the Court ought not to be disposed to disturb it. Wherefore I should think this judgment ought to be affirmed.

PER CURIAM. New trial.

Cited: *Musgrove v. Kornegay,* 52 N. C., 73.

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ATTORNEY-GENERAL v. THE PETERSBURG AND ROANOKE RAILROAD COMPANY.

1. An information filed by the Attorney-General for the purpose of having the charter of an incorporation declared to be forfeited, though it need not be expressed in technical language, yet it must set out the substance of a good cause of forfeiture in its essential circumstances of time, place, and overt acts.
2. When the Legislature required "the grounds" to be set forth on which the forfeiture is alleged to be incurred, nothing less could be meant than that the information, like an indictment or declaration, should state with certainty to a common intent those facts and circumstances which constitute the offense in its substance, whether of misfeasance or nonfeasance, so that, on its face, if true, it may be seen that there is a specific ground in fact, and not by conjectural inference, on which a forfeiture ought to be adjudged.
3. When a charter expressly imposes a duty which the corporation is to perform, not merely to the citizen, but towards the sovereign itself, although it may not declare that performance shall work a forfeiture, yet it must be taken to have been required by the State as a material stipulation, for the nonperformance of which by the corporation the State may put an end to the contract.
4. But if the sovereign, with us the lawmaking power, with a distinct knowledge of the breach of duty by the corporation, a knowledge declared by the Legislature, or so clearly to be inferred from its own archives that the contrary cannot be, thinks proper by an act to remit the penalty, or to continue the corporate existence, or to deal with the corporation as lawfully and rightfully existing, notwithstanding such known default, such conduct must be taken, as in other cases of breaches of conditions, to be intended as a declaration that the forfeiture is not insisted on, and, therefore, as a waiver of the previous defaults.

INFORMATION filed in this Court on 19 January, 1846, by the Attorney-General, charging a forfeiture of the charter of the corporation. The information states "that by an act of the General Assembly passed in 1830, entitled An act," etc., it is enacted, "that books be opened for the purpose of receiving subscriptions to the amount of $400,000, to consti-

tute a joint capital stock for the purpose of making a railroad from some point within the corporation of Petersburg, in Virginia, to some convenient point on the north bank of Roanoke River between the towns of Weldon and Halifax"; and that by the said act "the said Petersburg Railroad Company is invested with all the rights and (457) powers necessary for the construction, repair, and maintaining of the said railroad to be located as aforesaid, and to make and construct all works whatever which may be necessary and expedient in order to the proper completion of the said road, and also power to contract with any person or persons for making the said road and performing all other works respecting the same which they shall judge necessary and proper, and to purchase with the funds of the said company, and place on the railroad constructed by them under the said act, all machines, wagons, vehicles and teams of any description whatever which they may deem necessary and proper for the purpose of transportation"; and that by the said act it is further enacted, "that it shall be the duty of the president and directors of the said company to render to the Legislature of this State annually a fair account of the expense in constructing and keeping in repair that part of the said railroad within this State, and the amount of tolls received on the same; and that whenever the amount of tolls so received shall equal the sum expended in constructing that part of the road, with 6 per centum per annum on that sum from the time it was so expended, then it shall be in the power of the Legislature so to regulate the rate of toll that the net amount annually collected shall not exceed 6 per centum per annum on the sum originally expended." The information then states further, "that the said Petersburg Railroad Company, under the provisions of the said act of the General Assembly, have now for many years had their said railroad completed, and have placed the terminus thereof in North Carolina, at Blakely, on the north bank of the Roanoke River, in the county of Northampton, and since the completion thereof have had the said railroad in constant operation; and that by the provisions of the said act of the General Assembly the said Petersburg Railroad Company ought to have returned, and are bound to return, unto the said (458) General Assembly annual reports of the tolls, freights, and receipts of that part of the said railroad in North Carolina, as well as to make returns of the original cost of the construction of the same, in order to enable the said General Assembly to regulate the tolls on the said railroad; but that the said president and directors, in behalf of the said Petersburg Railroad Company, have failed to make the said returns."

The information then further states the acts of Assembly of 1832 and 1833, whereby the Portsmouth and Roanoke Railroad Company was

made a body politic and corporate for the purpose of making a railroad from Portsmouth in the State of Virginia to the south bank of the canal in Weldon in this State; and that the said road was completed in the manner directed by the said acts. And the information then proceeds further: "That by the proper construction of the said act of the General Assembly passed in 1830, the said Petersburg Railroad Company can only apply the moneys raised by the subscription aforesaid, and the moneys arising from the tolls, freights, and other sources for the transportation of produce and passengers, to the making and preserving of the said railroad and repairing the same, and can only contract with other persons for the like purposes, and that all moneys received by the said company are and ought to be applied to the said purposes, and, should any remain, the same is by the said act of the General Assembly to be paid to the subscribers holding stock in the said Petersburg Railroad Company." The information then proceeds further: "That that part of the said Portsmouth and Roanoke Railroad which lies in the county of Northampton, including the bridge across the Roanoke River at Weldon, hath heretofore been sold under executions issuing from the counties of Northampton and Halifax, and that Francis E. Rives was the purchaser under the said executions"; but the Attorney-
(459) General says that the franchise granted to the said Portsmouth and Roanoke Railroad Company does not pass by the said purchase and conveyance from the sheriff of Northampton under the said executions to the said Francis E. Rives, but remains and is now in the said Portsmouth and Roanoke Railroad Company; and that the said Petersburg Railroad Company, on 14 June now last past, entered into the following contract with the said Francis E. Rives, to wit: "Whereas the said Rives is the proprietor of the Weldon bridge, constructed over the Roanoke River in North Carolina, subject to a mortgage thereupon to secure a debt of $8,000 to the State of North Carolina, and of that portion of the railroad constructed by the Portsmouth and Roanoke Railroad Company which extends from the town of Weldon to the Margarettsville depot in that State, and he has offered to sell the same to the said Portsmouth and Roanoke Railroad Company for $50,000, which offer the said company has rejected; and whereas the said company obtained from the Legislature of North Carolina the passage of an act to authorize the sale of the whole railroad and other property belonging thereto, unto a new company, which act will go into operation if ratified by the General Assembly of Virginia; and whereas, from the present condition of the said company, it is believed that its means are not adequate to the purchase of the said Rives' interest and to the continuing of railroad business, unless the whole road and stock can be sold out to a new company, which must necessarily be effected at a very low

price, so that the large pecuniary interest of the State of Virginia in said road must in any event be almost wholly lost; and if such a new company be organized, it will most probably be by nonresidents of this State, and her interests in the upper railroads will be greatly impaired in value; and whereas it is of great importance to the stockholders in the Petersburg Railroad Company, of whom the State of Virginia is one to the extent of $323,500, to prevent the competition of (460) any such plan as is above specified, and the said Rives is willing for a reasonable compensation to prevent his portion of the said road from being used, with his consent, for the purpose aforesaid, the following stipulations have been agreed upon by the parties to these presents: The Petersburg Railroad Company hereby agree to pay to Francis E. Rives the sum of $60,000 in the following manner, namely, $2,500 on 1 September next, and the same sum every three months thereafter until the sum of $20,000 shall have been paid to him; then $1,250 every three months after that time until the whole sum of $60,000 shall be fully paid: *Provided,* that during the whole period aforesaid that part of the Portsmouth and Roanoke Railroad which was purchased by him, from Weldon to Margarettsville, and the Weldon bridge, shall remain unused as a railroad for the transportation of persons or produce, and in case the said road or bridge shall be so used for railroad purposes the payment aforesaid shall cease." The information then sets out the residue of the agreement, to the effect that if there should be any legal proceedings taken for putting the road in operation, the payments should be suspended until a decision should be given in favor of Rives' rights; that if any other railroad should be constructed to connect the Portsmouth and Roanoke Railroad with any point on Roanoke, then the payments should cease altogether; that if Rives should sell the road (excepting the iron on it), or it should be by any legal means condemned for the purposes of a railroad, that the price or damage allowed to Rives shall be applied to satisfy to Rives so much of the said price of $60,000 as shall then remain unpaid; and after that shall be done, then to reimburse to the company what it may have advanced under this contract; and that the surplus, if any, shall be divided equally between Rives and the company. The information then charges (461) further: "That in pursuance of the said contract and agreement the said Petersburg Railroad Company has already paid unto the said Francis E. Rives a large amount of the price stipulated to be paid to him by the said contract—the said agreement having been ratified by the stockholders in general meeting, which the said Attorney-General says is not only not granted to be done by the said act of the General Assembly passed in 1830 incorporating the said Petersburg Railroad Company, but is directly against the provisions of the said act of incorporation,

wherefore the said Attorney General says that the charter granted is forfeited, and that the said company ought not further to exercise the privileges granted to them by the said act of the General Assembly passed in 1830."

The defendants pleaded, as to the failure of the president and directors to make returns to the General Assembly, that by an act of General Assembly of this State passed in 1833, entitled "An act to amend an act," etc., it was amongst other things, enacted "that the Petersburg Railroad Company be and they are hereby authorized to construct a lateral railroad from the point at which their present line of railroad may be crossed by the Portsmouth and Roanoke Railroad, or from such point in the neighborhood of the same as they may deem most advisable, to the basin at Weldon, anything in the act to which this is an amendment to the contrary, notwithstanding," as by the record of the said act remaining amongst the rolls, etc.; and that afterwards, to wit, at the session of the General Assembly which commenced on Monday, 18 November, 1844, and ended on 10 January, 1845, a certain other act was passed, entitled "An act to provide," etc., whereby, after enacting (amongst other things) "that complaint had been make to the General Assembly that the bridge erected across Roanoke River, below the town of Weldon, by the Peters-
(462) burg Railroad Company obstructed the passage of masted vessels going to the wharf near the said town of Weldon," it is enacted "that it shall be the duty of the said Petersburg Railroad Company to construct a draw of sufficient capacity, at the most suitable point in the said bridge, so as to admit of the easy and convenient passage of such steamboats and masted vessels as navigate Roanoke River below the falls thereof, and to complete the same within nine months from and after 1 January, 1845: *Provided, however,* that the said company shall, from the time of ratifying this act, take all produce passing in vessels or boats up or down the river and intended to pass said bridge from the bridge to Weldon, and from Weldon to the bridge, as the case may be, until the draw in said bridge shall be completed as provided for by the act, in such manner as not to hinder or delay the transportation of such produce, and to take the same free of toll; and that it shall moreover be the duty of the said railroad company, so long as they shall keep the said bridge across Roanoke River, or permit the center pier of said bridge to stand, to keep a good and sufficient draw in the same, so as not to obstruct the passage of such steamboats and masted vessels as navigate the said river below, and, furthermore, to keep a suitable person at the said bridge to open the draw thereof, so as to occasion no delay to the passage of vessels as aforesaid; and that if the said Petersburg Railroad Company shall refuse, neglect, or omit to perform the duty required by this act, it shall be the duty of the Attorney-General, and

he is hereby directed, to institute legal proceedings against the said Petersburg Railroad Company, by way of indictment or otherwise, to cause the obstruction created by the erection of the said bridge to be removed, as by the record of the said last mentioned act of the General Assembly remaining among the rolls," etc., whereby all and every forfeiture of these defendants of their corporate rights and privileges or franchises in the said information supposed, by reason of the (463) failure of their president and directors to make the said returns, is waived and remitted; and this the said defendants are ready to verify by the said records. And, as to the making by the defendants of the said contract with the said Francis E. Rives and the payment by them of the said sums of money to the said Francis in pursuance of the said contract, the defendants plead that since 1 January, 1841, the moneys necessarily laid out and expended by them in repairing and keeping in repair the part of the said railroad lying in this State, betwen the southern boundary line of the State of Virginia and the said town of Blakely on the said Roanoke River and in defraying the necessary expenses incurred for maintaining transportation on the same, have greatly exceeded in amount all the sums of money, income, and receipts by them had or received by way of toll or otherwise, for transportation of persons or property on the same, and that these defendants, at the time of the said contract with the said Rives, had not nor at any time since had or now have any sum or sums of money received or accrued for the transportation on the said part of the said road, to be divided, as profit, to and amongst the several stockholders; and these defendants further say that by another part of the said act of the General Assembly passed in 1830 the said in formation mentioned, these defendants are incorporated into a company by the name and style of the Petersburg Railroad Company, and it is enacted that "in that name they may sue and be sued, plead and be impleaded, and shall possess and enjoy all the rights, privileges, and immunities of a corporation or body politic in law, and may make all such by-laws, rules and regulations, not inconsistent with the Constitution and laws of this State or of the United States, as shall be necessary for the well ordering and conducting the affairs of the company." And these defendants say that, because the said contract was manifestly beneficial to them and would enable them to make (464) large profits to be divided amongst the several stockholders, they, by their president and directors and by the assent of the stockholders in general meeting, did make the said contract, and did afterwards, out of the profits accrued upon that part of their said road lying in Virginia, pay the said sums of money to the said Rives in pursuance of the said contract, as they lawfully might for the cause aforesaid; all of which they are ready to verify, etc. Wherefore, forasmuch as the said defend-

ants at the time of exhibiting of the said information were not, nor at any time since have been, liable to any forfeiture of any of their rights, privileges, and franchises within this State, they pray judgment, etc.

