NORTH CAROLINA REPORTS.

VOL. 30.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

DECEMBER TERM, 1847

TO

AUGUST TERM, 1848

(BOTH INCLUSIVE).

REPORTED BY

JAMES IREDELL.

(8 IRE.)

ANNOTATED BY

WALTER CLARK.

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JUDGES OF THE SUPREME COURT

DURING THE PERIOD COMPRISED IN THIS VOLUME.

CHIEF JUSTICE:

THOMAS RUFFIN.

ASSOCIATE JUSTICES:

[1]JOSEPH J. DANIEL,

FREDERIC NASH, [2]WILLIAM H. BATTLE.

ATTORNEY-GENERALS:

[3]SPIER WHITAKER,

[4]EDWARD STANLY, [5]BARTHOLOMEW F. MOORE.

CLERK AT RALEIGH:

EDMUND B. FREEMAN.

CLERK AT MORGANTON:

JAMES R. DODGE.

REPORTER:

JAMES IREDELL.

---

[1]Died 10 February, 1848.
[2]Appointed May, 1848.
[3]Until December, 1846.
[4]Elected December, 1846.
[5]Appointed May, 1848, vice Stanly, resigned.

JUDGES OF THE SUPERIOR COURTS.

Name.	*County.*
THOMAS SETTLE	Rockingham.
MATTHIAS E. MANLY	Craven.
JOHN M. DICK	Guilford.
[1]WILLIAM H. BATTLE	Orange.
DAVID F. CALDWELL	Rowan.
JOHN L. BAILEY	Orange.
RICHMOND M. PEARSON	Davie.
[2]AUGUSTUS MOORE	Chowan.

[1]Promoted to Supreme Court Bench, May, 1848.
[2]Appointed May, 1848, vice Battle, promoted.

SOLICITORS.

Name.	*District.*	*County.*
DAVID OUTLAW	First	Bertie.
JOHN S. HAWKS	Second	Beaufort.
EDW'D STANLY (Atty.-Gen. *ex of.*)	Third	Craven.
JOHN F. POINDEXTER	Fourth	Stokes.
THOMAS S. ASHE	Fifth	Anson.
HAMILTON C. JONES	Sixth	Rowan.
BURGESS S. GAITHER	Seventh	Burke.

CASES REPORTED.

CASES CITED.

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CASES AT LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

DECEMBER TERM, 1847.

CHARLES WASHING v. EDMUND WRIGHT.

The testimony of a partner, not a party to the record, may be introduced by the plaintiff to prove that the defendant was a member of the firm and that goods were delivered to them by the plaintiff.

APPEAL from the Superior Court of Law of CHOWAN, at Fall Term, 1846, *Dick, J.*, presiding.

This was an action of *assumpsit*, in which the only question was whether one Jones, who was offered as a witness for the plaintiff, was competent. Jones was offered as a witness to prove the sale and delivery of the goods. The defendant objected that he was interested, and introduced one McCoy to prove his interest. McCoy stated the goods were ordered for him and the witness, they having agreed to go into business as copartners, but before their arrival they dissolved, and the goods were not received *by them*. The witness Jones was then introduced, under the directions of the judge, whereupon (2) the defendant insisted on examining him as to his interest, which the judge permitted, and on the examination of the witness he stated the ordering of the goods, as aforesaid; the failure of himself and McCoy to go into business; that thereafter he and the defendant entered into copartnership and purchased the goods of the plaintiff, and received them. The witness stated he had paid for half of the goods, and did not consider himself further liable, though he had no discharge. There

was no other evidence of the copartnership, nor of the purchase, than that derived from this witness. The defendant moved to exclude the witness for interest. This was refused by the judge. The witness was introduced in chief, proved the sale and delivery of the goods to the defendant and the witness, and the copartnership of the witness and the defendant; thereupon a verdict was rendered for the plaintiff. A rule for a new trial was had and discharged, and a judgment on the verdict, from which the defendant appealed.

A. Moore for plaintiff.
No counsel for defendant.

DANIEL, J. We are of opinion that the two cases cited by the plaintiff's counsel show that the decision of the judge was right. *Blackett v. Weir* (11 Eng. C. L., 257) establishes that, where in *assumpsit* for goods sold and delivered, to which the general issue was pleaded, a witness called by the plaintiff to prove the defendant's liability admitted on the *voir dire* that he (the witness) was jointly liable as a partner, this did not render him incompetent, for if the plaintiff recovered the defendant would have contribution, and if he failed he might sue the witness for the whole, and the latter may then claim contribution
(3) from the defendant. *Bayley, J.*, said, "the only difficulty arises from his proving a partnership with the defendant"; but his (the witness') testimony would not prove *that* in any other action. In *Cummins v. Coffin*, 29 N. C., 196, it was held that in an action against two partners the plaintiff may introduce the testimony of a third partner, not a party to the record, though he could not be compelled to give his testimony.

