ANNOTATIONS INCLUDE 169 N. C.

NORTH CAROLINA REPORTS

VOL. 29

CASES AT LAW ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1846
JUNE AND AUGUST TERMS, 1847

REPORTED BY
JAMES IREDELL
(7 Ire.)

ANNOTATED BY
WALTER CLARK.

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OF

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CASES REPORTED

CASES CITED

CASES AT LAW

ARGUED AND DETERMINED
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SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1846

DEN EX DEM. MOSES WALKER v. JOHN MARSHALL.

1. Where a judgment is for the penalty of a bond to be discharged on the payment of certain assessed damages, and the execution issuing thereon recites the judgment as for the damages only, this is a fatal variance, and any sale under the execution is void.
2. Where a judgment is against heirs for lands descended, after the plea of fully administered has been found in favor of the administrator, and the execution issues against the goods and chattels, lands and tenements of the heirs, the execution is void.

APPEAL from PERSON Spring Term, 1846; *Settle, J.*

The lessor of the plaintiff claimed the land in controversy, under a judgment and an execution against the heirs at law of Garnett Neely, deceased, and a sheriff's sale and deed to him as the pur- (2) chaser. The defendant contended that there was no proper and legal execution under which the sheriff could have sold the land; and of this opinion was the court, and judgment was rendered for the defendant, wherefrom the plaintiff appealed.

Garnett Neely had entered into a bond, in a penalty of $2,000, to perform certain covenants mentioned in the condition of the same. P. M. McMany, administrator of William Stewart, deceased, brought suit on the bond, against the administrators of G. Neely, in Caswell County Court, and at October Sessions, 1841, obtained judgment for the penalty ($2,000). The sum of $395.44 was assessed as damages by the jury for a breach of the conditions of the bond, with interest from 1 July, 1841, until paid, and there was judgment accordingly, and also for his costs, to be taxed by the clerk. The plea of "fully administered" had been found by the jury in favor of the defendants. A *scire facias* was then issued, at the instance of the plaintiff, against the heirs at law

of G. Neely, to show cause why McMany, administrator, etc., should not have judgment and execution against them as heirs at law of G. Neely, deceased, for the aforesaid debt and costs. The judgment, as above stated, was recited in the *scire facias*. At April Sessions, 1842, there was judgment for the plaintiff according to *sci. fa.*, whereupon a *fi. fa.* issued to the sheriff of Person against "the goods and chattels, lands and tenements of Calvin Neely and John Marshall and his wife, and Nicy Neely, heirs at law of G. Neely, deceased," to satisfy the sum of $395.44, with interest from April Court, 1842, until paid, and for costs. The sheriff returned on this execution a levy on the premises in dispute in this action as belonging to the heirs of Garnett Neely, deceased. Whereupon a *venditional exponas* issued, and, at a sale under it, the lessor of the plaintiff became the purchaser of the land now
(3) in controversy, and the sheriff executed to him a deed.

Kerr for plaintiff.
Norwood for defendant.

DANIEL, J. The defendant insists that there never was any such judgment as that recited in the *fi. fa.* and *venditioni*, and that, therefore, the said executions were void in law. The judgment on the *sci. fa.* against the heirs by default, at April Term, 1842, was that the lands descended from their ancestor to them are condemned to the satisfaction of the judgment recited in the *sci. fa.*, which was for $2,000, to be discharged by force of the statute by the payment of the damages assessed by the jury for the breach of the conditions of the bond. Revised Statutes, ch. 31, sec. 63. There never was a judgment against the heirs of G. Neely for the sums mentioned in the *fi. fa.* and *venditioni* under which the land was levied on and sold to the lessor of the plaintiff; the judgment having been for $2,000 and the executions being for $395.44, the damages assessed for the breach. Besides, the judgment was against the lands descended, and the executions were against the goods and chattels, lands and tenements of the heirs themselves. The judgment was thus against the assets of the ancestor in the hands of the heirs, while the execution was *de bonis propriis* of the heirs. Those variances between the judgment and executions are fatal to the plaintiff's title, and the judgment must be

PER CURIAM. Affirmed.

(4)

DICKSON & MABRY v. THOMAS H. ALEXANDER ET AL.

If one partner purchase goods, ostensibly for the firm, but in truth for himself, the firm is bound in the same manner as it would be if the partner had borrowed money for the firm and misapplied it.

APPEAL from TYRRELL Fall Term, 1846; *Pearson, J.*

Assumpsit for goods sold and delivered, and was tried on the general issue. The facts were that the defendants, Thomas H. Alexander, Joseph Alexander, and Abner Alexander, entered into partnership in a fishery in Tyrrell County, and by the agreement each of them was to furnish certain things needful to the prosecution of the business, as parts of his stock therein. The plaintiffs were merchants in Virginia, with whom the defendants had not before dealt, and who had no knowledge of the particular stipulation between the defendants just mentioned. In order to procure some of the articles which Thomas H. Alexander was to supply, he ordered them from the plaintiffs in the name of the firm, and the plaintiffs filled the order to the value of $274.65, and they charged the goods to the firm, and forwarded them, and they came to the use of the firm.

The question upon the trial was whether the defendants Joseph and Abner were liable to the plaintiffs. The court held that they were, and from a judgment against them they appealed.

A. Moore for plaintiffs.
Heath for defendants.

RUFFIN, C. J. The opinion of his Honor is sustained by the direct authority of *Wharton v. Woodburn*, 20 N. C., 647. It is there laid down, in conformity with settled principles, that if one of the partners purchase goods ostensibly for the firm, but in truth for himself, the firm is bound in the same manner as it would be if the partner had borrowed money for the firm and misapplied it. If it were (5) not so, there would be no security in dealing with partnerships. How could these plaintiffs know that Thomas H. Alexander was breaking his contract with the other parties and was not buying for the firm, when he said that he was, and purchased in their name? It is a question of loss between innocent persons, and it is plain which of them should bear it. His copartners trusted Thomas H. Alexander, but the plaintiffs did not. They trusted the firm, upon an application in the name of the firm, and they have a right to look to every member of it for their debt.

PER CURIAM. No error.

Cited: Partin v. Lutterloh, 59 N. C., 344.

DEN ON DEMISE OF JAMES MEREDITH v. TIMOTHY ANDRES.

1. When one of two tenants in common of a tract of land is in possession of the tract, and his cotenant makes a demand of the whole tract, his refusal to comply with that demand is not to be considered as evidence of an ouster of his cotenant.
2. More especially is this the case when the demand is made by one professing to claim under the cotenant, but of whose title the tenant in possession knows nothing.
3. Nor, when the person so claiming enters into possession and is turned out by a writ of forcible entry and detainer, can this be considered an ouster of the cotenant.

APPEAL from BLADEN Fall Term, 1846; *Settle, J.*

Ejectment. Title was established in the lessor of the plaintiff to an undivided moiety of the premises as a tenant in common with the defendant. It was thus derived: John Andres died seized in fee,
(6) and from him the land descended equally to the present defendant and one Elizabeth Locke; and the latter devised her share to the plaintiff's lessor.

The defendant was in possession of the premises, and the plaintiff alleged that he had actually ousted Meredith before this action was brought. In order to establish such an ouster, the plaintiff gave in evidence that a person who claimed to be a tenant under the lessor of the plaintiff took possession of the tract of land, and the defendant proceeded against that person under the statute as for a forcible entry and detainer, and he was turned out and the defendant restored to the possession. The plaintiff further gave in evidence that his lessor demanded the possession of the premises from the defendant, and that the defendant refused to admit him; and the witnesses stated that the demand was an unqualified demand of the possession, the lessor of the plaintiff not claiming a share of the premises, nor alleging that he wished to be admitted into the possession with the defendant as a tenant in common.

The counsel for the defendant insisted that there was not evidence upon which the jury could find an ouster, and moved the court so to instruct them. But his Honor refused the motion, and held that the jury might infer the ousters from the evidence; and after a verdict and judgment for the plaintiff, the defendant appealed.

Reid for plaintiff.
Strange for defendant.

RUFFIN, C. J. The Court cannot concur in the opinion of his Honor. It will be perceived that there are no dates set forth in the case, nor any great length of possession by the defendant, nor any knowledge by

him of the title of the lessor of the plaintiff as derived from the defendant's original cotenant, nor any knowledge that the person who was turned out as a forcible trespasser was the lessee of Meredith, (7) nor even that such person was really Meredith's lessee. Without something of the kind the other two circumstances proved are too inconclusive to constitute evidence of an ouster. Although an actual ouster may be inferred from circumstances, yet they must be such circumstances as tend to show that the tenant in possession denies the right of the other to any part and refuses to let him into possession of his share, but claims the whole for himself. The rule is thus laid down by a respectable text-writer: "If upon demand by the cotenant of his moiety the other refuse to pay, and deny his title, saying he claims the whole, and continue the possession, such possession is adverse and ouster enough." And the text is fully authorized by the two cases cited in support of it, *Fisher v. Prosser,* Cowp., 217, and *Hillings v. Bird,* 11 East, 49; in the latter of which it is said: "The tenant in possession claiming the whole, and denying possession to the other, is sufficient evidence of ouster." Now, it is plain that the principle can reach no case in which the tenant in possession did not know or was not informed by the other of his right, so that he might understand to what extent he was required to surrender the possession, and that he was not required to give it as far as he could rightfully claim it under his own title to a share of the land. Hence, where a demand and refusal, merely, are relied on as evidence of ouster, the kind of demand meant is a demand by the cotenant of "his moiety." If to such a demand the party in possession replies by a denial that the other is entitled to a moiety, and an assertion of his own title to the whole, that shows that his possession is not held for his fellow and himself, but for himself exclusively, and thus is adverse and constitutes evidence of an ouster. But if a cotenant aliens, and the alienee, without giving notice that he has the estate that was in his vendor, comes to the other and demands possession generally, the latter may well (8) regard him as a stranger who is attempting the usurpation of the title and possession of the whole, and as such refuse to surrender the possession; for in such a case the demand is that the tenant in possession shall surrender it out and out, and not that he shall let in the other with him; and he is only doing that which is apparently his duty to the former owner, whom he supposes to be his cotenant still, as well as asserting his own right by a refusal to let such a person in at all. It cannot be inferred from such a transaction that the possessor is claiming all *for himself,* which is indispensable to turn the possession into an adverse one, but only that he does not acknowledge in the person who makes the demand a title of which he is ignorant, and the other gives him no notice.

It follows from what has been said that the proceedings for a forcible entry and detainer still less tend to create a presumption of an intention in the defendant to hold the possession against his cotenant, Elizabeth Locke, or any person entitled under her to a moiety. It is said, indeed, that person claimed to be Meredith's tenant. But that cannot make a difference; for it is to be presumed that, like his landlord, he claimed the whole land. Besides, nothing else appearing to the contrary, it is an inference from the judgment of the justices that the supposed lessee took possession in an illegal and violent manner, and without any right; for, although it is said that he "claimed" under the lessor of the plaintiff, it does not appear that he made that known to the defendant, nor does it appear that he had in fact a lease from that person. Even supposing, then, that the defendant was informed of Meredith's title to a share (which cannot be assumed), yet he had sufficient grounds for proceeding, as he did, against one who was *prima facie* a trespasser with strong hand; and it creates no likelihood that the defendant intended to put out or to keep out the person, whoever he or she might be, to
(9) whom the undivided moiety of the land descended from John Andres really belonged, and claim the whole for himself. Such may have been the fact; but if it be, it was not made to appear upon the trial of this suit.

PER CURIAM. *Venire de novo.*

Cited: Page v. Branch, 97 N. C., 102; *Gilchrist v. Middleton,* 107 N. C., 682.

THE STATE TO THE USE OF J. C. BARNES ET AL. v. ELIZABETH SHANNONHOUSE ET AL.

When a legacy is given to four children by name, and one of them dies in the lifetime of the testator, his legacy is lapsed and must go, as undisposed property, to the next of kin of the testator.

APPEAL from PASQUOTANK Spring Term, 1846; *Bailey, J.*

The testator, Thomas L. Shannonhouse, in the tenth clause of his will gave to four of his children, naming them, the residue of his chattel property, and directed his executor to convert it into money and equally divide it between his said four children, "except one (Susan Forbes) to have $500 less, for the two negro girls already given to her." William Shannonhouse, one of the four legatees, died in the lifetime of the testator. The judge was of the opinion that his share did not survive to the other three legatees, but lapsed, and was undisposed of by the will, and went to the next of kin of the testator.

A. Moore for plaintiff.
No counsel for defendant.

DANIEL, J. We are of the same opinion with the judge below. (10) In *Johnston v. Johnston,* 38 N. C., 426, where the testator bequeathed the residue of his estate, not disposed of, to his wife and her six children, to be equally divided between them and their heirs, share and share alike, A., one of the six children, died in the lifetime of the testator. *Held,* that this bequest was not to the children *as a class,* but as if each had been particularly named; and as each was entitled to only one-seventh, the share would not be enlarged by the death of one in the lifetime of the testator; and that the share of *A.* lapsed and was undisposed of, and belonged to the next of *kin* of the testator, and to his widow. In the case now before us each of the four children was particularly named by the testator. The share of William, who died in the testator's lifetime, never vested in him, but lapsed, and became so much of the undisposed personal property of the testator, and of course went to the testator's next of kin. The judgment must be

PER CURIAM. Affirmed.

ROBERT R. HEATH v. CHARLES LATHAM.

Under the statute, directing that upon judgments against infant heirs the execution shall be stayed for twelve months, the guardian of the infants has a discretion to waive the stay and permit the execution to issue *instanter*, and the sheriff is bound to proceed upon such execution.

APPEAL from WASHINGTON Fall Term, 1846; *Pearson, J.*

Case brought to recover of the defendant, who is the sheriff of Washington County, damages for failing to sell the real estate of the infant heirs at law of John D. Bennett, under two *fi. fas.* that (11) issued to him at the instance of the plaintiff, on motion in open court, from August Term, 1845, of Washington County Court, for not appropriating to the said executions a proportion of the moneys raised under the executions hereinafter mentioned, viz., 1, 2, 3, 4, 5, and 6. It appeared that the plaintiff obtained his judgments against said infant heirs, on debts due from the ancestor, at May Term, 1845, of the said court, and that at the succeeding term of the said court, in August, 1845, the stay of execution was waived by Thomas E. Pender, the clerk of said court, who was, on the return of plaintiff's *sci. fa.* at May Term, 1845, appointed guardian *ad litem* to said infant heirs. Other judgments in behalf of other plaintiffs were obtained at August Term, 1844,

of said court against said infant heirs on debts due from their ancestor, upon which there was a stay of execution of twelve months, and at the expiration of the said twelve months, on motion in open court, executions were ordered to issue, and accordingly did issue from August Term, 1845, of said court, and under the last named executions the sheriff sold the land of the said infant heirs and applied towards their satisfaction all the proceeds of the sales. Upon the face of these executions under which the defendant sold it appeared that they "issued after a stay of twelve months and on motion in open court"; upon the face of the plaintiff's executions it appeared that they "issued after waiver of the stay by the guardian *ad litem,* and on motion in open court"; and upon each of the plaintiff's executions the defendant made the following return: "This execution having come to my hands, *and it not appearing by it that it was issued after a stay of twelve months, and on motion in open court,* and there being other executions, Nos. 1, 2, 3, 4, 5, and 6, regularly issued against the same defendants, returnable in the same court to the same term, I levied said executions, Nos. (12) 1, 2, 3, 4, 5, and 6, on all the lands of the defendant in my county, and sold the same under said executions, 17 November, 1845, and the proceeds did not satisfy said last mentioned executions." Signed, C. Latham, sheriff. Upon these facts, if the court be of opinion that the plaintiff is entitled to recover, then judgment to be rendered in his favor for $67.20; otherwise, judgment for the defendant; and his Honor, *Pearson, J.,* being of opinion that the plaintiff was not entitled to recover, rendered judgment in favor of the defendant, from which the plaintiff prayed an appeal to the Supreme Court.

Heath for plaintiff.
A. Moore for defendant.

DANIEL, J. The statute declares that no execution shall be levied on the goods or chattels, lands or tenements of any minor in the hands of his guardian until twelve months after judgment obtained on the *scire facias,* nor shall execution issue at any time but on motion in open court. Rev. Stat., ch. 63, sec. 11. The plaintiff's executions were issued from a court having competent jurisdiction, and after a motion made in open court that they should be issued. The defendant, who was then the sheriff, insisted that as it did not appear by the executions that they were issued after a stay of twelve months, and also on motion in open court, he was not bound in law to execute them on the lands descended to the infant heirs of William Bennett. The judge who tried this cause was of the same opinion, and gave judgment for the defendant. We do not agree with his Honor. The statute was enacted solely for the benefit of infant heirs. Twelve months stay of execution is given them by the

statute to enable their guardians to provide the means of satisfying the judgment without a sale of the property, or to enable the guardian to prevent the property being sacrificed by an immediate sale. (13) But wherever a statute is made for the benefit of a person or persons, he or they may waive that benefit; and there was a waiver, by the guardian of the infant heirs of Bennett, of the time the law gave them as to the stay of the executions of Heath. In many cases which may happen, as in this, the infant heirs and their guardian may see that the property descended cannot by any means in their power be saved from a sale; and then they may, in such cases, wish that all the creditors of their ancestor should be paid equally, as far as the proceeds of the sales made of the property would admit; and we see no good reason why they may not, to effect such an object, waive their stay of execution and let it be done; for the aforementioned statute was not passed to favor any set of creditors over others. And not only did the guardian waive the stay of execution, but the heirs have since acquiesced in what was done, and have not moved to set the executions aside. On this waiver the Court, on motion, ordered Heath's executions to issue; and they were issued, and came to the hands of the sheriff, and he was thereby legally commanded and it was his duty to have levied on and sold the lands under them, with the others then in his hands. He did not do it, but refused to do it, and the plaintiff therefore was damnified, and had a legal and just cause of action against him. We think that the judgment must be reversed, and judgment be rendered for the plaintiff.

PER CURIAM. Reversed.

(14)

DAVID CARTER v. CASON G. SPENCER.

1. Where, in the county court, the suit was against three, and on an appeal to the Superior Court the judgment was only against one, without its appearing on the record what had been done as to the others: *Held*, that although the judgment in the Superior Court might have been erroneous or irregular, yet the judgment was good until reversed, and under an execution issuing on it the sheriff had legal authority to sell the property of the defendant against whom it issued, in conformity to such judgment.
2. A good execution in the sheriff's hands sustains a sale under it, though wrongly recited or not recited in the sheriff's deed.
3. A vested remainder or a reversion in slaves may be sold under a *fieri facias*, subject to the temporary right of a hirer or other particular tenant.
4. The bid of one person at an execution sale may be relinquished to another, who may take the sheriff's deed.
5. Where the purchaser of a slave has two different places of residence in two different counties the registration of his deed in either of those counties is sufficient.

APPEAL from HYDE Fall Term, 1846; *Bailey, J.*

Detinue for a slave, tried on the general issue. The plaintiff claimed title under an execution sale by the sheriff of Hyde and his bill of sale. One Joel McLean instituted an action of debt on a bond, in the county court or Orange, against the defendants Cason G. Spencer and Peleg Spencer, the administrators of Isaiah H. Spencer, deceased, and against Daniel Murray and John Buffalow. In that court judgment was rendered for the plaintiff against Spencer, who appealed to the Superior Court, and there a verdict and judgment were, in June, 1843, rendered for the plaintiff against Spencer's administrators for $1,610 debt, besides damages and costs, and a *fieri facias* issued thereon to the sheriff of Hyde, *de bonis intestati,* in the hands of the said administrators. There were also two judgments in Orange County Court in favor of
(15) James Webb against Spencer's administrators, on which writs of *fieri facias* were likewise issued to Hyde County. The latter writs, however, did not name the persons, who were the defendants, as administrators of Isaiah H. Spencer, but commanded the sheriff to make the money "of the goods and chattels of Isaiah H. Spencer, deceased, in the hands of his administrators," and in other respects did not conform to the judgments. All the executions came to the hands of the sheriff of Hyde in July, 1843, who seized several slaves, of which the negro claimed in this action was one, and sold them, under the three executions, on 31 July, 1843, and on that day made a bill of sale for this slave to the plaintiff as the purchaser. The negro had in the beginning of 1843 been hired out by the administrators to a person in Hyde, for one year, and the hirer had the possession until the sale by the sheriff, when the negro was present; and after the sale the hirer again took him and kept him until the end of that year, and then the present defendant, claiming as one of the administrators of Isaiah H. Spencer, took the slave again, and, after a demand, refused to deliver him to the plaintiff, and this action was brought.

When the plaintiff offered in evidence the sheriff's bill of sale, the defendant objected to its competency for want of due registration. It was registered in Hyde County in November, 1844, and the defendant insisted that Hyde was not the proper county. In support of the objection he proved by witnesses that the plaintiff for several years before 1840 resided and kept a hotel in Raleigh, to which place he removed from a farm he owned in Hyde, and which he cultivated and occasionally visited; and that in 1840 the plaintiff went with his family to the farm in Hyde, and generally remained there until June, 1843. At the latter period the plaintiff went with his family again to Raleigh, where he had a dwelling, and the family remained in Raleigh until the autumn
(16) of 1844, and the plaintiff also remained there principally during

that period, though he visited Hyde in the winter of 1843 and 1844. In November, 1844, the plaintiff resided and has continued to reside in Hyde exclusively. The court received the bill of sale in evidence.

In the bill of sale the executions in favor of Webb are alone referred to as being in the sheriff's hands, and no notice is taken of that of McLean. For that reason the defendant, insisting that Webb's executions were void because of their form and variance from the judgments, as before mentioned, prayed an instruction to the jury that nothing passed by the sheriff's sale and conveyance. But the court refused the instruction prayed for, and informed the jury that although Webb's executions were void, yet that the purchaser might get a good title if the sheriff sold under McLean's execution, notwithstanding that execution was not recited in the sheriff's deed. The defendant then further objected that the *fieri facias* of McLean was not valid because his suit was brought originally against Murray and Buffalow, as well as Spencer, and the record did not show in any proper manner that it had been determined as to Murray and Buffalow. By the transcript of the record of McLean's suit in Orange Superior Court it appears that in the transcript sent to that court from the county court, upon Spencer's appeal, it is not stated why the judgment was against Spencer alone, or how Murray and Buffalow were discharged from the suit; but that in the Superior Court Spencer's administrators alone appears as appellants and defendants, and the judgment was against them alone; and, moreover, that at March Term, 1846, the Superior Court of Orange (after reciting that the plaintiff McLean had entered a *nolle prosequi* in the county court as to Murray and Buffalow, and that the clerk of the county court had, by mistake, omitted to insert the same in the transcript sent to the Superior Court) ordered that the transcript in that court be (17) amended by inserting therein the *nolle prosequi* as to the proper period. Thereupon his Honor held that the writ of *fieri facias* in that case gave a valid authority to the sheriff to make sale.

The defendant then further gave evidence that the plaintiff was not the purchaser of the negro at the sheriff's sale, but that James Webb was, at the price of $459.99; and contended that, for that reason, the plaintiff could not recover. The plaintiff then gave evidence that Webb, immediately after he was declared the highest bidder and purchaser, transferred his bid to the plaintiff and directed the sheriff to make the bill of sale to him, and the plaintiff paid the price bid and received the deed at once. Thereupon the defendant insisted that the bid could not be thus transferred, and especially as the person who had hired the negro for the year 1843 was entitled to him during that year, and the possession was adverse to the sheriff and to Webb. But the court refused

so to instruct the jury. There was a verdict for the plaintiff, and judgment, and the defendant appealed.

Shaw for plaintiff.

No counsel for defendant.

RUFFIN, C. J. The opinion of the Court is that the judgment be affirmed. Nearly every point made by the exceptions has been repeatedly decided in this Court contrary to the argument of the defendant.

The amendment in the Superior Court of the transcript from the county court makes the judgment consistent with the record and right, as in our law all contracts are joint and several. But if the amendment had not been made, the sale would still have been good. The execution conformed to the judgment, which was against the administrators of Spencer alone. If there was error in any part of the proceedings, therefore, it was in the judgment. Now, error or irregularity in the
(18) judgment of a court of competent jurisdiction, remaining unreversed, does not affect the execution or the sale under it. *Smith v. Kelly,* 7 N. C., 507. *Hatton v. Dew, ibid.,* 260, establishes that a good execution in the sheriff's hands sustains a sale under it, though wrongly recited or not recited in the sheriff's deed.

A vested remainder or a reversion in slaves may be sold under a *fieri facias,* subject to the temporary right of a hirer or other particular tenant. *Knight v. Leak,* 19 N. C., 130. The possession of a hirer is, in truth, that of the general owner, and not adverse to him. *Whitaker v. Whitaker,* 12 N. C., 310. In *Smith v. Kelly* it was also ruled that the bid of one person may be relinquished to another, who may take the sheriff's deed; and the same doctrine was held in *Testerman v. Poe,* 19 N. C., 103.

The remaining question, upon the registration, is the only one of any novelty; and upon that our opinion accords with that of his Honor. The counsel for the plaintiff has, indeed, argued that the bill of sale is good without registration, as there is no creditor or purchaser in the case. But whether the sale of a sheriff stands upon the same ground with that of the owner himself, or whether the construction of the Rev. Stat., ch. 37, sec. 19, which reënacts section 7 of the act of 1784 without its preamble, is to be the same as that of the original act with the preamble, the Court does deem it necessary now to decide; for we hald that the deed was properly registered in Hyde. The statute, Rev. Stat., ch. 37, sec. 20, requires the conveyance of a slave to be registered in the county where the purchaser resides, if he be in possession of the slave; but if, under any special agreement at the time of sale, the seller shall remain in possession, then it shall be registered in the county in which the vendor lives. The act does not, in any case, require a registration in more than one place. It is to be either in the county of the

purchaser or the seller, but not in both, when they happen to be (19) different counties. If this be a case in which the registration is to be in the purchaser's county, we think the act has been complied with, because Hyde was his residence, or one of his places of residence. He, with his family, had been living on his plantation in that county continuously for about three years and up to the month before the purchase. That was certainly sufficient to gain him a domicil there. Nothing appears from which it is to be inferred that the plaintiff meant to give up that domicil. At most, it may be said that he acquired a residence in Raleigh by coming to his house there. That is not clear, since there is nothing to show how long he intended to remain up the country when he came. But suppose he intended to fix a residence in Raleigh: he might do that without giving up his previous residence in Hyde; and upon his death the court of either Wake or Hyde had jurisdiction in granting administration or probate of his will. In the same manner this conveyance might be registered in either of the counties as that of his residence; for, as before noted, the act does not require registration in two counties as to the same slave, and either county was a county of the plaintiff's residence. But the plaintiff here was not in actual possession of the slave, and, therefore, the case does not fall within the first provision of the section, which directs the registration in the county of the purchaser's residence. So that, at all events, Wake was not the proper county at any time after the deed was made. The case, indeed, is not literally within either clause of the section; for, strictly speaking, it cannot be said that there was a special agreement that the vendor should retain possession. That language is appropriate to a sale by the owner of a slave of the present property, and not to the sale of a reversion by a sheriff. But it is clear the Legislature must have intended that the sheriff's deed, in such a case, should be registered somewhere; and the purposes for which registration is required (20) are best answered by a registration in the county in which the slave was sold and the hirer and possessor of him lived. If not within the words of the latter part of the clause, the case then is within the spirit and meaning of it. In this case, indeed, it so happened that at the time of registering the bill of sale, November, 1844 (which was in due time under the act enlarging the period of registering deeds), the plaintiff had resumed his residence in Hyde as his exclusive residence; so that it was then the county both of the vendee and vendor, and must have been the proper county. In every point of view, therefore, the registration is sufficient.

PER CURIAM. No error.

Cited: Owen v. Barksdale, 30 N. C., 83; *Hardin v. Cheek*, 48 N. C., 138; *Wade v. Pellitier*, 71 N. C., 75.

CHARLES R. HOWCOTT'S EXECUTORS v. THOMAS D. WARREN.

An executor or administrator has a right to a remedy by petition, under the act, Rev. Stat., ch. 74, to recover damages for the overflowing by a millpond of his testator's or intestate's land in the lifetime of such testator or intestate.

APPEAL from CHOWAN Fall Term, 1846; *Pearson, J.*

The proceedings in this case are under the act of the General Assembly, Rev., Stat., ch. 74, *sec. 9, and following.* The petition is filed to recover from the defendant damages sustained by the plaintiff's testator for overflowing his land by the millpond of the defendant. The petition was heard, and order granted for a jury, in accordance with the provisions of the act. A verdict was returned assessing the plaintiff's
(21) damages to $25. From the judgment on this verdict in the county court an appeal was taken to the Superior Court, and upon motion there his Honor dismissed the petition upon the ground that it would not lie for an executor for an injury in the testator's lifetime.

Heath for plaintiffs.
A. Moore for defendant.

NASH, J. In this decision we are of opinion his Honor erred. By the common law, when a *tort* to real property was not immediately injurious, but was consequential only, an action on the case was the only proper remedy; and when the act complained of constituted a nuisance, the action might be brought for every fresh continuance of the nuisance. *Penruddock's case,* 5 Rep., 101. As the action was usually brought to abate the nuisance, the damages in the first recovery were often merely nominal. If other suits became necessary through the obstinacy of the defendant, fresh actions were brought, until at length the defendant found it to his interest to submit to the law and abate the nuisance. Every man is bound so to use his own as not to injure his neighbor, and it never has been doubted that the overflowing of a neighbor's land gives to him a right of action on the case, in the first instance. This continued to be the law of this State up to 1809, when the act was passed under which these proceedings took place. The main object of the act, as declared by the Court in *Gillett v. Jones,* 18 N. C., 343, is to protect the owners of mills from the harassing and injurious effects of the principles of the common law with respect to the continuance of a nuisance. However small in value that injury might be, the party injured was at liberty to renew his action until he attained his object. In regard to public mills, which are considered valuable to the community at
(22) large, the principle is altered. The party injured has no right

to his common-law remedy unless the annual injury he sustains is to the amount of $20, and it has directed in what manner the injury shall be ascertained. The common-law remedy, therefore, is not abolished in such cases; it is but suspended. His Honor decided the plaintiff could not sustain his petition because the injury complained of was committed in the lifetime of the testator. If this be so, then injury of this kind can be redressed only by the person sustaining it. The heirs cannot complain of damages done to the estate before it became theirs. Suppose the action had been brought by the testator himself, and had continued in court several years, so that the injury had amounted to a destruction of the property, as by destroying a valuable meadow, for instance, thereby depriving the plaintiff of its entire use, and the plaintiff had died a short time before the trial: according to the opinion of the court below, the cause would abate, as it could not be revived by the executor; for if the action cannot in the first instance be brought by him, neither will it survive to him when already commenced. We do not agree with his Honor. At common law all personal actions to recover damages for injuries to property, real or personal, or to the person, died with the person inflicting or sustaining the injury; and so the law is still, as to the last; but as to the two former it has long been altered by statutes in England and in this State. Thus the three statutes of 4, 25, and 31 Edward III. give to executors and administrators, and the executors of executors, the same remedies for injuries to the personal estate of the testator or intestate committed in his lifetime as the deceased himself might have had; and the statute 3 and 4 William III., ch. 42, extends the like remedy to his representative, when the injury has been done to land. All these statutes are in force in this State, and are embodied in Revised Statutes, ch. 6, sec. 37. The language of the act is, that executors and administrators shall have actions, (23) in like manner as the testator or intestate might have had, for goods taken, etc., "and for injuries done to the property of said testator or intestate, either real or personal, when such injury was sustained in the lifetime of such testator or intestate," etc. It is not denied but that the testator, Howcott, could have filed his petition in like manner as the plaintiff, his executor, has. Another reason assigned in the case why the plaintiff cannot maintain his plaint is that the object of the act was the protection of the owners of mills, and that when the injury is past, as in this case, no such protection is necessary, and the act does not apply. If the case is not provided for by the act, the common-law remedy remains in fully force, and if the plaintiff is not driven to this preliminary inquiry, he can immediately, as we have shown, bring *his* action on the case. So that the protection of the owner is entirely removed, because the protection meant must be from the action at law.

In *Gillett v. Jones,* and several previous cases, it was held, upon the policy of the act, that it embraced all cases for injuries from mills; and that has been since modified only so far as it is declared in *Waddy v. Johnson,* 27 N. C., 333, that it does not apply to an injury to health only, where there is no overflowing of the plaintiff's land. With that exception, the action at common law is superseded by this remedy; and we hold that it will lie wherever the action on the case would for which it is substituted. We are of opinion that there was error in dismissing the petition.

PER CURIAM. Reversed.

Cited: Butner v. Keelhn, 51 N. C., 61; *Mast v. Sapp,* 140 N. C., 537.

(24)

CHARLES R. HOWCOTT'S EXECUTORS v. JAMES COFFIELD'S EXECUTORS.

A remedy by petition, under the act of Assembly, Rev. Stat., ch. 74, to recover damages for overflowing land by a millpond, may be had against the executors or administrators of the person who committed the injury.

APPEAL from CHOWAN Fall Term, 1846; *Pearson, J.*

Petition under the act of Assembly, Rev. Stat., ch. 73, prescribing the mode of recovering damages for the overflowing of land in certain cases by a millpond. The plaintiffs were the executors of the person whose land had been overflowed, and the defendants were the executors of him who, it was alleged, had committed the injury. The court was of opinion that the proceeding under the act was applicable only to present and continuing injuries, and did not apply to those which were past, and that the proceeding could not be sustained by an executor or against an executor. The court, therefore, ordered the proceedings to be dismissed, and the plaintiffs appealed.

Heath for plaintiffs.
A. Moore for defendants.

NASH, J. This case is similar in its foundation to *Howcott v. Warren, ante,* 20. It was the opinion of the Court in that case that the right to file a petition under the act concerning mills, for an injury sustained by the erection of a mill during the life of an individual, survived to his executor or administrator in like manner as it was possessed

by him. The question here is, whether a petition can be brought against the executor of the party committing the injury. The opinion of the presiding judge was "that the proceeding under the act was applicable to present and continuing injuries, and did not apply to (25) past injuries, and that the proceeding could not be sustained by an executor nor against an executor." In the case referred to we have decided that the right to bring the action for an injury committed during the life of the testator did survive to his executor, and we are of opinion that the petition can be brought against the executor of him who committed the injury.

The petition alleges that Howcott, the testator, was the owner of the tract of land which adjoined the lands of James Coffield, who erected on his own land a milldam which poured the water on the land of the intestate, whereby it was injured; that Coffield is dead, having duly made his last will and testament, and that the defendant is his executor, and claims from the defendant the damages which his testator sustained in his lifetime in consequence thereof. Unless this action can be sustained by the plaintiff, the estate of the testator is without redress. The heirs are clearly not answerable. *Fellow v. Fulghum,* 7 N. C., 254; and though the Court does not, in so many words, say the executors are answerable, they strongly intimate it. That was a petition to recover damages for the erection of a milldam. During its pendency the defendant died, and a *sci. fa.* issued against his heirs. The Court decided that it could not be sustained, for in no case was the heir answerable for the *tort* of his ancestor. They then go on to say: "Executors and administrators act in *autre droit,* and maintain the rights of their testators and intestates." But the act of Assembly under which the petition is filed expressly gives the remedy. It gives to executors and administrators "actions in like manner as their testator or intestate might have had for goods taken, etc., or for injuries done to the property of said intestate or testator, either real or personal, etc.," "against the person or persons so detaining, etc., or committing such injury, etc., them and each of them and each of their executors, administrators, and (26) heirs." The act then expressly gives the executor the right to sue for an injury done to his testator's real property, during his life, in like manner as he could himself, not only against the person committing the injury, but against his executor or administrator. It is right it should be so. The property of the plaintiff's testator has been injured by the wrongful act of the defendant's testator; the damages, when properly ascertained, become a debt which ought, in the first place, to be paid out of the personal assets. Two objections have been raised in the argument here against this conclusion: one is that the act has subjected the mill to execution to satisfy the judgment, the plaintiff

may recover, and the heirs, who are now the owners of the mill, are not parties to these proceedings; and the second is that the executor or administrator may have no assets to meet the judgment, and no provision is made in the act for trying such a question. The answer to the first exception is that that provision in the act applies only to cases where the owner or occupier of the mill is the defendant, and not to the case of an executor, which is necessarily an exception. As to the question of assets: when the act gives the action against the executor, it does not deprive him of the privilege of protecting himself by proper pleas, pleaded at the proper time. The petition charges that the defendant has assets, and it is not denied.

PER CURIAM. Reversed.

Cited: *Butner v. Keelhn,* 51 N. C., 61.

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(27)

STATE v. DANIEL ANGEL ET AL.

1. Where on the trial of an indictment for murder the prisoner's counsel objected that the name of the deceased as mentioned in the indictment was not his true name, that was a fact to be tried by the jury.
2. The purpose of setting forth the name of the person on whom an offense has been committed is to identify the particular fact or transaction on which the indictment is founded, so that the accused may have the benefit of an acquittal or conviction, if accused a second time. The name is generally required as the best mode of describing the person; but he may be described otherwise, as by his calling or the like, if he be identified thereby as the individual, and distinguished from all others; and if the name be not known, that fact may be stated as an excuse for omitting it altogether.
3. The act of Assembly restraining judges from expressing to the jury an opinion as to the "facts" of the case only applies to those "facts" respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendant depends.

APPEAL from YANCEY Fall Term, 1846; *Caldwell, J.*

The prisoner was indicted, with another, for the murder of Robert B. Roberts by stabbing with a knife, and found guilty. Upon the trial witnesses for the State testified that the prisoner gave the mortal wound without any previous provocation from the deceased. Witnesses for the prisoner, however, stated that the deceased was in the act of striking at the prisoner when the stab was given; and other witnesses for the prisoner testified that the deceased had struck the prisoner one slight blow on the head or hat, and was in the act of striking another when he received the stab.

In the course of the charge to the jury the presiding judge remarked that "the witnesses differed in their accounts of the transaction," and then recapitulated their testimony as to the manner in which the rencounter took place, and, after some instructions upon matters of law, he remarked, further, that "according to the testimony of the prisoner's witnesses the mortal blow *was given* at or about the commencement of the rencounter." The judge informed the jury that they were the judges of the truth and weight of the testimony of the (28) witnesses.

The judge subsequently remarked to the jury that the counsel for the prisoner had not, in their argument, contended that the law touching the degree of the homicide was otherwise than it had been laid down by the judge, "but that they had argued the facts with much ingenuity," and therefore his Honor reminded the jury as to the importance of the matter in hand, and that it was their duty to weigh the evidence deliberately, and give a verdict according to the facts and to the law as it had been expounded by the court.

During the examination of the witnesses the prisoner's counsel made the point that the deceased was not properly named in the indictment, "Robert B. Roberts," and requested the court to reserve the question. But the court declined doing so, and said that it was a question of fact for the decision of the jury whether that was the name of the deceased. Witnesses then stated that "Robert Burton Roberts" was supposed to be his full name, but that he was commonly known as "Robert B. Roberts," and often called, for short, "Burt Roberts." Upon that evidence the counsel for the prisoner in the argument before the jury did not deny that the deceased was described by his proper name in the indictment, or raise any question thereon.

After the verdict against the prisoner his counsel moved for a new trial upon the ground that the deceased was not properly named in the indictment, and it was refused by the court.

The prisoner's counsel then moved for a *venire de novo* upon the ground that, in making the remarks to the jury before mentioned, the presiding judge had given an opinion upon the facts. That was also refused, and sentence of death pronounced, and the prisoner appealed.

Attorney-General for the State.
Baxter and Alexander for defendant. (29)

RUFFIN, C. J. The Court is of opinion that there is no error in the judgment.

On the point respecting the name of the deceased, his Honor was certainly right in saying that it was the province of the jury to determine what the name was. We do not understand what was meant by

the request that the court would reserve that question. If the prisoner meant to insist that the name of the deceased was not that given to him in the indictment, but another, and wished the aid of the judge in getting the lawful advantage of the defect in the description, the proper method would have been to ask an instruction to the jury that if they found that the deceased was not named "Robert B. Roberts," but something else, they should acquit the prisoner for that variance. But the court could not assume that the variance in the names existed, so as to reserve or withdraw the whole matter from the jury, according to the motion on behalf of the prisoner.

With the decision of the jury on that question, whether right or wrong, the Court cannot interfere, as has often been declared. But if we could interfere, it is not improper to say that there does not appear to be any ground for doing so here. The purpose of setting forth the name of the person who is the subject on which an offense is committed is to identify the particular fact or transaction on which the indictment is founded, so that the accused may have the benefit of one acquittal or conviction if accused a second time. The name is generally required as the best mode of describing the person; but he may be described otherwise, as by his calling or the like, if he be identified thereby, as the individual, and distinguished from all others; and if the name be not known, that fact may be stated as an excuse for omitting it altogether. But here the description of the deceased is by a name, and the objection is that it is not his true name. Now, there is no evidence what the true name was, that is to say, in the sense of being the name by (30) baptism; for it does not appear that this person was ever baptized. He could, therefore, have had a name by reputation only; and it seems that by reputation he was known as well by the one as the other of three appellations, namely, "Robert Burton," "Robert B." and "Burt"; and the probability, from the common usage of the country, is that in formal and serious transactions he was more generally called "Robert B." than otherwise, though on familiar occasions he was oftener by contraction called "Burt." The jury might therefore be well warranted in treating these, not as different names, but as different modes of calling the same name. There could be no difficulty imposed on the prisoner in pleading former acquittal or conviction; for, by proper averments that the "Robert B. Roberts" mentioned in one indictment is one and the same person as the "Robert Burton Roberts" or "Burt Roberts" mentioned in the other, he could readily show the truth of the case. It must be a sufficient designation of a person, in such a case, to give the name by which he is generally known.

His Honor undoubtedly did not transcend his powers and duty under the act of 1796 in delivering his charge to the jury. The "facts" on

which the act restrains him from expressing an opinion to the jury are those respecting which the parties take issue, or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendant depends. But the act does not prohibit the judge from drawing attention to things that occur in court and speaking of them as having actually occurred there. Thus the court could not tell the jury that it had been sufficiently proved that the stab was given without any provocation, or that it was after the prisoner had received a blow, because that was a fact involved in the past transaction that was then the subject of investigation, and in respect to which the parties differed, and it was the province of the jury to inquire of the truth. But that (31) the State's witnesses gave one narrative of that transaction, and the prisoner's witnesses gave another, and, of course, that the "witnesses differed in their accounts," the judge might not only state to the jury, but it was his duty, by the act of 1796 itself, to state to them, for that act "declares it to be the duty of the judge to state, in a full and correct manner, the facts given in evidence, and explain the law arising on them." He was bound, therefore, in summing up the evidence, to draw the attention of the jury to the conflict in the testimony, and explain the importance of it, so as to advise them what, in law, should be their verdict, according as they should believe that the one or the set of witnesses told the truth.

With respect to that part of the exception which refers to the words of the judge, that "the mortal blow *was given,*" and that it was given "at or about the commencement of the rencounter," the argument is that the judge assumed those facts to exist. He had a right to assume them as against the prisoner, because they were stated by witnesses brought by him to support his defense, and are to be treated as his own account of the transaction, to this purpose. It is obvious that the prisoner did not deny the death of the party, nor that he gave the blow which caused it; and that he was insisting by way of defense on an extenuation from the circumstances under which, as he said, it was given. This presupposes that the mortal blow was actually given, and the prisoner's own witnesses proved the fact; and that amounts to an admission by the prisoner himself that the blow *was* given by him, and the prisoner cannot complain that the judge so treated it. Then with respect to the remark as to the period at which the blow was given, his Honor but repeated the substance of what the prisoner's witnesses themselves had stated and the prisoner had acquiesced in. Their account was that the stab was given as the deceased was about giving his first blow, or immediately after having given a slight one, and while attempting to (32) give another, and there was no evidence even of any preceding altercation. It was surely, then, given at or about the commencement

of the affray; and as that appeared upon the prisoner's own defense, the court could not err, as against him, in treating as facts what the prisoner alleged and his witnesses proved to be the facts.

Judgment of death was therefore properly given, and the Superior Court will further proceed thereon according to law.

PER CURIAM. No error.

Cited: S. v. Bell, 65 N. C., 314; *S. v. Henderson,* 68 N. C., 349; *S. v. Dancy,* 78 N. C., 438; *S. v. Pickens,* 79 N. C., 653; *S. v. Jacobs,* 106 N. C., 696; *Williams v. Lumber Co.,* 118 N. C., 934; *S. v. Howard,* 129 N. C., 661; *Meadows v. Tel. Co.,* 131 N. C., 77; *S. v. Rogers,* 168 N. C., 116; *Long v. Byrd,* 169 N. C., 659.

DEN ON DEMISE OF CORNELIUS FLYNN v. JOHN W. WILLIAMS ET AL.

1. A, being seized and possessed of an estate in fee in a tract of land, subject to a limitation over to B in the event of A's dying without issue, made a fraudulent conveyance of the land. Afterwards B died, leaving A his heir at law. *Held,* that after the death of B the whole estate was liable to the satisfaction of A's creditors.
2. The act regarding fraudulent alienations of property makes the fraudulent conveyance absolutely void, and in that way prevents the passing of any estate as against creditors, etc.

APPEAL from BEAUFORT Fall Term, 1846; *Bailey, J.*

The plaintiff and defendants each claim the land in dispute under Joseph R. Hanrahan. Walter Hanrahan died previous to 1823, having duly made his last will and testament, in which he devised to (33) Joseph R. Hanrahan, his son, in fee, the lands in question, and in a subsequent part of the will he devises as follows: "In case my son Joseph R. Hanrahan should have no issue at the time of his death, I then devise the aforesaid lands already given him to my son William K. Hanrahan." Walter Hanrahan left three sons, James, Joseph R., and William K. Hanrahan. Of these, James died the first after his father, without having any issue, and then William, who died in 1834 and without having had issue, and leaving Joseph his heir at law, and the latter died in 1837. In 1827 one Christie obtained a judgment in the county court of Beaufort against Joseph R. Hanrahan, and to defeat this claim Hanrahan, on 14 December, 1826, conveyed the lands in question to the lessor of the plaintiff, without any valuable consideration, at which time the suit was pending. After the death of Joseph R. Hanrahan various creditors of his, upon debts contracted after the date of his deed to the lessor of the plaintiff, obtained judgments

against his heirs, and the lands in dispute were, under executions issuing on said judgments, sold by the sheriff of Beaufort County, and James O'K. Williams, the father of the defendants, purchased them.

The plaintiff requested the court to instruct the jury "that notwithstanding they might be satisfied of the existence of a fraudulent intention on the part of Joseph R. Hanrahan to defeat the anticipated recovery of Christie in making the deed to Flynn, yet this fraudulent intention avoided the deed only so far as it conveyed the estate, which was *then* in Joseph R. Hanrahan and liable to be sold under execution; that, as to the contingent estate, which was then in William K. Hanrahan and afterwards descended to Joseph by the death of William, the deed could not be avoided by the existence of such fraudulent intention, but that said estate was conveyed to the said Flynn." His Honor refused to give such instructions, but charged the jury "that if Joseph R. (34) Hanrahan intended, by his deed to Flynn, to defeat the anticipated recovery by Christie, the deed was void as to Christie, and by conclusion of law was also void as to the subsequent creditors of Hanrahan, under whom the defendants claimed." A verdict was found for the defendants, and the plaintiff appealed.

Rodman for plaintiff.
Stanly, J. H. Bryan, and Shaw for defendants. (37)

NASH, J. In the opinion of his Honor we entirely concur. The very ingenious argument submitted to us in behalf of the plaintiff has failed to convince us that he is entitled to a verdict in this case. It is fallacious, and its fallacy consists in considering the act against fraudulent conveyances as operating on the estate of the fraudulent grantee, and not on the conveyance. The words of the act are plain and unambiguous: "All and any feofment, etc."—"at any time had or heretofore made, or at any time hereafter to be had or made, etc.," "to or for any purpose or intent to delay, hinder, and defraud creditors and others of their just and lawful actions, debts, and accounts shall be deemed and taken to be clearly and utterly void, frustrate, and of no effect." It is the conveyance with the act makes void. *Haffner v. Irwin*, 23 N. C., 498. The plaintiff, while he distinctly admits that the conveyance to Flynn is fraudulent as to Christie, contends that it is void only as to the estate which was then in Joseph R. Hanrahan, and not as to that which was contingent and dependent upon the death of William Hanrahan, for the reason that only the estate Joseph then had was liable to execution for his debts. Admit this to be so. Unfortunately for the plaintiff, he claimed both estates by the same conveyance, and by what alchemy he separates the two estates, so conveyed, so as to preserve the one while admitting the other to be void for fraud, we cannot well (38)

perceive. It is a well established principle that when a statute makes a deed void for any cause, the whole deed is void, although mixed with illegal considerations, there may be others which are just and proper. Thus it is declared by the Court in *Haffner v. Irwin,* 23 N. C., 498: "If the hindrance form any part of the actual intent of the act done, so far the act against them is a malicious or wicked contrivance, and it is not to be questioned that a *conveyance* or *assurance,* tainted in part with a malicious or fraudulent intent, is by the statute made void as against creditors *in toto.*" Here it is admitted that, at the time the conveyance was made to Flynn, Joseph R. Hanrahan had in the land an estate which was subject to Christie's claim, to wit, his defeasible estate in fee simple, and it is admitted it was made to defeat his debt. It was then, in part at least, tainted with a malicious and fraudulent intent, and is, according to the decision just cited, void *in toto,* that is, the conveyance or assurance is utterly void. It is inoperative even as color of title against a creditor until the latter has acquired a right of entry. *Hoke v. Henderson,* 14 N. C., 15; *Pickett v. Pickett, ibid.,* 6. By the will of his father Joseph took an estate in fee, defeasible on his death without issue, when the estate was limited over to his brother William in fee. This remainder to the latter was good as an executory devise because it was limited to take effect during lives then in being. The death of William no farther affected the estate than to throw upon his heir the contingent estate devised to him, and Joseph was his heir at law, and upon his death without issue it passed, *eo instanti,* to his heirs at law. Whatever might be the effect of an estoppel or rebutter as between the present plaintiff and the heirs of Joseph R. Hanrahan and those claiming under them, it can certainly have no operation upon his creditors, in whose shoes the defendants stand.

(39) In *Flynn v. Williams,* 23 N. C., 509, it is decided that Christie, by his purchase under his execution, acquired only the title which was in Joseph at that time, and which consequently expired with the life of Joseph. The case states that Christie's debt is still unsatisfied, and that the father of the defendants purchased at the sale by the sheriff under execution against the heirs of Joseph to satisfy debts contracted by him after the date of his deed to the plaintiff. The deed to the plaintiff being made to defraud Christie, a present creditor, it is utterly void as to subsequent creditors, for it is not *bona fide.* 1 St. Eq., 348, sec. 352, and the authorities there cited; and also page 352, sec. 361, where the same principle is stated. *Taylor v. Jones,* 2 Atk., 601; Newland on Contracts, 389. The plaintiff claims the land in controversy alone under that deed, and it being utterly void as against the creditors of the grantor, under whom the defendants claim, it confers upon the plaintiff no legal title against them, and the plaintiff cannot recover.

We are of opinion his Honor was right in refusing the instruction prayed for, and committed no error in his charge.

PER CURIAM. No error.

Cited: Stone v. Marshall, 52 N. C., 304; *Morris v. Pearson,* 79 N. C., 259; *Cowles v. Coffey,* 88 N. C., 342.

STATE v. WILLIAM A. GREEN.

In an indictment under the statute, Rev. Stat., ch. 34, sec. 48, for maiming by biting off an ear, it is not necessary to state whether it was the right or left ear.

APPEAL from GRANVILLE Fall Term, 1846; *Battle, J.*

Indictment for an assault and biting off "the ear" of W. H. on purpose and unlawfully, but without "malice aforethought," and it concludes *contra formam statuti.* After conviction, the prisoner's (40) counsel objected that sentence could not be passed under the statute, Rev. Stat., ch. 34, sec. 48, because the indictment is uncertain and insufficient, inasmuch as it does not state which ear was bitten off. The presiding judge was of that opinion, and refused to give judgment of imprisonment as prescribed in the act, though willing to pass sentence as upon an indictment for an assault at common law; and the solicitor for the State appealed.

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

RUFFIN, C. J. After a resolution in *Long's case,* 5 Rep., 120, that certainty to a certain intent in general is required in indictments, and no more, *Lord Coke* states a further resolution, that charging a stroke on the head, or on the face, or upon the right hand, or left arm, is sufficient, though not specifying on what part of the head or face the stroke was given, or whether it was on the back or palm of the right or left hand, or on what part of the arm; but that *super manum,* or *super brachium,* or *super latus,* without "the right" or "the left," is not sufficient, because in such cases the part of a man in which the wound is is not certain. The reason of the distinction is obvious enough. There is but one head or face, and therefore it sufficeth to say *"the* head" or *"the* face," being that degree of certainty which is requisite in an indictment. In like manner there is but one "right hand," and the law does not

require a certainty that shall be carried to every particular of the part or parts of that member injured. But when the injury is to a member of the body of which there are two, it is but a certainty to a certain intent in general to designate that one of the two to which the
(41) injury was done. It is certain, therefore, that at common law, in charging the mortal wound on the hand, arm, side, or leg, in an indictment for murder, it was indispensable to state it to be the right or the left arm, hand, side, or leg. But it is equally clear that this was requisite as a matter of form in the indictment, from respect to precedents, and to no other purpose. It was not regarded as one of those substantial averments to which the proof must correspond in manner and form; for *Lord Hale* states "that an indictment for murder, besides laying the act to have been done *felonice,* and ascertaining the time, must have these certainties and requisites: (1) Declare with what it was done, namely, *cum gladia;* though killing with another weapon maintains the indictment. (2) Must show in what hand the sword was held; and for want of that an indictment had been quashed. (3) It ought to show in what part of the body the deceased was wounded, and therefore, if it be on the hand or arm, without saying whether right or left, it is not good. (4) The length and depth of the wound is to be shown." Yet he adds, "But, though the manner and place of the hurt and its nature be requisite, as to the formality of the indictment, yet if, upon evidence, it appears to be another kind of wound in another place, if the party died of it, it is sufficient to maintain the indictment." Thus we see that so great respect was paid to the form of indictments, as settled by precedents, that an indictment was actually quashed for not averring which hand held the weapon with which the wound was given; but, nevertheless, the evidence need not show that it was with or on the right or left hand, though so laid in the indictment. Archb. Cr. Pl., 315. It was upon that ground, namely, that the manner and form of laying the cause of the death and describing the wound was not of the substance of the indictment, that the Court held, in *S. v. Moses,* 13 N. C., 452, that under the act of 1811 an indictment was good which did not state the dimensions of the wound. It was deemed unneces-
(42) sary to charge any matter which need not be proved on the trial; and that was laid down as the rule of construction of the statute. It was considered at the time that at common law it was indispensable to state the dimensions of the wound, according to the ancient authorities, and *Owen's case* in this State; and it was supposed that the law so continued in England up to that time. We were not then aware of the St. 7 Geo. IV., ch. 64, whereby several most material alterations were made in the law in that country as to the form of indictments and the proceedings thereon, and the mode of taking advantage of certain

defects in them; among which is a provision that no judgment upon any indictment, whether after verdict, or outlawry, confession, or otherwise, shall be stayed or reversed "for want of the averment of any matter unnecessary to be proved." It was thus, by an express enactment, that the same provision was adopted there which this Court thought was one of the necessary effects of the general terms of our enactment, except that by the English statute the defects are waived by pleading over, and, therefore, are still open to a demurrer, whereas by ours the indictment, notwithstanding the defects, is sufficient to all intents and purposes, and cannot be quashed nor the judgment arrested. We find it stated accordingly by a respectable writer on pleading in criminal cases, after mentioning the rule as to laying in what part of the body the wound was given, that it would be ridiculous to attempt to account for or justify that particularity; and he gives his reason for the remark in these words: "For the same strictness is not required as to the evidence necessary to support it; as if, for instance, the wound be stated to be on the left side, and proved to be on the right, the variance is immaterial; and, *for this reason,* the objection can now only be taken by demurrer," by force of the act 7 Geo. IV., ch. 64; Archbold Cr. Pl., 316. For the same reason it cannot be taken here in any way, according to the act of 1811, Rev. Stat., ch. 35, sec. 12. It may be mentioned by (43) the way, that the very point decided in *S. v. Moses* was in 1825 so adjudged in England in *Rex v. Mosely,* R. and M., 97, in which it was held by ten judges that, as it was never necessary to prove the wound as laid, it is not at common law necessary to state in the indictment the length, breadth, or depth of it.

When it is thus seen that an indictment for a capital felony, which charges a mortal wound in the right ear, is supported by evidence of the wound in the left ear, it would seem to follow necessarily that an indictment for the misdemeanor of biting off the right ear is, in like manner, sustained by proof that the left ear was bitten off. The offense by the statute is biting off "an ear," and as there is no difference in the crime, whether it be one or the other, the substance of the offense charged is established by proof that it was either ear. As *Lord Hale* says, it is fit to be laid as near the truth as may be, yet if upon the evidence it appear to be a wound in another place, it is sufficient. There must doubtless be a charge of biting off an ear, because that member is the specific object of the enactment; but it is not necessary the indictment should state whether it be the right or the left ear, to enable the accused to defend himself, or to inform the court of the act creating the offense or of the punishment prescribed, nor to give the party the full benefit of the plea of former acquittal or conviction. If not good in this general form upon the principles of the common law applicable to the mode of

charging offenses against the person of another, the Court holds that it is clearly good under the act of 1811, because the *corpus delicti*, as constituted by the statute, namely, "on purpose and unlawfully, but without malice aforethought, biting off an ear of another person," is described in it in a plain, intelligible, and explicit manner. Therefore the refusal to pass judgment on the indictment under the statute was erroneous.

Further proceedings may be had on the verdict accordingly.

(44) PER CURIAM. Error.

Cited: *S. v. Shepherd,* 30 N. C., 199.

JACOB G. WALKER ET AL. v. JAMES FAWCETT ET AL.

1. Where a conveyance is made to A, B, and C for a certain tract of land, as trustees for the Methodist Episcopal Church, a suit of trespass *quare clausum fregit* may be brought by A, B, and C against the wrong-doers, though they may not have been appointed trustees according to our act of Assembly in relation to the appointment of trustees by religious congregations.
2. The title is vested in them individually and they may recover at law, though in the writ and declaration they style themselves "trustees." The latter word may be rejected as surplusage.
3. It is only when a suit is brought by persons, who claim as "successors," that the question arises, whether the original bargainees were duly chosen the trustees of a religious congregation, and whether the persons suing were also duly chosen trustees, so as to give them legally the character of "successors" to the former, and thereby vest in them the title to the property, which is necessary to support an action.

APPEAL from ORANGE Fall Term, 1846; *Battle, J.*

Trespass *quare clausum fregit,* tried on the general issue. The plaintiffs are Jacob G. Walker, James Murray, and seven other persons, and they claim the premises under a deed made to them by Thomas White and Mary P. White. The deed is dated 26 September, 1838, and purports to be a deed of bargain and sale for 5¼ acres of land (in

(45) consideration of $1) from the bargainors to Walker, Murray, and the other seven plaintiffs "and their successors (appointed according to the deed of settlement used by the Methodist Episcopal Church as contained in their discipline), trustees in trust for the uses and purposes hereafter mentioned and declared, to have and to hold unto them, the said Jacob G. Walker, James Murray (and the other seven plaintiffs), and their successors in office forever: *In trust* that they shall erect and build or cause to be erected and built thereon a

house or place of worship for the use of the Methodist Episcopal Church in the United States of America, according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said Church at their General Conference in the United States of America; and *in further trust* that they shall at all times forever hereafter permit such minister and preacher belonging to the said Church as from time to time may be duly authorized by the General Conference of the ministers and preachers of the said Methodist Episcopal Church, or by the Annual Conference, authorized by the said General Conference, to preach and expound God's holy word therein."

The plaintiffs gave further evidence that by the rules of discipline of the Methodist Episcopal Church in the United States the minister having charge of a circuit is to nominate trustees for the different churches or congregations in his circuit, except in States where the law prescribes a different mode of appointment; and the plaintiffs gave further evidence that a house called Mount Pisgah Meeting-house was erected on the premises as a place of worship, and was used for that purpose by a congregation of religious persons belonging to the Methodist Episcopal Church, under the charge of a minister and preacher of the circuit in which the meeting-house was situate; and that before the said deed was made, and when the congregation that usually worshiped at that meeting-house was assembled therein, the said minister and (46) preacher announced to the congregation the appointment of the nine persons, who are the plaintiffs in this action, as trustees for that congregation to receive a conveyance for their land and take charge of the property belonging to the congregation and church; and that to such announcement no assent was expressly given nor objection made by the congregation. But the plaintiffs gave further evidence tending to show that they accepted the office or trust, and proved that they accepted the said deed from Thomas White and Mary P. White.

The defendants thereupon insisted that the plaintiffs were not elected or appointed trustees in the manner prescribed by the statute, and, therefore, that they could not maintain this action, in which they name themselves trustees; and further, that the deed did not pass the title to the plaintiffs, by reason that the trust therein expressed is too indefinite. The presiding judge declared his opinion to be with the defendants on the first ground; and for that reason, without deciding the second point, the plaintiffs were nonsuited, and appealed.

Venable and McRae for plaintiffs.
Norwood for defendants.

RUFFIN, C. J. The Court is of opinion that it was not correct to nonsuit the plaintiffs on the ground stated. The action is brought by

the persons, and all the persons, to whom the deed was made; and if it passed the legal title to them, in any capacity, they have the right to bring this action. It is true that in the writ and declaration the plaintiffs are styled "trustees"; but, by itself, that is an unmeaning term, and does not affect the proceedings for good or harm, but is mere surplusage. The action in all such cases is brought by the plaintiffs in their natural capacity; for, as they are not incorporated, they have no name by which they can describe themselves in pleading but their names as natural persons. It is enough, therefore, to sustain their
(47) action that they show a legal title in them by a conveyance or otherwise. Where the plaintiffs, as here, are the very persons to whom the deed for the premises was made, they must recover on the legal title, which is in them for their lives, at least, by operation of the deed, under the general law, and without any help from the act concerning religious societies. It is when a suit is brought by persons who claim as "successors" that the question arises whether the original bargainees were duly chosen the trustees of a religious congregation, and whether the persons suing were also duly chosen trustees, so as to give them legally the character of "successors" to the former, and thereby vest in them the title to the property, which is necessary to support their action. But these plaintiffs are not obliged to show themselves to be trustees by election of the congregation, according to the statute, because by the deed they have the title; and it does not impair their title that they hold it as trustees, by contract, for a religious society. That observation distinguishes this case from those of the *Trustees v. Dickinson,* 12 N. C., 189, and *White v. White,* 18 N. C., 260, on which the objections here were probably raised. There the deeds were made to persons who were admitted to be the trustees of the societies, duly chosen, and in the former case the action was by successors; and the Court held that the deeds were inoperative because they were made, not, in truth, in trust for the society, but in fraud of the law, and against its policy, upon a forbidden trust to emancipate the slaves, or to hold them in a state of *quasi* freedom. The Court could not, therefore, in *White v. White,* upon any just ground, uphold the deed to the trustees as made to them and without regard to their relation to the society, against the express terms of the deed itself, and also against the actual intention of the parties to the instrument. But here the defendants deny that
(48) the plaintiffs were the trustees of the congregation of Methodists; and, indeed, base the objection to their recovery on that very ground. If that be true, there is, plainly, no reason against the operation of the deed, as one founded on a good consideration and to persons in their natural capacity; for the plaintiffs would then have but their natural capacity, and there is nothing immoral or illegal in their taking

a conveyance of land to them, as natural persons, in trust to allow a Christian church to erect on it and use a place of worship. The plaintiffs were either the trustees duly chosen by the congregation, or they were not; and in either case they can have this action. If the former be the truth, then their title would be sustained by the act of 1796, according to the defendants themselves. If the latter, then, independent of the act, the plaintiff's title would be good, because they had but a capacity as natural persons.

Whether the trust can or cannot be enforced is not material, for, not being for an immoral or unlawful purpose, it does not affect the operation of the deed as a conveyance of the legal estate; and, therefore, the point is not further considered here, but left for the cognizance of the court having jurisdiction of trusts. These defendants, who are strangers and wrong-doers, have no concern with that question.

PER CURIAM. Reversed.

THE STATE v. J. W. GARLAND ET AL.

1. The State can bring an action in the Superior Court on a bond payable to herself for a sum less than one hundred dollars.
2. General statutes do not bind the sovereign, unless expressly mentioned in them.

APPEAL from MACON Fall Term, 1846; *Caldwell, J.*

Debt on a bond for $24.50, which was given to the State, it is said, for the purchase money of a tract of what is called the Cherokee land. It was instituted in the Superior Court, and, considering (49) that the action is by writ at the common law, and looking to the statutes relative to the debts for Cherokee lands, the presiding judge was of opinion that the court had not jurisdiction of the case, and, on motion of the defendants, dismissed the suit. From that decision the attorney for the State appealed.

Attorney-General for the State.
Henry W. Miller for defendant.

RUFFIN, C. J. The only question is whether the State can bring an action in a Superior Court on a bond for a less sum than $100, and, as we think, she undoubtedly may. This results plainly from a few undeniable elementary principles. In the first place, the Superior Court is one of general jurisdiction, being the highest court of original jurisdiction in the State, and it may take cognizance of all suits which are

not taken from it by statute. Besides, the act of 1777, ch. 115, sec. 2, expressly enacts that it shall have legal jurisdiction of "*all pleas of the State,*" and criminal matters, of what nature, degree, or denomination soever, whether brought before the court by original or mesne process, *certiorari,* writ of error, appeal, or any other way or means, except where it is or may be otherwise directed by act of the Legislature. To oust the jurisdiction, then, it is requisite to show a statute that pleas of the State for sums under $60 or $100 shall not be within the cognizance of the Superior Court, but shall be brought before some other tribunal. There is no such statute. No doubt, the motion in this case was founded on secs. 40 and 42, ch. 31, Revised Statutes, which provide that if a suit be commenced in the Superior Court for a sum less
(50) than $100 due by bond, it shall be dismissed. But it is a known and firmly established maxim that general statutes do not bind the sovereign unless expressly mentioned in them. Laws are *prima facie* made for the government of the citizen and not of the State herself. The very section under consideration has a provision which furnishes an example of the rule that the sovereign is not to be brought within the purview of a statute by general words, but only by being expressly named. The provision is that when a suit is dismissed, or the plaintiff nonsuited upon the ground that the case is not within the jurisdiction of the court, the plaintiff shall pay all costs. Now, no one will say that there can be judgment against the State for costs in any case. But it is unnecessary to exemplify the rule, as it is well established as applying generally to the rights of the public. Upon this ground, therefore, and by itself, the action was cognizable in the Superior Court. The remark of his Honor, that this proceeding is by writ, according to the course of the common law, and, therefore, that the court had not jurisdiction, refers, it is presumed, to the statutes which authorize judgments upon motion against accounting officers or other debtors to the State. 1793, ch. 383, and 1822, ch. 1150. It seems to have been supposed that these acts create the jurisdiction in these cases; and it is thence inferred that without a similar act expressly embracing the proceeding by writ and declaration there is no jurisdiction of an action of the latter kind. But that is reversing the rule of law, and supposing that there must be express enactments in order to vest the courts with jurisdiction of pleas of the State; whereas it requires a prohibitory statute to oust the jurisdiction. The acts alluded to were not necessary to confer jurisdiction of demands by the State, but their purpose was merely to give the summary proceedings by motion; and they do not affect the remedy at common law.

(51) There is, also, another consideration which renders it plain that every plea of the State is cognizable in a court of record.

The State, as an artificial being, cannot appear before a judicial tribunal otherwise than by attorney; and she has appointed no officers to represent her in her pleas before a justice of the peace, nor are there any attorneys at law who, as such, represent suitors out of court. It is not to be supposed that the State's revenues are to rest upon evidences of debt held by justices and constables, instead of appearing of record, and being under the immediate control of the great revenue and law officers. These observations are peculiarly applicable to that part of his Honor's reasoning which is drawn from the acts relative to the debts for Cherokee land. There is nothing in those acts which seems to have any bearing upon this question. The acts are supposed to be those of 1840, ch. 4, and 1844, ch. 2, which provide for the appointment of an agent of the State, resident in Macon or Cherokee County, with authority to receive payment from the debtors, and to bring suit on the bonds when directed by the Treasurer or when he thinks the interest of the State may require it. That means only that the agent shall cause proper suits to be instituted; and it no more makes it his duty or confers the authority on him to appear before a justice of the peace out of court than it does to appear before a court of record as the attorney at law of the State. It creates no change of the law as to the jurisdiction of the courts.

We do not say that a justice could not give judgment for the State, if she were to bring a suit before him; but clearly the State can sue in her own courts of record until she shall expressly deny herself the right.

PER CURIAM. Reversed, and *procedendo* ordered.

Cited: S. v. Adair, 68 N. C., 70; *Harris, ex parte*, 73 N. C., 66; *Guilford v. Georgia Co.*, 112 N. C., 38.

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(52)

STATE v. HATHCOCK ET AL.

1. An indictment which charges that "A, B, and C, etc., with force and arms, etc., unlawfully, riotously and routously did assemble together to disturb the peace of the State, and did then and there, being so assembled and gathered together, make a great noise and disturbance in and near the dwelling-house of one W. S., proclaiming that the said W. S. and his wife were persons of color, offering them for sale at auction, and calling them vulgar and opprobrious names, all of which was done in a loud voice, so that the same could be heard at a great distance, to the great damage and terror of the said W. S. and his wife and the common nuisance, etc.," does not charge any criminal offense, inasmuch as it does not state that the said W. S. or his wife were in the house at the time.
2. Every indictment is a compound of law and fact, and must be so drawn, that the court can, upon its inspection, be able to perceive the alleged crime.

APPEAL from STANLY Fall Term, 1846; *Dick, J.*

The indictment is in the following words: "The jurors for the State, upon their oath present, that Nelin Hathcock, James Hathcock, and Green Hathcock, late of the county of Stanly, together with divers other evil disposed persons to the number of ten or more, to the jurors aforesaid unknown, on the 20th day of August, in the year of our Lord 1845, with force and arms, to wit, with sticks, staves, and other offensive weapons, at and in the county of Stanly aforesaid, unlawfully, riotously and routously did assemble and gather together to disturb the peace of the State, and did then and there, being so assembled and gathered together, unlawfully, riotously, and routously make a great noise and disturbance in and near the dwelling-house of one Willis Shed, proclaiming that they, the said Willis Shed and his wife, Election Ann Shed, were persons of color, offering them for sale at auction and calling them vulgar and opprobrious names, all which was done in a loud voice, so that the same could be heard at a great distance, to the great damage and terror of the said Shed and wife, and the common nuisance of the good citizens (53) of the State, and against the peace and dignity of the State."

The defendants upon the trial were convicted, and moved in arrest of judgment "because no offense was set forth in the indictment known to the law; or, if any offense was set forth, it was not sufficiently set forth." The motion was overruled, and the defendants appealed.

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

NASH, J. Every indictment is a compound of law and fact, and must be so drawn that the court can, upon its inspection, be able to see the alleged crime. The offense, here intended to be charged against the defendants is that of a riot: in their assembling in a tumultuous manner in and about the dwelling-house of Shed, and there making a great noise, using abusive and insulting language. The gist of the offense consists in the defendants using such force and violence as amounted to a breach of the peace, and the law requires that in indictments of this kind the facts shall be so charged as to show a breach of the peace, or acts directly tending to it, and not a mere civil trespass. Here nothing but a civil trespass is charged. The indictment does not state that Shed or his wife, or any member of his family, was in the house or present at the time the defendants were guilty of this improper conduct; and, indeed, for anything that appears upon the record, the house was vacant. It is true, it is charged that the acts were committed "to the great damage and terror of the said Shed and his wife," but a conclusion cannot make an averment. Men may be guilty of a riot in assembling together to the number of three or more and in a tumultuous and violent

manner breaking into a house, or demolishing it, or otherwise injuring it, though neither the owner nor any of his family be present; for that is, in itself, a breach of the public peace; but the essence of the charge here is not for any violence done to the dwelling-house, (54) but for riotously disturbing the owner in the quiet and peaceable possession of it, and the charge is not made with sufficient legal certainty unless it appear upon the face of the indictment that the owner or his family were present to be so disturbed. In looking into the precedents, we find this principle to run through them; thus 2 Chitty Criminal Law, 505, in giving the form of an indictment against three persons for a riot before the house of G. H., and shooting off a loaded gun, after setting out the riotous conduct of the defendants, charges, "and thereby *then* and *there*, not only greatly terrified and alarmed the said G. H. and his family, and disturbed and disquieted them in the *peaceable* and *quiet possession, use*, and *occupation of the said dwelling-house*," etc. It is very important that the line of distinction which separates a civil from an indictable trespass shall be kept as clear and distinct as the nature of the offense will permit; and in order to bring a trespass within the criminal jurisdiction of the court it must appear on the face of the indictment to amount to a violation of the criminal law.

It is the opinion of this Court that the judgment below is erroneous.

PER CURIAM. Reversed.

Cited: *S. v. York*, 70 N. C., 67; *S. v. Stamey*, 71 N. C., 203; *S. v. Smith*, 106 N. C., 657; *S. v. Davenport*, 156 N. C., 615.

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(55)

THE BANK OF CAPE FEAR v. GURDON DEMING.

Under the charter of the Bank of Cape Fear the bank is exempt from all taxes, town as well as county and State taxes.

APPEAL from CUMBERLAND Fall Term, 1846; *Settle, J.*

The action is brought to recover from the defendant a sum of money under the following circumstances: The Bank of Cape Fear is a banking corporation, having a branch in the town of Fayetteville, where it owns real estate. The defendant is the officer duly appointed and authorized to collect the town taxes for the year 1845. He demanded those duly assessed upon the real property of the plaintiffs in the town, which were paid under a reservation of their rights. The taxes so collected are what are called town taxes, for the use of the town. There being a verdict and judgment for the plaintiff, the defendant appealed.

Strange for plaintiff.
(58) *Warren Winslow for defendant.*

NASH, J. We consider this case as entirely within the decision of the Court in *Bank v. Edwards,* 27 N. C., 516. It was there decided that under the charter granted to the plaintiffs they were not bound to pay the tax imposed for county uses; that they were public dues. It is thought by the defendant, and so argued before us, that taxes imposed for the use of the town of Fayetteville are not public dues. The reply is, they are as much public dues as county taxes are. The latter are imposed, not for the benefit of the State at large, but for that of a particular district called a county; and so of the former, they are imposed for the special benefit of a particular district called a town. In common parlance we call those taxes under which the revenues of the State is collected, the public taxes, and the rest take their particular designation from the uses to which they are devoted, as, the poor tax, taxes for county purposes, taxes for town purposes. They are, however, all taxes, imposed either by the Legislature immediately or under power granted by that body. When, therefore, the Legislature in granting the charter of incorporation to the plaintiffs say that in consideration of their paying into the public treasury annually 25 cents upon each share owned by private individuals "the said bank shall not be liable to any other tax," it is saying that they shall not pay *any* other tax but the one imposed by the charter. It may be the Legislature meant
(59) only that the bank should not be called on by them to pay any other sum in the way of taxes, into the Public Treasury. If so, they have not made themselves so intelligible as to show such was their meaning; nor is there anything in the act itself, or in the subject-matter, to point out to us that their meaning was different from what their words import on their face.

On behalf of the defendant it has been urged before us that the word "taxes" means parliamentary taxes, as it is termed, and does not embrace those imposed by the commissioners of a town for town purposes. To support this position our attention has been directed to several authorities. We have examined them with that attention which is due to every suggestion made at the bar. Our examination has led to a directly contrary opinion: that they not only do not sustain the defendant's position, but that, under them, it fails him entirely.

Lord Holt, in *Brewster v. Kidgell,* Carthew, 438, says: "The word 'taxes' comprehends rates for the church, and poor, and those rates imposed by the commissioners of the sewers, as well as parliamentary taxes." *Lord Coke,* 2 Inst., 532, says that "Talliage (the ancient word used for taxes) is a general word and includes all subsidies, taxes, tenths, fifteenths, impositions, or other burdens or charges put or set upon any

man"; and so *In the matter of the Mayor, etc., of New York,* 11 John., 77. In the latter case the question arose under an act of the Legislature of that State, wherein it was provided "that no real estate belonging to any church or place of worship, etc., shall be taxed by any law of the State." The commissioners of the city, in widening and extending Nassau Street, made a report of the estimate and assessment of the damage and benefit to the parties interested, etc., among which or whom were certain churches. These churches objected to the report upon the ground, principally, that the word tax used in the act comprehended every species of contribution or burden imposed by the (60) authority of the State. The Court decided "that the provisions of the act all refer to general and public taxes to be assessed and collected for the benefit of the *town*, county, or State at large," and further, "that the word 'taxes' means burdens, charges, or impositions put, or set, upon persons or property, for public uses; and they refer to the authorities already cited. We think this is a case very strongly in point for the plaintiffs. It is true, the judgment was against the churches, not because the assessment was a tax, for they expressly say it was not, but because the Legislature intended to relieve the churches from these public burdens. "But to pay for the opening of a street, in a ratio to the benefit or advantage derived from it, is no burden," and is not a tax.

These authorities satisfy us that the assessment made by the commissioners of Fayetteville upon the real estate of the plaintiffs within the corporation was, in the legal acceptation of the word, a tax. The dues so to be collected are, in the acts incorporating the town of Fayetteville, called a tax, and are uniformly so designated in every act passed by the Legislature granting a municipal incorporation.

We have not been able to see the force of the argument drawn from the inequalities of the burden imposed upon the citizens of the town by withdrawing from taxation such a part of the taxable property; nor can we perceive the want of power in the Legislature to grant the exemption, when the public good requires it. By the revenue act, Rev. Stat., ch. 102, sec. 2, the real estate belonging to the University and such houses and lots and other real estate as are set apart and appropriated to divine worship, or for the education of youth, or the support of the poor, and also such real property as is or shall be exempted by any act creating a society or company with corporate powers or privileges, shall be exempt from paying public taxes. Acts of this kind are nearly coeval with our Government, and have been sustained in our courts; (61) and yet they withdraw from taxation much valuable property, and thereby increase the burden of those whose property is not exempt.

We perceive no error in the opinion of the court below.

PER CURIAM. Affirmed.

THE STATE v. THOMAS G. ELLINGTON.

In forming a jury in the trial of an indictment for murder the prisoner challenged a person, tendered as a juror, because he was not indifferent for him. To sustain the challenge before the court, the prisoner offered that person as a witness, and, being sworn, he stated "that he had formed and expressed an opinion adverse to the prisoner, upon rumors which he had heard, but that he had not heard a full statement of the case, and that his mind was not so made up as to prevent the doing of impartial justice to the prisoner." *Held*, that, upon this evidence, the court might find that the juror was indifferent; and having so found, as a matter of fact, the Supreme Court cannot revise their decision.

APPEAL from ROCKINGHAM Fall Term, 1846; *Battle, J.*

The prisoner was indicted for murder, and when forming the jury he challenged a person tendered as a juror because he was not indifferent for him. To sustain the challenge before the court the prisoner offered that person as a witness, and, being sworn, he stated "that he had formed and expressed an opinion adverse to the prisoner, upon rumors which he had heard, but that he had not heard a full statement
(62) of the case, and that his mind was not so made up as to prevent the doing impartial justice to the prisoner." The court "decided that the said J. W. is indifferent," and thereupon the challenge was overruled, and then the prisoner challenged the juror peremptorily.

Upon the trial the mother and a sister of the prisoner were witnesses for him, and their credibility was attacked on the part of the State. In the argument before the jury the counsel for the State urged their relation to the prisoner as one reason, amongst others, which affected it; and in charging the jury the presiding judge, in reference to the point, informed them "that it was their province to determine on it, and that it was for them to say whether those witnesses had testified truly, notwithstanding their relation to the prisoner, or had yielded to that human infirmity to which we are liable, and had testified falsely in favor of their son and brother."

After conviction, the prisoner moved for a *venire de novo*, upon the grounds, first, that his challenge for cause was not allowed, and, secondly, that the judge had expressed an opinion upon the facts, contrary to the act of 1796. But the court refused the motion, and passed sentence of death on the prisoner, and he appealed.

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

RUFFIN, C. J. The discussion in *S. v. Benton*, 19 N. C., 196, of the point respecting the juror left little to be said on the rule in our law

on that subject; and it is only necessary to compare the present case with that to see that this judgment cannot be reversed on the first ground. The conclusions there arrived at are that an opinion fully made up and expressed is a good cause of principal challenge, as a matter of law, but that one imperfectly formed, or one merely hypothetical, that is, formed on the supposition that facts are as they have been represented, does not constitute cause of such a challenge, but "of challenge (63) to the favor, which is to be allowed or disallowed, as the triers shall find the fact of favor or indifferency." When the record sets out simply the matter alleged as the cause of challenge, and a disallowance of the challenge, the truth of the matter so alleged is understood to be admitted, and the decision is assumed to be of the matter of law, substantially as on demurrer. That, of course, can be reviewed. But when upon evidence *the fact* of favor or indifferency is found, whether by triers or by the court in their stead, the finding cannot be reviewed, but is conclusive. Those are the general doctrines of that case. The particular circumstances of it were that a juror was challenged by the prisoner because he had formed and expressed an opinion, though he said further that his opinion was not so fixed as to influence him in making up a verdict, but that he could pass impartially on the case after hearing the evidence; and thereupon the record stated merely that the court overruled the challenge and put the prisoner to his peremptory challenge. Upon that record the court held that if it had appeared that the opinion which the juror had formed was adverse to the prisoner it would have been a good ground of principal challenge, notwithstanding the subsequent qualifications with which the juror described his opinion. But that was owing to the state in which the record placed the case. It did not appear from what source the juror drew his opinion—whether from personal knowledge, or from his presence at an examination of witnesses respecting it, or from the relation of one who was present at it, or from newspapers or other medium of common fame. But even under those circumstances the court considered that, in point of fact, there was room for doubt whether the juror had any fixed opinion or bias, especially as it is common experience that persons seek to be excused from serving as jurors upon the ground of an opinion, when in truth they have none that is fixed. And the court said (64) that if it were so, then there would be but a cause of challenge to the favor; and the judge, on becoming satisfied that what the person called an opinion was not such in legal meaning, and had left no unfavorable bias upon the mind, would be perfectly correct in overruling the challenge. The difficulty, however, in that case was that, though we might much suspect that to be the fact, as to the opinion or degree of bias, this Court could not judicially act on it because we were bound

down by the record, and that described the opinion "as one formed and expressed," and without further explanation we must understand it to be fully formed and gravely expressed. We could not regard the subsequent explanation of the juror, because it was not inconsistent with that understanding, as many persons cannot divest themselves of settled opinions, and some even are so weak as to continue under the influence of impressions or opinions—if they may be so called—founded on rumor alone, and notwithstanding subsequent evidence to the contrary; and, at all events, as the indifferency was not found in the Superior Court, this Court could not assume it, but ought, if there were any doubt of it upon the whole record, to presume the fact most favorably to the prisoner, and understand the judgment to have been that the alleged cause was insufficient in point of law.

In the present case, however, the court expressly finds *the fact* "that the juror is indifferent," and upon that finding proceeds to overrule the challenge. The indifferency of the person at the time of the trial being admitted or established, we think it cannot be seriously doubted that, notwithstanding his previous impressions against the prisoner, he was a competent juror. The challenge could not be allowed, after that finding of the fact, unless it be the judgment of the law that the human mind is so constituted that after entertaining from rumor an
(65) opinion of the guilt of an accused person, it cannot deliberately investigate that question upon evidence, and impartially decide according to it when legally given, or determine upon a defect of proof. We think there is no such rule of law, and that there ought not to be such a rule. Rumor is so proverbially false, it would seem, that no man with sense enough to sit on a jury in any case could found upon it an opinion affecting the person or property of another that would stand one moment in opposition to evidence given on oath in a court of justice, or on which he could pass the judgment of the law without evidence duly given. Little credit is due to rumor upon any subject; and persons conversant with judicial inquiries and discussions know by experience that perhaps less is to be allowed to it respecting controversies *sub judice* than anything else almost. Gentlemen of the bar are aware that they can seldom rely even upon the relation of their clients for the facts of their own cases as they are to appear to be on the trial from the evidence; and they seldom undertake to judge the result until the proofs be closed. Such persons, therefore, find it difficult to conceive how the mind of an upright man can from such a source as rumor derive an impression that can properly be called an opinion that one is or is not guilty. But we suppose there are persons of minds too weak to distinguish the just grounds of decision, who might not be able to divert their attention from the rumor and direct it to the evidence,

or with minds greedy of evil reports, and inclined to yield them credence, and obstinate in retaining and defending impressions from them; and when a person is tendered as a juror who, upon evidence of himself or others, is found to possess such a mind and such a disposition towards a party, it is a just exception to him. But, on the other hand, evidence that a juror had upon rumor formed an opinion and expressed it does not conclusively establish that it is really an opinion that would hinder an earnest investigation of the truth of the case and an honest determination of it; in other words, a fair trial—such a trial (66) as the juror would give if he had never heard the rumor. Such an opinion would seem in its nature to be hypothetical—one founded on the supposition that the facts are according to the rumor. But admit it to be otherwise, and that, nothing else appearing, the forming and expressing an opinion upon the ground of rumor alone is, *prima facie,* evidence that the juror is not indifferent; yet when the party calls the challenged person as the witness to prove his state of mind and feelings towards him, and, after stating honestly what they had been, he proceeds further to depose that he had only heard an account of a part of the case, and that, notwithstanding his former opinion, his mind was then in a state to do impartial justice between the State and the prisoner, according to the evidence, that is clearly evidence on which there may be *a finding of the fact* that the person tendered was indifferent. Something might depend on the impression made on the triers by the appearance and examination of the person, as to his intelligence, his habit of and capacity for investigating questions depending on evidence, the coolness of his temper, and general impartiality and candor. But, certainly, for ordinary cases, the evidence here given was sufficient to justify triers or the court in finding this person "to be indifferent," and that he would "*well* and *truly* try the issue joined." And it cannot be that there is any rule of law concluding the triers or judge from finding as the fact what so obviously ought to be, and so probably was, the fact. It having been found in this case upon the prisoner's own evidence, it is conclusive; and there cannot be a *venire de novo* on that.

