ANNOTATIONS INCLUDE 182 N. C.

NORTH CAROLINA REPORTS

VOL. 3

CASES ADJUDGED

IN THE

SUPERIOR COURTS OF LAW AND EQUITY

AND

COURT OF CONFERENCE

OF

NORTH CAROLINA

FROM 1797 TO 1806

REPORTED BY

JOHN HAYWOOD

VOL. II.

---

2 ANNO. ED. BY

WALTER CLARK

(Retaining former Notes of W. H. Battle)

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JUDGES OF THE SUPERIOR COURT
1797 TO 1806

JOHN WILLIAMS
JOHN HAYWOOD
ALFRED MOORE
‡SAMUEL JOHNSTON
§FRANCIS LOCKE
SPRUCE MACAY
*DAVID STONE
†JOHN LOUIS TAYLOR
‖JOHN HALL
¶SAMUEL LOWRIE

ATTORNEY-GENERAL:
BLAKE BAKER
**HENRY SEAWELL

*Resigned 1798; reëlected 1806.

†Elected 1798, *vice* David Stone, resigned.

‡Appointed February, 1800, *vice* Alfred Moore, promoted to United States Supreme Court.

‖Elected May, 1800, *vice* John Haywood, resigned.

§Elected 1803, *vice* Samuel Johnston, resigned.

¶Elected 1806.

**Elected Attorney-General 1804, *vice* Blake Baker, resigned.

NOTE.—There were, in 1797, four judges, two jointly holding courts in the Eastern Riding and two in the Western Riding. The judges were directed in 1800 to meet in Court of Conference and hear appeals. In 1805 the name was changed to "Supreme Court." In 1806 two new judges were added, and there were six circuits, ridden by each judge in rotation. 103 N. C., 474-477.

CASES REPORTED

CASES CITED

CASES ADJUDGED

IN THE

SUPERIOR COURT AND COURT OF CONFERENCE

NEW BERN, September, 1797.

IRVING v. IRVING

An answer may be taken out of the State, under a commission, before any person authorized by law to administer an oath at the place where taken, and will be received, though the commission was issued in blank, and afterwards filled up by the defendant with the name of the commissioner.

BILL IN EQUITY for an injunction to stay the defendant from proceeding at law. A commission had issued to Maryland to take the answer of the defendant, the reading of which was now opposed by Mr. Martin, because the commission for taking the answer had issued with a blank for the name of the commissioner, and had been filled up by the defendant or his counsel after it went from the office of the clerk and master. He contended that the commissioner should have been named, and approved of by the court before the commission issued. And he cited the case of ——— *v. Mooring,* in this Court, where the answer was referred for impertinence and the Court declared that no commission ought to issue for the future to a commissioner not previously approved of by the Court.

Badger, e contra, cited several cases in this Court, as also did Taylor and others, where the answer had been taken by commission filled up as in the present case and had been received by the Court.

WILLIAMS and HAYWOOD, JJ. The practice of taking an answer upon a commission filled up by the defendant with the name of a commissioner is a dangerous one; as the defendant may name a man who will certify an answer as sworn to, when in truth it was not. Such abuses have been committed with respect to commissioners to take testimony. But as this answer was taken before the Chief Justice of one of the districts of Maryland, and as the practice has been to receive answers taken before persons authorized by the laws of the country where taken to administer oaths, it is better to adhere to that practice than now to alter it.

Let the answer be read.

NOTE.—See *Hunt v. Williams,* 1 N. C., 318; *Allen v. State Bank,* 21 N. C., 7.

EDENTON, October, 1797.

BOATWELL'S ADMINISTRATORS v. REYNELL AND WIFE.

An executor or an administrator, as such, can no otherwise become entitled to the goods of his testator or intestate than by paying their value to creditors. He cannot purchase at his own sale.

TROVER for a number of articles purchased by Boatwell in his lifetime at the sale of one Winburn, deceased, whose widow had intermarried with Boatwell, having previously obtained letters of administra-
(2) tion on the estate of Winburn. After the purchase Boatwell died and she married Reynell, who in her right obtained the articles so purchased by Boatwell, alleging that an administrator could no otherwise acquire a property in any articles belonging to the estate of his intestate than by paying the value to a creditor, which here he had not done.

The defendant's counsel cited Office of Executor, 89.

HAYWOOD, J., only in Court: Boatwell in right of his wife was the vendor by means of the sheriff, according to the act of 1762, ch. 5, sec. 10. And it is absurd that the seller shall become the purchaser. To whom shall he give bond and sureties as required by the act? Surely, not to himself; much less to the sheriff, who is only an instrument and has no interest. The goods yet remain part of the intestate's estate, and an execution issued against his assets in the hands of his administrators would attach upon them. An administrator or executor as such can no otherwise become entitled to the goods of his testator than by paying their value to creditors, as stated in the book cited.

Verdict and judgment for defendant.

NOTE.—See *Corbin v. Waller*, *post*, 108; *Tomlinson v. Detestatius*, *post*, 284; *Brittain v. Brown*, 4 N. C., 332; *Ryden v. Jones*, 8 N. C., 497; *Gordon v. Finlay*, 10 N. C., 239; *Falls v. Torrence*, 11 N. C., 412; *Cannon v. Jenkins*, 16 N. C., 422; *Villines v. Norfleet*, 17 N. C., 167.

COLLINS v. DICKERSON.

1. The clerk and master is entitled to charge for each amount, expressed in figures, only as for one word—as, for instance, £1 10s. 11d. shall be charged for as one word.

2. A copy-sheet consists of ninety words.

GERARD'S WILL.

THE clerk and master, Mr. Iredell, had issued his execution for about the sum of £400 as due for the costs of this suit, which Dickerson complained of. And the Court in the beginning of this term referred it to Mr. Blair to state to the Court the services which had been performed by Mr. Iredell. He accordingly made his report; whereupon several questions arose and were debated at the bar.

One was, whether for sums expressed in figures in recording the proceedings he should charge for as many words as would be necessary to express the sum in words at length, or whether he should charge for each sum expressed in figures as for one word.

WILLIAMS and HAYWOOD, JJ. He shall charge as for one word for each sum expressed in figures in pounds, shillings, and pence—as, for instance, £1 10, 11, expressed in figures, shall be charged for as for one word.

Another question was, what should be deemed a copy-sheet; that not being expressed in the act of 1787, ch. 22, sec. 3.

PER CURIAM. It is mentioned in the act of 1782, ch. 11, sec. 4, to be ninety words: The Legislature meant the same thing in the act of 1787.

HALIFAX, October, 1797.

IN THE MATTER OF GERARD'S WILL.

Probate of wills must be had in the county court of the county where the deceased resided. The Superior Court has only an appellate jurisdiction in the case of probates.

GENERAL DAVIE moved to prove the will of Major Gerard, lately deceased, saying the estate was under such circumstances as required immediate attention before the time of the sitting of the County Court of Edgecombe, where the testator resided at the time of his death. (3)

WILLIAMS and HAYWOOD, JJ. The act of 1789, ch. 23, sec. 1, directs the probate of wills to be in the court of the county where the deceased resided, to the end that those concerned to contest it might know where to go to make opposition to the probate. The parties cannot know it will be offered here, so cannot be prepared to oppose it here, *et per*

HAYWOOD, J. This Court, independent of the other reason, has but an appellate jurisdiction in cases of probates, by 1777, ch. 2, sec. 62, 63, and for that reason cannot take probate in the first instance.

Motion denied.

NOTE.—See 1 Rev. Stat., ch. 122, secs. 4, 5, and 6. But where an issue of *devisavit vel non* has been carried by appeal to the Superior Court and there finally tried, that is the only proper court in which to demand a reprobate. *Hodges v. Jasper*, 12 N. C., 459.

Dist.: Cowles v. Reavis, 109 N. C., 421.

BRYANT v. VINSON.

The expression "thence to a corner," etc., in describing the boundary of a tract of land, means a direct line from the former to a latter point, and not the courses of a former deed where it is not referred to.

EJECTMENT. A tract of 640 acres had been granted, then 320 acres sold off by an uncertain description, then the remaining 300, "running along a path to a branch, then down the branch to its junction with another branch, then up the latter branch to the path, and along the path to a corner on the opposite extremity of the tract, and so around to the beginning." The bargainee of this latter tract bargained and sold to another, beginning as in the former deed and running to the branch, thence to the corner (before described) on the opposite extremity.

WILLIAMS, J. The plaintiff's counsel contend that by the description in the latter deed the line was intended to run as described in the former—down the first branch, then up the second, and thence along the path to the corner. But the word *thence* is not a term of relation; it does not refer to the boundaries in the former deed. *Thence to a corner* can mean nothing but a direct line from the former to the latter point. To deviate from the former point immediately and return by another line to the direct one from that to the latter, and then along the direct line, is not warranted by the term *thence to the beginning.*

HAYWOOD, J. assented; but the jury found otherwise.

NOTE.—See *Hough v. Horn*, 20 N. C., 228.

WHITEHEAD (WIDOW) v. CLINCH.

1. To a petition for dower, the defendant is not obliged to answer on oath, but should plead his defense.
2. Oral evidence of cohabitation is admissable in this State as evidence of marriage.

PLAINTIFF exhibited her petition for dower under the act of 1784, ch. 22, sec. 9, and defendant pleaded.

Baker, for plaintiff, insisted that the proper way for the defendant to make his defense was by way of answer on oath to the petition, whereupon the Court will determine in a summary way, and the issue shall be tried by the Court.

Davie, for the defendant, argued strenuously that pleading the defense was the only proper way.

WILLIAMS and HAYWOOD, JJ. It is true, some of the practices since the act of 1784 have made their defenses by way of answer; it is equally true that others have made defense by pleading; and it is fit the practice should be settled. The act of 1784 did not intend this to be an equity proceeding; it did not mean to require that the defendant should answer on oath; it alters the common law no (4) further than it has directly expressed by substituting the petition in place of the intricate proceedings by writ and declaration. The defense must be made and tried as before. It is absurd to say the Court shall try in a summary way, whether the plaintiff received satisfaction or not, or was lawfully married or not. The rules of the common law are never to be departed from but where the Legislature have expressly directed it, or where it necessarily follows from what they have directed. They have not done this in the present instance; they have not required any answer on oath, and the Court will not. So the jury were sworn on the pleas, and after much argument on both sides the Court permitted oral evidence to be given of cohabitation in proof of the marriage, notwithstanding the English authorities require a certificate of the bishop, because there is no record kept here of marriages, as in England there is; consequently, no certificate of any officer can be had, and unless parol evidence be received we shall invalidate all the marriages in the country.

NOTE.—Upon the first point see 1 Rev. Stat., ch. 121, secs. 1 and 2. As to the second question, see *Felts v. Foster, post,* 102; *S. c.,* 1 N. C., 121. General reputation and cohabitation are evidence of marriage in all civil cases except actions of *crim. con. Weaver v. Cryer,* 12 N. C., 337.

Cited: Spencer v. Weston, 18 N. C., 214.

WILLIAMSON, BY GUARDIAN v. COX.

A widow cannot enter upon and occupy what part of her husband's lands she pleases, without an assignment of dower.

TRESPASS, and on not guilty pleaded upon trial, the case appeared to be that Williamson was seized of the lands in which, etc., and died seized in 1780, and afterwards his widow married, and her son, the heir of Williamson, assigned dower by metes and bounds which were specified in a deed signed by the son and his mother. Some time afterwards Cox, the second husband, died, and the widow cleared the lands and cultivated them beyond those bounds.

PER CURIAM. The deed ascertaining the boundaries is not binding, being signed by the defendant during her coverture with the second husband; neither is her acceptance of dower during coverture an estoppel to her to claim more, as it might have been had the acceptance been during her widowhood; but she ought to have had a new assignment of dower if she was dissatisfied with the former; she cannot enter upon and occupy what part she pleases without assignment; and, therefore, her entering upon the land beyond those bounds, and clearing and cultivating them, was a trespass.

Verdict for the plaintiff.

Cited: Harrison v. Wood, 21 N. C., 440; *S. v. Thompson,* 130 N. C., 681.

STATE v. INGLES.

1. The State cannot divide an offense, consisting of several trespasses, into as many indictments as there are acts of trespass that would separately support an indictment, and afterwards indict for an offense compounded of them all.

2. A former conviction for another offense of another denomination, grounded on the same facts as those now relied on, is a bar.

INDICTMENT for a riot with others, and for beating and imprisoning Edward D. Barry. The defendant pleaded that he had been heretofore indicted in the County Court of Edgecombe for an assault and
(5) battery on the said Barry, and thereon had been convicted and fined, which indictment and conviction had been grounded on the same facts that this indictment was preferred for.

Baker for the State.
White for defendant.

ANONYMOUS.

PER CURIAM. The truth of this plea is admitted by the demurrer. The State cannot divide an offense consisting of several trespasses into as many indictments as there are acts of trespass that would separately support an indictment and afterwards indict for the offense compounded of them all—as, for instance, just to indict for an assault, then for a battery, then for imprisonment, then for a riot, then for a mayhem, etc. But upon an indictment for any of these offenses the Court will inquire into the concomitant facts, and receive information thereof, by way of aggravating the fine or punishment, and will proportion the same to the nature of the offense as enhanced by all these circumstances; and no indictment will afterwards lie for any of these separate facts done at the same time. This plea is a good one, and must be allowed.

The plea was allowed and the defendant discharged.

NOTE.—A person may be indicted for an assault committed in view of the court though previously fined for the contempt. *S. v. Yancy*, 4 N. C., 133, 519. An indictment pending on the county court may be pleaded in abatement to one in the Superior Court for the same cause. *S. v. Yarborough*, 8 N. C., 78. If a bill be merely found in the Superior Court, and before the party is taken he is indicted and convicted in the county court, he may plead the former conviction to the bill in the Superior Court. *S. v. Tisdale*, 19 N. C., 159.

Cited: S. v. Lindsay, 61 N. C., 470; *S. v. Cross,* 101 N. C., 779.

WILMINGTON, November, 1797.

ANONYMOUS.

Interest must be calculated according to the law of the place where the contract was made.

DEBT upon a bond executed here, and payable to a person of South Carolina.

HAYWOOD, J., only in Court: This bond is not made payable in South Carolina. If it were, yet as it was executed here, it shall only carry North Carolina interest. A contract is to be interpreted according to the law of the country where made, and draws to it such legal consequences as the law of that country attaches to it. Had the bond been executed in South Carolina, and there payable, it would undergo a different consideration.

NOTE.—See *Kaighn v. Kennedy*, 1 N. C., 37.

COBHAM, ASSIGNEE OF CREEDON v. EXECUTORS OF NEILL.

The saving in the statute of limitation extends only to such persons as were beyond seas at the time when the action accrued; not to such as were here when it accrued; and if the statute once commenced running, the going beyond seas afterwards will not stop its operation.

CASE upon a note of hand, and the act of limitation pleaded. This action has been instituted against the testator in his lifetime, and after his death was continued against his executors by *scire facias,* under the act of 1786, ch. 14, sec. 1. On the trial the plaintiff proved an acknowledgment of the debt about a month after the assignment, the assignee then being in the country, and having gone off, about a month after the acknowledgment to Europe.

HAYWOOD, J., only in Court: The plaintiff's cause of action accrued by the assignment (the original promisee being beyond sea). The act began to run upon his demand, and continued to do so all the time he stayed here; and his withdrawing to parts beyond the sea afterwards will not suspend its operation. The saving in the act only ex-
(6) tends to such persons as were beyond the sea at the time when the action accrued; not to such who were here when it accrues: and as he did not sue within three years after the accruing of the action, he is barred.

Verdict and judgment for the defendant.

NOTE.—*Andrews v. Mulford,* 2 N. C., 311, and the references in the note to that case.

Cited: Copeland v. Collins, 122 N. C., 622.

COBHAM, ASSIGNEE OF CREEDON, v. MOSELY.

Where, in assumpsit on a note of hand, the plaintiff, to take the case out of the statute of limitations, proved that the defendant said, "It was at the desire of my mother I gave it; I will not pay it; Ross ought to pay it; I will speak to him about it," *it was held* that these words took the case out of the statute.

CASE upon a note of hand and the act of limitation pleaded. The note was dated and made payable in 1775. This action was commenced in 1792, but the plaintiff proved the note was presented to Mosely not

longer than a month or two before the beginning of the action, who said: "It was at the desire of my mother I gave it; I will not pay it; Ross ought to pay it; I will speak to him about it."

WILLIAMS and HAYWOOD, JJ. After the point had been reserved and argued, the latter words of this conversation admit the debt has never been paid; the former admit the defendant's signature. An admission of the signature, it is true, is no admission of the debt; for still it may be usurious, a gaming debt, or the money may have been paid, or it may be under some other circumstances which render it not a just debt. But when he says "Ross ought to pay it; I will speak to him about it" —this shows the debt is not paid; and though he says at the same time, "I will not pay it," yet, being legally due from him, the law will compel him to pay it.

Verdict and judgment for the plaintiff.

NOTE.—Now the new promise must be in writing. Code, sec. 172. See cases cited in Clark's Code under that section.

COBHAM, ASSIGNEE OF CREEDON, v. ADMINISTRATORS.

Where one of two administrators said, upon his intestate's note being presented to him, "It is the signature of the deceased, and all his just debts shall be paid when the Holly Shelter lands shall be sold," *it was held* that the case was taken out of the statute of limitations.

CASE upon a note of hand, and the act of limitation pleaded, amongst other pleas. The note was executed and made payable before the war, and suit had not been commenced till long after three years of computable time had elapsed from the day of payment. Evidence was offered by the plaintiff's counsel of an admission of the debt within three years next before the action commenced, which was objected to by the defendant's counsel, on the ground that any exception to take the case out of the act should have been replied and notice thereby given of the particular fact relied upon to take the case out of the act, and he was about to produce authorities to that point.

PER CURIAM. You need not produce cases to that effect. The law is so, and if you insist upon it, on that ground the Court will reject the evidence; but the practice of the bar has been not to draw out the pleadings at length, nor to reply, but, when the act of limitation is pleaded,

to proceed to give evidence of facts that will avoid the act, as if such facts had been replied. It is for you to consider whether insist-
(7) ing upon the strict rule of law at this time be for the advancement of justice or consistent with the implied agreement amongst the practitioners, not to take advantage for want of a replication.

The plaintiff's counsel then said if the practice had been as stated, he would not infringe it. Wherefore, the evidence was given, which proved that the intestate in his lifetime had admitted the debt, and that after his death the note was presented to one of his administrators, who said, "It is the signature of the deceased, and all his just debts shall be paid when the Holly Shelter lands are sold."

WILLIAMS and HAYWOOD, JJ. Admission of the signature is not an absolute admission of the debt; but the admission of the signature with the addition, that all his just debts shall be paid, is equivalent to saying that this debt, if a just one, shall be paid, which in ordinary cases would certainly avoid the act of limitations; also in ordinary cases the admission of one of several defendants would avoid the act as to all (Douglass, 652, 653), and we can see no reason why the admission of one of several executors should not have the same effect. Any one of the executors may pay a just debt, though barred by the act of limitations, if he will, for he is not bound to take advantage of the act of limitations. Such payment would be a good one and he would be allowed it on a plea of *plene administravit* as to creditors, or in a settlement with legatees or next of kin. Then why not also bind the assets by his promise to pay it, if one of two executors should admit the debt and be sued first and plead the general issue? That,
(8) in the case of unsealed instruments, would be good evidence of the debt and supersede the necessity of proving the instrument on trial. Then why not take it out of the act of limitations? As to a new promise being the ground for an action against the executor only in *jure proprio,* he may possibly be sued that way and be charged, perhaps, *de bonis propriis;* for it has been sometimes held that a new promise is not only evidence of the old debt, but also of assets to pay it; at least it is so laid down in many of the old books. But that does not prove that the old cause of action is extinguished and that no action will lie against the executor, after such new promise. With respect to the act of limitations, the bar does not proceed upon the idea that the old debt is extinguished, for an admission of the debt after the action commenced will avoid the bar. 2 Bur., 1099. The act was intended to operate where a presumption of payment could fairly be raised from acquiescence for a considerable length of time that the debt was paid,

which presumption remains not after a recent acknowledgment of the debt. An acknowledgment or new promise gives not a new cause of action only to be used as a substitute for the old, but removes the presumption of payment, which is an obstacle opposed by the act to the plaintiff's recovery on the old cause of action.

There was a verdict for the plaintiff and a motion for a new trial, and a rule made in order that the above points might be again argued and maturely considered; and on the day appointed to show cause the above points were again argued on both sides, and the Court gave the same opinion as before. Upon the latter argument a new point was made. It was argued that if here was a promise to pay, it was conditional, and to take effect when the Holly Shelter lands were sold, and cannot be obligatory before that event takes place, which as yet it has not, the Holly Shelter lands being not yet sold.

PER CURIAM: In this conversation there are two branches: the one admits the debt if it be a just one, the other relates to payment to be made out of a particular fund. All that is material as to the act of limitations is the admission of the debt; for upon that the law says it shall be paid out of the personal estate, and it is to no purpose for the executor to say he will pay out of the real, over which he has no control. Here is no evidence to impeach the justness of the debt; his signature may well stand as evidence of that originally till the contrary be shown, though the signature alone may not be evidence that it is a subsisting debt.

Rule discharged.

NOTE.—See *Wilkings v. Murphey, post* 282, and *Falls v. Serril,* 19 N. C., 371. In the latter case it is said that if a new promise, taking a case out of the statute of limitations, be made by or to an executor, the action must be brought on it; and that when the new promise is conditional, upon the performance of the condition it is evidence of a previous absolute promise.

FITZPATRICK v. NEAL.

A letter of attorney given to one not an attorney at law, for the purpose of causing an arrest, should be under seal.

DUNCAN was elected by letter from Fitzpatrick to cause Neal to be arrested for a debt due to him, should he arrive at Wilmington. Neal was arrested accordingly, and imprisoned; and now Neal, being

(9) brought up as upon a *habeas corpus,* moved by his counsel to be discharged because Duncan had not a letter of attorney under seal. The counsel argued that every letter of attorney for the purpose of causing an arrest, or recovering a debt or the like, should be under seal, in order that he who gives the power may be estopped to say he did not give it, and so charge the defendant again, as he might do if the attorney or agent acted without proper authority; and in a case like the present, where a suit is carried on in the name of the principal, the power should be filed among the records of the court, and should be duly authenticated; otherwise, a bar or recovery in this action could not be effectually pleaded against a new action for the same cause. The principal might say he gave no power to commence any such action as the former, which if true would avoid the plea. The principal could not be bound by his acts, for otherwise debtors might come here and cause themselves to be sued by their friends and have a judgment of the court in their favor and become discharged of their just debts. And to prove that letters of attorney should be under seal, they cited Coke Litt., 52; 1 Ba. Ab., 198; 2 Roll. Ab., 8.

WILLIAMS, J. For the reasons given at the bar, I am of opinion the authority given by this letter is insufficient.

HAYWOOD, J. Powers of attorney to attorneys at law, to sue or defend, are always without seal, unless given by corporations, who can only act by their common seal. These attorneys may enter satisfaction on record, receive the moneys due, cause arrests to be made, and do many other acts. On the contrary, all the instances in West and other books, of letters of attorney to private persons, are under seal, which, to be sure, is some argument that the law requires them to be so. But why a seal in the latter case is necessary when in the former it is not, I cannot well see any good reason. I will consider further of it at another day.

This case being again moved, WILLIAMS, J., gave the judgment of the Court that the defendant be discharged from his imprisonment, the authority to Duncan to cause the arrest not being sufficient, for want of seal.

He was discharged accordingly.

NOTE.—See *Whitmore v. Carr, post,* 181, which seems contra; and see, also, *Dick v. Stokes,* 12 N. C., 91, which decides that an agent of the bail must have at least a written authority for arresting and surrendering the principal.

YOUNG v. IRVIN.

1. Where, upon a contract for the purchase of land, the purchaser takes possession before he obtains his deed, this possession shall not be considered adverse to the owner.

2. A plaintiff in ejectment need not have been in actual possession seven years before action brought. If he has a title by grant or deed, he has a constructive possession by operation of law, which preserves his right of entry until it be destroyed by an actual adverse possession, continued for seven years together under color of title.

EJECTMENT. The land in question was granted by the King to Solomon and James Ogden on February 20, 1735; they conveyed to Clark in 1737, and he to Gabriel Johnson in 1738. Johnson devised, in 1751, that his executors should sell; his widow, being his executrix, intermarried with Rutherford, and they conveyed to Orme in 1754, who in the same year reconveyed to Rutherford, who in 1763 conveyed to Duncan, and he in the same year reconveyed them. Rutherford in 1773, pursuant to a decree of the court of chancey, conveyed (10) to Murray, and in 1774 Murrray conveyed to Young, who died, leaving the plaintiff his heir; but before the decree Rutherford contracted for a sum of money to sell to Irwin, and to convey when he should have paid the consideration money. Irwin in 1757 made his will and died. He left Rutherford his executor, and it was proven that Rutherford wrote his will: he directed money to be raised out of his personal estate to discharge the debt due for the land, and then devised it to his sons, John and James; he died in possession, which he took pursuant to the contract. Some time in 1753 Rutherford, as executor, took the whole personal estate, to a much larger value than the debt in question, but said he had expended it in the payment of debts. What was the precise amount, either of the personal estate or debts of the deceased, did not appear.

Taylor for plaintiff.

HAYWOOD, J., only in Court (after stating the facts as they (11) were proven on the trial): The legal title has been regularly deduced from the original proprietor to the lessor of the plaintiff, and he is entitled to recover in this action unless barred by the act of limitations, or by Rutherford's sale, or the joint operation of both.

With respect to the contract to sell and the taking possession in consequence thereof, by the permission of the vendor: If that be considered independent of any concomitant or subsequent circumstances, it can

give no title whatsoever. The land could not pass nor any estate in it upon the making of the contract and taking possession pursuant to it by the vendor's consent. A deed properly executed and registered is at least required to pass an estate of inheritance in this country; and this to avoid the danger of claiming estates as passed from the owner's verbal testimony, and of turning men out of their estate and possessions by corrupt witnesses. When a purchaser in a case like the present takes possession, he takes it by consent of the owner, and may continue it until he fails in payment, and then is liable at law to be turned out. He does not take a tortious possession and gain a tortious fee, as has been contended. If he is not, strictly speaking, a tenant at will, his possession is that of the owner, and not a distinct independent possession opposed to his. If he is ousted of possession by a stranger, he cannot regain it by an action in his own name, but only in an action which sets up and affirms the vendor's title. Such possession of the purchaser is, therefore, not an adverse possession to the vendor; and if by the act of limitations an adverse possession is necessary to bar the plaintiff's title, such an one as has been in the present case will not answer that description. Under the act of limitations, it is very true the English law books require the plaintiff in ejectment to prove himself to have been in possession within twenty years; but by our law he need not be in actual possession within seven years. If he has a title by deed or grant, he has a constructive possession by operation of law, which preserves his right of entry until it be destroyed by an actual adverse possession, continued for seven years together. If he has never seen his land—if he has not entered upon it for fifty years—his title may be good, if his adversary hath not been in possession for seven years continually during the whole time, with a color of title. The act of
(12) limitations operates between individuals having different grants of the same lands, or claiming by mesne conveyances under them, where there were two such claimants. The Legislature, in 1715, when this country was a wilderness and the great object was to procure settlers, thought it more politic to prefer a patentee or a grantee under him who had actually settled upon his land and continued in possession for seven years than another who had not settled upon the land, though he had a prior grant or deed; but it did not mean to give any preference to an usurper who settled upon the King's or proprietor's land without obtaining a title at all or paying for it; or who settled upon the lands of an individual proprietor, knowing he was a trespasser in doing so, which he must have known if he had no colorable title. It is argued that the will of old Irwin was a color of title in his devisees. In some cases, perhaps, a will may be so considered. It cannot, however, in the

present case, because this will expressly takes notice that the title was in Rutherford, and provided for the obtaining a title by payment of the money. So here is neither an adverse possession nor color of title, both which are necessary to accompany a seven years possession, in order to give a title to the defendant.

Verdict and judgment for the plaintiff.

NOTE.—On the first point, see *Jones v. Taylor*, 12 N. C., 434; *Walton v. File*, 18 N. C., 567. As to the second, see the note to *Strudwick v. Shaw*, 1 N. C., 34; *S. c.*, 2 N. C. 5.

Cited: Hinson v. Kerr, 178 N. C., 539.

DUDLEY v. RUTH STRANGE.

1. Where lands are designated by known and visible boundaries, and possessed for sixty years, it is, at common law, evidence of a grant.
2. Where an issue was tried between the heirs and administrators upon the plea of fully administered, and found in favor of the latter, upon which there was judgment against the lands and an execution commanding the sheriff to levy on the lands in the hands of the administrators, stating them to be the defendants; and the sheriff sold the lands in the possession of the heirs, *it was held* that the execution did not command a sale of the lands in the hands of the heirs, was not warranted by the judgment, and that therefore the purchaser acquired no title.

EJECTMENT and not guilty pleaded; and upon the trial the evidence was that the lands in question were included within marked lines, and were settled upwards of sixty years ago by one S. Williams, who conveyed to Ellemore Anderson, who died possessed, devising it to his two sons, who conveyed to Mathias Strange, who died some years ago, leaving the defendant his widow; she, jointly with her son, took out letters of administration on the effects of Mathias Strange, and she also obtained a State grant for the premises, dated 23 November, 1796. A patent sworn to have been granted to Williams on 14 September, 1737, is lost. Mathias Strange in his lifetime was indebted to Dudley, the lessor of the plaintiff, in a considerable sum; and in January, 1789, the administrators confessed a judgment, and the land was levied on. The heirs of Strange were cited to ——— April, 1789, to choose guardians; and James Strange, one of the administrators, and eldest son of the deceased, was appointed guardian *pro tempore*. In April, 1790,

an issue was tried between the heirs and administrators upon the plea that the latter had fully administered, and it was found for the administrators; then there was a judgment against the lands; an execution issued against the lands in the hands of the administrators, stating them to be the defendants; and pursuant thereto the lands in question were sold by the sheriff and purchased by the plaintiff. The sheriff executed a deed to him, dated 25 June, 1791.

(13) WILLIAMS and HAYWOOD, JJ. (after argument by Moore for the plaintiff and Wright for the defendant, who used the same arguments the Court went upon and took notice of in giving their opinion): The appropriation of the premises in question by an original patent or grant is actually proven by a witness who saw it and surveyed the land by it, taking down the name of the grantee and the date of the grant in writing. Besides that, the land is designated by marked and visible boundaries, and has been possessed for sixty years. This at the common law is evidence of a grant, and under the act of Assembly gives title against the State, where there is a color of title with twenty-one years possession. Anderson had a conveyance from Williams; and he and those claiming under him were possessed under it for the length of time and more. As to this point, therefore, we have no doubt but that Mathias Strange had title at the time of his death. His administrators confessed a judgment, and this bound them either to find personal assets or pay the money out of their own pockets. But the Court of Equity for New Bern district, upon some equitable circumstances disclosed in a bill preferred by the administrators, have decreed that no advantage shall be taken of their omission to plead *plene administravit*. The heirs, then summoned to put this fact in issue, did so, and a *plene administravit* was found, so as now to appear of record, and there is a judgment now remaining in full force against the land. This judgment warrants a sale of the land to satisfy the plaintiff's debt, but no such sale ever took place. The sheriff sold to the lessor of the plaintiff by virtue of an execution issued against the administrators, whereas the judgment is against the heirs; it commanded the sheriff to levy the debt on the lands in the hands of the administrators, whereas the judgment condemns the lands descended to the heirs at law and in their possession. There is no judgment, therefore, to warrant the execution by which this land was sold; neither did the execution command a sale of the lands now in dispute, and the sheriff has sold them without any authority.

Verdict and judgment for the defendant.

Quere: What judgment the Court would have given had the *fieri facias* commanded the sheriff to levy the debt of the lands and tenements in the hands of the heirs, and there had not been any judgment produced? Would the vendor have recovered as a purchaser under a *fieri facias* issued to and executed by the proper officer, or must he also have shown a judgment? The *fieri facias* justifies the sheriff, though the judgment was void, or be vacated afterwards, or be reversed at the time, except in the instance where he sells goods claimed by a third person which are alleged to have been fraudulently transferred to him by the debtor in illusion of the judgment; but it will not justify the plaintiff, who should not cause it to issue, if the judgment be void or vacatable for irregularity, or be reversed; neither will any stranger be justified by the *fieri facias* alone. Salk, 409; 2 Bl., (14) 1104.

NOTE.—Upon the point in regard to the presumption of a grant, see *Sullivant v. Alston, post,* 128; *Hanks v. Tucker, post,* 147; *Fitzrandolph v. Norman,* 4 N. C., 564; *Rogers v. Mabe,* 15 N. C., 180; *Harris v. Maxwell,* 20 N. C., 241; *Candler v. Lunsford, ib.,* 407. The cases of *Fitzrandolph v. Norman* and *Harris v. Maxwell* decide that the act of 1791 (1 Rev. Stat., ch. 65, sec. 2) making certain possessions of land valid against the State, does not affect the common-law principle of presuming a grant from great length of possession.

SAMUEL NOBLE v. HOWARD'S EXECUTORS.

On a *sci. fa.* to show cause why a judgment in another court in favor of the plaintiff against the defendant should not be set off against a judgment obtained by the defendants against the plaintiff in this court, it was ordered by the court that the judgment in the other court should be deducted from the judgment here as prayed for, and that execution only issue for the balance.

NOBLE has a judgment in FAYETTE* Superior Court against the executors of Howard, and they have a judgment in this court against him, and this is a *scire facias* against them to show cause why Noble's judgment should not be set against theirs, and they to have execution for the balance, if any; and it is now stated in court that the estate of Howard is insolvent, and if the executors are permitted to levy their debt, Noble will probably not be able to get the amount of his judgment refunded by having it levied against them, in support of the *sci. fa.*

*Later changed to Cumberland, N. C.

Moore, for plaintiff, cited *Baskerville v. Brown,* 2 Burr., 1229, and *Barker v. Brohim,* 2 Bl., 869.

Taylor e contra.

There is no new case to show that a judgment in one court, as this is, shall be deducted out of the amount of a judgment in another. The last case cited is indeed of judgments in the courts of common pleas and King's bench, and the one being deducted from the other; but these courts sit under the same roof. In the cases now before the Court they are the judgment of two different courts, sitting for two distinct and separate districts.

WILLIAMS and HAYWOOD, JJ. The reason of the thing is the same in both cases; the common pleas is as much a distinct court from the King's bench as two Superior Courts held for different districts. Let the judgment in Fayette be deducted from the judgment here, as prayed by the *scire facias,* and execution issue for the balance only.

NOTE.—See *Hogg v. Ashe,* 2 N. C., 371; *S. c.,* 1 N. C.

ANONYMOUS.

Under the plea of *plent administravit* the defendant begins by showing an administration of something, which, if he does, then the plaintiff must prove, by the inventory or otherwise, assets to a greater amount than is proven to be administered.

HAYWOOD, J., only present: Upon the plea of *plene administravit* the defendant begins by showing an administration of something, which, if he does, then the plaintiff must prove, by the inventory or otherwise, assets to a greater amount than is proven to be administered; and this is evident if we will but consider the pleadings. The defendant says he fully administered, or hath fully administered all except so much. The plaintiff replies he has assets enough to satisfy his demand, or assets enough besides these confessed, etc.; and upon this, issue is joined: The affirmative comes from the plaintiff in his replication, and the joining of issue is upon that. In the nature of things, it cannot be otherwise; for, suppose it incumbent on the defendant to prove a full administration, and he proves one of 20 shillings, when in fact the estate is worth

£10,000, will not this drive the plaintiff to give evidence charg- (15) ing him with further assets? *Vide* Lill. Ent., 475; 2 Bl. Rep., 1105; Salk, 296; 1 Mo. Ent., 450; Comb., 342; Godol., 175; Cro. Rep., part 3, case 171; Godol., 176.

NOTE.—*Quære* and see *Gregory v. Haughton*, 12 N. C., 442; *Waugh v. Chaffin*, 14 N. C., 101.

CORSE & SKEPTON v. GEORGE LEDBETTER.

The objection of the want of an affidavit to a plea in abatement is good, but it cannot be taken by a demurrer, but by moving the court not to allow the plea to be received.

PLEA in abatement, that they resided out of this State, and Ledbetter was an inhabitant of the district of Morgan; and to this there was a demurrer, and assigned to be for want of an affidavit of the facts stated in the plea.

PER CURIAM: The proper way is not to demur, as is done here; for a demurer is mute and cannot advance a new fact, as is attempted here. You should have moved the Court not to allow the plea to be received as a plea—the matter pleaded is sufficient; but as the counsel agree that the validity of the plea shall be decided upon without regard to the form of opposing it, let it be overruled and the defendant answer over.

LANGDON & WARD v. JOHN TROY.

It is not necessary in a *sci. fa.* against bail to set forth that a *ca. sa.* issued against the original defendant. If the bail wish to avail themselves of the want of a *ca. sa.*, they must do it by plea.

DEFENDANT executed a writ as sheriff, upon a defendant sued by these plaintiffs, and returned a writ without a bail bond; whereby he became answerable as bail himself. There was judgment against the defendant, and a *capias ad satisfaciendum* against him, returned *non est inventus;* and this is a *scire facias* to charge Troy as bail. The defendant demurred generally; and his counsel now argued that the

sci. fa. is in the nature of a declaration and should state all circumstances material and necessary to support the plaintiff's demand; and this *scire facias* does not state that any *ca. sa.* ever issued, which is expressly required by the act of 1777, ch. 2, sec. 19. And of this opinion the Court seemed to be, but ordered precedents to be searched; and on this day Mr. Jocelyn, for the plaintiff, produced the entry of a *sci. fa.* against bail, in *Atkinson v. Wilcox,* in Lilly's Entries, 307, and divers other cases from same book, where no mention is made of the *ca. sa.*

PER CURIAM: The return of the *ca. sa.* is equally necessary in England as it is here; and the want of it may be made an exception, but it must be stated in the defendant's plea. We will not change the precedents; Therefore, let judgment be for the plaintiff.

Vide 2 Co. Inst., 184, 187.

NOTE.—See *Arrenton v. Jordan,* 11 N. C., 98. See, also, *Howzer v. Dellinger,* 23 N. C., 475.

Cited: Gray v. Hoover, 15 N. C., 477.

EMMETT'S EXECUTORS v. E. & W. STEDMAN.

Defendants were sued as executors, and pleaded *non assumpsit* and *plene administravit.* The jury found a verdict for the plaintiff on the first plea, but did not respond at all to the second; and upon a *sci. fa.* to charge the executors *de bonis propriis,* they were permitted *ex necessitate* to plead *plene administravit;* but the Court said the plea must relate to the *teste* of the first process, and that they would not have been entitled to such plea now, had they not pleaded it to the first action.

SCI. FA. against the defendants to show cause why the plaintiffs should not have execution *de bonis propriis,* to which they pleaded no assets, *plene administravit,* and *nullo devastravit,* to which there was a demurrer and joinder. The defendants were sued in the first
(16) action as executors, by a *sci. fa.* issued upon the death of their testator; and on coming into court upon the *sci. fa.* they pleaded the general issue, statutes of limitations, and *plene administravit,* and the jury found a verdict in favor of the plaintiffs, affirming the assumpsit within three years, but found nothing as to the *plene administravit.*

PER CURIAM: The finding was imperfect, and no judgment should have been entered upon it; but since it was entered, and there is no mode of reversing it, being a judgment of the Superior Court, though clearly erroneous, the defendants *ex necessitate* must be allowed to plead the same matter to this *sci. fa.* to discharge their own goods, though they would not be entitled to such a plea now, had they not pleaded it to the first action. However, the plea now put in must relate to the teste of the process by which they were first brought into court, and must state a full administration and no assets at that time.

Cited: Ray v. Patton, 86 N. C., 389; *Hinsdale v. Hawley,* 89 N. C., 88.

JOSHUA G. WRIGHT, ADMINISTRATOR, ETC., v. JOHN WALKER.

A recovery in trover vests the property in the defendant; and a bar in trover or verdict for the defendant is, in an action on a warranty of title, *prima facie* and most generally a proof of property in him; but it is not conclusive, and may be rebutted by showing that some other fact besides the right of the property occasioned the verdict for the defendant.

CASE upon a warranty on the sale of negroes to the intestate; which negroes were gotten out of his possession by the guardian of two orphan children, by the name of Scull, he claiming them as the property of the children; whereupon an action of trover was brought by the intestate against the guardian for the recovery of these negroes; and there was a verdict for the defendant, upon the plea of not guilty.

WILLIAMS and HAYWOOD, JJ. A recovery in trover vests the property in the defendant; and a bar in trover or verdict for the defendant is *prima facie* and most generally a proof of property in him. It is not, however, conclusive, as such verdict may have been upon the ground that the defendant had not possession of the thing, and so had not then converted or held possession, having a lien upon the thing until paid for the work he had done upon it; or because he may have had a particular interest in the thing for years, or the like, which has since expired. In all these cases, and others that might be instanced, the defendant would be entitled to a verdict, and yet the plaintiff, in an after action, be entitled to recover as having the property. A verdict for the defendant is, therefore, only *prima facie* evidence of property

in him, which will stand till the contrary be proven by showing the particular fact in evidence that occasioned the verdict to be for the defendant.

There was a verdict and judgment for the plaintiff.

NOTE.—See account *Garland v. Goodloe, post,* 351; but see *Saunders v. Hamilton, post,* 226, 282; *Pearse v. Templeton, post,* 379; *Shober v. Robinson,* 6 N. C., 33; *Williams v. Shaw,* 4 N. C., 630, 197; *Coble v. Welborn,* 13 N. C. 388; *Martin v. Cowles,* 19 N. C., 101, *contra.* As to the effect of a verdict against the plaintiff in an action of detinue on the plea of *non detinet,* see *Long v. Bangas,* 24 N. C., 290.

WALKER & YOUNGER v. LEWIS & BINGFORD.

A paper purporting to be a bail bond and having all the forms of one except a seal, will not, on the plea of *nul tiel record,* support a *sci. fa.* calling on those who signed it to answer as bail.

SCI. FA. to have judgment and execution against the defendants, as bail for Fleming, against whom the plaintiffs had recovered judgment and taken out a *ca. sa.,* which had been returned *non est inventus;*
(17) and to this *sci. fa.* the defendants pleaded *nul tiel record.* The paper supposed to be a bail bond, and relied on as such by the plaintiffs, when produced, appeared to have all the forms of a bail bond, except the seal, which it had not.

PER CURIAM. This is a fatal variance. The *sci. fa.* states a bail bond as the ground of this proceedings, and by the act the *sci. fa.* can only issue to charge them as bail when they have executed a bond, and that is returned and filed amongst the records of the court. Laws 1777, ch. 2, secs. 16, 18, 19. Here it wants a circumstance material to the essence of a bond.

The Court adjudged there was no such record.

ANONYMOUS.

PER CURIAM. In calculating interest, the payment must first be applied to discharge the interest accrued at the time of payment, and

the excess of the payment, if any, carried to the reduction of the principal. The same directions were given in every case where the calculation of interest came in question during this term.

NOTE.—See *Bunn v. Moore*, 2 N. C., 279, and the references in the note.

BALLARD v. AVERITT.

NOTE.—See this case reported in 1 N. C., 147.

(18)

TOOMER v. LONG.

The words "I have credited him in my account with the value of the certificates. If he will meet me at New Bern, I will settle with him," *were held* to take the case out of the operation of the statute of limitations.

CASE. The defendant pleaded the act of limitations, and there was at the last term a verdict for him and a motion for a new trial, being, as the plaintiff's counsel alleged, a verdict against evidence.

WILLIAMS, J., reported the evidence to have been that Toomer's attorney applied to the defendant for satisfaction for some certificates he had received of the plaintiff soon after the war, who answered, "I have credited him in my account with the value of the certificates. If he will meet me at New Bern, I will settle with him"; and he further reported that MCCAY, J., and himself took time at the last term to consider of the motion for a new trial, and after the term had both agreed that a new trial should be granted; and he was now of opinion the verdict should be set aside and a new trial granted.

HAYWOOD, J. "I will settle with him" imports a promise to pay that balance, if any. For what purpose would he settle and ascertain the balance, unless for the purpose of paying it, should it be found against him?

A new trial granted on payment of all costs.

NOTE.—See the cases referred to in the note to *Cobham v. Mosely, ante*, 6. See, also, *McLin v. McNamara*, 22 N. C., 82, which decides that a promise to settle an account is an admission of a subsisting liability, and an engagement to pay any balance which may, upon the settlement, be found due, and repels the plea of the act of limitation.

ANONYMOUS.

Whether an administrator *de bonis non* may sue upon a bond, taken by a former administrator upon the sale of his intestate's goods, in the name of himself as administrator, *quere*. HAYWOOD and WILLIAMS, JJ., differing upon the questions.

IT became a question in this case whether an administrator *de bonis non* may sue upon a bond taken by the former administrator for goods sold which were the deceased's, in the name of himself as administrator. It was objected the bond was not any part of the assets of the deceased, and cannot be sued in the name of the administrator, for that when an executor or administrator sells the effects of the deceased, he is liable for the value; he is chargeable for all the assets everywhere that may be reduced into his possession before the sale of them, and taking a bond for the price; and the counsel cited 2 Ba. Ab., 441; L. Rav., 437, 865, 1215, 1413.

E contra. It was argued that although the contract sued upon was after the death of the intestate, the administrator may sue as administrator even by the common law. 1 Term, 487.

WILLIAMS, J. However the law might have been formerly, such bonds taken by executors or administrators are now a part of the estate of the deceased, and are only assets when the money is received. The obligors and sureties may become insolvent, without any default of the executor, before a recovery can be effected. It would be very unreasonable if he were to be made a warranter of all the bonds he takes in the execution of a duty prescribed to him by an express law.

HAYWOOD, J. With respect to the rule of the common law upon this subject, there can be no doubt. Every contract entirely and wholly originating after the testator's death, made with his executors, is a contract entirely and wholly originating after the testator's death, made with his executors, is a contract which they do not succeed to, and therefore must sue in *jure proprio*. 4 Term, 277; 5 Term, 234; L. Ray., 436, 437; Salk, 207; 6 Mo., 181; Godol., 155. Where the thing to be recovered by the action will be assets when recovered and not before, the action must be as executor; but if it be assets already, and whether he recover or not, he need not sue as executor. 6 Mo., 94. Now all the effects of a testator actually come to the hands of an executor are assets, rendering him liable to answer the value to legatees and creditors, unless he can excuse himself either by showing that the effects were lost

or impaired in value without any default in him, as if destroyed by enemies, flood, lightning, or the like; or if insolvent trespassers come and destroy the goods without any default or neglect in him; or if a debtor in an obligation made to the testator be insolvent, or become so before the moneys can be recovered of him—these and the like cases will form an excuse for him and exonerate him, either (20) of the whole value or of part, according as the proof lies upon him, it being better to require it of him than of the legatees or creditors (the first of whom may be infants and the latter perhaps living at a distance) to give proof of more having come to his hands of the value of any article than he admits. He might, and it is to be feared would, in many instances, charge himself with smaller sums than did come to his hands, and throw it upon them to prove the circumstances of each particular article, of which in most instances they could know anything. Office Exrs., 110, 113, 115. Then if all the effects which actually come to the hands of the executor be assets, he is at the common law *prima facie* chargeable with that value, and if he sell or waste or otherwise dispose of them, he is still liable, not for what he may have gotten, but for the value, and his sale of them is of no consideration to the legatees and creditors, they not being at all concerned in the contracts he may think proper to make; they are his own—they affect him only, and he can claim the performance of them. If the executor take a new security for a debt due to the testator, he extinguishes the old demand and becomes liable, and therefore shall sue in his own name. 2 Ba. Ab., 441. By a parity of reason, if he sells the testator's goods, and takes a bond or promise instead of the possession of the goods, he shall be liable, and the same consequences follow. This being the old law, the question arises, Has it been altered by the acts of Assembly? I think they have not altered the old law in this respect. The first of them was made to restrain abuses practiced by executors and administrators, who had the goods appraised frequently at an under-value, and so wronged the legatees and creditors. This is recited in the preamble of the act, and is then said to be "to the great detriment of the creditors and kindred," and the act itself alters this for the future by directing a public advertisement at the courthouse, a public sale to the highest bidder, and a return of the account of sales by the executor on oath. Those provisions have one only object, namely, that of preventing the selling of the goods or keeping them by the executor at an under-value. The other act adds, that the sale shall be made by the sheriff, on a credit of six months, and that bonds with sureties shall be taken. Is all this to favor the executor? To alter the law so as to render him less liable than before? No, surely; it was to take from him the probability of abusing his trust, by

diminishing the value of the estate. Before the act he might take the goods at their appraised under-value; now the appraisement is done away. He might sell privately to a friend or trustee, now he cannot; he might sell for ready money, now he cannot; before the last act and after the first, he might sell at public auction himself, or by an
(21) agent of his own appointment, but now only by the sheriff, a public sworn officer, entrusted by the law to enhance the price as much as possible; and he is now to sell on six months credit. Those provisions are all of them directed against the power to commit abuses, and had not in view in any instance to alter the law in favor of the executor. But why take bond and security? For this reason: that, being directed to sell upon credit, it would have been a legal excuse for him if the vendee became insolvent before the day of payment. To take from him this excuse, he is directed to take sureties, so that if the vendee became insolvent, he might be told to resort to them, and so be without excuse for not having the value of the goods sold. The latter act did not intend to put it in his power to say to a legatee or creditor, "Though I once had the goods, I sold them and took bond and sureties, and here it is." As to an executor or administrator discharging himself by a tender of the bonds, that is designedly left out of the act, though that provision is expressly made for guardians. And why left out in these cases? Because executors and administrators must collect and pay debts, and settle the estate with those moneys, which guardians are not to do. These acts limit the discretionary power which executors and administrators had before, and which might be exerted to the prejudice of the estate in the several instances before mentioned; but they do not enlarge this provision or diminish their liability in any one instance; and consequently the executor must be liable for the goods which come to his hands since these acts in the same manner as before. He had the power to sell before, and might sell in any way he thought proper; he may still sell, but when he sells he must do it as the acts direct, so as to exclude the possibility or the suspicion that the goods have been sold for less than their value. This is the meaning of the acts. If before the acts he had sold on credit, he must have sued in his own name, and the bonds would have gone to his executors, and if the obligors or sureties were insolvent at the date of the bond, or were then likely to become so, or have since become so, his estate will be liable for the amount and must pay it, unless they can prove what in law will excuse them, which is far more equitable than to say the administrator *de bonis non* shall take the bond, and that it is a part of the deceased's estate, and that the administrator must sue upon it, and in case of his being able to recover or obtain nothing, that then he shall be turned

round to sue the estate of the first administrator or executor, and to prove the debtor's insolvency at the date of the bond, before he can be allowed to recover. I will, however, think further of this question, as the opinion I am now of seems to be against that of WILLIAMS, J., and also against what I have heard some of the most respectable of the profession express.

Sic adjournatur.

NOTE.—See *Cutlar v. Quince, post,* 60; *Eure v. Eure,* 14 N. C., 206, which establish that a bond taken by an administrator for the sale of his intestate's goods is assets, part of the estate, and may be sued upon by the administrator *de bonis non* in the name of himself as administrator.

(22)

CRAIK'S ADMINISTRATORS v. CLARK.

An heir cannot by the English law, redeem without payment of a specialty debt, though not secured by the mortgage. The Court doubted whether it was so with regard to executors, but upon consideration decreed a redemption on payment by the administrator of the mortgage money, and also a bond debt not secured by the mortgage.

THE bill stated that Craik in his lifetime borrowed of Clark $500, and mortgaged several negroes as a security for the repayment of that sum, with interest, and afterwards both died, and that Craik's administrators, since his death, had tendered the principal sum and interest. The answer stated that Craik in his lifetime was further indebted to Clark in the sum of £100, not secured by mortgage, and that the plaintiffs ought not to be permitted to redeem without payment of that sum also. Plaintiffs replied that they themselves were creditors of Craik, and entitled to be paid by retainer in preference to any other creditor.

HAYWOOD, J. An heir cannot, by the English law, redeem without payment of a specialty debt, because when he redeems he instantly has assets to satisfy the specialty debt; but I do not recollect any case to show the executors are in the same situation. They would, it is true, have assets upon redeeming, but those assets may be liable to debts of a superior nature to that of the mortgage; and the thing redeemed, though assets, might not be assets applicable to the satisfaction of the mortgagee's debt.

We will delay giving an opinion for the present; but it may be mentioned again tomorrow.

The next day Mr. Moore cited 1 P. W., 776, and some cases from Powell on Contracts, and thereupon the Court decreed a redemption upon payment of the mortgage money, and of the £100, with interest upon both sums.

REGULA GENERALIS.

THE Court made this general rule:

When it shall be referred to the master to state an account, he shall, if possible, make his report two months before the ensuing term, and shall give copies thereof to the parties, and the party excepting to the report shall file his exceptions and serve the adverse party with a copy at least a fortnight before the term, and no exceptions shall be allowed of after the commencement of the term but by leave of the Court.

This order was to obviate the inconvenience resulting from the practice of filing exceptions in term-time, and sometimes on the first or second equity day when it was too late for the opposite party to prepare to argue them; and also from the practice of praying time to file exceptions, which was looked upon as a matter to be granted by the Court of course, whereby great delay took place.

ANDERSON'S ADMINISTRATORS v. ————.

Equity will restrain by injunction, at the instance of an administrator, a former administrator who had never given bond and security, from receiving any more of the bond debts of the intestate; and under certain circumstances will order a sequestration of the effects of the intestate in the hands of the former administrator.

ANDERSON died, and the defendant applied to the County Court of NEW HANOVER for administration, who ordered letters to be
(23) issued to him, he giving bond, etc. He never gave the bond, but took possession of the effects of the intestate. Some of them he sold and took bonds for; the others he retained, having first exposed them to sale and bid them off himself; then letters of administration

were granted to Hooper and two others, who gave bond and security, and filed a bill in equity, stating that the defendant was wasting the goods and effects of the intestate, and was receiving the debts due upon the bonds, and was about to retire in a short time to Ireland.

HAYWOOD, J., in the vacation, granted an injunction against his receiving any more of the bond debts, but refused to grant a sequestration as to the goods in specie until the sitting of the Court. And now, at this term, affidavits were produced in support of the charge of wasting the effects, and of the defendant being about to remove immediately to Ireland; and the Court upon the precedents of *Barrow and Barrow,* and a case in this Court in the Spring Circuit in 1796, ordered such sequestration to issue and the effects in specie to be taken in the possession of the sequestrators, and retained by them till the defendant should give security to abide the event of the suit absolutely; and in case of his not giving such security, they were empowered to sell the effects, taking bond with sufficient securities for the purchase money; also, they were empowered to take possession of the bonds, and to bring suit for the moneys due thereon, and to keep all the said moneys in their hands till the further order of the Court. And the Court said, though the defendant had bid off the effects now remaining in specie in his hands, that had made no alteration of the property. They were still part of the estate of the deceased.

WALKER & YOUNGER v. DICKERSON & ROUTLEDGE.

One partner may bind the firm by a bond under seal, signed by himself in the name of himself and his copartner.

THIS was an action of debt upon a bond which one partner had signed with the names of himself and partner. Objected, that one could not sign for the other.

HAYWOOD, J. A similar objection prevailed in a case reported by Dallas, 120; and the same doctrine seems to be hinted at in 1 Term, 313. I am, however, of opinion, when two persons enter into partnership, it is understood by them and also by others to whom their partnership is known, that they are reciprocally empowered, the one by the other, to sign the name of that other to all obligatory instruments occasioned by

their joint concern, as much so as if he had been expressly appointed an attorney by the other to execute that bond in his name, and then the bond is well executed to bind both.

Verdict and judgment for the plaintiff.

NOTE.—See *Anonymous, post*, 99; *Person v. Carter*, 7 N. C., 321, *contra.*

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(24)

WHITFIELD & BROWN v. ANTHONY WALK.

Proof of the handwriting of a clerk in entries made in the plaintiff's books shall not be admitted while the clerk is living, although he may be absent from the State.

ACTION on the case, upon an account for goods, wares, and merchandise sold and delivered. The entries were made in the handwriting of a clerk now in South Carolina.

WILLIAMS, J. It was decided some time ago at Fayetteville, in a case similar to the present, that such testimony as is now offered, namely, proof of the handwriting of the clerk and his absence from this State, was admissible; but the contrary has been decided since by the opinion of the greater part of the judges in this State. Therefore, it cannot be received.

HAYWOOD, J., assented.

The plaintiff then gave other evidence and had a verdict.

NOTE.—See *Kennedy v. Fairman*, 2 N. C., 458.

MCNEIL v. COLQUHOON & RITCHIE, COPARTNERS WITH AULEY MCNAUGHTON & CO.

The bankrupt law in Scotland cannot affect any goods, estate, or debts due to the bankrupt here; and therefore they may be attached here by a creditor under our attachment laws.

THE plaintiff in this action had commenced the same by attachment, and the following circumstances were disclosed by the garnishee on his

examination, to wit: That one of the defendants was one of the partners of the company, who in Scotland had been declared bankrupts and their estates put into the hands of sequestrators; and the defendant, one of the partners here, at the time of the sequestration in Scotland had goods on hand here and debts due to a large amount; that the sequestrators in Scotland appointed the garnishee in this action to be their agent to get possession of the goods here, and also to collect and recover the debts here for the sequestrators; and that the garnishee had received into his possession goods to a large amount and part of the debts, and was about to receive others to a much larger amount than would satisfy the plaintiff's demand.

Curia advisari. At another day the Court asked the counsel (25) whether it would be satisfactory to them if the Court would decide that the plaintiff's debt was payable out of the debts not yet collected, saying nothing of the goods and debts received. The counsel on both sides answered in the affirmative, and said the garnishee had lent money to the plaintiff to the amount of the debt demanded, to be applied to the discharge thereof, should the Court be of opinion he ought to recover upon any of the facts disclosed in the garnishment, or to be returned in case of a contrary decision.

PER CURIAM. We are prepared to say the plaintiff is entitled to recover out of the debts not yet collected. The bankrupt laws in Scotland cannot affect any goods, estate, or debts due to the bankrupt here. And here we must rest our opinion for the present, choosing purposely to avoid any opinion relative to the effects and debts received by the agent of the sequestrators.

Judgment for the plaintiff.

Cited: Holshouser v. Copper Co., 138 N. C., 258.

(26)

ANONYMOUS.

A conveyance absolute upon the face of it, but acknowledged by the answer to be subject to a verbal agreement for redemption on repayment of the money, is a mortgage in equity, notwithstanding it be added to the verbal agreement that the conveyance shall be absolute in case of failure on the very day, or to pay with his own money or the like, or in case of failure to comply with any other condition added to render the right of redemption more difficult or doubtful.

ANONYMOUS.

THE bill stated that the plaintiff's testator borrowed of the defendant a sum of money, and gave an absolute bill of sale for several negroes to the defendant, who engaged verbally to return the negroes on the repayment of the money borrowed, with interest. The answer admitted the advancement of the money, and stated the bill of sale to be absolute, and the negroes to have been purchased; and that he had promised the plaintiff's testator that if within twelve months or two years afterwards he would repay the money, that he (the defendant) would redeliver the negroes; but if he failed to pay principal and interest on the first day prefixed, he should not redeem on the second day prefixed, but by another sum in addition to the principal; and that if he failed at both days, the purchase was to be no longer subject to any redemption.

WILLIAMS and HAYWOOD, JJ. An absolute conveyance upon the face of it, but subject by a verbal agreement to redemption on repayment of money, is in equity a mortgage, notwithstanding it be added to the verbal agreement that the conveyance shall be absolute in case of failure on the very day, or to pay with his own money, or the like, or in case of failure to comply with any other condition added to render the right of redemption more difficult or doubtful the answer confesses enough for us to say it is a mortgage; but as the defendant's counsel insists upon having the contents proved, as the mortgage is lost, we will hear such proof.

Proofs were examined, and established it to be a mortgage, and the Court decreed a redemption.

ANONYMOUS

No interest on a *sci. fa.*

THERE was a *scire facias* to revive a judgment obtained some years ago, and the plaintiff claimed interest.

PER CURIAM. A plaintiff is entitled to interest upon his judgment, if he institutes a new action upon the judgment; but if he brings a *scire facias* to revive, he can only have execution upon the old judgment, without interest.

NOTE.—See act of 1807 (1 Rev. Stat., ch. 31, sec. 95) and the case of *Deloach v. Worke*, 10 N. C., 36.

Cited: Collais v. McLeod, 30 N. C., 223.

CUTLAR v. POTTS AND ANOTHER.

POTTS, as agent of the defendant, had rented a house in Wilmington to the complainant, who enjoyed it about nine months, and the house was burnt down. Potts sued upon the note he had taken at the time of making the contract, and recovered the whole rent; and Cutlar filed his bill for an injunction, and to be relieved as to the rent for the one-fourth of the year, being the time elapsed after the premises were burnt, and during which he had no enjoyment. The answer stated that the houses were let at a great under-value, and the note taken to secure the lessor at all events of the rent therein contained, and to place it beyond the power of accident. (27)

HAYWOOD, J., was strongly inclined that the rent should be apportioned, but took time till this day to look into the cases; and now at this day he mentioned *Brown v. Quilter,* Amb., 619, and *Stuart v. Wright,* 1 Term, 708, and said, as there appeared to be so much more equity in those cases than in the others cited on the other side, he was still inclined to follow them; but as it was stated in the answer that the rent contracted for was not above half the real value of the premises, that circumstances should have some weight, and he would therefore continue the injunction for the present, and put the party to reply and take depositions, that the whole matter might once more come fully before the Court at another term.

Adjournatur.

NOTE.—See *S. c., post,* 60.

NEW BERN, MARCH, 1798.

IRVING v. IRVING.

When the subscribing witness to a bond resides in another state, his handwriting may be proved.

DEBT upon a bond executed in Maryland, which had two attesting witnesses, one of whom was dead, the other alive but residing in Maryland, and his deposition had not been taken.

Badger for plaintiff. (28)
Martin, e contra.

PER CURIAM. Proof of the handwriting of a merchant's clerk, while he is alive, is not admissible, because of the great opening to fraud that it would make. A merchant might charge to any man in his books the delivery of articles to any amount, and cause the entries to be made by a clerk about to remove to another state beyond the reach of process from our courts, and after his removal recover upon proof of his handwriting. In the case of an instrumentary witness, his name appearing in his own handwriting is some evidence that he was required to attest for the purpose of proving it in case of a dispute; and when this evidence is corroborated by proof also of the obligor's handwriting, it amounts to strong proof of the bond. Here, there is not so much reason for caution as in the other case. A deposition is not required, because it might be very expensive and troublesome to obtain it, and the obligor's handwriting ousts the probability of a contrivance between the obligee and witness; but proof of the witness's handwriting is required, because, if not made, the plaintiff would not give the best evidence in his power, and thereby raises a suspicion that the witness did not attest. Where there is no attesting witness the handwriting of the obligor might under some circumstances be proof enough; but that case is not liable to the objection of the plaintiff not making all the proof in his power.

Badger then proved the defendant's admission of the bond, and praying an injunction against this action by producing the bill in equity that he had filed, and the plaintiff had a verdict.

NOTE.—*Tullock v. Nichols*, 1 N. C., and the note thereto.

McKINLAY v. BLACKLEDGE.

A promissory note to pay at the expiration of seven years from the date, without interest, will draw interest after the seven years have elapsed.

CASE upon a promissory note to pay at the expiration of seven years from the date, without interest. The seven years elapsed more than two years ago.

Baker for defendant.

HAYWOOD and STONE, JJ. This contract was made upon an expectation that it would be performed at the expiration of the seven years, and

the words "without interest" are applicable to the seven years. They cannot be supposed to extend to the case of a delay of payment after that time. Interest is allowable for the delay of payment after that time.

There was a verdict accordingly.

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(29)

MOODY v. JOHN COOR PENDER.

In an action for malicious prosecution, what the defendant swore on the trial of the indictment may be given in evidence for him.

ACTION for a malicious prosecution; not guilty pleaded; and the cause came on now to be tried. To prove probable cause, the defendant's counsel offered what the defendant had sworn on the trial of the indictment, which was for a felony. It was objected to on the ground that this would be to make a man a witness in his own cause.

PER CURIAM. Frequently an offense is committed which no one knows of but the prosecutor. What the accused has done may not amount completely to the crime charged against him, but yet affords good ground for a prosecution. If a man prosecutes under these circumstances, and the party indicted be acquitted and sue the prosecutor for a malicious prosecution, and what the defendant swore on the trial cannot be given in evidence for him, no one who was the only witness of the offense would dare to prosecute for the public. Prosecutions would be discouraged and many offenders escape punishment. Had any other witness sworn to the same facts and circumstances, it might be improper to admit this testimony; but as there is no other, the evidence should be received.

It was received, and the trial proceeded.

It appeared in evidence that Moody had undertaken to build an house for the defendant, who procured some tools for the purpose, which Moody worked with. They disagreed, and Moody went off to work for another man who lived in the neighborhood. Pender locked up the tools in a chest in a house at some distance from his dwelling-house; Moody came there in the evening when Pender was absent, broke open the chest, and carried away the tools; he called with them at the house of the defendant's brother and stayed there all night, and next day carried the tools with him to the place where he was building for the other person before mentioned, who lived about five miles from Pender.

A few days afterwards there was a meeting at Pender's, at which Moody was, and there Pender told him if he did not bring back the tools, he would make him pay for them; to which Moody replied, "Well, I can bring them back," and soon afterwards did bring them back. At the next term of the county court, Pender stated to the county solicitor that Moody had come to his plantation in a clandestine manner, broken the chest and carried the tools away, and afterwards returned them, upon being threatened by him; and said if these facts could support an indictment for petty larceny, he would prosecute. The county solicitor thought such an indictment might be supported upon those facts, and a bill was preferred to the grand jury for petty larceny, which they found; Moody was arrested, tried, and acquitted. A long argument now took place respecting the law arising upon the several parts of this evidence.

(30) PER CURIAM. To support this action, the indictment for felony must have been prosecuted without probable cause, maliciously, and the plaintiff must have been acquitted. The record of the county court proves that he was indicted by the defendant, tried and lawfully acquitted. The facts might have warranted an indictment for a trespass.

There was no probable cause for an indictment for felony; the defendant did not view it as a felony himself; he threatened to make Moody pay for the tools unless he brought them back. As to the malice, the jury will judge from the evidence whether the indictment was preferred to answer the purposes of revenge or ill-will against him. The only part of the evidence applicable to this point is the general quarrel which took place between them.

Verdict for the plaintiff, damages £65, and he had judgment.

Cited: Johnson v. Chambers, 32 N. C., 291.
Doubted: McRae v. O'Neal, 13 N. C., 171.

BLACKLEDGE v. SIMPSON.

1. There are two modes of excepting to an award—one, for what appears on the face of the award itself, as that it does not come up to the requisites of the law for constituting a good award; the second, for matter extraneous, as misbehavior in the arbitrators.

2. Arbitrators must pass on all that was particularly referred to them; but their award need not specify each particular. It is sufficient if the general result shows that every matter referred must have been considered and decided.

3. An award must be mutual, the meaning of which is that the award must not leave him, who is to pay, liable to be sued for the same cause for which he is awarded to pay.

THE bill stated several settlements of account at different periods between the complainant and defendant, and balances struck, for which the complainant had given bonds and mortgages; and that in each settlement there were many errors and unfair items, particularizing them, and that Simpson had obtained judgments, and prayed that the accounts might be opened and the errors rectified. Simpson pleaded the account stated, and that there were not any such errors as the complainant alleged. The matters in dispute were referred to arbitrators, who awarded that the first settlements were final, and as to the last settlement, that the balance justly due from Blackledge was so much, which was a much smaller sum than had been struck by the parties, and this sum they awarded Blackledge to pay. Blackledge then filed exceptions to the award—the first of which was that the arbitrators had not given any award with respect to the errors complained of in the bill; the second was that the arbitrators did refuse to receive any evidence of the errors alleged in the bill; the third was that the award was not mutual.

PER CURIAM. There are two modes of excepting to awards; one for what appears on the face of the award itself, as that it does not come up to the requisites of the law for constituting a good award; the second is for matter extraneous, as for misbehavior of the arbitrators. The first and the third of these objections are of the first sort, the second of the latter sort. The first objection amounts to this, that the arbitrators have not passed upon all that was particularly referred to them, and if this appear upon the face of the award, it is not a good one. They have awarded that the first settlements were final. This is equivalent to saying that the settlements ought not to be disturbed or opened, and this they could not determine without examining into the errors complained of, to see whether in reality there were any errors (31) or not. It was not necessary they should state each complaint of error and say it was ill-founded; they have stated enough to show they have considered these complaints and overruled them, and that is enough. As to the third exception, to be sure the rule is that an award must be mutual, but the meaning of that is that the award must be so construed as not to leave him, who is to pay, liable to be sued for the same cause for which he is awarded to pay; but here it sufficiently appears by looking into the bill, pleadings, reference, and award, for what cause they order this sum to be paid, and then it follows that if he should be again sued for the same cause, he may produce these proceedings and show he has already discharged himself of these de-

mands. It is not necessary they should have awarded anything to be paid or done by Simpson; the Coblers award reported by Burrow was held good; it awarded a sum to be paid for the first breach of the law, and this was upon the principle that the word *for* sufficiently identified the cause which was the consideration of the payment. As to the second objection, that is for the misbehavior of the arbitrators, and must be made out by proofs.

A day was given to make out the proof, and on that day no proof being adduced to substantiate the exception, it was overruled, and a decree passed agreeably to the award.

NOTE.—See *Bryant v. Milner*, 1 N. C.; *Carter v. Sams*, 20 N. C., 182; *Cheek v. Davidson*, 36 N. C., 68.

STATE v. MOODY.

On an indictment for murder, the declarations of the deceased have sometimes been received; but then they must be the declarations of a dying man, of one so near his end that no hope of life remains, for then the solemnity of the occasion is a good security for his speaking the truth, as much so as if he were under the obligation of an oath; but if at the time of making the declarations he had reasonable prospects and hopes of life such declarations ought not to be received. In this case the declarations were made by the deceased the day after he was wounded, six or seven weeks before his death, and were rejected.

INDICTMENT for the murder of one Mason; not guilty pleaded, and upon the trial the Attorney-General offered in evidence the examination of the deceased taken upon oath and subscribed by him before a justice of the peace on the day after he had received the wounds. He died six or seven weeks afterwards. It was offered as the declarations of the deceased.

PER CURIAM. Declarations of the deceased have sometimes been received, but then they must be the declarations of a dying man, of one so near his end that no hope of life remains, for then the solemnity of the occasion is a good security for his speaking the truth, as much so as if he were under the obligation of an oath; but if at the time of making the declaration he has reasonable prospects and hope of life, such declarations ought not to be received, for there is room to apprehend he may be actuated, by motives of revenge and an irritated mind, to declare what possibly may not be true.

HAYWOOD, J. Though it may not be proper to receive this paper as containing the declarations of the deceased, it may be a question whether it may not be received as an examination taken on oath before a justice of the peace, pursuant to the act of Assembly prescribed for such depositions in cases of felony. When regularly taken pursuant to the act, and the witness afterwards dies, it may be read (32) in evidence; more especially if the party to be affected by that testimony were present at the examination, as the prisoner was in the present case.

Badger for the prisoner: I perceive it cannot be read, because the justice says he believes the deceased was first examined and what he said taken down, and then he was sworn to the truth of the contents. He should have been first sworn to tell the whole truth and then what he said taken down. As he was sworn, he might have sworn truly, and yet not to all he knew.

STONE, J. I cannot think this paper is receivable at any rate. How is it possible a man can be a witness to prove his own death?

HAYWOOD, J., thinking there might be something in Badger's objection, did not insist upon receiving the testimony.

So it was rejected.

NOTE.—See *S. v. Poll*, 8 N. C., 442, where *it was held* that the declarations of a deceased person that he was poisoned by certain individuals, not made immediately previous to his death, but at a time when he despaired of his recovery, and felt assured his disease would prove fatal, were admissible as dying declarations.

Cited: S. v. Blackburn, 80 N. C., 478; *S. v. Shouse,* 166 N. C., 308.

LEWIS v. LEWIS.

CASE upon a note of hand made payable at no certain day nor on demand.

PER CURIAM. When money is payable on demand, interest accrues not till demanded; when no time is appointed the money is payable immediately, without demand, and interest accrues immediately.

Verdict accordingly.

NOTE.—See *Freeland v. Edwards, post,* 49.

HATCH v. HATCH.

1. When an ambiguity does not appear on the face of a will, but is bred by evidence, it may be explained away by evidence. An averment may ascertain the subject-matter of a devise, but not add to the will or take from it, nor in any wise control its meaning.

2. Any circumstance whatever, plainly indicative of the testator's satisfaction with the paper as his will at a particular period, may be taken to be a republication from that time; and a codicil is particularly so considered.

EJECTMENT. Upon the trial the case appeared to be that Lemuel Hatch, the father of the plaintiff and defendant, being seized of the premises in question, devised to the defendant a tract of land called the Beaver Dam, held by patent of such a date, and he devised to the plaintiff a piece of land purchased by Foy, containing ..... acres. The land purchased of Foy was comprised of four several tracts, and one of them was a tract which formerly was a part of the Beaver Dam tract, and had been sold by Lemuel and repurchased with the other three tracts, and this is the land now in dispute.

Evidence was allowed to be given to show what was meant by the Beaver Dam, and that proved that the whole tract formerly was called the Beaver Dam, but that after the part in question had been sold to Foy, and before he had reconveyed, the residue had still been called the Beaver Dam tract, and particularly that Lemuel, the devisor, had made a will in the interval between the sale and repurchase, in which he called the residue the Beaver Dam tract.

PER CURIAM. When the ambiguity does not appear upon the face of the will, but is bred by evidence, it may be done away by evidence. An averment may ascertain the subject-matter of a devise, but not add to the will or take from it, nor in any wise control its meaning. Therefore, the evidence offered in the present case is proper; and it was received. The land in question was reconveyed to Lemuel by Foy about two months after the making of this will; he had purchased it before making the will, but did not take a conveyance till after. But some time after the conveyance he made a codicil and appointed another executor. Thereupon the defendant's counsel argued with great earnestness that this will at the time of its execution did not convey the lands purchased of Foy to the plaintiff, the devisor not then having them to devise, and as to the codicil, whoever may choose to say the contrary, the books say it is not a republication.

Harris e contra: Any circumstance after the execution of a will which shows the devisor's intent that it may be considered as his will.

may be taken as a republication, and particularly the making of a codicil, for that amounts to a declaration that upon revising his will he is satisfied with every part thereof except that which is regulated by the codicil; and he cited 5 Ba. Ab., 615, and the cases there cited, and many other books.

PER CURIAM. The law is undoubtedly as laid down by Mr. (34) Harris. Any circumstance whatever plainly indicative of his satisfaction with the paper as his will at a particular period may be taken to be a republication from that time, and particularly a codicil is so considered. The court then stated to the jury the evidence which had been given, and said the question depends upon what is meant by the Beaver Dam. This may perhaps be explained by the words of the will itself.

They are in the one case the tract called the Beaver Dam, held by patent; in the other, a piece of land purchased of Foy. The different modes by which he had acquired these lands seem to have been mentioned by the devisor for the purpose of distinguishing the lands themselves. The residue of the Beaver Dam was never purchased of Foy, and the land purchased of Foy he held immediately by a deed from him, and not under a patent, as he held the other. This seems to be decisive; but in addition to this, he always considered and called the residue of the tract, after part was sold to Foy, the Beaver Dam, and devised it in a former will by that name.

There is also another point in this case: The defendant, after the death of Lemuel, acted as the plaintiff's guardian, took possession of the land in question as guardian and rented it out from year to year till the plaintiff came of age. This possession will have exactly the same effect as if another person had been guardian and had done the same acts; and such a possession would have given title to the plaintiff after seven years, if it were accompanied with all other legal requisites. But here the plaintiff had no color of title to the land in question unless it be included in the devise to him. There is no need to resort to the aid of a seven years possession.

There was a verdict for the plaintiff and a new trial moved for, but the Court refused to make a rule.

ANONYMOUS.

When the defendant suffers judgment to go against him by default in an action on a promissory note, he cannot give evidence, on the inquiry, that the note was without consideration, for the purpose of lessening the damages.

THIS was an action upon a promissory note, and there was judgment by default, and the jury being now sworn to assess damages.

Taylor, for the defendant, stated to the court that the facts of this cause were that a race was made between the plaintiff and defendant and the notes of each placed in the hands of a third person to be delivered to the winner; that it was an article of the race, if either of the horses should be disabled so as to be incapable of running on the day appointed for the race, that then the bet should be void and the notes returned to the makers; that the horse of the defendant actually did become disabled on the day of the race, and was adjudged to be so by one of those appointed to determine it, the other being absent; that,
(35) notwithstanding, the plaintiff ran his horse over the ground and the stakeholder delivered him the note upon which this action was brought; upon the whole of which statement he said it appeared the note was without consideration and that it was delivered to the plaintiff without the defendant's consent, and so no contract of his, and that in point of law the defendant might be permitted to give this matter in evidence to the jury, who inquire of the damages upon a judgment by default, not for the purpose of overturning the action, but of mitigating and lessening the damages. The jury have this entirely in their power, and ought to hear every kind of evidence that may tend in justice to cause a diminution of the damages; and he moved to be at liberty to give these matters in evidence.

HAYWOOD, J., only in Court: Can you show any authority to justify the admission of such testimony after a judgment by default?

Taylor: I can, and will produce it. The subject of a consideration being necessary or not is treated of very copiously in 1 Fonb., 333; all the authorities are there collected, and a conclusion drawn from them that a consideration is necessary, and that without one an action cannot be supported. The defendant may give in evidence that the consideration is illegal, Bull. N. P., 275; and though there be a judgment by default, the note must be produced and proved on executing the writ of inquiry, Bull, N. P., 278; and it cannot be proved to be a valid note unless it have a good consideration, upon a judgment by default; the plaintiff cannot recover any greater damages than he can prove to the

jury sworn to assess them, 2 Burr., 907, 908. This was so laid down by *Lord Mansfield* in an action upon a policy of insurance where the declaration was for a total loss, and the evidence proved a partial one only, where the question was whether the plaintiff, having declared for a total loss, could recover less, or for a partial one; and I cannot perceive any difference in reason between a default on a promissory note and one upon an action on a policy of insurance.

PER CURIAM. The declaration states a note signed by the defendant for such a sum on such a day, and the fault admits it; in the case of the policy the damages are totally uncertain till the jury have assessed them; in the case of the note the damages to the amount specified in the note are certain, but capable to be increased by taking the interest into consideration if the jury think proper to allow it, or to be lessened by the proof of payments. But the principal objection which lies against the testimony offered is this. When a default takes place and an inquiry is to be executed as to the damages, everything material to the support of the action is admitted by the defendant. The *quantum* of damages is the only thing in question, and the plaintiff comes prepared as to that point only, he has no notice that any of these (36) facts are to be proven which show that the note is not a good one in law, as that it was without consideration, or upon an illegal one, and therefore he must necessarily be taken by surprise were such evidence suffered to be introduced. If the defendant meant to avail himself of such testimony he should have pleaded the general issue or some other plea which would have given notice to the adverse party that these facts were intended to be proved on the trial. 1 Str., 612; *East India Co. v. Glover.*

The evidence was rejected and the jury assessed damages to the amount of the note, and the plaintiff had judgment.

Mr. Taylor immediately moved the Court for a new trial, but the Court refused to make a rule to show cause why there should not be a new trial unless he could show a probability that the decision was wrong. Rules are not to be granted unless the Court be first satisfied that justice probably requires them.

NOTE.—See *Templeton v. Pearse, post,* 339.

DEN ON THE DEM. OF JOHN GRAY BLOUNT v. JOHN HORNIBLEA.

1. Where an alien purchases lands in fee, those lands vest in him, and the State is entitled to have them divested out of him, if it think proper to exert its right, by causing an office to be taken finding his right; but until such office be found, the title continues in him.