The Attorney-General demurred generally and the defendants joined in demurrer.

The Attorney-General, with whom was Iredell, for plaintiff.
Badger for defendants.

RUFFIN, C. J. The act of 1831, Rev. Stat., ch. 26, authorizes two modes of proceeding at the instance of the public against corporations. The one is by bill of the Attorney-General in the court of equity, to restrain them by injunction from assuming or exercising any franchise or transacting any business not allowed by the charter. This part of the act is applicable only when the purpose is not to dissolve the corporation by a judicial decision, but to preserve it, in order that its useful functions may be performed, and, at the same time, that it may not be able to abuse its powers or transcend them. The object of the other mode is to have a forfeiture of the charter or a dissolution of the corporation judicially declared, and a judgment of ouster thereon; and that is to be effected by an information by the Attorney-General in a Superior Court of law or in this Court, "setting forth, briefly and without technical terms, the grounds on which such forfeiture or dissolution (465) is alleged to have been incurred or to have taken place." Of this latter kind is the present proceeding. It is in the nature of *a quo warranto,* and although the act dispenses with technical formalities, yet it is clear that the information must set out the substance of a good cause of forfeiture in its essential circumstances of time, place, and overt acts. That rule belongs to all pleading, and especially is it proper in reference to a proceeding in its nature criminatory, to insist upon a forfeiture of valuable franchises which cost a great outlay of capital. The demurrer by the Attorney-General to the defendants' pleas necessarily opens the way to objections to the information, upon the principle that, as against the party demurring, we are to go back to the first fault in the pleading; for it is manifest, for example, that here it is immaterial whether the matter pleaded be a good bar or not, if the charge itself be so radically defective that no judgment of forfeiture can be pronounced on it. In a *quo warranto,* properly speaking, the charge is general, that the defendants, without lawful warrant, use the franchise of being a body politic and doing certain acts as a corporation. The plea brings forward the charter as the warrant for acting as a corporation, and states such parts of it and other acts as authorize the defendants to exercise the corporate franchise specified up to the time of the writ brought; and then the replication specifies any number of particular

overt acts or omissions on which it is intended to insist the forfeiture has been incurred, and thereto the defendants may either demur or take issue. Under the statute, however, it was intended to simplify the proceedings by having the whole matter of accusation set forth at once in the information, or, at least, some sufficient matter to entitle the State against an admitted corporation to judgment of ouster. These observations have been made because, as this is the first proceeding under the act, as far as is known to the Court, it has been deemed (466) proper to give some intimation that the inartificial and extremely loose statements of this information are not approved by the Court as sanctioned by the act. For example, it does not charge the subscribing of the stock or the organization of the company under the charter as a subsisting corporation at any time, but only an authority in the charter for certain subscriptions for making a railroad from, etc., to, etc., without giving any names, and then says that "the said Petersburg Railroad Company" is invested with the rights and powers necessary to make the said railroad *to be located* as aforesaid. Again, while it charges that it was the duty of the president and directors to render to the Legislature, annually, a fair account of the expenses in constructing and keeping in repair that portion of the road within this State, it does not show any part of the act giving power to the stockholders or imposing the duty of appointing a president and directors, nor that any were appointed—a thing indispensable to render the stockholders amenable in this most penal manner for the omissions of the president and directors. Again, it states that the company have now "for many years had their said road completed, and since the completion thereof" have had it in "constant operation," without fixing any time whatever as that of the completion or of the operation of the road, or stating in what the operation consisted, as conveying persons or things for hire and the like; and while it states that "the said Petersburg Railroad Company" ought to have [not "rendered annually a fair account"] "returned unto the General Assembly annual reports of the tolls, etc., of that part of the road in North Carolina, as well as to make returns of the original cost," etc., it proceeds to charge "that the said president and directors in behalf of the said Petersburg Railroad Company have failed to make the said returns," without showing any time when it became a duty to render such account or an omission of it at any particular time or place, and without showing any sum expended or any profits received or accrued. The other part of the information which respects the (467) transaction with Rives is equally vague and defective. It states that, by the charter, the company can only apply money, subscribed or received for tolls, to making or repairing the road and the payment of dividends of profit to the stockholders, and, after setting out the purchase

of Rives of a part of the Portsmouth and Roanoke Railroad, without the franchise of using it as a railroad, it proceeds to state that on 14 June, 1845, the company entered into a contract with Rives, which is set out in the information, whereby the company binds themselves to pay Rives certain sums on certain days on certain conditions; and that, "in pursuance of the agreement, the company has already paid to Rives a large amount of the price stipulated to be paid him," without affixing any time or place to either of the facts alleged, except the date of the contract, and without mentioning any sum or sums in particular as paid to Rives, or averring that the same had either been subscribed by the stockholders or received for tolls, or how otherwise raised, as by borrowing or in some other manner. When the Legislature required "the grounds" to be set forth "on which the forfeiture is alleged to be incurred," nothing less could be meant than that the information, like an indictment or declaration, should state with certainty to a common intent those facts and circumstances which constitute the offense in its substance, whether of misfeasance or nonfeasance, so that, on its face, if true, it may be seen that there is a specific ground in fact, and not by conjectural inference, on which a forfeiture ought to be adjudged. But the Court does not think it necessary to decide the case upon formal defects in the information of these kinds, because, taking it properly to charge the matters which, as we suppose, it was meant to charge, the Court is of opinion either that it is substantially insufficient or (468) that the facts alleged by the defendants and admitted by the demurrer sufficiently answer it.

There are two grounds on which it is alleged that the forfeiture has been incurred. The one is that the charter as set forth makes it the duty of the president and directors to render to the Legislature annually a fair account of the expense of making the road in this State and the amount of tolls received on it; and that the president and directors have failed to "make any returns," as it is called. Now, it may be supposed to charge the period when the road was made, the cost of it, the period of using it up to the last session of the Assembly, and the annual profit received or accrued, and that the General Assembly had, during that period, divers sessions at such and such days, and that the company omitted to render an account of the cost of the tolls to the Assembly at any one or more of those sessions; and yet we think, upon the ground taken in the plea in answer to that part of the information, that there cannot be judgment against the defendant. A question might, indeed, have been made as to an omission—if it be so—to render an account during the year that elapsed between the rising of the Assembly on 12 January, 1845, and the filing the information on 19 January, 1846, since the charter requires the account to be rendered annually, and it

may, perhaps, be still proper to render the account at the period prescribed, although the Assembly does not constitutionally have annual sessions, as it had when the charter was passed. But we do not understand the information as raising that question, and, therefore, do not consider it, for the information clearly makes the *gravamen* on this part of the case to consist in not making a return which would have enabled the General Assembly to regulate the tolls, as provided for in the charter, and, therefore, has in view only such returns as ought to have been made before or at the last session of the Assembly, which may be supposed to be stated to have been in November, 1844, according to the fact. We entertain no doubt that the omission of an express duty prescribed by a charter to a corporation is cause of (469) forfeiture. Its performance is in the nature of a condition, and the sovereign may insist on resuming his grant for the breach of the condition. With respect to the duties arising by implication from the nature of the franchise granted, and the interest of the public in their due and continued performance, we should be inclined to hold that only such acts or omissions would be destructive of the charter as concern matters which are of the essence of the contract between the State and the corporation, when the corporation fails to do that which it must be seen it was intended and expected it would do, or does that which it is certain it was intended and expected it would not do. But when a charter, as here, expressly imposes a duty which the company is to perform, not merely to the citizen, but towards the sovereign itself, although it may not declare that nonperformance shall make a forfeiture, yet, by no latitude of equitable interpretation can it be regarded as a hard bargain, and, as such, relieved against in a court of law: but it must be taken to have been required by the State as a material stipulation, for the nonperformance of which by the corporation the State may put an end to the contract. But, on the other hand, if the sovereign—with us, the lawmaking power—with a distinct knowledge of the breach of duty by the corporation, a knowledge declared by the Legislature, or so clearly to be inferred from its own archives that the contrary cannot be, thinks proper by an act to remit the penalty or to continue the corporate existence, or to deal with the corporation as lawfully and rightfully existing, notwithstanding such known default: such conduct must be taken, as in other cases of breaches of conditions, to be intended as a declaration that the forfeiture is not insisted on, and, therefore, as a waiver of the previous defaults. It must be so in the nature of things; for while the State insists on these stipulations in a charter, as conditions express or implied, in a contract the citizen has a (470) right that they shall be dealt with as other conditions, and that a breach shall not be insisted on when, after it, the parties acted and

dealt as if there had been no breach; for example, when a landlord receives rent after he might have entered for nonpayment of it. We do not mean that an omission by the Legislature to take immediate legal steps to enforce a forfeiture, for even a cause most notoriously existing, or that even in such a case, a statute recognizing the the actual exercise of the corporate functions would necessarily receive that construction, as, for instance, borrowing money from or keeping account with a bank that had violated its charter. But in the case before us the duty imposed on the company is that of making their president and directors render accounts to the General Assembly itself, so that it could not but be certainly known to the Assembly of 1844 that no return had been made to it; and in that state of things the Legislature passed an act on the day before the adjournment which not only recognizes this corporation as then existing, but authorizes and requires it to perform acts which imply that it is to exist for nine months afterwards, at least, and such acts as impose on the corporation the immediate expenditure of a considerable sum of money and continued outlay for an indefinite period, apparently expected to be coextensive with the charter. The amended charter allowed the company to extend the road to the canal of Weldon, which is a point on the south side of Roanoke, without expressly directing or authorizing a bridge over the river, though apparently indispensable. After the company had built a bridge, the Legislature requires them to make alterations at their own expense, within nine months, in a work on this new part of their road, and to keep attendants to open the draw as long as the bridge shall be kept up. Surely, it would not comport with the good faith that should actuate every government if the State were to turn around imme-
(471) diately after inducing this further expenditure by the company, and getting the work done, and insist upon a forfeiture for a default that had occurred and was absolutely known to the Legislature to have occurred prior to or contemporaneously with the passing of the act. The necessary inference from such provisions in a statute, whether depending on the general principles for the construction of statutes or regarding them as the acts of a party to a contract with conditions, must be, we think, that the Legislature intended the corporation to continue until there should be a further breach; and the executive officers of the State cannot counteract the legislative intention by insisting on the prior default. Happily, we have not had occasion in this State to become familiar with the defaults of corporations, committed or punished; and we should feel the more hesitation in adopting the conclusion we have if we did not find it sustained by the authority of decisions by courts in which these doctrines have been frequently discussed. In the great case

of the Manhattan Company in New York, 9 Wend., 361, the judgment was rendered for the defendant principally on this ground.

The other alleged ground is that the company paid some money to Rives which they ought to have expended on the road or divided among themselves. There is no allegation that the expenditure on the road would have been necessary or useful. There is no complaint of this transaction upon the ground that its object was contrary to the interest or policy of North Carolina in any other respect, as, for instance, to prevent the use by the public of the road as a highway, or to obstruct any steps that might legally be taken by the State, or by any under her authority, to appropriate Rives's part of the Portsmouth and Roanoke Railroad to public uses. Indeed, it is plain that the agreement had nothing of the kind in view; but, on the contrary, it provides for the contingency that the proper authorities, whose action the parties could in no way defeat or bind, should have the road condemned (472) for a railroad. The information then supposes nothing wrong—save only that money, which it assumes but does not aver, was part of the capital subscribed, or of the profits of the road, was paid to Rives, instead of being kept by the corporation themselves. To this part of the information, after stating by way of inducement that there were no profits of that part of the road which lies in North Carolina received or accrued at the time of making the contract with Rives, nor since, to be divided among the stockholders, the plea in substance is that the payments to Rives were made with money which accrued as profits on that part of the road which is situate in Virginia. The plea thus raises an interesting question, which may some day prove embarrassing, with respect to charters granted by two States to the same corporation, constituted to conduct a work situate partly in each State—whether or not it be amenable to each State exclusively for everything touching so much of the work as may be in it, and for the application of the profits arising on each part. The plea supposed that to North Carolina the company is not to account for not constructing the Virginia portion of the road, or not repairing it, or misapplying the profits made on it. This may be true in respect of punishing the officers by indictment for a default in Virginia, or in respect of adjudging a forfeiture of the charter or the franchise in Virginia, which things clearly depend on territorial jurisdiction. But we are not prepared to say where by the charters of the two States the work is executed as one whole, by subscriptions of stock applicable alike to the parts in each State, that one of the States could not insist, as the ground of forfeiture of so much of the franchise as is used within it, that the corporation had not fulfilled its duties in the other State, but violated them to the prejudice of the complaining State. For example, if the charter required that the whole work should

(473) be completed by a day limited, and the company made the road in North Carolina, but did not make that in Virginia, would it not be a forfeiture of the part in this State, both because the omission was against the letter of the act and because it impaired the utility of the part here, by the interruption of the intended line of transportation and travel? Suppose the company were to charge on the road in Virginia double the tolls allowed by law, so as to extort from citizens of North Carolina, passing on the same, excessive fees and prevent others wishing to use the road from doing so, would it not form just cause of complaint on the part of this State, and though not expressly declared in the charter to be in itself a dissolution, ought it not to be considered a breach of duty arising out of an implied condition of the charter for so much of the work as is within our jurisdiction? For, as implied powers of a corporation are as much protected by the law against the unjust resumption by the State as those expressly granted, so the duties of a corporation arising by reasonable implication are as obligatory on the corporation as those expressly imposed, and their breach visited by the same consequences. It may be, in this case, that the profits arising from the different parts of the road form distinct funds, as the charter requires an account of those in this State only to be rendered, though, no doubt, that is with a particular view to the regulation of the tolls in this State. But we do not find it necessary to decide either that question or the more general one raised by the pleas, as before mentioned, because, let the statements in the information be taken as they may, the facts constitute no offense, that we can perceive. The information does not state out of what funds the payments to Rives were made, except that it may be collected by argument, from the statements of certain parts of the charter, that it was out of the capital or out of the profits of the road in this State, or out of them and the profits of the road in Virginia.