It also seems to the Court that the prisoner can take no benefit from his other exception. His Honor did not express an opinion upon any fact in controversy; but merely applied a rule of law to an admitted fact. It was not disputed that the witnesses were the mother and sister of the prisoner; and the court, therefore, did not err in so con- (67) sidering them. Nor was there error in telling the jury that their relation to the prisoner affected their credit. That is a proposition of reason and law. The law takes notice that some relations are so close that persons standing in them, though they might tell the truth, cannot be trusted in general; and, therefore, it excludes them altogether. That

rule does not, indeed, embrace parents and children, or brethren. Yet all writers upon evidence say that, though it does not make them incompetent, it goes to their credit, because we know that such relations create a strong bias, and that it is an infirmity of human nature sometimes, in instances of great peril to one of the parties, to yield to the bias produced by the depth of sympathy and identity of interests between persons so closely connected. How far these witnesses adhered to their integrity, or were drawn aside by the ties of nature between them and the prisoner, in other words, the degree in which the relation actually affected their veracity, was a question for the jury; and his Honor left it to them explicitly. It was proper to let them know that they might legally take the relation into their consideration in estimating the credit to be given to their testimony; and there was nothing improper in stating, also, the reason on which the rule of law rests.

The opinion of the Court is that there was

PER CURIAM. No error.

Cited: *S. v. Nash,* 30 N. C., 37; *S. v. Dove,* 32 N. C., 472; *S. v. Nat.* 57 N. C., 117; *S. v. Collins,* 70 N. C., 243; *Flynt v. Bodenhamer,* 80 N. C., 207; *S. v. Boon,* 82 N. C., 648; *S. v. Jenkins,* 85 N. C., 546; *Buxly v. Buxton,* 92 N. C., 484; *S. v. Green,* 95 N. C., 613; *S. v. De Graff,* 113 N. C., 691; *S. v. Bohanon,* 142 N. C., 697.

(68)

STATE v. E. M. McINTOSH ET AL.

1. Where, in an action against the sheriff and his sureties for failing to collect the county taxes, it appeared from the record that "twenty-two justices" were on the bench when the taxes were assessed: *Held,* that the court must intend that these were a majority or the whole of the justices of the county, and, therefore, the taxes were properly imposed.
2. This is different from the cases in which the law requires a *certain number* of justices to be present when a tax is imposed, and the record does not show that the requisite number was present.

APPEAL from MOORE Fall Term, 1846; *Settle, J.*

Debt, brought upon a bond, purporting to be the official bond of the defendant, E. McIntosh, as sheriff of the county of Moore. The other defendants are sureties. The bond is in the form usual in such instruments and contains the usual conditions. The breach assigned was for failing to collect the county taxes. In order to show that the taxes were duly imposed, the plaintiff produced the records of the county court of Moore, from which it appeared that at the time of their assessment twenty-two magistrates were on the bench. On the part of the defendants it was objected that to enable the court to assess the county taxes it

was necessary that a majority of the acting justices should be present on the bench, and that such must appear to be the fact from the record itself, "in so many words"; that the record here produced does not show that the twenty-two magistrates, who are named did constitute such majority. To remove the objection, the plaintiff offered to prove that the twenty-two magistrates whose names appear on the record as being present at the assessment of the taxes did constitute a majority of the acting justices of the county. This evidence was rejected by the court.

His Honor being of opinion with the defendants, the plaintiff, in submission to it, suffered a nonsuit and appealed. (69)

Strange for plaintiff.

D. Reid and A. K. Kelly for defendants.

NASH, J. The objection of the defendants was that the record did not aver *in hæc verba* that a majority of the acting justices were present making the assessment, but it nowhere appears in the record that there were any more justices in the county. For aught that appeared, those twenty-two who were present did constitute a majority of the whole body of the magistracy of the county. Every case which has been before this Court on the delivery of the official bonds of sheriffs and constables, and when it has been held there was no delivery for the want of a court properly constituted to receive it, has been a case in which the Legislature has itself designated the precise number of magistrates which shall constitute a court for that purpose, and the records have shown that there were not that number. Thus in the several cases of *S. v. Wall,* 24 N. C., 273, the records show that a less number of magistrates were on the bench where the action of the court complained of took place than was by law required. In *Dudley v. Oliver,* 27 N. C., 227, the requisite number of justices was not named as being present, and at the same time it appeared that there were others. In the case now before us the law does not point out the precise number of magistrates necessary to be on the bench when the taxes are laid, but leaves that to be ascertained by the number of acting justices in the county. There is nothing in the record, as it appears before us, to show that there were any other magistrates in the county of Moore than those enumerated, and, of course, there was a majority present.

There were several other points taken by the defendants, on which the opinion of the Court was in favor of the plaintiff, and therefore we can take no notice of them.

We are of opinion there was error in the judgment below, and (70) it must be

PER CURIAM. Reversed.

Cited: Clifton v. Wynne, 80 N. C., 148.

THE STATE v. PATTERSON.

The defendant was indicted and convicted upon the following indictment, to wit:

"STATE OF NORTH CAROLINA, } Superior Court of Law.
GREENE COUNTY. } Fall Term, 1846.

The jurors for the State, upon their oath, present that John Patterson, late of the county of Greene, on 1 August, 1845, and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at and in the county aforesaid, did keep and maintain a certain common ill-governed and disorderly house, and in his said house, for his own lucre and gain, certain persons, as well free as slaves, to frequent and come together, then and on the said other days and times, there unlawfully and willfully did cause and procure, and the said persons in his said house at unlawful times, as well in the night as in the day, then and on the said other days and times there to be and remain, drinking, tippling and misbehaving themselves unlawfully, and willfully did permit and doth permit to the great damage and common nuisance of all the citizens of the State there inhabiting, residing and passing, to the evil example of all others in like case appending, and against the peace and dignity of the State." Upon motion in arrest of judgment, *Held*, that this indictment did charge a criminal offense, and that it was not necessary to set further the particulars, as the names of the parties, etc., though these particulars might be given in evidence on the trial.

APPEAL from GREENE Fall Term, 1846; *Manly, J.*

Indictment, as above set forth, and the defendant, being con-
(71) victed, moved in arrest of judgment that the indictment contained no criminal charge. The judge refused the motion, and defendant appealed.

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

DANIEL, J. We think that the judge was right in overruling the motion in arrest of judgment. The indictment is (with the omission of the words "cursing, swearing, quarreling") a copy from the precedent to be found in 2 Chitty Cr. Law, 40. The defendant is charged with keeping a common ill-governed and disorderly house, and, for lucre, causing persons, both free and slaves, to frequent it, and there to be and remain, drinking, tippling, and misbehaving themselves, etc., to the common nuisance of all the citizens of the State there inhabiting, passing, etc. The State might, we think, be permitted to give evidence of particular acts of misbehavior of the inmates of the house, under the above general charges, as that they gambled, quarreled, fought, got drunk, made great noises, cursing and swearing, to the annoyance of the people

in the neighborhood. As in an indictment for keeping a bawdy-house, so in this, it is not necessary to state particulars, as the names of those who frequent the house; but evidences of particular instances of illicit intercourse may be given under the general charge. 2 Chitty Cr. Law, 39, 40 (note). We are of opinion that the indictment does charge a criminal offense. The judgment, therefore, is

PER CURIAM. Affirmed.

Cited: *S. v. Calley,* 104 N. C., 860.

(72)

MARTHA LEWIS, BY HER GUARDIAN, v. DAVID LEWIS, EXECUTOR, ETC.

Where a testator dies, having made no provision by his will for his wife, and that wife is a lunatic under the care of a committee, she cannot claim by petition any portion of the testator's estate, because she is incapable from want of reason of dissenting herself, and her committee has no authority by law to enter a dissent in her behalf.

APPEAL from BLADEN Fall Term, 1846; *Battle, J.*

This was a petition in the name of the plaintiff, by her guardian, alleging that her late husband died, having made a last will and testament, and therein made no provision whatever for her; that at the term when the said will was admitted to probate she, in open court, entered her dissent thereto, and praying that some suitable portion of her late husband's estate should be allotted to her, according to the act of Assembly in such case made and provided.

The executor opposed the petition on the ground that the petitioner was of unsound mind at the time of the death of her husband and ever since, under the care of a committee, and therefore incapable of dissenting. This fact being made to appear, the court directed the petition to be dismissed, from which judgment the plaintiff appealed.

Strange for plaintiff.
D. Reid for defendant.

DANIEL, J. It seems to us that the court could only proceed in this petition on a dissent declared and entered according to the words of the statute: that is, when a widow is dissatisfied with the last will and testament of her husband she may signify her dissent thereto before the judge of the Superior Court or in the county court where she resides, *in open court,* within six months after the probate of the (73) said will. There is no *proviso or saving* in the statute that, in case the widow be a lunatic, then her committee may dissent for her.

When the Legislature has not thought proper to insert such a *proviso* in the act, it seems to us to be asking of the court too much for it to tack such a *proviso,* by way of construction, to the statute. In *Hinton v. Hinton,* 28 N. C., 224, we held that a widow could not dissent from her husband's will by attorney, and that she must be *personally present in open court.* The object was to have record evidence both as to the time and the fact. How can it be said that the widow was dissatisfied with her husband's will when she was at the time a lunatic, and incapable of a rational satisfaction or dissatisfaction with it? The dissent was not hers, but that of the guardian. It is but justice to state that the testator had left a considerable legacy to his son (the defendant), and directed him (in the will) to support his (the testator's) wife for her life. Whether the directions to the son to maintain the wife of the testator is a *charge* on the legacy given to the son, or whether she could or ought to have an *election* to take that interest or a distributive share of her husband's estate are questions that a court of law certainly has no jurisdiction to decide on. The judgment of the court dismissing the petition was, in our opinion, correct, and judgment must be

PER CURIAM. Affirmed.

Cited: Cheshire v. McCoy, 52 N. C., 377.

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(74)

WILLIAM RIVES v. J. F. PORTER ET AL.

1. An officer who, under a *fi. fa.* from a justice, seizes a horse and mule, puts them up in a stable—though it be on the premises of the defendant—and sleeps on the premises during the night of the seizure, has such a possession as justifies him in having an action against another officer who goes during that night and takes away the property under another *fi. fa.* from a justice.
2. It would be unnecessary to require an officer to remove property instantly. It answers all the purposes of giving notoriety to the levy, for the officer to take possession of the property on the premises, provided he remain there with it so as to be able to exercise over it that dominion which owners in possession usually exercise.

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

Trover for a horse and mule, and was tried on the general issue. The case states these facts. The plaintiff was a constable and received several executions, which were issued on judgments of a justice of the peace against Hayes; and by virtue of them he went to the residence of Hayes and seized the horse and mule, some corn in a crib, and other chattels. He then made a schedule of the articles and delivered the same, with the property, to John W. Hayes to keep for the plaintiff on

the premises until it should be sold. John W. Hayes was an infant son of John Hayes, and resided with his father. He was ploughing with the horse and mule when the plaintiff seized them, and he undertook to keep them for the plaintiff, as requested. He afterwards continued to plough the horse and mule on the farm, and he fed them out of the crib, and also supplied his father's family with bread, as had been usual. Some time afterwards the defendant Porter, who was also a constable, received other justices' executions against Hayes; and the plaintiff, learning the same, told him of the levy he had made, and that he had left the articles in the custody of John W. Hayes to keep for him, and warned him not to take any part of them, unless there should be a residue after satisfying the executions the plaintiff had. The (75) plaintiff then, on the evening of a certain day, went again to the plantation of Hayes and took the horse and mule a second time into his own possession, and put them into a stable there at night and fastened the door, so as to keep them in, though he did not lock it. The plaintiff slept at Hayes' that night, and in the course of the night the defendants went there and opened the stable and took away the horse and mule, which were afterwards sold under the executions in Porter's hands.

The court instructed the jury that if the plaintiff left the property with the debtor's son, on the plantation, for the ease and favor of the debtor, it was a fraud on other creditors, and the defendants were justified in seizing it under their executions; but that if the plaintiff constituted John W. Hayes his agent in good faith for the purpose of keeping the property for the plaintiff until the day of sale, he might lawfully do so, unless the sale were unreasonably delayed; and that if the plaintiff did thus act in good faith, the subsequent use of the property for the debtor's benefit would not, of itself, impair the plaintiff's right or impeach the levy; and the court further instructed the jury that by going to Hayes' and taking actual possession of the horse and mule the second time and putting them in the stable for the night, and remaining on the premises that night, the plaintiff terminated the possession of John W. Hayes as his agent, and resumed it himself; and that thereby, at all events, the property vested in the plaintiff, and that by taking the horse and mule out of the stable that night and afterwards selling them, the defendants were liable in this action.

There was a verdict for the plaintiff, and from the judgment the defendants appealed upon the ground of error in the instructions given.

Osborne for plaintiff.
Boyden for defendant.

RUFFIN, C. J. The case might have been made to appear (76) more fully and satisfactorily on the first point if the periods of

the respective seizures had been stated, and the age and capacity of young Hayes to hold possession against his father, and whether the plaintiff advertised a sale under the first seizure or not, and the proportion the debts bore to the value of the things seized. But the defects in those respects are less material, because the case need not be decided on that point, as the plaintiff was clearly entitled to recover upon his title acquired by his second taking and the possession held by him at the time the defendants took away the property. By the statute, goods are not bound by a *fieri facias* issued by a justice of the peace, but from the levy. Therefore, the defendants could not justify the taking under the executions in Porter's hands, if at that time the goods were bound by a levy made by the plaintiff at any previous time. Such was the case here; for if all that was done under the first levy by the plaintiff be thrown away, still the plaintiff was at liberty to seize the property again, and he did seize it in the evening preceding the night in which the defendants took it. The case does not profess to set forth the evidence merely upon this part of the transaction, but the defendants' exception states the several circumstances affirmatively as facts; and upon them it is seen that on that very day the plaintiff in his own person took the actual possession of the horse and mule, and shut them up in a stable for the night, and then he remained on the premises for the purpose of keeping the possession. That we hold to be sufficient to vest and continue the title in him. It would be unreasonable to require an officer to remove property instantly. It answers all the purposes of giving notoriety to the levy for the officer to take possession of the chattels on the premises, provided he remain there with them so as to be in a situation to exercise over the things that dominion which
(77) owners in possession usually exercise. It was not requisite that the plaintiff should carry away the articles that night, nor that he should sleep in the stable with them, nor set a guard there over them. A delay of a day or night in removing things seized by an officer is not unreasonable nor suspicious, when he remains on the premises with them; and here the articles were placed where everybody keeps such things, and where, probably, the horse which the plaintiff rode to Hayes' that day was also kept. The horse was not more in the possession of the plaintiff than the horse and mule which he had levied on as the property of Hayes, and the one should be as much protected by the law as the other.

On this point, therefore, without adverting to the other, the judgment should be

PER CURIAM. Affirmed.

Cited: Long v. Hall, 97 N. C., 293; *Perry v. Hardison,* 99 N. C., 27; *Penland v. Leatherwood,* 101 N. C., 515.

THE STATE, ON THE RELATION OF ISAIAH RESPASS, v. ROBERT JOHNSON.

1. Where a constable receives notes or other evidences of debt a short time before his office expires and does not collect them for want of time, and, after his office expires, refuses to deliver to the owner the notes or other evidences of debt so placed in his hands, he and his sureties on his official bond are liable to an action for the amount.
2. If the constable had continued in office for another year and the creditor had permitted the evidences of the debt to remain in the hands of the officer, it might be evidence of a new contract of agency, upon which the sureties of the second year would be liable.

APPEAL from MARTIN Fall Term, 1846; *Manly, J.*

Action upon a constable's bond. The defendant stipulated in the condition of the bond sued on that Robert Johnson, the constable, "should, from time to time, and at all times during his contin- (78) uance in office, faithfully discharge his duty as constable according to law." Five days before the expiration of his official year the relator put in his hands five promissory notes, and the constable gave him a receipt for each note, in which receipt are these words, "which I promise to collect, or return as constable." The jury, under the instructions of the court, found a verdict for the defendants, and judgment being rendered thereon, the plaintiff appealed.

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

DANIEL, J. If the constable had collected the money within the five days, and a demand had been made of him after, for payment, both he and his sureties might have been sued on this bond, in case he had not paid over the money; for the law made it his duty to pay it over; and the obligation rested on the constable to pay over money thus collected, even after his official year had expired. The constable, whilst in office, gave a receipt that he would collect or return the notes. He did not collect the money due on them; his year ran out, and the notes were demanded of him in October of the next year, when he refused to deliver them or account for them. We think that the sureties were bound to see not only that all the moneys which the constable had collected during his official year should be paid over to the persons to whom the same was due, on demand, but that all evidences of debt placed in his hands as constable should be returned to their respective owners when his year expired. If, indeed, the constable had continued in office for another year, and the creditor had allowed the evidences of the debts to remain in the hands of the officer, it might be evidence of

a new contract of agency, upon which the sureties of the second
(79) year would be liable. But in this case there is nothing on which such a presumption can be raised, as we believe it is the universal understanding that under the act of 1818 the constable merely by having the claim for collection is constituted the creditor's agent only during the period he continues to be a constable. If the sureties were not held responsible for the return of those evidences of debt which were not collected at the expiration of the constable's year, much injury might happen to the owners of such evidences by the conduct of insolvent or careless constables.

We think the evidence proved that the constable had not discharged his duties according to law.

PER CURIAM. New trial.

Cited: S. v. Wall, 30 N. C., 14; *Hubbard v. Wall,* 31 N. C., 23; *S. v. Galbraith,* 65 N. C., 412.

PROTHEUS E. A. JONES, QUI TAM, ETC., v. RHODES N. HERNDON ET AL.

1. When a witness in giving his deposition refers to a note, and, by way of identifying it, recites what he believes to be a correct copy of the note, no objection can be taken on that account to the deposition, and the party will be at liberty to introduce on the trial the original note so described.
2. Where an usurious loan is made to A as the avowed agent and for the benefit of B, the declaration must state the loan to have been made to B.
3. Though in a declaration for usury it is proper that some day should be stated as the day of payment of the usurious interest, yet it is not necessary to set forth the true day of payment, inasmuch as it is immaterial when the usurious interest was paid, if before the commencement of the action.
4. It is only necessary to set forth truly the time for which the forbearance was stipulated in the contract of loan.

APPEAL from GRANVILLE Fall Term, 1846; *Battle, J.*

Debt for $800, due as a penalty under the act against usury. The declaration states that after 1 January, 1838, to wit, on 4 May,
(80) 1841, upon a corrupt contract, made on 4 August, 1840, between the defendants on the one part and the plaintiff Jones on the other part, the defendants took from Jones the sum of $134.16 for having forborne and given day of payment of the sum of $400 on 4 August, 1840, lent and advanced by the defendants to Jones from 4 August, 1840, to 4 May, 1841, which said sum of $134.16 exceeds, etc. The plea was *nil debet.*

On the trial the plaintiff offered to read in evidence the deposition of Horace T. Royster of Alabama, in which he stated that on 4 August, 1840, as the agent of the plaintiff Jones, he proposed to the defendants to sell them a Raleigh and Gaston Railroad scrip for $500, payable to S. B. Everett or order, and indorsed by said Everett and by said Jones; and they agreed to let the witness have for Jones the sum of $400 for the scrip, provided Royster would also add his indorsement; and he did so, and then delivered to them the scrip and received the $400, and paid it over to Jones. The witness states that Jones was the owner of the scrip, and that, throughout the transaction, he acted as the agent of Jones, and the defendants knew that he did; and that he gave his own indorsement solely at the instance of the defendants, as an additional security. The deposition then proceeds thus:

The following is believed to be a copy of the scrip referred to:

$500. RALEIGH, N. C., 1 March, 1840.

The Raleigh and Gaston Railroad Company promise to pay to S. B. Everett or order $500 on account of depots, with interest from date.

No. 951. GEORGE W. MORDECAI, *President.*

The witness states further that the defendant sued Jones and the (81) witness on their indorsement in Granville County Court, and obtained judgment against them at February Term, 1841, and that on 4 May, 1841, Jones paid the sheriff the principal money and interest due thereon.

To the reading of the deposition the counsel for the defendants objected because no sufficient reason was given why the original note or scrip, of which the deposition professes to set forth a copy, was not produced before the commissioner when the deposition was taken, nor its absence accounted for; and thereupon the counsel for the plaintiff produced the original scrip itself, with the record of the suit brought in Granville County Court by the present defendants against Jones and Royster, which is referred to in the deposition, and proved the scrip and the indorsements, and then gave the same in evidence, and thereby it appeared that a judgment was rendered therein at February Term, 1841, and a writ of *fieri facias* issued thereon, which was returned by the sheriff of Granville to May Term, 1841. On the part of the plaintiff evidence was further given that on 4 May, 1841, the sheriff collected from Jones upon the execution the sum of $534.16, being the amount due for the principal and interest upon the judgment and execution to that time; and that the sheriff paid the same to the defendants on 10 May, 1841. Thereupon the court, notwithstanding the said objection of the defendant's counsel, allowed the deposition to be read to the jury.

Upon the evidence thus given, the counsel for the defendants insisted that the plaintiff had not maintained the issue on his part: First, because Royster indorsed the scrip after Jones had done so, and that, therefore, in law the contract of loan was not with Jones, but with Royster, or with Jones and Royster; secondly, because the declaration states the money to have been received by the defendants on
(82) 4 May, whereas it was in fact on 10 May, and that variance is fatal.

By the assent of the parties, the questions were reserved and a verdict taken for the plaintiff; and it was agreed that if the judge should be of opinion that by reason of either of the objections, the plaintiff was not in law entitled to recover, the verdict should be set aside and a nonsuit entered. Afterwards, though the defendants' counsel again insisted on his former objections, the judge gave judgment for the plaintiff, and the defendants appealed.

Badger for plaintiff.
J. H. Bryan and Gilliam for defendants.

RUFFIN, C. J. The objection to the deposition was properly overruled. The testimony was not offered to establish the contents of the instrument before the jury, in the sense of dispensing with the original for that purpose. On the contrary, the original was produced and given in evidence. The sole purpose, then, of setting out the copy of the note in the deposition was to identify the particular instrument, which was the subject of the transaction to which the witness refers and primarily deposes. There may have been many papers of the kind, and therefore it might be material to identify that about which the parties dealt. That might have been done by this witness saying, for example, that it was the only one he ever indorsed, or was sued on in Granville Court, or the like. It does not hurt his testimony that after stating the suit on it, he proceeded further to set out a copy, so that any paper that might be produced as an original might be compared with the copy, as a test whether it was really that of which the witness was speaking. It was a particularity that might have operated inconveniently to the plaintiff, if the witness or the commissioner had made a slip in copying; but it can by no means hurt the deposition as evidence of identity,
(83) which was the sole purpose for which it was offered upon the trial. It is in that respect that this case differs from that of *Regina v. Douglass*, 1 Car. & Ker., 670, where the original books were produced before the court in Madrass, which took the deposition, and they were retained there, and a copy of them sent in the deposition as the only evidence upon the trial in England of the contents of the originals.

There is nothing, we think, in the notion that, as the commissioner acts under and as the substitute of the court in taking the deposition, he ought not to take testimony from the witness to any fact to which the witness could not under the same circumstances testify before the court; for the deposition is not at the taking offered as evidence, but it is taken to be offered as evidence on the trial of the cause; and it will or will not be received, as it may then appear to have been duly taken. For example, the commissioner may proceed to take the deposition without proof before him of the notice to take it; or he may examine a witness as to the contents of a lost bond, though the loss be not first proved; but before the deposition can be read in evidence the notice must be shown to the court, or the loss must be established at least, *prima facie*. The truth is, however, that there is nothing in this deposition which the witness might not have stated if he had been personally examined on the trial; for he did not mention the contents for the purpose of establishing them thereby, but merely to designate what original he was deposing about.

Jones v. Cannady, 15 N. C., 86, is conclusive upon the point that the declaration is not supported in the allegation that the loan was to Jones. Supposing the evidence of Royster to be true, the fact is expressly proved.

The next objection is that the day of payment of the usurious interest is erroneously stated to be 4 May. If it be necessary that the precise day of taking the unlawful premium should be laid in (84) the declaration, this objection is fatal, inasmuch as it was held in *Wright v. Gibbony*, 19 N. C., 474, that the action did not arise upon the collection of the money by the sheriff, but upon the receipt of it by the defendant. But no authority has been cited, and the Court is not aware that there is any, establishing that the day of making the payment must in this case be truly laid in the declaration more than in any other case, or that the precise time of committing the offense of usury is more material than that of committing any other offense. It is necessary, when a deed, record or other writing is stated in pleading, that the true date or proper term should be set out, as it is in respect to the sum of money mentioned therein, or the parties to the document, because those particulars enter into the description of the contract or record, and are necessary to its proper and sufficient description. But if an action be brought on an oral contract, though it be necessary in the declaration to allege a day when it was made, as time and place must be annexed to every material fact stated, yet, when the time is laid under a *videlicet*, it is not necessary to prove the day as laid, because it is neither a part of the description of a document nor of the substance of the agreement as made. So if payment *ad diem* be pleaded, payment before the day sustains it; and if the payment be pleaded *post diem*, although a time

must be alleged in the plea, it is certain the evidence is not restricted to that time; for the substance is the payment, and that is not affected by the day on which it took place, unless, indeed, it be pleaded as a payment acknowledged by writing, which is relied on as an estoppel. In stating a case of usury, either in a declaration or plea, the time must, according to the general rule, be annexed to each fact; and, furthermore, the time must be alleged, as far as it enters into the description of the contract, because that is indispensable to the ascertainment of the receipt by one of the parties from the other of excessive interest;
(85) in other words, to show that the offense has in law been committed. The sum lent and forborne, the time of forbearance, and the sums received for interest must appear in the declaration. *Allen v. Ferguson,* 28 N. C., 17. And in order to show the time of forbearance, the several days on which the loan or the agreement for forbearance was made, and that on which, according to the agreement, the payment was to be made, must necessarily be stated. Usually the forbearance is measured by the period between the day of the agreement for forbearance and the day of payment; and, therefore, in that case the day of payment is naturally stated, according to the truth, to be that on which the forbearance, as stipulated for, expired. But if it be supposed, as may well happen, that A. owes to B. £100, and that it is agreed between them on 1 January that for the forbearance thereof from that day until 1 July following, A. shall pay £10 on 1 July, and A. does not pay the £10 on 1 July, but pays it on 1 August, then the declaration must set forth 1 January and 1 July as the period of forbearance agreed on and as that for which the £10 was paid, so as to show the excess of interest. For it would not be correct to allege that the forbearance was until 1 August, although the payment was on that day; for the parties contracted for forbearance of the principal up to 1 July, and the £10, though received afterwards, was received as the price of the forbearance to 1 July and not to 1 August. In that case the day of the payment of the unlawful interest, and the day of the expiration of the forbearance, *for which it was paid,* would be different; and although the day which determined the forbearance must be truly alleged in order to measure the rate of interest, just as the sum forborne and the sum paid for interest must also be truly alleged, yet there is no such reason why 1 August as the day of receiving the premium should be set forth with precise truth. That forms no part of the contract of loan or forbearance,
(86) nor is requisite to measure the interest. It is simply annexed to an allegation of the payment of a sum of money on a certain contract, and, as in other cases of an alleged payment, there is no variance from the substance of it when the payment is shown to have been made on a different day from that alleged, but to the amount men-

tioned and for the purpose mentioned. The Court, therefore, holds that the plaintiff did maintain the issue on his part, notwithstanding the day on which the defendants received the usurious interest was different from that stated in the declaration—it appearing that the sum lent, the time of the loan, and the time for which it was forborne are all truly alleged.

It is, indeed, further insisted that the period of the forbearance is not properly alleged in the declaration, because it extended to 10 May, 1841. This point is not stated in the exception to have been taken in the Superior Court, and, therefore, could not be insisted on here. But it is admitted that it was intended to be stated, and agreed that it should be considered as having been stated, and that if the Court should find anything in it the exception should be amended. But the Court is of opinion that the declaration states the forbearance truly, according to the evidence; for, although the defendants did not actually receive the money into their own hands, so as to incur the penalty under the statute, until 10 May, there was yet, not a forbearance to that day, but the payment was exacted from the debtor on 4 May. The forbearance to the debtor certainly terminated with the payment by him, which discharged his debt and put the money beyond his control, unless it had become his again by refusal of the creditor to receive it and his direction to the sheriff to pay it back.

PER CURIAM. Judgment affirmed.

(87)

SOPHIA HURDLE ET AL. v. E. N. REDDICK ET AL.

A had put into the possession of his daughter B a negro woman named P. While in her possession she had two children. A then resumed the possession and continued it to his death, during which time P had another child. A afterwards died, and among other things bequeathed as follows: "I give and bequeath to my daughter B all the property I have heretofore possessed her with except negro woman P, which I lend her during her life, and after her death the negro woman P and all her increase to be equally divided among my daughter B's children." The executors assented to the legacy. *Held*, that after the death of B her children could not recover by petition any of these negroes: First, because, as to the negro woman P, the legal estate had vested in them and they might recover by action at law. Secondly, because, as to the issue of P born before the testator's death, they did not pass under the will to the children of B. "Increase" in the bequest of a female slave means only the increase born after the testator's death, unless where, upon an apparent intent to include issue born after the making of the will, or even that before, by any words or reference to a period from which the birth of the issue that is to pass shall be counted.

APPEAL from PERQUIMANS Fall Term, 1846; *Pearson, J.*

Petition for a legacy of certain slaves under the will of Willis Reddick. The testator had a daughter named Clarissa, who intermarried with Noah Hurdle about the year 1820. Shortly afterwards he put into the possession of the daughter and her husband several articles of personal property, among which was a female slave named Penny; and she continued in their possession until she had two children named Harry and Kate. In 1828, or early in 1829, Hurdle wished to sell the negroes, or some of his creditors threatened to sell them, and the testator thereupon resumed the possession, and took the three negroes to his own house. On 7 November, 1829, Willis Reddick made his will, and therein bequeathed, amongst other things, as follows: "I give and be-
(88) queath to my daughter Clarissa Hurdle one cow and calf, and, also, all the property I have heretofore possessed her with, except negro woman Penny, which I lend to her during her life, and after her death, that negro Penny and all her increase be equally divided among my daughter Clarissa's children." At the making of the will the testator had been in possession of Penny, Harry, and Kate for about a year or, perhaps, more, and was then in possession of them, and so continued until his death, which happened in the summer of 1832. Between the date of the will and the death of the testator Penny had a third child, named Kitty, which also the testator kept in his possession until his death.

The testator gave the residue of his estate to his widow for her life, and at her death to be equally divided between his son Edmund and his two daughters, Clarissa and Amesia.

After the death of the testator, the defendants, who are the executors, assented to the legacy of Penny to Mrs. Hurdle for life, and delivered her; but they claimed to retain the three children, Harry, Kate, and Kitty, as a part of the residue of the estate, and did so. Mrs. Hurdle has since died, and left the present plaintiffs, her only children, and they have instituted this suit against the executors for Penny and her three children, above mentioned, claiming them under the limitation over to them of Penny and her increase.

The cause was heard in the Superior Court, on the petition and answer, and the court decreed for the plaintiffs as to all four of the negroes and their profits from the death of Mrs. Hurdle; and the defendants appealed.

A. Moore for plaintiffs.
Jordan and Bruer for defendants.

RUFFIN, C. J. The will is so imperfectly expressed that it is very difficult to put a sensible and consistent construction on it, and
(89) one cannot be sure that a decision either way would be carrying

out the intention of the testator. Indeed, we think it probable that the actual purpose in this case, if it had been expressed, or as it would have been expressed if the attention of the testator had been drawn to it, will not be effectuated by the construction which we are obliged to put on this disposition by the language used and the settled principles of interpretation.

As to the negro woman Penny, herself, clearly the decree cannot be supported. No doubt, she belongs to the plaintiffs; but she is their legal property, and may be recovered from the possessor in detinue. The assent of the executor to the gift for life to Mrs. Hurdle does not appear to have been in any manner qualified, and a general assent to the legacy to the first taker inures as an assent to the remainder-man, and the executor is no longer liable to the remainder-man. That is settled doctrine, and has been very recently acted on in *Howell v. Howell*, 38 N. C., 528, and *Acheson v. McCombs, ibid.*, 455.

There is more doubt as to the three children; and, possibly, we may be disappointing the expectations of the testator as to the effect which he thought would be given to his words, while we are governed by his intention as expressed by his words. But we believe this case must be determined by the general rule, that "increase" means only the issue born after the testator's death. It may be carried back upon the apparent intent, so as to include issue born after the making of the will, or even that before, by any words of reference to a period from which the birth of the issue that is to pass shall be counted, as was stated in *Hurdle v. Elliott*, 23 N. C., 177, and *Stultz v. Kizer*, 36 N. C., 538. But there is no such word of reference here. "All her increase" means, in this case, no more than "increase" *per se*. It is very clear that in the gift to the plaintiffs the testator meant to give only such negroes, namely, Penny and her increase, as were personally given to (90) their mother for life; and it is probable that he may have used that term "increase" because he thought that without it the future issue of Penny would belong to the daughter as tenant for life. Now, it is apparent that the two children, Harry and Kate, born before the will was made, are not given by it to Mrs. Hurdle for life, but are either given to her absolutely or fall into the residue. For the words are, "I give my daughter Clarissa *all* the property I have *heretofore* possessed her with, *except Penny*, which I lend to her during life." It is to be noted that the gift is not of such property as the testator had put into the possession of the daughter, and was then in her possession; but it is of *all* property which he had at any time before put into her possession, though it might not then be in her possession, but was in that of the testator himself. That is the operation of the word "heretofore," of itself. But that is confirmed by the exception of Penny, for it is the

nature of an *exception* to take out of a disposition what, but for the exception, would pass by it. The testator thus gives us to understand that he knew that his daughter would have Penny, under the general terms of the gift to her of all the property he had theretofore put into her possession; and, therefore, since Penny alone is excepted, and not her two children then born, and that had been with their mother in the possession of the daughter, the conclusion logically follows that those two children cannot be embraced in the exception, but were left, under the operation of the previous disposition, in absolute property to the daughter. Indeed, it may well be supposed that while the testator was, in view of his son-in-law's imprudence, making some permanent provision for his daughter's children in the bequest of Penny and her subsequent issue, he thought it but right to leave to the daughter herself and her husband the two young negroes, not only as a provision of his bounty for them, but as justly their right in remuneration for
(91) their care and nurture of them at their birth and for some years afterwards. If that be the correct view of the will, those two negroes still belong to the daughter's executor, as the executors of the father never assented to the legacy as regards them, and they were not reduced into the possession of the husband. But if that were not the correct interpretation of the clause, and Harry and Kate are not given in entire property to Mrs. Hurdle, then they are not given to her at all, as the gift to her is of Penny *nominatim*, and *she* only gets her increase as included in Penny herself, that is, such as should be born after the will went into effect upon the death of the testator. If Mrs. Hurdle was not to have them, we cannot think the testator meant the plaintiffs should, because the plaintiffs are to have nothing until their mother's death, and why postpone their enjoyment of these two slaves until that event, when the mother was to have no benefit from them? It is not natural that those two children should be separated from the mother in their infancy and kept as an unproductive part of the general residuum. Besides, the gift over to the plaintiffs is not upon their mother's death, whereas the residuum is to belong to the testator's widow for her life, and then be divided between Mrs. Hurdle and two other children of the testator. It is not necessary now to say whether those two negroes belong to Mrs. Hurdle's representative or fall into the residue of the testator's estate, as, in either case, the plaintiffs have no right to them. Still weaker is the claim to Kitty, who never was in possession of Hurdle, but was born after the testator resumed the possession of Penny, and remained in his possession to his death. Clearly, the plaintiffs' mother did not take that negro, either absolutely or for life, and unless she had taken in the latter manner the plaintiffs, as has been already mentioned,

were not intended to take, as far as we can see; and they cannot take her under the term "increase" merely.

The decree must therefore be reversed and the petition dis- (92) missed; and the plaintiffs must pay all the costs.

PER CURIAM. Reversed.

EDMUND CLAYTON v. ASA D. LIVERMAN.

1. Where the question is whether an instrument of writing is a testamentary paper or a deed, it becomes a fact to be proved by all kinds of evidence, by which, in law, any other fact may be established. The evidence which arises from the face of the instrument may be aided or opposed by evidence *aliunde*.
2. Therefore where A and B, by an instrument of writing, "gave and bequeathed" to C certain slaves "to have and to keep the aforesaid property at our death," and it was proved that the donors intended this as a deed of gift, and so signed, sealed and delivered it: *Held*, that this was a deed of gift and not a testamentary paper.
3. The plaintiff having recovered one thousand dollars as damages for the detention of the slaves, whereas the damages laid in the writ and declaration were only two hundred dollars: *Held*, that the plaintiff might, in the Supreme Court, amend his writ and declaration so as to state the damages at one thousand dollars, he paying all the costs of the suit.

APPEAL from WASHINGTON Fall Term, 1846; *Pearson, J.*

Detinue, brought to recover the three negro slaves mentioned in the suit. The plaintiff proved that Patsey and Sally Liverman were formerly the owners of said slaves. He then offered in evidence the instrument annexed, made part hereof, and marked A; he introduced Charles McClees, a subscribing witness thereto, who proved that Nancy McClees, the other subscribing witness, was dead; that Patsey (93) and Sally Liverman, the signers of said instrument, sent for him and told him they wished him to write a deed of gift of the slaves and property in said instrument to the plaintiff, they being at that time the owners and in the possession of said slaves and property; that he drew said instrument, and read it over, including the attestation clause, "Signed, sealed, and delivered in presence of"; that they then signed and sealed it, and he and said Nancy, at their request, witnessed it; that all this was done in the presence of the plaintiff and said Patsey and Sally; he further stated that he did not recollect whether the instrument was left on the table or whether it was handed to the plaintiff or to said Patsey and Sally. The plaintiff then introduced other evidence of the delivery of the instrument as the act and deed of the said Patsey and Sally. The plaintiff was then permitted to read the instrument, whereupon the defendant objected that the instrument was not a deed, but was testamentary in its character. The testimony

proceeded, his Honor, *Judge Pearson,* reserving this question. The plaintiff then proved the value of the slaves, that the defendant had taken possession of them, and had them in his possession at the bringing of this action; he also proved the value of their hires for the time they had been detained, and that the action was brought within a month or two after the detainer, the detainer having been since Patsey's and Sally's death. His Honor, *Judge Pearson,* after explaining to the jury the requisites of a deed, left it to the jury to say whether the said instrument had ever been delivered by the signers to the plaintiff as their act and deed; if so, the jury were instructed to find for the plaintiff; if not, for the defendant. Under these instructions the jury found for the plaintiff. Upon the question reserved, his Honor was of opinion that as the instrument contained words which, if in a deed, were sufficient to convey the slaves and property therein to the plaintiff,
(94) and the jury having found the execution of the instrument as the act and deed of the signers thereto, it was and had the force and effect of a deed, and did convey the slaves and property in it mentioned to the plaintiff. A judgment was rendered for the plaintiff, and the defendant appealed.

(A.)

(*Instrument referred to.*)

Know all men by these presents, that I, Patsey Liverman and Sarah Liverman, do, for the good-will and divers good causes which we have not mentioned, have given and bequeathed to Edward Clayton the following articles, to wit: First, we give and bequeath 50 acres of land, which we purchased of Uriah Spruill; also one negro woman by the name of Phillis, one girl Grinny, and one boy by the name of Robert, to have and to keep the aforesaid property, at our death, free and clear from any enthrallments whatever.

In testimony whereof we have hereunto set our hands and seals, this 28 July, 1828. (Signed by the donors.)

Signed, sealed and delivered
in the presence of
(Signed by two witnesses.)

Heath for plaintiff.
A. Moore for defendant.

DANIEL, J. *First,* the judge decided that the instrument of writing under which the plaintiff claimed the three slaves was not a testamentary paper. We concur in the opinion delivered by his Honor. When, as to the extent of estates, or the particular limitation of estates in a deed or will, the intention of a testator, or the intention of the maker of a deed, is to be ascertained, the Court must decide the question only upon

the face of the instrument itself. But when the question is whether an instrument of writing is a testamentary paper or a deed, it becomes a fact to be proved by all kinds of evidence by which, in law, any other fact may be established. The evidence which arises from the face of the instrument may be aided or opposed by evidence *aliunde.* (95) The language of this writing, except the word *"bequeathed,"* and all the incidental circumstances in making it, are those which really belong to a deed. The three slaves to pass by the instrument to the plaintiff, on the death of the donors, is a circumstance (since our statute) applicable either to a deed for slaves or to a last will. But the subscribing witness deposed that the donors told him that they wished him to write a *deed of gift* to the plaintiff for the property mentioned in this instrument; he wrote it, and then read it over to them, and they signed and sealed it, and he witnessed it at their request. And then there was express evidence, from other witnesses, that Sally and Patsey Liverman delivered the instrument as *their deed.* The whole of the evidence is, in our opinion, quite satisfactory that the donors intended to execute a deed, and not a will. And although this Court has heretofore decided that the donors could not make a joint will, yet there is no dispute but that they might make a joint deed of gift, and that the separate interest of each of the donors in and to the said slaves would pass by the deed to the donee, by force of the statute, on the death of the donors. That the instrument cannot in law operate as a will is another strong reason why it should be regarded as a deed and as having been intended by the parties to operate as a deed, passing vested interests and operating immediately.

Secondly, the law upon the question of a delivery of the deed was correctly stated by the judge to the jury. With out repeating his charge on this point, it seems to us to be right, according to the principles laid down by this Court in *Moore v. Collins,* 15 N. C., 384. The damages assessed for the detention of the slaves amount to $1,000, while those laid in the writ and declaration are only $200; and the counsel for the plaintiff have moved for leave to amend by enlarging the sum laid. The cases are that he may do so; but he must pay for the privilege all the costs of the suit in this and the other courts. *Grist* (96) *v. Hodges,* 14 N. C., 198. Upon the record as amended the judgment will then be affirmed, except as to the costs.

PER CURIAM. Affirmed at costs of plaintiff.

Cited: Outlaw v. Hurdle, 46 N. C., 167; *Parsons v. McBride,* 49 N. C., 100; *Bond v. Coke,* 71 N. C., 99; *Davis v. King,* 89 N. C., 446; *Egerton v. Carr,* 94 N. C., 653.

STATE v. BROUGHTON.

1. A grand juror, on the trial of an indictment, may be compelled to disclose what was given in evidence by a witness before the grand jury.
2. Although a prisoner, on his examination, shall not have his examination, if given on oath, read against him, yet where a grand jury are investigating an offense, with a view to discover the perpetrator, and the person who was subsequently indicted was examined before them on oath and charged another with the commission of the offense, this examination may be given in evidence against the prisoner on the trial of his indictment.

APPEAL from NEW HANOVER Fall Term, 1846; *Nettle, J.*

The prisoner was indicted for the murder of Frank DeSilva. The homicide occurred in Wilmington, during the term of New Hanover Superior Court, and the grand jury then impaneled were engaged in an inquiry as to the circumstances, character, and perpetrator of the act. At the instance of the grand jury, Broughton was summoned and sworn in court and sent to them as a witness. On the trial of the present indictment Mr. Savage, who was at the time the foreman of the grand jury, was called as a witness for the State to prove that the prisoner, on his examination before the grand jury on that occasion, charged one Gonzales with the murder of DeSilva. The counsel for the prisoner objected to the examination of Mr. Savage as to any
(97) matter that occurred before the grand jury. But the court received the witness for the purpose to which he was called; and he stated that the prisoner charged Gonzales with murder and betrayed unusual anxiety to fix it upon him.

On the part of the State further evidence was given that DeSilva kept a shop in Wilmington, and had some money on hand, and that on the night preceding his death the prisoner was entirely without money, but immediately afterwards had money and made an ostentatious boast of it, and treated his acquaintances at several tippling shops, and when arrested, six days afterwards, he still had $14 or $15 about him, and also had two purses, a cap, and a pencil case that belonged to the deceased at his death. And it was further given in evidence that the deceased was in the habit of wearing a ring on one of his fingers, but that when the dead body was found the ring was gone, and that the prisoner, who had never worn a ring before, was seen, two or three days after the homicide, with just such a ring on as DeSilva had usually worn.

After the conviction of the prisoner his counsel moved for a *venire de novo* because the evidence of Savage was improperly received, and because the court ought to have instructed the jury to place no reliance whatever in the charge on the prisoner's pecuniary condition, as that

might have taken place in many ways, nor on the possession of the prisoner of the several articles before mentioned. The motion was refused, and from the judgment of death the prisoner appealed.

Attorney-General for the State.
Strange for defendant.

RUFFIN, C. J. By the policy of the law grand juries act in secret, and, with a view of sustaining that policy, it is prescribed that a grand juror shall, amongst other things, swear that "the State's (98) counsel, your fellows, and your own, you shall kept secret." The whole sense in which those words are to be received, or the duration of the secrecy imposed, we do not find accurately stated by any ancient writer on the common law. There are some reasons for the rule which are obvious enough; and, as far as the public interests can be subserved by it, the secrecy ought to be kept not only while the grand jury continues impaneled, but it ought also to be subsequently observed. The principal ground of policy is, no doubt, to inspire the jurors with a confidence of security in the discharge of their responsible duties, so that they may deliberate and decide without an apprehension of any detriment from an accused or any other person, but be free "true presentment to make." Therefore it is clear that at no time nor upon any occasion ought a grand juror to make known who concurred in or opposed the presentment, as the power to do so would or might in some degree impair that perfect freedom from external bias which a grand juror ought to feel. It is probable, likewise, that another ground is that it might lead to the escape of criminals, if their friends or others on the grand jury were at liberty to make known the institution and progress of an inquisition into their guilt. But as that reason can operate only while the accused is at large, it would seem that, as far as the rule depends on that, it would not be obligatory after his arrest. We think, too, that in furtherance of justice the law may have intended to forbid a grand juror from giving aid to one indicted, and thus found to be probably guilty, in his efforts to defeat the prosecution by publishing the evidence before the grand jury, and thus enabling him to counteract it, perhaps by foul means, after he knew where the case pinched. That would be betraying "the State's counsel," which is necessarily opened to the grand jury. But that is the immunity of the public, and not the privilege of the witness; and, therefore, it would seem that the rule should create an obligation on the con- (99) science of the juror and be enforced by a court only when the public justice may be advanced by it, and that it cannot be urged by the witness himself, when it would defeat justice and thus encourage witnesses before that body to commit perjury, by false statements or the suppression of the truth; for it is obvious that if grand jurors are

through all time and to all purposes, prohibited from disclosing and proving the testimony of witnesses before them, there is a perfect exemption from temporal penalties of perjury before a grand jury. The consequences of such a doctrine would be alarming; for, besides the danger of tempting the witnesses to commit so great a crime without the fear of punishment, grand jurors would have no credible evidence on which to act, on the one hand, and the citizen, on the other, would be deprived of one of his most boasted and valuable protections against arbitrary accusations and arrests. It would be extraordinary were witnesses thus enabled to perjure themselves without responsibility. Yet we have not found in the books an instance of an indictment for a perjury before a grand jury, and the text-writers leave it doubtful how far in principle, as they understand it, it is competent to prove what evidence was given before the grand jury. In this State there has not been a prosecution for such a perjury within the experience of either of the judges sitting here. We are, however, well informed by a gentleman, formerly eminent at the bar and afterwards on the bench, Judge Cameron, that there was, before 1807, in the Superior Court for the district of Morganton, a prosecution for perjury committed before a grand jury, in which the oath taken by the defendant was proved by the grand jurors, after objection taken, and there was a conviction, followed by punishment. But evidence has been frequently given, without exception on the circuits, as we ourselves know, in order to discredit a witness, that
(100) his testimony before the grand jury differed from that in court.

The judges have not considered the rule as designed for the protection of witnesses, but for that of the grand jurors, and in furtherance of the public justice; and we own that our minds are inclined to adopt that conclusion; especially as in the modern case of *Rex v. Watson*, 32 Howell St. Tr., 107, *Lord Ellenborough* allowed a witness to be examined as to a part of his evidence and actions before the grand jury, and said that, though doubtful himself, he did so upon the authority of a previous decision, of which, however, he did not give the name. It seems to us that the witness has no privilege to have his testimony treated as a confidential communication, but that he ought to be considered as deposing under all the obligations of an oath in a judicial proceeding, and, therefore, that the oath of the grand juror is no legal or moral impediment to his solemn examination, under the direction of a court, as to the evidence before him, whenever it becomes material to the administration of justice. But we need not go that length at present, for there was no attempt to go into the evidence of this prisoner before the grand jury in detail, but merely to prove that he appeared as a witness and charged the crime on one Gonzales. That was in substance what was done by *Lord Kenyon* in *Sykes v. Dunbar*, as the case is stated

in 2 Selw. N. P., 815, who required a grand juror to state that the defendant was the prosecutor of an indictment before the grand jury.

The counsel for the prisoner took the further ground here, that it was incompetent to prove the evidence of the prisoner, because it was in the nature of a confession, which compelled by an oath, was not voluntary. It is certainly no objection to the evidence merely that the statement of the prisoner was given by him as a witness under oath. He might have refused to answer questions, when he could not do so without criminating himself; and the very ground of that rule of law is that his answers are deemed voluntary and may be used afterwards to criminate or charge him in another proceeding, and such is clearly the law. (101) 2 Stark., 28; *Wheater's case,* 2 Mood. Cr. Cas., 45. But it is true, if a prisoner, under examination as to his own guilt, be sworn, his statement is not evidence, because the statute, Rev. Stat., ch. 35, sec. 1 (which is taken from that of Phil. & M.), intended to leave the party free to admit or deny his guilt, and the oath deprives him of that freedom. 2 Hawk. Pl., 6, ch. 46, sec. 37; Bul. N. P., 242. And we think it was also properly decided in *Lewis's case,* C. C. and P., 161, where a magistrate was engaged in the investigation of a felony, and no one in particular was then charged with it, and the prisoner and other persons were summoned and sworn as witnesses, and the prisoner gave evidence upon which he was committed for trial, that his examination was not admissible against him; for, plainly, it was a case within the reason of the statute, which could be completely evaded if, instead of a direct examination of a suspected person, there could be a general inquisition and every individual made to betray himself. For that reason the Court would, in this case, have held that the evidence given by the prisoner could not have been used against him if it purported to confess his guilt and the grand jury had founded a presentment on it; for the proceeding before the grand jury at the time was in its nature inquisitorial and the witness was as much the object of it as any other person. But it is altogether a mistake to call this evidence of a confession by the prisoner. It has nothing of that character. It was not an admission of his own guilt, but, on the contrary, an accusation of another person. That it was preferred on oath in no way detracts from the inference that may be drawn from it unfavorably to the prisoner, as being a false accusation against another, and thus furnishing, without other things, an argument of his own guilt.

There was, in our opinion, no error in receiving the evidence.

There is no exception that the presiding judge directed the jury that the law, under the circumstances stated, raised a presumption of the prisoner's guilt from the possession of the money or of (102) the goods proved to have belonged to the deceased; nor that he

did not leave the weight of those facts fairly to the jury. But the exception is that his Honor did not instruct the jury that the circumstances were entitled to no weight, and, therefore, that they ought to disregard them altogether. Now, certainly, those are circumstances tending to connect the prisoner with the deceased at or about the time of his death, and the judge could not take it on himself to say that, notwithstanding those circumstances, the prisoner was not concerned in the death, as it was the province of the jury to determine how far they proved the fact. Indeed, if it had been proper that the court should have given any advice to the jury on that point, we must say that the circumstances, so far from not being entitled to any weight, are cogent evidence and raise a very high degree of probability that the prisoner committed the murder.

The Court is, therefore, of opinion that there ought not to be a *venire de novo.*

PER CURIAM. No error.

Cited: S. v. Young, 60 N. C., 126; *S. v. Matthews,* 66 N. C., 110; *S. v. Rowe,* 98 N. C., 633; *S. v. Mallett,* 125 N. C., 728, 729; *S. v. Parker,* 132 N. C., 1018.

MILTON HUDGINS v. JOSIAH PERRY.

An implied warranty cannot extend to defects which are visible, and alike within the knowledge of the vendee and the vendor, or when the sources of information are alike open and accessible to each party.

APPEAL from PERQUIMANS Spring Term, 1846; *Bailey, J.*

This was a special action on the case. The facts are as follows: One Stephen Elliott, being indebted to James C. Skinner by bond,
(103) proposed to pay it by a bond or note which he held on the defendant. To this arrangement Skinner assented, so far as to agree to wait for his money until Elliott could recover the amount due him from Perry. The latter, not wishing to be sued, proposed to Elliott and Skinner to furnish Elliott with a note upon which suit might be brought to the use of Skinner. To this both Skinner and Elliott agreed, but the note of no particular person was mentioned. Subsequently, Perry brought to Elliott a note given by Joseph Gordon and payable to Exum Elliott & Co., upon which Stephen Elliott caused a writ to issue in the name of the payees, and it was by his direction indorsed "To the use of James C. Skinner." Gordon's note was not indorsed by the payees, and when judgment was obtained and the money collected,

it was paid to Skinner. The latter was not present when S. Elliott received the Gordon note from Perry, and, when informed by Elliott of what had been done, refused to receive it in payment of Elliott's note to him, but agreed, if the money upon it was collected, he would receive it and credit the note in his hands. The parties, Elliott and Skinner, did not exchange notes, but the note due by Perry was retained by Elliott, who, after Skinner's refusal to receive absolutely the Gordon note, transferred Perry's note for a valuable consideration to the plaintiff in this action. The defendant, in discharge of his note, passel to the plaintiff the receipt which had been given by an attorney in whose hands the Gordon note was, and who was to prosecute the claim to judgment. The attorney's receipt is in the following words: "Received 11 August, 1843, of Josiah Perry, Esq., one note, executed by Joseph Gordon, payable to Exum Elliott & Co. for $101, upon which suit *is* brought in Perquimans County Court, which I am to prosecuted to judgment." This transaction took place between the plaintiff and the defendant while the suit was pending on Gordon's note, and at the same (104) time the plaintiff surrendered up to the defendant his note. The action is brought to recover from the defendant the amount of the judgment against Gordon and which had been received by James C. Skinner. Upon an intimation from the presiding judge that the action could not be sustained, the plaintiff submitted to a nonsuit and appealed to this Court.

Jordan and Heath for plaintiff.
A. Moore for defendant.

NASH, J. We concur with his Honor, that the action cannot be sustained. If the defendant had received the Gordon money, it would have been received by him to the use of the plaintiff, and the equitable interest conveyed by him to the plaintiff would have been a sufficient consideration to support the implied promise to pay. But here the money has been received by Skinner to his own use, though wrongfully. The plaintiff's declaration contains two counts, the first upon a warranty of title and a right to transfer, the second upon a mere contract that the claim thereby transferred was good and collectible, and should be collected for the use of said Hudgins. The breach assigned in the first count is that the said Perry had not then good right "to pass to said Hudgins said receipt and note and to authorize him to receive the amount when collected, for that previous to said contract said Perry, the defendant, had duly passed said note to one James C. Skinner, and authorized him to receive the money, when collected, to his own use." The breach assigned in the second count is the same. The answer to the breach in each count is the same, as each count and each breach is substantially the same. An implied warranty cannot extend to defects which are

visible, and alike within the knowledge of the vendee and the
(105) vendor, or when the sources of information are alike open and accessible to each party. Here, from the receipt of the attorney, it was obvious that Perry, the holder, had no legal title to the Gordon note. The note was payable to Exum Elliott & Co., not assigned by them, and the suit was in the name of the firm. Perry, therefore, upon the face of the instrument, had no legal right to it, nor could he so transfer it as to clothe his assignee with any legal interest. The implied warranty, therefore, did not arise, for there is no pretense of any fraud on the part of the defendant Perry. It is evident all the parties mistook the nature of their rights. The legal title to the Gordon note never passed out of Exum Elliott & Co., and they were the only persons who had in law a right to receive the money upon it. When Mr. Skinner received it, he received it to their use at law, and at law is answerable to them. It is very plain how the difficulty has arisen. The contracts or agreements between Perry and Stephen Elliott and between the latter and Skinner were inchoate and never executed. S. Elliott accepted the Gordon note only upon condition that it should serve to discharge his debt to Skinner, and Perry transferred only with the view to pay his debt to Elliott. When the latter apprised Skinner that the Gordan note was received and put in suit for his benefit, he refused to receive it in payment of his claim against Elliott, who thereupon returned it, doubtless, to Perry; for the attorney's receipt is given to Perry, the note being received from him. Considering the contract between him and Skinner at an end, Elliott, who still retained his note on Perry, for a valuable consideration sold or assigned it to the plaintiff, and Perry, upon the payment of it being demanded by Hudgins, might well consider his inchoate contract with Elliott at an end, as it certainly was. No legal title to the Gordon bond had ever passed to Elliott, and the purpose for which it had been delivered to him having failed, and it having been returned to him by Elliott, and his note assigned to Hudgins, he,
(106) the defendant, was entirely at liberty to make what use of it he could in meeting the demand upon his note against himself. For that purpose it had doubtless been transferred to him by the original owners. He, therefore, had full right to transfer his equitable interest to the plaintiff. But that did not in law authorize the plaintiff to receive the money when collected, nor had Perry such right. When Skinner received it, he received it to the use of Exum Elliott & Co., who were the legal owners. As, however, Exum Elliott & Co. lay no claim to the money, there cannot be a doubt but that before another tribunal the rights of the plaintiff to the money would be recognized and enforced.

RUFFIN, C. J. The declaration contains three counts. The first is for money had and received, and the other two are upon special promises.

The second is, in substance, that the defendant was indebted to the plaintiff by bond, and in consideration of the acceptance of the same by the plaintiff in payment of the bond and canceling the bond, the defendant passed and assigned to the plaintiff a promissory note made by Joseph Gordon and payable to Exum Elliott & Co. for $101, which said note was then in the hands of A. M. Esquire, an attorney at law, who had before undertaken to bring suit on the note and obtain judgment thereon; and that the defendant, upon the consideration aforesaid, undertook and promised that, notwithstanding any act or thing done or suffered by the defendant, he had good right to pass and assign to the plaintiff the said note, and that the plaintiff might and should receive to his own use the sum for which the said note was given. It then lays a breach that the defendant had not the right to transfer the debt to the plaintiff, and could not authorize him to receive the money due thereon, for that, before that time, the defendant had only passed the note to James C. Skinner and authorized him to receive to his own use the same money, and that Skinner by means thereof became entitled to the money when recovered, and did afterwards receive it and prevent the (107) plaintiff from receiving any part thereof.

The next count lays that in payment of the bond to the plaintiff, the defendant gave him an order on A. M. Esquire, an attorney at law, to pay to the plaintiff the sum due on Gordon's note, when the same should be collected by him, and then undertook that the note was good, and that the money mentioned therein should be collected and paid by the said A. M. to the plaintiff for his own use in a reasonable time. It then lays a breach, as before, that the defendant had before passed the debt to Skinner and authorized him to receive and hold the money.

There is no evidence tending to support the count for money had and received, nor the second special count. There was no order given on the attorney, who was not to collect the money, but only get a judgment. The case, therefore, turns on the second count, which is founded on a transfer of Gordon's debt in payment of the debt of the defendant to the plaintiff.

It will be perceived that the defendant's liability is not placed upon the ground that the note belonged to Exum Elliott & Co., the payees, and not to the defendant; nor upon the ground that Gordon did not owe the money, or was insolvent; nor upon any other ground depending upon a general guaranty. But this count puts the case upon the single point that the defendant undertook that he had done no act whereby the plaintiff should be prevented from receiving the money due from Gordon on the note, and that, notwithstanding any act by the defendant, the plaintiff might and should receive the money to his own use. The decision of the point is not necessary in this case; but it may be

admitted that the legal effect of the immediate transaction between these parties amounted to such an undertaking as is laid in the count,
(108) upon the ground that passing a debt to another for a valuable consideration imports an engagement, at least, that the assignor has done nothing and will do nothing rendering the transfer ineffectual. For example, that it is to be implied that a person stipulates that he has not collected the money, and that he will not take it. Of course, the engagement must include also the acts of other persons under his authority or a title derived from him. But if it be yielded that such an undertaking may be inferred in this case, still it remains for the plaintiff to show a breach on the part of the defendant. Here a breach is stated, that the defendant had previously transferred Gordon's note to Skinner and authorized him to receive the money due on it to his own use, and that he has done so. Now, that is not true. The declaration imports that there was an absolute assignment to Skinner. That was never true. There was, at most, a conditional agreement, at one time, that Skinner should have the money that should be recovered from Gordon. But in the events that occurred, Skinner had no right to it. There was no agreement between Skinner and the defendant, by themselves. All three, Skinner, S. Elliott, and the defendant, were parties to the agreement that was made; and an essential part of it was that the money that should be recovered on any bond furnished by the defendant should be applied, in the first place, to the credit of the defendant's debt to S. Elliott. In truth, that was the only part of the agreement between the three which was beneficial to this defendant. There was no assignment to Skinner in the nature of an indorsement of a negotiable instrument, so as to vest the legal right in him, but only a verbal agreement conferring an authority on Skinner to receive the money for certain purposes—one, and the first of which was, that if S. Elliott would forbear to sue Perry on his bond until judgment could be obtained on Gordon's note and the money collected, the money should be applied in payment of Perry's debt to S. Elliott, and then in payment of Elliott's debt to
(109) Skinner. That was clearly the understanding between those persons, and it could have been no other. It was, plainly, conditional, as just mentioned; for the present defendant had no motive for agreeing to transfer the claim but to pay his own debt. From the nature of the agreement, then, Skinner's right to this money was dependent upon the act of S. Elliott, namely, in giving or denying a credit therefor on Perry's debt to him; and, therefore, when S. Elliott parted from the defendant's bond, the whole arrangement fell through. It cannot be supposed that the defendant meant to transfer Gordon's note in payment of S. Elliott's debt to Skinner, and not in payment of his own debt to Elliott. When Elliott disabled himself from giving the defend-

ant the credit for which he had stipulated with the other two, Skinner had no longer any right to touch the money; and his receiving it subsequently was wrongful as against the defendant and not by his authority. For this reason the judgment ought to be

PER CURIAM. Affirmed.

BURTON W. HATHAWAY v. JOHN FREEMAN.

A sheriff is bound to mark on process delivered to him the *true* day on which it came to his hands, otherwise he will forfeit the penalty of $100 imposed by Rev. Stat., ch. 31, sec. 43.

APPEAL from CHOWAN, Fall Term, 1846; *Pearson, J.*

Debt for the penalty of $100 under the act of 1777, Rev. Stat., ch. 31, sec. 43, against a sheriff for not marking on a writ of *capias ad respondendum* the day on which he received it. It was (110) proved on the trial that the writ was delivered to the defendant in his county on 23 March, 1843, and that he failed to mark it on the writ, but stated thereon that it came to hand 3 April, 1843.

Upon these facts the counsel for the defendant insisted that as the defendant had marked on the writ a day as that on which it was delivered to him, he had not incurred the penalty, although that was not the true day.

But the court refused so to instruct the jury, and instructed them that the plaintiff was entitled to recover; and from a verdict and judgment for the plaintiff, the defendant appealed.

Heath for plaintiff.
A Moore for defendant.

RUFFIN, C. J. The case is within both the words and policy of the act of 1777, and the judgment is clearly right. The only authority cited for the defendant is a case from New York, *Spafford v. Hood,* 6 Cowen, 478; and that has no application to this question. The Court held in that case that, upon the whole scope of the statute upon which the action was founded, it was directed against persons chosen to certain onerous offices who refused to serve in them, and not against particular defaults of one in office; and that was the ground of the decision. It would be in point if this action had been brought on another statute of the same year, 1777, ch. 118, sec. 2, for refusing to accept and execute the office of sheriff; for he who undertakes the office does not, in the sense of the latter act, refuse to execute it by neglecting to perform a particular offi-

cial duty. But the act on which the present proceeding is founded is directed to a specific default of a person in office. The policy is obvious. It is to compel the sheriff to furnish, under his own hand, upon the process proof that he received it in due time to enable him, and
(111) make it his duty, to execute it, and thereby induce that diligence which will prevent him from incurring an amercement or action for a false return. But it is needless to look thus far; for, as has been already remarked, the case is within the letter of the act. It makes it the duty of a sheriff to "mark on each process *the* day on which he shall have received it," and it enacts that "for neglecting so to do he shall forfeit $100, to be recovered by any person who shall sue for the same." Here the defendant states on the writ that it came to hand on 3 April, and that was not *the* day of its delivery, but another; and marking the latter day was not more a compliance with the act than marking no day at all.

PER CURIAM. No error.

Cited: Duncan v. Philpot, 64 N. C., 480; *Wyche v. Newsom,* 87 N. C., 145; *Swain v. Phelps,* 125 N. C., 44.

WILLIAM COSTIN v. WILLIAM BAXTER.

1. Where the plaintiff declares in three counts and enters a *nolle prosequi* on two of them, but obtains judgment upon the third, the defendant is not entitled to recover any costs, though he had summoned witnesses, who were admitted to be relevant, to defend himself against the counts on which the *nolle prosequi* was entered.
2. The recovery of costs depends upon statutory regulations, and by our statute on the subject, the party who obtains a judgment is entitled to his costs.

APPEAL from RUTHERFORD Spring Term, 1846; *Pearson, J.*

The plaintiff's declaration contained three counts: the first two in assumpsit and the last in trover. No evidence was offered by him
(112) on the first and second, and on motion he was permitted to enter a *nolle prosequi* upon them, and confined his testimony to the third. His right to enter the *nol. pros.* was denied by the defendant, and the motion opposed. The jury returned a verdict for the plaintiff, and the court rendered judgment in his favor for the damages and costs of suit. The defendant tendered the witnesses he had summoned in his defense upon the first and second counts, and moved his Honor for a judgment against the plaintiff for the amount of their costs. It was

admitted that upon those counts their testimony was relevant, and not upon the third. The defendant's motion was overruled by the court.

Miller and Bynum for plaintiff.
Baxter and Woodfin for defendant.

NASH, J. We concur in the opinion of his Honor. We are not apprised of any power in the judge to pronounce the judgment prayed for. All costs are given, in a court of law, in virtue of some statute. The common law made no provision on the subject, and in our State they are regulated by the statute of 1777, Rev. Stat., ch. 31, sec. 79, which declares that, "In all actions whatsoever the party in whose favor judgment shall be given, or in case of a nonsuit, dismission, or discontinuance, the defendant shall be entitled to full costs," etc. The judgment, which was rendered in favor of the plaintiff, was right and proper. This the defendant does not contradict, but says that he is entitled to his costs in defending himself upon the counts abandoned by the plaintiff. This, abstractly, is certainly right and proper. The plaintiff in his declaration has claimed from the defendant that which he subsequently admits he was not entitled to. The defendant was bound, at least was justified in preparing for his defense by summoning his witnesses, and the plaintiff, for his false clamor in that matter, ought to pay the costs to which the defendant has been unnecessarily put. This, it appears to me, is what right and justice would demand. But is (113) there any law which would justify the Court in rendering a judgment in such a case? The common law, as before observed, gives neither party any costs. Is there any statute which gives to a defendant his expenses, under such circumstances? I know of none. In the English courts the practice is urged by the defendant's counsel, but there it is by virtue, not of any statute, but of rules of court adopted by the judges. In *Hilary Term*, in 2 William IV., a number of rules were adopted; among them the 7th makes a provision for a case of this kind. It is as follows: "Where there is more than one count, plea, etc., upon the record, and the party pleading fails to establish a distinct subject-matter of complaint or defense in respect of each count, plea, etc., a verdict and judgment shall pass against him upon each count, plea, etc., which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, etc., including those of the evidence as well as those of the pleading." Previous to the adoption of these rules, when the plaintiff succeeded upon a part of his demand only, the defendant was not entitled to costs upon the issues found for him. Brown on Actions, 167, 580, 581, 582. By those rules, however, the court is required in such cases to give him a judgment. The act of 1777, with the exception of the restraining statutes, is the

only one governing the courts in the question of costs. And in that act the right of the defendant to them in the event of a nonsuit, dismission, or discontinuance is restrained to the case where, by either of those means, the suit is terminated. It is our opinion the act of '77 does not authorize the court to grant the judgment asked for by the defendant. Judgment having been rendered for the plaintiff, he is entitled to his full costs. Not to his costs upon the expunged counts, for they form no part of the declaration; and we have seen that previous to the (114) adoption of the rules at *Hilary Term*, if those counts had still constituted a part of the declaration, that the defendant would not have been entitled to costs upon them, though the verdict upon them had been for him. For this reason it is not deemed necessary to express any opinion as to the power of the court below to admit or refuse to the plaintiff to enter a *nolle prosequi* to any of the counts of his declaration. The defendant has not, as to the question now before us, been placed in any worse situation than he would have been had those counts remained in the declaration. As no injury, therefore, has resulted to the defendant by the allowing the *nol. pros.* to be entered, this count would not disturb the judgment, although the judge below may have erred in permitting it. Numerous decisions have been made here upon that principle. *Norwood v. Morrow*, 20 N. C., 578; *Reynolds v. Magness*, 24 N. C., 26; *Ratliff v. Huntley*, 26 N. C., 545.

RUFFIN, C. J. A verdict and judgment were given for the plaintiff on one count in his declaration, and the defendant moved for judgment against the plaintiff for costs incurred by the defendant in the attendance of witnesses to prove his defense to other counts in which the plaintiff had entered a *nolle prosequi*. The court refused the motion, and the defendant appealed.

The question depends entirely upon the statute. The Revised Statute, ch. 31, sec. 79, taken from Laws 1777, ch. 115, sec. 90, is that "in all actions whatsoever the party in whose favor judgment shall be given, or in case of a nonsuit, dismission, or discontinuance, the defendant shall be entitled to full costs, unless when it may be otherwise directed by statute." The words are as plain and positive as they can be, and are decisive against the defendant. There was no nonsuit, dismission, or discontinuance of the plaintiff's action, but there was judgment given in favor of the plaintiff. Therefore, under the act he is entitled to his full costs, and the case has not happened in which the defendant (115) can have a judgment for costs. The act provides for no division of costs between the parties in any case. The party who gets a judgment for costs at all, whether it be the plaintiff on confession, verdict, or demurrer, or the defendant on verdict, demurrer, retraxit, or nonsuit, is "entitled to *full* cost" by the express terms of the statute.

A question, indeed, often arises what costs the prevailing party shall have—what are his full costs; and the court frequently refuses to allow sums claimed, for example, by a successful plaintiff, to be taxed against the defendant: as if he had summoned more witnesses to a single fact than allowed by the subsequent act of 1783, or summoned witnesses to irrelevant matter, or did not swear or tender them. In such cases the courts have often left them to pay such witnesses, and refused to include them in the costs for which judgment was rendered against the losing party. But in no instance found in the books, or recollected in the profession, has the losing party recovered his costs or any part of them. There has been no such judgment; and, as far as is known, this is the first instance in which it has been asked for. The *nolle prosequi* upon the two counts can make no difference upon this point, whether the court ought or ought not to have allowed it; for, as to the question of the defendant's costs, he has suffered no prejudice by the *nolle prosequi*, since, if it had not been entered, he could not have had judgment for them against the plaintiff, who obtained a verdict in the action.

Such being the plain provision of the law, a court ought not, upon any notion of its injustice, to thwart the legislative will. The Court does not undertake to form any opinion of its justice or injustice, as our duty is merely to execute the act in its obvious sense.

I agree, therefore, that the judgment shall be affirmed.

PER CURIAM. No error.

Cited: Fox v. Keith, 46 N. C., 525; *Wooley v. Robinson*, 52 N. C., 31; *Loftis v. Baxter*, 66 N. C., 342; *Vestal v. Sloan*, 83 N. C., 557; *Cook v. Patterson*, 103 N. C., 129; *S. v. Massey*, 104 N. C., 878; *Ferrabow v. Green*, 110 N. C., 416; *Hobbs v. R. R.*, 151 N. C., 136; *Cotton Mills v. Hosiery Mills*, 154 N. C., 465; *Chadwick v. Ins. Co.*, 158 N. C., 381; *LaRoque v. Kennedy*, 161 N. C., 464.

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(116)

THE STATE, ON THE RELATION OF ELIZA J. ROSS, v. HARRISON WHITE ET AL.

1. When a suit is brought upon an administration bond the defendants have a right, under the plea of the general issue, to show that the supposed intestate was alive at the date of the letters of administration and of the bond, the county court in such case having no jurisdiction.
2. In like manner the relator of the plaintiff can show that the person alleged to have been dead, intestate, was not the person whom the defendants offered to prove was then alive, but some other person of the same name, who was then actually dead.

APPEAL from BERTIE Spring Term, 1846; *Bailey, J.*

Debt brought upon an administration bond, in the usual form, on the relation of Eliza J. Ross. The breach assigned was in not paying to the relator her distributive share of the estate of William Ross the elder, to which the defendants pleaded general issue, payment and set-off, conditions performed and not broken. The records of the county court of Bertie show, at July Term, 1835, the following entry, to wit: Ordered, that letters of administration on the estate of William Ross be granted to Harrison White, upon his entering into bond with Meedy White and Whitmell Hughes securities in the sum of $1,000. At the same time, Harrison White, with the other defendants as his surety, entered into said bond, which was received by the court. The defendant then introduced one William Ross as a witness, whose testimony was received by the court, reserving the question of its admissibility. This witness stated that William Ross the elder, on whose estate the administration had been granted, was the father of the witness, and of the relator of the plaintiff; that he, the witness, saw the said William the elder in 1839 alive; that he had understood that his father died in 1840. The defendants insisted that upon this evidence the grant of administration and the bond taken thereupon were void; that if this was not so,

(117) there was no sufficient delivery of the bond and no breach of conditions so as to entitle the relator of the plaintiff to recover. It was agreed that a verdict should be entered for the plaintiff, with an understanding that if his Honor should be of opinion with the plaintiff upon the question reserved, the verdict should stand; if not, that it should be set aside and a nonsuit entered. It was further agreed that $70.72, with interest from 15 November, 1845, was the amount of damages if the plaintiff should be entitled to recover. His Honor, upon the question reserved, was of opinion with the plaintiff, and judgment was entered up accordingly, from which judgment an appeal was prayed and granted to the Supreme Court.

No counsel for plaintiff.
No counsel for defendants.

DANIEL, J. The defendants proved that William Ross, the supposed intestate, was alive at February Sessions, 1835, of Bertie County Court, and long thereafter. This evidence was offered to show that the county court had then no power or jurisdiction to grant letters of administration on the estate of Ross, or to take the bond for the State which is now sued on. The court was of opinion that this evidence was improperly admitted, and disregarded it. The reasons that induced his Honor to come to this opinion are not stated in the case. It seems to us, however, that the evidence was very proper and legal. The court of pleas and

quarter sessions of the county where the intestate had his usual residence at the time of his *death* had power and jurisdiction to grant letters of administration and take bond, etc. Rev. Stat., 272. If the county court of Bertie took the defendant's bond for the faithful administration of the personal estate of William Ross, when he was alive, it was done without authority. They were not the agents for the State to take such a bond, and the defendants might well show the same (118) in evidence under the general issue. If the defendants be precluded from showing that one William Ross had died intestate, it would yet remain for the relator to show that her father was the William Ross, since to that person in particular is she one of the next of kin. The bond given only recites that a certain William Ross was dead, and does not specify that he was the relator's father; and, therefore, the defendants could surely show that he was not, and that her father was in fact living.

We think that the judgment must be reversed, and a judgment of nonsuit entered.

PER CURIAM. Reversed.

Cited: London v. R. R., 88 N. C., 589, 591; *Springer v. Shavender*, 116 N. C., 16, 17; *s. c.*, 118 N. C., 44.

JOHN D. PIPKIN, QUI TAM, V. HENRY BOND.

When a person loaned $800 at a premium of $80 beyond the lawful interest, and afterwards took the defendant's bond for $932.80 being the principal and interest on the $800 loaned and the premium of $80—and he also gave a separate note for $93—and the declaration in a *qui tam* action alleged that this $93 was for the usurious interest on a loan of $932.80: *Held*, that the evidence did not correspond with the declaration, as the usurious interest reserved was for the loan of $800.

APPEAL from CHOWAN Fall Term, 1846; *Pearson, J.*

Debt under the act against usury. It is founded on a loan made by the defendant to one McNider. There are several counts in the declaration, and they vary in stating the days of the contract, the periods of forbearance, and the days of payment of the usurious interest. (119) But they all agree in one respect, which is laying that McNider was indebted to the defendant in the sum of $932.80, and that it was agreed that for the forbearance of that sum the former should pay to the latter and did pay to him the sum of $93, which exceeds the rate 6 per cent.

Upon *nil debet* the plaintiff gave the following evidence: In February, 1836, Bond lent McNider $800, and took his obligation therefor, payable one day after date. At the same time he took a separate obligation for $80, also payable one day after date, as a premium on the loan, over and above the lawful rate of interest. On 19 May, 1839, the parties agreed that McNider should substitute new bonds for the two originals, and the interest that had accrued thereon, and he then gave the defendant his bond for $93, payable one day after date, in lieu of that for $80, and including the interest thereon at 6 per cent, and on 21 May, 1839, he gave the defendant a bond executed by himself and one Pipkin as his surety, for $932.80, payable one day after date, in lieu of the bond for $800, and including the interest thereon at 6 per cent up to that time. On 1 October, 1841, McNider paid the principal money due on the bond for $93, and the legal interest thereon from 19 May, 1839, up to 1 October, 1841; and then this action was brought.

The defendant, among several objections, took one that there was a variance between the declaration and evidence; and the court being of that opinion, ordered a nonsuit, and the plaintiff appealed.

Heath for plaintiff.
A. Moore for defendant.

RUFFIN, C. J. The evidence does not support either count. The declaration is of a debt of $932.80, and that the $93 was to be paid and was paid *for* the forbearance of *that sum;* whereas it includes the
(120) sum of $80 which was agreed to be paid for the original loan of $806, and the forbearance of this latter sum. The bond for $93, then, was not the price of the forbearance of $932.80 from the time the new securities were given, but part of it, if not the whole, was the price of the past forbearance of the $800 from the time of the loan of that sum up to the giving of the substituted bonds. The plaintiff did not prove the contract as laid in either count, and was therefore properly nonsuited.

PER CURIAM. Affirmed.

AARON POOL v. DRURY ALLEN.

Where a person owing a debt has two agents, and one of them pays the debt to a constable, with whom it had been placed by the creditor for collection, and afterwards the other agent pays the same debt to the creditor himself: *Held*, that the principal might recover back this money, without showing that the constable had paid to the creditor what he had collected.

APPEAL from PERSON Fall Term, 1846; *Battle, J.*

Assumpsit, commenced by warrant before a justice of the peace. It was tried in the Superior Court on the general issue, and upon the trial the facts appeared to be as follows: The plaintiff and the defendant resided in Person County until 1838, when the plaintiff removed to another State. At the time of his removal the plaintiff was indebted to the defendant in the sum of $23.85, and he appointed two persons, Stanford Long and Wyatt Pool, his agents in this State, (121) with directions, amongst other things, to pay the debt which he owed to the defendant. At that time the defendant had placed his claim in the hands of H. Bumpass, a constable, to collect; and soon afterwards Wyatt Pool saw Bumpass and paid him the money in full. About a month afterwards Long met with Allen, the defendant, and informed him that he had been instructed by the plaintiff to discharge the debt, and that he was ready to do so as soon as he could see Bumpass, who held the claim for collection. To that the defendant replied that the debt belonged to him, and that he was the proper person to receive the money; and he said that if Long would pay it to him, he would stand between him and danger. Upon that assurance, Long paid the debt, $23.85, to Allen, and upon its being afterwards discovered that it had been before paid by Wyatt Pool to Bumpass, the money paid to the defendant Allen was reclaimed from him, and this suit brought to recover it.

Upon these facts the counsel for the defendant moved the court to instruct the jury that the plaintiff ought not to recover, because it did not appear that Bumpass had paid to the defendant the sum which had been paid to Bumpass, and the payment by Long to the defendant himself was voluntary. But the court refused the prayer, and directed the jury that if they believed the witnesses, who stated the facts, the plaintiff was entitled to recover. There was a verdict for the plaintiff, and from the judgment the defendant appealed.

No counsel for plaintiff.
Venable for defendant.

RUFFIN, C. J. The payment to Bumpass discharged the debt. It made no difference that he did not pay the money over. That was between him and his principal, Allen. As he was Allen's agent, with authority to receive the money, the payment of it to him (122) was the same as payment to the creditor personally. Then, as the debt was discharged, the second payment, to Allen himself, was without consideration, and made by mistake; and the case is, therefore, one of those common ones stated in the books in which the action for money had and received lies. The second payment was not voluntary

in any sense that can affect this action. It is true, it was not illegally enacted by process or by duress. But that is not the criterion. Money paid as a debt, under a mistake, and where no debt exists, may be recovered back, although there was no compulsion on the person to make the payment. There was no intention here to make a gift of the money, so as in that sense to constitute it a case of a voluntary payment. On the contrary, it was clear that the money was paid and received in discharge of a debt then believed to subsist. In that there was a total mistake on the part of the person making the payment, and, probably, on that of the receiver also, and it is plain that money thus got under a mistake, and for no consideration, cannot be kept *ex equo et bono*. On that ground, then, the plaintiff was entitled to a verdict. But here the case goes further, and sets out in substance an express promise to return the money if it were not then properly payable to the defendant. It was said, indeed, that the defendant's promise was to indemnify Long against personal loss, and did not extend to the present plaintiff. But clearly the promise must be considered as made to Long in the character in which he was then acting, namely, as the plaintiff's agent. The case is one, therefore, in which there can be no hesitation in affirming the judgment.

PER CURIAM. No error.

Cited: Mitchell v. Walker, 30 N. C., 245; *Newell v. March, ibid.,* 445; *Adams v. Reeves,* 68 N. C., 136; *Comrs. v. Comrs.,* 75 N. C., 241; *Lyle v. Siler,* 103 N. C., 265; *Brummitt v. McGuire,* 107 N. C., 355; *Houser v. McGinnas,* 108 N. C., 635; *Worth v. Stewart,* 122 N. C., 261; *Simms v. Vick,* 157 N. C., 80.

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(123)

GODFREY BALDWIN v. DANIEL M. JOYNER.

Where by a deed of gift, made in 1833, the donor conveyed a female slave to B and then says, "that is, after my decease, to have and enjoy unto the said B, his heirs, etc." *Held*, that under the operation of our statute passed in 1823 (Rev. Stat., ch. 37, sec. 22) the issue of the female slave as well as the slave herself passed to B in the same manner as if this disposition had been made by will.

APPEAL from COLUMBUS Fall Term, 1846; *Settle, J.*

Trover, brought to recover slaves, Mercury or Mick, Ireland, Archey, and Anna Jane, which the plaintiff claimed as the children of Hesse, one of the slaves mentioned in the annexed deed of gift, marked A, duly executed from Mary Baldwin to the plaintiff (and duly proved and reg-

istered), the said four slaves having been born between the execution of the said deed and the death of Mary Baldwin, the maker of the said deed. The defendant claims them as the administrator of the said Mary Baldwin, who held them to the time of her death, and, upon demand by the plaintiff after the death of the said Mary, refused to deliver them up; after which the said action was brought and the foregoing facts agreed upon, and the case is submitted to the court for judgment, and if the court is of opinion that the plaintiff is entitled to recover, then judgment to be rendered for the plaintiff for $1,000 and costs; and if not, then judgment to be rendered for defendant for costs. The court being of opinion that the plaintiff is entitled to recover, judgment is accordingly rendered for the plaintiff for $1,000 and costs, from which judgment the defendant appeals to the Supreme Court.

(A)

STATE OF NORTH CAROLINA—COLUMBUS COUNTY.

To all people to whom these presents may come, I, Mary Baldwin, send greeting:

Know ye, that I, the said Mary Baldwin, for and in consideration of the natural love and affection which I have and bear unto my beloved son Godfrey Baldwin, of the State and county aforesaid, and for divers other good causes and considerations, have given and granted and by these presents do give and grant unto the said Godfrey Bald- (124) win one negro woman by the name of Hesse and two children by the names of Let and Flora, also one bed and furniture, six head of cattle, that is, after my decease, to have and to enjoy unto the said Godfrey Baldwin, his heirs, executors, and administrators and assigns, to his only proper use and behoof; and I, the aforesaid Mary Baldwin, do warrant and defend the said property unto the said Godfrey Baldwin and his heirs and assigns forever, and I also bind myself, my executors and assigns, to warrant and defend the same by these presents. In witness whereunto I have set my hand and seal this 4 April, 1833.

MARY BALDWIN. (SEAL)

Signed and sealed and delivered in presence
of us,
WILLIAM BALDWIN,
JOHN WINGATE.

Strange for plaintiff.
No counsel for defendant.

DANIEL, J. In April, 1833, Mary Baldwin, the mother of the plaintiff, executed to him a deed of gift of a slave named Hesse. After words

of immediate gift comes this clause: "that is, after my decease, to have and enjoy unto the said Godfrey Baldwin, his heirs," etc. At common law the plaintiff could have derived no benefit under this deed; for the life estate in Hesse, which remained in the donor, was equal to the entire estate in the whole chattel, and there would have been no remainder to pass, on her death, to her son. But such limitations, if contained in a last will and testament (to wit, to one for life, remainder over to another), were always held good as executory devises or bequests. The Legislature, in 1823, passed an act declaring "that every limitation by deed or writing, of a slave, which limitation, if contained in a last will and testament, would be good and effectual as an executory devise or bequest, shall be good as a remainder of such slave, and any limitation made or reserved to the grantor or donor in any such deed or writing of a slave shall be good and effectual in law, provided it had been
(125) made to another person, it would have been good according to the preceding clause." Rev. Stat., ch. 37, sec. 22.

The law is very well established, we believe, in all the slave-holding States that a bequest of a female slave to one for life, remainder to another, carries the mother and her increase during the life estate, and to the remainderman on the determination of the life estate.

In the case now before us the deed of gift transferred to the plaintiff an immediate interest in Hesse; but herself, and her issue born after the date of the deed, were not to be possessed and enjoyed by him until the death of his mother. We say her issue, because if she (Hesse) passed over to the plaintiff on the death of Mrs. Baldwin, her issue (who were in herself at the date of the deed) must, in law, also pass with Hesse to the plaintiff on that event happening.

PER CURIAM. Affirmed.