2. The State is in possession without entry in all cases where an individual would be by entry.

3. Whether a conveyance by the trustees of the University is valid when a third person is in possession of the premises claiming adversely, *quære.*

EJECTMENT for the one-half of a lot, No. 7, in the town of Washington, and upon not guilty pleaded, the evidence was that this lot belonged to three men by the names of Bonner, and had been in their family from 1747 till 29 July, 1790, when they sold it to Hatridge, who was born in Scotland and came to this country in 1787 or 1788, and died seized, after the purchase; and that the trustees of the University, on 6 May, 1795, sold the same to the lessor of the plaintiff as having escheated to and vested in them by the act of 1789, ch. 21, sec. 2. Upon the death of Hatridge, his clerk kept possession for his heirs, who resided in Europe, and that possession has been kept ever since for them, first by one and then by another.

Taylor, for the defendant, made the following objections to the plaintiff's recovery:

1. Hatridge, the purchaser, was an alien, and purchased for the benefit of the State; and the title accrued to the State by the alienage of the purchaser, not by escheat; and therefore the University had not any title to convey to the lessor of the plaintiff.

2. Admit that the premises escheated upon the death of Hatridge without heirs inheritable, the title did not vest by escheat until an entry made for that purpose by some one authorized by the public. The lord's title by escheat is not complete till he has entered on the lands and tenements escheated. 2 Bl. Com., 245; 3 Bl. Com., 173, 179.

3. If the title was vested in the State without entry, so that they could convey to the University, still the University has no more privileges as a corporation than individuals have as individuals, and so could
(37) not convey to the lessor of the plaintiff before entry; a right of entry cannot be conveyed by them.

This is recognized by many decisions of the courts of this country, and is stated as law by all the books that treat of the subjects.

Harris, for the plaintiff: Hatridge continued in possession till he died. The State did not in all that time disturb his possession, and

therefore the presumption is that he was a citizen; he might have become so by taking and subscribing the oath of allegiance according to the laws of the country.

As to the second objection, the King in England, who is the representative of the public, may grant and obtain choses in action; the public here may do the same. The State in this respect succeeds to all the privileges of the crown. Such a principle was allowed for the public good, and is equally necessary here as in England, and now as it was before the change of government. 4 Ba. Ab., 214; 1 P. W., 252.

As to the third objection, the rule that choses in action cannot be transferred was of use when first adopted but by a gradual change of circumstances it has been long deemed, even in England, to be a very inconvenient and useless rule; and it may be well doubted whether it is proper to be received here in its full extent; it is certainly a mere nominal rule at this day, for the vendee may still use the name of the vendor and recover. He cited Swift's Com., 300; 4 Term, 340.

But if the rule has been received here and confirmed by judicial determinations, which I do not remember, it does not apply to the present case, for our act of Assembly, 1715, ch. 38, sec. 5, provides that all conveyances of land done and executed according to the directions of that act shall be valid and pass estates in land or right to other estate without livery of seizin, etc. So that since this act, where the party cannot make livery of seisin because he has not the seisin, his conveyance is as good as before the act it could have been, where he was in possession and did not make livery of seisin; and therefore since the act, the grantor need not make any entry, that being dispensed with by the act.

HAYWOOD and STONE, JJ. When an alien purchases lands in fee, those lands vest in him, and the State is entitled to have them divested out of him, if they think proper to exert their right, by causing an office to be taken finding his alienage; but until such office be found the title continues in him; and as he resides in the country and upon land purchased here, he is legally deemed to be a citizen as to this purpose till the contrary be found. *Page's case,* 5 Re., 52, third resolution, also Cro. El., 123, abridged in 1 Ba. Ab., 81. It is better the law should be so than that it should require the party to show his citizenship whenever the question incidentally arises before the court, when perhaps it is not foreseen nor expected; for if an office be found upon the very point, he cannot be taken unawares; he has notice of the question; he may traverse the very fact and satisfy it upon issue joined. (38) Hatridge, therefore, having died in possession, and no office finding his alienage having ever been taken, he is to be deemed a citizen;

as he died without any heirs in this country, or elsewhere inheritable to his estate, it is an estate that accrues to the public for want of an owner, and may properly enough be called an estate escheated. Whether it vested or not in the public without entry may be decided either upon the law produced and relied upon by the defendant's counsel or by considering it independent of that law, as land without any owner to inherit it but such as are aliens. If the lord is entitled by entry, it is vested in the State without entry; for wherever a private person is entitled upon entering, the public is entitled without entering. 4 Re., 58. Or if it be considered as land left without any owners who can succeed as heirs but such as are aliens, then also the law casts it upon the public, because the freehold cannot be in abeyance; it must vest somewhere, and in the alien heirs it cannot vest, and therefore by operation of law must be vested in the public without any act to be done by them. 1 Ba. Ab., 81, who cites Co. Litt., 2; Leon., pt. 61.

The title, then, of the premises in question upon the facts proven in the cause was in the public, and by the act of 1779 was transferred to the University.

As to the question whether they could convey to the lessor of the plaintiff, the general rule is that a right of entry or of action cannot be conveyed. We do not know that the force of it is weakened where applied to the case of a corporation. The cases relied on by the plaintiff's counsel admit the existence of the rule, though they question the propriety of it at this day. It has been recognized by many determinations in the courts of this county, and these, too, of very modern date. However, as this is a question that very much concerns the University, and those who now are or hereafter may become claimants under them, it had better be reserved for a little more consideration. This may be effected by a verdict for the plaintiff, subject to the opinion of the Court upon this point, whether a conveyance by the University to the lessor of the plaintiff is valid under the circumstances of its having been made when there was a possession in a third person claiming adversely to the University.

The verdict was for the plaintiff accordingly, subject to the opinion of the Court upon that question.

NOTE.—On the first point see *Barges v. Hogg*, 2 N. C., 485. Upon the second and third points, see *Clark v. Arnold*, *post*, 287.

HENRY v. HERITAGE.

When a new trial was granted on a *certiorari* in a *caveat* cause, the case was ordered to the county court for trial, that court only having jurisdiction.

CERTIORARI to remove proceedings below, on a *caveat* between the parties, and the affidavit stated sufficient reason for ordering a new trial, which was not contradicted by opposite affidavits.

PER CURIAM. Let there be a new trial; but it cannot be in this (39) Court, as urged by the defendant's counsel. That has been before decided, and upon this ground: the act of 1777, ch. 1, sec. 6 and 1779, ch. 4, sec. 1, both taken together, show it to have been the intent of the Legislature that these trials should be in the county where the premises lie, either upon the premises or at the bar of the county court, and not out of the county; and for this reason they could not permit an appeal to the Superior Court. This court now interferes by virtue of its general superintending power in order to prevent injustice or a defect of justice; but it will interfere no further than absolutely necessary. For these ends the verdict will be set aside and new trial allowed; but that must be where the Legislature has directed—at the bar of the County court or on the premises.

NOTE.—The laws in relation to *caveats* to entries and grants of land are repealed. See 1 Rev. Stat., ch. 1, sec. 2, and ch. 42.

THE UNIVERSITY v. HORNIBLEA.

Where the University conveyed lands to Blount while a third person was in the adverse possession of them, *quere* whether in a suit against this third person they are not estopped by their deed to Blount to say they yet had title.

EJECTMENT for the same premises as demanded in the action, *Blount v. Horiblea, ante,* 36, and the same evidence as in that case, upon which the doubt was whether as the University, being out of possession, conveyed to Blount by deed of bargain and sale, they could recover in the face of that deed, or whether they were not estopped thereby to say they yet had title; and verdict was taken for the lessors of the plaintiff, subject to that doubt to be decided by the Court.

Et adjournatur.

(45)

BARNES, EXECUTOR OF KAY, v. KELLY.

A confession shall be taken altogether; but if there are circumstances mentioned in the confession which, when examined into, disproved the matter in discharge, or where that matter can be disproved, the jury are to reject it and go upon the other parts of the confession only.

THE plaintiff's counsel produced an account, and proved that it had been presented to Kelly, who said, "It is just, but I paid it by a man in Petersburg, and had I time I could prove it." This was before bringing the present action.

The counsel for the plaintiff insisted that though the rule in general was that a confession is to be taken altogether, yet that part which goes in discharge, if it be a distinct fact in avoidance, ought to be proved; and here the payment is a distinct fact; and cited Bull. N. P., 58.

The counsel *e contra* argued that the true meaning of the rule was that the confession should be taken altogether, unless where the matter in discharge was attended with circumstances which rendered it improbable, or not to be believed, or could be disproved; and he cited a case from Dallas.

PER CURIAM. The rule is that a confession shall be taken altogether; but if there are circumstances mentioned in the confession which when examined into disprove the matter alleged in discharge, or where that matter can be disproved, the jury are to reject it, and go upon the other part of the confession only; as where he says, "The account is just; but I paid it before such persons," and they know nothing of the payment; or at such a time and place, and it be proved that at that time he was not at that place, but at another far distant; or if he says, "The account is just; but I will prove it paid, if I have time," and he is allowed that time, and called upon to make that proof, and does not. In such and the like cases the matter in discharge will be rejected.

Verdict and judgment for the plaintiff.

NOTE.—See *Jacobs v. Ferrall*, 9 N. C., 570; *Walker v. Fentress*, 18 N. C., 17.

PONS' EXECUTORS v. KELLY.

1. The endorsee of a bill of exchange undertakes to present the bill in a reasonable time, first for acceptance, then for payment, and, in case of nonacceptance or nonpayment, to give notice thereof within a reasonable time to the endorser. The endorsee can never support an action unless he

performs all parts of the undertaking; he must prove the giving of notice, or, in case of the nonacceptance of a bill, prove that there were no effects of the drawers in the drawee's hands; that is, if he means to resort to the drawer. But this proof in excuse of not giving notice can only apply to the case of a bill of exchange not accepted; it does not apply to a bill of exchange accepted, nor to a promissory note; if the maker of a promissory note be insolvent, the endorsee must still give notice to the endorser.

2. As to what shall be deemed sufficient notice, the endorser must have notice from the endorsee that he cannot obtain payment and that he looks to the endorser for payment.

3. The party shall give notice as soon as he conveniently may, all circumstances considered; but the court will say what time is reasonable.

4. If an endorsee keep the paper so long in his hands as to make it his own, *ex necessitate* it must be a discharge of the precedent debt, though not so originally.

ACTION to recover a sum of money due as a balance for the sale of a house in HALIFAX. The declaration also stated another count for a sum of money contained in a note of hand for the same amount as that balance was of, which Kelly had endorsed to Pons upon one Cox of Edenton, which Pons could not procure payment of from Cox. The house was sold in April, 1793, and for the balance remaining unpaid, which was $414.50, the note was endorsed. In about three weeks afterwards Pons, by his agent, Mr. Porrie, applied to Cox for payment, who informed him he was not able to pay it. In the fall of that year Porrie, who before that time had returned the note to Pons, accidently saw Kelly, and told him he had applied to Cox for payment in behalf of Pons, and that Cox said he was unable to pay it; and added, "Pons will look to you for the money," Kelly replied, "He has made the note his own by keeping it so long." In the fall of 1794 Kelly, on (46) his way to Edenton, called at Pons', and inquired for the note, saying he would take it and try to get it passed off to Blanchard. Some time after this the present action was brought. It was, however, further proven that Cox was insolvent when the note was endorsed and when Porrie applied for payment.

The jury found a verdict for the plaintiff, and a new trial being moved for, and a rule to show cause given.

Baker for the plaintiff.
Davie contra.

PER CURIAM. If an endorsee keeps the paper so long in his (47) hands as to make it his own, *ex necessitate* it must be a discharge of the precedent debt, though not so originally. It would be absurd to

say he could keep the note and also recover for the precedent debt; the case cited admits it may become so *ex post facto.* It means that a note endorsed is not a discharge of a precedent debt unless agreed to be so, except in the case where the holder keeps it an unreasonable time in his possession, and then it may; and that this is fit to be left to the jury. In order, therefore, to determine whether the note in question be a discharge or not, we must resort to the endorsement and to the law upon it, and draw conclusions from them. The endorsee of a bill of exchange undertakes in reasonable time to present the bill for acceptance, and then for payment, and in case of nonacceptance or nonpayment, to give notice thereof in reasonable time to the endorser. The endorser can never support an action unless he performs all parts of this undertaking; he must prove the giving of notice, or, in case of the nonacceptance of a bill, prove that there were no effects of the drawer's in the drawee's hands; that is to say, if he or the payee means to resort to the drawer.
(48) But this proof in excuse of not giving notice only can apply to the case of a bill of exchange not accepted, for if it be accepted, that is full proof that the drawer has effects in the hands of the drawee, or that he has credit upon him. But such proof in excuse of want of notice can never be given in case of a note endorsed, for there the maker has accepted at the time of drawing or making the note, and the endorsee cannot say he had no effects of the drawer in his hands. As to the point whether notice is necessary in case of a promissory note, every reason which requires it in the case of a bill holds equally strong in the case of a note. *Tindall v. Brown* is a case upon a note, so was that of *Russell v. Langstaff,* reported by Douglass in the case cited from Kidd., 79. It is expressly stated that notice in case of a note is necessary to entitle the holder to his action. These cases which state the law to be otherwise are old cases decided before the law respecting bills and notes had advanced to its present degree of perfection. As to what shall be deemed notice sufficient, the endorser must have notice thereby from the endorsee that he cannot obtain payment, and that he (the endorsee) looks to the endorser for payment. The argument that the insolvency of the maker of the note would be an excuse to the endorsee for not giving notice seemed to be of same weight when first offered, but upon consideration it has none. The endorsee ought to give notice, for perhaps the endorser may procure payment by the help of friends, or by some means unknown to the endorsee, and not within his power. Kidd., 79, abridging the cases in the books, says if the maker of the note be insolvent, the endorsee must give notice to the endorser; the same as laid down in Bl. Rep., 747. And Lee, in arguing the case of *Russell* and *Langstaff,* said that *Lord Mansfield*

had nonsuited many plaintiffs at *nisi prius* for want of notice, although it were proved that the maker of the note or drawee of the bill was insolvent; and in the case of *Goodall et al. v. Dolley,* 1 Term, 712, where the drawee and drawer were both insolvent, and the counsel to excuse the want of notice insisted upon that circumstance, it was answered to be perfectly clear that the law was otherwise; and that answer prevailed so far both with the counsel and the bench that the point was instantly abandoned and no more notice taken of it. With respect to what shall be reasonable, it must be laid down in general that the party shall give notice as soon as he conveniently may, all circumstances considered, but the court will say what time is reasonable; and if the jury allow beyond that time, the court will set aside their verdict; otherwise, one jury might think one time reasonable, another another, and so on *ad infinitum,* so that there would be not the least certainty.

Verdict set aside and new trial ordered.

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(49)

FREELAND, ASSIGNEE, v. EDWARDS.

Where money is payable on demand, interest does not accrue until a demand is made; when no time is appointed, the money is payable immediately without a demand, and interest accrues immediately.

DEBT upon a bond, with a penalty, conditioned to pay without any time mentioned; and the question was, from what time interest was to be calculated.

HAYWOOD, J. The rule is fixed that bonds payable without any certain time mentioned are payable *instanta,* and bear interest immediately from the delivery.

W. R. Davie for plaintiff: I wish we could have the reason upon which these determinations have been founded, that we might examine them and see whether they be good or not. A bond payable on demand is payable immediately, and may be sued upon immediately, without any previous demand made for that purpose. The same is the case with a bond payable on no certain day mentioned in the bond. I believe the British determinations have concurred with ours on this subject, but really I can perceive no good reason for the distinction. Our

own act directs that bonds payable on demand shall bear interest from the demand; by the same act an account stated and signed bears interest immediately from the signature.

HAYWOOD, J. The reason of the distinction is this; in case of a bond payable without saying when, the obligee has not to do any act either to entitle himself to the action or to the interest; in case of a bond payable on demand, he undertakes to make a demand, otherwise the words "on demand" have no meaning; and if a demand is to be made, it is for some purpose. It is not to entitle himself to the action, therefore it must be to give a right to demand interest. The act of Assembly proceeds upon this very principle. It says a note payable on demand shall bear interest from a demand made. When speaking of an account signed, it says interest shall accrue from the signature; yet in both instances an action may be brought immediately without any formal demand. But if we could not give the reason of the decision, yet we know the rule is so established. It is therefore far better to make it the standard of our adjudications than to render the law again uncertain by departing from it.

There was judgment accordingly for interest from the date.

Cited: Caldwell v. Rodman, 50 N. C., 139.

KINCHEN'S EXECUTORS v. BRICKELL.

Under the act of 1785 (see 1 Rev. Stat., ch. 4, sec. 10) judgment may be entered up *instanter* against the sureties to an appeal bond, upon an appeal from the county to the Superior Court.

DEBT upon bond which had been brought up into this Court by appeal from the County Court of Franklin; and now there being a verdict against the defendant.

Mr. Falconer, for the plaintiff, moved that judgment might be entered up upon the appeal bond against the sureties for the appeal, and he grounded this motion in Laws 1785, ch. 2, sec. 2. "When any appeal prayed shall not be prosecuted, and the court before whom the said appeal may be determined shall affirm the judgment, then shall the appellant be decreed to pay the appellee, 12½ per cent interest
(50) from the passing of the judgment in the county court by which

such appeal may have been granted, and the bonds taken for prosecution of appeals with effect shall hereafter make part of the records sent up to the Superior Court, upon which judgment may be *instanter* entered up against the appellant and his sureties," etc.

HAYWOOD, J. A motion of this sort was some time ago made in Salisbury court, STONE, J. and myself being present, and he seemed to be of opinion that the motion ought not to be allowed. I do not recollect that the practice has been settled.

General Davie: Such a motion was lately made at Hillsboro, and failed.

HAYWOOD, J. I will take time to consider of it; you may mention your motion a day or two hence.

And now at this day Mr. Falconer renewed his motion.

HAYWOOD, J. The motion at Salisbury was, as well as I remember, the term after the judgment. I thought the judgment might be entered; STONE, J., thought it would be to pass against him unheard. The answer to that was that the laws having provided the entering up judgment against sureties *instanter* was a full notice to them that they would be proceeded against, or might be proceeded against, whenever judgment should be obtained against their principal, and then they should be ready to defend themselves; that the bond was a record made up in court, and spoke the truth incontrovertibly, so that its execution could not be denied. The event of this decision was that notice issued and judgment was entered against the sureties at the next term.

General Davie: Some years ago, at Hillsboro, I made a similar motion with the present, and WILLIAMS, J., would not allow it, from the same reasons that STONE, J., thought it improper, and I was obliged to take out a *sci. fa.* MCCAY, J., at Hillsboro, would not give judgment the other day, because of the opinion of WILLIAMS and STONE, JJ., which was then mentioned to him, but said it was the established practice in the Western riding to enter up judgment against the sureties as now moved for.

HAYWOOD, J. The law is expressed that judgment may be entered up against them, as Mr. Falconer proposes. The objection that the defendant has no notice of this proceeding being intended is well answered

by saying that the act of the Assembly gives him notice; the nature of his undertaking, combined with the law, is a sufficient notice to him that he may be thus provided against whenever judgment shall be obtained against the principal. I am well satisfied in this opinion, and as MacCay, J., is of the same opinion, I shall permit the judgment to be now entered as moved for.

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(51)

McNEILL v. WEST.

Where a suit was brought in the Superior Court on a bond with a penalty, for depreciated money, and the jury found that upon applying the scale the sum really due, with interest, was less than £50, *it was held* that under the act of 1777 (1 Rev. Code, ch. 115, sec. 10) the plaintiff must be nonsuited.

Debt on a bond, with a penalty, for depreciated money, payable in 1778. The bond was executed in July, 1777, and when the scale was applied to it by the jury the sum really due, with the interest thereupon, was for a less sum than £50. A motion was made to nonsuit the plaintiff before the verdict was entered, but agreed to be subject to the opinion of the court, and a nonsuit to be entered if the court should be of opinion that the motion was proper. And now, at this day, the motion for a nonsuit was again made.

Baker in support of it.
Davie and Wythe against it.

Haywood, J. This act extends to actions of debt and to assumpsits. The Legislature, speaking to the plaintiff, say where the defendant was in the same district with yourself, so that it will not be very inconvenient for you to sue him in his own county, which is near, you shall not harass him with the expenses of a suit in the Superior Court, unless your demand be of importance in point of value, and that standard shall be £100; but if he lives in another district, where it would be very inconvenient for you to sue in his own county, your convenience shall be so far consulted as that you shall be permitted to sue him in the Superior Court of your own district, provided the value of your demand be £50. And in order to compel you to an observance of this, you shall be nonsuited in case you do not prove the necessary sum due upon trial; except where part of the demand cannot be recovered for want of proof,

or is barred by length of time, though originally just; and this must be shown by affidavit; in which case, there may be a recovery for what is well proven, if that, together with what is lost, amount to the sum necessary to give jurisdiction to this court. It is intended that the second proviso in the tenth section of ch. 2, Laws 1777, must be considered as excepting some case out of the enacting part of that clause, otherwise, it was nugatory, and then it would follow, the word "not" should be rejected, and the clause would then signify that suits upon bonds with a penaly should not be subject to go off by nonsuit, although the balance due upon them was of less value than the sum required by the clause in other cases to give jurisdiction to the court. But in the first place, I would ask, is there any reason to distinguish the case of a bond with a penalty from a single bill or bond without one, that should induce the Legislature to have had the intention attributed to them? I think that is not. Next, this very clause has been re-enacted by a law subsequent to that of 1777, and the word "not" is retained. It was either put in *ex abundanta cautela* to enforce the former part of the act more strongly, or perhaps it was intended as an exception to the first proviso, and meant to say that bonds with a penalty, where the balance was under £50, should not be pro- (52) tected from a nonsuit by the penalty or by such affidavit as was allowed in the other proviso. Whatever may have been the meaning of the Legislature, it certainly could not mean to distinguish bonds with penalties from single bills, for the purpose of making them smaller in the Superior Court, where less was due upon them than the sum necessary to give jurisdiction to the court. It is argued that want of jurisdiction should be taken no advantage of by plea in abatement, and not after a plea in chief, which always admits jurisdiction. This is true at the common law, but in the present case the Legislature saw it could not be well done in all cases by plea in abatement, and therefore they altered the order of peading. Suppose payments have been made on a bond, and not endorsed, which reduce the sum under £50, or a release or other discharge given for part, and the original sum be sued for and the defendant pleads the sum really due is of less value than £50; the plaintiff replies, it is of the value of £50, and the defendant offers payments in evidence. Under this issue he cannot be permitted to prove them, and yet the sum really due is under £50. If he cannot, therefore, take advantage of want of jurisdiction by some other means than by plea in abatement, he would lose the benefit of this act, and therefore the Legislature has directed it to be taken by way of nonsuit. After all the evidence is given and when the jury have pronounced their verdict, and before it is entered, is the proper time to take advan-

tage of the act. A plea in abatement is entered to save expense by preventing a trial when the action in its present form is not legally supportable. But if all the evidence is to be examined upon a plea in abatement, in order to discover whether the sum sued for is really of the necessary value or not, then a plea in abatement is not at all preferable in point of saving expense, to a plea in chief, and that was one further consideration that operated with the Legislature to direct a nonsuit. It is argued that this is a bond for depreciated money which upon the face of it is of sufficient value to give jurisdiction to this court; for the jury were at liberty to value it by applying the scale at the time when the debt was contracted, as well as when it became payable; in the former case it would have been of £50 value and upwards. The answer to this is, the plaintiff knew the circumstances under which the debt was contracted. If these circumstances entitle him to have the money in the bond estimated according to the value of currency when the bond was executed, then it would amount to £50, and he might safely sue. If the circumstances would not entitle him to have it admitted in the manner, then the money in the bond was of less value; and when the jury have pronounced its value, their verdict, if not set aside, is the highest evidence of the value of the money, and
(53) proves that the plaintiff has come improperly and against law in this Court. The plaintiff is as much bound to know the value of his depreciated bond as he is the balance of a bond not depreciated.

It is next argued that the plaintiff in the present case resides in Virginia, and that suing here he might as well sue in the Superior as in the county court for a debt of £50, and if the Legislature considered the expense in making the claim in question to determine their intention as to a suit in the county court on such a case as the present, rather than one in the Superior Court, the trouble of attending is equal, and the expense to the defendant is greater in the latter court, and therefore the action should have been brought in the county court. The answer is, the defendant may be sued to a court out of his district when the debt is of £50 value, to suit the plaintiff's convenience; and he cannot complain if he is sued for that sum in the Superior Court of his own district, where the plaintiff is obliged to come to that court from a great distance. Perhaps it is less troublesome to the defendant to attend there to answer a debt of £50, than it is to attend to the suit of one of his own citizens out of his district; and the foreigner should in justice have the same advantage as is allowed to citizens, and this can only be attained by allowing him to sue in the Superior Court for the same sum as he might have sued for had he been a citizen residing in another district. He may have actions of £50 value against persons

residing in several counties of the same district; and it would be far more convenient for him to sue them altogether in the Superior Court, where his business might be all attended to and at the same time, than be obliged to almost perpetual attendance on the several county courts at different times and places, and as to the defendant, it subjects him to no more inconvenience than he would be subjected to if the debt belonged to any other person not residing in his district, though a citizen of the State.

I am of opinion as the jury have found a verdict for a less sum than £50, that a nonsuit ought to be entered.

BRANCH v. BRADLEY AND OTHERS.

In trespass for arresting the plaintiff's negro, brought against a constable and others, the constable cannot justify under a warrant without producing it, though his assistants may; but if any of the assistants did more than was necessary to compel submission to the arrest, as by beating the negro after he was arrested, they are trespassers.

TRESSPASS.

PER CURIAM. The defendants plead a justification under a warrant to arrest the plaintiff's negro, they do not produce the warrant, but prove it by parol. The constable must produce it or he cannot justify under it. The warrant is put in writing, to the end he may produce it when questioned for what he does pursuant to it; and without producing the warrant, he is in the same situation as if none ever existed. As to such of the defendants as were summoned to aid him in making the arrest, they may justify without producing the warrants; they were bound to assist the officer and could not first require a sight of his warrant; so whether he had one or not, they were bound to (54) obey. But if after they were summoned they acted improperly, and did more than was necessary to compel a submission to the arrest, they were trespassers. And if the constable, after the arrest, suffered the negro to be beaten by Bradley, he was a trespasser; for the arrest was made for the purpose of carrying him before a magistrate, and not for that of beating him without carrying him before the magistrate.

Verdict and judgment for the plaintiff v. Bradley and the constable.

NOTE.—See *S. v. Stalcup*, 24 N. C., 50.

STATE v. WEAVER.

If a free servant refuses to obey the commands of his master, and the master endeavor to exact obedience by force, and the servant in such case offers to resist by force, and the master kills, it is not murder, nor even manslaughter, but only justifiable homicide; much more is it justifiable if a slave actually uses force and combats with the master, or offers to do so.

INDICTMENT for the murder of a negro man named Lewis, the property of Smith, not guilty pleaded, and the trial now came on.

HAYWOOD, J., only in Court. In his charge to the jury. The nature of the evidence is such as makes it necessary, you should have clear ideas respecting the requisites to constitute several denominations of homicide, that is to say, justifiable homicide, manslaughter, and murder; for upon this evidence it has been contended for the State that the offense of the prisoner amounts to murder, by the counsel for the prisoner, that it is but manslaughter at most, if not justifiable homicide.

So far as the evidence can relate to these offenses, justifiable homicide may be defined thus: Where the person killed attempts to kill the slayer, and he kills in his own defense, it is justifiable.

Manslaughter is where some great provocation is given, that is calculated to excite the resentment of a reasonable man to such a degree as to take away the proper exercise of his reason, and he kills the aggressor; as if the aggressor spits in his face, pulls his nose, kicks him, or the like, or where blows pass. In all these cases the blood is heated and the passions roused or excited; and the killing under such circumstances is attributed to human frailty, and not to a wickedness of heart.

Murder is where the homicide is with malice aforethought, which means not what is commonly understood, but a doing the act under such circumstances as shows the heart to be exceedingly malignant and cruel, above what is accordingly found amongst mankind; and the wickedness of heart is collected either from the express words and conduct of the party or from the manner in which the deed is done—in the first instance, by threatening expressions, former grudge, or schemes to do him mischief, as by lying in wait for him and the like; in the latter instance, by the excessiveness and punishment or dangerous weapon, or means made use of to punish; as if for a slight offense, which deserved only moderate correction, any man should take up his servant and beat him so excessively as to cause his death; if in such a case for such an offense, he should beat out his brains with an axe, shoot him with a gun, or kill him with a sword; from all these circumstances it is allowed (55) that the heart is exceedingly depraved and cruel, and that the

killing has not proceeded from the frailty of human nature, and therefore the offense is deemed murder.

This is the law with respect to a freeman who is killed, but with respect to a slave it is somewhat different, for if a free servant refuses to obey the commands of his master, and the master endeavor to exact obedience by force, and the servant offers to resist by force in such a case, and the master kills, it is not murder, nor even manslaughter, but justifiable; much more is it justifiable if the slave actually uses force and combats with the master.

If, therefore, you shall be of opinion, upon examining the evidence, that the deceased actually attempted to kill the prisoner, who was a temporary master, having hired him for a year, and that the prisoner killed in his own defense, he is justifiable; if you find the deceased actually used force and was resisting by force when he was killed, the prisoner is justifiable; or if he offered to resist by force when he was killed, the prisoner is justifiable. If none of these circumstances are to be found in the case, and you are of opinion that the killing with the pistol was with malice aforethought, as before explained, then the prisoner is guilty of murder.

Verdict of not guilty.

NOTE.—See *S. v. River, post* 79; *S. v. Tackett*, 8 N. C., 217; *S. v. Hale*, 9 N. C., 582; *S. v. Jarrott*, 23 N. C., 76.

STATE v. LABAN PUGH AND FOUR OTHERS.

In an indictment for a riot, if one of several be convicted, the others not yet taken, he may be punished, because, though the others may be acquitted, he is estopped by the verdict to deny his guilt.

THIS was an indictment for a RIOT. Two of the defendants were now tried, and one of them found guilty, with the others named in the indictment, except the other defendant now tried, whom they found not guilty. One of the remaining three not before the court was dead, another in South Carolina where he resided, and one in this State, but not taken. The Attorney-General moved for judgment.

HAYWOOD, J. I have a doubt whether judgment can now pass upon the defendant, who is now convicted. I will look into the books. Let it be again moved tomorrow.

Accordingly the next day the matter being again moved,

HAYWOOD, J. My doubt yesterday was that as two of the defendants not brought into court were yet alive, and as it is not impossible but that they may still be brought in and tried and acquitted, it still remained doubtful whether the prisoner now convicted might not be legally innocent; for the acquittal of these two, together with the acquittal of the one which has already taken place, would leave but two to be guilty —and so not a riot. I have looked into 1 Str., 193, the *King v. Kennersley,* and into 2 Burr., 1264, in one of which cases the objection was stated that arose in my mind, and was there answered by saying that the verdict estopped the party to say he was not guilty; and the Court deemed it a sufficient answer. Upon this authority, I shall proceed to judgment against the defendant now convicted.

He was fined and imprisoned for three months.

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(56)

STATE v. WYATT.

1. In an indictment for perjury in swearing to attendance as a witness, the prosecutor is a competent witness, though he be the person liable to pay for the attendance sworn to.
2. In order to constitute perjury, the oath must be taken in some judicial proceeding, and before some person empowered to administer the oath assigned. A mere voluntary oath cannot amount to perjury. Therefore, a man cannot be indicted for perjury in swearing before a justice to his attendance in court as a witness, the clerk only being authorized to administer such oath.

INDICTMENT for PERJURY in swearing to his attendance as a witness in the County Court of MARTIN, before a justice of the peace, and charging for eight days attendance, whereas he has not attended eight days, etc.

HAYWOOD, J., only present. The prosecutor may be a witness, though he be a person who is liable to pay for the attendance; for a verdict and conviction in this prosecution cannot be given in evidence to prove it. The evidence ticket being taxed in the execution is a recovery in the form prescribed by law. But it is alleged on the part of the defendant that the justice was not empowered by any law to take probate of this evidence ticket; the indictment fails at once, and it is useless to proceed any further in the trial. This indictment concludes against the act of Assembly, and this subjects to the punishment of perjury only

where the oath is taken before some officer authorized to take it pursuant to the laws of the State. In order to make it a perjury, the oath must be taken in some judicial proceeding, and before some person empowered to administer that oath that is taken. A mere voluntary oath cannot amount to perjury.

The Attorney-General endeavored to controvert these practices, and offered some authorities to show the contrary.

PER CURIAM. The doctrine is incontrovertible. I have no doubt upon the subject. Not an instance can be shown to the contrary. Perhaps the defendant might be indicted for a misdemeanor. I think I have known some prosecutions of that kind supported.

Verdict for the defendant.

NOTE.—As to the competency of the witness. see *S. v. Caulter*, 2 N. C., 3; *S. v. Hamilton*, *post*, 288; *S. v. Hasset*, 1 N. C., 139; *S. v. Kimbrough*, 13 N. C., 431. Upon the second point, see *S. v. Alexander*, 11 N. C., 182. Where the court has jurisdiction, perjury may be properly assigned in an oath taken before it, though the witness was erroneously sworn. *S. v. Molier*, 12 N. C., 263.

GRANT v. WINBORNE.

1. The act of limitations concerning lands was made with the intention that when a man settled upon and improved lands upon the supposition that they were his own, and continued in the occupation for seven years, he should not be subject to be turned out of possession; hence arises the necessity for color of title; he cannot suppose the lands are his own, and he settles upon them in his own wrong.

2. The possession which is calculated to give title under our act of limitations is a possession under color of title, taken by a man himself, his servants, slaves or tenants, and by him or them continued without interruption for seven years together.

EJECTMENT.

HAYWOOD and STONE, JJ. The premises in question consist of a small parcel of land comprised in a grant to Skippen, dated in 1725, and also in a grant to the father of the lessor of the plaintiff, dated in 1762, which latter grant lapped over upon the former. It is admitted the former patentee once had title to it; but it is contended that there has been such a possession in the latter patentee and those claiming under him as

has destroyed that title, and acquired one for the lessor of the plaintiff. As to the nature of the possession that is calculated to have this operation, it is to be collected from a recurrence to the time of passing the act of limitations, and the then circumstances of this country. The act was passed in 1715, when this country was but thinly inhabited, and it was the policy of the Legislature to encourage its population.

In many instances the same land was covered by two or more
(57) grants, and frequently when a latter patentee or those claiming under him had settled upon the land comprised in his grant, and had cleared and improved it, he was turned out of possession by the exhibition of a prior grant. This tended to discourage the making of settlements, and of course repressed population. The Legislature, therefore, provided the act of limitations to obviate these mischiefs; and it was the intent of the act that where a man settled upon and improved lands upon supposition that they were his own, and continued in the occupation for seven years, he should not be subject to be turned out of possession. Hence arises the necessity for a color of title; for if he has no such color or pretense of title, he cannot suppose the lands are his own, and he settles upon them in his own wrong. The law has fixed the term of seven years both for the benefit of the prior patentee and the settler, that the latter might not be disturbed after that time, and in that time the prior patentee might obtain notice of the adverse claim and assert him own right. Hence arises the necessity that the possession should be notorious and public, and, in order to make it so, that the adverse claimant should either possess it in person or by his slaves, servants or tenants; for the feeding of cattle or hogs, or building hog-pens or cutting wood from off the land, may be done so secretly as that the neighborhood may not take notice of it; and if they should, such facts do not prove an adverse claim, as all these are but acts of trespass. Whereas, when a settlement is made upon the land, houses erected, lands cleared and cultivated, and the party openly continues in possession, such acts admit of no other construction than this, that the possessor means to claim the land as his own. In order to make this notorious in the country, he must also continue the possession for seven years; occasional entries upon the land will not serve; for they may be either not observed or, if observed, may not be considered as the assertion of rights. And from this view of the subject arises the following definition of possession which is calculated to give a title: A possession under color of title, taken by a man himself, his servants, slaves or tenants, and by him or them continued with interruption for seven years together.

Verdict for the plaintiff.

INGLES *v.* DONALSON.

NOTE.—See *Strudwick v. Shaw*, 1 N. C., 5; *S. c.*, 2 N. C., 5, and the cases cited in the note to that case.

Cited: Burton v. Carruth, 18 N. C., 3; *Loftin v. Cobb,* 46 N. C., 410, 411; *Morris v. Hayes,* 47 N. C., 90; *McConnell v. McConnell,* 64 N. C., 343; *Williams v. Wallace,* 78 N. C., 357; *Greenleaf v. Bartlett,* 146 N. C., 499; *Haddock v. Leary,* 148 N. C., 382; *Holloway v. Durham,* 176 N. C., 550.

INGLES v. DONALSON.

1. A *fi. fa.* binds the lands, goods and effects of the defendant from its *teste.*
2. No sale of property made pending an execution against it unsatisfied will be good to vest the property in the vendee, unless eventually the execution shall become satisfied by some other means.
3. Property sold remaining in the possession of the vendor is evidence of fraud, though not subject to be explained.

TROVER for a negro named Cæsar; not guilty, and upon the evidence the case appeared to be thus: That the negro formerly belonged to Murray, who in the County Court of EDGECOMBE, at November Term, 1792, confessed judgment to Garner for the sum of £40 or thereabouts, upon which judgment and execution issued, tested 27 November, 1792. On December, 1792, another execution, but of what date did not appear, upon a judgment before a justice of the peace, at the (58) instance of another plaintiff, was in the hands of Jewell, a constable, who on that day levied on Murray's household furniture; Murray immediately on the same day applied to Donalson to discharge the debt for him, being to the amount of £13, 5s. Donalson did discharge it, and took from Murray a bill of sale, dated on that day, purporting to be an absolute bill of sale, and to be in consideration of £152. The negro was sent for and delivered to Donalson, and immediately returned to Murray's service by Donalson's direction; but in a few days afterwards came to Donalson and worked with him, about a week after which he returned again to Murray, and continued in his possession till the time of executing a bill of sale to Ingles, and in that time Murray occasionally hired out the negro as his own. Donalson on two different occasions admitted the bill of sale on him was intended as a security for money, and he now proved that Murray was indebted to him in the two further sums of £40 and £26. On 31 January, 1793, Ingles purchased the same negro of Murray, paying off Garner's judg-

ment, deducting a debt due to him from Murray, of £54 or thereabouts, and assuming other debts which Murray owed, and which he (Ingles) has since discharged, to the amount, in all of £134 13 3. Ingles acknowledged, and it is now proved, that he had first notice of the bill of sale to Donalson. Ingles registered his bill of sale at February Term, 1793; Donalson registered his at May Term, 1793, and Garner's execution was returned satisfied to February Term, 1793. When the bill of sale to Donalson was executed, Jewell, the attesting witness, heard Donalson say it was to secure his money, and he heard them talk of no money save only the £13 5 0.

(59) *Baker for the plaintiff.*
Davie e contra.

HAYWOOD, J. The first thing to be observed upon is the execution upon Garner's judgment. Murray's goods and effects were all bound by that from the time of its teste, and he could not after that teste sell or dispose thereof so as to defeat the execution. No sale made pending the execution unsatisfied will be good to vest the property in the vendee unless eventually the execution shall become satisfied by some other means. As to what has been said respecting the want of possession, if it be necessary in the present case to resort to that circumstance, the want of possession is a strong badge of fraud. The property is placed in the creditor, the possession continues in the debtor, and by that means other creditors, perceiving no visible diminution of the debtor's effects, rest satisfied, and take no measure to secure their debts until perhaps the whole estate of the debtor is exhausted, whereas, should the creditor immediately take possession, other creditors would thereby have notice that the debtor's estate was wearing away, and apply for the discharge of their demands in time. It has this further ill effect, that the debtor still continuing in possession, and being reputed owner, obtains credit upon a belief that he is the owner, and so, by fault of the vendee, possesses the means of contracting debts without the means of paying them. But, in general, this want of possession is only evidence of fraud, which may be explained and repelled by contrary evidence; it is not absolutely conclusive, but it is only a strong sign of fraud, which by circumstances equally strong, tending the other way, may be overturned. In the present case the bill of sale to Donalson purports upon the face of it to be absolute, and to vest the whole property immediately in the vendee; whereas in truth it is but a security for money, this also is a mark of fraud, for it is calculated to mislead and deceive creditors, and to make them believe that no part of the negro or his value is subject to their demand, when in fact it is otherwise. Indeed, the case cited

at the bar determines that an absolute bill of sale not accompanied with possession is fraudulent and void; though a bill of sale with a condition permitting the possession to remain with the vendor is not, because there such a possession is consistent with the deed, which upon the face of it discovers the truth to creditors, and cannot be said to intend a concealment of circumstances in order to deceive them. This doctrine is supported by a great number of decisions, and is built upon good reason. Where creditors are concerned, the transactions of the debtor in relation to the disposition of his property should exhibit their real situation and circumstances to the world, that every one who (60) is interested in them may know with certainty what has been done, and how to act. If they do not, but, on the contrary, are so constructed as to conceal circumstances which should be known, and to give a different appearance and coloring to the business than it really ought to bear, the presumption of fraud attaches to them in proportion to such concealment. With respect to the purchase made by Ingles from Murray, it has been urged that as between Murray and Donalson the property passed out of Murray; though supposing the conveyance fraudulent, it did not as to creditors; and that therefore a sale from Murray afterwards to Ingles could carry no property, however, a sale by the sheriff might have done it. I was at first very forcibly struck with the remark, but the cases cited from Bullers N. P. and from 5 Re., 60, have removed my doubts. These state that a contract which is fraudulent as to creditors is fraudulent also as to purchasers; and that if the purchaser has no notice without registration, his purchase is good; for if he has notice, he knows the contract to be a fraudulent one and void.

The jury could not agree, and a juror was withdrawn by consent.

Cited: *McCree v. Houston,* 7 N. C., 450.

WILMINGTON, May Term, 1798.

CUTLAR v. POTTS.

Whether equity will relieve where a man has rented premises and given his bond for the rent, and the premises are burnt before the term has expired, *quœre.*

THIS case was again taken up, and HAYWOOD, J., was of opinion that equity should relieve in cases where the premises are burnt down without the default of the lessee, before the rent day or the expiration of the

stipulated time, upon the ground that when the consideration fails in whole or in part, the obligation built thereupon ceases in proportion.

STONE, J., thought it politic that the law should be as stated in the law authorities cited on the former argument, otherwise, a lessee might frequently be tempted to destroy the premises, in order to get clear of his bargain. The law as laid down in these authorities has the opposite tendency. Lessees have every inducement to take care of the premises, and none to injure them, when they must pay whether the premises are burnt down or not. The value of the rent is a loss that must fall somewhere upon the lessee if he pays, upon the lessor if he does not; and why should that loss fall upon the lessor, who is an innocent man, any more than upon the lessee, who is no better than one innocent man?

NOTE.—If a tenant covenant to build and leave in repair, and does build, but the houses are burned before the expiration of the term, equity will compel him either to rebuild or to pay the value of the buildings. *Pasteur v. Jones*, 1 N. C., 393.

CUTLAR v. QUINCE.

A bond taken by an administrator is assets, part of the estate, and belongs to the administrator *de bonis non*, and not to the personal representative of the first administrator.

THIS case was again argued. Old Quince died; young Quince administered, sold part of the estate, and took the bond in question, he
(61) died and Miss Quince administered as administratrix *de bonis non;* and the question is, Is she a creditor of the obligor, and entitled to administration on his estate, by Laws 1715, ch. 48, sec. 8, in preference to Cutlar, who is a creditor, but for the smaller demand?

Mr. Hill cited several cases from Com. Digest to show that the action for moneys due upon the sale of a testator's estate must be brought as executor; and he also cited Laws 1795, ch. 14, sec. 1, where after directing a sale upon credit and bonds with sureties to be taken, it proceeds thus: "And such executor, etc., or administrator, etc., shall, after the time of such payment is past, take and pursue all lawful ways and means to recover and receive the money so due as aforesaid, or otherwise shall be chargeable or answerable for the same; and that such moneys when received shall be liable to the satisfaction of judgments previously obtained, and entered up as judgments when assets should come to the hands of the executor or administrator." And he argued that by this act most evidently the money due upon such bonds is considered as

belonging to the estate of the testator, and to be assets to charge the executor only when recovered and received; whereas the authorities which say the executor shall sue in his own name consider the bonds as belonging to the executor himself, who is chargeable for the goods sold, whether he receives the money due upon the bond or not, and supposing the common law to be as contended for on the other side, it is now altered as to this point by the act of 1795, as it substitutes the money due upon the bond when recovered in the place of the goods sold, and makes him not chargeable as formerly for the goods, but for the product of them when received; and, consequently, these bonds being a part of the deceased's estate, and to be sued for in the character of executor or administrator, and not *in jure proprio,* will, upon the death of the executor or administrator, go to the administrator *de bonis non* of the first testator or intestate, as part of his estate, and not to the executor or administrator, who since the act has not any property in them, whatever he may have had before.

And of that opinion were the Court, HAYWOOD and STONE, JJ., being present; and they gave the administration to Miss Quince as the greatest creditor of the obligor.

NOTE.—See note to *Anonymous, ante,* 18.

Cited: Cowles v. Hayes, 71 N. C., 232.

CUTLAR v. SPILLER.

Under the Acts of 1784 and 1792 (1 Rev. Stat., ch. 37, sec. 19) an unattested bill of sale for slaves is good as between vendor and vendee.

DEFENDANT had given a bill of sale for negroes, without an attesting witness.

Baker, in a very lengthy argument, insisted that the instrument was void for want of attestation.

PER CURIAM. Laws 1792, ch. 6, sec. 3, directs "That in all trials at law where a written transfer or conveyance of a slave or slaves shall be introduced to support the title of either party, the due (62) and fair execution of such writing shall be proved by a witness subscribing and attesting the execution of such writing; but if such

witness shall be dead or removed out of the State, then the probate and registration of such writing may be given in evidence." This clause supposes the case of a written transfer produced on the trial, purporting in the face of it to have been attested, and directs it to be proved by the attesting witness if to be had, because that is the best evidence. The act did not contemplate the case of an unattested transfer, and of course has given no directions relative to it. Even the act of 1784, ch. 10, sec. 7, requiring registration of bills of sale of slaves, does not mean to make the transaction void as between the vendor and vendee, for want of registration or attestation, but only so far as regards creditors or purchasers, who may say it is void if all ceremonies required by the act are not complied with; but as between vendor and vendee, if none of them be complied with, the sale is good. The case now before us is out of the act of 1792, and must be decided by the rules of evidence at the common law, and by the common law a deed is not void for want of attestation, and may be proven by witnesses who did not subscribe it, or by other means.

NOTE.—See the cases collected in the note to *Farral v. Perry*, 2 N. C., 2; also *Bateman v. Bateman*, 6 N. C., 97; *Rhodes v. Holmes*, 30 N. C., 193. A sale of a slave accompanied by a delivery is valid, and transfers the title, although no bill of sale is executed, nor any memorandum of the contract signed by the parties thereto. *Choat v. Wright*, 13 N. C., 289. See, also, *Muskat v. Brevard*, 15 N. C., 73; *White v. White*, 20 N. C., 427. The act of 1792 applies to a sale between the vendor and vendee, although no third person is concerned as creditor or purchaser. *Caldwell v. Smith*, 20 N. C., 64.

Cited: *Palmer v. Faucett*, 13 N. C., 242; *Bell v. Culpepper*, 19 N. C., 21; *S. v. Fuller*, 27 N. C., 29; *Carrier v. Hampton*, 33 N. C., 309; *Thompson v. Bryant*, 46 N. C., 343.

ANONYMOUS.

The mother shall have only an equal share with the brothers and sisters of a child dying possessed of personal property under the act of 1766 (1 Rev. Stat., ch. 64, sec. 1), whether that property was acquired from his father or otherwise.

A. dies leaving a widow and children, and his personal estate is divided amongst them; then one of the children acquires some additional property and dies. That part of his estate which came from the father was divided amongst the mother and children; but as to the acquired

part, the mother claimed the whole, as next of kin; and her counsel insisted that the act of 1766, ch. 3, sec. 1 ("And if after the death of the father any of his children shall die intestate in the lifetime of the mother, without wife or children, every brother and sister, and the representative of them, shall have an equal share with the mother, of the estate of the child or children so dying intestate"), did (63) not extend to this case. Before the enacting of this clause she was clearly entitled to the whole as next of kin to her child, and the clause itself was made to obviate the injustice of carrying a child's part, which he derived from his father, out of the family and from the children of the father, by the intermarriage of the widow to a second husband, and his children or relations; and this being the intent of the act, as is evident from a case in Atkins (which he read) and other books that treat of the subject, the operation of the clause in question should be confined to the estate which came from the father. Where the estate is acquired by the child by his own industry, there is not any injustice in carrying it over to his mother, or to his half-brothers and sisters, or to his mother's relations, to share equally with those on the father's side, since both are to be supposed equally dear to him.

PER CURIAM. The clause in question was passed for the reasons given at the bar, and it is general, not distinguishing between different parts of the child's estate, as it probably would have done had the Legislature entertained the design attributed to them. The reason of the clause holds equally strong in the case of property acquired by a child as it does in respect of property derived from his father. He would in all probability prefer his own brothers and sisters to a father-in-law and his relations, or even to the children of his mother by him.

Let the mother have an equal share only with each brother and sister.

Cited: *Wells v. Wells,* 158 N. C., 331.

ANONYMOUS.

1. If a suit to which three years is a limitation be brought before the three years have expired, and there is a nonsuit, the plaintiff may sue again within twelve months, and then only the time elapsed before the first action shall be counted.

2. Whether, if the new action be not commenced within twelve months after the nonsuit, the time elapsed during the pendency of the former suit shall be counted, *quere.*

THE act of limitations had run about eighteen months, then the plaintiff sues and his action is continued in court about four years, and then he is nonsuited, and upwards of twelve months after that he renews his action, and the defendant pleads the act of limitations.

HAYWOOD and STONE, JJ. If a suit be instituted before the three years are expired, and there is a nonsuit after three years, the plaintiff may sue again within twelve months, and then only the time elapsed before the first action shall be counted. But then a doubt was conceived whether, if the action be commenced after twelve months from the nonsuit, the time between the commencement of the first action and the nonsuit shall be counted, or only the time before the commencement of the first action and the time after the nonsuit and before the commencement of the second action.

HAYWOOD, J. If after the nonsuit a new action be commenced in a reasonable time, that time which intervened during the pendency of the first action shall not be counted, because the second suit being commenced with all proper diligence is looked upon to be *quasi* a
(64) continuance of the former; but if it be not commenced in a reasonable time, it will not be considered as a continuance of the former, and then the former being an effectual one, shall not be regarded at all, and consequently the time elapsed during its pendency shall be counted. The reasonable time I speak of is ascertained by the equity of the act itself, sec. 6, to be one year.

STONE, J. I am not satisfied but that the time elapsed during the pendency of the former action should be rejected, and then the plaintiff is not barred.

Sic adjournatur. *Vide* Str., 907; 3 Term, 664.

NOTE.—See *Pearse v. House, post,* 386, where the judge seemed inclined to think that it should be counted, which the editor thinks is now the settled construction of the statute.

Cited: Skillington v. Allison, 9 N. C., 348; *Bradshaw v. Bank,* 172 N. C., 634.

(65)

NEW BERN, September Term, 1798.

WITHRINGTON AND FERGUSON v. ANN WILLIAMS.

NOTE.—See this case, reported in 1 N. C., 89.

BLOUNT v. MITCHELL AND OTHERS.

NOTE.—See this case, reported in 1 N. C., 85.

Cited: Smith v. Tritt, 18 N. C., 243.

(66)

ANONYMOUS.

Executors must be made parties within two years of death of plaintiff dying *pendente lite.* But if made parties after two years without opposition, no abatement will lie.

On motion to be made a party.

PER CURIAM. If the executors of the plaintiff (dying during the pendency of his suit) will not apply within two terms after his death, computing from the day of his death, and not from a suggestion entered by the defendant, the cause will abate, and the defendants be discharged from further attendance; but if after this the executors apply to be made parties by a *sci. fa.* or notice served on the defendants and they do not oppose it, and the plaintiffs be made parties by order of the court, it will be too late afterwards to move for an abatement, but the cause shall be tried.

See General Rule, 1 N. C., 88.

Cited: Hobbs v. Bush, 19 N. C., 511; *Collier v. Bank,* 21 N. C., 331; *McLaughlin v. Neal,* 25 N. C., 295; *Lea v. Gauze,* 26 N. C., 10; *Borden v. Thorpe,* 35 N. C., 301.

LATHAM v. OUTEN.

Under the act of 1784 (1 Rev. Stat., ch. 37, sec. 19) a gift of a slave to a child, as against a purchaser, must be by a deed registered.

TROVER for a negro. Dawson was the owner; he gave and delivered the negro to his daughter, now married to Outen, in 1791, and afterwards swapped him to Latham for another, and delivered him to Latham also; then Outen got the possession, and on demand refused to deliver to Latham.

HAYWOOD, J., only in Court. The act of 1784, ch. 10, sec. 7, requires sales of slaves to be in writing, and to be proved and registered within a definite time, or otherwise to be void; it also directs deeds of gift to be in like manner proved and registered, or otherwise to be
(67) void. The act of 1792 dispenses with the necessity for a bill of sale where, upon the sale, possession is delivered to the vendee; but it leaves deeds of gift under the regulations of the former act; and the meaning of that act is that upon a gift made by a parent to a child, a deed of gift shall be executed and proved and registered. The reason for publicity which induce the Legislature to pass the act being, as they considered, stronger in this latter case than in the former. Should we determine by the letter of the act that the parties are not bound to make a deed of gift, but only to register it when made, the consequence will be that this act will encourage the not making deeds of gift, and many cases will not be concealed in private parol transactions, which before the act, and had it not been passed, would have had the solemnity and publicity of a deed; and the act will be made to have an operation directly the reverse of what it was intended to have.

Verdict and judgment for the plaintiff.

NOTE.—See the cases collected in the note to *Farrel v. Perry*, 2 N. C., 2.

Cited: *McCree v. Houston*, 7 N. C., 453; *Bell v. Culpepper*, 19 N. C., 21.

EDENTON, October Term, 1798.

HARRAMOND v. MCGLAUGHON.

NOTE.—See *S. c.*, reported in 1 N. C., 90.

SAWYER v. SEXTON'S ADMINISTRATORS.

The plea of *plene administravit* should be received at all times, but the Court will not suffer the defendant to gain any improper advantage, nor put the other party to any disadvantage, by his pleading so late.

THE defendant had pleaded several terms ago the general issue, convenants performed, etc., release and satisfaction, and now Slade moved for leave to enter the plea of *plene administravit,* and after much argument at the bar—

HAYWOOD, J., only present. The English reporters prove this motion to be allowable, and our courts have adopted the same practice. The ground they go on is that an administrator shall not be charged *de bonis propriis,* if at any time before he is fixed with a judgment he offers to plead a full administration and will prove it. The (68) court, however, will not suffer him to gain any improper advantage by the motion, nor put the other party under any disadvantage by his pleading so late; he must plead that he had no assets at the time of the suit commenced, nor at any time since, wherewith he could satisfy the plaintiff's demand, or he must show specially what assets he had at or since the commencement of the action. Strange, 1075, shows this to have been the practice in the English courts.

The Court gave time to file the plea as moved for.

NOTE.—See *Anonymous,* 2 N. C., 484, and the note thereto.

GRIER & CO. v. COMBS' ADMINISTRATORS AND PONS' EXECUTORS.

NOTE.—See *S. c.,* reported in 1 N. C., 91.

HARRELL v. ELLIOT.

NOTE.—See *S. c.,* reported in 1 N. C., 92.

(69)

WYNN'S EXECUTORS v. BUCKETT.

NOTE.—See *S. c.,* reported in 1 N. C., 93.

ARMOUR v. WHITE.

The act of limitations can never ripen a possession which is unaccompanied by a color of title, into a title. The second clause of the act relates only to cases of irregular conveyances made before the act passed, and confirms them when accompanied by a seven years possession before the act, or where the possession was then continuing, and should complete seven years after the act; but it extends to no case arising since the act.

EJECTMENT.

HAYWOOD, J., only in Court. Part of the land in dispute has been in the possession of the defendant for forty years and more, but there is no deed from the ancestors of Armour which includes it, nor is there a deed from any other person that does. The act of limitations can never ripen such a possession into title; the act gives that effect to possessions which are taken and kept with a reasonable ground of belief that the lands so possessed do belong to the possessor, as by some deed or the like from some person having a pretended title. If he has a deed covering other lands, and settles upon the land in dispute, he is a trespasser, and that known to himself. The second clause of the act of limitations relates only to cases of irregular conveyances made before the act passed, and confirms them when accompanied with a
(70) seven years possession before the act, or where the possession was then continuing and should complete seven years after the act; but it extends to no case arising since the act.

NOTE.—See *S. c., post,* 87.

HALIFAX, October Term, 1798.

BRODIE v. SEAGRAVES.

NOTE.—See *S. c.*, reported in 1 N. C., 96.

Cited: Woodley v. Gilliam, 67 N. C., 239.

ANONYMOUS.

MCCAY and HAYWOOD, JJ. In this case there are several defendants, some of whom have been taken and others not; but the process has been carried on against them to the *pluries,* which has been returned

non est inventus. The plaintiff may now declare against those who are taken, saying that they with those who are not, etc., and there need not be any special entry on the record to show that those not taken have been pursued to the *pluries,* for that already appears by the record.

NOTE.—See *Sherrod v. Davis,* 2 N. C., 282, and the note thereto.

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(71)

ANONYMOUS.

Where, after the act of 1786 (1 Rev. Code, ch. 253, sec. 7), fixing the jurisdiction of a single justice to £20 and under, a suit was brought in the county court to which the defendant pleaded in chief, and the jury found a verdict for less than £20, upon which a nonsuit was ordered and the plaintiff appealed, *it was held* by the Superior Court that the cause must be tried *de novo,* and if the plaintiff by means of the accruing of interest or otherwise obtained a verdict for more than £20, he should have judgment; and that the defendant ought to have pleaded in the first place that the debt really due to the plaintiff was less than £20.

MACAY and HAYWOOD, JJ. This action was commenced in the county court of NORTHAMPTON, and the defendant pleaded in chief, and a trial was had there, and a less sum than £20 found for the plaintiff; whereupon the court nonsuited him. We cannot direct the jury now to find what was the value of the demand at the time the action commenced in the county court, for we cannot see upon this record that the jurisdiction is questioned, and of course the cause must be tried as other causes are, and the jury must find the value of the demand at this time. Should their verdict be for a less sum than £20, possibly the Court may then see that the court below had no jurisdiction. Salk., 202. The words of 1786, ch. 14, sec. 7, are "*Provided,* that no suit shall be commenced in the first instance, returnable to any court for any sum under £20." The court has no jurisdiction if at the time of the action commenced it is apparent that the demand, independent of set-offs, is of less value. Here the demand, by the accruing of interest between the time of commencing the action and the present time, has become of more value, though under the value of £20 when the action was commenced. The defendant should have pleaded that the sum really due to the plaintiff was under £20 at the time of the action commenced, and then the jury would have been bound to find the value at the commencement of the action, as well as the value at this day, and the judgment of the court would be against or in favor of the plea. According with the verdict, such plea would have admitted the execution of the instrument,

and questioned only the *quantum;* but then the defendant could not have made set-offs. 1 Wils., 19, 20. The plaintiff could not know beforehand whether he would set off or use a cross-action; and it shall not be at the option of the defendant by using or not using the set-off to give jurisdiction or not to the court, for at that rate the plaintiff could never recover; when before a court the defendant would reduce the demand by a set-off under £20; when before a justice of the peace the set-off would not be used, and the demand would be too large, and so no recovery at all to be had before either jurisdiction. Had the plaintiff taken a writ of error upon the judgment of nonsuit in the county court, the Court now could examine the record to see whether they had given a proper judgment, and would confirm it as this case is circumstanced; but having appealed, it is to be taken that the complaint against the decision below regards some mistake of the jury, and then there can only be a new trial by a jury here. The safest way, therefore, must be to plead to the jurisdiction, and tie up to the inquiry to the value of
(72) the demand at the time when the action is commenced; for if that is not done, and by the accruing of interest the sum rises to above £20 before the cause is tried, here the Court is bound to give judgment accordingly.

NOTE.—See *Brooks v. Collins*, 1 N. C., 512.

STATE v. DUNCAN DEW.

NOTE.—See this case reported in 1 N. C., 94.

KILLINGSWORTH v. ZOLLICOFFER.

NOTE.—See *S. c.*, reported in 1 N. C., 95.

Cited: Torrence v. Graham, 18 N. C., 288.

(73)

ANONYMOUS.

NOTE.—See *S. c.*, reported in 1 N. C., 97.

Cited: Bryan v. Brown, 6 N. C., 344.

STATE v. PARISH.

On a conviction for manslaughter, the court thinking the case as proved was murder, and showed the prisoner to be a very dangerous man in society, ordered him to be bound with sureties for his good behavior for five years, and to remain in jail until the surety is given.

DEFENDANT was indicted for murder and found guilty of manslaughter; and when he was brought into court to be burnt in the hand, HAYWOOD, J., inquired of the bar if they knew of any instances where a man had been indicted of murder and found guilty of manslaughter, when the circumstances were such as in the opinion of the court amounted to murder, where the court had required surety of the prisoner for his good behavior, and whether the security had ever been required for a longer time than one year, saying, upon the latter point, he thought there was a case reported in Burrow which decides it in the affirmative; but he had not known any instance of it in this country. Mr. Moore said he recollected several instances, but not the names of the cases where it had been done, but that when he first heard it he thought it a strange doctrine.

PER CURIAM. This man's conduct has shown him to be very (74) dangerous to society, and as there have been precedents in this country, I shall direct him to give security for his good behavior for five years, himself in £1,000, with two sureties each in the sum £500, and that he remain in prison till this security be given.

It was ordered accordingly.

NEW BERN, March Term, 1799.

BRYAN v. CARLETON AND ALLEN.

NOTE.—See *S. c.*, reported in 1 N. C., 151.

ANONYMOUS.

NOTE.—See *S. c.*, reported in 1 N. C., 154, under the name of *Gardner v. Ellis.*

ANONYMOUS.

THE counsel stated to the Court that he wished to read a deposition which had been taken for his client, upon the ground that the witness was unable to attend court, and offered to prove that fact by his client.

MOORE, J. If that has been the practice, it is improper; that fact should be proven by some disinterested person.

HAYWOOD, J. The practice has been heretofore settled in this Court that such fact should be proven by indifferent testimony, and not by the party offering to read the deposition.

The client's oath refused.

NOTE.—See *Willis v. Brown*, 1 N. C., 70; ——— *v. Brown*, 2 N. C., 227.

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(75)

BLOUNT, EXECUTOR OF OGDEN, v. STARKEY'S ADMINISTRATORS.

NOTE.—See *S. c.*, reported in 1 N. C.

SLADE v. GREEN.

NOTE.—See *S. c.*, reported in 1 N. C., 158.

WITHERSPOON AND WIFE v. BLANKS.

NOTE.—See *S. c.*, reported in 1 N. C., 157.

STANLEY AND WIFE v. ————.

NOTE.—See *S. c.*, reported in 1 N. C., 150, under the name of *Stanley and Wife v. Kean.*

(76)

ANONYMOUS.

PER MOORE, J. Getting wood upon land to make tar is a possession; and the plaintiff must enter within seven years, or he will be barred.

HAYWOOD, J., thought it not a possession within the meaning of the act of limitations.

NOTE.—See the cases referred to in the note to the case of *Strudwick v. Shaw*, 1 N. C., 34; *S. c.*, 2 N. C., 5.

HARGETT AND WIFE v. ————.

The contents of a record lost or destroyed cannot be proved otherwise than by a copy.

MOORE, J. The contents of a record lost or destroyed cannot be proven otherwise than by a copy. It is better to suffer a private mischief than a public inconvenience, especially one of such magnitude as the introducing of parol testimony to supply a record.

Quere de hoc by Reporter.

NOTE.—See *Stuart v. Fitzgerald*, 6 N. C., 255; *S. c.*, 4 N. C., 17, 234; *Spencer v. Cohoon*, 18 N. C., 27.

Overruled: Mobley v. Watts, 98 N. C., 288.

STATE v. PIVER.

1. If a slave violently shove a white man so that he falls, or is in danger of falling, and he arises and immediately shoots the slave, it is manslaughter.

2. Under the act of 1791 (see 1 Rev. Code, ch. 335, sec. 3), making the willful and malicious killing of slaves murder, no punishment is affixed to the crime of manslaughter committed upon a slave.

THE defendant was indicted for the murder of a negro slave, and now upon his trial it appeared that, returning home from a neighbor's house, with a gun, in a public road, the deceased came meeting him, and the

prisoner, a boy of about 13 or 14, said to him jocosely, "Stand off, or I will shoot you; my gun is charged with buckshot." The deceased continued to walk on, and Piver got before on that side the road which the other had taken; whereupon the negro shoved him with some violence to the other side of the road, and Piver would have fallen had he not caught on his hands. The deceased passed by, and Piver rose up and shot him, so that he died.

PER CURIAM. This is manslaughter; and in the act of Assembly against the malicious killing of slaves there is no punishment affixed to manslaughter; so he must be acquitted.

Verdict accordingly.

NOTE.—Upon the first point, see *S. v. Weaver, ante*, 54, and the note thereto. As to the second point, the law is now altered. See 1 Rev. Stat., ch. 34, sec. 9.

HOBDY v. CHARLES AND JAMES EGERTON.

Long acquiescence is evidence from which a jury may infer a confirmation of a sale made by a stranger of a slave which belonged to the person acquiescing.

ACTION for the recovery of a male slave. The slave had been left by the will of their father to the defendants, who were infants; their elder brother brought the negro from South Carolina and sold him to Hobdy, and then returned to South Carolina, and lived near the defendants six or seven years after their arrival to full age, and they never
(80) questioned the sale nor interrupted the plaintiff's possession until soon after the death of the elder brother, when they got the negro into their possession, whereupon this action was instituted.

PER CURIAM. Those circumstances are proper to be left to the jury, who may, if they think proper, determine upon them that such acquiescence is proof of a confirmation of the bargain after their arrival to age.

The jury found for the plaintiff, and the defendants moved for a new trial, but the Court refused it.

NOTE.—By the act of 1820 (1 Rev. Stat., ch. 65, sec. 18) the possession of a slave for such a length of time as will be a bar under the statute of limitations will give a title to the possessor.

ANONYMOUS.

NOTE.—See this case reported in 1 N. C., 154, under the name of *Harget v. Blackshear.*

(81)

TAGGERT v. HILL.

1. Where a sheriff had levied an execution on goods, and, upon an injunction from a court of equity being served on him, had redelivered the goods, *it was held* by HAYWOOD, J., against the opinion of MOORE, J., that he was not liable to the plaintiff, though no security had actually been given for the injunction.

2. If an execution issue, having the costs endorsed thereon in abbreviated words, it is illegal under the act of 1784 (1 Rev. Stat., ch. 105, sec. 24) only for the costs endorsed; the judgment must be levied.

CASE against the defendant for a misbehavior in his office, in redelivering the goods of one Walk, seized in execution, without levying the money. There were two other counts, but the cause rested upon this.

The following facts appeared upon the trial: Taggert obtained a judgment in the County Court of WAYNE, against Walk; took out execution thereupon and delivered it to Hill, the sheriff of Franklin, to be executed, who seized Walk's goods in execution, and appointed a day of sale by advertisement; but having on that day or before received an injunction issued by WILLIAMS, J., he released the goods and redelivered them to Walk, who afterwards disposed of them and became insolvent. Hill returned upon the execution, "Stopped by injunction." (82)

Badger for plaintiff.
Baker e contra.

MOORE, J. The cases cited for the plaintiff are sound law. (83) The defendant is necessarily discharged of the debt when the sheriff has seized property to the value. By the act of seizure the property is divested out of the defendant until the debt be satisfied and vested in the sheriff, who becomes absolutely answerable for the debt. The defendant is liable to an action of trover or trespass, to be brought by the sheriff as owner, for taking away the goods; and the defendant being once discharged, can never afterwards be charged by any new process, nor can the sheriff's liability be done away by any writ or process issuing

after the seizure. An injunction has no such effect; that is a writ of modern date, in comparison of the rule about the entirety of an execution. Its lawfulness was violently opposed and denied by the common law judges as late as the reign of James I. It is a creature of the court of equity, which has no power to alter any common-law rule nor its operation, and which could never act upon property by any process, but *in personam* only. Till our act of 1787, ch. 22, sec. 2, our injunction could not affect the property, and can only subject the person who disobeys it to attachment; it cannot in strictness issue to the sheriff, who has the goods by seizure, but to the plaintiff in the action only. The sheriff who has made a seizure cannot legally take notice of an injunction, and must proceed as if none had issued; that is to say, by selling the goods and bringing the money into court. Consequently the defendant should not have redelivered the goods to Walk; and having done so, is liable to the plaintiff's action.

HAYWOOD, J. The injunction in this State possesses the same effects and qualities precisely as the injunction in England. There has been no act of Assembly to give it different effects or qualities. Also the case cited for the plaintiff about the entirety of an execution are good law; still it seems to me the sheriff acted properly in redelivering the goods. The apothegm that an execution is an entire thing, and cannot be stopped when once begun to be executed, contains no reason in itself, and is not accompanied by any in the books cited that shows why the law is so. It becomes necessary, then, to search for the reason, and to discover it, in order to understand how far it extends and to what cases it is properly applicable. One of the books this moment cited, since I began to speak, says an injunction shall stay the goods in the hands of the sheriff. Admitting it to be so, that proves the rule about the entirety of an execution to be applicable to the case of an injunction; for by the rule it is necessary to proceed and sell. If we discover that the reason of the rule is not universal, and reaches only to particular cases, the universality of the terms in which it is conceived must be restrained to those cases. When the plaintiff obtains judgment and takes out execution, the law still allows the defendant to have the cause further examined, and provides various means of doing so, suited to each particular case of hardship; as by *supersedeas,* writ of error, *certiorari,* etc. But
(84) in granting this indulgence, it were unjust to place the plaintiff in a worse situation than he stood in at the time the *supersedeas,* writ of error, etc., issued. If he has gained a security for his debt by a seizure to the value, that shall not be taken from him without giving an equal or better security; and as no such security was given at the common law, of which this is a rule, prior to issuing the *supersedeas,* writ

of error, etc., the goods when seized were to be retained in the hands of the officer or sold; and it would be vastly inconvenient to all parties that they should be retained in the hands of the officer, for if perishable, they may be destroyed in the interim; if living animals, they may be fed; or if inanimate, may require a warehouse. By destruction, the value is lost to the plaintiff or defendant; and so it is if the expenses eat up the value. It is better for all parties that they be sold; and it is for that reason that the law orders a sale, notwithstanding a *supersedeas* or other writ in the nature of a *supersedeas,* which issues at the common law without any security previously given. Hence arose the quaint saying that an execution is an entire thing, and cannot be stopped when once begun to be executed, the reason of it extends to no case where a security equal to the seizure is given by the defendant before he obtains process for a stay of proceedings. Will it then apply to the case of injunction? In England, when an injunction issues after verdict and before execution, the money must be deposited. *Cursus Concellariæ,* 447. If after execution has issued the money and costs recovered at law must first be paid into the court of equity. *Cursus Concellariæ,* 448; 2 Brown Ch., 14, 182; Ch. C., 447. We must not look into the old books for the properties of an injunction; the writ itself is but of modern origin, and like other things, has been matured and fitted for the transactions it is used in, and has but lately acquired perfection. When money is deposited, it is unjust to retain the goods any longer, and it is unnecessary to the plaintiff's security. Much more unjust would it be to proceed to a sale. Hence it is deducible that the goods are to be redelivered; and if this be the effect of an injunction, issued after a verdict in England, the next question is, Has any law or established practice altered such effect in this State? There is no act of Assembly for that purpose, and the practice before the revolution, and for five years last past, has been either to deposit the money or give security to pay the debt in case of a dissolution, according as the circumstances stated were more or less favorable for the complainant. The proceedings of the old court of chancery in this country have been inspected, and they prove the practice to have been as I state it. But why require a bond if the goods are to be retained; if they are to be sold, notwithstanding the injunction, and if the defendant is absolutely discharged by a seizure to the (85) value? The plaintiff cannot possibly have any cause of complaint for which he may sue upon the bond; he has the full benefit of the seizure and of the security detained by it. It follows that either the bond is filed for no purpose or that the goods are to be redelivered; and it is more reasonable to presume the latter than the former—the more so, seeing the universal practice has been to redeliver the goods, which, though it may not make the law, is evidence in a doubtful case of what

it really is; and as our act of 1802 directs the proceedings in our present court of equity to be like those in the court of chancery under the old government—upon this view of the subject, the defendant acted rightly in redelivering the goods to Walk. It is indeed a misfortune which occasions this dispute—the money not having been deposited nor security given before the injunction issued. That is not the fault of the defendant, who was bound to obey the writ without inquiring whether all necessary steps were taken before it issued. As to the book which says the injunction shall stay the goods in the hands of the sheriff, it is an old authority. There is no fee allowed by law to the sheriff for such service; the position is against first principles, for the goods may perish or incur an expense in the keeping. It is more agreeable to principles that they should be sold; and if they must be sold, the injunction is a dead letter. The property of the goods is not absolutely divested out of the defendant by seizure, for if the money be paid, he shall have them again; and that is done by a deposit. And as in this country, owing to the circumstances stated by the defendant's counsel, a bond is in some instances substituted in the place of a deposit—a security instead of satisfaction. The effect of an injunction in both cases is the same; but in the latter, after a dissolution, an execution *de novo* may issue, for the defendant is absolutely discharged by a seizure where he is passive, and does no act to obstruct the consequences of a seizure; but where, by his own act and at his own instance the goods are released upon an allegation made by himself that he is not chargeable, it is no hardship upon him when upon further scrutiny it turns out that his allegation is not true. If he is subjected by a new writ, the constant practice in this State has been in such cases to issue a new *fi. fa.* after a dissolution, and not a *venditioni exponas* or *distringas* against the sheriff who seized.

Verdict for the defendant.

NOTE BY REPORTER.—This case happened some years ago in the district of Halifax: The defendant, whose name, I think, was Robinson, was taken and imprisoned upon a *ca. sa.* and then obtained an injunction and was discharged; and though the plaintiff's debt became desperate, and was actually lost by the discharge, as well as I recollect, no advice was given to sue the sheriff.

(86) This case happened in the district of Salisbury, eight or nine years ago: A defendant's goods were taken in execution, then an injunction issued; the goods were released, and the defendant immediately removed himself and his effects to Georgia, and no one advised the suing the sheriff; then the injunction was dissolved, and no property to be found. About six or seven years ago, at Salisbury, this case happened: The sheriff of Rockingham (Mr. Joyce, as well as I remember) was indicted because, having taken the defendant in execution, who afterwards exhibited a bill and procured a judge's fiat for an injunction, and showed that to the sheriff on the day of sale, not

having time to go to the office of the clerk and master: the sheriff, supposing the fiat not sufficient, had proceeded to sell; and for this conduct both he and the plaintiff were convicted of trespass and fined, two judges being present, as well as I remember. Numberless cases have occurred where the goods have been redelivered, and where afterwards new executions issued. Were all such cases illegal, and the plaintiffs liable to be sued or to make restitution? And must the sheriffs in all such cases be resorted to? Or are they still liable in all cases to be resorted to where the goods have been redelivered, and afterwards none to be found—notwithstanding the general opinion hath been hitherto that they did but their duty in making redelivery and were no ways responsible afterwards? If so, the lawsuits to arise from this source are innumerable and the effects inculculable.

NOTE.—It was attempted to defend the sheriff on another ground, namely. that the bill of costs annexed to the execution contained some abbreviated words, and that therefore he ought not to have executed the writ. The words of 1784, ch. 7, sec. 8, are: "and to the said execution shall be annexed a copy of the bill of costs, of the fees on which such execution shall issue, wrote in words at length, without any abbreviation whatsoever; and all executions issuing without the copy of such bill of costs annexed shall be deemed illegal, and no sheriff shall serve or execute the same."

PER CURIAM. That clause relates to executions for costs, not to those or such parts of those as are for the judgments; and in the present case, though there be an abbreviation, that will not justify the sheriff in not levying the principal, however it may operate as to the costs.

Verdict for the defendant, and motion for a new trial.

NOTE.—See the report of this case in the Court of Conference upon the motion for a new trial. 1 N. C.

Cited: Wingate v. Galloway, 10 N. C., 8; *Coltraine v. McCain,* 14 N. C., 312.

ANONYMOUS.

NOTE.—See this case reported in 1 N. C., 152, under the name of *Hancock v. Hovey.*

Cited: McCree v. Houston, 7 N. C., 451; *Bell v. Culpepper,* 19 N. C., 21.

(87) EDENTON, April Term, 1799.

ARMOUR v. WHITE.

1. The possession of part of a tract circumscribed by marked lines is a possession of the whole tract within these lines.
2. A naked possession for seven years without entry or claim will bar the right of entry of all adverse claimants; and a possession with color of title for seven years will give to the defendant in possession an absolute right against all others forever.

EJECTMENT. The land in dispute was 100 acres, part of the lands granted by an old patent to Thomas Stanton, who conveyed the said 100 acres to William Armour, who had a son, Theophilus, who had a son, William, the lessor of the plaintiff, who left this country in 1768 and settled in South Carolina, and never made any claim after going away till just before the commencement of this action. Stanton, in 1714, assigned the land, comprised in a certain plat to Guthrie, in order that he might obtain a patent for the same, but the plat was not shown to the court, and in 1716 a grant issued to Guthrie for 110 acres the
(88) lines of which grant included a part of the 100 acres in dispute; and under this patent the defendants claim the whole 100 acres. They, and those under whom they claim, have possessed a part of the 100 acres in Guthrie's patent upwards of forty years; that is to say, they cleared and cultivated part of an adjoining tract, and extended a part of that clearing over a small part of the 100 acres lying within the limits of Guthrie's patent; and they proved by several old deeds for land adjoining that part of the 100 acres which was not included in Guthrie's patent, that the lines of the 100-acre tract on that side were reputed the lines of those under whom they claim.

MOORE, J. The possession of part of a tract, circumscribed by marked lines, is a possession of the whole tract within these lines. If the defendants possessed the part mentioned in the evidence, claiming under Guthrie's patent, their possession extends to the lines of that patent and no farther; but if they possessed this part claiming as far as the lines of the 100-acre tract, then their possession extends to the whole tract. A naked possession for seven years, without entry or claim, will bar the right of entry of all adverse claimants; and a possession with color of title for seven years will give to the defendant in possession an absolute right against all others forever.

Verdict and judgment for the defendant.

NOTE.—See this case, *ante*, 69, and see the note to the case of *Strudwick v. Shaw*, 1 N. C., 35, and 2 N. C., 5. See, also, the observations of HAYWOOD, J., on this case annexed to the report of it in the first edition, but now omitted here, as they are to be found in a note to *Stanly v. Turner*, 5 N. C., 14, accompanied by some remarks of MURPHEY, J.

(97)

BORRETS v. TURNER.

NOTE.—See this case more fully reported, *post*, 113.

(98)

TRUSTEES OF THE UNIVERSITY v. DENNIS SAWYER.

NOTE.—See *S. c.*, reported in 1 N. C., 159.

Cited: Stanmire v. Powell, 35 N. C., 315; *Lovingood v. Burgess,* 44 N. C., 408; *Barnett v. Woods,* 58 N. C., 433.

SCOTT, PER GUARDIAN, v. MCDONALD.

On the trial of an issue in equity, the defendant's answer may be read as evidence for him, though it is not conclusive, and the jury may give to it only the credit it deserves. MOORE, J., against the opinion of HAYWOOD, J.

MOORE, J. This being an issue in an equity cause, the answer denying the bill shall be given in evidence to the jury for the defendant. It is not conclusive, however; they may give it only the credit it deserves.

HAYWOOD, J. It should not be given to them as evidence (99) Requiring the oath of the defendant is not for the purpose of making evidence for himself, but in order to compel him to confess for the benefit of the complainant what otherwise perhaps he could not prove.