(474) Take it in any one of those cases, and still there cannot be judgment for the State; for such an appropriation of the money of the corporation produces no prejudice to the State or the public, and is against no stipulation of the corporation to the public, express or implied. There is, indeed, a provision in the charter that the president and directors shall semiannually declare such dividends of the net profits from the tolls as they may deem advisable. This we know from reading the charter, and use for illustration; for that part of the charter is not set forth in the information, but it is only said that by the proper construction of the act "the company can only apply their money to certain purposes mentioned, namely, making and repairing the road and dividing the surplus." But it is clear that part of the charter is not inserted for the advantage of the State or to protect the State from detriment, either from an accumulation of capital or a misapplication of profits,

but solely for the benefit of the stockholders. Bank charters sometimes require periodical dividends of the *bonus,* as it is called, besides the stated dividends of profits at shorter intervals. That is to prevent the bank from hoarding its profits so as, in effect, to enlarge the capital beyond the sum fixed by the Legislature by compounding the profits with it; therefore, the public has an interest in the observance of such provision, and may insist on it. But the provision in this charter has no such view and is not of that sort, for it leaves the dividends to the discretion of the president and directors, controlled only by their responsibility to the stockholders, who can turn them out, and are expected to do so, for improperly withholding dividends or misapplying the funds. There is no policy of the State in this case to be subserved by the declarations of dividends, when not demanded or desired by the stockholders. The provision is exclusively for the benefit of the shareholders; and it would, indeed, be an unheard-of measure of penal justice upon the stockholders if they were to be deprived of their franchise because *their servants,* the president and directors, wrongfully withheld *from them* their money and gave it to some one else. But we may (475) take it that it was not, in this case, the act of the president and directors, as the contract was approved in a general meeting of the stockholders, and, therefore, what was done under it may be considered as done by their orders or by them. Suppose it so, then we own that we see nothing in the charter nor in any duty which the stockholders as a corporation or as natural persons owe to the public which makes it criminal in them to dedicate their profits to the use of any person whatever. The profits are theirs, and they have a right to dispose of them to any purpose to which they might lawfully devote their money derived from any other source. If what has been done amounts to an assumption of a franchise in that part of the Portsmouth and Roanoke Railroad, let the proper steps be taken to restrain them from the exercise thereof or to oust them therefrom; but, certainly, the giving Rives their money, whether for a consideration or without, is no forfeiture by the stockholders of their own charter, much less when the purpose was to make their road more useful to the public and more profitable to themselves, by drawing travel and freight to it.

The opinion of the Court, therefore, is that there must be judgment on the demurrer for the defendants.

PER CURIAM. Demurrer sustained.

Cited: Asheville Division v. Aston, 92 N. C., 586; *Simmons v. Steamboat Co.,* 113 N. C., 151; *Hurst v. R. R.,* 162 N. C., 380.

(476)

ELIZABETH CITY ACADEMY v. DAVID LINDSEY.

1. When it has been shown that a charter has been granted to a corporation, those in possession and actually exercising the corporate privileges must be considered as rightfully there, against wrongdoers and all who have treated or acted with them in their corporate character.
2. The sovereign alone has a right to complain, for if there be an usurpation, it is upon the rights of the sovereign, and his acquiescence is evidence that all things have been rightfully performed.
3. Therefore, where a corporation of trustees of an academy, consisting of ten, was shown to have existed, and corporate acts had continually been done in the name of the corporation, although it was shown by the defendant, in an action against him by the corporation, that one of the original trustees remained alive, it was *Held*, that the corporation was not bound, in such an action, to show a regular succession of trustees down to the time of bringing the suit.

APPEAL from PASQUOTANK Spring Term, 1846; *Bailey, J.*

Trover, brought to recover the value of a set of globes, alleged to have been purchased by the defendant Lindsey as the agent of the trustees for the benefit of the Elizabeth City Academy. It was in evidence on the part of the plaintiff that in 1820 the Legislature of North Carolina passed an act incorporating an academy in the town of Elizabeth City, naming ten persons in the said act as trustees of the said academy; it was further in evidence that of the original ten trustees, all of them were either dead or removed from the State save John C. Ehringhaus, who was examined as a witness, and stated that he acted as a trustee of said academy from its commencement for about eighteen months after its organization, and that the institution had been kept up from that time till the present, with the exception of a few intervals when teachers could not be procured. It was further in evidence, from the minutes kept by the board, that the trustees had acted regularly as such from the year 1838 to the present time; that they had built an academy, inclosed their lot, and repaired the premises from time to time,
(477) and were at the time of the issuing of this writ in the enjoyment of their corporate franchises and privileges.

The plaintiffs then introduced several witnesses for the purpose of showing how the fund was raised for the purchase of these globes, from whose testimony it appeared that a subscription paper, payable to the trustees of the Elizabeth City Academy and expressed to be for the benefit of the said academy, was circulated or handed to them by the defendant Lindsey; that he collected their subscriptions, stating at the time that the globes would be for the benefit of the academy and would not be removed. The defendant Lindsey further stated that he was going to New York and would purchase them, he having charge of the

said academy as teacher the previous session, and that being vacation. It was further in evidence that the defendant Lindsey went to New York, purchased the globes, returned, and again took charge of the academy; that he subsequently took charge of another school, and was then teaching school at the bringing of the action, and that the globes were demanded of him by Timothy Hunter, one of the trustees, previous to the bringing of this action, when he refused to give them up, alleging they were purchased for him. As to the other defendant, Fearing, they were demanded of him also, and he answered that he wished he had never seen the globes.

The defendants objected that the plaintiff could not recover, first, because a continuance of the corporation had not been shown, and upon this point insisted that it must appear that the places of those corporators who had died or removed had been regularly filled or supplied according to the provisions of the charter; that it was not sufficient to show that persons were calling themselves trustees and acting as such, but that the plaintiffs must show a regular and unbroken succession from the commencement, according to the provisions (478) of the charter.

Secondly, it was objected that the plaintiffs could not recover because the globes were bought for the benefit of Lindsey, the defendant, to remain in his possession as a teacher while he remained in the place, and not for the use of the academy; and for this purpose several witnesses were introduced, who swore, in substance, that they subscribed for the purchase of the globes for the benefit of Lindsey's school, and that they desired, when he left the academy, and still desired, that he should retain them. Furthermore, the defendant offered in evidence a paper-writing, signed by sundry individuals, stating that they were subscribers and desired that Lindsey should have the globes. This evidence was objected to by the plaintiff's counsel, and rejected by the court.

The court instructed the jury that if they were satisfied that there were persons acting as trustees of the Elizabeth City Academy, and exercising corporate franchises under the act of incorporation, at the time the suit was brought, the only inquiry would be, for whom the globes were bought, for the trustees or for the defendant Lindsey. If they were purchased by Lindsey as the agent of the trustees, and were used by him as their agent, then his possession was lawful until a demand was made; but if, upon demand made, he refused to give them up, and carried them away and used them as his, it was a conversion, and the plaintiffs would be entitled to recover their value. But if the globes were purchased by Lindsey for himself, then they should find a verdict for him. And as to the other defendant, the evidence was submitted to them whether he had any control over them, or possession of them, at the

time of the demand or before; if not, they should find in his favor. Whereupon the jury found a verdict in favor of the plaintiff against David Lindsey, and in favor of Oliver Fearing. Rule for a new trial.

Rule discharged, and judgment for the plaintiff. Appeal prayed (479) to the Supreme Court, and granted upon bond and security given.

A. Moore for plaintiff.
J. H. Brown for defendant.

DANIEL, J. The plaintiffs were by charter an aggregate corporation of ten trustees. It was incorporated in the year 1820 by the Legislature, and immediately thereafter it was organized and acted as a corporation. The defendant proved that all but one of the original ten corporators had either died or moved away, and he insisted that the plaintiffs could not recover because a continuance of the corporation had not been shown. He insisted that the places of the original nine trustees, who had since died or moved away, should be by the plaintiffs proved to have been regularly filled up according to the provisions of the charter; and that it was not sufficient to show that persons calling themselves trustees acted as such, but that the plaintiffs ought to show, upon the trial, a regular and unbroken succession of trustees from the year 1820, according to the provisions of the charter. The court instructed the jury upon this point of the defense that if they were satisfied that there were persons acting as trustees of the academy, and exercising corporate franchises under the act of incorporation, at the time the writ was brought, then their only inquiry would be for whom the globes were bought—for the trustees or the defendant. We think that this part of the charge of his Honor was correct. In *Navigation Co. v. Neil,* 10 N. C., 537, the Court said that when it is shown that a charter has been granted, then those in possession and actually exercising the corporate rights shall be considered as rightfully there, against wrong-doers and all those who have treated or acted with them in their corporate character. (480) The sovereign alone has a right to complain, for if it is an usurpation, it is upon the rights of the sovereign, and his acquiescence is evidence that all things have been rightfully performed. The defendant then insisted that the globes were purchased for him as a teacher, and not for the academy, and he examined several witnesses on this point of his defense, and, in aid of their testimony, he offered in evidence a paper-writing signed by several individuals, stating that they were subscribers for the purchase of the globes, and that they now desired that the defendant should have them. This evidence was rejected by the court; and we think it ought to have been rejected, for the bare wishes of the subscribers upon the subject at the present time could

neither given nor take away the title to the property. The paper-writing was, therefore, immaterial and irrelevant to the issue then under consideration.

PER CURIAM. No error.

Cited: *R. R. v. Saunders,* 48 N. C., 128; *R. R. v. Johnson,* 70 N. C., 350; *Dobson v. Simonton,* 86 N. C., 496; *Asheville Division v. Aston,* 92 N. C., 586; *S. v. Shaw, ibid.,* 771; *Cotton Mills v. Burns,* 114 N. C., 355; *Boyd v. Redd,* 120 N. C., 339; *Hurst v. R. R.,* 162 N. C., 380.

BENJAMIN WHITLEY v. JAMES A. DANIELS.

On a suit for the penalty for trading with a slave, when it was proved the defendant offered to show the plaintiff his "barter book," in order to convince him that he had paid nothing to the negro, who had delivered the articles to his agent, it was not competent for the plaintiff, on the trial, to prove by the witness before whom this declaration was made, in order to show the *time* when the transaction took place, "what was the time of trading, *as appeared on the book.*" Notice to produce the book should have been proved before such evidence was admissible.

APPEAL from MARTIN Spring Term, 1846; *Battle, J.*

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

Whitaker for plaintiff. (481)
No counsel for defendant.

NASH, J. The defendant was warranted to recover the amount of a penalty alleged to have been incurred by him in illegally trading with a slave by the name of Ganze, the property of the plaintiff. In order to prove the charge, the declarations of the defendant were relied on. The defendant admitted that his agent at his landing had received such articles from Ganze as were claimed by the plaintiff, and that *he* had received them, but did not know there was no permission in writing; that they had been entered on his barter book, but were not paid for, as the plaintiff could see by inspecting the book, which he tendered to him for that purpose, as also the time when they were received. In order to show when the transaction took place, the witness who proved these declarations was asked, "What was the time or trading, as *appearing on the book?*" The question was objected to because of the want of notice to produce the book. The objection was overruled and the testimony received, and upon it it appeared the warrant was brought within due

time. No more of the case is here stated than is necessary to exhibit the point upon which our opinion is founded.