GEORGE W. CANDLER ET AL. v. JACOB B. TRAMMELL.

Where the condition of a bond was that A should pay to B and C, attorneys, one hundred dollars, on condition that they cleared A of three suits and three indictments in the Superior Court, and A was cleared in the Superior Court of all the cases except one, in which he was convicted and the case was taken to the Supreme Court, where A had to employ another attorney, but the judgment below was reversed and A discharged from the prosecution: *Held*, that B and C had substantially complied with the condition precedent and had a right to recover from A.

APPEAL from BUNCOMBE special court in June, 1846; *Battle, J.*

Debt, on the bond of which a copy marked A is appended;
(126) pleas, general issue, payment, set-off, and accord and satisfaction.

Upon the trial it was admitted that the plaintiffs acted as the attorneys and counsel for the defendant, and that all the suits and indictments against him were decided in his favor except one; that upon that he was convicted in Burke Superior Court of Law, and his counsel, Mr. Clingman, prayed an appeal to the Supreme Court and assisted in making up the case for that Court; that the defendant then applied to him to attend the Supreme Court to argue the case for him, when he, Clingman, informed him that it would be out of his power to attend the ensuing term of the Supreme Court; whereupon the defendant employed Mr. Caldwell, and paid him a fee of $15 to appear for him in that Court; that a new trial was granted by that Court, and at the ensuing term of Burke Superior Court the solicitor for the State entered a *nolle prosequi,* and the defendant, on motion of his counsel, Mr. Clingman, was discharged. The counsel for the defendant contended that the employment of Mr. Caldwell and the payment of a fee to him for his services in the Supreme Court was a payment or satisfaction of the bond, or that the condition upon which the bond was given was not performed by the plaintiffs, and that, therefore, they could not recover. But the court instructed the jury otherwise, and upon a verdict and judgment being given for the plaintiffs, the defendant appealed.

(A)

I promise to pay G. W. Candler and T. L. Clingman $100 on condition that they clear me of three suits wherein B. L. Brittain is plaintiff, also clear me in the three indictments now against him. 27 September, 1837. J. B. TRAMMELL. [SEAL]

Baxter for plaintiff.
Edney for defendant.

DANIEL, J. There was a condition precedent in the bond, and the plaintiffs were bound to show to the court and jury that they (127) had performed that condition. The defendant insisted that the plaintiffs had not cleared him of the six suits mentioned in the bond, but that he was compelled to employ another lawyer to attend to one of the indictments sent up to the Supreme Court, and that he was out of pocket $15 on that account. We think the objection taken by the defendant was properly overruled by his Honor. The condition has been substantially performed by the plaintiffs. In criminal cases the judgment of acquittal or conviction, properly speaking, is in the Superior Court exclusively. This Court only gives an opinion what it should be; and in this case the opinion was that the previous conviction was erroneous, and that the defendant was entitled to a *venire de novo.* To get the benefit of it, the defendant accepted the services of the plaintiffs,

and then they went without day upon a *nolle prosequi.* Therefore, the judgmnt must be

PER CURIAM. Affirmed.

Cited: Kittrell v. Hawkins, 74 N. C., 415.

JOHN B. ETHERIDGE v. SAMUEL W. THOMPSON.

Where wrecked goods were placed under care of the wreck-master by the captain of the vessel, to be disposed of according to law, and the owner, afterwards and before a sale, promised the wreck-master that if he would deliver up the goods to him he would pay him his commission: *Held,* that there was a sufficient consideration for the promise.

APPEAL from CURRITUCK Fall Term, 1846; *Pearson, J.*

Assumpsit. The plaintiff gave in evidence that he was a com-
(128) missioner of wrecks for District No. 4, for the county of Currituck; that, thereupon, as commissioner, he required of the captain to be allowed to take in charge the goods wrecked and stranded. The captain refused, but on the next day consented, and delivered over to the plaintiff all the said goods; that afterwards the plaintiff, as commissioner, exposed to sale part of the goods to the amount of about $900, and the defendant, as owner of the goods, requested the plaintiff not to sell the balance of the goods, but to deliver them over to him, promising that if he would do so he would pay him his commissions. Accordingly the plaintiff delivered to him the balance of the goods aforesaid; and afterwards the defendant, being requested to pay his commissions according to his promise aforesaid, refused to do so. At the time of his promise a valuation was made of the goods by consent, and fixed at $900. It was further in evidence that the commissions due the plaintiff for the sale aforesaid were paid to the plaintiff at the time of said sale. The defendant's counsel insisted that the plaintiff at the time of bringing his action as commissioner was only entitled to commissions upon goods wrecked and actually sold by him. He also insisted that the captain, owner, consignee, or agent had the right to reship wrecked goods at any time before actual sale; that the promise was a *nudum pactum,* unsupported by any consideration.

The court charged that if the jury were satisfied that the plaintiff, as commissioner of wrecks, had taken the goods into his charge and custody; that he sold part and was about to sell the balance, and the defendant then prevented the further sale by promising that if the sale

was stopped and the goods delivered over to him he would pay the plaintiff his commissions, then the plaintiff had a cause of action. If he refused to comply with his promise, that the question of damage was for the jury and that the plaintiff not having the trouble and expense of keeping and taking care of the goods was a matter (129) bearing upon the amount of damages which the plaintiff had a right to recover.

There was a verdict for plaintiff. Rule for new trial. Rule discharged. Judgment according to verdict, and the defendant appealed.

Heath and Jordan for plaintiff.
A. Moore for defendant.

DANIEL, J. This was an action of assumpsit. Plea, *non assumpsit.* The defendants insisted that the promise, proved to have been made by him to the plaintiff, was a *nudum pactum,* and that as he, by law, was entitled to his goods, which had been wrecked, and the plaintiff had no right to sell them, he had no right to commissions on that value as if he had sold them. To this the plaintiff replied, and proved as the consideration for the promise made by the defendant, that he, as a wreck-master, had received the goods by the consent of the captain of the wrecked vessel, and that he had (as by law he was bound to do) used care, trouble, and expense in the preservation of the said goods. The court charged the jury that if the plaintiff had taken the goods into his *charge and custody* as wreck-master, then the promise made by the defendant to pay was supported, and that the expense of keeping and taking care of the goods was a matter bearing upon the amount of damages. Now, we can see no error in this charge. The defense set up, that it was a *nudum pactum,* failed, we think, when the plaintiff proved that the goods were placed in his hands as wreck-master, by the captain, who was the defendant's agent for that purpose. The care, trouble, and responsibility of the plaintiff concerning the goods in his character of wreck-master raised a consideration for compensation, and the only effect of the agreement was to liquidate the amount. (130)

PER CURIAM. No error.

JAMES WEBB ET AL. V. ACHILLES DURHAM.

1. When a *recordari*, according to the common practice in our State, is brought with a view to have a new trial upon the facts, as it is a favor, in the nature of an extension of the power of appeal, it must be applied for speedily, and any delay, after the earliest period in the party's power to apply, must be accounted for.

2. But when the *recordari* is used as the foundation for reviewing summary convictions, or other proceedings, before inferior tribunals in a case of false judgment, it is in the nature of a writ of error, and in fact always lies as a matter of right.
3. Where the *recordari* is to bring up the proceedings in a case of forcible entry and detainer, although the plaintiff may have entered no traverse before the justice, yet he shall be permitted to assign as many errors as he thinks proper.

APPEAL from RUTHERFORD Spring Term, 1846; *Pearson, J.*

In November, 1845, the plaintiffs obtained from the Superior Court of Rutherford a writ of *recordari* to bring up a certain proceeding had at the instance of Durham before a justice of the peace for an alleged forcible entry into a certain tract of land, as it was stated in the affidavit, on which the writ was moved for. The affidavit further stated that the land belonged to one Baxter in fee, who leased the same
(131) to the plaintiffs, who entered peaceably and were quietly possessed of the premises when they were evicted by order of the justice of the peace, who rendered a judgment against them for the costs of the said proceedings; and it also stated several particulars in which the plaintiffs were advised the proceedings were erroneous: first, that they were carried on in the name of the State; secondly, because the jury did not find any forcible entry or detainer; thirdly, because the jury did not find that Durham had any estate in the land.

The justice returned thereon proceedings in the following words:

NORTH CAROLINA—RUTHERFORD COUNTY, 31 December, 1844.

Achilles Durham v. Charles Webb and John Webb. The party of the second part has made forcible entry and detainer on a certain tract or parcel of land, and a certain house known by the name of the McKinney House, and agreeable to act of Assembly we command that the sheriff of said county, or any lawful officer, summon a jury of good and effective men to attend on the premises and make their report, as in accordance with the same.

M. R. ALEXANDER, J. P.
JOHN BABER, J. P.

Returned "Executed" by J. A. Carpenter, constable.

There were thereon these further entries:

"In accordance to a summons to us undersigned jurors to act as directed by the laws of the State in case of possession, wherein Achilles Durham is plaintiff and Charles Webb and John Webb are defendants, we report as follows: that our judgment is that the said Durham holds possession of the premises in dispute, consisting of the mansion house and its appurtenances; and this is our verdict." This was signed by twelve persons, and attested by "M. R. Alexander, J. P."

Then comes the following:

"In conformity to the within decree, we, the jury, say that Achilles Durham is entitled to the premises herein alleged, and we put him in full possession of the same, this 31 December, 1844," which is also signed by the twelve jurors and by "M. R. Alexander, J. P."

Then there is added as follows: (132)

Judgment against the defendants in this case for $6.20 for the costs. M. R. ALEXANDER, J. P.

The justice stated further, that "as soon as the jury made their report the said Webbs, being present, agreed to give up possession to Durham and pay the costs; and therefore the proceedings were stopped at that point and no further record made."

Durham filed a long affidavit in which he stated his title to the land, and that on 31 December, 1844, a person who was his tenant for that year was leaving the permises, and as he went out the present plaintiffs, intending to get possession, sent some of their goods to the premises, though they did not themselves get into possession, and that he, Durham, fearing that he would be ousted, applied to the justices and got the proceedings instituted. He then states that the defendants abandoned their claim, as stated by the justice, and brought an ejectment against him. Upon the foregoing facts the court, on the motion of Durham, dismissed the writ of *recordari* because the plaintiffs Webb had not tendered a traverse before the justice, and because the plaintiffs did not apply for the writ at the first term of the court in 1844, but delayed until the second term, in November, 1844. From that decision an appeal was taken to this Court.

Baxter for plaintiff.
Guion for defendant.

RUFFIN, C. J. As was mentioned in *Leatherwood v. Moody,* 25 N. C., 129, and *Brooks v. Morgan,* 27 N. C., 481, writs of *certiorari* and *recordari* are most commonly used in this States as substitutes for appeals, so as thereby to obtain a trial *de novo* upon the merits, which might be had upon an appeal. That is so much the more common purpose to which those writs are applied that it would seem that it began to be thought that such was their only purpose in our law. But, in (133) truth, that application of the writ has grown up in recent times, out of the provision with us for retrials of the facts. When asked for to that end, as it is a favor, in the nature of an extension of the power of appeal, it must be applied for speedily, and any delay after the earliest period in the party's power to apply must be accounted for. But when

the *recordari* is used as the foundation for reviewing summary convictions or other proceedings before inferior tribunals in a case of false judgment, it is in the nature of a writ of error, and in fact always lies as a matter of right. 2 Chitty Gl. Ps., 219. Mr. Chitty, in that part of his work, explains very fully the mode of proceeding on it, whether to reverse the judgment for matter already apparent in the proceedings, or for errors of the magistrate upon questions of evidence received or rejected, or other like matter; and there seem to be many regulations by acts of Parliament on the subject. When, however, it is, as in this case, brought for the sole purpose of reversal for error in the plaint as recorded—for no other is suggested in the affidavit—and that, too, in a case in which no appeal is allowed by law, or, if allowed, there can be no retrial on it, there can be no mistake as to its character. It can be regarded in no other light but as a writ of false judgment; and the plaintiff has a right to assign substantial errors and have the judgment of the court upon the matter of law. It was for that reason that the writ was sustained in *Parker v. Gilreath*, 28 N. C., 221; for Parker, as a garnishee, could have no trial *de novo* in the Superior Court, as his liability depended on the garnishment already given before the justice of the peace; yet he was entitled to the judgment of a Superior Court whether in law he was chargeable on that garnishment. It was erroneous, therefore, to dismiss this writ as having been improvidently
(134) issued after *laches* in the plaintiff. Then, as to the other reason, namely, that the plaintiff took no traverse before the justice, it plainly proceeds upon a mistaken view of the writ; for that circumstance, if there had been opportunity to take a traverse and an omission, would not preclude the plaintiffs from assigning other errors, patent on the record of the conviction. The court ought, therefore, to have required the plaintiffs to assign their errors, and upon their refusal to do so, according to the course of the court, then the writ might have been dismissed for the want of an assignment. But by this reason the court would determine that the plaintiffs should not assign any errors, though apparent in the plaint, because they had omitted to take a particular defense at a certain juncture. The truth is, however, that there was no finding of any forcible entry or detainer which the plaintiffs could have traversed.

The jury merely found that "Durham holds possession," and they did not find that either of the plaintiffs had entered forcibly or held forcibly. Indeed, they could not have so found, according to Durham's own affidavit, for he states that they were never actually in possession, but that he resorted to this proceeding to prevent them from getting the possession. The whole proceeding was so improper in itself and so informally conducted that it is obvious upon its face there ought to have been no

judgment against the present plaintiffs for the costs. However, that matter is not before us now, but will arise when errors shall have been assigned and the record of the plaint looked into with the view to reverse or affirm the judgment. At present we are restricted to the point whether the writ should have been quashed without allowing the plaintiffs even to assign errors, much less to obtain a judgment of the court upon them. We think the order was erroneous, and it must be reversed and the cause remitted to the court below for further (135) proceedings thereon according to law.

PER CURIAM. Reversed.

Cited: Hartsfield v. Jones, 49 N. C., 310; *Steadman v. Jones,* 65 N. C., 391; *S. v. Swepson,* 83 N. C., 588; *Boing v. R. R.,* 88 N. C., 63; *Weaver v. Mining Co.,* 89 N. C., 199; *Hartman v. Spires,* 94 N. C., 153.

DEN EX DEM. MATTHEW WALLACE v. JOHN T. MAXWELL.

Where a person has been not only in the actual occupation of a part of a tract of land for 25 or 30 years, but has also claimed it and exercised acts of dominion and ownership over it, up to a well-defined boundary, for that and a longer time, this is altogether evidence to be left to the jury, to presume a grant of the land to the person and of conveyances to those claiming under him, who so held the possession.

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

The lessor of the plaintiff claimed title to the land in dispute, under a grant from the State, which issued on 10 May, 1842, for 28 acres. The defendant showed no paper title, but claimed under one Black, as to whom none was offered in evidence, but it was alleged that he had had a long possession by actual cultivation, and that he claimed the land up to the boundaries by a hill by which it was circumscribed; that he lived on an adjoining tract and had cut and used timber off of it up to the said boundaries. Two witnesses introduced by the defendant testified that the said land was circumscribed by the boundaries of (136) other tracts; that they had known them for the last thirty-five years; that the said Black had claimed and cut timber occasionally up to those boundaries, and that, between twenty-five and thirty years ago, he had cleared and inclosed a small portion of the land in dispute, and had afterwards added to it by a further clearing, and had kept the same in constant cultivation till within the last ten years; that the said Black had cleared a field fifteen years ago on another part of it, which had

been constantly occupied by cultivation till the commencement of this suit.

The counsel for the defendant insisted that, from the length of the possession, the jury ought to presume a grant. The court was of opinion that Black and those claiming under him could not, in the absence of a paper title, by these declarations make up a title up to the boundaries of the land, and that the length of possession was not sufficient to justify the jury in presuming a grant even for the part in actual cultivation. The jury returned a verdict for the plaintiff, and, the rule for a new trial being discharged, the defendant prayed an appeal to the Supreme Court.

Alexander and J. H. Bryan for plaintiff.
Osborne for defendant.

DANIEL, J. Where any person, or the person under whom he claims, shall have been or shall continue to be in possession of any lands whatever under titles derived from sales made either by creditors, executors, or administrators of any person deceased, or by husbands and their wives, or by indorsement of patents, or other colorable title for the space of twenty-one years, all such possessions of lands under such title shall be and are declared good, and are a bar against the entry (137) of any person under the right or claim of the State, *provided* the possession so set up shall have been ascertained and identified under known and visible lines or boundaries. Rev. Stat., 372. If the defendant had rested his defense solely under this statute, then *color* of title would have been indispensable for him. But this statute does not affect the common-law principle of presuming a grant. *Fitzrandolph v. Norman,* 4 N. C., 564; *Harris v. Maxwell,* 20 N. C., 382. It is very true that possession of a part is possession of the whole claimed by a deed when there is no adverse possession or superior title. *Carson v. Burnett,* 18 N. C., 546. The lands in controversy were circumscribed by the well known lines and boundaries of other coterminous tracts, which well might, or might not be, the lines and boundaries of an old patent covering the land now in dispute. If they were well known as the lines and boundaries of this tract of land, as well as of the others (as the witnesses prove to have been the fact), they furnish by reputation the boundaries of the land of which Black and the defendants have held the possession. *Tate v. Southard,* 8 N. C., 45. Black for thirty-five years exercised dominion over the whole tract by claiming it and cutting timber occasionally up to those very lines and boundaries; and he had, between twenty-five and thirty years ago, cleared, inclosed, and cultivated a part of the land, and that field, and another field on the said land, had been in his and the defendant's actual possession and

cultivation from that time to the commencement of this action. All necessary assurances may and ought to be presumed upon a long actual possession and enjoyment. But when one enters upon land without any conveyance or other thing to show that he claims, his possession cannot by presumption or implication be extended beyond his occupation *de facto*. To allow him to *say* that he claims to certain lines and boundaries beyond his occupation and not visible and known of (138) itself is not sufficient evidence of his possession to those lines or boundaries; one cannot thus make himself in possession, contrary to the fact. *Bynum v. Thompson,* 25 N. C., 578. In that case there was no possession of any part of the land covered or supposed to be covered by both titles, nor were there any visible boundaries known or generally reported to be those of the Braswell patent; but there was simply a declaration by Lane, who had no conveyance from Braswell, that he claimed under that patent, and, therefore, claimed the land covered by it, wherever the boundaries might be, and although they were uncertain. That would not do; for it would be working a possession by a claim merely, without either title or actual occupation. But when a person (as Black was) has not only been in the actual occupation of a part of a tract of land for twenty-five or thirty years, but has also claimed it, and exercised acts of dominion and ownership over it up to a well defined boundary for that and a longer time, we must say that we think that it, altogether, was evidence that should have been left to the jury to presume a grant of the land from the State to Black or those under whom he claimed.

PER CURIAM. New trial.

Cited: May v. Mfg. Co., 164 N. C., 265.

(139)

JOHN C. HATFIELD v. RALEIGH GRIMSTED.

At common law land covered by water was the subject of grant except where the tide ebbed and flowed, and so it was in this State in the year 1839, the former legislative restrictions having been repealed by the act of 1839, and not reënacted until the session of 1839-40.

APPEAL from CURRITUCK Spring Term, 1846; *Pearson, J.*

This proceeding was for $10 penalty for hunting on land of the plaintiff. The plaintiff proved that the defendant had gone with a gun and killed geese at a blind in Currituck County on a shoal at the head of the channel which led to Currituck inlet, which is now closed. The blind

was about 1 mile from the marshes on the banks. The plaintiff, to show title, read two grants, one for 496 acres, the other for 346 acres, dated in 1839. These grants are located so as to take in a small quantity of the marshes at the banks and then run out with the channel about 1½ miles into the sound. One of the grants included the place where the defendant had, by concealing himself in the blind, been very *destructive* to the wild geese, as appeared from the evidence. The part of the sound included in these grants was mostly shoal, intersected at irregular distances by small slues or channels. The water usually covered these shoals, and was from 10 to 12 or 18 inches deep. In the slues or channels the water was usually 2 to 4 feet deep; in high tides the whole was so deep that boats could pass on the shoals; but occasionally, when there was a strong wind from the north or northeast of several days duration, some parts of the shoals were entirely dry, and would continue so until the wind ceased or changed its direction; and the blind in question had been made on the shoal where the water was in cold weather some
(140) 10 inches deep, by depositing large blocks of marsh-grass and stuff so as to make a mound about 6 feet square at top, which was some few inches above the level of the water. A blind stood at this place many years ago. The present blind was erected on the ruins of the old one, some six years ago. Currituck inlet closed in the year 18.., since which time the sound has been much more shallow. These shoals were not fit for any purpose save that of hunting grounds for wild fowl, that resort there in large numbers to feed on the water grass and moss. The court was of the opinion that the sound, although shoal as described, since the inlet closed, was not the subject of entry; in submission to which opinion the plaintiff suffered a nonsuit and appealed.

Heath for plaintiff.
No counsel for defendant.

RUFFIN, C. J. His Honor probably founded his opinion that the grants to the plaintiff were void upon Laws 1715, Rev. Code, ch. 6, sec. 3, and of 1777, ch. 114, sec. 10, which directed how land lying on a navigable water should be entered and surveyed, not adverting to the circumstance that those provisions were not in force in 1839, when the grants were issued. Whether the *locus in quo* would have been the subject of entry or not, under those acts, it is not material to inquire; for the Revised Statutes, ch. 42, omits the actions under consideration, and so left the matter at common law. Now, at common law this land could clearly be granted by the sovereign, for this case does not state any regular flood and ebb of the tide in Currituck Sound since the closing of the inlet. The omission in the act of 1836 has been supplied by

an act at the late session of the Assembly which reënacts those parts of the acts of 1715 and 1777; but while they were dormant, and the common law alone in force, the grants to the plaintiff (141) were valid.

The judgment must, therefore, be

PER CURIAM. Reversed.

Cited: Ward v. Willis, 51 N. C., 184; *Bond v. Wool,* 107 N. C., 149; *S. v. Eason,* 114 N. C., 791; *Land Co. v. Hotel Co.,* 132 N. C., 522.

THE STATE v. DAVID VALENTINE.

When the Attorney General, upon an appeal by the defendant on an indictment, informs the Court that he has looked into the record and that he consents that the *venire de novo* prayed for should be granted, the Court will of course grant the *venire de novo*, without examining into the errors assigned.

RUFFIN, C. J. In this case the Attorney-General has informed the Court that he has looked into the record and is of opinion that he ought not to ask that the judgment should be affirmed, but that it was his duty to consent that there should be a *venire de novo*. The Court was at some loss, at first, as to the proper steps to be taken under those circumstances. But we find from what *Lord Mansfield* said in *Wilkes' case,* 4 Bur., 2527, that it is the course in the King's Bench and the House of Lords, when the Attorney-General makes known that "he does not oppose" a reversal of a judgment on a writ of error in a case of felony, that the courts reverse the judgment upon grounds that could not prevail if opposed, because insufficient in law, and, indeed, as a matter of course. That is done by adopting, as the form of reversal, that it is for the errors assigned *"and other errors appearing in the* (142) *record,"* without specifying any, and, therefore, without establishing any legal precedent. We suppose that our duty is much the same; for, as the judgment of the Superior Court is superseded by the appeal, so that no further proceedings can be had on the indictment until this Court shall have remitted the cause, the whole matter must necessarily be under the control of the Attorney-General here, whether he will bring on the cause or prosecute further; and as he might thus discharge the prisoner, he may by consent allow the lesser benefit of a second trial. The Court, therefore, does not look into the record at all

with the view of forming any judgment of its own whether there be an error or not, but will direct the judgment to be reversed forasmuch as the Attorney-General, who appears on behalf of the State, admits to the Court that for the matters mentioned in the prisoner's exception, and for other causes appearing in the record, the judgment was erroneous and ought to be reversed.

PER CURIAM. *Venire de novo.*

Cited: S. v. Leak, 90 N. C., 658; *S. v. Lee,* 91 N. C., 572.

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(143)

BANISTER MIDGETT v. SAMUEL G. WATSON, JR.

1. An account in the following words, to wit:

Sold to Samuel G. Watson, this 6 December, 1844, 153 turkeys at one dollar a pair.....$ 76.50
211 chickens at 12½ cents each..... 26.38

$ 102.88

Payable in corn at one dollar and sixty cents, with sixty days to deliver the corn in
credit this account fifty shillings..... 5.00

$ 97.88

J. G. WATSON, JR.

is not a liquidated account within the meaning of our act of Assembly, giving jurisdiction to a single justice of liquidated accounts above sixty and under one hundred dollars.

2. A liquidated account under this act means one in which the debt is adjusted and the balance stated, without the necessity of having recourse to extrinsic evidence.

APPEAL from HYDE Fall Term, 1846; *Manly, J.*

The facts upon which the opinion of the Supreme Court is founded are fully stated by the judge who delivered the opinion. It seems, therefore, unnecessary to recapitulate the case sent up by the judge below.

Stanly for plaintiff.
Shaw for defendant.

NASH, J. The action was commenced by warrant, and the plaintiff claims in it from the defendant the sum of $97.88, "due by signed

account." To sustain his claim he gave in evidence a paper-writing which is in the words and figures following: (144)

Sold to Samuel G. Watson, Jr., this 6 December, 1844, 153 turkeys at $1 a pair.....	$ 76.50
211 chickens at 12½ cents each.....	26.38
	$ 102.88
Payable in corn at $1.60 with sixty days to deliver the corn in; credit this account 50 shillings.....	5.00
	$ 97.88

S. G. WATSON, JR.

The reception of this paper in evidence was opposed by the defendant on two grounds: first, that it was not such a paper as was described in the warrant, and, secondly, that a single magistrate had not jurisdiction of the claim as set forth in the account. As their objection lies at the foundation of the plaintiff's right of recovery in this action, we have not considered ourselves called on to decide any other points raised. Upon its face the warrant claims a sum of money under $100 as due by a signed account. If the account produced is not within the act of Assembly, it does not support the warrant, and ought not to have been received in evidence. *McFarland v. Nixon,* 15 N. C., 141. The presiding judge was of opinion that it was a signed account, and overruled the objection. In this opinion we do not concur. We hold that the account is not, in the language of the act, a liquidated account.

The act under which the warrant is brought is as follows: "All debts and demands due on bonds, notes, and liquidated accounts, when said accounts shall be stated in writing and signed by the party from whom the same shall be due, when the principal does not exceed $100, etc., shall be cognizable and determinable by any one justice of the peace out of court." Rev. Stat., ch. 62, sec. 6; and by the latter part of the same section the jurisdiction is confined, in claims for money, to sums under $60, when not so evidenced, and to specific articles not exceeding that sum in value. The whole question turns upon the (145) construction of the words "liquidated accounts," for the description of the account, in the warrant, is but a description or defining of them. It is manifest that the Legislature intended that the different securities enumerated should bear upon their face the same and equal certainty. A bond or not payable to no one cannot be considered, as in law, a valid instrument. So it must show what is due or payable, or furnish the means whereby the amount may be ascertained. So a liquidated account is one which is stated in writing and signed by the party to be charged. To liquidate is to settle, to adjust, to ascertain or

reduce to precision in amount. See *Walker,* word *liquidate.* So liquidation is the act of settling or adjusting debts, or ascertaining their amount, or the balance due. There must, then, be some one to whom that balance is due, as well as some one from whom it is due. To liquidate an account is to ascertain the balance due, to whom due, and to whom payable. But to subject such an account to the jurisdiction of a single magistrate, the amount must be under $100, and the account must be stated in writing and signed by the debtor. In *Newman v. Taylor,* 27 N. C., 232, the Court decides what constitutes, under the act we are considering, a liquidated account: "The instrument must in itself amount to plenary evidence, without requiring the aid of other evidence to supply its defects." The instrument sued on, in that case, was as follows: "22 April, 1844. Received 15 hundredweight of bacon at 6 cents, and 128 pounds of lard. William Tabor." The question was whether that was, under the act, a signed account, and the Court say it is not. Among other objections, the Court notices the fact that the paper does not say from whom the bacon and lard were received, and that it did not purport to be a liquidated account between the parties before the Court. The paper in this case is equally uncertain
(146) with that in Tabor's. It does not state who sold the turkeys and chickens to the defendant Watson, nor to whom the amount was due. They are to be paid for, not in money, but in corn at $1.60, and deliverable in sixty days, but to whom, or when, is not stated; and whether the $1.60 is per barrel or per bushel, it does not state. It does not, then, in the language of the Court in *Tabor's case,* contain plenary evidence in itself, but requires other proof to supply its defects. Accordingly, the plaintiff was permitted to prove *aliunde* that George Staples was employed by him as an agent to sell goods for him as a merchant in Hyde County, and that he sold the articles to the defendant, and that the paper offered in evidence was taken from the books kept by Staples at the store, and that the books were surrendered up by him, as the books of the plaintiff, to a person authorized by the plaintiff to receive them, and acknowledged by the defendant as being the property of the plaintiff. But none of this evidence was furnished by the account introduced. It was all without and beside it. No case could have more fully exemplified the meaning of the Court in *Tabor's case* than the present. There is no doubt the account properly belongs to the plaintiff, and he can maintain an action on it, but not this action. The account is not within the meaning of the act a signed account. The sum claimed is over $60, and is beyond the jurisdiction of a single magistrate, and the defendant was entitled to have the judgment of a nonsuit.

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

Cited: Furman v. Moore, 64 N. C., 360.

(147)

THE STATE v. JAMES GALLIMORE.

1. The Supreme Court will take no notice of mistakes by the jury in the court below, whether or not they find against the facts or the law.
2. The jurisdiction of the Supreme Court is confined to matters of law adjudged by the judge of the court below, and, to ascertain what matters of law were so adjudged, they look to the case stated, which is in the nature of a bill of exceptions.
3. Yet, upon a motion in arrest of judgment, the Supreme Court will look into the whole record, and, if they find error, will so decide.
4. In an indictment for larceny, when the property stolen is alleged to be the property of A. B., and that the defendant "did feloniously steal, take and carry away the said property," this is a sufficient description of the offense. It is not necessary to state that the property stolen was then actually in the possession of the said A. B. or that it was actually taken out of his possession, the law implying his possession from his ownership.

APPEAL from IREDELL Fall Term, 1846; *Dick, J.*

The matters upon which the opinion of the Supreme Court is founded are sufficiently set forth in that opinion, and it is therefore deemed unnecessary to insert the case sent up by the judge below.

Attorney-General for the State.
G. A. Miller for defendant.

NASH, J. The prisoner was indicted for stealing a negro woman named Harriet, the property of one Allen Bost. The indictment contains three counts. It is unnecessary to advert further to the second and third, as upon them the prisoner was acquitted. The first count is as follows: (148)

STATE OF NORTH CAROLINA—CABARRUS COUNTY.

Superior Court of Law, February Term, 1846.

The jurors for the State, upon their oath present, that James Gallimore, late of said county, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on 10 January, 1845, with force and arms, in the said county of Cabarrus, a certain female slave named Harriet, of the value of 50 shillings, and the property of Allen Bost of the said county of Cabarrus, feloniously did steal, take and carry away, contrary to the act of Assembly in such case made and provided, and against the peace and dignity of the State.

Upon this count the prisoner was convicted by the jury, and through his counsel moved for a new trial "because the jury had found him guilty without sufficient testimony." It is unnecessary here to state the

testimony given on the trial. We have no authority, as the case appears before us, to look into it. The question raised by the motion has been repeatedly decided in this Court. The Supreme Court is a court for the correction of errors in law committed by the court trying the cause, and not for the correction of those committed by the jury. If there is error here, it is of the latter kind, the only remedy for which rests in the sound discretion of the judge before whom the cause was tried, by granting a new trial. We cannot interfere, although in our opinion it might appear that injustice had been done. *Long v. Gantly,* 20 N. C., 457; *Goodman v. Smith,* 15 N. C., 459. The last case that came before this Court in which this question was raised was *Reed v. Moore,* 25 N. C., 313, in which the doctrine is laid down with so much clearness and precision that it is difficult to perceive how any mistake or misapprehension can still exist upon it. The language of the Court is: "It has been repeatedly declared that this Court cannot correct the errors of the jury in finding a verdict without or against evidence or against law, but must leave it to the judge who tried the case." To the same effect is *Terrell v. Wiggins,* 23 N. C., 173. For the reason assigned in the case,
(149) it is not in the power of the Court to grant a *venire de novo.* But the counsel for the prisoner, not urging this point, claims a new trial upon the ground that it was the duty of the presiding judge to have instructed the jury that there was *no evidence* before them that the felony complained of was perpetrated within the county of Cabarrus. Every appeal to this Court from a trial at law consists of the record of the case below, properly so called, and the statement accompanying it. This statement is in the nature of a bill of exceptions, and is considered as containing the proceeding excepted to in the court below by the party complaining of them. It is our duty to examine the record of every case and to pronounce such judgment on it as the court below ought to have pronounced. Beyond the statement sent here, the Court cannot look without manifest injustice to the appellee; he would be surprised by objections taken here for the first time. It has, therefore, long been the established rule in this Court that only those points which were raised below can be heard here, unless they appear upon the record. We cannot listen to objections arising out of the *ore tenus* incidents, as they are termed, of the trial. Of them no court can take notice but that before which they occurred. Everything found by the jury or ruled by the court must be held by us to be right, unless objected to at the trial. *Hemphill v. Hemphill,* 13 N. C., 294; *Atkinson v. Clark,* 14 N. C., 174. We conclude this part of the case, then, in the language of the Court in *Reed v. Moore,* 25 N. C., 314: "We can do only with the errors of the judge. It is true, it is erroneous to submit an inquiry of fact to the jury to which there is no evidence in the case; but as to that, we have to say

in this case that the prisoner took no exception at the trial nor on his motion for a new trial, and, consequently, we cannot suppose the testimoney to have been stated but with a view to the objections raised. The plaintiff's motion for a new trial was on the ground that the (150) verdict was against evidence and law, and not because the court left a point to them without evidence." And so here, the plaintiff moved for a new trial because the jury found the prisoner guilty without sufficient evidence, and not because a point was left to them without evidence. The latter was a question of law, to be decided by the court; the former one of fact, for the exclusive consideration of the jury.

The prisoner's case has, in our opinion, in no manner been prejudiced by the omission. We have looked carefully into the testimony, and think that there was evidence to go to the jury, and that the court could not have told them there was not any; and the jury, after a most careful and clear charge from the presiding judge upon this point, returned their verdict of guilty against the prisoner. If in this they erred, it is an error which could have been cured only by the granting of a new trial, which was within the peculiar discretion of the court, with the exercise of which, as we have before said, we cannot interfere.

The prisoner moved further in arrest of judgment, and assigned as error, that the indictment did not set forth or charge "that the slave was in the possession of the owner, and that the prisoner took and carried her away from his possession." The indictment in this particular conforms to the precedents to be found in the books. We have looked through Archbold, and find that the words "shall take and carry away" are the operative words used by him. Nor do we anywhere find it stated to be necessary that the indictment should charge that the property stolen was in the possession of the owner, or that the prisoner stole it from his possession. Possession in the owner at the time of the larceny is a part of the essence of the crime; but it is a matter of evidence, and is not usually stated in the indictment, and is not (151) necessary to its validity. The indictment, in *S. v. May*, 15 N. C., 328, charges the felony as in this case. That was for stealing a slave, and was very maturely considered; each of the judges delivered an opinion, and although the exception was not taken, it is not likely it would have escaped their notice. And if the law had required that the possession, in so many words, should have been charged in the indictment, the judgment would have been arrested without a motion to that effect. The indictment in this case is an exact copy, *mutatis mutandis*, of that in *S. v. Jernigan*, 7 N. C., 12. The indictment charges the negro Harriet to be the property of Bost, and in a legal sense imports possession by him, and then charges a felonious asportation.

After a careful examination of the case, we are unable to discover any

good reason why there should be a *venire facias de novo,* or why the judgment should be arrested.

PER CURIAM. No error.

Cited: S. v. Tribett, 32 N. C., 152; *S. v. Orrell,* 44 N. C., 218; *S. v. Langford, ibid.,* 442, 444; *Brown v. Kyle,* 47 N. C., 443; *S. v. Smallwood,* 78 N. C., 562; *S. v. Fox,* 81 N. C., 578; *S. v. Taylor,* 85 N. C., 592; *S. v. Crook,* 91 N. C., 538; *S. v. Eliason, ibid.,* 565; *S. v. Powell,* 94 N. C., 923; *S. v. Best,* 111 N. C., 643.

DEN ON DEM. OF JOHN McENTIRE v. ACHILLES DURHAM.

A purchaser at a sheriff's sale of land, under execution, is only bound to show a judgment, execution, and the sheriff's deed. He is not bound to show a levy by the sheriff. His title is complete as against the defendant in the execution.

APPEAL from RUTHERFORD Fall Term, 1846; *Caldwell, J.*

The plaintiff claimed title to the lands in dispute as a pur-
(152) chaser at a sale made by the sheriff, and on the trial of the case he offered in evidence several judgments rendered against the defendant in Rutherford Superior Court in favor of third persons; also executions issuing thereon, a sheriff's deed covering the premises, and proved the defendant in possession of the same. The sheriff was examined, and testified that said lands were sold by virtue of said executions. It was insisted for the defendant that it ought to appear that a levy on the land had been made by the sheriff and that he had acted under it. The court charged the jury that to entitle the plaintiff to their verdict in a case of this kind he must show a judgment against the defendant, an execution issuing thereon, and, corresponding with said judgment, a sheriff's deed covering the premises, and that the defendant was in possession when the suit was brought; and if he made out these facts, he was, *prima facie,* entitled to their verdict.

The jury found for the plaintiff, and on a new trial being refused, the defendant appealed to the Supreme Court.

Alexander and Bynum for plaintiff.
Guion for defendant.

DANIEL, J. The executions which were issued on the judgments against Durham bound his lands from the *teste* of the same. The sheriff

was the proper officer to sell the lands and raise the money to satisfy the said executions. The sheriff on the trial proved that he sold the lands by virtue of said executions. The plaintiff showed several judgments and executions against Durham, and then proved a sale of the land by the sheriff under those executions, and produced the sheriff's deed to himself. That was sufficient to transfer the title to him. The objection taken by the defendant, that the sheriff did not *levy* (153) the executions on the land before he sold them, was, we think, properly overruled by the judge. There is no law that we know of which requires a purchaser of land at a sheriff's sale to show that the executions had been levied on the same before the sale by the sheriff to him; if he shows a judgment, execution sale, and a sheriff's deed to himself for the land, he is entitled to recover the possession as against the defendant in the execution.

PER CURIAM. No error.

Cited: Owen v. Barksdale, 30 N. C., 83; *Hardin v. Cheek,* 48 N. C., 138; *Peebles v. Pate,* 86 N. C., 440; *Burton v. Spiers,* 92 N. C., 505; *Williams v. Dunn,* 163 N. C., 212; *S. v. Knotts,* 168 N. C., 190.

THE STATE TO THE USE OF J. R. LINDSAY v. DANIEL ENGLAND.

1. Under the acts for the sale of the Cherokee lands the purchaser has a right, upon the certificate of his purchase from the commissioners, to institute an action of ejectment, in the name of the State, against any person in possession.
2. The person so in possession cannot set up as a defense to this action that he had received a deed from the purchaser which had never been registered, but which was alleged to be lost, or destroyed by an agent of the purchaser.

APPEAL from CHEROKEE Spring Term, 1846; *Pearson, J.*

Lindsay, the real plaintiff, purchased the land of the commissioners for the sale of Cherokee lands, and received of them a certificate of purchase. The defendant, being in possession, refused to deliver up the same when he was required to do so, and this action was (154) brought in the name of the State to recover possession agreeably to section 15 of the act of 1846 (2 Rev. Stat., 213). The plaintiff offered in evidence the aforementioned certificate, which the said act declares shall be evidence of title and right to sustain the action, when the purchaser has not forfeited his right under the said purchase. On

the trial the defendant offered to prove by parol that Lindsay had, for a valuable consideration, executed a deed by which he transferred, released, and assigned to him and his heirs all the interest, title, and claim he had and held, as purchaser, in the aforesaid tract of land, and that the deed had been fraudulently obtained and destroyed by Lindsay's agent before it had been registered. The court rejected the evidence, the plaintiff had judgment, and the defendant appealed.

Baxter for plaintiff.
No counsel for defendant.

DANIEL, J. The defendant omitted to take an assignment of the certificate, but left that in the hands of Lindsay; and until a grant is issued for the land, the State can sustain an action of ejectment. By force of the act, the purchaser who gets a certificate has the right to institute that action in the name of the State.

The defendant took a deed of bargain and sale from Lindsay, which was never proved and registered, and, without registration in the county where the land lies, no conveyance for land, in what manner or form soever drawn, shall be good and available in *law*. Rev. Stat., 224. The deed, if it had not been lost or destroyed, could not have been read in evidence for the defendant, either to show title in him or to work an estoppel.

PER CURIAM. Affirmed.

(155)

DEN ON DEMISE OF JACOB CANOY v. HENRY TROUTMAN.

1. A fraud in the consideration or treaty on which a deed is obtained is a ground for impeaching it in equity, but it does not avoid it at law. To have that effect it is necessary the execution of the deed should be obtained by fraud, so as to make a case for the defendants on the plea of *non est factum*.
2. When land is conveyed in fee to a person, under certain trusts mentioned in the deed, the trustee can convey a *legal* title to the property so as to enable the alienee to maintain an action of ejectment. The question as to his equitable right to convey, for a different purpose than that authorized by the trust, is one of purely equitable jurisdiction, and cannot be entertained in a court of law.

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

Ejectment. The plaintiff, in order to show a title in his lessor, read in evidence a deed for the premises mentioned in the declaration, which was made by the defendant to one Jacob Troutman on 4 May, 1843. It purports that the defendant, "Henry Troutman, in consideration of the sum of $1 to him in hand paid by the said Jacob Troutman, the receipt

whereof is hereby acknowledged, hath bargained and sold, and by these presents doth bargain and sell, unto the said Jacob, his heirs and assigns, that certain parcel of land lying, etc., to have and to hold to the proper use and behoof of the said Jacob, his heirs and assigns forever: In trust, however, and to the intent and purpose, that the said Jacob hath entered surety for said Henry on a judgment obtained against him by Conrad Casper before a justice of the peace for an appeal to the county court of Cabarrus County; and if the said suit be decided in court and the said Henry Troutman shall be cast and made liable for the costs and shall fail to pay them within two months thereafter, then (156) and in that case the said Jacob is to enter into the premises, and take possession and expose the said lands to public sale on the premises for cash, after giving twenty days notice, and out of the money arising from the sale of such land shall pay all the costs and charges of the aforesaid suit, and the residue of such money, if any, shall pay to the said Henry or his assigns." The plaintiff further proved a sale made by Jacob Troutman on the premises, to the highest bidder, and that the lessor of the plaintiff became the purchaser at a fair price, and received a conveyance from Jacob Troutman.

The defendant then, in order to impeach the foregoing title, proved that in April, 1843, Conrad Casper obtained a judgment against him before a justice of the peace for $50, and that he prayed an appeal therefrom and obtained leave to give security therefor within ten days; that he applied to Jacob Troutman to be his surety for the appeal, and proposed to give him, when requested, a deed of trust for his land as an indemnity; and that said Jacob assented thereto, and agreed that he would go to the justice and become the surety accordingly; that within the ten days the said Jacob went to the justice, in the absence of the defendant, and offered himself as surety for a stay of execution, and that the lessor of the plaintiff, being then present, remarked to the said Jacob that the defendant did not want a stay of execution, but wanted an appeal; and that, nevertheless, the said Jacob persisted in becoming surety for the stay of execution, instead of an appeal; that within a few days thereafter Jacob Troutman applied to the defendant to give him the deed of trust, as he had promised, but did not inform the defendant that he had not become surety for an appeal, but for a stay of execution; and that the defendant thereupon executed the deed hereinbefore set forth. When the stay of execution expired, Jacob Troutman paid the judgment and then made the sale and conveyance to the lessor of the plaintiff, at which sale the defendant was present and for- (157) bade the same.

Upon the foregoing evidence it was insisted on the part of the defendant that Jacob Troutman had been guilty of a fraud which avoided the

deed to him, and, therefore, that the plaintiff could not recover. But the court was of opinion that there was no evidence of a fraud in obtaining the execution of the deed, and, therefore, that it was not void on that ground.

And it was further insisted on the part of the defendant that the contingency had never arisen on which Jacob Troutman could rightfully sell and convey the land. Without any decision thereon, a verdict was, by the consent of the parties rendered, for the plaintiff, subject to be set aside and a nonsuit entered if the court should be of opinion for the defendant on that point. On consideration thereof, his Honor held that no power to sell had accrued to Jacob Troutman, because there had not been an appeal, nor costs incurred in court which the defendant failed to pay, as provided for in the deed to him; and, therefore, that said Jacob could not make a good title to the lessor of the plaintiff. Accordingly, the verdict was set aside and a judgment of nonsuit given, from which the plaintiff appealed.

Osborne for plaintiff.
Alexander for defendant.

RUFFIN, C. J. The Court is of opinion that there ought to have been judgment for the plaintiff on the verdict in his favor. On the first point made, this Court concurs with his Honor. A fraud in the consideration or treaty on which a deed is obtained is a ground for impeaching it in equity; but it does not avoid it at law. To have that effect, it is necessary the execution of the deed should be obtained by fraud, so as
(158) to make a case for the defendant on *non est factum*. *Logan v. Simmons,* 18 N. C., 13; *Reed v. Moore,* 25 N. C., 310.

Upon the other point, the Superior Court treated the deed as if it created only a power in Jacob Troutman to make a sale in certain events, which events, it is very clear, did not occur. But that is not the true construction of the instrument. It neither confers a contingent power merely, nor even an estate on condition. But it is a deed of bargain and sale in fee, and carries with that estate every legal incident to it, including that of alienation. The estate is absolute at law, without any limitation or restriction. It is true, the legal estate is conveyed and accepted upon a trust, and on it are engrafted certain conditions and restrictions; but with the construction and enforcing of trusts, or giving redress for the breach of them, a court of law has no concern. That jurisdiction belongs to another tribunal, which may, and probably will, hold the present lessor of the plaintiff to hold the legal title precisely upon the same trusts on which his bargainor did. Yet he is not the less tenant in fee by virtue of the conveyances from the defendant to Jacob Troutman, and from the latter to him; and as tenant in fee he must

recover in an action of ejectment against even his own *cestui que trust,* because a court of law cannot take notice of a trust except so far as it is in some instances made the subject of cognizance at law by certain statutes. Not only does this deed convey the estate, and not simply create a power in Troutman to sell, but it does not convey the estate as a mortgage does, upon a condition, by the performance of which the estate of the mortgage determines and the title revests in the mortgagor without a reconveyance. Thus, in the case of a proper mortgage, if the mortgagor pay or tender the money at the day, he saves the forfeiture of the estate, and it is immediately in him, by force of the terms of the deed, as a legal interest. But deeds of trust like the present are entirely different, and convey the whole title at law to the trus- (159) tee, and he is accountable in equity only. It is in vain to say that he ought not, according to the trusts on which he took the legal title, to have sold; for still he had the legal title and conveyed it; and the legal title ought always to carry a person through a court of law in an action turning on the title. For an injury to another, by perverting his legal title to a different purpose from that on which he took it, he is amenable in a different form.

The judgment must, therefore, be reversed, and judgment be entered for the plaintiff on the verdict in his favor.

PER CURIAM. Reversed and judgment for plaintiff.

Cited: Allen v. R. R., 106 N. C., 522; *Devereux v. McMahon,* 108 N. C., 147.

THOMAS LOCKE v. TIMOTHY ANDRES.

To make specific articles payments they must be received as payments, or by subsequent agreement they must be applied as payments.

APPEAL from BLADEN Fall Term, 1846; *Settle, J.*

Debt upon a judgment, and the plea, payment. On the trial the defendant proved by a witness that the plaintiff had been indebted to one Alfred Andres on a note for $100, and that the plaintiff requested the witness to get Alfred Andres to take the plaintiffs' judgment against the defendant and credit his note for the amount of it, but that Alfred Andres never gave the credit on the plaintiff's note, but (160) required the plaintiff to pay the whole note in cash, and the plaintiff did so. The defendant further proved that he had at several times let Alfred Andres have small quantities of bacon. Upon that

evidence the defendant moved the court to instruct the jury that they might find a payment on the plaintiff's judgment to the amount of the value of the bacon got by Alfred Andres. But the court refused to give the instruction, and, from a verdict and judgment of the whole of the plaintiff's demand, the defendant appealed.

D. Reid for plaintiff.
Strange for defendant.

RUFFIN, C. J. The instruction was very properly refused, for there was no evidence from which a payment could have been inferred. If the defendant had owed the debt to Alfred Andres, the bacon would not have been a payment, properly speaking, but only formed the subject of a mutual demand, that might have been set-off. To make specific articles payments, they must be received as payments, or by subsequent agreement they must be applied as payments. But the case could not be viewed as favorably to the defendant as to suppose even that the defendant's debt belonged to Alfred Andres. There was merely a proposal by the plaintiff, through the witness, that Alfred Andres should accept the plaintiff's judgment as a credit on the plaintiff's debt to him. It did not appear that the witness ever communicated the proposal to Alfred Andres, much less that the latter acceded to it, and still less that the defendant was a party to any arrangement made in compliance with the plaintiff's proposal. On the contrary, the plaintiff was required to pay, and did pay, the whole of his debt to Alfred Andres, as he was bound to do. There is no ground whatever on which the defendant can ask the plaintiff to answer for the bacon sold to Alfred
(161) Andres, and especially to treat the value of it as a payment on this debt.

PER CURIAM. No error.

Cited: Young v. Alford, 113 N. C., 132.

RUANNA SHERRILL v. ELI ECHARD.

A testator devised to his wife during her life or widowhood all his estate except what he should by his will otherwise dispose of. He then gives certain property to his children, to be theirs at *his* decease. Then comes this clause: "Also, at the decease of my wife, I give to my son G. my man Stephen, and to my son L. my man Charles. Also I give and bequeath to my son L. W. all my lands," etc. (on which he had previously given his wife a life estate). "Also unto my son L. W. I give my two boys Dick and David with their mother." *Held*, that these negroes did not pass immediately to L. W., but only in remainder after the death or marriage of the widow.

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

Detinue for a negro man named David, whom both parties claim under the will of Alexander Sherrill, deceased. In it are the following dispositions: (162)

"I give and bequeath to my wife during her life or widowhood all my estate, both real and personal, except what may be hereinafter otherwise disposed of, to have the disposal and control of the same, with all my debts and demands that may be owing to me, with all my household effects, furniture, farming utensils, and stock. My will is that my son Logan W. continue to live with his mother and attend to the management of the farm, and that he shall have, of the proceeds of the crop, 200 bushels of corn annually, if there be that much to spare over and above the support of the family and stock. Also, my will is that he shall have two beasts, a roan horse and a gray filly, as his property at my decease. Unto my son Lawson I give the piece of land lying on the west side of the branch that runs between my dwelling and his, to have and to hold to him and his heirs forever, after my decease.

"And whatever I have given to any of my children, or may give them previous to my decease, I wish them to retain without any account thereof hereafter.

"Also, at the decease of my wife I give to my son Gabriel, my man Stephen, and to my son Lawson, my man Charles. Also I give and bequeath unto my son Logan W. all my lands, except what I have given above to Lawson, to have and to hold the same to the use of himself and his heirs forever; and also unto my son Logan W. I give my two boys, Dick and David, with their mother Leah.

"To my daughter Polly I give $250 at my decease, which shall be laid out by my executor in a negro girl, which she shall have for herself and her heirs forever. My woman Charlotte I allow my (163) wife to dispose of as she may think proper. My wagon I allow my sons Lawson and Logan W. to have. And further my will is that the money belonging to me, and all debts due the estate at the decease of my wife, she may dispose of amongst the children as she may think proper."

The sole question made upon the trial was whether the slave *David* was given by the will for life to the widow (who is the plaintiff), with a limitation over, upon her death, to Logan W. Sherrill, or was given immediately and absolutely to the son, under whom the defendant claims. By consent of the parties, a verdict was rendered for the plaintiff, subject to the opinion of the court on that question; it being agreed that if the court should construe the will as giving the negro to the plaintiff for her life, there should be judgment upon the verdict for her; otherwise, that the verdict should be set aside and a nonsuit entered. The court

was of opinion against the plaintiff, and set aside the verdict, and gave judgment as upon a nonsuit, and the plaintiff appealed.

Alexander, J. H. Wheeler, and J. H. Bryan for plaintiff.
Craig for defendant.

RUFFIN, C. J. This Court differs from his Honor upon the construction of the will. As the case comes here, it is to be assumed that the plaintiff proved the assent of the executor, and, therefore, that the only inquiry is as to the construction of the will. We entertain a decided opinion that the testator intended his wife to have the slave for
(164) life. By the first clause a general gift of everything, real and personal, is made to her during life or widowhood, with an exception of what may be otherwise disposed of in that instrument. Afterwards, the testator gives to Logan W. two horses "as his property at my decease," and to his son Lawson a part of his land then occupied by the devisee and adjoining his own residence, "to him and his heirs after my decease." Then follows the clause in which *David* is disposed of, and which begins thus: "At *the decease of my wife* I give to my son Gabriel my man Stephen, and to Lawson my man Charles. *Also,* I give to my son Logan W. all my land, except that given to Lawson, *and also* my two boys, Dick and David." Upon this clause by itself, or rather construed together with the clause in favor of the wife in the beginning of the will (and without any regard to expressions in other parts of the instrument, the son Logan W. could not take until the decease (or, at all events, the marriage) of the wife. The grammatical construction establishes that position; for, after gifts, in the first part of the clause, of two slaves to the sons of Gabriel and Lawson, limited expressly to commence "at the decease of my wife," come, in the same clause, the two gifts to the son Logan W., the one of land, which begins with the word *"also,"* that is, "in like manner"; the other, of negroes Dick and David, which begins with the words *"and also,"* that is, again, "in like manner," which clearly connect those gifts to this son with those to the two other as all having the same beginning, namely, at the death of the wife. But this is rendered yet more certain by the connection between the two gifts to Logan W. himself. That of the land is unquestionably in remainder after the death or marriage of the mother; for, independent of the term "also" which couples this gift with those to the two other sons, there is the decisive circumstance that the land given to him includes the
(165) tract on which the testator resided, which, as far as we can see, was all the testator had besides that given to Lawson; and he had, in a previous part of his will, in a very particular manner directed that this same son, Logan W., should live with his mother on that farm and manage it for her, receiving a compensation in part of the annual

products when they might exceed the consumption of the mother's family. Besides, unless the wife took that part of the land, she would get no real estate, notwithstanding the express gift of realty to her in the first clause; for, as has already been remarked, the testator had but the tract he and his son Lawson lived on, and the gift of the latter part was expressly to take effect at the testator's death. It being clear, then, that the son Logan W. taks the land only after the death of the mother, it follows that the gift of the slaves to the same person, and connected with the gift of the land by the words "and also," is likewise in remainder after a previous life estate of the mother. Furthermore, this construction is enforced by the explicit manner in which, when the testator means an immediate gift to his children, he so declares, in plain contrast to the gifts intended to take effect after the enjoyment of his wife. Thus, in the two clauses preceding that on which this controversy arises, he gives Logan W. two horses, and Lawson land, each, "at *my* decease," and in the clause next following it the testator gives his daughter Polly, also "at *my* decease," a sum to purchase a negro girl. Between those provisions comes that under consideration, beginning with "at *my* wife's decease," and *then* giving a negro, each, to two sons; also the residue of his land to the son Logan W. "and also" Dick and David to the same son. Upon the whole will, therefore, the intention is quite clear that the wife was to have an interest, during life or widowhood, in the land and negroes given to the son Logan W., and the judgment must be reversed, and judgment given on the verdict for the (156) plaintiff.

PER CURIAM. Reversed and judgment for plaintiff.

Cited: *Robertson v. Roberts,* 46 N. C., 76.

At the session of the General Assembly in 1846-47, EDWARD STANLY, Esquire, was elected ATTORNEY-GENERAL, in the place of SPIER WHITAKER, Esquire, whose term of office had expired, and was thereupon commissioned by the Governor.

CASES AT LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1847

JOSEPH DOUB v. JOSEPH HAUSER, ADMINISTRATOR.

In an action of debt upon a bond, where the defendant has pleaded several pleas, and, among others, the plea of *non est factum*, and the jury find all the pleas in favor of the defendant, this Court is concluded by that verdict and cannot inquire into the instructions of the court below, as to the other pleas, whether those instructions were erroneous or not.

APPEAL from STOKES Spring Term, 1847; *Manly, J.*

Debt, brought in 1844, upon a bond for $668, due 2 June, 1826, purporting to be executed by Noah Ward, William J. Ward, Elijah Ward, and Henry Doub. Pleas: *Non est factum,* and the statute of 1826, raising a presumption of payment upon bonds after ten years from the day of payment. It was in proof that in 1831 three of (168) the obligors, to wit, Wiley J. Ward, Elijah Ward, and Henry Doub, had sent the bond to Tennessee, with power of attorney from them to collect the debt of Noah Ward, who it appeared was the principal obligor. And in the further progress of the cause the plaintiff offered in evidence, upon the issue under the statute, as admissible and pertinent to repel the presumption created thereby, an exemplification of a record from Tennessee of one of the courts in that State in a cause between himself, the plaintiff in this cause, and Noah Ward, wherefrom it would appear that a recovery had been effected upon the bond now in suit, and in 1840 the sum of $600 made upon a *fi. fa.* on the judgment.

This evidence was objected to, and the court, deeming it inadmissible, so ruled, for which the plaintiff excepts. In obedience to instructions from the court, the jury found a verdict for the defendant, and the plaintiff appealed from the judgment thereon.

No counsel for plaintiff.
Morehead for defendant.

NASH, J. It was an action of debt on a bond. The defendant pleaded *non est factum,* payment and set-off, accord and satisfaction, release, *solvit ad diem* and *solvit post diem,* Laws 1826-7, presuming payment, etc. To rebut the presumption of payment, the plaintiff offered in evidence a judgment recovered in his name upon this bond against Noah Ward, the principal obligor, but upon which there had been a partial payment only, made in 1840. The action against Ward was commenced in 1831. This testimony was rejected by the presiding judge, and under his instructions the jury found a verdict for the defendant.

In the case presented to us it appears that the jury found all the issues in favor of the defendant, and of course passed upon their
(169) plea of *non est factum.* That finding puts an end to the case, for the jury have said it was not the deed of the defendant. It is unnecessary to express any opinion as to the correctness of the presiding judge in ruling out the testimony offered by the plaintiff. We are precluded from so doing by several adjudications of this Court, *Morrisey v. Bunting,* 12 N. C., 6; *Bullock v. Bullock,* 14 N. C., 260; *Martin v. Waugh,* 19 N. C., 518.

PER CURIAM. No error.

DOE EX DEM. DANIEL McPHAUL'S HEIRS v. JOHN GILCHRIST.

1. When a grant called for certain courses and distances, and from the last (the third line) "thence north 87 west 199 poles to a hickory; thence *the courses of the swamp* to the beginning": *Held,* that though the distance from the last corner to the swamp gave out 9 chains and 50 links from the swamp, and no hickory corner was to be found, nor was there any proof of its existence, yet the line should be extended to the swamp and thence pursue its courses.
2. *Held further,* that the declaration of an owner of the land, that his fourth line runs from the termination of the distance mentioned in the third line directly to the beginning, did not of itself divest him of his title to the land lying between that line and the swamp.
3. Under our confiscation laws, in the absence of commissioners or other officers appointed by law for that purpose, the county court had no authority to seize, condemn, and sell the property of any Tory of the Revolution, then dead, without notice to his heirs.

APPEAL from ROBESON Spring Term, 1847; *Battle, J.*

Ejectment to recover the possession of a small parcel of land of which it was admitted that the defendant was in possession.

(170) The plaintiffs claimed under a grant to James Pace, made in 1760. They could show no conveyance from James Pace, but they produced a deed from William Pace to Richard Smith, dated 1763,

and a deed from the said Smith to Neil McPhaul, dated 1772, in both which deeds the same description was given as in the grant to James Pace. The plaintiffs then introduced as a witness Mrs. McArthur, who testified that she was a daughter of Neil McPhaul; that her father died about the close of the Revolution, prior to the year 1784, leaving Daniel McPhaul his eldest son; that her father was a Tory captain and died in Charleston, in the service of the British Government; that her mother resided on a different tract of land from that which her father bought of Richard Smith, and that the witness and her brother made a crop about the time of the death of her father, with the permission of her mother, on the Smith land; that shortly afterwards her brother married and settled on the land bought of Smith, and continued to reside on it from that time until his death, since the commencement of this suit. Mr. Campbell, another witness for the plaintiffs, also proved that Daniel McPhaul was the eldest son of Neil McPhaul, and that he took possession of the land which his father bought of Smith, in less than five years after the Revolution, and continued to reside on it until after the commencement of this suit. The plaintiffs then introduced one of the surveyors, Mr. Fauly, who testified that the beginning corner of the grant to James Pace was admitted; that he found a red oak standing there marked as a corner with marks apparently corresponding with the age of the grant; that he ran the courses and distances called for as the first, second, and third lines of the grant, but he found no marked trees on either of said lines; that a corner was marked at the end of the second line, but apparently of a very recent date; that he found no hickory or any other tree marked as a corner at the (171) end of the third line, which was 9 chains and 50 links from the white-oak swamp on the direct line to it. The plaintiffs contended that the call for the fourth line of the grant to Pace, which was from the fourth corner, "thence the courses of the swamp to the beginning," entitled them to go from the end of the third line in a direct line to the swamp, and thence along the edge of the swamp to the beginning, which would include the land in dispute, and they insisted that the swamp was intended as the western boundary of their land.

The defendant claimed under a deed of recent date, and contended that the west line ran from the end of the third line direct to the beginning red oak of the plaintiff's grant, both because that was the proper construction of the call of the fourth line under the grant to Pace and because Daniel McPhaul recognized it as the line of his land, and to establish this fact he introduced Mr. Campbell, who testified that he was the brother-in-law of Daniel McPhaul; that the witness owned a 70-acre tract of land adjoining, and that Daniel McPhaul never claim that his

third line ran through witness's said land; that some thirty or forty years ago he heard Daniel McPhaul say that the line represented as running directly from the end of the distance of the third line was his line, and saw some marked trees upon it, but they were fresh marks. Neil Patterson, another witness for the defendant, testified that he was living with Daniel McPhaul in 1838 and 1839, and, being a blacksmith, he wanted some coal, and asked Malcolm McPhaul, a son of Daniel, and now one of the lessors of the plaintiffs, whether he could make it from the tops of certain pine trees which the defendant had cut down in clearing the field within the disputed ground, when Malcolm told him that he would have to ask the defendant for the privilege of taking them.

(172) The defendant contended further, that the plaintiffs had no title to the land which they claimed, because it had been confiscated by the State in the year 1782, as the property of Neil McPhaul, on account of his having joined the enemy, and introduced a record from office of the county court of Bladen County, a copy of which is sent as a part of this case.

The court held that the judgment of confiscation relied on did not take away the title of the plaintiffs, because at the time it was given the title of Neil McPhaul had descended to his oldest son and heir at law, Daniel, and that Daniel was entitled under our Constitution to a trial by jury before his title could be divested; and further, that though the court declared the said land to be confiscated, it had never been taken possession of by any officer for the State. The court held further, that the call in the grant to Pace, which was also contained in the deeds from William Pace to Richard Smith, and from him to Neil McPhaul, carried the fourth line to the swamp, and along the edge of the swamp to the beginning, and that the evidence introduced by the defendant to show that Daniel McPhaul only claimed to the line mentioned before did not divest him of his title to the piece in dispute, in the absence of any conveyance from him or an adverse possession held under such circumstances as would give title to the possessor. The jury returned a verdict for the plaintiff, and the defendant moved for a new trial for error in the charge of the court. Motion overruled, and judgment for the plaintiff, from which the defendant appealed.

[*Copy of the Record from the County Court of Bladen.*]

STATE OF NORTH CAROLINA—BLADEN COUNTY.

At a county court of pleas and quarter sessions held for the county of Bladen on the first Monday of August, 1842. Present, etc.

The widow of Neil McPhaul, being cited to appear before this court to show cause, if any she has, why the estate of her husband, Neil Mc-

Phaul, should not be forfeited, and the said widow acknowledged that her husband had joined the enemy of this State, and ac- (173) knowledged the right of confiscation, and the court were of opinion that the said McPhaul's estate be confiscated.

Copy of record certified in the usual form.

Strange for plaintiffs.
Badger for defendant.

DANIEL, J. The lessors of the plaintiff claimed all the land contained within the boundaries of a grant made in 1760 to James Pace, lying on the east side of Drowning Creek, beginning about a mile above Overstreet's bridge at a red oak, thence 87 E. 179 poles to a pine, then S. 3 W. 179 poles to a pine; thence N. 87 W. 179 poles to a hickory; thence the courses of the swamp to the beginning. The distance mentioned in the third line gave out 9 chains and 50 links from the swamp; there was no hickory corner to be found, nor any proof of its existence. The judge charged the jury that the call of the fourth line of the grant from the hickory, *"thence the courses of the swamp to the beginning,"* entitled them to extend the third line to the swamp (a natural boundary), and thence along the swamp to the beginning *red oak*. This part of the charge we think was correct. In *Sandifer v. Foster*, 2 N. C., 247, the call of the last line was, "thence along the river to the beginning"; the *river* was held to be the boundary, although the line coming towards the river called for a *white oak* at its termination, which was half a mile distant from the river. *Hartsfield v. Westbrook*, 2 N. C., 258; *Pender v. Coor*, 3 N. C., 183.

2. The judge charged that the declaration of Daniel McPhaul, that his fourth or west line ran from the termination of the distance mentioned in the third line to the beginning red oak, did not divest him of his title to the land lying between that line and the swamp, in the absence of any conveyance from him or adverse possession held (174) under such circumstances as would give a title to the possessor. We see no error in this part of the charge. If the land in dispute belonged to Daniel McPhaul, he could not part with the title to it by parol; nor was his admission binding on him and those who claim under him, if they were made under ignorance or a clear mistake of his rights.

3. Neil McPhaul in 1772 purchased of Richard Smith the land mentioned in the aforesaid patent. Neil McPhaul died about the close of the Revolutionary War, and before 1784, leaving Daniel McPhaul his eldest son and heir at law. The heir entered on the land shortly after the death of his father, and continued to reside on it from that time to the commencement of this suit. Neil McPhaul was a Tory, and died

a captain in the service of the British Government. The county court of Bladen, at its August Sessions, 1782, entered a judgment of confiscation of the estate of Neil McPhaul, as is mentioned in the case. The Legislature had by the confiscation acts declared that the lands of all such persons as adhered to and aided the enemy, by taking up arms in their favor, should be forfeited. Commissioners of confiscation were directed to be appointed in each county, who were to give bond and take an oath faithfully to perform their duties. The duties of these commissioners were to take possession of lands and movable property, in the name and for the use of the State, which by the act of Assembly were declared to be forfeited to the State, and to sell the same and make titles to the purchasers, and account for the purchase money. The act of 1780, ch. 170 (Rev. Code), enacts that for want of commissioners of forfeited estates in each county the sheriff or coroner, and where there is no sheriff or coroner, the county court, is hereby strictly enjoined to seize and take into their possession all such property as has been described in the said act.

(175) If the court was authorized to act in the place of commissioners, and if the order could be construed to *include* this piece of land, it condemned the land to confiscation without any notice to the heir to defend, which was contrary to law; and, moreover, the land was never seized to the use of the State by any officer or person, but remained in the actual adverse possession of the heir for more than sixty years before this controversy arose. We think that the title of Daniel McPhaul never was divested by any office found in the mode pointed out by any of the confiscation acts. The judgment is affirmed.

PER CURIAM. No error.

Cited: Literary Board v. Clark, 31 N. C., 61; *Campbell v. Branch,* 49 N. C., 314; *Baxter v. Wilson,* 95 N. C., 143; *Brown v. House,* 118 N. C., 881; *Drake v. Howell,* 133 N. C., 165; *Rowe v. Lumber Co., ibid.,* 437; *Whitaker v. Cover,* 140 N. C., 283.

JOHN SMITH v. EBENEZER INGRAM ET AL.

1. Where surveys are made on any navigable water, the water shall form one side of the survey; and any island or islands in any navigable water may be entered, surveyed, and granted.
2. Where land is subject to entry and has been granted, the action of trespass *q. c. f.* lies, although the land is covered with water.

3. Where land is lapped by two deeds or grants, the adverse possession for seven years by a person not being in possession of the lapped part can give him no right against the superior title to the part so lapped.
4. One who is in the actual or constructive possession of land may recover damages from him who dispossesses him, though not in possession at the time of the action brought. No ulterior profits or damages can be recovered until he regains the possession; and then the law, by relation, would adjudge him to have been in possession from the first ouster, and entitle him to damages for all the time the defendants wrongfully held the lands.

APPEAL from ANSON Spring Term, 1847; *Battle, J.*

Trespass quare clausum fregit, to which the defendant pleaded the general issue and *liberum tenementum.*

The plaintiff produced a grant under which he claimed and (176) which covered the *locus in quo,* dated in 1796, and then showed a regular chain of conveyances to himself. The plaintiff's grant included some small islands, rocks, shoals, and the bed of Peedee River where it is not navigable. It was in proof that the defendants, in the Fall of 1836, erected a dam and put in a fish trap at the place in dispute, and which is within the boundaries of the plaintiff's grant. It further appeared that they kept up this dam and continued to fish there until the Spring of 1839, but whether they continued to do so up to the time when the action was commenced in July of that year was matter of dispute upon the testimony. It was in evidence on the part of the plaintiff that he erected a dam and put in a fish trap at or very near the spot where the defendants' dam had been erected, in the Spring of 1839, and that the defendants took out his trap and carried it off. The plaintiff claimed damages for the trespass committed by the defendants in erecting their dam in 1836, and for taking away his fish trap in 1839.

The defendants claimed title to the *locus in quo* under a deed from one Terry to Slaughter, executed in 1824, and a deed from the latter to E. Ingram made in 1836. The deed under which the defendants claimed included part of the same land as that covered by the plaintiff's grant, and included the *locus in quo;* and they proved that those under whom they claimed had erected a dam for the purpose of putting in a fish trap on a part of the premises included in their deed, but not on the lapped part, and had used it for the purpose of catching fish for more than seven years before the suit was commenced. It did not appear that the plaintiff, or those under whom he claimed, ever had actual possession of the premises included in his grant until he erected his dam in 1839.

The defendants objected to the plaintiff's recovery, first, that (177) the plaintiff's grant was void because the place granted was not

subject to entry; second, that the seven years possession of Terry and those claiming from him under color of title, though not upon the lapped part, gave them a good title to all the land within the boundaries of their deed and, of course, to the *locus in quo;* third, that the plaintiff was not in possession of the *locus in quo* at the time of the commencement of this suit.

The court held that the first and second objections were untenable; that, as to the third, the plaintiff was entitled to recover for the entry by the defendants to erect their dam and put in their fish trap upon his premises in 1836; that if the defendants were in actual possession of the *locus in quo* in 1839, when the suit was commenced, it could not be sustained for damages then committed, but that if the defendants had abandoned the possession of the *locus in quo* in the Spring of 1839, and the plaintiff then entered and erected his dam and put in his fish trap, and the defendants afterwards took the trap and carried it away, he might recover damages for that injury also. The plaintiff had a verdict and judgment, and the defendants appealed.

No counsel for plaintiff.
Strange for defendants.

DANIEL, J. Where surveys are made on any navigable water, the water shall form one side of the survey; and any island or islands in any navigable waters may be surveyed and granted. Rev. Stat., ch. 42, sec. 1. The grant, dated in 1796, under which the plaintiff claimed the land does not cover any navigable water, whether we are to understand the term in its common-law sense or according to any meaning it has received in this State. The *locus in quo* was, we think, subject to entry and grant. And this action is well brought, for it (178) lies although the land is covered by water. Co. Lit., 4; Yelver, 143. Secondly, we are of opinion that the seven years possession of Terry and those under whom the defendant claim under a color of title (not being on the *locus in quo* or on that part of the land where the deeds of the respective parties lap on each other) did not give them a title to any part of the land contained in the lap, as the title of the plaintiff was the elder and better title and extended to the boundaries mentioned in his grant and deeds, and as no adverse possession interfered with him within the scope of his boundaries. *Carson v. Burnett,* 18 N. C., 546. The plaintiff, and those under whom he claims, were never at any time ousted of any portion of their land so as to be put to their right of entry. The defendant and those under whom he claims had never taken any possession of the land claimed by the plaintiff so that an action of ejectment could have been maintained against him or them.

How, then, can it be contended that a possession by Terry and the defendants of land which the plaintiff never claimed or had any title deeds to cover could be an actual adverse possession of those lands, or any part of them, lying within the boundaries of the plaintiff's grant and deeds? It cannot be so. If the defendants, or those under whom they claim, or either of them, had entered on that part of the land comprised in the lap, and continued in actual adverse possession for seven years of that, the plaintiff's right of entry would have been tolled as to that; and then the defendant's inferior title to the *lapped* part would have become the better title to that part. Thirdly, we think the charge of the judge was correct upon the third point. The plaintiff was constructively in possession of the *locus in quo,* as he had the possession by virtue of the legal title, and the action of trespass *quare clausum fregit* is always brought to recover damages for any injury to the plaintiff's possession of lands. The unlawful entry of the defendants upon the plaintiff's land, and then and there erecting the dam in 1836, was an injury to his *then* constructive possession; and although (179) the plaintiff might not have been in possession of the land, either actually or constructively, at the time of the issuing of his writ, he nevertheless might well maintain this action if he was in possession of the *locus* at the time the injury or trespass was first committed by the defendants; for it is the damages sustained by the plaintiff by the very act of dispossessing him of his land by the defendants that he now seeks to recover. He was injured in his possession by that very act. *Graham v. Houston,* 15 N. C., 232. No ulterior profits or damages, it is true, could be recovered until he regained his possession; and then the law, by relation, would adjudge him to have been in possession from the first ouster and entitle him to recover damages for all the time the defendants had wrongfully held the lands and kept him out of possession. If a man is disseized, he may bring trespass against the disseizor for the *act of disseizin.* 2 Rolle's Abr., 553; Co. Lit., 257 (a); Com. Dig., Trespass, B 2; Roscoe on Actions, 663. And if he reënter, he may have trespass against the disseizor or a stranger for continuing in possession, for by the reëntry he revests the possession in himself, *ab initio.* Roscoe on Actions, 663, 664, and the cases there cited.

PER CURIAM. No error.

Cited: *S. v. Glen,* 52 N. C., 326; *Hedrick v. Gobble,* 61 N. C., 349; *London v. Bear,* 84 N. C., 272; *Maxwell v. Jones,* 90 N. C., 327; *McLaughlin v. Mfg. Co.,* 103 N. C., 106; *McLean v. Smith,* 106 N. C., 176; *Gwaltney v. Timber Co.,* 115 N. C., 585; *Rowe v. Lumber Co.,* 128 N. C., 303.

(180)

THE STATE v. JAMES S. WHITE.

In an indictment for a libel, charging that the prosecutor "was called a murderer and forsworn," it is not competent for the defendant to justify by proving that there was and long had been a general report in the neighborhood that the prosecutor was a murderer and forsworn.

APPEAL from CRAVEN Spring Term, 1847; *Pearson, J.*

The defendant was indicted for publishing a libel of the prosecutor. It appeared that the prosecutor had made a publication in which the defendant was mentioned, and the defendant, in replying to it, published the writing containing the libelous words. They were as follows: "He forgot to tell the people that he is called a murderer and forsworn," etc. The counsel for the defendant in justification offered to prove that at the time the writing was made and published, and for many years before, there was a general report in the neighborhood in which the prosecutor and he lived that the prosecutor had murdered one of his slaves and was forsworn. The court decided that the proof would not sustain the defense; that if there was such a report the defendant was not at liberty to give currency to it, and put it into the shape of a libel; and that to sustain the plea of justification it was necessary to prove that the prosecutor had committed murder and was forsworn. Under this charge the defendant was convicted, and appealed to this Court.

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

NASH, J. We concur in the opinion of his Honor in the court below. The evidence was offered under our statute, passed in 1803, Rev. Stat., ch. 35, sec. 13, which gives a defendant, charged by indictment (181) with the publication of a libel, the right to prove on the trial the truth of the charges in the libel. To ascertain the meaning of the act, in permitting the truth of the facts alleged to be given in evidence, it is necessary to see what was the law as to the justification of slander, both oral and written, at the time of its passage. Oral slander has ever been considered as a civil injury, to be redressed by a civil action; and the defendant was always at liberty to defend himself by proving on the trial that the words spoken were true, that is, that the plaintiff was guilty of the offense with which he had charged him, and it was essential to the validity of his plea that it should aver the guilt of the plaintiff in the act charged. 3 Chit. Plead., 1032. But this was not the case in prosecution for libels. At no time, by the common law, could a defendant give in evidence the truth of the facts which he had published of the prosecutor, and for the reason that a libel tends directly to a breach of the public peace. Whether, therefore, the indi-

vidual of whom he made the publication was guilty or not guilty of the charge, the danger to the public peace was not the less great. This continued to be the law of North Carolina until the act of 1803, above referred to. The truth, which that act gives to a defendant in a prosecution for a libel the right to show, is the truth which defendants were at liberty, under the plea of justification in civil suits for words spoken, to give in evidence. I have been able to find no case, in which the slander consists of rumor, where the defendant has been permitted to justify by showing that at the time he uttered or published the slander there was such a rumor or report. The nearest that any case has come to it is where the defendant gives the name of the person from whom he heard it at the time of the utterance or publication. This was ruled by *Lord Kenyon* in *Davis v. Lewis,* 7 Term, 17, and in the Resolution of the judges in the *Earl of Northampton's case,* 12 Co., 132.
But the authority of both these cases, as to that point, has been (182) questioned not only in this country, but in England. *Chancellor Kent,* in *Dole v. Lyon,* 10 Johns., 449, which was an action for a libel, in remarking upon these cases, observes: "But in neither of those cases was this point in judgment, and it may well be questioned whether even this rule as to slanderous words ought not to depend upon the *quo animo* with which the words with the name of the author are reported." In *Lewis v. Walter,* 5 Eng. C. L., 539, 4 Barn. & Ald., 615, the doctrine in the *Earl of Northampton's case* is more than questioned by all the judges. *Mr. Justice Holroyd,* after remarking at considerable length upon the *dictum in that case,* tells us what he understood to be the meaning of *Lord Coke.* "It is observable," says he, "that *Lord Coke* does not say that it is lawful to repeat slander in all cases and at all times, but only that a party may justify under certain circumstances. It must not, therefore, be taken as a general rule, even in oral slander, that the malicious repetition of it may be justified, if the name of the author be given up at the time." The doctrine upon this subject was elaborately considered in *Hampton v. Wilson,* 15 N. C., 468. That was a case of oral slander. The evidence was that the defendant had said that it was reported the *feme* plaintiff was incontinent. The defendant attempted to justify by proving the existence of such a report at the time he spoke the words. It was ruled by his Honor, *Judge Strange,* on the circuit, that the existence of the report would not justify its repetition by the defendant and would not avail him on his special plea; and upon appeal to this Court the judgment was affirmed. The *Chief Justice,* in delivering the opinion of the Court, observes: "The justification does not consist merely in the facts that the defendant heard the words and gave up his author, for that gives him no right to repeat them, if false, especially if he knew them to be false, and with intent to cause the

(183) guilt of the plaintiff to be believed. Such conduct makes him the indorser of the slander," etc. The reason given by *Lord Kenyon* for his opinion in *Davis v. Lewis* is that by giving the author's name at the time of uttering the slander, he thereby gives to the plaintiff a person to answer to his action. A very insufficient reason, but, insufficient as it is, totally inapplicable to general rumor. Against this ofttimes many headed monster the slandered individual can, in the nature of things, have no redress, while the injury to him is spread wider and deeper by every thoughtless and malicious tongue which chooses to repeat it. The law, while careful that the liberty of speech and of the press shall be duly preserved, is equally solicitous to protect every man in his fair fame and character. In speaking of written slander, in connection with a justification by giving up the name of the person, from whom it was received, *Chancellor Kent,* in *Dole v. Lyon,* says: "There is no existence of such a justification in an action for a libel." The Legislature, then, in authorizing the truth to be given in evidence by the defendant on the trial of indictments for libel, must have meant that the justification should have been such as would have proved an adequate defense at common law in actions for verbal slander. It was nothing more than to extend to the defendant on prosecution the same defense, as he would have if called to answer for the private injury. All persons who concur in doing an unlawful act are guilty, and equally answerable to the State, when the injury is to the public, and to the individual who may receive injury from the act. That the publisher of a libel cannot protect himself by giving up the name of the author is shown by the precedents in our books and the practice of our courts. The cases are many where the publisher of a newspaper is held answerable, even when the libel is published with the name of the author. And if giving the name of the author of him who writes
(184) a libel will not justify him who makes it public, much less will the publisher be justified by giving as his authority that perfectly irresponsible personage, common rumor. In this case the malice of the defendant, an essential ingredient in his offense, is apparent from the terms of the publication and the excuse as avowed.

RUFFIN, C. J. The defendant did not attempt to excuse his publication by evidence that he made it from a different motive than the malicious one of defaming the prosecutor, imputed to him in the indictment. He insisted simply that he was justified by the truth of his words. The single question, then, is whether a person with a view to injure the character of another can publish of him, in writing or print, as a general rumor, that he has been guilty of a felony or some infamous offense, and justify the publication by the evidence of the rumor and without any proof of the guilt of the person? The very stating of such

a proposition in the affirmative shocks the understanding and the sense of what is due to innocence.

It has long been settled in regard to a private action for such a publication that the action would lie, "although that in truth the party might hear" the scandalous words from others. *The Earl of Northampton's case,* 12 Rep., 134. That case was followed by *Hampton v. Wilson,* 15 N. C., 468. *Lord Coke* assigns as a reason for the rule that a person of no estimation might have spoken the words, "and if it should be lawful for a man of credit to report them generally, *that* would give greater color and probability that they were true, in respect of the credit of the reporter." The remark is founded in good sense and a knowledge of the heart. The publication of such an imputation, though as a general rumor, can only be intended to obtain, in some degree, credence in the truth of the charge. Therefore, the reporter ought to be required to establish its truth, or show some other motive for circulating (185) it than that of defamation merely.

The same reasons apply with equal force to an indictment, as to an action for a libel. The publication imparts to the rumor the credit of the reporter, so as to give that color of probability to the accusation which his name can procure for it; and it tends as directly to provoke a breach of the peace, as if he had affirmed the truth of the charge. As far as the authority of the publisher was intended to sanction the report or give credit to it, to that extent the publication of the rumor is substantially the assertion of its truth. It certainly cannot be undersood that he published it *as a false report.* Then he must have meant the world to believe that there was some ground of truth for the rumor; and, in order that it might be the more readily believed, he gave it the sanction of his name. Such conduct is not only a grievous wrong to the good name of an innocent man, but not less seriously endangers the public peace. The act of 1803 has no effect on this question. It merely allows the truth of a charge to justify it, upon an indictment for a libel, and, in that respect, puts an indictment and a civil action on the same footing, which was not so at common law. The Legislature did not mean that a person should be liable for a libel, at the private suit of the citizen, because the defendant could not prove the truth of a report published by him, and yet that he should not, for the same reason, be liable on an indictment for the very same publication. In fine, it could not have been intended that a person, from ill will to another, might with impunity circulate general reports of scandalous falsehoods respecting the other. Such a rule would give free scope to the worst passions and continually embroil society.

PER CURIAM. No error.

Cited: Johnston v. Lance, post, 456.

(186)

DEN EX DEM. T. L. WILLIAMS ET AL. v. JOHN MILLER.

If two grants lap and one of the claimants be seated on the lapped part, and the other not, the possession of the whole interference is in the former exclusively—possession of part of the lands included in both deeds being possession of all of it.

APPEAL from STOKES Spring Term, 1847; *Manly, J.*

Ejectment. The plaintiff read in evidence a grant to Joseph Williams, the ancestor of the plaintiffs' lessors, bearing date in 1755, and proved the defendant to be in possession of part of the land covered thereby. In his defense the defendant read a grant to himself bearing date in 1761, and offered evidence to prove that it covered all the land of which he was in possession. If that was true, then there was a piece of land covered by both patents; and it appeared that the two patentees, and those claiming under them, had been in actual possession, respectively, for upwards of fifty years of those parts of their several tracts not included within the lap, as insisted on by the defendant. The defendant then further offered evidence that, twelve years before this suit was brought, he cleared a portion of the lapped land and had kept it inclosed and cultivated ever since. On the part of the plaintiff evidence was offered that the grant to the defendant was bounded by the lines of the grant to Joseph Williams, and that there was no interference of the two patents; and the plaintiff further proved that about three years before this suit the defendant enlarged his clearing and inclosure and took in another portion of the land within the lap, if the two patents did interfere, as the defendant contended.

(187) Upon this evidence the counsel for the plaintiff insisted before the jury that the line of the two tracts was the same, and that the grant to Miller did not cover so much of the land in the possession of the defendant as is covered by the grant to Williams, and, therefore, that the plaintiff had a right to recover. And upon that point the court instructed the jury that if they should find that the land in possession of the defendant, which was claimed by the plaintiff, was not covered by the grant to the defendant, then they should find for the plaintiff. The plaintiff further insisted that if the jury should believe that the defendant's patent did cover all the land in his possession, yet that would give him a title only to such part of the land, which was also covered by the grant to Williams, as the defendant had been in actual and continued possession of by inclosure for seven years, and, therefore, that the more recent enlargement of the defendant's field entitled the plaintiff to a verdict in this action. But the court instructed the jury that the possession of the defendant within the lapping of the patents for seven years (the lessors of the plaintiff having no possession therein)

was a possession of the whole lap, and gave the defendant a good title thereto.

Upon the trial the plaintiff produced a witness who deposed that about fifty years ago Joseph Williams surveyed the line which the plaintiff now claims as that between him and the defendant, and then claimed it as the line of his patent; and the plaintiff offered further to prove by that witness that when the line was run, the surveyor began at a point on the Yadkin River which was some distance from the line, and that said Williams then stated "why it was necessary to begin at that point on the Yadkin in order to strike the line," but, being objected to by the defendant, the court excluded the evidence of those declarations.

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

No counsel for plaintiffs. (188)
Norwood for defendant.