NOTE.—The case of *Fetts v. Foster, post.*, 102, *S. c.*, 1 N. C., supports MOORE'S opinion, while *Salter v. Spier*, 1 N. C., and *Cartwright v. Godfrey*, 5 N. C., 452, are *contra.* But see *Johnson v. Person*, 16 N. C., 374, and *Chaffin v. Chaffin*, 21 N. C., 255; *McDonald v. McLeod*, 36 N. C., 221; *Lewis v. Owen, ibid*, 690; *Jones v. Jones*, 36 N. C., 332, which hold that the answer is evidence for the defendant where it is directly responsive to the allegations of the bill, but not otherwise.

BRYANT v. STEWART.

It must be pleaded that an endorsement on a bond was made before it was delivered.

DEBT upon a bond to comply with an award to be made by certain arbitrators; plea, no award. Replication stating an award and breach;

demurrer thereupon. The award by the condition of the bond was to be delivered before 29 April; but there was a further writing endorsed, purporting that the award should be binding if made before the 7th of May.

MOORE, J. It should have been averred that the endorsement was made before the bond was delivered; otherwise it cannot be taken to be a part of the bond.

NOTE.—See *S. c., post*, 111.

ANONYMOUS.

A partner cannot execute a bond binding on his partners.

PER CURIAM. This bond is executed by one partner for himself and the others. He had no power, merely as a partner, to execute a bond for the rest of the partners, and it is not obligatory on the others. The former decisions in this country have been contrary to the present opinion of the Court, but the authorities cited on the part of the defendant prove them to have been erroneous. The case in 7 Term Rep., cited by Mr. Brown is decisive.

NOTE.—See *Walker v. Dickerson, ante*, 23, and the cases referred to in the note.

HALIFAX, April Term, 1799.

BUSTIN v. CHRISTIE.

NOTE.—See *S. c.*, 1 N. C., 160.

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(100)

YOUNG v. DREW; SAME v. HARRIS.

NOTE.—See *S. c.*, 1 N. C., 162.

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(101)

ANONYMOUS.

NOTE.—See *S. c.*, reported in 1 N. C., 161.

KNIGHT v. KNIGHT.

NOTE.—See *S. c.*, reported in 1 N. C., 163.

INGLES v. DONALSON.

THIS cause coming on again, and the same evidence given as before, MOORE, J., was of opinion the transaction was fraudulent and void, and Ingles recovered.

See *S. c., ante*, 57.

HAMILTON v. MARY WILLIAMS.

THIS case now being on, MOORE, J., was of opinion that the witness was incompetent.

NOTE.—See *S. c.*, 2 N. C., 139, and the note thereto. See, also, *Sanders v. Ferrill*, 23 N. C., 97, which holds that where the subscribing witness to any instrument, except a negotiable one, becomes interested in a suit brought by him, his handwriting may be proved to establish the execution of the instrument, whether his interest was thrown upon him by operation of law or was acquired by his own voluntary act.

(102)

BARRY v. INGLES AND OTHERS.

NOTE.—See *S. c.*, reported in 1 N. C., 163.

Cited: Johnston v. Crawford, 61 N. C., 344.

FELTS AND WIFE v. MARY FOSTER AND WILLIAM THOMAS.

NOTE.—*S. c.*, reported in 1 N. C., 164.

GREER v. BLACKLEDGE.

NOTE.—See *S. c.*, reported in 1 N. C., 165.

BUTTS v. DRAKE.

A jury in a civil suit may separate after finding a verdict, and afterwards give their verdict.

EJECTMENT. The jury retired and found a verdict; but whilst they were out the court adjourned, and they separated without delivering their verdict to one of the judges, but delivered it next morning in court, and it was entered *de bene esse*. And after some days consideration, MOORE, J., decided that it was a good verdict, notwithstanding the objection that it should have been delivered to a judge before the jury separated.

Dist.: Willoughby v. Threadgill, 72 N. C., 440.

(103)

ANONYMOUS.

On a bond given in this State to a British creditor before the war and confiscated, *it was held* that the creditor was not entitled to interest but from the time the debt was demanded after the treaty of peace, but per HAYWOOD, J., it ought to be disclosed by plea that the creditor was beyond sea, and that the debtor had always been ready since the treaty to pay, and is now ready, in verification of which latter plea he should pay the money into court.

MOORE, J. This is an action brought by a British creditor, under the treaty of peace, for a debt contracted in this State before the war, which debt was effectually confiscated by a sovereign power having a right to make the confiscation. A treaty has not the omnipotence attributed to it, that of taking a debt from the State which lawfully belongs to it, or that of recharging a debtor who has actually paid into the treasury under the existing laws, and has procured a discharge agreeably to them before the treaty. And I would not now suffer such suitors to recover, but for the consideration that they may recover by suing in the Federal court. As to the interest, I am very clear it ought not to be allowed but from the time the debt was demanded after the treaty. These creditors did not return till long after the war; most of them kept the bonds in their possession beyond sea, so that the debtor could not pay.

HAYWOOD, J. I am of the same opinion now I was of at the last term—that these debts are recoverable by the law of the country, and

for the reasons I then gave. As to the interest, I agree, the debtor is not bound to seek his creditor beyond sea; but then it should be disclosed by plea that the creditor was beyond sea; and further, that the debtor has always been ready, since the ratification of the treaty, to pay, and is now ready; and he should pay the money into court in verification of the latter part of the plea. How else are we to know the creditor was beyond sea? Or how has the creditor an opportunity of showing where he was and when he returned, unless by replying to the plea of the defendant? The omitting to make such a plea and to give such opportunity amounts, as in all other cases, to an admission on the part of the defendant that no such fact exists. Interest is to be paid in all cases of bonds, unless where by a general law or for some general reason it is suspended for a time; as during the time of our war, or unless the defendant by a plea of tender properly pleaded will show that in justice he ought not to pay it.

So it was adjourned, as also were several other cases in the same predicament.

NOTE.—See *Child v. Devereux*, 5 N. C., 398.

WILMINGTON, May Term, 1799.

(ALFRED MOORE, JOHN HAYWOOD, Judges.)

——— v. ASHE.

NOTE.—See *S. c.*, reported in 1 N. C., 166, under the name of *Cobham v. Ashe.*

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(104)

BURGWYN v. ———

NOTE.—See *S. c.*, reported in 1 N. C., 167, under the name of *Burgwin v. Hostler.*

TRUSTEES OF THE UNIVERSITY v. ———.

A devise of land to an alien is void.

PER CURIAM. A devise of lands to an alien is void. These lands could not have been confiscated as belonging by devise to the alien; the devisor died without heir; the devise operated nothing; the lands, therefore, escheated, and the trustees are entitled to recover.

Verdict and judgment accordingly.

NOTE.—See *Gilmour v. Kay, post*, 108, but see *Miller v. Harwell*, 7 N. C., 194, which intimates that an alien may take by devise, but that he does not hold for his own benefit. An alien, however, cannot take by descent, curtesy, dower, or other title derived merely from the operation of law. *Paul v. Ward*, 15 N. C., 247. See, also, *Atkins v. Kron*, 37 N. C., 64.

ANONYMOUS.

NOTE.—See *S. c.*, reported in 1 N. C., 168, under the name of *Schaw v. Schaw*.

(105)

STATE v. HALL.

NOTE.—See *S. c.*, reported in 1 N. C., 168.

Cited: S. v. Jernigan, 7 N. C., 19; *S. v. Haney*, 19 N. C., 399; *S. v. Williams*, 31 N. C., 145.

(107)

HALIFAX, October Term, 1799.

(JOHN LOUIS TAYLOR, JOHN HAYWOOD, Judges.)

PLUMMER v. CHRISTMAS.

NOTE.—See *S. c.*, reported in 1 N. C., 145.

(108)

GILMOUR v. KAY'S ADMINISTRATORS AND THE TRUSTEES OF THE UNIVERSITY.

1. A devise to an alien is void.
2. The word *escheat*, used in the act granting property to the University, embraces every case of property falling to the sovereign power for want of an owner.

PER CURIAM. Kay purchased of Black the lots and small tract of land in question, and Black had previously purchased of Gilmour, who all along retained the legal title, and yet retains it. A decree of this

Court directed Gilmour to convey to Kay upon Kay's paying the balance of the purchase money to Black's administrator; but before this decree was executed Kay died and devised the premises to his sisters residing in Great Britain. We are of opinion they cannot take by this devise, being aliens; and that the equitable estate which Kay had vested by his death in the trustees of the University. The word *escheat,* as used in our act of Assembly, embraces every case of property falling to the sovereign power for want of an owner.

On the first point, see *Trustees of the University v.* ————, *ante,* 104, and the note thereto.

SMITH v. WEAVER.

NOTE.—See *S. c.*, reported in 1 N. C., 141.

CORBIN AND OTHERS v. WALLER AND OTHERS.

An executor or administrator cannot purchase at his own sale. The rule is the same with regard to the sheriff, who cannot purchase at a sale made by himself.

PER CURIAM. The executor, who is one of the defendants, procured an order from the County Court of WARREN to sell the slaves of the testator for the purpose of making a division amongst the legatees, there being five negroes and six legatees. The jury have found that this sale was conducted fairly. The executor himself purchased four of the negroes for less than their value. Had the sale been for the
(109) purpose of raising money to pay debts, there is no doubt but the purchase by the executor would be void. The general rule is that a person entrusted by the law to sell shall not be a purchaser. The rule is so formed to prevent the frauds which a want of the rule would give birth to. It seems to us the sale in the present case is within the reason of this rule; but we will take time to consider of it. It has been often determined that the rule extends to sheriffs selling by execution, who cannot purchase under any form at such sales made by themselves; and to executors selling to raise money for the payment of debts.

NOTE.—See *Boatwell v. Reynell, ante,* 1, and the note thereto; also *Anonymous,* 2 N. C., 2, and the note.

STATE v. KNIGHT.

NOTE.—See *S. c.*, reported in 1 N. C., 143.

WILMINGTON, November Term, 1799.

(JOHN LOUIS TAYLOR, JOHN HAYWOOD, Judges.)

BLAKE & GREEN v. WHEATON.

NOTE.—See *S. c.*, reported in 1 N. C., 148.

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(110)

ANONYMOUS.

NOTE.—See *S. c.*, reported in 1 N. C., 147, under the name of *Ballard v. Averitt.*

EDENTON, April Term, 1800.

BALLENTINE AND OTHERS v. POYNER AND WIFE.

1. The action of waste will lie in this State, and the county court has jurisdiction of it.
2. A view is requisite only when the court thinks proper to order it.
3. Waste may be defined to be an unnecessary cutting down and disposing of timber, or destruction thereof, upon woodlands, where there is already sufficient cleared land for the widow to cultivate, and over and above what is necessary to be used for fuel, fences, plantation utensils, and the like; but as it respects juniper swamp and other lands similarly circumstanced, where the making of timber into staves and shingles is the only use to be made of the land, then the widow or devisee shall not be liable to an action for using such timber, according to the ordinary use made of the same in that part of the country.

THIS was an action in the county court, for waste, and a verdict and judgment thereupon, and a writ of error wherein general errors were assigned; and, amongst others, *Slade* relied upon the following:

1. That the county court had not jurisdiction. 2. An action of waste will not lie in this country. What is waste in England cannot be so considered here, and there is no act of Assembly to define what waste is. 3. A view is incident to the action of waste, and here it does not appear upon the record that the jury had a view of the place said to be wasted; and notwithstanding this defect, there is a verdict and judgment.

HAYWOOD, J. The words of the act of 1777, ch. 2, sec. 61, are, That the county court shall have jurisdiction of all causes whatsoever at the common law, within their respective counties, where (111) the debt, damages, or cause of action is above £20, except certain cases within which the action of waste is not." And even as to these excepted cases, many of them are not under the jurisdiction by subsequent acts. Secondly: It is true, some difficulty may arise in precisely determining what shall be taken to be waste, but that is no argument to prove that an action of waste will not lie. There are many things all men would agree to be waste, though there are others which might divide opinions. Suppose a widow pulls down a valuable building in order to sell the timber, or to erect new buildings with the materials upon another tract of land; would it not be a great defect in the law were she not punishable in an action of waste for this? I would define waste thus: An unnecessary cutting down and disposing of timber, or destruction thereof upon woodlands, where there is already sufficient cleared land for the widow to cultivate, and over and above what is necessary to be used for fuel, fences, plantation utensils, and the like; but if it respects juniper swamp, and other lands similarly circumstanced, where the timber made into staves and shingles is the only use to be made of the lands, then the devisee or widow shall not be liable to waste for using such timber, according to the ordinary use made of the same in that part of the country. As to the third objection, a view at the common law was not only incident to the action, but necessarily to be observed therein. This, however, is altered by 4 and 5 Anne, 616, where the court is directed to order a view in such cases where to them it shall seem necessary.

Judgment for the plaintiff.

NOTE.—See *Ward v. Sheppard, post,* 283; *Parkins v. Coxe, post,* 339; *Sheppard v. Sheppard, post,* 382; *Bright v. Wilson,* 1 N. C., 251; *Carr v. Carr,* 20 N. C., 179.

Cited: Shine v. Wilcox, 21 N. C., 632; *Dozier v. Gregory,* 46 N. C., 104; *King v. Miller,* 99 N. C., 594; *Dorsey v. Moore,* 100 N. C., 44; *Sherrill v. Connor,* 107 N. C., 633; *Thomas v. Thomas,* 166 N. C., 629.

BRYER'S EXECUTORS v. STEWART.

If a bond be delivered, and afterwards the obligor take it, make an endorsement upon it and hand it back to the obligee, the endorsement will be binding as a part of the bond.

DEBT; and upon oyer craved and had, the defendant pleaded *non est factum*, and no award made. The plaintiff replied an award, setting it forth, and stating it to have been made before 8 May, and assigned a breach in not paying, etc. Issue was joined upon a breach, and as to the award itself, there was a demurrer and joinder, which now came on to be argued.

The condition of the bond was that the defendant would stand to, abide by, and perform the award of the arbitrators, if the same should be made before 30 April; but the defendant afterwards endorsed words purporting that he would perform the award if delivered before 8 May; and it was now insisted by the defendant's counsel that this endorsement being not under seal, and having been made after the delivery of the bond, was no part thereof; and, therefore, that the award being not delivered before 30 April, was not binding on the defendant; and he cited 3 Term, 592, where a parol agreement to enlarge the (112) term of building a house, stipulated in a deed of covenants, was not allowed of; and there in the notes is stated another case where the time for making an award being enlarged, not saying whether by parol or how otherwise, was not allowed.

E contra were cited Mod. Entries, 254, and 6 Mo., 237.

PER CURIAM. (After two days taken to consider): The question is, whether the endorsement be part of the bond; for if it be, then an award made within the time limited by the endorsement will be good. I agree with those who say that to be a part of the deed the endorsement must be made before the delivery thereof; but then if a deed be delivered and fail of its effect, and the terms of it be to be altered, and such alteration be accordingly made, it is no longer the old contract, but a new one; and in order to effectuate the new contract, the deed containing the same must be delivered. The case in Cowper where husband and wife mortgaged the lands of the wife, and after the death of the husband she wrote to the tenants to pay rent to the mortgagee, this was construed to be a new delivery, because tantamount to a new assent to the contract, and, is, in my opinion, decisive of the present; for if that act amounted to a new delivery where the widow never had the deed in her hands, how much more will the circumstances in this case amount to a delivery,

when the deed actually was in the defendant's hands, and the endorsement signed by him, and the whole paper redelivered to the obligee? This made it to be a new deed *in toto;* and consequently the endorsement, being before the latter delivery, is a part of the deed; and an award made before the 8th of May is good.

Judgment for the plaintiff.

NOTE.—See *McKee v. Hicks*, 13 N. C., 379; *Davenport v. Sleight*, 19 N. C., 381.

BURNSIDE v. GREEN, ADMINISTRATOR, ETC., AND WITHERSPOON, ADMINISTRATOR OF NASH v. SAME.

Where an executor fails to plead any plea showing a want of assets, and judgment is taken against him, a *fi. fa.* must issue *de bonis testatoris*, and be returned "*Nulla bona*," before a special *fi. fa.* should issue.

Plaintiffs in these causes had obtained judgments without any pleas on the part of the defendants denying their having assets, and an execution had issued in the first instance commanding the sheriff to levy the debt *de bonis testatoris si*, etc., *et si non*, then *de bonis propriis;* and TAYLOR, J., on the complaint of the defendants, had issued a *supersedeas*. And now Woods argued that there is not any book which warrants so speedy a proceeding. Even *Pettifer's case*, reported by Lord Coke, and adverted to by Wentworth, page 116, will not permit a *fi. fa.* to be levied *de bonis propriis* until a return of *nulla bona*. And as to the cases in this State, Haywood's Reports, 218, 298, go no further than to warrant a special *fi. fa.* after *nulla bona* returned to a general one. Cases may happen where even that mode will be found subject to inconvenience, for suppose, after judgment the personal chattel which the executor relied on for satisfying the plaintiff's demand should perish before (113) the execution satisfied; the sheriff would return *nulla bona*, and a special *fi. fa.* would immediately issue without giving to the defendant any opportunity to discharge himself by showing the destruction of his assets. I should therefore contend, were it not for *Pettifer's case*, and the strong intimation given in the cases decided in this State, that a *scire facias* should go; for there must be a new judgment to support this special *fi. fa.* The first judgment will not, for that is to be levied *de bonis testatoris*, and the damages *de bonis propriis;* and surely it is a little out of the common course to give a new judgment in the absence of the defendant, upon the mere return of *nulla bona*, that it should be

levied *de bonis propriis*. However, what I wish to establish at present, is that a special *fi. fa.* shall not issue until there be a return of *nulla bona;* and he cited Impey, 466.

PER CURIAM. The special *fi. fa.* ought not to issue till the return. We will adhere to precedents, even where they confine us to narrower limits than the reason of them requires.

NOTE.—See *Parker v. Stephens*, 2 N. C., 219, and the cases referred to in the note, the last of which, *Hunter v. Hunter*, 4 N. C., 5, decides that the special *fi. fa.* is improper, and that a *sci. fa.* or debt for *devastavit* is the only proper course.

WHITEHURST v. DAVIS.

That a *caveat* has been tried by thirteen jurors was held good cause for a writ of error.

CAVEAT. It had been tried by a jury on the premises, who had given a verdict, which the county court had confirmed. A writ of error was brought, and the error assigned was that it had been tried by thirteen jurors. Cro. C., 414, and Trials *Per Pais*, 70, were cited.

PER CURIAM. Our Constitution declares that in all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable. It may be said, if thirteen concur in a verdict, twelve must necessarily have given their assent. But any innovation amounting in the least degree to a departure from the ancient mode may cause a departure in other instances, and in the end endanger or prevent this excellent institution from its usual course. Therefore, no such innovation should be permitted.

New trial.

BORRETS v. TURNER.

1. The possession which is calculated to give title under the act of limitations is a possession under color of title, taken by a man himself, his servants, slaves, or tenants, and by him or them continued without interruption for seven years.

BORRETS *v.* TURNER.

2. When a tract of land is, as to part, included in A.'s deed or patent, and the same part is also included in B.'s deed or patent, and each grantee is settled upon that part of the tract comprised in his deed, which is not included in both deeds, the possession of the part included in both deeds is in him whose deed or patent is the oldest; but if one of them is actually settled upon such part included in both deeds for seven years together, the possession is his, and the other will be barred thereby.

EJECTMENT for 100 acres of land in the county of TYRRELL. The lords proprietors granted 440 acres to John Worsley in 1724; he died in 1740, devising his lands to his son Joshua; he died, leaving two sons, Joshua and William, and three daughters, Esther, Elizabeth, and Lavinia. Joshua, the grandson, died, and then William died, and the lands were divided amongst the three daughters. The part in question, being 100 acres, was allotted to Esther, January, 1792. In 1794 she conveyed to the plaintiff. On 30 April, 1725, John Worsley con- (114) veyed 100 acres to one Jones; and on 4 March, 1729, he conveyed 340 acres to Joshua, describing it as bounded to the westward by the lands in the possession of Jacob Blount, who then possessed the 100 acres now in dispute. In 1770 McKie took possession of a tract of land called Cooper's, adjoining to this 100 acres, and claimed both the 100 acres and Cooper's tract, and extended the clearing of Cooper's tract into and over a part of this 100 acres. About thirty years ago McKie ran the line along the edge of the plantation of Worsley, within the 340 acres. There was an execution against Mosely, who then possessed the 100 acres, and McKie purchased it.

PER CURIAM. Much has been said in the argument about the act of limitation. That has two clauses: the first regards possession under irregular and informal conveyances made before the passing of that act, and confirms the title where there either had been a possession for seven years or where there had been a possession for part of seven years, which should be completed after the act; the other regarded future possessions and titles, and meant to establish the title of a subsequent patentee, or bargainee of a patentee who should take and keep an undisturbed possession of seven years under such latter title. But it ripens no possession into title which is not accompanied with a color of title. It is true, as argued, that possession of part is possession of the whole, but this applies only where two patents cover in part the same tract of land, the one lapping over upon the other, and both claimants are in possession of that part covered by his patent and not covered by the other patent. He who has the elder title is then in the legal possession of the whole land within his patent, as well that covered by the other patent as that which is not; but if one of the patentees actually sits down upon the part covered by both patents, and

is in possession thereof seven years, the legal possession is his, not the other's; and the act of limitations will in such case complete his title, though the weaker one before. This must be, however, an actual possession taken and kept by himself in person, his tenants, slaves, or agents; and it must be a continued possession for the whole seven years. If in the present case the 100 acres in dispute was severed by the conveyance of the patentee from the 340 acres, his possession of part of the 340 extended no farther than to the dividing line between the 340 and 100 acres severed from it; nor could it ever extend into the 100 acres so as to ripen into title unless he by some other conveyance, devise, or the like, regained a colorable title thereto. Forty years possession of the 340 acres could not give a title to the 100-acre tract.

Verdict and judgment for the defendant.

NOTE.—Upon the first point, see the note to *Strudwick v. Shaw*, 1 N. C., 34; *S. c.*, 2 N. C., 5. As to the other point, see *Bryan v. Carleton*, 1 N. C., 51; *Slade v. Griffin, post.*, 178; *Sawyer v.* ————, *post*, 235; *Orbison v. Morrison*, 8 N. C., 467; *Green v. Harman*, 15 N. C., 158; *Carson v. Burnett*, 18 N. C., 546; *Williams v. Buchanan*, 23 N. C., 535.

(115)

ANONYMOUS.

The county court, under the £20-jurisdiction law of 1786 (1 Rev. Code, ch. 253, sec. 7), will not order a nonsuit if the sum be reduced under £20 by sets-off. Otherwise, if by payments.

PER CURIAM. The balance upon this debt as found by the verdict of the jury is a sum under £20. It has been brought into this Court by an appeal from the county court, where it commenced. A part of the act of 1786, ch. 14, sec. 7, is in these words: "*Provided,* that no suit shall be commenced in the first instance returnable to any court for any sum under £20." Articles were delivered to the plaintiff and charged by the defendant, for the delivery of which there was no stipulation in the bond, which was for money; and the jury allowed them, and the presumption is, that they allowed them as set-offs. Then the rule is that if a larger sum is reduced by payments under £20, the court will order a nonsuit upon a verdict ascertaining the sum to be under £20, because plaintiff, knowing of these, should have credit given for them, and consequently must have known the amount of the balance; but if only reduced by set-offs, the court will not order a nonsuit, because plaintiff could not know at the time of bringing his action whether the defendant would set-off or not.

Judgment for plaintiff.

NOTE.—See *Anonymous, ante*, 71, and the note thereto.

DEN ON DEM. OF PENELOPE SWANN v. HEMER MERCER.

A son inherited lands from his father, and died under age without child, brother, or sister, but leaving a mother and a paternal aunt of the half blood. *It was held* that under the act of 1784 (1 Rev. Code, chs. 204 and 225) the estate descended to the paternal aunt of the half blood and did not vest in the mother.

EJECTMENT, and a special case made for the opinion of the Court, which was in substance this: That John Swann died seized in fee of the lands in question, leaving an half-sister on the mother's side, a son and a widow, the now plaintiff the mother of that son. The premises descended to the son from the father, and then the son died on 11 April, 1796. The question is whether the mother be entitled to any and what estate in the lands.

After a lengthy and very able argument on both sides, the Court gave judgment as follows:

HAYWOOD, J. It is very true, as has been argued, that there is no necessity on the present occasion to inquire into the defendant's title; for if the plaintiff be not entitled to the possession, there must be judgment for the defendant; yet, for the satisfaction of the parties and the bystanders, I will make some remarks also upon the defendant's title, and consider this case in three different points of view. First, supposing John Swann had died not leaving a son; secondly, supposing the son had died not leaving a mother; thirdly, what obstacle the mother can oppose to the descent on the sister of the half blood on the mother's side.

First, then, had John Swann died leaving the defendant, his half-sister on the mother's side, and no child, the case would have been under the government of 1784, ch. 22, sec. 3: "If any person dying intestate, seized or possessed of any estate or inheritance in (116) land or other real estate in fee simple, and without issue, such estate or inheritance shall descend to his or her brothers or sisters, as well those of half blood as those of whole blood, to be divided amongst them equally, share and share alike, as tenants in common," etc.

Secondly, had the son died leaving no mother alive, but the defendant, the half-sister of his father by the mother's side, and without a child, the half-sister in that case would have been entitled under 1748, ch. 22, sec. 4: "The same rules of descent shall be observed when the collaterals are further removed than the children of brothers and sisters." What rules of descent? Why that the half blood shall take equally with the whole blood under the restrictions mentioned in the proviso of

the third clause: "*Provided always,* that when the estate shall have descended on the part of the father, and the issue to whom such inheritance shall have descended shall die without issue, male or female, but having brothers and sisters of the paternal side of the half blood, and brothers and sisters of the maternal line also of the half blood, such brothers and sisters respectively of the paternal line shall inherit in the same manner as brothers and sisters of the whole blood, until such paternal line is exhausted of the half blood; and the same rule of descent and inheritance shall prevail amongst the half blood of the maternal line under similar circumstances to the exclusion of the paternal line," etc. The half blood on the mother's side is excluded no longer than there is some of the whole or half blood on the father's side, and by the letter of the act no longer than there is half blood on the father's side. If, therefore, there is neither whole nor half blood on the father's side, the half blood on the mother's side will take in the same manner as if there were no half blood on the father's side. Here the collaterals are farther removed than to brothers' and sisters' children and the half blood, namely, the aunt of the half blood on the mother's side will succeed in the same manner as brothers and sisters, and their children succeed to a deceased brother—that is to say, the half blood equally with the whole, and the half blood alone where there is none of the whole blood. And as the defendant in this view of the case would have been entitled had there been no mother, the third question is, Can the mother oppose any obstacle of the descent on the half-sister of the father? For if she cannot, the half-sister remains entitled. This question must be decided on the act of 1784, ch. 22, sec. 7, and the amending clause in the act of 1784, ch. 10, sec. 3; the first of them in these words: "Whereas by the law of descents as it now stands, when any person seized of a real estate in fee simple dies intestate without issue, and not having any brother or sister, such estate descends to some collateral relation, notwithstanding that the intestate may have parents living—a
(117) doctrine grounded upon a maxim of law not founded in reason, and often iniquitous in its consequences: Be it, therefore, *enacted,* That in case of any person dying intestate, possessed of an estate of inheritance without leaving any issue, and not having any brother or sister, or the lawful issue of such, who shall survive, the estate of such intestate shall be vested in fee simple in his or her parent *from whom the same was derived;* or if such estate was *actually purchased* or *otherwise acquired* by such intestate, then the same shall be vested in the father of such intestate if living; but if dead, then in the mother of such intestate and her heirs; and if the mother of the intestate should be dead, then in the heirs of such on the part of the father; and for want of heirs on the part of the father, then to the heirs of the intestate on the

part of the mother." The latter act is in these words: "And whereas by the seventh section of the said act real estates actually purchased or otherwise acquired are to descend to the father if living; but if dead, then to the mother of such intestate and her heirs, by which the descent may be altered by the accident of death; and the paternal line, which is favored in all other instances, may be deprived of the inheritance by such accident: *Be it enacted,* That in case of the death of any person intestate, leaving any real estate actually purchased or otherwise acquired, and not having any heirs of his body nor any brother or sister, or the lawful issue of such, then such estate shall be vested in the father of such intestate, if living; but if dead, then in the mother for life, and after the death of the mother, then in the heirs of such intestate on the part of the father; and for want of heirs on the part of the father, then in the heirs of the intestate on the part of the mother forever."

These, if any, are the clauses which support the claim of the mother. She was not entitled as the law stood before these acts; and if she was not entitled under them, her claim is unfounded, and the case is then just the same as if the child had not left a mother; in which case the father's sister of the half blood on the mother's side succeeds.

Now, the preamble to the seventh section of the first act states the old rule excluding parents in favor of collaterals to be *often* not *always* iniquitous in its consequences, from whence it is to be inferred that it was not the intention of the Legislature to make the parents capable of succeeding to their children in all cases of a child's dying without children and without brothers and sisters, but in some cases only. These cases the act goes on to describe.

The first of them is where the child has *derived* his estate from the parent, that parent shall succeed. This necessarily means a derivation from the parent by some deed executed; it cannot mean a derivation by descent or devise; for in either of these cases the parent must be dead before the estate vests in the child; whereas the act supposes the parent will be alive at the death of the child. In the case before (118) us the lands came by descent to the child from the father.

The second of them is where the child actually purchased the estate; and that is not the case before us.

The third of them is where the child otherwise acquired the estate.

These words cannot include the two former cases, for then the specifying the two former were useless. It is intended to express some case different from these. They do not mean to comprehend the case where lands have descended from a parent to a child, because the seventh clause of the first act speaks of such an acquisition as either parent may possibly be alive to take, "It shall go to the father if living, and

his heirs; but if dead, to the mother and her heirs"—tantamount to saying, if both parents be alive, the father shall take; but if the father be dead, the mother shall take. How, then, will this idea comport with the other, of the estate having come from a parent by descent? Suppose the estate descended from the father; he must necessarily be dead, though the act contemplates a case where he may possibly be living. Suppose the estate descended from the mother, then, if the father be dead, she must be so also, and yet the act supposes she may be alive to take. The words "otherwise acquired" probably do not mean to include an acquisition by descent, because the third clause of the latter act says, if the father be alive he is to succeed and his heirs after him: so that if the act means to comprehend the case of a descent, then an estate descended to the child from the mother will be included. Then, suppose the child dies; the father's family inherits. Suppose the estate descended from the father, his family also inherits, leaving no chance for the mother's family in any event to succeed either to an estate coming from the father or from the mother, but making the father's family in every event to succeed to the mother's estate. No reason can be assigned for any such intention. Again, under the third clause of the latter act, if both father and mother be dead, or when the mother shall die, the father being not alive at the death of the child, the estate is directed to go to the heirs on the part of the father; and for want of heirs on the part of the father, to the heirs on the part of the mother. This, supposing it to mean the case of a descent, and that of a descent from the mother as well as a descent from the father, contradicts the spirit and letter of the proviso contained in the third and fourth clauses of the first act; for by them the rule of descent amongst collaterals farther removed than the children of brothers and sisters—that is to say, amongst uncles and aunts—shall be the same as the rules prescribed for descents amongst brothers and sisters; that is to say, brothers
(119) and sisters on the mother's side of the whole and half blood shall exclude those of the half blood on the father's side; yet, according to what is contended for, if lands descend from the mother to the son, and the son die without children and without brothers and sisters, and the father be dead, the heirs on the part of the father, namely, uncles and aunts on the father's side, shall exclude uncles and aunts on the mother's side, which in the case of a descent from the mother is expressly negatived by these clauses, the words of which are: "And the same rule of descent shall prevail amongst the half blood of the maternal line under similar circumstances to the exclusion of the paternal line; and the same rule of descent shall be observed in collaterals where the collaterals shall be further removed than the children of brothers and sisters." By these clauses the uncles and aunts on the father's side can at best share

only equal parts of the estate with the uncles and aunts on the mother's side; yet by the construction contended for, and allowing the words "otherwise acquired" to mean an acquisition by descent from the mother, the uncles and aunts on the father's side will in the case above supposed exclude the uncles and aunts on the mother's side entirely; for the words of the third clause of the second act are, "After the death of the mother, then in the heirs of such intestate on the part of the father; and want of heirs on the part of the father, then in the heirs of the intestate on the part of the mother." Again, the third clause of the latter act contemplates such an acquisition as leaves it to accident whether the father shall be living or dead at the time of the child's death, and supposes that such accident may carry the estate to the mother, saying, "By which the descent may be altered by the accident of death and the paternal line deprived of the inheritance by such accident." Then it cannot be meant of an estate which had descended from the father, for, he being dead, it could not be in the power of accident to effect what the act complains of; and if not meant of such an estate, neither is it meant of an estate descended from the mother, for it supposes her also to be alive; it being now to go "to her, if the father be dead, for life." Moreover, the act meant to prevent a deflexion of the heritable line by the accident of one person dying before another, and to provide that if the father be dead and the mother alive, that accident shall not change the heritable line. Suppose, then, the child die before the mother, and the words *otherwise acquired* be intended of an estate descending, the father is entitled to be tenant by the curtesy, and the inheritance goes to the heirs on the part of the mother; but if by accident the child die after the mother, it goes to the father and his heirs. If by accident the father dies before the mother, and then she dies, her estate will go to her son; and upon his death, without children or brothers, to her relations. But if she die before the father, and the lands descend to her son, who dies without children or brother, then the estate will (120) go to the father's relations.

By such a construction, when we avoid one mischief we fall into a greater. We avoid the operation of the accident as to the father, but establish such accidents and give them efficacy against the relations of the mother. In the case of a descent from the father, if there be no child, the widow is entitled to one-third, and the father's relations to the residue. What reason, then, to give her the whole when by the death of the child she stands in the same situation as if there had been no child originally? In the case of a descent from the mother, if the child die before her, the father is entitled to the whole for life. What reason, then, to give him the inheritance, when by the death of the child after his mother, his situation is precisely the same? All these considerations

prove the words "otherwise acquired" not to be intended of a descent from either parent; and then they must mean an estate acquired by gift, devise, or descent from some person other than a parent.

If it be objected that the third clause has in view the estates last mentioned, and in respect of them supposes the possibility of the father and mother being alive to take, and also had in view the case of an estate acquired by descent, in respect of which, not that supposed possibility, but only the general words directing the descent to the parent living are applicable, the answer is, that such a position involves this dilemma: either the words of the third clause, keeping the estate in the father's family, in all events goes farther than the spirit of the clause warrants, which was only to keep in the father's family estates acquired by gift, devise, or descent from a stranger, and then the generality of the words should be restrained to such estates only; or these words do not at all contemplate estates descending from parents, and then such estates are out of this clause. It may be said, the words *otherwise acquired,* as used in the seventh clause of the former act, do extend to an estate coming from a parent by descent; and such estate, not being within the amending clause, must be governed by that seventh clause. Such mode of considering the subject will avoid the mischief of carrying the mother's estate into the father's family, and of contradicting the rules established in the foregoing part of the act; but then it will lead us to as great an absurdity on the other side, for by the seventh clause of the former act the estate there spoken of as falling under the words *otherwise acquired* is to go to the father, if living, and his heirs; and if dead, to the mother and her heirs. Then, suppose that lands have descended to a son from the father, and the son die intestate and without children, and without brothers and sisters, the mother and her heirs will succeed to the estate descended from the father, although the third and
(121) fourth clauses of the former act expressly carry such estate to the uncles and aunts of the father's side, if not exclusively, at least jointly with uncles and aunts on the mother's side. It is impossible to avoid absurdity and contradiction if we suppose the words *otherwise acquired* to be intended of an estate acquired by descent from a parent; but if we suppose them to mean an estate acquired by gift, descent, or devise from a stranger, then there is no injustice in preferring the father's family. The mother's estate is not carried into his family; uncles and aunts on her side are excluded from a share of the estate descended from her. The third and fourth clauses introducing such uncles and aunts into the succession where the child dies without children and without brothers and sisters is not superseded; the father and mother both stand an equal chance to succeed according to the words of the act. The estate descending from the father is not carried into the mother's

family, in exclusion of the uncles and aunts on the father's side; for such estates by gift, descent, or devise from a stranger may descend without any such absurdity or contradiction; and we satisfy the words of the preamble to the fourth clause, stating the old rule was often iniquitous, and steer clear of the iniquitous and unjust consequence of excluding the mother's relations from sharing in the estate descended from her, and of excluding the father's relation from the estate descending from him; and therefore I am of opinion that the genuine meaning of the words *otherwise acquired,* as used in the seventh clause, is attained by understanding those words to comprehend an estate acquired by gift or devise from a stranger, and not by descent from a parent. And as the estate in the case now before us did actually descend on the part of the father, that therefore the present is not such a case as entitles the mother to succeed within the meaning of the before mentioned clauses, and consequently that the estate descended on the death of the son to his paternal aunt of the half blood on the mother's side.

Judgment for the defendant; but at the request of the plaintiff's counsel, it was sent to the Court of Conference for their consideration.

NOTE.—This case was taken to the Court of Conference, and there argued at great length at June Term, 1803, by *Haywood* for the defendant and *Brown* for the plaintiff, upon which the Court took an *advisari,* and it does not appear from any of the reporters of that day what became of it. See *post,* 246. The rules of descent have been since altered by the act of 1808 (Rev. Stat., ch. 38).

HILLSBOROUGH, October, 1800.

NEWTON v. ROBERTSON.

NOTE.—See *S. c.,* reported in 1 N. C., 174.

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ALSTON v. HARRIS'S EXECUTORS.

If an executor or administrator plead *plene administravit,* and it be found against him, upon which a *fi. fa. de bonis testatoris* issues and is returned *nulla bona,* a special *fi. fa.* may issue *de bonis testatoris si, et si non, de bonis propriis.*

PLAINTIFF had obtained judgment against three executors, upon a plea of *plene administravit,* found against them; a *fi. fa.* had issue and

nulla bona returned. *Mr. Norwood* moved that a special *fi. fa.* should issue, commanding the sheriff to levy the goods of the defendants if no goods of the testator to be found.

Haywood e contra: A *fi. fa.* as asked for has been issued in our courts, and in some cases it is not attended with any inconvenience. But in the present case one of the executors never had in his actual possession any of the goods of the deceased, but the other two only; they, therefore, ought to be only answerable for the *devastavit.* 2 Ba. Ab., 395; Godol., 134; Off. Exrs., 100.

TAYLOR, J. The practice in this country hath been to issue a special *fi. fa.* for the sheriff to levy *de bonis propriis,* if it can appear to him that the defendant hath wasted; but I will take time to consider.

Afterwards at another day, the parties informed the Court that a compromise had been made with one of the executors, who no longer insisted on the *sci. fa.*

PER CURIAM. Let the special *fi. fa.* issue as prayed for.

NOTE.—See *Burnside v. Green, ante,* 112, and note thereto.

NASH v. TAYLOR.

Time will be given to file exceptions to the master's report at any time during the term, when the report comes in during the term; and this extends to the last day of the term, though the court should rise sooner. The court, upon a proper application, will enlarge the time for filing exceptions, even beyond the term.

(126) THE master made up his report on the first equity day; and *Haywood,* counsel for Taylor, moved for time to file exceptions, which the court granted, ordering the exceptions to be filed within the term. On the next day, being that on which the court was to rise, the exceptions not being made out, the counsel for Taylor stated that they had not had time to make out the exceptions.

TAYLOR, J. The rule is to give time to file exceptions at any time during the term, when the report comes in during the term; and this extends to the last day of the term, though the court should rise sooner. The court, upon a proper application, will enlarge the time for filing exceptions, even beyond the term; but I do not see in the present case but that the time already allowed is sufficient.

MITCHELL v. CHEEVES.

When a father sends negroes to his son-in-law upon his marriage, it is in law a gift, unless the contrary be shown.

Haywood for plaintiff.

TAYLOR, J. When a father sends negroes with his daughter, lately married, to the house of the husband, that is *prima facie* evidence of the gift. It is, however, but presumptive, and may be overturned by a contrary presumption or express proof. If the possession of the husband be for any considerable time and uninterrupted, that is a very powerful presumption of a gift, and will not be overturned but by very clear proof to the contrary. The presumption in the first instance arises immediately, and does not, as the defendant's counsel contended, require a long and continued possession, such as stated in *Carter v. Rutland,* 2 N. C., 97. Also, it is very true that a delivery must accompany a gift of personal chattels; but then an after acknowledgment that he has given is evidence of the delivery.

NOTE.—See *Farrell v. Perry,* 2 N. C., 2, and the note thereto. See, also, *Adams v. Hays,* 24 N. C., 361.

Cited: Green v. Harris, 25 N. C., 218.

VICK v. KEGS.

1. Property sold remaining in the possession of the vendor is evidence of fraud, but may be explained.
2. Secrecy is a mark of fraud; and by secrecy is meant that the act is done in the presence of near relations only, being such persons as may be relied on not to disclose to the neighborhood what they know; or if it be done at such a distance from the neighborhood that it is unlikely the affair will become known to the neighbors.

TAYLOR, J. If possession is not taken at the time of the sale, but the property still remains in the possession of the vendor, that is a mark of fraud; so also is it a mark of fraud if the deed be absolute and unconditional, and the property remains with the seller. The property ought to accompany and follow the deed, as stated in the 2 Term, 586, 597; but I cannot agree with that case, that the property going otherwise as to its possession than the deed points out is absolutely fraud. It is also

a mark of fraud if the transaction be secret; and by secrecy is meant if it be done in the presence only of near relations, being such persons who may be relied upon not to disclose what they know, to the neighborhood of the seller, or it if be done at such a distance from the neighborhood that it is unlikely the affair will become known to them.

NOTE.—See *Ingles v. Donalson, ante*, 57, and the note thereto.

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——— v. MAY.

PER CURIAM. This action is found upon a deed acknowledging that defendant owed a debt, and in consideration thereof conveying lands to the creditor, who is authorized to sell for his satisfaction. There is no covenant for payment of the money, and the point reserved is whether a convenant to pay the money can be implied from any part of the deed.

I am of opinion the acknowledgment of the deed is not enough to raise such an implication upon, for the same deed also shows it satisfied. *Vide* 1 P. W., 291.

NOTE.—See *Dismukes v. Wright*, 20 N. C., 78.

JESSE GOBER v. GOBER.

In an action to try the plaintiff's right to freedom, the court will, upon affidavit that the defendant is about to send the plaintiff out of the country, or adopt some other means to defeat the ends of justice, require him to give security for the plaintiff's appearance, and in the meantime to treat him with humanity.

TAYLOR, J. The plaintiff is detained as a slave, and has commenced this action to recover his freedom, and now moves, without any affidavit, that defendant be ordered to give security that the plaintiff shall be forthcoming at the next term. I remember that in the case at Fayetteville, *Evans v. Kennedy*, 2 N. C., 422, and the note thereto, that the motion was founded on an affidavit, though the case does not state the circumstance.

The court will not interfere but where it is induced to believe by affidavit that defendant is about to send the plaintiff out of the country in order to defeat the end of his suit, or to adopt other means calculated for the same end.

LITTLEJOHN AND OTHERS v. BURTON, EXECUTOR OF WILLIAMS.

TAYLOR, J. If the defendant prays time to answer, and afterwards, within the time, he answers, denying combination, and demurs for the residue, that is sufficient compliance with the order.

ANONYMOUS.

The wife of one who was alleged to have given a slave to his child by parol, and afterwards conveyed the slave by deed to a stranger, shall not be received as a witness for the child, for her husband would not be permitted to contradict his own deed, and she is not competent to prove a fact which he could not be admitted to prove.

PLAINTIFF alleged the negro in question had been given to him by his father and delivered; the defendant alleged that the father (many years after this transaction was stated to have happened) by bill of sale conveyed the negro to him; and the wife of the father was introduced by the plaintiff to prove the gift.

TAYLOR, J. The wife cannot be received as a witness. The father himself could not be a witness, because he shall not be suffered to defeat his own deed; and if he could not, neither can the wife, for she is not competent to prove a fact which he could not be admitted to prove. He relied on 1 Term, 296, and said he was not aware of any decision which had restrained the rule there laid down to negotiable papers only.

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SULLIVANT v. ALSTON.

A jury may infer a grant from the circumstances though the grant is not now to be found.

ONE of the points debated in this cause was whether length of possession and other circumstances may be used as evidence to prove that a grant once existed.

JOHNSTON, J. A jury are at liberty to infer a grant from circumstances, although the grant is not now to be found. Cowp., 109, and the books there cited, are good law; and length of time itself may be taken as evidence of a grant.

NOTE.—See *Dudley v. Strange, ante,* 12, and the note thereto.

LONG'S EXECUTORS v. BAKER.

1. Reasons in arrest of judgment cannot be filed without permission of the court on hearing the reasons.
2. The assignment of a bond, not negotiable in law, vests the property in the assignee, and a court of law will take notice of him as owner.
3. The heir is liable in an action of debt on the bond of the ancestor, wherein the heir is named, notwithstanding there may be personal estate in the hands of the executors.

IN this case the following points were held by the Court, upon argument:

JOHNSTON, J. 1. When reasons in arrest of judgment are intended to be filed, they must first be shown to the court and the permission of the court obtained for filing them. (*Quere de hoc.*)

2. This assignment made by Long, the obligee, to Hamilton, who was a subject before the Declaration of Independence, shall be taken to be a vesting of the interest in Hamilton. It is in the nature of a power of attorney irrevocable; and instances have occurred before the Revolution where courts of law have taken notice of such assignments, and have protected them against the acts of the obligee.

3. This is an action upon a bond wherein the heir is named, and it is against the heir; and now it is objected that the act of 1777, ch. 2, sec. 29, exempts the lands from execution as long as there is personal property, and that the death of the ancestor makes no alteration in this respect, and that, therefore, after his death, the lands are still not liable till the personal estate is exhausted; that the same idea is preserved in 1784, ch. 11, sec. 5, and that the preamble of 1789, ch. 39, clearly supposes the old common-law remedy by action of debt lies not for a creditor against the heir. To all this the answer is that by the common-law the action of debt lay against the heir; and there is no act of Parliament nor act of Assembly which takes away that remedy; and, therefore, it lies still. The act of George II, was not made to narrow, but to enlarge, the remedy of creditors; the act of 1777 intended to enable a debtor to save his lands by showing personal property; the act of 1784 provides for the case where creditors first sue the executors, who discharge themselves of their assets, and the preamble of the act of 1789 speaks in reference to that act.

NOTE.—Upon the last point, see *Taylor v. Grace*, 6 N. C., 66.

Cited: Kiff v. Weaver, 94 N. C., 278.

JONES AND OTHERS v. JONES AND OTHERS.

Where a testator, after providing special legacies for his children, gave the use of certain negroes to his wife for life, and she sold one of the negroes for the support of her family, *it was held* that a court of equity would validate a sale under such circumstances, upon the ground that a devise to use was meant to the use of herself and her children, or, in other words, for their support.

JOHNSTON, J. Jones, the testator, provides by special legacies for his children, and then gives the use of some negroes to his wife for her life; and it is stated and admitted that she sold a descendant of one of these negroes. But it is stated in the answer that she was under (129) the necessity of selling this negro for the support of her family.

And I am of opinion that a court of equity will validate a sale under such circumstances. A devise to her use means to the use of herself and her children, or, in other words, for the support of herself and family. Therefore, I direct that one of the inquiries to be made by the jury shall be whether or not this negro was sold for the necessary support of herself and children.

The inquiry was made and found by the jury in the affirmative; and thereupon the court dismissed the bill as to the negro so sold, and her increase. *Quere de hoc.*

SWEAT v. ARRINGTON ADMINISTRATOR OF ARMSTRONG.

Where one drew the pay of a soldier, *it was held* that the soldier's right of action accrued immediately upon the drawing of the money, and the statute of limitations then began to run, unless there were fraud in the transaction, in which case the statute would not run but from the time of its discovery.

JOHNSTON, J. In 1783 Armstrong drew the pay of the plaintiff, a soldier, who lived (near the place where the commissioner sat) for five or six years afterwards, and never made application in his lifetime.

I am of opinion the act of limitations began to run from the time of the accruing of the action, and that was immediately after drawing the money.

It is said, however, that the drawing was fraudulent, and that is a circumstance which will impede the running of the statute. Supposing it to be a fraud (which, however, there is no evidence of), then the act will not run but from the time of its discovery; and when was that? Certainly, from the publication of the lists made out pursuant to the act of 1792. It was some time about the beginning of 1794 when the printed lists were deposited in the office of each county court clerk. This list stated the name of each soldier, the amount of his account settled with the commissioners, and by whom the money and certificates were drawn. The act of 1792 was a public law, and all persons concerned were bound to take notice of it, and of the list published in pursuance of it. Consequently, the plaintiff, as well as others concerned, had notice, from the beginning of 1794, who had drawn his pay; and not having sued till 1798, more than three years are elapsed from the time of the discovery, and so he is barred.

Verdict and judgment accordingly.

NOTE.—See *Hamilton v. Shepperd*, 7 N. C., 115, which seems to overrule that part of this case which relates to the operation of the statute of limitations where there is fraud.

Cited: *Borden v. Stickney*, 132 N. C., 417.

TRUSTEES OF THE UNIVERSITY v. GILMOUR.

If the purchaser of lands die before he has obtained a conveyance, the University shall have the lands by escheat, but must pay the balance of the purchase money.

GILMOUR sold some lots and a small piece of land in Halifax to Black, and Black sold to Kay, who brought a bill for specific performance, and had a decree for a conveyance from Gilmour, and then died before any conveyance, leaving his heirs aliens in the kingdom of Great Britain.

(130) JOHNSTON, J. The act giving escheat lands to the University meant to substitute the University in the place of the public in regard to all such real property as fell to the State for want of heirs capable to take. I therefore think the University entitled. But they take the lands and lot subject to the burden of paying the money now due for it.

Quere, of the obligation upon the University; for he did not state any known principal nor cite any authority to show that the debt did not descend as usual upon the heirs and executors of the purchaser, nor any principle from whence it could be deduced that lands should become liable to a specific lien which were not so at the death of the testator or purchaser.

Cited: *Grantham v. Jinnette,* 177 N. C., 238.

JEFFRIES v. HUNT.

Devise as follows: "I give to D. J., his male heirs and assigns forever, and for want of such to the male heirs of S. J., the lands, etc. D. J. had daughters at the date of the will, but never had a son. D. J. took an estate in tail male, which by the act of 1784 (1 Rev. Stat., ch. 43, sec. 1), for docketing entails, was converted into a fee, and descended on his death to his heirs generally.

EJECTMENT. Osborn Jeffries devised as follows: "I gave to David Jeffries, his male heirs and assigns forever; and for want of such, to the male heirs of Simon Jeffries, the lands in question." There was a devise in the same will to Simon. David, at the date of this will, had daughters but no son, and died without ever having had a son.

Baker, for the plaintiff, insisted that David took nothing, and that his male heirs were intended to take as purchasers; and that he dying without having had male heirs, the devise became inoperative, and the lands vested in the lessors of the plaintiff, the sons of Simon, who were in being when the will was made, and are designated as purchasers by the words used in describing them.

PER CURIAM. David Jeffries surely was not intended to be disinherited by this will. Another part of the will takes notice that parts of the lands in question, lying on Roanoke River, were devised to him by the clause in question. If he took at all, he took an estate entail male, which by the operation of the act of 1784, ch. 22, is converted into a fee, and descended on his death to his daughters, or went as his will directed.

Verdict and judgment for the defendant, who acted for the daughters.

NOTE.—See *Ross v. Toms,* 15 N. C., 376.

WILMINGTON, November Term, 1800.

CUTLAR AND HAY v. SPILLER'S ADMINISTRATORS.

A gift for life of slaves is, as in the case of other personal property, a gift of the absolute property to the donee.

McKAY, J. A conveyance by deed of personals to one for life is a conveyance of the absolute property, generally speaking; but I have great doubts whether the rule applies to slaves as subjects of property.

Such limitations of slaves with remainder over by deed has been generaly practiced and understood to be good, and it is countenanced by the case of *Times v. Potter,* 1 N. C., 12.

Let the jury give their verdict, and I will carry this case to the (131) Court of Conference, to be decided upon by all the judges.

The jury found for the reversioner, who had given an estate for life, not disposing of the residue, and the Court of Conference ordered a new trial, for that a gift for life by deed was a gift of the absolute property to the donee for life.

NOTE.—See note to *Tims v. Potter,* 1 N. C., 12, and the cases there referred to and *Glasgow v. Flowers,* 2 N. C., 234.

NEW BERN, January Term, 1801.

FOY v. FOY.

A creation of a trust or a declaration of one may be proved in this State by parol evidence, the statute of frauds not being in force here.

THE bill states that Thomas, a brother of both the parties, purchased, in conjunction with the defendant, a tract of land and paid half the purchase money, that title for the whole was made to the defendant, who promised to convey to Thomas, and that afterwards Thomas died. The answer denied these allegations. The proofs supported the bill, but evidence was given on the side of the defendant that Thomas, before his death said if he (Thomas) should die without a child, that he did not intend the defendant should be called on for an execution of his promise, and when his will was written he assigned as a reason for giving more slaves to the complainant than he did to the defendant to be because defendant had the half of the lands purchased by his money, which made his share equal.

Haywood for complainant.

A trust estate, when once raised, is governable by the rules of the common-law with respect to its transmission and descent. It will descend according to the rules of the common law; it is subject to a tenancy by the curtesy; a devise of it must be attested in the same manner as the devise of a legal estate. 5 Ba. Ab., 391; 2 P. W., 645; 1 P. W., 109; 1 Bl. Re., 160, 161; Sand on Uses, 188. In the latter case the intention to give to the devisee was as clear, if not clearer, than the intention in the present case to give the trust estate to the defendant; but that intention could not prevail because the rule of law required three attesting witnesses. So here a trust estate in one-half being clearly in Thomas, how was he divested of it? Not by any deed proved and duly registered, which our law requires in regard to legal estates, but by a mere parol declaration, which, if not equal to the purpose, will still leave the trust estate where it was; and then at the time of his death it passed, as to one-half, by his will, to the complainant. There is a great reason why the rules of law should be applied to such estates. They are generally created for helpless and weak persons, and children not having prudence and strength of mind enough to take care of themselves, or for married women—such persons, in short, from whom parol declarations can be most easily drawn, and who least weigh their expressions. (132) If a deed be not requisite, how liable are all such estates to be defeated by false testimony or the unwariness of those for whose benefits such estates are most commonly provided.

Baker e contra. It cannot be denied that if a trust estate existed at all in Thomas, its creation is evidenced by parol; and as everything may be dissolved by the same ceremony with which it is made, it seems to follow that a parol declaration is sufficient to pass a trust estate.

TAYLOR, J. There can be no doubt as to the justice of this case. It is evident Thomas intended his half of the land to remain with the defendant; but if there be any such rule as is contended for by the complainant's counsel, it must be followed. I will take time to consider.

And finally he decided that the parol evidence was sufficient. He said the statute of frauds in England enacts that no creation of trust or declaration of one shall be proved by parol evidence; whence it was to be inferred that before that act such parol declaration was valid; and our law is the same as in England before that statute.

NOTE.—See *Gay v. Hunt*, 6 N. C., 141; *Henderson v. Hoke*, 21 N. C., 119.

Cited: *Ferguson v. Haas,* 64 N. C., 778; *Pittman v. Pittman,* 107 N. C., 163; *Gorrell v. Alspaugh,* 120 N. C., 367; *Odom v. Clark,* 146 N. C., 551; *Lefkowitz v. Silver,* 182 N. C., 346.

ALLEN v. JORDAN.

1. Where an agent who took a note for his principal did not at the time of the execution subscribe his name as a witness, but did so on a subsequent day at the request of his principal, *it was held* to be a material alteration of the note.

2. Where two verdicts have been found against the charge of the judge as to the law, a new trial will not be granted if the verdict be according to the equity of the case.

JORDAN had given a note for payment of money, to Allen, which note was taken by the brother of Allen as his agent. He had been requested by Allen to subscribe his name as a witness to the note, but neglected to do so at the time of the execution. He did so afterwards and at another day.

TAYLOR, J. This is a material alteration of the note. Suppose it were given on a condition known to the first subscribing witness, and then a suit were commenced, and the second subscribing witness summoned for the plaintiff to prove it. He may not know anything of the condition, being not the witness called by the parties to attest. Of course, he will prove the note, and the plaintiff will recover, notwithstanding the condition.

The jury, however, found for the plaintiff, and TAYLOR, J., being moved for a new trial, refused it on the ground that the verdict was according to the equity of the case. The motion was opposed on the ground that this was a new trial, and that a second new trial should not be granted against two concurring verdicts.

NOTE.—As to the first point, see *contra Blackwell v. Lane,* 20 N. C., 113. Upon the other point, see *Manning v. Brickell, post,* 133; *Billups v. Ragan,* 2 N. C., 13, and the cases referred to in the note. See, also *Goodman v. Smith,* 15 N. C., 450; *Bank v. Pugh,* 7 N. C., 389; *Terrell v. Wiggins,* 23 N. C., 172.

WOOLFORD v. SIMPSON, ADMINISTRATOR OF WRIGHT.

Where an administrator was sued to the same term on a simple contract, and on a debt due by specialty, and to the simple contract pleaded *plene administravit*, and afterwards confessed judgment to the specialty creditor, he was permitted at a subsequent term to add, in the suit on simple contract, a plea of judgments confessed and no assets *ultra*.

WOOLFORD, immediately after the death of the intestate, sued his administrator upon a simple contract debt; a specialty creditor also sued, and both writs were returned to the same term. The administrator pleaded to Woolford's action, *plene administravit*, and afterwards, at a subsequent term, confessed judgment to the specialty creditor for £1,000, and at a subsequent term he moved for leave to add (133) the plea of the judgment and no assets *ultra*. This was opposed in the county court, and leave was given by the court, and thereupon an appeal taken to this Court.

Haywood argued that the plea ought not to be allowed.

Baker e contra. The reason of the equity cases is because the executor would not defend himself when he might. The court in such a case as the present would say to him, "Why did you not move for leave to amend the pleadings?"

TAYLOR, J. The plea was properly received. I ground my opinion upon several cases in Wilson's Reports which establish the rule that pleadings may be amended to attain the justice of the case.

NOTE.—See *contra Cutlar v. Cutlar*, *post*, 155; *Churchill v. Howard*, *post*, 335; *Grier v. Comb*, 1 N. C., 91. But see *Teasdale v. Branton*, *post*, 281.

MANNING v. BRICKELL.

1. When a partnership is dissolved and a receiver appointed, a payment of a partnership debt to one of the firm by a debtor, who knew of the dissolution and appointment of the receiver, is void, and the surviving partner may recover the debt.
2. Where it would be a hard case on the defendant if a recovery were effected, though according to law, if the jury find a verdict for the defendant, the court will not set it aside.

PER CURIAM. Brickell endorsed a note to Manning and Byrne, partners in trade, as satisfaction for a precedent debt due to the partnership, which note was released by Brickell to the maker before the endorse-

ment. An action was commenced against the maker, and on that circumstance appearing, was dismissed, and the note returned to Brickell; then the partnership was dissolved and a receiver appointed, and this was published in a Gazette which circulated in the town where Brickell lived; after which, Brickell paid the debt to Byrne; and I am of opinion that if Brickel knew the appointment of the receiver, his payment after such knowledge to one of the partners was void; and that Byrne (134) being since dead, the surviving partner is entitled to recover.

The jury found for the defendant, and a new trial being moved for, the judge refused it, saying it would be a hard case on the defendant should a recovery be effected, and therefore he would not disturb the verdict.

NOTE.—Upon the second point, see *Allen v. Jordan, ante*, 132, and the cases referred to in the note.

ANONYMOUS.

1. If a vendor, who has been long out of possession, make a conveyance *on the land*, it is not a conveyance of a right of entry.

2. The possession of land to give title under the statute of limitations, must be under color of title.

EJECTMENT. The plaintiff purchased from one who had been absent about thirty years or more in South Carolina, who claimed as heir to his father, who had been absent forty years or more. Some years after the departure of the father the defendant took possession, and claimed the land to the present time, and in 1784 obtained a patent from the State. The vendor was on the land when the deed to the plaintiff was executed.

TAYLOR, J. This is not the conveyance of a right of entry, for the vendor actually entered, and was in possession at the time of the sale. Secondly, the possession of the defendant before the grant from the State was a naked possession without color of title, and therefore he did not acquire the right of possession before that time; nor has he acquired it since, for there were not seven years uninterrupted possession prior to the vendor's entry.

NOTE.—Upon the second point, see note to *Strudwick v. Shaw*, 1 N. C., 34; *S. c.*, 2 N. C., 5.

ANONYMOUS.

EJECTMENT, in the name of a man who left the land in question and absented himself forty or fifty years ago, and has not been since heard of.

TAYLOR, J. Long absence and not being heard of is evidence of his death; and the plaintiff must be nonsuited. And he was nonsuited.

NOTE.—See *Bowden v. Evans, post,* 222; *Lewis v. Modley,* 20 N. C., 323.

ANONYMOUS.

THE bill states that the testator devised that his executors should procure, if possible, the emancipation of his slaves; and, if it be impossible, that then the plaintiff should have them. Several assemblies have been held since the death of the testator, and they are not emancipated.

TAYLOR, J. The executors had only a reasonable time, not their whole life, to perform the trust. They should have applied as soon as they reasonably could. Having not done so in several years, it is to be taken that the trust is impossible to be performed; and then the complainant is entitled.

(135)

WEBBER v. SYLVA, ADMINISTRATOR OF SYLVA.

Every judgment in a court of competent jurisdiction is to be presumed fair until the contrary be proved, and the evidence to impeach it must be strong and convincing.

THE defendant pleaded, amongst other things, a judgment obtained against one Stoughton of New York, and there was no replication filed nor entered on the docket. The cause being now called, a question arose concerning the replication. It was said by Webber's counsel that by agreement between the adverse counsel and himself they were to go to trial, supposing a replication to be filed, and that the substance thereof was *per fraudem.* The adverse counsel did not recollect such agreement, and understood the replication to be general. It seemed to be admitted on both sides that a replication is understood to have been

made, though not filed; and the court was appealed to, who said it was agreeable to the practice to suppose a general replication not a special one. But he said whenever the pleadings are in such a state that they will not bring before the court the merits of the case, they might be amended, and that therefore he would now admit a special replication, and when it was entered, that the opposite party might or might not try his cause at this term. The plaintiff replied *per fraudem;* and issue being joined, the parties went to trial, and there was a verdict for the plaintiff. But the defendant's counsel alleging they were surprised by testimony produced on the part of the plaintiff, which their client could counteract by testimony to be had at New York, the court granted a new trial, notwithstanding it was greatly opposed by the plaintiff's counsel.

The court in charging the jury said that every judgment in a court of competent jurisdiction is to be presumed fair till the contrary be proved, and that the evidence to impeach it must be strong and convincing. This was in answer to what the plaintiff's counsel had said, namely, that where a judgment had been confessed by the executor, as this had been, that amounted to declaration on his part that he had satisfactory evidence to convince him of the fairness of the demand, and to an undertaking to produce this satisfactory evidence whenever a creditor called for it. And his not doing so when called on is a proof that he had not such evidence; and then the consequence is that he has confessed, not knowing whether it was fair or not; from whence the jury may infer a fraudulent design. And, therefore, on such an issue as the present, that slight testimony on the plaintiff's side to induce a suspicion of fraud was enough to turn it upon the defendant to prove the judgment a fair one.

(136)

HESTER'S ADMINISTRATORS v. BURTON.

An execution more than a year and a day after judgment is irregular, though there be an entry that "execution should be stayed till further order"; but if there had been a *cessat executis* for a time certain, execution might have been taken out within a year and a day after that time without a *sci fa.*

MOTION to set aside an execution for irregularity, which came to this Court by appeal from the County Court of GRANVILLE. Judgment had been obtained more than a year before the issuing of the execution, and there was an entry *that at the request of the defendant execution should be stayed till further order.*

JOHNSTON, J. The execution was irregular. If there had been a *cessat executis* to a certain time, execution might have been taken out after that time without a *sci. fa.*, but here no certain time for the stay of execution is mentioned. The plaintiff might have taken it out the next moment after the entry. The entry makes no difference. If in the present case he can take out execution after the year, there is the same reason for his taking it out after any length of time whatever.

Execution set aside.

NOTE.—See note to *Perkins v. Ballenger*, 2 N. C., 367, and, in addition to the cases there referred to, see *Dawson v. Shepherd*, 15 N. C., 497.

ANONYMOUS.

JOHNSTON, J. A demand is not necessary to precede the action of detinue in order to support it. The practice of requiring a demand to be proved on the trial originated from a decision some years ago at Edenton, but the law is clearly otherwise, and I never could discover the principles on which that decision went.

NOTE.—See *contra Elwick v. Rush*, 2 N. C., 28. But see *Shepard v. Edwards*, *post*, 186, and *Knight v. Wall*, 19 N. C., 125; *Jones v. Green*, 20 N. C., 354.

BENTON v. GIBSON.

Where the answer to an injunction bill was not entirely satisfactory, the court permitted affidavits to be filed by the complainant in support of his bill, and thereupon continued the injunction.

BENTON filed his bill for an *injunction*, and Gibson answered; and exceptions in writing were taken to his answer, which were held good. Then he answered again, less evasively, but not to the entire satisfaction of the court; and Benton's counsel moved for leave to introduce affidavits in support of the matters alleged in the bill, and in disproof of the answer.

JOHNSTON, J., said he would permit affidavits to be read; and the next day they were read; and thereupon the injunction was continued.

NOTE.—See *contra West v. Coke*, 5 N. C., 191; *Leroy v. Dickerson*, 4 N. C., 110.

HART v. MALLET.

1. Jurisdiction cannot be given to the court of equity by the admission of the parties, when it has not jurisdiction of the subject-matter without such admission.

2. A bill may be dismissed on the hearing for want of equity, though no demurrer has been filed.

AFTER reading of the bill by plaintiff's counsel, counsel for defendant remarked that this was the proper time to bring forward a motion he intended to make which was that the bill be dismissed for want of equity. It stated an award whereby the defendant was ordered to pay money to the plaintiff, but no cause whatsoever for applying to this Court. (137) The remedy at law is complete for aught that is stated in this bill. It is no answer to say that we ought to have demurred for that cause, for at that rate every cause proper for a court of law may be brought into a court of equity and decided there by the consent or neglect of parties. It is a well known rule that this court, and, indeed, every other, must have jurisdiction by law over the causes it decides, and that the consent of parties cannot confer a jurisdiction which the law does not. Not demurring, therefore, is not an admission of jurisdiction, which the court can notice. At furthest it can only operate upon the discretion of the court in the awarding of costs. He cited 3 Atk., 1 Vesey, 341, 346, 163.

The counsel for the plaintiff replied.

Et per JOHNSTON, J. I am very loth to dismiss this bill, which I understand has been many years upon the docket; but the authorities are too strong and pointed for me to get over. Jurisdiction cannot be given to a court by the admission of parties, when it has not jurisdiction of the subject-matter without such admission.

Let the bill be dismissed, each party paying half the costs.

NOTE.—See *Dickens v. Ashe, post,* 176; *Waggoner v. Grove,* 1 N. C.

HALIFAX, April Term, 1801.

MUIR'S EXECUTORS v. MALLET AND OTHERS.

Under the act of 1787 (1 Rev. Stat., ch. 31, sec. 44) a plaintiff executor is bound to give security for costs.

HARRIS moved that the plaintiff should give security for the payment of costs in the event of having a decree against him, and the plaintiff's

counsel opposed the motion upon the ground that executors ought not to be compelled to take the risk of costs upon themselves and their own private property. Before the act of 1777 executors plaintiffs were not liable to costs, for the acts of Parliament giving costs, although they made no express exception of executors, were construed not to extend to them, because of the hardships of subjecting an executor who acted not for himself, nor upon his own knowledge, but solely for the benefit of others, to the payment of costs. And the act of 1777 only directs that the costs shall go with the cause, except where otherwise directed by statute. The meaning of which I take to be that where costs upon the construction of the statutes are not payable by an unsuccessful party, so neither shall they be under that act. The act of 1787, requiring security for costs, does not mention executors, and if we construe that act by the same rules which are applied in the construction of British statutes on the subject of costs, executors, if not named and expressly subjected, will be exempted from the general words of that statute. They are not required to give bail by 1777, when sued as defendants, because it would be unreasonable to subject them to pay out of their own estate, which they might be compelled to do if surren- (138) dered and imprisoned. It is equally unjust they should be subjected to costs out of their own estate when suing in the right of the deceased. If there is a probable cause of action, the law requires them to sue under the penalty of a *devastavit;* and if they do sue and are unsuccessful, it is now said they shall pay costs out of their own estate.

HALL, J. The act of 1787, requiring security for costs, is in general terms, and security must be given according to the motion.

Quere de hoc.

WILMINGTON, May Term, 1801.

HOSTLER'S ADMINISTRATORS v. ROAN'S EXECUTORS.

A demurrer may be withdrawn when a material fact is necessary to be introduced by plea; and the pleadings may be amended.

DEFENDANTS pleaded at the last term that the property was delivered over to the legatees after the expiration of the term prescribed by the act of Assembly.

And now *Mr. Wright* and *Mr. Gaston* moved to withdraw their demurrer to this plea, and to reply, because the fact was that the executor before delivering over the property had notice of the present demand, and they were prepared to prove it.

Haywood for Roan's Executors.

And after much argument, TAYLOR, J., allowed them to withdraw the demurrer and to reply, saying otherwise the Court would have to decide upon a statement of facts which did not disclose the real truth and merits of the case. He also gave leave to defendant to amend his pleadings.

NOTE.—See *Simpson v. Crawford*, 1 N. C., 55, and the cases referred to in the note of that case.

ANONYMOUS.

A witness is entitled to have his attendance dues taxed in an execution, though a previous execution has omitted them; but in such case the execution issues at the expense of the witness. If a year and a day has expired, he is entitled to a *sci. fa.* to show cause why he should not have execution; but it must issue in the name of the party who had judgment in his favor, and not in the name of the witness.

SNEED had been a witness in a cause tried in this Court. His wages for attendance had not been taxed in the execution, and a year and more had elapsed. He had taken a *sci. fa.* in his own name to show cause why he should not have execution for them against the party cast.

TAYLOR, J. He is entitled to have his attendance dues taxed in the execution, although an execution omitting them has been previously issued and satisfied; but the execution in such cases issues at the expense of the witness. If a year and day has expired, he is also entitled to a *sci. fa.* to show cause why he should not have execution; but then the *sci. fa.* should be in the name of the party who had judgment in his favor, for the witness is not a party on record, and therefore cannot have it in his own name.

Sci. fa dismissed.

NOTE.—See *Moore v. Islar*, 1 N. C., 78, and the references in the note thereto. See, also, *Poor v. Deaver*, 23 N. C., 393.

HANDY v. RICHARDSON.

1. When bail to a *sci. fa.* pleads *nul tiel record*, the plea refers to the record of the judgment, and if that agrees with the record set forth in the *sci. fa.*, though not with that recited in the *ca. sa.*, it is sufficient.
2. The insufficiency of the jail forms no excuse for not taking bail.
3. The bail cannot take advantage of the fact that the judgment against their principal has lain dormant more than a year and a day before *sci. fa.* against them.

SCI. FA. against the sheriff as bail. He has executed the writ, (139) but had not taken bail. Defendant pleaded that the jail was insufficient and had been protested by him, *nul tiel record;* and that after the *ca. sa.* issued, the judgment had lain dormant for more than a year and a day before this *sci. fa.*

TAYLOR, J. The record of the judgment is that which is referred to by the plea of *nul tiel record;* and that agrees with the judgment stated in the *sci. fa.*, though not with the *ca. sa.* The record, therefore, sufficiently disproves the plea. As to the insufficiency of the jail, that forms no excuse for not taking bail; for by the act of 1786, relative to the rebuilding of Franklin jail, it is provided by a public clause that the sheriff shall carry his prisoner to the jail of the district. As to the dormancy of the judgment, the cases cited 2 L. Ray, 1096, 6 Mo. 256, 304, prove that the bail cannot take advantage of that circumstance.

Judgment for the plaintiff.

NOTE.—From the case of *Granberry v. Pool*, 14 N. C., 155, it appears that no matter can be pleaded in discharge of the liability of bail except the death or surrender of the principal. See, also, *Howzer v. Dellinger*, 23 N. C., 475.

Cited: *Gray v. Hoover*, 15 N. C., 477.

SWAIN v. BELL & BELLUNE.

NOTE.—See *S. c. post.*, 179.

HOSTLER'S ADMINISTRATORS v. SCULL.

NOTE.—See *S. c.*, reported in 1 N. C., 183, and also upon another point, *post*, 179.

Cited: *Barwick v. Barwick*, 33 N. C., 82.

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CONFERENCE AT RALEIGH, June Term, 1801.

ANONYMOUS.

NOTE.—See *S. c.*, reported in 1 N. C., 406, under the name of *S. v. Carter*.

STATE v. GAYNER.

NOTE.—See *S. c.*, reported in 1 N. C., 479.

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SIMPSON v. NADEAU.

NOTE.—*See S. c.*, reported in 1 N. C., 332.

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MOORE v. BRADLEY.

If a tenant in tail had sold in fee simple before the act of 1784 (1 Rev. Stat., ch. 43, sec. 1) and the purchaser was actually in possession of the lands at the time of the passage of that act, he came within its provisions, and became entitled to the fee simple, though the tenant in tail had died before that time.

EJECTMENT upon this devise, to wit: "I give to my son William half of my lands in North Carolina, and if William or John die without

heirs of their body, the whole to William or John." William died without issue, having first sold by a deed of bargain and sale to Newsome, and John made an actual entry before the passing of the act of 1784, ch. 22; but at the time of passing the act Newsome was in possession.

Haywood for the plaintiff: At the time of passing the act of 1784, ch. 22, there was no estate tail in being, for that had ceased by the death of William without issue; nor any remainder, for that had come into possession. If the plaintiff is not entitled to recover it is because the act of 1784, ch. 22, has taken away his right of possession. He would certainly be entitled to recover had the act never been made. The words of the act are: "All sales and conveyances made *bona fide* and for valuable consideration since the first day of January, 1777, by any tenant in tail in actual possession of any real estate, where such estate hath been conveyed in fee simple, shall be good and effectual in law to bar any tenant or tenants in tail and tenants in remainder of and from all claim and claims, action and actions and right of entry whatsoever, of, in, and to such entailed estate against any purchaser, his heirs or assigns, now in actual possession of such estate, in the same manner as if such tenant in tail had possessed the same in fee simple."

First, if it was the intent of the Legislature to take away the plaintiff's right of possession, the act for that purpose is void. Secondly, it was not the meaning of the Legislature to take away the plaintiff's right of entry. Third, the words of the act do not comprehend the case before us.

First, the Legislature were authorized by the Bill of Rights, sec. 43, "to regulate entails in such a manner as to prevent perpetuities." This gave them no power over estates not entailed; and as to the other estates, every citizen is protected by the 12th and 14th sections: "No freeman shall be disseized of his freehold or deprived of his freehold but by the law of the land," which means, by due process of law, and by the judgment of a court of competent jurisdiction, proceeding by the known and established course of law. In 1785 the Assembly passed an act taking from all persons the right of suing for property sold by commissioners of confiscated estates, and of course the rights of (143) possession which such persons had. The judges declared the act invalid, and in 1786 the Assembly altered it. On that occasion the Legislature concurred at last with the judiciary in the position that the Legislature could not deprive any man of his right to property, or of his right to sue for it. One of the judges illustrated his opinion in this manner: "As God said to the waters, So far shall ye go and no further, so said the people to their Legislature." ASHE, J., deserves for this the veneration of his country and of posterity.

Secondly, it was not the intention of the Legislature to take away the plaintiff's right of entry. The preamble of the act complains of estates tail; the enacting part complains of estates tail, and converts them into fee simple. No design is intimated to meddle with any other estates. Estates tail were of two sorts: those where the tenants had not sold, which are converted into fee simples, and those where he had sold, which were secured to the purchaser by barring the claim of tenant in tail and tenant in remainder. The design was "to do away with entails." Was it essential to the promotion of this design to take away an estate in fee, as the plaintiff's was when the act passed, and to give it to another? The object was to free estates tail from the restrictions which rendered them unfit for a republic. Was it necessary to interfere with an estate already free without the aid of the act? Was it necessary that the purchaser of an estate tail already at an end by the failure of issue should hold it preferably to him who, as tenant in remainder, had become legally entitled to the possession by his entering upon it? Whether the one or the other held, it would not be a perpetuity; and it was of no moment to the public which of them held the lands.

Thirdly, if this act be construed literally it will not embrace the case before the Court; and every act ought to be so construed which tends to divest estates legally vested. 2 Dallas, 316. If it be asked, Who are to be barred? the act answers, Tenants in tail and tenants in remainder. The plaintiff was neither; for he had a fee simple in possession by his entry. If it be again asked, Of what are they to be bared? the act answers, "Of a right of entry to such entailed estate." John Moore's was a right of entry to an estate in fee; no estate tail existed which could be recontinued by entry. Again: against whom were they to be barred? the answer is, Against him who was in the actual possession of the estate tail. Newsome was not in the actual possession of such estate; it was extinct by the death of William without issue. The defeasible estate which Newsome had was actually defeated by John's entry; the possession which Newsome afterwards had was tortious; he was not a purchaser in actual possession of an estate tail when the act passed. The cases relied on on the other side, as determined in the courts of this State and in the Circuit Court, were cases where the estate tail
(144) actually existed when the act passed. In the present case it had actually ceased and the estate in remainder had become an estate in possession and had been reduced into possession by entry. Let it be remarked that the act in this clause does not give a fee expressly to the purchaser; it declares simply that the conveyance in fee shall bar tenants in tail and tenants in remainder. In the former clause it expressly converts estates tail, not conveyed, into fee simples. If it intended to

legitimate the estate of the purchaser against all persons, why is it not said here, also, that he should hold in fee simple? Why is the phraseology varied and the bar confined to persons of a certain description? Is it not because there might be persons of other descriptions who were not meant to be barred? Was it not because they did not mean to bar any others than tenants in tail and tenants in remainder persons who had not a present right of entry, but a right only in expectancy, dependent upon the death of tenant in tail in the one case, and upon his death without issue in the other? Such rights were subject to the power of the Legislature derived from section 43 of the Bill of Rights; for they were connected with and depended upon estates tail. They had no power over estates and rights legally vested and independent of estates tail. Accordingly they have been careful to use such words as confine the operation of the act to cases within their power—to estates tail, and to rights expectant upon them. These words should not be extended to a case like the present, neither within the power of the Legislature nor within their contemplation, nor within the compass of the terms they have employed. Again, why was the person in whose favor the bar was to operate to be a person in actual possession at the time the act passed? It was because they did not mean to confirm the lands to a purchaser whose possession was legally defeated before the act. If a recovery had been effected by the issue in tail or tenant in remainder against the sale of the tenant in tail, these were legal acts which defeated the estate of the purchaser and were not to be invalidated. Will it be said that if the issue in tail had sued the purchaser from his father who made the purchase after 1777, and had recovered against him before 1784, and had been dispossessed by the purchaser before the act of 1784, that the estate so recovered would be barred by that act? If not, I would ask, is not the estate of the purchaser as completely overturned and defeated by an entry given and allowed of by law as by a recovery at law? They required the purchaser to be possessed of the *estate tail*—why? Because if that had ceased, right of entry had accrued to the remainderman; and as it was unjust and beyond their power to defeat a recovery or actual entry of the remainderman it was equally so to defeat his right of entry to an estate in fee. If the estate tail continued and existed at the time of the act, the purchaser's was a legal possession. They intended, therefore, to confirm legal possessions, not those gained by tor- (145) tious dispossession, nor those maintained after the estate tail had ceased. Again, what difference is there between an estate defeated by a recovery or entry, and one liable to be defeated by a present right of entry but unjustly withheld from the true owner? What reason could there be to induce the Legislature to favor him who was liable to be dispossessed by a personal right of entry, more than him who had been

really dispossessed? What reason for favoring the owner who had regained and then lost his possession, more than him who was equally entitled but who had not regained it? They intended no such difference without a cause for making it. They have used terms pointedly calculated to exclude from the operation of the act as well rights of entry already accrued as possession already taken by the remainderman at the time of passing the act, and therefore judgment should be for the plaintiff, John Moore.