PER CURIAM. Judgment affirmed.

Cited: Street v. Meadows, 33 N. C., 133.

SAMUEL W. SMITH v. C. W. ANDREWS.

When a vendee takes an article *at his own risk*, or *with all faults and defects*, the vendor is not responsible for not disclosing any faults or defects he may know to exist in the thing sold, unless he makes use of some artifice or practice to conceal the faults or defects or to prevent the purchaser from discovering them.

APPEAL from the Superior Court of Law of BLADEN, at Fall Term, 1847, *Caldwell, J.*, presiding.

SMITH *v.* ANDREWS.

This was an action on the case for a deceit on the part of the defendant in trading a note to the plaintiff for a horse. It appeared in evidence that a conversation took place between the parties about the trade of a note held by the defendant on one ..... and endorsed by one Worthington, for $68, in which the defendant said the note was perfectly good. This conversation took place at the house of the plaintiff, and, (4) shortly after, the parties went to look at the horse, then at the house of a neighbor. It also appeared for the plaintiff that, after the trade and when the defendant had just got the possession of the horse, he remarked, "There is a good horse I have got for a note on Jesse ..... and John Worthington," mentioning the amount of the note; upon which a bystander said to the defendant, "The note is not worth a cent; I would not give a cent for it." The defendant then said, "Whether it is worth a cent or not, I have got a good horse for it"; and in another part of the conversation he said "he had got something, when he expected to get very little, and the horse was clear gain to him." It also appeared that the plaintiff lived about twenty miles from said ..... and Worthington, and that they were insolvent at the time of the trade, and had been for some months before.

For the defendant it appeared that when the parties went to the house where the horse was, they commenced chaffering about the note for the horse; the defendant said the note was genuine and that he would warrant that it was signed by the parties, and in speaking of the maker and endorser the defendant said, "You know that Daniel Baldwin says that ..... looks like a man that would pay his debts, and as for Worthington, you know him as well as I do." The plaintiff then asked the defendant to endorse the note, which he refused, saying that he was a trading man and dealt in notes, but he would not endorse the note of a wealthy man in the neighborhood, naming him; and said to the plaintiff if he took the note he must take it at his own risk. The plaintiff then took the note, and the horse was shortly thereafter delivered to the defendant.

A witness for the plaintiff proved that the defendant, in his trading, sometimes visited the neighborhood of the parties to the note.

The court charged that to entitle the plaintiff to a ver- (5) dict he must satisfy the jury that ..... and Worthington were insolvent at the time of the trade, and that the defendant knew it and concealed it from the plaintiff; and though it might be true that the plaintiff agreed to take the note at his own risk, yet if he was ignorant of the condition of the parties

to the note, and the defendant knew it and concealed it, it would be a fraud on the plaintiff, and he would be entitled to their verdict.

The jury returned a verdict for the plaintiff. A motion for a new trial was made, because of misdirection, which was refused, and the defendant appealed.

No counsel for plaintiff.

Strange, with whom were *W. Winslow* and *D. Reid,* for defendants.

DANIEL, J. The first part of his Honor's charge to the jury is unobjectionable and right in law; but when he proceeded to say, "Though it might be true that the plaintiff agreed
(6) to take the note at his own risk, yet if he was ignorant of the condition of the parties to the note, and the defendant knew it and concealed it, it would be a fraud on the plaintiff, and he would be entitled to their verdict," we think he erred.

In *Mellish v. Matteux,* Peaks' N. P. Cases, 115, *Lord Kenyon* laid down the law as his Honor did in this case; for he said, "with all faults" means with all faults unknown to the vendor; but *in Baslehole v. Watters,* 3 Camp., 154, *Lord Ellenborough* overruled the case of *Mellish v. Matteux,* and his decision is confirmed by the whole Court of Common Pleas in the case of *Pickering v. Dawson,* 4 Taunt., 778. The meaning of selling "with all faults" is that the purchaser shall make use of his eyes and understanding to discover what defects there are. But the vendor is not to make use of any artifice or practice to conceal faults, or to prevent the purchaser from discovering a fault, which he, the vendor, knew to exist. When the vendee takes the article at his own risk, or with all faults and defects, the vendor is relieved from disclosing any faults he may know to exist in the thing sold; the maxim *caveat emptor* then applies.