RUFFIN, C. J. The instructions of his Honor were undoubtedly correct. As the case stands upon the exception, it is to be assumed that the line of the Williams grant was where the plaintiff claimed, and where, indeed, the defendant admitted it to be; but it is to be assumed, also, that the line of the defendant's grant was where he claimed it to be, and where the plaintiff denied it to be; so that in point of fact there was, according to the expression that has come into common use, a lapping of the grants upon each other. In such a case the law has been held in many cases to be that if one of the claimants be seated on that part, and the other not, the possession of the whole interference is in the former exclusively—possession of part of the land included in both deeds being possession of all of it. *Green v. Harman*, 15 N. C., 158; *Dobbins v. Stephens*, 18 N. C., 5, *Carson v. Burnett*, 18 N. C., 546; *Williams v. Buchanan*, 23 N. C., 535. As the defendant thus had the possession for seven years of the whole of the land covered by both grants, he acquired a good title to the whole, though his was the junior grant.

The plaintiff cannot have a reversal of the judgment for the rejection of the declarations of Williams as to the reasons for beginning to survey not on any line of his tract, but at a place on the Yadkin at some distance from the land. In the first place, the plaintiff has not set forth in his exception, what the reasons declared were; and it is therefore impossible to determine whether they were relevant, or not, to any point in controversy. It is incumbent on the appellant to show the relevancy of the declarations, in order to establish an error in rejecting them. But the case is even stronger than that against the plaintiff,

for, as far as the nature of the declarations can be conjectured from the circumstances, they must have been irrelevant or incompetent. (189) If the object was to show that Williams then claimed the line which the plaintiff now does as the line of his patent, the evidence was wholly immaterial, inasmuch as the defendant did not at all deny that to be William's line, but admitted it throughout, and put his case entirely upon the title gained under the statute of limitations by a possession of more than seven years under the color of his own grant. If the object was to prove by those declarations where the line of the defendant's patent was, they were manifestly incompetent for that purpose, for, upon a question of boundary, it cannot be competent for one claimant to prove by his own declarations at a former period what is the ambit of his adversary's deed. In every point of view, therefore, there does not appear to have been an error in ruling out those declarations.

PER CURIAM. No error.

Cited: *McCormick v. Munroe,* 48 N. C., 334; *McLean v. Smith,* 106 N. C., 176; *S. v. Boyce,* 109 N. C., 758; *Boomer v. Gibbs,* 114 N. C., 84; *Currie v. Gilchrist,* 147 N. C., 652.

ABEL COHOON ET AL. v. EDMUND SIMMONS ET AL.

In order to entitle one to maintain trespass *quare clausum fregit,* where he has no occupation of any part of the premises, he must show a title in himself from which the law can deduce that, constructively, he has the possession.

APPEAL from TYRRELL Spring Term, 1847; *Caldwell, J.*

Trespass quare clausum fregit for entering into the premises and cutting down certain timber trees to make shingles, and was tried (190) upon "not guilty" pleaded. The plaintiffs gave in evidence a grant from the State dated in 1833 for the *locus in quo,* under which they claimed. The defendants then gave in evidence a grant for the premises from the State to Josiah Collins, bearing date in 1796. The plaintiffs thereupon moved the court to instruct the jury that they were entitled to recover, notwithstanding the grant to Collins, because the defendant did not show that he claimed under the grant. But the court refused to give the instruction as prayed for, and directed the jury that they ought to find for defendant, although he had not connected himself with the title of Collins. There was a verdict for the defendant, and from the judgment the plaintiffs appealed.

No counsel for plaintiffs.
Heath for defendants.

RUFFIN, C. J. The judgment must be affirmed. This action is founded on the possession of the plaintiff; and where he is in the actual occupation of the *locus in quo* another person cannot justify an entry upon him, unless it be upon a better title in himself or as the servant of him who has the title, because the law will protect a peaceable possession against a mere wrong-doer. But that principle has no application to a case in which there is no actual occupation by the plaintiff and the possession is in fact vacant; for in such a case the law adjudges the possession to be, constructively, with the title. At one time, indeed, it was doubted whether this action would lie at all where there was no actual possession and the *locus in quo* was in a wild state. But from the necessity of the case it has long been held in this country, not that the action will lie without possession, but that it will lie upon that possession which the law implies to be in the owner of land when no other person is in point of fact on it. Therefore, in order to entitle one to maintain trespass *quare clausum fregit* when he has no (191) occupation of any part of the premises, he must show a title in himself from which the law can deduce that, constructively, he has the possession. Hence it is manifest that in this case the plaintiff could not recover. There was no residence, inclosure, or occupation of the premises by any person, but the land was wholly unimproved, as far as we see. Then the law, which carries the possession to the title, carries it, of course, to the real title—that is, in this case, to Collins, and to him exclusively; because it cannot adjudge the possession to be in different persons at the same time merely by force of opposing claims to the title, and it must be in that person only who has the paramount title. *Carson v. Burnett*, 18 N. C., 546.

PER CURIAM. No error.

Cited: Williams v. Wallace, 78 N. C., 356; *Harris v. Sneeden*, 104 N. C., 377; *Springer v. Shavender*, 116 N. C., 20; *Moore v. Angel*, 116 N. C., 845; *Drake v. Howell*, 133 N. C., 166; *Currie v. Gilchrist*, 147 N. C., 652.

PRESLY HOLDER v. JONATHAN JONES.

1. Where the plaintiff, at the commencement of a suit, has given surety for its prosecution, it is not competent afterwards for the court, on his petition, to allow him to prosecute *in forma pauperis*, though the defendant objected to the surety and obtained a rule that further surety should be given or the suit should be dismissed.
2. The court ought either to have dismissed the suit, according to the rule, or to have made an order on the plaintiff's petition permitting him to carry on his action without giving further security.
3. The court could not discharge the first sureties from their responsibilities without the consent of the defendant.

APPEAL from SURRY Spring Term, 1847; *Settle, J.*

The plaintiff when he commenced his action gave bond for the prosecution of the suit, as required by law. The writ was returned to Spring Term, 1846, at which time the defendant appeared, and by his
(192) attorney entered his plea and the cause was put to issue. At the succeeding term of the court a rule was taken upon the plaintiff to show cause why he should not give other and better security or justify the present. At the following term the plaintiff filed his petition praying for leave to prosecute his suit *in forma pauperis*. Satisfactory evidence was produced showing to the court that the plaintiff was unable to give other security, and that he was, in the estimation of the law, a pauper. The court made the order as prayed for.

Morehead for plaintiff.
Boyden for defendant.

NASH, J. In this order we are of opinion there is error. The courts of justice in this State have long exercised the power of requiring other and better security from plaintiffs in cases where justice demands it, as when the sureties to the bond, already given, have moved away or have become insolvent. The act requiring security to be given before the writ issues is silent on the subject; but its spirit and meaning require it, and it is in accordance with the English practice on the subject of costs. The courts, however, in exercising this power ought and will do so, with a proper attention to the calls of justice between the parties, and will, when the plaintiff has once complied with the law in giving security, dismiss or refuse to dismiss his case, as a sound discretion may direct. When, therefore, in this case, the plaintiff failed to comply with the rule of giving better security, the court was not bound to dismiss his action, but might, upon proper reasons shown, permit him to prosecute it without further security. The motion of the defendant, upon the failure of the plaintiff, was to dismiss the suit. This

the court was not, we repeat, bound to do; but, in retaining the (193) cause, was not at liberty to take from the defendant the security against accruing costs which the bond already given afforded him. By that bond the sureties were bound, should the plaintiff fail to prosecute his suit with effect, to pay the defendant all his legal costs. It might be, and no doubt in this case was, a very insufficient protection. Still it was something. The sureties, though unable to pay anything, might, in a variety of ways, be placed in a situation to meet its responsibilities. The defendant had a legal interest in it, of which the court had no right, without his consent, to deprive him. By the order appealed from the sureties of the plaintiff were discharged, as far as the order could have that effect, from any liability to costs hereafter incurred, and as to them the defendant was without protection. The court ought either to have dismissed the suit according to the rule previously obtained upon the plaintiff or to have made an order on the plaintiff's petition permitting him to carry on his action without giving further security. This would be within the equity of the act.

The interlocutory order is erroneous, and is therefore

PER CURIAM. Reversed.

Cited: Biggerstaff v. Cox, 46 N. C., 536; *Dale v. Presnell*, 119 N. C., 491.

(194)

DOE ON DEMISE OF JOEL SULLIVAN v. SANDFORD RAGSDALE AND WIFE.

1. A testator devised "to my grandson, J. S., son of S. S., the tract of land I now live on, with the reserve and privilege of my son, S. S., the father of the said J., having the full privilege of the said land and all the profits arising therefrom during his natural life." In a subsequent clause he says: "I further give and bequeath all my lands that I am seized and possessed of at this time, or the profits arising therefrom, to my beloved wife during her natural life or widowhood; then for it to fall back to the said heir as above mentioned."
2. *Held*, that even if J. S. be the *heir* intended in the second clause of the will, yet he could only take the lands subject to the reservation in the first clause of a life estate to his father, and that he could not bring an action to recover the lands in the lifetime of the father.

APPEAL from GUILFORD Spring Term, 1847; *Manly, J.*

Joel Sullivan by his last will devised as follows: "I give and bequeath to my grandson, Joel Sullivan, son of Samuel Sullivan, the tract of land I now live on, supposed to be 163 acres, with the reserve and privilege of my son Samuel Sullivan, the father of the said Joel, having the full privilege of said land and all the profits arising therefrom during his

natural life." By a subsequent clause he devises as follows: "I further give and bequeath all my lands that I am seized and possessed of at this time, or the profits arising therefrom, to my beloved wife, Elizabeth, during her natural life or widowhood, then for it to fall back to the said heir as above mentioned." The lessor of the plaintiff is the devisee, Joel Sullivan, the grandson, and the defendants the heirs at law, or a portion of them, of the testator. The lessor of the plaintiff claims the premises by virtue of the second clause, as being the *heir* referred to in it. The defendants contend that under that devise nothing passed but the life estate of the widow, for the reason that the individual (195) who is to take after her is so obscurely pointed out that it is impossible to say who was meant, and the devise, of course, fails for uncertainty. The plaintiff offered to prove by parol testimony that his lessor was meant by the testator to take in remainder after his grandmother, the widow. The widow is dead, and the testator left his son Samuel and several other children.

Morehead for plaintiff.
Mendenhall for defendant.

NASH, J. It is unnecessary for the Court to decide any of the questions raised in the argument of the case. Whether the heir mentioned in the second clause refers to the father Samuel or to the son Joel, or whether the devise fails altogether for uncertainty as far as the remainder is concerned, are questions which will be answered when a case is before us in which they necessarily arise. In this action they do not. If it be admitted, as the plaintiff contends, that he is the person meant by the testator by the word *"heir,"* still he cannot maintain this action. We gather from the will that the testator owned other lands beside that mentioned in the first recited clause, and this other land is the subject of this suit. The plaintiff, if he be one of the persons meant in the second clause, must take this land, as he does the homestead, for the words are, after the death of the widow, "then for it to fall back *to the said heir*, as above mentioned." Now, under the first clause Samuel takes a life estate in the homestead, with remainder in fee to Joel Sullivan. The latter must take the additional land devised in the second clause (if at all) in the same way as he takes the homestead under the first, a remainder in fee after his father's life estate. We do not now decide who is or are meant by the testator by the word "heir"; all we decide is that if it be the lessor of the plaintiff, he cannot maintain this action, because the life estate of his father would precede his (196) remainder in fee, and it has not fallen in, Samuel Sullivan being still alive, as far as appears.

PER CURIAM. *Venire de novo.*

ENOS F. CUMMINS v. A. G. COFFIN.

1. In an action against two of three partners in a firm, the plaintiff may introduce the testimony of a third partner, not a party to the record, though he could not be compelled to give his testimony.
2. The evidence of a partner in behalf of those sued as part of the firm is not competent for them, because, in a suit for contribution, he is not only bound for his part of the debt recovered, but also for his proportion of the costs accrued in the action.

APPEAL from GUILFORD Spring Term, 1847; *Manly, J.*

The action is brought upon a note of hand, signed Coffin, Harvey & Co. The plaintiff proved that the defendant was a partner of the firm, Coffin, Harvey & Co., and that the signature to the note was that of William Coffin, another member of the firm. In order to prove the existence of the debt, and that it was contracted in the due course of partnership business, the plaintiff offered in evidence the deposition of Samuel Harvey, another member of the firm. This testimony was objected to by the defendant's counsel, but admitted by the court. The defendant then offered in evidence the deposition of the (197) partner William Coffin and that of the said Samuel Harvey, taken at a time different from the former. Both of these depositions were rejected by the court. A verdict was returned for the plaintiff, and a rule for a new trial being discharged, judgment was rendered for the plaintiff, and the defendant appealed.

No counsel for plaintiff.
Morehead for defendant.

NASH, J. We are at a loss to perceive upon what ground the objection to the deposition of Samuel Harvey rests. The firm consists, as the case states, of the two Coffins, William and A. G., and the witness Harvey. The latter, though not a party to the record, could not have been compelled to give evidence; but if he chose to give it, it was certainly competent testimony on behalf of the plaintiff. The declarations of a partner, when the partnership is established *aliunde*, is clearly evidence against another partner concerning a subject of joint interest, notwithstanding he is not a party of record. *Wood v. Braddick*, 1 Taunt., 104. So, also, after the dissolution of a partnership, the declaration of a partner is evidence against his copartners of transactions concerning the firm, and transacted while it existed, and also to repel the plea of the statute of limitations. *McIntire v. Oliver*, 9 N. C., 209; *Smith v. Ludlow*, 6 Johns, 267. If the declarations of Harvey could have been competent testimony in behalf of the plaintiff, much more

so is his deposition. But though his testimony is admissible in behalf of the plaintiff, it does not follow that it is competent evidence for the defendant. The general principle is that a party to a negotiable instrument, when there are more than one, is a competent witness, either to support or defeat an action upon it, unless he be directly interested in the event or unless the verdict would be evidence for or against
(198) him. 2 Stark. Ev., 179. When offered as a witness for the plaintiff, he is competent, because he testifies against his interest, for if the plaintiff succeed the defendant may have an action against him for contribution, and if he fail he stands still open to the plaintiff's action. If offered by the defendant, he is incompetent because he is liable to the defendant not only for contribution, but for a due portion of the costs of the first suit. *York v. Blott,* 5 Mau. & Sel., 71; *Moffit v. Gaines,* 23 N. C., 159. His Honor was correct in admitting the testimony of Harvey in behalf of the plaintiff. He was also correct in rejecting the depositions of William Coffin and Samuel Harvey, when offered by the defendant. Each of these individuals was a member of the firm of Coffin, Harvey & Co. Indeed, it consisted of those two and the defendant. The witnesses were bound to A. G. Coffin, the defendant, each for his share of the costs of the suit in which they were offered as witnesses, and, to that extent at least, they were interested in the event.

PER CURIAM. No error.

Cited: Washing v. Wright, 30 N. C., 3; *Carraway v. Cox, ibid.,* 80; *Street v. Meadows,* 33 N. C., 133.

THE STATE UPON THE RELATION OF NICHOLAS MILLER ET AL. v. THOMAS C. DAVIS ET AL.

The bonds of constables who are reappointed from year to year are not cumulative and, therefore, sureties of a constable are only responsible for breaches committed during the official year for which they became his sureties, though at the expiration of the year he may have been reappointed.

APPEAL from SURRY Spring Term, 1847; *Caldwell, J.*

In 1839 Thomas E. Davis, one of the defendants, was duly appointed a constable in Surry County, and entered into bond with the other
(199) defendants as his sureties for the faithful discharge of his duties. At the expiration of that official year he was reappointed and gave another bond for 1840. In July, 1839, the relator put into the

hands of Davis for collection a note upon a man by the name of Sugart, who was at that time solvent, and so continued up to the expiration of that official year. Davis neglected to collect the money during 1839, but did collect it in 1840, after his reappointment. The action is brought on the bond of 1839, and two breaches are assigned: the first for not collecting; the second for collecting the money and not paying over.

The defendants contended that the plaintiff was entitled only to nominal damages in this action, as the money was received in 1840, and the constable and his sureties for that year were alone answerable for it. The jury found a verdict against the defendants for the full amount of the plaintiff's claim subject to the opinion of the court; and the presiding judge, being of opinion that the verdict was right, gave judgment accordingly.

No counsel in this Court for plaintiff.
Boyden for defendants.

NASH, J. The office of constable endures but for one year, and the bond given for the faithful discharge of his duties binds his sureties only for acts done or omitted to be done during that time. If at the expiration of the official year he is reappointed, it is a new and distinct appointment, as much so, for the purpose of our present investigation, as if a different person were chosen. The different sureties, or the sureties on the different bonds, are answerable only for the year to which their bond extends, and at the expiration of each official year the (200) official bond given for that year ceases to have any obligatory force for breaches committed thereafter. Thus in *Keck v. Coble*, 13 N. C., 491, the defendant was appointed a constable for the year 1823, and in July the relator put into his hands a note for collection, the money upon which was received by him in 1825. In an action against the constable and his sureties upon his bond for 1823 for collecting the money and not paying over, it was held that the plaintiff could not recover. In *Governor v. Lee*, 20 N. C., 594, it is decided that when a constable receives notes to collect in one year, and is reappointed for the succeeding year, if he is guilty of laches in not collecting during the first year, but, still having the notes, does collect the money the second year and neglects to pay it over, in an action upon the second bond for the breach in not paying over it is no defense to show that there was a breach of the preceding bond. Each set of sureties are answerable for the breach committed for the year for which they are bound. So, in *Goforth v. Lackey*, 25 N. C., 25, the Court decided that when a constable who continues in office two years collects money for an indi-

vidual the first year and does not pay it over, the sureties upon the first bond are liable, though the money was not demanded until the second year. These cases show that the different bonds given by a constable are not cumulative, as in the case of guardians, but are distinct and separate, each to secure the performance of the duties stated in them. When there are more bonds than one, in order to ascertain which set of sureties is liable it is necessary to fix the time of the breach, for that will fix the liability. Now, in the case before us, in the plaintiff's declaration two breaches are assigned, one for not collecting in 1839 and the other for collecting and not paying over. The case states that no evidence was offered on the second; it was abandoned, as the money was received by him in 1840. For the first breach the defendants are
(201) clearly liable, and liable in damages to the amount of injury sustained by the plaintiff. If by the negligence of the defendant Davis the plaintiff had lost his debt by the insolvency of Sugart during the official year of '39, then the sureties of that year, the present defendants, would have been liable to the full amount of the claim against Sugart. But this is not the case. We are informed that Sugart not only continued solvent, but actually paid the money due the plaintiff to the constable Davis in the year '40, who was still an officer; and we have seen that the sureties on the official bond for the year when the money was received are the parties liable to the plaintiff for *it*. The plaintiff is entitled against these defendants to nominal damages only. His Honor, the presiding judge, erred in permitting the plaintiff to recover more.

PER CURIAM. *Venire de novo.*

Cited: Hubbard v. Wall, 31 N. C., 22; *Graham v. Buchanan*, 60 N. C., 95.

SILAS MURRAY v. EDMUND WINDLEY.

1. A plea that the amount claimed by the plaintiff, together with the costs then due, had been tendered to him since the commencement of the suit is, as a plea, no bar to the plaintiff's action, though the money has been paid into court under that plea.
2. The proper course when no tender has been made before action brought is for the defendant to move the court that he may be permitted to pay into court the amount he admits to be due. If the plaintiff agrees to receive this amount in full of his claim, the suit is at an end and the defendant pays the costs. If the plaintiff prefers going on to trial, and he does not recover more than the amount so admitted, he is liable for the costs incurred subsequently to the payment into court.

APPEAL from WASHINGTON Spring Term, 1847; *Caldwell, J.*

This action was commenced by warrant. The magistrate gave judgment for the plaintiff and the defendant appealed to the county court. After this, and before the suit was returned, the defend- (202) ant tendered the amount claimed, with the costs then due, to the constable who served the process and who was the agent of the plaintiff for the collection of the money. He declined receiving it, and at the term of the county court to which the papers were returned the money was paid into the office of the clerk. The presiding judge ruled that the tender of the money after the action had commenced was not good, and the payment of the money into court could not avail the defendant, as there was no rule or order of court authorizing it. Verdict for the plaintiff, and the defendant appealed.

E. W. Jones for plaintiff.
Heath for defendant.

NASH, J. We concur with his Honor upon both points. In general, all pleas relate to the bringing of the action and are answers to the plaintiff's claim as it then exists. The plea of tender is no exception to the rule. It admits the cause of action and is a bar to its prosecution, because before its commencement the defendant had tendered to the plaintiff the money due him. This is shown by the form of the plea. In it the defendant avers "as to the said sum of $... and *before the commencement of the suit,* to wit, on, etc., at, etc., aforesaid, etc." If this allegation is omitted, the plea is demurrable. Where the tender has been made at the proper time with an *uncore prist,* the defendant has a right to bring the money into court, because it constitutes a part of his plea; for the defendant must aver his readiness to pay the money admitted to be due, and that he hath paid the same into court, or that he now brings the same into court here ready to be paid to the said plaintiff, if he will accept the same, as the case may be. 3 Chit. Pl., 921. In *Haughton v. Leary,* 20 N. C., 14, it was expressly (203) decided that a plea of tender after suit brought is, as a plea, no bar. A plea, then, of tender and refusal, aptly pleaded and in due time, will bar the action and throw upon the plaintiff the costs of the suit. But though the defendant may by his negligence subject himself to the payment of the costs already accrued, he may protect himself from all that may subsequently be incurred. When he only disputes the amount to which the plaintiff is entitled he is at liberty to move the court for leave to pay into the office so much as he admits is due, together with all the costs which have accrued up to the time of making the motion; upon which the court makes the order, and the amount brought in is struck from the plaintiff's declaration. If the plaintiff accepts the

money as the full amount due, the action is, of course, at an end; but he may deny that it is sufficient to satisfy his demands, and go on to trial. In that case, if the jury find that more is due the plaintiff than is brought in, the latter is entitled to a verdict for the overplus, and the costs are paid by the defendant. On the contrary, if they find it sufficient, the plaintiff pays all the costs incurred since the rule obtained. In no case can the defendant, after failing to make a tender at the proper time and pleading it in a proper manner, bring money into court but upon a rule first obtained, 1 Sellon's Prac., 305. The rule was not obtained in this case, and the presiding judge did right in giving the instruction complained of.

PER CURIAM. No error.

Cited: Winningham v. Redding, 51 N. C., 127; *Cope v. Bryson,* 60 N. C., 113; *Pollock v. Warwick,* 104 N. C., 642; *Smith v. B. and L. Assn.,* 119 N. C., 256.

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(204)

JACOB HUBBARD v. THOMAS L. MARSH, EXECUTOR, ETC.

1. If in reply to the plea by an executor of the act of 1789, limiting the time within which actions shall be brought against executors, etc., the plaintiff wishes to avail himself of the proviso in that act, that he was requested by the executor not to sue, he must state the fact in a special replication.
2. Where it appeared that payments were indorsed on the bond declared upon, subsequently to the death of the testator, but it did not appear by whom, this afforded no evidence that the executor had requested delay.
3. A surviving obligor cannot continue or revive the liability of the estate of a deceased obligor by partial payments obtaining indulgence, or other means, so as to repel the operation of that statute.

APPEAL from UNION Fall Term, 1846; *Dick, J.*

Debt against Joel Harrell, and Marsh, executor of Thomas Watts, on a bond given to the plaintiff by David Watts and the said Joel and Thomas. The defendant Marsh pleaded *non est factum* and the act of 1789 limiting the time for bringing suits against executors; and the controversy, as between the plaintiff and that defendant, turned at the trial on the latter plea. In support of it the executor gave evidence that he advertised according to the statute, and it appeared that the action was not brought within the limited period thereafter. The plaintiff then produced the bond, and on it there appeared credits for certain sums entered as for payments made after the death of Thomas Watts; and thereupon, and without offering any evidence to show by whom or at what times, in fact, those entries were made, or that the defendant Marsh

had any knowledge of the bond before he was sued in this action, the plaintiff moved the court to instruct the jury that a presumption in law arose that the plaintiff delayed to bring his suit at the special request of the executor, and, therefore, that the action was not barred. But the court refused to give that instruction, and, on the other hand, directed the jury that, if they believed the defendant's evidence they ought to find for him on that issue. There was a verdict and judgment for Marsh, and the plaintiff appealed. (205)

Winston for plaintiff.
No counsel for defendant.

RUFFIN, C. J. The Court is of opinion that the judgment ought to be affirmed. In the first place, it was necessary that the plaintiff should have brought himself within the savings of the statute by putting the matter on the record by a special replication. But if that objection did not exist, the Court would still concur with his Honor on the construction of the statute. The second proviso of the act is that if a creditor shall delay to bring suit at the special request of the executor, the debt shall not be barred during the time of he indulgence. Now, there is nothing to connect the payments or the entries of payments with the executor so as to make them his acts personally. They may have been the acts of the other obligors or, perhaps, of the obligee himself. If so, they cannot affect the executor, nor deprive the personal estate of the testator of the protection of the act. It is not like *McIntire v. Oliver*, 9 N. C., 209, and others of that class, in which it was held that the act or acknowledgment of one partner which takes a case out of the statute of limitations as to him will do so likewise as to the others. There the obligation of all the parties not only arose upon the same promise, but the matter of discharge extends equally to the whole. Here, however, the discharge is one of the debtors by a special provision for his benefit peculiarly. As it was held in *Buie v. Buie*, 24 N. C., 87, that the discharge of an executor under the act of 1789 did not inure to the benefit of another obligor, so it follows, on the other hand, that a (206) surviving obligor cannot continue or revive the liability of the estate of a deceased obligor by partial payments, obtaining indulgence, or other means, so as to repel the operation of that statute. The operation of the act is restricted to the estate of the deceased obligor, and the executor alone can deprive himself or the estate of its protection.

Of course, this opinion is to be understood in reference to the case before the Court, and not at all as embracing the case where there are two executors and one of them requests delay, which may be subject to a different rule.

PER CURIAM. No error.

THE STATE v. JAMES GHERKIN.

Falsely putting a witness's name to a bond which is not required to have a subscribing witness does not vitiate the bond and is not forgery.

APPEAL from WASHINGTON Spring Term, 1847; *Caldwell, J.*

Forgery. The indictment contained two counts, but on the second the solicitor for the State entered a *nolle prosequi.*

The first count was as follows:

"WASHINGTON COUNTY, to wit:

"The jurors for the State upon their oath present, that heretofore, to wit, on 22 February, 1841, Sally Allen and James Gherkin signed and sealed their bond obligatory, payable to Joseph B. Griffin,
(207) which said bond obligatory is in the words and figures following, that is to say:

> $28. On or before 1 January, 1843, we promise to pay Joseph B. Griffin, or order, $28, with interest from date, it being due for value received in hand, this 28 February, 1841.
> Witness, SALLY ALLEN. [SEAL]
> JAMES GHERKIN. [SEAL]

"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said James Gherkin, with force and arms in the said county, before the delivery of the said bond obligatory to the said Joseph B. Griffin, to wit, on the day and year aforesaid, did of his own head and imagination and by false conspiracy and fraud, feloniously, knowingly, and falsely make and forge, and did wittingly, knowingly, and falsely assent to the forging and making the name of one George Stubbs as a subscribing witness to the said bond obligatory so payable to the said Joseph B. Griffin, which said bond obligatory was afterwards, to wit, on the day and year aforesaid, delivered to the said Joseph B. Griffin with intent to defraud the said Joseph B. Griffin, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

The defendant's counsel moved to quash the bill of indictment because the offense therein charged is not indictable. Judgment of the court that the same be quashed, whereupon the solicitor appealed to the Supreme Court.

Attorney-General for the State.

(209) *Heath for defendant.*

DANIEL, J. A subscribing witness is not material to the due making of a bond. The putting of the name of Stubbs to the instrument as a

subscribing witness did not vitiate the bond, after it was subsequently delivered by the obligors to the obligee. The bond could have been established (if denied by the obligors) by proof of their handwriting. *Blackwell v. Lane,* 20 N. C., 245. It was not an alteration in a material part of a true document by which the obligee was or could be defrauded of the money mentioned in the face of the bond. We think the judgment was right.

PER CURIAM. Affirmed.

(210)

THE STATE v. PETER GODET.

1. An indictment for stealing a hog is well supported by showing that the defendant stole a shoat.
2. When an indictment alleges the property stolen to be the property of Elizabeth Moore, and the evidence shows it was the property of a woman called Betsey Moore, it must be left to the jury to decide whether the person so described was known by both names.
3. In such an indictment the Christian and surname of the party injured, if known, must be stated; and the name so stated must be either the real name or that by which he is usually known; either is sufficient.

APPEAL from CRAVEN Spring Term, 1847; *Pearson, J.*

The defendant was indicted for stealing "a hog." The evidence showed that the animal was a boar shoat, between five and six months old. The owner is described in the indictment as "Elizabeth Moore," and it was shown in evidence that she was called Betsy Moore. For these variances the court was requested to direct the jury to acquit the prisoner, which was refused, and the prisoner convicted. The indictment was at common law. The prisoner appealed from the judgment on his conviction.

Attorney General for the State.
No counsel for defendant.

NASH, J. Two questions are presented by the case for our consideration. The indictment charges the stealing of a hog. Is it sustained by the evidence? An indictment for larceny must describe the article stolen with a certainty sufficient to identify it, and this for the purpose not only of enabling the judge to see upon its face that the article is of value, but also for the protection of the accused, to enable him to show, if subsequently called into court to answer for the offense, that he has already been convicted or acquitted of its commission. (211) 4 Bl. Com., 306. And the evidence must correspond with the

description of the property laid. Great strictness has been observed by the Court in the application of this rule. When a statute enumerates several different kinds of animals as being the subject of larceny, in an indictment on the statute the animal alleged to be stolen must be described and proved to be of the particular description specified in the statute. Thus, an indictment for stealing a cow cannot be supported by proof of the stealing of a heifer, *Rex v. Cooke,* 1 Leach, 105; 2 East P. C., 616, when the statute under which the party was indicted mentioned both cows and heifers. So, also, an indictment for stealing a sheep is not supported by proof of stealing a lamb, because the statute enumerates both sheep and lambs. *Rex v. Loom,* Russ. & Mylne, 160. These cases are under statutes taking away the benefit of clergy. But even under statutes 2 & 3 Ed. VI., against horse stealing, it has been decided that foals and fillies are not included, because the statute mentions only the grown animals. *Willand's case,* 1 Russ. & Ry. Ca. C., 404. Here the indictment is for stealing a hog and the evidence is that it was a shoat. For animals of this description swine is the original generic term. But the Legislature of this State, in legislating on the subject of mismarking, use the term hog as the generic term and consider all animals of that kind as hogs, irrespective of their ages. In Rev. Stat., ch. 17, sec. 1, it is enacted that "All persons shall ear-mark their hogs from six months old and upwards." From six months old they are designated as hogs to be marked; under that age they are still hogs, but there is no obligation to mark them. We think the description sufficiently specific, and that his Honor was correct in overruling the objection. The Court sees that the article alleged to be stolen is of value in the eye of the law, and, if prosecuted a second time for
(212) stealing it, the defendant would be at liberty to show by parol testimony, as in other cases, the identity of the article.

Another objection is urged against the conviction. It appears that the owner is described in the indictment as Elizabeth Moore; in evidence it was shown that she was called "Betsy Moore." The court was requested to direct an acquittal for this variance. This request was properly refused. In indictments for offenses against the person or property of another the Christian and surname of the party injured, if known, must be stated, and the name so stated must be either the real name or that by which he is usually known. Either is sufficient, *Rex v. Norton,* 1 Russ. & Ry., 510, and it is a question of fact to be decided by the jury whether he is known by both names. If, therefore, a prisoner wishes to avail himself of the objection he ought to request the judge to instruct the jury that if they found the fact to be that the name given in the indictment to the owner of the property stolen was not his true name, or that he was not known by it, they should acquit the prisoner.

Thus in this case the defendant ought to have required the judge to charge the jury that if the owner of the hog was not known by the name of Elizabeth Moore, or that it was not her name, they should acquit the prisoner.

This, however, was not the course pursued. The counsel asked for no instruction to the jury as to the fact, but that his Honor should decide the fact himself and direct an acquittal. This was properly refused. We concur with the presiding judge on both points.

PER CURIAM. *No error.*

Cited: *S. v. Clark,* 30 N. C., 228; *S. v. Horan,* 61 N. C., 573; *S. v. Glisson, ibid.,* 196; *S. v. Bell,* 65 N. C., 314; *S. v. Patrick,* 79 N. C., 656; *S. v. Credle,* 91 N. C., 645; *S. v. Hester,* 122 N. C., 1049.

(213)

WILLIAM COOKE v. JOHN S. NORRISS.

1. In an action for use and occupation, where it appeared that one P. had leased the premises to the defendant for the year 1844; that in the latter part of that year he, with the knowledge and consent of the defendant, rented the same to the plaintiff for the year 1845, who leased a part of the same premises to the defendant, who occupied them and held them under the plaintiff: *Held,* that if this was a case in which attornment was necessary, the defendant had attorned, and at all events was liable to the plaintiff for the rent.
2. *Held further,* that the defendant having abandoned the premises before the end of the year 1845, and no specific contract being proved as to the time he should enjoy them, and the premises being a wharf and warehouse in a commercial town, it was properly left to the jury to say for what time the parties intended the lease to continue, and the court could not nonsuit the plaintiff because his action was brought before the expiration of the year.

APPEAL from NEW HANOVER Spring Term, 1847; *Manly, J.*

This is an action for use and occupation of a wharf in the town of Wilmington. The case is, the wharf in question, together with an adjoining lot on which was a warehouse, belonged to one Parsley, who hired them to the defendant for the year 1844. The defendant was engaged in erecting a public building for the United States on a lot adjacent to the wharf, and hired the premises for the convenience of carrying on his work. In the latter part of 1844 Parsley, with the knowledge and consent of the defendant, rented the whole of the premises to the plaintiff for 1845, and the defendant hired from the plaintiff a room in the warehouse, and continued his occupation of the wharf

This occupation continued until the middle of the year, when the defendant abandoned the possession, and, refusing to pay any rent, this action was brought. The recovery of the plaintiff was opposed upon two grounds: First, that the defendant had never attorned to the plaintiff; and, second, that the action would not lie until the end of the year. The case was left to the jury by the presiding judge upon all the facts, stating at the same time it was necessary, in order to find a ver-
(214) dict for the plaintiff, that they should find some act of attornment or some admission of the plaintiff's title. Verdict for the plaintiff, and appeal.

Strange for plaintiff.
No counsel for defendant.

NASH, J. If this be a case in which the doctrine of attornment applies, the statement made by the presiding judge shows that the defendant did attorn. The defendant was in possession of the wharf under the plaintiff. His term under Parsley had expired and he had accepted from the plaintiff a lease for the room in the warehouse.

This is simply a case of subletting, by which the defendant became a tenant under the plaintiff. This was an acknowledgment of his right and, coupled with possession under him, would amount to an attornment.

We do not think the plaintiff's second objection a sound one, applicable to this case. It is true as a general proposition that any occupation of one man's land by another under a contract is, in law, considered a tenancy from year to year, and this from policy and to favor agriculture. In which case the lessor cannot support an action for the rent until the end of the year.

But it does not follow, because the law favors leases from year to year, that the parties may not contract for a shorter period, and, if so, the action can be brought as soon as the time of renting expires; it depends upon the contract of the parties. Here there was no direct evidence of a specific contract, either as to time or rent, and it was a question for the jury to decide, from the circumstances of the case, what the contract was. The wharf was occupied by the defendant, not for the purposes of agriculture, but as a convenience in carrying on his work on the adjacent lot. If the jury believed that it was understood by the parties mutually that the defendant was to occupy it for the whole year or for a short time, as his convenience required, then that was
(215) their contract; and if they should believe that the convenience of the defendant required its occupation the whole year, the action was prematurely brought, because he would be entitled to the possession until the end of the year. If, on the other side, the convenience of the defendant required a shorter occupation, and he terminated his posses-

sion because he had no further use for it, the term ended, and the plaintiff would be entitled to demand his rent as soon as his occupation ceased. We must suppose that the judge gave an instruction to this effect, or that the defendant did not deem it essential that he should, as no prayer for such instruction or refusal to give it is stated in the defendant's exception. The omission of proper instruction does not constitute error, but its refusal does. *Simpson v. Blount,* 14 N. C., 34.

PER CURIAM. No error.

JOHN COCHRAN v. JAMES R. WOOD.

1. Where a defendant on an appeal from the judgment of the county court gave but one surety, the surety cannot on the judgment being affirmed in the higher court, object to a judgment against himself on the ground that the statute requires two sureties on an appeal from a justice.
2. The sureties are required for the benefit of the plaintiff, and he may dispense with them in whole or in part, at his option.

APPEAL from ANSON Spring Term, 1847; *Battle, J.*

The plaintiff recovered a judgment in the county court against Wood, who appealed and entered into bond with Waddell as his surety. In the Superior Court the plaintiff again recovered, and then (216) moved for judgment against Waddell on the appeal bond, which the latter opposed on the ground that there was but one surety, whereas the statute requires "two sufficient sureties." But the court gave judgment for the plaintiff, and Waddell appealed to this Court.

Winston and Strange for plaintiff.
Mendenhall for defendant.

RUFFIN, J. An appeal bond is required for the security of the appellee; and for his better security the statute provides that there shall be "two sureties." But as the bond is intended for the benefit of the appellee, it is entirely competent for him to renounce it, either wholly or in part. It was upon this maxim that it was held, as far back as *Dr. William Drewry's case,* cited 10 Rep., 100, in debt on a bail bond to the sheriff, that the bond was good, though given by one surety and the statute used plural words. The same point was determined here in *Arrenton v. Jordan,* 11 N. C., 28. That case held, further, that a *scire facias* would lie on such a bond, and thus established that the principle extends to all remedies, as well those under the statute as those at common law. Now, the language of section 69, ch. 115, Laws 1777,

respecting bail bonds is precisely the same as that of section 75 respecting appeal bonds, each requiring the bond "with two sufficient sureties." The reasoning and decision of *Arrenton v. Jordan* is, therefore, in point here. The terms in which the sureties are to be bound cannot, indeed, be substantially varied, or, if they are, the obligee cannot entitle himself to the remedy of the statute, but must get on as well as he can at common law. But an objection founded solely on the number of sureties cannot impair the obligation of the bond or impede any remedy on it. Because the obligee thought that he might, he is not bound
(217) to, insist on the provisions of the act in his favor being strictly observed in that respect.

PER CURIAM. Affirmed.

GEORGE COON, EXECUTOR, ETC. v. JOSEPH RICE.

A testator bequeathed to A. B. as follows: "I give and bequeath unto my daughter Elizabeth Coon, during her natural life, at the end of which to the only heirs of her body, one negro girl named Riah, this to the aforementioned, to them and their heirs forever." *Held*, that as this disposition, if applied to land, would have created an estate tail, it gives the absolute property in the slave to Elizabeth Coon, there being nothing in the other parts of the will to show that the words "heirs of the body" meant "children."

APPEAL from DAVIE Spring Term, 1847; *Dick, J.*

Replevin to recover possession of a negro girl slave named Rachel. This girl is the child of Riah, a negro woman bequeathed in the will of Joseph Richards in the following words, viz.: "I give and bequeath unto my daughter Elizabeth Coon, during her natural life, at the end of which to the only heirs of her body, one negro girl named Riah, this to the aforementioned to them and their heirs forever." The testator, Richards, died in 1822. About 1812 his daughter Elizabeth intermarried with Jacob Coon, the plaintiff's testator. At the date of Richard's will, and at his death, there were living two children, the
(218) offspring of this marriage, and also several children of said Elizabeth, the offspring of a previous marriage, one of whom is the defendant. There was an assent to the legacy to Elizabeth Coon. The testator of the plaintiff died in 1844, and his wife Elizabeth since, but before the commencement of this suit. The girl Rachel was born after the death of Joseph Richards. Upon the death of the plaintiff's testator the plaintiff took possession of the girl Rachel and hired her out, and Elizabeth Coon became the hirer, and at the expiration of the term of hire she placed her in the possession of the defendant, where

she remained until the death of Elizabeth and until the commencement of this suit. A verdict was taken by agreement for the plaintiff, subject to the opinion of the court on the nature and extent of the estate in the woman Riah, given to Elizabeth Coon by the will of Joseph Richards—the plaintiff contending that it is an estate absolute and without remainder, and, therefore, that she and her child Rachel belong to the estate of his testator; the defendant contending that by the will no greater estate than for her lifetime is given to Elizabeth Coon in said slaves, and that a remainder thereof vested in her children, one of whom is a defendant, and so that, as against the plaintiff, his taking and detention were lawful.

The court being of opinion with the defendant as to the construction of the will, judgment of nonsuit was entered, from which judgment the plaintiff appealed to the Supreme Court.

Dodge for plaintiff.
No counsel for defendant.

DANIEL, J. If the property had been land, and Joseph Richards had devised it to his daughter Elizabeth Coon for life, "at the end of which to the only heirs of her body, this to the aforementioned, to them and their heirs," it would in law have been an immediate (219) estate tail, vested in Elizabeth Coon. In looking over the whole will there is not a word in it to indicate that the testator intended *"children"* when he used the words "heirs of the body of Elizabeth Coon." These words must, therefore, have their legal effect, and inasmuch as they would have created an estate tail in Mrs. Coon if the subject-matter had been land, they in law create in her an absolute estate in Riah, she, Riah, being personal property. The two cases cited by the plaintiff's counsel are, we think, in point for him.

The judgment of nonsuit must be set aside.

PER CURIAM. Reversed.

Cited: Donnell v. Mateer, 40 N. C., 9; *Worrell v. Vinson*, 50 N. C., 94; *King v. Utley*, 85 N. C., 61; *Leathers v. Gray*, 101 N. C., 166.

SUSANNAH J. E. AMIS ET AL. v. LEWIS AMIS, EXECUTOR, ET AL.

1. The act of 1829 (Rev. Stat., ch. 85, sec. 18), for the partition of slaves or other personal chattels, applies only to a plain legal tenancy in common, and not at all to a suit against an executor for negroes as parts of a legacy to two or more persons in common.

2. In this latter case the rights of the claimants cannot be ascertained until the administration has been closed or all the accounts have been taken, and the executor is proceeded against in his character of a trustee for the legatees.
3. The court will not entertain suits for the separate parcels, which constitute the mass or residue of an estate; but, in order to avoid an unnecessary multitude of suits, requires that the suit should be so brought as to take all the accounts, and distribute the whole estate by the decrees that may be made therein.

APPEAL from GRANVILLE Spring Term, 1847; *Manly, J.*

Joseph Amis by his will, dated 20 July, 1840, directed all his estate to be kept together under the control of his executors, and gave (220) them discretionary power to sell any part of his real or personal property, as they might think most advantageous for his wife and children. There are then these clauses in the will: "I direct that my children remain with my wife, to be raised and educated out of my estate, and, as one may become of age or marry, to have allotted to such child as much of my estate as I have given my daughter Betsy and put her in possession of. If my wife should die my widow, I direct at her death that my estate of every description be equally divided between all my children, considering in the distribution the part which each child may have received at marriage or full age; and if my wife should marry, in that event I direct that all my property be divided between her and all my children, at the same time taking into consideration what has been given off to such as have become of age or married. In educating my children, I direct that my son Lewis be continued at college until he graduates; and should the income of my estate justify, I wish my other two sons, James and Joseph, to receive a like education; otherwise, the best education the income of my estate will afford. I wish all my daughters to receive a good English education; and should the income of my estate fall short of giving them a good practical English education, I wish them to receive one, even at the expense of the capital of my estate." The testator appointed his wife executrix, and his son Lewis and his son-in-law, Lewis Amis, then the husband of the daughter Betsy, the executors of the will. At the death of the testator in August, 1840, he left seven children surviving him, namely, the married daughter Betsy, Ann S., Lewis, Mary, Jane, James, and Judy. After qualifying as an executor, Lewis Amis, the son-in-law, died, and also his wife, Betsy; but which died first does not appear. They left three infant children, who, together with the testator's daughter Ann S. Amis, are the plaintiffs in this suit, which was instituted in November, (221) 1846, by petition in the court of law against Lewis Amis, the son, as surviving executor of the will, and the other children of the testator. It states that the testator's widow had then recently

died, and that thereby the period for dividing the estate had arrived; that the advancement to the daughter Betsy was of the value of $1,300, and that the daughters Mary and Ann S. and the son Lewis had upon coming of age received advancements to that value respectively; and that the daughters Jane and Judy F., and the said James Amis, were each entitled to receive property to an equal value, and then that the residue of the estate was divisible equally amongst the children of the testator or their representatives, and that in such division the three infant plaintiffs, who are the children of Betsy Amis, represent their deceased mother and are entitled to her share; that the estate of the testator consisted, among other things, of twenty-seven slaves, who are named, and that the parties plaintiffs and defendants are entitled to them as tenants in common in the several shares before stated; and the prayer is that the said negroes may be divided accordingly and the shares of the several claimants allotted in severalty.

The answers admit the allegations of the petition. But they state that the two defendants, James A. and Judy F., are still infants and that their educations have not been completed, and insist that the expense thereof should be defrayed out of the income of the whole estate before any division, or that a sufficiency for that purpose should be set apart and retained by the executor. The executor also states that, after deducting his disbursements hitherto and certain other debts of the testator, there remains in his hands in cash and good debts the sum of $1,178, which he says is not sufficient to discharge his commissions and an annuity of $50 which the testator granted to one Downey for life, and to defray the expenses of attending to certain claims on persons residing in Mississippi and Texas; and he insists on being allowed to retain out of the negroes as many as will form an adequate (222) fund for those purposes.

Upon the hearing, the court declared, amongst other things, that, according to the proper construction of the will, the expenses of the education of the infant defendants, James A. and Judy F., were in the first instance to be defrayed out of the income of the testator's estate, but that those persons were, nevertheless, in the event that had happened, to be charged therewith as parts of their shares in the division of the estate; and declared further, that the executor ought to retain as much of the estate, including a part of the negroes, if necessary, as would meet those expenses, and would discharge from time to time the annuity to Downey and cover all proper expenses attending the collection of the claims in the South and completing the administration of the estate, and, subject thereto, that the residue of the slaves ought to be divided as claimed in the petition, allotting one share of them to the plaintiffs, who are the children of Mrs. Betsy Amis, deceased, as repre-

senting their mother. The decree then referred it to the master to inquire into the value of the advancement to the daughter Betsy and of those made to any others of the testator's children since his death, upon their coming of age or marrying, and to inquire also what part of the estate it would be proper the executor should retain for the purposes aforesaid; and then directed the master, after setting apart a proper fund therefor, to allot to each of the children who had not been advanced, a portion of the negroes equal in value to that of the advancement of the testator to his daughter Betsy, and then to divide all the residue of the slaves equally between the parties according to their rights as before declared; and all further directions were reserved until the coming in of the report. From that decree an appeal was allowed to the defendants.

(223) *Lanier for plaintiffs.*
Badger, E. G. Reade, and Gilliam for defendants.

RUFFIN, C. J. The proceedings in this case do not authorize the Court to decide the questions raised and decided in the Superior Court. The petition seems to have been drawn upon the idea that it would lie under the act of 1829 for the partition of slaves or other personal chattels; and the decree, we suppose, proceeded upon the same notion. But that act applies only to a plain legal tenancy in common, and not at all to a suit against an executor for negroes as parts of a legacy to two or more persons in common. In this latter case the rights of the claimants cannot be ascertained until the administration has been closed or all the accounts have been taken; and the executor is proceeded against in his character of a trustee for the legatees. The very decree in this case shows that it was impossible to treat the parties as tenants in common merely; for it became necessary to direct inquiries into the entire estate and as to advancements to the children respectively before either of the parties could claim anything.

But if this could be looked at as a petition in the courts of law for legacies and portions, as given by the statute, instead of the suit in the court of equity, the plaintiffs cannot be relieved on it, because the sole prayer and object of the plaintiffs is for an account of the slaves belonging to the testator's estate, and for a division of them. The slaves are not given specifically or separately from the other parts of the estate, but the children become entitled to them under the general gift of the testator's "estate of every description, to be equally divided among his children" at the death of his widow. Now, the Court does not entertain suits for the separate parcels which constitute the mass or residue of the estate; but, in order to avoid an unnecessary multitude of suits, requires that the suit shall be so brought as to take all the ac-

counts and distribute the whole estate by the decrees that may be (224) made therein.

Besides, there is another objection to the parties. The administrator of the testator's daughter Betsy is not before the Court, and her infant children are improperly made parties as representing her. The act of 1816, Rev. Stat., ch. 122, sec. 15, has no application here. That vests the estate given by the will of a parent to a child, who dies in the life-time of the parent, in the issue of such child so dying. But here the daughter Betsy survived her father, and the legacy rested in her and survived to her administrator or executor, and not to her children. Indeed, it may be that her husband survived her, in which case her administrator would hold in trust for the husband's representative, and not for the wife's children.

For all these reasons it was erroneous to pronounce the interlocutory decree given in the Superior Court. The plaintiffs must pay the costs in this Court.

PER CURIAM. Reversed.

(225)

THE STATE v. DAVID VALENTINE.

1. The deposition of a witness, taken in a criminal case before the examining magistrate, under the act of 1715, Rev. Stat., ch. 35, sec. 1, may be read in evidence on the trial of the prisoner if the witness is then dead.
2. In such a case the deposition may be used either in chief, by either party, if the witness is dead, or upon the cross-examination of the witness in court.
3. The proof of the deposition is usually but not necessarily by the magistrate or his clerk; but, in this State at least, there being no statutory direction as to the mode of proof, the probate must be a matter of sound discretion in the presiding judge, keeping in view the general principles of evidence, alike necessary to the safety of the accused and the due administration of the law.
4. *Held*, in this case that it appearing that the examining magistrate was necessarily absent in the discharge of high public duties, proof by the clerk of the Superior Court, to which the deposition had been returned according to law, that he was present when the deposition was taken, that the examination was written down by the magistrate himself, and that the deposition, returned to his office and offered in evidence, was in the proper handwriting of that magistrate, was sufficient to authorize the reading of the deposition.
5. A witness is not rendered incompetent by the commission of or by the conviction for any crime, but only by a judgment upon such conviction.

APPEAL from GUILFORD Spring Term, 1847; *Manly, J.*

Murder. On the trial the deposition of one Jacob Cotton, an accomplice, was offered in evidence by the prosecuting officer on behalf of the

State, and objected to by the prisoner's counsel. It was taken by his Honor, *Judge Pearson,* under the act of 1712, Rev. Stat., ch. 35, sec. 1, and in the presence of the prisoner. Its reception in evidence was opposed "for the reason that it did not appear that it was the one taken down by *Judge Pearson* at the time; that it did not appear when it was written; that the witness Cotton had been found guilty of murder by the verdict of a jury; that the deposition was taken between the verdict and the judgment: that the judgment was rendered on the ver-
(226) dict at the same term, and the witness shortly thereafter executed." The deposition was admitted upon such proof as the court thought sufficient. The prisoner was convicted, and from the judgment on such conviction appealed to the Supreme Court.

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

NASH, J. The first branch of the objection is as to the proof of the deposition. There is no direct provision in the act or in the statute of Philip & Mary authorizing any use of the evidence when taken, or pointing out the mode how it is to be authenticated. Under the statute it has been the constant practice in the English courts to permit the deposition to be read in evidence after the death of the witness, and such has been the uniform practice in this State, and, indeed, both acts evidently look to such a use of it; for they require that the deposition taken according to their provision "shall be returned to the office of the court wherein the matter is to be tried." To what purpose but to perpetuate them, and why perpetuate but to provide for the contingency of the death of the witness, or to serve as a check upon him, if called into court as a witness thereafter? The depositions taken under the act are legal evidence, to be used either in chief, by either party, should the witness die, or upon the cross-examination of the witness in court. *Westbeers' case,* 1 Leach, 12; *Smith's case,* Russ. & Ry., 339. In order, however, to its being used as evidence, it is usual, according to the English practice, to prove it either by the magistrate or his clerk, if living. It is to be remarked, this is but a matter of practice, and not a statutory provision, adopted by the courts as being the best mode of its authentication. Our magistrates have no other clerks but the individual whose pen they may use in writing down the deposition; and it is a matter of public law that at the time the prisoner had his trial *Judge*
(227) *Pearson* was necessarily in another part of the State in discharge of his judicial duties. It could not then be proved in either of those modes, as his Honor wrote it himself. The probate, then, in this State must be a matter of sound discretion in the presiding judge, keep-

ing in view the general principles of evidence alike necessary to the safety of the accused and the due administration of the law. In order to remove the objection raised and to identify the deposition, the clerk of the Superior Court of Rowan, "where the matter was to be tried," was examined, who stated "he was present when his Honor, *Judge Pearson*, examined the witness Cotton; that he wrote down the evidence as he examined him, and that the deposition and certificate were all in the proper handwriting of *Judge Pearson*, who afterwards delivered them to him, to file in his office." We think this evidence amply sufficient to prove and to identify the deposition.

But a further objection is raised, to wit, that at the time Cotton was examined he had been rendered incompetent as a witness by his previous conviction for murder, the deposition having been taken between the conviction and the judgment. This is the only important question raised in the case. Infamy of character does not render any one incompetent as a witness, nor does the commission of any crime, however atrocious, though acknowledged. 8 East, 97, 8. His guilt, to work that effect, must be legally ascertained by a conviction, and that followed by a judgment. The objection is a strictly legal one, and must be supported by strictly legal proof. This can only be done by the record, and that must show both a conviction and judgment; otherwise, it is incomplete, not a *full* record of the case. The judgment may have been arrested, and the conviction thereby rendered a nullity, as if it never had an existence. 8 East, 77; 8 Cowp., 8; Com. Dig., Title "Testimony," A. 5. It is not the conviction, then, but the judgment, which creates the disability. 2 Russ. on C., 597; Hawk. P. C., ch. 36, secs. 94, 95; 1 Phil. Ev., 31. (228)

We are of opinion that there is no error in the opinion of the judge who tried the cause. The deposition of the witness Cotton was properly taken and legally proved and identified, and at the time it was taken the witness was competent to give evidence.

PER CURIAM. No error.

Cited: S. v. Williams, 47 N. C., 268; *S. v. Taylor*, 61 N. C., 513; *S. v. Thomas*, 64 N. C., 76; *S. v. Grady*, 83 N. C., 646; *S. v. Houston*, 103 N. C., 389; *S. v. Behrman*, 114 N. C., 804; *S. v. Staton, ibid.*, 815.

THE STATE v. WILLIAM MOORE.

1. A special verdict is in itself a verdict of guilty as the facts found in it do or do not constitute in law the offense charged. There is nothing to do on it but to enter a judgment thereon for or against the accused, unless the court should deem the verdict, as found, not to be sustained by the evidence, when they may set it aside and order a *venire de novo.*
2. A judgment on a special verdict leaves the matter of law distinctly open to review in a higher court.
3. But when the court sets aside a special verdict, as they may do, they cannot of themselves enter a general verdict of guilty or not guilty. That must be done by a new jury.
4. If done by the court, it is a mistrial.

APPEAL from BEAUFORT Spring Term, 1847; *Pearson, J.*

The prisoner was indicted for stealing two barrels of turpentine, the property of Frederick Grist. The record states his plea of not guilty, and his trial by a jury, who found him not guilty, and judgment (229) given thereon for him; and then sets forth an appeal therefrom by the solicitor for the State. In an exception annexed to the record, however, it is stated that the jury found a special verdict to the effect that Grist owned a tract of land on which certain pine trees were boxed and worked for turpentine by him in 1846, until the month of May, and that he then discontinued the working for that season; and that in August of that year the prisoner secretly, during two days, dipped out of the boxes which had been made by Grist as much in quantity as two barrels of turpentine which had run after Grist had discontinued the cultivation in May, and the prisoner put the same into two barrels which he had provided and kept concealed in the woods, and then he carried it away secretly and sold it. And upon the facts thus found the jury prayed the advice of the court whether the said turpentine was the subject of larceny, and, if so, whether the allegation that the prisoner stole "two barrels of turpentine" was thereby sustained; and if the court should be of opinion in the affirmative upon both of those questions, then the jury found the prisoner guilty in manner and form as charged in the indictment; but if the court should be of a contrary opinion upon either of the said questions, then the jury found the prisoner not guilty. The exception further states that the court was afterwards of opinion with the prisoner upon the matters thus referred to it, and thereupon entered the verdict, "Not guilty," and gave judgment for the prisoner thereon; and then the solicitor appealed.

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

RUFFIN, C. J. It may have been the purpose of the appeal to get the opinion of the Court upon the questions raised in the special verdict which the exception states to have been given. But they are not open in the state in which the case is brought up. A special (230) verdict is in itself a verdict of guilty or not guilty, as the facts found in it do or do not constitute in the law the offenses charged. There is nothing to do on it but to write a judgment thereon for or against the accused; that is, upon the supposition that the court deems the verdict as found to be sustained by the evidence. A judgment on it leaves the matter of law distinctly open to review in a higher court. It is for this reason, principally, that special verdicts are given in criminal cases, so that the State as well as the prisoner can have the matter of law solemnly decided. But in this case, instead of proceeding to judgment on the verdict given by the jury, the Superior Court set that aside and entered a general verdict of not guilty. That presents the case in a condition entirely different from what it before was, and precludes this Court from dealing with the questions of law presented in the special verdict; for the Superior Court had the discretion, at the instance of the prisoner, to set aside that verdict, and there is no power here to reinstate it. But when it was set aside the power of the Superior Court ended, and the entering further of a general verdict of not guilty was without authority of law. A judgment for the prisoner on such a general verdict is essentially different from one in his favor on the special verdict. The latter involves matter of law only, and is therefore the subject of a writ of error or appeal. But a general verdict of acquittal, as it includes both fact and law, is conclusive against the State, however erroneously the jury may have been instructed or may have found in point of law. The security of the citizen demands this immunity from being questioned after a full acquittal by a jury, whether right or wrong. But that can only be true of a verdict really given. The verdict in this case, however, which now appears in the record was not given by the jury, and is therefore null. It is essentially different from that which was given, and was therefore improperly entered. It is (231) true that it is to be presumed that the verdict was given as entered; and that presumption would be conclusive against any evidence but the record of the special matter made by the judge before whom the verdict was given. But here we have the authority of the judge himself in the exception, that the jury gave one verdict, which he set aside, and that he then entered a different one. It is the same as if the verdict had been when there was no jury, or as if a general verdict of guilty had been turned into one of not guilty. As this all appears in the exception, this Court is bound to act on it, and to order a *venire de novo*

because there never has been legally a trial, but only a mistrial. 2 Hale P. C., 306; *S. v. Miller,* 18 N. C., 500.

PER CURIAM. *Venire de novo.*

Cited: S. v. Padgett, 82 N. C., 546; *S. v. Blue,* 84 N. C., 809; *S. v. Stewart,* 91 N. C., 569; *S. v. Bloodworth,* 94 N. C., 920; *S. v. Ewing,* 108 N. C., 759, 760; *S. v. Gilliken,* 114 N. C., 835; *S. v. Leeper,* 146 N. C., 674.

THE STATE ON THE RELATION OF K. GARRETT v. ASA JOHNSON ET AL.

1. In the administration of assets, judgments by justices of the peace are to be paid before bonds and notes. But as they are not matters of record, of which the executor or administrator is bound to take notice, actual notice of them must be given by the creditor.
2. The dormancy of a judgment does not at all affect its dignity in the administration of assets.

APPEAL from WASHINGTON Spring Term, 1847; *Caldwell, J.*

Debt on an administrator's bond by a creditor of the intestate, suggesting a *devastavit.* The relator obtained a judgment before (232) a justice of peace against the intestate, Abram Chesson, in his lifetime, and gave notice of it to Thomas W. Chesson, the administrator of Abram, and demanded payment from him. At that time and at the death of the intestate the judgment was dormant. The administrator then had assets sufficient to discharge the judgment, but he afterwards applied them to the payment of bond debts of the intestate. The only question at the trial on the issue of conditions performed was whether the judgment ought to have been paid before the bonds or not. His Honor held that the judgment was entitled to the preference, and from a judgment against them the defendants appealed.

Heath for plaintiff.
No counsel for defendant.

RUFFIN, C. J. We are not aware that the point in this case has been directly before the Court before. But we believe that it has been understood by the whole profession hitherto that justices' judgments were to be paid before notes and bonds. The members of the Court have always so considered, and upon inquiry of the Bar, we are informed that there has been no impression to the contrary, as far as the gentlemen attending this Court are informed. It is true that they cannot be allowed the

dignity of debts of record, of which an executor must take notice at his peril, because the executor cannot know where to go in search of them. Therefore it is necessary that the creditor should give notice of them. But when notice of a justice's judgment is given, its priority arises over specialties; because the one debt has been judicially ascertained according to the law of the country, and the other rests entirely *in pais*. There is every reason for preferring it before specialities, that there is for the preference given to a debt of record, except that the latter (233) is in such a state as to be in itself notice of its existence to the executor. Both creditors have been diligent in prosecuting their demands to judgment before the only tribunals having jurisdiction, and therefore each is entitled to the like favor; and each debt is established beyond controversy. Then, by giving actual notice, the creditor by a judgment out of court supplies all that is wanting to put his demand on the footing of a judgment in court, as respects its relative dignity with that of bonds. It is true that a justice's judgment does not absolutely prove itself, but to some purposes requires evidence that it is genuine. Yet to others it may be acted on without such evidence, as when one justice issues an execution on a judgment given by another.

The dormancy of a judgment does not at all affect its dignity in the administration of assets, for, in every case, no proceedings can be taken on a judgment until the executor has been made a party by *scire facias* or a judgment has been taken on it in an action against the executor.

Upon the whole, the Court concurs fully with his Honor.

PER CURIAM. Affirmed.

Cited: *Rogers v. Kimsey*, 101 N. C., 565.

(234)

STATE v. ANTHONY, A SLAVE.

1. On the trial of an indictment against a slave for a capital offense it is good cause of challenge on the part of the State to one called as a juror that he is nearly related to the owner of the slave, as it would be on the part of the prisoner that a juror was a near relative of the prosecutor.
2. An indictment for highway robbery may charge either that the robbery was committed *in* the highway or that it was committed *near* the highway.

APPEAL from NORTHAMPTON Spring Term, 1847; *Bailey, J.*

The prisoner is a slave of Kinchen Powell, and was indicted, with a free woman, for robbing Joseph Britt, in the public highway, of $1

and other things. When forming a jury for the separate trial of the prisoner, three of the persons drawn and tendered were challenged by the Attorney-General because they were related to the owner of the prisoner, and, that appearing, the challenges were allowed notwithstanding an objection by the prisoner's counsel. Afterwards a jury was formed before the prisoner exhausted his number of peremptory challenges, and he was convicted. His counsel moved for a *venire de novo* for error in allowing those challenges, which was refused. He then moved in arrest of judgment because the indictment did not conclude *contra formam statuti,* which was also refused, and then sentence of death was passed, and he appealed to this Court.

Attorney-General for the State.
Bragg for defendant.

RUFFIN, C. J. The Court is of opinion that the challenges were properly allowed. It is true, the statutes which give slaves the trial by jury in capital cases do not specify the qualifications of the jurors farther than that they shall be owners of slaves, but only require (235) that they shall be good and lawful men, and prescribe that the trial shall be conducted under the same rules, regulations and restrictions as trials of freemen for a like offense. Rev. Stat., ch. 111, secs. 43, 45, 46. Yet the latter provisions are sufficiently comprehensive to entitle the slave to all those privileges which are intended to secure to an accused person a jury indifferent between him and the State. It is clear the prosecutor, or one nearly related to him, would not be a good juror if challenged for that cause by the prisoner. The application of the *principle* on which that rule stands, and on which the common law proceeds in forming juries in all cases, necessarily excludes the owner of the slave or his son, and, by consequence, any other relation, from sitting on the trial. The concern in interest or feeling of those persons in the result is inconsistent with that indifferency which the law seeks. If this slave were the subject of a civil action between his owner and another, neither of those persons could have been of the jury, on the score of their favor for their kinsman. The same state of feeling prevents them from being held impartial on this trial. They are not "good and lawful men" in the sense of the statute. This is clear from the second proviso in the act of 1793, ch. 381, sec. 7, being the first that gave the trial by jury to slaves in the county court, which required that the three justices and jury of slaveholders who constituted the called court should "not be connected with the owner of such slave, or the prosecutor, either by affinity or consanguinity."

The counsel for the prisoner in this Court abandoned the objection taken in the Superior Court in arrest of judgment, that the indictment

concluded at common law; and very properly, as the statute did not create the offense, but only ousted clergy. But he took another, namely, that the indictment was bad because it did not pursue the words of the act and lay the robbery to have been "in or near the highway.

It appears that it was once usual to frame indictments in that (236) way at *Newgate,* as *Lord Hale* informs us. 1 Hale P. C., 535.

But he certainly does not deem it necessary nor, as is plain, strictly proper; for he admits it violates the rule which requires certainty in indictments, and rather apologizes for it, as tolerated upon usage. The passage in which he cites a case from Trin., 38, Hen. VIII., of an indictment of robbery in *quadam via regia pedestri,* being held bad, which was urged on us as an authority that it should have been *in vel prope,* does not turn upon the omission of the words *"vel prope,"* but that of *altam,* because, as he says, "it is not sufficient to say only *via regia* or *via regia pedestri,* since the statute is touching a robbery on the King's *highway.* Moreover, there are many precedents of indictments not in the disjunctive, but laying the offense positively *in* the highway, and others laying it *near* the highway. *The King v. Stone,* 1 Tremaine, 288, is an instance of the former, and that precedent is adopted by *Dogherty,* Cr. Cir. Com., 682; while *Fowler's case,* which is stated by East Pl. C., 785, is an instance of the latter. The more recent precedents in *England* do not aid us, as it is not necessary now to state any place, because the statute 3 W. and M. took away clergy from all robberies. But the older ones, and the reason of the thing, make it plain that an indictment, if good when it is *in vel prope altam viam,* is certainly so when it is in one count *in* the highway and in another *near* it.

PER CURIAM. No error.

(237)

DEN EX DEMISE OF WILLIAM WYNNE v. NATHAN ALEXANDER.

1. When nothing but course and distance is called for in a deed, parol evidence is not admissible to show that a line of marked trees not called for in the deed is the true boundary.
2. When one corner is established and the course and distance only given, and the next corner called for in the deed is also established, the line must run directly from the one corner to the other, although there may be a line of marked trees between the corners, but varying in some places from the direct line.
3. Nor is it sufficient to make an exception to this rule that the trees were marked as the line by the parties at the time when the deed was executed from one to the other.

APPEAL from TYRRELL Spring Term, 1847; *Caldwell, J.*

The facts upon which the points of law in this case arose are stated in the opinion of the Court.

Heath for plaintiff.
No counsel for defendant.

DANIEL, J. Tarkington (under whom both parties claimed) conveyed to Armstrong, and described the land in the deed by calling for course and distance. There is no line of marked trees called for in the deed with the course and distance. The court permitted parol evidence to be offered by the defendant to prove that a marked line of trees not called for or mentioned in the deed was the true boundary of the land conveyed, although varying from the written calls of course and distance (the only calls mentioned in the deed). This was not correct. Course and distance mentioned in deeds must be observed, except when natural boundaries are called for and shown, or where marked lines and corners can be proved, which were made at the original survey for a (238) grant, *Bradford v. Hill*, 2 N. C., 22. The court charged the jury that if the marked line insisted on by the defendant was marked by the parties at the execution of the deed from Tarkington to Armstrong, as the boundary of the land conveyed, the parties were bound by it, notwithstanding the variance from the course called for in the deed. We do not concur in this charge. The pine stump at the beginning of the line was ascertained, and so was the beech stump, at the termination of the said line. The call in the deed was for a line, S. 55 E. 114 poles to the beech. In *Hough v. Horne*, 20 N. C., 369, this Court said where a grant called for a certain course, from one corner to another, without saying by a line of marked trees, and the corners are both established, the direct line from the one corner to the other is the boundary, although there may be a line of marked trees between the corners, but varying in some places from the direct line. This being the law, the charge of his Honor was wrong, and there must be a new trial. The old cases of *Bradford v. Hill, supra,* and *Person v. Roundtree*, 1 N. C., 69, and 3 N. C., 378, and others of that kind, went much on the material circumstances that the surveying and the returns of it and the plat sent to the secretary's office, and the fllling up of the grant, were the acts of public officers whose mistakes it was hard to allow to prejudice the rights of the party; and especially as the law requires the plat and description of the land to be annexed to the grant, and so they could be referred to in aid of the construction.

PER CURIAM. New trial.

Cited: *Lumber Co. v. Lumber Co.*, 169 N. C., 95.

(239)

THE STATE v. JOHN COWAN.

1. It is sufficient to admit a witness to prove a conversation of the defendant when he says he can state all that passed on the occasion, when that conversation occurred, whether relative to that controversy or any other subject. It is not necessary for him to be table to state all the conversations of the defendant which he heard before or after the conversation offered to be given in evidence.
2. A defendant, in his exception, must show some error to his prejudice; otherwise, this Court will not set aside the verdict of the jury.
3. When a magistrate, on the examination of a prisoner accused of robbing an individual of a watch on the previous night and on whom the watch was found, told him "that unless he could account for the manner in which he became possessed of the watch he should be obliged to commit him, to be tried for stealing it," this did not amount to such a threat or influence as would prevent the introduction of the subsequent confession of the accused, especially as the magistrate repeatedly warned him not to commit himself by any confession.
4. A prisoner may be convicted upon his own voluntary and unbiased confession, without any other evidence.
5. If an indictment for robbing, under the statute, charges that the robbery was *in* the highway, the State cannot give in evidence that it was *near* the highway.
6. A wharf, simply as such and not being part of a street, is not a public highway.
7. An indictment for highway robbery which charges that the property was taken from the person and against the will of the owner, feloniously and violently, is sufficient.

APPEAL from NEW HANOVER Spring Term, 1847; *Battle, J.*

The defendant was indicted for highway robbery. On the trial a witness named Hall was introduced to prove a conversation which he heard between Cowan and Price, who were confined in jail for the same offense. The prisoners were in different cells, but could converse through a sink which passed under both cells. The witness was asked if he could state all the conversation which passed between the prisoners, to which he replied that he could not; that he could only state what had been said by one to the other on a particular occasion. This was (240) objected to by the prisoner's counsel, but admitted by the court.

The principal testimony relied upon by the solicitor for the State for the conviction of the prisoner was his own confession. As to that, Mr. James T. Miller testified that he was one of the magistrates before whom the prisoner was examined previous to his commitment for trial; that after he had closed the examination Mr. G. W. Davis, the British vice consul, who was present, asked of the prisoner one question, what, the witness did not recollect, but it was one which he supposed might induce the prisoner to say something prejudicial to his cause, and he immedi-

ately cautioned him against making any confession, telling him that he was not bound to do so, and that if he did make any confession it might be used against him.

Mr. G. W. Davis testified that he did not recollect asking any question of the prisoner, and he thought Mr. Miller was mistaken in thinking that he did so. He stated that after the watch, which it was alleged had been taken from Captain Rodney the night before, was proved to have been in the possession of the prisoner, Mr. Miller told him that unless he could account for the manner in which he became possessed of it he should be obliged to commit him to jail to stand his trial for stealing it; that the prisoner stated that he was anxious to sleep on board a vessel which was about to sail, and then commenced stating how he got the watch, when he was cautioned by Mr. Miller not to make any confession, as it might be used against him, but he declared that he would tell all about it. Under these circumstances the prisoner's counsel contended that his confession was inadmissible, because it was not free and voluntary, but obtained either by the question put to him by Mr. Davis, who it was alleged had an influence over the prisoner, who was a sailor, on account of his (Davis's) official station, or by the remarks of Mr Miller, the magistrate, that if he did not account for the manner in which
(241) he got the watch he must be committed to jail.

The court deemed the confession admissible; whereupon the witnesses stated that the prisoner confessed that he had knocked Captain Rodney down and taken his watch from him, and that the watch then produced, which Captain Rodney claimed as his, was the one which he took. Mr. Miller stated that his impression was that the prisoner stated that this took place in the street, but he was not entirely certain, but that it was on the wharf. Mr. Davis stated that he understood the prisoner to say that Captain Rodney was near a gate when he knocked him down, and that in taking his watch he broke the guard and buried it in the street, near the body of Captain Rodney. It was proved, and not disputed, that Captain Rodney was badly wounded on that night, having received several severe cuts and bruises on his head and face. It was also proved that the wharf near where the robbery was alleged to have been committed was used by the public, and was not in many manner inclosed, though some wharves below there were private property. The witnesses Miller and Davis stated, before testifying as to the prisoner's confession, that they believed they could give the substance of all that the prisoner confessed.

The court in the charge to the jury, after calling their attention to an alleged discrepancy in the testimony of the witnesses Miller and Davis, with remarks thereon, told them that the prisoner's confession alone, if believed by them to be true, would justify them in returning a verdict

of guilty, and much more would they be justified in rendering such a verdict if they found the confessions or any material part of them corroborated by other testimony; and that whether the offense was committed in the street or on the wharf, it was highway robbery.

The prisoner was convicted, and his counsel moved for a new trial:

1. Because of the admission of the testimony of Hall.

2. Because of the admission of the confessions of the prisoner. (242)

3. Because the court charged that the confessions alone would, if believed, justify a conviction, it being contended that the *corpus deliciti* ought to be proved by testimony independent of the confessions.

4. Because the court charged that the wharf was a highway.

The court overruled the motion and pronounced sentence of death, from which the prisoner appealed to the Supreme Court.

Attorney-General for the State.
Strange for defendant.

RUFFIN, C. J. This Court is of opinion that neither of the three first objections taken for the prisoner on his trial entitles him to a *venire de novo.*

That to the evidence of the witness Hall is entirely groundless. It would seem to be sufficient if a witness who is called to prove what another said or deposed to on a former occasion swears that he is able to state all that was said on the subject of controversy at the time to which his testimony refers. At all events, we hold it sufficient to admit a witness who says that he can state all that passed on the occasion when that conversation occurred, whether relative to the controversy or any other subject. Such was the state of the facts in this case. The declarations of the prisoner at another time, or his conversations with Price or another person upon a different occasion, were not admissible evidence, whether proved by this or any other witness. Besides, the exception does not set out the testimony given by Hall; and, for aught that we can tell, the declarations proved by him may have been irrelevant, and, so, harmless; or they may have been beneficial to the prisoner. It is necessary that the appellant should show in his exception some error to his prejudice, otherwise this Court cannot undertake to set aside the (243) solemn verdict of the jury.

We do not see the least ground for saying that the prisoner's confessions were obtained by any undue means—either threats, or promises, or any other improper influence; but they appear, as far as we are at liberty to or can judge, to have been "free and voluntary," as the expression of the books is. It is impossible to hold that the mere presence of a gentleman holding the respectable station of vice consul under a foreign government could place the prisoner, while under examination

before a magistrate of this country, under any inducement, but that of his own will, to make a confession, or that putting a question to him by that gentleman, the nature of which, if put, the witnesses could not state, could have any such effect, and that the more especially when the magistrate, according to his duty and the dictates of humanity, not only once, but twice, cautioned the prisoner against making a confession, and informed him that if he did it might be used against him. It was contended in the argument, however, that the confession was extorted by a threat of the magistrate himself in saying to the prisoner, "that unless he could account for the manner in which he became possessed of Rodney's watch, he should be obliged to commit him to be tried for stealing it." This was treated as a demand on the prisoner that *he should tell* how he came by the watch, under the penalty of imprisonment. But that is doing great violence to the language and purpose of the examining magistrate. The prisoner was not asked *to tell* anything about the matter, but he was required to *account* for his having the watch, that is, to account for it by proof, and not by any declaration of his own, in order, as the magistrate humanely informed him, that he might thereby repel the legal presumption that he came dishonestly by the article of which the owner, it appeared, had been robbed the night before.

(244) So far from that communication being capable of being regarded as a threat, it was really sound legal advice, calculated to put the prisoner upon a proper defense, if he could establish his case by proof; and that such was the purpose of the remark is obvious from two considerations. The one is that no statement of the prisoner, merely, could have been sought by the justice, as *that* could not satisfactorily "account" for the prisoner's possession of the watch so as to authorize his discharge; and the other is that the magistrate perceived that the prisoner, notwithstanding his previous caution, was, as he thought, about to state how he got the watch, and immediately, in order to correct any possible misapprehension of the prisoner and to apprise him of the consequence, cautioned him again not to make any confession. More could not have been done to put the prisoner upon his guard and instruct him as to his rights. But he persisted in the resolution to confess, declaring that he would tell all he knew about the matter; and he went on, accordingly, to admit his perpetration of the robbery. It would seem that if any confession is to be deemed voluntary, and to flow from a sense of the obligation of truth, this must.

We likewise hold that his Honor directed the jury correctly as to the effect they might allow to the prisoner's confessions. There was, indeed, evidence in corroboration of the confession, namely, the injuries inflicted on Rodney, which added greatly to the credit to which the confessions, in themselves, might be entitled. But we believe that it is now held by

courts of great authority that an explicit and full confession of a felony, duly made by a prisoner, upon examination on a charge before a magistrate, is sufficient to ground a conviction, though there be no other proof of the offense having been committed. We are aware that speculative writers do not agree in opinion entirely upon the respect due to evidence of this character. This is much like the diversity of opinion among legal essayist upon the sufficiency of the unsupported testimony of an accomplice to justify a conviction. Notwithstanding the doubts (245) thrown upon the point in that manner, persons having the responsibility of the judicial station were obliged, when once the evidence was held admissible, to leave its sufficiency, according to evidence actually yielded to it, to the jury, whose province it is to say what the fact is. There are many cases to the effect that there may be a conviction upon it alone. 1 Leach Cr. C., 464, 478; *S. v. Haney,* 19 N. C., 390; *S. v. Weir,* 12 N. C., 363. So upon the question in this case, *Chief Baron Gilbert,* for example, deems a confession evidence of the highest and most satisfactory kind, Gilb. Ev., 123; while Mr. Blackstone, 4 Com., 357, expresses quite a contrary opinion, that it is the weakest and most suspicious of all evidence. We might be at some loss in selecting, between two such eminent authors, a guide on this question. But we are relieved from that necessity by judicial decisions which seems to have settled the question, and therefore may be safely adopted. In *Eldredge's case,* Russ. & Ry. Cr. Cases, 440, the presiding judge told the jury that, independent of the prisoner's confession, there was, in his opinion, no evidence of a felony, and he left the case to them on the confession alone; and all the judges held a conviction on that evidence right. *Rex. v. Falkner & Bond, Id.,* 481, was similar, and with the same result. *Rex v. White,* Russ. & Ry., 507, is to the same effect; and in the next case, *Rex v. Tippett,* all the judges thought the conviction right, as there was some evidence, besides the confessions, which made it probable that the felony had been committed, and a majority of the judges held that without the other evidence the prisoner's confession was evidence upon which the jury might convict. These recent decisions, to say nothing of the earlier ones in *Wheeling's case,* 1 Leach, 311, and in *Lamb's case,* 2 Leach, 554, fully bear out his Honor in the instructions he gave upon this trial.

It is not sufficient to impugn the principle established by them (246) that there have been instances in which men have charged themselves with offenses which they did not commit, or which had never been perpetrated; for that argument would destroy all confidence in evidence, circumstantial or direct, since by each human tribunals have been misled. But the administration of justice cannot depend upon such nice possibilities. It may safely and, indeed, must necessarily pro-

ceed upon the common experience of men's motives of action and of the tests of truth. Now, few things happen seldomer than that one in the possession of his understanding should of his own accord make a confession against himself which is not true. Innocence or weakness is therefore sufficiently guarded by the rule which excludes a confession unduly obtained by hope or fear. Hence, if one pleads guilty there must be judgment against him. So, after a plea of not guilty, if the accused will make to the jury a plain and open declaration of his guilt, including all the facts which go to make up the offense legally, the court can do no less than tell the jury that they may act on such a declaration, and that it renders other evidence unnecessary. Of the same grade of evidence, precisely, is a confession out of court, provided only it be fully proved and appear to have flowed from the prisoner's own unbiased will. Such a confession which goes to the whole case is plenary evidence to the jury.

His Honor next instructed the jury that whether the robbery was committed in the street of Wilmington or on the wharf described in the exception, it was a highway robbery. In that position the Court is of opinion there was error. It is true, there was no evidence on which the jury might well be supposed to have found the robbery was in the street, and if they had said so this difficulty would have been removed. But as they did not state where they believed the act to have been done, we must, under the instructions, assume it to have been on the wharf. The

(247) description of the wharf and the relative positions of it and the street do not appear very explicitly in the case. It is possible the wharf may form part of the street, at its termination; for example, as some are made for ferry landings. But we cannot assume it to be so, especially as the presiding judge distinguished between the street and the wharf as being different places. The most we can presume is that the public freely and rightfully used it, as it is stated that although there were, near it, other wharfs that were private property, this was not inclosed and was used by the public, and no private right is suggested. But supposing it to be a public wharf, or a county wharf, as it is said such wharfs are sometimes called, the doubt arises whether it be a public highway; for if it be not, this indictment is not sustained. The statute takes away clergy from the offense of "robbing any one in or near any public highway"; and as this indictment has but one count, and that charges the robbery *in* the highway, and it is found to have been on the wharf, the evidence does not support the allegation, unless it be true that the wharf is a highway. We speak thus although the wharf is taken to abut on the street, and the latter is undoubtedly a highway in the strictest sense; so that a robbery *on* the wharf would be within the statute, as being done "near" the highway. But as the place in this case is material, it is necessary, we think, to state it truly, in the words of the

act either as being *in* or *near* the highway, so as to facilitate a defense upon *aute fois acquit* or *convict*.

It is true that *Lord Hale*, 1 P. C., 535, says an indictment for a robbery *in vel prope altam viam regionem*, though in the disjunctive, was usual at Newgate, though an indictment ought to be certain; and it is to be inferred from the whole passage that proof that it was committed either in the highway or near to it would support the indictment and enable the jury to find it, so as to oust clergy. But *Lord Hale* does not lay it down that it is a necessary form of the indictment that it should in every case state the robbery to be "in *or* near the high- (248) way," but only that it was admissible and usual; and that when so laid it would be sustained by evidence of a robbery at either place. It is clear from the precedents that they often laid the offense to be *in* the highway, by itself, and often laid it to be *near* the highway, according, probably, to the facts; and it is probable that it was frequent to have two counts, the one laying it *in* and the other *near* the highway. We own that were it not for the great authority of *Lord Hale*, we should have thought one count in the disjunctive bad. But although indictments for robbing in *or* near the highway were tolerated, and under such an one the proof might be of the one or the other, yet fairness to the prisoner and all legal analogy require that when the offense is laid positively to have been committed in *one of those* ways, it ought to be proved as laid, and not in the other mode. As we conceive, therefore, this indictment would not be sustained by evidence that the place of the robbery was not *in* but *near* the highway. The members of the Court are not familiar with such subjects, and, perhaps, may err from not knowing how persons engaged in commerce regard those places, and to what actual uses they are directed or can rightfully be applied. A *highway* is well understood in the law. It is said in England that there are three kinds; but they all agree in this, that they are common to all persons to pass and repass at pleasure. We know of but one kind here, as yet, namely, public roads or streets, over which all citizens may go at will on foot, or horseback, or in carts or carriages. They are thoroughfares over which people travel from one part of the country to another. But a public wharf does not seem in its nature to be a highway in any sense in which we have found either word used. A wharf is sometimes made on the land at the water's edge, and is sometimes built in the water to the channel of a river or other part, and is a space, as we take it, for the deposit of goods in order conveniently to lade and unlade (249) vessels. To those ends drays, carts, and other vehicles of burden go on them to carry or take away merchandise, and the merchants go also, either on foot or otherwise, according to their health or convenience, to look to their property and conduct their business. A public

wharf is, for those purposes, no doubt, open to all persons. The public have an interest in it, so that it is not *privati juris* only; and in that sense "it is *like* a public street," as was said in *Bolt v. Stennett,* 8 Term, 606. But it does not follow that it is a *highway,* any more than a court-house or a church is, because the former is open to all persons to witness the administration of justice and the latter to worship in. The public use of a wharf is not to pass from place to place over it, but it is merely for the convenience of commerce abroad that is carried on in ships. With these views of the question, we must hold that a public wharf, merely as such and not being a part of a street, is not a highway; and, consequently, that the prisoner was improperly convicted.

As the case will probably be tried again, it is proper to notice an objection taken, on the argument here, to the indictment. It charges a felonious assault in the county of New Hanover on 29 March, 1847, "in the common and public highway of the State, in and upon one J. H. R. then and there being in the peace, etc., and him the said J. H. R. in bodily fear and danger of his life in the highway aforesaid then and there did feloniously put, and one silver watch of the value, etc., of the proper goods, etc., from the person and against the will of the said J. H. R. in the highway aforesaid then and there feloniously and violently did steal, take, and carry away, against the peace and dignity of the State." It was contended that the indictment was insufficient because, although it charges the putting in fear in the beginning of the indictment, it does not state *the robbery* to have been *by means*
(250) of such putting in fear or by violence. A sufficient answer to this argument is, in the first place, that the indictment in that respect is according to the ancient precedents, as appears in Tremain, 288, and Dogherty's Cr. Cir. Comp., 682. But in truth the indictment does charge the robbery to have been by those means. It states the putting in fear first, and then proceeds, that the prisoner one watch from the said, etc., "then and there" feloniously and "violently" did steal. It is clear, therefore, that by means of the *"ibidem* and *tunc"* the verdict connects the putting in fear and the stealing together, so as to make the whole one transaction. But if that were otherwise, it expressly charges a taking in the highway from the person and against the will of the owner, "feloniously and *violently,"* and thus makes violence *the means* of effecting the robbery, which alone is sufficient, according to Mr. Blackstone. He states that it is not necessary, though usual, to lay in the indictment that the robbery was committed by putting in fear, but that it is sufficient if it be laid to be done with violence. 4 Bl., 243. The same appears from *Donally's case,* East C. L., 783. Indeed, that results from the definition of robbery, which is a taking by violence *or* by put-

ting in fear. The indictment would therefore do if it had been supported by evidence of a robbery *in* the highway, instead of one *near* it.