Mr. Baker, e contra, insisted that as Newsome was actually possessed of the lands purchased from William, at the time the act passed, that he comes within the words and spirit of the act.

And so the Court decided, and gave their opinion for the defendant.

Quere de hoc.

Cited: Wilson v. Jordan, 124 N. C., 721.

NEW BERN, July Term, 1801.

HARGET v. FOSCUE.

TAYLOR, J. Where the defendant obtains an order of survey and does not execute it, and moves for a continuance of the cause because it is not executed, he should satisfy the court that it is necessary on the trial.

Mr. Wood, for the defendant, was obliged, therefore to produce an affidavit, showing the necessity of it; and upon that the cause was continued.

MURPHY v. GUION.

NOTE.—See *S. c., post,* 162.

SMALLWOOD & DANIEL v. MITCHELL & HEARNE.

1. Where a witness is offered, the adverse party may, by other witnesses, prove him interested, and he shall then be rejected as incompetent.

2. The log-book of a vessel is admissible as evidence of the time of her arrival at and departure from a port.

3. The reading of a copy where the original is lost applies only where the owner of the writing proves it to be lost, not where it belongs to the adversary.

4. The copy of a writing in the hands of the adverse party cannot be read unless notice has been first given to produce the original.

TAYLOR, J. If a witness be offered, the adverse party may by other witnesses prove him interested, and he shall thereupon be rejected as incompetent.

The plaintiff offered the log-book on the voyage to show the (146) time of the vessel's arival at Savannah, and her continuance there; also the time of her arrival at Beaufort in this State. It was not objected to, and was delivered in evidence to the jury.

Defendant offered to read a copy of the sailing orders, and proved the original to have been in the plaintiff's hands.

PER CURIAM. You cannot read the copy unless you have given notice to the plaintiff to produce the original.

It then appeared, upon further examination, that the person who had the possession for the plaintiff had searched for it, but could not find it.

PER CURIAM. There is no difference, as insisted on, between deeds and other writings. You cannot read a copy where you have not given notice to produce the original. The reading a copy where the original is lost applies only in cases where the owner of the writing proves it lost, not where it belongs to the adversary.

NOTE.—Upon the first point, see *Murray v. Marsh*, *post*, 290; *Ingram v. Watkins*, 1 N. C.

Upon the last two points, see *Cotton v. Beasley*, 6 N. C., 259; *S. c.*, 4 N. C., 19; *McFarland v. Patterson*, 4 N. C., 421; *Blanton v. Miller*, 2 N. C., 4; *Baker v. Webb*, *ibid.*, 43; *Garland v. Goodloe*, *post*, 351; *Bryan v. Parsons*, 5 N. C., 152; *Carlton v. Bloodworth*, *ibid*, 424; *Nicholson v. Hilliard*, 6 N. C., 270; *S. c.*, 4 N. C., 24; *Governor v. Barkley*, 11 N. C., 20; *S. v. Kimbrough*, 3 N. C., 431; *Dumas v. Powell*, 14 N. C., 103; *Smith v. Wilson*, 18 N. C., 40; *Kello v. Maget*, *ibid.*, 414; *Murphy v. McNeil*, 19 N. C., 244.

SMALLWOOD v. CLARK.

NOTE.—See *S. c.*, reported in 1 N. C., 205.

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HAMPTON v. GARLAND.

1. On the trial of an issue *devisavit vel non* a witness who was disinherited at the time of attestation, but has become interested before probate, need not be offered.
2. The caveator of a will may call upon a subscribing witness to disprove the testator's sanity.

TAYLOR, J. The act of 1789, requiring all the living witnesses to be produced if to be had, means if the persons attesting are competent to be witnesses at the time of the trial of the issue *devisavit vel non;* but if any of them has become incompetent by means of an interest accruing after the attestation, as by death of a legatee to whom the witness is entitled to succeed, or by becoming informers, the person endeavoring to prove the will need not offer such witness.

(2) Although it is insisted that a witness shall not be produced by the opposer of the will to deny his attestation, and that it would be productive of ill consequences to the public if a man who had undertaken to the testator that he would support the will should be allowed against the undertaking to act a contrary part, and that such a rule would expose many good wills to be overturned and the witnesses to temptation where the estate was considerable, and notwithstanding the case in 4 Burrow, 2224, I am of opinion the opposer of the will may offer the attesting witness to disprove the sanity of the testator.

Cited: Old v. Old, 15 N. C., 502; *Bethell v. Moore,* 19 N. C., 314.

TYSON v. SIMPSON AND OTHERS.

1. The increase of cattle *ad infinitum* belongs to the owner of the orginal stock.
2. Where the widow of an intestate kept possession of his stock of cattle many years, and then administration on his estate was taken out, *it was held* that the statute of limitations did not begin to run but from the time of the letters being taken out.

Plaintiff's husband died, leaving a stock of cattle, which she took into possession. The old stock is gone and a new one arisen, and that new one gone and another risen; and lately the defendant, having obtained

administration, took them from her. The possession of the original stock and of the increase had been for forty years and more. This case was reserved by McKAY, J., in July, 1800, for consideration.

TAYLOR, J., after argument: The increase of the increase *ad infinitum* belongs to the owner of the original stock. The plaintiff cannot have acquired property by possession. The act of limitations did not run so as to bar the action of the administrator. The letters were obtained not till lately, and the act begins to run only from the time of obtaining them. It has been decided that the increase of negroes and their increase belong to the owner of the wench from whom all descend; and I cannot distinguish the case of negroes from that of other animals.

Judgment accordingly.

NOTE.—A tenant for life of animals is entitled to their increase during his term. *Perry v. Terrell*, 21 N. C., 441; *Poindexter v. Blackburn*, 23 N. C., 286.

HANKS v. TUCKER.

A jury may presume a grant from length of possession.

IN this case the defendant could not produce a deed or patent, or other colorable title, but proved possession for forty years under marked lines, with some other circumstances, such as the reputation in the neighborhood for a long time back that the lands were the defendant's, and an acknowledgment on the part of the plaintiff that they (148) were covered by patent.

PER CURIAM. Under the act of 1715, or of 1791, possession of itself will give no title to the possessor; but an uniform possession for forty years under circumstances which convince the jury that a grant once existed is a ground for them to go upon in saying there was a grant. If the jury in the present instance are satisfied from the evidence laid before them that a grant did exist, they will find for the defendant.

Verdict for the defendant.

NOTE.—See *Dudley v. Strange, ante*, 12, and the note thereto.

Cited: Reed v. Earnhart, 32 N. C., 528.

SASSER v. ALFORD.

The natural boundary described in a deed for land is to be followed, if it can be ascertained; but if the jury doubt which is the natural boundary, and are satisfied from the evidence that the artificial boundary was considered by the proprietor as the true one, they may establish it by their verdict.

DEFENDANT claimed the lands described in a patent, to Smythwick, beginning at the mouth of Bear Creek on Little River, thence up the creek N. 5 W. 248 poles to a gum, then up the north prong of said creek, N. 45 E. 264 poles to a hickory, thence a certain course to the river, and down the river to the beginning. The artificial course described as the two first lines declined from the creek and north prong, and the second course struck the river before the number of poles called for was completed; and by that means the third line was excluded altogether. Some distance up the branch from the beginning was a branch running to the northeast, which was insisted to be the north prong; but that branch was only 140 poles from the beginning, neither was it long enough to answer the distance called for in the second course, and, taking that for the north prong, the distance would have carried us to the river, excluding also the third line; but it was proved that the former owner of this land admitted the artificial boundary as laid down in the plot to be the true boundary of the land.

TAYLOR, J. The natural boundary, if it can be ascertained, is to be followed; but if the jury have doubts which is the natural boundary, and are satisfied from the evidence that the artificial boundary was considered by the proprietor as the true one, they may establish it by their verdict.

Quere de hoc.

NOTE.—See *Person v. Roundtree*, 1 N. C., 69, and the cases referred to in the note thereto.

MILLER v. WHITE.

If a survey be made and a new one moved for, the court will not order it, unless the former be shown to be imperfect.

EJECTMENT. An order of survey had been obtained at the last term, and a survey made; and now it was moved for the plaintiff that a new order be made, and the motion was opposed.

TAYLOR, J. A new order is not of course. The court will grant it if the former survey be imperfect; not otherwise.

Whereupon the plaintiff's counsel showed that in the survey returned, a line material to be ascertained had not been laid down in the plat returned; and the Court granted the motion.

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VAN NORDEN v. PRIMM.

1. The word "stock" in the act of 1796 (Rev. Stat. ch. 121, sec. 18), giving a year's allowance to the widow, means that which is commonly denominated stock in the country, namely, animals with which the plantations of farmers are usually supplied.
2. If the county court allow a year's provision in money to the widow, raised by the perishable estate, and the administrator pay it, he shall not be allowed for it in his settlement.
3. The court, before and instead of pronouncing a judgment on a demurrer to a bill, may give leave to the party complaining to amend his bill and to state that matter, without which the demurrer would be allowed.

Haywood for the complainant.

BILL IN EQUITY AND DEMURRER.

TAYLOR, J. The act of 1796, ch. 29, directs that the county court, on the petition of the widow, may appoint a justice and three freeholders to allot and lay off to the widow, for the use of herself and children, a year's maintenance out of the stock, crop and provisions of the deceased. The bill states that they allotted her £125 in money because the perishable estate had been sold; and now it is objected that the £125 paid by the administrator pursuant to this proceeding should not be allowed him against a creditor, because it is not stated to be an allowance out of the crop, stock and provisions. It may be an allowance out of the perishable estate, and at the same time not out of the stock, crop and provisions: as, suppose the deceased left neither the effects of other descriptions which in their nature are perishable. In support of the bill it is said, first, that this is a proceeding by a court of competent jurisdiction, and that the money having been paid in obedience to their sentence, the administrator ought to be protected. The county court have decided that all perishable articles constitute a part of this stock, and if they have judged erroneously the administrator ought not to be injured. Secondly, that the word stock embraces other articles beside cattle, hogs and sheep, and indeed all articles which our law denominates perishable; otherwise, it

might happen that the widow of a merchant, mechanic, lawyer, or the like, dying in a town, would have no maintenance for herself and children, when at the same time the widow of a farmer not leaving as large an estate would be provided for; and this could not be the meaning of the Legislature. I am of opinion the county court have no power to allot a maintenance out of any other part of the estate than the stock, crop and provisions, and that the stock here meant is that which is commonly denominated stock in the country, namely, animals with which the plantations of farmers are usually supplied. This construction is liable to the objection made to it, but it is not for us to legislate. The Assembly must interfere and give a greater extent to the act before I can persuade myself to make the construction asked for. The consequence of this opinion is that the county court acted without power in directing an allowance out of the perishable estate only, and the complainant should have appealed. I am further of opinion, from the authorities cited, that the court before, and instead of, pronouncing a judgment on the demurrer, may give leave to the party complainant to amend his bill, and to state that matter without which the demurrer would be allowed.

The complainant, therefore, may amend his bill, and I will suspend judgment upon the demurrer till after the amendment.

NOTE.—The law in relation to allowing the widow of an intestate a year's provisions out of his crop, stock and provisions on hand at his death has been extended so as to give the widow a year's support for herself and her family, though there may be no crop, etc., on hand. See 1 Rev. Stat., ch. 121, secs. 19 and 20.

As to the question of the amendment, see *Belloot v. Morse*, *post*, 157; *Marshall v. Lovelace*, 1 N. C.

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SQUIRES v. RIGGS.

1. In ejectment, on a disclaimer, the lessor of the plaintiff make take out execution for the part disclaimed.

2. If ejectment be brought for a moiety, a third may be recovered.

EJECTMENT. Defendant disclaimed part, having been permitted to plead after a judgment by default set aside, and having entered a disclaimer last term after plaintiff had left court. Stanly moved for a writ of possession, and that the defendant might pay costs.

TAYLOR, J. When there is a disclaimer entered, the plaintiff may take out a writ of possession, of course; as to the part defended for and not disclaimed, you may proceed to try. Also, if you sue for a moiety, you may recover a third; or if for two moieties under different devises, you may recover two-thirds.

NOTE.—Upon the second point, see *Bowden v. Evans, post*, 222; *Hatch v. Thompson*, 14 N. C., 411; *Huggins v. Ketchum*, 20 N. C., 414. On the several demise of one tenant in common, the plaintiff in ejectment may recover his term in the undivided share of that tenant, but the lessor of the plaintiff must, at his peril, take out a writ of possession only for the land to which he has title. *Godfrey v. Cartwright*, 15 N. C., 487. See, also, *Bronson v. Paynter*, 20 N. C., 393.

Cited: Graybeal v. Powers, 83 N. C., 563.

THOMPSON v. GAYLARD.

1. A note for money, dischargeable, however, in specific articles, is not negotiable.
2. Where a note promises to pay money dischargeable in specific articles of several kinds, a tender of all the different kinds of articles must be proved, not of some, only sufficient in value to discharge the debt.
3. A tender of a certificate for timber lying on the bank of the river, and there inspected, is not sufficient.

THIS action was brought to recover damages for breach of a contract in writing, promising to pay money, dischargeable, however, in specific articles.

TAYLOR, J. This note is not negotiable, and you must prove the consideration.

Whereupon *Martin*, for the plaintiff, called a witness and proved the consideration; and then a question arose concerning the tender.

TAYLOR, J. The money is dischargeable in plank, staves, and shingles. You must prove a tender of all the articles, not of some, only enough in value to discharge the debt. A tender of a certificate for timber lying on the bank of the river, and there inspected, is not a sufficient tender. The certificate is evidence, at most, only that lumber had been inspected, not that it was at the place of inspection at the time of the tender.

NOTE.—As to the first point, see *Hodges v. Clinton*, 1 N. C., and the references in the note.

Upon the question of tender see *England v. Witherspoon*, 2 N. C., 361; *Bell v. Ballance*, 12 N. C., 391; *Mills v. Huggins*, 14 N. C., 58; *Mingus v. Prichett, ibid*, 78; *Mobley v. Fossett*, 20 N. C., 96.

Cited: Poteet v. Bryson, 29 N. C., 340.

HILLSBOROUGH, October Term, 1801.

——— v. WRIGHT.

MACAY, J., after argument: If the general issue be pleaded to an action on an assigned bond brought by the assignee, that puts the plaintiff to prove both the execution of the bond and the assignment; also a bond made before the act of 1786, ch. 4, is not negotiable by that act.

HALIFAX, October Term, 1801.

THOMPSON v. ALLEN.

An injunction bill cannot be dissolved but upon the answer of the defendant himself.

BILL in equity for an injunction against a judgment at law. Allen was removed to some distant place unknown to his acquaintances. A third person really interested in the judgment made an affidavit,
(151) stating a denial of the matters of equity contained in the bill, stating also his own interest; and it was insisted upon before HALL, J., that an injunction might be dissolved on affidavits disproving the equity of the bill, especially in a case like the present, where the real defendant was not brought into court and the nominal one resided at some place whence his answer could not be procured; and the case of *Benton and Gibson* was urged, whereon injunction was continued on affidavits against the answer of the defendant. It was argued that if the court would continue on affidavits, the same reason required they would dissolve on affidavits, also; otherwise, the condition of the plaintiff or defendant would be unequal. The case was carried to the Court

of Conference, and there the judge who had decided *Benton and Gibson,* was of opinion that case afforded no principle of decision which could be applied to the present. The Court of Conference agreed that the affidavit in the present case was sufficient to show that the deponent should be made a party. They declared, however, that an injunction could not be dissolved but upon the answer of the defendant. What passed in the Court of Conference is *ex relatione.*

Cases cited for the deponent: 2 H. Ch. P., 227; Foth., 37; 2 H. Ch. P., 259; Ch. Rep., 209; Cursus Con., 445; 3 P. W., 255; 2 Bro. Ch. Rep., 15, 182 to 186.

NOTE.—*Christmass v. Campbell,* 2 N. C., 123; *LeRoy v. Dickinson,* 4 N. C., 110.

WILMINGTON, November Term, 1801.

NORTH & PRESCOTT v. MALLETT.

1. When notes are received by a creditor as a payment, the debtor should be credited for them from the receipt, to be applied in the first place to the interest, and then to the principal as other payments; otherwise when he makes them his own only by delay.
2. It is not a legal tender to say "Here I am, ready"; the tenderer must have the money ready also.

CASE for money due by two notes of hand payable January, 1784. Payments were made in part by two notes in 1783, also there were several other payments, and in 1785 a payment was made to the amount of the balance of the principal, and an offer was then made to pay any balance which might be then due, if the plaintiff would agree to credit to the amount of the notes, which he refused. It was stated by counsel that a calculation had been made by agreement, and that on 20 May, 1785, when Mallett offered to close the account, $320.60 were due as interest and not as principal, and to calculate interest on that sum would be giving interest on interest. To support this position he stated that the mode of calculating interest at the time this contract was entered into, and during the whole transaction, till May, 1785, was to find the interest on the principal sum till the time of settlement, and the interest on the several payments from the day on which they were made to the time of settlement also, and then to strike the balance. Pursuing this method in the present case, as the several payments made amounted to more than the principal, the balance due on 20 May, 1785, must

(152) certainly be considered as interest merely. And although the rule for calculating interest has been since altered, and that what is here contended for was erroneous in principle, yet as it was the mode in use when the parties contracted and paid, it ought now to be adhered to.

HALL, J. The payment ought, in the first place, to be applied to the discharge of the interest accrued, and if a balance of payments remains, then to deduct it from the principal. If the plaintiff received the notes as payment, the defendant should be credited from the day of the receipt; otherwise it is if he only made them his by delay and keeping them in his possession. The defendant may stop interest when he pleases by tendering the principal and interest; but it is not a legal tender to say, "Here I am, ready"; he must have the money ready also.

NOTE.—Upon the question of interest, see *Bunn v. Moore*, 2 N. C., 279; *Yancy v. Mutter*, 1 N. C.; *Peebles v. Gee*, 12 N. C., 341. Upon the other point, see *Mills v. Huggins*, 14 N. C., 58.

Cited: Overby v. B. & L. Assn., 81 N. C., 61.

EVANS v. JAMES.

Where a testator, after giving a life estate in his plantation to his wife, devised as follows: "I give to my oldest sons, R. and D., my plantation, etc., 320 acres on the river to R., and 320 acres to D., and they to put to school my two youngest sons, and to school them at their charge," *it was held* that the charge being such that the devisees would sustain a loss by paying it, supposing them to have only a life estate, they should therefore take a fee; particularly as the testator by giving his wife an estate for life showed that he knew how to limit a life estate when he intended it.

EJECTMENT. The plaintiff derived his title from the will of Jonathan Evans, who devised as follows: "I give and bequeath to my two eldest sons, Reece and David, my plantation, etc., 320 acres on the river to Reece, and 320 acres to David; and they to put to school my two youngest sons, and to school them at their charge."

The plaintiff's counsel contended that Reece and David took as joint tenants for life, and as David died first, the whole life estate went by survivorship to Reece, who was the eldest son of their father, and that on his death the estate in fee descended to Jonathan, the eldest son of

Reece, and heir at law of the devisor. It was stated in evidence that David died in 1781. Reece died in 1785, leaving a son, Jonathan, who took possession after Reece's death, by putting his stock of hogs and cattle on the land. Jonathan was an infant for many years after Reece's death; the remaining brothers of Reece, and uncles of Jonathan, sold to defendant James, in 1795. They never claimed title before, nor were they at any time in possession, nor was any person in possession but Jonathan, until James, the defendant, entered in 1795. An action was brought in 1796. David left a daughter in *ventre sa mere,* who was born four months after his death, and died in 1796. There were two other sons of old Jonathan.

Jocelyn for plaintiff: The devisees, Reece and David, were joint tenants. 12 Mo., 302; 1 Salk., 390. 2d. The devisees took an estate for life. Only the charge of schooling the two youngest sons is not such an one as will create a fee where otherwise the words would make an estate for life only. Schooling is an annual charge; it is not a sum in gross, for it might be more or less according to future circumstances, as the death of the children, etc.

Wright, e contra: The devisees took estates in severalty. All estates are so unless expressly made otherwise; no such expression is here; on the contrary, Reece is to hold 320 acres on the river, which is a particular designation of the spot intended for him; and the (153) remainder, of consequence, falls to David. They have no unity of possession so asserted to a joint tenancy. 12 Mo., 320, and 1 Salk., 390, support the position laid down by us when compared with the words of our will. Besides, the construction of deeds and of wills is materially different. The one is construed most strictly against the grantor, the other according to the intent of the testator. That was in our case most evidently to create an estate in severalty or at least in common. As to the next question, this is an estate in fee in the devisees. The charge is not expressed to be payable out of the profits. It is expressly said *at their own charge.*

HALL, J. Let the jury give a special verdict. [They did so, and afterwards he delivered his opinion.] If the charge is such that the devisee may sustain a loss by paying it, supposing him to have a life estate only, he shall in such case take a fee. Especially in a case like this, where, intending an estate for life to the mother, he expressly limits a life estate, which shows he knew how to limit for life when he intended it.

NOTE.—By the act of 1784 (1 Rev. Stat., ch. 122, sec. 10), passed subsequent to the date of the above will, all devises are to be construed to be in fee simple, unless otherwise plainly expressed.

McNEIL AND WIFE v. QUINCE'S ADMINISTRATORS.

An action at law will lie for a legacy, if there be an express promise by the executor or administrator to pay it, and he either has assets or promises in consideration of forbearance.

THE deceased left a legacy to the *feme,* for which this action on the case was brought. The administrator had been applied to, and he said he would pay it as soon as he could sell the Orton plantation.

Wright, for the plaintiff, cited Cowper, 284, 289; 1 Vent., 120; 2 Cro., 602.

Jocelyn, e contra, cited 5 T., 690; Iredell, 209.

HALL, J. Legacies may be recovered two ways in equity or by petition, and a suit will lie at law upon a promise by the executors to pay it. He is under a moral obligation to pay it when he has assets, and that is a consideration. If he promise in consideration of *forbearance,* (154) though there be no assets, that is enough. It will lie against the administrator of the administrator promising: the sum paid will be applied as if suit had been against the promising administrator.

NOTE.—As to a promise by an executor, having assets, to pay a *debt* of his testator, see *Sleighter v. Harrington,* 6 N. C., 332; *Williams v. Chaffin,* 13 N. C., 333.

ROBINSON'S ADMINISTRATORS v. JAMES DEVANE.

After declarations of a party shall not be received to explain his former acts.

THIS was an action to recover a negro named Peter, who had been sent to the house of the defendant, in 1783 or 1784, some two or three years after the marriage of Devane with the daughter of the intestate, where he has ever since continued.

HALL, J., refused to admit evidence of the intestate's declarations that he had not given the negro, made in 1796, saying, after declarations of the party shall not be taken to explain his former transactions.

Cited: Torrence v. Graham, 18 N. C., 288; *Jenkins v. Cockerham,* 23 N. C., 312.

WHEATON v. CROSS.

Continuance granted upon affidavit of counsel.

THE plaintiff was in Tennessee; Bell, the witness, had gone beyond sea since the last term.

HALL, J. The plaintiff's attorney may make affidavit, or the affidavit of any other person may be made to continue the cause.

NOTE.—See *contra*, *Sheppard v. Cook*, *post*, 241.

J. SPILLAR CUTLAR'S ADMINISTRATORS v. JAMES CUTLAR'S EXECUTORS.

1. The date of a deed is not of its essence, and a party thereto is not estopped to prove that it was delivered at another time than that of the date.
2. The words "heirs of the body," when used in a disposition of chattels, are in some cases descriptive of the person to take, and are words of purchase, not of limitation; but the word "heirs" simply is always a word of limitation, and vests the absolute property.

TROVER for negroes which Spillar in 1794 gave by deed to his daughter for life, and by another deed, dated 8 February, 1794, *to his daughter and her son, J. S. Cutlar, for their lives, and the life of the longest liver or survivor, remainder to the heirs of the survivor.* Cutlar, who had married the daughter, conveyed by deed, dated 10 February, 1794, to James Spillar, and covenanted never to claim any property which *should come* to his wife by purchase or descent.

HALL, J. Evidence may be given to prove that the deed last mentioned was really delivered on the 8th, and before the deed to the daughter and her son. The date is not of the essence of the deed, and it is not sound, as argued, that Cutlar, being a party to the deed and now a plaintiff, is therefore estopped to say the contrary of that which appeared on his own deed. *Vide* 2 Rep., 4; Dy., 307; Comber, 83.

As to the other points, he said that *heirs of the body,* when spoken of chattels, were in some cases descriptive of the person to take, and were words of purchase, not of limitation; but the word *heirs* simply was always a word of limitation, and operated to give the whole property to the survivor, and is here tantamount to executors. There is no difference

between saying remainder in fee to the heirs of the survivor, and remainder to the heirs of the survivor. The absolute property (155) was in suspense till the death of one, but upon that death the absolute property immediately vested in the survivor, and was no longer contingent, and consequently his administrator ought to recover.

NOTE.—As to the question of delivery, see *Nichols v. Palmer*, 4 N. C., 319, 436. With respect to the word "heirs" being always one of limitation when applied to a disposition of personalty, see *Ward v. Stowe*, 17 N. C., 509; *Allen v. Poss*, 20 N. C., 77. A gift of a slave by deed for life prior to the act of 1823 (1 Rev. Stat., ch. 37, sec. 22) passed the absolute interest in the slave. Note to *Tims v. Potter*, 1 N. C., 12.

HAY & CUTLAR v. SPILLAR'S EXECUTORS.

If one encourage the making a deed by a third person, he is bound by it, though it should convey the reversion in a slave to which he was entitled.

SPILLAR by deed dated 4 February, 1791, conveyed to his daughter Elizabeth the negroes in question, *to hold for and during the term of her natural life*. She afterwards married Tuton, and he by deed conveyed the same negroes to Hay and Cutlar forever, *in trust for his wife for her natural life, remainder to her heirs*. A witness was called to be questioned whether or not Spillar consented to or encouraged the making of this latter deed. It was objected that this question should not be put to him, for that the answer tended to show Spillar had parted with his *reversionary interest*, which ought not to be proved otherwise than by a deed. Reversions of real estate cannot be passed without deed, because they cannot be passed by livery of seizin. 2 Bl. Com. The same reason applies equally to a reversioner or remainder of a personal chattel, where the property is in that situation that it may be passed by delivery, that serves as a notorious symbol of the transfer; but the same cannot be said of a reversion.

HALL, J. The question proposed is proper; a reversion like this may be passed by parol, without deed.

The question was asked and the jury found for the plaintiffs. A question was made upon the effect of the first deed, whether it conveyed the absolute property or only for life; but the judge gave no opinion

upon that point. He directed the jury to consider whether the parol evidence satisfied them that Spillar meant by consenting to Tuton's deed to pass his interest, if any he had.

Quere do hoc.

NOTE.—Since the act of 1806 (1 Rev. Stat., ch. 37, sec. 17), which requires gifts of slaves to be in writing, *it has been decided* that the title to slaves cannot be transferred, without consideration, by virtue of an estoppel, arising from the misrepresentations of the owner, as that would be in contravention of the act. *Jones v. Sasser*, 18 N. C., 452.

JAMES SPILLAR CUTLAR'S ADMINISTRATORS v. SPILLAR'S EXECUTORS.

SEVERAL of these suits were on the docket; and after judgment had been obtained in two of them, the executors, saying these judgments would exhaust all their assets, moved for leave to plead them for the protection of the assets they had in the next suits.

HALL, J., took time till next day to consider, and then refused the motion.

NOTE.—See *Woolford v. Simpson, ante*, 132, and the cases referred to in the note.

BENJAMIN WILLIAMS v. SUSANNA GORMON.

Notice must be given of a *certiorari* within two terms after the judgment which is the foundation of the *certiorari*.

CERTIORARI. Plaintiff had obtained judgment in the County Court of ONSLOW, October Term, 1800. Defendant obtained a *certiorari*, returnable to May Term, 1801. At November Term, 1801, plaintiff moved that a *procedendo* should go to the county court, by reason that no notice of the *certiorari* had been given to the plaintiff. The (156) court ordered that the notice might now go, as two terms had not elapsed since filing the *certiorari;* and that the cause should be put upon the argument docket, in order that plaintiff may file counter-affidavits.

SMITH v. ESTES & MALLETT.

Renewal of order of reference discretionary.

THIS time twelve months the bill was abated as to Estes, and an order made by the master to take an account.

HALL, J., now renewed that order, though it was strenuously urged there had never been a decree to account. He did it, he said upon the ground of the former order, but he considered the practice to be in some cases that such a reference did not preclude the parties from insisting that he ought not to be decreed to account; and owing to the particular circumstances of this case, he would consider that the reference should not conclude, if the merits were with the defendant; but he would not order that the said reference should not preclude Mallett from insisting that he should not be decreed to account.

Quere de hoc.

NOTE.—See *S. c.*, *post*, 182.

SMITH v. BALLARD AND OTHERS.

1. Bill to perpetuate testimony against several persons who had possession of land which plaintiff claimed under an old grant; also amended bill charging that they had destroyed line trees; demurrer to first bill; some of the defendants had been dead more than two terms, and it was now moved to continue the suit, on cause shown by affidavit, to enable plaintiff to file bills of revivor; motion granted, without payment of costs, though it was objected, first, that the suit had been discontinued as to the deceased defendants by the lapse of two terms; secondly, that the testimony might be perpetuated as to those now in court, and a decree made against them which would affect them only, and the others might still be proceeded against by will of revivor.
2. A demurrer, according to the practice in our courts of equity, need not be set down to be argued.

THIS was a bill filed in 1788 to perpetuate testimony against twenty persons or more, who claimed and were seated upon a tract of land of 5,860 acres which plaintiff claimed under an old patent to one Conner.

There was also an amended bill stating that they had cut down and destroyed the line trees. Twelve of the defendants had died above two terms before the sitting of this present Court. At November Term, 1800, the plaintiff obtained leave to amend, which order at the last term was enlarged. To the first bill there was a demurrer.

Mr. Wright moved, upon an affidavit of Mr. Sampson, to continue the cause, stating that he intended between the last term and this to have filed a bill of revivor to bring in the representatives of the deceased persons, but was prevented by an accident from doing so; objected, first, that this cause is discontinued, as the representatives of the dead defendants were not brought in within two terms; secondly, this testimony may be perpetuated as to the defendants who are in court, and so there is no occasion, as to them, to wait till the others are brought in; should it be dismissed upon argument as to the defendants who are in court, the others may still be proceeded against by bill of revivor; thirdly, these defendants have interests totally separate and distinct from the absent defendants, and should a decree be now made, it would affect those only before the Court, and not the absent defendants; should the bill be dismissed as to those now before the Court, still the plaintiff may revive afterwards as to those who are not in; (157) fourthly, that a demurrer, according to the practice of the courts of equity in this country, need not be set down to be argued—and this the motion for a continuance supposes; fifthly, should the Court grant him a continuance, it ought to be on payment of all costs, as directed by the act of 1779.

HALL, J., took time to consider; and now at this day decided against all the objections, except the fourth; and the cause was continued without payment of costs.

Haywood for defendants.

Quere de hoc.

NOTE.—See *S. c., post*, 289.

ANONYMOUS.

Can proceed against one surety.

THIS was a bill in equity against the administrators of Gilchrist and the administrators of Toole, who were sureties of McKie for the costs. Jones's death was suggested.

It was insisted by *Haywood* that they should not proceed till the administrator of Jones, the other surety, should be brought in.

HALL, J. They may proceed against one alone.

Quere de hoc. Et vide 3 Atk., 406.

CAMPBELL v. HARLSTON'S ADMINISTRATOR.

A supplemental bill may be filed, upon good cause shown, after a decree reserving some matter for further consideration.

THIS cause had been heard and a decree made ascertaining the debt and giving a credit to the amount of the assets, reserving for further consideration the balance of £79, which it was supposed had been improperly charged to defendant, and the costs. And now a motion was made to have leave to file a supplemental bill.

HALL, J. The Court will expect an affidavit showing that the assets now intended to be charged were not charged in the former bill, and enough to induce a belief that such assets are in the defendant's hands.

BELLOAT v. MORSE.

Demurrer sustained; leave to amend.

DEMURRER to this bill because the plaintiff had not set forth that the will was proved and that the executors qualified thereto.

HALL, J. This is a good cause of demurrer, but the plaintiffs may amend.

NOTE.—See *Van Norden v. Primm, ante,* 149; *Marshall v. Lovelace,* 1 N. C.

ANONYMOUS.

Leave to except to report.

A REPORT of the master had been filed three terms ago and no exception taken thereto; and now it was moved for liberty to except, and after argument, HALL, J., gave leave to except, but the exceptions when filed at the next term to be subject to all objections as well to the (158) regularity thereof as to the merits.

Quere: For if the exceptions were receivable, they ought to have been received absolutely; if not receivable, they should not have been allowed.

MALLETT v. LONDON.

A garnishee may, after judgment against the principal, be examined on points left unfinished on his first examination.

DEFENDANT was summoned, as a garnishee, to the county court, in a suit against one for whom he acted as agent. He gave in his garnishment, and judgment was taken against the principal; on that he particularized some bonds and referred to others, not specifying them. The specified bonds were delivered into court and produced nothing. In the meantime London, the agent of one of the partners, both of whom were defendants in this action, assigned the bonds referred to, to a creditor of that partner, and lately Mr. London having moved the county court to be discharged from his garnishment, that motion was refused, and he appealed. Since the said appeal he has been examined again in this Court, and mentioned the said bonds specially which before were not so specified; and now the principal question was whether after judgment there can be any further examination of the garnishee.

HALL, J. He did not complete his first garnishment, but something remained to be done. The second is a continuation of the first, and as if done at the same time with the first; and as the second garnishment discloses property enough to satisfy the plaintiff's demand, there should be judgment for him.

Judgment accordingly.

NEW BERN, January Term, 1802.

DEN ON THE DEM. OF STRINGER v. PHILLIS.

British subjects, residents out of this country, became aliens by the Declaration of Independence.

EJECTMENT. Francis Stringer devised thus: "After the death of my mother, I give [the lands in question] to Ralph Stringer in fee, provided he or his representatives claim within ten years after my mother's death." He came from Europe in the lifetime of the mother and returned and died before the war, leaving Thomas Stringer his heir at law. He died in 1795, leaving Francis Stringer, the lessor of the plaintiff, his heir at law; Francis was then in this country.

Slade objected to the plaintiff's recovery; first, because here was a condition precedent, and it is not proved that Ralph claimed within ten years after the death of the mother; therefore, the estate never vested in him. Secondly, Thomas became an alien, and was so at the Declaration of Independence, and could not transmit his lands by descent to the lessor.

Gaston, e contra: Those who were not born aliens could not become so by a separation of empire; and, therefore, Thomas held his lands notwithstanding the separation, and could transmit them by descent. (159) Secondly, the claiming within ten years was not a condition precedent, but a conditional limitation, or a condition subsequent, which if not performed, the heir might enter. Here he did not enter after the ten years, though he had sold to Phillips. The estate vested immediately on the death of the testator, for the condition was performable by his representative or heirs, which proves the estate vested; otherwise, it could not descend to the heirs.

JOHNSTON, J. Article XXVI of our Constitution declares all the lands within the bounds of this State to belong to the collective body of the people, making exceptions in favor of those who had already obtained grants from the king or lords proprietors, which exceptions extend only to those who were parties to that instrument—the *freemen of North Carolina.* All others are out of the exceptions; consequently, all British subjects, and no one who was then a British subject had title to any lands within this State after that period. It will be said, Why, then, confiscate the lands of British subjects? I answer, the confiscation acts considered that some who were then British subjects might be willing to become citizens, and to join their efforts in the common defense. The Assembly meant to retain, and actually reserved, the power of restoring to such *the rights which to them once belonged,* if within the limited time they would apply for that purpose; and with respect to such as did not apply within time it was proper, and indeed necessary, to appropriate their estates to the common defense; the mode of doing which was pointed out by those acts, without which the property would have remained unused.

Cited: Benzein v. Lenoir, 16 N. C., 265.

BROWN v. LANE, ADMINISTRATOR OF LANE.

1. An administrator, on the plea of *plene administravit*, is bound to prove payment of the debts, but not that they were due.

2. Notice of a bond, before letters of administration taken out, is sufficient to prevent the payment of simple contract debts; notice need not be by suit.

An *ex parte* proving of a debt before a magistrate is of no avail.

THESE points were resolved by JOHNSTON, J.: First, the administrator, on the plea of *plene administravit,* need not prove each debt to be due that he paid off; he may prove the payment and the plaintiff may show, if he can, that the debt was not due. Secondly, if a bond be shown to the administrator before letters taken out, and he afterwards pays simple contract debts, he shall not be allowed them; notice of the bond debt need not be by suit; a notice by showing the bond is enough. Thirdly, the practice of proving a simple contract before a justice of the peace is of no use; it is *ex parte,* and if the debt be not due, that will not excuse the administrator; if it be due, the want of such proof will not make the payment void.

NOTE.—On the second point, see *Delamothe v. Lanier,* 4 N. C., 296.

HAWKS v. FABRE.

Attachment, variance in amounts.

ATTACHMENT for £250. The bonds produced amount to £224. Objected, the sums ought to agree, and as they do not, they are not the debt sued for, and cannot be given in evidence.

JOHNSTON, J. The attachment is to compel appearance. If (160) the bonds are specified, then no other bonds shall be given in evidence; but if not specified, the declaration may be of bonds within the amount laid in the attachment, and they may be given in evidence.

(161)

MILLER v. WHITE.

NOTE.—See *S. c.,* reported in 1 N. C.

Cited: Cherry v. Slade, 7 N. C., 90; *Wood v. Sparks,* 18 N. C., 389; *Dula v. McGhee,* 34 N. C., 333; *Brown v. House,* 118 N. C., 886.

BLOUNT v. PORTERFIELD'S ADMINISTRATORS.

Advertising in a newspaper printed in the county is equivalent to advertising in other places in the county as directed by the act of 1789 (1 Rev. Stat., ch. 46, sec. 16).

SCIRE FACIAS to have execution of a judgment obtained against Porterfield, and amongst other things was pleaded the act of 1789, for barring the claim of creditors if not exhibited within two years. Defendant proved the advertisement required by the act, except *as to the public places in the county,* but to supply that it was proved that a paper was printed within the county, and that the advertisement was made in that county.

JOHNSTON, J. That is equivalent to advertising at other public places within the county, and is, therefore, sufficient.

Cited: McLin v. McNamara, 22 N. C., 85.

McKENZIE'S ADMINISTRATORS v. ASHE.

The law as to construction of bets upon races follows the customs or rules of races.

THIS case came on again to be tried, and the same evidence given as before. See 2 N. C., 502.

JOHNSTON, J. These parties having entered into a racing contract, have submitted to have that contract governed by the rules of racing; and the evidence is that by the rules of racing such an accident will not excuse the defendant from running, nor save the forfeiture if he neglects to run. The contract is to be performed by running, notwithstanding any excuse which may be offered, and notwithstanding any impossibility which may occur in the meantime.

Verdict for the plaintiff, and judgment.

NOTE.—All bets are illegal now. Code, 2841, 2842; *Gooch v. Faucett,* 122 N. C., 270.

ANONYMOUS.

1. In a devise of a negro and also of lands for life, the phrase "and also" makes the devise of the negro for life, as well as the lands.

2. Where there is a legacy for life or years and no remainder, the assent of the executor enures only to the benefit of the particular tenant; and the executor is entitled to the possession of the chattel again to perform the other trusts of his office.

TESTATOR had devised a negro to his wife and *also* lands for life, and the executors of the testator sued for the negro.

JOHNSTON, J. The words *and also* continue the clause, and (162) the words *for life* refer to all that precedes. She had an interest for life in the negro as in the lands, and there remained a reversion which vested in the executors; and although the next of kin may be entitled to it, yet the executors must distribute it, and must recover in the first instance, in order to that distribution.

Judgment accordingly.

NOTE.—Upon the both points, see *Black v. Ray*, 18 N. C., 334, and upon the second, see *James v. Masters*, 7 N. C., 110.

Cited: Black v. Ray, 18 N. C., 334; *Williams v. McComb*, 38 N. C., 453; *McKinley v. Scott*, 49 N. C., 198.

MURPHY v. GUION.

1. The action for mesne profits does not accrue until possession is given after judgment in an action of ejectment, and from that time only the statute of limitations begins to run.

2. Where the law is clearly for one party, the court will grant a new trial, though several juries have found verdicts for the other.

3. After a new trial granted, the court may, in its discretion, permit the pleadings to be amended on both sides.

TRESPASS for mesne profits, and a new trial was moved for, and on argument having taken place—

JOHNSTON, J., said: As to the first ground on which it is moved for, namely, that the statute of limitations should have protected the defendant for all but the last three years, it is not tenable. Judge Buller, it is true, has said so, and it has been followed and copied into other books. There is, however, no adjudged case to that effect, and I do not consider myself bound by the *dictum* of any judge, however respectable. The reason of the thing is against that position. The plaintiff cannot bring his action till after the judgment, ejectment, and possession delivered or

obtained in consequence of it. And shall he be barred for not bringing his action in time, when the law itself for that time prohibits the bringing his action? It would be absurd to say so. The direction given to the jury was proper. As to the other ground, evidence has been received and damages given for cutting down of trees, when no charge for the cutting down of trees was laid in the declaration. Such evidence ought not to have been received, although the plaintiff did not object to it. The verdict, therefore, improper and unjust, being founded on evidence which was not admissible. He has had a new trial before, but still I think he ought now to have one for the cause alleged. Let the verdict be set aside; but the plaintiff may have a rule to show cause why the declaration should not be amended.

A rule was accordingly taken, and on the last of the term, after argument, the court permitted the declaration to be amended by adding a count for the cutting down of trees, and the defendant to add the plea of *liberum tenementum.*

NOTE.—Upon the main point, see *S. c.*, 6 N. C., 238, and 4 N. C., 12. Upon the question of the new trial, see *Commissioners of Fayetteville v. James*, 5 N. C., 40; *S. c.*, 1 N. C., 637; *Hamilton v. Bullock, post*, 224; *Jones v. Ridley*, 4 N. C., 280. As to the amendment, see the cases referred to in the note to *Simpson v. Crawford*, 1 N. C., 55.

STATE v. HADDOCK.

1. An appeal will lie for the State when the defendant is acquitted on an indictment in the county court as well as for the defendant upon conviction.
2. If the county court arrests judgment on an indictment, an appeal lies as well as a writ of error.
3. An indictment for larceny should state in whom the property of the thing stolen is; or that it is the property of some person unknown; and the omission of such statement is not cured by the act of 1784 (1 Rev. Stat., ch. 35, sec. 12).

DEFENDANT was indicted in the County Court of PITT, for stealing a heifer, the property of Adams, and a bell of the value of ten pence; and he was convicted as to the bell. He moved an arrest of judgment because it was not set forth whose property the bell was. The county court arrested the judgment, and the attorney for the State appealed; and after argument,

(163) JOHNSTON, J., decided the following points: First, that an appeal will lie for the State where the defendant is acquitted or otherwise discharged upon an indictment, as well as for the defendant

who is convicted. Though, he said, were this *res integra,* he should not be of that opinion upon the words of the acts relative to appeals. Secondly, in this case an appeal lies as well as a writ of error. Thirdly, the indictment should state in whom the property was, or that it was the property of some person unknown; otherwise, he could not plead in bar to another indictment for the same case. It was, therefore, not uniformality or refinement within the act of Assembly, but a matter of substance not cured by it.

Judgment arrested.

NOTE.—This case, so far as it decides that an appeal lies for the State upon the acquittal of the defendant, has been overruled by *S. v. Jones,* 5 N. C., 257.

Cited: S. v. Gallimore, 24 N. C., 376; *S. v. Hill,* 79 N. C., 659; *S. v. Ostwalt,* 118 N. C., 1220; *S. v. Ford,* 168 N. C., 166.

NATHAN SMITH v. SHEPPARD'S HEIRS.

In an action for an account against the administrator, the heirs at law may be joined as defendants.

THIS was a bill for an account brought against the administrators and heirs of Sheppard, to which the heirs demurred.

JOHNSTON, J. This bill is proper enough, and will prevent circuity of action. The heirs now may insist upon every defense which they would were the executors first sued to judgment and then the heirs.

Cited: Wilson v. Pearson, 102 N. C., 314.

STEPHENSON AND OTHERS v. PRESCOT AND OTHERS.

Bill of revivor after abatement.

COMPLAINANT died more than two terms ago.

JOHNSTON, J. The suit is abated, and must be revived by a bill of revivor; but defendant is not entitled to costs upon the abatement, though he would be entitled if after two terms a *scire facias* were brought and the abatement pleaded.

NOTE.—See *Collier v. Bank,* 21 N. C., 328.

BLOUNT v. STANLEY.

In equity, a deposition taken in South Carolina by one witness may be read.

IT was objected that the deposition offered by Blount's counsel should not be read, because the commission was directed to and taken in South Carolina by one person only; and by the rules of practice prescribed by the act of 1782 it should be directed to two justices of the peace.

JOHNSTON, J. That clause must be confined to depositions to be taken in this State. There are some counties where there are no justices of the peace. If the clause in question extends to all depositions, it would many times happen that the deposition could not be taken at all, for the want of justices.

The deposition was read.

NOTE.—See *Carver v. Mallet*, 4 N. C., 562.

(164)

WARD v. VICKERS.

1. If a reprobate of a will be moved for and refused by the county court, an appeal will lie from that determination.

2. Where an issue of *devisavit vel non* had been made up between some of the next of kin and the executor, and the issue found again the will, a devisee who had not been a party was not permitted to come in afterwards and have the issue retried, because our courts of probate are courts of record, and what is done by them is conclusive; otherwise of the ecclesiastical courts of England.

THIS was the case of a will which had been offered to the county court for probate, and was contested there by some of the next of kin; an issue had been made up in the County Court of LENOIR between some of the next of kin, and the executors who offered it, and the issue was found against the will. At the next court a devisee who had not been a party before moved to have a new issue made up, which the county court refused; whereupon the cause was removed to this Court. And now it was moved that the cause be dismissed, on the ground that the issue, will or no will, had been once tried, and was not appealed from, as the act of Assembly directs, and, therefore, after the term, could not be overhauled.

Woods, e contra: This case came before the Court several terms ago, and was solemnly argued, and the Court took time to advise, and some

of the then judges afterwards made up a solemn opinion which was drawn out at length, taking notice of all the authorities on this head which could be found, and concluding that the issue should be tried again. There is a way in England of bringing on the probate again in more solemn form, as it is called; God., 62; 2 Off. Exrs., 18, 48; Swinb., 448, 449. Moreover, it is against a general principle to bind any one by a trial without being a party and perhaps not knowing anything of it. The devisee now moving for a new issue to be made up was not a party to the former trial, and surely he ought not to be bound by the verdict, which possibly would not have been as it is had he been a party.

JOHNSTON, J. This is too clear a case to admit of doubt. Our courts which receive probates of wills are courts of record, and, therefore, what is done by them is conclusive. The ecclesiastical courts which receive probate in England are not of record, and, therefore, what they do may be reconsidered. This person should have appealed from the decision of the county court, as the act of Assembly directs. I will not say but such a case might be relievable in equity, if any fraud were used; but it is not proper for this Court.

Quere de hoc.

NOTE.—The opinion alluded to by Woods was that of HAYWOOD, J., shown to WILLIAMS, J., and approved of by him—and is as follows:

John Ward died, and a paper purporting to be his will is presented to the county court to be proved; and on an issue made up, there was a verdict of the jury against the paper. Afterwards, at another term, one of the devisees named in that paper moved to have leave to present it again for probate, and had that leave given; whereupon (165) the party opposed to the probate appeals to this Court, insisting that the order for granting such leave was illegal, as the verdict on the issue was conclusive to all persons whatsoever, and particularly to Noah Ward, who was a devisee, and therefore a party in the former trial. It does not appear by the record, nor is it admitted by his counsel, that he was in fact a party on that occasion.

This statement is not made wholly out of the record, for that states only an application by Noah to exhibit the paper in July Term, 1796, and a permission by the Court to do so, etc., and an appeal in consequence of that permission. And the question now is whether this appeal is sustainable; and it is objected that it is not—First, because it is an appeal from a final sentence, judgment, or order of the Court, and, second, because the verdict of the jury upon the former trial, and the rejection of the paper thereupon, is conclusive as to this devisee.

With respect to the first objection, the permission to reintroduce the paper for probate is a final adjudication of the Court upon the point submitted to them—whether by law such will could be introduced—and is, therefore, within the meaning of the act, such a sentence as may be appealed from; but if he had waited till after the trial and verdict, and had then appealed, that would have been an appeal from the verdict, not from the sentence for reëxamining the will; and there must have been a trial *de novo* without again arguing the propriety of the Court's judgment; else this inconvenience would result, that there must be a trial in the county court upon an issue made up and tried by examination of witnesses brought to court perhaps at a great expense, and after an attendance of all the witnesses at a very great expense also in the Superior Court, when it was not certain that their attendance would ever be necessary, since the question might be decided by the opinion of the Court on argument merely.

It is more proper and reasonable to decide that question before any issue made up than to go to trial at so much expense, in order to give the party an opportunity to take his exceptions to the opinion of the Court in the court above. I think the appeal proper.

As to the second objection, that the former adjudication is conclusive to Noah Ward, who is a devisee, but was not by his guardian or otherwise a party to the former trial, the case admits of much doubt, and will involve consequences which seem in some measure irreconcilable with natural justice, which way soever it may be determined. If it be decided that such a trial is conclusive to all persons, it infringes the rule that "No person should be condemned unheard, or without having an opportunity to be heard," and by this means many invalid wills be admitted to probate for want of that opposition which parties (166) might effectually make if they were present, or many rejected for want of the evidence which the parties might produce to support them, had they an opportunity to do so.

On the other side, if no person is bound by the admission to probate or rejection, who has an interest and is not a party, property held under wills, and those also who act under them as executors, legatees, or devisees, will never be safe so long as any person having interest, either as next of kin or as legatees under a former will, who has not been summoned, are remaining; for they may all come, one after another at different periods of time, and without limitation, for a new trial; and, indeed, they may choose to come then only when the evidence to support the will, or which caused it to be rejected, is no longer to be had; and what further increases the inconvenience is, that though the heirs, the widow, the next of kin, and the legatees in the contested property may

be known, yet the legatees in any former will who are concerned in interest may not be, and frequently are not known so as to be summoned—and, indeed, should they be known, they as well as the heirs or legatees in the contested paper, and the next of kin, may be so far removed from the court of the county where the paper is exhibited that it be impossible to summon them; or they may be removed to places unknown, and for that reason cannot be summoned. Shall the probate be delayed till they can be discovered and summoned, and in the meantime the property be wasted for want of some one to take care of it? Or shall the probate be denied because it is impossible to summon them, and the property inevitably wasted, and creditors defrauded of their debts? Or shall the will be rejected and an administrator appointed to distribute to the next of kin for such reasons, and the legatees defeated of the bounty intended for them by the testator? Or shall the will be proved, notwithstanding, and established beyond any further controversy, though these persons may afterwards appear with proofs sufficient to overturn the probate in one case, or to support it in the other, had they been produced in time? The laws cannot lose sight of the fundamental principle, that "No person is bound by a decision he could not controvert," nor should it abandon that useful rule, "Interest *republicæ ut sit finis litium.*" They are both of the last importance in the administration of justice: The one is intended to secure justice to every individual; the other to secure that peace of mind which arises from the consciousness of being secure in the enjoyment of his possessions. Neither of them can be abandoned without injury or violence to the whole system of jurisprudence; and, therefore, the true rule of decision must be in some medium which infringes neither.

Suppose, then, we look for it in a rule like this: that a will proven by witnesses in the presence of the widow, the next of kin, and the heirs, if they can be summoned, and of the legatees of a former will, if known to be summoned, shall be decisive; but if any of them be in a situation which notoriously incapacitates them to assert (167) their rights (which will comprehend the case of minors and persons beyond seas), that they shall have a right still to question the validity of the will if they apply for that purpose in a reasonable time, after which it shall be conclusive to them also as having relinquished their right; and that the probate of a will, or the disallowing the probate, shall be subject to the same rule.

Such a rule seems equally to avoid the imputation of an *ex parte* decision and of leaving property held under wills so long in jeopardy, and obviates objections that may be raised upon either ground. But

the question is, Can we infer any such rule from existing authorities? For if we cannot, and that fairly, too, we cannot make a rule, however convenient and proper it may appear to be now. I think such a rule may be deduced from them. To discover whether it may or not, it will be proper to take a view of the law of probates as it stood before the time of our first passing any acts of Assembly upon the subject, and then to consider what alterations those acts have made in the old law, either with respect to wills of personal or real estates. With respect to wills of personal estate, when they were admitted to probate in the ecclesiastical court, proceeding by the rules of the canon law, the validity of the will being established by the sentence of the proper forum, could not be controverted, contested, or questioned in any other court. 1 L. Ray., 262; Stra., 1; 3 Term, 127; 2 A. B., 421, p. 4; Gil. E. C., 207, 208. But by the common law the probate was liable to be brought into question, and to be repealed if justice required it, either where it was founded on the oath of the executor singly, if application was made within ten years, or where it was proven by witnesses, if all those who were interested in opposing it were not subpœnaed to be present at the examination; and those not summoned, apply within one year afterwards to be heard against it. 2 Off. Exrs., 18. The other old books say, in the presence of all those who are interested, or in their absence if summoned, where it is implied that if some are not summoned, it will not be conclusive as to them. 2 Ba. Ab., 404; 2 Nels. Ab., 130, sec. 1; Cunningham, Verb. Probate; Off. Exrs., 48; God., 62; Swin., 449; Woodson's Lect., 330; 2 Bl. Com., 508. Or if it should afterwards be discovered that the will was obtained by fraudulent means or forged. Str. 481, 703; 3 Term, 125. Or that the probate was founded upon a perjury; or that it was revoked; or there is a latter will. 1 P. W., 287. Which repeal is effected by commission of review or citation (2 Off. Exrs., 48; 3 Term, 125; 1 P. W., 388); or those who are interested to oppose it are beyond seas at the time of the probate, and apply to be heard within six months after their return; or if infants apply for a reëxamination within one (168) year after their minority ceases. Thus stood the law with respect to wills of personal estates when our first act upon this subject was passed in 1715, ch. 45, sec. 2; which directs, singly, who shall take probate of wills, not giving any rules to be observed in conducting or receiving proof of wills, and, consequently, must have intended that the courts which were to take probate under the act were to be regulated by the law in use before the act, and to have made the canon law, so far as concerns wills, the standard of decision in all controverted cases. The act of 1777, ch. 62, sec. 2, confines the probate to one only of the courts mentioned in the former act; and 1789 alters

the mode of trying a contested will, both of personal and real estates by submitting the dispute to a court and jury upon issue made up by a court, without altering any other part of the common law. The revocability of the probate upon proper ground, and its liability to be questioned within the time limited by the canon law, by those who are interested and not made parties to the former contest, is not altered; and, therefore, in the case of wills of personal estate the probate is still subject to be repealed or reëxamined at the instance of the probate, if he applies for a reëxamination within a year after it takes place. With respect to wills of real estates, they were not provable in the spiritual court, but are regulated entirely by the common law, and a probate of them in the spiritual court by the rules of the common law is *coram non judice,* and void. Salk., 552; 6 Rep., 23. The devisee must always be ready, upon every new contest, to substantiate the due execution of the will (1 Burr., 429) by evidence which the common law deems competent, the facts resulting from which are to be collected and found by a jury (2 Ves., 426), or the will must be proven in a court of chancery, where nothing can be done without the heir is a party plaintiff; and where the heir is a party, and will not acknowledge the due execution of the will, and issue is made up, by the direction of the chancellor, of *devisavit vel non,* and sent into a court of law to be tried and determined according to the rules of the common law, upon return of the whole proceedings in favor of the will the chancellor pronounces it well proven, and orders it to be registered (3 Bl. Com., 450; 1 Vez., 286; 2 Str., 764; 2 Vez., 456, 460; 1 Vez., 274; 1 Wils., 216; 1 Bro. Ch., 99, 330); or when the facts respecting the execution of the will are admitted on both sides and the doubt concerns the law only, it is sent down by the chancellor to the judges of the King's Bench, who certify whether it be well proven or not, and thereupon the chancellor proceeds to establish the will as before mentioned, or rejects the bill. But so strictly do the courts of chancery adhere to the rule of not condemning any one unheard, that if the heir who is deprived of the inheritance by the will is not made a party to the bill for proving the will, although it be stated in the bill that he is not to be found nor anywhere to be heard of, the court of equity will not decree the will to be (169) well proven. 2 Atk., 120. The heir may afterwards appear, and shall not be bound by proofs or by a verdict founded upon proofs he could not controvert.

There is no instance in the case of wills of real estates that ever the maxim was dispensed with. As to any alerations made upon this subject by our act, 1784, ch. 15, sec. 6, directs that probate of wills of real estates, taken either before or after that act, shall be received as evi-

dence of the devises; but they are not made conclusive evidence, but only presumptive evidence of the devise, for the act also directs that the original shall be produced when there is any suggestion of fraud committed in drawing or obtaining the will, or any irregularity in the execution or attestation. And for what purpose can this be, but to enable the court and jury to decide whether the county court, though admitted the will to probate, so far as it regarded lands or real estates, had acted properly or not—and if it had not, that they might correct what was done amiss, by a verdict and judgment against the probate? Thus a probate of a will of lands, though allowed of by the acts of 1784, had this effect more than it had in the law as it was before, namely, the registry of the will of lands may now be received as evidence, where the original is lost, which perhaps before it could not be; for in the English law, if a mere will of lands and goods were admitted to probate in the spiritual court, that was no evidence of the devises contained in the will, being *coram non judice* (Salk., 552), and it might afterwards happen, upon an issue made up in chancery, that the will as to the devises might be disproved and disallowed. 3 P. W., 166; 1 Vez., 278. The act of 1784, combined with that of 1789, may also, perhaps, have this further effect, that as the Court can now make up the same issue of *devisavit vel non* that the the court of chancery could before, and have it tried by a court of law in the same manner that a verdict in favor of the will upon such an issue made up, the judgment of the Court for admitting to probate thereupon may be equally conclusive with the declaration of the chancellor that the will was well proven before the act, provided the trial be conducted and the issue made up with the same solemnities as in a court of chancery, all parties interested being parties to the issue; and that part of 1784 relating to the introduction of the original upon trial operates only upon the cases it could operate upon immediately after its passage, viz., cases of wills proved in common form, without summoning all parties interested and without the intervention of a jury, which was the usual practice before the act of 1784. However, whether such a construction may or may not fairly be put upon the two acts last mentioned, it is not very material to the present question, for the party now applying for
(170) the examination and another trial was not any party to the former issue and trial; and then whether his case is to be regulated by the rules of the court of chancery as heretofore used, or by rules drawn from the spirit of the act of 1784, he cannot be concluded by the trial already had; and, therefore, he is entitled to be heard, for a rejection of a will to the prejudice of a devisee, not a party, is not to be distinguished from the proof of a will against an heir at law not a party, as far as regards the point of being bound or not by the decision

and the inviolable maxim of not deciding against a man unheard. I am of opinion that the county court acted properly when they gave leave to Noah Ward to reintroduce for probate, and, consequently, that the will ought now to be remitted to them, to be tried upon an issue to be made up under their direction.

NOTE.—In December Term, 1805, the Court of Conference unanimously decided, *In re Stuart's Will*, from Pitt, in the suit, *Dickinson and Others v. Spier's Executors*, that a will proved in the absence of the next of kin shall at their instance be reëxamined.

NOTE.—As to the right of appeal in such cases, see *Harvey v. Smith*, 18 N. C., 186. Upon the main point of the right to a reprobate by one not a party to the former issue, is *Redmond v. Collins*, 15 N. C., 430, in which the whole subject is elaborately discussed, and it is held that if an issue be formerly made up and tried between the executor and next of kin or one of the next of kin without collusion, the verdict and judgment will be conclusive, and no person claiming personalty under or against the will can have a new issue upon an application for a reprobate. Devisees, however, are not represented by the executor and are not affected by a sentence against a will when propounded by him, unless they are parties to the proceeding. But they cannot repropound it, and demand probate of it as a will of land as well as chattels. Their remedy is by proving it in an ejectment for the devised premises, which may be done when it has been rejected on the allegation of the executor, without notice to them.

Cited: Redmond v. Collins, 15 N. C., 446, 447; *Crump v. Morgan*, 38 N. C., 99.

HILLSBOROUGH, April Term, 1802.

GOBER v. ELIZABETH GOBER.

NOTE.—See *S. c.*, reported in 1 N. C., 188, under the name of *Gobu v. Gobu*.

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CRITCHER v. PARKER.

Burden of proof in action upon racing bet.

ONE part of the racing articles is that Critcher's horse should carry 130 pounds weight. It is incumbent on him to prove that the rider was weighed; otherwise he cannot show a compliance with the terms. And for want of proof of this fact, plaintiff was nonsuited.

NOTE.—See the act of 1810 (1 Rev. Stat., ch. 51) making void all bets, etc., upon horse racing, Code, 2841, 2842; *Gooch v. Faucett*, 122 N. C., 270.

ALSTON & CO. v. CLAY.

Money in the hands of a sheriff or clerk of a court cannot be attached.

THE plaintiff had attached money of the defendant's in the hands of the clerk of the court, which came into his hands upon the return of an execution, in which the defendant in this action was plaintiff. Upon that point the cause was removed to this Court, and now came on to be argued.

Haywood for plaintiff: I know not of any decision in this State upon the subject. We must argue upon the reason of the thing, and by analogy to other cases. I have heard it said that money in the hands of a sheriff, by execution, for the defendant, cannot be attached, because he has a precept from the court commanding him to have it before them. But in other cases the money may be stopped in his hands by order of court.

Mr. Burton replied, and his argument is contained in the opinion of TAYLOR, J.

TAYLOR, J. It has been several times decided that moneys in the hands of a sheriff cannot be attached. Those decisions are analogous to the present. They were made on the ground that the judgments of courts of justice should be effectual. Were the moneys levied in pursuance of them attachable, they might be defeated; attachments would be levied on such moneys when perhaps the plaintiffs were far distant, and unable from that circumstance to resist the claims made against them; no man would be assured of the effect of his judgment.

Judgment for defendant.

NOTE.—See *Overton v. Hill*, 5 N. C., 47. But the surplus remaining in a sheriff's hands after the execution under which it was raised has been satisfied may be attached. *Orr v. McBride*, 4 N. C., 236. So of the surplus in the hands of a trustee after satisfaction of the trust debts. *Peace v. Jones*, 7 N. C., 256. Property in the hands of an administrator, which will belong to the debtor as a distributee, after settlement of the administrator's accounts, cannot be attached. *Elliott v. Newby*, 9 N. C., 21. See, also, *Gillis v. McKay*, 15 N. C., 172. An attachment cannot be levied upon property held by, or debts due to, absconding debtors as trustees for others. *Simpson v. Harry*, 18 N. C., 202.

Cited: Hunt v. Stephens, 25 N. C., 365; *Coffield v. Collins*, 26 N. C., 491.

Overruled: Gaither v. Bellew, 49 N. C., 493; *Williamson v. Negly*, 119 N. C., 341; *LeRoy v. Jacobosky*, 136 N. C., 458.

DAVIS v. WATTERS.

The plaintiff must state in his warrant the nature of his demand, so as to give notice to the defendant of what is intended to be proved against him. Hence, if the warrant demand a sum as due by account, the plaintiff cannot go for damages for breach of an agreement.

THIS action was commenced by a warrant issued by a justice of the peace. It stated the demand to be for an *account*. Davis' counsel now stated that the account had arisen thus: That a special agreement had been entered into between the parties, whereby it was agreed that defendant should repair and fit the wagon of the plaintiff for the road, the iron to be found by the plaintiff; that the plaintiff delivered to him iron accordingly, and paid him the price of the work to be done on the wagon; that the defendant did not complete what he had undertaken, but did part of it only, and used but part of the (173) iron; for the residue of which plaintiff had raised his *account*. He had also included in the account part of the sum paid being the overplus above what was answerable to the work done, also for deficiencies in the work.

TAYLOR, J., after argument: The plaintiff must state in his warrant the nature of his demand, so as to give notice to the defendant of what is intended to be proved against him; and when that is stated he should not be allowed to vary from it. The cause of action now stated is not an account, but a complaint for nonperformance of a special agreement, sounding in damages. Admitting what is contended for on the part of the plaintiff, that a demand on a special agreement, where the sum to be recovered does not exceed £20, is within the jurisdiction of a justice, it will not avail the plaintiff, for that does not prove that when he sues on account he may claim for nonperformance of a special agreement.

The plaintiff was nonsuited.

NOTE.—See *Hamilton v. Jervis*, 19 N. C., 227. A single justice has not jurisdiction where damages are sought for the breach of an executory contract. *S. v. Alexander*, 11 N. C., 182; *Tyer v. Harper*, 12 N. C., 387; *Fentress v. Worth*, 13 N. C., 229; *Adcock v. Fleming*, 19 N. C., 470.

POINDEXTER'S EXECUTORS v. GEORGE BARKER.

The printed statute book of another State may be read as evidence of the law of that state.

THE plaintiff proved the mother of the negro slave in question was entailed on Poindexter; that an execution issued against him; that the sheriff sold the mother for the life of Poindexter; that Poindexter died; and it was moved on the part of the defendant that the executors should be nonsuited; the issue in tail, and not the executors, being the persons who had the property. And of this opinion was TAYLOR, J.

Then it was moved, on the part of the plaintiff, to introduce a law of the State of Virginia, where the negroes were entailed, to show that notwithstanding the entail the property was in the executors, on the death of the tenant in tail; and the printed book of the Virginia laws was offered. It was objected to, because a better evidence would be a copy of the law, certified by the proper officer who had the custody of the original acts; and it was insisted upon that this objection corresponded with the universal practice in this State for many years past. TAYLOR, J., was of opinion that the book was receivable, saying the Constitution of the United States declares that the acts and judicial proceedings of every state should be received in all the other states. Upon this, an examination of the Constitution and of the law of Congress made in pursuance thereof was had. The law directed that acts of the Legislature should be certified under the great seal.

TAYLOR, J., said he must be bound by it, and nonsuited the plaintiff.

Mr. Norwood moved to have the nonsuit set aside, on the ground of surprise, saying he had understood ever since *Alston v. Taylor*, 2 N. C., 381, that the printed book was evidence, and it had been admitted in that case. A rule to show cause was granted; and now at this
(174) day, the cause coming on to be argued, TAYLOR, J., desired the counsel to read the case in 1 Dallas, 462, where this question had been examined in the General Court of Pennsylvania.

TAYLOR, J. If a judge gives an opinion and afterwards discovers a mistake, he should rectify it as early as possible. If a nonsuit has taken place in consequence of it, he should set it aside. I think the act of Congress was not intended to prescribe one mode only of authentication in exclusion of all others. Such as were before used in the courts of this State may be still used. It is better, therefore, to submit this case to further consideration. At the next term another judge will be

here, and the same question may be made before him as is now agitated. It seems to me the same evidence as would be sufficient, were this cause on trial in Virginia, should be received here. The argument opposed to this is that no imposition could take place in Virginia, because there the judges know what the law is, but that here a spurious book might be offered, or a law which is repealed. The answer is, should such an attempt be made, it is almost impossible but that the imposition attempted would be suspected before it could be effected, and the proceedings would be suspended till further inquiry could be made. The bare possibility of such a mischief is no way comparable to that of sending the parties to Virginia in every case to get a certified copy whenever a law of Virginia is to be produced, when at the same time the Court has every reasonable assurance that the law is contained in the printed book, it being printed by the public printer, and being a counterpart of the books used in Virginia to show their laws.

Nonsuit set aside.

NOTE.—The opinion intimated by the judge in this case has been overruled in *S. v. Twitty*, 9 N. C., 441. The act of 1823 (1 Rev. Stat., ch. 44, sec. 3) prescribes that a copy of the law of any other state, drawn off by the Secretary of our State from the copy of the laws of such other state deposited in his or the executive office, certified under his hand with the seal of our State, shall be sufficient evidence of the existence of such law. See *S. v. Jackson*, 13 N. C., 563, decided upon this act. A printed copy issued by such other state is now sufficient. Code, sec. 1338.

WALTON v. KIRBY.

A writ cannot be amended so as to convert a civil into a penal action.

IT was moved by *Mr. Cameron* to alter the *writ* thus: to insert the words "who sues for the county as well as for himself," immediately after the name of the plaintiff. He said the instructions to the person who made out the writ directed him so to frame it, which instructions were by letter.

TAYLOR, J. Such an amendment would convert a writ in a civil case to a penal action. The Court will not aid a prosecutor on a penal act.

The amendment denied.

NOTE.—See note to *Simpson v. Crawford*, 1 N. C., 55.

NASH v. TAYLOR.

On the hearing of exceptions to a report, no evidence can be received to support an exception which was not taken before the master. But upon new evidence discovered, and proper cause shown, a party may have leave to go again before the master.

THE master reported, and exceptions were taken to the report, but the exceptant omitted an exception to the sum of £26, with which
(175) the defendant, an executor, was charged, and with respect to which sum he now offered a record of the County Court of FRANKLIN to prove it had been recovered by him, and the defendant imprisoned by *ca. sa.* had broken jail.

It was insisted for the defendant that there being such plain proof of the injustice of this charge, that the Court would correct it, although this record had not been produced before the master; or, if it was the rule on this subject that evidence could not now be received to impeach this item, because not excepted to, that the Court, rather than do injustice, would adopt some mode to let the defendant into the benefit of it, either by postponing the argument of the exceptions, and giving time to go before the master as to this item, or by some other mean.

Mr. Williams, for the complainant, read a passage from Harrison which stated that no evidence could now be offered which had not been offered before the master.

TAYLOR, J. I sit here to decide according to law, and that not admitting of the evidence now offered, I cannot admit it. If you make a ground, by affidavit, for believing that you ought to have an allowance, directions may be given for exhibiting the evidence before the master; but we will, in the meantime, proceed on the argument of the exceptions.

NOTE.—See *Potts v. Trotter,* 17 N. C., 281.

WILCOX'S EXECUTORS v. MCLEAN'S EXECUTORS.

1. If an order be made *nisi,* directing cause to be shown at the next term, and no cause be then shown, it is to be considered as absolute afterwards.
2. A petition is the proper mode of proceeding to procure the reversal of an interlocutory decree in a cause yet pending.

WILCOX *v.* MCLEAN.

IN 1795 an order had been made that the complainants give security for costs, or show cause at the next term, and no cause having been shown, nor the security given, it was now moved that the cause be dismissed.

Mr. Williams opposed this motion because at the next term after this order a *scire facias* had been granted to the plaintiffs for the defendants to show cause why this suit should not be carried on by the executors of Wilcox, and no return was taken of this rule, whence it was to be inferred that the cause had been shown by them and allowed of.

TAYLOR, J. No cause having been shown at the next term, the rule became absolute, and the security must be given. A rule must now be made that the complainants shall give the security on or before the first day of next term or the cause to stand dismissed as of this term.

It was then moved for the defendants that the order formerly made for opening the accounts settled by the award complained of and stated in the bill be set aside, unless cause can be shown to the contrary at the next term, and that there be a rule made for that purpose. The ground of this motion was that the complaint against the award stated the getting to possession by Wilkerson, the testator of McLain, and the concealment by him from the arbitrators of an account current belonging to Wilcox, which charged Wilkerson with a considerable sum not allowed to Wilcox by the arbitrators, owing to such (176) concealment. It was said and read from the answer that this allegation was not true, for that these papers had been laid before the arbitrators, and as this answer had never been replied to, it was to be taken as true. Notwithstanding which, the accounts had been ordered to be opened, and a new account stated.

Mr. Williams opposed this motion, saying here was a decree that the account should be taken; and that a decree could not be reversed but by a bill of review.

The counsel for the defendant argued that no bill of review would lie but on a final decree. By the British precedents a petition against this order would be the proper form of proceeding; that had not been used in our courts; and then there was no other mode left but by motion, and as that gave to the other side equal time to prepare for the defense, and equal notice of the point to be argued, as a petition would, it was equally proper for all purposes of justice as a petition was.

TAYLOR, J. A petition is the proper course, and it has been the practice in some instances to proceed by petition. I remember a case occurred at FAYETTEVILLE some time ago where an eminent counsel was concerned, who advised that course, and it was pursued.

Motion refused.

NOTE.—See, upon the second point, *Wilcox v. Wilkerson, post*, 221; *S. c.*, 5 N. C., 11; *Ricks v. Williams*, 16 N. C., 3.

Cited: Edney v. Edney, 81 N. C., 3.

DICKENS v. ASHE, ADMINISTRATOR DE BONIS NON OF MILNER.

1. If an attorney be sued for money alleged to have been collected by him, the debtor is a competent witness to prove that he paid the amount of the debt to the attorney.
2. No submission of parties can give jurisdiction to a court; yet if a court of equity orders an account to be taken, and a report is made and exceptions thereto taken and set for argument, it is then too late to say the demand is merely legal, and to move for a dismission of the bill:

THE master reported a balance against the defendant, and exceptions were taken, and now came on to be argued. The case appeared to be this: Alston gave two notes to one Swinney, who endorsed to the plaintiff, who put them in the hands of Milner, an attorney, to bring suit on; the master received the evidence of Alston to prove that he (Alston) had paid the money to Milner. It was objected that Alston's testimony was not admissible to prove that fact; if he established the fact, then he himself was discharged; if he did not, Dickens might sue him and recover. Also, it was argued that this demand of Dickens against Milner was a demand at law, more especially if Alston was a competent witness, for he could prove by him the receipt of the money by Milner, which would maintain an action for money had and received.

TAYLOR, J. (after a lengthy argument): If I make a mistake in giving judgment, it cannot be said I have done so *without the assistance of counsel.** Much time has been consumed. The witness is competent to prove the fact he was adduced to prove. If he establishes the fact he was adduced to prove, still he may be sued by Dickens (177) for the contents of the notes; and this recovery against Milner,

*Haywood.

effected by his testimony, cannot be given in evidence for him. As to the other point, I admit that no submission of the parties can give jurisdiction to a court, and, consequently, submitting to an answer will not; yet if the Court orders an account to be taken, and a report is made and exceptions taken and set for argument, it is too late then to say that the demand is merely legal, and to move for a dismission of the bill. The cases which have been read, of dismissing a bill after answer, appear to have been where the answer has been brought on upon bill and answer. No case has been offered of a dismission after a report made in pursuance of an interlocutory decree.

Quere de hoc.

NOTE.—Upon the question of evidence, see *Blackledge v. Scales*, 5 N. C., 179; *Reid v. Powell*, 6 N. C., 53. Upon the other point, see *Hart v. Mallet, ante*, 136; *Waggoner v. Grove*, 1 N. C. See, also, *Smith v. Mallett, post*, 182, and the note thereto.

PANNELL v. MCCRAWLEY & MCCRAWLEY.

If a suggestion of death be made, and not entered by the clerk, and a *supersedeas* be obtained and a writ of error moved for, an amendment may be permitted in the suggestion of the death, *nunc pro tunc*, to avoid the error, but it must be on payment of the costs of the *supersedeas* and writ of error.

EJECTMENT. Prior to the last term counsel for plaintiff suggested the death of one of the defendants, but the clerk failed to enter it. At the last term a trial was had, and a verdict for the plaintiff. In the vacation after this term an affidavit was made that one of the defendants had died before the trial, and that no suggestion of his death had been entered of record. A *supersedeas* was obtained and notice given that a writ of error would be moved for that cause. At this term plaintiff's counsel produced an affidavit of Mr. Taylor, who acted as deputy clerk at the time the suggestion was made, stating that it had been made, and that he was directed to enter it, but delayed the entry in order to consult his principal about the form, and it was afterwards forgotten.

And upon this affidavit the plaintiff's counsel moved for, and obtained, a rule to show cause why the suggestion should not be entered *nunc pro tunc*, which, coming on to be argued, the plaintiff's counsel cited 5 Burr., 2731; Cowper, 408, and 5 Term, 577.

Mr. Norwood, for the defendant, insisted that if the amendment moved for should be granted, still the Court should order the plaintiff to pay the costs of the *supersedeas* and other proceedings preparatory to the writ of error.

TAYLOR, J. The amendment moved for is within the principle of the cases cited, and, therefore, must be allowed. I am of the opinion, however, that as the plaintiff was put to costs by this omission, the defendant should pay the costs occasioned by it.

The defendant's counsel then moved that the cause should be referred to the Court of Conference.

TAYLOR, J. It shall be carried to the Court of Conference if the counsel desire it.

(178) Upon which the plaintiff's counsel produced an affidavit stating that the defendant was in declining circumstances, and praying that he be held to give security for the costs. The judge thought this reasonable, and directed such security to be given. The defendant declined giving the same, and the cause was not removed.

MASON v. DEBOW.

In equity, if a defendant who has just come of age will show satisfactorily by affidavit or otherwise that the answer put in for him by his guardian did not make as good a defense for him as he could now make, the hearing of the cause will be postponed and the infant allowed to put in a new answer.

BILL IN EQUITY. The defendant had died, and it was stated to the Court that his heirs had been made parties by bill of revivor; that they were the infants at the time of the revivor, and had answered; that one of them had now come of age, and was desirous to make a new defense. This cause had been set for hearing some terms ago, and was now moved to be heard by the plaintiff's counsel.

TAYLOR, J. If he will show by affidavit or otherwise, satisfactorily, that the former answer did not make as good a defense for him as he can now make, the hearing shall be postponed, and he shall be at liberty to put in a new answer; but unless he shows that, the cause shall be heard.

HALIFAX, April Term, 1802.

SLADE v. GRIFFIN.

Where there is a lappage, and defendant has been in possession thereof seven years, he is protected by the statute of limitations.

MACAY, J. Admitting the plaintiff's patent covers the whole land, the defendant's title also covers a part of it, and of this part the defendant has been in possession for more than seven years. The plaintiff has been in possession all along of part of the land covered by his patent, but not in the actual possession of any part within the defendant's deed, and in such case the act of limitations is a bar to the plaintiff.

NOTE.—See the cases referred to in the note to *Boretts v. Turner, ante*, 113.

HUNTER v. PARKER'S EXECUTORS.

When by the agreement in a horse race bond and security is to be given by each party by a specified time, the failure of either to do so by such time puts it into the power of the other to declare off.

ACTION to recover money won on a race. It was proved on the part of the plaintiff that the defendant agreed to run a certain horse, to carry weight for age, to run at certain paths on a certain day; that then the plaintiff remarked something further was to be done; the plaintiff understood him, said *"I will give bond and security for the money in case you win it."* It was then agreed that they should meet the next morning and give bonds and sureties at a certain place by 10 o'clock in the forenoon: the defendant proved he met at the place with his surety before 10 o'clock and stayed till 10, and then *declared himself off* the contract, the other not having appeared by 10 o'clock. Gentlemen of the turf, and of known experience, were examined (179) whether, according to the rules of racing, the plaintiff failing to appear, ready to give bonds and sureties by the time appointed, put it in the power of the other to declare himself off. They affirmed that it did. It was proved that the plaintiff had run his horse over the ground at the paths agreed on on the day appointed for the race.

MACAY, J. The plaintiff cannot recover, owing to the circumstance of his not appearing by 10 o'clock to give the bond and surety he had agreed to give.

Verdict for the defendant.

NOTE.—The act of 1810, 1 Rev. Stat., ch. 61, now Code, secs. 2841, 2842, makes void all horse-racing contracts. *Gooch v. Faucett*, 122 N. C., 270.

WILMINGTON, May Term, 1802.

SWAIN v. BELL & BELLUNE.

1. Where there is a natural boundary called for, course will be disregarded.
2. Where there is a lappage, possession thereof for seven years, interrupted, will ripen title in the possessor.