PER CURIAM. New trial.

Cited: Pearce v. Blackwell, 34 N. C., 61.

(7)

THE STATE, UPON THE RELATION OF MARY J. POOL, *v.* JOHN C. EHRINGHAUS.

Where a clerk and master has received money in his office under a decree of the court, and used it, and afterwards pays it out to a person whom he thought entitled to receive it, but who in fact was not so, he is liable to the party properly entitled, not only for the principal received, but also for interest thereon up to the time of the payment to such party.

APPEAL from the Superior Court of Law of PASQUOTANK, at Fall Term, 1847, *Dick, J.*, presiding.

This was an action of debt on the official bond of the defendant as Clerk and Master of the Court of Equity of Pasquotank County.

The facts were submitted to the court upon the following *case agreed:*

At Fall Term, 1835, on the petition of Samuel Lamb and his wife and Mary J. Pool, the present plaintiff, who was then a minor, and appeared by her next friend, Jesse L. Pool, an order was made by the Court of Equity for Pasquotank County for the sale of a tract of land held by them as tenants in common, and at Spring Term of the court succeeding a report of the sale was filed and confirmed, for the sum of $750. At Spring Term, 1838, an order was made directing the clerk and master to collect the money, which the defendant did. At Spring Term, 1839, on a petition filed by Lamb and his wife, an order was made directing the clerk to pay Mr. Lamb his moiety of the money arising from the sale, and which was then in office. On 5 September, 1839, without any order of court, under the belief that Jesse L. Pool was the guardian of his daughter Mary Jane Pool, the defendant paid over to him, as such guardian, the sum of $434.94, which was the principal and *interest* due to Mary J. Pool *up to that time.*

The action is in debt on the official bond of the defend- (8) ant, and the only question presented in the case is whether the plaintiff is entitled to interest on the amount due her from the time the money was wrongfully paid to J. L. Pool.

Upon the case agreed, the judge below, being of opinion that the defendant was liable for the interest claimed by the plaintiff, gave judgment accordingly; and from this judgment the defendant appealed.

A. Moore for plaintiff.

No counsel for defendant.

NASH, J. This is a case agreed, and we are required upon the facts to draw such a conclusion as a jury would. The case states that the sum of $434.94, paid to Jesse L. Pool, consisted of principal and interest up to the time of the payment by the clerk. It is not stated what sum the master did collect, nor when. But it is clear the money was in the office at Spring Term, 1839, or before, and the payment to Pool was on 5 September following, and the interest was calculated up to that time. If so, it must have been upon the ground that the defendant had used the money, for if he had kept it in the office no interest would be due. The defendant, then, had departed from his duty in two particulars, first in using the money so as to make him chargeable with interest, and secondly, in paying to Jesse L. Pool without any authority from the court.

We concur with his Honor that the defendant is justly chargeable with interest on the sum paid to Jesse L. Pool.

PER CURIAM. Judgment affirmed.

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(9)

HARBARD SPENCER v. GEORGE HUNSUCKER.

A justice of the peace has not jurisdiction of such a contract as this: "I, the subscriber, promise H. S. that if he can make it appear that I had in my hands as constable for collection three notes for $75 each, in favor of the administrators of S. S., deceased, against J. S. and others, and endorsed by B. B., then and on that evidence I am to stand indebted to him (H. S.) for one of said notes and interest thereon from 26 April, 1842."

APPEAL from the Superior Court of Law of MOORE, at Fall Term, 1847, *Caldwell, J.*, presiding.

This suit was commenced before a justice of the peace by warrant in "debt for $75 due by *assumpsit.*" After judgment and appeals the cause came on for trial in the Superior Court on *nil debet*, and on the trial the plaintiff gave in evidence a written instrument, signed by the defendant, in the following words: "I, the subscriber, promise H. Spencer that if he can make it appear that I had in my hands as constable, for collection, three notes for $75 each, in favor of the administrators of Samuel Smotherman, deceased, against Jacob Stutts and others, and endorsed by B. Barrett, then and on that evidence I am to stand indebted to him (Spencer) for one of said notes, and interest from 26 April, 1842."

SPENCER *v.* HUNSUCKER.

Several objections were taken to the plaintiff's recovery, and among them was one that the case was not within the jurisdiction of a single magistrate. After a verdict for the plaintiff, subject to the opinion of the court on the points made, the presiding judge set aside the verdict, and, according to an agreement of the parties, ordered a nonsuit; from which the plaintiff appealed.