PER CURIAM. *Venire de novo.*

Cited: S. v. Sherrill, 46 N. C., 510; *S. v. Patrick,* 48 N. C., 449; *S. v. Gregory,* 50 N. C., 317; *S. v. Scates, ibid.,* 423; *S. v. Worthington,* 64 N. C., 597; *S. v. Burke,* 73 N. C., 88; *S. v. Hamlet,* 85 N. C., 522; *S. v. Craige,* 89 N. C., 479; *S. v. Eliason,* 91 N. C., 565; *S. v. Gardner,* 94 N. C., 957; *S. v. Brown,* 113 N. C., 647; *S. v. Ashford,* 120 N. C., 589.

(251)

STATE v. O'NEAL.

1. There is no obligation on a judge to interrupt counsel in stating their conclusions, either of law or fact. It is the right and the duty of the presiding judge, if counsel states facts as proved upon which no evidence has been given, to correct the mistake, and he may do it at the moment or wait till he charges the jury—perhaps the most appropriate time.
2. In criminal charges the prisoner's character cannot be put in issue by the State, unless he open the door by giving testimony to it. But it is not a conclusion of law that from his silence the jury are to believe he is a man of bad character.
3. An omission on the part of a judge to instruct the jury on a particular point, if no instruction be asked from him on that point, is not error.
4. In an indictment for altering mark of a cattle-beast it is not necessary to set forth the original mark nor in what manner the alteration was made.

APPEAL from EDGECOMBE Spring Term, 1847; *Bailey, J.*

The prisoner is indicted for altering the mark of a cow belonging to Martha Benson. The words in the indictment describing the offense are, "unlawfully, knowingly, and willfully did alter the mark of a certain cow, the property of Martha Benson," charging the intent. No evidence was offered by the defendant of his good character. The Attorney-General, in the course of his argument to the jury, stated that the State was not at liberty to give evidence of the prisoner's character, but that the prisoner had a right to do so; that he had not availed himself of the privilege, and, from the absence of such testimony, was proceeding to argue that he was a man of bad character, when he was interrupted by the prisoner's counsel, who insisted that as no evidence had been offered as to character, the Attorney-General had no right to comment upon it. The court overruled the objection and permitted the Attorney-General to proceed with his argument. The prisoner was convicted and a rule for a new trial obtained because the court permitted the Attorney-

(252) General to make to the jury the remarks he did on the character of the prisoner. The rule was discharged. The defendant then moved in arrest of judgment because of the insufficiency of the indictment in not charging the particular mode in which the mark was altered. The motion was overruled and judgment pronounced, from which the prisoner appealed.

Attorney-General for the State.
B. Moore and Mordecai for defendant.

NASH, J. It is the privilege of parties to be heard at the bar through their counsel, and a wide latitude is given to the latter in making their argument to the jury. Nor do we know of any obligation on a judge to interrupt counsel in stating their conclusions either of law or fact. It is the right and the duty of the presiding judge, if counsel state facts as proved upon which no evidence has been given, to correct the mistake, and he may do it at the moment or wait until he charges the jury—perhaps the most appropriate time. In criminal charges the prisoner's character cannot be put in issue by the State unless he open the door by giving testimony of it; nor is it a conclusion of law that from his silence the jury are to conclude he is a man of bad character. Our attention has been drawn by the Attorney-General to *S. v. Vane*, 12 Wend., 78, 82. It certainly sustains him in his position, but we do not feel disposed to follow it. We much prefer the rule established by this Court in *S. v. Collins*, 14 N. C., 117. From the charge of the presiding judge we learn that no evidence was offered by the defendant to show that he was a man of good character. "The counsel argued to the jury that if they would not be justified by the testimony to convict the most respectable of their acquaintance, they would not in law be justified in convicting the prisoner. The jury was instructed that was not the true rule. (253) That when a defendant introduced no such testimony, the true rule was that if the evidence would not justify them in returning a verdict against a person of whom they had never heard before and of whom they knew nothing but what was disclosed by the testimony, then it would not justify a verdict against the defendant." This opinion was adopted by the Supreme Court. The rule is then established that no deduction results in law, unfavorable or favorable to the character of an individual charged by an indictment, from the fact that he has introduced no evidence to show he is a person of good character. The character, not appearing either good or bad, necessarily stands indifferent. Such is the rule in this State, and so, we doubt not, the presiding judge would have charged the jury if it had been required of him; but it was not asked. This Court has repeatedly decided that an omission on the part of the judge to instruct the jury on a particular point was no error.

If the party deem it material to his case, he must ask for instruction upon it. If the judge then neglect or refuse to give the instruction, or does not lay down the law correctly, it will be error, for which a new trial will be granted.

The motion in arrest of judgment cannot avail the defendant. The indictment uses the language of the act. But it is true that this, in all cases, is not sufficient. Thus in an indictment under the statute for stealing a slave, the name of the slave must be set forth, and so in an indictment for forgery the instrument forged must be set forth; and it is a general rule "that the special matter of the whole fact ought to be set forth with such certainty that it may judicially appear to the court that the indictors have not gone on insufficient premises," Hawk. P. C., Book 2, ch. 55, sec. 57; that is, that the facts set forth amount to a criminal offense, as charged. The authorities to which our attention has been directed by the counsel for the prisoner sustain his proposition, but not his objection. The objection is that the indictment does not set forth the mark of Martha Benson, the owner of the cow, nor the (254) mark into which the defendant put her; at least, as we understand it, the language of the objection is that the indictment does not charge the particular mode in which the mark was altered. Pursuing the words of the statute is sufficient, except in cases where the subject of the indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence. There is an indictment on the statute, 37 George III., ch. 70, making it felony to *endeavor* to seduce a soldier or a sailor from his duty: it is sufficient to charge an *endeavor*, without setting out the means employed. *Rex. v. Fuller,* 1 Bos. & Pul., 180. The *endeavor* to seduce, without any respect to the means, is the gist of the offense. Arch. Cr. Pl., 52. Now, in the case before us it is of no importance what Mary Benson's mark may be; it is made criminal by the statute knowingly to alter it, with intent to defraud, and it is a matter of no importance into whose mark it is altered; it is the willful alteration that constitutes the offense. In addition to this, the indictment conforms to the precedents heretofore in use in this State and sanctioned by this Court. In *S. v. Davis,* 24 N. C., 153, the indictment is for effacing the mark, and the offense is described, as in this, by simply pursuing the words of the act. The mark of McConnell, the owner of the animal, is not set out nor is the mode of effacing it. It is true that the motion in arrest of judgment did not rest on the objection now made; but the attention of the Court was drawn to the sufficiency of the indictment, and in every case the Court looks into the record, and, if error is detected, then we do not wait to have it brought by counsel to our notice. It cannot be supposed, then, that this objection, if a sound one, would have escaped the observation of the Court. It has, indeed, by some been

supposed that too much astuteness is exhibited in discovering errors in records sent here. If it be desirable that the administration of (255) the law should be kept steady and uniform, that the forms and precedents established by the wisdom of our predecessors should as rarely as possible be departed from, it should be the object of every Court to stand *super antiquas vias*. *S. v. Davis,* then, may be considered a precedent for the indictment we are considering.

We are of opinion there was no error committed by his Honor on the trial below, on either point decided by him.

PER CURIAM. No error.

Cited: Arey v. Stephenson, 34 N. C., 38; *S. v. Cardwell,* 44 N. C., 248; *Ward v. Herrin,* 49 N. C., 24; *Boykin v. Perry, ibid.,* 327; *S. v. Whit,* 50 N. C., 230; *S. v. Vinson,* 63 N. C., 340; *S. v. Deal,* 64 N. C., 277; *S. v. Smallwood,* 78 N. C., 561; *S. v. Austin,* 79 N. C., 627; *S. v. Hardee,* 83 N. C., 621; *Terry v. R. R.,* 91 N. C., 242; *Branton v. O'Briant,* 93 N. C., 104; *S. v. Rogers, ibid.,* 531; *S. v. Debnam,* 98 N. C., 718; *S. v. Bailey,* 100 N. C., 534; *McKinnon v. Morrison,* 104 N. C., 363.

WILLIAM L. MIZELL v. MAURICE S. MOORE.

1. The plaintiff commenced his action of assumpsit on 3 July, 1846. On the 13th, when the court to which the action was returnable sat, the defendant pleaded as set-offs certain bonds of the plaintiff's due 3 July. On these bonds the defendant had sued out warrants against the plaintiff on 7 July, and recovered judgments on 10 July, 1846. *Held,* that these bonds could not be introduced as set-offs, because they were merged in judgments before the plea pleaded.
2. A set-off must not only be due at the commencement of the suit, but must continue to be due in the same form when pleaded.

APPEAL from MARTIN Spring Term, 1847; *Bailey, J.*

Assumpsit for goods sold, and was commenced on 3 July, 1846. The defendant pleaded, amongst other things, nonassumpsit, and a (256) set-off due to him on three several sealed notes of the plaintiff.

Upon the trial the plaintiff proved his demand, and the defendant produced the three bonds, as described in his plea, which were due before and on 3 July, 1846. They appeared to have been canceled by having the word "Judgment" written across the face of them, and it was then established that on 7 July, 1846, the defendant sued out three warrants against the plaintiff on the bonds; and on the 10th of that month obtained judgments thereon before a justice of the peace; and that the

defendant therein (the present plaintiff) then stayed them by giving security according to the statute, which stay expired on 10 January, 1847. The trial of this suit was in February, 1847, and at that time no execution had issued on either of the three judgments, and they remained unpaid.

Upon this evidence the plaintiff insisted that the defendant was not entitled to any set-off in this action. But the court held otherwise, and the jury found for the plaintiff on the first issue, and assessed his damages at $77.51 for principal money and interest; and upon the other plea they found for the defendant "a set-off to the amount of $82.69, that is to say, on one bond upon which a judgment has been obtained, with the interest and costs, to the amount of $42.02, and on one other bond upon which a judgment has been obtained," etc. Upon the verdict, there was judgment for the defendant for his costs, and the plaintiff appealed.

Rodman for plaintiff.
No counsel for defendant.

RUFFIN, C. J. The judgment must be reversed. The defendant was not entitled to set-off his demands in this action in any form, neither as judgments nor bonds. Not the former, because they were rendered after the commencement of this suit, and were not due even when the plea was put in, having been stayed. Indeed, the plea is of the (257) bonds and not of the judgments; and yet the jury allowed the defendant his costs recovered in those judgments as a part of the set-off here. But the bonds themselves were not good set-offs; for a set-off must not only be due at the commencement of the suit, *Haughton v. Leary*, 20 N. C., 14, but it is plain that it must continue to be due in the same form when pleaded. The statute meant, indeed, to do away with the necessity of a multiplicity of suits. But it does not oblige one who is sued to set-off his counter demand; and if he chooses to sue on it, and thereby produce the mischief the law designed to correct, he renounces the privilege of the statute, and cannot afterwards claim it so as to defeat his creditor's action and throw the cost on him. The defendant can no more set-off these bonds, after merging them into judgments between the suit brought and plea pleaded, than he could if at that time he had received payment of them. This the very form of the defendant's plea shows. Taken from the precedent, it alleges "that the plaintiff before and at the time of the commencement of this suit, etc., was *and still is* indebted to the defendant in, etc., upon and by virtue of a *certain writing obligatory* sealed, etc., and now shown to the court, etc., which said *writing obligatory* at the commencement of the suit was *and still is in full force and effect, not released, paid off, satisfied, canceled, or otherwise made void.*" 3 Chitty P. C., 931, 936.

The counsel for the defendant, in order to show that the change in the face of the evidences of the debt does not defeat the set-off, has drawn our attention to that class of cases in which the court, where two persons have cross judgments, has satisfaction acknowledged or entered for the amount of the recovery and costs in the other. But that is a distinct jurisdiction, and not founded on the statute at all. It is a discretionary power, exercised by the court over its suitors for the purposes of
(258) promoting justice and preventing the loss of costs in cases of insolvency or the like. But the attempt here is not to set-off one set of costs, or judgment against the other, but to compel the present plaintiff to pay the costs of his own action, as well as those of the defendants, by using the set-off as a bar to the plaintiff under the statute.

PER CURIAM. *Venire de novo.*

Cited: Brittain v. Quiet, 54 N. C., 330; *Ramsour v. Thompson,* 65 N. C., 630.

ROBERT ARMFIELD v. THOMAS R. TATE, EXECUTOR, ETC.

1. Where an infant purchased land and gave his note for the purchase money, and, after he became of age, continued in possession of the land and promised to pay the note: *Held*, that this was a confirmation of the contract by the infant after he became of age, and he and his representatives were bound by it.
2. The circumstance that the vendor was informed, before the completion of the contract, that the vendee intended the place as a residence for his kept mistress does not vitiate the contract.
3. The law annexes no condition that the title deeds shall be given before a suit can be commenced on a note given for the purchase money.

APPEAL from GUILFORD Spring Term, 1847; *Manly, J.*

Assumpsit with three counts: first, upon a promissory note (a copy of which is annexed); second, upon oral promises to pay the sums therein mentioned; and, third, upon a *quantum valebat* for a house and lot in the town of Greensboro. Pleas, the general issue and infancy, to which were general replications, and to the latter the special replication
(259) that defendant's intestate had promised since arriving at full age.

It was proved that the promissory note was given for a house and lot in the town of Greensboro, and at the same time a bond taken to make a title when the purchase money should be paid; that the intestate at the time was under age, but after arriving at full age continued to occupy and claim the lot as his property, and promised *expressly* to

pay the purchase money. The defendant offered to prove that the plaintiff was informed, prior to the conclusion of the sale, that the premises were intended as a dwelling for a family with one of the members of which the intestate was in the habit of illicit sexual intercourse, but the court deemed the evidence immaterial and excluded it.

The defendant contended that the plaintiff could not, in any event, recover the purchase money for the lot, and especially not until after a tender of a title deed. But the court was of opinion that the promise to pay after arriving at full age being established to the satisfaction of the jury, the plaintiff was entitled, and so instructed the jury. Verdict for the plaintiff. There was a rule for a new trial, first, because of the exclusion of proper testimony; second, for misdirection by the court. Rule discharged and appeal.

(*Copy of bond referred to.*)

$350. One day after date I promise to pay to Robert Armfield the sum of three hundred and fifty dollars to be paid as follows: one hundred dollars 1 January, 1842, one hundred dollars 1 January, 1843, and one hundred and fifty dollars 1 January, 1844, with interest from date. Witness my hand and seal, this 24 February, 1841.

JOHN WORTH. ABSALOM T. HUMPHREY.

[No seal attached.]

No counsel for plaintiff.
Morehead for defendant.

DANIEL, J. All deeds for infants, which are merely voidable, (260) may be affirmed at full age. MacPherson on Infancy, 487. An infant may purchase land and the vendor or donor is bound by his own act or deed. *Ibid.*, 455. All contracts may be confirmed or adopted by an infant after he arrives at full age. *Ibid.*, 487. The defendant's intestate entered into the land, and continued the possession after he arrived at full age; and he then promised to pay the note which was given by him as the consideration for the land; this promise confirmed the contract on his part, and repelled the plea of infancy.

Secondly. The plaintiff being informed, before the completion of the contract, that the vendor intended the place as a residence for his kept mistress does not destroy the contract. The way the vendor in fee intended to use his property after he became the owner of it would not prevent his paying the purchase money to the vendor, who had no control over the subsequent use of the land. The case cited by the defendant's counsel was not like this case; there the lessor stipulated in the lease of his rooms that the lessee might use them as a brothel. The Court held that he could not recover the rent, because such a contract

was against good morals, and void, as being against public policy. But here the vendor enters into no stipulation how the land is to be used, and he retained no reversionary interest in the land, as the lessor did in the case cited.

Thirdly. The title deeds were expressly agreed not to be given by the plaintiff until the purchase money was paid. The law did not annex any condition precedent that the title should be made before suit could be commenced on the note, which is an independent security for the purchase money.

PER CURIAM. No error.

Cited: McCormic v. Legget, 53 N. C., 427; *Phillips v. Hooker,* 62 N. C., 206.

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(261)

DEN EX DEM. WILLIAM HOLLOWELL v. GEORGE KORNEGAY.

A. by will in 1786 devised to his son R. a tract of land, and then proceeded as follows: "And my desire is, if my son R. die without heir lawfully begotten of his body, for it to be sold and equally divided between his own sisters." *Held,* that the limitation over was too remote, and that estate tail having by the act of 1784 been converted into fee simple estate, the son R. took an absolute estate in fee simple in the land devised.

APPEAL from WAYNE Spring Term, 1847; *Pearson, J.*

The premises were devised by Richard Martin in 1786 as follows: "I give to my son Richard my dwelling plantation; only my wife to live on one-half the land during her widowhood and no longer. And my desire is, if my son Richard die without heir lawfully begotten of his body, for it to be sold and equally divided between his own sisters." The wife died, and then Richard died in 1843, without having had issue. The defendant claims under conveyances in fee made by Richard, the son, in 1798. The testator left several daughters, and they all died before their father, Richard, except Sarah Flowers, who is the lessor of the plaintiff in one count of the declaration. The testator appointed two executors, who died before 1843, and after the death of Richard administration with the will annexed was taken out, and the administrator sold and conveyed the premises in fee to William Hollowell, who is the lessor of the plaintiff in the other count of the declaration. Upon these facts, which were agreed between the parties, the Superior Court was of opinion that the title was in the defendant, and from a judgment for the defendant the plaintiff appealed.

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

RUFFIN, C. J. The judgment must be affirmed. There is noth- (262) ing in the will to tie up the period for the limitation over to take effect to lives in being and twenty-one years after, so as to make this an executory devise. "His own sisters" only means "his sisters," and cannot be understood as intending a benefit to the sisters *personally,* but only as vesting the interest in them *Saunders v. Hyatt,* 8 N. C., 247, is directly in point. The wills are almost literally the same. The only difference is that the devise by Saunders was to his son, "and if he die without any heir lawfully begotten of his body, the testator orders the land to be sold and the proceeds divided among his sisters." But that difference is entirely immaterial, as in each case the disposition over is after the death of the first taker "without heir lawfully begotten of his body," that is, of a remainder after an estate tail in possession, which the act of '84 makes void. The fee vested in Richard, and is now in the defendant. The decision of this point renders it unnecessary to consider the others, in respect to the power of the executors to sell under this will and that of the administrator under the act of 1836.

PER CURIAM. Affirmed.

Cited: Weatherly v. Armfield, 30 N. C., 26; *Buchanan v. Buchanan,* 99 N. C., 311; *Leathers v. Gray,* 101 N. C., 164; *Sain v. Baker,* 128 N. C., 259.

HIRAM PHELPS v. SALLY CALL.

1. It is of the essence of a bond to have an obligee as well as an obligor; it must show upon its face to whom it is payable.
2. The defect cannot be supplied by showing a delivery to a particular person.

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

This was a summary proceeding under the act, Rev. Stat., ch (263) 45, secs. 17, 18, to obtain judgment on a bond given by the defendant for the forthcoming of property levied on by a constable. The paper produced as the bond was as follows:

Know all men by these presents, State of North Carolina, Davie County, that I, the undersigned, bind myself in a bond of $90 for the forthcoming of a wagon in the possession of Samuel Drake, executed and levied on as his property by A. Sheets, deputized to the use of A. Taylor. It is to be delivered twenty days from this day and date, Sundays excepted, this 27 May, 1843. Whereunto I set my hand and seal.

SALLY CALL.

Witness: J. J. SPARKS.

The witness Sparks proved the execution of the paper-writing and its delivery to the said Sheets, and it was thereupon read in evidence. The defendant objected to a recovery on it because it did not appear that the said bond was payable to any one. This question was reserved, the trial proceeded, and the jury rendered a verdict for the plaintiff. On the question reserved the court was of opinion with the plaintiff. Judgment was rendered for the plaintiff, and the defendant appealed.

Boyden for plaintiff.
Craige for defendant.

NASH, J. This is a proceeding under the acts of 1807, 1822, and 1828. Rev. Stat., ch. 45, secs. 17, 18. The case is as follows: In the year 1843 one Almon Taylor obtained a judgment before a justice of the peace against Samuel Drake, an execution was issued and placed by him in the hands of A. Sheets, who was deputized by a magistrate to execute it. The officer levied the execution on a wagon as the property of the defendant, and left it in his possession. For the forthcoming of the wagon the paper upon which the proceedings are founded was executed by the defendant and delivered to the officer, Sheets, on 27 May,
(264) 1843. The notice in this case issued 29 July, 1845. In the meantime Sheets had died and the plaintiff had administered upon his estate. Several questions were made on the trial of the cause in the Superior Court. We deem it unnecessary to notice any but the first objection taken by the defendant. It lies at the foundation of the plaintiff's claim. The act requires of an officer who levies an execution on personal property to take a *bond* from the defendant for its forthcoming, when he leaves it with the owner. The paper-writing taken by Sheets is not a bond; it is made payable to no one. It is of the essence of a bond to have an obligee as well as an obligor; it must show upon its face to whom it is payable. Hurleston on Bonds, 2 Com. Dig., title, "Obligation." This was expressly so decided by this Court in *Graham v. Holt*, 25 N. C., 302. In a declaration on this instrument, in an action on it, the plaintiff could not supply the defect by an averment; if he did, the defendant might demur, for the declaration would show that there was no obligee, no one to whom the obligor was bound. As this objection lies at the threshold of the plaintiff's claim, we have, as before stated, confined our attention to it.

PER CURIAM. Reversed, and judgment for defendant.

Cited: Leach v. Flemming, 85 N. C., 451; *Sandlin v. Ward*, 94 N. C., 497.

(265)

STATE v. JOHN L. LEE.

In a case of bastardy, after the defendant has had an issue tried under the statute, and the verdict is against him, it is too late for him to move to quash the proceedings because the mother of the child, who was examined before the magistrates on oath, was a woman of color.

APPEAL from CRAVEN Spring Term, 1847; *Pearson, J.*

The defendant was arrested upon a charge of bastardy. A warrant was duly issued by a couple of magistrates against Catharine Curtis, a single woman, who upon her examination charged the defendant with being the father of her child. The defendant was bound to the county court. Upon the return of the proceedings the issue was made up to try the fact whether the defendant was the father of the child. These proceedings took place at May Term, 1846, of the county court, and the cause was continued until August Term following, when the defendant moved the court to quash the proceedings because it did not appear in the warrant and examination that the child was at the time the warrant issued under three years of age, whereupon the magistrates, being in court, were, on motion, permitted to amend the proceedings. The defendant then moved for permission to withdraw his issue, which was refused, and upon its trial before a jury a verdict was returned that the defendant was the father of the child. Upon this finding the county court made what is called an order of filiation. The defendant then moved to quash this order, upon the ground that the witness Catharine Curtis was a colored woman, and, therefore, incompetent to give evidence against a white man. This motion was refused, and the defendant appealed to the Superior Court from it, as well as from the other "orders in the case." In the Superior Court the motion to quash the order of filiation made by the county court was again made, and (266) refused by the presiding judge. A verdict was returned in favor of the State, a writ of *procedendo* was ordered, and the defendant appealed.

J. H. Bryan for the State.

Stanly (who had been retained before his appointment as Attorney-General) for defendant.

NASH, J. It is important to ascertain from what the defendant did appeal, and what was his complaint in the Superior Court. The record informs us that after the trial of the issue in the county court an order of filiation was made, and the counsel moved to quash the order because the mother upon whose examination he was charged was a colored woman. This motion was refused, and "from this decision, as well as

the other orders made in the case, the defendant appealed." Three motions were made by him in the county court, all of which had been overruled; the first, to withdraw his issue; the second, to quash the proceedings for irregularity, because the warrant and examination did not show that the examination was taken within three years after the birth of the child. These two motions were made before the issues were tried, and the third not until after the trial. On the return of the case to the Superior Court, the defendant again renewed his motion to quash the order of filiation made in the county court, and for the reason there assigned, which was refused.

The act of 1814, under which these proceedings are had, was passed for the purpose of removing the extreme severity of that of 1741, which permitted no man to escape from the effects of the oath of the mother of a bastard child. The former act makes the examination of the mother *prima facie* evidence of the fact, but it was not intended to deprive the defendant of all opportunity to show his innocence. Accordingly
(267) it is provided by section 4 of what is called the *Bastardy Act,* "that the person accused shall, upon the return to the county court, etc., be *entitled* to have an issue made up to try whether he be the father of such a child," etc. Rev. Stat., ch. 12, sec. 4. The issue is given to him for his protection, and he may abandon it whenever he pleases. The defendant had, therefore, a right to withdraw the issue, and it was error in the county court to refuse it. When the case came into the Superior Court he did not renew that motion on the second, nor was the attention of that court in any manner called to them. The defendant, then, must be considered as having abandoned them, and to have thrown himself entirely upon the third. Upon that alone the court was called on to say whether the county court had committed an error. The whole ground upon this point is covered by *S. v. Ledbetter,* 26 N. C., 243, or rather by the principle stated as governing cases of the kind. If for this defect the defendant had in the county court, before the trial of the issue, moved to quash the examination of the woman, and it had been refused, he might either have appealed to the Superior Court or taken his case there by *certiorari.* By so doing he would have put the decision of his case distinctly on the defect, the competency of the witness. This course he did not pursue, but first tried the issue, and, after a verdict against him, claimed the benefit of the objection. At that time the county court could not hear his motion. The verdict of the jury upon the issue constitutes evidence of paternity "legally complete," and upon its finding he stood, by force of the statute, "charged with the maintenance of the child," and the only course which the court would pursue while the verdict remained upon record was to pass the orders directed and to exact from the defendant bond with sufficient sureties for the indemnification of the county.

No defense is given by the law to any one charged either civilly (268) or criminally, of which he may not avail himself, but to do so he must make his application by plea or motion in due order and apt time. In this case no objection was made to the regularity of the examination, on account of the incompetence of the woman, until after the trial of the issue in the county court. The objection could not be made on the trial, because the act says the examination *shall* be evidence. *S. v. Patton*, 27 N. C., 180; *S. v. Robeson*, 24 N. C., 48. It could not be made afterwards, because it could have no operation, as the verdict of the jury concluded the defendant. If the defendant had appealed from the finding of the jury and the order made thereon simply, and without having made the motion to quash, he would have been entitled merely to a trial of the issue *de novo* in the Superior Court, and he could not have made the motion to quash *ab origine* in the Superior Court, because it was not incidental to the trial of the issue that the court should or should not adjudge the woman's examination to be quashed, upon the source of her incompetency. Therefore, that point arose upon the appeal of the defendant from the refusal of the county court to quash, as a distinct question, and consequently must have been determined in the Superior Court as upon a writ of error, upon the same principles and under the same circumstances in which the point was decided in the county court. As, then, the county court, as has been shown, properly refused the motion at the time it was made, the Superior Court did right in not reversing but affirming that order.

PER CURIAM. Affirmed.

Cited: S. v. Ingram, 85 N. C., 516.

(269)

DICKERSON RICKS v. MARTHA BATTLE.

1. If A. employ a crier or auctioneer to cry property at a public auction, without directing him not to cry the bid of B., and B. is the last and highest bidder, and the property is knocked off to him, then the contract is complete, provided B. complies with the terms of auction.
2. It is no defense to an action by B. against A. for a breach of this contract that A. had previously told B. his bid should not be received, unless she so directed the crier or auctioneer, or unless she objected at the time of the bidding and before the property was knocked off.

APPEAL from NASH Spring Term, 1847; *Bailey, J.*

This was an action brought to recover damages for the violation of a parol agreement. The evidence was that the defendant had charge of

several negroes belonging to the infant children of Lawrence Battle. She was not their guardian, but acted as their next friend in hiring them out. The defendant advertised that she would hire these negroes on 5 January, 1846, at the courthouse door; on that day she brought the negroes to the courthouse and employed one Griffin to cry them and one Smith to keep the account of hires and take notes. The terms of hiring were written on a piece of paper and read to the persons who were assembled at the hiring. It was objected by the defendant that the witness could not speak of the terms unless the paper was produced. This objection was overruled, and the witness stated that the terms as read from the paper were that all persons who hired negroes should give bond with approved security and that they should be well clothed. Mr. Griffin, the crier, stated that he put up a negro woman to the highest bidder; that the plaintiff bid for her loud enough for him to hear; that many persons were present and that the defendant was present; that he was standing at the door of the courthouse, and she was back in the passage, but whether she heard the bid made by the plaintiff or knew that he
(270) was bidding, he could not state; that the defendant had not told him not to cry the plaintiff's bid; that after the plaintiff bid, some other persons bid, and the plaintiff continued to bid by nods or winks, which he understood as bids; that this manner of bidding was not unusual, but that others bid in the same way for the negro woman; that the plaintiff was the highest and last bidder, and the negro woman was knocked off to him; and Mr. Smith stated that he entered his name upon the book which he kept as the hirer of that woman. In a short time the plaintiff offered his note with good security for the hire, but the defendant refused to receive the same and refused to deliver the negro woman. The defendant then offered to prove that the plaintiff had the character of a cruel man to negroes, and that he was unfit to have any control over them. This was objected to by the plaintiff and rejected by the court. The defendant then offered to prove that, before this hiring, the defendant had said to the plaintiff that he should never have any negroes over which she had any control, alleging as a reason that he was a cruel man, that she was afraid he would kill them, and that he was poor and unable to feed them. The plaintiff objected, but the testimony was received. The witness stated that twelve months before, at the hiring of these negroes by Nicholas Arrington, the defendant told the plaintiff he should never hire any negroes that she had the management of; that he was a cruel man to slaves, and that she would be afraid that he would kill them and that he would not give them enough to eat; and that, at another time, she told the plaintiff he should not have any negroes she had the control of. It was furthermore in evidence on the part of the defendant that a few minutes before the hiring commenced the witness

heard the defendant say to the plaintiff he should not pester her about the negroes; that she intended to take all the women herself; that immediately after the woman was knocked off, the defendant declared that the plaintiff should not have the woman, assigning as a (271) reason that he was a cruel man to negroes. The court charged the jury that if the defendant employed Griffin to cry the property as her agent, without informing him that he was not to cry the bid of the plaintiff or without making that known when the negro was put up, and the plaintiff was the last and highest bidder, and the property was knocked off to him, that the act of the crier was the act of the defendant, and that his assent was her assent; that the contract of hiring was complete, provided the hirer tendered a good and sufficient bond for the hire, and this was a question for them; that if the defendant had told the crier not to cry the plaintiff's bid, she had a right to do so, and if the crier had, notwithstanding, cried his bid and knocked off the property to him, she would not be bound by it, although he professed to act as her agent; that although she had informed the plaintiff before this hiring he should never hire any negroes put under her charge, or, if just before the hiring out she said to him he should not have any of the negroes, and she afterwards permitted the hiring to go on and the negro woman was knocked off to him, it was too late, after the negro was knocked off, to say that he would not have her; and if the plaintiff tendered a good bond agreeably to the terms of hiring and she refused to deliver the woman, the plaintiff was entitled to recover nominal damages. Under these instructions the jury found a verdict for the plaintiff Rule for a new trial for misdirection. Rule discharged, and the defendant appealed to the Supreme Court.

H. W. Miller for plaintiff.
B. F. Moore—for defendant.

DANIEL, J. This case has been argued by counsel. We have (273) considered it, and have come to the same conclusions that his Honor did upon each and every point, and for the very reasons given by him.

PER CURIAM. Affirmed.

MEEDS v. CARVER.

1. The plea of not guilty to an action of trespass on the person merely denies that he committed any trespass at all.
2. If in such an action the defendant hath matter of justification, he cannot give it in evidence under the general issue, but must plead it specially.

APPEAL from PASQUOTANK Spring Term, 1847; *Caldwell, J.*

Trespass and false imprisonment, and the plea, not guilty. On the trial the defendant showed that he was sheriff of Pasquotank, and he offered in evidence a precept from a justice of the peace, which is set forth in the exception, and was directed to any lawful officer, and delivered to one of his deputies, who arrested the plaintiff thereon and committed him to jail. The defendant insisted that the precept was a *capias ad satisfaciendum,* and authorized the arrest and imprisonment of the plaintiff; whereas the plaintiff contended that it was void, and did not justify the officer. His Honor was of opinion that the process, though not strictly formal, was valid and justified the defendant, and therefore directed the jury to find for him. There was, accordingly, a
(274) verdict for the defendant, and from the judgment the plaintiff appealed.

Badger for plaintiff.
A. Moore for defendant.

RUFFIN, C. J. We are obliged to reverse the judgment, without reference to the question whether the process be valid as a *ca. sa.,* so as to authorize the arrest; because, upon the pleadings in this case, it was not competent to the defendant to set up that defense. In actions for trespass on the person not guilty, says *Lord Coke,* is a good issue, if the defendant committed no trespass at all; but, by the common law, if he hath cause of justification or excuse, then can he not plead not guilty, for then upon the evidence it shall be found against him, and upon that issue he cannot justify it, but he must plead the special matter, and confess and justify the battery, *Co. Lit.,* 283; and we have no statute allowing an officer to give the special matter in evidence on the general issue. It is most probable his Honor's attention was not called to the fact that not guilty was the only plea, as both parties seem to have put the case upon the sufficiency of the process as a *ca. sa.;* but as the error is apparent in the record, and is insisted on here, this Court must necessarily reverse the judgment and order a

PER CURIAM. *Venire de novo.*

(275)

THE STATE v. THOMAS J. MILLER.

1. In this State the presumption is that a black person is a slave.
2. An indictment for trading with a slave in the daytime, by selling him spirituous liquor, must negative an *order* of the owner or manager as well as a delivery for the owner.
3. But an indictment for selling spirituous liquor to a slave in the night-time need not contain such a negation, for the offense is complete whether the slave had a written permission from his owner or not.
4. Upon conviction on an indictment containing several counts, one of which is good and the others bad, judgment must be rendered for the State upon the good count.

APPEAL from CHOWAN Spring Term, 1847; *Caldwell, J.*

Indictment for trading with a slave, and has two counts. The first charges that the defendant in, etc., on, etc., "unlawfully did sell and deliver to a certain slave, whose name to the jurors is unknown, a pint of spirituous liquor, not being delivered for the use of the master, manager, or person having the control of said slave, contrary to the form, etc." The second count charges that the defendant, "afterwards, to wit, on the first day, etc., in the night, between the setting of the sun and the rising thereof, unlawfully did sell and deliver unto a certain negro slave, whose name to the jurors is unknown, and the property of some person to the jurors unknown, a pint of spirituous liquor, the said spirituous liquor not being delivered for the use of the master, overseer, or person having the management of said slave, contrary," etc.

On not guilty pleaded, the evidence was that the prisoner, in the night-time, sold and delivered spirituous liquor to a *negro,* but the witness did not know him, and could not say whether he was a slave or not. The counsel for the prisoner objected to the evidence being received, and insisted that it did not legally authorize a conviction. But the court received it, and charged the jury that it was evidence on which they might find the defendant guilty. After a verdict for the State, the defendant moved for a *venire de novo* for error in (276) receiving the evidence and in the instructions to the jury; and that being denied, he moved in arrest of judgment because the indictment does not aver that the liquor was not sold to a slave *"by the order* of the owner or person having the management" of the slave. The motion in arrest was overruled, and the defendant appealed.

Attorney-General for the State.

A. Moore and Heath for defendant.

RUFFIN, C. J. Upon the question of evidence, and the presumption of the state of a negro from his color, the Court thinks the decision

right. In *Scott v. Williams*, 12 N. C., 376, the Court said explicitly that in this State there *must* be a presumption that a *black* person is a slave. That is a presumption not restricted to actions to try the right to freedom as peculiarly applicable to them. It is a natural presumption arising out of the color, and the known fact that all persons of *black* complexion, or negroes, were originally slaves here; and therefore it is laid on one who says such a person is not a slave, to prove it; and this extends to every case in which the question, slave or not slave, arises.

The judgment cannot be arrested, because, although we think the objection well taken to one of the counts, we hold the other to be good. Taking all the provisions of the act together, the effect of it is that on Sunday, and also in the night-time, it is altogether unlawful to trade with a slave, even with the express permission or order in writing of the owner. It seems to have been the intention of the Legislature that Sunday should not be desecrated by that species of traffic; it being probably considered, also, that much of the mischief, in point of civil polity, from the trading of slaves would be provided against or avoided by not allowing it on that day, when they are not so much in (277) the service or under the eye of the owner. This latter motive led further to the prohibition of traffic with them in the night-time of any other day, it not being deemed safe to allow them under any pretense to trade between sunset and sunrise. The language and grammatical construction of the act, besides the mischief in view, make this the necessary construction. The first enacting clause of the section, Rev. Stat., ch. 34, sec. 75, contains a general prohibition in broad terms, from buying any one of certain enumerated articles from a slave; and then follows a like prohibition from selling and delivering to a slave any goods or articles of personal property. Then come two provisos: the first of which relates to buying any of these forbidden articles from a slave, and *allows* such buying "in the daytime, viz., between the rising of the sun and the setting thereof," Sundays excepted, if the slave have the permission in writing of the owner, etc., to dispose of them; and the second relates to selling to a slave, and *also allows*, "in the daytime as aforsaid," the sale of anything in exchange or payment for any articles which the slave had written permission to sell. Both provisos are expressly restricted to the daytime, and do not allow any trading with a slave, except in the daytime. The trading with a slave, either in buying or selling, on Sunday or at any time but the daytime, as defined in the act, is thus left to the general prohibitory enactment in the beginning of the section. As that enactment forbids all trading, without any qualification as to the owner's permission or any other whatever, and the provisos, which introduce such qualification, are

expressly limited to "the daytime," it follows, when the indictment charges a trading in the night-time, it takes the case out of the operation of the provisos altogether and states a case in which the *corpus delicti*, as enacted by the act, is complete. There is nothing else to be added. Being in the night-time, it is no part of *that* offense that it was done without the permission of the owner; for the (278) permission, if given, would not prevent the act from being a crime, and therefore it need not be negatived. This conclusion is not affected by the exception in the second proviso—"always excepting spirituous liquors, firearms, powder, shot, or lead, unless these articles be for the owner or employer of such slave, or by the order of the owner or person having the management of the same." From its nature as an exception it only takes those articles out of the operation of the proviso to which it is an exception, and, therefore, the office of it here is to regulate the sale and delivery of those articles in the daytime, and it has no application to a sale of them in the night.

That exception, however, as we think, makes it necessary, in an indictment for selling or delivering spirits to a slave in the daytime, to aver that it was not *for* the owner *or by his order*. The object of the exception is obvious, standing as an exception to the second proviso. That proviso does not require that the written permission of the owner should specify the articles *which may be sold* to a slave; but it allows "any goods" to be sold to him in exchange or payment for any of the articles which the owner's permission (as mentioned in the preceding proviso) authorized the slave to sell in the daytime. The office of the exception was, in respect to the articles mentioned in it, to qualify that general permission to sell "any goods" by making it necessary not only that the owner's permission should specify what the negro might sell, but also that it should be specified that he might purchase or take in exchange these articles, to wit: spirits, firearms, etc. The meaning, then, is that there must be an express direction or written order of the owner or manager of these articles as the only justification for letting a slave have them in the daytime. But with such an order they may be sold to the slave or delivered for the owner in the day. The question then is, further, whether an indictment for such a sale must negative the delivery for the owner, and the written order of the owner or person having the management of the (279) slave. We think it must. It is true, there is a distinction between an exception in the enacting clause and a separate proviso, the rule being that the former must be negatived and that the latter need not, but is matter of defense. *Steel v. Smith*, 1 Barn. & Ald., 95. And it may possibly be that, as to purchases from slaves in the day, an indictment need not charge more than the buying of a prohibited article,

which would be *prima facie* unlawful, leaving to the defendant to show the authority. However that may be, and we give no opinion on it, we think an indictment for selling these particular articles in the daytime must negative the excuse, allowed by the exception for such a sale. The frame of the act is peculiar. What is said about spirituous liquors, firearms, etc., is, in itself, an important enactment also, in so far as it requires that, as to those articles, there should be a written permission, not only that the slave might sell the things for which these things were given, but also that the writing should expressly authorize the sale to the slave of the particular articles or their delivery to him for the owner. It amounts to an express prohibition against the sale of these particular articles by name, *unless* the slave be permitted in writing to buy *them* or to take *them* for his owner. As to them, the exception, "unless," etc., is so mixed up with description of the offense, and in the same sentence, that the one cannot be read without the other; and, therefore, according to the general rule, the description must bring the case within both the affirmative and the negative words of the enactment. Here that has not been done. The first count does not charge the sale to have been in the night, and we cannot assume that fact without an allegation of it. As an indictment for selling in the day, it is defective, because it does not negative *an order* of the owner or manager as well as a delivery *for* the owner.

But as one of the counts is good, and the judgment is such as (280) may lawfully be given on that, it cannot be declared erroneous as has long been settled.

PER CURIAM. Affirmed.

Cited: S. v. Robbins, 31 N. C., 357; *S. v. Hyman,* 46 N. C., 63; *S. v. Evans,* 50 N. C., 251; *S. v. Beatty,* 61 N. C., 53; *S. v. Tisdale, ibid.,* 221; *S. v. Baker,* 63 N. C., 21; *S. v. Stamey,* 71 N. C., 203; *S. v. Dalton,* 101 N. C., 683; *S. v. Smiley, ibid.,* 711; *S. v. Cross,* 106 N. C., 651; *S. v. Toole, ibid.,* 740.

JAMES BEALE v. MARIOT ROBERSON ET AL.

In an action for malicious prosecution, where probable cause is alleged it is the duty of the court to direct the jury that if they find certain facts from the evidence, or draw from them certain other inferences of facts, there is or is not probable cause, thus leaving the questions of fact to the jury, and keeping their effect, in point of reason, for the decision of the court as a matter of law.

APPEAL from CHATHAM Spring Term, 1847; *Manly, J.*

The plaintiff sued the defendants for having maliciously and falsely

sued out a warrant and prosecuted him, with two other persons, before a justice of the peace, for a felonious assault and robbery of the defendant Roberson on the highway. Upon not guilty pleaded, the evidence was that on a certain day Roberson and the plaintiff, and the two other persons who were prosecuted with the plaintiff, were in the town of Pittsboro together, and that in the afternoon Roberson, who was in a state of intoxication, set out on horseback for his residence, which was in the country in that vicinity. Afterwards, but how long did not distinctly appear, the witnesses saying about an hour or more, the plaintiff and the two other persons likewise left Pittsboro together; (281) to return, as they said, to their respective homes. The road which led to the residence of Roberson and the plaintiff and his companions was the same for 2½ miles from Pittsboro, but at this distance there was a fork, and the road on one hand was Roberson's and that on the other that of the other persons. When the plaintiff and the two others were on trial before the justice of the peace, Roberson was sworn and examined as a witness to support the prosecution; and on this trial, after the plaintiff had given in evidence, the acquittal and discharge of himself and the others by the magistrate, the defendants, for the purpose of showing probable cause, gave in evidence the examination of Roberson before the magistrate, in which he stated that he proceeded on his return home, to the fork, and took his own branch of the road, and had gone half a mile on it when he was overtaken by persons on horseback, and that he turned his face around to see who they were, and discovered that they were three in number, and that two of them rode horses of the same color with that of the two persons accused, but did not observe the color of the other horse; and that as he turned, and before he could recognize either of the persons who had come up, he was knocked from his horse by a violent blow across the head with a stick; and being then interrogated by the accused whether he knew or believed that they had stricken him, the said Roberson replied that he had no right to say they did; for he did not see them, and could not, indeed, say whether the persons were white or black. And the defendants gave further evidence that a short time after the blow was given to Roberson, as fixed by him in his examination, the three accused persons crossed Rocky River in company, a mile or two farther on their way.

Upon the foregoing evidence, the presiding judge directed the (282) jury "that it was essential to the defendants' justification that they should have had probable cause for deeming the plaintiff guilty and taking legal proceedings against him." And his Honor further stated to the jury, "that it was not easy to define, in precise terms, what probable cause was, but that he believed it to be such cause for proceeding as would have actuated a rational mind, imbued with ordinary

respect to the rights of others: and should the jury conclude, in making an application of the facts proved, that the evidence before the minds of the defendants furnished them at the time with reasonable grounds of suspicion and for suing out the warrant, the plaintiff could not recover." And his Honor further stated to the jury, "that if the defendants knew or believed that the plaintiff was innocent, they would then have no cause for what they did; yet, on the other hand, that it was not inconsistent with probable cause, though there was at the time no certain belief or settled conviction in the minds of the defendants of the plaintiff's guilt."

The counsel for the plaintiff insisted that the court was bound to inform the jury, as a matter of law, whether the facts given in evidence, or any of them, and which did or did not, amount to probable cause, and prayed the court to direct the jury that the evidence in this case, if believed by them, did not amount to probable cause. But his Honor declined giving any further directions, and the jury gave a verdict for the defendants; and from the judgment the plaintiff appealed.

Badger and McRae for plaintiff.
Manly for defendant.

RUFFIN, C. J. This case brings up again the question whether probable cause is matter of law so as to make it the duty of the court to direct the jury that, if they find certain facts upon the evidence, (283) or draw from them certain other inferences of fact, there is or is not probable cause, thus leaving the questions of fact to the jury, and keeping their effect, in point of reason, for the decision of the court as a matter of law. Upon that question, the opinion of the Court is in the affirmative; and, therefore, this judgment must be reversed.

The point is concluded in the State by repeated adjudications. It was first presented in *Leggett v. Blount,* 4 N. C., 560, in which the judge told the jury, after the examination of many witnesses on both sides touching the alleged probable cause, that there was probable cause; and the judgment was reversed because the judge had assumed the decision of the whole case, including the facts as well as the law. But it was distinctly admitted, or rather affirmed, there, that *probable cause,* as an abstract question, is one of law and to be decided by the judge according to the doctrine in *Johnston v. Sutton,* 9 Term, 510, and the authorities therein cited, which establish that upon a special plea and demurrer, or a special verdict, the court determines that question, and that, even when there is a general verdict for the plaintiff, it is the province of the court to say whether certain facts appearing on the declaration do not amount to probable cause. In the subsequent case of *Plummer v. Gheen,* 10 N. C., 66, *Chief Justice Taylor* (who had tried *Leggett v. Blount*)

delivered the opinion of this Court, and admitted that the Superior Court had explained to the jury correctly what probable cause was, but yet held that it was a question of law whether the circumstances, being true, amounted to probable cause, and that the parties had a right to the opinion of the court distinctly on it; and the judgment was reversed because upon very complicated and contradictory evidence the presiding judge had left that question to the jury. In *Cabiness v. Martin,* 14 N. C., 454, the presiding judge decided the question of probable cause, and this Court reversed the judgment, not because he assumed what was not within his province, but because he had decided (284) wrong, as we thought, by holding a certain fact, if found by the jury, to be probable cause, which we deemed not to be so. And in the two cases of *Swaim v. Stafford,* 26 N. C., 392 and 398, the question was again decided as matter of law—it being held, in the one case that there was, and in the other that there was not, probable cause. Such a series of decisions, in our own courts, the same way, would protect the doctrine laid down in them from being drawn into debate now, even if we entertained doubts of its correctness originally. But independent of authority, our reflections satisfy us that the principle is perfectly sound. It is a question of reason whether certain ascertained facts and circumstances constitute a probable and rational ground for charging a particular person with crime. If, indeed, the question was what was the actual belief of the prosecutor respecting the other's guilt, it would be purely one of fact, and proper for the jury exclusively, as that of malice is. But that is not the question in such cases. It is true, indeed, as his Honor told the jury in this case, if a prosecutor knows the person whom he accuses to be innocent, or does not believe the apparent circumstances of suspicion against him, that then *he* has no probable cause for prosecuting, however other persons, not knowing or believing as he did respecting the evidence, might justly entertain suspicions of the party's guilt. But while a prosecutor's belief of the innocence of the person charged may deprive the former of the pretense of probable cause, it does not follow, *e converso,* that the prosecutor's belief of the other's guilt shall excuse him; for he must take care that he acts only on a *reasonable* belief, a *just* suspicion; in other words, that he had, under the circumstances in which he was placed, as found in fact by the jury, a probable cause to think the party guilty, so that he might fairly and honestly call him to answer the charge. It is not, therefore, what a prosecutor believed, but what *he ought* to have believed, that justifies. If he has not the capacity to weigh the circumstances (285) justly, or finds his disposition towards a suspected person interfering with the coolness of his deliberations and the impartiality of his conclusions, it is his plain duty to consult those whose passions are not

heated and whose knowledge will enable them to judge more correctly, and not at once rashly to accuse an innocent person upon insufficient grounds. Now, our inquiry is whether, for the determination of the question as to the sufficiency or the insufficiency of the grounds of suspicion, supposing them to exist in fact, the court or the jury be the more competent; and we think, very clearly, that the court is, because it is a question of general and legal reasoning, and can best be performed by those whose professional province and habit it is to discuss, weigh, and decide on legal presumptions. The only argument against that is the difficulty in cases of many and complicated facts, and contradictory evidence, as in *Plummer v. Gheen*, of properly separating to the comprehension of the jury and to the satisfaction of the Judge the matters of law and fact. But that only proves the difficulty of deciding such cases, whether by the court or jury, and does not at all help us in saying whether this or that point should be decided by the one or the other. But, as was said by counsel in *Panton v. Williams*, 2 Adolph. & Ellis, N. S., 169, however great that difficulty may be, it is one which a judge can deal with better than a jury, as he does with reasonable time, due diligence, and legal provocation, and the like; and in the case just referred to, which was cited by the plaintiff's counsel, the point now under consideration was, after elaborate discussion, decided in the *Exchequer Chamber* upon a writ of error to the *Queen's Bench*. The Court held unanimously that in an action of this sort, if the defendant sets up facts as showing probable cause, the judge must determine whether the facts, if proved, or any of them, constitute such cause, leaving it (286) to the jury to decide only whether the facts, or those inferred from them, exist; and as that is so when the facts are few and the case simple, it cannot be otherwise when the facts are numerous and complicated. It would seem, then, that making a question on this subject must be regarded as an attempt to move fixed things, and cannot be successful either in England or here.

As the case goes back to another trial, on which the facts may appear differently, we think it unnecessary to consider those that came out on the former trial in reference to the question of probable cause, further than to remark that few cases, perhaps, could better illustrate the danger of leaving that question to the discretion of a jury, whose decision of it is not susceptible of review in another court.

PER CURIAM. *Venire de novo.*

Cited: *S. c.*, 30 N. C., 276; *Vickers v. Logan*, 44 N. C., 394; *Brock v. King*, 48 N. C., 48; *Smith v. Deaver*, 49 N. C., 514; *Woodard v. Hancock*, 52 N. C., 386; *Emry v. R. R.*, 109 N. C., 595; *Jones v. R. R.*, 125 N. C., 229; *Moore v. Bank*, 140 N. C., 303; *Wilkinson v. Wilkinson*, 159 N. C., 268.

ROBERT G. RANKIN v. ALEXANDER MATTHEWS.

What is stated by an auctioneer in his advertisement may be explained by what is said by him at the time of the sale.

APPEAL from NEW HANOVER Special Term in January, 1847; *Manly, J.*

This was an action to recover the price of certain goods sold at auction in the town of Wilmington, in pursuance of the annexed advertisement: (287)

AUCTION.

On Thursday morning at 9 o'clock I will sell at the store of Mr. Robert Simpson his stock in trade, consisting of molasses, coffee, sugar, soap, crockery, and a general assortment of groceries.

24 June, 1844. R. G. RANKIN,
Auctioneer.

PLEA—A SET-OFF.

The facts were that the goods mentioned had constituted the stock in trade of a merchant by the name of Robert Simpson, and were sold by the plaintiff, an auctioneer in the town of Wilmington, at the storehouse which had been occupied by Simpson. Some weeks, however, prior to the sale, the goods were conveyed by Robert Simpson to Miles Costin, to be sold by him and applied to the payment of a debt upon which he the said Miles Costin was surety. The goods were taken possession of by Costin, he keeping the key of the store from the time of the conveyance until it was delivered to the auctioneer, Rankin, with instructions to sell for his, said Costin's, benefit.

The defendant proved a debt due to him from Simpson of a greater amount than the one sued upon.

The court instructed the jury that to entitle the defendant to his set-off it should be established by him that the goods were represented and sold by the auctioneer as the goods of Simpson, and that the evidence upon this point (including the advertisement) was left to the jury.

The jury returned a verdict upon the issue in favor of the plaintiff.

The defendant had a rule for a new trial, and supported it upon the ground that the court ought to have instructed the jury that the advertisement was sufficient of itself, and conclusive upon the (288) auctioneer as to the property of the goods, so as to let in the set-off. The court thought otherwise, and discharged the rule.

Judgment for the plaintiff, and appeal by the defendant.

Iredell for plaintiff.
D. Reid for defendant.

DANIEL, J. The court charged the jury that the defendant was entitled to his set-off if he established that the goods were represented and

sold by the auctioneer as the goods of Simpson; and the evidence upon that point, including the advertisement of the auctioneer, was left to the jury, and they found the issue against the defendant. The defendant insisted that the advertisement concluded the plaintiff to deny that the goods when sold did not belong to Simpson, as he stated in the said advertisement that they were "his *stock in trade.*" We think with his Honor, that what was said in the advertisement by the auctioneer might be explained by what was said by him at the time of the sale. All the evidence went to the jury, and they have negatived that the goods were sold as the property of Simpson. We think the judge acted right in receiving other evidence besides the advertisement, and then leaving it all to the jury upon the question whether the plaintiff sold the goods as the property of Simpson. In England, by statute, the auctioneer is obliged to send to the excise officer a copy of his advertisement and an appraised schedule of the property offered for sale, with the names of the owners. All this is intended to check the auctioneer in accounting for the auction taxes. But these regulations are not in force here, and the rules there established for the better collection of the revenue are no part of our law.

PER CURIAM. No error.

(289)

THE STATE TO THE USE OF W. R. LEE ET AL. V. WILLIAM H. WATSON ET AL.

A. was appointed a guardian to certain infants at February Term, 1833, of the county court, and so continued until May Term, 1841. During this time he never renewed his bonds, as required by law. The first renewal should have been at February, 1836, and the second at February, 1839. In August, 1837, W. W. was appointed clerk, and issued no notice to the guardian to renew his bonds. *Held*, that the clerk and his sureties were responsible for this neglect, and were bound to make compensation to the orphans for any loss they sustained thereby.

RUFFIN, C. J., *dissentiente.*

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

Debt, upon the official bond of the defendant Watson, brought against him and his sureties.

The case is as follows: At February Term, 1833, of Johnston County Court Nathan T. Allen was appointed guardian of the relators, and so continued until February Term, 1841, of said court, when he was removed and William R. Lee was appointed. The guardian bond of Allen never was renewed, nor did any notice ever issue to compel him to do so. At the time of his appointment Ransom Saunders was the

clerk of the court, and held his office until August Term, 1837, when the present defendant, Watson, was appointed and gave bond according to law, which was renewed at August Term, 1838, with the other defendants his sureties. At February Term, 1839, Allen and his sureties were solvent; they have since become entirely insolvent. The relators, by their present guardian, brought suit against Allen and his sureties and recovered judgment for $1,500 as the amount of what was due to them from Allen as their guardian. The execution issued upon this judgment has been returned by the sheriff *nulla bona*. The action is brought on the bond executed by defendants at August Term, 1838, and the breach assigned is the failure of Watson, the de- (290) fendant, to issue to Allen a notice, from February Term, 1839, to May Term succeeding. It is admitted that the defendant did not in fact know that Allen had not renewed his bonds, nor did the records of the court show it in any other way than by their entire silence on the subject. There was a verdict for the defendants, and an appeal by the plaintiffs.

J. H. Bryan, Busbee, and Iredell for plaintiffs.
W. H. Haywood and H. W. Miller for defendants.

NASH, J. Upon the trial below, his Honor, the presiding judge, gave judgment *pro forma* against the plaintiffs. In this opinion I do not concur, but believe that the plaintiffs were entitled to a judgment to the full amount of the injury sustained by them in consequence of the failure of the clerk, the defendant Watson, to issue a notice to Allen, as assigned in the declaration.

The bond on which the action is brought is in the form usual to such instruments, and concludes with the following covenant: "and in all things do and execute the several duties of said office, as required by law." Did the *law* make it the duty of Watson as clerk of the court to issue the notice to Allen, as set forth in the case, and have the plaintiffs been injured by his failure so to do? To my mind it is perfectly clear that it was his duty, *ex officio*, to issue the notice, and that not to do it was a breach of his bond. The Legislature of our State has exhibited a praisworthy anxiety to guard the interest of orphans. From 1762 to 1825 they have enacted many laws with that view. To save the expensive and often tedious applications to a court of equity, by the act of 1762, ch. 69, they gave to the Superior and county courts the care of orphans and their estates in their respective counties, making it their duty to appoint guardians and take from them bond with good and sufficient sureties; and to insure a vigilant and faithful dis- (291) charge of this duty, the magistrates who are on the bench when the appointment is made and the bond taken are, themselves, constituted

sureties of the guardian if they fail to take such sureties as are good at the time. And in order that the orphan may be at no loss to know to whom to look for indemnity in such a case, by the act of 1825, ch. 18, sec. 2, it is made the duty of the clerk of the court "to make a record of and enter at large upon their docket and indorse upon the guardian bonds the names of the justices present in court and granting the guardianship," etc. By section 15 of the act of 1762 the county court is required to hold an orphan's court annually, to which all guardians are required to return their accounts and have them settled; and the act of 1816 makes it the duty of the clerk, *ex officio,* to issue notices to all guardians to make such returns. By sections 4, 9, and 16 of the act of 1762 it is made the duty of the several courts to remove any guardian, by them appointed, who is abusing his trust, "or where such guardian or his sureties are likely to become insolvent," and "to make such order for securing the estate of the ward as they shall think fit and proper." In 1820, ch. 5, for greater security of the estates of orphans, the Legislature provides that all guardians shall renew their bonds every three years from the date of their respective appointments. And by section 2 it is made the duty of the clerk of each court to issue a notice in the shape of a *scire facias* against each guardian failing so to do. By this act two evils were inflicted upon those whose interest it was intended to subserve: the one was that no *sci. fa.* issued without an order of the court, and the second was that much expense was incurred. To remedy them, another act was passed in 1824, ch. 16, which provides that instead of the *scire facias* required by the act of 1820, "the clerks be re-
(292) quired to issue an *ex officio* summons. This is a succinct history, in part, of legislation of this State upon this important and interesting subject. The object of the Legislature cannot be mistaken; it is to protect those so helpless in themselves and so needing protection; and if these laws are duly enforced it can scarcely be but that the estates of orphans will be secured.

The question in this case arises under the act of 1824. The phraseology is certainly awkward. The clerk is required to issue an *ex officio* summons; the meaning is too obvious to excite any doubt; it is that the clerk shall, *ex officio,* issue a summons. By the act of 1820 it is made the duty of the clerk to issue a *sci. fa.,* and the practice under it was that no *sci. fa.* issued without an order of court. The consequence was that it very rarely issued at all, for the want of some person to move in the matter. To remove this difficulty, it was made the official duty of the clerk to issue the notice. If it be his official duty, then unquestionably the omission on his part to issue the notice is a breach of his bond. But it has been urged here that the records of the county court of Johnston, when the defendant Watson was appointed clerk, did not

show that Allen had not renewed his bonds, and that he, Watson, was ignorant of the fact, and that no request was at any time made to him to issue a notice, nor did the court make any order to that effect. This may be all true, and doubtless is so; but it does not, in my estimation, form any justification for Watson, or, in other words, prevent a breach of his bond. There was no necessity for a request or order of court, for it was his duty as clerk and by virtue of his office to issue it. If he was ignorant of the fact, as alleged, it was a culpable ignorance, which cannot and ought not, in my opinion, to protect him. Allen's bond was renewable at February Term, 1836, and at February Term, 1839. Watson was appointed clerk at August Term, 1837, and then took possession of the records. They told him when Allen was appointed, and of course when this bond was renewable, and did not show that it ever had been renewed. (293)

It is asked, How far back was it the duty of the clerk to examine the records to find out who were defaulting guardians? The question is not without its difficulties, and I would not undertake to lay down any rule upon the subject, if any can be. In my opinion, it is not necessary to say more upon this point than that, here, the time is too short. But eighteen months elapsed from the period when Allen ought first to have renewed his bond, to wit, February Term, 1836, and the time when Watson was appointed clerk, to wit, August Term, 1839. And in 1839, when it ought, I presume, again to have been renewed, Watson was the clerk of the court.

It is no answer to the claim of the plaintiffs that Allen's first failure was while Saunders was the clerk of the court, and that his failure to issue the notice gave them a right of action against him and his sureties. This is certainly so, but it does not relieve the defendants from their liability for a breach of their bond by a like failure on the part of Watson.

It is asked, What damages are the plaintiffs entitled to, and by what rule are they to be ascertained? My answer is, the plaintiffs are entitled to damages to the amount of the injury sustained by them from the failure in the performance of official duty by the defendant Watson and that in this case a rule has been resorted to which is satisfactory to my mind, to wit, the ability of the guardian, Allen, to pay to the plaintiffs what he owed them at the time the notice ought to have been issued by Watson, and, his, now, entire inability. In August, 1837, when Watson was appointed clerk, Allen and his sureties were solvent, and so continued up to February Term, 1839; that is, Allen had property sufficient to pay all his debts and, of course, what he owed the plaintiffs. Had the defendant Watson issued the notice to Allen from February Term to May Term, 1839, during which period Allen

(294) and his sureties were solvent, the court might, and doubtless would, have taken the necessary steps to secure the estate of his wards, either by compelling him to renew his bonds and give new and sufficient sureties or by taking such other steps as they might have deemed necessary.

Believing, then, that it was the duty of the defendant Watson, *ex officio,* to have issued the notice to the guardian, Allen, I am constrained to say, in the language of his official bond, that he has not "done and executed the several duties of his office as required by law," and that the plaintiffs have a right to be compensated in damages to the full amount of the injury they have sustained by his delinquency.

In my opinion, the judgment of nonsuit was erroneous, and there ought to be a *venire de novo.*

DANIEL, J. Watson was the clerk of the county court of Johnston, and he and his sureties are sued on his official bond, given on 28 August, 1838. The condition in the bond alleged to be broken is as follows: "And that he (the said William W. Watson) would in all things do and execute the several duties of said office (of clerk) as required by law." The breach assigned upon this condition in the bond was that Watson had not, *ex officio,* issued a notice agreeably to an act of Assembly, to one Allen, the then guardian of the relators, for him, the said Allen, to come into court and renew his guardian bonds; he, the said Allen, having been appointed by the county court of Johnston guardian to the relators in 1833, and still continuing their guardian. He had not renewed his guardian bond, as the law directs, for three years next before 20 February, 1839, whereby the plaintiffs complain that they have been damaged, etc. The judge nonsuited the plaintiffs, and they appealed.

(295) We think that the nonsuit was improper. The clerk was bound by law to take notice that the guardian, Allen, had not renewed his guardian bond in the time prescribed by law; and it was then one of the duties of his office (*ex officio*) to have issued a *scire facias* to him, Allen, to come into court and renew his bond according to the requirements of the act of Assembly. He did not issue the notice, and it seems to us that the aforesaid condition in his official bond was broken, and that the plaintiffs were entitled to recover nominal damages at least. But before the damages could be further increased by the jury it would have behooved the plaintiffs to show to their satisfaction that if the notice had been issued returnable to November Term, 1838, or to February Term, 1839, the guardian was then able and would have given the additional sureties required by law; or that the court would then have removed him, on his failure to give such additional surety, and would have appointed another guardian, who would have recovered the whole

demand of Allen and his sureties before their failure; or would have recovered something out of the wreck of the estates of Allen and his sureties. The verdict of the jury must, of course, be regulated by such proofs as the plaintiffs can make upon the questions aforementioned. And if the jury should be of opinion that Allen would not, or could not, have given additional surety for his guardianship, or that nothing could have been realized by a new guardian out of the estates of him and his sureties if notice had been duly given him by the clerk, returnable either to November Term, 1838, or February Term, 1839, then nominal damages only should be their verdict. The whole debt due the plaintiffs from Allen, or a part of the same, or a nominal sum, must be the measure of the damages to be assessed by the jury, according as the proofs of the plaintiffs' loss may appear to have arisen from the negligence of the clerk or not.

PER CURIAM. *Venire de novo.* (296)

Cited: *Jones v. Biggs,* 46 N. C., 365; *Sullivan v. Lowe,* 64 N. C., 501.

STATE ON THE RELATION OF JOHN A. PARKER v. ROBERT W. WOODSIDE ET AL.

1. A sheriff to whom a writ has been delivered, but who goes out of office before the return day of the writ, has no power to make the return on it, and therefore is not liable to amercement for not doing so.
2. It is the duty of the sheriff going out of office to deliver all process remaining in his hands to his successor.
3. A judgment of an amercement against a sheriff is not conclusive against the sureties on his bond. They may show that the judgment was either fraudulently or improperly obtained against their principal.

APPEAL from NEW HANOVER Special Term in January, 1847; *Manly, J.*

Debt on the official bond of the defendant R. W. Woodside as sheriff of Brunswick County, to recover against him and his sureties the amount of an amercement for which judgment *nisi* was obtained against said Woodside at September Term, 1844, of New Hanover County Court, and which was made absolute at December Term, 1844, of said court.

The said bond bore date on 5 September, 1843, and expired on 5 September, 1844, being the last of several official terms of said sheriff; and it was proved and admitted that an execution had been placed in the hands of the said Woodside, sheriff as aforesaid, tested of June Term,

(297) 1844, of New Hanover County Court, and returnable to the September term of said court; and it was further proved that some time in the month of August, 1844, the sheriff acknowledged that he held the said execution, and had levied upon a tract of land belonging to the defendant in said execution; that the said sheriff had failed to return the said execution to September Term, 1844, of New Hanover County Court; that the said term commenced on 12 September, 1844, and that the amercement against the sheriff had been obtained for failing to return the said execution.

On these facts it was contended that the defendants were not liable, inasmuch as no proceeding to amerce the sheriff had taken place until 12 September, 1844, seven days after the expiration of his official year, and that, admitting the plaintiff to be at liberty to go behind the judgment of amercement to show that, although the amercement had been rendered after the expiration of the sheriff's official term, it had been for a particular default, yet that would not help the plaintiff, because the default for which he had been amerced had also occurred after the expiration of his official year. The plaintiff insisted that the judgment and amercement were conclusive against the sheriff and his sureties, and definitely fixed their liability. A verdict was taken for the plaintiff, with leave to the defendants, notwithstanding the verdict, to move that the plaintiff be nonsuited should the court be of opinion that on the facts the plaintiff is not in law entitled to recover; and the court being of this opinion, a nonsuit was accordingly entered, and the plaintiff appealed.

W. H. Haywood for plaintiff.
Strange for defendants.

DANIEL, J. The execution which the relator placed in the hands of Woodside commanded the sheriff to return it, and what he had done under it, to the next term of the court out of which it had issued; (298) and the act of Assembly subjected the sheriff to a penalty of $100 in case he neglected to return the writ. The act, being penal, must be construed strictly. Woodside was not sheriff at the time the execution was returnable; he, by law, therefore, could not return the said writ into court. The new sheriff or coroner, as the case might be, was the proper person to return the writ. It was the duty of Woodside, however, to turn over or surrender to the new sheriff or coroner all the writs in his hands, to be returned to the ensuing term by the new officer. If the plaintiff in this execution has been injured by the old sheriff neglecting to do his duty, he has his remedy by an action on the case against him; but he is not entitled to the penalty of $100. The plaintiff insists that the defendants are concluded by the judgment against Woodside for the $100. We do not think so; the sureties of the sheriff may

show that the judgment was either fraudulently or improperly obtained against their principal. It seems to us, however, that *McLin v. Hardie*, 25 N. C., 407, runs nearly upon all-fours with this case and is decisive of it. It was then held that a sheriff to whom a writ had been delivered, but who went out of office before the return day of the writ, had no power to make the return on it, and, therefore, was not subject to an amercement for not doing so. Without overruling this case (which we do not feel disposed to do), we are bound to affirm the judgment, which is done accordingly.

PER CURIAM. Affirmed.

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THE STATE v. JOHN BARFIELD.

When on the trial of an indictment for murder the prisoner proved a sufficient legal provocation at the time to extenuate the homicide, it is not competent to prove, in order to show that the killing was not on the immediate provocation, but from previous malice, that the prisoner, a year or a month previously, had declared his intention to kill two or three men, it being admitted that the prisoner had no reference in such threats to the deceased as one of those men.

APPEAL from CUMBERLAND Spring Term, 1847; *Battle, J.*

The prisoner was indicted for the murder of Alfred Flowers. In opening the case for the State the solicitor stated that he expected to prove from antecedent threats, as well as from the circumstances attendant upon the killing, that it was done with malice express, or, if he failed in that proof, he expected to show that the homicide was committed under circumstances from which the law would imply malice.

He then called Samuel Flowers, the father of the deceased, who testified that he was sent for and went to the house of his son about 9 o'clock on the night he was killed; that when he arrived he found his son dead; that his deceased son's wife seemed greatly distressed when she met him, and the prisoner mocked the cries which she made in weeping; that he saw some person uncover the corpse of his son, when the prisoner, who was present, remarked that he had laid him cold.

Mrs. Flowers, the widow of the deceased, was then introduced. She stated that the prisoner came to her husband's house about 1 o'clock of the day on which the homicide was committed; that he and her husband appeared to be friendly, and her husband invited him to drink; that shortly afterwards a quarrel arose between them in consequence of some offensive language used by the prisoner, and after a short time she heard her husband complain to the prisoner that he had cut his pantaloons (and the witness said the pantaloons were cut), but she did (300)

not see by whom or how it was done; that the parties then appeared to become friendly, and continued to drink together until her husband became very drunk and the prisoner excited by liquor, but not very drunk; that the prisoner and her husband were connected by the marriage of the former with an aunt of the latter, and that the latter frequently called him Uncle Jack; that towards night another quarrel arose between them, and her husband went out of doors, where the prisoner shut the door upon him, refusing to let him come in; but upon her husband's getting a pestle to beat down the door, and her interposition, the door was opened; that her husband then took a chair and sat down, and told the prisoner that he had come there uninvited, and he might take the road and go home; that the prisoner then commenced giving the damned lie to everything said by her husband or herself; that her husband arose from his chair, saying he could not stand it, and as he did so the prisoner came toward him with his knife drawn and thrusting it at him; that her husband, thereupon, raised his chair and pitched it over the prisoner's head, without intending, as she thought, to strike him; that in the effort to throw the chair, her husband staggered and fell, upon which the prisoner instantly rushed upon him and gave him several stabs while he was down; that she assisted him to rise, and he went towards the door, where the prisoner followed and stabbed him once or twice more on the back; that she then assisted him to the bed, upon which he laid down, and soon after died; she also testified to the fact of the prisoner's mocking her, and saying that he had laid Alfred cold.

Dr. Hicks was then introduced, and testified that he was called to see the deceased about 9 o'clock of the night when he was killed; that when he arrived he found that he had been dead some time; that he
(301) examined the forepart of his body, and found three wounds, one on his neck, another near the pit of his stomach, and a third on the breast, the two first of which were slight, and the last deep and calculated to produce death, and that it appeared to have been inflicted with a dirk knife. This witness testified further that the deceased was a low, corpulent, strong-made, athletic man, about 40 years of age, and that when he arrived at the house of the deceased the prisoner appeared to have been drinking, but was not drunk.

The counsel for the State here announced that they had closed their testimony, and would introduce no other witness unless it became necessary to do so in consequence of the testimony introduced in the defense.

The counsel for the prisoner then called two witnesses to prove that Mrs. Flowers had given a different account of the transaction when examined before the jury of inquest. One of these witnesses, who acted as coroner, testified that on her examination before the jury of inquest

Mrs. Flowers said that when she saw the chair raised and the knife drawn, she became alarmed, and turned and went towards the door, and presently she heard a noise, as if something had happened, and, turning around, discovered her husband going towards the bed, on which he fell and soon expired. They stated, upon cross-examination, that when Mrs. Flowers was sworn to give testimony before the jury of inquest she appeared to be greatly distressed, and very few questions were put to her; and they both testified that she had always borne a good character, and they would believe her when examined upon oath.

Another witness, Theophilus Barfield, a brother of the prisoner, was then called, and testified that Mrs. Flowers stated to him that she did not see her husband killed, having gone out of doors when she saw her husband raise the chair.

The prisoner's counsel then introduced as witnesses John and (302) Robert Flowers, sons of the deceased, who attended the trial as witnesses for the State. Robert Flowers, the elder of the two, a lad 16 or 17 years old, testified that he was not at home until late in the afternoon of the day when the prisoner came to his father's house; that when he went into the house he saw the prisoner sitting on a table with a gun in his hand; that he demanded the gun of the prisoner, who immediately delivered it to him; that he then went out of doors, and when he came back he found the prisoner lying on a bed; that his father sent him to draw some liquor, and when he returned he found his father sitting in a chair near the door; that the prisoner came towards his father, when his father arose from his chair, took it up, and threw it towards the prisoner, and it passed a little above his head without touching him (and he believed his father intended to throw it over his head without striking him), and in doing so he staggered and fell, when the prisoner rushed upon him and stabbed him; that he did not see the prisoner have any knife in his hand when he first came towards him, and he saw the prisoner draw it from his pocket at or about the time when his father raised the chair, and the prisoner rushed upon his father instantly that the chair was thrown; that immediately after his father was stabbed, he got up and went towards the door, and the prisoner followed and stabbed him again, and his father then went to the bed and laid down, and soon afterwards died; that he did not see his mother assist his father either to get up from the floor or to carry him to the bed, and thought, if she had done so, he would have seen it. He testified, further, upon cross-examination, that after his father was dead he went into the yard where the prisoner then was and asked him why he had killed his father, to which the prisoner replied that if he did not clear out he should send him off with cut throat.

The prisoner's counsel then called some witnesses who deposed to the

good character of Theophilus Barfield for integrity and veracity,
(303) and closed their case.

The counsel for the State then introduced James Manly, who testified that about a year previous to this transaction he saw the prisoner have a pocket knife; that upon prisoner showing it to him, he told prisoner that he ought not to carry it into company, upon which the prisoner replied that there were two men whom he intended to kill, and that he would be damned if he would not do it if he had to be hung for it the next day.

Allen Manly, another witness for the State, testified that about the Christmas before the killing, which was on the last day of January, 1846, he was at the house of the prisoner, who told him that he had a very pretty knife which he wished to show him; that he went into a room to get it, but soon returned, saying that he could not find it, and he expected that his son had taken it off; and he said further, that he had gotten the knife for two or three men. Other witnesses were then called who stated that they were at the house of the deceased after he was dead, on the night he was killed, and heard the prisoner say repeatedly that he had laid Alfred cold, and that he manifested indifference to his death. One of these witnesses testified that before this transaction the prisoner and the deceased appeared to be friendly, and that the deceased was a cowardly man, but violent when drunk.

It was proved by several witnesses that the prisoner and the deceased lived within a short distance of one another, were upon terms of intimacy and in the habit of exchanging frequent friendly visits, and there was no evidence of any disagreement or ill-feeling between them at any time. Some other testimony was given which it is unnecessary to state.

The prisoner's counsel admitted that if the testimony of Mrs. Flowers were to be taken as true, the prisoner was guilty of murder, but they urged upon various grounds that she was not to be believed, and
(304) they insisted that the account of the transaction given by Robert Flowers was the true one, and, if it were, then they contended that the throwing of the chair by the deceased at the prisoner was legal provocation; that the homicide was prompted by the provocation, and the prisoner's offense was thereby mitigated to manslaughter. They contended further, that at the time the deceased rose up from his chair he and the prisoner were upon friendly terms; that there was no evidence of any previous malice on the part of the prisoner towards the deceased, and that none could properly be inferred from his subsequent conduct, especially when it was considered that he was then highly excited by the use of ardent spirits, and that, consequently, there was nothing to show that the prisoner did not act upon the provocation which he received.

The counsel for the State, after insisting that the testimony of Mrs. Flowers was true, contended that if the case stood alone upon the testimony of Robert Flowers, there was no legal provocation for the killing; that the throwing of the chair by the deceased was not, under the circumstances, a legal provocation; but if it were, the prisoner did not act under its influence, but acted from malice towards the deceased, and this was to be inferred from his language and conduct towards the deceased after he came to his house and up to the time of the fatal deed, and also from his language and conduct after he had killed the deceased.

They contended further that the testimony of the Messrs. Manly was also to be considered, not in the light of threats towards the deceased, but as showing, in connection with other circumstances, the motive by which the prisoner was actuated when he killed the deceased.

The court charged the jury upon the testimony of Robert Flowers that if the parties were upon friendly terms up to and at the time when the deceased rose up, raised his chair, and threw it at the prisoner, the throwing of the chair by the deceased was such a violent assault as made it a legal provocation, and if the prisoner, then acting (305) under the provocation, drew his knife, rushed upon the deceased, and stabbed him, the killing was not a killing upon malice, but upon a legal provocation, and it would be the duty of the jury to acquit him of the charge of murder and find him guilty of manslaughter only. But the provocation could not avail the prisoner if they found that he did not act upon it, but acted upon malice; and in ascertaining his motive they had a right to consider his conduct towards the deceased previous to the killing, and also his language and conduct subsequent to that event.

That the testimony of the Manlys did not show such malice towards the deceased in particular as made it necessary for the prisoner to prove a reconciliation in order to prevent the presumption of malice continuing up to the time of the killing, according to the doctrine in *Madison Johnson's case,* but the jury might consider it in connection with the other circumstances of the case, including the conduct and declarations of the prisoner after the death of Flowers, to show whether the prisoner acted upon the provocation or with malice.

The prisoner was convicted of murder. A motion for a new trial was submitted because the court instructed the jury that they might consider the testimony of the Manlys, and also the testimony in relation to the language and conduct of the prisoner on the night of the homicide and after it was committed, in ascertaining whether he acted upon legal provocation or upon malice towards the deceased.

Motion overruled. Sentence of death pronounced, and appeal by prisoner.

Attorney-General for the State.
Badger for defendant.

(306) RUFFIN, C. J. The prisoner lost no advantage by not objecting to the admissibility of the testimony of the Manlys, as the counsel for the State, in the opening, stated an expectation to prove that the killing was upon express malice. To that purpose that evidence was material, if the jury, from it and other circumstances, inferred that Flowers was the person, or one of the persons, whose life the prisoner threatened; and it would be the stronger the more frequently the threat was uttered and the greater the length of time through which it was repeated, as tending to show that the prisoner's mind had brooded over vengeance, and that he deliberately purposed to have the other's blood.

But, after getting in the evidence in that way, the solicitor, in using it before the jury, distinctly admitted that the threats were not directed toward the deceased, and he could not well have contended otherwise, in the absence of any evidence of ill-feeling between the parties and after full evidence of the friendly relations that had subsisted between them. He, however, urged that though the deceased was not the object of them, those threats (amongst other things) "showed the motive by which the prisoner was actuated when he killed the deceased." And in reference to that position the court, after expressing the opinion that, according to the evidence of the lad, Robert Flowers, there was a legal provocation, directed the jury that the testimony of the Manlys did not show malice towards the deceased in particular; but that, nevertheless, "they might consider it, in connection with the other circumstances, to show whether the prisoner acted upon the provocation or with malice." The question before this Court is whether that direction was right or not. We think it was not, because that was not such evidence as would authorize the finding that the killing was upon malice, and not upon the provocation, and, therefore, that it was erroneous to leave the point to the jury on it.

(307) As the question comes before this Court, it is to be assumed that Mrs. Flowers was discredited, and that the case, as to the incidents of the combat, stood upon the evidence of the son. Upon that state of the case the court told the jury that there was legal provocation which palliated the killing to manslaughter, provided, only, the prisoner acted on it. If he did not, then, indeed, it followed that the killing was, in a legal sense, on malice against the prisoner, and amounted to murder, as there was no circumstance of accident or necessity to excuse or justify it. The essential inquiry, therefore, was whether there was any motive for the mortal assault besides that arising out of the admitted provocation.

Upon that question, the circumstances that the prisoner was approach-

ing the deceased when the latter rose from his chair, and that he did not, when he threw the chair, touch the prisoner, nor, as the witness believed, intended to do so; and that the deceased in throwing the chair fell, and the prisoner rushed on him and stabbed him while down; and, also, that the deceased got up and retreated, and the prisoner then pursued him and continued to stab him: those circumstances, together with the prisoner's deportment and language to the family of the deceased and respecting the homicide, were very properly submitted to the jury as material to be weighed by them upon the inquiry just mentioned. Upon their weight legally, or as authorizing an inference of fact as to the state of the prisoner's heart at the time of giving those stabs, it is not our province now to give an opinion, and we wish to be understood as carefully refraining from the intimation of one. We only mean to say that those were proper subjects for the consideration of the jury upon the point before them. But the instruction added to those circumstances, this other, as also proper for their consideration on that inquiry, namely, that a year before and also a month before the homicide the prisoner declared his intention to kill two or three men—it being at the same time admitted that the prisoner had no reference to (308) the deceased, but that he meant other men. Now, that is saying that it may be inferred, notwithstanding a present sufficient provocation, that the prisoner killed one person on express malice—a previous design, or set purpose to do so—because a year and a month previously he declared that he had a mind to kill another person. The declaration of an intention to kill another certainly cannot stand higher, as evidence of an unprovoked purpose to kill Flowers, than the actual killing of that other. If we suppose, then, that the Manlys had been offered to prove that a year and a month before this killing, they had seen the prisoner wantonly stab a man to death, it is clear that evidence could not have been received. The one transaction would be entirely distinct from the other. It would be altogether irrelevant to the point whether the prisoner stabbed the deceased, and not less so to the inquiry on what motive did he stab him. If proved, it would, of itself, be *no* evidence of this killing, or the *quo animo* on which the court could leave a case to the jury; and it would be equally inconclusive, and therefore calculated to mislead the jury, when left to them in aid of other evidence on those points. It would, in effect, be giving the prisoner's general character in evidence against him, or, even worse than that, as this is particular evidence (which the prisoner would not be prepared to answer) of an evil disposition towards certain persons formerly, as the foundation of a presumption that the prisoner afterwards killed another person *malo animo*, instead of having done so on an immediate provocation proved.

It is true that there are cases in which the killing is murder, though

there was no intention to kill the deceased in particular. But they all stand upon entirely different grounds from the present. The cases alluded to are those in which a person shoots at one man upon malice towards him, and happens to miss him and kill another; or if he (309) lay poison for one, and another ignorantly take it, and die; or discharge a gun in a crowd, and kill some one, though not directed to any one in particular; or, with the intent to steal it, shoot at an ox and kill a man; such cases are all murder. But in each of them there is, at the instant of the act done from which the death ensues, an intent to commit a felony, and an intent to commit it by that very act. The law, therefore, holds the perpetrator responsible for all consequences which flowed from that act, and treats him as if he actually intended to do what he happened, in the execution of that purpose, to do. But this man Flowers was not killed in any effort of the prisoner to slay either of the other men against whom he had been harboring malice, as declared by him to the Manlys. The inquiry in this case was, therefore, the strictly limited one, whether the killing was upon malice to the deceased. That could not rationally be inferred from an evil disposition towards other persons, however long and firmly cherished by the prisoner; and, therefore, according to our law of evidence, and mode of trial in criminal cases, that evidence ought not to have been received; or, after it was received under the circumstances in this case, it ought not to have been given in charge to the jury as matter which tended to repel the presumption that the prisoner, in killing Flowers, acted on the provocation which he then received.

PER CURIAM. New trial.

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(310)

JOHN GILCHRIST, JR. v. ARCHIBALD D. MCLAUGHLIN.

1. The plea of *liberum tenementum* in an action of trespass *q. c. f.* admits the fact that the plaintiff was in possession of the *close* described in the declaration, and that the defendant did the acts complained of, raising only the question whether the *close* mentioned was the defendant's freehold or not.
2. In a controversy about boundary, the plaintiff may give in evidence a recovery in an ejectment suit twenty-five years ago, by one under whom the plaintiff claims against the defendant, and the subsequent abandonment by the defendant of the land now claimed by the plaintiff.
3. A plaintiff may recover damages for a wrongful entry upon his land by a disseizor, although he may not have regained possession of his land at the time of the action brought.
4. Where a tenant claims by a disseizin, ripened into a good title by lapse of time, he must show an actual, open, and exclusive possession and use of

the land as his own, *adversely* to the title of the defendant. It must be known to the adverse claimant or be accompanied by circumstances of notoriety.

5. Where a person intends to place his fence on a particular line, but accidentally places a small part of it on land claimed by another, this will not be a possession adverse to such claimant.

6. Where, in running a line, another known line is called for, and the distance gives out before reaching the line called for, the distance is to be disregarded.

APPEAL from RICHMOND Spring Term, 1847; *Battle, J.*

The facts on which the questions of law arose in this case are stated in the opinion delivered in this Court.

Badger for plaintiff.
Strange for defendant.

DANIEL, J. This is an action of trespass *q. c. fregit.* The pleas are *"liberum tenementum"* and *"not* guilty." The first plea admits the fact that the plaintiff was in possession of the *close* described in the declaration, and that the defendant did the acts complained of, raising only the question whether the *close* described was the defendant's (311) freehold or not. 2 Greenleaf Ev., sec. 626. But under the plea of "not guilty" the defendant may give in evidence any matters which go to show that he never did the acts complained of; for example, that he did not enter the plaintiff's *close;* so he may show that the freehold and immediate right of possession are in himself, or in one under whom he claims title; thus disproving the plaintiff's allegation that the right of possession is in him. 2 Greenleaf, 513. Under the first plea, if it stood alone, the plaintiff would have had to prove nothing but the amount of damages he had sustained; and the burden of proving that the freehold was in the defendant (if the fact was so) lay upon him. Under the other plea, *not guilty* (the defendant may plead double), the plaintiff was driven to the necessity of sustaining by proof the affirmative allegation in his declaration, that the defendant *broke and entered his close* and built thereon his stables.

The eastern abuttal of the *close,* as described in the plaintiff's declaration, is Watson's line. The plaintiff, to show his constructive possession of the place when the defendant entered and built his stables, began his evidence by exhibiting a grant made to John McFarland for 150 acres of land and dated 18 August, 1787. The first line of the patent ran to Smiley's corner (Gulledge's grant of 1774, or 5), then with and beyond his line south 60 east 180 poles to a stake among three pines *on Watson's line;* then with and beyond it south 35 west 125 poles; then north 67 west 184 poles to the beginning. The plaintiff thehn introduced a

deed, dated 30 December, 1816, from A. Nicholson to Angus Gilchrist, for the same land and described by the same boundaries. He then proved that A. Gilchrist entered and possessed the said lands up to his death, in 1834, when he devised it to his son James Gilchrist, who took it in possession. James Gilchrist conveyed the same land to the
(312) plaintiff, John Gilchrist, by deed dated 20 January, 1840, who entered and possessed it up to the commencement of this action.