JOHNSTON, J. The courses of the patent after arriving at Lockwood Folly are described thus: *thence up a creek within the inlet and the westwardly branch to the head; thence northeast to Elizabeth River.* Where there is a natural boundary, it must be followed; and if, as here, the next course will lead to a point whereby the land will not be included, but calls for a natural boundary, the course is to be disregarded, and the nearest course to the natural boundary must be taken. As to possession, if a smaller patent be laid on land included in a greater, and the patentee of this smaller part take possession, and that be not interrupted, though possession be taken of other parts of the larger patent, and that uninterrupted possession be continued under the smaller patent for seven years, it will give a title to the possessor.

NOTE.—As to the first point, see the cases referred to in the note to *Person v. Roundtree*, 1 N. C., 18; and as to the second, see the cases referred to in the note to *Borretts v. Turner*, *ante*, 113.

Cited: Cherry v. Slade, 7 N. C., 86.

HOSTLER'S ADMINISTRATORS v. SCULL.

1. If an executor *de son tort* sell the property and pay the debts, the rightful executor cannot disturb the purchaser; but if he dispose of the property, *not* to pay debts, it would seem that he transfers nothing by his sale.

2. Letters of administration on the estate of the rightful owner of a slave, in possession of the defendant, taken out after the defendant acquired possession, when defendant was sued by a stranger, from whose possession he took him, will not defeat the action, though it will diminish the damages.
3. When the minutes of a court do not state an administration to have been granted at a certain term, no respect shall be paid to the certificate of the clerk that an administration was granted at that term.
4. Parol evidence shall not be given to show that administration was granted at a particular term, when the record of that term appears perfect on its face.

TROVER for a negro slave.

JOHNSTON, J., after argument: This negro belonged to John Vernon, after whose death William Vernon sold to Hostler, after whose death Scull got possession; and after the commencement of this action Scull obtained letters of administration on the estate of John; William was not an executor of John, nor obtained letters of administration. And now it is insisted that the sale by William is good, because he was an *executor de son tort,* and that such an executor may dispose of the property. This is a position which cannot be maintained. Shall every vagabond who may get into the possession of a deceased man's property have power to sell it? He may sell, and the wife and children of the deceased be utterly deprived of the property and its value. If an executor of his own wrong take property and pay debts with (180) it, the rightful executor shall not disturb the purchaser, because could he recover, the property must be disposed of to pay the debt. These letters of administration obtained by the defendant after issue joined in this action cannot be evidence for him in this place otherwise than to lessen the *quantum* of damages. The plaintiff will be entitled to recover but just damages enough to carry the costs.

Verdict for 5s. and judgment.

NOTE.—In this case, in order to prove that William Vernon was authorized to sell the negroes in question to Hostler, plaintiff's counsel offered in evidence a paper-writing attested by the clerk of the court, and purporting that William Vernon was appointed administrator or *ad colligendum,* mentioning the term. Defendant's counsel produced a copy of the minutes of that term, which had been left by the attesting clerk amongst the court records, that made no mention of any letters having been granted that term.

PER CURIAM. This shall be taken as a complete record of that term, having been filed amongst the court papers as a record. What is offered is no record, and cannot be received to add to the record produced.

Plaintiff's counsel then proved by respectable witnesses that in that term an administration was really granted to William, and that he gave bond and surety for his administration: and from hence counsel inferred and insisted that some part of the record was lost, or that the copy produced was not a true copy; and that the record being lost, its contents may be proven by the testimony offered and the paper-writing attested by the clerk.

PER CURIAM. If there were such a record, and it has been lost, the contents may be proved; but here is a complete record disproving the position that any other ever existed; and you cannot prove against it that the record you speak of ever did exist.

NOTE.—The plaintiff had a verdict in this case, though it appeared that a better title was in a third person when the action was commenced. TAYLOR, J., had on a former trial of this case decided otherwise. See 1 N. C., and *Laspeyre v. McFarland*, 4 N. C., 620, is to the same effect. But see note to *Hughs v. Giles*, 2 N. C.

As to the question of evidence to supply the omission or defect in the record, see *Harget v.* ———, *ante*, 76, and the cases there referred to in the note.

Cited: Barwick v. Barwick, 33 N. C., 82.

RICHARD QUINCE'S ADMINISTRATORS v. ANN ROSS'S ADMINISTRATORS.

Twenty years raises a presumption of the payment of a bond, but if any circumstances can be offered to account for the delay, these may hinder the presumption.

JOHNSTON, J. This bond was given in 1764, payable in December, 1764; in 1777 the obligor died; letters of administration issued in 1778, in the month of January; in 1794 the administrator died, and in 1798 new letters were issued to the present defendant. The rule is that after twenty years acquiescence presumption of payment shall arise, but if any circumstances can be offered to account for the delay, these shall hinder the presumption. Now here from 1773 to the first of June, 1784,

(181) the courts were shut up and the war intervened: after 1784 to 1794, when there was an administrator, is but ten years, and from

December, 1764, to 10 March, 1773, is but six years—added together, 16. After 1794 till the commencement of this action suit could not be brought, because there was no person to be sued, which sufficiently accounts for the delay. So that there is not twenty years of computable time from the period when this bond was payable to the commencement of this action, and the presumption will not arise.

Verdict for plaintiff.

NOTE.—See *S. c.*, 1 N. C., 185; *Ridley v. Thorpe, post*, 343; *Matthews v.* Smith, 19 N. C., 287; *McKinder v. Littlejohn*, 23 N. C., 66; *Wood v. Dean, ib.*, 230.

Cited: Tucker v. Baker, 94 N. C., 165; *Long v. Clegg, id.*, 767.

EAGLES v. EAGLES.

If a jury, in laying off dower, give the widow too much, the heirs may show this to the court by affidavit, and upon a rule made for that purpose the court will inquire into and set aside the verdict, if justice require it. If too little be assigned, the widow may show it by affidavit, and the same course will be pursued. Counter-affidavits may be filed by either party.

JOHNSTON, J., after argument: If a jury in laying off a widow's dower gives her too much, the heirs may show this by affidavit to the court, and the court, upon a rule made for the purpose, will inquire into it, and set aside the verdict if justice require it. It is true, a return of the writ commanding the dower to be laid off is not expressly directed by the act of 1784, ch. 22, sec. 9, but it is implied that it shall be returned and filed. How else is the extent of the dower lands to be known, or the court to be satisfied that it has been laid off? On the other hand, if the jury lay off too little for the widow, she may disclose it to the court by affidavit, and the court will make a rule, and have it inquired into, and set aside the allotment if there be cause for it. The proper way now is for the widow to contradict the affidavits filed against her, by other affidavits.

Cited: Stiner v. Cawthorn, 20 N. C., 644.

WALKER v. ASHE.

Examination of witness by the court upon a bill in equity.

THIS was a bill in equity, and counsel on both sides agreed to leave to the Court the whole cause, and not to impanel a jury as to the contested facts. In the course of the hearing, Walker's counsel offered a witness to be examined.

JOHNSTON, J. He may be examined on an issue tried by a jury, but in no other case.

NOTE.—See *contra*, *Mourning v. Davis*, *post*, 219. But see 1 Rev. Stat., ch. 32, sec. 4, and *Taylor v. Cawthorne*, 17 N. C., 221.

WHITMORE v. CARR.

A nonresident can sue in the courts of this State.

JOHNSTON, J. If a known agent, residing here, of a person residing abroad, sue a man here in the name of his principal, it is well; or if he sue in consequence of a letter written to him, it is well, also. Therefore, Carr cannot be discharged from arrest; it is legal, and the *habeas corpus* must be denied.

NOTE.—See *Fitzpatrick v. Neal*, *ante*, 8, and the note thereto.

ROBINSON'S EXECUTORS v. KENON'S EXECUTORS.

Contribution must be sought by a suit in equity. An action at law will not lie for it.

JOHNSTON, J. This is an action by one surety against another to recover a proportion of the moneys paid for the principal. There is no case to support such an action. That such an action is not
(182) supportable was lately decided at Hillsborough. The plaintiff must resort to equity for a contribution or reimbursement.

Quere de hoc. Et vide 2 Bos. & P., 368 to 274.

NOTE.—See *Carrington v. Carson*, 1 N. C., 410. But now, by the act of 1807 (1 Rev. Stat., ch. 113, sec. 2), one surety may have an action at law against his cosurety.

GILBERT v. MURDOCK.

If a slave be given by deed to A., his executors, etc., forever: *Provided*, that if he die under 18 or without issue, then to the plaintiff, the absolute interest will vest in A. and the limitation be void.

JOHNSTON, J. Plaintiff claims under a deed transferring a negro slave to A., his executors, administrators, and assigns, forever: *Provided*, that if A. died under 18 or without issue, then to the plaintiff. A. died under 18. The absolute property vested in A., and the after limitation is void. Had he given for the life of A. and made a limitation over, it would seem as if there was something left to be disposed of after the life of A. Here that is impossible; there cannot be a limitation by deed of the remainder of a personal chattel. The case of *Tims v. Potter* was the limitation of a trust in remainder, and that is good.

NOTE.—See the note to *Tims v. Potter*, 1 N. C., 12.

Cited: Morrow v. Williams, 14 N. C., 264.

CUTLAR & HAY v. BROWN'S EXECUTORS.

An action for abduction of a slave will lie against the personal representatives of deceased.

JOHNSTON, J. An action upon the case for seducing away the plaintiff's slave from his service will lie against executors for the same reason that trover and conversion will lie.

Vide C. Digest, Administrator b., 15. Off. Exrs., 127, 128; Cowp., 375; Toller on Administration, 360, 361.

Judgment for plaintiff.

QUINCE v. QUINCE.

An insufficient report of referee will be rereferred.

JOHNSTON, J. The report ought to state everything the reference directs. Here it has not stated the several periods when the money was received, but only that it was received between such a day and such another day.

Let it be referred again to make that statement.

NOTE.—See *Burroughs v. McNeill*, 22 N. C., 297.

SMITH AND OTHERS v. MALLETT.

After a reference to state an account, the court will not pass upon a plea in bar till the report comes in.

JOHNSTON, J. The bill is brought for an account, and the answer states facts from whence it is inferred, and perhaps properly, that defendant is not liable to account. There has been, however, a former order to refer to the master to take account, and I will not alter that; for should such a practice be adopted, a latter court would always be examining the propriety of what a former court had done. When the report shall be made, and the cause shall come to a hearing, the court will not decree him to pay if they shall deem him not liable to account.

NOTE.—See *S. c., ante*, 156. But see *Dickens v. Ashe, ante*, 176, and *McLin v. McNamara*, 21 N. C., 407.

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SMITH v. MURPHEY.

Where a course and distance is called for, and also a line of another tract, the distance is to be disregarded, if the line called for can be found; otherwise if such line cannot be found.

TRESPASS. *Quare clausam fregit* and *liberum tenementum* pleaded. Defendant produced in evidence two deeds. The third course of the latter deed called for 42 *poles to a corner standing on the other tract.* Forty-two poles were completed before arriving at the first tract. If the last line of the second tract should be drawn from the point where the 42 poles were completed, the land which plaintiff had obtained a grant for was not within any of defendant's deeds; but if the line be extended beyond the 42 poles to an intersection with the lines of the other tract, then the land claimed by plaintiff was covered by defendant's second deed.

TAYLOR, J. Where a course and distance is called for, and also a line of another tract, the distance is to be disregarded if the line called for can be found; if it cannot, you must stop at the end of the distance.

Verdict for defendant.

NOTE.—See the note to *Bradford v. Hill*, 2 N. C., 22, and, in addition to the cases there referred to, see *Sasser v. Herring*, 14 N. C., 340; *Carson v. Burnett*, 18 N. C., 546; *Flannigan v. Lee*, 19 N. C., 427; *Hough v. Dumas*, 20 N. C., 328.

Cited: Cherry v. Slade, 7 N. C., 90.

JOHN COOR PENDER v. COOR.

NOTE.—See *S. c.*, reported in 1 N. C., 228.

Cited: McPhaul v. Gilchrist, 29 N. C., 173.

SARAH NEALE'S ADMINISTRATORS v. HADDOCK.

Slaves, to whom the wife has a right in remainder, do not vest in the husband so as to entitle his executor to claim them, in the event of his dying during the coverture before they come into possession, but they survive to the wife.

DETINUE for a negro. Old Mr. Taylor, by deed of gift, gave the negro to his daughter Sarah, reserving the use to himself and his wife, and the survivor. Sarah married Neale. He died, leaving a son, who married and died, leaving a wife and child; the child died. Old Mr. Taylor is dead, and his wife also. Upon this evidence— (184)

Harris insisted that plaintiff had a right to recover.

Haywood, for defendant, insisted that Sarah, were she alive, would not be entitled to recover, and of course her administrator could not.

TAYLOR, J. It is perfectly well settled that the husband is not entitled to the remainder of a chattel belonging to the wife at the time of the intermarriage. (186)

Verdict for plaintiff.

Quere de hoc.

NOTE.—See the note to *Lewis v. Hines,* 2 N. C., 278, and, in addition to the cases there cited, see *Johnston v. Pasteur,* 1 N. C., 582; *Norfleet v. Harris, ibid.,* 517; *Walker v. Mebane,* 5 N. C., 41; *Knight v. Leak,* 19 N. C., 133; *Revel v. Revel,* 19 N. C., 272; *Hardie v. Cotton,* 36 N. C., 61; *Poindexter v. Blackburn, ibid.,* 286.

Cited: Weeks v. Weeks, 40 N. C., 120 (but under erroneous title of *Blount v. Haddock).*

SHEPPARD'S ADMINISTRATORS v. EDWARDS.

1. A demand is not essential in all cases to sustain the action of detinue.
2. To support detinue, plaintiff must have the right of possession at the time of the trial as well as at the time of the action brought.

DETINUE.

TAYLOR, J. A demand is not necessary to precede the action of detinue, and need not be proved on the trial. As to one of the negroes sued for, he was sold by direction of the plaintiffs and by the marshal after the institution of this action to satisfy an execution against the estate of Sheppard. It is no answer to say he was in the defendant's possession at the time of the action. There should be at this time a right of possession in the plaintiff; otherwise, he ought to recover.

Verdict for defendant.

NOTE.—As to necessity of a demand to support detinue, see *Anonymous*, *ante*, 136, and the cases referred to in the note.

Cited: Morgan v. Cone, 18 N. C., 238.

MOYE AND OTHERS v. ———

1. A remainder in slaves belonging to a wife will not belong to the husband's representatives, if he die before his wife during the continuance of the particular estate.
2. Where the remainder in slaves belongs to two or more *femes*, the acquisition of the life estate by the husband of one of them will not cause a merger so as to give him his wife's share in remainder.
3. One tenant in common cannot sue another in trover.

DETINUE for a negro. A. devised to B. several negroes for his life, and after his death to his (B.'s) daughters. One of the daughters married, and B. sent the negro in question to live with her. His other daughters also married, and he sent some of the negroes to live (187) with each. The husband of the daughter first married died; then B. died, and a division took place under the will, leaving out the negro in question.

TAYLOR, J. All the daughters were entitled in common to the remainder of this negro. B. could only pass *his* interest for life to his

son-in-law, not that of his daughter. Neither could there be any merger; for the estate in remainder was not correspondent to the estate for life, this latter belonging to the son-in-law, the former to *all* the daughters. Neither did his wife's share in the remainder vest in the son-in-law who died; for a husband is not entitled to the remainder of his wife. Had there been a drowning of the life estate, the husband of the deceased daughter would have been entitled to her share, and the person claiming under him tenant in common with the plaintiff, and could not have been sued by them in this action.

NOTE.—On the first point, see the references in the note to *Neale v. Haddock*, *ante*, 183.

On the last point, see *Campbell v. Campbell*, 6 N. C., 65—unless the joint property is destroyed, and the disposition of a perishable article by one joint tenant, which prevents the other from recovering it, is equivalent to its destruction. *Lucas v. Wasson*, 14 N. C., 398.

Cited: Grim v. Wicker, 80 N. C., 344.

JOHNSTON AND WIFE v. PASTEUR.

NOTE.—See *S. c.*, *post*, 230 and 306—more fully reported in 1 N. C., 582.

SPEIGHT v. WADE'S HEIRS, DEVISEES AND TERRETENANT.

NOTE.—See *S. c.*, 6 N. C., 295.

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MILLER v. ————.

NOTE.—See *S. c.*, reported in 1 N. C., under the name of *Miller v. Ireland*, 222.

LANE v. BROWN.

1. On dissolution of injunction, upon sufficient affidavit, the money may be retained in the office.
2. Prolix affidavits much censured.

TAYLOR, J. Upon the dissolution of an injunction, it is of course to retain the money in the office, if affidavit be made stating circumstances

which render it doubtful whether the same may be recovered out of the estate of the defendant, should the decree be against him, unless he will give security for its forthcoming on such an event.

Accordingly, in this case an affidavit was made to that effect; and TAYLOR, J., after very many censures upon the drawer of the affidavit, for its prolixity, ordered the money to be retained until security given.

NOTE.—See *Clark v. Wells*, 6 N. C., 3.

PASTEUR v. JONES AND ELLIS'S ADMINISTRATOR.

NOTE.—See *S. c.*, as reported in 1 N. C., 393.

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KEAIS v. SHEPPARD'S HEIRS.

1. To an action against an heir on the simple contract of his ancestor, he may plead that the executor has assets.
2. Where there is a demurrer to a plea, the court, though about to overrule it, may permit it to be withdrawn and a replication entered.

CASE upon a note. Plea, that the administrators have assets; demurrer and joinder. In support of the plea was cited 2 Re. Com., 340.

TAYLOR, J. The plea is good, and the demurrer must be overruled; but you may, if you please, withdraw the demurrer and reply.

Which was done accordingly.

Quere of that part of the decision which holds the plea good. The heir, ever since 32 Geo. II., ch. 7, may be sued upon a note or open account as well as upon a specialty; and he can no more turn the plaintiff around by a plea of assets in the executor's hands than he could if sued for a specialty debt before that act. The words of that act are, "The houses, lands, and other hereditaments and real estates, situate, etc., shall be liable to and chargeable with all just debts, duties, and demands, of what nature or kind soever, owing by any such person to his majesty or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty," etc. As to applying the personal estate first, there never was such a rule at law, for there the creditor was allowed to sue which of them he please first; I mean the executor or heir. 2 Atk., 426.

GLASGOW v. HAMILTON.

A complainant may be relieved as to the grounds of his complaint, and yet be taxed with the costs.

Plaintiff stated that he was distressed in mind, and whilst in that situation Hamilton's agent presented him with an estimate of an old debt, which he signed, and upon which Hamilton sued him and obtained execution, and that Hamilton had charged a large sum for interest which should not have been charged, and omitted to give credit for a considerable sum he had received.

The cause came on to be heard on bill and answer, and the Court relieved the plaintiff as to both parts of his complaint, but took time to consider as to costs; and on the last day of the Court ordered the plaintiff to pay them, saying Hamilton ought not to pay for the plaintiff's *perturbations,* though counsel for plaintiff insisted vehemently that Hamilton ought to pay for his *injustice* in not giving credit, and for persevering in a demand of interest which he was not entitled to.

NOTE.—Surely, costs ought to be laid upon him who does injustice, rather than upon him whose fault is that he has not been enough suspicious; in other words, upon guilt rather than simplicity.

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MOURNING v. DAVIS.

Upon the hearing of an equity suit, without a jury, a witness may be sworn and examined.

THIS cause came on to be heard, on bill, answer, and depositions, without a jury, which was dispensed with by consent.

Haywood, for complainant, offered the evidence of a witness then present, and prayed that he might be sworn; this was objected to, and it was said that JOHNSTON, J., at last Wilmington court, would not receive such testimony offered by *Haywood,* in *Walker v. Ashe, ante,* 181. It was answered, it was true JOHNSTON, J., would not receive it, nor recognize the practice as stated by the counsel offering it, which was that a witness may be summoned to give testimony in equity as well as at law; but that the party summoning him must pay the costs of his attendance. It is equally true, however, that in *Blount v. Stanley,* in this Court, a witness was offered and objected to by *Haywood,* and that JOHNSTON, J., did receive him, and founded his decree upon that testimony.

TAYLOR, J. I will not alter the practice, and the witness must be sworn; but I can perceive that cases may happen where its reception will be attended with inconvenience, as where a witness is produced to swear to a material fact which had not been sworn to before, the other party is taken by surprise; and perhaps had he been apprised in time, he would have disproved it, or discredited the witness.

The evidence was received, and a decree founded upon it.

NOTE.—See *contra*, *Walker v. Ashe*, *ante*, 181, and the note thereto.

HILLSBOROUGH, October Term, 1802.

YOUNG, MILLER & CO. v. FARREL, ADMINISTRATOR OF JORDAN.

The act of 1715, barring claims against deceased persons' estates, was not repealed by the act of 1789.

DEBT on a bond; and amongst other things, defendant pleaded fully administered and the act of 1715. Replication and issue.

Plaintiff proved on the first plea that after the debt was contracted, Jordan gave negroes to his daughter, married to Farrel, and that Farrel sold them before his death; and as to the second plea, plaintiffs' counsel insisted that the act was not in force, or, if it was, that it did not run on until plaintiffs had it in their power to sue, which in fact they had not till 1796, for in that year was the first recovery effected by persons who, like them, had been attached to the British nation during the late war.

E contra it was said that the replication here entered, without the word "special" preceding it, was to be taken, according to the practice of our courts, as a general replication, denying the truth of the plea under the act of 1715, and that no evidence could be given of any
(220) special fact to avoid the act, such as disability to sue, etc.

HALL, J. As to the evidence, in the first place, it cannot be regarded by the jury; they have nothing to do with it. And as to the replication, the act of 1715 is in force. The jury are to say whether the act bars plaintiffs' claim.

From this charge the reporter inferred the opinion of his Honor to be that the replication thus entered was to be considered as a general one, denying the matter of the plea, and not as introducing any new matter by way of avoidance.

NOTE.—See *Dry v. Roper*, 1 N. C., 484, but a different decision was made by the Circuit Court of the United States in *Ogden v. Witherspoon*, *post*, 227. By the act of 1799, the act of 1715 was declared to be in force, so that whether it were or were not repealed by the act of 1789, it is now in full force. 1 Rev. Stat., ch. 65, sec. 11.

WILLIAMS v. WILLIAMS.

An answer may be amended on motion.

Haywood moved for leave to amend the answer, and insisted it was agreeable to the practice, and had been done in many instances.

HALL, J., took time to advise; and the cause of *Wilcox's Executors v. McLaine* coming on in the meantime, in which was read an amended answer, he said, at another day the answer may be amended.

NOTE.—See *Barnes v. Hill*, *post*, 236; *Anonymous*, *post*, 352; *Benzien v. Lovelace*, 1 N. C.; *Arendell v. Blackwell*, 16 N. C., 354; *Tomlinson v. Savage*, 22 N. C., 68.

Cited: Graham v. Skinner, 57 N. C., 99.

HINES v. PEYTON WOOD.

Motion to set aside verdict.

THIS was a special verdict which had been found about five years ago, and had been twice argued; and now it was moved, upon affidavits, that the Court would grant a rule to show cause why it should not be set aside. This was strenuously opposed, on the ground that motions for new trials should be made within the term when the verdicts were given.

HALL, J. Let the motion be granted, and a rule made, returnable to next term.

DOE ON THE DEM. OF PILKINGTON & BROWN v. LUTTERLOH.

NOTE.—See *S. c.*, reported in 1 N. C., 556, under the name of *Brown v. Lutterloh*.

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HANK'S ADMINISTRATORS v. HANK'S EXECUTORS.

Proof of set-off.

SET-OFF pleaded. And now, on trial defendant produced an account, and a witness who swore the account had been shown to the plaintiff, who said, "If the witness and defendant will prove it, I will allow it." And further, the witness said that they afterwards swore to it before a justice of the peace.

HALL, J. This evidence is sufficient to establish the set-off.
Verdict for defendants.

Vide 1 C. D., Action, B. 4; 3 Lev., 241; 1 Leon., 94.

WILCOX'S EXECUTORS v. WILKERSON'S EXECUTORS.

Security for costs of motion.

THERE had been a decree to account, and a petition filed by the defendant to set it aside; and *Mr. Williams* moved that the petitioners be required to give security for costs.

HALL, J. The petitioner must give security to the extent of the costs occasioned by the petition.
And he gave security accordingly.

NOTE.—See *Wilcox v. McLain, ante,* 175, and the cases referred to in the note.

WADE v. EDWARDS.

NOTE.—See *S. c.*, reported in 1 N. C., 549.

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HALIFAX, October Term, 1802.

VICK v. WHITFIELD.

In an action of slander, the defendant may, under the pleas of the general issue and justification, prove the defendant's character to be a bad one in mitigation of damages, but shall not be allowed to prove any particular act.

BOWDEN *v.* EVANS.

THIS was an action for words; and the defendant pleaded the general issue and justification.

JOHNSTON, J. The defendant may give in evidence that the plaintiff's character is a bad one, in mitigation of damages; but he shall not be allowed to prove any particular act.

Evidence of reputation was given accordingly, and the jury found for the plaintiff, but gave only sixpence damages, owing, as I suppose, to the evidence aforesaid.

NOTE.—See *Nelson v. Evans*, 12 N. C., 9.

Cited: Goodbread v. Ledbetter, 18 N. C., 13.

DEN ON THE DEM. OF BOWDEN AND WIFE v. EVANS.

1. If ejectment be brought for a certain fraction of a tract of land, a lesser fraction may be recovered.
2. It is sufficient evidence of the death of a party that he has been absent seven or eight years, and has not been heard of in that time.

PLAINTIFF claimed one undivided ninth part of the tract of land in question, and proved title to one-eighteenth part only.

Baker, for defendant, objected that he cannot recover a part only of that which he has claimed in his declaration; and relied upon *Young v. Drew, S. c.,* 1 N. C., 162. MOORE, J., *ante,* 100.

JOHNSTON, J. If he is entitled to any part, he shall recover it; and the defendant must be found not guilty for the residue which he claims and has no title to.

It is sufficient evidence of the death of the ancestor of the lessor of the plaintiff that he has been absent seven or eight years, and has not been heard of in that time.

Verdict and judgment accordingly.

NOTE.—On the first point, see *Squires v. Riggs, ante,* 150, and the note thereto, and on the other point, see *Anonymous, ante,* 134; *Lewis v. Mobley,* 20 N. C., 323.

ALSTON, YOUNG & CO. v. RICHARD WARD'S EXECUTORS.

NOTE.—In the report of this case no opinion of the Court is given or intimated, and it is on that account omitted.

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BLOSS v. ———.

Where lands belong to the wife, and the husband sells in fee, the possession of the purchaser is not adverse until after the husband's death.

EJECTMENT.

JOHNSTON, J. Seven years possession without color of title will bar plaintiff's right to an ejectment; but if the wife be entitled, and the husband sell in fee, the purchaser is in under the wife's title, and has not a possession adverse to hers till the death of her husband; then it is adverse. But seven years have not elapsed, in the present case, since the death of the husband; therefore, the plaintiff may recover.

Verdict and judgment accordingly.

Quere as to the seven years naked possession being a bar to the plaintiff; for it is not law, as the Court of Conference has since decided.

NOTE.—Upon the intimation of the judge as to the effect of possession without color of title, see the cases referred to in the note to *Strudwick v. Shaw*, 2 N. C., 5, and 1 N. C., 34.

YOUNG, MILLER & CO. v. PERSON'S ADMINISTRATORS.

The assignee of a non-negotiable bond may sue in equity as well as at law.

JOHNSTON, J. The assignee of a bond not negotiable may sue in a court of equity if he pleases, and is not obliged to sue at law; but he must allege that the *assignment* was for *value*.

HUNTER, ASSIGNEE, ETC., v. HILL.

Bail must be proceeded against by *sci. fa.* and not by action of debt.

THIS was an action of debt against Hill, as bail of Ashe. Plea in abatement, that he should have been prosecuted by *sci. fa.* and not by an action of debt. Demurrer and joinder.

JOHNSTON, J. The act directs a *sci. fa.*, and it must be followed—meaning the act of 1777, ch. 2, sec. 18.

Judgment for defendant.

NOTE.—See 1 Rev. Stat., ch. 10; *Swepson v. Whitaker*, 2 N. C., 224; *Governor v. Jones*, 9 N. C., 359; *Barker v. Munroe*, 15 N. C., 412; *Tray v. Williamson*, 18 N. C., 252.

Cited: Summers v. Parker, 4 N. C., 581, 583.

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FALKNER v. PERKINS.

Not taking possession of goods only evidence of fraud.

JOHNSTON, J. The not taking possessoin immediately of goods conveyed by a bill of sale is not of itself a fraud, but evidence only of fraud, and may be accounted for by evidence; and if satisfactorily accounted for, the vendee shall recover.

NOTE.—See *Ingles v. Donalson, ante*, 57, and the cases referred to upon the second point in the note to that case.

HAMILTON v. BULLOCK.

A new trial may be granted to the same party a second time.

JOHNSTON, J. The plaintiff moves for a new trial, and it is objected to him that a new trial has been before granted, and that there cannot be a new trial after a new trial. I am of opinion there may be, and the court ought to grant a new trial where it is evident the second verdict is against law.

So a new trial was granted the second time. 4 Burrow, 2108, was the case cited in confirmation of the judge's opinion.

NOTE.—See *Murphy v. Guion, ante*, 162, and the cases referred to on the second point in the note thereto.

DAVIS v. DUKE.

1. Every person, who is an heir by the law of the country is entitled to the benefit of the exception in the act of distributions of 1766 (1 Rev. Code, ch. 79), and is not obliged to account for the lands settled on him by his parent, in a distribution of the personal estate.

2. If the administrator purchase at the sale of the intestate for the widow, he shall deduct the amount from her distributive share, although she has transferred half to a third person before the sale.

THIS was a petition for a part of the distributive share of Mary Duke, widow of the deceased, she having conveyed one-half to plaintiff. Defendant was administrator of the deceased husband. A reference had been made to several persons to state the amount of the estate and the credits to which the administrator was entitled, so as to ascertain the share of each distributee. They had charged the administrator, who was the only son of the deceased, who had died prior to 1795, but after 1784, with the value of a tract of land, purchased and paid for by the father, but conveyed, by his direction, immediately from the seller to defendant. They supposed this was an advancement for which he ought to account to the other distributees.

Defendant's counsel excepted to this charge, because he, being an heir at law, was, under the act of distributions, not obliged to account for it.

Counsel for plaintiff *e contra.*

JOHNSTON, J. What is meant by heir at the common law, in the case cited, is heir by the general law of the country, and not by the special laws of a particular place. The act of distributions is not repealed, and every person who is heir is entitled to the benefit of it, and is not obliged to account for the lands settled on him by his parents. Therefore, allow the exception. As to the exception which states that the defendant purchased for the widow effects at the sale of the deceased, she is a debtor to him for the amount, and he has a right to deduct that amount from her share, although the conveyance to plaintiff of half her share preceded the purchase.

WARD'S EXECUTORS v. WARD.

Where a grantor, after signing a deed, left it on the table, where it remained all night, and the next morning took it up and put it away, *it was held* that this was not a delivery.

BILL to compel defendant to deliver up a paper, purporting to be a deed given by their testator, the father of defendant, to him for lands, directed by his will to be sold by his executors, for that the said paper was not the deed of the father. The testimony rendered it very probable that the father had signed the deed, but the proof of delivery which was

offered was that, after signing it, he left it on the table, where it remained all night, and in the morning was taken up and put away by the father.

JOHNSTON, J. The cases cited to prove this a delivery do not come up to what is wished. This is not a delivery in law, and I believe, from the circumstances, was not so intended by the father. He knew a deed without delivery was not effectual; but his children, who were dissatisfied at the prospect of his marrying again, did not know it, and the old man adopted this mode of procuring his peace.

Decree according to the prayer of the bill.

NOTE.—See *Kirk v. Turner*, 16 N. C., 14; *Vanhook v. Barnett*, 15 N. C., 268; *Tate v. Tate*, 21 N. C., 22; *Moore v. Collins*, 15 N. C., 384; *Gibson v. Partee*, 19 N. C., 530; *Clayton v. Liverman*, 20 N. C., 238; *Waddell v. Hewitt*, 36 N. C., 475.

U. S. CIRCUIT COURT, December, 1802.

SANDERS v. HAMILTON.

NOTE.—See *S. c., post*, 282.

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OGDEN, ADMINISTRATOR OF CORNELL, v. WITHERSPOON, ADMINISTRATOR OF NASH.

1. If a latter statute be inconsistent with a former one, it repeals the former; if it be reconcilable with the former, but legislates upon the same subjects as the former does, and repeals all other laws within its purview, the former is repealed.

2. The Legislature, by an act passed in 1799, declared that a law passed in 1715 *has continued* and shall continue in force. It was a question, at the time of the passage of the act of 1799, whether the act of 1715 was not repealed by a law passed in 1789: *Held*, that the determination of this question belonged to the judiciary and not to the Legislature; and that, therefore, the act of 1799, so far as it regards this question, contravenes the 4th section of the Bill of Rights, and is void.

3. The act of 1715, limiting the time for the demand of claims against the estates of deceased persons, was repealed by the act of 1789 on the same subject.

Defendant pleaded the act of 1715, ch. 48, sec. 9: "Creditors of any person deceased shall make their claim within seven years after the death of such debtor; otherwise, such creditor shall be forever barred." Divers other actions were in court pending upon the same pleadings, and the Court appointed a day for the argument respecting the validity and effect of the plea. On the day appointed an argument was had, and the Court took time to advise; and some days afterwards delivered their opinions, in substance as follows:

POTTER, J. The act of 1789 is consistent with that of 1715, for it establishes a shorter limitation than the act of 1715, and upon different terms. The act of 1789, ch. 23, sec. 4 enacts: "That the creditors of any person or persons deceased, if he or they reside within this State, shall within two years, and if they reside without the limits of this State, shall within three years from the qualification of the executors or administrators exhibit and make demand of their respective accounts, debts and claims, of every kind whatever, to such executors or administrators; and if any creditor or creditors shall hereafter fail to demand and bring suit for the recovery of his, her, or their debt as above specified, within the aforesaid time limited, he, she, or they shall forver be barred from the recovery of his, her, or their debt in any court of law or equity, or before any justice of the peace within this State." Section 5 directs: "advertisements within two months after qualification," etc. The act of 1715, however, was in force till the act of 1789; but clearly its operation was suspended by section 101 of the act of 1777, ch. 2, commonly called the court law, and by other acts passed after the beginning of the war, disabling British subjects to sue in our courts. These disabilities continued till the treaty of peace was enforced in this State by the act of 1787, which declares it to be a part of the law of the land. The act of 1799, declaring the act of 1715 not to have been repealed, and to have continued in force, has not the effect of making that act to have been in force after it was repealed, till reënacted.

MARSHALL, C. J. In the act of 1789 there is this clause: "That all laws and parts of law that come within the meaning and purview of this act are hereby declared void and of no effect." There are two (228) rules for determining what act shall be deemed to be repealed by a later one. If the latter be inconsistent with the former, it repeals the former. If it be reconcilable with the former, but legislates upon the same subjects as the former does, and repeals all other laws within its purview, the former is repealed. Then, what is the subject of section 9 of the act of 1715? The estates of all dead men, and all creditors upon them, and a limitation of the time for the exhibition of such claims. What is the subject of the latter act? Precisely the same

estates and persons, and a limitation of the time for bringing forward their claims. There is a legislation in both acts upon the same cases. The repealing clause, then, extends to the section in question. The act of 1715 prescribes a limitation, without an exception of persons; the act of 1789 excepts persons under disabilities, such a *femes covert* and the like. If the act of 1715 be in force, persons under disabilities will be excepted until the expiration of seven years, and not afterwards; for at that period all persons will be barred by the act of 1715, if it stand with the act of 1789. But why should the Legislature design a permission for persons under disabilities to sue after the time prescribed in the act of 1789 for other persons, and until the completion of the seven years fixed by the act of 1715, and not afterwards? The same reason which continued the exception till the expiration of seven years will still operate to continue it longer. If the exceptions are to last, as mentioned by the act of 1789, until the disabilities be removed, then the act of 1715 must be repealed. The act of 1799 declares that the act of 1715 hath continued, and shall continue, to be in force. I will not say at this time that a retrospective law may not be made; but if its retrospective view be not clearly expressed, construction ought not to aid it. That, however, is not the objection to this act. The Bill of Rights of this State, which is declared to be a part of the Constitution, says in section 4: "That the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other." The separation in these powers has been deemed by the people of almost all the states as essential to liberty. And the question here is, Does it belong to the judiciary to decide upon laws when made, and the extent and operation of them, or to the Legislature? If it belongs to the judiciary, then the matter decided by this act, namely, whether the act of 1789 be a repeal of section 9 of 1715, is a judicial matter and not a legislative one. The determination is made by a branch of government not authorized by the Constitution to make it, and is, therefore, in my judgment, void. It seems, also, to be void for another reason: Section 10 of the first article of the Federal Constitution prohibits the states to pass any law impairing the obligation of contracts. Now, will it not impair this obligation if a contract which, at the time of passing the act of 1789, might be recovered on by the creditor, shall by the operation of the act (229) of 1799 be entirely deprived of his remedy?

Upon the point of suspension of the act of 1715, prior to its repeal by the act of 1789, I am of opinion with my brother judge, and for the reasons by him given, that it was suspended, and continued so till the act of 1787 declaring the treaty of 1783 to be a part of the law of the land, for it was not settled till the making of the Federal Constitution that treaties should *ipso facto* become a part of the laws of every state, with-

out any act of the State Legislature to make them so. It has been argued that by an act passed in 1791 all acts and parts of acts retained in the compilation of Mr. Iredell, and not by him declared to be repealed or obsolete or not in force, shall be held to be in force; and that section 9 of the act of 1715 being retained therein, and having no such declaration attached to it, is therefore in force. The whole of 1789 is also retained, and the repealing clause, as well as the other parts of the act; and if the repealing clause be in force, as no doubt it is, it had the same effect in 1791 as in 1788 and 1789, and continued to keep section 9 of the act of 1715 repealed until the passing of the act of 1799.

This cause was removed to the Supreme Court by a writ of error, where it was also decided that the act of 1715 had not been repealed by the act of 1789.

NOTE.—The reporter was of the same opinion in 1799, when he published the manual, and placed the act of 1715, as taking effect in 1799; but TAYLOR, J., and some of the other judges of the Court of Conference, were of a different opinion, and held the act of 1715 not to have been repealed by that of 1789.

NOTE.—See *Young, Miller & Co. v. Farrel, ante*, 219, and the note thereto.

NEW BERN, January Term, 1803.

SMITH *v.* ———.

If a debtor, with intent to defraud creditors, convey to a third person to hold in trust for his benefit, the grantee shall be held in equity to perform the trust. The contract is void only as to creditors; as between the parties, it is binding.

SMITH's father-in-law had given him the negroes in question, and Smith being afterwards sued by two creditors, and apprehending that his debts would exhaust all his property, gave back the same negroes to his father-in-law, who promised to reconvey to Smith when his embarassments should be over. Smith reclaimed the negroes by this bill.

HALL, J. Though it be insisted that a conveyance for the purpose of defrauding creditors, and upon trust that the property should be reconveyed to the grantor, should not be asserted in equity, so as to be carried into effect as between the parties themselves, when one endeavors to deceive the other after the main purpose is accomplished, and that equity

will not hear one of them complain that the other, having con- (230) curred in defrauding creditors, now endeavors to defraud his co-agent, but will leave the parties in the situation where they have placed themselves, and by so acting, render it unsafe for a debtor fraudulently disposed to place such a degree of confidence in any one: yet I am of opinion that if a debtor, with intent to defraud creditors, convey to a third person, who promises to hold in trust for his benefit, the grantee should be compelled in equity to perform the trust. This contract is only void as to creditors, it is binding to all purposes as between the parties themselves.

Quere de hoc.—Et vide 1 Fonb., 128, 138; 2 Vern., 602, 71; 2 Vezey, 375; 1 P. W., 620; 8 T., 95.

NOTE.—See *contra, Mulford v.* ———, *post*, 244; *Vick v. Flowers*, 5 N. C., 321; *Jackson v. Marshall, ibid.*, 323.

WOOLFORD v. WRIGHT'S ADMINISTRATORS.

A bond or note may be proven by other than the subscribing witness.

HALL, J. On the plea of *plene administravit,* the administrator need not produce the subscribing witness to a note or bond given to him by the intestate, but may prove it by other means.

BLOUNT v. SHEPARD'S HEIRS.

An amendment after a continuance is not of course.

HALL, J. It is not of course, after a cause is continued, to move to amend the pleadings. The Court will require an affidavit or some evidence to show the necessity and propriety of the amendment.

NOTE.—See *Simpson v. Crawford*, 1 N. C., 55, and the cases referred to in the note thereto.

JOHNSTON AND WIFE v. PASTEUR.

NOTE.—See *S. c.*, reported in 1 N. C., 582.

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ANONYMOUS.

If money, notes, or other articles of property won by gaming be paid, it cannot be recovered back under the act of 1788 (1 Rev. Stat., ch. 51).

THIS was an action to recover back moneys, notes, and other articles of property paid and delivered to the defendant by the plaintiff, as being won of him by gaming at cards. The facts were proved, and—

Harris, for defendant, insisted that money won cannot be recovered by the winner; yet if the loser pay it, he cannot recover it back. *Sic potior est conditio possidentis.*

Haywood, for plaintiff, admitted this to be the common law, but urged the act of 1788, ch. 5, which makes void, among other things, "every transfer of slaves, or other personal estate to satisfy money won." Money, he said, was within the description of *personal estate,* and the payment of it within that of *the transfer of personal estate;* and such transfer or payment being void by the express words of the act, no property vested thereby in the defendant, the winner; and he was a holder of goods, notes, and money, which belonged to the plaintiff. As to the articles of property and notes delivered to the defendant, they seem to be within the express words of the act, "or other transfer of slaves or other personal estate, to any person or for his use, to satisfy or secure money won," etc. Was here a transfer of personal estate? and was it to satisfy money won? If so, the act declares it void. And for what purpose shall it be so, if not for the benefit of the plaintiff, and to enable him to revindicate? In cases depending on the English acts against gaming, the loser having paid cannot recover back, because those laws allow the loser to pay if he will; they only afford him a defense against the action of the winner, which he, the winner, may also renounce if he will, and which he does renounce by electing
(232) to pay the money. The *payment* is a valid one, because not prohibited nor made void. By our law the payment itself is void. The English cases, decided on the ground of no repetition against a *valid payment,* cannot govern this case, which is of a repetition against *a void payment or transfer.*

This case did not proceed to judgment, owing to the dispersion of the jury, by a cry of fire; but HALL, J., told the Reporter he was clearly of opinion the plaintiff could not recover. Which seemed strange. *Vide* Ambler, 269.

NOTE.—See the cases referred to in the note to *Mooring v. Stanton,* 1 N. C., 52.

EDENTON, April Term, 1803.

EELBECK'S DEVISEES v. JAMES GRANBERRY AND OTHERS.

1. Where any influence has been used in inducing the execution of a will, the jury must decide whether it was by fair and reasonable means, or by unfair and fraudulent ones; if the former, they should find for the will; but if the latter, against it.

2. The signing of a will may be proved by proof that testator acknowledged it, though the name or signature or handwriting was not before him, and though the paper lay at a distance on the table. And the attestation of witnesses may be at different times, so it be in the presence of the testator.

A PAPER, purporting to be the last will of Henry Eelbeck, deceased, was offered for probate to the County Court of CHOWAN, and opposed, and an issue made up under the direction of the Court of *devisavit vel non,* pursuant to the act for that purpose. A verdict was found in the affirmative, and an appeal taken to this Court, and now came on to be heard in this Court.

The proof of the execution was by one witness, who said he saw it signed by the testator, and witnessed it in his presence, and that the other witness, the next day, came into the room, and the will, being called for, was produced and handed to the testator, and then carried to the second witness, who asked the testator if that was his act for the purposes within mentioned, who answered, "Yes"; whereupon he signed in the presence of the testator. The other witness, in his deposition, said that he came into the room and witnessed the will, and asked the testator if that was his act for the purposes within mentioned, who said, "Yes."

TAYLOR, J. The requisites to the right execution of a will are *that the testator must be sane* and under no restraint or improper influence; that he must sign it; that it must be witnessed in his presence by two witnesses. There is a sound distinction between an honest and an unfair exertion of influence. Should a brother or sister, for instance, with whom the testator had been at variance, represent to him the facts which had led to it in such a way as to convince him that his displeasure was groundless, and by these means he should alter his former purposes, and make a will in her favor, or in favor of her children, to the prejudice of legatees provided for by a former will, that would not be cause for invalidating the latter. The jury will judge whether any influence has been used on the occasion of making this will; whether it was by fair and reasonable means, or by unfair and fraudulent ones, and decide accordingly. As to the point of execution, the two witnesses must each depose to the *signing* as well as to every (233)

other material fact. But the *signing* may be proved from the witness having seen it *written* by the testator or from having heard him *acknowledge* it. It is not necessary, if he acknowledge the signing, that the *name,* or *signature,* or *handwriting,* should be before him at the time; if the paper lie at a distance on the table, and he acknowledge the signing without seeing it, it is sufficient. It is admitted, and so the law is, that the attestation of the witnesses may be at different times, so it be in the presence of the testator.

Verdict for the will.

NOTE.—Upon the first point, see *Downey v. Murphey,* 18 N. C., 82; *Ross v. Christman,* 23 N. C., 209. On the second point, see *Bateman v. Mariner,* 5 N. C., 176; *Blount v. Patton,* 9 N. C., 237; *Ragland v. Huntingdon,* 23 N. C., 561.

Cited: In re Herring, 152 N. C., 263; *Ripley v. Armstrong,* 159 N. C., 159; *Watson v. Hinson,* 162 N. C., 77; *Bradshaw v. Bank,* 172 N. C., 634.

CAMPBELL'S EXECUTORS v. LEACH.

An endorsement stating that the endorser will be liable in case the maker proves insolvent will not make liable upon proof that the maker has gone to prison and given security for the bounds.

LEACH had purchased lands of Campbell, and in part of the price had given him a note on Ellison, with an endorsement purporting that he (Leach) would be liable for the amount in case Ellison should prove *insolvent.* Campbell sued him and had judgment, and issued a *ca. sa.* and he was committed to jail, and gave security for the prison bounds and forfeited his bond.

(234) TAYLOR, J. The endorsed bond was substituted for that portion of the original debt the amount whereof it represents. Leach cannot be made liable but upon the terms of the endorsement; that is to say, not unless it be established that Ellison was insolvent. A loss of the debt for any other cause will not subject him.

HALSEY'S ADMINISTRATORS v. BUCKLEY.

There is no privity in law between the vendor and vendee of a *chose in action,* so as to make a suit brought by the latter available to prevent the operation of the statute of limitations against a suit afterwards brought by the former.

PEARSE *v.* OWENS.

DETINUE for negroes. It appeared these negroes had been given by will to the widow of the testator for life, and after her death to the plaintiffs. She married, and her husband sold them to a person under whom defendant claimed. And after her death, whilst in the possession of defendant, or the vendee, these plaintiffs sold them. The purchaser sued and was nonsuited, because his action was improperly commenced. Then plaintiffs sued in the present action, but before its commencement the three years had elapsed, and the question now was whether the verdict which had been given in the former action could now be given in evidence; and after much argument the Court decided it could not, for that between the vendor and vendee of a chose in action there is no privity which the law will recognize.

PEARSE v. OWENS.

1. A deed, made since the statute of uses, is not to be construed by the same rules of interpretation as were applied to deeds before that statute. Therefore, if a deed give an estate to a woman during her life or widowhood, it determines by her marriage.
2. Uncertainty in a deed will invalidate it, but it must be such an uncertainty as makes it impossible to tell what estate is granted or who is first to take. The assent of a grantee is to be presumed to a deed in his favor.
3. After a limitation in a deed to *heirs of the body*, a clause empowering the tenant in tail to sell will be rejected as repugnant.
4. The deed of a wife and her husband, to which she has not been privily examined, is color of title.

EJECTMENT. In this cause the following points were ruled by—

TAYLOR, J. First, a deed made since the statute of uses is not to be construed by the same rules of interpretation as were applied to deeds before that statute. If a deed now gives an estate to a woman for her life or widowhood, she is not to take the estate which is most beneficial, but to hold during her widowhood only. The nonsuit which is moved would, therefore, be improper, for the widow, though alive, has determined her estate and widowhood by marriage.

Secondly, uncertainty in a deed will invalidate it; but it must be such an uncertainty as makes it impossible to tell what estate is granted or who is first to take.

Thirdly, the assent of a grantee is to be presumed to be a deed in his favor. Here J. Harrol made the deed under which plaintiff claims an

estate tail; there is no subscribing witness, but the grantor acknowledged it in court, and that is proof of the assent of the grantee. Upon such acknowledgment it was recorded. The deed, therefore, is well enough notwithstanding the objection.

Fourthly, the estate is limited by this deed *to heirs of the body,* (235) and though afterwards it gives power to the tenant in tail to sell to any of his brothers, it is not to be taken that this clause is to influence the former, but it must be rejected as repugnant.*

Fifthly, this deed was executed in 1751; the deed to the grantor was in 1747, which, for want of the examination of the feme covert, who was the owner and proprietor, was not at first valid; and therefore it is urged that he had not an estate out of which he could create an estate tail. It is in proof that he and his son, made tenant in tail, continued in possession more than seven years; and that is sufficiently conformatory of his estate to make good the estate tail.

NOTE.—Upon the first, second, and fourth points, see *Sheppard v. Simpson,* 12 N. C., 237; *Roberts v. Forsythe,* 14 N. C., 26; *Proctor v. Pool,* 15 N. C., 370; *Belk v. Love,* 18 N. C., 65; *Dismukes v. Wright,* 20 N. C., 206; *Wiggs v. Saunders, ibid.,* 480; *Everett v. Thomas,* 23 N. C., 252; *Mayo v. Blount, ibid.,* 283; *Massey v. Belisle, ibid.,* 170.

As to the third point, see *Tate v. Tate,* 21 N. C., 22. And upon the last point, see note to *Strudwick v. Shaw,* 1 N. C., 34, and 2 N. C., 5.

Cited: McConnell v. McConnell, 64 N. C., 344; *Perry v. Perry,* 99 N. C., 273; *Ellington v. Ellington,* 103 N. C., 58; *Greenleaf v. Bartlett,* 146 N. C., 498; *Norwood v. Totten,* 166 N. C., 651.

SAWYER v. ———.

Where there is a lappage, possession thereof seven years under the junior grant will give title. If neither grantee is in possession, the law carries the title to the oldest grant.

TAYLOR, J. If one patent laps over upon another, and the latter patentee is in the actual possession of the part covered by both for seven years, he will acquire the title; but if neither be in the actual possession it will belong to the first patentee.

NOTE.—See the cases referred to, upon the second point, in the note to *Borretts v. Turner, ante,* 113.

**Vide Alston v. Jones, post,* 298.

SYMONDS v. TRUEBLOOD.

If the defendant defends for that part of the land of which he has had possession for seven years, and also for a part adjoining, of which the plaintiff has had possession, the whole defended for shall be deemed one tract, of which, as both have had possession, the legal possession will be in him who has title.

PLAINTIFF's deed covered a piece of land including that in dispute; and of the whole of this piece, defendant had been more than seven years in possession, and plaintiff has had no possession of any part during that time; but defendant entered into the common rule, not only for this piece, but for another piece adjoining, which had been in the possession of plaintiff; so that, taking the piece defended for altogether, plaintiff had possessed one part and defended all the rest. That part, however, which plaintiff had possessed was no otherwise a part of the disputed lands than it was defended by defendant, for defendant's deed did not cover it, and he did not on the trial claim it.

TAYLOR, J. The record only can show us what land is in dispute, and that appears to be a tract composed of different parcels; part whereof the plaintiff has possessed and part the defendant. Then the rule applies, that he who is in possession of part of the tract claimed by both, though the other is also in possession of part, shall be deemed the possession of the whole; consequently, defendant has no legal possession of any part, and plaintiff's title must prevail.

HALIFAX, April Term, 1803.

JAMES BARNES v. HILL'S EXECUTORS.

If an amendment appear to be necessary on the hearing of an equity suit, *it seems* the court will allow it.

SET for hearing, and now moved by *Mr. Brown,* for the plaintiff, to amend, pointing out the particulars of the amendment to be made.

E contra it was argued by *Baker* that he ought to have amended before; it is now too late.

HALL, J. We will hear the cause now, and if the necessity of an amendment shall appear, we will consider what is to be done.

NOTE.—See *Williams v. Williams, ante,* 220, and the cases referred to in the note to that case.

HAMILTON v. PERSON'S ADMINISTRATOR.

Contracts in depreciated currency should be scaled according to the rate existing at the time the contract was made.

THE bond was dated in 1777, when money was depreciated 2¼ for 1, payable in 1778, when money was depreciated 4½. The jury found the value according to the latter period. In consequence whereof they found for the defendant, his payments being larger than that value. A new trial was moved for, and the ground of the motion was that the jury should have scaled at the former period.

Counsel for defendant: All that we are bound to do by the treaty is to give the value of the debt to the British creditor; and if we estimate the value by the same measure as to our citizens, there cannot be any cause for complaint. The act of 1783 has declared that all matters, circumstances, and things shall be given in evidence to the jury, and that they shall make up their verdict according to equity and good conscience. They have not directed the time of the contract, nor of the payment to be taken as the proper period. The jury are the only proper judges, and here they have valued their debt; and what is there to enable us to say they have done wrong? No evidence at all was given of the consideration of the bond. Perhaps it may have been a speculating contract, made with a view to the value at the time of payment. The jury ought so to consider every contract made in
(237) times of depreciation, unless circumstances are presented to them on the part of the plaintiff to show the justice of the other period.

HALL, J. Let a new trial be granted.

NOTE.—See *Bruton v. Bullock*, 1 N. C., 372; *McNair v. Ragland*, 16 N. C., 516.

THOMPSON v. ALLEN AND OTHERS.

1. Where the complaint moves to continue an injunction, and the defendant's death is suggested, that fact shall be tried *instanter*, unless the court be satisfied that there is a strong probability of his death.
2. Where, upon the suggestion of the death of a defendant to an injunction bill, the cause was continued, and the plaintiff in the injunction took out a *sci. fa.* in equity, to make the administrator a party to his bill, so as to keep up the injunction against the administrator, the injunction was dissolved upon the answer of the administrator.

JONES *v.* DRAKE.

INJUNCTION bill. *Mr. Harris* moved to continue the injunction. Counsel on the other side suggested the death of Allen, on the record.

HALL, J. The point of his death shall be tried *instanter,* unless the Court can be satisfied that there is a strong probability of his death.

Whereupon, evidence was given that his friends have received letters stating his death; and then the cause was continued until next term.

Defendant's counsel took out a *sci. fa.* on the law side of the Court, calling upon Thompson, who was defendant at law, to show cause why the administrator of Allen should not have execution upon the judgment at law, which Allen had in his lifetime obtained against Thompson. And thereupon Thompson took out a *sci. fa.* in equity, to make the administrator a party to his bill in equity, so as to keep up the injunction against the administrator. Then the administrator answered and dissolved the injunction.

NOTE.—See *Hill v. Jones,* 6 N. C., 211; *Collier v. Bank,* 21 N. C., 328.

JONES v. DRAKE.

When an infant is sued in equity, the practice is to serve a bill on him, when he has no guardian, and then appoint a guardian to answer the bill; but if the guardian has not had a copy of the bill, time will be given him to answer.

DEFENDANT was an infant, and was served with the bill in equity before the last term; and at the last term Davis was appointed his guardian to answer and defend the suit for him.

And now *Mr. Plummer* moved that he was not bound to answer at this term, because he had not been served with a copy of the bill.

E contra: The practice is to serve the bill on the defendant, and then appoint him a guardian to answer *that* bill. There is no necessity to serve the guardian with a new bill. And counsel cited 1 Harrison, 474, and *Kay v. Black,* in this Court.

HALL, J., doubted; but applying to Baker to know how the practice was, and he saying it was to serve the bill on the infant only, his Honor then appoint him a guardian to answer *that* bill. There is no necessity to serve the guardian with a new bill. And counsel cited 1 Harrison, 474, and *Kay v. Black,* in this Court.

NOTE.—The court of equity has power to appoint the clerk and master guardian to infant defendants to appear and answer for them, even against his consent. *Muir v. Stuart,* 5 N. C., 440.

CARTER AND WIFE v. ALSTON.

If an administrator against whom a bill is filed for an account sets up a release from complainant, which complainant admits he signed, but says he was under age and ignorant of his rights, an account shall be taken before trying the validity of the release.

BILL and answer. The object of the bill was for an account of the personal estate of Jesse Atherton, deceased; Alston being the (238) administrator. It stated that defendant pretended a release, and plaintiff admitted that he signed the same, but says he was ignorant of his right, and also under age.

Defendant answered he had received property, part of the said estate, and disposed of part thereof after being of age. And the question now is whether an account shall be decreed.

HALL, J. If the account should not now be ordered to be taken, and at the next term a verdict should be against defendant, we shall not be ready to pass a final decree, for want of the account. It should, therefore, be taken, as one of the materials for making up a decree, in case it should turn out that he is liable to account.

NOTE.—See *Bruce v. Child*, 11 N. C., 376, and *McLin v. McNamara*, 21 N. C., 407, which seem *contra*.

STATE v. CARSTAPHEN.

In the trial of a case not capital, if two of the jury retire without permission and without an officer, it shall not vitiate the verdict, if it appear from the affidavit of the jurors that they spoke to no one while they were out.

INDICTMENT FOR PERJURY. On the trial, after part of the evidence was delivered, the judge retired for a few minutes. Two of the jurors also retired, without *leave and without an officer,* and returned again. The jury found him guilty; and it was now moved that the verdict should be set aside; and defendant's counsel cited *Jacob L. D., verbo jury,* who cites it from Lilly; and also 2 H. H. P. C., 295.

HALL, J. If it shall appear upon the affidavits of the jurors that they did not speak with any person in their absence, the verdict ought not to be set aside.

And this afterwards appearing, defendant's counsel did not further press his motion.

Cited: S. v. Miller, 18 N. C., 514.

SHEPPARD'S EXECUTORS v. COOK'S EXECUTORS.

Where a jury decided that on a bond sixteen years raised a presumption of payment, they are still legally competent to try the same question between the same parties on another bond similarly situated.

THERE were two actions of debt depending upon two bonds written upon the same piece of paper, and taken at the same time. The jury tried one, and found for the defendant. Plaintiff's counsel then moved that the other cause might be submitted to the other jury attending the court.

HALL, J., refused this, saying it would impute to this jury improper conduct.

Whereupon plaintiff suffered a nonsuit, and moved afterwards it should be set aside, and cited Co. Litt., 157, to show that a juror who had once tried the cause or matter in dispute between the same parties or others could not try it again. Here the parties were the same, and the point the same as in the other cause, namely, whether fifteen or sixteen years acquiescence after the last acknowledgment of a debt due upon bond is sufficient to raise the presumption of payment. Your Honor left it to the other jury to declare in the affirmative, and they did so. Plaintiff's counsel conceives it to be a rule that if the plaintiff suffer a nonsuit out of a deference to the Court's opinion, and that is wrong, that the Court is bound to grant a new trial. 1 Bl. Re., 670; 2 Bl. Re., 698; 2 Bl. Re., 1228. And what prospect could the plaintiff have in submitting his cause to a jury who had just (239) determined against him the very point they had already passed upon in the other?—a point which it is conceived they determined improperly, because of a wrong direction given by the Court. It could not be known by plaintiff's counsel that he could obtain a new trial. It would have been madness to have risked a new trial, the jury and Court being both against his client, when the counsel was satisfied that at another time, when the law could be properly understood, his client would recover. It is not the rule that fifteen or sixteen years is sufficient to raise the presumption of payment. It is that which JOHNSTON, J., laid down some time ago at WILMINGTON, in *Quince v. Ross.* Whereas the Court here took up the idea broached by *Mr. Brown,* that the rule of presuming payment after twenty years was when interest was at 5 per cent; so that the presumption arose as soon as the interest equalled the amount of the principal; and that was done in this country at the end of sixteen years and a few months. Presuming payment from time was begun in the term of *Lord Hale,* when interest was at 8 per cent.

The case in 6 Mo., 221, in the second year of Queen Ann, is prior to the reduction of interest to 5 per cent.

HALL, J. The objection is not a good one, and I cannot set aside the nonsuit. It is not a sufficient ground for setting it aside that a new trial is granted in the other suit.

In consequence of which, and of the opinion of the Court, the nonsuit was suffered; so plaintiff had to pay all the costs of this suit. Then he commenced a new action; but in the meantime, having recovered on the other bond, the defendants agreed to pay the money mentioned in this.

NOTE.—See *S. c., post,* 241.

DEVANY & BOBBIT v. ———.

The Superior Court cannot reverse an erroneous judgment at a subsequent term, on motion.

THE now plaintiffs were sureties on an appeal bond, drawn differently from what is prescribed by the act of Assembly. The Court of Conference had condemned such bonds in other cases, and discharged the defendants. Upon this bond, however, being with condition "to pay all costs and charges in case the appellant should be cast," this (240) Court had entered up judgment against them *instanter,* on motion, for the principal and costs. Plaintiffs obtained a *supersedeas,* and now moved to have the said judgment set aside; and they urged, by their counsel, that at this day the Court would give the same relief, on motion, as they would give on an *audela querela;* and he cited Bosanquet, 428; French Law, 488; 3 Bl. Com., 406; 4 Mo., 314. And he said this was a case which the Court would give relief in, upon an *audela querela,* because judgment being entered *instanter,* the party had no opportunity to show to the Court the insufficiency of the bond.

HALL, J., took time to consider, and discharged the *supersedeas,* saying that though the judgment was erroneous, he had no power to alter it.

NOTE.—*Matthews v. Moore,* 5 N. C., 181; *Bender v. Askew,* 14 N. C., 149; *White v. Albertson, ibid.,* 241; *Skinner v. Moore,* 19 N. C., 138; *Winslow v. Anderson,* 20 N. C., 9; *Dunns v. Bachelor, ibid.,* 52; and mark the difference between the power of the Court over erroneous and irregular judgments. The latter may be set aside at any time on motion, while the former can be only reversed, after the term at which they are given, by writ of error to a higher tribunal.

HAMILTON v. BULLOCK.

It seems that the jury, and not the court, shall apply the scale of depreciation.

PLAINTIFF had sued by bill in equity, upon some equitable circumstance, to give jurisdiction for a sum of money due by bond, dated in times of depreciation; and the question arose, who should value the money by applying the sale, the court or the jury?

HALL, J., after hearing an argument, and taking time to advise, said he would carry this question to the Court of Conference, though his opinion was it belonged to the jury to decide.

NOTE.—See *Winslow v. Bloom*, 2 N. C., 217; *Anonymous, ibid.*, 354.

WHITEHEAD v. BELLAMY.

NOTE.—See *S. c., post*, 278, and *Whitehead v. Clinch*, 6 N. C., 128.

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SHEPPARD'S EXECUTORS v. COOK'S EXECUTORS.

1. Twenty years raises a presumption of payment on a bond.
2. A cause cannot be continued but upon the affidavit of the party himself.

THIS is the action spoken of before in the other case of the same name. It was an action of debt on a bond, dated in 1773, payable in 1774. Within fifteen or sixteen years plaintiff and defendant had been at variance, and agreed to be reconciled, and plaintiff invited defendant to his house. Cook said, within the same time, that the bond was given for the lands he had in his possession, but that the obligee had not made him a title, and he would not pay.

HALL, J., directed the jury that from 10 March, 1773, to June, 1784, was not to be regarded in the computation of time, and that payment might be presumed in fifteen or sixteen years, with small circumstances to aid it.

They found for the defendant; and plaintiff's counsel moved for a new trial; and after argument and time taken to consider—

HALL, J., said: It is proper that the time for raising a presumption of payment against a bond should be fixed and understood in the same way by all the courts. Some other judges have considered that twenty years was the time; here, here is either twenty, or even eighteen years; so that the presumption has not attached, if that opinion be (242) correct. Also payment pleaded means payment at the day; and if so, the evidence proved an admission of the debt long since, and, of course, its existence since the time to which this plea refers. There must be a new trial.

Haywood, counsel for defendant, endeavored to continue the other case for want of a material witness; but HALL, J., said he would not receive any affidavit but the plaintiff himself; and said to *Haywood:* "You know that it is a rule you yourself have urged." I do not know whether he referred to *Wheaton v. Cross,* WILMINGTON, May Term, 1801.

NOTE.—See, upon the first point, *Quince v. Ross, ante,* 180, and the cases referred to in the note thereto. And upon the second point, see *contra, Wheaton v. Cross, ante,* 154.

NEWSOME v. PERSON'S ADMINISTRATORS.

If plaintiff produce an account, in which he has given defendant credit for an article within three years, and defendant claim advantage of the credit and examine testimony to show that it ought to have been more, it will be considered equivalent to his keeping an account against plaintiff, and prevent the statute of limitations from barrying plaintiff's account.

PLAINTIFF charged for services performed in 1792, and from thence till the death of the intestate, in 1800. The statute of limitations was pleaded. He gave credit for a plantation within three years; and defendant's counsel examined as to the value of this plantation, endeavoring to bring out that it was of more value than credited at.

HALL, J. For all items above three years the act of limitation bars plaintiff, unless defendant has made some promise to pay within three years. Keeping an account against the plaintiff, and charging him with items within three years, admits a current account, and amounts to a promise to pay the balance, and so takes it out of the act. The defendant in the present instance has produced no such account, but he has claimed a credit arising within three years; and that is equivalent,

if the jury choose to consider it so, to keeping an account against the plaintiff; and then the act will not bar any part of plaintiff's account.

Verdict accordingly.

NOTE.—See *Kimboll v. Person, post*, 394; *Green v. Caldcleugh*, 18 N. C., 320; *McLin v. McNamara*, 36 N. C., 75.

WILMINGTON, May Term, 1803.

RUTLEDGE v. READ.

1. Where a deposition was taken on the next day after that appointed, upon an adjournment of the commissioners, it was permitted to be read; but it seems that it would have been otherwise had the adjournment been to a distant day.
2. In declaring on a note drawn in South Carolina, the declaration should state that by the laws of that State such note was negotiable, and was endorsed to the assignee who sues. Such averments are material and should be proved.
3. A new trial will be granted on the ground of surprise by an unexpected objection, and that though the objection be purely legal.

TAYLOR, J. The deposition offered in evidence was taken not at the precise day mentioned in the notice, but on the next day, upon an adjournment; and it is objected that a deposition cannot be taken at an adjourned day, for then the commissioners by adjourning for weeks or months might compel the party noticed to remain on expenses, or abandon his cross-examination, and it is urged that if the commissioner may adjourn once, he may oftener, and so adjourn whenever the party noticed should *appear* to join in the examination. The cases stated would not be allowed. Here, however, the adjournment is to the next day, no time intervening; and that cannot produce (243) the mischiefs apprehended.

The deposition was read, and it proved a note dated at Charleston, and the endorsement thereof to the plaintiff.

Counsel for defendant objected that there are but two ways of declaring on this note in the name of the assignee: the one stating it to be a South Carolina note, and that by the laws of South Carolina it was negotiable by assignment, and that it was *assigned;* the other not mentioning that it was a note drawn in South Carolina. In the latter case it would be assignable by the laws of North Carolina, and should upon the production appear to be a note not drawn out of this State. Here the note proved was drawn in South Carolina, and so

appears to be on the face of it. It should not be given in evidence, because variant from the declaration. If declared on as a note drawn in South Carolina, then the allegation that it is assignable by the law of South Carolina is a material one, and should be proved. Here it is not proved, and plaintiff, therefore, should not be permitted to recover.

After this objection, plaintiff gave evidence of a promise to pay to Rutledge, the assignee, the amount of the principal debt.

TAYLOR, J. I am at present of opinion that the objections are good, and that a note drawn in South Carolina cannot be considered here as endorseable unless it be proved to be the law of South Carolina that such notes are assignable. I know, privately, that by the laws of South Carolina such notes are assignable, but I cannot say judicially that they are so unless it were proved. It cannot be proved by parol, because the laws themselves are better evidence, and may be had. As to the express promise that renders the defendant liable to the extent of the principal sum, I am willing, however, that a new trial should be moved for, or the case removed, in order to have further consideration of this point.

Verdict for the principal sum on the express promise, or a new trial was moved for and granted upon the ground of surprise.

NOTE.—Upon the first point, see *Kenedy v. Alexander*, 2 N. C., 25, and the cases referred to in the note thereto. Where the notice specifies that the deposition will be taken between certain hours of the day, the deposition cannot be read unless it appears to have been taken between the hours specified. *Harris v. Yarborough*, 15 N. C., 166.

As to the last point, see *Murray v. Marsh*, *post*, 290; *Arrington v. Coleman*, *post*, 300; *Thompson v. Thompson*, *post*, 405; *Person v. Davey*, 5 N. C., 115; *Lester v. Zachary*, 4 N. C., 50, 380; *Welborn v. Younger*, 10 N. C., 205; *Barnes v. Dickinson*, 12 N. C., 346.

BARCLAY'S ASSIGNEES v. CARSON.

1. The commission and assignment of a bankrupt's estate is proof of the trading, bankruptcy, the time thereof, and the appointment of the plaintiffs as assignees, as against a debtor of the bankrupt.

2. Where two partners became bankrupt, and a suit was brought by the assignees of one of them against his debtor, *it was held* that a creditor of the firm was competent to prove the debt due to the one whose assignees brought the suit, upon its being shown that his separate estate was not sufficient to pay his separate creditors.

3. A partner who is bankrupt is competent to prove that a debt sued for by the assignee of his copartner, also a bankrupt, is due to such copartner.

4. A demand by one who was a surety before the bankruptcy, but paid the debt afterwards, or by one who became a creditor by the delivery of goods to the bankrupt after the act of bankruptcy, cannot be set off against the assignees.

TAYLOR, J. This being an action against a debtor of the bankrupt, producing the commission and assignment is a proof of the trading, bankruptcy, the time thereof, and appointing plaintiff's assignees. Were this a debt due from Gibbs and Barclay, I am of opinion that as the assignees of Barclay had sued, and no plea in abatement put in, they may recover a moiety. I am of opinion, also, that a creditor of Gibbs and Barclay may be a witness to prove the debt due to Barclay, if it be proved that the separate estate of Barclay will (244) not suffice to pay his separate creditors; for, as the creditor upon the joint fund must first apply to the joint fund, and the separate creditors to the separate fund, if this latter be exhausted by the separate creditors, a creditor in the joint fund can have no interest in placing the demand in question in the separate fund; and in so doing, he diminishes the joint fund out of which his dividend is to come. I am of opinion, also, that Gibbs, the other partner and bankrupt, may be admitted as a witness to prove the debt due to Barclay, for that tends to diminish the fund out of which his allowance is to come.

A demand against the bankrupt, which the defendant has acquired since the bankruptcy, cannot by the express words of the act be set off against the assignees. Of this nature is a debt paid by defendant since the bankruptcy, as a surety before; so also is a debt arisen by delivery of goods to the bankrupt by the defendant since the act of bankruptcy committed.

MULFORD v. ————.

Where a vendor permitted the purchaser to take a slave and pay for him at a low price, upon the promise on the part of the purchaser to return the slave whenever the vendor could reimburse him, *it was held* that if not done with a view of defeating creditors, a court of equity would, upon a tender of the money, enforce a return of the slave.

TAYLOR, J. If this were what it is represented to be by defendant's counsel—a contract made between plaintiff and defendant, to vest the property in defendant for the purpose of defeating creditors, and then to be for the use of the plaintiff—I should not hesitate to say, with him, that this Court would not enforce the return of the property. But this is not that case. He permitted the defendant to purchase the slave

in question, and to pay for him at a low price, with a promise on the part of the defendant to return him whenever the plaintiff could reimburse him. He has tendered the money, and my opinion is he should have back his negro.

Decree accordingly.

NOTE.—See *Smith v.* ———, *ante*, 229, and the cases referred to in the note thereto. See, also, *McBrayer v. Roberts*, 17 N. C., 78; *Fleming v. Sitton*, 621; *Chambers v. Hise*, 22 N. C., 305; *Munnerlin v. Birmingham, ibid.*, 358; *Poindexter v. McCannon*, 16 N. C., 373; *Newsom v. Roles*, 23 N. C., 179.

ANONYMOUS.

If a deposition fails to state where it was taken, it may be shown to have been taken at a place named in the notice; also the caption may be amended to show it.

TAYLOR, J. The deposition offered in evidence does not specify the place where taken, and for that reason it cannot be read; but I do not see why the party who wishes to use it may not be permitted to prove that it was taken at the place mentioned in the notice. And clearly the commissioner may now amend the caption by inserting the place.

He was present and did so, and the deposition was read.

BRICE v. MALLETT.

Where the pendency of another bill is pleaded in equity, reference to the master may be made to find the fact.

TAYLOR, J. Defendant has pleaded another bill pending in another court for the same cause, and this is denied by the replication. The proper way now to be pursued is to refer it to the master, to (245) inform the Court whether the plea be true or not.

DENNIS v. FARR.

NOTE.—See *S. c.*, reported in 5 N. C., 138.

REARDON v. GUY.

1. Where the jurisdiction of the Superior Court is not taken away by express words, and no appeal is given expressly by law, a *certiorari* is the proper remedy.
2. If a *certiorari* be obtained on an affidavit stating the grounds of moving for a new trial, which is not contradicted by counter-affidavits, there shall be a new trial.

REARDON had entered and paid for a tract of vacant land, and his grant was suspended by Guy. This suspension was tried in the County Court of DUPLIN, and a *certiorari* was obtained by Reardon.

And now *Jocelyn* objected that the act of Assembly had denied an appeal; and this Court cannot issue a *certiorari,* for that is to exercise appellate jurisdiction as substantially as if it had come up by appeal.

TAYLOR, J. The jurisdiction of this Court cannot be taken away but by express negative words. Where an appeal is not allowed by law, a *certiorari* is the proper remedy; for suppose injustice done in the proceedings either by the Court or jury, must the party have no relief against it because he is not allowed an appeal? No, surely. He shall then have such remedy as suits his case, and a *certiorari* has been used as the proper one for many years back. This *certiorari* was obtained on an affidavit stating the grounds of requiring a new trial. That is not contradicted by any cross-affidavit, and is to be taken as true. Therefore, let a new trial be granted.

NOTE.—Upon the first point, see *Allen v. Williams,* 2 N. C., 17; *Fryar v. Blackmore, post,* 374; *Street v. Clark,* 1 N. C.; *Perry v. Perry,* 4 N. C., 617; *Dongan v. Arnold,* 14 N. C., 99; *Swaim v. Fentress, ibid,* 601.

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COURT OF CONFERENCE, June Term, 1803.

SWANN v. MERCER.

NOTE.—From the records of the Court of Conference which the Editor has examined it appears that no decision was ever made by the judges upon this case. After long arguments by *Brown* for plaintiff and *Haywood* for defendant, the Court took an *advisari,* and at June Term, 1804, the suit was remanded to Edenton District Court, upon its being suggested that the parties had compromised. The arguments of the counsel are omitted here, as the same question arose and was very fully argued in *Sheppard v. Sheppard,* 7 N. C., 333.

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RUTHERFORD v. CRAIK'S EXECUTORS AND OTHERS.

1. *It seems* that a trust estate in personalty is as much subject to distribution on the death of the owner intestate as a legal estate in personalty.
2. Where a settlement was made, in contemplation of marriage, of all the real and personal estate of the intended wife, and certain real estate of the intended husband, whereby a portion of the wife's personal estate was secured to the husband, and the balance thereof was secured to the wife, together with the life estate in his real property and an annuity of £120 out of his property not conveyed in the settlement, in the event of her surviving him, the Court *inclined to hold* that upon the death of the husband intestate, the wife could not claim a distributive share in the personal estate secured by the deed to him.

PLAINTIFF claimed, under the will of Jane Corbin, all that she was entitled to under the marriage settlement between her and Francis Corbin, prior to the marriage, particularly they claimed all the *increase* of the negroes mentioned in the deed whereby the marriage settlement was made, and a widow's share, under the act of distributions, of the one-half of the original stock of negroes secured by that deed to Corbin, who died before her, intestate. They made other claims besides, but these were the claims upon which lay the stress of the argument.