Haughton for plaintiff.
Strange for defendant.

RUFFIN, C. J. Without adverting to the other objec- (10) tions, the Court deems that upon the question of jurisdiction fatal to the action.

It is first to be noted that this is not within that provision in the act which makes "demands due on special contract or agreement" cognizable before a magistrate out of court; because that clause is restricted to demands of $60 or under, and this contract and action are for $75. The question is whether it falls within the other clause, which embraces debts whereof the principal does not exceed $100, "due on bonds, notes, and liquidated accounts." We think it does not. This contract is not a bond, not being under seal. Nor is it a note, in the sense of the statute, which means, like the acts of 1762 and 1786, by that word, "note," a promissory note for money. That is the legal import of the term *per se;* and the construction is the clearer upon this statute, from the contrast in the language of the two clauses in this section which relate to the several classes of debts of $60 and of $100, that of the former being "special contract, note, or agreement," generally, while that of the latter is confined to the specific forms of contracts, "bonds or notes," in their technical sense. Still less can this instrument be called "a liquidated account," which the statute itself defines to be an account stated in writing and signed by the party from whom the (11) debt shall be due. This imports an amount or balance ascertained to be due on account from the one party to the other, and it excludes the idea of an original contract whereby one person engages to pay a sum of money to another on a certain contingency, in the nature of a wager.

Such a case is not within the purview of that part of the act.

PER CURIAM. Judgment affirmed.

THE STATE TO THE USE OF JACOB HUBBARD v. STEPHEN WALL'S EXECUTORS.

In an action upon a constable's bond for not collecting bonds, notes, etc., placed in his hands for collection, after a sufficient time has elapsed for that purpose, it is incumbent on him or his sureties to show that he could not have collected the money by reason of the insolvency of the debtor or otherwise, and also that he had returned or offered to return the security for the debt to the creditor; otherwise he and his sureties will be liable for the amount.

APPEAL from the Superior Court of Law of RICHMOND, at Fall Term, 1847, *Caldwell, J.*, presiding.

(12) The following case was reported by the presiding judge:

This was an action of debt on a bond executed by the testator of the defendant on 16 April, 1839, as one of the sureties of one Sedbury, a constable. The breaches assigned were as follows: *First*, that the constable had collected the money on a claim put into his hands by the relator, and had failed to pay it over; *secondly*, that he had failed to use due diligence in collecting the said claim; *thirdly*, that he had failed to return the note. On the trial it appeared that the relator had placed in the hands of the constable, on 1 February, 1840, a note on John and Jane McAlister for the sum of $75, and took his receipt therefor, in which it was set forth that he, the said constable, would collect or return the said note. It also appeared that Sedbury had been appointed a constable and had given his bond in 1840, and had run off before the commencement of this action, which was on 23 July, 1845. It also appeared in evidence that some time in 1845 the relator called on the testator of the defendant and demanded of him the money on account of a note he had placed in the hands of the said Sedbury. It did not appear on the trial that the constable had collected the money from the McAlisters, nor was it made to appear that they had any property out of which the debt could be made.

On this state of facts the court was of opinion, and so charged, that the relator was only entitled to nominal damages on the breach assigned for not returning the note, and the jury so found.

The plaintiff appealed from the judgment rendered on the verdict, on the ground of misdirection by the court.

Winston for plaintiff.
Strange for defendant.

NASH, J. This was an action of debt on the official (13) bond of one Sedbury, a constable, to which the defendant's testator was a surety. The case states that in April, 1836, the relator put into the hands of Sedbury a note for $75 upon John and Jane McAlister, and took his receipt to collect the money or return the note. In 1845 a demand was made upon the surety for the money, the constable having previously run away. The case then proceeds: "It did not appear upon the trial that the constable had collected the money from the debtors, the McAlisters, nor was it made to appear that they had any property out of which the debt could be made," and for these reasons "the court charged the jury that the relator was entitled only to nominal damages for not returning the note."