The distance called for in the plaintiff's second line gives out before it reaches Watson's line as contended by the plaintiff; he, however, insisted that he had a right to go to the *Watson line* called for in his title deeds; and he offered witnesses to prove that it had been so reputed and understood for a long time. The defendant objected to parol evidence as inadmissible to establish where Watson's line ran, before the plaintiff had laid a foundation for such evidence by showing some written document that Watson ever had a line for any land in that neighborhood, and he insisted that the plaintiff should be nonsuited in case of his inability to produce some written document to that effect. The court, however, refused to nonsuit the plaintiff, and let in the parol evidence. We think that the defendant has no right to complaint of this, because, independent of the plaintiff's right to prove a line of Watson by reputation, the court had no right to nonsuit if the plaintiff was willing to risk a verdict against him. The defendant did not, however, rely upon an error in that decision and stop his case. He proceeded and exhibited a grant for a 100-acre tract of land to one Thomas Gaddy, dated in 1773, and a deed for the same lands from T. Gaddy to *Alexander Watson,* dated in 1776, and thus, himself, showed a line of Watson as called for. Both parties then admitted that the call for *Watson's line* in the plaintiff's title deeds must be the western boundary line of the Gaddy grant. And where that western line ran, or lay, was the bone of contention between the parties.

The plaintiff insisted that the red dotted line designated as X. N. Y. was the true Watson line; and the defendant (who had married Watson's daughter, and had purchased of him the two tracts of land
(313) mentioned on the plat, to wit, the Gaddy grant of 100 acres and the Alexander Watson grant of 250 acres) insisted that the black line, designated as running from black L. to 2, was the eastern boundary of the John McFarland grant, and was the *western line* called for in the plaintiff's deeds. If his position was true, the *locus in quo* would be the defendant's freehold. The land had been granted, and if the stables were within the boundaries of the plaintiff's title deeds, then the long-continued adverse possession of the John McFarland land, from 1816 to 1843, under color of title, would bar McFarland and his heirs, and give a good title to the plaintiff. The plaintiff proved that he had cleared a

field of 30 or 40 acres soon after he purchased the land in 1840, up to within 80 yards of the stables, and they were built by the defendant in 1843. The defendant then proved that he had a field, and had continued in possession of it, claiming under the color of title he derived from Watson, for more than seven years.

He proved that his field extended west of the red dotted line *N. Y.* To repel the force of this testimony, the plaintiff offered the record of an action of ejectment which had been brought by Angus Gilchrist, as lessor of the plaintiff, against the defendant, in 1819 or 1820, in consequence of a controversy that then arose between them about the said boundary line, in which there was a verdict and judgment for the plaintiff. This evidence was objected to by the defendant, but was admitted by the court. We think that the judge did right in admitting the evidence for the purpose for which it was offered in this case. The land was described in the declaration in that suit in the same manner as it is in the present declaration, and in the grant to McFarland; and on the recovery by Angus Gilchrist, the present defendant abandoned the land on the western side of the line *N. Y.* as having been recovered in that suit, upon the ground that *N. Y.* was the boundary between the parties, or, at least, the plaintiff so contended, and it was a (314) proper question for the jury whether the defendant had so abandoned, and, if so, for what reason; for it would be an argument for the plaintiff upon the question of boundary if the defendant had admitted as far back as twenty-five years that the boundary was in truth as the plaintiff now claims. Now, to that end it was material to give in evidence the record of the former suit, in order to show for what land and by what boundaries the recovery there was, and thus satisfy the jury of the defendant's reasons, immediately after that trial, for removing his fence and placing it where he did.

The defendant contended that the plaintiff could not maintain this action, though he had established his title up to the red dotted line *X. Y.*, because he had not gained possession of the *locus in quo* at the date of his writ. The court said that this action might be maintained for the first entry if the plaintiff had a constructive possession of the *locus* at the time the wrongful entry of the defendant was made, although he had not regained possession at the date of the writ. We concur in this opinion, and have given our reasons in *Smith v. Ingram, ante*, 175. The defendant also insisted that at the time the act complained of was committed he was as much in possession as the plaintiff. The court charged the jury that if the defendant, when he removed his fence, after the trial in the ejectment, intended to place it on the red line *X. Y.*, so as not to inclose any land west of that line, but did by mistake place it so as to include a part of the land west of that line, it would not avail to

give him possession up to the line *H. I.*, even if that was the boundary of the Watson grant of 250 acres. We see no error in this part of the charge of his Honor. Where the tenant claims by a *disseizin* ripened into a good title by lapse of time, he must show an actual, open, and exclusive possession and use of the land as his own *adversely* to the
(315) title of the defendant. It must be known to the adverse claimant or be accompanied by circumstances of notoriety. 2 Greenleaf, 5, 557. If the defendant intended to place his fence on the line and to abandon all the land west of that line (which was a question proper for the jury), then the accidental circumstance that the laborers in erecting the fence placed a small part of it west of the line would not satisfy the requirements of the law that the defendants's possession west of that line must be *adverse* to the title of Gilchrist. *Green v. Harman,* 15 N. C., 158. The defendant insisted that the plaintiff must stop at the termination of his distance, and then his eastern line must be the black line L, 2, as there was no evidence of a Watson line in 1787 or at any period anterior thereto. Where another known line is called for, and the distance gives out before reaching the line called for, the distance is to be disregarded. The defendant is mistaken when he says there is no evidence of a Watson line in 1787 or before; for Watson purchased the Gaddy tract of land in 1776; and the lines of that tract after that date were called Watson's lines, as we learn from Watson himself, in his survey of his grant for 250 acres, surveyed 10 November, 1785. In that survey the lines of the Gaddy land are called Watson's lines; and whether this evidence was furnished on the trial by the plaintiff or the defendant is quite immaterial. The defendant insisted that the line H. I. was the western line of the Watson grant of 250 acres, and that he had been in possession for more than seven years of the lapped part before the plaintiff took possession in 1840; and he contended that his seven years possession under Watson's grant gave him a better title to the *locus in quo* than the plaintiff.

The answer to this portion of the defense is that the seven years possession by the defendant of the lapped part could not be made out without resorting to the possession of the very small part of the
(316) land that was by mistake included within the defendant's fence when he in fact intended, as the jury had found, to place it on the red line. That possession of the land by the defendant inside of the fence west of the red line was not an *adverse* possession, in the opinion of the judge and jury; and a seven years possession (not adverse) never ripens the tenant's title into a perfect title; for an adverse possession is one taken exclusively and upon a claim to hold as his own against the true owner.

We cannot discover any error in the decisions of the judge, unless it

may be the admission in evidence of the judgment and execution against John McFarland; if, indeed, that be an error. The title deeds exhibited by the plaintiff, beginning with that from Nicholson, and the evidence of the continued possession from 1816 up to this time, gave him just as good a title without the judgment and execution as with them. They, therefore, were immaterial to the plaintiff's right to recover in this action; and, being so, it is not necessary that we should decide on their validity, as their admission in evidence by the judge was immaterial, and, therefore, founds no ground for a new trial.

PER CURIAM. No error.

Cited: Loftin v. Cobb, 46 N. C., 412; *Rogers v. Ratcliff,* 48 N. C., 238; *Mode v. Long,* 64 N. C., 435; *Maxwell v. Jones,* 90 N. C., 327; *Smith v. Headrick,* 93 N. C., 213; *King v. Wells,* 94 N. C., 352; *McLean v. Smith,* 106 N. C., 179; *Hill v. Dalton,* 140 N. C., 13; *Locklear v. Savage,* 159 N. C., 238; *Belk v. Vance,* 165 N. C., 675; *McCaskill v. Lumber Co.,* 169 N. C., 26.

(317)

JAMES LEMIT TO THE USE OF BURTON HATHAWAY v. JOHN FREEMAN.

When a sheriff returns that a writ came to his hands "too late to execute," the writ having been delivered to him more than ten but less than twenty days before the term of the court, he is liable to the penalty of $500 prescribed by the statute, Rev. Stat., ch. 109, sec. 18, for making a false return.

APPEAL from CHOWAN Spring Term, 1847; *Caldwell, J.*

This is an action against the sheriff of Bertie for $500 for making a false return of "Too late to hand to execute in time" on a *capias ad respondendum* sued out from the Superior Court of Chowan by James Lemit to the use of Burton W. Hathaway against William H. Capehart and George W. Capehart; and was tried on *nil debit* pleaded. The writ was delivered to the defendant seventeen days before the term to which it was returnable, and the return was made in the defendant's name by his deputy. Upon evidence of those facts given on the part of the plaintiff, the defendant insisted that the plaintiff could not recover, first, because he had not given evidence that either of the Capeharts was an inhabitant of Bertie or was in that county while the defendant had the writ; and, secondly, because the writ was not delivered twenty days before the sitting of the court. A verdict was taken for the plaintiff, with leave to the defendant to move to set it aside and enter a nonsuit if for either of those reasons the law was against the plaintiff; and afterwards

the court, on motion of the defendant, did set the verdict aside and gave judgment of nonsuit, and the plaintiff appealed.

Heath for plaintiff.
A. Moore for defendant.

(318) RUFFIN, C. J. If Hathaway had sued the defendant for not executing the writ, or for a false return of *non est inventus,* it would have been incumbent on him to allege and establish that the defendants in the writ were in the sheriff's county. But that circumstance has no application to an action for the penalty for such a return as this, which falsely alleges that the writ came to hand too late to be executed —even if the defendants therein were in the county.

The case, therefore, depends on the second point made on the trial, which is the only one which is argued here.

The act of 1777, ch. 115, sec. 14, provides that all writs in the Superior Courts shall be executed at least *ten* days before the beginning of the term to which they shall be returnable, and that process executed at any other time shall be adjudged void on the plea of the defendant. Rev. Stat., ch. 31, sec. 53. The act of the same year, ch. 118, sec. 5, enacts that every sheriff shall execute all writs to him directed, and make due return thereof under the penalty of £50 (fixed at $100 in 1821) for each neglect, where the process is delivered *twenty* days before the sitting of the court to which it is returnable, to be paid to the party grieved, by order of the Court on motion. The section then proceeds: "And for every false return the sheriff shall forfeit and pay £50 (raised to $500 in 1836), one moiety thereof to the party grieved and the other moiety to him or those who will sue for the same, and be, moreover, liable to the action of the party grieved for damages." Rev. Stat., ch. 109, sec. 18.

In the first place, it seems clear that the return is false; for the writ was delivered in time to give the sheriff seven clear days in which he might have served the writ. It did *not* "come to hand too late to execute *in time.*" Indeed, the defendant's counsel admitted that an action would lie on this return for the party grieved for his damages. He contended, however, that the penalty was not given in such a case, but that the correct exposition of the act is that, as the first clause gives (319) the amercement for not making any return only when the writ has been delivered twenty days, the second clause gives the penalty for the false return of only such a writ as that before specified, that is to say, one delivered twenty days. But the language of the two parts of the section does not bear out that construction. The amercement is given expressly, and only, for not returning a writ that had been delivered twenty days at least. The succeeding clause, which gives the pen-

alty for a false return, is not thus expressly restrained to a writ that had been thus long delivered; nor does it use the words "such writ" or any other term of reference to the preceding provision. But in the most enlarged phrase it declares that *for every false return* the sheriff shall incur the forfeiture. If, however, the two cases, of making no return and of making a false return, stood on the same reasons, the Court, in order to effectuate the apparent legislative intention, would probably feel authorized to restrain, by construction, the general terms used respecting the false return to the particular case before specified, of a writ delivered twenty days. But the two duties are very different. It was well understood that sheriffs could not return writs to various courts in distant parts of the State if the parties were at liberty to put them into his hands up to the last day. Therefore, the law does not give an amercement to one who will not return it. But no such reason applies to a false return; for the fault in that case is altogether on the part of the officer. He may not be obliged to go to the court or return the writ—at least, not under pain of amercement. But if he does go there and undertake to return the writ, he ought to return it truly. There is *no* reason why he should not. If he had served the writ, as he might, surely the law, although it would not impose a fine for *not* returning it, would not leave it to him to return *cepi corpus* or *non est inventus* at his option. The act never meant to confer the privilege of falsehood in any case, though in some cases it would not fine for not making a (320) return. Therefore, there is no ground on which the court is at liberty to disregard the words of the statute by holding that the forfeiture is not incurred by "every" false return.

Some doubt was at first entertained whether this return of "too late to hand" was in its nature such an answer to the writ as to amount to one of those returns which the Legislature meant. But upon consideration we think it is. It is a recognized return, and has long been. Com. Dig., Return D. 1, F. 2, 3. If false, it works a prejudice to the party like other false returns. Indeed, one of the objects of the St. 13 Ed. I., ch. 39, was to give a remedy for falsely making this return of *Tarde*. After reciting that sheriffs will not return writs, and also that they return them falsely, it provides that "such as do fear the malice of sheriffs shall deliver their writs in the open county, and may take of the sheriff or under-sheriff a bill, wherein the names of the demandants and tenants mentioned in the writ shall be contained, and that the seal of the sheriff or under-sheriff shall be put to the bill for a testimony, and that mention shall be made of the day of deliverance of the writ; and that if the sheriff will not return writs delivered to him, and it be found by inquest before the parties of assize that the writ was delivered to him, then damages shall be awarded to the plaintiff or defend-

ant"; "and by this means," it is added, "there shall be remedy when the sheriff returneth that the writ come too late, whereby he could not execute the King's command." So it appears clearly enough that this is one of those false returns anciently complained of as being made by the malice of sheriffs, and remedied by act of Parliament. Other parts of our act of '77 which require the sheriff to mark on the process the day he receives it, and giving the forfeiture and damages for a false return, have the same purpose. It is said, indeed, by *Chief Baron Comyns* that *Tarde* is not a good return upon a *capias ad respondendum.* He (321) cites no authority for the position and assigns no reason for it, though, doubtless, it may be received as law in England upon his authority alone, and the reason may lie in the nature of that writ there. But as by our statute it is expressly made the leading process, and the day of its delivery is to be marked on it, and a time is limited for its execution, it is, we think, within the meaning of that part of the act of '77 which makes it penal on the sheriff to make a false return of a writ.

The judgment, therefore, must be reversed and judgment entered for the plaintiff according to the verdict.

PER CURIAM. Reversed.

Cited: Lemit v. Mooring, 30 N. C., 314; *Hassell v. Latham,* 52 N. C., 466; *Harrell v. Warren,* 100 N. C., 265.

THE STATE v. GEORGE, A SLAVE.

1. The acts and declarations of an accomplice are evidence when they are part of the *res gestæ*, and done in furtherance of the common design.
2. But to make the acts or declarations of another evidence against a prisoner, a conspiracy or common design between them must be established.

APPEAL from GRANVILLE Spring Term, 1847; *Manly, J.*

The prisoner was separately tried upon an indictment in which he was charged as principal and Mary Meadows as accessory before the fact with the murder of James Meadows. In the course of the trial a (322) witness for the State, having been examined as to some other matter, was then interrogated by the solicitor for the State as to the acts and declarations of Mary Meadows tending to show hostility to her husband and an intention to cause some great bodily injury to be inflicted upon him. This was objected to by the prisoner's counsel, but the solicitor stating at the same time that he then intended to call wit-

nesses to prove a conspiracy between Mary Meadows and the prisoner, it was admitted by the court.

Evidence was then introduced to show a guilty connection between the prisoner and Mary Meadows, which it is not thought necessary to repeat.

In another and subsequent stage of the cause, after a recess and before recommencing the examination of witnesses, the prisoner's counsel, addressing the court, remarked, they supposed it was unnecessary to repeat the objection already made to evidence, to which the court replied, it was deemed unnecessary; that objection would be considered as made to all testimony of the same kind. If they desired, however, to make a point as to the admissibility of other evidence upon other grounds, it ought to be mentioned.

No exception is taken to the instructions given to the jury. There was a rule for a new trial on account of improper testimony. Rule discharged. Judgment and appeal.

Attorney-General for the State.
Badger, E. G. Reade, and Gillam for defendant.

NASH, J. The prisoner is indicted, together with Mary Meadows, for the murder of James Meadows, her husband, the first as principal and the second as accessory before the fact. The prisoner was tried alone. On the trial a witness was called to state "acts and declarations of Mary Meadows tending to show hostility to her husband and an intention to cause some great bodily injury to be inflicted on him." (323) Objection being made on behalf of the prisoner, the prosecuting officer stated he intended to introduce witnesses to prove a conspiracy between the prisoner and Mary Meadows. The evidence was admitted by the court. *What* these acts were, or what were the declarations of Mary Meadows, the case does not inform us, any further than that they *tended* to show the state of *her* feelings towards the deceased. An accomplice is certainly a competent witness, either for or against a partner in the perpetration of the offense, if he be not a party to the record; and if he be, his declarations will be heard, under certain restrictions. A simple bald declaration will not be received unless it be, in itself, an act; as in treason, to make it evidence, it be accompanied by an act of which it is explanatory, for which act his accomplices are responsible; and the declaration must be a part of the *res gestæ,* and be done in furtherance of the common design. *Fur Co. v. United States,* 2 Peters, 364; *Gooding's case,* 12 Whe., 460; 1 Phil. on Ev., 414; 4 Haw. P. C., Book 2, ch. 46, sec. 34; *Cabiness v. Martin,* 15 N. C., 110; 1 Greenleaf Ev., 345; *S. v. Poll,* 8 N. C., 442. The declarations and acts of Mary Meadows

had none of the qualities rendering them evidence against the prisoner. The acts, as far as the case discloses, were not such as he was answerable for, nor were they done in furtherance of the common design, to wit, to murder James Meadows. They were descriptive, simply and entirely, of her feelings towards her husband, without pointing in the most remote manner to the prisoner. For this reason, if there was no other, I should send the case back to another jury.

But there is another and still more formidable objection to the sustaining of the verdict in this case. The prosecuting officer, when he offered in evidence these acts and declarations of Mary Meadows,
(324) was sensible that at that state of the case they were not admissible; to make them so, he declared his intention to prove a conspiracy, and it is to be presumed such a conspiracy as would authorize their introduction. The prisoner was on trial for the murder of James Meadows, and the conspiracy to be proved was one to effect that crime; and so the court must have understood it. Does the *case* show that *any* conspiracy was proved? It states, "that evidence was then introduced to show a guilty connection, and that it was not thought necessary to go into particulars." It appears that after the introduction of this testimony the court took a recess, and upon resuming the trial the prisoner's counsel renewed his motion, or, rather, informed the court that he had not abandoned it, and the evidence was not withdrawn from the jury. Whatever doubt might rest upon the admissibility of the acts and declarations of Mary Meadows, as proved, coupled with evidence of a conspiracy, to my mind it is perfectly clear that, as the case appears here, they were not admissible. The words "guilty connection" have no definite meaning as descriptive of any particular offense. The combination of a parcel of smugglers is a guilty connection; so to rob, or to commit an assault or battery, or to strike for higher wages, all these are guilty connections, punishable by law. But the words, in common parlance, when applied to a man and woman, mean a carnal connection. If A. charge B., a woman, with having a guilty connection with C., ninety-nine men out of every hundred will understand it as a charge of incontinence on the part of B. And if the words were introduced into a declaration for slander, with proper averments, no jury would hesitate to hold them slanderous. And we are required to hold that these vague expressions show that a conspiracy to murder James Meadows existed between the prisoner and Mary Meadows, for it is the only ground upon which her acts and declarations were, or could be, held admissible. It is precisely as if the State, after promising to prove the existence of
(325) a conspiracy, had offered no evidence of it. In such a case it cannot be denied that the admission of the declarations would be illegal and erroneous. The State did not redeem its pledge; it did not

prove a conspiracy of any kind, and there *was* error in the admission of the declarations of Mary Meadows. It is, however, objected that the prisoner cannot now avail himself of the objection, as he has not put it into his bill of exceptions. This is a court of errors, and the proper way to bring cases here for our consideration is by a bill of exceptions; but for the convenience of all parties, the statement of the case, under the sanction of the court, is received in the place of a bill; and it is true, we can take no notice of any objection which is not stated in the case, or does not appear upon the record, properly so called. The prisoner's objection does appear upon the face of the bill tendered by him, as I understand it. Whether there was such a conspiracy as would legalize the acts and declarations of Mary Meadows as evidence against the prisoner was a preliminary question of law and of fact to be decided by the presiding judge. With the errors committed in adjudging the facts submitted to him we have nothing to do; our business is only with errors of law. At the time the evidence of the acts and declarations of Mary Meadows were received it was admitted that it would not be evidence unless a conspiracy was proved. The case does not show that any conspiracy was proved, but in its place a guilty connection, which might or might not be evidence of one, but assuredly was not one; and his Honor in so deciding that it was, as we must understand from the case as sent here, committed an error in law. It is no answer to say that such could not have been in fact the decision of the court. I cannot look to anything which is not in the case, more particularly when the life of a human being is at issue. If the case had stated that a conspiracy to murder James Meadows was proved, the prisoner, so far as this question is concerned, would have been concluded, unless he had (326) set forth in his exception some legal objection to it—as that it was a conspiracy to commit some other crime; and the acts and declarations of Mary Meadows, in furtherance of the common design would have been evidence against him. The case states that "it is unnecessary to go into particulars," that is, of the guilty connection; but the notes of the presiding judge were sent up. I have not looked into them, as they constitute no part of the case. *S. v. Godwin*, 27 N. C., 403. It is objected that these particulars ought to have been set out by the prisoner in the case. I cannot see to what purpose or effect. To my apprehension, the prisoner has omitted nothing it concerned his interest to state. If a bill of exceptions does not state correctly the matter excepted to, the judge is not bound to sign it; otherwise, he is. Here he has signed it, and we must consider it as stating all that was necessary. It is further stated in the case that the prisoner did not complain of the charge. No; the complaint is that the declarations of Mary Meadows were admitted without proof of the existence of a conspiracy, which

alone could legalize them; and this appears upon the face of the case. I have little doubt that much more was proved at the trial, upon this particular point than is stated in the case, but I must decide it as it is; I cannot look out of the bill of exceptions.

When the declarations were first offered they were objected to, and when the guilty connection was proved the motion to reject them was again renewed in substance. What more the prisoner could do I cannot perceive. It appears to me he did all, through his counsel, it was necessary or proper for him to do to bring his objection before the court. It surely was not necessary for him to ask for an instruction from his Honor that these acts and declarations of Mary Meadows were not evidence against him. His Honor had already decided that (327) they were. I consider the declarations and acts of Mary Meadows as given to the jury without proof of any conspiracy between her and the prisoner, and in this there was error.

In my opinion, the prisoner is entitled to a *venire de novo*.

DANIEL, J. As to the prisoner's liability to be affected by the confessions of others, it may be remarked, in general, that the principle of the law in civil and criminal cases is the same. In civil cases, when once the fact of agency or partnership is established, every act and declaration of one in furtherance of the common business, and until its completion, is deemed the act of all. And so in cases of conspiracy, riot, or other crime, perpetrated by several persons, when once the conspiracy or combination is established, the act or declaration making a part of the *res gestæ*, of one conspirator or accomplice in the prosecution of the enterprise is considered the *act* of all, and is evidence against all. Each is deemed to assent to, or commend, what is done by any other in furtherance of the common object. But after the common enterprise is at an end no one is permitted, by any subsequent act or declaration of his own, to affect the others. 1 Greenleaf Ev., 233; *S. v. Poll*, 8 N. C., 442; *United States v. Gooding*, 12 Wheat., 459. 2 Peters, 358; 2 Stark. Ev., 232, 237; Roscoe on Ev., 60. The State had, first, to establish a conspiracy between the prisoner and Mrs. Meadows to murder Meadows before any evidence of declarations of hers were admissible against him. The case states that evidence was introduced to show "*a guilty connection* between the prisoner and Mary Meadows, which it is not thought necessary to repeat." How, then, can we see, or say, that any conspiracy ever existed between the prisoner and Mary Meadows to "murder the deceased or to do him some great bodily (328) harm?" "*A guilty connection*—what about? What do these words mean? I must confess I cannot tell. I cannot say that a combination or conspiracy between them to kill the deceased is the plain

meaning of the aforesaid words; and without a combination or conspiracy between the prisoner and Mary Meadows to kill or do some great bodily harm to the deceased, the acts or declarations of Mary Meadows relating to that subject could not lawfully be given in evidence against the prisoner. The prisoner moved for a new trial because the court permitted the declarations of Mary Meadows (without oath or any opportunity of cross-examination) to be given in evidence against him. The State replied that there was "evidence introduced to show *a guilty connection* between you and her." Can this answer be a satisfaction of the previous requirements of the law before acts or declarations of others are admissible as evidence against a prisoner? I think not, and am of opinion that a new trial should be granted.

It is said that it was the prisoner who tendered the bill of exceptions, and it was his duty to state the fact (if it was a fact) that the declarations of Mary Meadows were admitted in evidence against him, when no combination between her and him to kill the deceased had been established. And, I ask, if he has not done so. If there had in fact been a combination to kill proven on the trial, then the judge ought to have refused to sign this bill of exceptions.

RUFFIN, C. J. I think there ought to be a *venire de novo* upon the ground, simply, that the acts and declarations of the woman which were given in evidence are not of such a nature as can affect the prisoner. To make the acts and declarations of one person those of another, or to allow them to operate against another, it must appear that there was a common interest or purpose between them; as applied to the case before us, that there was a conspiracy to murder the deceased, (329) formed between his wife and the prisoner. But that is not all which ought to appear. Before the acts or declarations of one of the conspirators can be received against another it must be shown that they were acts done and declarations uttered in furtherance of the common design, or in execution of the conspiracy. They must be acts and declarations of the one that were authorized by the other, or such as became necessary in the prosecution of the joint business or criminal conspiracy. It has, indeed, been held in this State that the declarations of one of the parties, unless they accompany acts, so as to come within the rule of *pais res gesta*, can only be received against himself. *S. v. Poll*, 8 N. C., 442. But, admitting that to be too strict a rule, no case has carried the doctrine further than has been just mentioned, that is, that the acts and declarations must be such as relate to the common business or purpose, and in furtherance of it. Now, this evidence does not appear to be of that character. I do not deem it material or, rather, so indispensable that the conspiracy should have established, in the

first instance, that the judgment should be reversed on that ground merely. Though that is the more natural, and convenient order of proof, it would be sufficient to support the conviction, if it was made to appear on the trial, so as to show that, on the whole, there was no prejudice to the justice due the prisoner. But supposing a conspiracy to murder the deceased to have been shown in this case: that does not seem to be any such connection between that conspiracy and the evidence given of the woman's act and declarations as conveys to the mind the slightest impression that they were in furtherance of the common purpose. If, for example, a conspiracy between these persons appeared for having the deceased murdered, and then Mary Meadows had procured another person to do the deed, that act of hers and any (330) instructions she gave for the mode of executing it might be evidence against the prisoner. But the evidence in this case was entirely of a different kind, being nothing more than naked indications of her personal hostility to her husband and of her intention to have great bodily harm done to him. It cannot be seen that those acts or declarations were calculated or designed to bring about the killing of her husband or in any manner furthered the common purpose between the prisoner and herself.

On this ground I think the judgment erroneous. I own that I am entirely of a different opinion from that of my brethren as to the consequences of the deficiencies in the bill of exceptions. It is to be recollected that this is a court of errors, and that every verdict and judgment prove to us their own correctness until the contrary appears. There is no *case* sent here, no report of evidence, on which we are to see all the facts set forth, that are legally sufficient to authorize the judgment given. But it lies upon the appellant to allege an error, and then to set forth, in his exceptions, such of the facts of the case as will show the opinion to which he objects to be erroneous in point of law. The bill of exceptions is the production of the appellant, and contains his words, with the signature and seal only of the judge to verify it. Thus looked at, it seems plain to me, when the prisoner's exception says that evidence was given to show *a* guilty connection between him and Mary Meadows that, in common fairness to the presiding judge and to the State, we must understand him to admit that it establishes *the* guilty connection before spoken of in the exception, that is, one to murder Meadows. What other can be imagined in reference to this accusation? That, as it strikes me, must be the just interpretation of that expression, if it stood alone. But the conclusion is irresistible to my mind when the prisoner further states in his exception that he does not think it necessary to set out the evidence of that connection; (331) for what else can be inferred therefrom than that the evidence

legally established a guilty connection between the woman and himself, and *that it was such a guilty connection as was relevant to this trial and to the question of evidence raised by him on the trial?* I agree that the statements in the exception are very imperfect and unsatisfactory, such as would not enable us to see distinctly whether the decision was right or wrong. But whose fault is that? Very clearly, the prisoner's. It would have been much more correct to have stated in the exception, for example, what were the acts and declarations of Mary Meadows that were given in evidence, instead of saying merely that they were acts and declarations tending to show hostility; and so of the particular conspiracy alleged, and of that conspiracy (or connection, as it is called) which was proved. But the prisoner declined expressly to have that latter evidence set forth; and, surely, in a court of error he cannot complain that it was not stated, nor insist that, if stated, it would have proved merely a case of *criminal connection,* or any other connection not relevant to the question then raised. The truth is that even the counsel at the bar, though the same who tried the cause in the Superior Court, did not suggest such an idea; but insisted only on the two points, that it was error to receive the evidence of Mrs. Meadows' acts and declarations, first, because they did not grow out of or concern the common purpose of the prisoner and herself, and, secondly, because they were admitted *before* the State had proved the conspiracy to kill the husband.

I think, if this were a civil action, no one would doubt that it was not a case for reversal merely because the appellant had not set forth the evidence given to show the kind and extent of the connection between those parties. He would be told that if he chose to keep that in the dark, the judgment could not be reversed, if there *could* be *any* guilty connections that would justify the admission of the evidence, because it was incumbent on him to show affirmatively an error. It is (332) the same in criminal, and even in capital cases; for the statute puts all cases upon the same footing, there being no means of bringing up *any* cause to this Court but by bill of exceptions and appeal thereon.

Supposing, then, the other point in the case to have been against the prisoner, I could not have united in reversing the judgment because the prisoner declined stating the evidence or used the vague expression, "guilty connection"—if, as the case stands, it can be considered vague. But upon the first ground I concur in reversing the judgment.

PER CURIAM. *Venire de novo.*

Cited: S. v. Dean, 35 N. C., 71; *S. v. Dula,* 61 N. C., 214; *Hauser v. Tate,* 85 N. C., 86; *S. v. Turner,* 119 N. C., 848; *Henderson Co. v. Polk,* 149 N. C., 108.

(333)

HOUSER AND WILSON v. HENRY G. HAMPTON.

1. The plaintiffs sued out a writ against James Bowles, which was returned "*Non est inventus*": the plaintiffs in their joint names may sustain an action for a false return, both as informers and as the parties grieved.
2. The ignorance of a sheriff's deputy, who makes a false return, if in fact it was false, does not excuse the sheriff from the penalty.
3. When a defendant in a writ is openly and at large in a county, *non est inventus* is a false return; and if he cannot be taken elsewhere, the statute requires that the sheriff shall go to his place of residence before he makes that return.
4. If a sheriff who has *mesne* process in his hands finds the defendant, and really endeavors to arrest him, and is prevented by any sufficient cause, or if, after arrest, the defendant is rescued, he should return the facts in excuse for not taking the body, and not return generally *non est inventus*, contrary to the fact.
5. Rescue is a good return in excuse, and the sheriff may return that he did not take the body because he was kept off by force of arms.
6. The sheriff is not obliged to summon the power of the county upon *mesne* process.
7. What is an excuse to the sheriff for not making an arrest is matter of law, after the facts are ascertained.

APPEAL from SURRY Spring Term, 1847; *Settle, J.*

Debt for the penalty of $500 for making a false return of "Not found" to a *capias ad respondendum* at the suit of the present plaintiffs against James Bowles. Plea, *Nil debet.*

On the trial the defendant insisted that the plaintiffs could not unite in this action; but the court held otherwise. It then appeared in evidence that the writ was delivered to a deputy of the defendant, and that while he had it in his possession he saw Bowles and had a conversation with him in Surry, "and attempted to arrest him, but failed to do it," and that he then delivered the writ to another deputy of the defendant, without informing him of the previous transaction,
(334) and that the latter deputy went twice to the house of Bowles for the purpose of serving the writ, and did not find him there, though on one of the occasions he saw Bowles at a distance, but could not get near him; and that, without consultation with the defendant, he then made the return, "Not found."

The court instructed the jury that if they were satisfied the deputy who first had the writ made reasonable efforts to arrest Bowles, and that the return was made by the other deputy without any knowledge of what had been done by the former, then they should find for the defendant. Verdict for the defendant, and appeal.

Boyden for plaintiffs.
No counsel for defendant.

RUFFIN, C. J. The action, we think, lies for the two plaintiffs. The act gives the penalty, one moiety to the party grieved and the other moiety to him *or those* that will sue for the same. These plaintiffs fill both characters, and are entitled to the whole recovery.

It was not correct that the defendant's liability depended at all upon the ignorance of the deputy, who made the return, of its falsehood, if in fact it was false. That might, perhaps, affect the liability of that deputy, if the defendant sought a recourse on his deputies for a loss sustained by him in the premises. But as between the plaintiffs and the defendant the return is that of the defendant; and as he is liable for the acts and omissions of his deputies, the return is to be considered as having been made by himself with all the knowledge of the facts possessed by both or either of the deputies. It is his fault to have deputies who will not communicate, the one to the other, such acts of the one as are material to a return which the other is to make; and the sheriff cannot be excused for a false return by the belief of a deputy who made it that it was true. That, however is not of so much consequence in the case, if the return be such as ought to have been made, that is, was true. (335)

Upon that point the opinion of the Court is for the plaintiffs. When the defendant in a writ is openly and at large in the county, *non est inventus* is a false return; and if he cannot be taken elsewhere, the statute requires, moreover, that the sheriff should go to his place of abode before he makes that return. In this case, however, the party was actually found by the deputy who had the writ, and he conversed with him, as we must take it, at the ordinary distance from each other. It is stated, indeed, that there was evidence that the deputy "attempted to arrest Bowles and failed." We are not informed what were the efforts to make the arrest, nor why they were not successful. But the facts as stated do not justify the return as to its truth in fact. It may be admitted, he was not obliged to return *cepi corpus* on those facts. Yet, certainly, he could not truly return *non est inventus*, any more than he could have done it if he had actually taken Bowles and he had been rescued. As the sheriff's returns cannot be traversed, and the only remedy for a false return is by action, it is right that the returns should be required to be made strictly according to the facts. If, then, the deputy, after finding Bowles, really endeavored to arrest him, and was prevented by any sufficient cause, the defendant should have returned the facts in excuse for not taking the body, and not return, generally, *non est inventus*, contrary to the fact. Rescue is a good return in excuse. *May v. Sheriff*, Cro. Jac., 419. And it is held here that the sheriff may return that he did not take the body because he was kept off by force of arms. *Crumpler v. Glisson*, 4 N. C., 516. For the

sheriff is not obliged to summon the power of his county upon *mesne process*. But we do not see, here, any facts that could have excused the failure to arrest Bowles. They ought to have been set forth, so that the Court could judge of their sufficiency. It was erroneous to (336) leave that question to the jury, as a general inquiry whether, in their opinion, the officer made reasonable efforts to make the arrest; for what is an excuse in such a case is a matter of law, after the facts are ascertained. Perhaps there may have been a case upon which the court to which the writ was returnable might with propriety have been applied to for leave to amend the return. But in this action, however hard, the sole inquiry is whether the return, as it stands, be true or false, and it is not competent to the jury to palliate the falsehood by weighing excuses for not fully executing the writ. The judgment must, therefore, be reversed, and a *venire de novo* awarded.

PER CURIAM. *Venire de novo.*

Cited: *Lemit v. Mooring*, 30 N. C., 314; *Swain v. Phelps*, 125 N. C., 44.

CASES AT LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

MORGANTON

AUGUST TERM, 1847

HENDERSON POTEET v. JAMES H. BRYSON.

1. Where a forthcoming bond is given for the delivery of property levied on by a constable, it is the duty of the obligors to put the officer in the quiet and peaceable possession of the property at the time and place specified; otherwise their bond will be forfeited.
2. Where a covenant is entered into for the delivery of a variety of articles, the condition is broken if all are not delivered.

APPEAL from CHEROKEE Spring Term, 1846; *Pearson, J.*

The plaintiff, as a constable of Cherokee County, levied an execution which he had in his hands against William Cunningham upon certain articles, the property of the defendant in the execution, (338) all of which he left in his possession, by virtue of the act of the General Assembly passed in 1827, Rev. Stat., ch. 45, sec. 17, taking from him at the same time a bond for the forthcoming thereof to answer the execution. The present defendant was an obligor in this bond. The articles mentioned in it were four head of horses, two oxen, a set of harness, and two wagons. The delivery was to be at Murphy on 5

MEMORANDUM.—By an act of the General Assembly passed at the session of 1846-'7, the judges of the Supreme Court were directed to hold an annual term of the said Court at Morganton on the first Monday of August.

JAMES R. DODGE, Esquire, of Surry, was appointed by the judges clerk of the said Court in May, 1847.

The Attorney-General and the Reporter both attended at this term.

August. Cunningham lived at Murphy. On the day appointed two of the horses levied on and included in the bond were delivered, and sold at public auction at the courthouse in Murphy, one bringing 27 and the other $10, prices much below their value. Cunningham then declared that no more of his property should be sold at that rate, and immediately started for his house, Poteet following him. The other two horses were in the stable of Cunningham, and when he got there he found Cunningham at the door, armed with a deadly weapon, and who opposed his efforts to enter. While the quarrel was going on between the parties, the defendant said to the plaintiff, "If you will say the word, I will bring out the property," and during the altercation he repeated the same words. Poteet made no reply to him at either time. The defendant then observed to him, "There lie the wagons; take notice, I deliver them to you," and turned and walked off. The plaintiff immediately after observed to him, "I will hold you bound on your bond." The wagons were in the street opposite to the stable door of Cunningham and in the rear of him and the plaintiff; one of them was old and of no value, the other worth $80; of the latter, the body was lying on the ground. It was not pretended that either the oxen or the harness were delivered. But it was, on behalf of the defendant, urged

(339) that the wagons were delivered and the horses in the stable, in consequence of the plaintiff's not saying anything to the defendant's offer to bring them out; and he further contended that he was not bound to deliver all the property, as that which was delivered, to wit, the wagons, was worth $80, a sum more than sufficient to discharge the balance remaining due after deducting the sum of $37 raised by the sale of the two horses. His Honor instructed the jury that there was no delivery of the horses in the stable, nor of the wagons, if they inferred that Cunningham was determined to resist the officer if he attempted to take them in the same manner he had resisted the taking of the two horses; but that there was a clear breach of the bond in the nondelivery of the oxen and the harness. The jury having found a verdict for the plaintiff, the defendant appealed from the judgment thereon.

Edney and J. W. Woodfin for plaintiff.
Francis for defendant.

NASH, J. We concur in the opinion of his Honor in the court below. If there was an error it was one of which the defendant has no right to complain. It appears to us too plain to admit of a doubt that neither the horses in the stable nor the wagons were delivered. Cunningham, the defendant in the execution, stood at the door of the stable, armed

with a deadly weapon, and opposed the entrance of the plaintiff. The latter was going beyond the calls of his duty in attempting to go into the stable; he had the bond of the defendant to deliver them to him. Nor was it necessary to tell the defendant to go in and bring them out; it was his duty to do so, if he wished to save his bond. The silence of the plaintiff under the circumstances of the case, when addressed by the defendant, was no discharge of his obligation. Nothing but a positive declaration on the part of the plaintiff, in answer to the inquiry of the defendant, that he would not receive them if brought and tendered could have that effect. With respect to the wagons, the same (340) remarks apply. When the two horses were sold, Cunningham declared, not that no more of his horses should be sold, but that no more of his property should. This declaration necessarily included the wagons, for they had been levied on and are specified in the bond. His arming himself was, according to his declaration, to protect all the property subject to the execution, and the wagons were protectd by the same force that protected the horses. The question is not whether the plaintiff would not have been justified in taking them into his possession, but whether the declaration of the defendant under the circumstances did amount to a delivery, so as to redeem his bond. To us it appears, as it did to his Honor who tried the cause, to be a mere mockery so to hold. The delivery which would save the condition of the defendant's bond was such an one as would place the property in the quiet and peaceable possession of the plaintiff—not one which called upon him to fight to get the possession.

But a full answer to the defendant's objection is that the oxen and harness were not delivered. When a covenant is entered into for the delivery of a variety of articles, the covenant is broken if all are not delivered. *Thompson v. Gaylord,* 3 N. C., 150. The defendant's argument is founded upon the assumption that the defendant has a right to select what part of the property levied on shall be sold. This is a mistake. It is the privilege of the officer to make the selection. For the time being and for the satisfaction of the execution, he is the owner of the property. A court of equity might, under peculiar circumstances, control his discretion in the sale; and after selling as much as satisfies the process in his hands, he has no right nor authority to sell more; but still he has a right to have the whole delivered. It is unnecessary to pursue these views any further. We are of opinion that neither the wagons nor the horses in the stable were delivered, and that there is (341)

PER CURIAM. No error.

DOE ON DEMISE OF SAMUEL SMITH v. ROBERT REAVIS.

1. Under the statute of Elizabeth voluntary conveyances to children, as such, are not absolutely void as to creditors. To make them void it must be shown that the maker of the deed was indebted at the time or so soon afterwards as to connect the purpose of making the deed with that of contracting the debt and defeating it.
2. By indebtedness in such a case is not meant a debt of a trifling amount, in comparison to the donor's estate, but he must be "greatly indebted," or at least he must owe some debt that remains unpaid and will be unpaid if the conveyance be sustained.
3. If a father, who conveys land to a son, be indebted at the time, that does not avoid the deed, provided the father pay that debt, or if he retain property sufficient to pay the debt and out of which the creditor can raise the money when he seizes the land conveyed to the child.
4. This deed was made before the act of 1840-1, ch. 28.

APPEAL from BUNCOMBE Spring Term, 1846; *Pearson, J.*

The premises in dispute belonged to Thomas Reavis in June, 1838, and he then conveyed them to his son Robert Reavis, the defendant, by a deed expressed to be made in consideration of $1 and of natural love and affection. At the same time Thomas Reavis made similar deeds for other land to each of his sixteen other children, but he retained (342) a tract of land, on which he still lives, and a considerable amount of personal property. In October, 1838, Thomas Reavis contracted a debt of $100 to the State, and confessed a judgment therefor, and a *fieri facias* was issued thereon, under which the premises were sold by the sheriff to the lessor of the plaintiff in April, 1839. On the trial the plaintiff proved that in April, 1838, an indictment was found against Thomas Reavis, which was pending when he made the deeds to his children, and on which he was convicted in April, 1839, and fined $150; but it was admitted that he paid the fine and the costs forthwith. The counsel for the plaintiff moved the court to instruct the jury that the pendency of the indictment against Thomas Reavis at the time he conveyed the land to the defendant and his other children, created such an existing demand against him as made those deeds fraudulent and void in law. But the court refused the motion, and directed the jury that the deed to the defendant was to be regarded as voluntary, and that the indictment, though it did not create a debt which existed when the defendant's deed was made, was sufficient evidence of a debt in contemplation; and that it was for the jury to consider whether the deed, under the circumstances, was made with the intent to hinder or delay that contingent or contemplated debt. A verdict was found for the defendant, and from the judgment the plaintiff appealed.

Edney and Francis for plaintiff.

N. W. Woodfin for defendant.

RUFFIN, C. J. The refusal to give the instructions asked on the part of the plaintiff was, we think, correct. The act of 1840, ch. 28, makes the question of fraud in such a case one for the jury, under proper advice from the court. Therefore, it was right to decline pronouncing the deed fraudulent as a matter of law. But independent of that act, and under any construction of the Stat. 13 Eliz. that has ever prevailed, this deed could not be deemed convinous. As *Lord* (343) *Hardwicke* observed in *Walker v. Burrows*, 1 Ark., 93, there was always a distinction between the two statutes of 13 and 27 Elizabeth; and it would be attended with bad consequences if, as to creditors, voluntary conveyances were, as such, absolutely void, as the statute extends to goods as well as land, and that construction would defeat every provision for children, though the father were not indebted at the time. Hence, under 13 Eliz. it has always been held necessary to show that the maker of the deed was indebted at the time, or so soon afterwards as to connect the purpose of making the deed with that of contracting the debt, and defeating it. At least, that has always been the rule where the deed was not made to a stranger, so as to be purely voluntary, but was made to a child, as a reasonable provision, and thus founded on a meritorious and the "good consideration" mentioned in the statute. And when the donor's indebtedness at the time is spoken of, it is not intended that the deed is void if he owed a dollar or other trifling sum in comparison to his estate; for then no man could make a deed that would stand. But it is meant that he should be "greatly indebted," as *Lord Coke* says in *Twyne's case*, 3 Rep., 81, or, at the least, that he should owe some debt that remains unpaid and will be unpaid if the conveyance to the child be sustained. *Lush v. Wilkinson*, 5 Ves., 384; *O'Daniel v. Crawford*, 15 N. C., 197. But if a father, who conveys to a son, be indebted at the same time, that does not avoid the deed, provided the father pay the debt, or if he retain property sufficient to pay the debt, and out of which the creditor can raise the money when he seizes the land conveyed to the child; for the idea of an intention to defeat the debt is completely repelled, in the one case, by the actual payment by the father, and, in the other, by the existing and continuing ability to pay it. It is only when the donor is unable to (344) pay his debts when he makes a gift, or becoming so, and a debt remains unpaid, that the creditor finds the deed an obstacle to his satisfaction, and has the right to impute fraud to it. Now, in this case, if it be supposed that the fine and costs that might result from the indictment constitute a debt, yet that debt was actually paid by the father out of his reserved property, which rebuts the imputation of fraud. So of the debt for which the land was sold. That was contracted after the deed to the defendant, but, it may be admitted, so soon

as to give it, for this purpose, the character of an existing debt. If so, it cannot, nevertheless, affect this deed with covin, because the father kept property much more than sufficient to discharge it, not only when he made the deed, but he had it when he contracted the debt and confessed the judgment, and when his son's land was sold, and, as far as it appears, still has it, amenable to the process of execution.

PER CURIAM. Affirmed.

Cited: Houston v. Bogle, 32 N. C., 505.

THE STATE TO THE USE OF JACOB MERRILL v. JAMES R. MCMINN ET AL.

Where the only record of the appointment and qualification of a constable was in the following words, to wit, "James R. McMinn appeared in court and filed his bond as constable, for the County of Henderson for one year and was duly sworn": *Held*, that under the act of 1844, curing defects in the official bonds of certain officers therein named, this was sufficient evidence of the appointment of the constable and of his having qualified and given bond.

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

Debt on the bond of McMinn, one of the defendants, as a constable in the county of Henderson. Plea, *non est factum*. The relator (345) on the trial produced the entry of record made in the county court, which entry is in the following words, to wit: "James R. McMinn appeared in court and filed his bond as constable for the county of Henderson for one year, and was duly sworn." The defendant objected that this entry did not establish his legal appointment as constable. The court thought otherwise, and a verdict was rendered for the plaintiff, from which the defendant appealed.

N. W. Woodfin for plaintiff.

J. W. Woodfin and Francis for defendants.

DANIEL, J. It is very certain that the objection would have been held good had it not been for the act of the General Assembly at its Session of 1844-5, curing defects in the official bonds of certain officers therein named. The circumstance that the constable's bond was taken by a court composed of only three magistrates makes no difference, since the passage of the aforesaid act of Assembly. *S. v. Pool*, 27 N. C., 105.

PER CURIAM. Judgment affirmed.

Cited: Comrs. v. Magnin, 86 N. C., 289.

(346)

D. F. RAMSOUR v. JESSE RAPER ET AL.

A joint judgment was obtained before a justice of the peace against A. and B. A. appealed to the county court and gave C. as the surety for the appeal. At the June Session, 1843, of the county court judgment was entered against B. and also against C., the surety, both A. and B. having appeared and pleaded in the county court. At December Session, 1843, on motion, the judgment against C. was vacated. From this order the plaintiff appealed to the Superior Court. The Superior Court dismissed the appeal on the ground that there was no error in the judgment of the county court at its December Session, 1843. *Held*, first, that the appeal from the justice took up all the proceedings to the county court, as, the judgment being joint, one half of it could not be vacated and the other half left valid in the magistrate's court. *Held*, secondly, that the county court had no power to reverse a judgment rendered at a preceding term.

APPEAL from CHEROKEE Spring Term, 1846; *Pearson, J.*

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

DANIEL, J. Thomas Brown had executed a negotiable bond to Jesse Raper, and he had indorsed it to the plaintiff, who sued by warrant the maker and the indorser jointly, and obtained judgment by default against both. On the warrant there is this entry: "The defendant Jesse Raper prays an appeal, on a judgment obtained against him by default in favor of D. F. Ramsour, to the next county court, and gives for security James Raper, this 26 April, 1843. Teste, E. D. Shields, J. P." The said appeal vacated the judgment obtained before the justice, not only as to Jesse Raper, but also as to Thomas Brown, and took up all the proceedings to the county court. The judgment being joint, one-half of it could not be vacated, and the other half left valid in the magistrate's court. But, however, both the defendants appeared and pleaded in the county court; and at the same (347) sessions (June, 1843) there was a judgment entered against Brown "according to specialty," with a stay of execution also; and, on motion, the court gave judgment against James Raper, the surety to the appeal. At December Session, 1843, a motion was made to set aside the judgment which had been entered against the surety for the appeal at June Session, 1843, on the ground, as he alleged, that there had been no judgment recovered against his principal, Jesse Raper. And the county court held that the said judgment was erroneous, and granted the motion. The plaintiff appealed to the Superior Court from this order. At Spring Term, 1846, the Superior Court of Cherokee County dismissed the appeal, on the ground, as the judge said, that there was no error in the judgment of the county court at its December Session, 1843. From this judgment of the Superior Court the plaintiff appealed to the Supreme Court. We think that there was error in the judgment

of the Superior Court. The county court, at June Session, 1843, had jurisdiction over the subject-matter it then professed to act on; and, although what they then did may have been very erroneous, it was not void; and the same court, at its December session following, had no power to reverse the judgment entered against James Raper at the antecedent June session for any error apparent upon the face of the records of these proceedings. The Superior Court was the court where the writ of error should have been returned, and errors assigned and then determined on by that court before the judgment of the county court (at June Session, 1843) could have been reversed, if in fact erroneous. We are of opinion that the judgment of the Superior Court dismissing the plaintiff's appeal to that court was erroneous, and must be reversed. And this must be certified to the Superior Court, and a writ of *procedendo* issued to that court to the intent that the said Superior Court may proceed accordingly and may issue a writ of *procedendo* to the county court requiring the said county court to reinstate the
(348) said judgment rendered at June Term, 1843, and proceed further thereon according to law.

PER CURIAM. Ordered accordingly.

ROBERT HENRY ET AL. V. LEWIS SMITH ET AL.

In an action on a bond for $60, payable to two attorneys for attending to a suit, which bond had been due for more than twenty years, the defendants relied upon the presumption of payment or satisfaction under the statute, from the lapse of time. To rebut the presumption the plaintiff proved that one of the defendants had recently said that he had paid one half of the bond, and the other half was relinquished because the attorney to whom it was payable had neglected to attend to the suit. *Held*, that these declarations were not sufficient to rebut the presumption.

APPEAL from HAYWOOD Spring Term, 1846; *Pearson, J.*

This suit was commenced on 3 April, 1889, by warrant before a justice of the peace. It is debt on a bond for $60, dated 8 April, 1817, and payable immediately to Robert Henry and Joseph Wilson, two attorneys, and expressed to be for a fee, for appearing for the obligors in an action of ejectment then pending. It came on for trial in the Superior Court upon the pleas of accord and satisfaction and payment *ad diem* and *post diem*.

Upon the production of the bond, there appeared on it a credit for $30, paid by Smith, 7 April, 1818, to Mr. Henry, and entered by that gentleman. Mr. Wilson died several years past. To rebut the pre-

sumption of payment, the plaintiff offered evidence that the bond (349) was in the possession of the plaintiff Henry until the year 1828, and that he then placed in the hands of one Deaver for collection, and that Deaver then presented it to the defendant Smith for payment, and Smith replied "that he considered the debt satisfied; for he had paid Mr. Henry $30 for his part, and Mr. Wilson had not been present at the trial of the suit, in which he had been employed, and for that reason he had agreed to give up his part;" that Deaver then presented the bond to the defendant Wikle, and he said that soon after the bond was executed he made an arrangement with Smith by which Smith undertook to pay the debt, and that he, Wikle, was to have nothing more to do with it, and had supposed the money had been paid long ago; that shortly afterwards Smith and Wikle were together in the presence of Deaver, and Smith admitted the statement Wikle had made to be true, but at the same repeated what he had himself before said: that Deaver kept the bond from that time until the suit was brought and mentioned the matter several times to Smith, within ten years before the issuing of the warrant, and Smith always insisted that the bond was satisfied in the manner before mentioned and refused to pay anything on it.

The defendants then gave in evidence that in 1835 Smith asked the plaintiff Henry, "Did you not agree, when I paid you the $30, to deliver me up the bond to be canceled?" and Henry replied in the affirmative; but he said, further, "that when he spoke to Mr. Wilson the latter claimed and took one-half the $30 which had been paid, and told him, Henry, to hold on to the bond for $15 due, as he and you had made a new agreement." Whereupon Smith insisted again that Wilson had given up his half, as he had neglected the business in which he had been employed.

The court was of opinion that the presumption of payment was (350) not rebutted by the evidence given, and so instructed the jury, who gave a verdict for the defendants, and, after judgment, the plaintiffs appealed.

Francis for plaintiffs.
N. W. Woodfin and Avery for defendants.

RUFFIN, C. J. We concur in the opinion delivered to the jury. There was a lapse of twenty-two years from the giving of the bond and of twenty-one from the last recognition of it as obligatory on the defendants, by the payment then made on it, before the beginning of this suit. There were, indeed, several applications to the obligors, or one of them, by the plaintiff's agent for payment, but there is no explanation of the

delay to sue, in the insolvency of the obligors or any acknowledgment of the defendants' request for forbearance, but the defendants' on the other hand, directly refused, from the first, to pay anything more, and that distinctly on the ground that the bond was satisfied upon a new arrangement between the obligees and them. If the facts alleged by Smith were proven, they would constitute a good accord and satisfaction; for, undoubtedly, a lawyer who undertakes to appear for a client and fails to do so is answerable upon his contract to the client, and that will furnish a sufficient consideration for his agreement to cancel or deliver up a security for his fee. But the defendants are not obliged to prove that agreement in aid to the presumption of payment from the lapse of time, more than they would have been if they, when applied to by Deaver, had alleged any particular mode of payment, technically speaking. It certainly does not impair the force of the presumption that the obligors, when asked for payment, should affirm that the debt had been paid, or released, or satisfied in any other mode; but this rather strengthens the presumption, inasmuch as it plainly shows a just reason why the obligees did not sooner demand payment. Here it appears that one
(351) of the obligees admitted that he had agreed, twenty years before suit, to deliver up the bond as satisfied, and the defendants uniformly insisted that the other obligee had been actually satisfied by setting off against his part of the bond his liability for not performing the engagement on his part, for which the sum mentioned in the bond was to be his remuneration. It is, therefore, a strong case of the concurrence of the legal presumption with actual justice; and the time mentioned in our statute, ten years, has more than run twice over.

PER CURIAM. No error.

ANN DONAHO'S ADMINISTRATOR v. JOSHUA WITHERSPOON.

A. had collected a sum of money for B. and, being sued for it by B.'s administrator, pleaded only the general issue. *Held*, that A. could not give in evidence that B. had lived with him and that the expenses of her maintenance amounted to more than the money collected. He should have pleaded this as a set-off.

APPEAL from BURKE Spring Term, 1846; *Pearson, J.*

Assumpsit for money had and received, and the pleas nonassumpsit, statute of limitations, accord and satisfaction and release.

On the trial the plaintiff gave evidence that about six years before the death of his intestate, Ann Donaho, the defendant collected from

one C. Howard the sum of $300, which he owed to her on his promissory note; and that the defendant said at the time that he was collecting the debt for her, who then lived with him and had sundry (352) articles of personal property there. The plaintiff further gave evidence that after he administered, he applied to the defendant for the property in his hands belonging to the intestate, and, after receiving the specific chattels, that he asked the defendant if there was no money or any note for money belonging to her, and he said there was not. Thereupon the present suit was instituted.

On the part of the defendant evidence was then given that for seven years before the intestate died she lived with the family of the defendant on a tract of land belonging to her, the intestate, and that she was so old and infirm as to be unable to attend to her business; and he offered to prove that the maintenance of the intestate during that period exceeded in value the sum of $300 so received by the defendant. The plaintiff then offered to give evidence to show that, admitting the $300 was not sufficient to defray the charges of the intestate, yet the profits or annual value of her plantation, on which the defendant lived, was more than equivalent to that expense. But the court was of the opinion that the action was misconceived, for that the facts made a fit case for a bill in the court of equity for an account of moneys collected, or that the defendant ought to have collected, for the intestate, of the profits of the land, and that in this action, where the defendant showed that the $300 he had received had been expended for board and clothes, the plaintiff could not introduce as a new item the use of the land as an equivalent. In submission to the opinion, the plaintiff was nonsuited, and appealed.

N. W. Woodfin and Alexander for plaintiff.
Gaither and Avery for defendant.

RUFFIN, C. J. The Court considers the decision erroneous. The defendant did not offer evidence of payments to the intestate, nor that she and he had come to an account for her board and maintenance, on the one hand, and of the money collected by him, on the other. (353) His defense was simply that he had a counter-demand against the intestate for seven years board and clothing. That demand is strictly a set-off and admissible in no other form; but that was not pleaded. If the defendant had asked leave to add the plea, doubtless the court would have allowed the plaintiff to add counts for rent or use and occupation, and for other moneys collected, so as to have brought the whole controversy fairly before the jury for adjustment. They were all proper subjects of legal jurisdiction and might have been embraced in this action

on either special counts or the general counts on promises. However, it is needless to speculate on that point, because in the state of the pleadings this defense was not open at all; and, therefore, without adverting to any other matter, the judgment must be

PER CURIAM. Reversed.

JOHN HALL v. JAMES WHITAKER.

Where A., who is an indorser on the note of B. after it becomes due, borrows money from a bank on his own note with surety, and with it discharges B.'s note, which also belonged to the bank: *Held*, that A. before paying up his own note in the bank may maintain an action against B. for money paid to his use.

APPEAL from MACON Spring Term, 1847; *Pearson, J.*

Case brought to recover money paid by the plaintiff to the use of the defendant.

(354) The plaintiff was an indorser of the defendant's note, discounted at the branch of the bank of the State at Morganton for the defendant's accommodation. The defendant failing to pay, judgment was taken by the bank. The plaintiff procured his own note, with a surety, to be discounted at the same bank, and the proceeds entered to his credit, and by his check he applied the proceeds in payment of the judgment. This latter note was not paid by the plaintiff until after the commencement of this action. On behalf of the defendant it was contended that the plaintiff could not maintain this action until he had paid off his own note at bank. The objection was overruled, and a verdict for the plaintiff. The defendant appealed.

Francis for plaintiff.
N. W. Woodfin for defendant.

NASH, J. We concur with his Honor, that this is not like the case where a surety merely procures the creditor to accept his own note in satisfaction of the note of himself and principal. He cannot, in the latter case, maintain the action for money paid to the use of his principal until he has paid his own note, because, until then, he has not in fact paid anything—he is out of pocket nothing. But this is a case widely different. The plaintiff did *actually pay off* the judgment himself and the defendant with his own *money,* and not with his credit, before commencing his action. The discounting of his note by the bank was an entirely distinct matter, and the money resulting from it was

his own, to every purpose, to be applied and used by him as he chose. If he had borrowed the money from any other person, and with it paid the judgment, it could not be questioned but that he might maintain his action against his principal before discharging his own (355) note. If he had conveyed to the plaintiff, in the judgment against him and his principal, *property* of any kind, as a negro, horses, or bank notes, in discharge of judgment, and it had been received as such, he might immediately maintain his action for money paid and advanced, *Brisendine v. Martin,* 23 N. C., 288, because in either of the cases enumerated he would have given that which was money's worth—he would have been so much out of pocket. It will be perceived that in the case cited bank notes are enumerated as being a sufficient payment to sustain the action. In this case bank notes were in fact paid by the plaintiff; and whether he drew out of the bank the proceeds of his note in bank notes, and then paid them into the bank again, or whether, after checking for them, they were by his direction transferred to his credit in discharge of the judgment, can manifestly make no kind of difference. The bank notes were his, to appropriate as he pleased, and, by the appropriation made, he was out of pocket to their amount.

PER CURIAM. No error.

Cited: Brooks v. King, 46 N. C., 48; *Tiddy v. Harris,* 101 N. C., 593.

(356)

THE STATE TO THE USE OF JAMES B. BISHOP v. HENDERSON POTEET ET AL.

1. The interest which excludes a witness produced in a suit must be a legal and beneficial interest in the subject-matter for the recovery of which the suit is brought.
2. It is not sufficient that a witness believes himself interested if in fact he is not; nor is it sufficient if he conceives himself bound in morality and honor to make good any loss sustained by the person in whose favor his evidence is to be given, in consequence of a judgment against him.
3. The leaning of the courts in modern times is to let the objection on the ground of interest go to the credit rather than to the competency of the witness.

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

The defendant, as an officer, received from the plaintiff through one H. Barnard, certain promissory notes for collection. The action is on his official bond, and the breaches assigned were for collecting and not paying over, and for negligence in not collecting. To sustain the plain-

tiff's claim, H. Barnard was tendered as a witness, and the sole question presented was as to his competence. On his examination he stated that when he took the notes to hand to the defendant there was no contract between him and the plaintiff that he should receive anything by way of compensation for his trouble; that he should not ask any compensation, nor was the plaintiff bound to pay any; that if he received any it would be a mere gratuity on the part of the plaintiff. He was then asked by the defendant's counsel, if a recovery was effected in the case, would he not expect some remuneration from the plaintiff for his trouble. He answered, "yes he did; he thought it was likely the plaintiff would give him something, but not because he was under any obligation to do so, for what he had done was a mere act of friendship for the plaintiff." In another part of his examination he
(357) stated that he had before done the same thing for the plaintiff, who had given him some money for his services. The objection was overruled by the court, and there being a verdict and judgment for the plaintiff, the defendants appealed.

Francis and J. W. Woodfin for plaintiff.
Edney for defendants.

NASH, J. We think the judge below was correct in overruling the objection. The witness had no such interest as would disqualify him from giving evidence for the plaintiff. It is the object of course of justice to ascertain the truth in every case brought before them; and to this end such rules have been adopted with respect to evidence as are considered best calculated to its attainment; some of them extremely arbitrary, and justifiable only as being a portion of a general system. Among these rules is that which excludes a witness, without any regard to his moral standing, because of interest. It is not, however, every interest that does exclude a witness. A son has a deep interest in securing or in adding to the property of his father; yet he is a competent witness for him in a suit affecting even his entire property. The law says this interest is too remote. But the instant the father dies, the son is incompetent, because he then is interested directly in increasing or preserving a fund, to a distributive share of which, as next of kin, he is entitled. *Cox v. Wilson,* 24 N. C., 234. The interest, then, which does exclude must be a legal and beneficial one in the subject-matter for the recovery of which the suit is brought, or when he is called to protect or increase a fund which a recovery in the suit will increase or diminish. The witness Barnard stands in no such position here. He expressly states that between him and the plaintiff no contract existed as to compensation of any kind; that his services were those of a friend,

and, in law, according to his testimony, amounted to a volun- (358) tary courtesy, for which no action could be maintained. It is said, however, by the defendant's counsel, in argument, that the witness stated he thought it likely the plaintiff would give him something for his services, and gave his reason for so thinking. He had performed similar services for the plaintiff, and he had given him money for it; but he went on to state that if the plaintiff did give him anything, "it would not be because he was under an obligation to do so." A more full, direct, and positive negation of *all* legal interest in the cause could not be given by a witness. It was at one time thought, and there are *dicta* to that effect, that when a witness believed himself interested, though in fact he was not, he was rendered incompetent. The contrary doctrine is now fully established. *Bank v. Hughes*, 17 Wend., 102; 8 Johns, 428. So, also, if a witness conceive himself bound in morality or honor to make good any loss sustained by the person in whose favor his evidence is to be given, in consequence of a judgment against him, he is still a competent witness. *Gilpin v. Vincent*, 9 Johns, 220; *Moore v. Hitchcock*, 4 Wend., 297; 2 Smith Leading cases, 99. These authorities show that the interest which excludes a witness must be a direct legal interest; otherwise, the objection is to the credit and not to the competency of the witness. The leaning of the courts in modern times (I use the expression in reference to the old cases) is to let the objection go to the credit rather than to the competency, where a doubt may arise. *Walton v. Shelly*, 1 Term, 300; *King v. Bray*, Rep., in time of *Lord Hardwicke; Bent v. Baker*, 3 Term, 27. Here, there is no doubt the witness had no legal interest whatever. It will be observed that this opinion is confined to the question of the interest that disqualifies a witness, and not to the different modes by which it may be tested; as whether the verdict can be given in evidence for or against him, or his liability to costs.

We concur with his Honor who tried the cause, that the witness (359) had no such interest as excluded him, but that the objection went to his credit.

PER CURIAM. No error.

THE STATE ON THE RELATION OF JOHN N. MURRAY v. WILIE JONES.

Where a sheriff's bond had been taken in 1838, only three justices of the county court being present, and the bond was only for $4,000 instead of $10,000 as required by law: *Held*, that these defects were cured by the act of 1844-5, which had a retrospective as well as a prospective operation.

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

This was a suit on the bond of the defendant, executed in October, 1838, as sheriff of Buncombe. It appeared from the record of the county court that when it was taken there were but three justices of the peace on the bench, and the bond appears to be in the penal sum of $4,000, instead of $10,000, as required by law. The defendant's counsel moved that the plaintiff be nonsuited, on the ground that there were but three justices, who received the bond, and because it did not contain the penalty required by statute. The question was reserved, and the relator, on the breaches assigned, had a verdict. The court, on consideration refused to nonsuit, on the ground that the defects were cured by the act of 1844-5, and on the ground that, if
(360) not cured, the bond was a good bond at common law. Judgment for the plaintiff, and appeal by the defendant.

N. W. Woodfin for plaintiff.
Francis for defendant.

NASH, J. This suit was commenced in 1842, and, according to the decisions of this Court theretofore made, the plaintiff could not have maintained his action. In carrying out the will of the Legislature, as expressed in their acts passed at various times, a series of decisions had been made by the courts, the effects of which were to deprive those who put business into the hands of public officers, or of those who assumed to act as such, of a large portion of the protection they ought to receive. From year to year, as these evils were brought to their notice, remedies were applied by the Legislature, until, at the Session of 1844-5, an act passed which, it was hoped, had remedied and provided for every mischief and defect which had previously been found to exist. That act provides "that all persons who shall be admitted by the county court and sworn into the office of sheriff, coroner, or constable, shall be held and deemed to be rightfully in office until ousted by due course of law; and that all bonds which have been, or may hereafter be, taken by any court of pleas and quarter sessions, upon admission of any person into either of the said offices, shall be held and deemed to be valid and effectual to all intents and purposes, notwithstanding any defect, insufficiency, or irregularity in the election, appointment, or admission of such person, or in any of the proceedings of the court in relation thereto." In *Jordan v. Pool,* 27 N. C., 105, the action had been commenced prior to 1843, and it was a point of
(361) the defense that the act of 1844 could not apply to it, so as to alter or change the principles upon which it was to be determined. There, as here, the records of the county court did not show

that a majority of the justices were present when the bond on which the action was brought was accepted. But the Court was of opinion that although this was a fatal objection at the time the action was instituted and the pleas were entered, yet that it was perfectly competent to the Legislature to ratify the delivery, previously made to a third person, of the bond, as it was payable to the State; and that it had done so by the act of 1844-5. In other words, that the latter act embraced as well bonds made before its passage as those made afterwards. This decision disposes of the first objection made by the defendant.

Another objection has been taken, which is equally untenable. The act regulating the election of sheriff requires him, before he enters on the discharge of his official duties, "to enter into bond with two or more good and sufficient sureties in the penalty of $10,000," etc. Rev. Stat., ch. 119, sec. 13. In the present case the penalty of the bond is $4,000. Before the act of 1844-5, this would have been a fatal objection to it as an official bond. The error, however, is cured by the second clause in the act referred to. The language is, "and that bonds which have been or may be taken, etc., upon admission of any person into either of the offices shall be held and deemed valid and effectual to all intents and purposes, notwithstanding any defect, insufficiency, or irregularity, etc., or in any other proceedings of the court in relation thereto." This bond was taken by the court on the admission of the defendant Jones into the office of sheriff.

These are the only objections which were taken to the plaintiff's recovery in the court below, and the only ones which have been or could be considered here.

We perceive no error in the opinion of the judge who tried (362) the cause, and the judgment must be

PER CURIAM. Affirmed.

Cited: Comrs. v. Magnin, 86 N. C., 289.

DOE ON DEM. OF DAVID PARKS v. JAMES MASON.

Where a return of a levy on land by a constable conforms, in its description, to the directions of the act of Assembly, Rev. St., ch. 62, sec. 16, setting forth, among other things, that the land lies on a creek, naming it, and it appears that there are several creeks in the county of that name, it is competent for a party to an ejectment suit, brought to recover the land sold under that levy, to show which creek was intended when the levy was made.

APPEAL from MECKLENBURG Special Term in November, 1846; *Pearson, J.*

The plaintiff claimed the premises, described in the declaration, under a sheriff's sale on an execution against the present defendant. The land was levied on by a constable, upon a *fieri facias* issued on a justice's judgment, and he returned the levy in the following words: "For want of goods and chattels, levied this execution on the defendant's land—two tracts—one adjoining the lands of William Lackey and others, and one adjoining the lands of Robert Watson's estate and others, and lying on the waters of Sugar Creek." On the return of the levy to the county court there was an order made for execution to issue, and a *venditioni exponas* did issue, and under it the lessor (363) of the plaintiff became the purchaser of the last mentioned tract, namely, that on Sugar Creek.

The sole question made by the defendant on the trial was whether the land was sufficiently described in the constable's return. It appeared upon the evidence that Sugar Creek and its branches watered a large portion of the county of Mecklenburg, in which the land is situate, that one of the streams was called "Big Sugar Creek," another "Town Sugar Creek," and another "Little Sugar Creek"; and that they came together in the edge of South Carolina. The plaintiff, then, in order to identify the land, gave evidence that the late Robert Watson owned a tract of land in the county of Mecklenburg, on the "Town Sugar Creek," and did not own any other land in the county, and that the premises now sued for adjoined that tract of Watson's, and was on that branch of Sugar Creek known as "Town Sugar Creek," and also that it lay on the main road from Salisbury to Charlotte.

Upon that evidence, the court held that there was not sufficient certainty in the description of the land in the levy, and nonsuited the plaintiff, who thereupon appealed.

J. H. Wilson for plaintiff.
Alexander for defendant.

RUFFIN, C. J. The levy is returned strictly in compliance with the act of Assembly which directs that the constable shall set forth what lands he levied on, where situate, on what water-course, and whose land it adjoins. Rev. Stat., ch. 62, sec. 16. That was done literally in this case; and, looking to the return alone, there is no ambiguity in the description, nor any room to doubt that by it the land could be identified so that the sheriff could tell what land he was to sell and bidders also understand what they were buying, which are the objects of the statute in requiring the particularity of description prescribed.

This return must be sustained, for it follows the very words of (364) the act. The land is situate in Mecklenburg County, lies on Sugar Creek, and adjoins the land that belonged to Robert Watson, lately deceased. It is true, as was observed in *Smith v. Low,* 24 N. C., 458, a levy, though returned in the precise words of the act, may require extrinsic evidence to identify the land, as, indeed, may be the case with the most accurate description in a deed. Here, for example, an ambiguity not appearing on the return was raised by evidence *dehors* that there were three Sugar creeks in Mecklenburg. But that cannot absolutely avoid the levy and return, which conform to the statute. It only made it necessary that evidence should be given which would connect the return with one of those creeks, and make it appear on which of them the land, according to the description in the return, must lie. This was completely done by proving that the Watson land, which is called for in the return, lies on a particular branch of the creek, and that Watson had no other land, and that this tract in fact adjoined that one of Watson's How better evidence could be given to show on which of the streams the land lies, or to identify the parcels levied on and sold, it is difficult to conceive.

PER CURIAM. Reversed.

Cited: Hillard v. Phillips, 81 N. C., 105.

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(365)

JOHN WELCH v. WILLIAM W. PIERCY ET AL.

1. The county court has full power to *order* the laying out of public roads, but none to *lay them out.* The last power is given to a jury.
2. The court has the power to decide whether the public convenience requires the laying out of a road, and to order a jury for the purpose of laying it out; but it has no power, except as to the *termini*, to direct the jury or any one else *how* it shall run, that being the exclusive province of the jury, their verdict being, of course, subject to the judgment of the court whether it shall be received or not.
3. An order of the court directing how a road shall be run and opened does not justify an overseer who acts under it, and he is liable to an action by the party grieved.
4. Every man is presumed, in law, to intend any consequence which naturally flows from an unlawful act, and is answerable to private individuals for any injury so sustained.
5. Therefore the defendant was liable, in action of trespass *quare clausum fregit*, for the loss of hogs, etc., occasioned by the unlawful breaking down of the plaintiff's fence.

APPEAL from CHEROKEE Spring Term in January, 1846; *Pearson J.*

Trespass *quare clausum fregit,* brought to recover damages for throwing down the fences of the plaintiff, whereby he lost several hogs and other property. The defendant pleaded in justification that he was appointed by the county court of Cherokee County to open a public road at the place where the fences were thrown down. He produced in evidence the record of the county court, whereby it appeared that at June Term, 1840, a petition was field wherein it is stated "that it will be of great convenience to the neighborhood that a public road be established, leaving the State Road at or near Joel Vannoy's Valley River, passing by Andrew Calvert's, W. W. Piercy's and to intersect the State Road at or near James King's." At June Term, 1840, (366) an order was made by the court directing the sheriff "to summon a jury to view, mark, and lay off a road from Thomas G. Forney's line, passing Andrew Calvert's and William W. Piercy's, and intersect the State Road at James King's." The jury was duly summoned, and their return is as follows: "The jury met according to the order, and agree that the road be made." They then recommended that the defendant Piercy be appointed the overseer, with the hands within certain designated boundaries. The order of the court appointing Piercy overseer is as follows: "Ordered by the court, that William W. Piercy be overseer of the road leading from James King's down the south side of Valley River, crossing the said river at Joel Vannoy's to the Hanks branch, and that he command all the hands on the south side of the said river, a due south course from these points," etc. It then directs the overseer "to work out the same," etc. Acting under this order, the defendant, in opening the road committed the trespass complained of. It was admitted by the defendant's counsel that he had failed in proving that the road had been laid off by the jury along the place where the alleged trespass was committed; and he moved the court to instruct the jury that as the road had not been laid off and marked by the jury at any place, the defendant was justified, under his order, in opening out the road along the nearest and best route between the points mentioned in his order. This instruction was refused, and under the charge of the jury a verdict was rendered for the plaintiff in their damages the injury sustained by the loss of the hogs and other articles. From the judgment on this verdict the defendant appealed.

Francis and Edney for plaintiff.
Gaither for defendant.

NASH, J. The defendant asks for a new trial because of the refusal of the judge to instruct the jury as required, and because he charged

them that they might give damages for the loss of the hogs and other property if they thought it resulted from the pulling down of the fences. We entirely agree with his Honor on both points; and very much for the reasons assigned by him. The county court of each county is vested with "full power and authority to *order* the laying out of public roads," but none whatever *to lay them out.* That authority is given to another tribunal, that is, a jury. By section 2 of the act of 1784, Rev. Stat., ch. 104, sec. 4, it is ordained that "all roads shall be laid out by a jury of freeholders to the greatest advantage of the inhabitants and as little as may be to the injury of inclosures." And to secure a faithful discharge of their duty, the jury may make their return on oath. The court, then, have the power to decide whether the public convenience requires the laying out of the road, and to order a jury to be summoned to lay it out; but they have no power, except as to the *termini,* to direct the jury or any one else *how* it shall run, that being the exclusive right of the jury; their verdict being, of course, subject to the judgment of the court whether it shall be received or not. It has been urged before us that, as the defendant was acting under an order of the court of competent jurisdiction, he could not be a trespasser, as the order was not void, but only voidable. If this were the fact, the argument would be sound; but the order is not voidable alone, it is absolutely void, both for uncertainty and want of power in the court to make it. It is obvious, from an inspection of the record, that (368) the jury did not lay off the road. They neither marked nor staked it, nor designated in the report the course it should run; and until they had so done the court had no power to order it to be opened, for there is no road to be opened. All that the overseer can do is to carry into execution the determination of the jury. If the court direct him to vary from the location made by them or to open a road without their previous action, fixing where it shall run, their order is null and void and does not protect him. To hold that an order such as was made in this case would protect the overseer is at once to place at the irresponsible discretion of the county court and of the overseer the inclosed premises of every individual. The court would not be answerable, because, if valid, it would be a judicial act, and the officer would be irresponsible, because acting under a warrant from a competent tribunal. But the question has been already partially decided in *S. v. Marble,* 26 N. C., 321, and in *Baker v. Wilson,* 25 N. C., 170. In the latter, the plaintiff was appointed an overseer of a road that had no existence in law or in fact, and the action was brought to recover from the defendant one of the hands assigned to the plaintiff, the penalty for not working on it. On behalf of the plaintiff it was contended that the order was a judicial determination that there was such a road. The court decided

that it was not; that so to hold would be to repeal the act of the Legislature on the subject. In this case the road ordered by the court to be opened by the overseer had no existence in law or in fact. If, instead of suing the defendant for a trespass, the plaintiff had put up his fences again, could an indictment have been maintained against him for obstructing a public road? Surely not, for the plaintiff was the owner of the land. If it could, the singular spectacle would have been exhibited of two antagonistic rights existing in different persons at the same time—the right of the overseer to throw down the fences and the (369) right of the owner to put them up. This cannot be so. If the order justified the overseer, then he had in law a right to do what he did, and it would have been criminal in the plaintiff to have opposed him, or permitted him, or to have obstructed the road after it was opened. But, again, if the county court had the power to make the order, it was the duty of the overseer to obey it, and, if he did not, he would be punishable by indictment. But *Baker v. Wilson,* decides that he could not be punished. The instruction prayed for could not have been given without a manifest and palpable violation of the act of Assembly. It is admitted that if the jury had laid out a road, the defendant had departed from it in pulling down the fences, and his justification is claimed under the order, on the plea that he had chosen the best and most convenient ground on which to run it between the points designated by the court. This defense substitutes the overseer for the jury, and transfers from the latter to the former a discretion which the law nowhere authorizes. It violates one of the most important provisions of the road law, the protection which it throws around the property of every citizen. It never was the will of the Legislature that any man's property should be taken for the use of the public without compensation; and the law we are considering so said, and appointed a tribunal to assess the damage each individual may sustain by running the road on his land—not the court nor the overseer, but a jury of his county. This case remarkably exemplifies the danger of departing from the provisions of the act. Two individuals on whose land the jury intended the road should run are allowed trifling compensation, for the injury was small, while the present plaintiff, through whose valuable lowgrounds and inclosures the overseer has chosen to run it for a quarter of a mile, is allowed nothing. Upon the return of the (370) jury, it was the duty of the county court to have set aside their verdict, because they had not performed the duty assigned them, and to have ordered another jury to go upon the ground. They had no right nor power to substitute themselves or the defendant in the place of a jury.

We entirely concur with his Honor, that the county court had no

power to make the order they did, nor had they the power to authorize any man to cut out a road at his discretion, and that the defendant was not justified by it in pulling down the fences of the plaintiff.

We agree with the court below on the question of damages. Every man, in law, is presumed to intend any consequence which naturally flows from a unlawful act, and is answerable to private individuals for any injury so sustained. The authorities cited at the bar, so far as we had it in our power to examine them, sustained the proposition. The question was very correctly left to the jury to say whether the loss of the hogs and other property was the consequence of the pulling down of the fences, and they said that it was.

PER CURIAM. No error.

Cited: *Shoffner v. Fogleman,* 44 N. C., 282; *Burnett v. Thompson,* 51 N. C., 215; *Burden v. Harman,* 52 N. C., 355; *S. v. Smith,* 100 N. C., 554; *Johnson v. R. R.,* 140 N. C., 576; *Cordell v. Tel. Co.,* 149 N. C., 413.

MICHAEL JONES v. WILLIAM B. MORRIS, EXECUTOR, ETC.

Where the defendant, in consideration of a debt he owed, agreed to let the plaintiff have a bed and furniture of the value of $28, but no particular bed and furniture were conveyed or delivered, and afterwards the defendant refused to deliver any bed and furniture: *Held,* that the action of trover would not lie for the plaintiff.

APPEAL from McDOWELL Spring Term, 1847; *Dick J.*

Trover for a bed and furniture, tried on not guilty. The (371) case was that Morris was found to be indebted to Jones, on a settlement, in the sum of $60, and they agreed that the former should give the latter his note for $32 (which he did) and also should give him a bed and furniture at the price of $28, being the residue of the debt, when Jones should apply for it at the house of Morris. Shortly afterwards Jones went there for the purpose of getting the bed and furniture, and met Morris at the gate going from the house, who requested plaintiff to go to the house, saying he would be back soon. The plaintiff went in, but was ordered out by Mrs. Morris, and went away without seeing Morris, and then brought this suit. The court expressed the opinion that the plaintiff could not recover, because he made no demand on Morris for the bed and furniture, and also because he failed to prove a conversion, and in submission thereto the plaintiff suffered a nonsuit and appealed.

Guion for plaintiff.
Edney for defendant.

RUFFIN, C. J. A demand was really immaterial, for if it had been made and refused it would not have entitled the plaintiff to recover in this form. His case fails because he has not shown a property in any bed and furniture which could be converted to his prejudice. The agreement between the parties was merely executory, obliging Morris to convey and deliver to the plaintiff some bed and furniture of the value of $28, and not amounting to a conveyance or delivery of any bed and furniture in particular, so as to vest the title in the plaintiff. The action was, therefore, misconceived, and cannot be sustained.

PER CURIAM. Affirmed.

Cited: Hill v. Robison, 48 N. C., 504; *Blakeley v. Patrick,* 67 N. C., 42; *Sharpe v. Pearce,* 74 N. C., 602; *Shearin v. Riggsbee,* 97 N. C., 220.

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(372)

WILLIAM GUDGER v. JOHN R. FLETCHER.

1. The plaintiff sold to the defendant some cattle for $50. He received from the defendant a promissory note for $30 payable 1 January, ensuing, and a bank-note for $20, which was to be returned if not found to be good, and the defendant was to have credit until 1 January. The bank-note was returned, as also the due-bill, which was destroyed by the defendant, who then offered to pay $10 and give his note with surety for $40, payable 1st of the next January. The plaintiff refused to accept them. *Held,* that the plaintiff could not sue the defendant in a *quantum valebat* until after 1 January.
2. A due-bill, though written with a pencil and not in ink, if legible, is good.

APPEAL from HENDERSON Special Term in June, 1846; *Bailey, J.*

Assumpsit on *quantum valebat* for cattle sold and delivered to the defendant. Plea, the general issue. The plaintiff introduced a witness who testified that the defendant stated to him that he had bought the plaintiff's cattle for the sum of $50, and that in payment therefor he gave his due-bill for $30, on which the plaintiff agreed to wait until 1 January following, and the balance he paid in a bank note which the plaintiff at first hesitated to accept, upon which he told him that if it were not good, or did not answer his purpose, he would take it back and give him another; that some time afterwards he met the plaintiff, who told him the bank note was worthless, and handed it back, and

also handed back the due-bill, which had been written with a pencil, and which on that account the plaintiff alleged was not good; that the defendant then offered to give the plaintiff $10 and secure the balance of the debt, which was disagreed to by the plaintiff, and nothing further was done. Another witness for the plaintiff testified that he was present when the plaintiff returned the bank note, and he gave substantially the same account of what then happened between the parties as had been stated by the defendant to the first witness, adding only that when the due-bill was handed back the defendant (373) tore it up.

The defendant then introduced a witness who testified that the sale of the cattle was made upon the following conditions: first, that the defendant was to give his due-bill, payable to the plaintiff 1 January thereafter, with the witness as surety, which he did, and the same was accepted by the plaintiff; secondly, that the defendant was to pay $20, which he then had, and if it did not answer the purposes of the plaintiff, he was to return it to defendant and wait till 1 January for the said sum.

The court instructed the jury that, according to the original terms of the contract, if they had been complied with by the defendant, the plaintiff could not have recovered in this case, because he had commenced his action before 1 January, upon a *quantum valebat*; but that if the jury believed the account given by the witness of what took place between the parties upon the offer of the plaintiff to return the bank note, the special contract was done away with, and the plaintiff then had the right to sue immediately and declare upon a *quantum valebat*. The plaintiff had a verdict and judgment, and the defendant appealed.

N. W. Woodfin and Edney for plaintiff.
Baxter for defendant.

DANIEL, J. The court told the jury that what took place between the parties upon the offer of the plaintiff to return the bank note caused the special contract to be done away with, and the plaintiff had the right to sue immediately on the count for a *quantum valebat*. It does not seem to us that the plaintiff had a right to sue before 1 January following. The due-bill for $30, although written in (374) pencil, if legible, was good. The law does not require a note or bond to be written in ink; it is done generally, as the most convenient mode and the most likely to perpetuate the contract. Story on Bills, pp. 33, 34, 53. The bank bill was to be taken back if the plaintiff did not like it, and the defendant was then to have time until 1 January

following, to pay that sum also. The defendant, however, on the return of the bank bill, and the surrender to him of his note for $30, offered to give his note with surety for $40, payable 1 January following, and $10 in cash. This offer was rejected by the plaintiff. It seems to us that the defendant tendered performance of the contract on his part, and that the plaintiff, because he refused to accept the defendant's note with surety for $40, and $10 in cash, had not a right immediately to sue on a *quantum valebat*. The defendant was entitled to time to pay the $50, until 1 January following, to wit, 1845.