The deed recited that on that day, 28 October, 1761, the said Jane Innis and Francis Corbin, as well for and in consideration of a marriage, by God's permission, intended shortly to be had and solemnized between the said Francis Corbin and Jane Innis, and of the sum of 20s sterling money of Great Britain, by Samuel Swann and John Swann to the said Jane Innis in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged; and for and towards settling and assuring the several plantations, tracts, or parcels of lands, tenements and hereditaments, *and negro slaves* (1) *and heir increase,* plate, household goods, and stock of horses, cattle, hogs, and sheep; *the estate of her,* (2) *the said Jane Innis,* hereinafter mentioned to be granted in trust, to and for the several uses, intents and purposes, and subject to the powers, provisos, limitations, and agreements hereinafter limited, declared and expressed; and for divers other good causes and considerations hereunto especially moving, she, the said Jane Innis, by and with the consent, direction, and appointment of the said Francis Corbin, testified by his being party to and signing and sealing these presents, hath granted, bargained, sold, aliened, released, and
(263) confirmed, and by these presents doth fully, clearly, and absolutely grant, sell, alien, release, and confirm unto the said Samuel Swann and John Swann, in their actual possession, now being by virtue of a bargain and sale to them thereof made for one year, in

consideration of 10s sterling money of Great Britain, by indenture bearing date the day next before the day of the date of these presents, and by force and virtue of the statute for transferring uses into possession, and to their heirs and assigns, all those the three plantations, tracts, or parcels of land of her, the said Jane, lying and being on the easternmost branch of Long Creek, in New Hanover County, containing, in the whole, 1,260 acres; also all that other plantation, tract, or parcel of land of her, the said Jane, lying and being on the northeast side of the northwest branch of Cape Fear River, joining the upper side of the late Henry Simons' land in Bladen County, containing 320 acres; also all that other plantation, tract, or parcel of land of her, the said Jane, containing 180 acres, lying and being in Bladen County, on the west side of the northwest branch of Cape Fear River, joining McNight's land, together with all the houses, outhouses, edifices, buildings, orchards, gardens, lanes, meadows, trees, woods, ways, paths, waters, watercourses, casements, profits, commodities, advantages, emoluments, and hereditaments whatsoever, to the said several plantations, tracts, or parcels of land or either of them, belonging or anywise appertaining; and the reversion or reversions, remainder or remainders, rents, issues, and profits thereof, and of every part or parcel thereof; and all the estate, right, title, interest, use, trust, possession, property, claim, and demand of her, the said Jane Innis, of, into, and out of the said several plantations, tracts, or parcels of lands, tenements, and hereditaments, and premises, and every of them; to have and to hold the said several plantations, tracts, or parcels of lands, tenements, and hereditaments, and all and singular other the premises, unto the said Samuel Swann and John Swann, their heirs and assigns, in trust, nevertheless, to and for the several uses, intents, and purposes, and subject to and under the several powers, provisos, limitations, and agreements hereinafter and by these presents limited, declared, and expressed. And this indenture further witnesseth, that for the consideration aforesaid, and in consideration of the sum of 10s, like sterling money, to the said Jane Innis in hand paid by the said Samuel Swann and John Swann at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, she, the said Jane Innis, by and with the consent, direction, and appointment of the said Francis Corbin, also testified by his being party to and signing and sealing these presents, hath granted, bargained, sold, aliened, and confirmed, and by these presents doth grant, bargain, sell, alien, and confirm unto the said Samuel Swann and John Swann, their heirs and assigns, (264) all that tract or parcel of land situate, lying and being in New Hanover County, containing 320 acres, being the plantation whereon the said Jane Innis now dwells, and called or known by the name of

Point Pleasant; and also all that other tract or parcel of marsh land, containing 100 acres, lying and being in the county aforesaid, across the river, opposite to the plantation aforesaid; and also all the houses, outhouses, tenements, gardens, orchards, trees, woods, underwoods, profits, commodities, advantages, hereditaments, ways, waters, and appurtenances whatsoever, to the said plantation, tracts, or parcels of land above mentioned belonging or in anywise appertaining; and also the reversion and reversions, remainder and remainders, rents and services of the said premises, and of every part thereof, and all the estate, right, title, interest, claim, and demand whatsoever, of her, the said Jane Innis, of, in and to the aforesaid two several tracts or parcels of land and premises, and every part thereof: to have and to hold the said two tracts or parcels of land and tenements, and all and singular the said premises with the appurtenances above mentioned, and every part or parcel thereof, unto the said Samuel Swann and John Swann, their heirs and assigns, for and during the natural life of the said Jane Innis, in trust, nevertheless, to and for the several uses, intents and purposes, and subject to and under the several powers, provisos and limitations and agreements hereinafter by these presents limited, declared, and expressed. And this indenture further witnesseth, that for the consideration aforesaid, and in consideration of the sum of 10s like sterling money, to the said Jane Innis in hand paid by the said Samuel Swann and John Swann, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, she, the said Jane Innis, by and with the consent, direction, and appointment of the said Francis Corbin also testified to his being party to and signing and sealing these presents, hath granted, bargained, sold, assigned, set over, transferred, and by these presents doth fully, freely, and absolutely grant, bargain, sell, assign, set over, and transfer unto the said Samuel Swann and John Swann, their executors, administrators, and assigns, all and singular *her negro slaves* (3) *following,* by name, Peter, Johnny, Peter, Jr., Rutherford, Mingo, March, Ben, Sinclair, Jr., Exeter, Bob, George, Quomino, Cato, Monrow, Murray, Jemmy, Cyrus, Canisby, Sinclair, Cuffe, Jamaica, Tom, David, Mundingo, Charles, Betty, Murry, Cæsar, Southerland, Ross, Solomon, Anthony, Carthness, Cain, Cudjo, Douglass, London, Sentry, Jimboy, George, Jr., Shields, Sandy, Cæsar, Nancy, Phœba, Lucretia, Jr., Uphamia, Victoria, Jenny, Barbary, Violet, Lucretia, Delia, Cœlia, Carolina Jenny, Dinah, Mary,
(265) Jenny Murray, Nanny, Guy, Jenny Pollard, Bell, Sarah, Minah, Patient, Peggy, Polly, Nancy, Delia, Jr., Belindah, Dinah, Jr., Statira, Suckey, Dinah, Betty, Maze, Nanny, Rose, *together with their* (4) *future increase;* also all the plate, household goods, stocks of horses,

black cattle, sheep and hogs, and all other the personal estate of her, the said Jane Innis, wheresoever to be found in the province of North Carolina or elsewhere; to have and to hold, all and singular the said *negro slaves, together with their* (9) *future increase,* plate, household goods, stocks of horses, black cattle, sheep, and hogs, and every of them, and all the other personal estate of her, the said Jane Innis, by these presents granted, bargained, sold, assigned, set over, and transferred, mentioned or intended to be granted, bargained, sold, assigned, set over, and transferred unto the said Samuel Swann and John Swann, their executors, administrators, and assigns, in trust, nevertheless, to and for the several uses, intents, and purposes, and subject to and under the several powers, provisos, limitations, conditions, and agreements hereinafter by these presents limited, declared and expressed. And this indenture further witnesseth, that in consideration of the said intended marriage, and of the great love and affection the said Francis Corbin hath and beareth to the said Jane Innis, and of the sum of 20s sterling money of Great Britain to the said Francis Corbin in hand by the said Samuel Swann and John Swann at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, he, the said Francis, hath granted, bargained, sold, aliened, released and confirmed, and by these presents doth fully, clearly, and absolutely grant, bargain, sell, alien, release, and confirm unto the said Samuel Swann and John Swann, in their actual possession, now being by virtue of a bargain and sale to them thereof made for one year, in consideration of 10s sterling money of Great Britain, by indenture bearing date the day next before the day of the date of these presents, and by force and virtue of the statute for transferring uses into possession, and to their heirs and assigns, *all that* (6) *lot or half-acre of land, and wharf of him, the said Francis, lying and being in the town of Edenton, in Chowan County,* purchased by the said Francis of Thomas Barker, Esq., *also all that island and the marsh thereunto belonging,* purchased by the said Francis of the executors of James Craven, Esq., deceased, lying and being near Edenton, in Chowan County aforesaid, called and known by the name of Strawberry Island, together with the houses, outhouses, improvements, and all other the appurtenances to the said lot and wharf and island belonging or anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and of every part and parcel thereof, and all the estate, right, title, interest, use, trust, possession, claim, and demand of him, the said Francis Corbin, (266) of, in and to or out of the said lot or half-acre of land, wharf, houses, island, and marsh, tenements, hereditaments, and premises,

and every of them; to have and to hold the said lot or half-acre of land, wharf, island and marsh, houses, tenements, and all and singular other the premises last mentioned, and parcel thereof, with the appurtenances, unto the said Samuel Swann and John Swann, their heirs and assigns, in trust, nevertheless, to and for the several uses, intents, and purposes, and subject to, and under the several powers, provisos, limitations, and agreements hereinafter by these presents limited, declared and expressed. And it is hereby declared and agreed by and between all the said parties to these presents, that the said Samuel Swann and John Swann, their heirs, executors, and administrators, shall hold and be seized of all and singular the said lands, islands, lot, wharf, messuages, houses, tenements, and hereditaments, and have, hold, and possess all the *negro slaves and their future* (7) *increase* plate, household goods, stocks of horses, black cattle, sheep, and hogs, and all and singular other the premises to them hereinbefore and hereby granted and sold as aforesaid, to the several uses following; that is to say, as to all and singular the lands, tenements, and hereditaments, in the several counties of New Hanover and Bladen, *and the negro* (8) *slaves,* plate, household goods, stocks of horses, black cattle, sheep, and hogs, and every of them, the real and personal estate of the said Jane Innis, to the use and behoof of the said Jane Innis and her heirs and assigns, until the said intended marriage shall be had and solemnized; and from and after the said intended marriage shall be had and solemnized, to the only use of the said Samuel Swann and John Swann, their heirs, executors, administrators, and assigns, in trust, nevertheless, that the said Samuel Swann and John Swann, and the survivor of them, and their heirs, executors, and administrators and assigns of such survivor, shall receive and pay the clear *rents, issues and profits of the* (9) *aforesaid* lands, tenements, and hereditaments in the counties of New Hanover and Bladen, all reasonable deductions being first made from time to time, yearly and every year, or oftener if conveniently may be; *and shall also permit and suffer the said Jane Innis* (10) *to receive all the profits arising by the negro slaves aforesaid, either from their labor, increase, or hire;* and also all that shall or may in any manner arise from all and every other part of the personal estate of the said Jane Innis aforesaid for and during the term of *her natural* (11) *life* for her separate use and benefit, exclusive of the said Francis Corbin, her intended husband, and so that the same, or any part thereof, shall not be subject to the control, disposition, debts, forfeitures, encumbrances, or contracts of the (267) said Francis Corbin, her intended husband; and that all such sum or sums of money as shall be paid unto her during her coverture shall be paid into her own hands or to such person or persons as she, the said Jane Innis, shall by writing signed with her name, of

her own handwriting, direct or appoint; and that her own receipt shall be a sufficient discharge for the same unto Samuel Swann and John Swann, or any other person whatsoever, notwithstanding her coverture. *And from and after the decease of the said Jane Innis,* then they, the said Samuel Swann and John Swann and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, shall stand and be seized of those, the said three plantations, tracts, or parcels of land lying and being on the easternmost branch of Long Creek, in New Hanover County, containing, in the whole, 1,260 acres; and also of those other two plantations, tracts, or parcels of land in Bladen County, the one joining the upper side of Henry Simons' lands and the other joining McNight's lands; and shall have, hold, and possess *the negro* (12) *slaves* and other the personal estate aforesaid, of her, the said Jane Innis, in trust for the uses, intents, and purposes following; that is to say, *so much of the said* (13) *lands, negro slaves* and other the personal estate of the said Jane Innis aforesaid, not exceeding the one-half thereof, or the sum of £2,000 proclamation money, to be raised and paid by the said trustees, and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, out of the whole real and personal estate aforesaid of the said Jane Innis (whichever the said Jane shall be minded to give and dispose of), to the use and behoof of such person or persons, his or their heirs and assigns forever, to whom the said Jane, whether covert or sole, and if covert, notwithstanding her coverture, shall, by any deed or writing, last will and testament, or other writing purporting to be her last will and testament, attested by two or more creditable witnesses, give, devise, (14) direct, or appoint the same, and for the want of such direction and appointment, to the use of the said Francis Corbin, his heirs or assigns forever, and the other half or remaining part of the said lands, negroes, and of other the personal estate of the said Jane Innis, to the use and behoof of the said Francis Corbin, his heirs and assigns forever. And as for touching and concerning the said lot or half-acre of land and wharf, with the tenements and appurtenances thereto belonging and appertaining, lying and being in the town of Edenton, in Chowan County, and the said island called Strawberry Island, and marsh thereto belonging, lying and being near Edenton, in Chowan County aforesaid, the estate of the said Francis Corbin to the use and behoof of the said Francis Corbin and his heirs, until the solemnization of the said intended marriage, and from and after the said intended marriage shall be had and solemnized, to the use and behoof of the said Francis (268) Corbin and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste, and from and after the determination of that estate, to the use and behoof of the

said Samuel Swann and John Swann, and their heirs, during the natural life of the said Francis Corbin, in trust to preserve the contingent uses hereinafter limited from being barred and destroyed, and for that purpose to make entries and bring actions as the case shall require, yet as to permit and suffer the said Francis Corbin to receive the rents and profits of the said last mentioned premises for and during his natural life, and from and after his decease, (15) then to the use and behoof of the said Jane Innis, his intended wife, and her assigns, for and during the term of her natural life, without impeachment of or for any manner of waste, and from and after the decease of the said Francis Corbin and Jane, his intended wife, and the longest liver of them, to the use and behoof of the said Francis Corbin, his heirs and assigns forever: *Provided, always,* and it is declared and agreed by and between the said parties to these presents that it shall be lawful to and for the said Francis Corbin, during the term of his natural life, and from and after his decease, to and for the said Jane, during the term of her natural life, as when the said Francis Corbin and Jane shall be in the actual possession of the said last mentioned premises limited to the said Francis Corbin and the said Jane Innis during their several and respective lives, by any deed or deeds attested by two or more credible witnesses, to demise, lease or grant the said lot or half-acre of land and wharf, with the tenements, hereditaments, and appurtenances thereto belonging, and the aforesaid island and marsh, with the appurtenances thereto belonging, to any person or persons for and during the term of the respective life of the said Francis or Jane, and no longer, for and upon such rents as to the said Francis or Jane shall seem meet and convenient, so as every such lease contain a condition for reëntry for nonpayment of the rent thereby to be reserved, and as every such lessee do execute a counterpart of such lease; anything herein to the contrary notwithstanding: *Provided, also,* and it is hereby further declared and agreed by and between the said parties to these presents, that it shall and may be lawful to and for the said Jane, notwithstanding her coverture, and as if she were sole and unmarried, by any deeds, writing, or writings, signed by her, with her name, of her own handwriting, sealed and delivered in the presence of two or more credible witnesses, with the consent of the said Samuel Swann and John Swann, and the survivor of them, and the heirs of such survivor, testified by their being parties to such deed or deeds, to make any lease or leases, demises or (269) grants of all or any of the lands limited to the said Samuel Swann and John Swann and their heirs, in trust for the sole and separate use and behoof of the said Jane Innis as aforesaid, to any person or persons, for the term of the natural life of the said Jane, and no longer, for and upon such rents as the said Jane can agree for

or shall think meet and convenient; and also for the said Jane from time to time, and all times hereafter, during her natural life, and when she shall be so minded, notwithstanding her (16) coverture, and as if she were sole and unmarried, to have and take upon her the whole and sole care, ordering, direction, and management of the negro slaves, and all other the personal estate hereinbefore limited to the said Samuel Swann and John Swann, their executors, administrators and assigns, in trust for the sole and separate use of the said Jane as aforesaid; and to receive, have, take, and dispose of the profits arising from the same and every part thereof, either by the labor, hire, and increase of the negro slaves, increase of the stocks of horses, black cattle, sheep, and hogs, or otherwise, at her will and pleasure, and in such manner (17) as she shall please or think fit, without the control, intermeddling, interruption, let, or hindrance of the said Francis Corbin, her intended husband, anything hereinbefore contained to the contrary notwithstanding: *Provided, also,* and it is hereby further declared and agreed by all the said parties to these presents, that it shall and may be lawful to and for the said Francis Corbin and the said Jane, his intended wife, at any time during her natural life, notwithstanding her coverture, with the consent of the said Samuel Swann and John Swann, or the survivor of them, first had in writing, attested by three or more credible witnesses, and if the said Samuel Swann and John Swann shall both of them be dead, then for the said Francis Corbin and Jane Innis, without such consent, by any writing or writings by them to be signed and sealed in the presence of three or more credible witnesses, and proved, the said Jane being first privately examined touching her consent and agreement thereto, in due form of law (and not otherwise), to revoke all or any of the use and uses, trusts, estates, and limitations hereinbefore limited and declared of or concerning the said lands, negro (18) slaves and their increase, plate, household goods, stocks of horses, black cattle, sheep, and hogs, hereinbefore mentioned, and by the same writing or writings, or by any other deed or deeds signed, sealed, executed, attested, and approved as aforesaid (the said Jane being first privately examined as aforesaid), absolutely to sell (19) and dispose of the said lands, negro slaves, plate, household goods, stocks of horses, black cattle, sheep, and hogs, or any of them, to such person or persons, to such uses, intents, and purposes as they, the said Francis Corbin and the said Jane, his intended wife, shall limit, declare, or appoint; anything hereinbefore contained to the contrary notwithstanding. (270) And the said Francis Corbin and Jane Innis do hereby severally covenant, promise and agree to and with the said Samuel Swann and John Swann, their heirs, executors, and administrators, that the said

lands and every of them, with their and every of their appurtenances, and negro (20) slaves, plate, household goods, stock of horses, black cattle, sheep, and hogs and premises, and all and every of them, shall and may be at all times from henceforth peaceably and quietly held and enjoyed by the said Samuel Swann and John Swann, and their heirs, executors, and administrators, according to the several trusts, and subject to the several provisos hereinbefore mentioned, limited, expressed or directed, touching and concerning the same; and further, that they, the said Francis Corbin and Jane Innis, shall and will at all times hereafter, upon the reasonable request of the said Samuel Swann and John Swann, make, do or execute, or cause or procure to be made, done and executed, all and every such further and other lawful and reasonable grants, acts and assurances in law whatsoever, for the further, better, and more perfect granting and assuring of all and singular the said lands, with the appurtenances, and the (21) negro slaves, plate, household goods, stocks of horses, black cattle, sheep, and hogs and premises, and every of them above mentioned, to and for the several uses, intents, and purposes, and under the trusts and subject to the provisos hereinbefore contained, according to the true intent and meaning of these presents, as by the said Samuel Swann and John Swann, or the survivor of them, the heirs, executors, and administrators of such survivor, or their or any of their counsel learned in the law, shall be reasonably devised or advised and required. And whereas it is agreed by and between the said Francis Corbin and Jane Innis that in case the said intended marriage shall take effect, and that the said Jane shall survive the said Francis Corbin, that then and in that case the heirs, executors, administrators and assigns of the said Francis Corbin shall out of the other estate whatsoever of the said Francis (not in these presents before mentioned), or out of profits arising therefrom, pay to the said Jane, yearly (22) and every year, the yearly sum of £120 proclamation money, being the yearly interest, at 6 per cent, of the sum of £2,000 like money. Now this indenture further witnesseth, that the said Francis Corbin, for and in consideration of the said intended marriage, for himself, his heirs, executors and administrators, doth covenant, (23) promise, and grant to and with the said Samuel Swann and John Swann, their heirs, executors, and administrators, that in case the said intended marriage shall take effect, and the said Jane shall survive him, the said Francis Corbin, that then and (271) in that case the heirs, executors, and administrators and assigns of the said Francis Corbin shall out of the (24) other estate whatsover of him, the said Francis Corbin, and of which he shall or may die possessed, or at any time of his decease be entitled to (not in these presents before mentioned), or out of the profits arising there-

from, pay to the said Jane, yearly and every year, the yearly sum of £120 proclamation money: *Provided always and lastly,* and it is hereby expressed, declared and agreed to be the true intent and meaning of these presents and of the said parties, that the said Samuel Swann and John Swann, their heirs, executors, and administrators and assigns shall not, nor shall any of them by virtue of these presents, nor shall they or either of them be charged or chargeable with the receipts, payments, or acts of the other of them, but each of them for and with his own receipts, payments, and acts only, and not otherwise; nor shall they or either of them be charged or chargeable with any loss or losses that may happen by reason of insolvency of or by the said Francis Corbin or Jane, his intended wife, or either of them, or of or by any person or persons whatsoever; and that they, the said Samuel Swann and John Swann, their heirs, executors, and administrators, shall be paid from time to time out of the trust estates aforesaid all such costs, charges, damages, and expenses which they or either of them, their or either of their executors or administrators, shall pay, bear or be put unto by virtue or reason of the trusts hereby in them reposed, or the execution thereof or otherwise relating thereto; anything hereinbefore contained to the contrary thereof in any wise notwithstanding.

In witness whereof the said parties within mentioned have to these presents interchangeably set their hands and seals, the day and year first above written.

Defendant's counsel insisted, upon this deed, first, that on the death of Mr. Corbin, intestate, his widow was not entitled to the increase of the negro slaves born after the date of the deed; for by parts 1, 2, 3 and 4, the negroes and their increase are vested in the trustees; part 5, to be held with their increase, and part 7, also to these uses, viz., as to the negro slaves, to permit her, part 10, to receive all the profits arising by the negro slaves aforesaid; which, by reference, includes the negro slaves and their increase, either from their labor, increase or hire; and their profits by increase means profits derived from or by means of the labor or hire of the increase. It would be inconsistent to vest the increase in the trustees as a subject of trust, and direct them to hold the increase in trust, and at the same time to make them a part of her separate estate, and to give her power, by part 16, to take and dispose of them at her will and pleasure. Moreover, she and her husband, by part 19, may sell and dispose, under restrictions there (272) mentioned, of the said negro slaves; which, by reference, are the negroes vested in the trustees—that is to say, both negroes and their increase. And how could it be necessary to give them jointly this power if, as to the increase, they are intended by the deed to be abso-

lutely heirs? And here the term, "said negroes," relates to the last antecedent, in part 18, where the word "increase," and their power to revoke the uses concerning the said negroes and their increase, is expressly mentioned, and immediately afterwards it is added, "and they may sell the said negroes."

Secondly: They argued that this marriage settlement was to be considered as a bar to her claim of a distributive share of the estate of F. Corbin, which belonged to him by this deed; and they cited 1 Fonb., 92; 2 Vern., 58; 4 Viner, 40; 2 Vern., 709; 1 P. W., 324; 3 Atk., 419; 1 Vez., 1; 1 P. W., 324; 2 Bro. Ch., 95, 394, and many other cases.

Thirdly: They argued that she had under this deed a provision made for her out of his estate. In part 15, a lot, wharf, and island are to be to her use after his death, for the term of her life; and that this made him a purchaser in equity of all the estate secured to him by the deed of a settlement; and he has also provided her with £120 per annum, to be paid to her for life, in case of her surviving him, in part 22; and they doubted whether his estate, being a trust estate, was subject to the act of distributions.

E contra: She is entitled under this deed to the increase, as a part of her separate estate; for the negroes and increase are mentioned in parts 1, 3, and 4, where the purposes of the deed and the passing of the property to the trustees is provided for; and in part 7, where the trustees are to hold the property; yet in part 10 the word "increase" is dropped as an antecedent, and made use of as a relative, she is to receive the profits of the negro slaves, by labor, hire or *increase.* And why is the omission so carefully observed? Is it not because, otherwise, profits by increase would have meant profits by increase of the negroes and increase? Whereas the writer meant the increase themselves to go to her. In part 12, where the trusts of the property, and particularly of the negroes vested in the trustees, are stated, the term "increase" is also carefully omitted. They are to hold the negroes in trust that so much of the said negroes, etc. Why is the term "increase" dropped here? The answer is, Because the increase were appropriated to her by part 10. In part 16 she is to take the direction and management of the negro slaves, and to take the profits arising from the same by the labor, hire, and increase of the negro slaves. Why is the term "increase" here omitted as the antecedent? And why is she di-
(273) rected to take and dispose of the profits by increase in such manner as she shall please and think fit? Here the expression is, "increase of the negro slaves." If the term "profits by increase" could be construed in page 10 to be some other increase than that of

slaves, it is here explained unequivocally what is meant. It cannot be understood otherwise than that she is to dispose at her pleasure of the negro children born after the deed.

In part 12 the trustees, after her death, are to possess and hold the *negro slaves* for the uses, etc. Why is the word "increase" not here used? It is because by parts 10 and 16 the increase is given to the feme.

In part 13, where power is given to her to dispose by will, the term "increase" is omitted; and it was properly omitted, because, as to the increase, she needed no such power, that being already vested in her by part 10.

The doubt which the ingenuity of counsel have thrown upon this question is produced by referring the words *profits by increase* to the words *negroes and increase,* mentioned in 1, 3, and 4. It should be remembered that the last antecedent is in part 10, and immediately precedes the relative words, *profits by increase.* There is no rule better established than this, that *verba relata ad proximum antecedents referunt.* If this rule be applied to the deed in question, which seems to have been drawn with uncommon accuracy, it will dispel all the doubts which have been raised by referring the term to a remote antecedent; for then, as clearly as can be spoken in our language, she will be entitled to profits by increase of the negroes, and no one inconsistency will be found in the whole deed, and every part of the deed where the word "increase" is used or omitted will be completely explained and accounted for.

As to the question whether she is barred of her distributive share of the property he acquired under this deed, it is to be remarked that contracts in prospect of marriage are of various kinds: some settle specific property; others *covenant* to pay money, or settle property or money. With respect to those which settle property specifically, some of them are in bar of the future claims of the wife, and some of them operate as a purchase of her fortune and future acquisitions. Such as operate in bar of her future claims have that quality, not merely because they are settlements of property in prospect of marriage; nor, indeed, do they derive any part of this quality from the consideration that they are settlements of property between the husband and wife, but solely and only from the consideration that the parties have agreed they shall be in bar of her future claims. And such agreement must be evidenced either by the express terms of the deed that they shall be in bar, and of what future claims particularly; for nothing will be barred unless included within the extent of the terms made use of. For instance, dower will not be barred by a marriage (274)

settlement, when it accrues by the death of the husband, unless it be mentioned in the deed that the settlement is to be in bar of her dower, or unless that meaning and intent is to be fairly inferred from the terms made use of in the deed. In C. D., 2 vol. Chancery Dower, 3 E., it is laid down from Equity Cases, 152, that a woman shall not be restrained from having her dower where the husband makes a settlement upon her in consideration of the marriage portion, if it is not expressed to be in bar of dower, and it does not appear to be expressly intended. If a settlement by him of his estate, in consideration of her portion, will not bar her, how much less will she be barred when he settles nothing of his own upon her, and gets by the settlement half of her estate? 3 Atkins, 8; 2 Vernon., 365; E. Ca., 218, 219, support the principle that she is not barred of her dower unless by an agreement clearly expressed or plainly to be implied from the deed. The same principle applies with equal force, and is equally well supported in regard to her claims upon the personal estate—her distributive share, for instance; it is not barred by a settlement unless agreed to be so, and that agreement sufficiently expressed. In 3 Bro. Ch. C., 362, a leasehold estate was settled previous to marriage upon the wife, in recompense and bar of dower; *and for a provision for the wife,* the husband had no real estate; and the question was, whether this was a bar to the wife's claim of thirds; and L. Chancellor held it was not. Though mentioned to be for a provision for the wife, yet not being expressed to be in bar of her thirds, the necessary agreement to render it a bar did not appear. 2 Vernon, 725; 1 Atk., 439; 1 Vernon, 15, are to the same effect. Another circumstance very material in the present case is that there is no case to show that a settlement of the wife's estate on her, or of part of her estate on her, has ever been, by construction, made to be a bar where there are not express words. 3 P. W., 199; P. Ch., 63; 2 Vern., 58; 1 E. C. A., 70. There is no agreement, expressed nor to be implied from what is expressed in the deed now before us, for the purpose of barring any claim of the wife, whatsoever. There is no such thing hinted at; and if it be a true rule that she cannot be barred of her thirds unless there be an agreement for the purpose, then we may conclude that she is not barred of her thirds, a moiety, on his dying intestate.

Then the next question will be, Can he be considered as a purchaser of her fortune and future acquisitions under this deed? A man by making settlement on his wife may place himself in a situation to be considered in equity as a purchaser of her property; but then, in the first (275) place, he must make the purchase by a settlement on her of his

property, not her own. Secondly, it must be *agreed* that he shall be considered as a purchaser. Thirdly, there must be such words used as are sufficient to show it. For support of the first point, he cited 3 P. W., 199. In support of the second, he cited 1 Fonb., 692; Ambler, 692; 4 Viner, 40; P. Ch., 209; 1 Fonb., 310; 2 Vern., 68; 2 C. D., 390: "A husband settles a jointure suitable to the portion of his wife, which consists of choses in action, and, the inheritance settled, the husband dies, his executor shall not have those debts or the inheritance, without a special agreement for that purpose, though the husband left not otherwise assets for his debts." And in support of the third point, namely, that such words must be used in the deed as imply the property settled to be for her fortune, he cited 2 Vez., 677; 1 E. C. A., 170, 70, as to say, that he makes it *in consideration of her fortune,* or in lieu thereof. 1 Vernon, 7; 2 Vernon, 68, 501; 1 P. W., 378; 2 P. W., 608; 2 Atk., 448; 3 Atk., 20. There is no such agreement here, either expressed or implied; and, therefore, he cannot be considered as a purchaser. The settlement is not expressed to be made of his estate, in consideration of her fortune, but for *and in consideration of a marriage,* etc., and for settling land, negroes, etc., *the estate of the said Jane Innis.*

With respect to covenants to pay money: If they be covenants to pay after the death of the husband, and as he leaves her as much by will, or to devolve upon her, as her share, it is a performance or satisfaction of the covenant. 4 Atk., 419; 2 Vern., 709; 1 Vezey, 1; 1 Vez., 520. But if the covenant be performable in his lifetime, 'tis a debt, and debts are to be paid first, and the surplus divided; and then she is to be paid, and to divide the surplus, also. 1 P. W., 324; 1 Bro. C. Ch., 63; 2 Bro. C. Ch., 394; 2 Bro. C. Ch., 95. Here is no covenant for payment of money in the lifetime of the husband; and the only consideration remaining is whether there be anything given to her in satisfaction of her claims. He has covenanted, indeed, after his death, that his executors shall pay her £120 per annum for her life. It will not be pretended that this covenant was to be as a purchase of or in bar of her future claims. It was covenanted for the reasons and considerations expressed as the causes of that deed; and it has never been performed, for it is admitted by the pleadings to be in arrear, and it is hardly denied that he had nothing wherewith to pay it; and for one thing to be in satisfaction of another, it must be of equal value. 2 V., 37, 409; 2 Vern., 478; 2 Bro. C. Ch., 100; 2 Fonb., 326; 4 V., Jr., 391. It must be of the same nature. 1 V., 521; 1 P. C., 394; 2 Fonb., 327. And it must be equally certain. 1 V., 521; 2 V., 636; P. Ch., 394; 1 P. W., 408; 2 P. W., 553, 616; 1 V., 126; 2 Atk., 300; 3 P. W., 227; 1 P. W., 410 (14th ed.). The lot, wharf and island do not answer this description; her interest therein is contingent, depending upon his death before hers. (276)

It is also for her life only, whereas her moiety is forever. They are of different natures, for one is realty and the other personalty; and they are of very different values. How can property to the value of £100 ever be presumed to be in satisfaction of claims to property for £10,000? She is entitled to the annuity, because he has neither given nor left her any property equivalent thereto; and she is entitled to her distributive share, because there is nothing even, setting aside the necessity for an *agreement,* that the settlement should be in bar which he has given of his in exchange for her claims. She never had any interest in the lot, wharf and island, because she survived the husband.

As to the objection that the husband's trust estate is not subject to the act of distributions, a trust estate in personalties is as much subject to distribution on the death of the intestate owner as a legal estate in personalties is. 2 Fonb., 15; 2 Atk., 296, 299; 1 Vernon, 204; 1 P. W., 109; 1 Vez., 237.

The cases cited on the other side belong to distinct classes. Some of them are cases where the husband has been considered as a purchaser by making an equivalent settlement. Such are 1 Fonb., 92; 2 Vernon, 58; 4 Viner, 40; Pre. Ch., 209, 63, 312; 3 P. W., 199. These respect his claim of that which was hers, not her claim, as in the present case, of that which was his, and are therefore inapplicable. Some are cases of satisfaction, where the question is whether the wife's share shall be a discharge of that which was *covenanted?* Such are 2 Vern., 709; 1 P. W., 324; 3 Atk., 419; 1 Vezey, 1; 2 Bro. C. Ch., 95, 394. Here it is contended that she is barred of her share; not that it is a bar of any covenants he has made; they are, therefore, equally inapplicable. Others, again, are cases of *performance* of covenants for the payment of money to be made after the husband's death, and which are deemed to be performed by a share of equal value coming to the wife—such as Vezey, 520. But here they contend that no share comes to her. Every case of purchase of her portion, satisfaction or performance of covenants must be laid aside; they are arranged. 2 C. D.; 2 M., 10; 3 D., 2. The cases which can be properly cited are those only which tend to prove that a settlement on the wife is of her claim to a distributive share of her husband's estate; and every case of that class will be found to stand upon this principle: that the wife has agreed to accept of the settlement in bar of her share, and that such agreement is expressed or sufficiently implied in the deed of settlement. A settlement alone even of the husband's estate will not bar her. The case in 1 Atkins, 439, is expressed to be in bar; and the Lord Chancellor relied upon this, which he need not
(277) have done if the settlement of itself was a bar. The same remarks apply to 2 Vernon, 724; 1 Vernon, 15; 1 Vez., 55. The Lord Chancellor thought it would be in bar of all she could claim as widow

if the deed had said the settlement was for a jointure. The same principle prevails in cases of dower: she cannot be barred, although there be a settlement, unless expressed to be in bar. 2 Vernon, 365; E. C. A., 209; 3 Atk., 8; Ress. E. C., 152.

LOCKE, J., seemed to think it was needless to consider whether or not the *feme* was entitled to the increase of the negroes, for the deed directs that at her death she may dispose of half, etc., and the other half or remaining part of the said lands, negroes, and other the personal estate of the said Jane Innis, to the use and behoof of the said Francis, etc., part 14; and, therefore, if she was entitled to the increase, besides the half which she might dispose of by will, etc., that was a part of her *personal estate,* and belonged under this clause to the husband. He seemed to think, also, she was barred of her distributive share by the settlement.

HALL, J., thought that profits by increase of negroes mentioned in part 10 and part 16 did not mean the young negroes born after the making of the deed; and as to her distributive share, he thought that all which either party could claim was fixed unalterably by the deed, and that she was not entitled to claim any more than *that* had assigned.

Counsel of plaintiff, perceiving the opinion of the Court, dismissed his bill and commenced his suit *de novo* in the Circuit Court of the United States.

WILKINS v. McKINSIE.

NOTE.—See *S. c.*, reported in 1 N. C., 570, and also *post*, 333; on the trial which took place after the grant of the new trial in the Court of Conference.

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MARTHA WHITEHEAD v. CLINCH'S HEIRS AND EXECUTORS.

NOTE.—See *S. c.*, reported in 7 N. C., 128.

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ANONYMOUS.

NOTE.—See *S. c.*, reported in 1 N. C., 573, under the name of *Schermerhorn v. Pelham.*

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CIRCUIT COURT OF THE UNITED STATES,

RALEIGH, June Term, 1803.

GIBSON AND OTHERS v. WILLIAMS, HEIR OF WILLIAMS.

1. If an heir pay debts of his ancestor, so much of the lands descended as such payments are worth shall be deemed to have been purchased by the heir, and shall not be affected by the other debts.
2. As to the other part of the land, it shall be charged, not according to its value at the time of the descent to their heir, but its value at the time he sold it.
3. On the surplus beyond the amount paid for the ancestor, the heir shall not be liable for interest.

SCI. FA. to subject defendant to the payment of a debt recovered against the executor of William Williams, his ancestor. He pleaded that he had nothing by devise, and as to what he had by descent, that he had in 1796 mortgaged the lands descended to certain creditors of his ancestor for $1,800, and had paid bond debts, besides, to the value of the lands. It appeared he had in 1801 sold the equity of redemption, and these questions arose as to the value above the debts paid for his ancestors: First, shall he pay interest for the surplus? and it was held by *Marshall* and *Potter,* Judges, that he should not. Secondly, as to the value, shall it be estimated as worth at the death of the ancestor, or at the time of the mortgage, or at the time of sale in 1801?

PER CURIAM. So much of the lands as the money secured by the mortgage was worth shall be deemed to have been purchased by the heir by payment of the debts of the ancestor; the surplus of the land shall be estimated as worth at the time of sale in 1801. It must not be valued as worth at the time of descent to the defendant, for the intermediate profits are a recompense for the expenses incident to holding the land, such as taxes and the like.

Verdict and judgment accordingly.

NOTE.—See *Williams v. Askew*, 6 N. C., 28; *Speight v. Wade, ibid.*, 295; *S. c.*, 4 N. C., 29; *Ricks v. Blount*, 15 N. C., 128. See, also, 1 Rev. Stat., ch. 63, sec. 15.

TEASDALE v. JORDAN, ADMINISTRATOR, ETC., OF BRANTON.

An administrator may be permitted to amend by adding a plea, where judgments have been obtained to the amount of the assets in his hands since he first pleaded.

THIS cause being called for trial, *Woods* moved to add a plea, and stated that since the defendant pleaded, judgments had been obtained against him to the amount of the assets in his hands.

And by MARSHALL, C. J., to which POTTER, J., assented: It is in the discretion of the court to permit the addition of a plea at any time before the trial; and the court will admit the plea where the justice of the case requires it. And the plea now offered is such an one as justice requires the admission of. It would be a monstrous proposition that when judgments after plea had taken away all the assets, the executor or administrator should, notwithstanding, be compelled to answer the debts first pleaded to.

The plea was added.

NOTE.—See *Woolford v. Simpson, ante*, 132, and the cases referred to in the note.

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SANDERS v. HAMILTON.

1. A. sold to B. a negro, and agreed that if B. would defend a suit brought against him for the negro, he (A.) would make good the damages sustained. Upon the negro being recovered from B., *it was held* that he was entitled to recover from A. in damages the value of the negro at the time of the recovery, and not the present value.

2. In this case *it was held, further*, that the record of the recovery against B. by a third person was not evidence against A. of such third person's title; but was evidence to show the fact of B.'s eviction and the amount of the damages.

THE declaration stated that Hamilton's agent had sold a negro for Hamilton to Sanders, who was sued for the increase; in consideration whereof, and that Sanders had promised he would defend the suit, Hamilton promised that if judgment should be obtained against Sanders, he (Hamilton) would make good the damages; that Sanders did defend the suit, and had judgment against him. One question upon the trial was, how the damages should be assessed—whether according to the present value of the negroes, or of the value when recovered.

MARSHALL, C. J. The jury should assess damages according to the value at the time of recovery; for, supposing he is to have the present value, he should bear the loss in case of the death of the negroes or other loss since the judgment; and, besides, plaintiff's demand arises immediately upon the recovery, and is not to be influenced by after circumstances.

In the progress of this cause it was moved that the record of the recovery between Streeter and Sanders should be read.

PER CURIAM. It may be read to prove that there was a recovery, and and the amount of damages, but not to prove that Streeter had title, because Hamilton was not a party, or privy.

A juror was withdrawn, and plaintiff's counsel moved for leave to add a count, which the Court said was necessary to arrive at the merits, but would not admit the amendment except upon the condition of paying all the costs to this time. He accepted of these terms and made the amendment.

NOTE.—See *Wright v. Walker, ante,* 16, and the cases referred to in the note to that case.

Cited: Martin v. Cowles, 19 N. C., 102.

WILKINGS v. MURPHEY, ADMINISTRATOR, ETC.

1. Whether an admission of a debt of the intestate by an administrator where the intestate has been dead more than three years will take the case out of the statute of limitations, *Quere.*
2. A count upon the intestate's promise, and upon that of the administrator to pay the debt of the intestate, may be joined.
3. Where there was a count upon the promise of an intestate, a plea of the statute of limitations, a replication that the intestate assumed within three years, and the evidence was that the administrator assumed within three years, and upon this a verdict for the plaintiff, the verdict was set aside and leave given to the plaintiff to amend upon the payment of all costs.

PLEA, the act of limitations; replication, that the *intestate* assumed; and the evidence offered was that the *administrator* promised within

three years. It was objected that such evidence was not that which the replication offered, and therefore should not be received. To this it was answered that an admission of the debt by the administrator takes the case out of the act, and there is no other way of giving the evidence to the jury but under a replication such as this. If the replication should state a promise of the administrator, that would be a departure from the declaration, which states a promise of the intestate; and you cannot in the declaration join a count founded on the promise of the administrator with that against the intestate. Such counts cannot be joined, the judgments upon them being different: Plaintiff's counsel cited 4 T., 347; H. Bl. Rep., 108, 110. *E contra* was cited H. Bl. Rep., 104.

MARSHALL, C. J. I doubt whether an admission of the debt (283) by an administrator will take the case out of the act of limitations; for the admission presupposes a promise made within three years, and how can this be when the intestate has been dead ten years? If it were true that an admission of the debt did take the case out of the act, and it could not be given in evidence at all unless allowed of upon such a replication, I should think that a strong argument for admitting the evidence. But the premises are not correct; it is not true that a count upon the intestate's promise, and upon that of the administrator to pay the debt of the intestate, may not be joined. The contrary is directly proved by the case cited from H. Bl. Rep., 104, where the administrator, upon an *insimul compulasset* and promise thereon, was held liable *de bonis testatoris*. The other cases cited which state that he is bound *de bonis propriis* are where the consideration for the promise arose after the death of the intestate and in the time of the administrator. Here the promise was on a consideration arising in the time of the intestate. The cases are reconcilable.

The verdict founded on the admission of the evidence was set aside, and leave given to plaintiff's counsel to add a count, the plaintiff paying costs up to this time.

NOTE.—Upon the first point, see *Cobham v. Credon, ante*, 6, and *Falls v. Sherrill*, 19 N. C., 371. On the second point, see *Gregory v. Hooker*, 8 N. C., 394. And on the last point, see *Simpson v. Crawford*, 1 N. C., 55, and the cases referred to in the note thereto.

NEW BERN, July Term, 1803.

WARD AND OTHERS v. SHEPPARD, WIDOW.

Waste in this country is not to be defined by the rules of the English law in all respects; for cutting timber trees for the purpose of clearing the land is not waste here, which arises from the situation of our country. What shall be deemed waste must, in a considerable degree, be in the discretion of the jury upon evidence; if trees be cut, not to clear the land, but for sale, it is waste.

THIS was an action of waste alleged to be committed in the dower lands of the widow. The plea was, no waste committed.

JOHNSTON, J. Actions of waste have been rarely brought in this country. I remember but one in my practice; that was against Holderness, formerly of Roanoke. And then it was decided that waste in this country is not to be defined by the rules of the English law in all respects; for cutting timber trees for the purpose of clearing the lands was not waste here, though it was so in England. If lands are leased to a lessor in an uncultivated state, he must of necessity have the power to clear; otherwise, the lease would be of no profit or advantage to him. The same is the case of dower lands. It is proved here, or attempted to be proved, that the cleared lands were not enough for her cultivation, and that the trees were cut down in contemplation of making a clearing. What shall be deemed waste must in a considerable degree be in the discretion of the jury upon evidence. It seems to me the evidence rather proves that the trees were cut down for sale. The jury will con-
(284) sider whether they were cut down for this purpose or not; and if they shall be of opinion that this was the design, then they should find her guilty of the waste. If, on the contrary, the evidence proves that they were cut down with a view to clearing the land, they should find her not guilty.

Verdict for the plaintiff as to 40 acres out of 477. Small damages assessed, and motion to arrest judgment.

NOTE.—See *Ballentine v. Payner, ante,* 110, and the cases referred to in the note thereto.

Cited: King v. Miller, 99 N. C., 595; *Dorsey v. Miller,* 100 N. C., 44.

TOMLINSON'S EXECUTORS v. DETESTATIUS'S EXECUTORS.

If property of a deceased person be sold by order of court and by a public officer, as the sheriff, the executor may purchase it for less than its value, if he can; but if not sold by order of court and by the sheriff, the executor, if a purchaser, shall answer for the real value.

CASE upon promissory notes, and *plene administravit* was pleaded.

Upon evidence, it appeared the property was sold by order of court, by an auctioneer in the town of New Bern, and for less than its value, but not under any other circumstances of unfairness. It was purchased in by the widow, who was the executrix.

JOHNSTON, J. The law of England is as stated by plaintiff's counsel, that an executor or administrator cannot purchase but by paying the full value. The law, however, is different here; for here it is sold by order of court, and by a public officer, the sheriff, whose interest and duty it is to take care that it sells for its value. Therefore, she may purchase in such case for less than the real value, if she can; but if not sold by order of court, or not by the sheriff, the proper officer, she, the executrix, shall still answer for the real value.

NOTE.—See *Boatwell v. Reynell, ante*, 1, and the cases referred to in the note to that case.

PENDER v. JONES.

An entry to divest an estate claimed by another must be on the lands claimed by him; and if there be several possessors on patented land, the entry must be on each part possessed.

EJECTMENT. The defendant, under a deed from his father, took possession, twenty-five years ago, of lands then included in Pollock's patent, and has continued that possession ever since. Pollock was an infant till September, 1790; but within three years from that time he went over part of the lands included in his said patent, but not then in dispute, claiming the whole, and threatening to sue unless those settled upon the patented lands would admit his title and purchase from him. The settlers, with the defendant, appointed agents to purchase, and did purchase; and defendant purchased part of the lands he was settled on, and the plaintiff the residue. This was in 1795, and soon afterwards the plaintiff enclosed a part of the lands in dispute, and kept them

enclosed, and used them till just before the commencement of this action.

Plaintiff's counsel contended that he had gained title under his (285) deed and possession.

Defendant's counsel contended that Pollock's *entry* upon part of the patented lands vested the whole in him; and if not, that his *claim,* made known in the neighborhood of the disputed lands, and the *admission* of his title, avoided the possession and its effects.

JOHNSTON, J. An *entry* to divest an estate claimed by another must be on the lands claimed by him; and if there be several possessors on patented lands, the entry must be on each parcel possessed.

As to the *claim,* I will not now undertake to decide how it must be made; that point may be reserved. Continual *claim* must be made as near the land as the claimant dare go, and that vests the possession for one year and day. Here it is contended that *claim* in our act of limitations is of a different import, and is productive of different effects, inasmuch as it vests the possession and preserves the title for seven years more. And also it is contended that all which is meant by it is a making it known to the possessor, by some notorious act or declaration, that he, the claimant, is the owner of the land settled on. Perhaps it may be so.

The jury found for the plaintiff, and a new trial was moved for. And after argument the judge said there has been seven years possession in this case, and that, too, under a deed; and it makes a clear title for the defendant, unless his possession was overturned by the true owner within three years after coming to age, by entry or claim. Now, an entry to have this effect must be an entry upon the very lands possessed by the defendant. He said nothing of the claim, but ordered a new trial.

NOTE.—See *S. c., post,* 294.

SMITH v. RICHARD CASWELL'S HEIRS, DEVISEES, AND LEGATEES.

A creditor obtained judgment against an executor and granted a stay of execution; the executor, before the stay expired, removed the personal property, so that it could not be found to satisfy the execution. Equity will support a bill against the heirs and devisees to charge the real estate, which the executor was by the will directed to sell for the payment of debts.

UPON the bill, answers, and evidence, the case appeared to be that the testator by his will charged his real estate with the payment of his debts, and authorized a sale by his executors in case it should be necessary.

Smith obtained judgment at law in this Court at September Term, 1792, for about £700, with stay of execution for six months. At that

time the executor had assets to the amount of $8,000 or $9,000. Before the six months were expired other judgments were obtained. The largest of these, to the amount of £541, the executors purchased. Under these executions, part of the property was sold, and in (286) 1796 a sale was made by the sheriff to satisfy the execution of £541. Before the expiration of the six months the property was removed to another county, and a sale was attempted afterwards to satisfy plaintiff's execution; but the executor and one of the heirs, now a defendant, drove away the bidders, and a sale was postponed. After this time the property could not be found by the sheriff.

Plaintiff's counsel insisted that the bill was a proper one, and in aid of the execution; for the lands could not be come at at law, since, although they were made assets by the will in the hands of the executor, they could not be sold by a common-law execution; neither could they be sold by a *sci. fa.* to be issued upon this judgment: the executor had not pleaded fully administered.

For the defendant it was argued that the executor was liable to be proceeded against as for a *devastavit,* and should be resorted to before recourse could be had to the lands. Indeed, the heirs cannot be proceeded against at all in equity, because the deficiency of assets was occasioned by the delay of execution, which the creditor consented to. It is the loss which took place in consequence of this delay that has forced the plaintiff to attempt a recovery against the heirs. Part of this property was not sold till 1796. Plaintiff's execution bore test before several others under which it was sold. Secondly, plaintiff can yet have remedy at law by an action of debt on the bond against the heirs, if they were liable to the debt under the circumstances of this case. Thirdly, plaintiff can have remedy at law by proceeding against the executors or the representatives of the executor, who, it is said, is now dead.

JOHNSTON, J., decided that, notwithstanding these objections, the bill in equity will lie, and decreed for the complainant. He said it is sufficient for the plaintiff that his execution was returned, "Nothing to be found." He need make no further proof. Possibly he might sue the heir upon the bond. He might, perhaps, by proceeding against the representatives of the wasting executor, recover; but he would meet with great difficulties in that way, if not finally defeated. And why take that course, when there is one more near and plain than the one he has taken? There can be no doubt but that this Court has jurisdiction over the cause. The will directs the executors to sell the lands for the payment of debts. It is a *trust* in them, and this Court is properly called on to enforce the execution thereof.

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HILLSBOROUGH, October Term, 1803.

CLARK v. ARNOLD.

1. Circumstantial proof, even the admission of the opposite party unconnected with possession, is not sufficient to raise the presumption of a grant.
2. If the practice of A. was to sell lands and deliver a deed, and then take back the same before registration, and keep it until the purchase money was paid, and if the deed of A. be lately delivered to a purchaser, parol evidence of the practice of A. shall be received to show that the deed in question was so delivered.
3. The confession of one under whom the defendant claims, made before the defendant's purchase, shall not be received to affect the defendant.
4. A delivery of a deed to a purchaser and taking it back by the vendor before registration, to secure the payment of the purchase money, will pass the title to the vendee, if the deed be afterward registered.
5. Registration of a deed has relation back to the time of its delivery.
6. A conveyance by the trustees of the University is not valid if a third person be in possession, claiming adversely. The State may possibly convey in such case, because she is in possession without entry; but her grantees are not entitled to the same privileges.

EJECTMENT. Plaintiff claimed under the trustees of the University, who claimed the lands as confiscated, having lately belonged to Henry Eustace McCulloch, who was and remained an absentee in the time of the war. It became necessary for plaintiff to prove that these lands had belonged to McCulloch. Plaintiff proposed to do this by a variety of circumstances, and particularly that the defendant, being in possession when the attorney for the University was about to sue, admitted the lands did once belong to McCulloch, and had been confiscated. This was intended to be relied on as circumstantial proof that defendant knew the grants to him had existed.

But HALL, J., refused the testimony, saying such circumstances, unconnected with possession, were not proper to be received as raising the presumption of a grant.

The trial proceeded, and the defendant offered in evidence a deed signed by the attorney of Henry Eustace McCulloch, which had been delivered to Hughey, who had conveyed to defendant in 1784. This deed had been delivered after the sale by the trustees of the University to the plaintiff. But defendant's counsel offered witnesses to prove the usual practice of Henry Eustace McCulloch to have been, when he contracted for the sale of lands, to receive part of the money and to deliver a deed to the purchaser, and immediately take it back from him, before registration, and to detain it till the residue of the money should be paid.

Plaintiff's counsel objected that such testimony, not applying immediately to this deed, ought not to be received. But the Court decided that such evidence might be given as circumstantial proof of the delivery. Plaintiff's counsel then offered to prove that after the date of the deed from McCulloch, Hughey acknowledged he had not paid the purchase money, and that he had no title, as circumstantial evidence to show that in fact no delivery of this deed had ever been made to Hughey. But the Court would not receive this evidence, though the confession was made before the deed of Hughey to Arnold, because if received it would affect a third person, Arnold, the purchaser under Hughey. It was insisted for the plaintiff that such delivery, if believed by the jury, was a delivery upon condition, to be effectual should the money afterwards be paid, which not having been done before the confiscation acts in 1779, that the deed had not passed the title from McCulloch, and, consequently, that the confiscation acts had found the title in him and had transferred it to the State. But the Court said such a delivery was effectual to pass the title from him. Plaintiff's counsel urged that if the delivery was good, still registration was necessary to complete the title of the purchaser, and that had not taken place in 1779, nor was originally (288) intended to take place till the purchase money should be paid. Therefore, the title remained in Henry Eustace McCulloch, and of course was confiscated. The Court said that the deed had lately been registered, having been delivered by the attorney of Henry Eustace McCulloch, who claims the purchase money; and, when registered, that it had relation back to the time of its first delivery, and passed the title as from that time, and therefore McCulloch was divested of it before 1879. The defendant was in possession in 1779, when the attorney for the trustees conveyed; and the Court said, for that reason a conveyance could not be made before the possession was recovered from him; and that though possibly (which he would not determine) the State might have conveyed, because the State is in possession without entry in all cases where an individual would be by entry, yet the trustees of the University, the grantees of the State, were not entitled to the same privileges.

Verdict and judgment for defendant.

NOTE.—Upon the first point, see *Cutlar v. Blackman*, 4 N. C., 368; *Dancy v. Sugg*, 19 N. C., 515.

Upon the third point, see *contra*, *Guy v. Hall*, 10 N. C., 150. See, also, *Hoyatt v. Phifer*, 15 N. C., 273.

Upon the fifth point, see *Haughton v. Rascoe*, 10 N. C., 21.

And upon the last point, see *Blount v. Horniblea*, *ante*, 36.

EDENTON, October Term, 1803.

STATE v. HAMILTON.

On the trial of an indictment for perjury, a person who is interested to prove the defendant guilty, because he will thereby exclude his testimony against him in a civil suit then pending, is incompetent; so, also, is the party to the civil suit whose interest it is to support the defendant in the indictment.

(289) INDICTMENT. Mr. Hamilton, as the attorney of Mr. Deane of Wilmington, had taken a note from Harvey and Jones, payable to John Hamilton, attorney, etc., and had endorsed to Deane. It was alleged that this note was not payable in *two years,* but that the word *years* had been stricken out and the word *days* inserted in its stead; and that an action had been commenced in the name of Deane, assigne, against Harvey and Jones, in the county court, before the two years expired; that judgment was given against them thereon; that they appealed to this Court; that a new declaration had been drawn for debt upon promises instead of the former, which was debt upon specialty; that this new declaration was sent up by the county court clerk, and docketed by the clerk of this Court; that the jury were impaneled in this Court to try the cause; that Hamilton was offered as a witness, and swore he was not interested. He was indicted for perjury, and the perjury assigned in this *that he was interested.* On the trial, Jones and Harvey were offered as witnesses on behalf of the State, and it was objected that they were incompetent, for if their evidence should cause a conviction, then the defendant would be rendered incompetent to be a witness against them when the civil action should again come on to be tried, for it was yet depending; and after much argument, JOHNSTON, J., was of opinion the objection was a good one, and rejected their testimony. Deane's testimony was then offered for Mr. Hamilton, and rejected for the same reason, namely, because he was interested in proving the innocence of Mr. Hamilton in order that he might support the action of Mr. Deane against Harvey and Jones.

Verdict of not guilty.

NOTE.—See *S. v. Wyatt, ante,* 56, and the cases referred to in the note thereto.

WILMINGTON, November Term, 1803.

SMITH AND WIFE v. BALLARD AND OTHERS.

A bill to perpetuate testimony will be dismissed when complainant is out of possession.

AFTER a very elaborate argument in this case, and time taken to consider,

MACAY, J., was of opinion that this being a bill to perpetuate testimony relative to lands of which the complainants were *out of possession,* should be dismissed upon the demurrer filed to it. The complainants might sue at law, and have the benefit of the teste money immediately, notwithstanding (1 P. W., 117); and notwithstanding there was an affidavit here as to some of the witnesses, that they were aged and infirm and not likely to live long. And he seemed to think there was still less reason here for perpetuating testimony in such a case than in England, for here, when an action at law is commenced, the depositions of the witnesses may be taken, but their depositions cannot be taken in a suit at law, and, of course, as to those who were not able to travel to court, their evidence must still be lost to the plaintiffs; and that, possibly might be the reason of the decision in 1 P. W., 117.

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CIRCUIT COURT OF THE UNITED STATES,

RALEIGH, December, 1803.

MURRAY & MURRAY v. MARSH & MARSH.

1. A bankrupt who endorsed a note before his bankruptcy, and who has obtained his certificate, is a good witness for the endorsee.

2. A record of the proceedings against a bankrupt, attested by the clerk of the District Court, is good evidence; the act of Congress not requiring the certificate of the presiding judge in the case of records from Unites States courts.

3. If the objection to a witness arises from proof made by the objector, the witness cannot discharge himself of the objection by any matter sworn by himself; it must be removed by proof drawn from some other source.

4. Depositions which do not show, either in the caption or body of them, between what parties they were taken, cannot be received.

5. If a plaintiff, supposing himself ready, press a trial, and it is found on the trial that the testimony he relied on cannot be given in evidence as he expected, and he be nonsuited, the allegation of surprise shall not prevail to set aside the nonsuit.

MARSHALL, C. J., and POTTER, J. Loomis and Tillinghast assigned to the plaintiffs the note sued on, which was made by defendants, and afterwards became bankrupts, and obtained a certificate; and now Loomis is offered as a witness for plaintiffs. He is a competent witness, for he is by the certificate discharged of all debts provable under the commission, and his endorsement to plaintiffs rendered him liable to them, so as to make their demand against him. Secondly, the record of the proceedings against them, attested by the clerk of the district court, without any certificate of the presiding judge, is good evidence; for the act of Congress relates to certificates in case of officers of the several states, not to those of the United States. Thirdly, if the objection to a witness arises from proof made by the objector, the witness cannot discharge himself of the objection by any matter sworn by himself. It must be removed by proof drawn from some other source. Fourthly, depositions taken, not specifying the parties between whom they are taken, in the caption, nor naming them as parties in the body of the deposition, cannot be received. Fifthly, if a plaintiff, supposing himself ready, press for trial, and it is found on trial that the testimony he relied on cannot be given in evidence, as he expected, and he be nonsuited, the allegation of surprise shall not prevail to set aside the nonsuit.

NOTE.—See upon the last point, *Rutledge v. Read, ante*, 242, and the case referred to in the note on the last point in that case.

McALISTER AND OTHERS v. BARRY AND OTHERS.

Misrepresentations and obtaining a bargain in consequence thereof disadvantageous to the party complaining is a ground in equity for setting aside a conveyance, although the party imposed on were of sound understanding, and had time enough to detect the falsehood before he made the contract. But the grantee shall be allowed for the improvements made on the estate.

PER CURIAM. Misrepresentations and obtaining a bargain in consequence thereof disadvantageous to the party deceived by them is a ground in equity for setting aside the conveyance, although the party imposed on were of sound understanding, and had time enough to detect the false-

hood before he made the contract. In this case the debts due from the testator were represented to his legatees to be very large, and likely to fall upon the estate in remainder devised to them; and it was concealed from them that a fund was provided by the testator for payment of his debts. The conveyance must be set aside, but the grantee shall be allowed for the improvements made on the estate.

NOTE.—See *Thigpen v. Balfour*, 6 N. C., 242.

(291)

HAMILTON v. JONES AND OTHERS.

A *sci. fa.* issued against an heir to have execution of the lands of the deceased, but before the *sci. fa.* issued the heir sold the lands, and *it was held* that the purchaser from the heir might, in the name of the heir, be permitted to plead to the *sci. fa.* that the executor had assets.

SCIRE FACIAS against the heirs and devisees of John Jones, deceased, to have execution against the lands descended or delivered to them of a judgment obtained against the executors upon a plea fully administered, found for the executors. After the test of the *sci, fa.,* but before the issuing of it was known to Peter Arrington, he purchased a share of the lands from one of the defendants, who, being served with the *sci. fa.,* would not plead thereto. Arrington alleged there were personal assets much more than sufficient to pay the debt.

MARSHALL, C. J. The seller impliedly gave power to the vendee to plead such pleas in his name as were necessary for the defense of the land; and should a plea be now put in by Arrington in the name of the vendor, I would not consent to strike it out.

Whereupon Arrington put in the plea of personal assets in the hands of the executor enough to satisfy the judgment. And he put in the name of the vendor in open court.

HAMILTON v. SIMMS.

If the heir, in an action against him upon the bond of his ancestor, plead *nothing by descent or devise*, and it be found against him, judgment shall be *de bonis propriis.*

PER CURIAM. This is a debt upon bond against the heir of the obligor; and if the plea of nothing by descent or devise be falsified by verdict, the judgment will be *de bonis propriis* of the heir or devisee. And it will not

help the defendant if the jury should find the value of the land on such issue, for still the court would give the judgment against the defendant *in jure proprio* for the whole debt.

Thereupon this plea was, by consent, withdrawn, and the lands devolved to the defendant in remainder set forth in a new plea.

JONES AND WIFE v. WALKER AND OTHERS.

1. An appeal from an inferior court of admiralty takes the cause from that court, and it can no longer act in such cause; but it still retains power to take care of the goods seized, which are the subject of the suit, and to that end may order a sale of such as are likely to perish.
2. Where the records of a court of admiralty appear to have been loosely and carelessly kept on slips of paper, depositions may be read to prove that an order for the sale of property was made in the cause.
3. All persons are bound by a decree in admiralty on the point then in controversy.
4. But those persons who became interested by a purchase, under orders and proceedings of the court of admiralty, are not bound by a decree, as to the right of property between the libelants and claimants.

PER CURIAM. An appeal from an inferior court of admiralty takes the cause from that court, and such court can no longer act in it. But it still retains power to take care of the goods seized, which are the subject of the suit; and to that end it may order a sale of such goods as are likely to perish. What raised the greatest doubt with us was the uncertainty whether the goods in question were sold by order of the court. The proceedings show that after the appeal the now plaintiff was ordered to pay for salvage, one-third in value of the property by a certain day, or otherwise an order of sale should issue. Then it appears that counsel for the claimant procured a postponement of the sale till the 4th of February. It appears, also, by a deposition of the marshal, that he
(292) sold by order of the court. And it appears by other depositions that the papers of this Court were kept very loosely, on slips of paper, which were often removed from the office, as applied for by individuals. From all these circumstances we have concluded that the evidence is in favor of the order of sale. Then if the court ordered a sale, those who purchased under it should be protected; and the defendants are those persons. It was argued that all the world are parties to a prize cause in admiralty, and are affected by a decree in the appellate court. This should be understood with some restriction. Upon the publication

made of the suit depending, in order that all persons interested may come in and defend, all persons are bound by the decree pronounced upon the point then in controversy. But there is no controversy between the libelants or claimants and those who afterwards became interested by a purchase, under orders and proceedings of the court in the cause between the libelant and claimants. Such intervening persons are not bound by a decree made between the libelants and claimants in the appellate court. The defendants are entitled to retain the property they have purchased, although the decree of the appellate court declared it to belong to the claimant.

NOTE.—Upon the second point, see *Hargett v.* ————, *ante*, 76, and the cases there referred to in the note. See, also, *Walker v. Greenlee*, 10 N. C., 281.

Cited: Starke v. Etheridge, 71 N. C., 246.

NEW BERN, January Term, 1804.

GRAY v. EDWARD HARRISON.

1. Declarations made by one after he has sold and conveyed lands cannot be given in evidence to invalidate the sale.
2. Estoppels run between parties and privies; therefore, when defendant formerly claimed by deed, under the person the plaintiff now claims under, he may now deny, *as against the plaintiff*, that such person had title, and he is not estopped as against the plaintiff, who is neither party nor privy to defendant's deed, though had defendant produced that deed on the trial, it would have estopped him.

EJECTMENT.

TAYLOR, J. Plaintiff claims under Febin Gilgo, who claimed as heir to William Gilgo, who died in 1781; and upon the sale by Febin, he said he had sold the lands which he heired as brother of the half-blood to William Gilgo. This evidence is not admissible, and the jury should not regard it; for a man, after he has sold, cannot say that which renders the sale invalid.

As to the other point, the defendant formerly exhibited a paper purporting to be a deed to himself from Febin Gilgo, and had it proved and admitted to registration, and claimed title under it when the land was about to be sold as his brother's. It is, therefore, now insisted that *he* cannot, whatever the *plaintiff* may, *deny* that to have been the deed of Febin. That deed, therefore, must be taken to exist and he estopped to

say Febin had no title. Had he exhibited the deed in this Court, on this trial, and claimed title under it, I think he would have been estopped. Estoppels run between parties and privies. Here the plaintiff is not a party to the deed, nor is privy to it.

NOTE.—On the first point, see *Arnold v. Bell*, 2 N. C., 396, and the cases referred to in the note to that case, and also *Askew v. Reynolds*, 18 N. C., 367. On the second point, see *contra*, *Murphy v. Barnett*, 6 N. C., 251; *S. c.*, 4 N. C., 14; *Phelps v. Blount*, 13 N. C., 177; *Sikes v. Basnight*, 19 N. C., 157; *Ives v. Sawyer*, 20 N. C., 51; *Ross v. Durham*, *ibid.*, 54; *Norwood v. Marrow*, *ibid.*, 442. But the State is not bound by an estoppel, nor is a grantee from the State estopped to deny what the State from whom he claims is at liberty to assert. *Taylor v. Shufford*, 11 N. C., 116; *Candler v. Lunsford*, 20 N. C., 407.

Cited: Headen v. Womack, 88 N. C., 471.

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LAVENDER, AN INFANT, BY HIS NEXT FRIEND, v. PRITCHARD'S ADMINISTRATORS.

NOTE.—See *S. c.*, more fully reported, *post*, 337.

PITMAN v. CASEY.

If a trespass be begun by entering on lands three years before the action of trespass, and continued until action brought, the plaintiff is barred by the act of limitations, for the action is founded on the first tortious entry.

TAYLOR, J. The trespass complained of first commenced above three years before the institution of this action, and has been continued to the time of the action, which was within three years. The act of limitations is pleaded; and most clearly that act is a bar to the action, for it must be founded upon the first tortious entry, not upon any continuance of possession afterwards, and within the three years. Before an action of trespass can be maintained for continuing in possession after the first entry, there must be a regaining of the possession by the party
(294) expelled. Then the law deems the possession to have been his all along; and, of course, that the defendant was a violator of it every moment he continued in possession.

Upon this opinion, the plaintiff was nonsuited.

NOTE.—See *Graham v. Houston*, 15 N. C., 232; *Dobbs v. Gullidge*, 20 N. C., 68.

PENDER v. JONES.

1. If seven years be completed at a period of time occurring after arrival to full age, when part of the seven years elapsed during infancy, the party has three years from his arrival at age to make his entry or claim on land, and no more.

2. A deliberate avowal, on the part of the possessor of land, of title in the claimant, or a serious assent to the validity of his title, will render an entry or claim unnecessary, and is equivalent in its effects to an entry or claim.

EJECTMENT. Defendant was in possession on the first of July, 1734, under a grant and deed of mesne conveyances. The person under whom plaintiff claims came of age in September, 1790. He sold to the plaintiff in October, 1793. In April, 1793, he went to the house of one of the many terretenants who had settled upon the different spots included in this large tract of 6,000 acres.

And it is inferred by plaintiff's counsel from the evidence, that the defendant, with the other terretenants, appointed an agent to purchase for them the several spots on which they respectively resided; and that in October he was at another meeting where was the defendant; and there all the terretenants admitted the title of Pollock.

I am of opinion that if seven years be completed at a period of time occurring after arrival to full age, when part of the seven years elapsed during infancy, that the party has three years from his arrival to age to make his entry or claim, and no more. As to the second point made in the argument, the act requires an entry or claim within the prescribed time; but it is urged that such *entry or claim* is dispensed with if the party in possession admits the title of the claimant: for why enter or claim, to divest or prevent a title, when the possessor admits it to be in his adversary? I am of opinion that a deliberate avowal on the part of the possessor, of title in the claimant, or a serious assent to the validity of his title, will render an entry or claim unnecessary, and is equivalent in its effects to an entry or claim.

There was a verdict for defendant, and upon a motion for a rule to show cause why there should not be a new trial, counsel for plaintiff argued as follows:

Certainly the owner out of possession is not bound to enter within three years from his arrival to age. Instead of six years, suppose only one year or one week elapsed in the time of his infancy, must he enter within three years after or be barred? If so, infancy, instead of conferring a privilege, will in reality abridge the time of limitation, and require an entry within the space of a week and three years after;

whereas a person of full age might defer his entry till six years and fifty-one weeks after his full age. Shall he be compelled to enter (295) before the seven years are completed, when part elapses during his infancy and the residue after his full age? Suppose, then, he was of age one day only before the seven years are completed, must he enter the day after? Then the infant who has neglected his entry is in a more eligible situation than he who has neglected it for a less time; for if the seven years expire whilst an infant, he has three years longer; but if only six, he has but one year more. He who is most negligent is the most indulged. He who comes of age today, when the time elapses tomorrow, shall be deemed conusant of his rights, and capable to put himself in a condition to assert them in twenty-four hours; when he who came of age yesterday, after the seven years expired, shall be deemed not conusant of them, nor capable to possess himself of the means of vindicating them in less than three years after. If it be said that on coming of age he has it in his election to enter within three years, or at any time after, before the expiration of the seven, that is in substance to say the proviso does not take place in such a case, for if it operates, it must bar, if the entry should not be made in three years; whereas this opinion supposes he may enter after the three years, and before the seven are completed. Then this case is under the enacting clause; and then the opinion amounts to only this, that where part of the time runs during infancy, and other part after, that the bar take place after the expiration of seven years. If, therefore, four years run in the time of infancy, he must enter within three years afterwards, not by force of the proviso, but of the enacting clause, and is exactly the same opinion combatted by the example of seven years elapsing the day after arrival to full age.

It may be said, *exceptio unius est exclusio alterius;* and as none are excepted out of the generality of the enacting clause, all are bound except those described in the proviso—infants against whom the seven years have run, not those against whom it did not run in the time of infancy. The letter of the act is so, but the meaning cannot be, for it involves the absurdity before pointed out, of most indulgence to the most dilatory. Then the act contemplates only two cases, seven years running against a person of full age, and seven years against those under age. The mixed case now before us was not contemplated, and is a *casus omissus;* and if so, it is either not under the operation of the act, and is subject to no limitation, or, if subject to its general spirit, that is to be collected by the rule laid down by Lord Coke by construing the act as near to the rule and reason of the common law as possible. That imputes no laches to infants whatever, as may be seen in a great

variety of instances in Lord Coke's chapter of Entries, Descents which toll Entries, and Warranty. This rule, if not imputing negligence to them, is universal with the exception of *estates upon condition,* plenary for six months, by an incumbent, and some few others distinguished by the peculiarity of the reasons on which they are (296) founded. If so, the operation of the act did not commence in the case before us till his arrival at full age. This is proved to be the true construction by another example, which cannot be disputed. Suppose six years run against an infant, and he then dies under age, leaving an infant heir: he will have the same time allowed him to enter as if no time had elapsed in the life of his ancestor. Suppose, also, six years run against an ancestor of full age, and he dies, leaving an infant heir: he will be barred if he shall not enter within one year after. And what is the reason of this difference? It is because no laches are imputed to the infant ancestor, and, therefore, no time reckoned against him; whereas laches are imputed to the ancestor of full age; and, therefore, the time shall be reckoned against him and his heir also. And if the six years shall not be computed against the infant ancestor who dies, why shall it when he lives to arrive at age? I can see none.

The new trial was not granted, but it seemed to be upon the ground that if the direction was wrong which the judge gave to the jury, still the seven years were completed one year after his arrival to age, and he ought to have entered before that period, and that he was not entitled to seven years after coming of age; for, admitting there was no exception, it would be so; the plaintiff, whether an infant or not, would be barred; and the exception only takes place when seven years have elapsed during infancy, by the words of the act.

DAWSON v. ———.

If the plaintiff apply to the clerk and master for a *dedimus* to take testimony within two terms after the dissolution, the cause will not be dismissed or heard, but may be continued.

MR. STANLEY stated that this was an injunction bill, and that the injunction had been dissolved more than two terms ago, and that the plaintiff had not proceeded in the meantime in the cause.

Counsel for the complainant stated that the papers intended to be used as evidence in it had been left by Mr. Dawson, on his going away, in the hands of Mr. Lowthorp, and the counsel had not yet obtained them.

TAYLOR, J. The cause must either be dismissed or heard; its having not been set for hearing is no objection.

The clerk and master then said that Mr. Dawson had applied to him for a *dedimus* to take testimony at the last term. Upon which the Court said that is a proceeding towards the hearing the last two terms, and continued the cause.

NOTE.—See *Anonymous*, 2 N. C., 162; *Avery v. Brunce, ibid.*, 372.

SMITH v. BOWEN.

1. Any fact stated in the bill and denied in the answer may be inquired into if the counsel require it, and the Court will not refuse to submit it as an issue to the jury.
2. A conveyance cannot be deemed fraudulent to defeat creditors unless it be proved that there was a creditor to be defrauded.

TAYLOR, J. Defendant has a right to require that any fact he deems important, and which is stated in the bill and denied in the answer, to be one of the issues to be inquired into, and the Court will not (297) refuse it. So an issue which HALL, J., at the last term refused was now referred to the jury, namely, whether the bill of sale made by the plaintiff to defendant's wife was intended to comprehend the negroes in question; and whether the conveyance which Smith made of the negroes in question, to Rowland, the father of defendant's wife, was intended for the fraudulent purpose of defeating creditors. Plaintiff alleged it was in trust to return the negroes to him when called for; and upon this allegation his bill was founded.

TAYLOR, J., said in his charge to the jury: It is not enough for the maintenance of this issue that the parties supposed a certain person would recover against the grantor, and that the conveyance was made to defeat that person. It should appear that he was actually *a creditor*.

And upon this issue the jury found for the plaintiff, that it was not to defraud creditors, though there was full proof that it was intended to protect the property against the effects of an action, then depending, in which the plaintiff claimed damages for the conversion of certain slaves, in which he finally failed.

NOTE.—As to the first point, see 1 Rev. Stat., ch. 32, sec. 4, which provides that the court of equity may, at their discretion, submit a fact to the jury or decide it themselves. Upon the second point, see *Brady v. Allison, post*, 348.

STOWELL v. GUTHRIE.

If money or property won by gaming be paid, it cannot be recovered back.

TROVER for goods, and notes for money won by gaming. For the plaintiff it was argued that though under the British act, and according to the cases which put a construction on it, the plaintiff cannot recover, because in *pari delicto potior est conditio possidentis,* yet that rule will not apply to our act, which goeth further than the British act, in this, that by our act not only the *security* but the *contract* is void; and by our act, also, the *transfer of any personal chattel to satisfy or pay money or other thing won by gaming* is void. By the British act the payment of money won is left at the option of the plaintiff; and if he makes it he cannot complain. But by our act the *payment* is rendered void. If so, it passes no property to the receiver, and he gains a naked *possession* only by the transfer, leaving the *property* in the loser. And why leave the *property* in him unless he can recover it? Of what use will it be to say that the transfer shall be void, if the plaintiff cannot have an action to assert his right of property? The transaction will be void in *words,* but in reality unavoidable, for want of the means necessary to its avoidance.

E contra it was argued that winning a thing staked up at the time was not within the prohibition of the act; and if it was, that the plaintiff, who is a violator of the law, shall not be heard to complain of the consequences of his misconduct.

TAYLOR, J. The act should be so construed as most effectually (298) to suppress the vice of gaming, which is the parent of every misfortune; and the best way to do this is to give no action to the plaintiff in such a case; for, knowing that he will not be relieved, he will take care not to engage in gambling.

Verdict for defendant.

QUERE: Is not the principle of this act to take care of those who have not prudence enough to take care of themselves? If so, it is against its principle to say, let men take care of themselves.

NOTE.—See *Mooring v. Stanton,* 1 N. C., 52, and the cases referred to in the note to that case.

STATE v. CRAWFORD.

It is no ground for a new trial that one of the jurors was not a freeholder.

INDICTMENT for passing counterfeit money. Amongst other things, evidence was given of his having in his possession, five or six years ago, stamps for making impressions to the similitude of dollars and guineas. Having been convicted, a new trial was moved because one of the jurors was not a *freeholder,* and this not known to the defendant till after the trial.

TAYLOR, J. A new trial is in the discretion of the Court, who will not grant it unless dissatisfied with the verdict. Here was a full defense and a full examination of the evidence, and it was very sufficient, in my opinion, to warrant a verdict. This is not like the case of a juror who had expressed ill-will towards the defendant before being impaneled; for there, though the verdict was not incompatible with the evidence, there might be reason to suspect the trial had not been impartial.

NOTE.—See *S. v. Greenwood,* 2 N. C., 141, and the notes thereto.

Cited: S. v. Davis, 80 N. C., 414; *S. v. Boon, ib.,* 465; *S. v. Davis,* 126 N. C., 1010; *S. v. Council,* 129 N. C., 517; *S. v. Maultsby,* 130 N. C., 665; *S. v. Upton,* 170 N. C., 771; *Wilson v. Batchelor,* 182 N. C., 95.

HILLSBOROUGH, April Term, 1804.

ALSTON'S EXECUTORS v. JONES' HEIRS.

NOTE.—See *S. c.,* 5 N. C., 45.

Cited: Pearse v. Owens, ante, 235.

HALIFAX, April Term, 1804.

JOSEPH HILL AND OTHERS v. ROBERT HILL AND OTHERS.

An executor is not entitled to a lapsed legacy, nor a surplus undisposed of.

BILL to compel the defendants, executors of Thomas Hill, deceased, to distribute the *residuum* of his estate undisposed of by his will, and

also a legacy which had been lapsed on the death of the legatee (299) in the lifetime of the testator. Defendants demurred, and insisted in argument that the property sought to be distributed belonged to them as executors.

MACAY, J., took time to consider of the same after argument, and said, as to the lapsed legacy, that could not go to the executors, because the disposition to the legatee showed that he did not intend it for the executors; and he relied upon Fonblanque, 131, where the disposition of the *residue* to a legatee who dies in the lifetime of the testator has that operation. He overruled the demurrer as to that. As to the undisposed *residuum,* the defendants' counsel argued that the idea of the alteration of the old law in this point arose from the words used in the act of 1715: "No executor or administrator shall take or hold himself (according to the value of the appraisement) more of the deceased's estate than amounts to his necessary charges and disbursements, etc.; but that all such estate so remaining shall immediately after the expiration of twelve months be equally and indifferently divided and paid to such persons to whom the same is due by this act or the will of the deceased," etc. The object of this act was a special one, to exclude the executor from holding the property for himself, as had been the practice, and charging himself by the *appraisement* to the legatees and next of kin of the intestate. This act directs that he shall not for the future so hold it, but shall divide it. The goods, by the procurement of the executor, were frequently estimated at an undervalue, and the executor was held liable for that value, as the law stood before this act. Indeed, the abuse of appraisements became so intolerable that not long afterwards, in 1723, the Legislature, ch. 10, openly complained of and abolished them. And they say in the preamble of this latter act that *such appraisements have been generally much short of the true value of the property.* If the object of 1715 was to prevent executors holding for themselves property thus undervalued, it would be going beyond the act to extend its meaning to any other alteration of the existing law, especially an alteration of so much consequence as that contended for. The makers of this act had not in contemplation the surplus which under the existing law belonged to executors. They have said, *"No executor or administrator* shall take or hold." They meant to abolish a mischief common to *both.* Now the *administrator* could never retain to himself the residue undisposed of by the will; he was bound to distribute all. The law, then, does not comprehend the case of a residue undisposed of by will. Again, the executor or administrator is to deliver over the property to the party entitled to it by the will of the deceased,

or by this act. By this act the next of kin were entitled to the estate of an intestate; but no one is intestate who makes a will, and (300) where there was a will the executor was entitled, by the existing law, to all that was not disposed of otherwise by the will. Then the direction of the act is to pay all to the legatees where there is a will, or to the next of kin where there is no will. Where there is a will, and not all disposed thereby, the executor cannot deliver over to legatees *that part,* for there is no legatee of that part. Nor are the next of kin entitled by this act, for this act gives to them only the estate of an intestate. This clause relates only to an executor or administrator on one side and to legatees and next of kin on the other. These latter are entitled to the full value of the property, or rather the property itself, notwithstanding the appraisement. But where there are no legatees nor any intestacy, the clause is silent.

What we contend for is very greatly confirmed by the ninth and last clause of the act of 1715, ch. 49, the act in question. It directs that "If any sum or sums of money shall hereafter remain in the hands of an *administrator,* after the term of seven years shall be expired, and not recovered by any next of kin to the deceased, or by any creditor in that time, the same shall be paid to the church wardens," etc. Why did not this clause direct *executors* to pay over in like manner when a surplus remains in their hands after payment of legacies? Clearly because *executors* were, by the law in being, entitled to such surplus.

The Court overruled the demurrer as to the undisposed residue, also. *Quere de hoc.*

NOTE.—Notwithstanding the doubt thrown out by the Reporter as to the correctness of the decision in relation to a residue undisposed of not belonging to the executor, it has long been the settled law of this State that whatever personal estate is undisposed of by a will is held by the executor in trust for the next of kin.

ARRINGTON'S ADMINISTRATOR v. COLEMAN.

A new trial will be granted on the ground of surprise where plaintiff is not permitted to read depositions because of the deponent's being security for costs.

WHEN the trial came on, the plaintiff was about to read two depositions of one Phillips and his wife, which were essential in the cause, and it was objected that Phillips, the witness, was a surety for the costs

of the suit; whereupon his testimony was rejected. Plaintiff moved for a new trial, on the ground of surprise; and MACAY, J., rejected his motion without hesitation.

NOTE.—See *Rutledge v. Read, ante,* 242, and the cases referred to in the note on the last point in that case.

STATE v. STALLINGS AND OTHERS.

The State may ask if a witness is a man of bad moral character.

MACAY, J., after argument: The Attorney-General may ask the question concerning a witness for the defendants, whether he is a man of *bad moral character.* He is not confined to the question whether the witness be a man of veracity, or of veracity when (301) upon oath.

So the question was asked as to his moral character.

NOTE.—See *S. v. Boswell,* 13 N. C., 209.

Cited: S. v. Boswell, 13 N. C., 210; *S. v. Daniel,* 87 N. C., 508.

——— v. COLLIN PERSON'S EXECUTORS.

A judgment in Virginia against defendant as executor, to be levied *de bonis testatoris,* is proof of assets; and in debt on such judgment here, the judgment shall be *de bonis propriis.*

THIS was an action of debt brought against the defendants, naming them executors, and founded on a judgment in Virginia against them as executors, *to be levied of the goods of the testator, if there were any such, and if not, then the costs de bonis propriis of the defendants.* To this action the defendant now pleaded. *No assets.*

PER CURIAM. The confession of judgment in Virginia, and the entry in consequence thereof, is a proof of assets, and the judgment now shall go against the defendants for the whole, *de bonis propriis.*

NOTE.—See *Hunter v. Hunter,* 4 N. C., 558.

JOHNSTON v. HOUSE.

If a deed call for 80 poles and a certain tree as a corner, and such tree be at the distance of 160 poles, that shall be the corner, notwithstanding proof that the surveyor, after making the corner, cut off 80 poles to get the exact quantity.