The third breach assigned in the plaintiff's declaration was for not returning the note. The first, for collecting the money and not paying it over. As the fact assigned as the third breach is necessarily connected with the first assigned, in the view we have taken of the case, we shall not give it a separate and distinct consideration. His Honor charged the jury that it did not appear that the constable had collected the money from the debtors, the McAlisters. In this we think there is error. If he meant that there was no direct proof of that fact, he was right; but there was no necessity for such evidence to enable the plaintiff to recover for the first breach. If he did not so mean, the language was well calculated to mislead the jury, and must have had that effect, as they gave nominal damages only for not returning the note—in compliance with the charge as to the third breach. That there was evidence to go to the jury, and which ought to have been submitted to them, is evident from the facts stated in the case. Near, if not quite, six years had elapsed after Sedbury received the note before this action was brought, and upon the trial it was not produced nor offered to be surrendered up, nor was any account given of it. The constable had run away, and had either taken the note (14) with him or received the money and converted it to his own use before he did so. *Wilson v. Coffield*, 27 N. C., 515, is a direct authority upon this point. There the constable had, in February, 1838, received from the plaintiff a judgment to collect, and the action was brought in 1844. This Court decided that the judge might have instructed the jury that from the length of time which had elapsed the law presumed the constable had received the money. This presumption arises from the fact that when the action is brought the note is neither surrendered to the plaintiff nor is it in any way accounted for. His Honor laid upon the constable the duty to show he had not collected

the money. The plaintiff has not been placed by the constable in the situation in which he was when the agency was assumed and which he had a right to require. There was then evidence to go to the jury that Sedbury had collected the money. This action is against the surety, but it is not denied that he must stand in the shoes of his principal; it was his duty to see that the constable not only paid over all the money which he had collected to the persons to whom due, but, also, that all evidences of debt placed in his hands for collection be returned to their respective owners at the expiration of his official year. *S. v. Johnson,* 29 N. C., 78. We are of opinion that the presiding judge erred in the instruction he gave the jury.

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

Cited: Wiley v. Logan, 95 N. C., 361.

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(15)

THE STATE v. TIMOTHY ANDERS ET AL.

1. In a case of forcible entry and detainer a magistrate has no right to award restitution unless the jury have found by their verdict that the complainant had *some estate* in the land, either a freehold or for a term of years.

2. Without such finding the magistrate may bind over the defendant to the court to answer to an indictment for the forcible entry; but without such finding he has no jurisdiction to oust the defendant of his possession and put the complainant in. If he does so he is himself liable to an indictment for forcible entry.

APPEAL from the Superior Court of Law of BLADEN, at Fall Term, 1847, *Caldwell, J.*, presiding.

This is an indictment for a forcible entry by the defendants upon the possession of one Flynn, and on the trial it was fully proved. On behalf of the defendants it appeared that an inquisition of forcible entry and detainer, at the instance of the defendant Anders, had been taken on the premises, under which said Flynn was ousted; that it had been returned to the Clerk of the Superior Court of Bladen, and by the counsel for the State it was admitted to have been lost or mislaid, but the regularity of said requisition was denied. In proving its contents it appeared that a jury had been summoned; that they appeared on the premises; that they were sworn by the magistrate; that said Flynn was present; that they returned their verdict in

these words: "The jury find that said Flynn entered peaceably, but held the premises by force"; that the magistrate adjudged that restriction should be made, and thereupon the said Flynn was put out of possession and the said Anders put in by the defendants.

It did not appear that said Anders made any affidavit (16) or written complaint before the magistrate on which said inquisition was founded. And it appeared that the jury had been summoned by a constable. The court was of opinion that a constable was not the proper officer intended by the statute to summon the jury, and that an affidavit in writing ought to have been made before the magistrate by said Anders to authorize the proceedings. And the court, in direct terms, charged that as the verdict of the jury did not find that said Anders had any estate whatever in the land of which he sought to dispossess said Flynn, the award of restitution by the magistrate was null and of no effect, and offered no protection to the defendants. Under this charge the jury returned a verdict of guilty against the defendants. A rule for a new trial was moved for, because of misdirection, which on argument was discharged.

Judgment was pronounced against the defendants, and thereupon the defendants Anders and Evans appealed to the Supreme Court.

Strange for appellants.
Attorney-General for the State. (17)

DANIEL, J. The defendants, with force and arms, and with a strong hand, entered upon the premises of one Flynn, and him dispossessed and took possession of the messuage and appurtenances, and have held them up to this time. The defendants insisted that their entry was *lawful*, and they introduced as evidence on the trial the proceedings which had taken place on a warrant for a forcible entry and detainer which had before that time been issued by Evans (a justice) at the instance of Anders; all of which is stated in the case.

The judge was of opinion that Evans, the justice, had no power to restore Anders by force of those proceedings, because, if all other things had been correctly done the jury by their verdict had not found that Anders had any *estate*, (18) either of freehold or for a term of years in the land. We concur with his Honor; the very question was decided by this Court in *Mitchell v. Fleming*, 25 N. C., 123. In that case we said that before a writ of restitution can be awarded the jury must find by their verdict that the party forcibly dispossessed

had either a freehold or a term for years in the land of the possession of which he had been deprived. In *S. v. Nations*, 23 N. C., 325, this Court held the same doctrine.