Section 75, ch. 34, Revised Statutes, forbids the trading with slaves for the articles therein enumerated without a written permission from the owner or manager of the slave, specifying the articles which he is permitted to sell, under a penalty of $100 for each offense. By section 77 the offense is made indictable, and by section 80 it is *"Provided,* that no suit or indictment shall be prosecuted for any violation of section 75 unless such suit or indictment be commenced within twelve months after such violation." The defendant had pleaded that the suit had not been commenced within the time limited by the act, and it was im-
(482) portant to the plaintiff to show that it was brought within due time. The evidence offered to prove the fact was not competent, and his Honor erred in receiving it. Everything said by the defendant at any time concerning the transaction was legal evidence against him, and the plaintiff was entitled to the benefit of it. But the objection now is that the evidence was not to prove any declaration of his whatever, but of a separate and distinct fact—*the contents of the barter book.* The witness was not asked what the defendant had *said* was the time of committing the offense, but what the barter book stated was the time. In all the cases to which our attention has been drawn the testimony was as to the declarations and acts of the defendants accompanying them. In *King v. Moores* the indictment was for *administering seditious oaths.* Witnesses swore to some words, in nature of an oath, *spoken* by the prisoner, who held a paper in his hands whilst he uttered them, and it was insisted no parol evidence could be received *of what he said,* because notice had not been given to produce the paper from which it was supposed he had read them. The objection was overruled by the court. *Hunt's case,* in 5 Eng. C. L., 377, is to the same effect. The defendant, with others, was indicted for a conspiracy to disturb the peace. A meeting was held at Smithfield, where Hunt appeared on the hustings, and delivered to the witness a paper containing, as *he stated,* a copy of the resolutions to be proposed to the meeting, and the witness swore that the resolutions he heard read corresponded with the copy so delivered to him. It was objected the paper was but a copy of the resolutions, and, therefore, not the best evidence without notice to produce the original. *Justice Bailey,* before whom the case was tried, admitted the evidence, and, upon taking the opinion of the other judges, his decision was approved, upon the ground that the paper produced was received from the hands of Hunt as containing the resolutions
(483) then under discussion in the meeting, and, as to him, it was as good if not better evidence than any other could have been. In *Moore's case* it was not necessary to produce the paper he held in his

hand, because he *administered* the oath in the hearing of the witness. It was, therefore, that his declaration, or what he said, was given in evidence against him, and if the paper held by him had been produced and had proved to be a blank, still what he did and said in administering the oath would have been evidence against him; and in *Hunt's case,* it was the same as if he had repeated to the witness the resolutions, or the witness had heard him propose them to the meeting, for he told him it contained the resolutions to be proposed, or then actually under discussion. In truth, as *Chief Justice Abbott* remarked, the paper handed the witness was as good if not better evidence than any other. In both cases it was what the defendants said that was given in evidence. The principle of those cases does not apply to the one we are considering.

The defendant Daniels said the articles had not been paid for, and tendered the barter book as proving that fact. He did not say when the trading took place, but that the book would show it; nor was the witness called on to prove any declarations of his as to that fact. He was asked, not what the book had said as to the time, but what the book stated. It was in no part a view of the *res gestæ.* The case of *La Motte,* 1 E. C. L., 126, was decided upon a different principle than those we have been considering, but still upon one which does not help the plaintiff's case. He was indicted for carrying on a traitorous correspondence with France while war existed between her and England. Letters of the prisoner, written to the French Government, were intercepted, copied, and sent on to their destination. The reception of these copies in evidence was opposed, upon the ground that the originals ought to be produced, as being the best evidence. The objection was overruled. The originals were not in the possession or under the control of the prisoner, and the doctrine of notice did not apply, neither (484) were they within the jurisdiction of the court. No process that could issue could produce them. The copies, then, were the best evidence the nature of the case admitted. Here the barter book was in the possession of the defendant. The plaintiff might have compelled its production, or, by giving due notice, entitled himself to give parol evidence of its contents. He has not, therefore, given the best evidence the nature of his case admitted. For this error on the part of the presiding judge the judgment must be reversed.

PER CURIAM. *Venire de novo.*

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ACCESSORY. See Evidence, Indictment.

ACCORD AND SATISFACTION. See Pleading and Practice.

ADMINISTRATOR. See Executors.

ADVANCEMENTS. See Hotchpot.

AGENT AND PRINCIPAL.

1. When an agent is appointed to sell articles of personal property the law implies that he has a right to warrant their soundness in behalf of his principal. *Hunter v. Jameson*, 252.
2. If he sells the articles with such a warranty as binds him personally, and damages are recovered against him upon the warranty by the purchaser, he has a right to be reimbursed by his principal to the amount of such damages, as well as of the necessary costs incurred in defending the suit. RUFFIN, C. J., *dissentient* as to the last point. *Ibid.*

AGREEMENTS. See Contracts.

APPRENTICES.

Where a boy was bound by his father as an apprentice to a copartnership, to be taught a mechanical trade, and the father took away the boy before his time had expired, and soon afterwards the copartnership was dissolved, the period of apprenticeship being still unexpired: *Held*, by a majority of the Court, RUFFIN, C. J., dissenting, that the persons composing the copartnership could only recover damages for the loss of the boy's services during the time the copartnership continued, and not afterwards. *Hiatt v. Gilmer*, 450.

ASSIGNMENT.

An assignment of a judgment is utterly void at law, and cannot be noticed in a court of law. *Ferrebee v. Doxey*, 446.

ATTACHMENT.

1. In a proceeding by attachment, when an interplea has been filed, the only issue submitted to the jury is as to the title to the property levied on. The jury have no right to assess the value of the property or damages for its detention or destruction. *McLean v. Douglass*, 233.
2. After property is levied on under an attachment, it is, until replevied, in the hands of the officer, in custody of the law. When the issue as to the title is found in favor of the plaintiff in the interplea, the court, on motion, will make an order on the officer for its delivery, a disobedience of which on his part would be punishable as a contempt. *Ibid.*
3. If the officer has voluntarily parted with the property or, by his negligence, suffered it to be destroyed or injured, he is answerable in damages to the owner. *Ibid.*

ATTACHMENT—*Continued.*

4. Under our attachment law a nonresident creditor may attach the property of a debtor residing in this State who has absconded or so conceals himself that the ordinary process of law cannot be served on him. *McCready v. Kline*, 245.

BAIL.

A sheriff was bail for A. and B., against whom there was a joint action. *A. ca. sa.* issued upon the judgment against them. B. was not to be found, but the *ca. sa.* was executed on A. and then the sheriff voluntarily permitted him to escape, but afterwards retook him. *Held*, that this recaption was unlawful, and that the assent of the plaintiff, after such recaption, that A. should not be held in custody, did not operate as a satisfaction of the judgment, nor did it deprive the plaintiff of his remedy against the sheriff as the bail of B. *Jackson v. Hampton*, 34.

BAILMENT.

Where a person had agreed to purchase a horse, which was delivered to him and was to be his when he paid the full price, and he died before he completed the payment, this was a bailment coupled with an interest, which, on his death, vested in his personal representative. *Grant v. Williams*, 341.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Taking negotiable paper in payment of a precedent debt constitues a purchase for value; and the *bona fide* indorsee will hold it, unaffected by any equities, if he take it without notice of any facts which implicate its validity, as between the prior parties. *Reddick v. Jones*, 107.
2. Where a note was executed in this State, not payable at any particular place, and was afterwards indorsed in the State of Virginia: *Held*, that whatever might be the law in Virginia, the indorsee could maintain his action in this State against both the drawer and indorser. *Ibid.*

BONDS.

1. In the construction of bonds, if the bond be a single one, it is to be taken most strongly against the obligor; but when a condition is annexed to it, which is doubtful, as that it is for the ease and favor of the obligor, it is to be taken most strongly in his favor. *Bennehan v. Webb*, 57.
2. In the construction of conditions the Court will look to the meaning of the parties, so far as it can be collected from the instrument itself, and, when the intention is manifest, will transpose or reject insensible words, and supply an accidental omission, in order to give effect to the intention of the parties. *Ibid.*
3. When the condition of a bond is preceded by the recital of a particular fact, the recital will operate against the parties to the bond as a conclusive admission of the fact recited; and this recital will frequently operate as a restraint of the condition, though the words of it imply a larger liability than the recital contemplates. *Ibid.*

See Official Bonds.

CLERKS OF THE COUNTY COURTS.

1. The county court is constituted the tribunal to determine contested elections of clerk, and neither an appeal nor a *certiorari* can be supported to reverse their decision. *Daugherty, ex parte*, 155.
2. Nor is the party against whom the decision has been made entitled to a *mandamus* unless he swears that if the county court had made the proper inquiry as to the validity of the votes given to the respective candidates, or, if it should be made now, there is good reason to believe that the person complaining, and not the other candidate, was duly elected. *Ibid.*
3. If a person thinks himself elected clerk of a county court, instead of the one pronounced by the said court to have been duly elected, his remedy, if he has any, is by writ of *quo warranto*. *Ibid.*
4. Where an election for clerk of the county court is contested, the party contesting should be confined to those objections of which he has given the legal notice to the opposite party. *Ibid.*

CONSTABLES.

A constable has no official authority to collect money except upon execution; and he and his sureties are only liable on his official bond under the act of 1818, Rev. Stat., ch. 24, sec. 7, giving a remedy to the creditor on that bond for notes, accounts, etc., put into his hands for collection, when it is proved that the constable was the creditor's agent for collecting the money due on the claims. *Williams v. Williamson*, 281.

CONTRACTS.

1. In construing an agreement there are no technical rules to determine whether its stipulations are dependent or independent, but every agreement is to be judged of according to its own terms and the nature of the transaction to which it relates, so as best to effectuate the intention of the parties. *Dwiggins v. Shaw*, 66.
2. The order in which the provisions are found in the instrument does not control the construction, but they will be transposed so as to effectuate the intention, which is to be collected from the order in point of time in which the several acts of the different parties are to be performed. *Ibid.*
3. The construction of a written document is purely a matter of law in all cases where the meaning and intention of the parties are to be collected from the instrument itself. *Sizemore v. Morrow*, 54.
4. Where A. sold a tract of land to B., made him a conveyance and took his bond for the purchase money, and afterwards B. reconveyed to A., who entered into bond that he would convey to B. whenever the purchase money should be paid, and it was further stipulated that if the purchase money were not paid, B. should pay a certain rent: *Held*, that this latter contract rescinded the first, and that the bond given under the first contract was discharged at law. *Ibid.*
5. A contract was made with two partners for the keeping certain horses. Afterwards one of the partners died and the surviving partner gave his notes for the amount due on the contract. These notes not being paid and being tendered back to the surviving partner: *Held*, that the original cause of action was not merged, and the suit might be

CONTRACTS—*Continued.*

brought against the representatives of the deceased partner to recover damages for the breach of the contract. *Mebane v. Spencer*, 423.

6. The plaintiff was a trustee in a deed of trust made by A. to secure a debt he owed to B. The defendant was also a creditor of A. Under these circumstances a promise by the plaintiff to forbear the proceeding under the deed of trust would not amount to a good consideration in law to uphold a promise of the defendant to pay to the plaintiff the debt due by A. to B. so as to enable the plaintiff to declare upon it in his own name. *Jordan v. Wilson*, 430.

CORPORATIONS.

1. An information filed by the Attorney-General for the purpose of having the charter of an incorporation declared to be forfeited, though it need not be expressed in technical language, yet it must set out the substance of a good cause of forfeiture in its essential circumstances of time, place, and overt acts. *Attorney-General v. R. R.*, 456.
2. When the Legislature required "the grounds" to be set forth on which the forfeiture is alleged to be incurred, nothing less could be meant than that the information, like an indictment or declaration, should state with certainty, to a common intent, those facts and circumstances which constitute the offense in its substance, whether of misfeasance or nonfeasance, so that on its face, if true, it may be seen that there is a specific ground in fact, and not by conjectural inferences, on which a forfeiture ought to be adjudged. *Ibid.*
3. When a charter expressly imposes a duty which the corporation is to perform, not merely to the citizen, but towards the sovereign itself, although it may not declare that nonperformance shall work a forfeiture, yet it must be taken to have been required by the State as a material stipulation, for the nonperformance of which by the corporation the State may put an end to the contract. *Ibid.*
4. But if the sovereign, with us the lawmaking power, with a distinct knowledge of the breach of duty by the corporation, a knowledge declared by the Legislature, or so clearly to be inferred from its own archives that the contrary cannot be, thinks proper by an act to remit the penalty, or to continue the corporate existence, or to deal with the corporation as lawfully and rightfully existing, notwithstanding such known default, such conduct must be taken, as in other cases of breaches of conditions, to be intended as a declaration that the forfeiture is not insisted on, and, therefore, as a waiver of the previous defaults. *Ibid.*
5. When it has been shown that a charter has been granted to a corporation, those in possession and actually exercising the corporate privileges must be considered as rightfully there, against wrong-doers and all who have treated or acted with them in their corporate character. *Academy v. Lindsey*, 476.
6. The sovereign alone has a right to complain, for if there be an usurpation, it is upon the rights of the sovereign, and his acquiescence is evidence that all things have been rightfully performed. *Ibid.*
7. Therefore, where a corporation of trustees of an academy, consisting of ten, was shown to have existed, and corporate acts had continually been done in the name of the corporation, although it was shown by the defendant, in an action against him by the corporation, that one

CORPORATIONS—*Continued.*

of the original trustees remained alive, it was *Held*, that the corporation was not bound, in such an action, to show a regular succession of trustees down to the time of bringing the suit. *Ibid.*

COUNTY TRUSTEE. See Sheriff.