MACAY, J. Person surveyed the land for the patentee, under whom House claims, and extended the line in question 160 poles, and marked and cornered it, and also the next line; but, coming to calculate, he found he had included 712 acres instead of 640, and he cut off the land in question by drawing a line from 80 poles instead of 160. But he returned a plat to the office, mentioning the corner red oak, marked at the end of 160 poles, and the corner white oak, marked at the end of the next line drawn from thence. The plat having been returned with these corners, although mentioned to stand at the distance of 80 poles instead of 160, they shall be taken, notwithstanding the *distance* mentioned in the plat, to be the true corners. The corner marked at the end of 80 poles is a white oak, instead of a red oak, called for in the patent.

Verdict for defendant and a new trial refused.

NOTE.—See *Person v. Roundtree*, 1 N. C., 69, and the references in the note to that case.

Cited: Cherry v. Slade, 7 N. C., 89; *Brown v. House*, 118 N. C., 886; *Deaver v. Jones*, 119 N. C., 600.

WILMINGTON, May Term, 1804.

BORDEAUX v. WILLIAMSON.

Ways are of two kinds, those which are established by public authority, and private ones, which are by grant or prescription; a way which has been used as such by a neighborhood for 40 years, when the commencement of the usage is known, will not suffice to establish it as a way.

TRESPASS *quare clausum fregit*, and the defendant pleaded *that* a common way used by the neighborhood and leading to a *landing* and public *road* ran through the lands of the plaintiff, and that it (302) had been usual to repair it by cutting timber for the purpose *near to it*; that the trespass complained of was for cutting needful timber for the repair of this common way, and near to it, etc.

LOCKE, J. Ways are of two kinds: those which are established by public authority, and private ones, which are by grant or prescription. Proof, as here, that it has been used as a way for the neighborhood for near forty years, when the commencement of the usage is known, will not suffice for the establishment of it, as contended for by defendant.

Verdict for plaintiff.

NOTE.—See *Woolard v. McCullough*, 23 N. C., 432.

LONDON v. HOWARD.

NOTE.—See *S. c., post*, 332.

Cited: Johnson v. McGinn, 15 N. C., 278.

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BATTLE v. YATES' EXECUTORS.

Where a testator, among other bequests, directed as follows: "After my debts are paid, it is my will and desire that my stock of hogs and cattle, my notes and accounts, shall go to U. W.," and the executor paid the debts out of an undisposed of surplus, and not out of the legacy thus left to U. W., *it was held* that the application of the surplus by the executor was right.

PETITION by one of the next of kin of the testator, claiming a portion of a surplus not bequeathed by the will of the testator. It was agreed between the counsel that the cause should be submitted to the Court upon the following statement: That the testator, amongst other bequests, made the following: "After my debts are paid, it is my will and desire that my stock of hogs and cattle, my notes and accounts, shall go to Uz. Williams"; that the executor paid the debts of the estate out of the undisposed surplus, and that if this application of the surplus by the executor was proper, and if he was not bound to pay (305) the debts out of the legacy bequeathed to Uz. Williams, that then the petition should be dismissed; otherwise, there was to be judgment for the petition.

LOCKE, J., declared his opinion that the application of the surplus by the executor was proper.

And the petition was dismissed.

NOTE.—See *Dickens v. Cotton*, 22 N. C., 272, and *White v. Green*, 36 N. C., 45, which recognize the rule that an undisposed surplus is the proper fund to be first applied to the payment of debts. See, also, *Boon v. Rea*, 36 N. C., 71.

ASHE, ADMINISTRATOR, ETC., v. SMITH.

If the assignee of an unnegotiable paper sue in the name of the payee and fail, he shall, upon a rule for that purpose, be compelled to pay the costs.

THIS was an action brought by Walker, as the assignee of an unnegotiable paper, made payable to plaintiff's intestate and assigned. There was a verdict for defendant. And now it was moved, in behalf of Ashe, that a rule should be made on Walker to show cause why he (Walker) should not pay the costs. And upon argument, and citing several cases adjudged in our courts, and upon time taken to consider, the Court adjudged accordingly, and ordered Walker to pay the costs, and execution to issue against him for them.

Overruled: Lea v. Brooks, 49 N. C., 425.

HOSTLER'S ADMINISTRATORS v. SMITH, EXECUTOR OF ROWAN.

An execution cannot be levied upon the property of a deceased man after it is delivered over to his legatee; but such legatee must account for its value.

DEFENDANT pleaded that after the expiration of one year he delivered over the estate to the legatees, and that afterwards judgments were obtained against the executor, and the property so delivered over was taken to satisfy them, all but five negroes, etc. Demurrer thereto.

PER CURIAM. Executions cannot be levied on property delivered over to the legatee. He must account for the value, and not redeliver the property to be sold.

Demurrer allowed.

NOTE.—See *Alston v. Foster,* 16 N. C., 337.

Cited: McKinsie v. Smith, post, 372; *Rea v. Rhodes,* 40 N. C., 157; *Grant v. Hughes,* 82 N. C., 220.

MOSELEY'S HEIRS v. MOSELEY'S HEIRS.

NOTE.—See *S. c.,* reported in 1 N. C., 631.

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COURT OF CONFERENCE,

RALEIGH, June, 1804.

MILLISON v. NICHOLSON.

NOTE.—See *S. c.*, reported in 1 N. C., 612.

JOHNSTON AND WIFE v. PASTEUR.

NOTE.—See *S. c.*, reported in 1 N. C., 582.

STANLY v. TURNER.

NOTE.—See *S. c.*, 5 N. C., 14, and 1 N. C., 635.

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TRUSTEES OF THE UNIVERSITY v. FOY.

NOTE.—See *S. c.*, reported with the opinions of the judges at length in 5 N. C., 58.

Cited: Robinson v. Barfield, 6 N. C., 423; *Hoke v. Henderson,* 15 N. C., 16; *Wilson v. Jordan,* 124 N. C., 715.

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CUNNISON & CO. v. HUNTER.

On demurrer to one issue and answer to the other the case stands for trial on the issue.

PER CURIAM. If there be a demurrer to one plea, and issue upon another, the parties must be prepared for trial on the issue, though the demurrer be under the direction of the Court. Upon an argument formerly had, and the plaintiff being not ready, he was nonsuited.

HAMILTON & CO. v. SIMMS.

A deed from the ancestor to the heir is proof the heir had lands from the ancestor.

PER CURIAM. The defendant, to be liable as heir, must have lands which descended to him from his ancestor, and to which that ancestor had title. A deed shown by the plaintiff from the ancestor to the defendant is a proof that the defendant had the lands from his (327) ancestor, though it does not appear who caused the deed to be registered, or that it was even delivered to or accepted by defendant.

NEW BERN, July Term, 1804.

——— v. HERITAGE.

Where a grant calls for a certain course and distance to A. B.'s line, thence a certain course and distance *along his line,* the second line is along the line of A. B., and not the course and distance called for.

HERITAGE had sold lands to the plaintiff, and covenanted for the goodness of the title. He had in his deed described the lands by a line of a certain course and distance to A. B.'s line, thence a certain course and distance *with his line* to, etc. The course and distance of these two lines included land which belonged to another, but not if A. B.'s line be considered as the boundary.

MACAY, J. The line of A. B. is to be considered as the boundary of the land sold by Heritage. He did not sell any beyond that, and of course did not sell to the plaintiff the land he says he did. If that land has been recovered from the plaintiff, this covenant does not subject defendant to pay for the value of it.

Verdict and judgment accordingly.

NOTE.—See *Smith v. Murphey, ante,* 183, and the references in the note thereto.

Cited: Dula v. McGhee, 34 N. C., 333; *Bowen v. Gaylord,* 122 N. C., 821.

EDENTON, October Term, 1804.

ANONYMOUS.

Under the plea of *non est factum* to an action upon a bond, evidence cannot be given that the bond was delivered as an escrow.

DEBT upon a bond, and *non est factum* pleaded. Plaintiff proved the delivery of the bond, and was proceeding to state the conditions on which it was delivered, to be delivered over.

Mr. Drew insisted that as there was no plea of *delivered as an escrow,* no such proof could be offered, and relied upon *Smallwood v. Clark, ante,* 146; *S. c.,* 1 N. C., 205, cited by TAYLOR, J., at NEW BERN, and afterwards by the Court of Conference.

HALL, J., said he had long doubted exceedingly of that decision; but as it had been decided by the Court of Conference, he would not undertake to overrule it. But if a proper case was made, he would carry it to the Court of Conference for their reconsideration. Most clearly, if the delivery was made to the plaintiff by the intervening person to whom it was delivered for the plaintiff's benefit, before the terms were complied with in which the delivery to him was authorized by the defendant, it was done without authority, and could not be considered as his delivery, and so not his bond.

NOTE.—See *Smallwood v. Clark,* 1 N. C., 205; but see, *contra, Moore v. Parker,* 5 N. C., 37; *S. c.,* 1 N. C.

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HALIFAX, October Term, 1804.

TROUGHTON'S ADMINISTRATOR v. JOHNSTON.

Where a by-bidder, by agreement with the owner, runs up the price of property, and it is knocked down to him, he shall hold the property against his employer; because the agreement is fraudulent, and a party to a fraudulent agreement cannot allege that it was fraudulent to avoid its effects.

HALL, J. The negro sued for belonged to Troughton, and was pledged to Johnston as security for a sum of money due from the former to the latter. Four years intervened, and the negro was exposed to public auction by direction of Troughton, and bid off by Johnston.

It is now said the purchase by Johnston was a mere pretence, and by agreement between him and Troughton, the real object having been to sell to Kirk, a buyer of negroes, by running him up to a high price, and by bidding off for Troughton, if Kirk would not bid as high as the sum contemplated. Such agreement is fraudulent, and Troughton, a party to that fraud, cannot allege for the purpose of avoiding the sale. But if the jury think a new agreement was made afterwards, which revested the property in Troughton, then the sale has lost its effect.

NOTE.—See *Smith v. Greenlee*, 13 N. C., 126.

BELCH v. HOLLOMAN.

A recovery in trespass is not a bar in detinue unless the damages in trespass were given for the property, and that is to be left to the jury upon the evidence.

DETINUE for the recovery of a negro slave, sold by Sherrod, a constable to satisfy executions against the estate of Cobb, to whom the plaintiff's wife was an executor and also a legatee. She had not made a dvision according to the will, although two years and more were expired. And now defendant's counsel insisted that if the property had vested in her by her electing to take as legatee, which he did not admit, still there was a verdict and judgment against Sherrod for seizing and selling this negro, rendered at a former term, for the sum of £30 and costs.

HALL, J. The jury are to judge from circumstances whether the £30 were given for the trespass only, or for that and the property. If for the former only, the plaintiff is not barred; if for the latter, he is. And he left to the jury the circumstances from which it might be inferred to have been for the trespass only.

They found for the plaintiff, and there was judgment accordingly.

HALL, ASSIGNEE, v. BYNUM.

If the subscribing witness to a bond becomes assignee thereof, and assigns it over to the plaintiff, proof cannot be received either of his handwriting or of that of the obligor.

DEBT on a bond. John Short was the attesting witness, and James Short the obligee. He assigned to John Short, and he again to the

plaintiff. The handwriting of John Short was proven, and also that of the obligor; and *Brown* objected to its being read to the jury.

HALL, J. The case is somewhat like that in 1 Strange, 34, (329) where the obligor left the subscribing witness his executor; but not at all like the case where the witness dies, or cannot be found, or becomes blind, *non compos,* or infamous; for these disqualifications are not brought about by the agency of the obligee. Here it is; and by such means a forged bond may be easily established against any one, without swearing to a falsity.

The subscribing witness writes the name of the obligor, and the payee or obligee assigns to him; and then some person who is acquainted with the handwriting of the subscribing witness swears to it. Proof of the handwriting of the obligor is liable to a similar rejection; for if the proof of his handwriting will do, then by a like assignment to the witness, something like that he knew for the advantage of the obligor would be kept back.

Some days afterwards the cause was again considered on a motion for a new trial.

Plaintiff's counsel said he would not insist upon the first point, that the witness could be sworn, or his handwriting proved; but as to the second, namely, that the handwriting of the obligor might be proved, he could not abandon *that* without the utmost reluctance. The reason given for rejecting such proof was that as the witness could not be sworn, the obligor might lose something within the knowledge of the witness, very material for his defense. Who is it that causes the rejection of the witness? The obligor. Shall he be permitted to say the witness shall not be sworn, and then to say, if he were allowed to be sworn he would say something in my favor, and as he cannot be sworn, his handwriting shall not be proved? Again, proof of the handwriting of the obligor, in cases where there is no subscribing witness, establishes the execution of the bond by the defendant; and the obligee's possession of it is *prima facie* evidence of the delivery. What, then, could the subscribing witness prove if he were sworn? He could not say, it was delivered as an escrow to the obligee, for there cannot be delivery as an escrow to the obligee, nor can he prove a condition, for you cannot aver, by parol, a condition against the bond. If it were delivered as an escrow to a third person, there is no need of the witness, for the third person can prove it; nor can the witness prove usury, gaming, or the like, for by his attestation he has undertaken to support the instrument. There never was a witness called upon to subscribe for the purpose of destroying the instrument by his evidence.

E contra, Brown argued that the subscribing witness would be allowed to prove, delivered as an escrow, usury and gaming, which evidence was excluded by his rejection.

The Court took time to consider, and after several days, the judge said his opinion was not altered by the arguments he had heard; (330) that he adhered to the rejection of the proof of the handwriting of the obligor, as well as proof of the handwriting of the witness.

NOTE.—See *Ellis v. Hetfield*, 1 N C., 41, and the references in the note thereto.

Cited: Saunders v. Ferrill, 23 N. C., 102; *Overman v. Coble*, 35 N. C., 4.

EELBANK'S EXECUTORS v. BURT.

The declaration of a parent made subsequent to a gift to a child shall not be received for the purpose of invalidating such gift.

DETINUE for negroes. .Mr. Davis was offered as a witness to prove some conversation had with Mrs. Eelbank, who, it is alleged, made a gift of the negroes to Mrs. Burt, on her marriage. But it having been previously sworn that she had admitted a gift on the morning preceding the marriage, when Mrs. Burt was present, the judge thought it improper that any after conversation of hers should be received to invalidate the gift. So he was rejected. But had not such admission been proved, and the defendant's reliance had been on the circumstance of the negro's going home with his wife, and continuing there for some time, he would have received evidence of conversations about the time of their going home, in order to have discovered what were the intentions of the mother.

NOTE.—See *Gray v. Harrison, ante*, 292, and the references in the note to that case.

PENNINGTON AND WIFE v. HAYES, ADMINISTRATOR, ETC.

An action of debt suggesting a *devastavit* will lie against an executor upon a decree in the court of chancery in Virginia, to be levied *de bonis testatoris, et si non de bonis propriis* of the executor.

PLAINTIFFS had obtained a decree in a county court in Virginia, on the chancery side, to be levied *de bonis testatoris, et si non de bonis propriis.*

Plummer, for defendant, objected that this action, which was an action of debt, suggesting a *devastavit,* should have been against Hayes as administrator. Secondly, that as a *devastavit* was suggested, it should be proved to the jury. Thirdly, that this decree being in chancery *in rem,* would not support such an action, the object of which is to subject the proper goods of the administrator. He now abandoned the two first objections, but insisted upon the third; and argued that as the decree was to be satisfied out of the assets in the hands of the executor, it could not be claimed out of his own estate.

E contra, it was argued by plaintiff's counsel that the proper decree of a court of chancery, not made a court of record, is that the executor, personally, shall pay the debt, and process of contempt issues against him for disobedience. 1 Bro. Ch. C., 488. And in that view of the case, it can be no hardship to proceed upon the decree to subject him personally. If, however, the decree be *in rem,* as it is insisted, it must be because the decrees in Virginia can do what decrees in England cannot; for there the maxim is, Chancery *agit in personam.* Their decrees are *in personam,* and their process to enforce them, also. It is not, however, for the advantage of the defendant to say the decree is *in rem,* for so is the judgment at law against an executor, *to wit,* (331) to be levied *de bonis testatoris,* and is enforced by a *fieri facias,* which is a process *in rem.* There is not any reason why the nonproduction of assets shall not be attended with the same consequences in chancery as at law, namely, being subjected *de bonis propriis.* The judgment at law is a proof of assets and a *devastavit,* if *nulla bona* be returned, because at law a judgment would not be pronounced to be levied *de bonis testatoris,* unless it had been previously ascertained that he had assets; so neither would a decree in equity, for there an account of assets is always taken, unless the defendant admits them. The Court will not pronounce a decree unless there be a report of assets. Can there be any reason, then, that he shall not be liable personally, in equity, for the nonproduction of assets, when that nonproduction will make him liable at law? Or that the words, to be levied *de bonis testatoris,* with a return of *nulla bona,* shall at law be proof undeniable of a *devastavit,* but in equity shall afford no such evidence, nor be attended with any such consequences? Let me ask, How, then, is the plaintiff in equity, who has such a decree, to proceed upon the return of *nulla bona?* If he cannot subject him *de bonis propriis,* and cannot proceed *in personam,* as is objected, how, then, can he proceed? He must still look for the fund which nowhere exists; and if he cannot find that, he must stop. This is the plain consequence of the objection. It cannot be objected that an action of debt will not lie,

for the decree in chancery in Virginia is a matter of record as much as a judgment at law, is equally conclusive, and equally extinguishes the cause of action on which the decree is rendered. This point was decided by MARSHALL, J., at the last term of the Circuit Court at RALEIGH, in *Miller v. Hardiman.* The only reason why in England debt will not lie on a decree is because, not being of record, it cannot extinguish, but only ascertain the demand on which the decree is rendered.

The defendant is not estopped as at law; in other words, the judgment not being *in rem,* nor enforced by *fi. fa.,* but in *personam* only, there must be a new proceeding before the *res* or property of the defendant can be affected; which new proceeding is grounded upon the original cause of action.

The Court took time to consider, and then gave judgment for plaintiff.

Cited: Armistead v. Bozman, 36 N. C., 123.

HUSON'S ADMINISTRATORS v. PITMAN.

If by mistake or unskillfulness in the drawer of a bond it be not drawn according to the true understanding of the parties, the surety of the obligor shall be subjected in equity, according to the true understanding of the parties. Hence, where, in an appeal bond from the county to the Superior Court there was omitted the clause obliging the obligors to pay the debt, etc., whereupon the Superior Court refused to render judgment against the sureties upon the appeal bond, *it was held* that the plaintiff was entitled to a decree against the sureties.

THIS bill in equity stated that Huson was a purchaser for value of a bond given by Waller to Arthur Waller, and sued in the County Court of Halifax, in the name of A. Waller, and obtained a verdict. (332) Waller, the defendant, appealed, and gave Pitman for surety in the appeal bond. Plaintiff obtained judgment in the Superior Court, and took out a *sci. fa.* upon the appeal bond, against Pitman. Upon examination of the bond it appeared there was omitted out of it the clause obliging the surety to pay the debt, etc., whereupon he was discharged by a judgment of the court. Plaintiff then filed this bill, and stated the omission, and that it was by mistake that defendant understood he was bound to pay the principal debt when he entered into the bond, in case of a judgment against his principal; and that he had gotten from Waller, the defendant, an indemnity. Plaintiff's counsel, observing

that the *mistake* had been denied, said he would rest his case upon that circumstance alone, and said the difference was this; where a bond was given by a surety, as the parties intended it to be, but by a subsequent event the surety became discharged at law, he will not be charged in equity; but where by *mistake* or *unskillfulness* of the drawer the bond is drawn not according to the understanding of the parties, and thereby the plaintiff is disabled to recover, equity, on account of the mistake, will relieve. He cited 1 Atk., 32; Ch. Rep., 99; 2 Wash., 141. *E contra* was cited Ch. C., 125, stated also at the end of Francis's Maxims.

The Court took time to consider of the cases, and on the last day of the term decreed for the plaintiff, upon the ground of mistake in drawing the bond; and the Court held that the plaintiff need only prove a valuable, not an adequate, consideration to entitle himself in equity.

NOTE.—See *Armstead v. Bozman*, 36 N. C., 117, where relief was granted in equity to the ward against the sureties to a defective guardian bond.

Cited: Armstead v. Bozman, 36 N. C., 117.

TAYLOR v. WOOD'S EXECUTORS.

Equity will reimburse a defendant at law, who, by judgment at law, has been compelled to pay too much; he not having had notice of the proceeding at law against him.

WOOD had obtained a judgment against Taylor as a collector, without giving him notice by motion for judgment in the county court, for a considerable sum more than was due, and enforced payment. Taylor sued him at law for a reimbursement, and obtained a verdict, but could not get judgment, because it was a suit to recover what had been recovered by judgment. He then sued in equity, stating in his bill all the circumstances; and the Court relieved him, and gave him a decree for the excess taken from him by Wood.

NOTE.—See *Fish v. Lane, post*, 342; *Gatlin v. Kilpatrick*, 4 N. C., 147; *Jones v. Jones*, 4 N. C., 547; *Peace v. Nailing*, 16 N. C., 289; *Alley v. Ledbetter, ibid.*, 449; *Bizzell v. Bozman*, 17 N. C., 154; *Armsworthy v. Cheshire, ibid.*, 234; *Dudley v. Cole*, 21 N. C., 429; *Woodfin v. Smith, ibid.*, 451; *Wells v. Goodbread*, 36 N. C., 9; *Piercy v. Piercy, ibid.*, 214.

WILMINGTON, November Term, 1804.

JOHN LONDON v. HENRY B. HOWARD.

What shall be deemed reasonable notice to the endorser of a note of nonpayment by the maker must depend on the local situation and the respective occupations and pursuits of the parties. But *it seems* that where the parties live in the same town, from the 10 November to 26 January following is too great a delay in giving notice to the endorser of nonpayment.

ON 10 November, 1801, John Barclay gave to the defendant a promissory note, which on the same day was endorsed by the defendant to the plaintiff. The note being payable on demand, the plaintiff, in (333) the presence of the defendant, asked Barclay when it should be paid, and was answered, in a day or two. On 26 January, 1802, Barclay became a bankrupt, and no other demand for payment from Barclay, besides what is above stated, appeared to have been made by the plaintiff before the day when Barclay failed; and no notice of the refusal or inability of Barclay given to the defendant until after Barclay's failure. It further appeared that between 10 November and 26 January following, the plaintiff received from Barclay considerable sums of money in payment of other demands. All the parties lived in Wilmington, and were commercial characters.

Wright for plaintiff.
Gaston & Jocelyn for defendant.

TAYLOR, J., submitted it to the jury, under all the circumstances of the case, to decide whether the plaintiff by his delay or indulgence to Barclay had not made the note his own, and discharged the defendant. The strict rule laid down in the English law books respecting bills of exchange and negotiable notes have never been deemed in force and in use in this State; and it was impossible to lay down an universal rule at the time when demand of payment should be made of the maker of the note, and notice given to the endorser. The rule must depend on the local situation and the respective occupations and pursuits of the parties. In this case he thought that the indulgence given by the plaintiff to Barclay was too long, and that the plaintiff should sustain the loss occasioned by Barclay's failure.

Verdict for defendant.

NOTE.—See *Pons v. Kelly, ante,* 45, and the references in the note to that case.

Cited: Johnson v. McGinn, 15 N. C., 278.

WILKINS v. MCKINSIE.

Where A. purchased of B. a draft drawn by C. (who was B.'s debtor), on New York, and B. being about to leave town, A. asked him, "How shall I get your endorsement?" to which B. replied, "I will leave an order which will secure you": *it was held* that this amounted to a contract by B. to indemnify A., should the bill not be accepted.

THIS cause again came on to be tried before TAYLOR, J., and the same evidence was given as on the former trial, except this addition, that McKinsie being about to leave town, Wilkins said to him, *"How shall I get your endorsement?"* McKinsie answered, "I will leave an order which will secure you." The judge left it to the jury to determine whether this evidence proved an agreement on the part of McKinsie to indemnify the plaintiff in case of a nonacceptance of the bill. If they thought it was, then a verdict should be found for the plaintiff; if otherwise, for the defendant.

Verdict for plaintiff.

NOTE.—See statement of this case as it appeared on the former trial in the report of it in 1 N. C., 570.

HOWARD v. ROSS.

1. An owner of a vessel is liable for the contract of his captain. But if he parts with the management and control of the vessel to the captain upon a contract to receive part of the earnings of the vessel, he is discharged from his liability unless he himself makes the contract for taking in a cargo on freight.

2. For the loss of a cargo by the captain's mismanagement, damages should be given according to the value of the property at the port where it was received.

DEFENDANT owned a vessel which he had contracted with Noble to leave to his management and custody; that Noble should victual and man her, and take in freight when and where he thought proper, and should account for one-third of the profits to defendant. He took in a load, on freight, at New River, for Howard, to be carried to Wilmington, put into an intermediate port, took in more lading, (334) and thereby the vessel and cargo was lost.

It was argued for the defendant that the action lay against Noble, and not against Ross, under the above circumstances. Noble was the owner *pro tempore,* he being completely from under the control of Ross,

who could not oblige him, whilst the contract lasted, to observe any directions Ross could give him. Defendant's counsel cited 2 Str., 1251, and the American Law Mercatoria, 103.

TAYLOR, J. Ross continued to be owner notwithstanding this contract, and is liable for the undertakings and miscarriages of Noble. The case in Molloy, 229, 230, is not law, so far as it states the master only to be liable for a deviation or barratry.

There was a verdict for the plaintiff, and a motion made for a new trial, and on the appointed day was fully argued; and now, on this day, being near the close of the term, the Court gave judgment.

TAYLOR, J. An owner is liable for the contract of his captain; and is discharged from his liability if he parted with the management and control of the vessel to the captain upon a contract to receive part of the earnings of the vessel. Here, however, the contract was made by the owner himself, with the plaintiff, which shows he still considered himself an owner. As to the damages to be recovered, the owner should not be charged but for the value of the goods at the port of reception. The case cited from 2 Burrows, 1171, and other cases upon the subject, the principles of which are analogous to the present case, seem decisive upon the subject, and there must, upon this ground, be a new trial, unless the plaintiff will remit the difference between the value at the port of delivery and that at the port of departure.

Plaintiff remitted accordingly, and had judgment for the residue.

NOTE.—See *Murfree v. Redding*, 2 N. C., 276; *Harvey v. Pike*, 4 N. C., 519.

WELCH v. GURLEY.

An administrator is not liable to answer, as garnishee, whether his intestate was not indebted to the defendant in the attachment.

THIS action was instituted by process of attachment, and Mrs. Snead, as administratrix of her deceased husband, was summoned as a garnishee, to discover whether her intestate did not owe a debt to Gurley, the defendant. It came up by appeal from the county court of ONSLOW.

Gaston & Haywood for the garnishee.
Jocelyn for plaintiff.

Counsel for the garnishee made a previous question, to wit, whether an administratrix could be compelled, as a garnishee, to appear and answer. (335)

TAYLOR, J. She cannot; because having not contracted the debt, she cannot be presumed enough conusant of the transaction to answer. Also, she cannot by plea put upon the record the plea of *plene administravit,* or bonds, or judgments outstanding; for no such plea, nor indeed any plea, is allowed by law to a garnishee. All she could do would be to answer the interrogatories put to her; and if in fact she had *fully administered,* she might, by a judgment against her as garnishee, be forced to the commission of a *devastavit.* Should an issue be directed as to the debt itself between her and the plaintiff, what evidence could be given on the trial? The bond, note, or other evidence of the debt would be in possession of the defendant, and could not be produced on the trial. If less evidence than that would do, then she could not tell how to plead as to assets, were she allowed a plea; whereas, if sued by the defendant, she could know by demanding oyer, before she pleaded, of what nature the demand was, and would defend herself, as to assets, accordingly. If she could on her garnishment put such defense on the record, which is much to be doubted, then she would be compelled to swear to the plea, which in all other cases she is not obliged to. Moreover, if she confessed the debt in part, not knowing precisely the amount, she would be condemned to pay it, and would not be discharged as other garnishees are; for a second and third creditor might still call on her as a garnishee, and, proving more of the debt still due, might have a second and third judgment against her; which is not the case with other garnishees. Also, the assets in the hands of the executor might, by means of an attachment and garnishment, be paralyzed; for while the executor was held up as a garnishee, no other creditor of the testator ought to be permitted to recover against him, since he is so far bound by the garnishment as if eventually there should be condemnation he will be bound to produce the assets attached in his hands. This would open a wide door to fraud, for just creditors by such means might be kept off at pleasure.

Garnishee discharged.

Cited: Gee v. Warwick, post, 354; *S. v. Morehead,* 65 N. C., 686.

COURT OF CONFERENCE,

RALEIGH, December Term, 1804.

CHURCHILL & LAMOTTE v. HOWARD.

NOTE.—*See S. c.*, 5 N. C., 39, and 1 N. C., 636, under the name of *Churchill v. Comron.*

(336)

HOWARD v. PERSON'S HEIRS.

If one bind himself to procure a tract of land for an infant by the time he comes of age, and fail in the performance, the infant is entitled to damages according to the value of the land when he arrives at age.

THE Court granted a new trial, because General Person, the intestate, being bound by his promise to procure a tract of land of a certain description for the plaintiff, by the time he should come of age, and having not done so, the jury should have assessed damages according to the value of such lands at the time of his arriving at age; whereas they assessed them by taking the value at the time of the verdict.

And we will not require of the defendants, as a condition of the new trial, that they should not insist upon the act of limitations.

ORMOND v. FAIRCLOTH.

NOTE.—See *S. c.*, 5 N. C., 35, and 1 N. C., 636.

WYNN v. ALWAYS.

NOTE.—See *S. c.*, 5 N. C., 38, and 1 N. C., 636.

JOHN C. STANLEY v. TURNER.

NOTE.—See *S. c.*, 5 N. C., 14, and 1 N. C., 635.

(337)

NEW BERN, January Term, 1805.

LAVENDER v. PRITCHARD.

1. A surety to an appeal bond is an incompetent witness for the appellant, but his incompetency may be removed by the appellant's giving a new bond with other sureties.

2. A symbolical delivery of chattels is good when the things given are not present to be delivered. Hence, where one said to a child, "I give you all my corn and all my hogs, my horse, and my boy," and then took an ear or two of corn out of a wallet and said, "Here taken of the corn I have given you," and gave the child the ears of corn, *it was held* to be a good gift of corn, but not of the boy, horse, and hogs.

PLAINTIFF offered a witness who was surety in the appeal bond, and an objection being made to his competency on this account, plaintiff's counsel offered to give another surety in his place.

TAYLOR, J. Withdrawing this surety from the appeal bond would discharge the bond; therefore, in case of withdrawing at all, another new bond must be given, to be signed by two new sureties. This the plaintiff could not do. So the witness was rejected.

Other evidence was then laid before the jury, and the gift to the plaintiff by Pritchard was proved thus: Pritchard came to the house of Lavender, having some ears of corn in a wallet, and after getting into the house said to the plaintiff, a child: *"I give you all my corn and all my hogs, my horse* [naming him] *and my boy"* [naming him]. He then took out of the wallet an ear or two of corn, and said: *"Here, take of the corn I have given you"*—and gave the child an ear or two.

The jury found a verdict for the plaintiff, with damages for all the property claimed by the plaintiff. A new trial was moved for, on the ground that a gift *inter vivos* could not be perfected but by a delivery of the very thing itself given, not by a symbol or representative of the thing given. Secondly, if a symbol would do, the thing used as a symbol should be delivered expressly in the name of the thing given; and here it was not said for what purpose the corn was given, nor whether it was intended as a representative of the whole or any part of the property. Defendant's counsel cited 2 Vezey, 442; 2 Bl. Co., 442; and they challenged the other side to produce a single case at the common law where it is said that a delivery of something, in lieu of the thing given, was a sufficient delivery to complete the gift.

TAYLOR, J., who had directed the jury that a delivery of part of the thing given was a good delivery of the whole of that species of property, took several days to consider of the motion for a new trial, and came into court with divers books, which he read in support of his former opinion. Our law, he said, was taken from the civil law, which allowed of a possession of part to be given in the name of the whole. 1 Brown Civil and Admiralty Law, 256. He said it was also analogous to the common law respecting the seisin of lands or of rents, where one thing may be given in the name of seisin of the rent or land. He cited 1 Inst., 1596, 160, 315. It was true, he said, there are not many old books which treat of this subject, because in ancient times personal property was not considerable enough to engage the attention of law writers.

He said the doctrine which he delivered to the jury was to be
(338) found in modern books, particularly in Wood's Institutes, 242, where it is said: "Upon a gift, or bargain and sale of goods and chattels personal, the delivery of sixpence or a spoon is a good seisin of the whole." Here was a delivery of part of the corn, which the jury are at liberty to consider as a delivery of the whole corpus of which that thing was a part. But it cannot be considered as a delivery of all the things given, because the horse, one of the articles enumerated in the gift, was present, and might have been delivered, and yet was not; and as to the hogs and the negro boy, no words were expressed to show an intent that the ear of corn should be a symbol of these. There must, therefore, be a new trial, unless the plaintiff will release the damages for all but the corn.

They did so, and the verdict stood for the residue.

NOTE.—Upon the first point, see *McCullock v. Tyson*, 9 N. C., 336, and *Garmon v. Barringer*, 19 N. C., 502.

On the other point, see the note to *Arrington v. Arrington*, 2 N. C., 1, and the case of *Adams v. Hayes*, 24 N. C., 361.

Cited: Brittain v. Howell, 19 N. C., 108; *Garmon v. Barringer, ib.,* 503.

CHURCHILL v. SPEIGHT'S EXECUTORS.

1. If the subscribing witness to a bond or note does not believe the signature of the obligor to be his handwriting, but that his (witness's) name is his own handwriting, and that he never attested more than one paper signed by the obligor, that may be taken by the jury as proof of the execution by the obligor.

2. If a bond or note be given for the purchase of a tract of land, for which the purchaser takes a deed and has it recorded, a subsequent delivery of the deed back to the vendor will not restore the title, and will not amount to a payment or satisfaction of the bond or note.

TAYLOR, J. This is an action of debt on a single bill. The general issue is pleaded, and payment. To prove the bill the subscribing witness is sworn he believes his name subscribed thereto to be of his own handwriting. He remembers that he attested a note from Speight to Sheffield (who assigned to the plaintiff), and that he never attested more than one paper of that description. He does not believe the signature of this paper to be in the handwriting of Speight; nor does he remember or believe that there was a seal to the paper he attested. Where circumstances are proved which could not have existed unless the principal fact also existed, such circumstances are proofs of the principal facts. Then his handwriting to this paper, when he never subscribed to another of the like kind, leads to a conclusion that this is the very paper which Speight executed; and then the signature is the signature of Speight; and if so, the words in the body of the paper are his likewise, and these speak of his seal as well as of his hand, which is persuasive evidence of his seal. The jury will, therefore, consider whether the seal is proved or not. As to the payment, the witness says the note he speaks of was given for a tract of land which Sheffield conveyed to Speight. He says, also, they came to a settlement afterwards, and the note was included in it; that the deed was redelivered to Sheffield, and he admitted the note was discharged, but that it was lost or mislaid. It appears, however, that the deed was recorded before the redelivery. If the obligee agrees to accept of something as payment, supposing it to be of a certain value, the payment is not good. Here the parties supposed the redelivery of the deed was a restoration of the title to Sheffield. It does not restore the title; that still remains in Speight. The redelivery of the deed was of no value, and the intended payment is, therefore, not (339) good.

Verdict for plaintiff.

Cited: Dorsey v. Moore, 100 N. C., 44.

TEMPLETON v. PEARSE.

After judgment by default in an action of covenant, defendant cannot, in the execution of a writ of inquiry, give in evidence a counter-agreement, signed by the plaintiff, to make deductions on the happening of certain events which it is alleged have taken place.

COVENANT upon a sealed instrument for payment of money; and the defendant has suffered judgment by default. He now applies to be at liberty to give in evidence to the jury a counter-agreement signed by the plaintiff, engaging to make deductions on certain events which the defendant says have taken place, and to incur a penalty if he did not make such deductions.

I am of opinion the defendant cannot give this counter-agreement in evidence for the purpose of reducing the damages. Plaintiff ought to have had notice thereof by plea, if indeed it could be at all used by way of reducing the damages in this action.

NOTE.—See *Anonymous*, ante, 34.

PARKINS v. COXE.

It is waste to cut down timber for sale, or to make tar out of lightwood on the land; but it is not waste to destroy timber in clearing the land for cultivation, or to cut it for the purpose of repairing buildings, fences, and plantation utensils.

TAYLOR, J. It is not waste to clear tillable land for the necessary support of his family, though the timber be destroyed in clearing; nor is it waste to cut down timber for making or repairing fences, necessary buildings, or plantation utensils. But it is waste to cut down timber for sale; so it is waste to collect together the lightwood and extract tar from it, for that is a permanent injury, as it takes several years to produce as much lightwood. If the tenant is to have liberty of burning lightwood for tar, or felling the timber for sale, it should be conceded to him in the lease.

NOTE.—See *Ballentine v. Payner*, *ante*, 110, and the cases referred to in the note to that case.

Cited: King v. Miller, 99 N. C., 595; *Thomas v. Thomas,* 166 N. C., 631.

JASPER'S ADMINISTRATORS v. TOOLEY'S ADMINISTRATORS.

Covenant will lie on the condition of a bond with a penalty.

TAYLOR, J. Covenant will lie on a bond in a penalty, with condition for conveying to the plaintiff half of the negroes that shall be recovered from a third person, in the name of Tooley, but at the expense and under the management of the plaintiff. Defendant's counsel had argued that a condition following the penalty of a bond was so far from being a covenant or engagement on the part of the defendant that it was inserted expressly for his benefit, and to relieve him from the penalty, and that he might or might not make use of it at his pleasure.

NOTE.—See *S. c., post*, 351.

SPIVEY v. FARMER'S ADMINISTRATOR.

1. If a man's slave usually acts for him as a ferryman, the master is considered as a common carrier.
2. If one induce a slave, who is a ferryman, to take in such a load as is obviously and plainly too heavy for the boat, whereby the slave is drowned, the owner shall have case against such person and his executors.

THIS action was brought for that the intestate of the defendant enticed and persuaded a negro man of the plaintiff to attempt to transport him in a flat across the Neuse River, with a load which rendered the attempt dangerous, when the river was swelled and rapid; in consequence whereof the flat sunk, and the negro, as well as the intestate himself, were drowned. (340)

TAYLOR, J. It is not material that this was not a ferry licensed by law, and within 10 miles of another ferry, whereby it was illegal to ferry persons over for a reward. The negro was usually employed by his master to ferry over travelers and others for a reward; and that is equivalent to a command from the master to carry them over when applied to. It places him in the light of a common carrier. The true question is whether the defendant's intestate induced the negro to take in such a load as was obviously and plainly, without calculating upon chances, too heavy for the vessel to sustain whilst there was that swell in the river. Secondly, the witness and his horse was taken in at the same time with the intestate, his horse, and two oxen; and neither they

nor Farmer apprehended danger from the weight of the load. It is therefore apparent that the load was not such an one as obviously endangered the vessel.

Verdict for defendant.

NOTE.—On the subject of common carriers, see ——— *v. Jackson*, 2 N. C., 14, and the cases referred to in the note thereto. On the other point, see *McGowin v. Chapin*, 6 N. C., 61; *Hilliard v. Dortch*, 10 N. C., 246.

Cited: Haynie v. Power Co., 157 N. C., 506.

STATE v. FELLOWS.

The owner of the property is not a competent witness in an indictment for forcible trespass, and an indictment found on his testimony must be quashed.

TAYLOR, J. The person who is to be entitled to a restitution of possession in case of a conviction on an indictment of forcible entry cannot be a witness on the trial; and if the indictment has been found on his single testimony, it ought to be quashed.

And this indictment was quashed for that cause, though there was other testimony now ready to support it.

Cited: S. v. Ivey, 100 N. C., 541; *S. v. Coates*, 130 N. C., 705.

ANONYMOUS.

If a witness has said that he was, by the promise of the plaintiff, to have part of the recovery, a release will not render him competent.

THE witness offered had said that he was to have a part of the recovery; and this being proved by witness in support of the objection to his competence, *Wood*, for the plaintiff, drew a release, which he executed, and then offered the witness.

TAYLOR, J. He is as much incompetent now as he was before. Plaintiff was not bound before to give him part of the recovery by any engagement which had the support of law; and, therefore, the release

discharges no legal obligation. The confidence of the witness in the promise made to him by the plaintiff, though that promise is of no force in law, is what excludes his testimony, and that is not removed by the release. However, you may examine the witness for the present, and reserve the question of competence in case a verdict should be found for the plaintiff.

Quere, if it should not have been proved that plaintiff had agreed to give part to the witness. A witness cannot disqualify himself.

(341)

NOTE.—See *Ingram v. Watkins*, 18 N. C., 442.

SIMMONS v. RADCLIFF.

On the abatement of a suit by the death of the plaintiff, his representatives are liable for his costs, but no execution should issue for them until a *sci. fa.* has issued to the representatives.

PLAINTIFF sued defendant in an action of trespass *quare clausum fregit,* and died during the pendency of the action. An abatement was entered, and execution issued against his representatives for costs.

Harris now moved to set aside the execution for costs; and a day being appointed to hear him in support of the motion, he argued that no costs were paid upon an abatement by the law as it stands in England, nor is there any provision for payment of costs in such a case by our law, which only directs costs to be paid by the plaintiff on a *nonsuit, dismission, or discontinuance, or judgment* against him; and without the express directions of an act for that purpose, a judgment cannot be entered against the estate of a dead man, as a judgment to pay costs must be, if entered upon an abatement by his death.

Counsel for defendant: The constant practice ever since the passing of our act of 1777, ch. 2, sec. 99, hath been to issue executions as this has issued; and the practice in such cases is a good expositor of the act. An abatement by death, though not mentioned in the act, is within its equity. A discontinuance or nonsuit may not be by the voluntary act of the plaintiff. A want of preparation for the trial by nonattendance of witnesses or other accidents or irregularity in conducting the pleadings may occasion them, and yet the plaintiff pays costs, because he has been

active in causing expense whilst the defendant was passive; and the plaintiff has not demonstrated the justice of his procedure by the event, and not till then can he show the justice of compelling the defendant to pay them. So in all other cases where he has caused the accrual of costs, and has not proved the defendant ought to pay them, he must himself be responsible, as much as in cases specified in the act.

TAYLOR, J. A nonsuit is within the equity of the 6th section of the act of limitations, and I think the case of an abatement by death is within that of the 99th section of the court law. But I differ from both the gentlemen with respect to *the mode* of obtaining costs from the estate of the plaintiff. A process in the nature of *sci. fa.* ought to issue to bring in the representatives, and the judgment should be entered against them before the execution issues.

Referred to the Court of Conference.

NOTE.—Executors pay costs in this country because the *party* in whose favor judgment shall be given shall be entitled to costs. That must be from his adversary, whoever he be.

NOTE.—See *S. c.*, 5 N. C., 113, where the Court of Conference held that a *sci. fa.* should issue to the representatives of the plaintiff before any execution should be issued against them for his costs on an abatement by his death.

(342)

FISH v. LANE.

If a plaintiff on a trial at law conceals facts which, if known, would have prevented a recovery, such concealment is a good ground for coming into equity.

THIS bill in equity stated that Fish discovered an error in the patent under which he held, by which error all the land he claimed was left out of his boundaries. It stated that Lane represented to Fish that the law would not admit of a correction of the error, and advised Fish to employ him (Lane) to cover it with a warrant he had to obtain a grant in his name, and to convey to Fish with warranty. It stated, also, that Lane engaged to take the notes of the complainant and his brother, and to return the notes to the plaintiff should he ever get the error rectified; and that the error was rectified, and that Lane would not give up the note, but sued upon it and recovered. It was objected for the defendant that the matter here stated might have been proved at law, and the plaintiff would thereupon have had the same relief as he now seeks.

TAYLOR, J. It is also stated that the present defendant, on the trial at law, *concealed* facts which, if they had been known, would have prevented his recovery. *Concealment* of material facts is a good ground for coming into this Court after a trial at law.

The bill was therefore not dismissed, but, on issue, was made up and tried.

NOTE.—See *Taylor v. Wood, ante*, 332, and the cases referred to in the note thereto.

EDENTON, April Term, 1805.

RHEA v. NORMAN'S EXECUTOR.

There ought to be an attestation by two witnesses of every part of a will of lands; and, therefore, a will which was attested by one witness, and afterwards the date inserted, and then the other witness subscribed, is not good to pass lands.

A WILL, dated 12 February, 1804, had been proved, and another was offered for probate, dated the 14th of the same month. On the trial it appeared one witness subscribed and then the testator inserted the word *February*, and seemingly in the place of another word, after which the witness attested.

TAYLOR, J. There ought to be an attestation by two witnesses of every part of a will of land; and, therefore, this will, if good at all, can only be so for the personalty.

TAYLOR, J., granted a new trial in this case, but upon what ground the Reporter does not know, having not been present.

NOTE.—See *Bateman v. Mariner*, 5 N. C., 176, in which the Court says that the insertion of the words "dearly beloved," and the date, is wholly immaterial, and produces no alteration in the will.

SUTTON v. BLOUNT.

An old survey made in a controversy between A. and B. cannot be given in evidence in a suit between B. and B. to affect C.

EJECTMENT. Defendant offered in evidence a survey made in 1728, as he said, upon a complaint made that the land of Wilkinson, adjoining that of Blount, and bounded in part by a part of the third line of

Blount's land, contained more than the patent called for. The survey, he said, was made in consequence of such complaint to the Governor and Council by a Mr. Moseley, the then Surveyor-General of the province of North Carolina.

TAYLOR, J. The survey is no evidence against Sutton, who claims under Blount's patent; for as to Blount, it was *ex parte,* and made behind his back. Moreover, this survey is stated to have been in consequence of an order issued by the Governor and Council. Then the proceedings before them should be produced; otherwise, the survey has no foundation; and Mr. Moseley could not, at the mere instance of some stranger, make a survey of Wilkinson's land, and thereby affect Blount's title to the land he claimed.

The survey was rejected.

NOTE.—*Simpson v. Blount,* 14 N. C., 36.

RIDLEY'S ADMINISTRATORS v. THORPE.

1. Twenty years raises a presumption of the payment of a bond; but if any circumstances can be offered to account for the delay, they may hinder the presumption.
2. The act of 1715 (see 1 Rev. Stat., ch. 65, sec. 11) barring the claims of creditors against a decedent's estate after seven years, having made no exception whatever of any description of persons, the court can allow of none.
3. If the first seven years after the death of the debtor cannot for any cause be computed, the next seven may.

DEBT upon a bond given on 28 September, 1772, and payable on demand. Defendant, who was the heir of the obligor, and was sued in that character, pleaded payment, that there were personal assets sufficient in the hands of the administrator and next of kin, and the act of 1715, concerning the proving of wills and granting letters of administration, etc. It was proved that Peterson Thorpe, the obligor and ancestor of defendant, died in May, 1777, and that Timothy Thorpe administered, and had assets more than sufficient to pay all his debts; that Day Ridley, the obligee, died in June, 1777, leaving the said Timothy Thorpe, his executor, who qualified as executor the same month; that the said Timothy died in 1787, and an administrator was appointed for his estate; administration *de bonis non* of Day Ridley was granted in 1790, and a like administration for the estate unadministered of the said Peterson was granted in 1804.

TAYLOR, J. Where a bond has not been sued upon for the (344) space of twenty years, nor interest paid upon it in that time, and if the plaintiff cannot account for not suing in the time, a jury are at liberty to presume the bond to have been paid. Defendants rely upon length of time, as such evidence of payment in the present case. Plaintiff says he has accounted for not suing from 1777 to 1787, by proving that one and the same person, during all that time, was the representative of the obligee and obligor, and so could not sue himself. Defendants, on the other hand, say the presumption is much strengthened by this circumstance, and, indeed, they say that it is of itself tantamount in law to payment. They rely upon the case of *Dorchester v. Webb,* Cro. C., 372, 373. The amount of that case is that the plaintiff was the executor of the obligee, and also the executor of the obligor; but at the death of the obligor, or after, she had not any of the effects of the obligor wherewith she could pay the debt; and because she had no such assets, the Court adjudged she might maintain her action against the coöbligor of her testator; for, said the Court, although she be executor to John Dorchester, the other obligor, yet when she hath fully administered all the estate of the said John Dorchester, before she be made executor to Ann Rowe (the obligee), she hath in a manner discharged herself of being executrix to John Dorchester, and hath not anything of his estate. The case allows the circumstance of being representative of both, and having assets sufficient of the obligor to afford a very strong presumption of payment; and the jury may take into consideration a calculation of the principal and interest due upon the bond, to be endorsed thereon, as made 21 December, 1779; also the circumstance of the administrator of the obligor permitting the widow to remove from Virginia to North Carolina, with eighteen or twenty negroes, in 1780. As to the act of 1715, plaintiff's counsel insist it cannot run on from 1777 to the end of the war, nor after 1787 till 1790, because in the intermediate time there was no person who could have sued upon the bond; and that if the act does not take effect at the end of the first seven years next after the death of the obligor, it never can take effect at all. My answer to these remarks is this: The act of 1715, requiring creditors of any person deceased to make their claim within seven years after the death of such debtor, otherwise such creditor shall be forever barred, makes no saving whatsoever for any person under any circumstances; and *my Lord Coke* says where the Legislature have made no exceptions the judges can make none, and that infants and femes covert would have been barred by the common act of limitations, had they not been excepted therein. The Court, indeed, goes so far as to say that a case like one of those excepted by the act shall be within its equity and government, but (345)

it cannot make an exception of any kind where the act itself has not made any exception. Then, admitting that the act of 1783 has suspended the operation of all acts of limitation during the war, this act will remain afterwards; and if seven years elapse without claiming the debt, though not the next seven years next after the death of the debtor, the creditor will be barred, for it cannot be law that the creditor is left without limitation if for some cause the first seven years cannot be computed.

Verdict for defendant, and judgment.

NOTE.—See, on the first point, *Quince v. Ross, ante,* 180, and the cases referred to in the note thereto.

On the other points, see *McLellan v. Hill,* 1 N. C., 479; *Jones v. Brodie,* 7 N. C., 594; *Rayner v. Watford,* 13 N. C., 338; *Godley v. Taylor,* 14 N. C., 178; *McKinder v. Littlejohn,* 23 N. C., 66; *Lee v. Gause,* 24 N. C., 440.

Cited: Rogers v. Grant, 88 N. C., 443; *Tucker v. Baker,* 94 N. C., 165; *Long v. Clegg, ib.,* 767.

WILMINGTON, May Term, 1805.

LARKINS v. MILLER.

Possession of part is possession of the whole, both parties having color of title.

DEFENDANT'S fence included about a quarter of an acre of the land in question; the rest of the field, enclosed by the fence, belonged to another tract.

HALL, J. The possession of this quarter of an acre is the possession of all the disputed tract of which it is a part. Such possession will prevent the running of the act of limitations against the defendant. Both parties have color of title under different grants and deeds, and the perfect title is in him who has had the requisite possession.

Plaintiff suffered a nonsuit.

Cited: Fitzrandolph v. Norman, 4 N. C., 575.

PARKER v. ———.

If a negro sue the person claiming him as a slave for his freedom, and the defendant imprison him, and upon a *habeas corpus* a strong case in favor of the negro is made out, the defendant will be required to give security to let him go at liberty to procure testimony.

PLAINTIFF sued defendant for his freedom, by a writ returnable to this Court; whereupon the defendant put him in prison. Plaintiff's counsel complained of this to the Court, and moved for an *habeas corpus,* and the Court ordered one to bring him in a future day in the term, and ordered notice to be given to the defendant. The plaintiff was brought into court on the day appointed, and examinations in writing were taken to prove the probability that he was free, and a strong case was made out by them; these were filed in court. The Court ordered that the defendant either should give security to leave the plaintiff at liberty until the next term, to go whither he pleased to procure testimony, or should submit to the Court to go immediately into the consideration of what was proper to be done in the *habeas corpus.* He chose the former, and then the Court proceeded no further in the *habeas corpus.* The defendant was ordered to give bond and sureties accordingly, and the plaintiff was released from imprisonment.

The action brought by the plaintiff was trespass for false imprisonment; to which the defendant pleaded that the plaintiff was his slave; and issue was joined thereupon. (346)

NOTE.—See *Goble v. Goble, ante,* 127, and *Evans v. Kennedy,* 2 N. C., 422.

COURT OF CONFERENCE,

RALEIGH, June Term, 1805.

MATTHEWS v. DANIEL.

NOTE.—See *S. c.,* 5 N. C., 42.

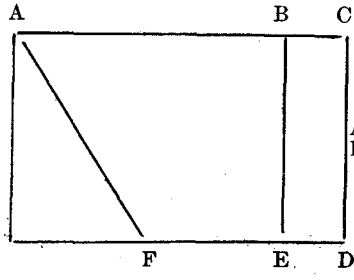
NEW BERN, July Term, 1805.

LOFTEN v. HEATH.

Any mistake or wrong description of the land in the plat or patent may be rectified by parol testimony, and the true location of the land be proved by testimony *dehors* the patent.

EJECTMENT.

TAYLOR, J. Plaintiff insists that the beginning of defendant's tract is at a *cypress,* and that the fourth corner is a pine upon the creek, and so along the creek to the beginning; in which case the land in dispute is left in plaintiff's patent. The defendant insists that the *pine* is the *beginning* tree; that the original survey actually began there, and ended at the cypress; in which case the land in dispute is within defendant's patent. The creek is not parallel to the second line, as probably the surveyor supposed, but runs transversely from the *cypress to the pine.* The distance of 200 poles from the pine, and then the course of the second line, will intersect the line from the cypress at a much greater distance than 200 poles from the cypress. Running from the cypress 200 poles and there stopping, and from thence running the second line, will intersect the line from the pine at a much less distance



than 200 poles. It is in evidence from the hearsay of the chain carriers, now dead, that the original survey began at the pine, and from thence to the second corner, and so to the third, being the courses that defendant contends for. It is also in proof that the former courses of defendant's tract called the cypress the beginning of the tract; and the patent says, beginning at a cypress. It is contended on the part of plaintiff that as the patent calls for a cypress as the beginning of the tract, defendant cannot be allowed to depart from the words of the patent, and say that the *pine* is the beginning, and not the *cypress.* I will not say whether it was wise or not, in the first instance, to depart

from the words of a grant, but many decisions of our courts have allowed of such a departure, in order to fix the location where it *really* was made originally. (He cited and stated the case of *Person v. Roundtree*, 1 N. C., 69, which he said had been followed up by many other cases to the same effect.) It must now be taken as the law of this country that, notwithstanding any mistake or wrong description either in the plat or patent, the party who is likely to suffer by it may by parol testimony show the mistake, and prove the location of (348) his land by testimony dehors the patent; and upon making clear proof thereof, shall hold the land actually laid off for him. Consequently, if the jury are well convinced that the original survey began at the *pine*, they ought to find for the defendant.

NOTE.—See *Person v. Roundtree*, 1 N. C., 69, and the references in the note to that case.

Cited: Reed v. Shenck, 14 N. C., 68, 70; *Higdon v. Rice*, 119 N. C., 630.

BRADY v. ELLISON.

If a conveyance be made to defeat an expected recovery in a suit, it will not be deemed fraudulent to defeat creditors, should the recovery not take place.

BRADY was sued by Worsley, and was apprehensive of a recovery. Ellison represented to him that the plaintiff was likely to recover, and that Brady and Ellison *agreed* that Brady should convey to Ellison his land, which Ellison should reconvey, if Worsley should not obtain judgment; but if he should, that then he should convey to Brady's *children*. Worsley was nonsuited, and Ellison refused to reconvey the land.

PER CURIAM: If Worsley was a creditor, the conveyance intended to defeat him was a fraudulent conveyance, and an assumpsit by Ellison to restore the lands was void. The act of Assembly says the contract shall be valid between the debtor and his grantee; and why? To deter the debtor from the attempt, by placing him in the power of the grantee. This obstacle to the attempt would be completely removed if the plaintiff could legally bind himself to restore the property or its value, and the debtor could practice a fraud on his creditors without the least risk, for after he had succeeded in defrauding his creditors the law would interfere in his favor and enforce the returning of his property by the vendee.

If Worsley, however, was not a *creditor,* then the conveyance is not fraudulent, and there is no legal objection to the contract which the plaintiff has sued on.

Verdict for plaintiff.

NOTE.—*Smith v. Bowen, ante,* 296.

Cited: Jackson v. Marshall, 5 N. C., 331; *Dobson v. Erwin,* 18 N. C., 575; *Bank v. Adrian,* 116 N. C., 543.

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(349)

GARDNER & DEVEREUX v. SMALLWOOD.

1. Taking a full price and stowing upon deck will subject the owner of a vessel to pay damages, if what is placed on deck be *thereby* lost or damaged; but if *that* did not occasion the loss, he will be no more liable for damage to that part of the cargo than for the rest of it.

2. A captain of a ship is not a competent witness for the owner, sued for the loss of a cargo, to prove that the loss was occasioned by stress of weather and not by negligence.

DEFENDANT was owner of a vessel, bound to New York, and took in freight, part of a load belonging to the complainants, for which they gave him the full price. The captain stowed part in the hold and part on deck, as was contended. The cargo, as well in the hold as on deck, was injured by a storm.

PER CURIAM: Taking a full price and stowing upon deck will subject the owner of the vessel to pay damages, if what is placed on deck be *thereby* lost or damaged; but if *that* did not occasion the loss, he will be no more liable for damage to that part of the cargo than to the rest of it.

Vide New York Term Reports, 43. Goods shipped on deck, the shipper paying one-half freight, if ejected in a storm, shall not have contribution from the goods in the hold, and the owner of the vessel is not liable.

N. B.—In the above case the owner of the ship, the defendant, offered the captain as a witness to prove the loss to have been occasioned by distress of weather, and not by any neglect on his part; but the Court would not receive him till released by the defendant. The Court said it is not like the case of a shopkeeper's servant becoming a witness.

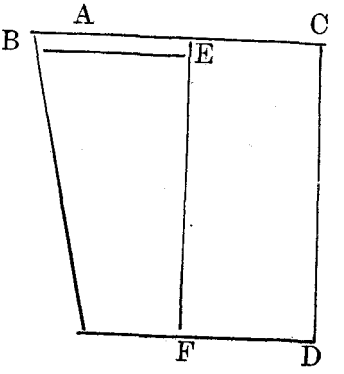
HARRIS v. POWELL'S HEIRS.

General reputation or hearsay is admissible as evidence in questions of boundary.

PLAINTIFF'S patent called for a *white oak,* then the second line, then the third to a creek, then down the creek to the beginning. He proved a marked *white oak,* on a branch emptying into the creek, and running from thence so as to form an acute angle between it and the creek. He proved, also, a red oak at the third corner, and a red oak was called for in the patent, and that where the red oak stood the second line would terminate, if drawn from the end of the first line, beginning at the white oak. This white oak standing on the branch was at the (350) distance of 200 or 300 yards from the creek.

Under the charge of the court, however, the jury found a verdict establishing it as the beginning, and the verdict remained undisturbed.

This verdict was found on the hearsay of a witness now dead, who heard a former proprietor, now also dead, say that the white oak was the beginning tree; and on the hearsay of another witness, who said he ran out the land for the said proprietor when he purchased it, and began at the said white oak, in 1766. The original survey was made in 1753, or earlier.



If the beginning was at A, then C D was the true line of the patent. If at B, then E F was the true line. The plaintiff claimed to C D, and prevailed, as the white oak at A was established instead of the beginning at B on the creek.

NOTE.—See *Standen v. Bains,* 2 N. C., 238; *Tate v. Southard,* 8 N. C., 45; *Taylor v. Shuford,* 11 N. C., 116; *Mendenhall v. Cassells,* 20 N. C., 49. But

the rule of admitting hearsay in questions of boundary must be confined to what deceased persons have said. *Gervin v. Meredith*, 4 N. C., 439. And the hearsay evidence must not be *post litem motam*. *Dancy v. Sugg*, 19 N. C., 515.

Cited: Hurley v. Morgan, 18 N. C., 430; *Hartzog v. Hubbard*, 19 N. C., 243; *Whitehurst v. Pettipher*, 87 N. C., 179; *Smith v. Headrick*, 93 N. C., 212; *Shaffer v. Gaynor*, 117 N. C., 20; *Yow v. Hamilton*, 136 N. C., 359.

GASKILL v. DIXON.

If after a promise of marriage with the plaintiff, the defendant discovers that she is unchaste, he may give that fact in evidence; and if true, it is a complete defense to an action for breach of the promise.

PER CURIAM: The plaintiff has sued the defendant upon a contract of marriage, and he insists, by way of excusing himself for the non-performance, that after the contract he discovered that she was a woman of impure and unchaste habits and practices, and has attempted to prove her so. If he has succeeded to the satisfaction of the jury, it will form a *complete defense* for him against the action, and will not be in mitigation of the damages only. She held herself up to him as a chaste and undefiled woman. Upon *this* as a *condition*, he contracted, and surely he is released from his engagement when she is found to be otherwise, for the condition on her part is not complied with.

The jury disbelieved defendant's witnesses, and found a verdict for the plaintiff, with heavy damages, and she had judgment.

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GARLAND'S EXECUTORS v. GOODLOE'S ADMINISTRATORS.

1. The register's certificate of instruments not required by law to be registered is of no validity.
2. The loss of a bill of sale may be proved by the party's own oath, and if there be no copy, parol evidence of its contents may be given.
3. If the subscribing witness to a bill of sale, which is lost, be dead, others may prove its contents.
4. If the vendee of a slave be sued, and give notice to the vendor of the suit, the record of the recovery against the vendee is conclusive evidence, as to the vendor, of the superior title of the recoverer.

THIS action was brought on a warranty contained in a bill of sale of a negro woman, made by Goodloe to Garland, and which had been recovered from Garland by Mrs. Prescot.

The bill of sale was given in 1783, and on the trial the following points were determined:

That the certificate of its probate and registration could not prove a copy, because the bill of sale did not require registration when it was made. The law of registration passed since, and the officer was not entrusted to certify in such case.

Secondly, the loss of the bill of sale may be proved by the plaintiff, and parol evidence of its contents may be given, there being no copy.

Thirdly, the subscribing witnesses were proven to be dead, and others were suffered to prove the contents.

Fourthly, it was proven that Goodloe had notice of the pendency of the suit by Mrs. Prescot, and the record of her recovery was therefore admitted against him as conclusive evidence of her superior title.

Verdict and judgment for plaintiff.

NOTE.—As to the first point, see *Yarborough v. Beard*, 1 N. C. On the second, see *Smallwood v. Mitchell, ante*, 145, and the cases referred to in the note to that case. On the third, see the cases referred to in the note to *Tullock v. Nichols*, 1 N. C., 27. And on the last point, see *Wright v. Walker. ante*, 16, and the cases there referred to in the note.

JASPER'S ADMINISTRATORS v. TOOLY'S EXECUTORS.

Quere, whether covenant would lie on a bond for division of property when it should have been recovered at law.

TOOLY, in his lifetime, had given a bond in the penalty of £500, with a condition underwritten that if Tooly should recover certain negroes, and should deliver to said Jasper one-half of them, and one of them taking one and the other another, and so on till all were divided, that then the above obligation should be void.

The plaintiffs brought covenant, and at this term obtained a verdict for £757; and it was moved in arrest of judgment that *covenant* would not lie on this bond, nor on the condition thereof, nor would any action lie on the condition.

Haywood, for arresting the judgment, cited Haywood's Reports, 215; 1 B. Ab., 529; 2 Mo., 36; Cro. J., 281; C. Digest *verbo* Covenant, A., 3; Salk., 326; Sh. Touch., 158, 159.

Harris, e contra, cited 3 C. Digest, 257, 258, A., 2.

Curia advisari vult.

NOTE.—See *S. c., ante*, 339, and the case of *Tooley v. Jasper*, in equity, *post*, 383.

RHODES v. GREGORY'S ADMINISTRATORS.

An action on the case against a sheriff for misconduct in his office will not survive against his executors.

RHODES took an attachment against Frazier for a debt due from him, and delivered the same to Gregory, the sheriff, who seized a negro, and returned upon the attachment that he escaped. Whereupon he sued Gregory in an action of debt upon the case for negligence and misconduct in his office. Gregory died, and his administrator was brought in by *scire facias*.

(352) *Graham,* for the defendant, insisted that such an action would not lie at the common law against executors, nor will it by force of the act of 1799, for that only makes a trespass survive against executors where property, either real or personal, is involved in the decision to be made upon it.

Harris, e contra: Either trespass extends to trespass on the case, as well as trespass *vi et armis,* or, if not, the equity of the act extends to this case. The motive of the act was to prevent a wrong by the death of the defendant, by subjecting his estate to make compensation. Here a wrong is done the plaintiff, and he cannot recover satisfaction for the debt he has lost unless he is suffered to maintain this action. It is not pretended any other will lie.

PER CURIAM: It has been decided in the Court of Conference that such an action is not maintainable against executors after the death of the defendant, then testator.

On the importunity of one of defendant's counsel, the judge agreed to carry the cause to the Court of Conference.

NOTE.—See 1 Rev. Stat., ch. 2, sec. 10.

STATE v. ROACH.

The Court will quash an indictment when it is plain no judgment can be rendered in case of a conviction, as where no day is stated as that on which the offense was committed.

INDICTMENT for passing counterfeit dollars, knowing them to be such. It was found at January Term, 1805. The defendant pleaded to it, and it now stood for trial. Defendant's counsel moved that it might be quashed because there was no day stated on which the offense

is supposed to have been committed, though the year is stated; there is a blank left in the indictment for the day and month. They said it was useless to proceed to trial, since the Court must see no judgment could be given upon a conviction; and they cited 2 Hawk. P. Crown, 258, 259.

PER CURIAM: The defect which is pointed out would be fatal upon a motion in arrest of judgment; and though it is true, as has been argued, that the Court has a discretion to quash or not, still it will quash where it is plain no judgment could be given in case of a conviction. Therefore, let this indictment be quashed; but the defendant shall not be discharged, but must be bound over to another term to answer the charge.

NOTE.—On the subject of quashing indictments, see *S. v. Jeffreys*, 1 N. C., 528; *S. v. Fellows*, *ante*, 340; *S. v. Smith*, 5 N. C., 213; *S. v. Baldwin*, 18 N. C., 195; *S. v. Roberts*, 19 N. C.; *S. v. Buchanan*, 23 N. C.

Cited: S. v. Benthall, 82 N. C., 667; *S. v. Harwell*, 129 N. C., 552.

ANONYMOUS.

Where upon a hearing by consent upon the bill, answer, and depositions, it appeared that the plaintiff claimed *choses in action* from A., who was a defendant in the suit, and had not proved that he had given a valuable consideration for them, the Court allowed A. to be made a party plaintiff instead of defendant, and put off the hearing, that the amendment might be made.

THIS bill, answer, and depositions, to save time, were left, by consent, to be determined by the Court; and on opening the bill and answer it appeared the plaintiff claimed certain negroes under a late conveyance by his father, who, about twenty years ago, conveyed them to the defendant's father, as he alleges, *upon trust,* who always after- (353) wards kept them.

Counsel for the defendant argued that the bill ought to be dismissed, for that the plaintiff states choses in action, and does not show he gave a valuable consideration for them.

TAYLOR, J., allowed the objection to be good; but on motion of defendant, he permitted the father of the plaintiff, who was a defendant, to be made plaintiff, and put off the hearing to a future time, in order that the amendments might be made.

NOTE.—See *Williams v. Williams*, *ante*, 220, and the cases there referred to in the note.

EDENTON, October Term, 1805.

BLOUNT v. BENBURY.

1. The copy of the grant from the Secretary's office, which grant does not appear to have been signed by the Governor, cannot be given as evidence of the grant, but it may as a circumstance to show that the grant once existed.

2. A line described in a deed or patent may be departed from in order to follow a marked line which the jury believe to be the true one.

PLAINTIFF offered a copy of a grant from the Secretary's office. It was not signed by the Governor.

HALL, J. It cannot be received as a copy of a grant, but it may as a circumstance to show that there was once a grant in existence.

It was read. The dispute concerned the title of land between two parallel lines. The lower of them was said to be J. Blount's patent line; and if so, defendant was not in possession of plaintiff's land; but if the upper parallel line was J. Blount's patent line, then the defendant was in the possession of plaintiff's land. The patent under which the defendant claimed called for *Beasley's* line and J. Blount's line, S. 85 E. as one of the boundaries; and the grantor to Benbury, in 1783, called for J. Blount's line, and marked the line now contended for by the defendant, at the time of making his deed. One question was whether the line thus marked should be considered the line which the deed extended to, or whether J. Blount's line, wherever it might be, should be considered the boundary of the deed, notwithstanding the demarcation.

HALL, J. The act of limitations would make a title for the defendant, if the deed extended to the marked line; but I am of opinion it extended no further than to J. Blount's line, wherever that was. The demarcation is not an ascertainment of the line, which he meant as James Blount's line, called for in the deed; and of course the defendant has no color of title to the land in dispute. Also, though the patent calls for Beasley's line, and the patentee's old line, S. 85 E. for one boundary, still the jury may consider Beasley's line the boundary, so far as it goes; and then the marked line, which is 51 poles to the north of it and parallel to the line drawn from the termination of Beasley's, the same course with Beasley's, because there have been many (354) decisions in this country which warrant a departure from the line described in a deed or patent, to follow a marked line which the jury have good reason to believe was the true one.

NOTE.—See, as to the second point, *Person v. Roundtree*, 1 N. C., 69, and the references in the note to that case. 2 N. C., 378.

Cited: Cherry v. Slade, 7 N. C., 88; *Fruit v. Brower*, 9 N. C., 341; *Reed v. Shenk*, 14 N. C., 68, 70; *Dobson v. Whisenhunt*, 101 N. C., 648; *Brown v. House*, 118 N. C., 879.

HALIFAX, October Term, 1805.

HUNTER v. BYNUM.

1. Where racing articles specified the terms of the race, and money betted, though there was no obligation distinct from the articles, yet as they detailed all that could have been set forth in an obligation and articles, *it was held* that they were equivalent to the bond required by the act of 1800, ch. 21.
2. Racing articles in writing cannot be varied or altered by parol testimony, though such testimony is admissible to prove their effect.
3. If the articles are to play or pay, and defendant refuses to run, the plaintiff is entitled to one-half the sum betted.

THIS was an action to recover moneys upon a race. The articles were executed 21 April, 1802. They specified the terms of the race, and the money betted, $500; and the following points were now decided:

First, although there was no obligation distinct from the articles, yet the articles detailing all that could have been set forth in an obligation and articles, it was equivalent to the bond required by the act of 1800, ch. 21, which is in the following words: "No money shall be recovered at law by means of any bet or wager on a horse race, except a written obligation is produced on the trial, containing the sum so betted or laid on such horse race, signed, sealed, and attested by at least one witness."

Secondly, the written contract cannot be varied or altered by parol testimony, but such testimony is admissible to prove the effect of the written contract, namely, that the plaintiff having run his horse on the day and place appointed, and the defendant having failed to appear and run his horse, the plaintiff was thereby entitled to half the sum betted. The rules of racing were provable before the act to show that by such contract the defendant under such circumstances was liable to pay half, and so they are yet. Parol evidence was received and proved that such was the rule of racing, and there was a verdict for half the sum; otherwise, said the witness, would it have been had there been a clause that the parties were to play or pay.

NOTE.—On the second point, see *Sharp v. Murphy*, 1 N. C., 631; *Critcher v. Pannell*, 5. N. C., 22; *Jackson v. Anderson, ibid*,.137. On the third, see *Farrell v. Patteson, post*, 362. All horse-racing contracts are now void. 1 Rev. Stat., ch. 51.

GEE v. WARWICK & CO.

A garnishee cannot be asked whether he does not owe as administrator, but he may be as to whether he does not owe as heir or devisee.

ATTACHMENT for a debt, and Mr. Hamlin was summoned as a garnishee. It was now objected that he ought not to be asked whether he owed as the executor of his father or grandfather.

HALL, J. He cannot be interrogated in that character, unless the Court can be convinced by further argument that the case of *Welch v. Gurley, ante*, 334, decided not long since at Wilmington, is not law.

Haywood and *Plummer*, for the plaintiffs, forebore any such question; but they asked him whether he did not owe as *heir* to his father or grandfather, and he answered; and his counsel, *Mr. Brown*, (355) did not object to the question; and he admitted a bond due from his grandfather, and that he had assets from him, not as heir, but as devisee.

NOTE.—See *Welch v. Gurley, ante*, 334.

Cited: Russell v. Hinton, 5 N. C., 473.

HARRISON v. HARRISON.

A witness is competent, though interested in the event of the question, even though he conceives himself interested in the event of the suit, if in truth he is not; and the verdict in the present case cannot be given in evidence against him.

PLAINTIFF sued for two negroes, and called upon a witness to prove the detainer, who said he owned one of the negroes descended from the wench, the defendant was sued for; and that if the defendant lost her, he (the witness) would lose his, also.

Seawell insisted the witness could not be sworn if he conceived himself interested, and cited Stra., 129.

HALL, J. The rule is, if the verdict in the present case cannot be given in evidence in the suit against the witness, he shall be deemed disinterested; and it is no exception to the rule that he conceives himself interested, when in reality he is not.

He was sworn, and proved the detainer, and plaintiff had a verdict and judgment.

NOTE.—See *Farrell v. Perry*, 2 N. C., 2, and the note thereto.

Cited: Mull v. Martin, 85 N. C., 406.

JACKSON v. ANDERSON.

NOTE.—See *S. c.*, 5 N. C., 137.

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BRYANT AND OTHERS v. DEBERRY.

If there be a devise of lands to A. for life, and after his death to John, son of A., and his heirs forever, and if no heir, then over; the limitation over is too remote, and void.

EJECTMENT. Abraham Stephenson died in 1791, leaving a will, and therein he devised the lands in question to his son Charles for his life; and after his death to John, the son of Charles, and his heirs forever; *and if no heir,* then over to Abraham Darden and his heirs forever, etc. John died in the lifetime of the devisor, leaving two sisters of the whole blood, the plaintiffs. In the will there is a residuary clause devising *all the rest and residue of his real and personal estate to Charles.*

Haywood, for plaintiffs, contends that the devise over to Abraham Darden is a void devise, being to take effect after failure of heirs of John, which event was too remote to expect, and made a *perpetuity;* and, besides, that the event had not taken place, for John did not die without heir, but had an heir, the two plaintiffs. And if the limitation over was void, or could not take effect because the event had not happened, then the estate, being undisposed of by the (357) death of John in the lifetime of the devisor, went, under the residuary clause, to Charles, and from him descended to his heirs, the

two plaintiffs; or if it did not pass by the residuary devise, then it descended on Charles, and, on his death, to the plaintiffs. The event of John's death in the life of the devisee would have let in the next limitation had it been a good one *in its creation;* but not being so, no *after event* can make it good; and for this he cited Fearne, 4th edition, 417, 438.

Browne, e contra: The meaning of the devisor is to be followed, and the word *heir,* being in the singular number, meant *child;* and the phrase used is tantamount to saying if John died without a child, then over to Abraham Darden. He cited *Archer's case* in Coke's Reports. Also, he said the expression was, *if no heir,* then over; which did not mean a dying without heirs indefinitely, but a dying without heir at the time of his death.

Haywood, in reply: His meaning was that John and his posterity should have the estate as long as there was any, and when that failed, that it should go over. If John had a child and died, and then that child had a child and died, and then the last child died without issue, it was the meaning of the testator that in such an event the estate should go over to Abraham; and such meaning is not agreeable to the rules for prevention of perpetuities, and concerning executory devises.

HALL, J., was of opinion for the plaintiffs, and directed the jury to find for them, which they did; and there was judgment for the plaintiffs, after a new trial had been moved for.

NOTE.—See *Sutton v. Wood,* 1 N. C., 399; *Bryson v. Davidson,* 5 N. C., 143; *Pendleton v. Pendleton,* 6 N. C., 82; *Wooten v. Shelton, ibid.,* 188; *Jones v. Spaight,* 4 N. C., 157; *Davidson v. Davidson,* 8 N. C., 163; *Sanders v. Hyatt, ibid.,* 247; *Bailey v. Davis,* 9 N. C., 108; *Beasley v. Whitehurst, ibid.,* 437. By the act of 1827 (1 Rev. Stat., ch. 122, sec. 11) the law on this subject is altered.

Cited: Rice v. Satterwhite, 21 N. C., 71; *Buchanan v. Buchanan,* 99 N. C., 311.

BRICKELL & GREEN v. JONES.

It is no ground for relief in equity that a defense was made at law, and by the misapprehension of the law by the judge was overruled.

THE bill stated that Byrd was the administrator of his brother, and *they* his sureties in the administration bond. That he was afterwards appointed their guardian, and of course became entitled to receive what-

ever *he owed* as administrator, which by operation of law was a payment as administrator. That the defendant had sued for the children of the intestate, on the administration bond, and recovered. The bill prayed an injunction. The answer was read, and admitted the facts above stated, but insisted that the complainants, when defendants at law, had urged the same facts by way of defense, and as they had the benefit of such defense at law, they ought not again to urge the same in equity.

Haywood, in support of the injunction, argued that such facts amount to payment; and he cited Salk., 305, 326; Cro. C., 337; 1 L. Ray., 520. There, by the verdict at law, and judgment which proceeded upon a *mistake,* the defendants, when they owed nothing and were legally discharged, have been unjustly made liable to the pay- (358) ment of the sum stated in the complainant's bill. They have been guilty of no default or omission; they are brought into these circumstances by the mistake of the court and jury. And as there is no court of errors, nor any other court in this State which has power to rescind this judgment and to relieve the defendants at law by a revisal, this Court ought to proceed rather upon the ground of mistake, as was done in 2 Washington, 273, 274, 275, or because after the judgment at law the defendants at law became entitled to relief which no court of law could give.

E contra it was argued that to proceed here after a cause properly cognizable at law had been determined in a court of law, would convert this Court into a court of appeals, and for matters of law into a court of errors, and in a short time all litigated causes will end here; whereas this Court is for such extraordinary cases as courts of law are not competent to redress. The defense here was proper to be made, and could have been made with as much effect at law as in equity; and if either it was not made where it might have been, and was made and overruled, though improperly, this Court ought not to interfere.

HALL, J., took time to consider; and after some days, determined that the facts disclosed in the bill have been used by way of defense at law; and if used there and rejected as insufficient, there could not be relief in equity.

Carried to the Court of Conference.

NOTE.—See *Taylor v. Wood, ante,* 332, and the cases there referred to in the note.

GEE v. WARWICK & CO.

A garnishee cannot be asked whether he has paid a bond, which the defendant in the attachment held, and which was more than twenty years old.

ANOTHER garnishee appeared, and a question arose whether upon a bond of more than twenty years standing he could be asked whether he had paid it or not. And the Court, after consideration, determined that he could not, because that would be to make him give up a defense he would have if sued by the defendants; for if sued by them he might plead payment, and rely upon the lapse of time since the bond became payable. I think, said the judge, he is entitled to the same benefit when called on as a garnishee. I cannot see why the defendant's going away and subjecting the garnishee to be called on as such ought to deprive him of any advantage he has. He was examined, and stated that the bond was given in 1774, payable on demand. He also stated the sum for which it was given, but the Court would not suffer the question to be asked of him whether he had ever paid it.

NOTE.—See *Russell v. Hinton*, 5 N. C., 468.

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BLAKE BAKER v. WILSON BLOUNT.

Where a witness who had been subpœnaed failed to appear, and also refused to give his testimony under a commission issued for that purpose, the Court ordered an attachment against him, without a rule, but directed that when taken he might be bailed.