But it is insisted that the justice (although he personally assisted Anders in gaining possession, in the manner described in the indictment) is not liable in law to be indicted, because he acted under ignorance of the law or error in judgment. The justice had power to inquire whether Flynn had made a forcible entry upon the possession of Anders, and, if the evidence satisfied him that the fact was so, he might have bound him over to court, to have been indicted for a forcible entry. This course he did not pursue, but he forcibly dispossessed Flynn and put Anders into possession. This was not an error in judgment; it was an act the statutes gave the justice no power or authority to do; his action in the matter was not voidable, but was absolutely void and tortious. Without the finding by the jury of an estate for years, at least, in Anders, the justice had jurisdiction to bind the offender to answer personally for the offense of forcible entry. But without such finding he had no jurisdiction to oust Flynn of his possession and put Anders in. It is, therefore, not a case of error of judgment of a judicial officer, upon a matter within his jurisdiction, but of usurpation of power, beyond his jurisdiction.

We think the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Grissett v. Smith, 61 N. C., 165.

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(19)

STATE v. SPENCER S. REEVES.

1. Where the record of the proceedings on an indictment for murder uses the past tense instead of the present, this is not error.

2. Where a prisoner, indicted for murder, upon his arraignment pleads not guilty, "and for his trial puts himself *on his country*," this is sufficient without his saying "*on God and his country*."

APPEAL from the Superior Court of Law of GUILFORD, at Fall Term, 1847, *Bailey, J.*, presiding.

The case was this: After a conviction of murder the prisoner moved in arrest of judgment; and, after the motion was overruled and sentence passed on him, he appealed. The motion was founded on two reasons. The one, that in several instances

the proceedings are stated in the record in the past instead of the present tense. The other, that in that part of the record which contains the arraignment and plea of the prisoner it is stated, "and thereof, and for his trial, the said Spencer S. Reeves puts himself upon the country," whereas it should have been that the prisoner said that he would "be tried by God and the country."

Attorney-General for the State.
Morehead for defendant.

RUFFIN, C. J. There is no force in either of the reasons in arrest. That respecting the tense was taken and overruled in *S. v. Martin*, 24 N. C., 101. As to the other point, the record is right in its present form. The inquiry, how the prisoner will be tried, which tenders to him an election as to the mode, had its origin, doubtless, in his right anciently to a trial by jury or by battle. But, though still made, in deference (20) to long usage, that inquiry and the answer to it are held, at this day, an unmeaning ceremony, as we have but one method of proceeding for capital felonies, which is by indictment and trial by jury. Indeed, although the old forms are adhered to in England, in the oral proceedings in the arraignment of the accused and taking his plea, yet the only note of them made at the time is a memorandum by the clerk on the indictment—"*po. se*"—meaning that the prisoner put himself (*ponit se*) upon the country. 1 Chit. C. L., 416. And in the best formularies of engrossed records no notice is taken of any part of that ceremony subsequent to the plea; but they merely state that, "being demanded concerning the premises, etc., how he will acquit himself thereof, he saith *that he is not guilty thereof*," and "thereof, for good and evil, *he puts himself upon the country*": and then, after an entry of the *similiter* (which, indeed, may be omitted without error), there follows immediately the award of the *venire*. 4 Bl. Com., 340, Appendix 3. Whether regard be had, then, either to the substance or the forms of the proceeding, it is only necessary that there should be a plea of not guilty, tendering a proper issue to the country.

It must, therefore, be certified to the Superior Court that there was no error in passing judgment of death on the prisoner to the end that it may be carried into execution.

PER CURIAM. Ordered to be certified accordingly.

Cited: S. v. Swepson, 81 N. C., 575.

(21)

THE STATE v. WILLIAM DANIEL.

Where in a criminal case in which, after conviction, the defendant has been sentenced to imprisonment, and he appeals merely for delay, without filing any exceptions or making any defense in point of law, the Supreme Court thinks this an abuse of the right of appeal, and that the Superior Court should not admit the convict to bail during the pendency of the appeal.

APPEAL from the Superior Court of Law of PERSON, at Fall Term, 1847, *Bailey, J.*, presiding.

This was an indictment against the defendant for an assault and battery, and, upon not guilty pleaded, he was convicted, and the court sentenced him to pay a fine of $100 and be imprisoned ten days, and enter into bond for his good behavior, etc. From this judgment the defendant prayed an appeal to the Supreme Court, which was granted upon his giving the usual appeal bond, conditioned that "he would abide by the sentence, judgment or decree of the Supreme Court in the said suit." No exception was made to the judge's charge, nor any motion in arrest of judgment made.