COVENANT.

1. A covenant by one for himself and his heirs to stand seized to an use *in futuro*, as, for instance, on his death, is good in law. *Davenport v. Wynne*, 128.
2. A., by deed poll, in consideration of love and affection, conveyed to his son B. and grandson C. certain lands, with the usual *habendum* and *tenendum* clauses, and then follows these words: "and, furthermore, they, the said B. and C., their heirs and assigns, are not to interrupt the said A. during his lifetime on the said premises. By them terms I have hereunto set my hand and seal," etc. *Held*, that this was a covenant by A. for himself and his heirs to stand seized to the use of B. and C. and their heirs on his death, and that, therefore, the statute of limitations could not commence running against B. and C. and their heirs until the happening of that event. *Ibid.*
3. The omission of the word "penal" in stating the damages which either party might recover for a breach of a covenant, as, for instance, a covenant for conveying title, does not necessarily make the sum mentioned liquidated damages. *Lindsay v. Anesley*, 186.
4. Whether the sum mentioned be merely a penalty or liquidated damages must depend upon the circumstances and nature of each case. *Ibid.*
5. The *quantum* of damages in an action of covenant may be assessed by the jury when the precise sum is not the essence or substance of the agreement. *Ibid.*

DEED.

1. A deed conveying "the storehouse wherein A. B. had a store, now occupied by him as a postoffice, with the outhouse and office adjoining," conveyed also the lot on which the houses were, there being nothing in any other part of the deed to control the description and exclude the lot. *Wise v. Wheeler*, 196.
2. A., by deed dated in 1790, in consideration of the natural love and affection, etc., conveyed certain lands to his son B., "to have and to hold, etc., unto the said B. his natural life only, and then to return to the male child or children of the said B. lawfully begotten of his body; for the want of such, to return to the male children of my other sons, C. and D., to their proper use, benefit of him, them, and every one of them equally, and to their heirs and assigns forever; and the said A., for himself, etc., doth covenant and grant to and with the said B., his lawfully begotten male heirs, and, for such as aforesaid, with my other two sons, C. and D., and each and every of their male heirs, etc., that he, the said B., and his heirs above mentioned, if any, or otherwise his two brothers above named, during their natural lives or life, and after them unto their male heirs, etc., shall and may lawfully, peaceably have, hold," etc.: *Held*, that this was a covenant by A. to stand seized to the use of B. for his life, and for any son or sons of his after his death. If B.'s son was born at

DEED—*Continued.*

the time the deed was executed, the remainder was then vested in him; if born afterwards, the seizin remaining in the covenantor was sufficient to feed the contingent use when it came into *esse*, and enabled the statute of uses to transfer the equitable use into a legal estate in the fee in remainder, B. having had a son, who survived him. *Borden v. Thomas*, 209.

3. A warranty by a tenant for life is void against all persons claiming in remainder or reversion; and so are collateral warranties by an ancestor, as against his heirs at law, the ancestor having no estate of inheritance in possession. *Ibid.*

See Evidence, Covenant.

DESCENT.

1. Tamar Sanderlin had issue a legitimate son, Isaac Sanderlin, and an illegitimate daughter, named Zelia, who intermarried with Lemuel Sawyer. They died, leaving an only child, who is the *propositus*, to whom the premises were devised in fee by her grandmother, Tamar. The *propositus* died without issue, leaving as her nearest relations a brother and sister of her deceased father, who are the lessors of the plaintiff, and also the said Isaac Sanderlin, under whom the defendant claims. *Sawyer v. Sawyer*, 407.

2. *Held* by a majority of the Court, RUFFIN, C. J., *dissentiente*, that no part of the land descended to Isaac Sanderlin, but the whole descended to the brother and sister of the father of the *propositus*. *Ibid.*

3. *Held* by RUFFIN, C. J., that the land descended equally to Isaac Sanderlin, the uncle *ex parte materna*, and to the brother and sister, uncle and aunt *ex parte paterna*. *Ibid.*

DEVISES AND LEGACIES.

1. A man having several children, advanced to each of his five eldest children, the children of a first wife, property, real and personal, which he valued at $2,000. He then made his will as follows: "If it should so happen that any of my children by my last wife should marry, etc., the county court shall appoint some three or more persons to set apart to him or her such part of my estate on hand as may be most for their advantage, and the advantage of the heirs at large, without a draw, which allotment so made shall be binding on all the heirs, provided that each allotment so allotted shall not exceed in value the sum of $2,000, so as to make them all equal. All the valuations to be made on the same scale or principle as the valuation I put on the property I have heretofore given my sons, etc., a schedule of which they or some of them can produce of property they have received on which is a valuation of $2,000 I then put. And at a final division of the property among my children it is my desire it shall be equally divided among all my children." No such schedule as that mentioned in the will was produced. *Held*, that the commissioners appointed by the county court did right in fixing the valuation of the property for the younger children at $2,000 each at the time the allotment was made to them. *Mayo v. Mayo*, 84.

2. A bequest of slaves to A., and "after her death to be equally divided between the heirs of A.'s body," is a good limitation over to the children of A. *Miles v. Allen*, 88.

DEVISES AND LEGACIES—*Continued.*

3. Where the person in possession of this property after the death of A. claimed it as his own, it was not necessary for the remaindermen to make any demand on him before they commenced their action; and they are entitled to damages for the detention of the property from the time of A.'s death. *Ibid.*
4. Where a father had made a parol gift of slaves to a daughter, and afterwards died, leaving a last will and testament by which he only devised lands and appointed executors, but made no disposition of his personal property: *Held*, that this was not such an intestacy as was meant by the proviso of the act of 1806, Rev. Stat., ch. 37, sec. 17, that the daughter therefore acquired no title to the said slaves as an advancement, in the case of an intestacy, and the executors were entitled to recover them from her or her assignees. *Person v. Twitty*, 115.
5. Where a devise or bequest is, after sundry devises and bequests, "all the remainder of my estate I leave to my wife, Elizabeth, to be divided among my children as she thinks proper," and she is appointed executrix of the testator's will: *Held*, that no beneficial interest passed to her, by this bequest or devise, in the remainder so disposed of, but she only took it in trust for the benefit of her children and to be divided among them. *Green v. Collins*, 139.
6. The court before whom the case was tried erred in declining to advise the jury, unequivocally, as to the proper construction of the will, upon which construction a material question in the cause necessarily arose. *Ibid.*

EJECTMENT.

1. A plaintiff in ejectment can only recover upon the strength of his own title, as being good against all the world, or as good against the defendant by estoppel. *Clarke v. Diggs*, 159.
2. The landlord has a right to be made defendant in an action of ejectment in which the declaration has been served on his tenant, a tenant in possession. *Wise v. Wheeler*, 196.
3. No other person has a right to be so made defendant without the consent of the plaintiff; and if the plaintiff consents, the person made defendant must not only enter into the common rule, but must also admit that he was in actual possession at the time of the declaration. *Ibid.*
4. When a new defendant is thus substituted the declarations of the tenant on whom the declaration was served cannot be given in evidence against him. *Ibid.*
5. A plaintiff may recover in ejectment upon the demise of only one of several tenants in common to the extent of his interest; and there may be a general verdict and judgment that he recover his term, as under the writ of possession the lessor of the plaintiff proceeds at his peril. *Holdfast v. Shepard*, 361.
6. Where in an action of ejectment the defendant relied upon the statute of limitations, and the evidence was that the defendant and A., under whom he claimed, had had seven years actual possession, except for the space of four or five months, an interval that elapsed between the time when a tenant of A. left the premises and the time when the defendant entered under his purchase: *Held* by the Court, that the

EJECTMENT—*Continued*

interval between these two occupations was too large to found a presumption on of a continued possession, in the absence of any intermediate act of ownership by A. or any one under him. *Ibid.*

ESCAPE.

The act of 1777, ch. 118, sec. 11, Rev. Stat., ch. 190, sec. 20, alters the law as it was under the statute 4 Ed. III., by giving the action of debt for escape against the executor of the sheriff as well as to the executor of the creditor. *Wright v. Roberts*, 119.

See Bail.

EVIDENCE.

1. Where a bond is offered in evidence, and the obligor offers to show that the bond has been declared fraudulent by a court of equity, and that it should be surrendered, the evidence is inadmissible, because the bond, being uncanceled, is still good at law, and the obligor can only proceed in equity to enforce the decree by process of contempt. *Davidson v. Sharpe*, 14.
2. A deed of trust for land need not be proved on the trial of an action of ejectment by a subscribing witness. The registration is sufficient *prima facie* evidence of its execution. *Harper v. Burrow*, 30.
3. The testimony of a witness on a former trial, where the present plaintiff and defendant were not parties, cannot be given in evidence, though that testimony was against his own interest. *Ibid.*
4. A witness may be compelled to testify in a civil suit, though his evidence may militate against his own interest. *Ibid.*
5. Where a plaintiff in a petition claims to be an assignee by a written instrument, whether he is so or not, by the terms of the instrument, is a question of law for the court, and not of fact to be submitted to a jury. *Clark v. Edney*, 50.
6. Where one consideration is mentioned in a deed and others referred to, though not specified, the latter may be proved by parol. *Chesson v. Pettijohn*, 121.
7. It is a well established rule that the loss or destruction of a conveyance may be proved by a party to the suit as a ground for letting in to the jury the secondary evidence of a copy or other inferior evidence. *Harper v. Hancock*, 124.
8. But the court never intended to relax the general rule that the best evidence must be produced, beyond the plain necessity of the case, or where it did not appear clear that the higher evidence was not accessible to the party. *Ibid.*
9. The loss must, therefore, be proved by the person in whose possession the conveyance is presumed to be. *Ibid.*
10. But if a party who is *prima facie* presumed to have possession of the original deeds of his grantor, because he bought with special warranty, swears that he never did have the originals, his evidence is not sufficient to establish the loss, as the presumption is, in that case, that the grantor has them until rebutted by such grantor's oath. *Ibid.*
11. In an action on a bond, one who is an obligor, but who is not a party to the action, may be examined as a witness for the defendant, his

EVIDENCE—*Continued.*

coöbligor, and more especially when the defendant had executed a release to the witness. *Ligon v. Dunn*, 133.

12. Grants from the sovereign, when enrolled in the office from which they emanate, are there records, and copies of them may be used in evidence by all persons except those who would be entitled to the originals. *Clarke v. Diggs*, 159.

13. Copies of abstracts entered in Lord Granville's office are evidence. *Ibid.*

14. A party is never permitted to produce general evidence to discredit his own witness; but if a witness prove facts in a cause which make against the party who called him, yet the party may call another witness to prove that these facts were otherwise. *Shelton v. Hampton*, 216.

15. Where a deposition is read in evidence, the opposite party may contradict the witness by showing that he has subsequently made different statements, without having put to the witness the usual preliminary questions, as such could not be put from the nature of the case. *Roberts v. Collins*, 223.

16. On the trial of one indicted as accessory in the crime of murder, a transcript of the record of the conviction of the principal was received in evidence, it appearing in the transcript that after the conviction of the principal he appealed to the Supreme Court, from which the case was sent back to the Superior Court; but the decision of the Supreme Court not appearing in the transcript: *Held*, that notwithstanding this omission, and though the decision should properly have been entered on the record, yet the transcript was good evidence against the accessory, for at most the judgment against the principal was only erroneous. *S. v. Duncan*, 236.

17. An accessory cannot take advantage of error in the record against the principal, and the attainder of the principal, while unreversed, is *prima facie* evidence against the accessory of the principal's guilt. *Ibid.*

18. Evidence on the part of a prisoner indicted as an accessory in murder, that he was a man of violent passions and often in the habit of using threatening language, intended to rebut the presumption arising from his threats against the deceased, is irrelevant and inadmissible. *Ibid.*

19. Threats of other persons against the deceased, or admissions by them that they had killed him, are only hearsay, and cannot be received in evidence. *Ibid.*

20. The declarations and admissions of an agent, after his agency has ceased, as to past transactions, are not competent evidence against his principal. *Williams v. Williamson*, 281.

21. To make the acts of one person evidence against another, as his agent, the creation of the agency must, in the first instance, be established by proper evidence, independent of such acts and declarations themselves. *Ibid.*

22. Where an action of tort is brought against the owner of a vessel for not delivering a cargo intrusted to him, an alteration by the plaintiff in the bill of lading, in which there had been a mistake, does not in any degree affect his right to damages. *Benbury v. Hathaway*, 303.