DEBT upon a bond, to which one Adie was a subscribing witness. He was summoned to attend the last term as a witness, and did not do so, because, as he said, he was subpœnaed to attend as a witness at Fayetteville court, which sat on the same day as this Court. Mr. Baker at the last term took a commission to take his testimony; and Mr. Jocelyn was appointed a commissioner. The witness does not attend now, and Mr. Jocelyn has certified that he caused Adie to appear before him, and administered the oath of a witness to him, and that he would not answer the questions put to him, saying he had not his papers ready, and that it was improper to swear him by commission when he was at the same time under subpœna to attend in this suit. Baker moved for an attachment against him, and renewed the motion several times during this term. The Court seemed to be in doubt whether an attachment was proper in the first instance, before a rule was served to show cause

why an attachment should not go; and the more so, as it might well be doubted whether upon the attachment the person attached was bailable. But at length, it being stated to him that in 1780, in this Court, upon an indictment against Willison, a girl being recognized to appear, and having gone off when the jury were in part sworn, that Mr. Iredell, then Attorney-General, moved for and obtained an attachment; upon which Hatton, the person who carried off the girl, was taken up and bailed, and at the next term answered interrogatories.

HALL, J., granted the attachment, but ordered an endorsement to be made that Adie, when taken upon it, should be bailed.

The attachment issued accordingly.

ALSTON v. SUMNER'S HEIRS.

NOTE.—See *S. c., post*, 404.

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HENRY BAKER'S ASSIGNEES v. PUGH.

NOTE.—No opinion was either given or intimated by the Court in this case, and it is therefore omitted.

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BELLAMY v. BALLARD.

Tenant for life of personal property may be required to give bond that they shall not be removed out of the State.

UPON this bill, filed for the purpose, the Court being satisfied that the tenant for life of negroes had threatened to remove them out of the State, and had given reason to believe he intended to do so, did decree that he should give security not to remove them; and this decree was also extended to the stock, which was in like circumstance with the negroes.

NOTE.—See *Wilcox v. Wilcox*, 36 N. C., 36; *Sutton v. Craddock, ibid.*, 134.

HIGHTOUR v. RUSH.

An injunction will be dissolved if it appear that the process was not returned to the return term, and that the complainant had not endeavored to have it served.

THIS was an injunction bill. The process was not returned to this term, to which it was returnable; and no proof was made by the affidavit of Mr. Hightour that he had delivered the process to be executed.

Haywood argued that although an injunction might be dissolved for unnecessary delay, that here Mr. Seawell *appeared* for the defendant for a dissolution of the injunction, which proved that they had notice of it; and although not served with the process, defendant might answer and dissolve the injunction if he could, upon the merits.

The injunction was dissolved because it did not appear the complainant had endeavored to have the process served.

FROHOCK v. EDWARDS.

When the specific performance of a contract made by an ancestor is decreed against an heir or devisee, he shall not pay costs, if there has been a careless delay on the part of the complainant.

FROHOCK's father purchased a tract of land from the defendant's father, upwards of thirty years ago, and paid for it, and continued in possession of the land till his death; and that possession has been continued by the plaintiff till the present time, but no deed was ever obtained from the vendor. This bill was for a deed to be made by Edwards, who was the devisee of all his father's lands. Edwards answered that he did not know of the contract, nor of the payment. The depositions proved the contract, the payment, and the acknowledgment of payment by the defendant. The Court decreed a conveyance, but doubted as to the costs; whereupon were cited for the defendant, 2 Atk., 424; 3 Atk., 387.

HALL, J., took time to consider; and after two or three days directed the costs to be paid by the complainant. He said there had been a careless delay on the part of the complainant; and the defendant had a right to ascertain, by putting the complainant to prove, whether there had been such a contract, and whether it had been executed on
(362) the side of complainant. He had therefore done nothing amiss, and should not be compelled to pay the costs.

NOTE.—See *White v. Thompson*, 21 N. C., 493; see, also, *Tindall v. Mounger*, 5 N. C., 290.

THOMPSON v. ALLEN'S ADMINISTRATORS AND PETERSON.

Both defendants shall have costs upon the dissolution of an injunction, though one claims under the other.

THIS was an injunction bill, and Peterson was brought in by an amended bill. He claimed under the other defendant, and both defendants answered. A question was made, on the dissolution of the injunction, whether each defendant should have costs.

HALL, J., took time to consider, and after some days directed that each defendant should have costs.

FARRELL v. PATTESON.

1. If a race is to be run at A.'s quarter paths, plaintiff need not prove that he actually run a quarter of a mile, but only that he ran over the said paths.
2. If a writ be issued on the day of a race for money won thereat, it must be proved that it issued after the race.
3. If by the terms of a racing contract a horse must be owned by persons in a particular county, all the owners must reside in that county.
4. If the articles be play or pay, and the defendant refuses to run, plaintiff may recover the whole; otherwise, only half.
5. Before the winner in a race can recover, he must prove that his horse carried through the paths the weight he received at the starting poles.

ACTION for money won upon a race; and on the trial it appeared that Farrell was to run with some horse in the county of Franklin, and owned by persons in Franklin; the race was to be run on the seventh day of the month, and on that day the writ issued, as appeared by its endorsement. The horse which he ran over the ground was one in the county of Franklin, but one of his owners, there being two, resided in Franklin, the other in Warren.

PER CURIAM: If the agreement be to run at A.'s quarter paths, (363) the plaintiff need not prove he actually did run a quarter, but that he ran at such paths is enough; otherwise it is if the agreement be to run one-quarter of a mile at such paths. If the writ be issued on the day of the race, the plaintiff must prove it issued after the race. As to the owners of the horse, he ought to have been owned wholly by

persons in the county of Franklin. Thirdly, if the articles are not *play or pay,* and defendant refused to run, the plaintiff is entitled to one-half the sum bet. But if the articles be *play or pay,* the plaintiff shall recover the whole sum bet. Fourthly, it ought to be proved that the plaintiff's horse carried through the paths the weights he received at the starting poles.

NOTE.—See *Hunter v. Bynum, ante,* 354, and the note thereto.

WILMINGTON, November Term, 1805.

WILLIAMS' ADMINISTRATORS v. BRADLEY.

1. Where a defendant had died after judgment, and execution issued tested after his death, under which the sheriff levied upon certain slaves and sold them to the plaintiff in the execution, the sheriff having previously purchased lands of the defendant in the execution and promised to apply the purchase money to the payment of the execution, *it was held* that, in a suit brought by the defendant's administrators against the plaintiff in the execution for the negroes, the sheriff was a competent witness, on the ground that he was equally interested on both sides of the question.
2. If a former sheriff has seized lands to satisfy an execution, there being personal property, it is no satisfaction of the execution as to the defendant, and upon another *fi. fa.* a new sheriff may still seize personal property.
3. A *fi. fa.* binds property from its *teste,* and the lien continues, if a new execution be taken out within a year from the last return, which may be done though the defendant has died since the last return.
4. A purchase of lands by the sheriff from the defendant, and a promise by the sheriff to apply the purchase money to the satisfaction of the execution, do not amount to the discharge of the execution, but to a mere executory contract, which does not satisfy the execution till performed.

DETINUE for negroes. Bradley obtained judgment against Williams in this Court, in the lifetime of Williams. Execution issued from November, 1801, to May, 1802, returned *stayed.* Then it issued to November, 1802, returned *stayed.* Williams died April, 1803; execution issued from May, 1803, to November, 1803, returned without endorsement or blank; then it issued to May, 1804, returned levied on three negroes. A *venditioni exponas* issued to the sheriff, then out of office, to sell, and he sold the negroes in question to Bradley, who was the plaintiff in the execution.

Bloodworth, the sheriff, was offered as a witness.

LOCKE, J., admitted him on the ground that he was equally interested on both sides of the question; for if plaintiff recovered against Bradley, *Bradley would recover against the sheriff* for making an illegal sale. If the plaintiff failed, then he was liable to the plaintiff, for he had purchased lands of Williams, and had promised to discharge Bradley's execution.

Secondly, he decided that if a former sheriff seized lands to satisfy this execution, there being personal property, it is not a discharge of the execution as to the defendant, and the new sheriff may still seize personal property, upon a new *fi. fa.* being delivered to him, and he ought to do so. Besides, Williams sold the lands to Bloodworth in September, 1802, and consented, as Bloodworth swears, that negroes should be considered as seized.

Thirdly, he decided that if a *fi. fa.* issues, it binds the property from the teste; and if a new execution be taken out within a year from the last return, though not from the last return term next after that, it is a sufficient continuance of the execution, and will lay hold (364) of the property of the defendant, though he dies between the return term and the next term, where there is a suspension of the execution. The authorities cited by defendant's counsel were Salk., 322; 2 Ba. Ab., 352; 1 Cro., 174, 181; 2 L. Ray., 851; 2 Viner, 8; 2 Leon., 78; C. Lytt., 290, b; 2 L. Ray., 808.

Fourthly, a purchase of lands by the sheriff from the defendant, and a promise by the sheriff to apply the purchase money to the satisfaction of the execution, is not a discharge of the execution, but is an executory contract, which does not satisfy the execution till performed.

NOTE.—On the subject of the lien of executions, see *Ingles v. Donaldson, ante*, 57, and the references in the note thereto, and also *McLean v. Upchurch*, 6 N. C., 353.

On the second and fourth points, see *Collier v. Bank*, 17 N. C., 525.

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HOOPER v. MCKENZIE.

Possession of one tract, under a deed, less than seven years will not be aided by possession of an adjoining tract longer than seven years.

LOCKE, J. If A. have a deed for one tract, also a deed for a second adjoining, and they are all comprehended together, and A. is in possession for seven years of one and not of the others, the title to these others will not be aided by the act of limitations.

Quere de hoc.

NOTE.—See *Steel v. Hatch, post*, 381; *Carson v. Burnett*, 18 N. C., 546.

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KING AND WIFE v. WORSLEY AND OTHERS.

An advancement will be varied according to its worth at the time of the advancement.

PLAINTIFF'S wife, whilst a widow, dissented to her former husband's will, and now sued for a child's part; and the question was as to an advancement made to one of the children, whether that should be estimated according to the present value or as was the value when advanced. The advancement consisted of a wench and one child, but there are now seven children.

LOCKE, J. The advancement must be estimated according to the value when advanced.

NOTE.—See *Stallings v. Stallings*, 16 N. C., 298.

Cited: Lamb v. Carroll, 28 N. C., 5.

HUNTER v. MCAUSLAN.

A witness who by his testimony will prevent a suit against himself is not competent.

HUNTER repaired the lighters of the defendant, and defendant drew an order for the amount on Gibbs & Barclay, who became bankrupts the day it was drawn. McAuslan says he employed Gibbs & Barclay, and that they employed Hunter; that Hunter was their agent or servant, and that they were liable to him; and that this order was only to ascertain the amount which they were to pay; and that there was no consideration, as between Hunter and defendant. Gibbs' deposition was offered to prove this statement; and it was objected that he is inadmissible, because if Hunter, in consequence of such evidence, should fail in this action, then Gibbs establishes a right in himself to claim the money from McAuslan; for the latter admits it was since due to some one, and if not due to Hunter, it is to Gibbs & Barclay. If paid by McAuslan to Gibbs & Barclay already, then if Hunter recovers, McAuslan will claim from Gibbs & Barclay what he has paid; and, therefore, it is for the interest of Gibbs that Hunter should not recover.

(367) *E contra:* Gibbs proves he and Barclay owed and paid the money to Hunter. If Hunter should not recover against McAuslan, then he will sue Gibbs & Barclay, and put Gibbs to prove, as well as

he can, the payment which he speaks of in his deposition; and possibly, nay probably, Gibbs will not be able to prove it. Then Gibbs is interested that Hunter should recover in this action; for then he (Gibbs) will not be sued by Hunter. Should Hunter recover against McAuslan, then it is said he will sue Gibbs; then if Hunter fails, Gibbs will be sued; or if he succeed, Gibbs will be sued for the money now in controversy. It is therefore immaterial to Gibbs whether he fail or succeed. But it is not true that Hunter's recovery *will* give McAuslan an action against Gibbs, for if Hunter recovers, and McAuslan then sues Gibbs, the latter may still say, "I had a right to receive the money, and am not bound by the verdict and judgment between Hunter and yourself." Gibbs, therefore, need not fear Hunter's recovery; he is interested that he should recover; for if he fails, then Gibbs will be liable to his action. Gibbs, therefore, when he swears to prevent Hunter's recovery, swears against his own interest. Also, it is to be further considered that Gibbs became a bankrupt, and has obtained his certificate, and there is no dividend, nor likely to be any; the whole of his effects have been taken to pay debts due to the United States, which have a preference, and there remains not a farthing for other creditors. Neither Hunter nor McAuslan can sue Gibbs, because of his certificate; and if either of them sues the assignee, it cannot produce a diminution of the funds, because there are no funds. And, besides, the assignee, supposing they had a fund, would be liable exactly as Gibbs would be, laying the bankruptcy aside, namely, to Hunter if he fails in this action, and, as they say, to the action of McAuslan, if he should recover. In either case a diminution to the same amount will take place, and therefore Gibbs is as much interested that Hunter should recover as that he should not; and, therefore, is an admissible witness.

LOCKE, J., after hearing several arguments: Had it not been for the bankruptcy, he would not be a good witness; because, by defeating Hunter, he prevented a suit against himself, and retained in his hands what McAuslan paid him, and because McAuslan, being originally liable either to Gibbs or Hunter, must remain so to Gibbs if Hunter fails in this action; for then no other person can claim but Gibbs. But Gibbs having obtained his certificate, and all his estate having been exhausted in paying the debts due from the United States, and there being no fund in the hands of the assignees to be diminished by McAuslan's suit against them, it seems to me there should be a new trial, that this part of the case may be better considered, and that it may be so carefully determined as to give satisfaction to the parties concerned. (368)

A new trial ordered.

NOTE.—See *Harrison v. Harrison, ante,* 355; *Farrell v. Perry,* 2 N. C., 2, and the note thereto.

A. TOOMER'S HEIRS v. HENRY TOOMER'S HEIRS.

Where a devisor purchased other lands after the making of his will, and gave a portion of them to one of his children in his lifetime, and died without having disposed of the residue, *it was held* that the lands advanced to the one child must be brought into hotchpot in the division of the undisposed of lands amongst the devisor's children, and that the lands advanced must be valued as worth at the time of the gift, and the lands to be divided according to their value at the ancestor's death.

PETITION for the division of lands, under the act of 1787, ch. 17. It stated that Henry Toomer made his will in 1789, and devised to his son Anthony, father of the plaintiffs, an equal share of his estate with the defendants, who were also his children; that he afterwards acquired other real estates, and in 1799 died without making any will as to these; that soon after the date of the said will, Henry Toomer gave to his son Anthony part of the real estate he had at the time of making the will; and the questions made by the petition were two: First, whether the lands so advanced were to be brought into hotchpot. Secondly, whether, if brought in, they were to be valued as worth at the time of the gift, or of the death of the testator, or at the time when the division shall be made.

Haywood for plaintiffs: The words providing for hotchpot, in the act concerning the descent of real estates, 1784, ch. 22, sec. 2, were nearly the same as those used in the act for distribution of personal estates. They were of the same import, and for the same end and purpose, namely, to establish equality amongst the sharers. But hotchpot is not required under the act for distribution of personal estates, unless the case be such as is mentioned in the act, that is to say, a case of total intestacy. The case now before the Court is not one mentioned in
(369) the act in which hotchpot is to be used; the case mentioned in the act is where *one shall die intestate;* here he did not die *intestate,* for he left a will. As to the valuation in case the advancement is to be brought into hotchpot, it has often been decided in the case of personals, and was so decided in this Court the other day, that the valuation shall be as the advancement was worth at the time of the gift. I can see no reason why the realty should differ from the personalty in this respect.

E contra, it was argued by *Jocelyn* and *Gaston* that hotchpot existed at common law amongst copartners (Co. Litt., 176), and, therefore, in cases of division under the act, supposing hotchpot not be to be expressly provided for, it should nevertheless take place. But in truth the act

operates upon every case where a part of the realty is left undisposed of; for then he is intestate as to that part, and all the same rules apply as in case of any other intestacy.

Curia advisari. And at the end of the term

LOCKE, J., delivered his opinion, and said the lands advanced must be brought into computation and valued as worth at the time of the gift; the lands to be divided must be valued as worth at the time of the ancestor's death.

NOTE.—This case was carried to the Court of Conference, where the judges were unanimously of opinion that the judgment of the court below should be affirmed. See 5 N. C., 93. See, also, *Norwood v. Branch*, 4 N. C., 400.

Cited: Dixon v. Coward, 57 N. C., 357.

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McKINSIE v. SMITH.

An executor who has delivered over a share to a legatee, and is afterwards sued and a recovery effected against him, is not entitled to charge the legatee with interest on the amount so delivered over.

BILL IN EQUITY for an injunction; and one question arising upon the bill and answer was whether, as Smith, the executor of Rowan, whose daughter McKinsie married, had delivered over his share of the estate to McKinsie and had been since sued for debts of Rowan, which were recovered against him, was entitled to charge McKinsie with interest upon the value of the property so delivered over. McKinsie had given a bond to refund not exceeding the value he had received. Smith, in making up his account, had charged him with the value of the property delivered over, and the interest, and given him credit for the payments made by McKinsie, and the interest thereupon; and insisted that if the balance was under or not exceeding the penalty of the bond, he had a right to issue his execution for the penalty dischargeable by such balance.

Mr. Gaston argued for McKinsie that Smith was accountable to creditors for no more than the value of the property delivered over to a legatee.

Haywood, e contra, argued that Rowan died before 1789, and (373) a delivery over before debts paid was no legal administration. If he had kept the property, he would have been answerable for the value

and interest, or the profits, and delivering over the property illegally cannot surely exempt him from a burden which, but for that, he would have been subject to, nor take from the creditor his *interest,* which, but for that, he might have recovered. If the creditor can recover interest, then either Smith, the executor, or McKinsie, the legatee, must pay it; and surely the legatee who received the profits ought to pay it rather than the executor, who gets nothing for the pains he has taken but the trouble of this and other lawsuits.

LOCKE, J., however, was of a contrary opinion, and said he ought not to be charged with interest, for that he was not bound to refund exceeding the value he had received; and independent of that, an executor delivering over the property was liable to creditors for the value, and no more.

NOTE.—*Hostler v. Smith, ante,* 305, defendant pleaded that the property was delivered over in 1786, to McKinsie and others; and LOCKE, J., decided that such delivery over did not amount to an administration; and the more so as Smith had notice of Hostler's debt.

NOTE.—See *McKinsie v. Smith,* 6 N. C., 92.

ANDREWS v. DEVANE.

A default will be set aside where the defendant has probably merits on his side, and his not making defense arose from mistake.

GASTON presented the affidavit of defendant, stating that soon after he was served with the writ, he wrote to Mr. Jones, an attorney of this Court, to plead for him, and rested under a belief that he had done so, until the present term, when, looking upon the docket, he found a default entered: that he then went out of the court to employ Mr. Jocelyn, and before he returned, a jury had been sworn and the damages assessed. He further set forth in his affidavit *that he did not owe the plaintiff anything.*

Mr. Gaston moved, upon this affidavit, that the verdict might be set aside upon payment of costs, and the party let in to plead, so as to bring the merits in question.

Jones e contra, opposed the motion with much earnestness.

LOCKE, J. It is agreeable to the practice to set aside the verdict where the merits have not been tried, and that owing to mistake, provided it appears that the applicant probably has the merits on his side.

Let the verdict be set aside on payment of costs, and the party be admitted to plead.

NOTE.—See the next case of *House v. Bryant; Cogdell v. Barfield*, 9 N. C., 332; *Reynolds v. Boyd*, 23 N. C., 106.

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HOUSE v. BRYANT.

A default will not be set aside where it has been occasioned by the forgetfulness of the defendant's attorney.

HAYWOOD then stated that in his suit he had been retained prior to the last term, by defendant, and had forgotten it, and suffered judgment by default at the last term; since which, discovering his mistake, he had determined to move for leave to plead, but before he had done so, the jury had been impaneled in the cause, and it had not occurred to him that this was the case he intended to move in until after some evidence had been given to the jury. He further stated that from the communications made to him by the defendant, he probably had a title to the negro.

LOCKE, J. I cannot set aside the verdict on these facts.

Motion refused.

NOTE.—See *Andrews v. Devane, ante*, 393, and the cases referred to in the note thereto.

COURT OF CONFERANCE,

RALEIGH, December Term, 1805.

FRYAR'S ADMINISTRATORS v. BLACKMORE'S ADMINISTRATORS.

NOTE.—See *S. c.*, 5 N. C., 94.

TRUSTEES OF THE UNIVERSITY v. FOY.

NOTE.—See *S. c.*, reported with the opinions of the judges at length in 5 N. C., 58.

Cited: Robinson v. Barfield, 6 N. C., 419, 423.

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ANTHONY TOOMER'S HEIRS v. HENRY TOOMER'S HEIRS.

NOTE.—See *S. c.*, 5 N. C., 93.

MORELAND v. MORELAND'S EXECUTORS.

NOTE.—See *S. c.*, 5 N. C., 48.

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HOWARD v. PERSON'S ADMINISTRATORS.

NOTE.—See *S. c.*, 5 N. C., 100.

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CIRCUIT COURT OF THE UNITED STATES,
RALEIGH, December Term, 1805.

TEASDALE v. BRANTON'S ADMINISTRATORS.

1. If, upon a plea of *nul tiel record*, the record produced shows a verdict, but no judgment regularly entered thereon, the court will presume, according to the loose practice in this State, that there was a judgment entered pursuant to the verdict, and pronounce that there is such a record.
2. After a finding or confession of assets, and a judgment to be levied *de bonis testatoris*, and a return of *nulla bona*, a *sci. fa.* to the executor or administrator to subject him *de bonis propriis* is the proper course.
3. If an administrator defendant plead judgment and no assets *ultra*, replication thereto may be either *nul tiel record*, or assets *ultra*, or *per fraudom*, or any other fact properly triable by a jury.

THIS was a verdict against the administrator upon the plea of fully administered. Judgments, etc. Execution issued, and was returned *nulla bona*. This *sci. fa.* issued to show cause why the plaintiff should not have judgment to be levied *de bonis propriis*. The defendant pleaded *nul tiel* record, no *devastavit* returned or found. Judgments. Replication to the plea of *nul tiel* record, and demurrer to the other pleas. The record produced showed the verdict; no judgment had been regularly entered. The *sci. fa.*, after stating the verdict, went on and stated that judgment was rendered accordingly.

ANONYMOUS.

PER CURIAM. We must presume, according to the loose practice of this State, that there was a judgment entered pursuant to the verdict, and therefore we must say there is such a record. As to the demurrer for that no *devastavit* is returned or found: to be sure, by the English practice, no *sci. fa.* lies against the executor, to subject him *de bonis propriis,* till a *devastavit* is found upon a *scire fieri* inquiry, and returned. An action of debt, however, will lie upon suggestion of a *devastavit,* and the practice in this State has been to issue a *sci. fa.* upon such suggestion. And as every defense can be made to the *sci. fa.* which could be made to the action, there can be no good reason for adjudging the *sci. fa.* improper. If the *sci. fa.* here be considered in lieu of the *scire fieri* inquiry in England, it possesses advantages far above the English mode; for it is to be executed in court, and under the direction of the court; whereas the other is in the county before a jury. With respect to the demurrer to the plea of judgments and no assets *ultra,* that was pleaded in the original suit; but defendant's counsel say a replication thereto, denying the judgments, is *nul tiel* record; and the record shows that the jury said there were no such judgments. Therefore, the plea has not been tried; and, if so, no judgment can be presumed, for the court ought not to enter judgment when any one plea remains untried. The answer is, the replication may be either *nul tiel* record, or assets *ultra,* or *per fraudom,* or other matter of (378) fact; and such replication was properly triable by jury; and an irregularity committed by the clerk in entering the verdict will not raise a presumption that the judgment was not given upon the verdict. If there was such a judgment, that estops the defendant from using any plea which he did or might have pleaded prior to that judgment. The demurrer, therefore, must be allowed.

NOTE.—Upon the first point, see *Gibson v. Partee,* 19 N. C., 530. Upon the second point, see the note to *Burnside v. Green, ante,* 112. And on the last point see *Bell v. Davison,* 13 N. C., 397.

Cited: King v. Howard, 15 N. C., 583, 584.

ANONYMOUS.

In a *sci. fa.* to subject bail, interest is not allowed on the judgment against the principal.

PER CURIAM. This is *sci. fa.* against bail; and plaintiff's counsel urges that he is entitled, against the bail, to *interest* upon the judgment against the principal. We are of opinion he is not so entitled, for the

judgment upon the *sci. fa.* is that the plaintiff have execution against the bail of the judgment against the principal. The very same execution, therefore, issues against the bail as issues against the principal; and, consequently, damages arising after the judgment cannot be included. Cases cited, Salk., 208; Stra., 807, 808; 2 L. Ray., 1532; C. Digest Bail, R. 10.

GRUBBS' ADMINISTRATOR v. CLAYTON'S EXECUTORS.

1. A dismission of a bill, except upon the merits, is no bar to a subsequent bill for the same cause.
2. If there be no administrator of a deceased creditor to bring suit, the act of 1789 (1 Rev. Stat., ch. 65, sec. 12) cannot operate as a bar.

PER CURIAM. This cause was instituted formerly in Wilmington Superior Court. The act of 1715 was pleaded, and thereupon a case was made and stated for the Court of Conference, who decided that the said act of 1715, ch. 48, sec. 9, was in force. Plaintiff's counsel then replied to the plea; and after the replication the whole bill was dismissed on their motion, that is to say, on the motion of plaintiff's counsel. The suit was then instituted in this Court, and defendant's counsel have pleaded the former dismission in bar. We are opinion that was not a dismission *upon the merits,* considered of and decided by the Court, and, therefore, that the plea in bar is not good. There is also another plea in bar, namely, the act of 1789, ch. 23, sec. 4, by which it appears that this suit was not commenced within three years from the qualification of the executors, though there was an administrator of Grubb in England. Now, as there was no administrator in this country, there was no person in being who could demand the debt, and of course no creditor to be barred. The words of the act are: "The creditors of any person deceased, if they reside without the limits of this State, shall within three years from the qualification of the executor or administrator exhibit and make demand, etc.; and if any creditor shall hereafter fail to demand and bring suit for the recovery, etc., he shall forever (379) be debarred," etc. The plaintiff, therefore, is not within the body of the act. We need not consider whether an exception shall be allowed of which is not expressly mentioned in the act.

NOTE.—Upon the first point, see *Springs v. Wilson,* 22 N. C., 385. On the second point, see the cases referred to in the note to *Ridley v. Thorpe, ante,* 343, decided upon the act of 1715 (1 Rev. Stat., ch. 65, sec. 11), which is stronger in its terms than the act of 1789.

Cited: Lee v. Gause, 24 N. C., 448; *Long v. Clegg,* 94 N. C., 767.

UNITED STATES v. HOLTSCLAW.

The signatures of the president and cashier of a bank may be proved by persons who never saw them write, but whose business has made them conversant with bank bills; and the judgment of persons well acquainted with bank notes is sufficient evidence to determine whether a note be genuine or forged.

PER CURIAM. The objection made by *Mr. Seawell,* that no one shall speak as to the handwriting of the president and cashier of the bank but one who has seen them write, or has been in the habit of receiving letters from them in a course of correspondence, is not a sound one. These signatures are known to the public, and persons who have been in the habit of distinguishing the genuine from the counterfeit signature, and conversant in dealings for bank bills, are as well qualified to determine of their genuineness as persons who in private correspondence have received letters from the person whose handwriting is in question. Moreover, it is determined by the skillful whether the bill be genuine, not only by the signature, but also by the face of the bill, and by the exact conformity of the devices which are used for the detection of counterfeits to those in true bills. We are of opinion that the judgment of persons well acquainted with bank paper is sufficient evidence to determine whether the one in question be genuine or otherwise.

Cited: S. v. Allen, 8 N. C., 10; *S. v. Chandler,* 10 N. C., 394. See, also, *Pope v. Askew,* 23 N. C., 16.

NEW BERN, January Term, 1806.

PEARSE v. TEMPLETON.

A record of recovery in ejectment is not evidence, in an action by the purchaser against the vendor on a warranty, of the superior title of the lessor of the plaintiff.

DEBT upon a bond, with condition stating that defendant had sold several warrants to the plaintiff, and that if any of them were bad, the defendant, on request, would give credit on the note which Pearse had given for the consideration money, to the amount of the value, etc. The pleas were conditions performed and *non est factum.* The bond was proved, and the plaintiff further proved that he had caused a survey to be made, pursuant to one of the warrants, No. 190, and had

obtained a patent for 640 acres; and he stated that of 200 acres, part of the 640, one Joseph Pearse was in possession; that the plaintiff had sued him for the 200 acres, in an action of ejectment, and that there was a verdict against him for the plaintiff. He offered the record of the ejectment to prove this.

Harris, for the defendant, objected that Templeton was no party to that ejectment, and that it ought not to be read against him.

E contra, it was argued that it ought to be read as *prima facie* evidence of *title* in the defendant in that action, leaving it to
(380) Templeton to show, if he could, that the verdict was by Covin, or that the title was not in Joseph Pearse; and the counsel cited 1 Wash., 306 to 308.

HALL, J. The record ought *to be read,* but can prove no more than that the plaintiff did not recover. It will not be of itself proof that Joseph Pearse had title.

The record was read, and HALL, J., directed the jury that the plaintiff should have proved Joseph Pearse's title, and that he had not done so, for the record was not evidence of that; and the plaintiff, hearing the opinion of the Court, suffered

A nonsuit.

NOTE.—See *Wright v. Walker, ante,* 16, and the cases there referred to in the note.

Cited: Shober v. Robinson, 6 N. C., 37.

BRYANT v. PARSONS.

NOTE.—See *S. c.,* 5 N. C., 152.

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STEELE v. HATCH.

If A. have a deed for one tract including the whole of the land in dispute, also a deed for another tract including part of the disputed tract, and has been in possession of part of the disputed tract for more than seven years, but the part so possessed was part of the land conveyed by the latter deed, which was a deed from the father of the lessor of the plaintiff, such possession will not avail the defendant for the land conveyed by the first deed.

STEELE claimed the disputed part under an old grant made to his father, who had sold all of it but the disputed part. Defendant claimed first under a grant of a latter deed, for 85 acres, including the whole of the disputed part; also under a grant of 200 acres, including part of the disputed tract. He proved possession of part of the disputed tract for thirty years, but the part so possessed was a part of the 200 acres, which 200 acres had been sold to Hatch by the father of the plaintiff, under whom the plaintiff claimed the disputed part.

HALL, J. This possession will not avail the defendant, for though it is a part of the land included in the first patent, it is also a part of the land included in the second patent, and also a part of the 200 acres. It gives possession only of the 200-acre tract, not of the land included in the 85 acres, because, being sold as a part of the 200 acres by P. Steele, the father who owned the said remnant, he was thereby divested of so much of the said remnant as was included in the 200 acres, and could not sue for it, nor could the plaintiff claiming under him. The possession was not of any land which belonged to the plaintiff, nor did such possession call upon him to assert his claim to the residue of the remnant not included in the said 200 acres, by entry or otherwise.

NOTE.—See *Hooper v. McKenzie, ante*, 365; *Carson v. Burnett*, 18 N. C., 546.

MURPHY v. GUION'S EXECUTORS.

NOTE.—See *S. c.*, 6 N. C., 238.

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SHEPPARD AND OTHERS v. SHEPPARD'S WIDOW.

That only is to be considered waste, which is substantially an injury to the inheritance: Therefore if the jury, in an action of waste, find insignificant damages, judgment shall be arrested.

PLAINTIFFS, as heirs at law of their ancestor, sued defendant, as tenant in dower, for waste done on about 40 acres, part of her dower lands; and the jury found that waste was done as they had declared, and assessed damages to *sixpence*. Whereupon it was moved in arrest of judgment that where such small damages were assessed, the Court could not consider it as such waste for which an action would lie; and defendant's counsel stated the law to be that the Court could not

adjudge any destruction to be legally a waste unless it amounted to something considerable; and he cited 2 Bos. & Pull., 86, and the cases there cited, viz., Fitz. Ab. Waste, p. 111, 123; Co. Litt., 54 a; 2 Inst., 306; Cro. C., 414, 452; Finch Law Lib. 1, ch. 3, sec. 34; 3 Bl. C., 228; Viner, Ab. Title Waste n.; Bull. N. P., 120.

HALL, J. (after taking till the last day of the term to consider of the authorities): The authorities cited are strong to the point for which they were cited, nor do I conceive them unreasonable. Where waste of insignificant value is done scatteredly through a whole tract, the tenant must lose the place wasted; and this is too heavy a penalty where the damage is to the amount only of a small sum. That ought only to be considered waste which is substantially an injury to the inheritance.

Judgment arrested.

Cited: Shine v. Wilcox, 21 N. C., 632; *King v. Miller,* 99 N. C., 595; *Sherrill v. Connor,* 107 N. C., 633; *Thomas v. Thomas,* 166 N. C., 629.

SMITH v. AULDRIDGE.

1. Where a line called for is "thence 50° east down the creek," the creek is the beginning.
2. An injunction shall not be issued against a judgment for costs, if the plaintiff at law has incurred them by bringing an ejectment, when he should have resorted to equity.

IN May, 1795, Auldridge purchased a tract of land from Turner, running to a corner, and from thence South 50 E. down the creek to a white oak, at the mouth of a branch; thence, etc. Turner afterwards sold to Smith the land between the creek and the said line, South 50 E., not saying down the creek. Auldridge got possession of the land between the creek and this line, saying the creek was the boundary of his land, as well as of the patent under which he claimed; and Smith sued him in this action of ejectment.

HALL, J., charged that the creek was the boundary, and included within the bounds of Auldridge's deed the land in controversy.

Smith proved on the trial many admissions of Auldridge, after his purchase, that the said line, South 50 E., was his boundary;
(383) and many offers on his part to purchase the land between that and the creek. Upon this evidence after a verdict for the defendant, Smith filed his bill, stating a mistake in drawing the deed, and that the

said line was the line shown to him at the time of the purchase, and understood it to be the line purchased to. It prayed an injunction against the costs of the action in ejectment until the court of equity should make further order upon this bill.

HALL, J. (after argument): The plaintiff knew of Auldridge's claim, and has taken a wrong mode of obtaining redress. He should not have brought an ejectment. The costs have accrued in consequence of this wrong step, which is imputable to him. It is said the defendant was wrong in setting up a defense for the lands claimed by the plaintiff, as he knew he, the defendant, had not purchased them. Plaintiff, however, had every reason to believe he would set it up, because he had taken possession and kept it. The first departure from correctness was on the part of the plaintiff in this bill, and therefore I will not screen him, by an injunction, from the costs incurred thereby.

Injunction refused.

NOTE.—On the first point, see the references in the note to *Person v. Roundtree*, 1 N. C., 69; S. c., 2 N. C., 378.

Cited: Rogers v. Mabe, 15 N. C., 194; *Power v. Savage*, 170 N. C., 629.

TOOLEY'S EXECUTORS v. JASPER'S ADMINISTRATORS.

When an injunction was granted against a judgment at law, obtained on a bond alleged to be unconscionable and without adequate consideration, the injunction will be continued unless the defendant sets forth the consideration particularly in his answer, that the court may judge whether it was adequate or unconscionable.

TOOLEY sued his father-in-law, J. Tooley, for certain negroes alleged to have been given by the defendant to his daughter, the plaintiff's wife, and afterwards detained by the father. Whilst this suit depended, Jasper entered into a written agreement to pay all the costs of it should it prove unsuccessful; and Tooley, the plaintiff at law, gave a bond in the penal sum of £500, with condition to deliver to him one-half of the negroes recovered, should a recovery be effected. The negroes were recovered, and the half of them were estimated at upwards of £700. Jasper's administrators brought an action of covenant on the *condition* of the bond, which action, by the opinion of TAYLOR, J., was held to be maintainable, notwithstanding an objection taken thereto that covenant would not lie on the condition of a bond. In consequence of this opin-

ion, the cause remained on the docket, and went to trial at an after term, and the jury assessed damages for the value of one-half of the negroes, as before stated. Whereupon the executors of Tooley filed this bill in equity, stating that the said Jasper had not been at any expense; that he had given no consideration, and that he had not given an adequate consideration; that the bargain was unconscionable, and that it was founded in maintenance and champerty. The answer stated that he had expended large sums of money, but did not particularize (384) any. After a lengthy argument on both sides—

HALL, J., said it seemed to him the answer should have stated the sums advanced, that the Court might judge from thence whether the consideration were adequate or unconscionable; and he refused to dissolve the injunction. The authorities cited for the complainant were 2 C. Digest, Chancery 4 D. 3; 4 D. 4; 4 D. 5; 4 D. 7; 4 D. 10; 4 ed., p. 665, 666, 668, 669.

Cited: McLean v. McLean, 84 N. C., 371.

COMMISSIONERS OF GREENE COUNTY v. HOLLIDAY'S EXECUTORS.

Parol evidence cannot be received to explain the meaning of a written order delivered to a third person, especially as against that third person.

THE Assembly laid a tax for two years, to be collected each tax the years following that in which it was laid. Holliday was appointed sheriff in the first collection year, and received part of the taxes; he was appointed also for the second, but the time of payment of the tax had not arrived. Sheppard, who had undertaken the erection of the public buildings, applied for money, and the commissioners drew on the sheriff, directing him to pay to Sheppard *the taxes collected or to be collected.* Under this order, Holliday paid the taxes for both years. The commissioners allege that the words, *to be collected,* referred to the taxes then *payable* and not collected, and did not extend to the taxes of the second year. Counsel for the commissioners offered to give parol evidence that such was the meaning of the order; and he relied upon Peake's Evidence, pages 77, 78, where it is said an ambiguity, either latent or patent, may be explained by parol, where the thing which is the subject of the writing would pass without deed; and that is the present case, for a verbal order would have been of as much efficacy as this written one.

HALL, J. Whether the passage referred to be correct or not, I conceive the evidence offered cannot be received, for Holliday had not any knowledge of the contract between the commissioners and Sheppard, except what he derived from the inspection of the order. If the evidence be good to explain what the parties meant, as between themselves, it cannot be so as to third persons, who have governed themselves by the words used in the writing.

NOTE.—See *Hawkins v. Hawkins*, 4 N. C., 431; *Clark v. McMillan*, 4 N. C., 244; *Donaldson v. Benton*, 20 N. C., 435; *Reynolds v. Magness*, 24 N. C., 26.

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EDENTON, April, 1806.

FANNIE RAY v. MARRINER AND WIFE.

1. Where a will has been admitted to probate, nothing but an attested copy of it can be given in evidence.
2. A witness cannot be examined on his *voir dire* after witnesses have been examined to prove his interest.

DEVISAVIT VEL NON, made up under the direction of the Court; and these points were determined by the Court.

Mr. Browne stated that a will dated 12 February, 1784, was proved in the county court, and that the paper now offered was dated on the 14th; and he wished to exhibit a copy of the one proved, to show some sentences that were contained therein, and how different the dispositions were from those pretended to have been made two days after.

TAYLOR, J. This will being proved, cannot be given in evidence but by an attested copy, not by a sworn copy; not because an attested copy cannot be dispensed with where a sworn copy can be proved, but because, in the case of a will, the probate is the only regular proof.

The defendants offered a witness, to whom it was objected by plaintiff's counsel that he was interested, and that they would prove the interest. Upon inquiry, however, the witness to prove the interest was absent. They then proposed to examine him on the *voir dire;* and it was said by the plaintiffs they could not now examine upon the *voir dire.*

TAYLOR, J. The rule certainly is that when witnesses are examined to prove an interest in one who is offered as a witness, and fail in doing it, that the person offered cannot be examined in the *voir dire*. He cited 10 Mod., 193. But he said no witness had been examined to prove the interest in the present case; and, therefore, the person offered as a witness might be examined on the *voir dire*.

NOTE.—See, upon the first point, *Sasser v. Herring*, 14 N. C., 340.

HAMILTON v. BENBURY.

A creditor may apply a payment at law, if the debtor fail to do it, to a bond or account due from the debtor, at his option.

PLAINTIFF had a bond given by defendant, and also an account against him. He drew an order on the defendant for a small sum of money, which he paid without directing whether it should be carried to the credit of the bond or of the account; and Hamilton now applied it to the account.

PER CURIAM. The plaintiff may apply the payment *at law*, if the defendant fails to do it.

NOTE.—See *S. Bank v. Armstrong*, 15 N. C., 519.

WIGGINS v. TATOM.

In case of average loss, whether the captain or owner is liable to an action at law by each freighter for his proportion, *quere*.

TATOM owned a ship, and took on board, to be carried to New York, 640 bushels of peas, for the plaintiff, some for R. Armstead, and some for John Armstead. The vessel ran aground and was in danger of perishing, when all the peas but 176 bushels were thrown over-
(386) board to lighten the vessel. This action at law, being an action on the case, was brought against Tatom by the plaintiff, to recover from Tatom his proportion of the loss.

PER CURIAM. I will not proceed till you satisfy me that an action at law is the proper remedy to be pursued. I think it is not.

Plaintiff's counsel cited, but did not produce, 1 East's Reports, 220; and the judge said he would have the plaintiff called, and would set aside the nonsuit if plaintiff's counsel would convince him that it was wrong.

Plaintiff was nonsuited; but the Reporter, having left the Court before the end of the term, cannot say whether the nonsuit was set aside or not.

Vide 2 Bos. & Pull., 268, 274, which supports the position that the suit may be at law.

PEARSE AND OTHERS v. HOUSE.

NOTE.—See *S. c.*, 4 N. C., 722.

Cited: Ellington v. Ellington, 103 N. C., 58.

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CUNNINGHAM v. BUTLER.

The master of a vessel cannot give his own protest in evidence in an action against himself.

THE defendant, master of a vessel, offered in evidence a protest to show that he was not chargeable with the cargo, having lost it in a storm.

Plaintiff's counsel argued that such evidence was not admissible, for the reasons stated in *Miller v. Ireland,* 1 N. C., 222. 7 T., 159. Whereupon *Hamilton,* for the defendant, cited 1 Dallas, 16; Gel., 116; 2 Dallas, 196; 1 Dallas, 317; Weskett, 232; 1 Dallas, 318, 6, 9, 10; Weskett, 433, 430; 2 Valins, 222; Park 139; *Muse's case,* 12 Reports, 63.

TAYLOR, J. If a protest can be evidence in any case, it cannot be so for the captain. What is a protest? An account of the vessel and cargo given on the oath of the captain and sailors, before a notary. Suppose the captain had come to this Court and made an oath for his exculpation, it would not be received. Why, then, receive an exculpatory account of himself, taken under circumstances more unfavorable to truth? If we must receive the oath of the captain to discharge himself, why not also the oath of a defendant that he has paid the debt, or that he

did not commit an assault? Such is the situation of our commerce that our merchants are obliged to employ many foreign sailors; they are a class of men who consider custom-house oaths, in relation to commercial business, as a mere ceremony. I do not say this of all of them, for I know of some honorable exceptions, but as a general rule these remarks are correct. Shall the property of our merchants be disposed of by such oaths as these, made in the absence of the party to be affected by them, and when no one for him is on the spot to cross-examine the deponents? I am decidedly of opinion that the protest cannot be given in evidence for the captain.

NOTE.—See *Miller v. Ireland*, 1 N. C., 222.

WILLIAMS v. FEREBE.

If a merchant's custom is shown to be to charge interest at end of three months if bills are not paid, the jury may allow interest after three months.

TAYLOR, J. If the jury are satisfied from the evidence that the plaintiff, who was a merchant, and sold goods to the defendant as a customer, made it a rule to charge interest at the end of three months if the principal were not then paid, they may now give interest to him after the three months.

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LITTLEJOHN v. GILCHRIST'S EXECUTORS.

1. The act of 1715 (1 Rev. Stat., ch. 65, sec. 11), barring claims against the estates of decedents after seven years, does not apply in a case where the plaintiff claims immediately, and keeps it up by a regular correspondence and demand of payment, although seven years elapse before suit brought.

2. In the case of a bond for money to be discharged in tobacco, the tobacco shall be estimated at its worth when it becomes deliverable. This is the general rule, and payments in tobacco should be estimated accordingly; but if the custom of merchants be different, it will control the general rule, and custom shall prevail.

DEBT on a bond for delivery of tobacco, on 24 February, 1781. Payment in tobacco had been made at divers times up to 1789; and the tobacco thus delivered, though a smaller quantity than was to be de-

livered, was of more value in money, estimating it by the prices it bore at the several times of delivery, than the whole that was due by the bond was worth on 24 February, 1781, with the interest thereon. Evidence was given that the executor Gilchrist and the plaintiff corresponded on the subject of a settlement till the death of the executor, which was in 1801. The act of 1715, ch. 48, sec. 9, was pleaded, and payment.

TAYLOR, J. As to the act of 1715, I think it does not take place in such a case where the plaintiff *claims* immediately, and keeps it up by a regular correspondence and demand of payment, although seven years and more are expired after the death of the debtor before the commencement of the creditor's action. As to the mode of valuing the tobacco, the general rule, no doubt, is, that it shall be estimated as worth when it becomes deliverable; but here it is proved that at the time when the tobacco should have been delivered it was the custom and practice of merchants to keep a tobacco account, and to give credit in tobacco, not in its value in money, and if a balance of tobacco remained, to charge as much money as it was worth when it became payable. If the jury are satisfied of this, then they may estimate accordingly, because the custom will control the general rule of law.

Verdict and judgment accordingly.

BLANCHARD AND OTHERS v. PASTEUR'S EXECUTORS.

One partner is not bound at law by the deed of his copartner; yet equity will give relief against the copartner not bound by the deed.

GILMOUR and Pasteur were partners in trade, though the fact was denied both now and upon the trial at law. Gilmour purchased goods of the plaintiffs, and gave a bond signed Gilmour & Co. An action at law was instituted on the bond, after the death of Gilmour and Pasteur, against Pasteur's executors, and judgment was upon the merits in that suit for the defendant. This bill in equity was to compel payment of the money for which the goods were sold, from Pasteur's executors. The suit at law and judgment was pleaded to this bill.

TAYLOR, J. There could not be a recovery at law, upon the bond, against Pasteur's executors. One partner cannot bind another by bond. Plaintiff's relief was in this Court, under such circumstances. Plaintiff

failed at law, because he had chosen the wrong jurisdiction; and if he could now be told, "You cannot recover here, because of your failure at law," it would be very absurd.

Decree for plaintiff.

NOTE.—See *Walker v. Dickerson, ante*, 23, and the cases referred to in the note. See, also, *Spear v. Gillet*, 16 N. C., 466; *Horton v. Child*, 15 N. C., 460; *Wharton v. Woodburn*, 20 N. C., 507.

Dist.: Fisher v. Pender, 52 N. C., 484.

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HALIFAX, April Term, 1806.

KING'S EXECUTORS v. BRYANT'S EXECUTORS.

1. If a plaintiff, after a trial in the county court and an appeal to the Superior Court, lose the bond declared on, he may prove its contents without amending his declaration.
2. If one is so drunk that he does not know what he is about, and in that situation is induced to sign a paper for a debt which he did not owe, it is a fraud; and a fraud practiced upon a man, whether drunk or sober, will vitiate the instrument signed by him.

DEBT upon a bond commenced in the county court, and an appeal taken to his Court; and the plaintiff now proposed to prove by the subscribing witness that a bond was given to the plaintiff the time when it was given, and that it was lost at or since the trial in the county court.

Fitts, for the defendant, said that as the declaration had not been drawn since the loss of the bond, and that as the first declaration made a profert of the bond, the bond so referred to the court must be produced in the plea of *non est factum,* and proved as in common cases. Had it been lost before the declaration, it might then have been declared on as lost by time or accident; in which case the bond need not be produced, but might be proved as the plaintiff now proposes.

E contra, it was said that if a bond be proffered in the declaration, and whilst in the office the seal be torn off, that it shall be proved without the seal, and notwithstanding it has none; so also should it be when not only the seal, but the whole bond, is destroyed or lost.

TAYLOR, J. Let this point be reserved, and let the proof proposed be now made as plaintiff's counsel propose to make it.

This was done; and the defendant then proved that the obligor was so drunk at the time he could not stand, and did not know what he was about. But it was insisted that drunkenness alone is no objection; the law requires the party to have been drawn in to drink, and then imposed upon. 3 P. W., 130.

TAYLOR, J. If he was so drunk at the time that he did not know what he was about, and if in that situation he was induced to sign a paper for a debt which he did not owe, that was a *fraud;* and a fraud practiced upon a man, whether drunk or sober, will vitiate the instrument signed by him. The jury will consider whether he was so imposed upon or not.

Verdict for plaintiff; referred to the Supreme Court.

NOTE.—See, upon the first point, the same case in the Supreme Court, where it was affirmed, 5 N. C., 131. Upon the second point, *Perry v. Fleming*, 4 N. C., 344; *Logan v. Simmons*, 18 N. C., 13; *Gibson v. Partee*, 19 N. C., 530.

Cited: Cameron v. Power Co., 138 N. C., 368.

KIMBOLL v. PERSON'S ADMINISTRATORS.

The act of limitations will only run from the last article in an account current.

TAYLOR, J. It is in proof that the plaintiff resided in a house of the intestate in the years 1796, 1798, 1799, and 1800; that he labored in these years as a blacksmith for the intestate, and in other employments; that in 1800 he proved before a magistrate the account for that year, and two other accounts besides, which latter are not shown. The administrator paid off the account for 1800, and took a receipt for it. The act of limitations is pleaded. This action commenced in February, 1802. Three years elapsed before commencement of (395) the action upon the accounts of 1796 and 1798. In the account of 1800 credits are given for advancements made by the intestate. The accounts for 1796 and 1798 are barred, unless the jury think, from the evidence, that the account was a current one through all these years. If it was, then the act of limitations will only run from the last article in the account current. If the intestate continued to make payments and advances all through these years, without ever coming to a settlement and liquidating the account, it is an account current; but if the account was liquidated in the time, and a balance struck, it then ceased to be current, and the three years must be computed from that time.

Verdict for plaintiff, and judgment.

NOTE.—See *Newsome v. Person, ante*, 242; *Green v. Caldcleugh*, 18 N. C., 320.

CHRISTMAS'S ADMINISTRATOR v. JENKINS.

1. Where the terms of an auction sale are that bond and security shall be given, a person who, upon bidding and having property knocked down to him, fails to comply with the terms by giving bond and security, is liable for the difference between the sum bid by himself and a less sum bid by another, on a resale of the property.
2. When the terms of an auction are advertised or otherwise published, every one who becomes a bidder is presumed to be acquainted with the terms, and to undertake that he will comply with them.

ACTION to recover from Jenkins on the following facts: The plaintiff had advertised a sale of his intestate's effects, and the terms of the sale were that the purchasers should give bond with approved sureties before the property should be delivered. A mare was exposed to sale, and a bid of £50 was made for her. Jenkins then bid £60, and she was struck off to him as the highest bidder. He did not on that day give bond with sureties, alleging, as the truth was, that he could not procure sureties. On the next day, he still continuing not to offer sureties, the mare was offered for sale again, and was bid off for £43, the most that could then be obtained for her. This evidence being now given, it was contended by *Jones,* for the defendant, that as the *property* did not pass to the purchaser till after security given, the defendant, having not been able to give it, should not be compelled to pay for an article the property whereof had not passed nor the thing itself delivered; and that as the defendant was in a state of intoxication, his bid should not have been received; that the liquor by which he had been inebriated was furnished by the plaintiff. This man's drunkenness was justly imputable to the plaintiff, who had furnished the means of intoxication with a view of selling the property to advantage; and that having drawn in the defendant to make an offer very injurious to himself (the defendant), the plaintiff ought not to be allowed to profit of it.

TAYLOR, J. When the terms of auction are advertised or otherwise published, every one who becomes a bidder is presumed to be acquainted with the terms, and to undertake that he will comply with them. If one of them be that the purchaser shall give bond and sureties, he who becomes the highest and last bidder is bound to do so. He cannot excuse himself by saying he is unable to procure the sureties; he
(396) ought to have known what he was able to do in this respect before he became a bidder. If the argument for the defendant be correct, then every bidder might refuse to give bond for the property he had purchased; and whilst on the one hand the seller would be bound to deliver the property to every bidder on security given, none

of them would be bound to give the security to him. And suppose all of them should fail in this respect, shall the seller have no compensation for his disappointment, trouble, and expense? Many instances have occurred in this State where actions have been maintained under such circumstances against delinquent purchasers; and the measure of damages is the difference between the price the defendant bid and that for which the property sold on being a second time exposed to sale.

Verdict for the plaintiff, and damages assessed for the difference between the £60 and the £43.

HARWOOD & WILCOX v. CROWELL & McCULLOCH.

An action of debt will lie upon an instrument without seal, given for the security of money.

DEBT brought upon an instrument in the form of a bond, with a penalty and with a condition to be void on payment of a less sum; but it had not a seal. It was objected by Mr. Daniel that debt would not lie on such an instrument, but that an action on the case was a proper one.

Mr. Fitz, e contra: It was lately decided in England, in the case of *Bishop v. Young,* 2 Bos. & Pull., 78, that debt would not lie on a promissory note, against the drawer, and that a promissory note, being rendered negotiable by statute, afforded sufficient evidence of consideration. He cited, also, *Walker v. Witter,* 1 Doug., 1, where debt was held to lie on a foreign judgment, although a former judgment is considered in the light of a simple contract debt.

TAYLOR, J. The action of debt lies in England upon a simple contract, by the rules of the common law. And although I do not remember an instance of such an action in our Court, I am not aware that the disuse of such action has been owing to any apprehension that it could not be maintained if attempted. My opinion at present is that it will lie. I am willing, however, that it shall undergo the consideration of all the judges in the Supreme Court. Of instruments not under seal, which are exhibited as evidences of the debt, a consideration for them must be proved, if they are not rendered negotiable: if they are so, they then assume the same nature as mercantile instruments, which are themselves evidences of a good consideration.

Verdict for plaintiff.

NOTE.—See *Gardner v. Clark,* 5 N. C., 283.

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SAWREY v. MURRELL AND OTHERS.

1. The practice permits a person who has served the notice that a deposition will be taken, to appear before the commissioners and swear to that fact; and if the certificate of the commissioners show it, the deposition may be read.

2. Where two commissioners take a deposition, one alone cannot amend the certificate made by both.

3. A party cannot impeach the credibility of his own witness.

4. But a defendant, by calling back one of the plaintiff's witnesses to examine him to a distinct fact, does not thereby make him his witness.

THE plaintiff produced a witness and examined her; the defendant then offered a deposition, and the certificate of the commissioners stated that the person who gave notice of taking the deposition had appeared before them and proved that legal notice had been given; and the Court decided that the certificate was insufficient, for it should have stated when the notice was given, that the Court might be able to determine whether it were legal notice or not. Defendant's counsel then offered to examine one of the commissioners in court as to what the person who gave the notice had sworn before them. The Court would not permit him to be so examined, because the witness himself who swore before the commissioners might be produced. Defendant's counsel then moved that the commissioner might amend his certificate. The Court said that might be done, were both commissioners present; but that one alone could not alter a certificate made by both. Defendant's counsel then called upon the witness first examined by the plaintiff, she being the plaintiff's daughter, to say whether or not notice had not been given to the plaintiff of taking this deposition, and she failed to prove it. Defendant's counsel then called witnesses to discredit the plaintiff's witness, and plaintiff's counsel opposed their admission on the ground that the defendants could not discredit their own witness, and that they had made the plaintiff's witness their own by calling her to prove a distinct fact, after her first examination was over.

PER CURIAM. It is very correct to say that a plaintiff or defendant cannot discredit a witness produced by himself; but the reason of this rule does not apply to the case before us. If a man could discredit a witness called by himself, he might, having the means of discrediting her in his own power, pass for true that which she swore if it made for him, but destroy the effect if it made against him. Here the witness was not produced by the defendant. It would be of dangerous consequence if when produced by the plaintiff the defendant could not

interrogate the witness except as to the facts which she had deposed for the plaintiff; for then all distinct facts within her knowledge, however much they would operate for the benefit of the defendant if brought out, must remain undrawn from the witness, for fear of the defendant's being precluded from the advantage of proving her want of credit. The question asked by defendant's counsel on the present occasion is to be considered as an interrogatory as to a distinct fact upon the cross-examination of the witness, although it was put to her after her first examination was desisted from for some time, and other witnesses examined in the intermediate time between her first examination and being called again.

The witnesses to discredit her were sworn. The Court doubted (398) for some time whether the deliverer of a notice to take depositions could be sworn as to the time he gave notice before the commissioners appointed to take the depositions; but several of the bar informing him that was the usual practice, the Court said it was so; he could not alter it.

NOTE.—As to the rule that a party cannot impeach the credibility of his own witness, see *S. v. Norris*, 2 N. C., 429, and the last note to that case. See, also, *Spencer v. White*, 24 N. C., 236.

Cited: S. v. Taylor, 88 N. C., 697; *Smith v. R. R.*, 147 N. C., 607; *Lynch v. Veneer Co.*, 169 N. C., 171.

JAMES GEE AND WIFE AND OTHERS v. CUMMING, WARWICK & CO.

1. The lapse of twenty years is presumptive evidence of the payment of a bond, but the presumption may be weakened more or less or totally overturned by circumstances inducing a contrary presumption, or accounting for the delay.
2. A garnishee cannot be asked whether he has paid a bond more than twenty years old; but if he does not say in his garnishment that he has paid it, it is a circumstance to be considered in deciding whether the presumption is rebutted.

ATTACHMENT. Clack had been summoned as a garnishee, and declared that a bond had been given by him to the defendants thirty-one years ago. He stated the sum and the time it was payable; an issue had been made up under the direction of the Court, which was whether this bond had been paid or not, and it now came on to be tried.

TAYLOR, J. The garnishee's counsel relies for the proof of payment on the time elapsed since this bond was payable, which was from the time of the date. The law allows a jury to presume that a bond has been satisfied if twenty years have elapsed since it was payable; but the time elapsed here is not to be considered like the time elapsed under the act of limitations, which makes it a positive bar. In the case of the bond, lapse of time is only presumptive evidence of payment, and the presumption may be weakened more or less, or totally overturned, by circumstances inducing a contrary presumption, or accounting for the delay. One circumstance relied upon in the present case as encountering the presumption is that the garnishee has not sworn in his garnishment that he paid the money mentioned in the bond, which is a fact he might have sworn to if he could have done so. Another circumstance relied upon is that the defendants adhered to the king of Great Britain in the late war, and removed themselves from America, and were not permitted to recover till long after the war was ended—not, indeed, until after the making of Mr. Jay's treaty. As to the first of these circumstances, it is certainly a very persuasive one for the purpose for which it was adduced. It is said that it would be to erect a court of inquisition to decide that a garnishee could be called upon to say whether or not he had made payment, when, were he not a garnishee, but a principal defendant, the lapse of time would form for him a sufficient proof of payment. It is unjust, it is said, to compel him to give up this and to give evidence against himself. The answer is that it would be really inquisitorial if the defendant, who is compelled to say whether he executed a bond or not, could not be permitted to say that he had
(399) paid it; and how is the hardship greater to extort from him a confession of his executing a bond, the execution whereof could not be otherwise proved, than to extort from him an answer as to the payment?

The second circumstance relied upon is of weight, as it accounts for the reason why the defendants did not sue for some time after the war for the debts due to them in this country. Much has been said by one of the counsel (Mr. Browne) of the ingratitude of those who were circumstanced as were the defendants, in withdrawing themselves from this country in the hour of distress and in becoming the most inveterate and implacable public enemies we had, of the prolongation of the miseries of war through their means, and of the devastations they committed through all parts of this country by fire and the sword. Such arguments ought to have no weight. Our courts are not created for the purpose of dealing out justice to one set of men and of refusing it to others. It would be most impolitic if we should refuse to foreigners the same justice we administer to our own citizens; for then the courts

of foreign nations would also refuse justice to our citizens. Justice is represented as blind, because it sees no one so as to distinguish him from others by its distributions. In this sense I trust the courts and juries of this country will continue to be blind, and that they will not perceive a difference between a foreigner and a native, a Mussulman and a Christian.

Verdict that the bond is not paid.

NOTE.—See *Quince v. Ross*, *ante*, 180, and the cases referred to in the note to that case.

BRADLEY v. AMIS.

Where a second action is brought for overflowing plaintiff's land by a mill, the damages should be assessed for the time between the commencement of the first action and the commencement of the second; but as the action may be repeated for every continuance of the nuisance, the damages should be light.

ACTION for nuisance by overflowing the plaintiff's lands. A former action had been brought, and damages assessed, and a judgment given against the defendant.

TAYLOR, J. If the jury are satisfied that the defendant has caused the nuisance as stated by the plaintiff, they should assess damages for the time elapsed since the commencement of the former action to the commencement of the present one; but the damages are usually light, because the action may be repeated for every continuance of the nuisance after a former action.

Verdict for £3.

NOTE BY REPORTER.—I cannot think the directions concerning the damages correct, because if the keeping up of the nuisance will afford more profit to the wrong-doer than the small damages assessed by a jury, he will keep it up forever, and thus one individual will be enabled to take from another his property against his consent, and detain it from him as long as he pleases. The damages ought not to be for what the incommoded property is worth, but competent to the purpose in view, that is, a demolition of the erection that occasions the nuisance. Sometimes the profits of such erections, as merchant mills, for instance, are of much greater value in one year than the fee simple of the annoyed property. In such cases the object of the law cannot be obtained but by damages equivalent to the profits gained by the erection, or by damages to such an amount as will render those profits not worth pursuing. See ——— *v. Deberry*, 2 N. C., 248, and the note to that case.

Cited: Moore v. Love, 48 N. C., 218.

FLEMMING v. WILLIAMS.

One surety to an appeal bond from the county to the Superior Court is sufficient, if such surety be good; at all events, *it seems* that the Superior Court may in its discretion take a new bond with two sureties.

DEFENDANT appealed from the county court and gave but one surety in the appeal bond. It was moved that the appeal be dismissed because there were not two sureties.

TAYLOR, J. (after argument): This Court, in advancement of justice, can take a new bond with two sureties in place of the old one; but said that point might be reserved for further consideration. He remembered instances of the like exercise of the Court's discretion, and divers others were mentioned at the bar. In the meantime he ordered the cause to be tried, unless an affidavit could be produced for a continuance; which being made, the cause was continued.

NOTE.—In the case of an appeal from the County Court of Nash, somewhere about 1789 or 1790, the appeal bond had but one surety, and for that cause it was moved that the appeal should be dismissed; but the Court, having made the inquiry, and finding that the single surety was a very competent one, they said the only object of the act requiring sureties was to make the plaintiff safe; and if one surety was really able to pay his recovery, it was better to sustain the appeal than to reject it and do irreparable mischief to the appellant; and they did sustain it.

NOTE.—As to sufficiency of one surety to an appeal bond, see *contra*, *Jones v. Sykes*, 5 N. C., 281; *Gibson v. Lynch*, *ibid.*, 495. See, also, *Forsythe v. McCormick*, 4 N. C., 359; *Ferguson v. McCarter*, 4 N. C., 544, 107; *Smith v. Niel*, 9 N. C., 14; *S. v. Mitchell*, 19 N. C., 237, the three last of which cases show that the appeal bond is provided for the benefit of the appellee, and if he either expressly or impliedly waive it, the Court will not afterwards dismiss the cause for the want of sufficient bond.

COLLIER, ASSIGNEE, ETC., v. JEFFRIES'S ADMINISTRATOR.

Depositions, taken by one party and filed in court, may be read by the other party without proof of notice; and being so read, on a second trial they may be read by the party who took them, without proof of notice.

ON the trial of this cause at the last term, some of plaintiff's witnesses being absent, and his cause being ruled to trial, he resorted to depositions lodged in the office by the defendant, and he was allowed to read them

against the defendant without proof of notice. A juror was then withdrawn. The cause now came on to be tried again, and the defendant, after plaintiff's evidence was gone through, offered his depositions without attempting to prove that notice was given of the taking of them, and insisted he was entitled to read them, because they had been read, and by the plaintiff, in the former trial.

TAYLOR, J. The reading, by the plaintiff, of a deposition taken by the defendant is an intimation to the defendant that its regularity will not be questioned; and it would be unjust in the highest degree to take advantage of his inability to make proof of its regularity, when he has been induced by the plaintiff's intimation to leave them at home.

The deposition was read without proof of notice of the taking.

NOTE.—See *Kaighn v. Kennedy*, 1 N. C., 37; *Rutherford v. Melson*, 2 N. C., 105.

Cited: Strudwick v. Brodnax, 83 N. C., 404.

DEN ON DEM. OF WHITEHURST v. HUNTER.

It must appear that a deed from husband and wife was acknowledged by the husband as well as the wife.

Plaintiff deduced title to himself to the lands in question. Defendant offered a deed from one of the mesne owners, through whom the plaintiff claimed, which owner was a feme covert. The deed had no endorsement of a probate in court, or an acknowledgment by the baron; but in the minute docket of the county court there was an entry purporting that the deed was acknowledged, not saying by whom or in what court. There was also an endorsement on the deed, not stating in what county court or term, purporting that the *feme* acknowledged the deed in court, and was privately examined, not saying by whom.

TAYLOR, J. (after argument): I will *ut res magis valeat quam pereat* give a favorable construction to the endorsement. I will understand that she was privately examined, not that she was examined in court, for that would be a private examination in open court, which is absurd. What is stated may admit of the idea that she acknowledged the deed in open court, and was there privately examined. It is not said by whom she was examined. I will presume it to have been made in the usual

mode, by some member of the court. The act does not require that it should be expressed by whom. I think, therefore, that the endorsement is sufficient in these respects. The objection that the deed was not acknowledged by the husband, nor proved to be his deed, is fatal. Had there been a statement upon the minutes that the husband
(402) acknowledged the note endorsed on the deed, I should deem that sufficient; but here it is not said on the minutes that the husband acknowledged, but only, in general terms, that the deed was acknowledged. I need not give my opinion upon the point of the county or court not being mentioned in the endorsement, stating the wife's acknowledgment and examination. The wife cannot make a deed without the consent of the husband; and it does not appear that he has executed this deed with her.

So the deed was not read.

NOTE.—See *Hunter v. Bryan*, 6 N. C., 178; *Sutton v. Sutton*, 18 N. C., 582; *Gilchrist v. Buie*, 21 N. C., 346; *Joyner v. Faulcon*, 17 N. C., 386.

Cited: Burgess v. Wilson, 13 N. C., 310; *Barfield v. Combs*, 15 N. C., 518; *Joyner v. Faulcon*, 37 N. C., 390.

SIMMS v. BAREFOOT'S EXECUTORS.

It is not competent to invalidate a deed by showing that it was given to secure release of grantor's son from duress.

PER CURIAM. Evidence cannot be given to prove that the son of one of the obligors was in duress, and that she executed the deed to procure his enlargement, and that the other obligor executed as her surety; for the duress of the son, who is a stranger to him, shall not render his deed invalid. He relied upon Cro. 2 Ba. Ab.

Quere: If the surety be compelled to pay the money, cannot he recover of the mother, who induced him to become surety upon an implied promise of indemnification? And if he can recover, it seems useless to say the mother shall be discharged in the first instance, but not him; for that makes her liable indirectly to what she cannot be more so directly. Either both should be discharged or neither.

KENNEDY v. WHEATLEY.

Constructive possession is sufficient in this State to support the action of trespass *quare clausum fregit.*

TAYLOR, J. This is an action of trespass, for breaking the plaintiff's close, entering upon his lands, etc.; and defendant's counsel, relying upon the English law, insists that an actual possession in the plaintiff at the time of the trespass committed is necessary to be proved to support the action. In England all their lands are occupied, and a trespass cannot be committed but upon the possession of some one, and it must be proved who was the actual occupant, for the purpose of ascertaining the person who is entitled to the action. Here a great part of our lands are not occupied by any actual possession; and if he were to require the same proof that is required by the English law, we should expose the unoccupied lands of every person to be trespassed upon, and the timber to be cut down and destroyed to whatever extent those who were in the neighborhood thought proper, and the owner could have no remedy.

NOTE.—See *McMillan v. Hafley*, 4 N. C., 186; *Graham v. Houston*, 15 N. C., 232; *Dobbs v. Gullidge*, 20 N. C., 68; *Tredwell v. Reddick*, 23 N. C., 56; *Harton v. Hensley, ibid.*, 163.

Cited: London v. Bear, 84 N. C., 272.

SLEDGE v. POPE.

Previous threats may be given in evidence to increase damages, in an action of assault and battery.

TAYLOR, J. (after argument): In this action for an assault and battery the plaintiff proposes to give in evidence threats which the defendant made in the presence of the plaintiff, to be executed at a future day. Counsel for the defendant opposes the evidence on the (403) ground of a former decision made in this Court, in the case of *Bary v. Ingles,* which excluded testimony of a provocation given to the defendant some months before the assault by the plaintiff, by newspaper publications. That decision proceeded on the principle that the passions of men should cool and subside in some reasonable time, and would not allow the continuance of them, without a reasonable provocation, to be taken as a mitigation of an assault made at a distant time; but that

principle is not opposed to the evidence now offered, for the object of it is to enhance the damages, because the defendant still kept alive his resentment after a sufficient time for it to cool. If an old provocation will not excuse a recent assault, a threat formerly made and recently executed, as it evinces an unreasonable continuance of heat, will induce an increase of damages on that account.

NOTE.—See *Causey v. Auden*, 20 N. C., 246.

Cited: Mills v. Carpenter, 32 N. C., 301.

HUNTER v. STROUD.

1. In an action of debt upon a racing bond, when it is not said in the articles that it is a *play or pay* race, the plaintiff cannot recover if defendant does not run, because the action is for a precise sum; and if it were not *play or pay*, the plaintiff is only entitled to half the sum bet, and must recover that in another form of action.

2. If by the agreement the parties were to run between certain hours, the plaintiff must show that his horse ran between the hours specified, and it will not be sufficient to show that he ran just as the time was completed.

TAYLOR, J. This is an action of debt on a bond which the defendant has pleaded he deposited as an escrow to be delivered to the plaintiff as his bond, if the plaintiff should win the race they had made. It does not appear that it was a "play or pay" race; and it is in evidence that where it is not mentioned in the articles that the parties shall run or pay, if one fails to run, the other shall be entitled to the forefeiture of half, and that although the terms of the race be in writing. If the jury are of opinion that such are the rules of racing, and that the defendant failed or refused to run, then there cannot be a recovery upon this bond, which is for the precise sum, which cannot be diminished by the discretion of the jury, but the plaintiff is entitled to recover half the amount, as a forfeiture, in another action. It is also contained in the articles that they were to run on 25 November, between the hours of 12 and 4 in the afternoon, and it is stated in evidence that Hunter's horse ran precisely at 4 o'clock, though one of the witnesses say about four minutes before 4. Where two persons agree to run or do any other act between 12 and 4, it is evident that the act will not be effectually done unless it be done between the points of time specified. If done when the time is completed

within which it was to be done, it is too late, or if done at any time after the time is completed. The jury will consider, therefore, whether he did run precisely at 4 o'clock; and if so, the verdict should be for the defendant.

The jury could not agree, and a juror was withdrawn.

NOTE.—See *Hunter v. Bynum, ante,* 354, and the note thereto.

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ALSTON v. SUMNER'S HEIRS.

1. If the plea of *plene administravit* be found for the executor, and *sci. fa.* issues to the heirs, the executor is continued in court until the heirs come in to make up an issue.
2. An executor is not compelled to try an issue at the same term at which it is made up.

AFTER much argument, the Court delivered its opinion as follows:

This is a *sci. fa.* taken out against the heirs of Sumner, after a plea of fully administered, found in the original action of the administrator. The heir at the last term pleaded assets in the hands of the administrator, and a *sci. fa.* therefore issued to bring in the administrator. I am of opinion the administrator is continued in the court till the heir comes in, and that no such *sci. fa.* was necessary; but the plaintiff, at the last term, should have applied to the court to direct an issue to be made up between the administrator and heirs; which, when made up, would have stood for trial at this term. The executor is not compelled to try the issue at the same term it is made up; for he, like others, should have time to procure the attendance of his witnesses. As such collateral issue was not made up at the last term between the heir and administrator, let it be now made up, and the cause stand over till the next term for trial.

The issue was made up accordingly.

Cited: Speer v. James, 94 N. C., 422.

BAKER v. BLOUNT.

The handwriting of a subscribing witness may be proved, when such witness refuses to attend under circumstances of fraud, and the party has done all he can to procure his attendance.

BAKER *v.* BLOUNT.

DEBT on a bond, and one Andrew Adie had subscribed as a witness; he had been summoned, and did not attend; a commission was issued, and when before the commissioners he refused to depose, alleging that his papers were not in his possession. At the next court he did not attend, and the court issued an attachment against him; hearing of this, he removed into another county. It was proved that Blount, before giving this bond, had left money with a company, of whom this Adie was one, or had lent them money under such circumstances as raised a presumption that they were to pay this debt when recovered. The truth now coming in, all these circumstances were proved to the court; and Baker moved to be at liberty to prove his handwriting in the same manner as if he resided out of the State, being only an instrumentary witness; and after much argument,

TAYLOR, J., declared his opinion: The first rule of evidence is that the plaintiff shall produce the best in his power, to exclude the idea that the better evidence remaining in his possession, was not withheld because it made against him. To this rule, however, there are divers exceptions, founded on necessity: If a man dies, and the subscribing witness becomes his administrator or executor, or becomes blind, or removes out of the State where the process of the court cannot reach, here, (405) in such cases and many others, the necessity of the thing forms an exception, and causes the presence of the witness to be dispensed with. The grounds of these exceptions do not make a better cause for exceptions than the cause before us. A fraud is practised to prevent the obtaining of this testimony, because if produced it would probably subject the witness to the payment of the debt; and fraud, whenever attempted under the sanction of the court, should be obviated by its decisions. The witness attempts to avail himself of the practice of the court to prevent a recovery; and it would indeed be an odium upon the law if such artifices could be effected. If a witness, when searched for, cannot be found, his handwriting shall be proved. Here the witness continues to be as much absent as if he could not be found, and the reason for admitting his testimony in the case now before us is as strong as if he could not be found. Let proof be given of his handwriting. It was given, and there was

Verdict and judgment for plaintiff.

NOTE.—See *Tulloch v. Nichols*, 1 N. C., 4, and the cases there referred to in the note.

THOMPSON v. THOMPSON.

Where plaintiff's counsel offered on a trial an attested copy of a bill of sale for a slave, without accounting for the absence of the original, and was thereupon nonsuited, a new trial was refused, because there was not surprise, but negligence.

TAYLOR, J. (after argument): Plaintiff's counsel moved to set aside a nonsuit, which was suffered, because on trial the plaintiff offered an attested copy of a bill of sale for a negro, instead of the original, and did not account for the absence of the original. Plaintiff's counsel say that the papers were shown to them on the day before the trial, and it did not occur to them that the original would be required, nor did they remember that it would be wanting till the trial came on. The plaintiff, they say, was therefore surprised in consequence of their overlooking the objection that was made against them. This is not surprise, but it is *sua negligentia,* and the nonsuit ought not to be set aside.

The rule to set aside the nonsuit discharged.

NOTE.—See *Rutledge v. Read, ante,* 242, and the cases referred to in the note on the last point in that case.

STATE v. ———.

If a continuance is asked by the State and the defendant has a nonresident witness, it must be on condition that his deposition of absent witness will be allowed.

PER CURIAM. The Attorney-General moved for a continuance, and the Court is informed that the defendant has a material witness who has removed to the State of Tennessee. If he has the continuance at all, it must be upon the condition of his agreeing that the defendant shall take the deposition of his witness, and that such deposition shall be read on the trial.

NOTE.—See *Walker v. Greenlee,* 12 N C., 367.

MARSHALL v. WILLIAM'S EXECUTOR.

Where the plaintiff borrowed of the defendant £25, and gave him a bill of sale for a negro, with an endorsement stating that if the £25 with interest should be paid by a certain time the bill of sale should be void; but if not paid with interest on that day, then the defendant should be entitled to the negro and a further bill of sale, and should pay £10 more in addition to the £25; and that if the negro should die in the meantime the loss should be the plaintiff's, *it was held* to be a mortgage; and the slave being once redeemable, was always redeemable.

THIS bill in equity stated that some time prior to 25 December, 1789, the complainant borrowed of the defendant's testator £25, Virginia money, and gave him a bill of sale for a negro man with an (406) indorsement stating that if the £25, with interest, should be repaid on 25 December, 1789, the bill of sale should be void; but if not paid, with interest, on that day, then Williams should be entitled to the negro and a further bill of sale, and should pay £10 more in addition to the £25; and that if the negro should die in the meantime, the loss should be the complainant's; that the £25 and interest was tendered on 29 December, 1789, and Williams refused to receive it. This bill was filed about ten years afterwards.

Plummer and Browne, for the defendants, insisted this was a conditional sale, and that on the nonpayment of the sum borrowed, and interest until 25 December, 1789, the testator was to be considered as the absolute proprietor, but bound to pay the £10. They cited Call's Re. *E contra* was cited 2 Vern., 188.

PER CURIAM. A conditional sale is when at the time of the contract the absolute property passes to the vendee, but subject to be defeated by paying the sum advanced. The negro, until the money paid back, belongs to the vendee; and if he died he is the loss of the vendee; he is entitled to his services in the interim, and is not entitled to the money advanced for him, and so cannot claim the interest of it. Here the money was loaned; interest was to be paid on it; the negro, if he died, was to be considered as the property of the complainant. He was therefore a pledge for the security of the money; was redeemable; and being once so, was always so. He must be delivered up and his yearly value accounted for, deducting from thence the money loaned and the interest. After each value shall be ascertained, interest must be paid on such yearly value from the time it becomes due.

NOTE.—See *Anonymous, ante,* 26, and the cases there referred to in the note.

TROUGHTON'S ADMINISTRATORS v. HILL'S EXECUTORS.

If the husband be banished under the penalty of high treason, his wife may transfer her property and be considered as a *feme sole.*

THIS bill stated that McNeil, in 1777, being married to his wife Fanny, was called up to take the oath of allegiance to this State or to depart. He refused so to do, and was compelled to leave the State under the penalty of law established of incurring the crime of high treason if he returned. That the said Fanny was left here, and afterwards intermarried, during his life, with Troughton; and in 1793, by deed, conveyed to Troughton all her property and rights to property; and that the defendant was accountable to her for divers sums of money and articles of property due from her father's and mother's estate, under their wills. The defendant demurred to this bill, because by her own showing, being either the wife of McNeil or of Troughton, she could not convey by the deed mentioned in the bill. Plaintiff's counsel cited 2 (407) Vern., 104, or 1 Vern, 104, and 2 Bos. & Pul., 226; and after much argument the Court said: We must take the facts stated in the bill; and although possibly the answer might vary the case so as to show the plaintiff could not recover, yet, as the bill states that McNeil was perpetually banished, it follows that, except as to the objection of the marriage, McNeill is to be considered as to all purposes to be actually dead; and she as to all purposes as a *feme sole;* she may sue and be sued, acquire and transfer property. If she may do so by will, as stated in 2 Vern., there is no reason why she may not also do so by deed.

The demurrer must be overruled; and it was overruled, and the defendants ordered to answer.

Cited: Hall v. Walker, 118 N. C., 380; *Levi v. Marsha,* 122 N. C., 567.

WILMINGTON, May Term, 1806.

MCKINZIE v. SMITH.

An answer to an injunction bill may be referred for impertinence, but the report of the master should be made at the same term at which the bill stands for hearing.

BILL in equity for an injunction against an execution at law. The cause being now called in course, *Mr. Gaston,* for the plaintiff, moved the

Court that the answer might be referred to the master for impertinence, saying he had perused the answer, and a great part of it was irrelevant to the matter in controversy.

E contra: Whatever the practice may be in England, it is manifest we have not adopted nor cannot adopt all the English rules of practice without great inconvenience. Our rules should be adapted to our circumstances. Here the court is open but three days; it would operate as a delay of six months to the common-law execution. Should such a reference be made without examining, upon the bill and answer, whether the injunction should be dissolved or continued? Let us read them and consider of that part, and afterwards let the reference prayed take place, and let the defendant pay for his scandal or impertinence, if he has been guilty of either.

PER CURIAM. Let the reference take place, and the report be made on the second equity day of this term; and if not then made, the bill and answer shall be read, and the injunction dissolved or continued. This was on the first equity day.

DUDLEY v. ———.

NOTE.—See *S. c.*, reported in 5 N. C., 339, under the name of *Dudley v. Carmolt.*

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[NOTE—References are to marginal pages.]

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