PER CURIAM. New trial.

(375)

THE STATE TO THE USE OF WILLIAM M. DULA v. WILLIAM LAWS ET AL.

Where, in a suit pending in the county court, an award by referees under a rule of court is made in favor of the plaintiff, and the court sets aside the award and orders a trial, upon which there is a verdict for the defendant, the plaintiff cannot, by then appealing, bring the questions on the award before the Superior Court. He should, as he had a right to do, have appealed from the decision of the county court upon the award.

APPEAL from WILKES Spring Term, 1847; *Settle, J.*

The writ in this case was returned to August Term, 1839, of Wilkes County Court. At February Term, 1844, the case was referred by a rule of court to L. Q. Sharp, and his award was returned to April Term, 1844. On the motion of the defendant the award was set aside at the same term, and the cause was ordered to stand for trial. At May Term, 1846, the issues were tried on the pleas of the general issue, convenants performed, no breach, and a verdict was rendered for the defendant. An appeal was taken to the Superior Court, and, on motion of the plaintiff's counsel, judgment was by the court rendered according to the award in the county court. From this judgment the defendant appealed.

Iredell for plaintiff.
No counsel for defendant.

NASH, J. In the opinion of his Honor, there is error. The judgment of the county court upon the award was final, in form at least, upon that point, and it materially affected the subject-matter in dispute. The defendant, against whose interest the judgment operated, had
(376) a right to appeal to the Superior Court, that a review of the error of the county court might be had, if there was any. He

failed to do so, and the cause went on to be tried by the jury; and, upon a verdict and judgment against him, he appealed to the Superior Court. We are of opinion that the appeal did not take up the judgment of the county court upon the award. The objections to *that judgment* were waived by the plaintiff because he did not bring them forward in proper time, as he might have done by an appeal. Upon the appeal as taken, the award was not before the appelate court, and the cause ought to have proceeded as it did in the county court. *Harvey v. Smith,* 18 N. C., 189, recognizes the true and establishes an exception to it. That was a case of a petition for the reprobate of a will. In the county court the prayer for reprobate was granted, and issues were made up to try the validity of the will. These were submitted to a jury, who returned a verdict, and an appeal was taken to the Superior Court, where, upon motion, the proceedings were dismissed by the presiding judge for error in the judgment for reprobate of the will. The Supreme Court, after recognizing the rule herein stated, proceeds: "But, *nevertheless,* we are of opinion that where, upon a petition for a reprobate, and the same has been ordered and an appeal taken by either party from the ultimate sentence upon such a reprobate, *that* appeal places the entire cause in the revising court." And the reason given is that the petition must be considered as containing the allegations of those propounding the paper, and the ultimate judgment must be founded on those allegations, as admitted or proved. *"If they* will not authorize a sentence for the party propounding, the court is obliged to refuse to him such a sentence." The decision in that case rests upon the peculiar nature of the proceedings, which distinguish it from the present. But if the award had been before the court, the judgment affirming it was erroneous. Upon its face it was not final. (377)

PER CURIAM. Reversed, and order of *procedendo.*

Cited: Anders v. Anders, 49 N. C., 245.

THE STATE TO THE USE OF N. S. JARRATT v. THOMAS MCGEE ET AL.

1. The receipt of a deputy sheriff for a claim put in his hands for collection is evidence against the sheriff in an action for failing to collect the claim.
2. And as such a receipt binds the sheriff, it is, under the act of 1844, competent evidence against his sureties as well as himself.

APPEAL from CHEROKEE Spring Term, 1847; *Dick, J.*

Debt on the sheriff's bond, against him and his sureties, and was tried

on the plea of conditions performed. The breach assigned was the failure to collect a justice's judgment, which the relator placed in the hands of one of the sheriff's deputies for collection. In support of his case the relator offered in evidence the receipt of the deputy to the relator for the judgment, "to collect or return," and the counsel for the sureties objected that it was not competent evidence against them; but the court admitted it and there was a verdict for the plaintiff. From the judgment the defendants appealed.

(378) *Gaither for plaintiff.*
J. W. Woodfin for defendants.

RUFFIN, C. J. There is no doubt upon this question of evidence. The act of 1836, Rev. Stat., ch. 109, sec. 23, makes the sheriff and his sureties liable for claims placed in the hands of a deputy. The receipt of the deputy for the claim is evidence against the sheriff when given in the discharge of official duties; and this is a receipt of that kind. *S. v. Allen,* 27 N. C., 36. Indeed, the receipt of the deputy being the act of an agent, is in law the receipt of the sheriff himself, and binds him accordingly—as if the deputy receive the money on an execution and give an acquittance therefor, or return satisfaction on the execution in the sheriff's name. It is true that in *S. v. Fullenwider,* 26 N. C., 364, it was held that a constable's receipt for a claim to collect was not evidence against the sureties. But probably on account of that case that has been altered by the act of 1844, which makes the receipt or acknowledge of the sheriff, or any other officer, or any other matter or thing which is admissible against him, competent also against his sureties. The act is remedial, and this is the receipt of the sheriff, within the meaning of the act; and, at all events, it is an instrument which is competent evidence against the sheriff, and it is, therefore, admissible against all the defendants.

PER CURIAM. No error.

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(379)

THE STATE TO THE USE OF MARY B. KESLER v. RICHARD W. LONG ET AL.

A sheriff and his sureties in his official bond are not bound for the collection of any claim put in his hands for collection, unless, as in the case of constables, the claim be within the jurisdiction of a justice of the peace.

APPEAL from ROWAN Spring Term, 1847; *Settle, J.*

The case was as follows: Long, one of the defendants, while sheriff of Rowan County, gave his receipt to the relator for a note against

one Cowen for $250, "to bring suit on." This action is against Long and his sureties in his official bond, and the breach assigned is the receipt of the money by Long and his failure to pay it over to the relator. Pleas, *non est factum,* conditions performed, and no breach. The plaintiff proved that the defendant Long had received the money. The court being of opinion upon the question reserved that the plaintiff could not recover in this action, a nonsuit was entered, and the plaintiff appealed.

No counsel for plaintiff.
Boyden and Iredell for defendants.

DANIEL, J. A sheriff who receives claims for collection shall diligently endeavor to collect and pay them over in *like manner* as constables are now bound; and in default of such duty he and his sureties are liable for damages by suit on his official bond. Rev. Stat., ch. 109, sec. 23. This act was originally enacted in 1836. The sheriff, as well as a constable, could and often did, before the passage of this act, serve warrants and return them before magistrates, and execute any judicial process issuing from a magistrate's court, if it was directed to him as sheriff. It was, in many parts of the State, very common for the holders of claims to put them in the hands of the sheriff or his (380) deputy for collection; and we suppose that the Legislature passed the above act to place the sheriff and his sureties upon the same footing on which a constable and his sureties were then placed as to claims put in his hands. If claims were of an amount above the jurisdiction of a magistrate, they usually were placed in the hands of an attorney, to be sued on in a court of record; if less, they usually were placed in the hands of a constable, who then became agent for the plaintiff in having the warrant issued and the judgment and execution obtained; and then he officially acted as constable in enforcing the execution and collecting the money. The sheriff, by the act, is bound to collect and pay over claims "in like manner as constables are now bound." How are they bound? The law requires a constable to collect, or diligently endeavor to collect, all claims put in his hands for collection, and pay over all sums thereon received, either with or without suit. If the claim could not be collected with suit, the constable was to sue upon it. Where? The answer seems plain that he is to sue in the magistrate's court whose ministerial officer the constable is. The claims mentioned in the act, then, must be such as are within the jurisdiction of a justice of the peace, or are brought within his jurisdiction by judgments obtained before him. This being the proper construction of the aforesaid statutes, as it seems to us, we think that the claim of $250 placed by

the relator in the hands of Long was not a claim, within the meaning of the act, to subject and his sureties. The claim was one that should have been sued on in a court of record, and should more properly have been placed in the hands of an attorney at law or an attorney in fact for collection. We think that the judgment must be

PER CURIAM. Affirmed.

Cited: Ellis v. Long, 30 N. C., 515; *Ramsour v. Thomas*, 32 N. C., 168.

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(381)

THE STATE TO THE USE OF JAVAN TRAMMELL v. ROBERT THOMAS ET AL.

Where a judge told the jury in his charge that they must find for one of the parties, unless they believed his witness had committed perjury, the charge was erroneous, because the credit of the witness was a matter for the jury, not for the court, and the witness might have been mistaken, and not guilty of perjury.

APPEAL from HENDERSON Special Term in June, 1846; *Battle, J.*

Debt upon the bond of the defendant Thomas, as sheriff of Henderson County, in which the breaches assigned were that one Clayton had, as the deputy of Thomas, failed to collect a claim against one Hunter, which he had in his hands and might by due diligence have collected, and for failing to make a due return of a *ca. sa.* which he had taken against the said Hunter. Pleas, conditions performed and not broken. Upon the trial the plaintiff had made a *prima facie* case. The defendants, after a release by Thomas to his deputy, introduced him as a witness. He testified distinctly and positively, and repeated it upon his cross-examination, that when the plaintiff placed the claim against Hunter in his hands for collection, which was in 1842, he told him he looked upon it as a doubtful claim, and he wished him to do what he could to collect, or at least to secure it; that thereupon he, the witness after being unable to find any property of Hunter upon which he could levy a *fi. fa.*, at the instance of the plaintiff sued out a *ca. sa.* and under it arrested the defendant therein, Hunter, who gave bond with security to appear at the succeeding term of the county court and take the benefit of the act for the relief of insolvent debtors; that he,

(382) the witness, had the papers at that term and would have returned them had not the plaintiff requested him to keep them until he could endeavor to arrange the debt with Hunter, and that on the second or third day of the term the plaintiff applied to him and took the *ca. sa.* and other papers from his hands, and had never returned them to him. He stated that this took place in the presence of several

persons, and that the defendant in the execution, Hunter, was, as he believed, present. Hunter was then asked if he was present and saw the papers returned to the plaintiff, and he stated that he had no recollection of the transaction, and, moreover, that he had remained at court all the week, awaiting the return of the *ca. sa.* into court.

The court instructed the jury that the plaintiff was entitled to recover unless they believed the witness Clayton, but that the testimony of that witness, if believed, formed a complete defense to the action; that the statement of Clayton was such as precluded the idea of a mistake; and if it were false, it must be within his own knowledge; and that the jury must believe he had committted perjury before they could find a verdict for the plaintiff; and the charge was closed with directions to the jury about the duty of reconciling testimony, etc.

The jury returned a verdict for the defendants, and the plaintiff's counsel moved for a new trial upon the sole ground that the court had instructed the jury that they must believe that Clayton had committed perjury before they could find a verdict for the plaintiff. That motion was overruled, and, judgment being rendered for the defendants, the plaintiff appealed.

Baxter and Francis for plaintiff.
N. W. Woodfin and J. W. Woodfin for defendants.

DANIEL, J. The plaintiff moved for a new trial because the judge charged the jury that the witness Clayton could not be mistaken in his testimony, and that they must believe he had committed perjury before they could find a verdict for the plaintiff. We think that (383) the charges were erroneous. The credit which is to be given to the testimony of a witness is not a matter of law for the court to decide upon, but a matter of fact to be ascertained by a jury without the assistance of the court. That Clayton might have been mistaken in what he stated was in the range of possibility; whereas, to make him guilty of perjury, he must have sworn to material facts in the cause which he knew at the time to be false. The judge did not permit the jury to inquire whether Clayton was innocently mistaken in his testimony; but he took it upon himself to pronounce that the jury must believe him unless they were of opinion that he was perjured, that is, that he had sworn falsely knowingly, willfully, and corruptly. We think that his Honor went a little farther in his charge than the law authorized.

PER CURIAM. New trial.

Cited: S. v. Presley, 35 N. C., 494; *Critcher v. Hodges,* 68 N. C., 23; *Withers v. Lane,* 144 N. C., 190; *Speed v. Perry,* 167 N. C., 127.

(384)

H. B. WILLIAMS v. ALEXANDER SPRINGS ET AL.

1. In an action of debt on a covenant, proof of the handwriting of the obligee, together with possession by the obligee, is evidence from which the jury may presume a delivery, in the absence of proof to the contrary.
2. The circumstance of there being three seals affixed, without any names before them, is not sufficient to rebut the presumption of delivery or to show that those who did sign did not intend that the covenant should not be delivered until the other persons signed it.
3. A covenant was executed by B. and C. reciting that whereas A. had loaned to D. $1,600 and D. was desirous of securing the same, they, B. and C., bound themselves to A. that if D. did not pay the debt before 30 February, 1844, they would pay it at the time stipulated and waive notice. This is not a mere guaranty, but an absolute promise to pay the money if D. did not pay it at the time stipulated, and no notice was necessary.

APPEAL from MECKLENBURG Special Term in November, 1846; *Pearson, J.*

This action is brought on the following covenant: "Whereas H. B. Williams hath this day advanced for W. J. Alexander and Nat. W. Alexander the sum of $1,600, and whereas the said Alexanders are desirous of securing the said Williams in the payment of the same: Now, we, the undersigned in the event the said Alexanders should fail well and truly to pay the said Williams the sum aforesaid on 30 February, A. D. 1844, do for value received hereby covenant, promise, and agree to and with the said Williams to pay the same; and we hereby agree, in the event the said Alexanders should pay the same at the time stipulated, to waive notice thereof. Given under our hands and seals, 30 August, 1843." The covenant was signed and sealed by the defendants and M. Hoke, and there are three other seals without any names before them. There was no witness to the deed, and no other evidence of
(385) its delivery than its being in possession of the plaintiff and produced by him on the trial. The plaintiff offered in evidence a single bill under seal, executed by W. J. Alexander and N. W. Alexander, for $1,602.37, payable to the plaintiff six months after date, and dated August, 1843, but on what day does not appear. The reading of this bond was objected to by the defendants, but admitted by the court. The action was brought 5 August, 1844. The covenant was admitted in evidence upon proof of the handwriting of the defendants. The defendants alleged that the covenant was to have been signed by three other solvent persons before it was to be their deed, but gave no evidence to that effect. The recovery was opposed on three grounds: first, that there was no sufficient proof of the execution of the covenant; secondly, that

there was no evidence that the sum guaranteed by the covenant had not been paid by the Messrs. Alexander; thirdly, that the bond should not have been admitted, and, without it, there was no evidence that the sum stated in the covenant was advanced by the plaintiff to the Messrs. Alexander. W. J. Alexander was produced as a witness, and on his examination stated that he borrowed the money from the plaintiff and agreed to give the guaranty of the defendants with W. Hoke. The objections were all overruled and a verdict rendered for the plaintiff. From the judgment thereon the defendants appealed.

J. H. Wilson for plaintiff.
Boyden and Iredell for defendants.

NASH, J. We concur with his Honor in the court below, and for the reasons he assigns. Proof of the handwriting of the defendants, together with possession by the plaintiff, was evidence from which a jury might presume a delivery by the defendants in the absence of any proof to the contrary. *Vanhook v. Barnett,* 15 N. C., 268; *Blume* (386) *v. Bowman,* 24 N. C., 338. The latter case sustains the opinion of his Honor, that the circumstance of the three seals affixed, without any names before them, was not sufficient to rebut that presumption or to show that the defendants did not intend that the covenant should not be delivered until other persons signed it. In that case not only were there three vacant seals, but the name of another obligor in the bond who did not sign it. The *second* objection is founded upon the idea that the covenant was a guaranty, on the part of the defendants, of the repayment of the money borrowed by the Messrs. Alexander. Such may have been the intention of the parties, but such certainly is not the effect of the deed. It is, on their part, an obligation to pay to the plaintiff the money mentioned in it if on 30 February, 1844, the Messrs. Alexander did not pay it. This condition is inserted for their benefit, and is to be proved affirmatively by them. To enable the plaintiff to recover in this action, it was not necessary for him to have made a demand on the Messrs. Alexander or to prove that they had not paid. The obligation of the defendants to pay became complete upon the expiration of the time within which they, the Alexanders, were to make payment, and their failure to do it. *Gardner v. King,* 24 N. C., 300. The introduction of the bond given by the Messrs. Alexander was entirely harmless and of no effect. If it was intended by the plaintiff as evidence to prove the sum borrowed, the recital in the covenant was sufficient, and the bond was, therefor, irrelevant. If any error was committed by suffering its introduction, it was entirely redeemed by the instructions given

to the jury as to their measure of damages, if they found for the plaintiff. We concur with his Honor on all points ruled by him.

PER CURIAM. No error.

Cited: *Devereux v. McMahon,* 108 N. C., 146; *Whitman v. Shingleton, ibid.,* 194; *Herndon v. Ins. Co.,* 110 N. C., 284.

(387)

THE STATE ON THE RELATION OF TURNER CULBERSON v. SILAS MORGAN.

1. An execution upon a dormant judgment is not void. It is only irregular; and that is an objection which can only be taken by the defendant in the execution, and not by the officer to whom it is directed, who is bound to serve it.
2. It is the duty of an officer to sell property levied on in a way to bring the best price, unless the parties interested consent that the sale may be made in a different way.

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

Debt on the official bond of the defendant, as a constable, and the breach is a false return of *nulla bona* on a *fieri facias,* issued by a justice of the peace on a judgment in favor of the relator against one Sharp. Plea, conditions performed. On the trial the relator gave evidence that, after he delivered his execution to the defendant, the latter sold a wagon and team, consisting of five mules, and their gear, in mass, for $138, which was less than their value, and that he did not apply any part thereof to the relator's satisfaction. The defendant then showed that the judgment had been rendered a little more than a year before the execution issued; and thereupon his counsel insisted that he was not bound to act on the execution. But the court held that the defendant was bound diligently to serve it. The defendant then further gave evidence that when he received the execution in favor of the relator he had seized the wagon, gear, and team (amongst other things) on executions in favor of other creditors of Sharp; and that by the agreement of some of these creditors, who were present at the sale, he offered the property in mass,

(388) and it brought the sum before mentioned, which was applicable to the prior executions. The court thereupon told the jury that the sale was unlawful, as it was the duty of the officer to sell the property in a way to bring the best price, unless the relator consented to a sale in that manner. The jury found against the defendant, and after judgment he appealed.

Francis for Plaintiff.
J. W. Woodfin for defendant.

RUFFIN, C. J. An execution upon a dormant judgment is not void; it is only irregular; and that is an objection to be taken by the defendant in the execution. It does not lie with the sheriff to raise it. The process justifies him, and, therefore, he is obliged to serve it. *Dawson v. Shepherd,* 15 N. C., 497, is in point.

The duty of the officer as to the mode of sale was correctly stated to the jury, as the counsel for the defendant admits. But he insists that the judge erred in undertaking to assume as a fact that the articles sold for less, when put up together, than they would if offered separately. The Court would concur readily in that position if that point of fact had been disputed on the trial, and the judge had undertaken to decide it instead of submitting it as an inquiry for the jury. But it is obvious that was not the case. The very low price, being but little if any more than the value of a good wagon, prevented the defendant from contending before the jury that more would not have been got if more competition had been admitted by putting up the articles separately. Therefore, instead of doing that, he took another position which was that some of the creditors selected that mode of sale, and that was sufficient for his justification. So it was as to those creditors who directed it, but it was not as to those creditors who were absent and who suffered prejudice by that manner of selling; and of the latter class was the relator. But, plainly, that defense yielded that a different mode of selling might or (389) would have brought a better price, especially as the defendant gave no evidence to the contrary, nor insisted thereon in argument. Although it would have been erroneous not to have left that point to the jury, if it had been asked, or if the defense had not imported that the defendant did not dispute the matter of fact, yet it is not error in the judge to have assumed as true what the defense itself thus either expressly yielded or what was plainly to be inferred from it. The objection was not taken at the trial and fairly presented to the court, but is a mere afterthought and catch at the judge's words, taken abstractly and without reference to the state of the case in which he used them, and as such it cannot be sustained. As no question was made upon the amount of damages, we take it for granted they were assessed upon the principle of allowing the relator what he would have received if the sale had been properly conducted, and after satisfying the prior executions, for he was entitled to no more.

PER CURIAM. *No error.*

Cited: Murphrey v. Wood, 47 N. C., 64; *Williams v. Williams,* 85 N. C., 386; *Ripley v. Arledge,* 94 N. C., 471.

(390)

SPENCER RICE v. ROBERT PONDER.

1. In an action for a malicious prosecution, it is sufficient, in order to prove the prosecution terminated, to show that the plaintiff was bound to appear at a term of a court to answer a criminal charge; that he did appear, and was not rebound. Much more is it so when the solicitor for the State makes an entry on the docket that he does not think the evidence sufficient to convict.
2. It is not a sufficient defense to an action for a malicious prosecution that the defendant really believed the plaintiff guilty of the crime with which he charged him, but he must prove facts and circumstances which would induce a reasonable suspicion of the guilt in the minds of unprejudiced and, at least, ordinarily intelligent persons.

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

The action is for a malicious prosecution for a larceny, and was tried on not guilty pleaded.

The plaintiff gave in evidence a State's warrant issued against him and two other persons, upon the application of Ponder, for stealing certain hogs belonging to Ponder, in Yancey County, on which the plaintiff was arrested and, after examination before a magistrate, was bound over to the county court at February Term, 1842, to answer the charge. At that term the defendant appeared, but no indictment was preferred against him, nor was he further bound over; but an entry was made on the docket, "that the solicitor, on examining the witnesses, was of opinion that the charge could not be sustained; the defendants, or two of them, at least, living in Tennessee, and the taking not proved to have occurred in Yancey County." The plaintiff then called several witnesses further to support the issue on his part, who deposed as follows: One Lamras stated that he was the son-in-law of the defendant Ponder, and that being in the house of the plaintiff in Tennessee, a few miles
(391) from the State line, the plaintiff proposed to sell to him some fat hogs, then in a pen near the house, and that he went to the pen to look at the hogs, and immediately discovered that two of them were in the mark of Ponder, and, therefore, he asked the plaintiff how he came by them, and the latter replied that he purchased one of them from Balis Moore and the other from David Metcalf, who had purchased it from said Moore, and that Moore had bought both of them from one William Rice, a brother of the plaintiff. The witness further deposed that on the same day he made inquiry of Balis Moore respecting the hogs, and was informed by Moore that they with others in the same mark—which the witness then saw—had been purchased by him from William Rice, and that the plaintiff had afterwards purchased the two in the manner in which the plaintiff had before stated. And this witness further deposed

that he informed the defendant Ponder of all these facts in some short time and before he instituted the prosecution.

The said Balis Moore and David Metcalf also deposed that Moore had purchased the hogs, with others, from William Rice, and that they were sold by them, respectively, to the plaintiff, as above represented; and that they so told Ponder before he took out the warrant.

The said William Rice also deposed that he had formerly lived in this State, but that, several years past, he had moved over the Tennessee line and lived near the plaintiff's, and about 10 miles from Ponder's and across the mountains from him; that after getting to Tennessee he purchased a brood sow, which had a litter of pigs in the winter, all of which were frozen to death but two, and the ears of those were frostbitten so badly that when he went to mark them he found he could not put them into the ear-mark which he had formerly used in this State, and he then marked them by cropping both ears and slitting the left. He further deposed that the sow had a second litter some months afterwards, which he put into the same mark, and that, afterwards, being (392) about to remove back to this State, he sold all the stock of hogs, when the pigs were small, to Balis Moore. He further deposed that shortly after Ponder had heard that hogs in his mark were in the plaintiff's pen, he inquired of the witness whether he had so marked them and sold them to the plaintiff or Moore, and that he, the witness, had then forgotten that he had marked them in this particular mark, and, therefore, informed Ponder that he had not thus marked them, and offered to make oath thereof; but that, at the same time, he further informed the defendant that he remembered the flesh marks of the pigs that he had in Tennessee, and that he had sold to said Moore. The witness further deposed that soon afterwards, and before the defendant took out the State's warrant, they went together to the plaintiff's to see the hogs, and there found them in the pen; that he, the witness, then recognized the hogs, by their flesh marks, as those which he had sold Moore, and so declared to the defendant Ponder, but that still he did not recollect having marked them until the plaintiff, in the presence of the defendant, reminded him of the circumstances under which the two litters of pigs had been marked, as before stated by him, and that then he did at once remember the same, and immediately informed the defendant that he remembered it, and stated all the particulars to him as above set forth. Some days after that transaction the defendant took out the State's warrant and had the plaintiff arrested.

To maintain the issue on his part the defendant produced his son, John Ponder, who deposed that he knew his father's stock of hogs and saw the two hogs in the plaintiff's pen, and he believed them to belong to his father, and that they had been missing two falls. And he stated,

also, that the plaintiff denied having a knowledge of his brother William's stock mark. The defendant also gave in evidence that on the trial of the warrant he was examined as a witness for the State and (393) then deposed that from the ear-marks and the flesh marks found in the plaintiff's pen he believed them to be his property, and that he also believed that they had been stolen out of the range in North Carolina. The defendant further gave in evidence that on the next day after William Rice had stated to him, at the plaintiff's house, that he remembered marking the hogs, the said William denied that he had marked the hogs, and said "he would not swear to it to save all their lives." The said William, however, stated at the same time that the hogs found in the pen of the plaintiff were the same hogs he had sold to Balis Moore. And the defendant gave further in evidence that Balis Moore attempted, after his purchase, to alter the ear-mark, but that finding he could not change it into his own mark, he desisted; and that this also was made known to the defendant when he was at the plaintiff's.

Upon that evidence, the counsel for the defendant insisted before the jury that the plaintiff was guilty of the larceny charged on him; and if the jury should find otherwise, then he insisted, secondly, that the evidence showed that he had a reasonable and probable cause for having the plaintiff prosecuted therefor; and he prayed the court so to instruct the jury. The court refused to give the instruction as prayed; but, after informing the jury that to support the action it was necessary the plaintiff should show that the defendant instituted the prosecution maliciously and without probable cause, the presiding judge gave his opinion to the jury that if all these facts as given in evidence were true, there was not any just or probable ground of suspicion that the plaintiff had stolen the hogs of the defendant, and that there was not, therefore, probable cause for the prosecution. Thereupon the court instructed the jury that if they should believe that the defendant was actuated by malice towards the plaintiff in causing him to be prosecuted for the theft of the hogs, (394) they ought to find for the plaintiff, and assess such damages as they might deem right. The counsel for the defendant also moved the court to instruct the jury that the plaintiff could not recover, because he had not shown that the prosecution had been finally determined. But the presiding judge refused to give such instructions. The jury found for the plaintiff, and he had judgment, and the defendant appealed.

Francis and Baxter for plaintiff.
N. W. Woodfin for defendant.

RUFFIN, C. J. Upon the last point, *Murray v. Lackley*, 6 N. C., 369, is a direct authority for the plaintiff. He was not only not rebound, and

thus stood discharged, according to that case, but it is clear, from the memorandum of the State's attorney on the docket, that the proceeding was intended and considered to be at an end.

Upon the question of probable cause, the evidence produces on the minds of the members of the Court the same impression that it did on that of his Honor in the Superior Court. As the case stands, it is to be admitted that the defendant and his son and son-in-law, and it may be others, believe that the hogs of the defendant had been stolen, and that those in the plaintiff's pen were the same, or some of them. But with that admission there was not sufficient evidence that the plaintiff probably stole them. The only circumstance against him is that hogs which the defendant thought to be his were in his possession. That is evidence, that may be very cogent, or the contrary, according to other circumstances. Where a theft is recent, the possession of the stolen goods, not accounted for, is strong evidence when, from the nature of the goods, it is probable if the party came honestly by them he could show it. But it is a sufficient answer to the suspicion arising from the possession if the party does not show that he got them by purchase or in any (395) other fair way. And even in such a case of recent theft, if the person upon whom the goods are found does not conceal them, but, as here, keeps them near his house, open to observation, and, upon their being challenged as another man's, tells at once how, when, and from whom he received them, and, at the instance of the claimant, produces the very persons from whom he said they came, and they confirm his representation in all its particulars and exonerate him from all charge, and make themselves responsible for his possession, no intelligent and impartial mind could harbor a suspicion that, however it might be with others, he had stolen the goods, though they were in his possession. If, indeed, this were a fair reason for thinking that the persons thus assuming the responsibility did so falsely in collusion with the possessor, for the mere purpose of screening him, that would make a difference. But such a supposition is not readily credited, and is not admissible but upon good proof; and in this case there was no request on the part of the defendant to leave an inquiry of that kind to the jury. In truth, however, the present case is far less strong than that supposed. The defendant's own evidence is that his hogs were turned into the range in the mountains fifteen or perhaps eighteen months before they were seen by the son-in-law at the plaintiff's, which was the distance of 10 miles from the defendant's, with two mountains between. From those facts simply and the identity of the marks of these hogs with that of the plaintiff it would be a rash presumption and harsh inference that the plaintiff had gone across the mountains and stolen those hogs—at all events, without asking him how he got them, and assuming everything in its worst form.

No jury would, we think, pronounce a man guilty under these circumstances. But here inquiries were made of the plaintiff, and he promptly gave answers and explanations which, if true, perfectly exculpated (396) him, and then he proceeded to make it appear that what he declared was true by producing two men who acknowledged that they had sold the hogs to him, with the marks they then had, and that, without altering the marks, he had kept them openly and had claimed them notoriously for a year or more. Surely, after that, every possible suspicion of theft by the plaintiff vanishes. It would be impossible for any man on whom a stolen article may at any distance of time be found to establish his innocence of the theft by proof of an honest purchase if the evidence here, if believed, were not convincing that the plaintiff was not guilty of either taking the hogs or of receiving them feloniously. Then let it be taken for granted that the defendant believed the hogs to be his; and still that will not affect the plaintiff's right to recover. The defendant must know that he, like other men, is liable to be mistaken, and also that others may have the same mark that he has; and upon the information he had, it was but a just and ordinary diffidence of his own infallibility to allow that he might be and was mistaken, and that these were not his hogs. But if he were ever so confident upon that point, yet he could not believe—at least, not rationally—that the plaintiff had stolen them, when others assured him that they had sold them to the plaintiff, and he had not only kept them exposed to the view of all comers, but when he actually took a member of the defendant's own family to look at the hogs, upon a proposal to sell them to him, marked as they were, and when, from that time to the end of the investigation, the plaintiff gave the same account of the manner of his coming by them, and was fully sustained therein by the persons referred to by him. It is true that one of those persons, William Rice, on being applied to by the defendant, at first said he did not mark the pigs he sold; but even then he said he did sell some pigs to Moore, among which were the two the plaintiff afterwards purchased, and that he should know them (397) if he could see them. Accordingly the defendant took the witness with him to examine them; and as soon as he saw them in the plaintiff's pen, he declared them to be the same which he had sold, when young, to Moore; and upon the circumstances under which he had marked his pigs being recalled to his mind by the plaintiff, in the presence of the defendant, he declared that he then remembered that also. All these statements came fully to the knowledge of the defendant before he began the prosecution, and it does not appear that he had the least reason to doubt, or disbelieve, that the plaintiff did purchase the hogs from Moore and Metcalf honestly and thinking that they had a right to them. If those witnesses were to be believed, the defendant had no

ground for a lingering suspicion of the plaintiff's integrity in the transaction, but was obliged then to think him, as the jury has since, upon the same evidence, found him to be, not guilty.

PER CURIAM. No error.

Cited: *Hatch v. Cohen,* 84 N. C., 683; *Brinkley v. Knight,* 163 N. C., 195.

(398)

J. J. McELRATH ET AL. v. THOMAS BUTLER.

1. Where a judgment was rendered in October, 1838, by a magistrate, upon a return of the constable on the warrant "Executed," but not having the name of the constable signed to the return: *Held,* that this judgment was not *void* for the want of the signature of the constable to the return on the warrant.
2. And *Held further,* that the defendant in that judgment, against whom a magistrate, at a subsequent time, had rendered judgment upon the former judgment, could not be relieved from the last judgment by writ of *recordari* without first having the prior judgment reversed.

APPEAL from BURKE Spring Term, 1847; *Dick, J.*

The defendant Butler issued a warrant against Hugh McElrath and several others, in a plea of debt for $100, due by note; and the constable returned the warrant "Executed," but did not sign his name thereto, and afterwards he died. On 15 October, 1838, R. C. Pearson, a justice of the peace, entered judgment against the said Hugh for $100 principal, interest, and costs. On 4 September, 1843, Butler issued another warrant against Hugh McElrath in a plea of debt due by former judgment in the sum of $100. This warrant was executed and a judgment rendered on it by Thomas Walton, a justice of the peace. Hugh McElrath obtained a writ of *recordari* to issue to Walton to record the proceedings had before him, and sued them into the Superior Court of Burke County, which was done accordingly. The ground of the motion for the *recordari* was that the first warrant on which Pearson gave a judgment against him had never been executed on him, nor had he any notice of the same. The judge, on the hearing of the Superior Court, ordered that the judgments heretofore given by R. C. Pearson and Thomas Walton, Esquires, be vacated. From this order the defendant Butler appealed to the Supreme Court. (399)

No counsel for plaintiff.
Avery for defendant.

DANIEL, J. It seems to us that the judge erred in reversing the first judgment given against Hugh McElrath by R. C. Pearson, for there was no petition nor prayer by Hugh McElrath that it should be vacated. It was not before the Court. *Secondly.* Hugh McElrath insisted that the judgment rendered against him by Walton was erroneous because he, Walton, had rendered it on the former judgment, which Hugh alleged was *void* as having been rendered against him without notice. The judge, we think, erred in reversing this judgment. The warrant on which the first judgment was rendered against Hugh McElrath was returned executed on him by the constable, but the constable neglected to sign his name to his return. We do not think that the judgment rendered by Pearson was *void.* If it was erroneous until it was reversed for error, it was good evidence for Walton to render the second judgment on. We think that the judgment of the Superior Court must be reversed and judgment on the *recordari* entered for the original plaintiff Butler.

PER CURIAM. Judgment accordingly.

Cited: Spillman v. Williams, 91 N. C., 489; *Stafford v. Gallops*, 123 N. C., 23.

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(400)

JOHN PARKER v. PENIL GILREATH.

1. A seal is not required to be affixed to an attachment or warrant issued by a justice in a civil case.
2. Where a defendant in an attachment is brought before a magistrate, not by a levy on his property, but by summoning a garnishee, no advertisement or notice in writing is required.

APPEAL from HENDERSON Special Term in June, 1846; *Battle, J.*

This was a writ of false judgment brought to reverse a judgment obtained before a justice of the peace by the present defendant against the present plaintiff, who had been summoned as a garnishee in an attachment at the instance of the defendant against one Leonard Cagle. The errors assigned are set forth in the opinion delivered in this Court. The judge below reversed the judgment, and the defendant appealed.

No counsel for plaintiff.
Baxter and Woodfin for defendant.

DANIEL, J. This was a writ of false judgment to the Superior Court of Henderson. The plaintiff assigned several errors, and the defendant

replied that in nothing assigned was there any error. The court adjudged that the judgment which had been rendered by the justice against the garnishee, Parker, should be reversed. The judge does not inform us on which of the errors assigned he reversed the judgment of the justice. We must, therefore, examine the whole record and see if his Honor's judgment was right. The *first* error assigned is that there was no seal to the attachment or the judgment. We know of no law that requires a justice of the peace to seal an attachment or (401) warrant in a civil case or his judgment thereon, and the practice has always been not to seal them. The *second* error assigned was that there was no condition nor final judgment against the defendant in the attachment, and, therefore, none could, in law, have been rightfully entered against Parker, the garnishee. We have examined the proceedings returned in the Superior Court, and see that there were both a conditional and (after thirty days) a final judgment rendered against the defendant in the attachment for $98. There is, therefore, no error here. *Thirdly*, that there was no notice to the defendant in the attachment, nor advertisement in writing. We think that on attachments of this kind advertisement in writing is not necessary. The act (Rev. Stat., ch. 6, sec. 19) gives attachment against debtors residing abroad and also those who conceal themselves, and requires the justice to direct advertisement for thirty days, when the officer levies the attachment on the goods and chattels, lands and tenements of any person or persons *residing out of the county* in which such attachment is issued. This attachment recited that L. Cagle (the defendant in it) "had absconded, or so conceals himself that the ordinary process of law cannot be served on him." The constable did not levy the attachment on any goods or lands of Cagle; he was brought into the magistrate's court by summoning a garnishee. The words "had absconded," in the attachment, do not show that Cagle resided out of the county. The justice's omitting to make advertisement for thirty days, in this case, was not error. *Fourth* error assigned, "No judgment against garnishee, for reason, not within thirty days or without with notice." We cannot make sense of this. If it is intended to be assigned for error that no judgment had been rendered against the garnishee, we must say it is not true, for such (402) judgment was rendered for $94 on the day the garnishment was given in to the justice. *Fifth* error, "Transferred by defendant in attachment before notice of the attachment." If we are to understand by this assignment of error that the debt due by the garnishee to the defendant in the attachment was *bona fide* transferred by the defendant to another person and paid by the garnishee to that person before he had notice of the attachment, we must say that there is nothing in the proceedings to show that averment to be true. On the contrary, the

garnishee stated in his garnishment that he owed that debt to Cagle. If it were true, he should have brought such a defense to the notice of the justice in his garnishement that Gilreath might have denied the fact, if he thought proper, and taken issue on it. This course was not taken by the garnishee, and it cannot now be heard. It is no good cause to reverse the judgment rendered against the garnishee. *Sixth* error assigned, "The attachment was not returnable at any certain time or place." We see that the officer was directed in the attachment to return it before the justice who issued it, or some other justice of the county, within thirty days, Sundays excepted. This was agreeably to the act of Assembly; and if the defendant had appeared and offered to replevy, then the officer would, as in other warrants served, have given him notice of the time and place of trial.

We cannot see any legal ground upon which the Superior Court could have reversed the judgment which the magistrate gave in favor of Gilreath against Parker, the garnishee. We think that the judgment of the Superior Court must be reversed, and that of the justice affirmed.

PER CURIAM. Reversed.

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(403)

JOSEPH RINEHEARDT v. FELTON W. POTTS.

1. Where, in speaking of a trial before a magistrate, in which the plaintiff had been a witness, the defendant said that "he (the plaintiff) had sworn falsely," these words import that the plaintiff had committed perjury, and are, in themselves, actionable.
2. This Court cannot act upon affidavits offered in the court below. It is the province of that court exclusively to determine the facts, and the Supreme Court can only review so much of the judgment as involves matters of law, strictly.

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

Slander. The words charged in the declaration and proved were that the defendant, in speaking of the testimony given by the plaintiff, on the trial of a warrant before a magistrate against the defendant and two others, Davidson and Enloe, in which they were charged with a forcible trespass in taking a horse, said "he had sworn falsely." The defendant relied upon the plea of justification, and introduced testimony tending to establish the truth of the charge, which was met by testimony on the part of the plaintiff tending to prove that the evidence which he gave before the magistrate was true. It appeared on the investigation of the charge against the defendants for the forcible trespass that the defendant Potts was an officer, and as such had levied an execution on

a horse as the property of one Wikle, and taken him into possession and delivered him to Davidson to keep; that he was secretly taken from Davidson's stable and was afterwards found in the stable of the plaintiff's father, with a chain locked around his neck and fastened to one of the logs of the stable; that Potts, Davidson, and Enloe went there to get him, but were forbidden by the plaintiff's mother to take him; and that Davidson and Enloe, notwithstanding such prohibition, prized up the logs of the stable and took him out, the plaintiff (404) and his mother both being present and objecting to it. The plaintiff swore that Potts assisted in getting the horse from the stable, and in that it was that the defendant Potts said he committed the perjury. In his argument to the jury the defendant's counsel contended that neither Potts, Davidson, nor Enloe had committed any forcible trespass, for that in law they were justified in taking the horse in the manner they did; but no point of law was raised to the court that the plaintiff could not have committed perjury on the trial of the warrant, and that, therefore, the words were not actionable. So far from it, the whole argument of the counsel was addressed to the jury, insisting that the evidence sustained the plea of justification. The jury returned a verdict for the plaintiff. The defendant moved to set it aside, upon an affidavit, the substance of which was that, in making up their verdict, each juror put down what he thought should be the amount of damages, that these several sums were added up, and the aggregate was divided by twelve and the quotient determined upon as the verdict. The court refused the motion. The defendant then moved for a new trial because the court had not told the jury that the words were not actionable; but the court held that, as the objection had not been taken before, it could not be raised for the first time on a motion for a new trial. The motion was accordingly refused and judgment given for the plaintiff, from which the defendant appealed.

N. W. Woodfin and Edney for plaintiff.
Francis for defendant.

DANIEL, J. In a *colloquium* relative to a trial before a magistrate of a State's warrant against the defendant and two others, when and where the defendant had been sworn and examined as a witness, the defendant said "That Rinehardt (the plaintiff) had sworn (405) falsely." These words were in law to have that sense and meaning placed upon them by the court and jury that the bystanders affixed to them. The hearers of the said words spoken could not, from the subject-matter of the conversation, understand the defendant to mean anything else than that the plaintiff had committed perjury in his evidence on that trial. The words, spoken under the circumstances they

were, were actionable of themselves, for they, in effect, charged the plaintiff with having committed willful and corrupt perjury.

Secondly. The defendant offered the affidavit of Dowdle to show to the court that the jury had misbehaved themselves in the manner of making up their verdict; and on this affidavit he moved that the verdict should be set aside and a new trial granted. The case sent up here only states, "that the court refused the motion." We do not know upon what ground the judge refused the motion; it may have been because he did not believe Dowdle. The defendant did not pray the court to give the reason for rejecting the motion; and, as we cannot see that it was in fact overruled *against law,* we cannot say that there was any error in the judgment of the judge upon this part of the case. We have often stated that this Court cannot act upon affidavits offered in the court below. It is the province of that court exclusively to determine the facts, and we can only review so much of the judgment as involves matters of law, strictly.

PER CURIAM. No error.

Cited! S. v. Smallwood, 78 N. C., 562; *S. v. Best,* 111 N. C., 643; *S. v. DeGraff,* 113 N. C., 696.

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(406)

THE COMMISSIONERS OF THE TOWN OF ASHEVILLE v. JAMES B. MEANS.

1. The commissioners of an incorporated town have no right to impose any taxes but such as are expressly authorized by the act of incorporation.
2. A power to enact by-laws, etc., for the good government of the town, of *itself,* confers no right to levy taxes.

APPEAL from BUNCOMBE Special Term in June, 1846; *Battle, J.*

This was an action commenced by a warrant before a single magistrate to recover the sum of $25 which the board of commissioners for the town of Asheville had imposed as a tax upon the defendant as a retailer of ardent spirits. It was admitted that the defendant resided and did business, as a retailer, within the limits of the town; and the plaintiffs contended that they were authorized to impose and collect the tax sued for by virtue of Laws 1840, ch. 58, entitled "An act to incorporate the town of Asheville in the county of Buncombe and to appoint commissioners thereof." The defendant insisted that the act referred to did not confer the power upon the plaintiffs to impose the tax sued for, and of this opinion was the court. Upon the intimation of this opinion, the plaintiffs submitted to a judgment of nonsuit and appealed.

N. W. Woodfin and Edney for plaintiffs.
Gaither for defendant.

DANIEL, J. The judge was of opinion that the act of Assembly mentioned in the case did not confer the power on the commissioners to lay the tax on the defendant for the nonpayment of which he was sued. Section 3 of the act empowers the commissioners of Asheville to lay a tax annually on the property and *inhabitants* of the said town, not exceeding 10 cents on each hundred dollars valuation (407) of real estate in the said town and 10 cents on every taxable poll, as they shall deem necessary for the repair of the streets and for the good of said corporation. It seems that the Legislature has expressly conferred on the commissioners the power of taxing but two objects, to wit, the real estate and polls within the limits of the town. The Legislature, designating two objects of taxation, intended, as it seems to us, to exclude from the taxing power of the commissioners everything else. It would have been very imprudent legislation to have permitted the commissioners to tax any and every thing in the town they might think fit, and that, without limit in the amount of the tax. The powers conferred on them to pass by-laws for the good government of the town does not authorize them to make by-laws to lay taxes on any other things than those expressly named by the Legislature. We think that the judgment must be

PER CURIAM. Affirmed.

Cited: *S. v. Bean*, 91 N. C., 558, 560; *Winston v. Taylor*, 99 N. C., 213; *S. v. Irvin*, 126 N. C., 992; *Charlotte v. Brown*, 165 N. C., 437.

(408)

LEVI McDANIEL v. PHILLIP W. EDWARDS.

An action by a father for the seduction of his daughter will not lie when the daughter is of full age and not living in her father's family, but in the actual employment of another person, though her father was to receive part of her wages.

APPEAL from HAYWOOD Spring Term, 1847; *Dick, J.*

Action on the case for the seduction of the plaintiff's servant and daughter, Mary. Plea, not guilty.

The plaintiff introduced the daughter as a witness, and she stated that she always lived with her father and labored as one of the family until she went to live with the defendant, as hereinafter stated; that in Feb-

ruary, 1844, her father hired her to the defendant at 50 cents a week, to manage his household affairs during the expected confinement of his wife, and that she then went to the defendant's and remained there until October following, when she returned to her father's in a state of pregnancy from cohabitation with the defendant during May of that year and while she was living with the defendant. She further stated that she has lived ever since with her father and labored in the family, and that she was there delivered of the child of which she was pregnant by the defendant in May, 1845. She further stated that she was uncertain whether she was 21 years of age in September, 1843, or became of that age in September, 1844; and that she received from the defendant part of her wages while she lived with him, and her father received part.

On the part of the defendant evidence was given that the daughter herself made the contract for services with the defendant, and that she was of full age two or three years before she made it or went to his house.

(409) The court instructed the jury that if the daughter was an infant when the seduction occurred, they ought to find for the plaintiff; and, also, that if they believed she was of full age when she went to live with the defendant, and was seduced by him, yet if the plaintiff had made the contract under which the daughter went into the defendant's service, and received the wages to his own use, then and in that case they ought to find for the plaintiff.

The jury gave a verdict against the defendant, and from the judgment he appealed.

Edney and J. W. Woodfin for plaintiff.
Francis for defendant.

RUFFIN, C. J. Actions of this kind have been frequent in modern times, and we have looked into most of the reported cases; but we have been unable to find one that bears out the latter branch of the rule laid down to the jury in this case. Since *Postlewait v. Parks,* Bur., 187, it has been perfectly understood that the gist of the action is the relation of master and servant and the loss of service. Therefore, though very slight service is sufficient to establish that relation, *de facto,* between father and daughter, yet it is indispensable to show some service in order to have that effect. Where the daughter is living with the father, whether within age or of full age, she is deemed to be his servant, for the purposes of this action; in the former case absolutely, and in the latter, if she render the smallest assistance in the family, as pouring out tea, milking, or the like. So, also, if the daughter be within age, the action may be maintained by the father, to whom she returned to lie in,

although she was on a visit to or living with another person at (410) the time of the seduction, *Harper v. Luffkin,* 7 B. & C., 387, unless the daughter had not the *animus revertendi,* in which case she could not by any fiction be considered in the father's service. *Deen v. Peel,* 5 East., 45. The reason why the father may have the action for seducing his infant daughter, though not living in his family, is that she is, both legally and actually, *sub potestate patris.* But that shows that the action will not lie when the daughter is of full age, and not living in the father's family, but in the actual employment of another person. There is no case that gives any color for the supposition that it would lie under those circumstances, except that of *Johnson v. McAdams,* stated in the argument of counsel in *Deen v. Peel.* But that was the decision of a single judge at *nisi prius,* and the daughter went from her father's on a short visit, merely, to a lady, and not on a contract of hiring, and, moreover, was under age when she went away, though she attained full age before the seduction. Even in that case *Mr. Justice Wilson* hesitated very much, saying, at first, that "where the daughter was of full age and no part of the father's family, he thought the action *not* maintainable." It is true, he afterwards told the jury that the consent of the father to the daughter's visit was to be inferred from the circumstances, and, therefore, that she might be considered as a part of the family. But the case was never carried before the Court in Bank, and, when cited by counsel, did not receive any expression of approbation. If, however, that case was right, it has no application to the present, as here the daughter was living with another person, and was his actual servant upon a contract of hiring, which comes within the rule laid down by *Judge Wilson* himself, above quoted. That rule was adopted by this Court in *Phipps v. Garland,* 20 N. C., 38. There it was expressly stated that the daughter, who was of full age, went to live with Garland, with her father's consent, and her *animus* (411) *revertendi* was clear, as she left her property at her father's, and she frequently returned there on visits, and on such occasions washed and cooked; yet it was held that she could not constructively be considered the father's servant, and, therefore, that the action did not lie. The reason why the action does not lie in that case is that the father has no legal right to the service of the daughter, nor authority over her, and she is not, *de facto,* a servant in his employment, but stands in that relation to another. Therefore, the circumstance that the father and this defendant made the bargain for the daughter's service and wages can make no difference; for although that might be the form the transaction assumed, yet, in law, the contract was that of the daughter, as she was *sui juris.* We do not say how it might be if there had been an actual contract between the father and daughter for her service to him for a

definite period, and, within the term, the father, by her consent, hired her to the defendant and he seduced her. But if the father could have the action in that case, it would be by force of the express contract between him and the daughter for her time and labor; and that could not authorize this action, where there was no such contract and no ground for implying it. The defendant did not become entitled to the services of this young woman in virtue of any contract of the father; for she was *sui juris,* although he may be called her master while she remains in his family, and he cannot, upon mere implication, be allowed the authority, as master, to hire her out, so as to make it obligatory upon her, and thereby continue the relation of master and servant between them. In law, the contract on which she served the defendant was her own and the wages were hers. The fiction of service has been carried far enough in actions of this kind without pushing it to this extreme length, which, if admitted, would break down the rule itself, that (412) the action is founded on loss of service; for, next, it would be said if the parent aided in the support of the daughter, as by giving her a garment or nursing her in sickness, that she might be considered as continuing to be his servant, though of age and living in service abroad, and thus it would come at last that the action was that of a father and not a master, and present the extraordinary instance mentioned by *Lord Mansfield* in *Satterthwaite v. Dewhurst,* 5 East., 46, note, of an action by a person on account merely of incontinence between two others, both of whom are of full age.

PER CURIAM. *Venire de novo.*

Cited: Kinney v. Laughenour, 89 N. C., 368; *Snider v. Newell,* 132 N. C., 620.

DAVID PARKS v. THOMAS N. ALEXANDER ET AL.

1. A sheriff has no right to return *nulla bona* on an execution without making an effort to find property at the residence of the defendant in the execution, or making any demand of payment or inquiry for property.
2. A mere general report that the debtor has no property will not justify such a return, if the debtor in fact has property subject to be levied on.

APPEAL from MECKLENBURG Special Term in November, 1846; *Pearson, J.*

Debt upon the defendant's bond as sheriff for 1840. The breach assigned was a failure to collect a debt due by one Johnson, which had been placed in his hands for collection.

The plaintiff proved that in May, 1840, he placed in the de- (413) fendant's hands for collection a note due by the said Johnson for about $30. The plaintiff called one McGilvery, who swore that during the summer and fall of 1840, and until some time in 1841, Johnson had in his possession, using and claiming as his own, a carryall and buggy, worth over $50; and that in 1841 the carryall and buggy were sold by a constable to satisfy another debt of Johnson's. The defendant called several witnesses who swore that in 1838 Johnson was sold out, and from that time until his death in 1842 was reputed and considered to be insolvent. Johnson, as well as the plaintiff and defendant, all lived in the town of Charlotte. None of these witnesses had ever been to the house of Johnson to make inquiry after property. Johnson was an intemperate man, a saddler and harness-maker by trade, and worked in a shop owned by one Houston, and was generally supposed to have no property and to be entirely insolvent. The defendant's counsel insisted that when a man was generally reputed to be insolvent, an officer could not be made liable for failing to collect a debt unless the plaintiff showed him property, or proved that the officer knew that the debtor had property. The court refused so to instruct the jury, but told them that if they believed the testimony of the witness McGilvery, the defendant had not used due diligence, and was liable in damages to the plaintiff for his neglect; that where a debtor had property in his possession, it was the duty of the officer to make inquiry, notwithstanding a general report as to the debtor's insolvency, and if it turned out that the debtor was in fact the owner of property liable to execution, it was no excuse for the officer, and he had no right to say that it was the plaintiff's business to make the inquiry and inform him of the fact.

The jury found a verdict in favor of the plaintiff. A rule for a new trial for misdirection was discharged. There was judgment for the plaintiff, and the defendants appealed. (414)

J. H. Wilson for plaintiff.
Alexander for defendants.

DANIEL, J. It was the duty of the sheriff, after he received the note for collection, to have had a judgment rendered on it, and an execution issued against Johnson in a reasonable time; and then it was his duty to have gone to the house of Johnson in search of property to levy on. If the sheriff had pursued this course, he must have found property worth as much as the amount of the execution. He had no right to return *nulla bona* without making any effort to find property at the residence of the defendant in the execution or making any demand of payment or inquiry for property. The general report that Johnson was

insolvent did not excuse the sheriff in his negligence. We may be very certain that if the debt had been the sheriff's own he would have made inquiries, which would have led to the seizure and sale of the debtor's property.

PER CURIAM. No error.

(415)

CALEB OSBORNE v. BAKER BALLEW.

The copy of a grant from the register's office is good evidence where the production of the original is, from any cause, dispensed with.

APPEAL from ASHE Fall Term, 1846; *Dick, J.*

Trespass *quare clausum fregit.* The writ issued in March, 1841.

The plaintiff produced and read in evidence a conveyance made to him by one Dobson in 1836, which covered the *locus in quo,* and proved that he took immediate possession under it, and that he is still in possession. To show the trespass, he gave in evidence the copy of a grant to the defendant, bearing date in 1840, which covered the land in dispute, and alleged that the trespass consisted in running and marking the lines preparatory to the taking out of his grant. He further alleged that before the land was entered by the defendant it had been granted to another person. To prove this he offered in evidence the copy of a grant from the register's office of Ashe County, where the land lay, and at the same time filed his own affidavit that the grant was not in his possession, and those of other persons that it could not be found. The plaintiff further disclaimed deriving title under it. The introduction of the copy was opposed by the defendant, *first,* because a copy from the office of the Secretary of State was better evidence, and, *secondly,* because the plaintiff had not accounted for the original. The court rejected the evidence. The plaintiff, in submission to the opinion of the court, suffered judgment of nonsuit to be entered, and appealed.

(416) *No counsel for plaintiff.*
Boyden and Iredell for defendant.

NASH, J. If this were a case in which the plaintiff was bound to produce the original grant, he had entitled himself to the use of secondary evidence by his own affidavit and those which were tendered. As the latter were not read, we are to presume they were dispensed with as unnecessary, and that the fact was, as alleged, that the grant could not be found. But the plaintiff was not bound to account for the original. The copy offered was that of a grant under which he did not claim title and to the possession of which he had no right. The plaintiff was entitled to give in evidence a copy of the grant in question, *Candler v.*

Lunsford, 20 N. C., 142: and the only inquiry on that point is, Was he entitled to use the copy tendered? It is objected that he was not, because a copy from the Secretary's office was better evidence. It is a presumption of law, until the contrary appears, that the grant was recorded as directed in the act; and we are of opinion that the objection is untenable. It is founded on the principle that the best evidence within the power of the plaintiff had not been offered by him; that better testimony was behind, to wit, a copy from the Secretary's office. It is a general rule that the best evidence shall be produced to prove every fact in controversy which the nature of the case admits and which is in the power of the party; in other words, secondary and inferior testimony shall not be substituted for that which is of a higher and superior character. The rule is one of policy, and is founded on the suspicion of fraud; for if, from the nature of the transaction, it is evident that there is better evidence of the fact to be established, which is not produced, a presumption at once arises that it is withheld because its production would be injurious to the party offering the inferior testimony. But in this case the testimony offered, and that which it is alleged ought to have been offered, are both secondary and not primary. It is admitted a copy from the Secretary's office would (417) have been legal evidence. What would that be but a copy? It would have been admissible, because it was the copy of a record. The rule requiring the best evidence to be produced, being intended to guard against fraud, its operation ceases when that presumption does not arise. It does not arise in the case of a record, and its production is, therefore, dispensed with and a copy substituted. To require the production of the record would often be inconvenient. 1 Stark. Ev., 393; 2 Steph. N. P., 1514. The copy, then, of a grant from the Secretary's office is a copy of the record, *Candler v. Lunsford,* 20 N. C., 142; and a copy from the register's office is a copy of the original grant. The grant is, in fact, the original in each case. Each, therefore, is but secondary evidence; and in such case there are no degrees. When a party is entitled to give such evidence, he may give any species of it at his pleasure. 2 Steph. N. P., 1517. Nor is it any objection that the copy from the register's office may be weaker in its effects than one from the office of the Secretary of State, or that all the testimony of the same grade has not been produced that might. Thus the contents of a notice to produce a letter may be proved by any one who knows its contents, without calling the person who wrote it; and handwriting may be proved without calling the writer himself.

His Honor, therefore, erred in rejecting the copy of the grant from the register's office.

PER CURIAM. Reversed.

(418)

LEONARD E. THOMPSON v. ROBERT W. FORD.

1. Where a slave has been conveyed by deed in trust for the payment of debts a sale of such slave, under an execution against him who executed such deed, is not valid, at least while any of the debts remain unpaid.
2. The indorsement by such a trustee on the deed "that he had sold (a certain negro) and satisfied the claims mentioned in the within deed, and retained a balance of $..... in my hands," does not purport or amount to a conveyance by him, but only shows that he then no longer held the title for the creditors secured in the deed, as one of the trusts on which he took it originally, but only for the maker of the deed, or such persons as might be entitled through him, either by contract or act of law.

APPEAL from LINCOLN Spring Term, 1847; *Settle, J.*

Trover for a slave named Willis, in which the defendant pleaded not guilty. It came before the court upon the following case agreed:

On 24 February, 1842, William Fullenwider, of Lincoln County, then the owner, conveyed the said Willis and a woman named Eliza, by deed of trust, to the plaintiff, in trust to sell and out of the proceeds pay certain debts in the deed mentioned; and the deed was proven and registered on the same day. Payments were made on the debts secured by Fullenwider so as to reduce them considerably, during 1843. In June, 1842, Jacob Ramsour recovered two judgments against Fullenwider: one for $136.17½ and the other for $1,087.35; and he issued writs of *fieri facias* thereon, and raised the sum of $123.21 by the sale of some land; and as to the residue there were returns of *nulla bona* in September, 1842. In October following Ramsour exhibited his bill in the court of equity against Fullenwider and Thompson, charging that the two slaves were of value more than sufficient to discharge the balance of the secured debts, then unpaid, and praying to

(419) to have his debts satisfied out of the surplus; and that suit is still pending. On 5 January, 1843, the negro Willis was taken out of the possession of the present plaintiff, by a constable, upon two justices' executions against Fullenwider for about $102, and delivered by him to Fullenwider, and Fullenwider immediately sold the negro to the present defendant, at the price of $600, whereof the sum of $102 was applied to the payment of the executions in the constable's hands and the residue of $498 credited on a debt which Fullenwider owed Ford; and then he, Ford, carried the negro to Cabarrus County, where he resided. Shortly afterwards the negro returned to the possession of the plaintiff, and he kept him about a month. He was then enticed away by some person unknown, and carried back to Cabarrus, and was then seized by the sheriff of that county under a *fieri facias* issued on a judgment in Lincoln Superior Court in favor of John F. Cowan against said Fullenwider and another, bearing teste the second Monday after

the third Monday of February, 1843; and he was sold at the price of $600 on 2 June, 1843, to the present defendant, who has since held the negro and claimed him as his own.

On 5 June, 1843, the plaintiff sold the woman Eliza for $362, and then made on the deed, and signed, an entry in the following words: "Sold negro Eliza for the sum of $362, and satisfied the claims mentioned in the within deed, and retained a balance of $247.01 in my hands."

After filing his bill, Ramsour sued out other writs of *fieri facias* on his judgments, and, after indemnifying the sheriff, had some personal property sold, which was claimed by other persons, and thereby raised on the one execution the further sum of $54, and on the other that of $447.05.

This suit was brought in September, 1843, and upon the case (420) agreed, judgment was entered for the plaintiff for a sum specified therein, for which it was to be entered in case the opinion of the court should be for the plaintiff; and from the judgment the defendant appealed.

Thompson and Williamson for plaintiff.
Boyden and Iredell for defendant.

RUFFIN, C. J. The Court can take no notice of the rights of Ramsour arising out of the filing and prosecution of his bill in the court of equity. It belongs to that court to vindicate its jurisdiction by dealing with persons who violate rights created by a *lis pendens* there.

Sitting in a court of law, we cannot judicially know how a court of equity will apply an equitable fund of this sort to the satisfaction of creditors, or as between the creditors and the assignee of its owner. We can look only to the legal rights of the parties to this record. But confining ourselves even to that limit, we hold that the plaintiff must recover. The plaintiff got the legal title by the conveyance of Fullenwider, and it has never been divested out of him and gained by the defendant, of course the defendant took nothing by his purchase from Fullenwider himself. Nor did he get a title under the purchase from the sheriff, because the negro at the time he was seized and sold was not liable to execution, and consequently the sale passed nothing. Section 2 of the act of 1812 which authorizes the sale of an equity of redemption is confined to a mortgage of lands, tenements, rents, and hereditaments; and, therefore, this case is not within that clause of the act. Nor is it within the first section, although that extends to both lands and goods, because, on 2 June, 1843, when the defendant purchased, there was a balance due on the debts secured by the deed, and the same remained due until the 5th of that month, when it was paid out of the proceeds of the sale then made of the other negro by the plain- (421)

tiff. At the sale to the defendant, therefore, the negro Willis was not held by the plaintiff upon a pure and simple trust for Fullenwider, the defendant in the execution, but upon a mixed trust, for him and the creditors secured in the deed; and that is not within that section of the statute, *Brown v. Graves,* 11 N. C., 342, and the sale to the defendant passed nothing.

The memorandum made on the deed and the facts stated in it did not determine the plaintiff's title. They do not purport or amount to a conveyance by him, but only show that he then no longer held the title for the benefit of the creditors secured in the deed, as one of the trusts on which he took it originally, but only for Fullenwider or such persons as might be entitled through him, either by contract or act of law. Still the legal title was left in the plaintiff, and that entitles him to judgment in this action.

PER CURIAM. Affirmed.

Cited: *Sprinkle v. Martin,* 66 N. C., 56, 57; *Hardin v. Ray,* 94 N. C., 460; *Mayo v. Staton,* 137 N. C., 676, 679.

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(422)

N. E. AND J. LUDWICK v. SOLOMON FAIR AND ADELINE, HIS WIFE.

1. A defendant, who is sued upon a judgment obtained before a justice of the peace has no right to plead that he was an infant when that judgment was rendered.
2. A judgment by a justice of the peace, though not a matter of record, determines, between the parties, their respective rights in the matter of controversy. Neither party can, in a subsequent proceeding to enforce it, deny or contest the matters of fact ascertained by it.

APPEAL from CABARRUS Fall Term, 1846; *Dick, J.*

The plaintiffs had obtained a judgment against the defendant Adeline before her intermarriage with the other defendant. That judgment lay dormant for twelve months and more, when the warrant in the present case, on the former judgment, was issued against both the defendants. The case was taken to the county court by appeal, when the defendants pleaded the general issue and former judgment. In the Superior Court, to which the case was carried, it was tried on the same pleas as in the county court. On the trial the defendants alleged and were allowed to prove that the defendant Adeline was, at the time of the rendition of the first judgment, and then was, an infant. The court held that the defense could not avail the defendants in this action. A ver-

dict being rendered for the plaintiff and judgment rendered thereon, the defendants appealed.

Thompson for plaintiff.
No counsel for defendants.

NASH, J. In the opinion of his Honor below we concur. The judgment of a justice is not a matter of record, but to many purposes it has the qualities of one. It determines, between the parties, their respective rights in the matter of controversy. Neither party (423) can, in a subsequent proceeding to enforce it, deny or contest the matter of fact ascertained by it. In an action of debt upon it, as this is, its validity cannot, in pleading, be impeached or affected by any supposed defect or illegality in the transaction on which it is founded; and, consequently, it is not necessary to state the circumstances or consideration on which it is founded. 1 Chit. Pl., 354. It is well settled that, in pleading to a *scire facias* to revive a judgment or to an action of debt upon it, no matter of defense can be pleaded which existed anterior to the recovery of the judgment. E East., 258; 4 East., 311. The infancy of the defendant Adeline at the time the first or original judgment was obtained might have been a good defense. She either did make it on that trial or she did not. If she did, it is then *res adjudicata,* and she is concluded by it, as the judgment is in full force. If she did not, then she is, by the principle before stated, excluded from making it now. That judgment not only ascertained the amount due to the plaintiff, but that she was *in law* bound to pay it. But an effectual answer in this case is that the plea of infancy was not tendered by the defendants. When she married the other defendant, Solomon Fair, it was an existing debt of hers, and in this action the plaintiff has a clear right to recover it.

PER CURIAM. No error.

Cited: Spillman v. Williams, 91 N. C., 489.

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(424)

W. W. DAVIS v. WILLIAM T. COLEMAN ET AL.

1. The alteration of a bill or note in a material part vacates the bill or note, except as between the parties consenting to such alteration.
2. Cutting off the name of one of the makers of a promissory note and substituting another is a material action.
3. A payment made by one of the makers of a promissory note, within three years, will take the debt out of the statute of limitations as to all.

4. Where the contract for the loan of money is made in Georgia, it will bear Georgia interest, though the note for the amount loaned be executed in this State.

APPEAL from HENDERSON Spring Term, 1847; *Dick, J.*

Debt, brought on a promissory note, executed by William T. and George S. Coleman, as principals with William Coleman and J. F. E. Hardy as sureties, payable to the plaintiff. The defendants pleaded the general issue, payment, statute of limitations, and statute against usury. The note bears date 25 November, 1836. The facts agreed on by the parties were as follows: The plaintiff was, and now is, a citizen of the State of Georgia, but for several years before and since 1836 spent the summer months in the county of Buncombe, State of North Carolina. William T. and George S. Coleman were merchants and partners doing business in the town of Asheville, North Carolina, under the firm name of William T. & George S. Coleman, in 1836, and for some time after. The note was originally made by William T. & George S. Coleman, William Coleman and John Osborne. After the note had stood three years, Osborne became dissatisfied, and it was agreed by W. W. Davis, the plaintiff, William T. Coleman, John Osborne, and J. F. E. Hardy that Osborne's name should be cut off the note and that J. F. E. Hardy should sign it, which was done (425) accordingly, in the town of Asheville, North Carolina. George S. Coleman was not present and had no knowledge of the change being made. This change in the note was made in November, 1839. The copartnership between William T. and George S. Coleman expired in 1838. It was further agreed that William T. Coleman, on 15 January, 1840, executed a deed in trust to one Isaac T. Poor, by which deed he conveyed to the said Poor all the partnership effects for the purpose of paying the creditors of the firm and the note on which this suit is brought is mentioned in the said deed as one of the debts to be paid out of the said effects. Poor, the trustee, made sundry payments on the said note during his lifetime, one of which was within three years before this suit was brought. The executor of the said trustee made payments on the said note out of the partnership effects within three years before the commencement of this suit.

The defendants contended, *first,* that the cutting off of Osborne's name and the signing by Hardy, without the consent of all the parties to the note, rendered it void, so that no suit could be brought on it. *Secondly,* that if the note was not void, it could take effect only from the signing by Hardy, and was a new instrument, made in North Carolina. *Thirdly,* that the note was barred by the statute of limitations, and the payments made by the executor of Poor, the trustee, would not take the case out of the operation of the statute. *Fourthly,* that the note was infected

with usury, and therefore void. Evidence was given to show that the note was to bear 8 per cent interest, that being allowed by the laws of Georgia. The note bore date at August, Georgia.

The court charged the jury that the cutting off of Osborne's name and the signing by Hardy did not destroy the note, but the plaintiff would be entitled to recover the amount due on it unless it was infected with usury or barred by the statute of limitations. The court further charged the jury that the trustee, Poor, having made (426) sundry payments on the note out of the funds of the copartnership, by the direction of William T. Coleman, and one payment being within three years before this action was brought, and the executor of Poor having also made payments on said note out of said funds, all of which were within three years before action brought, the statute of limitations did not bar. The court further charged the jury that if they believed from the evidence that there was a corrupt bargain made between the plaintiff and the defendants William T. and George S. Coleman in the State of North Carolina, for the purpose of securing to the plaintiff more than 6 per cent on the money loaned, and that the note was dated "Augusta, Georgia," for the purpose of giving a false coloring to the transaction, when in fact the contract was fully consummated in North Carolina, the note would be void, and they ought to find for the defendants. The court further charged the jury that if they found there was no such corrupt intent to evade the statute against usury, yet if they found that the contract was fully consummated in North Carolina, although the note was dated "Augusta, Georgia," they ought not to allow the plaintiff more than 6 per cent interest. But if they found that the note was in fact made in Augusta and to be paid in Augusta, and it was not infected with usury, the plaintiff was entitled to recover the balance due, with 8 per cent interest on the principal money, that being the rate of interest in the State of Georgia.

The jury found a verdict for the plaintiff for the balance due on the note, and further found that the note was made in Augusta and to be paid in Augusta, and allowed interest at 8 per cent on the principal money due. The defendants moved for a new trial, which was refused, and judgment being rendered for the plaintiff, the defendants appealed.

Baxter for plaintiff. (427)
Gaither and Avery for defendant.

DANIEL, J. The judge charged the jury that the cutting off from the note the name of Osborne did not destroy it, and the plaintiff was entitled to recover notwithstanding. The plaintiff had a verdict and judgment against William Coleman (who was not present when the alteration in the note was made and who never assented to the making of the altera-

tion) and J. F. E. Hardie. We do not agree with his Honor; for we think that the alteration of a bill or note in a material part vacates the bill or note, except as between the parties consenting to such alteration. *Downs v. Richardson,* 5 Barn. & Ald., 674; 1 Steph., N. S., 788. The cutting off the name of one of the makers of the promissory note and substituting that of another was a material alteration of the note, and vitiated it as to William Coleman, for he agreed to be bound with Osborne, and it may be that Hardy is not a substantial cosurety. *Secondly,* we concur with his Honor that the action was not barred by the statute of limitations. William T. Coleman, one of the makers of the note, made a payment on it by his agent, Poor, within three years next before the commencement of this action. Poor had funds placed in his hands by William T. Coleman to aid in paying this very note, and he did aid in paying as aforesaid. This payment, made by one of the makers of the note, according to numerous decisions, took the case out of the act of limitations as to all the other makers of the note. Cases were cited to show that dividends received by the creditor under a commission of bankruptcy against one of the joint debtors will not repel the statute as to the others; and we approve of those cases, because (428) there the payments are by the force of law, and are not the acts of the parties. But the payments here are made by the debtor himself, or under his authority by his agent and out of his funds, which distinguishes this from the other cases. *Thirdly,* the money was loaned by the plaintiff to the Messrs. Coleman in Georgia, and the note for the repayment was then and there given. The fact that Hardy, by the consent of the plaintiff and one of the borrowers, placed his name on the paper as one of the makers of the note in North Carolina, did not make it, as to him, a North Carolina contract. The name of Hardy on the note, without a consideration, would only have been a *nudum pactum.* It was the loan made in Georgia by a Georgia citizen that constituted the consideration of the note, not only as to the parties that originally made it there, but as to Hardy, who subsequently signed the paper here. It is a case like that of *Arrington v. Gee,* 27 N. C., 590. The original contract of loan having been in Georgia, even a note given here might properly reserve Georgia interest. *McQueen v. Burns,* 8 N. C., 476. Therefore, this note, purporting to be given in Georgia, though executed by Hardy here, is no evasion of our law against usury, but properly drew 8 per cent interest, which is admitted to be the rate in that State.

We think the judgment must be reversed because the judge charged that the plaintiff was entitled to recover against William Coleman, although he did not assent to the alteration made in the note. The recovery ought to have been against Hardy only.

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

Cited: Anderson v. Doak, 32 N. C., 297; *Roberts v. McNeely,* 52 N. C., 507; *Lane v. Richardson,* 79 N. C., 161; *Green v. Greensboro College,* 83 N. C., 451; *Long v. Mason,* 84 N. C., 16; *Wood v. Barber,* 90 N. C., 80; *Taylor v. Sharp,* 108 N. C., 381; *Wicker v. Jones,* 159 N. C., 109.

(429)

DOE ON DEMISE OF JESSE DICKSON v. REUBEN PEPPERS.

The officer making a levy on land under an execution from a justice of the peace must make his return of the land he has levied on, on the judgment and execution, when they are on one and the same piece of paper; or on the execution when they are on different ones; or on some paper annexed to the one or the other, and which would constitute a part of it and have to be recorded with it. A sale made under an execution issuing on such return is void.

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

The only question in this case was as to the sufficiency of the return, by a constable, of a levy made on the land in dispute. A judgment had been obtained before a justice of the peace against this defendant, and an execution was issued to a constable, who made the following return: "No goods and chattels to be found, levied on land as per notice filed." The notice was produced, and it set forth, among other things, that the constable had levied on the land of the defendant, where he lived, etc. Upon this return the county court rendered judgment condemning the land; and an execution having issued pursuant thereto, the plaintiff became the purchaser at the sale. This action is brought by the purchaser, against the defendant in the execution, to recover the possession. On behalf of the defendant it was objected that the order of the county court under which the land was sold was void for the want of a proper levy, and the sale conveyed no title to the purchaser. Of this opinion was the presiding judge, who decided that the levy, to be legal, must be indorsed on the judgment and execution, or on the execution, and could not be made by reference to another paper, and that the order of the county court awarding an execution was irregular and void. In deference to this opinion, the plaintiff, having (430) submitted to a judgment of nonsuit, appealed.

No counsel for plaintiff.
Iredell for defendant.

NASH, J. We concur with his Honor that there was no sufficient return of a levy in this case. The paper to which reference was made

by the officer who was intrusted with the execution of the process was not attached to the execution or judgment; and to this fact, it must be presumed, the presiding judge had allusion in saying that "the levy could not be made out by reference to another paper," because, if attached, it would constitute a part of the paper itself, and could not, with propriety, be said to be referred to. As to the insufficiency of the levy there can be no doubt, upon an inspection of the act directing the manner in which the officer shall perform his duty. It directs him, upon an execution from a justice of the peace coming to his hands, to levy on the goods and chattels, etc., and, for want of goods and chattels, to levy on "the lands and tenements," etc., "and make return thereof to the justice who issued the same, setting forth *on the execution* the money," etc., "and what lands and tenements he hath levied," etc. It further provides: "And the justice to whom the return is made shall return such execution, with all the other papers on which the judgment was given, to the next court to be held for his county," and the clerk of the court shall "record the whole of the papers and proceedings had before the justice." Rev. Stat., ch. 62, sec. 16. This last clause explains why it is the Legislature required the return to be indorsed on the execution; it is that it might be made a record of. Justices' courts are not courts of record, and sound policy did not permit that the title to real property, acquired under the action of the law, should be trusted
(431) to their frail memorials. To enable the county court to act advisedly and to know what land they were called on to condemn, it was necessary that the proceedings before the magistrate should be filed on their records, ascertaining with legal certainty the land levied on. They constitute their warrant for proceeding to condemnation, without which the cannot act, or, if they do proceed, their action is void. To the puhchaser under such an execution the provision is all-important. It preserves to him the evidence upon which his title to the land rests. If other land than that levied on is sold by the officer, the purchaser acquires no title. By pursuing and observing the provisions of the act, the land is effectually identified, and his evidence is perpetuated for him. The officer, then, making the levy must make his return on the judgment and execution when they are one and the same piece of paper, or on the execution when they are different ones, or on some paper annexed to the one or the other. In this case the paper referred to by the officer was not attached to either the judgment or execution, but is the notice required to be given to the defendant five days before court by the officer making the levy. This notice is the act of the officer, with which the justice had nothing to do, and it was not to be returned to him. The law does not require *it* shall be recorded. Being a loose piece of paper, it might very easily be lost, to the great injury of the

purchaser. The objection to the plaintiff's right of recovery lies upon the face of his title, and the defendant is at liberty to avail himself of it.

Cited: *Jones v. Austin,* 32 N. C., 22; *Brazier v. Thomas,* 44 N. C., 29.

(432)

DEN ON DEMISE OF JOHN B. S. HARRIS ET AL. v. JOHN IRWIN.

When land has been sold by a sheriff under an execution, and he dies before making a conveyance, the succeeding sheriff cannot make the conveyance unless the purchase money has been paid to the sheriff who sold.

APPEAL from MECKLENBURG Special Term in November, 1846; *Pearson, J.*

Ejectment, in which the plaintiff and defendant both claimed title to the land in question under one Penman. The title of the plaintiff consisted of a sheriff's conveyance under a judgment and execution against Penman. The sale was in October, 1839, and the sheriff's deed dated 4 November, 1839. The proceedings were all regular. The defendant's title was as follows: At April Term, 1838, of the county court of Mecklenburg, Joseph H. Wilson obtained a judgment against Penman for a large sum of money, upon which an execution issued, and was by J. McConapay, the then sheriff of the county, levied on the land in question. The levy was made on 1 October, 1836, and the execution returned, "Not executed for want of bidders." A *venditioni exponus* was issued to the April Term, 1839, and the land was sold by McConapay on 28 January, 1839, after he had gone out of office. Joseph H. Wilson, the plaintiff in the execution, was the purchaser. In his return the sheriff stated that no money was paid, and that when paid it was applicable to other executions. McConapay went out of office in November, 1838, and was succeeded by one Alexander, by whom the deed was made to Wilson, and at that time McConapay was dead. The case further shows that, after the sale by McConapay several other executions issued under the judgment of Wilson. The deed from the sheriff, Alexander, to (433) Joseph H. Wilson bears date 24 May, 1845, and recites the *venditioni exponas* to McConapay, and contains a receipt for the money as paid to him, Alexander, by Wilson. The court was of opinion that Alexander had no authority to make the conveyance to Wilson. Thereupon a verdict was rendered for the plaintiff, and from the judgment pursuant to the verdict, the defendant appealed.

Boyden, Guion, and Iredell for plaintiff.
Wilson and Alexander for defendant.

NASH, J. On the trial of the cause below several questions were made. Only one was decided by his Honor, and as we concur with him in his opinion on that point, we have not, as it would otherwise have been our duty to do, looked into the others. His Honor decided that the deed from Alexander to Joseph H. Wilson, under which the defendant claimed title, was void, as being made without any authority in law. The objection is that the power given by the Legislature to a sheriff to make title to lands sold by his successor in office is a special one, and must be strictly pursued. In this case the purchase money bid by Wilson, the purchaser, was not paid to McConapay, the officer by whom the purchase was made, but to Alexander, his successor in office. If the latter had any authority in law to receive it, then his deed might be good; if he had no such authority, it is not. All the acts which have been passed by the Legislature on this subject confine the power of a sheriff, out of office, to execute a deed for land sold by him while in office to the case where the money has been paid. This is the language of the act of 1784, the first on the subject. It provided that "Where a sheriff or coroner has heretofore sold any lands, etc., and has not executed deeds for the same, such sheriff or coroner, though he be now out of office, shall and he is hereby required (434) to seal and execute a deed of bargain and sale for such lands to such person or persons who have purchased at vendue and *paid the money* for the same"; and, "In case of his death or removal out of the State, then his successor is to make the deed as is herein next before directed." The same direction is contained in the act of 1799 and in that of 1838; the acts differing only in extending the provisions on the subject to deeds made after the periods of their respective passage as well as to those made before. Through all these acts, then, the same provision is found, that when a sheriff makes a sale of land under an execution which has begun to run, and his term of office expires, he can make a deed or conveyance of it *if the purchaser has paid the money.* The payment of the money is a condition, and it must be paid to him, as he is the only officer of the law authorized to receive it. In this case the execution had begun to be executed by McConapay. He had levied the *fieri facias* upon the land in question, the *venditioni exponas* had been directed to him, and under it he sold and returned to the court that the money was not paid by the purchaser. The new sheriff, Alexander, was not the returning officer, and had no process nor power to receive the money. The money was not received by him in his official character. The authority which sheriffs have to execute a conveyance under such circumstances is derived solely from the acts above referred to. It is a

special delagation of power, and must be strictly pursued. If one departure from the requirements of the law is permitted, it will necessarily introduce others, until at length the law as established by legislative will will give way and be superseded by the law of convenience. If it were necessary to investigate this case further, there are discrepancies between the return of the old sheriff, McConapay, and the deed of the new sheriff, Alexander, which would require explanation. But, believing as we do, that the authority given to Alexander by the act of 1838 was a special one, and being of opinion that the case had not arisen in (435) which he had any power to make the deed under which the defendant claims, we are of opinion that it is void and conveyed to the defendant no title.

PER CURIAM. No error.

Cited: Isler v. Andrews, 66 N. C., 555; *Edwards v. Tipton,* 77 N. C., 224; *Cook v. Pittman,* 144 N. C., 531.

HORATIO THOMPSON v. L. D. CHILDS.

When a submission to arbitration is by bond and an award is made, if the award be for the payment of money, a suit may be brought either on the bond or on the award, at the option of the party claiming benefit under it.

APPEAL from LINCOLN Spring Term, 1847; *Settle, J.*

Debt upon an award, and the case was this: The plaintiff and defendant, having mutual claims, by bond bearing date 4 February, 1846, submitted the matters in dispute to the arbitrament of L. E. Thompson and W. Williamson, who made their award on the 7th of the same month and duly notified the parties thereof. In the award the arbitrators decide that the defendant owes to the plaintiff $1,732.52, and adjudge that he pay it. The objections made by the defendant to the plaintiff's recovery were all overruled by the judge, and from the judgment given in favor of the plaintiff, the defendant appealed. The objections are (436) stated in the opinion delivered in the Court.

Thompson and Williamson for plaintiff.
Alexander and Guion for defendant.

NASH, J. On the trial below, several objections were taken to the plaintiff's right of recovery, all of which were properly overruled by the

presiding judge. The first is that the action ought to have been brought on the bond of submission. It may be brought on either, at the option of the plaintiff, where the award is for the payment of money. 2 San., 62, Caldwell on Awards, 190, 192. The second objection is to the award, that it does not correspond to and agree with the submission. The words in the bond are, "all manner of accounts, debts, *dues,* and demands"; the matters taken into consideration and passed upon by the arbitrators are, "all matters of account, debts, *claims* and demands." The only difference between the two instruments is in the substitution in the latter of the word *claims* for that of *dues* in the former; substantially they are the same. The third objection is that the arbitrators had not decided upon or taken into their consideration a bond for $500 held by the plaintiff on the defendant, and that, therefore, their award was incomplete. With respect to this bond, it appeared that before the matters in dispute were referred to Thompson and Williamson, they had been referred to other arbitrators, who had made an award in favor of the plaintiff. The defendant then offered to give to the plaintiff his bond for $500 if he would consent to set aside that award and refer the matters in dispute to Thompson and Williamson, and would stand to, abide by, and perform their award. The plaintiff agreed to the proposition, and the $500 bond was executed and placed in the hands of Thompson as an escrow. When the award was made, a copy was handed to the plaintiff by Thompson, and he expressed his willingness to abide by it,

(437) whereupon the bond was, by Mr. Thompson, delivered to him.

The exception by the defendant is that the arbitrators did not in their award pass upon this bond. The answer to the objection is a simple one. If that bond constituted a debt, within the terms of the submission, then it was passed on by the arbitrators, and constitutes a portion of the $1,732.52 awarded by their judgment; if it did not come within those terms, the arbitrators had no power to take it into their consideration, and their not doing so constitutes no error on their part. Whether the bond was or was not within the submission, we do not decide, as the question is not before us. That question cannot arise until a suit be brought on that bond and the defendant plead the award in bar. The arbitrators in their award do not profess to be guided in their decision by the principles of law, and, if they did, no error in that particular has been pointed out to us, nor do we perceive any. We see no error in the opinion of the court below.

PER CURIAM. Affirmed.

(438)

JAMES W. PATTON v. SAMUEL SMITH.

An attachment, served in the hands of a garnishee as a debtor, is substantially an action at law by the defendant in the attachment, and, therefore, the plaintiff in the attachment cannot recover against the garnishee in a case in which the defendant in the attachment could not have recovered the same debt.

APPEAL from BUNCOMBE Spring Term, 1847; *Dick, J.*

Assumpsit, on the defendant's acceptance of an order drawn on him by one Newland in favor of the plaintiff for $123, expressed in the order to be "the balance in your hands on the McCraw note, when collected." It was tried on *non assumpsit.* On the trial the plaintiff did not produce the order; and, to account for not doing so, he gave evidence to the court that there had been a former trial of this suit, and that the order was then produced by the plaintiff's counsel and proved; and one of the gentlemen who was of counsel for the plaintiff on that trial stated that he had it at that time, and supposed he had put it among his client's papers in cases in that court; but that, upon diligent search, he could not find it among his papers, and, therefore, he believed that it was left with the clerk of the court among the other papers of the cause. Another gentleman who was also of counsel with the plaintiff at the former trial stated that it was not in his possession, and that he believed it was put away among the papers in the cause by the counsel or jury, and left with the clerk. The clerk then stated that he had no recollection of having the paper, and that he had diligently searched all his files of the term of the former trial, and had not been able to find it. Upon that evi-
dence, the court allowed the plaintiff to prove the contents of the (439) instrument and its execution by the drawer and acceptor.

The plaintiff further gave evidence that Newland held a note on one McGraw for $800, payable in the summer of 1838, and was indebted to the defendant in the sum of $677, and, for the purpose of paying it, that he transferred to the defendant on 3 July, 1838, McCraw's note, either by indorsement or delivery, it did not appear which, leaving a balance of $123 due on McCraw's bond belonging to Newland when it should be collected. For that balance this order was drawn and accepted, as above stated, in order to pay that sum, which Newland owed to the plaintiff. The plaintiff further gave evidence that McCraw was entirely solvent, and that in 1839 the plaintiff called on the defendant for payment of his acceptance, when he replied that the money had been taken out of his hands by attachments, at the instance of other creditors of Newland, and, therefore, he refused to pay the plaintiff.