EVIDENCE—*Continued.*

23. A confession made by a prisoner while in prison is evidence against him, provided it be the prisoner's own act, not unduly obtained by threats or promises. *S. v. Jefferson*, 305.
24. When the original records are offered in evidence in the court to which they belonged they should be received, because the court is presumed in law to know its own proceeding; but in another court the proper evidence is a copy of the record, authenticated by the seal of the court. *Ward v. Saunders*, 382.
25. The declarations of a person who has executed a deed, at a period subsequent to such execution, are not evidence against the grantee. But the declarations of a grantor between the time when the deed falsely bears date and the time when it was actually executed are evidence as to the fraudulent intent of the parties. *Ibid.*
26. On a suit for the penalty for trading with a slave, when it was proved the defendant offered to show the plaintiff his "barter book" in order to convince him that he had paid nothing to the negro, who had delivered the articles to his agent, it was not competent for the plaintiff, on the trial, to prove by the witness before whom this declaration was made, in order to show the *time* when the transaction took place, "what was the time of trading, *as appeared on the book.*" Notice to produce the book should have been proved before such evidence was admissible. *Whitley v. Daniels*, 480.

See Marriage; Contracts; Indictment; Wills; Rape.

EXECUTIONS.

1. A purchaser at a constable's as well as a sheriff's sale is bound to pay the whole amount of his bid to the officer selling; and the latter, and his sureties on his official bond, are liable to the person whose property is sold for the excess beyond the amount required to satisfy the execution in the officer's hands. *S. v. Read*, 80.
2. Where, after a judgment, a memorandum was made on the docket by the parties that execution should not issue before a certain day, as this forms no part of the judgment, if the execution issue before that day no one can complain of it but the parties. As to all other persons, the execution is not even voidable. *Cody v. Quinn*, 191.
3. A sale of land under a *fi. fa.* bearing teste after the death of the defendant in the execution, where his heirs have not been made parties, is void. *S. v. Pool*, 288.
4. The act of Assembly of 1823, ch. 74, relating to the sales of land under execution in the county of Pasquotank and other counties therein named, is a local and private act, and, therefore, not repealed by the act of 1836, Rev. Stat., ch. 1, sec. 2, being within the proviso in section 8. *Grandy v. Morris*, 433.
5. By the operation of this act of 1823 sales of land under execution in the counties therein named are, as to the places of sale, put on the same footing as sales before the act of 1820, which directed them to be at the courthouse; and in those counties the sheriff may now sell lands under execution at such places as he in his sound discretion shall judge most expedient. *Ibid.*
6. Under the acts of 1820, 1821, and 1822 the sales of land under execution in the county of Currituck are excepted from the general pro-

EXECUTIONS—*Continued.*

visions of those acts directing the places where such sales should be made. *Humphries v. Baxter*, 437.

7. In Currituck County, therefore, lands may be sold under execution by the sheriff at any place which in his sound discretion he deems most proper. *Ibid.*

See Executors and Administrators.

EXECUTORS AND ADMINISTRATORS.

1. The county court has no right to appoint an administrator with the will annexed when there is an executor laboring under no disability, until the renunciation of the executor, and such renunciation must appear of record. *Springs v. Erwin*, 27.
2. Such an appointment is not merely voidable; it is absolutely void. *Ibid.*
3. Only those things in which a person has a beneficial interest are assets, and not those which he holds in trust for another. *Green v. Collins*, 139.
4. An agreement between counsel that, in an action at law against an executor or administrator, the jury may inquire as to equitable as well as legal assets, must be inoperative at law, as the court cannot assume a jurisdiction which the law does not confer; and, moreover, there is an essential distinction between the nature and application of legal and equitable assets. *Ibid.*
5. A court of law knows nothing of trusts, except so far as they are brought within its jurisdiction by statute. *Ibid.*
6. An executor or administrator is not answerable in a court of law, as for a *devastavit* in relation to equitable assets, unless so far as these are affected by the act of 1836, Rev. Stat., ch. 46, sec. 22. *Ibid.*
7. If an executor or administrator refuse to call upon the trustee of a legal estate, the equity of which is alleged to be in their testator or intestate, the only tribunal to decide upon the default is a court of equity. *Ibid.*
8. One who sues as administrator or executor is not liable for costs *de bonis propriis* if he fails in his suit. *Collins v. Roberts*, 201.
9. Goods of a deceased person in the hands of an executor *de son tort* cannot be taken in execution for the personal debts of such executor no more than in the case of a rightful executor or administrator. *Grant v. Williams*, 341.
10. An executor *de son tort* cannot be called upon to support a disabled slave of the deceased, under the act of Assembly, Rev. Stat., ch. 89, sec. 19. *Wardens v. Silverthorn*, 356.
11. If an obligee makes his will and appoints any one of his obligors his executor, it is a release or extinguishment of the debt as to all the obligors; but when the court appoints one of the obligors to be the administrator of the obligee it only suspends the debt on the bond during the administration of that administrator, and it does not release nor extinguish it. *Ferebee v. Doxey*, 448.

FORGERY.

Falsely, wittingly, and corruptly rubbing out, erasing, or obliterating a release or acquittance on the back of a note or bond, or elsewhere, does not, according to the law of North Carolina, amount to the crime of forgery. *S. v. Thornburg*, 79.

FRAUDS AND FRAUDULENT CONVEYANCES.

1. A voluntary deed is not void as to creditors when the donor retains sufficient property to pay his debts, and out of which the claims of the creditors may be satisfied. *Arnett v. Wanett*, 41.
2. The act of Assembly of 1840, ch. 28, secs. 3 and 4, applies to voluntary deeds made before the passage of that act as well as to those made subsequently. *Ibid.*

FREE PERSONS OF COLOR. See Pleading and Practice.

GUARANTY.

A., on 21 August, 1841, transferred to B. certain promissory notes of C. which he had at the time guaranteed. B. made no application to C. for the payment of the notes until 29 July, 1842, and gave no notice to A. that the notes were unpaid, and he should hold him responsible on his guaranty, until 29 February, 1844. *Held*, that B. had been guilty of such *laches* as to discharge A. from his guaranty. *Beeker v. Saunders*, 380.

See Justices.

HOMICIDE.

1. On a trial for murder the question of provocation is proper for the decision of the court; for whether certain facts amount to a sufficient provocation to palliate a killing from murder to manslaughter is entirely a question of law. *S. v. Craton*, 164.
2. When one man is *unlawfully* restrained of his liberty and kills the aggressor, the offense is only manslaughter, unless attended with circumstances of great cruelty and barbarity. But when the restraint is upon one man by another so far as to prevent the former from doing what the latter may lawfully resist his doing, and the person restrained in that manner and for that cause kill the other, it is murder. *Ibid.*
3. A husband has a right to use compulsion, if necessary, to enable him to regain the possession of his wife from one in whose society he finds her, and who he has good reason to believe either has committed or is about to commit adultery with her. *Ibid.*
4. Whether an instrument by which death is occasioned, if it be in fact described by the testimony, be one by which death may or may not be probably caused is a question of general reason, and, therefore, proper for the court; and if it be doubtful whether it would probably cause death, the court should direct a conviction for manslaughter only. *Ibid.*

See Evidence.

HOTCHPOT.

The value of an advancement is to be estimated as of the time the advancement was made, and not as of any subsequent term. *Lamb v. Carroll*, 4.

HUSBAND AND WIFE.

Where in a decree of divorce alimony is assigned to the wife in certain specific articles, as, for instance, slaves, the wife's right to the enjoyment of this property only continues until a reconciliation or until the death of either party; and during the separation the provision for alimony may be altered, at the discretion of the court, upon any change of circumstances. *Rogers v. Vines*, 293.

See Marriage.

INDICTMENT.

1. In an indictment for perjury it is not necessary to set forth the pleadings in the former case in which the perjury is alleged to have been committed; our act of Assembly of 1842, ch. 49, having altered the common law in that respect. *S. v. Hoyle*, 1.
2. There is but one statute in this State punishing the crime of perjury, Rev. Stat., ch. 34, secs. 50 and 52, and, therefore, an indictment for that crime which concludes against *the statute* is right. *Ibid.*
3. When the perjury on which an indictment is founded is alleged to have been committed on the trial of a cause at a special term of a Superior Court it is not necessary to set forth in the indictment the order of the judge directing such special term to be held, nor the appointment by the Governor of the particular judge who is to hold it. *S. v. Ledford*, 5.
4. Nor is it necessary to prove either of those facts on the trial of the indictment. *Ibid.*
5. Keeping an open shop and selling goods on Sunday is not an indictable offense in this State. *S. v. Brooksbank*, 73.
6. Profanation of Sunday is only punishable here by certain pecuniary penalties imposed by the Legislature and to be recovered before justices of the peace. *Ibid.*
7. An indictment against a free person of color which charges that he did "buy of, traffic with, and receive from a certain negro slave, etc., one peck of corn," etc., is good, although the act making the offense of a free person of color dealing with a slave only uses the words "if he shall trade with any slave either by buying of or selling to him," etc. The other words used in the indictment are mere surplusage. *S. v. Cozens*, 82.
8. On the trial of an indictment for murder the prisoner offered a witness who was so much intoxicated as to be incapable of understanding the obligation of an oath. The court refused to permit him to be sworn, but told the prisoner he might recall him when he was sober. The prisoner examined other witnesses, but did not recall this one. *Held*, that this was no cause in law for a new trial. Granting or refusing a new trial on this ground was a matter of discretion for the judge. *S. v. Underwood*, 96.
9. A new trial was moved for on the ground that the grand jury had been drawn by a boy of 13 years of age, and that such illegal drawing might have affected the composition of the petit jury. *Held*, that this objection, if a valid one at any time, came too late. It should have been made, before the petit jury was sworn, in the form of a challenge to the array. *Ibid.*

INDICTMENT—*Continued.*

10. On the application of a prisoner to remove or continue his case, the discretion to do either rests with the judge of the Superior Court, and cannot be reviewed in this tribunal. *S. v. Duncan*, 98.
11. A witness for the State on the trial of an accessory before the fact in a capital case, being asked by the defendant whether he had stated before the examining magistrate certain facts he was then narrating, replied that he had not, having been deterred by the threats of the principal, and was proceeding to state the conversation between himself and the principal when the defendant objected to this evidence. *Held*, that the evidence was admissible. *Ibid.*
12. Where a principal and an accessory are tried separately, though on the same indictment, evidence of the conviction of the principal is not admissible on the trial of the accessory, unless judgment has been first rendered against the principal. *Ibid.*
13. The words *vi et armis* in an indictment are now superfluous, and more especially so in an indictment against an accessory, as his offense tends only to a breach of the peace, and not of itself an actual breach of it. *S. v. Duncan*, 236.
14. Where upon a trial for fornication or adultery one party is found guilty and the other not guilty, no judgment can be rendered against the former. *S. v. Mainor*, 340.
15. In an indictment for libel, the indictment must set forth matter on its face libelous, in which case the court is to judge whether it be so or not; or it must aver that the matter charged, though not on its face libelous, was intended in fact to be so; and then the question is to be submitted to a jury. *S. v. White*, 418.
16. Where on the trial of an indictment the jury find a verdict of guilty generally, and that appears on the record, this Court cannot consider it as a special verdict, subject to the opinion of the court, notwithstanding the statement of the case by the judge so reports it. *S. v. Cox*, 440.
17. A presentment made within two years after the commission of a misdemeanor on which an indictment is founded is the commencement of a prosecution within the meaning of our act of Assembly, and prevents the statute of limitations from attaching. *Ibid.*
18. A presentment need not be signed by all the jury. It should be handed to the court by the foreman, who is the organ of the grand jury to and from whom communications are made with the court. It should be made in the presence of the jury, but when entered of record no further evidence is required of its authenticity. *Ibid.*
19. Neither a presentment of a grand jury nor an indictment requires, necessarily, that it should be signed by any one. *Ibid.*
20. It is the returning of the bill or indictment publicly in open court, and its being there recorded, that makes it effectual. *Ibid.*

See Roads; Jury; Pleadings and Practice.

INSOLVENT DEBTORS.

1. Where a debtor has been arrested on a *ca. sa.* and given bond for his appearance at court, under the insolvent debtor's act, and the sureties surrender him and he is ordered into custody, the *committitur*

INSOLVENT DEBTORS—*Continued.*

is in execution, and the sheriff has no power to discharge the debtor out of prison of his own will and without the order of the court. *Wright v. Roberts*, 119.

2. Where an insolvent debtor, in filing his schedule, only surrenders his interest in certain property conveyed by a deed in trust, and the jury, upon an issue, find the deed fraudulent, he must be imprisoned until he makes a surrender of the whole property so conveyed. *Hutton v. Self*, 285.

JUDGMENTS IN OTHER STATES.

1. Where a decree or judgment in another State is produced in evidence in one of our courts, it is not necessary to show, by any extrinsic evidence, that the judgment or decree was warranted by the laws of the State in which it was pronounced. The judgment or decree itself is the highest evidence of that fact. *Davidson v. Sharpe*, 14.
2. A judgment or decree pronounced in any State against an inhabitant of another State upon whom process in the suit has not been served is only binding in the State in which such judgment or decree has been rendered. *Ibid.*

JURY.

1. The court has a right to excuse jurors who have been summoned upon a *venire* in a capital case, upon their application, for any reasonable cause. *S. v. Craton*, 164.
2. The State's challenge to a juror for cause need not be decided on immediately, but it is in the discretion of the court to let it stand until the panel be gone through. *Ibid.*

JUSTICES' JUDGMENTS, ETC.