Attorney-General for the State.

No counsel for defendant.

RUFFIN, C. J. The defendant was indicted for a battery on one Hopkins, and was convicted on not guilty pleaded, and sentenced to pay a fine of $100 and be imprisoned ten days, and he appealed to this Court.

(22) Of course, the conviction is to be presumed right, in point of law as well as in point of fact, since the defendant tendered no bill of exceptions. Therefore, there cannot be a *venire de novo*. Nor does the Court find any error in the record for which the judgment should have been arrested. Indeed, none has been suggested on the part of the defendant; but he has given up the case. We conclude that the appeal was for delay merely; and we notice it merely for the purpose of expressing our disapprobation of such an abuse of the right of appeal, and intimating the propriety in such cases of preventing it by the Superior Courts refusing to let a convict to bail, since thereby the purposes of the law in requiring offenders to be punished are in a considerable degree defeated and the law evaded and brought into contempt.

The usual certificate, that there is no error in the judgment, must be sent to the Superior Court, to the end that further proceedings may be had there according to law.

PER CURIAM. Ordered accordingly.

(23)

THE STATE v. JOHN POTEET ET AL.

1. On the trial of an indictment under the statute for fornication and adultery it is not necessary to show by direct proof the actual bedding and cohabiting; it is sufficient to show circumstances from which the jury may reasonably infer the guilt of the parties.

2. Where on such a trial a witness testified that he went early one morning to the house of one of the defendants, and on knocking was, after some hesitation, admitted by the other defendant, the female, who came to the door with her frock on but unfastened; that the male defendant was in the only bed in the room; that the shoes of the female were near the head of the bed, and that the bed seemed to be very much tumbled: *Held*, that the judge did right in refusing the instruction, prayed for by the defendants, that there was *no* evidence from which the jury might infer the criminality of the defendants.

APPEAL from the Superior Court of Law of CASWELL, at Fall Term, 1847, *Bailey, J.*, presiding.

This was an indictment under the section of the Revised Statutes concerning fornication and adultery, to which the defendants pleaded not guilty. On the trial the State examined a witness by the name of Willis, who testified that on the morning preceding the last Easter he, in company with another individual, went to the house of the defendant Poteet, at a very early hour, between daybreak and sunrise, and knocked at the door of the room in which this defendant was in bed, and, on knocking, he heard the voice of the defendant Martha Hooper refusing admission, but the defendant Poteet told her to open the door and let the witness in. She accordingly opened the door, and the witness entered the room and found Poteet in bed, the bed very much tumbled; the defendant Martha had on her frock, but it was not fastened, and her shoes were also off and were lying in the corner near the head of the bed. This witness further testified on cross-examination that there were (24) two other rooms, adjoining the room in which he saw the defendants, the doors of which were closed, and he could not see whether there was a bed in either of the rooms or not. He was asked if the defendant Martha lived with Poteet, and he replied that he had seen her there several times, when passing, but could not say whether she lived there or not. Another witness for the State testified substantially to the same facts, except that in regard to the shoes of the defendant Hooper, as to which he stated that they were lying in the corner when he and the first witness went into the room, but said nothing about their being near the bed. A third witness testified that the defendant

Martha had lived in the house with the defendant Poteet for four or five years, and that she had been married, but her husband was dead.

The defendant's counsel insisted that there was no evidence to be left to the jury tending to show the guilt of the defendants, and asked the court so to charge.

The court declined giving the instruction asked for, but charged the jury that, before they could convict, they should be satisfied from the evidence that there was an habitual criminal intercourse between the parties, or a surrender of the person of the one to the gratification of the other. The jury returned a verdict of guilty, and from the judgment pronounced thereon by the court the defendants appealed.

Attorney-General for the State.
Morehead for defendants.

DANIEL, J. There was no express evidence to prove that the defendants "bedded and cohabited together." But, in the absence of express and positive testimony, the law authorized the conviction of the defendants on presumptive evidence, if it was so strong as to leave no reasonable doubt on the minds of the jury that they were guilty. The Court is of opinion that
(25) the facts and circumstances proved on behalf of the State all tended to support the charge in the indictment, that the defendants did bed and cohabit together, and that the judge could not have said that there was *no* presumptive evidence to support the indictment. The weight of the evidence was left to the jury; they convicted the defendants, and the court rendered judgment, which we affirm.