The counsel for the defendant insisted that to entitle the plaintiff to

recover he ought to show that the defendant had collected McCraw's note, and that there was not sufficient evidence of that fact; and he prayed the court so to instruct the jury. The presiding judge thereupon stated to the jury that they ought not to find for the plaintiff unless they were satisfied that the defendant had collected the debt from McCraw when the plaintiff demanded payment from him, and that there was evidence given for the plaintiff from which they might find that fact.

The counsel for the defendant further prayed the court to direct the jury that, as the plaintiff did not prove that McCraw's note was indorsed to the defendant, the sum of $123, claimed by the plaintiff, was subject to be attached by other creditors of Newland, and, consequently, that the plaintiff could not recover; which instruction the court refused to give.

There was a verdict for the plaintiff and a judgment, and the de-
(440) fendant appealed.

N. W. Woodfin, Edney, and Gaither for plaintiff.
Francis for defendant.

RUFFIN, C. J. We think the evidence of the loss of the instrument was sufficient to let in proof of its contents. The affidavit of the plaintiff might have been added, and doubtless would have been required, if it had appeared that he had the possession at or after the former trial, or if there had been evidence to raise a probability that it had since come to his hands. But there was no suggestion that the plaintiff was even present when the case was first tried, or that there was any opportunity for him to get the paper. The counsel distinctly stated that they, and not their client, had it in possession, and that it was kept after the trial either by one of them or the clerk; and upon search by all of those gentlemen, in whose custody it certainly had been, it has not been found, and that sufficiently establishes the loss for the purposes of this question.

There was certainly evidence to be left to the jury of the collection of the money from McCraw by the defendant. Indeed, although it was not direct evidence, it was little less convincing. The debtor was good for the money, and it had been due about six months before the plaintiff's demand, and the defendant did not show on the trial that he had been put to a suit on the note, or produce or give any account of it; and, especially, when asked for payment, the defendant did not say he had not collected the money, but impliedly admitted that he had by the strong negative pregnant contained in his declaration as the reason for refusing payment, that the money had been attached in his hands by Newland's creditors.

The court properly refused to give the last instruction, for several reasons. The jury ought not to be charged upon abstract points to which

there is no evidence; and here no such attachments were shown (441) as those supposed. Besides, if there had been, they could not have protected the defendant, because he had engaged to pay the plaintiff on the single condition that he should collect the money from McCraw, and, having done so, his engagement became absolute. Under those circumstances, moreover, the money was not liable to attachment, if that were material, for, clearly, Newland could not have recovered the money from the present defendant; and, consequently, it could not be attached by a creditor of Newland, since an attachment, served in the hands of a garnishee as a debtor, is substantially an action at law by the defendant in attachment. *Gillis v. McKay,* 15 N. C., 172. The defendant would have had nothing to do but state the facts in his garnishment, and they would have shown that the money did not belong to Newland, because he had accepted his order for it in favor of another person. That would have been equally true whether the bond was assigned or not; for if, in the latter case, he acted in a legal sense, as the agent of Newland in collecting the money, yet, when collected, he had a right to hold it for himself, as the fund on which his acceptance was founded. In every point, therefore, the opinions given by his Honor were correct.

PER CURIAM. No error.

(442)

JESSE WILLIAMS v. GEORGE CLAYTON.

The declarations of a vendor, after he had sold property, are not evidence against his vendee as to the title of the property.

APPEAL from BUNCOMBE Spring Term, 1847; *Dick, J.*

Trover, brought to recover damages for the conversion of two barrels of brandy to the use of the defendant. The plaintiff first introduced a witness by the name of Patton, who stated that about 1 April, 1844, the plaintiff informed him that he, the plaintiff, had understood that one Bates, then residing in Hendersonville, was offering 40 cents cash per gallon for brandy, and it was agreed between the witness and the plaintiff that each of them should send two barrels of brandy to Bates. The brandy was sent accordingly by one Byers. Patton further stated that he expected to get the money for his two barrels of brandy on the return of Byers, but did not receive it. He further stated that neither Williams nor himself had seen Bates or made any contract with him before the brandy was sent by Byers. Byers was then examined. He stated that he was employed by Williams (the plaintiff) to take the brandy to Bates. He also took a paper from Williams to Bates, which he understood was

an order for the money due for the brandy. When he got to Hendersonville, he did not find Bates at his grocery, but was informed that he was at the courthouse. He found Bates at the courthouse, who stated he was much engaged, and could not attend to receiving the brandy then, and directed the witness to have the brandy placed in his (Bates') yard and he would attend to it when at leisure. The brandy was placed
(443) according to the direction. The witness then presented to Bates the paper sent by Williams. Bates said he could not then attend to it, but he would see Williams and Patton the next week at Buncombe court. The defendant then introduced one Gilreath, who stated that the plaintiff was indebted to him on a justice's judgment, and, for the purpose of discharging the same, the plaintiff drew an order on Bates, in the words and figures following, to wit: "Mr. J. J. Bates. Sir: Pay Penil Gilreath $65 for the brandy I sold to you. Jesse Williams." This order Gilreath presented to Bates, but it was not paid, and was returned to Williams. The defendant then proved that, after the return of the above order to Williams, Bates, being much indebted to various persons, on ....., 1844, by deed conveyed in trust to the defendant, for the benefit of his creditors, the four barrels of brandy above mentioned and all his other effects, and delivered the brandy to the defendant. The plaintiff then proposed to prove the declarations of Bates, made in the presence of the defendant, after the execution and delivery of the deed in trust and after the delivery of the brandy to the defendant, for the purpose, as he alleged, of showing that there was no sale in fact of the brandy by the plaintiff to Bates. The court rejected the evidence. The plaintiff's counsel prayed the court to charge the jury that the facts sworn to by Patton and Byers did not in law constitute a sale and delivery of the brandy to Bates. The court refused to give the instruction prayed for, but charged the jury that if they believed from all the evidence submitted to them there was a sale and delivery of the two barrels of brandy to Bates by the plaintiff, the property vested in Bates, and he had a right to convey it to the defendant, and the plaintiff was not entitled to recover.

(444) The jury found for the defendant, and a new trial being moved for and refused, and judgment rendered according to the verdict, the plaintiff appealed.

Baxter for plaintiff.
Gaither for defendant.

DANIEL, J. Bates assigned by deed the two barrels of brandy, now in controversy, to the defendant. The vendor is never permitted, after he has sold property, to be heard to say that he never had any title to that

property, nor are any declarations of his made after the sale, whether in the presence of the vendee or not, admissible in evidence to defeat or impair the sale. The judge did not err in refusing to receive the evidence offered of the declarations of Bates, made in the presence of the defendant.

Secondly, the plaintiff insisted that the court should charge the jury that the evidence given by the two witnesses, Patton and Byers, did not of itself establish contract of sale of the brandy. The court refused, but charged the jury that if they believed, from *all* the evidence submitted to them, that there was a sale and delivery of the brandy, then the property vested in Bates. We do not see any error in the court's refusing to charge on garbled parts of the evidence, as the plaintiff did not pretend to allege that the residue of the evidence offered by the defendant, to wit, the order drawn by the plaintiff on Bates in favor of Gilreath, was a forgery. That order was an admission, in writing, by the plaintiff, of a sale of brandy by him to Bates. It is possible that the order may have been drawn for the price of another lot of brandy. But there is nothing in the case to show that the plaintiff ever had any dealings in brandy with Bates except the single lot carried by Byers. If the plaintiff had insisted that the order had not been proved to be his, or that it was a forgery, then there would have been some propriety in his (445) prayer to the judge to charge as he requested.

PER CURIAM. No error.

Cited: Hodges v. Spicer, 79 N. C., 229.

WILLIAM H. THOMAS v. GEORGE W. HOLCOMBE.

Where a warrant is issued against three, and returned "Executed," and the judgment is against the "defendant" in the singular, and so also is the entry in the stay of execution, and especially where the justice who rendered the judgment was himself a party defendant, it cannot be determined by the court against whom the judgment really was.

APPEAL from CHEROKEE Spring Term, 1846; *Pearson, J.*

This suit was commenced 7 June, 1843, by warrant against the defendant, as the indorser of a note made by Singleton Rhea to William Cunningham for $45.60, and indorsed by Cunningham to the defendant and by the latter to the plaintiff Thomas. The plea was, former judgment, and in support of the issue the defendant produced a warrant, at the suit of the present plaintiff, issued against Singleton Rhea, William

Cunningham, and the present defendant, George W. Holcombe, in a plea of debt due by note for $45.10, which was returned "Executed," and on which judgment was entered on 5 August, 1841, by William Cunningham, a justice of the peace, in the following words: "Judgment
(446) against the defendant, by confession to the officer, for the sum of $45.10, principal, and interest from 14 January, 1841, until paid, and 40 cents costs." And a stay of execution was entered, also, in the following words: "Defendant prays stay of execution and gives for security A. J. Connor, this 12 August, 1841," which was signed by Connor and attested by William Cunningham as a justice. The defendant then proved that the note on which this warrant is brought is the same as that mentioned in the warrant of August, 1841, and the William Cunningham who gave the judgment of 1841 is the payer of the note and one of the persons mentioned as defendants in the warrant on which he gave the judgment as aforesaid; and the plaintiff thereupon insisted that the same was not a valid judgment against the present defendant, and did not bar this suit. Of that opinion was the court, and so instructed the jury; and they having found accordingly, and judgment being given for the plaintiff, the defendant appealed.

J. W. Woodfin for plaintiff.
Francis for defendant.

RUFFIN, C. J. It seems that the ground chiefly relied on in the Superior Court in support of the decision was that the judgment was void because it was rendered by a magistrate who was interested to have the judgment entered against the other parties and also was, himself, a party to the suit.

Although it is extremely reprehensible in a judicial officer to sit in a cause to which he was a party, or in which he is interested, and we suppose that a judgment given by a justice of the peace on the side of his interest may be reversed or quashed for that cause, yet the Court is not prepared, without more consideration than we can now bestow, to say that it is so utterly void that it may be so treated immediately by
(447) the plaintiff who obtained it, and that as against other parties than the magistrate himself. The point is not further examined because the Court holds, on another plain ground, that the judgment does not protect the defendant in this suit. That ground is that it does not appear to be against him, and it is necessary that it should in order to constitute a bar. It is true, the warrant was against the three, and it was returned "Executed," yet it is not stated on whom it was executed, and the judgment is only "against the defendant" in the singular number, without saying which defendant. So in the entry of the stay the

same phrase, "defendant," is used again. It is to be taken, by a plain implication, we think, that the magistrate was not giving judgment against himself, as he professes to act on an admission to the constable, proved, as we suppose, by that person; and, moreover, he could not be so silly as to suppose the stay good that he would grant to himself. If he was not charging himself by the judgment, it is presumed he did not mean to render one against this defendant, who was his own assignee. It is extremely probable, therefore, that the "defendant" was Rhea, the maker of the note alone, especially as costs are given only for service on one person. But, however that may be, we think this defendant does not establish that it was against himself; for the "defendant" either meant Rhea or it is so vague that it does not designate any one in particular, and would, for that reason, be ineffectual. We think such a judgment against the "defendant," upon a warrant against three persons, would not justify a sale of this defendant's goods on an execution; and that, as against him, it is a nullity.

PER CURIAM. No error.

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(448)

SAMUEL P. JOHNSTON v. JOSEPH LANCE.

1. If the truth of the charges made in a libel, when the libeler has been prosecuted for it, will justify him in bringing an action for malicious prosecution, the charges ought to be proved to be strictly true by plain and full evidence.
2. Where one repeats an oral slander and gives the name of his informant, he is justified or not, according to the *quo animo* the charge is repeated and propagated.
3. In the case of a written libel, the mention of the name of the author, or the general rumor, of the libelous matter will not excuse or justify the publication of such, even if the author or the rumor be strictly proved.

APPEAL from BUNCOMBE Special Term in June, 1846; *Battle, J.*

This was an action on the case for a malicious prosecution. Pleas, general issues and jurisdiction. The plaintiff, in support of his action, introduced a State's warrant, taken out against him by the defendant, and charging him with publishing a libel against the defendant, under which he was arrested and detained in custody about thirty-five hours, when he was taken before a magistrate, and, upon examination, was discharged. The defendant then in his defense proved that the plaintiff published the paper writing, of which the following is a copy: "Notice. To all not only the people of this State and County but to the whole Union if there is any yet in the dark, though I dont even think that

there is any in these regions but nows as much about the gentleman as I do but for the benefit of others I hereby certify that one Jo Lance one of the beings of that State and County is a lyer and if the boy wants it I can do as I have done before I can prove it I dont apprehend that this will hurt the gentleman's feelings, for I heard Mr.
(449) W. H. F. tell him to his face that he had swore a lye and stole a hog and he could prove it from which the said Lance had like to rode Ball to death for a writ which he obtained and Mr. W. H. F. was bound to cort and I am told since that one glass of apple jack cured the wound and I recon that is true for I saw the gentlemen drink friends so if this should tech the feelings and the gentleman and he wants to reach me he can ride ball again and look below and find my name S. P. Johnson Look for a shoat from Bets at a broken leg but dont forget to mind selling milk and water to J. R. S. at ten cents per lb."

The plaintiff then undertook to prove that the charges contained in the alleged libel were true; and for this purpose he called upon several witnesses who testified that the defendant had the character of being a common liar. He then called William H. Fulton (the person whom he alleged to be alluded to in the paper writing under the initials W. H. F.), who testified that he had, some time before the publication of the paper, charged the defendant to his face with having sworn to a lie and stolen a hog; that the defendant had sued him therefor, and that while the suit was pending he and the defendant had agreed to settle the matter and be friends, and that they, at the instance of a mutual friend, took a drink together and parted, as he supposed, friendly; but the defendant afterwards refused to stand to the agreement; but how their suit was ultimately disposed of was not shown. The plaintiff then called upon Mr. Shuford (whom he alleged was alluded to also in the publication by the initials of his name), who testified that the defendant brought some butter to his store for sale, that he proposed to buy it, and, in looking at it with that view, found it had a large quantity of milk and water in it. He, however, told the defendant he would take it after he could have the milk and water separated from the butter, to which the defendant assented, and he then
(450) bought upon those terms. The plaintiff insisted that he had proved the truth of all the charges contained in the alleged libel; that the defendant, therefore, had no probable cause for the prosecution; that it was malicious, and he had a right of action against him.

The defendant contended that the plaintiff was bound to prove not only that he, the defendant, had been charged with swearing to a lie and with stealing a hog, but that he was actually guilty of those offenses. He contended, further, that the evidence introduced, if believed, did not

establish the charges of his having compromised his suit with Fulton over a drink of liquor, and of having sold milk and water for butter.

The court instructed the jury that it was not necessary for the plaintiff to prove the truth of the charges, that the defendant had sworn to a lie and stolen a hog, but only that he had been charged to his face with those offenses by W. H. F., and that, if the plaintiff's testimony were believed, he had proved substantially all the allegations contained in his publication. The jury returned a verdict for the plaintiff, upon which he had a judgment, and the defendant appealed.

Edney for plaintiff.
N. W. Woodfin for defendant.

RUFFIN, C. J. The publication made by the plaintiff concerning the defendant is so obviously and grossly defamatory that it must be taken upon its face to have been made with the intent to injure the character of the defendant, and, therefore, that it was, in a legal sense, malicious and libelous. The defendant had unquestionably, then, probable cause for instituting a prosecution for the libel—at least, *prima facie*. We are not prepared to say at present that even proof in this action of the defendant's guilt of the matters, charged on him in the libel, would deprive him of the bar to the action arising out of the probable cause the defendant had for supposing the plaintiff liable to (451) indictment for that malicious publication; for, although when indicted the plaintiff could have given the truth of his charges in evidence, and thereupon would have been entitled to an acquittal, yet he was *prima facie* guilty of libeling a citizen, and, therefore, might justly, perhaps, be called on for his proof, and ought not to have his action against one for so doing. We entertain serious doubts whether the statute, which allows the truth to be given in evidence upon an indictment for a libel, can be carried further and to the extent of giving to the defendant in the indictment an action against the prosecutor for malicious prosecution because the libel was true, for his acquittal arises upon evidence which he is compelled to give on his part in order to extricate himself from a state of probable and apparent guilt; and it would seem to be almost impossible to persuade a jury that a person, libeled as the defendant was, preferred a prosecution against his defamer from motives of malice merely, instead of a desire that the person should be punished for the malicious publication complained of by him; and without such malice by the prosecutor, this action ought not to have been sustained, even though there had not been probable cause. But the point was not made in this case nor argued before us, nor, indeed, has it been much considered by us; and as we think it deserves to be well

discussed and considered before a decision of it either way, we do not think proper now to lay down any rule in respect to it, since in our opinion, this case may be determined and a *venire de novo* must be awarded upon other points on which there is no doubt.

If the truth of the charges made in a libel will not only justify the publication, when the author is tried for it, but also will give him an action for malicious prosecution, it is plain that to have this last effect the charges ought to be strictly true, by plain and full evidence.
(452) This plaintiff avowed in this publication itself the purpose of provoking the defendant to sue or prosecute him for it. He expressly invited the very proceeding of which he now complains, as, indeed, every libeler impliedly does. Then he ought to be prepared to make good every word he thus utters to gratify his malevolence, and is entitled to no charitable construction of his language, nor liberal extension of his evidence beyond its necessary import; for a libeler is not a public benefactor, but is among the most licentious, malignant, and mischievous of our race, and, therefore, can ask no indulgence to which he is not entitled *stricti juris.*

The plaintiff's proof in this case not only did not sustain his charges strictly, nor even substantially, but, in the opinion of the Court, signally failed in respect to each and every one of them.

The first is: "I hereby certify that Jo. Lance is a liar. And if the boy wants it, I can do as I have done before—I can prove it." This is a direct and positive averment that Lance *is* a liar; and it is perfectly plain that its truth is not sustained by evidence that he had the general character of being a liar. If Lance had brought an action for the libel, a plea of such a general reputation would not justify the charge, though the fact might mitigate the damages; for the charge affirms as a positive fact that he was guilty of the despicable vice of lying, while the proof is *not* of *the fact,* but that people suppose him to be thus guilty. If one accuse another of stealing a horse, the plea of a common rumor that the person is a horse thief will not amount to a justification in an action for the libel, more than evidence of such a rumor would establish the party's guilt upon an indictment for the theft. Reputation is in no case evidence that one is guilty of a specific offense; and that is the charge here.

The next imputation on the defendant is: "I heard Mr. W. H. F. tell him to his face that he had sworn a lie, and stole a hog, and he
(453) could prive it; for which the said Lance had like to have rode Ball to death for a writ, which he obtained, and Mr. W. H. F. was bound to court; and I was told since that one glass of apple-jack cured the wound, and I reckon it was true, for I saw the gentlemen drink friends." Here are two libelous imputations against the defend-

ant. The one, that the plaintiff had heard some person, not named, but designated only by the initials, "W. H. F.," accuse the defendant to his face of the crime of perjury, and the other that the defendant either sued or prosecuted "W. H. F." therefor, and then, as the plaintiff had heard from some one not named, the defendant had compounded the case over a glass of liquor without the accusation being retracted or compensated in any other way. Neither of those charges is sustained by the evidence, as we apprehend. The latter, plainly, was not. According to the libel, a glass of apple-jack cured the wound, so that the defendant was pacified by a drink. But Fulton's testimony did not prove any such thing. He says that he and the defendant "agreed to settle the matter and be friends, and that, at the instance of mutual friends, they took a drink together and parted friendly; but that afterwards the defendant refused to stand to the agreement." Now, it is plain that, according to this testimony, the liquor did not cure the wound and induce the defendant to dismiss his suit against Fulton. In fact, it was not compounded at all, and, as far as appears, is now pending. Fulton says "they agreed to settle the matter," but upon what terms was not specified, or, at least, he mentions none. The natural inference is that as the parties were to be "friends," the settlement was expected by the defendant to be made on such terms as became that relation—which, certainly could not be that he should dismiss his suit and pay the costs, and lie quietly down under the unretracted charge by his "friend" of perjury and theft. That could be no "settlement of the matter," but only a downright abandonment of all right to redress. That was not what Lance intended, and hence he did (454) not and would not "settle" the suit, because, when the parties came to talk about the terms, they could not agree. The drink of spirits was, therefore, not the price of the slander upon him, and of his suit; but it turned out that while the parties were in treaty for a compromise (which was never closed) they drank together, at the instance of friends who wished to promote peace between them. That transaction was, therefore, grossly perverted in the plaintiff's publication, according to his own evidence in support of it.

The other and more serious branch of the charge under consideration was equally destitute of support in the evidence. That consisted of the testimony of William H. Fulton that, before the publication, he had charged the defendant to his face with having sworn to a lie and stolen a hog, and that the defendant sued him for it, and that thereafter the transactions with a view to a compromise occurred, which have been already stated. The deficiency in the proof is that there is none whatever to the truth of the charges thus made by Fulton on Lance, that is to say, that, in fact, the latter did swear to a lie and did steal a hog,

as we unanimously hold there ought to have been. It has long been settled that, even in cases of oral charges, the repeater, who does not at the same time name his author, takes the assertion upon himself and can only justify by proving the truth of the accusation. *Earl of Northampton's case*, 12 Rep., 132. Within that rule the plaintiff was bound to give evidence of the guilt of the defendant; for he does not mention the name of the person from whom he heard the charge, but designates him by initial letters only, as "Mr. W. H. F. This did not give the defendant a certain cause of action against any other person in particular, and, therefore, according to the case cited, an action would lie against the repeater himself, unless he established the truth
(455) of the charge. But if it were admitted that "W. H. F." might, under the circumstances, be understood to be "William H. Fulton," yet the plaintiff would not be exonerated from the burden of proving the charge to be true. Where the slander is oral, and the repeater gives the name of the person from whom he heard it, the Court strongly intimated the opinion in *Hampton v. Wilson,* 15 N. C., 468, and *McBryer v. Hill,* 26 N. C., 136, that the justification depended upon the *quo animo* the charge is repeated and propagated; and with that we are, upon longer reflection, entirely satisfied; for, if one circulates a slander with the design to cause it *to be believed* either upon his own credit and character or those of his author, that the person implicated is guilty of the fact charged, he really and truly, though covertly, endorses the charge and should bear the burden of having affirmed its truth. He meant, when he repeated the slander, that *thereby* the party's character should be injured. How? By inducing the world to think that as such a man made the charge, and he, the repeater, gives it currency, it is true. That is the substance of what one intends and does who propagates a slander *malo animo,* that is, with the purpose of detracting from his neighbor's character and standing in society; and, therefore, he ought to be held bound to prove the charge as he meant it should be understood. If that be so where the slander is oral, much more is it true when it is printed or written, because the ill-feeling and evil purpose of the propagator are more distinctly exhibited, and the injury done to the other party is more extensive and durable. *Lewis v. Walton and Dole v. Lyon,* which were cited in *Hampton v. Wilson,* hold clearly that a justification by giving the author is inadmissible altogether in actions for libels; and the familiar case of the liability of the printer of a newspaper for a publication therein of another person, under the author's name, is conclusive upon the point.

There have also been several cases since, both in England and
(456) this country, to the same effect. The present is the first case in this State in which the point has arisen directly. But the con-

clusion necessarily follows from what has been held and said in the other cases before mentioned, and particularly in *S. v. White, ante*, 180. In that case we held that upon an indicement for a libel the publication of a charge as a rumor was not justified by proof of the rumor, but required proof of the charge itself; and it was distinctly stated by my brother *Nash* that even if the author had been given, it would have made no difference, unless the defendant had shown that he made the publication for a good end and without the evil one of defaming the prosecutor. Now, this plaintiff did not ask to be excused upon a good motive that actuated him, but insisted only that upon strict law he was justified by the truth. The truth of what is it to be understood? He says it is that Fulton told Lance he was forsworn and a theif. But was that all he meant the readers of his piece to believe from it? Certainly not. Courts must read like the world does, and understand charges in the same sense in which other men do. No person can read this piece without seeing that the plaintiff intended to injure the defendant's character as far as he could, and to have it believed that he was guilty. It is to that end that he says he heard the defendant charged with those crimes to his face, and that, after suing for the scandal, the defendant gave up the suit for the pitiful pretense of a drink of friendship, without any reparation by damages or acknowledgment of injury and pardon asked. Is it not clear the plaintiff supposed and intended that the world would infer from such conduct of the defendant that he had no character to vindicate, and was afraid to bring his suit to trial from a consciousness of guilt; in fine, that the public would infer that the defendant was really guilty? He ought, therefore, to make good the charge in the sense in which he intended to make it, which is, by proving the acts charged (457) on the defendant.

The last charge is the direct one of "selling milk and water at 10 cents per pound," and the evidence was an offer to sell butter from which the milk and water had not been perfectly separated. Upon the most favorable presumptions for libelers—to which, indeed, they are not entitled—evidence of an intention to do an act does not prove a charge of the act done. Besides, a man may innocently take a parcel of butter to market which may not have been properly beaten up by the dairy woman, while few would suppose that he could fairly sell milk and water at the price stated. Things are not to be taken in their worst sense against a person accused, but his innocence rather is to be assumed until the contrary be shown, and libelers ought not to be encouraged to misconstrue and misrepresent the conduct of others by allowing them boldly to make specific charges, and then support them by loose evidence of something that was not entirely creditable to the other party. They

ought to confine themselves in the gratification of their bad passions to making such charges only as they can fully and strictly prove.

Upon the whole, it appears from its contents that this was a publication of as pure spite as one almost ever sees; and, as we think, it was not supported by proof in any part of its substance, and, consequently, this action was groundless.

PER CURIAM. *Venire de novo.*

Cited: Hamilton v. Nance, 159 N. C., 59.

(458)

HENDERSON G. WEAVER v. JAMES B. UPTON.

Where two partners entered into a covenant that one of them should receive a salary for managing the business: *Held,* that this salary must be paid out of the partnership funds.

APPEAL from BURKE Spring Term, 1846; *Pearson, J.*

Covenant; the breach assigned was the nonpayment of $450. The execution of the convenant was not denied, and it was read in evidence. The defendant's counsel moved to nonsuit the plaintiff upon the ground that the convenant amounted to an article of copartnership and that the $450 for the nonpayment of which the convenant was alleged to have been broken was to be allowed out of the funds of the copartnership, and did not constitute such a demand as would support this action. The question was reserved. It was proven that the plaintiff had ceased to act as manager some short time before the end of the year, by mutual consent; in consequence of which the jury, in assessing the damages upon the breach assigned, made a deduction from the $450 which was the amount of damages claimed. There was a verdict for the plaintiff, subject to be set aside and a nonsuit to be entered upon the question reserved. The court being of opinion with the defendant on the question reserved, the verdict was set aside and a nonsuit entered, from which the plaintiff appealed.

The following is the convenant referred to:

STATE OF NORTH CAROLINA—BURKE COUNTY.

27 December, 1841.

James B. Upton and H. G. Weaver hereby enter into an article of agreement for the next year (1842). James B. Upton, of the first part, has privilege of working twenty hands on "the McKenzie mine," (459) paying the fifth part of the gold that is made for toll. H. G. Weaver, of the second part, has the privilege of putting in four hands at a valuation, bearing a proportionable part of the expenses

attached thereto; the said Upton, of the first part, bargains and agrees to give me, the said Weaver, of the second part, $450 to manage the business, which I agree to manage according to the best of my judgment, making true returns of all the gold made by me. The mine is to be worked according to the lease. We make our seals," etc. Signed and sealed by James B. Upton and H. G. Weaver.

Gaither for plaintiff.
N. W. Woodfin for defendant.

DANIEL, J. Weaver and Upton, on 16 December, 1840, leased of one McKenzie a tract of land for three years to mine for gold; the rent was to be one-sixth part of the gold that should be obtained by the lessees. On 27 December, 1841, the lessees entered into the agreement under their seals mentioned in the case. Upton was to work twenty hands and Weaver four hands, "bearing a proportionable part of the expenses attached thereto. The said Upton, of the first part, bargains and agrees to give me, the said Weaver, of the second part, $450 to manage the business, which I agree to manage according to the best of my judgment." It seems to us that the agreement was one of partnership; and the law being well settled that the acting and business partner is never entitled to claim pay of the firm for his services unless he stipulates for it in the articles of copartnership or otherwise the parties therefore agreed that Weaver should manage the business and Upton, the other partner, agreed to give him $450 "to manage the business." Weaver was to bear his proportion of the expenses of managing and working the mine. The salary of the superintendent was a part of the expenses of the firm; and the firm ought, according to the true construction of the articles, to bear this expense in proportion to the number of hands each partner worked in the mine. The words, "the said Upton bargains and agrees to give me, the said Weaver, $450 to manage the business," only denoted the assent of Upton (460) that Weaver, although a partner, should be paid for his services $450. The parties were stipulating concerning the partnership business, and the terms on which it was to be carried on, and, among others, that Upton bargained and agreed to let Weaver have $450 for his services that lear. It seems to us that it would be against justice and right to construe the covenant to be an agreement by Upton that he would pay that sum out of his own pocket. We think that it was an item in the expenses account of the firm, and that the firm should pay it.

PER CURIAM. Affirmed.

WILIE GAITHER v. ELIJAH TEAGUE.

The following instrument was signed, sealed, and delivered: "Know all men by these presents, that I, Edward Teague, have this day bargained for a sorrel filly with W. Gaither, which filly I want to stand as security until I pay him for her. I also promise to take good care of her. Witness my hand and seal, this 5 October, 1838." *Held,* that upon the face of the paper it was doubtful whether it was intended as a mortgage or a conditional sale, and that it was properly left to the jury to determine its character from the accompanying circumstances.

APPEAL from CALDWELL Spring Term, 1847; *Settle, J.*

Trover for a filly, and the plea, not guilty. It was admitted (461) on the trial that the filly had formerly belonged to the plaintiff; and the controversy turned upon the question whether he had sold her and parted from the title to one Edward Teague and then taken a mortgage of the filly from the said Edward, or whether he had made only a conditional sale to Teague, keeping the title in himself. To support the issue on his part, the plaintiff gave in evidence an instrument in the following words:

Know all men by these presents, that I, Edward Teague, have this day bargained for a sorrel filly with W. Gaither, which filly I want to stand as security until I pay him for her. I also promise to take good care of her. Witness my hand and seal, this 5 October, 1836. EDWARD TEAGUE. [Seal]

The plaintiff further gave evidence that the price agreed on for the filly was $30, and that Teague then gave him his bond therefor, and that the same still remains unpaid.

The plaintiff, further to support the issue on his part, called as a witness one W. B. Nicholls, who is the subscribing witness to the said instrument and bond, and he deposed that they were executed at the same time and before the filly was delivered by Gaither to Teague, and that Gaither required Teague to give him the said instruments before he would let him have the filly, and that immediately after receiving them he delivered the filly to Teague, who then had her shod at Gaither's shop and took her home. The plaintiff further gave evidence that on 5 October, 1836, all the property of Edward Teague was levied on by constables on executions against him when he got home, and that he then said, and, also, frequently afterwards, that Gaither held the property in the filly until she should be paid for. The plaintiff further gave evidence that the present defendant, Elijah Teague, some months after the contract, informed the plaintiff that he had traded with Ed-

ward Teague for the filly, and was to pay the bond to the plain- (462)
tiff, and that, afterwards, the defendant had the filly and sold her as his own property.

The defendant on his part then offered the evidence of Edward Teague, who deposed that he bargained for the filly absolutely with the plaintiff, and gave his bond for the price, and that she was delivered to him; that he had her shod at Gaither's shop, and, after that was done, he requested Gaither to take a lien on her, stating to him that there was debts against him for which she might, otherwise, be sold; and that Gaither replied that he did not want it, himself, to secure the money, but that, to accommodate him, Teague, he would take the lien; and that thereupon the written instrument before set forth was executed and given to Gaither, who told the witness that he might dispose of the filly as he pleased; and that five or six months afterwards he did sell her to the defendant for $40, of which the defendant paid him $10, and the remaining $30 he agreed to pay in discharge of the bond to the plaintiff for the price of the mare. He further deposed that afterwards it was agreed between the witness, the plaintiff, and the defendant that the defendant should pay the $30 on other debts which the witness owed the plaintiff, and he did so.

The defendant further to support the issue on his part, called several witnesses who, or some of them, deposed that the plaintiff had said that he kept a mortgage on the filly at Teague's request, to keep off the constables, and that the witness Nicholls had said that after the trade was finished Teague requested Gaither to take a lien to keep off the officers; that the defendant delivered to the plaintiff 470 pounds of iron at 6 ¼ cents per pound and requested it to be applied to the debt for the filly, and offered to pay the residue in money, but that the plaintiff wished to credit the payment on a note given by the two Teagues to one Austin, that was payable in iron, and then belonged to the plaintiff, and that the defendant agreed thereto, saying that he did not care on which debt the credit was entered, as he had to pay but $30 for (463)
his brother.

The plaintiff then gave evidence that a short time before the iron was delivered the defendant asked the plaintiff if he would receive iron for the filly debt, and the plaintiff told him he would not, as that debt was payable in money; but that he would receive it on the Austin note, which had been given by both the Teagues and was payable in iron; and that when the defendant afterwards brought the iron, he again asked the plaintiff to apply it to the filly debt, but the plaintiff replied as before, and thereupon the defendant applied it to the Austin debt, saying that it was immaterial, as he was bound for both debts and expected to pay them; and the defendant took up the Austin note.

It was, therefore, insisted by the counsel for the defendant that the instrument taken from Edward Teague by the plaintiff was a mortgage, and that it was void for want of registration, as against the defendant, a purchaser; and, also, that if in law the contract were held to be a conditional sale, the condition had been performed by the payment of the iron; and, also, that the plaintiff had abandoned his title by consenting to the sale to the defendant; and the counsel moved the court so to instruct the jury. The counsel for the defendant moved the court, also, to direct the jury that if they believed the testimony of Edward Teague they should find for the defendant.

The court charged the jury that the instrument could not be held to be a mortgage upon its face merely, but that if they should believe that the plaintiff transferred the property in the filly to Edward Teague, and that they afterwards came to an agreement to secure the plaintiff in the price, and for that purpose made this instrument, then they ought to regard it in the light of a mortgage, and it would be void as (464) against the defendant. The court further instructed the jury if they believed the plaintiff abandoned or relinquished his title by consenting to the sale to the defendant or allowing Edward Teague to dispose of the filly as he pleased, or if they believed that the plaintiff and Edward Teague, at the time of the contract, intended to deceive or defeat Edward Teague's creditors, or purchasers from him, or if they believed the evidence of Edward Teague, or if they believed the plaintiff had received payment for the price of the filly in iron or otherwise, that then they ought to find for the defendant.

From a verdict and judgment for the plaintiff, the defendant appealed.

Gaither for plaintiff.
Guion for defendant.

RUFFIN, C. J. The presiding judge gave every instruction the defendant's counsel asked for (and even went beyond the prayer in some respects), excepting only in not holding that the instrument given in evidence by the plaintiff was a mortgage. Under the circumstances of the case this Court is of opinion that his Honor was right in so holding, and in leaving it to the jury to determine its character as they might find the facts, whether it was given at the instance of the plaintiff or Teague or before or after the sale had been completed by a contract and delivery. Upon its face the instrument is equivocal. It is not, indeed, a paper given by the seller to the buyer and purporting in itself to be a sale on certain conditions, as the defendant's counsel says it ought naturally to have been, if that was the nature of the contract. But, although the paper comes from the other side, and might, therefore, raise a presumption that the title had before vested in Teague, and that

the purpose was to give a security from him for the price, yet that consequence does not necessarily follow either from the terms of the instrument or the reasons on which it may have been given. (465) It has no terms of conveyance from Teague, as the existing owner, to the creditor, as a mortgage ought. It only says that Teague had "bargained" for a sorrel filly with Gaither, which may mean an executory as well as an executed contract of purchase; and, in common parlance, the word is most commonly and properly used in the former sense. Then there follows the convenant that Teague will take good care of the filly, which is most unusual and inappropriate in a mortgage, properly speaking. And when it is asked why the paper is taken from Teague, instead of being given by the vendor, the answer at once suggests itself, that from the nature of the article the title would apparently vest in the vendee by the contract on delivery, and, therefore, that no instrument made by the vendor only and delivered to the vendee would be available to the former to show the terms of the contract; but that in order to show that it was necessary that the instrument should be given by Teague, saying that the title did not then vest in him, notwithstanding his bargain and possession, but remained with Gaither until he should be paid the purchase money. According to the terms of the instrument and the nature of the property, therefore, it seems to the court that, though dubious, it should be held that it was intended rather as evidence of a conditional sale than to constitute a mortgage. Under those circumstances, it aids very materially in ascertaining its character, when the period at which it was given and the declared purpose of giving it are known. If it were true that it was given after an absolute sale and delivery by the plaintiff to Teague, and at the suggestion of the latter, as stated by him, it could be nothing else but a mortgage or a security in the nature of one, and the equivocal language would have a meaning impressed on it which could not be mistaken. But, upon that point, the testimony of that person and that of the subscribing witness were irreconcilably at issue; and the court left their (466) credit to the jury, and they found that Teague's account was not true and that of the other was. That renders it as plain, on the other side, that the instrument was not intended as a mortgage, because it was given by Teague before any property in the filly vested or could have vested in him, and, consequently, that it was not a conveyance from him, but a declaration, simply, of the terms on which his purchase was to become absolute.

PER CURIAM. No error.

Cited: Deal v. Palmer, 72 N. C., 587; *Clayton v. Hester,* 80 N. C., 276; *Frick v. Hilliard,* 95 N. C., 120.

JACOB HOYLE v. JOHN A. WILSON.

1. A report of a processioner is radically defective which does not state with precision the claims of the respective parties so as to show what lines were disputed or how far they were disputed.
2. The important and conclusive effect given by the statute in relation to processioning, whereby two inquisitions of the processioner vest an absolute title, requires the court to view the proceedings with a vigilant eye, that no injury may accrue from tolerating an undue laxity in the proceedings.

APPEAL from CLEVELAND Spring Term, 1847; *Dick, J.*

Proceeding under the act for processioning land. The report of (467) the processioner states "that I, at the instance of Jacob Hoyle, attended on the premises on Beaver Dam branch of Knob Creek for the purpose of processioning the land of said Hoyle, and it appearing that said Hoyle had given due notice to the adjoining proprietors, I proceeded as follows, to wit: commencing at a spanish oak on south side of said branch, and I was proceeding to procession when I was forbid by John A. Wilson to proceed. Then I removed to the next station, and beginning at a black oak on the north bank of the branch, and running thence south 87 degrees east with the meanders of the branch 38 poles to a maple, thence south," etc., setting forth several lines by course, distance, and corners, until he comes to a black oak, and then stating, "thence south 67 degrees east 16 poles to a maple near said Hoyle's fence. Here I was proceeding to procession the line from this last station to the next, when I was forbid by said John A. Wilson to proceed further in running and marking the said line, and thereupon I desisted, and make this my report."

The county court, thereupon, appointed five freeholders "to appear with the processioner on the disputed lines between Jacob Hoyle and John A. Wilson and designate the lines according to law, and report," etc.

The report of the processioner and freeholders states that after being duly sworn they proceeded to establish the line in dispute between John A. Wilson and Jacob Hoyle as follows, that is to say, running in favor of Jacob Hoyle: Beginning at a maple, where John A. Wilson stopped the processioning, and run south 35 west 70 poles to a stake and pointers on a line of James Wilson's old 300-acre grant, and thence with said line north 86 west 83 poles to a stake in John A. Wilson's field; thence south 18 west 43 poles to a spanish oak; thence south 54 east (468) 119 poles to a black oak, where the former begun; and we have caused the said line to be run, marked, and processioned." The counsel of Wilson moved the county court to quash the reports, but the

court refused, and ordered the proceedings to be recorded, and gave judgment against Wilson for the costs, and he appealed.

In the Superior Court the judgment was reversed with costs, and the report of the freeholders set aside, and the original report of the processioner quashed for insufficiency, and therefrom Hoyle appealed to the Superior Court.

No counsel for plaintiff.
Guion for defendant.

RUFFIN, C. J. The report of the processioner is radically defective in not stating with precision the claims of the respective parties, so as to show what lines were disputed or how far they were disputed. In every legal controversy there must be an identity given to the subject, and an issue between the parties. In actions at common law in which the question of boundary is triable the land is described and identified in the declaration or new assignment, and the issues arise on the pleas and rejoinder, and thus it appears upon the record what the controversy is. There is the same necessity for precision in proceedings of the kind under consideration, since it cannot otherwise be known to what subject the controversy relates nor on what point it is to turn; and the Court cannot see what decission should be given, nor to whom costs should be awarded. Indeed, the very import and conclusive effect given by the statute to these inquisitions, whereby two of them vest an absolute title, requires the court to exercise the utmost vigilance to prevent surprise and inquiry to the true owners of land by tolerating any undue laxity in the proceedings. As has just been said, it is necessary that the parties should be brought to a point in this proceeding as in (469) actions and the Legislature intended they should. But, unfortunately, instead of leaving the parties to the regular modes of pleading whereby the issues may be joined technically and distinctly, they are delivered into the hands of a processioner, whose report is to serve the purposes of declaration and plea and all the subsequent steps necessary to come to an issue. It is not surprising, then, that the requisite precision is not observed, and so few proceedings of the kind can be sustained, though the Court has taken pains heretofore to explain themselves upon this subject as clearly as they could.. *Carpenter v. Whitworth,* 25 N. C., 204; *Mathews v. Mathews,* 26 N. C., 155.

This report points out no specific dispute, but leaves everything at large. It begins by saying that the processioner "went upon the premises" on a certain branch of a creek for the purpose of processioning "the land of Jacob Hoyle." But it gives no description whatever of the land thus claimed by Hoyle, so as to show that the subsequent dis-

pute was touching it. Then it proceeds to say that the processioner was about to run some line from a spanish oak on the south side of the branch, and that he was forbidden by Wilson, and that he went to the next station, beginning at a black oak and ran thence. On the line, then, from the spanish oak we must understand that there was "a dispute," and that there was none on the line from the black oak, because the former, Wilson, would not let him run, and to running the latter he made no objection. How that could be it is not easy to understand, as the report calls the black oak, "the next station," as we suppose, in Hoyle's deed or claim; and, therefore, it would seem the line must be a straight one from the spanish to the black oak. Certainly, however, the report professes to state a dispute as to a line from the spanish oak. But what it was no one can possibly divine, for it does not describe any course or distance or *terminus* for the line claimed by Hoyle (470) from the spanish oak, unless, indeed, the black oak be the *terminus,* and in that case there is the absurdity just mentioned. But after going through six or eight lines after leaving the black oak, the processioner got to a maple corner, and was there also stopped by Wilson, although Hoyle wished him to run further, though in what direction and how far, or how many lines, is not stated. It is obvious, therefore, that no particular dispute—no precise issue—upon any part of the boundary is here reported; and a report of the freeholders of particular lines, either from the maple or the spanish oak, may not conform to the claim of either party, although their province is "to go on *the* lines disputed" and "establish *such* disputed lines." And thus it turned out that in this case the freeholders in part did; for, beginning at the maple, where the processioner was stopped, they ran three lines, described by course, distance, and *termini,* to the spanish oak, at which the processioner wished to begin, and then again, a line south 54 east 119 poles from the spanish to the black oak, where the processioner actually began his first survey. Therefore, instead of deciding disputes raised in the report and establishing lines therein stated to be claimed by one party or the other, the freeholders have established lines which, for aught that we see, neither party alleged to be his. In fine, the processioner reported no issue between the parties, and there was, in fact, nothing definite to be tried; and, therefore, all the proceedings were properly quashed.

PER CURIAM. Affirmed.

Cited: Porter v. Durham, 90 N. C., 58; *Forney v. Williamson,* 98 N. C., 332; *Euliss v. McAdams,* 101 N. C., 397; *Vandyke v. Farris,* 126 N. C., 745.

(471)

DEN ON DEMISE OF HUGH M. LEE v. MARY FLANNAGAN.

1. An indulgence for a year, upon obtaining a real security for an existing debt, which is necessarily made public by registration, is not so unreasonable as to raise a legal presumption of an intent to hinder a creditor by the security.
2. On a question of fraud as to a deed of trust, etc., it is a proper subject of inquiry by the jury whether the sale was to be in convenient time under all the circumstances of the parties.
3. Where a deed in favor of one creditor is made *for the purpose* of defeating another creditor, it is fraudulent; but it is not so when the loss of the latter is *merely a consequence* of the preference given to a just debt.
4. It would seem that a mortgage of land for a just debt cannot be fraud upon another creditor (since our act of 1812), because it cannot obstruct his remedy, by a sale of all that under any circumstances ought to be sold, namely, the debtor's whole interest in the premises.
5. In an action of ejectment, when the tenant in possession makes default, and another is let in, by consent, to defend, upon an admission of actual possession in that person, it must be understood that it was the object of those parties to try the title between themselves at once, without the delay or expense of a new suit.

APPEAL from MECKLENBURG Special Term in November, 1846; *Pearson, J.*

Ejectment. The declaration was served on David G. Flannagan, who was then in possession. He did not appear to the action; and, by consent of the plaintiff, Mary Flannagan was made a defendant in his stead, and admitted herself to be in possession, and entered into the common rule and pleaded not guilty.

Both parties claim under David G. Flannagan as follows: In October, 1836, Lee, the lessor of the plaintiff, instituted two actions of ejectment for other land against the said David G., and also an action of slander. In February, 1848, in the latter action, (472) judgment was confessed by the defendant for the costs, which amounted to $478.17, and, upon a *fi. fa.* thereon, the premises were purchased by the lessor of the plaintiff in April, 1843, and he took the sheriff's deed and brought this suit.

On 29 July, 1839, D. G. Flannagan conveyed the premises by a deed of trust to David Chambers in fee, to secure the payment of the sum of $460.75 recited therein to be due from Flannagan to Richard Peebles. In the deed it was provided, amongst other things, that if Flannagan should fail to pay the debt to Peebles by 1 August, 1840, the trustee, upon request in writing from Peebles, should, after a specified notice, sell the premises to the highest bidder, and out of the proceeds discharge the debt, and that in the meantime Flannagan might remain in

possession. In May, 1843, Chambers offered the land for sale and Peebles became the purchaser, and, after taking a deed from the trustee, he sold and conveyed to the defendant Mary.

In support of the issue on her part, the defendant also called David G. Flannagan as a witness. He deposed that the debt to Peebles, mentioned in the deed, was justly due. He stated that Lee's suits against him alarmed all his creditors, and caused them to take judgment against him; and that before and during the summer of 1839 all his personal property, and also all his land, except the place on which he lived (which is that now in controversy) were sold therefor; and that there remained unsatisfied several judgments, amounting in the whole to $460.75, of which one was in favor of Peebles. He further stated that the creditors in those judgments were about selling his home place also in July, 1839, and he then applied to Peebles, who was his neighbor and intimate friend, for indulgence, and also for assistance in paying his other judgments; and he told Peebles that Lee's suits were all unjust, and he thought they would be decided in his favor, and, in that event, he believed he would be able to pay all the debts without a (473) sale of his home place. In order that he might have that opportunity, he requested Peebles to advance the money for all the other creditors, and offered to give him a deed of trust of the premises as a security for the whole; and Peebles agreed thereto, and to indulge him until August, 1840, and the deed was then executed. Upon his cross-examination the witness was asked by the counsel for the plaintiff whether, at the time he made the deed, Peebles did not agree to indulge him until the decision of the said suits; and he answered that there was no such agreement.

Several instructions were moved for by the counsel for the plaintiff in the court below, which will be found stated in the opinion delivered in this Court. Under the instructions of the judge, the jury found a verdict for the defendant, and the plaintiff appealed from the judgment thereon.

Boyden and Iredell for plaintiff.
Alexander for defendant.

RUFFIN, C. J. The counsel for the plaintiff first moved the court to instruct the jury that the deed was upon its face fraudulent in law because a sale was not to take place for a year after its execution. The court refused to give the instruction, and, instead thereof, told the jury that the delay in the sale was a circumstance to be considered by them in determining whether the deed was made upon an intent to defraud or hinder Lee of any recovery he might make, and that if they found such intent, then the deed was void.

This Court concurs in the opinion given to the jury. An indulgence of a year, upon obtaining a real security for an existing debt, which is necessarily made public by registration, is not so unreasonable as to raise a legal presumption of an intent to hinder a creditor by the security. This is more especially true when the debt (474) arose mostly upon a loan at the time from one intimate friend to another, with a view to relieve all his pressing necessities by discharging every demand ascertained at the time. The inference of an unfair purpose from such forbearance is so very slight that it is scarcely possible that a jury should ever find it, especially as the resulting trust in the land, belonging to the debtor, is subject to execution in our law. But, at all events, the deed cannot for this cause be pronounced void as a matter of law; and it was a proper subject of inqury for the jury whether the sale was to be in convenient time, under all the circumstances of the parties. *Moore v. Collins,* 14 N. C., 126.

The counsel for the plaintiff moved his Honor further to instruct the jury that if they believed the deed was made with the intent to defeat the recovery which Lee might effect, then the deed was fraudulent and void, notwithstanding the sum secured therein to Peebles was a true debt. The court gave the instruction as prayed for, but added that the term "defeat" was to be taken in a qualified sense; for if the deed was made to secure a true debt, and another creditor lost his debt merely by reason that the debtor's property was not sufficient to pay both, and was all exhausted in satisfying the preferred creditors, in that case the deed is not deemed fradulent, because the law allows a debtor to prefer one creditor to another.

This Court approves, also, of this second instruction. The very power of an insolvent debtor to give preference implies that the effect may be that some of the creditors may lose their debts. Therefore, the distinction is that when a deed in favor of one creditor is made *for the purpose* of defeating another creditor, it is fraudulent; but that it is not so when the loss of the latter is *merely a consequence* of the preference given to a just debt. *Moore v. Collins, supra; Hafner v. Irwin,* 23 N. C., 490.

The counsel for the plaintiff asked for a further instruction (475) to the jury, that although a debtor may prefer one of his creditors, yet he must give an honest preference; and that the advantage stipulated for the maker of this deed that he should be indulged for twelve months, rendered it void. The court thereupon informed the jury that it was required that the preference given should be an honest one; but that debtors had a right to obtain indulgence by giving a security on their property, and that if they believed Flannagan's object in making the deed for his land was to obtain indulgence for a true

debt from July, 1839, to August, 1840, or even for a longer time, if the lawsuits then hanging over him should not then be decided, it did not render the deed void; for it was not a stipulation for such a benefit or advantage as the law did not allow him to obtain, and worked no injustice to the plaintiffs in those suits.

This instruction, as prayed, ought to have been refused, for the same reasons on which the first was; for it is in substance but a repetition of it, though not precisely in the same terms. After a preliminary, undeniable proposition, that debtors can only make honest preferences, it asks the court to lay down to the jury, in reference to this case, that the stipulation in the deed that the debtor should be indulged for twelve months made it void, which is just the same as "that the deed was upon its face fraudulent in law, because a sale was not to take place for a year." The court might, therefore, have properly refused the instruction, and if that simply had been done there would have been no necessity for further observations from this Court. But the Superior Court went beyond the refusal of the directions which were asked for the plaintiff, and gave others, and that imposes upon us the duty of considering their correctness. It did not appear, indeed, that there was, as supposed, an agreement for forbearance until the suits of Lee or either of them should be determined; for the only evidence touching that point was the testimony of Flannagan, drawn out by the plaintiff, and
(476) that flatly denied any such agreement. For that reason the judgment ought not to be reversed, although the instructions were erroneous, since it was entirely irrelevant to the case before the court, and could not, therefore, prejudice the plaintiff. We do not, however, see that there is any doubt of the opinions given to the jury. But while we say so, we cannot but express a regret that, in the hurry of trials, the court should sometimes go out of the points arising on the proofs or raised by the counsel and lay down abstract propositions; for it not infrequently creates unnecessary difficulties, as it is not always as easy to perceive, as distinctly as here, that the propositions were altogether inapplicable. But to return to the instructions. We must say that we concur in their legal correctness. If the deed had been made or used to enable the debtor to get away from his creditor, or to give a false credit, or to keep off executions, or to secure any advantage to the maker as against his general creditors, it would vitiate it. But it would seem singular that an evil intent should be imputed to an agreement that a creditor should indulge his friend for a just debt by not enforcing a registered security on land, and on nothing else, until some other person should get a judgment against the debtor. Apparently, the preferred creditor could not better observe good faith against another creditor than by saying to their common debtor that, for himself he

would be willing to wait as long as the estate would suffice to pay the debt; but that, nevertheless, he could not agree to do so, longer than fairness and his duty to other creditors might render it proper that he should raise his money and leave the residue of the estate open to the process of others. It was impossible that Lee could suffer any prejudice from this deed until he should get his judgment. If, when he had done that, the deed was set up as an obstruction, so that he could not, immediately or in convenient time, have execution of the debtor's interest in the lands, and the purchaser could not turn the debtor (477) out of the enjoyment of the estate, then there would be cause to complain of the deed. But no such vice attaches to a mortgage of land, or a deed of trust, by which the creditor is at liberty and bound by agreement to proceed to sell enough to pay his debt as soon as another person, by getting a judgment, should have an interest in clearing the debtor's property from prior encumbrances. Indeed, since the act of 1812, as was observed in *Davis v. Evans*, 27 N. C., 525, it is not easy to see how a mortgage of land for a true debt can be deemed covinous upon the ground of forbearance merely, since a judgment creditor has the direct remedy of selling the equity of redemption, and that is the debtor's whole interest. If the day of forfeiture or day of sale be fixed in the deed so remotely as to show an intent to keep the security on foot, as a hinderance to the purchaser under execution in getting into possession, we will not say that would not affect the conveyance, though, in the case just cited of *Davis v. Evans* it was held that the purchaser could not be thus withstood, but might recover the possession in ejectment against the mortgagor in possession. But, however that may be, an agreement that there should be a sale under the deed as soon as the interest of a person then suing should require it, by his getting a judgment, is surely no reason for an allegation of fraud in the deed by that creditor; for the stipulation is actually for his benefit, and resulted from an unwillingness of the parties to the deed to cover the property from his execution when he should get a judgment. Here the debtor did not wish to sell his home if he could help it, and he thought he could do so in case he succeeded in the suits with Lee, as he believed he could pay the other demands by his labor. He expected, indeed, that the land must be sold, if Lee recovered. But, as that was uncertain, there was nothing improper in getting the sale deferred until, by the event, it could be seen whether the satisfaction of his debts, including (478) Lee's recovery, made it unavoidable. In the forbearance of a friend to await that result there is nothing immoral or illegal—provided only that there was no intention to defeat the recovery, if one should be made; for a mortgage is not obliged, in law or conscience to coerce immediate payment, but only to do so when it becomes injurious to

another to keep the debt on foot in that form. As already remarked, it would seem that a mortgage of land for a just debt cannot be a fraud upon another creditor, because it cannot obstruct his sale of all that under any circumstances ought to be sold, namely, the debtor's whole interest in the premises. But, however that may be, certainly an agreement between the mortgagee and mortgagor that the former shall raise his money out of the estate whenever another creditor's interest may require it, by his getting a judgment, cannot be injurious to such judgment creditor.

Lastly, the counsel for the plaintiff further prayed the court to instruct the jury that if they were satisfied from the evidence and circumstances that the understanding between Peebles and Flannagan was that Peebles should indulge until the lawsuits then pending should be determined, the omission to set the same out in the deed was a fraudulent concealment which rendered the deed void. The court instructed the jury that it was not necessary to set forth in the deed that understanding, if the jury should believe that in fact it existed.

It was enough to justify the refusal of this instruction that there was no evidence of any such understanding. But we likewise think that the omission supposed would not vitiate the deed, because it could not work any harm to the lessor of the plaintiff, and the operation of the deed, without that clause, is precisely the same as if it had contained it. For the period to which the sale was postponed by the terms of the deed was the first of August, 1840, and that had passed two and a half (479) years before Lee got a judgment; and there appears no reason for supposing that either Flannagan or Peebles expected that the judgment could be got, if at all, before the expiration of the year.

In this Court it has been further objected that this defense was not open to this defendant, because it would not have been to the defendant in the execution upon whom the declaration was first served. But we had occasion in *Wise v. Wheeler,* 28 N. C., 196, to look into this question, and held that when the tenant in possession makes default, and another is let in, by consent, to defend, upon admission of actual possession in that person, it must be understood that it was the object of those parties to try the title between themselves at once, without the delay or expenses of a new suit. That such was the intention in this case is certain, as the objection was not taken on the trial. For that reason, also, it cannot be sustained here.

PER CURIAM. No error.

Cited: Wiggins v. Reddick, 33 N. C., 381; *Hardy v. Simpson,* 35 N. C., 141; *Gilmer v. Earnhardt,* 46 N. C., 560; *Jenkins v. Peace, ibid.,*

416; *Jessup v. Johnston*, 48 N. C., 339; *Cheatham v. Hawkins*, 76 N. C., 337; *S. c.*, 80 N. C., 162; *Maddrey v. Long*, 86 N. C., 385; *Savage v. Knight*, 92 N. C., 498; *Helms v. Green*, 105 N. C., 259; *Barber v. Buffaloe*, 111 N. C., 213; *Hobbs v. Cashwell*, 152 N. C., 191.

(480)

JOHN CHANDLER v. HENRY ROBISON.

Where a person charges another with perjury, and is sued in an action for the defamation, it is not sufficient for him to prove simply that what the plaintiff swore to was not true, but he must introduce evidence to convince the jury that the false oath was taken corruptly.

APPEAL from HAYWOOD Special Term in June, 1847; *Bailey, J.*

Action for a verbal slander; the pleas, the general issue and justification. The charge was that the defendant said he had been informed, or a grand juror had informed him, that a true bill had been found against the plaintiff for swearing to a lie in a suit before a justice of the peace, between the plaintiff and one Hinson, on which trial the plaintiff was sworn under the book-debt law, and that he would have his black jacket striped, or stript, at the next court. To sustain his plea of justification the defendant proved that, some two or three years since, one Hinson owed the plaintiff eight gallons of brandy, which he was to have at 31¼ cents per gallon, *if he paid the cash*. Hinson did not comply with his contract, but, soon after, paid $1.12½, for which the plaintiff gave credit on his account. The plaintiff and Hinson then came to another agreement. The plaintiff agreed if Hinson would deliver to him 2½ bushels of wheat, before sowing time, he would take it in discharge of the balance of his account, the whole to be valued at 75 cents per bushel, and the brandy at 37½ cents per gallon. After this, Hinson delivered 1 bushel of wheat, which is credited in the plaintiff's account at 75 cents, making in the whole paid to the plaintiff $1.87½; but Hinson failed to deliver the balance of the wheat in time according to the agreement. After this failure, the plaintiff warranted Hinson for $4, and at (481) the same time informed the officer that, after deducting the credit, there would be due on the account $1.12½, or thereabouts. On the trial of the warrant the plaintiff exhibited his account, in which he charged Hinson with 8 gallons of brandy at 50 cents per gallon, and credited him with $1.87½. He swore that, after giving all just credits, his account was just and true. The magistrate gave judgment for the plaintiff, and afterwards granted the defendant a new trial, and, on the second trial,

the plaintiff admitted that he had made the two contracts, as hereinbefore stated, and again swore that his account was just. It was shown that, about the time of the second contract, the plaintiff had sold brandy for 50 cents per gallon.

The defendant's counsel moved the court to charge the jury that if they believed the witness, the plaintiff had taken a false oath; and further, that as the plaintiff had, on the second settlement, given credit for $1.87\frac{1}{2}$ and had agreed to take $2\frac{1}{2}$ bushels of wheat for the balance of his account, at 75 cents per bushel, rating his brandy at $37\frac{1}{2}$ cents per gallon, and as a bushel of wheat had been delivered in pursuance of his last agreement, the plaintiff was bound by it, as far as it was complied with, and could not look beyond it, and had no right to charge more than $37\frac{1}{2}$ cents per gallon for the brandy not yet paid for. This instruction the court refused to give, but charged the jury that although the plaintiff had entered into the contracts stated by the witnesses, and had agreed to take the wheat and charge the brandy at the stipulated prices, yet if Hinson failed to comply with his part of the contract the plaintiff had a right to be remitted to his original account, and to charge for the brandy whatever it was worth. His Honor further instructed the jury
(482) that in order to sustain the defendant's plea of justification they must be satisfied that the plaintiff not only swore falsely, but that the oath taken by him before the magistrate was willfully and corruptly false. If so, they would find a verdict for the defendant.

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

Francis and J. W. Woodfin for plaintiff.
Edney for defendant.

NASH, J. We agree with his Honor in refusing the instructions prayed for, and are not able to perceive any error in the charge. The first branch of the instruction required was palpably wrong. The court was required to instruct the jury that the testimony of the witnesses, if believed, showed that the plaintiff had taken a false oath. That was not the charge made by the defendant against the plaintiff; but it was one of perjury. It was not sufficient, therefore, to the defendant's justification that he should show that the oath was false; but he must go further and show that it was corruptly false. If this were not so, the condition of a witness would be truly perilous; the ignorant and the innocent would occupy the same ground with the corrupt. The most intelligent and upright are liable to be mistaken. It is not the falseness of the oath, alone, that constitutes the crime of perjury; but it is the corruptness of the heart in taking it. The court, therefore, could not give the instruc-

tion as required, and the charge upon that part of the case is entirely correct. Neither was there any error in refusing the instruction asked for as the price of brandy sworn to. Two special contracts were entered into between the plaintiff and Hinson relative to the brandy. By the first, Hinson was to have the brandy at 31¼ cents per gallon for cash. With this contract Hinson did not comply; and, after making a partial payment, it was mutually abandoned and a new one made, wherein both the price of the brandy and the mode of payment were (483) changed. With this latter contract Hinson did not comply, and might by the plaintiff be considered as having abandoned it. And in an action for the brandy Hinson would not be allowed to set up in his defense a special contract which he himself had broken. 2 Smith Lead. Cases, 27. The plaintiff, then, was no further bound by it than as it had been partially performed. Having been disappointed by Hinson in getting his seed wheat at the time he needed it, he was justified in considering the contract so far at an end as to authorize him to charge for his brandy what it was worth. Such was the charge the jury received. But if, in strict law, the plaintiff was still bound by the contract, yet he might well believe he was remitted to his original account upon the failure of Hinson to comply with it; and if he did so believe, though the oath taken by him might have been false, it would not have been corruptly so, and would not support the defendant's plea; and the question of corruption was left to the jury.

PER CURIAM. No error.

(484)

NANCY HARRISON v. NATHANIEL HARRISON.

On a petition by a wife for a divorce, the court will not suffer an issue to be submitted to the jury in such general terms, as these: "Did the defendant, before the petitioner left his house, offer such indignities to her person as to render her condition intolerable and her life burdensome?" The petition must set forth the *facts*, the jury must pass upon those facts, and on their verdict the court will determine whether the facts found constitute or not a proper case for a divorce.

APPEAL from HAYWOOD Spring Term, 1846; *Pearson, J.*

Petition by the wife for a divorce *a mensa et thoro*, and for alimony. It was filed on 21 October, 1842, and it states that the parties married in 1839, and that the petitioner endeavored to perform all her duties as a wife, "but that, notwithstanding, her husband's conduct to her became daily more and more intolerable, by threats of violence to her person and charging incontinency, so as to render her life miserable; that, especially

for the last three months of her residence with him, her treatment from him was cruel in the extreme; that she was once compelled to leave his house and seek protection at a neighbor's from the threatened violence to her person from her infuriated husband; and that often in the night, when he would awake and find her distressed by reflecting on her forlorn condition, he charged her with having illicit intercourse with one Henry Grady before her marriage and attributed her wakefulness to the lashings of a guilty conscience for her past whoredoms; and that, day after day, in the presence of his children by a former marriage, was she compelled to hear herself called by him the usual appellation of whore."

The petition further states "that the petitioner bore without a
(485) murmur his cruel treatment, in the hope that, by inquiring into her character, her husband would become convinced that the charge was unfounded; but that, except in the presence of strangers, his conduct towards her became daily more barbarous, until she became satisfied that her life would no longer be safe under his roof, and that she then left for her father's, ostensibly to have the aid of her female friends during her approaching confinement with her first child, but inwardly resolved never to return to her husband until she had some assurance of a change in his conduct towards her." The petitioner then avers "that she never gave her husband any reason for his discontents, and that the charge made by him against her reputation is wholly false, and that it was only trumped up by him to cover an ulterior purpose of driving her from his house, as he knew her character to be good, and had declared that he did not marry her for any love he had for her, but through the persuasions of others."

The answer states that the defendant was at his marriage the clerk of the county court of Buncombe and resided in Asheville, and that his wife then lived with her father, John Murry, in the county of Henderson; that after the marriage Mrs. Harrison went home with the defendant and lived with him thirteen months; and that for about ten months they lived in peace and affection, and she was kind and dutiful as a wife and careful of his domestic concerns; but that about that period she became negligent of her household duties and indifferent to him; that, nevertheless, he overlooked it, as he did not suspect a want of affection for him, and attributed her conduct to melancholy and a predisposition to hysterics; that she became greatly dissatisfied with Asheville, and urged him to remove to the neighborhood of her relations in Henderson; but that he could not do so, as his duties in office and interest required him to reside in Asheville. The answer further states that her neglect and indifference increased to such a degree that he felt obliged to
(486) admonish her; and admits that, being a man of hasty temper, he may have done so more rudely and harshly than was becoming.

The answer then states that a short time before the petitioner left the defendant's house her father suggested to them that, as the period of her confinement was approaching, it would be prudent she should go to his house, where she could have assistance of her female friends; and that the defendant readily assented, and furnished the necessary means for her going, and did not then entertain the slightest suspicion of any dissatisfaction on her part. Soon afterwards he was informed by a letter from Mr. Murry of the birth of a daughter, and immediately the defendant went to Henderson to see his wife and child, and, after remaining with them a night and day, took an affectionate leave of them, being under the necessity of returning to his business. The answer further states that when the defendant set off home Mr. Murry, the father, accompanied him some miles, and then informed him, for the first time, that the petitioner "had concluded not to live with this defendant, because," as he said, "her ways and his ways were different." The answer then states various efforts of the husband, by his personal solicitations to his wife and through her father and a brother-in-law, to effect a reconciliation, by making acknowledgments for any unkind expressions he might have used at unguarded moments—all of which were unsuccessful, by reason, as the defendant believed, of the final opposition of the wife's father. The answer then denies positively that the defendant ever offered or threatened violence to the wife's person, or that she ever had, to his knowledge, to ask the protection of a neighbor's house from his threats of violence, and that he ever called her a "whore" under any circumstances, or accused her of incontinency at any time, or believed her guilty of it. He says that while they were engaged to be married the petitioner informed him that at one time she had been engaged to one Henry Grady; but that she did not know his character at the (487) time, and, discovering afterwards that he was a wicked man, she broke off the match; and that after their marriage the petitioner resumed the subject of her engagement with Grady, and then added some circumstances which she had before withheld and induced the defendant to remark, "that no prudent woman, who wished to stand above suspicion, would have conducted herself so," and that the defendant states, was the only remark ever made by him to his wife from which she could infer he intended to make the charge of unchastity.

When the cause came on for trial several issues were, at the instance of the plaintiff's counsel, made up and submitted to a jury, upon the several facts alleged in the petition, that is to say, whether the defendant ever threatened violence to the plaintiff's person; whether she was ever compelled to leave his house and seek protection of a neighbor, for fear of violence to her person threatened by her husband; whether the defendant, in the presence of his children, or at any time, called the peti-

tioner a whore, or charged her, before she left him, with illicit intercourse with Henry Grady before marriage, or attributed her wakefulness to the lashings of a guilty conscience for her past whoredoms. To those issues the plaintiff's counsel moved to add one in these words: "Did the defendant, before the petitioner left his house, offer such indignities to her person as to render her condition intolerable and her life burdensome?" But the court refused the motion.

The plaintiff then read to the jury several depositions as evidence on the other issues. They were those of the father, mother-in-law, and sister of the plaintiff, and they proved, in substance, that after the separation the wife stated to her familiar friends that her husband had made accusations against her of fornication with Grady, and said she would not return to live with him unless he changed his opinion on that
(488) point, because, unless he did, they could not live in any quiet or comfort. The father, upon the visit of the defendant to his wife after the birth of the child, first communicated to the defendant information of his wife's statement; and in reply the defendant, after expressing his surprise and mortification, stated to Mr. Murry that, before their marriage, his wife had informed him of her engagement to Grady, and that he, Grady, had traveled in company with her on one occasion, while they were engaged, from Henderson to Macon County on a visit to her sister; but that the match had been broken off by the opposition of her father, who knew Grady's character; and that the defendant further stated to him that after the marriage his wife represented to him that, during the engagement with Grady, he attended her three times on visits to Macon, and that once they met on the road, after she had left home, and that he considered Grady a dissolute man, and told his wife that her conduct was very imprudent and censurable and unbecoming a virtuous woman. Upon being asked whether the defendant charged his wife with incontinence, the witness, Mr. Murry, replied that he could consider his observation nothing less, as he had admitted he had complained of his wife's keeping Grady's company improperly, and did not deny the representations of his wife, that he had accused her of incontinence. The other evidence was much of the same character; and all the witnesses proved that the defendant often said that he never discovered any evidence of unchastity in his wife while she lived with him, and was importunate for her return to him.

The court instructed the jury that the evidence did not support the issues on the part of the plaintiff, and they found accordingly. The court dismissed the petition, and the plaintiff appealed.

(489) *N. W. Woodfin and Francis for plaintiff.*
Avery for defendant.

RUFFIN, C. J. The Court is of opinion that the instructions to the jury were right. There is no pretense that the material allegations of violence or threats of violence by the husband to the wife are true, or that she was compelled to leave his house through fear of him. The remaining allegations of specific facts are that the husband used the opprobious language to the wife, charging her with unchastity, as set out in the libel and the issues. There is no evidence to the fact of any altercation between the parties, or improper language used by the one to the other. The only evidence is that of a subsequent conversation between the husband and the near relations of the wife, in which he makes admissions that some things had passed between them which were calculated to produce in her mind an impression that he harbored suspicions of her regard for a former suitor, and, perhaps, had not entire confidence in her previous purity of mind and prudence. But, although the father, with, perhaps, an excusable tenderness for his daughter's honor, says he could understand from his conduct nothing less than that the defendant had accused his wife of incontinence, yet that is stated merely as a matter of inference from the impressions which the wife's communications to him of her associations with a dissolute man had made on him with respect to her sympathies with that person, and her prudence, as a discreet and modest maiden, in indulging and exhibiting those sympathies in the manner she did. It does not appear that the defendant ever admitted that either in her presence or elsewhre he applied to the wife the very gross epithet of "whore," or imputed the actual guilt of criminal conversation; and he swears positively that he never did under any circumstances, nor did he entertain such a belief. Even upon the hypothesis that such an occurrence between husband and wife as that supposed would justify her in leaving him without explanation or notice, and would entitle her thereafter to a decree for separation and (490) maintenance—a point we do not decide—yet the evidence here offered established no such case, and could not authorize the jury to find it.

The Court likewise concurs in the opinion that an issue ought not to have been raised in the general form of an inquiry "whether such indignities to her person as rendered her life burdensome" had been offered to the wife by the husband. It is for the court to judge what are "such indignities." The statute requires "that the material facts charged" in the bill shall be submitted to the jury, and it is their whole office to respond as to them. It is clear that a divorce could not be granted upon a libel which charged only that the husband offered such indignities to the wife's person as to render her condition intolerable or life burdensome, without alleging any overt act of indignity. It is, therefore, a finding of facts which constitutes indignities, legally speaking, which

alone can entitle the plaintiff to a decree; otherwise, there always would be a surprise on the defendant.

PER CURIAM. Affirmed.

Cited: *Coor v. Starling,* 54 N. C., 243; *White v. White,* 84 N. C., 344; *Jackson v. Jackson,* 105 N. C., 438; *Ladd v. Ladd,* 121 N. C., 121.

(491)

EVAN S. HOWELL ET AL. v. HENRY HOWELL ET AL.

1. Where there is a conveyance of chattels in immediate and absolute property, and there is in the same indenture a distinct personal covenant of the grantee, that the grantor shall have certain uses of the property during life, that ought not to be construed to a reservation of a life estate, but taken as a covenant merely, chiefly because the granting part of the instrument would otherwise be made void, and thus the whole contract become of none effect.
2. All instruments made at the same time and relating to the same subject may be treated as one and construed together, where this is necessary to effectuate the intention, and the provisions of the instruments, so put together will not be incompatible.
3. But when contracts are put into several instruments, each of which has a sensible meaning, and may have a full operation by itself, they ought not to be put together for the purpose of making them mean, as one, differently from what they could in their separate state, and especially when the effect of such consolidation would be to avoid an essential part of the contract.

APPEAL from HAYWOOD Spring Term, 1846; *Pearson, J.*

Trover for a mare, negro Jack, and several horses, cattle, and other goods, and was tried on the general issue.

The defendant Henry Howell owned all the articles, and on 1 July, 1843, in consideration of natural love and affection, and of the sum of $300, he conveyed them, and also a tract of land, by two deeds, to his three sons, who are plaintiffs in this action. At the same time the plaintiffs gave their father an obligation in the penal sum of $1,000, with conditions as follows: "The conditions of the above obligation are such that whereas the said Henry Howell hath sold all his property—see deed for land and bill of sale for negro, stocks, and property—and now we, N. G. Howell, etc., for the love we have for our father, do put into his possession a certain negro, named Jack, one gray horse" [and sundry other horses, cattle, sheep, hogs, crops of wheat, corn, rye, oats, as (492) conveyed to them] "that is on the plantation where the said Henry lives; and he, the said Henry, is to continue in possession of all the aforesaid property during his natural life by taking good care

of the same, or as long as he may remain on the same place, for him to make the necessary support of life. Nevertheless, it is expressly understood that the said Henry is not to remove any part of this property off the premises that the said Henry now lives on, without consent of the said N. G. Howell, etc., neither to hire nor lease said property without consent of the said N. G. Howell, etc.; and it is further understood that when the said Henry is so unable by any infirmity to support himself and property, the said property is to be surrendered up to the said N. G. Howell, etc., and we are to support our father in sustenance during his natural life, provided the said Henry will live with his children; and none of the property is to be removed more than 8 miles from the premises the said Henry now lives on, then all the said property, together with the said land and negro, to be surrendered to the said N. G. Howell, etc., at the instant the said property is removed; then this obligation," etc.

Also, at the same time, the father, Henry Howell, gave to the plaintiffs his obligation in the sum of $1,000 with conditions "that the said Henry do well and truly take care of the farm and all the premises that he now lives on, etc., take good care of the negro named Jack, and all the stock and property that I, Henry Howell, sold to N. G. Howell, etc.; and I do bind myself that I will not remove said property, nor hire nor lease the same to any person, without the consent of said N. G. Howell, etc., and if I should, the aforesaid property is to go into possession of said N. G. Howell, etc., and I am to be dispossessed of any benefit of said property."

On 28 September, 1843, Henry Howell conveyed to the defendant Battle the land and all the personal property now sued for, by deeds purporting to convey the land in fee and personalty absolutely.

The plaintiffs thereupon demanded possession from the defend- (493) ants, and, after a refusal, brought this suit.

The court instructed the jury that the legal effect of the deed executed by the plaintiffs taken in connection with the other deeds which were executed at the same time, was to give Henry Howell an estate for life in the negro and other chattels, and that the life estate amounted to the absolute property in all except the negro, and, therefore, that as to them this action could not lie; and as to the negro, the court charged that by the deed Henry Howell had but a life estate, and that the reversion was in the plaintiffs; but that, nevertheless, they could not recover for him, because the condition that said Henry should not remove nor hire him without the consent of the plaintiffs was repugnant to his estate, and void, and also because the performance of that stipulation was secured by the obligation of the father for $1,000, instead of a provision for the revesting of the property in the plaintiffs.

N. W. Woodfin and Francis for plaintiffs.
Gaither and Edney for defendants.

RUFFIN, C. J. The Court is of opinion that the construction put on the instrument given by the plaintiffs is erroneous. It is in form a personal obligation of the sons, under a penalty, that the father shall, upon certain terms, possess and enjoy the property as long as he will live on the land. The question is whether it is to be taken according to its form and natural sense or to be construed to be a reservation or conveyance of the legal estate to the father for life. The true principle for the construction of all instruments is that of effectuating the intention of the parties, if it can be done. When there is but one instrument, the different parts ought to be reconciled, if possible, so as (494) to make each separate, and the whole received in such a sense *ut res magis valeat, quam pereat.* If, indeed, a conveyance be made of chattels, to take effect after a life estate, or if the grantor of chattels expressly reserve a life estate, there is no helping the grantee, unless under some statute, because at the common law nothing remained after the life estate to be conveyed. But if there be a conveyance of chattels in immediate and absolute property, and there be in the same indenture a distinct personal covenant of the grantee that the grantor shall have certain uses of the property during life, that ought not to be considered as a conveyance, or, rather, a reservation of a life estate, but taken as a covenant merely, because it is in that form, which of itself indicates the intention to a great extent, and chiefly because the granting part of the instrument would otherwise be void, and thus the whole contract become of none effect. Much more does a construction in support of all parts of the contract commend itself when the different parts are put into separate and apparently in different instruments. There is no doubt that all instruments executed at the same time and relating to the same subject may be treated as forming but one, and construed together. But that is not the natural construction, and is only resorted to in order to effectuate the intention, and where the provisions of the two instruments, if put together, will not be incompatible. Where contracts are put into several instruments, each of which has a sensible meaning and may have a full operation, by itself, it would be a hazardous assumption to put them together for the purpose of making them mean, as one, differently from what they could in this separate state; and, certainly, the court cannot do such violence to the intentions of the parties, and the language in which they are expressed, as to consolidate separate instruments when the effect of doing so would be to avoid an essential part of the contract and make an estate, intended to be granted, fail altogether. Here the legal title

of the land, negro, and other chattels was conveyed to the plain- (495)
tiffs by the deeds to them, taken in their natural import and by themselves. The contract on the part of the sons purports to be a pecuniary obligation, with certain underwritten stipulations to be performed as conditions. It was unquestionably intended that the sons should have some title in all and each of the things conveyed; and the only way in which they can is to vest the whole in them absolutely; for they get nothing if their grantor reserved a life estate. This is certainly so as to all the chattels except the negro; and that governs the construction, because it is conclusive of the intention as to them, and, therefore, as to the negro and land also, which are all included together in the condition of the bond, and the same provision made as the whole. In this very case the Superior Court was obliged, upon the construction there adopted, to hold that the grant to the sons of the perishable chattels was annulled *ab initio* by the estate for life supposed to be reserved to the father. That seems to us to be an unanswerable argument against putting the obligation of the sons to the deed of the father; for it not only modifies the operation of the latter, but, as to the chattels, defeats it entirely. In fine, we do not see any reason why either the obligation of the sons or that of the father, in the same penalty, and importing to be personal contracts, should not inure as such merely, or why the former should be allowed to operate as part of the deed, made by the father, and thus defeat the estate granted therein.

PER CURIAM. *Venire de novo.*

Cited: Howell v. Howell, post, 496; *Lance v. Lance,* 50 N. C., 414; *Moring v. Dickerson,* 85 N. C., 468; *Bank v. Loughran,* 122 N. C., 673; *Belvin v. Paper Co.,* 123 N. C., 145; *Kirkman v. Hodgin* 151 N. C., 591.

(496)

DEN ON DEMISE OF N. G. HOWELL ET AL. v. HARRY HOWELL ET AL.

The estate of a tenant at will is determined by a demand of possession by the owner, and also by his own conveyance in fee.

APPEAL from HAYWOOD Spring Term, 1846; *Pearson, J.*

N. W. Woodfin and Francis for plaintiffs.
Gaither and Edney for defendants.

RUFFIN, C. J. The lessors of the plaintiff are the same persons who were the plaintiffs in the action of trover, *Howell v. Howell, ante,* 491;

and the same question arose in this case as in that, as to the construction of the deeds of the father to the sons, and of the obligation of the latter to the former; and the same instruction was given to the jury, who found accordingly, and the plaintiff appealed.

It is true that under the statute of uses an estate in the land might be made to arise to the sons at the death of the father; and if it had been so expressed in the deed made by the father, the plaintiffs could not recover. But it is not so expressed, nor can the estate for life to the father be raised at all without connecting the deed and obligation together. Now, whether that ought to be done or not depends upon the necessity for doing so in order to effectuate the intention, or upon its effect in defeating the grant or a part of it. In a case between the same parties this Court held that these instruments could not be incorporated, because that would annul the grant of the chattels conveyed by Howell to his sons. As that is decisive of the intention of the parties that the instruments should not be embodied, but that each should operate *per se,* it follows that the legal title to the land is in the lessors of the plaintiff and that he ought to recover.

A further objection was raised in the argument here against (497) the action, which is, that the father became, at least, the tenant at will of his sons, and that they ought to have given reasonable notice before this suit. The answer is that, merely as a tenant at will, his right was determined by both the demand of possession by the lessors of the plaintiff and also by his own conveyance in fee before the action brought.

PER CURIAM. *Venire de novo.*

ANDREW H. KILLIAN v. JOSHUA HARSHAW.

1. In the construction of covenants technical rules are not to be so much consulted as the real meaning of the parties, where it can be gathered from the instrument itself.
2. To arrive at the intention, sentences may be transposed and insensible words, or such as have no distinct meaning, may be rejected.
3. The whole instrument must be taken together, and one part may be explained by another.

APPEAL from CHEROKEE Fall Term, 1846; *Caldwell, J.*

Covenant. At a public sale of lands belonging to the State in the county of Cherokee, in 1838, David R. Lowry purchased a lot in the town of Murphy at the price of $195. According to the terms of sale, he paid one-eighth of the purchase money and received a certificate of

the purchase. He sold the lot to the plaintiff, and assigned him his certificate. Killian sold to the defendant, upon the conditions contained in the following covenant, to wit: "27 February, 1844. This day, after a trade being made by the undersigned, whereas A. H. Killian hath sold unto Joshua Harshaw a certain lot in the town of Murphy, Lot No. 7, containing one-half acre, which lot was purchased at the land sale in North Carolina in 1838, by David R. Lowry: (498) Now, if the said Lowry does well and truly pay to the State of North Carolina the purchase money on the said lot and *make a title to Joshua Harshaw,* then the said Harshaw is to pay the said A. H. Killian $195, or account to him in a settlement for the same. But if the said Lowry fails to pay the same to the State, then the said Joshua Harshaw is to pay the State himself, in consideration for the lot before above mentioned, or should D. R. Lowry have paid a part of the $195, the remaining part of the said sum is to be accounted for to A. H. Killian by the said Joshua Harshaw." The breach is assigned on the last clause in the covenant, and the jury, under the directions of the judge, gave the plaintiff a verdict for $160.73, being the whole amount of the original purchase, less the one-eighth paid by Lowry at the time of the sale.

Judgment being rendered pursuant to this verdict, the defendant appealed.

Francis for plaintiff.
Gaither and Edney for defendant.

NASH, J. In the opinion of the presiding judge we think there is error. The covenant is drawn very inartificially, but still the real meaning of the parties is, upon a careful inspection, apparent. It is well settled that in the construction of covenants technical rules are not so much consulted as the real meaning of the parties, where it can be gathered from the instrument itself; and to arrive at the intention, sentences may be transposed and insensible words, or such as have no distinct meaning, may be rejected. The whole instrument must be taken together, and one part may be explained by another. *Foster v. Frost,* 15 N. C., 426. The first stipulation in this covenant, as to the price, is a key to the others following, and particularly to the one we are considering. By the terms of the sale the purchaser was obliged to pay, at the time, one-eighth of his purchase money. (499) Upon making this payment he received a certificate of purchase, and not until he paid the whole could he receive a grant. Lowery had made this first payment. This was known to the parties to this covenant, but it was not known whether he had made or would make any

further payment, or, if so, to what amount. By the sale to the plaintiff he was substituted to the rights of Lowry in the purchase from the State, and, like him, could not obtain a title until the claim of the State was satisfied; and the defendant by *his* purchase occupied the same position. By the first condition it is stipulated that if Lowry had paid or should pay to the State the whole purchase money and make a conveyance to Harshaw, then the said Harshaw is to pay to Killian $195, the whole of what Lowry had paid, the full purchase money of the lot; and this because Killian had by his purchase acquired the contract of Lowry. It was as if *he* had paid the money to the State he was entitled to receive it back from Harshaw. All this is plain, and it thereby appears this was the whole that was to be paid by the defendant. But the second and third conditions are contradictory, and cannot stand together under the construction put upon the latter in the court below. They are as follows: But if the said Lowry refuse to pay the same to the State, the said Harshaw is to pay the State himself; and, in that case, there is no provision for any payment to the plaintiff, for he will have paid nothing either by himself or by Lowry. But if Lowry has paid a part of the $195, "the remaining part of the said sum is to be paid to Killian." Now, it was known to the parties that Lowry had paid the one-eighth, for they know that without so doing he could not have obtained his certificate of purchase. Lowry was bound to the State for the other seven-eighths. Killian was not, and could not be called on for it; neither was Harshaw bound. According to the
(500) second condition, if Harshaw paid the purchase money to the State, which was seven-eighths and which was all the State could claim, there is no express provision for any other or further payment to any one by him. But under the construction put upon the third condition by the plaintiff, if Lowry had not paid more than the eighth, the defendant was bound to pay the plaintiff the other seven-eighths, leaving the defendant still to pay the same sum to the State before he could get a title. This, it appears to us, could not be the true intent of the contract. What the parties to this covenant meant was that the defendant should pay to plaintiff all that Lowry had paid or should pay to the State in the purchase of the lot. This construction is in conformity to the first condition, which is plain and sensible, and is fortified by the fact that in the third condition the sum mentioned as to be paid to Killian corresponds exactly with the purchase money to be paid by Lowry. It is admitted by all parties that the covenant is obscurely worded, and it is our duty to put upon it such a construction as, in our opinion, will carry out the intention of the parties as appears on the face of the instrument. The defendant binds himself to complete the purchase from the State. If in so doing he has the whole of the pur-

chase money to pay, he is to pay no more to any one. If Lowry has paid the whole, then the defendant is to pay the whole to Killian, upon getting a title from him. If less than the whole has been paid by Lowry, the defendant is bound to pay what is still due to the State, so as to entitle him to call for a conveyance of the lot from its officers. Such appears to us the true construction of the instrument. It does injustice to no one, while that put upon it in the court below evidently compels the defendant to pay for the lot twice—once to the plaintiff and again to the State—before he can get his title.

PER CURIAM. *Venire de novo.*

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