1. A justice's warrant in a civil case was dated in June, 1844, and the execution in September, 1844, and the judgment and execution were on the same paper with the warrant. *Held*, that it did not appear on the face of these proceedings that the judgment was void, so as to render the officer who served the execution guilty of a trespass. *S. v. Conolly*, 243.
2. If the judgment could be reversed by a writ of false judgment, yet it could not be impeached collaterally. *Ibid.*
3. The continuances of a warrant need not be stated on the face of the proceedings. *Ibid.*
4. A justice of the peace has no jurisdiction of the question of guaranty. *Wall v. Nelson*, 300.
5. Justices' judgments are not properly in the plaintiff, for which an action of trover will lie. *Cobb v. Cornegay*, 358.
6. They are not records, but they are judicial determinations and muniments of the rights of both parties. *Ibid.*
7. A person placed in the hands of a constable a note for $158.80 for collection, upon which the constable took out two warrants against the debtor, one for $80 and one for $78.80, as due by note, and the debtor appeared and confessed judgment before the justice according to the tenor of the warrants. Executions issued, and the constable failed to levy them on property subject to their satisfaction. *Held* by the

JUSTICES' JUDGMENTS—*Continued.*

majority of the Court, RUFFIN, C. J., *dissentiente*, that the judgments, confessed by the debtor in the manner stated, were valid judgments; that he was estopped to deny their validity, and the constable was bound to use due diligence in collecting the executions issued on the judgments. *S. v. Mangum*, 369.

8. *Held*, by RUFFIN, C. J., that as no note was shown to have been in existence but the note of $158.80, of which the justice had not jurisdiction, the judgments were void, and that the confession of judgment by the debtor could not confer the jurisdiction or waive the want of it. *Ibid.*
9. In the case of the return of the levy of a justice's execution on land to the county court, though notice is directed by law to be given to the defendant, no evidence is required of that notice but the record of the county court ordering the *venditioni exponas*. *Ward v. Saunders*, 382.
10. The description in the return of a constable of a levy on land need not literally comply with the act of Assembly in such cases, its requirements being substantially that the land should be sufficiently distinguished and identified. *Ibid.*
11. In the case of a return by a justice of a levy on land, with the corresponding papers, it is not necessary that it should appear, by a distinct certificate of the clerk, that these papers have been enrolled in bound books, as required by the act of Assembly. The ordinary copy of the record, certified by the clerk under the seal of the court, is sufficient evidence of the enrollment. *Ibid.*

LANDS OF DECEASED DEBTORS.

1. Although a *scire facias* against heirs and terre-tenants need not name them, but leave it to the sheriff to summon and return them, yet the judgment is always against particular persons, and the writ of execution must name the same persons. *Roberson v. Woolard*, 90.
2. An execution commanding the sheriff to sell the lands of A. B., deceased, "in the hands of his heirs," without naming the heirs, is void, and a sale under it confers no title. *Ibid.*

LEGACIES. See Devises and Legacies.

LESSOR AND LESSEE.

1. Where a lease was given upon the condition that the lessee, at the end of each year, should give bond and surety for the rent of the succeeding year, and at the expiration of one year the lessee failed to give such bond and surety, but the lessor was absent and did not demand it: *Held*, that no forfeiture was incurred, it being the duty of the lessor to make the demand. *Tate v. Crowson*, 65.
2. The law leans against forfeitures; and when the agency of the landlord is involved in any way in the act which is to work or prevent a forfeiture, he ought so to act as to make it appear clearly that he means to insist upon the forfeiture. *Ibid.*
3. The lessee shall not be punished without a willful default, which can not be made appear unless an actual demand be proved, and that it was not answered. *Ibid.*

See Usury; Libel; Indictment.

LIMITATIONS, STATUTE OF.

1. If, in reply to the plea of the statute of limitations, the plaintiff wishes to avail himself of the pendency of a former suit, he must set forth the suit specially in his replication. *S. v. Hankins*, 428.
2. By the practice in this State, if no replication is actually entered, a general one is understood. *Ibid.*
3. When the statute of limitations is pleaded to an action on the bond of a sheriff, clerk, etc., the plaintiff cannot reply that a former suit for the same cause of action had been brought within the proper period, in which there had been a nonsuit, discontinuance, etc. In suits of this kind there is no such saving against the operation of the statute. *Ibid.*

See Ejectment.

LITERARY BOARD.

1. The president and directors of the Literary Board have no right to allow, and are not bound to pay, their secretary a *per diem* compensation for a greater number of days than they are actually in session. *Battle v. Literary Board*, 203.
2. Where the board passed a resolution that their secretary should be allowed to much *per diem* while he was employed, the construction is that he was allowed the *per diem* pay only while the board itself was in session. *Ibid.*

MARRIAGE.

1. It is not necessary to the validity of a marriage that the parties should have obtained a license from the clerk of the county court. The omission of the license only subjects the minister or justice performing the ceremony to a penalty. *S. v. Robbins*, 23.
2. It is sufficient proof of a marriage that the ceremony was performed by one who was in the known enjoyment of the office of a justice of the peace, and notoriously acting as such. It is not necessary to produce his commission from the Governor. *Ibid.*

MILLS.

1. One who complains of a nuisance to his land by the erection of a mill-dam is not obliged to wait until the expiration of a year before he files his petition to recover damages under the act of Assembly, Rev. Stat., ch. 74. *Cochran v. Wood*, 194.
2. When the suit is brought within the year, the damages are necessarily limited to the time the injury has existed. *Ibid.*

MORTGAGE.

One who has made a mortgage of property to secure a debt may afterwards convey the same property to the mortgagee absolutely, in satisfaction of the debt, provided the conveyance be *bona fide* and for a good price. *Shelton v. Hampton*, 216.

See Pledges.

NEW TRIAL. See Pleading and Practice.

OFFICIAL BONDS.

Under the act of Assembly, Rev. Stat., ch. 81, sec. 3, prescribing the remedy against sheriffs, constables, etc., when they have collected

OFFICIAL BONDS—*Continued.*

money and failed to pay it over, the party injured may have his action on the officer's bond against any one or more of the parties to the bond, without joining the principal or all the sureties. *Guess v. Barbee,* 279.

PARTIES.

1. Where a paper under which a plaintiff in a petition claims to be an assignee does not on its face purport to be an assignment, but only an order for money, it is necessary that the alleged assignor or his personal representative should be a partty to the petition, either plaintiff or defendant. *Clark v. Edney,* 50.
2. On a petition against administrators for a distributive share of an estate all persons entitled to distribution should be made parties. *Ibid.*

PARTITION.

A petition was filed in the county court and order made for the partition of certain slaves among the tenants in common. The plaintiff was the agent of one of the petitioners. The commissioners made a division, and awarded to the petitioner, as agent, certain slaves, and also a sum of money to be paid by another of the petitioners to him as agent, to equalize the shares. The report was returned, and confirmed by the court, but no formal decree drawn. The agent cannot, by a notice in his own name, call upon the other petitioners to have the decree entered in his favor—or to pay the sum so awarded. *Irwin v. King,* 219.

PARTNERS.

One partner made an advance of $808.12 to the firm, and took a memorandum therefor in the shapae of a note signed by the other partner and payable to the first. Afterwards the firm was dissolved, and no actual account of the partnership being taken, the partner who had made the advance agreed to take a certain amount as his share, and the other partner was to take all the remainder of the effects of the firm, and also "to pay all the debts due from firm." *Held,* that by this settlement the partner who made the advance was precluded from claiming the sum advanced as one "of the debts of the firm." *Patterson v. Martin,* 111.

PATROLLERS.

1. In the absence of any special regulations by the county court, no act of a patroller in the dischharge of his patrolling duties can be valid unless a majority of the patrollers in the district be present and a plurality of these sanction the act. *S. v. Hailey,* 11.
2. The office of a patroller is both judicial and *quasi* judicial, and executive. *Ibid.*

PAYMENT.

The acceptance by the obligee of a bill of exchange in discharge of a bond will, in an action on the bond, support the plea of payment. *Ligon v. Dunn,* 133.

PLEADING AND PRACTICE.

1. In every declaration for money paid for the use of another it must be laid to have been paid at his request; but this request may be express or implied, and it is always implied in law where the payment is subsequently recognized by the person for whom it is made. *Taylor v. Cotton*, 69.
2. A plea of accord and satisfaction to an action on a bond is not good unless it avers an acquittance under seal. *Ligon v. Dunn*, 133.
3. The Superior Courts, when an appeal is taken to the Supreme Court, should only state so much of the evidence as raised a question of law at the trial, and then the opinion prayed and given thereon, with simplicity and precision. A report of the whole trial below is out of place in the case to be sent to the Supreme Court. *Green v. Collins*, 139.
4. Though the party against whom the judge in his charge commits an error obtains a verdict, yet when the principal, so erroneously laid down, might have prevented the defendant from making his full defense, a new trial will be granted. *Clarke v. Diggs*, 159.
5. Where it was suggested the Court on behalf of the State that there were errors in the transcript of the case sent up, and it was also suggested that these errors existed in the original record below, and that they were mere misprisions of the clerk of that court, on motion of the Attorney-General it was ordered that a *certiorari* issue, and, although it was a capital case, that the *certiorari* be made returnable at a day posterior to the next term of the court below, in order that that court might, if they thought fit, make the proper amendments in their record before the return of the *certiorari*. The errors consisted in mistaking the name of the judge who held the court when the indictment was found, and omitting altogether the name of the judge before whom it was tried. *S. v. Craton*, 164.
6. Although it is more correct, in making up the record of a criminal trial, that the presence of the accused should be expressly affirmed, yet it is sufficient if it appear by a necessary or reasonable implication; as where it is stated that the accused, who had been before committed to the custody of the sheriff, was ordered to be brought to the *bar*, and immediately thereafter he is called, by the jury in giving and the clerk in recording the verdict, the prisoner at the *bar*, and next, the court in passing sentence adjudged that the prisoner be *taken back* to the prison. *Ibid.*
7. Where the county court, upon affidavits, ordered an amendment of their records, and the party aggrieved appealed to the Superior Court, it was the duty of the Superior Court to have decided upon the question of amendment, and if the superior Court dismissed such appeal without deciding upon the merits, their judgment must be reversed. *Slade v. Burton*, 207.
8. The Superior Court may, upon such appeal, not only view the decision of the county court, on the affidavits there filed, but may hear further evidence as to the propriety of the order of the county court. *Ibid.*
9. The Supreme Court cannot look into affidavits filed in the court below upon the question whether dower was properly admeasured or not. *Bowman v. Thompson*, 224.

PLEADING AND PRACTICE—*Continued.*

10. The court to which, on the removal of a cause, the transcript of record is sent is the sole judge whether the transcript is properly verified by the seal of the court from which it is sent, and all other courts are bound by its decision. *S. v. Duncan*, 236.
11. After a free person of color has been convicted on an indictment, under the act of Assembly, for marrying a slave before the passage of the act of 1845, it is too late for him to apply to the Court to discharge him on the ground that the master of the slave had given his consent to the marriage. The defense should have been made on the trial. *S. v. Roland*, 241.
12. Where the jury find a general verdict of "Guilty," the court must either pronounce its sentence upon the verdict or grant a new trial. *S. v. Curtis*, 247.
13. It cannot set aside the verdict and direct a judgment of acquittal to be entered for the defendant. *Ibid.*
14. Even where the jury find a verdict subject to the opinion of the court on a point reserved, the court cannot grant a judgment against the verdict unless the jury say "they find such and such facts, and if, upon them, the court think the law is with the defendant, they find him not guilty; if otherwise, guilty," or words, in substanec, to that effect. *Ibid.*
15. Where an action is brought for a penalty imposed by a statute, or actions are brought founded on rights created by a statute, and for which there was no action at common law, the declaration, like an indictment, must be framed on the statute or statutes, stating not only the circumstances necessary to bring the case within the meaning of the act, but also expressly counting on it. *McKay v. Woodle*, 352.
16. But this rule does not embrace the case where a statute is simply remedial, giving an easier or cumulative remedy for a wrong for which there was a remedy at the common law. *Ibid.*
17. Therefore, in an action for worrying, maiming, and killing the hogs of the plaintiff while trespassing on the inclosed grounds of the defendant, the same not having a sufficient fence according to the act of 1831, Rev. Stat., ch. 48, it was not a sufficient objection to the action that the declaration did not refer to the statute, for the plaintiff had a remedy at common law. *Ibid.*
18. Although the inclosed land within the bounds of which this trespass was alleged to be committed belonged to more than one person, yet the actual perpetrators of the act are, even under our act of Assembly, individually liable. *Ibid.*
19. A single suit upon an administration bond may be brought by more than one of the persons entitled to distribution of the intestate's estate, as relators. *S. v. McKay*, 397.
20. The Court, when the suit is at the instance of more than one relator, will adopt such rules as may be necessary to prevent injustice to the defendants, either as to the mode of declaring, the breaches assigned, the pleadings, the trial, or the costs. *Ibid.*
21. Where upon a writ of *recordari* judgment was rendered against the plaintiff in the *recordari*, and the clerk entered the judgment against the sureties only for the costs, and the court at a subsequent term di-

PLEADING AND PRACTICE—*Continued.*

rected that the judgment should be entered nunc pro tunc against the sureties for the *debt* as well as the *costs: Held*, that the court had the power to do so, if in their discretion they thought it right, and that this Court could not revise such discretionary power. *Brady v. Beason*, 425.

22. No matter which might have been well pleaded to the original action can be heard as a defense to a *scire facias* brought to revive the judgment rendered in that action. *Ferebee v. Doxey*, 448.

PLEDGE.

1. A pledge of personal property, as, for example, a pledge of bank stock, differs from a mortgage and is not included within the words or meaning of the registry act. *Doak v. Bank*, 309.
2. A mortgage is a pledge and sometimes more, for it is an absolute pledge to become an absolute interest if not redeemed in a certain time. *Ibid.*
3. A pledge is a deposit of personal effects, not to be taken back but on payment of a certain sum by express stipulation to be lien on it. *Ibid.*
4. Generally speaking, a bill of equity to redeem will not lie in behalf of a pledger or his representatives, as his remedy is at law upon a tender of the money. *Ibid.*
5. Per NASH, J. The Legislature clearly recoginzed the distinction between mortgages and pledges of property for the payment of debts to banks, in the act chartering the Cape Fear Bank in 1804 and in the act chartering the Merchants Bank of New Bern in 1834. *Ibid.*
6. Per RUFFIN, C. J. The stock in the bank, pledged in this case, was not tangible property subject to execution, and, therefore, did not come within the words or meaning of the registry act, nor within the mischief intended to be prevented by the Legislature in directing encumbrances on property to be registered. Pledges of personal property, tangible to legal process, are as much within the act as mortgages or deeds of trust. *Ibid.*

POWER OF ATTORNEY.

A power of attorney, or other authority, is in general revocable from its nature, and the power of revoking an authority may be exercised at any time before its actual execution. *Brookshire v. Voncannon*, 231.

RALEIGH AND GASTON RAILROAD COMPANY.

The State, under the act of 1840-1841, entitled "An act to secure the State against any and every liability incurred for the Gaston and Raleigh Railroad Company, and for the relief of the same," cannot recover upon any bond given under the said act unless it is proved that the whole amount of $500,000 had been secured by bonds. *Bennehan v. Webb*, 57.

RAPE.

1. On a trial for rape, the prisoner may give in evidence that the woman had been his concubine, or that he had been suffered to take indecent liberties with her. *S. v. Jefferson*, 305.
2. But he cannot give in evidence, to prove her a strumpet, that she had had criminal connection with one or more particular individuals. It

RAPE—*Continued.*

is a question of character, and the evidence, as in other questions of character, must be of a general nature. *Ibid.*

3. On a trial for rape, the acts and declarations of the husband of the woman on whom the offense is alleged to have been committed are not admissible to discredit the wife, examined as a witness. *Ibid.*

RECORD.

1. A judge who by the general law and a permanent commission holds a Superior Court is not to require evidence that he is the judge of the court; and the record made by him establishes to those who succeed him that he held the Court at the terms at which, according to the purport of the record, he appears to have held them. *S. v. Ledford*, 5.
2. The regularity of the proceedings of a Superior Court in point of time, as in other things, is to be presumed, unless the contrary appears. *Ibid.*

See Evidence; Pleading and Practice.

RECORDARI.

1. The writ of *recordari* is the foundation of all the proceedings in a case of *false judgment*. *Parker v. Gilreath*, 221.
2. Therefore, where a *recordari* was returned and heard upon affidavits, the court had a right to order the cause to be placed on the trial docket and stand there as on a writ of *false judgment*. *Ibid.*

REPLEVIN.

1. In an action of replevin, if the defendant wishes to put in issue the title of the plaintiff, he must plead that the title is in himself or some other person by whose authority he took the property. Where the plea is only *non cepit*, etc., the plaintiff's title is not denied. *Rowland v. Mann*, 38.
2. In an action of replevin for slaves, the jury, if they find for the plaintiff, must in their verdict assess the value of each slave. *Ibid.*

RETAILERS. See Towns, etc.

ROADS.

1. The county court has no authority to discontinue any public road but upon the petition of one or more persons filed in the court, and the other necessary proceedings prescribed by the act of Assembly, Rev. Stat., ch. 104, sec. 2. And any order for discontinuing a public road made otherwise than as the Act directs is void. *S. v. Shuford*, 162.
2. A person who erects a fence across a public road so attempted to be discontinued is liable to an indictment therefor. *Ibid.*

SET-OFF.

1. A judgment in one court is a set-off against an action of assumpsit in another court. *Wright v. Mooney*, 22.
2. Courts of law in this State only recognize the *legal* claimant in a suit, and will not permit a set-off to be introduced against one, who is alleged to have an equitable assignment of the claim. *Jones v. Gilreath*, 338.
3. Where a suit is brought by A. against B. and C., a claim by B. alone against A. will not be allowed to be set-off. *Ibid.*

SHERIFF.

1. Where a sheriff returned an attachment levied on certain property, and was afterwards permitted by the court, to which the attachment was returned, to amend his return by stating that the property had been levied on by executions having priority to his attachments: *Held*, that he could not be held responsible on his first return; but the record, as amended, must be taken to be true. *Cody v. Quinn*, 191.
2. Where a writ from a court of competent jurisdiction is delivered to a sheriff, he is bound to execute it according to the exigency of the writ, without inquiring into the regularity of the proceedings on which the writ is grounded. *Ibid.*
3. Under our statutes a second action may be brought on a sheriff's bond for money which he holds as county trustee, by any person who is injured thereby, *toties quoties*, until the penalty is exhausted. *S. v. McAlpin*, 347.
4. But the party injured may, if he prefers it, recover what is due him by a *scire facias* on the first judgment, setting forth other breaches. *Ibid.*

See Bail; Escape, etc.

STATUTES.

One part of a statute may be public in its nature, while another is local and private; and those ports of these acts which concern "particular counties" merely are to be taken to be of the latter kind, and are, therefore, saved from the general repealing clause of the act of 1836, ch. 1, sec. 2, by the proviso in sec. 8. *Humphries v. Baxter*, 437.

TOWNS.

1. The act of Assembly, passed in 1800, imposing a penalty on persons retailing spirituous liquors by the small measure in the towns of New Bern and Wilmington, without the permission of the commissioners of those towns respectively, is a private act, and was not repealed by the general law on the subject of retailers, passed in 1825, nor by the act passed in 1836. *McRae v. Wessell*, 153.
2. The ordinance of the corporation of a town which is authorized to abate nuisances within the town and which declares that hogs running at large are nuisances operates as well upon nonresidents who suffer their hogs to run within the limits of the town as upon those who are actual residents. *Whitfield v. Longest*, 268.
3. An inspector of lumber, etc., in the town of Wilmington is, by the usage of trade in that town, the agent of both buyer and seller, and, by the same usage, it is the privilege of the purchaser to designate the place of delivery and the duty of the seller to deliver it there. Therefore, where lumber was placed with an inspector for inspection, and he was directed by the purchaser to deliver it on a particular wharf, and by mistake he delivered it on another wharf, and especially when after such deposit the purchaser informed the seller he would not receive it there, and the property was afterwards casually destroyed by fire: *Held*, that the seller was responsible for the loss, and the purchaser was not bound to pay him the price he had contracted to give. *Buie v. Brown*, 404.

TRESPASS.

No matter what an officer declares when he seizes property, if he has a lawful process authorizing him to seize the property, he is not guilty of a trespass. *S. v. Elrod*, 250.

TROER.

1. When there are two part owners of a chattel, and one of them, without the assent of the other, *destroys* the chattel or renders it *useless by use*, the former is liable in damages to the latter for the value of his share. *Guyther v. Pettijohn*, 388.
2. In such a case no demand is necessary before bringing the action. *Ibid.*

TRUST.

A conveyance of slaves is made to a trustee in trust for the sole and separate use of a married woman. The husband of this woman died, and she then by deed conveyed the slave to A. *Held*, that A. acquired only an equitable title, and could not support an action at law to recover possession of the slaves. *Jones v. Strong*, 367.

USURY.

1. In an action *qui tam*, etc., for usury, where the count was that the defendant had corruptly taken, on 20 April, 1844, etc., usurious interest on a contract for forbearance, etc., from 21 April, 1843, to the said 20 April, 1844, and it appeared in fact that the usurious interest was taken for forbearance, etc., from 21 April, 1843, to 21 April, 1844: *Held*, that there was a fatal variance between the count and the proof, and, therefore, the plaintiff could not recover. *Allen v. Ferguson*, 17.
2. Although it is not requisite in a declaration for usury *qui tam*, etc., as it is in a plea, to describe the usurious contract specially, but it may be done generally, yet the declaration must be precise and accurate in the statements of the sum lent and forborne, the time of forbearance, and the excess of interest; and these facts must be proved as laid. *Ibid.*
3. Where A. is the legal owner of a tract of land and leases it to B., though the agreement for the lease may be usurious, yet B. is estopped in an action of ejectment against him by A.'s heirs from denying the title of A. *King v. Murray*, 62.
4. The usury could not be relief on as a defense in an action for the rent reserved by the usurious contract of lease. *Ibid.*
5. Where a person takes a bond, and includes in it usurious interest, it is *prima facie* evidence that he knew what he was about, that there was no mistake, and that he did it knowingly, and, therefore, corruptly. If he relies upon there being a mistake in the calculation of interest, he must show it. *Dawson v. Taylor*, 225.
6. Under our statute of usury, Rev. Stat., ch. 117, the reservation of usurious interest makes the contract void, but it does not incur a forfeiture. The forfeiture is incurred only by taking usurious interest, as such. *Godfrey v. Leigh*, 390.
7. Although there be a corrupt agreement for excessive interest when the money is advanced, yet no action lies for the penalty until some illegal interest has been received. *Ibid.*
8. So, on the other hand, if the contract was not for excessive interest, but the lender afterwards receives it, he forfeits double the sum lent. *Ibid.*

USURY—*Continued.*

9. If the bond be given upon an usurious consideration, and a new bond of the borrower is afterwards substituted for it, the offense is not committed so as to subject the lender to a penalty until the second bond be paid. *Ibid.*

10. But where the debtor does not give his bond, merely as a security, but gives that of another person payable to him and belonging to him, in payment, and it is accepted as a payment, it is a payment in law as well as in the common understanding of men. *Ibid.*

11. A payment in money's worth received as a payment is considered in law to be the same as a payment in cash. *Ibid.*

12. A contract for usurious interest may be laid, in a declaration for the penalty, as of the day when the illegal interest was paid. *Ibid.*

WIDOWS.

A widow cannot dissent from her husband's will by attorney. She must do so personally in open court. *Hinton v. Hinton*, 274.

WILLS.

1. A petition was filed for the reprobate of a will on the ground that the supposed testator was *non compos mentis*. A., and B., his wife, joined in the petition, she being one of the next of kin. Afterwards, A., the husband, caused himself to be joined with the executors in propounding the will, leaving his wife one of the caveators. *Held*, that on the trial of the issue *devisavit vel non* the declarations of A. were not admissible in evidence to prove the incapacity of the supposed testator. *Enloe v. Sherrill*, 122.

2. An issue to try the validity of a will is not an adversary suit; there are strictly no parties to it. *Ibid.*

3. Where a will is propounded, if the executor decline to prove it, or if there is ground for believing that the executor will not faithfully perform his duty, the court will permit any person who is interested in supporting the will to join with the executor in propounding it, or to propound it alone. But the party applying for such an order must show that he is not a mere intruder, but that he either has or believes he has an interest in establishing the will. *Ibid.*

4. When the declarations of any party to an issue *devisavit vel non* are admitted in evidence, it is because of the rule that the declarations of any one against his interest is legal testimony as against him. *Ibid.*

5. If a testator in his will refers expressly to another paper, and the will is duly executed and attested, that paper, whether attested or not, makes part of the will; but the instrument referred to must be so described as to manifest distinctly what the paper is that is meant to be incorporated; and the reference must be to a paper already written, and not to one to be written subsequently to the date of the will. *Chambers v. McDaniel*, 226.

6. On the trial of an issue *devisavit vel non* the court may instruct the jury to find as to the validity or invalidity of the whole or any part of the will, and the declarations of a legatee against his interest will be good evidence on such trial, so far as his interest extends. *Gash v. Johnson*, 289.

WILLS—*Continued.*

7. If the declarations of a devisee of land, who is not a party to the suit, be received, that is no cause for a new trial, as the interest of such devisee in the land devised will not be affected by the finding of that issue. *Ibid.*

WITNESS.

A witness who is summoned in this State while casually here, but who resides in another State, cannot be amerced for nonattendance, if he has returned to his own State and is there at his domicile, where his presence as a witness is required in one of our courts. *Kinsey v. King*, 76.