PER CURIAM. Ordered to be certified accordingly.

Cited: S. v. Eliason, 91 N. C., 566; *S. v. Dixon,* 104 N. C., 707; *S. v. Austin,* 108 N. C., 784; *S. v. Chancy,* 110 N. C., 509; *S. v. Varner,* 115 N. C., 745; *S. v. Dukes,* 119 N. C., 783.

DEN ON DEMISE OF WILLIAM AND ABNER WEATHERLY *v.* SOLOMON ARMFIELD.

A, in 1817, devised as follows: "I give to my son I the tract of land he now lives on; but if he should die without an heir, the land then to be divided between my two sons A and W": *Held*, that the limitation over was too remote, the devise to I creating an estate tail, which by our act of Assembly is converted into a fee simple.

APPEAL from the Superior Court of Law of GUILFORD, at Fall Term, 1847, *Bailey, J.*, presiding.

This was an action of ejectment in which the parties agreed upon the following facts:

Isaiah Weatherly, the elder, was seized of the premises in fee, and devised them on 5 September, 1847, as follows: "I give to my son Isaiah the tract of land he now lives on; but if he should die without an heir, the land then to be divided (26) between my two sons, Abner and William." Isaiah, the son, enjoyed the premises during his life and died without ever having had a child, and the defendant claims under him. The testator's two sons, Abner and William, to whom the premises were limited over, are the lessors of the plaintiff. Upon not guilty pleaded, the plaintiff was nonsuited in the Superior Court, and appealed.

Morehead for plaintiff.
Iredell for defendant.

RUFFIN, C. J. The limitation over is clearly too remote, and the whole estate vested absolutely in the first taker. "Heir" means heir of the body in this will, as the gift over, upon the death of one son "without an heir," is to his two brothers. There is nothing in the will to enable us to read "child" or "children" for "heir," and in its proper sense of "heir of the body" Isaiah, the son, took a fee by force of the act which turns estates tail into fee simples. This conclusion is supported by several cases, which are directly in point. *Davidson v. Davidson*, 8 N. C., 163; *Sanders v. Hyatt*, *ib.*, 247; *Hollowell v. Kornegay*, 29 N. C., 261.

PER CURIAM. Judgment affirmed.

Cited: Leathers v. Gray, 101 N. C., 164, 166.

(27)

RICHARD SNEED v. ROBERT A. JENKINS.

1. In an action upon a covenant for rent contained in a lease it is competent for the defendant to show that at the time of its being made the plaintiff had no title, provided he can show at the same time that in consequence thereof he could not enter, or, having entered, he was evicted by a paramount title.

2. In every plea of eviction there must be an averment that the lessor had not a perfect title when he demised; and it must also be added that, in consequence, the lessee was evicted. The whole is the defense.

APPEAL from the Superior Court of Law of GRANVILLE, at Spring Term, 1847, *Manly, J.*, presiding.

This was an action for the breach of a covenant for the payment of rent, contained in a lease. The plaintiff, by deed, leased to the defendant a tract of land for the year 1842, reserving a rent of $125, which the defendant covenanted therein to pay. The defendant entered into and kept quiet possession of the land for the period for which it was leased. The action is brought on the covenant to recover the rent. On the trial it appeared that the legal title to the premises at the time the lease was made was not in the plaintiff, but in another person, whose agent, before the expiration of the defendant's term, sold the land at public auction, when the defendant and his father became the purchasers. It was further shown that at the request of the plaintiff and of the father, Robert Jenkins, the agent, at the time of the sale expressly reserved to the defendant the right to the possession during his term, then unexpired. The defendant relied upon the plaintiff's want of title to defeat the action.

His Honor charged the jury that, upon this state of facts, the plaintiff was entitled to recover, and the jury found a
(28) verdict for him. From the judgment thereon the defendant appealed.

Badger and *Mangum* for plaintiff.
E. G. Reade and *Iredell* for defendant.

NASH, J. The covenant to pay being in the lease, and not in a distinct and separate obligation, it was competent for the defendant to show, in an action upon the lease, that at the time of its being made the plaintiff had no title, provided he could show, at the same time, that in consequence thereof he could not enter or, having entered, he was evicted by a paramount title; for it is upon the title of the lessor and the enjoyment of the

premises by the lessee that the landlord's right to the rent depends. In truth, in every plea of eviction there must be an averment that the lessor had not a perfect title when he demised; but that fact alone is not sufficient. To constitute a perfect plea it must be added that, in *consequence*, the lessee was evicted —the *whole* is the defense. 6 Taun., 534; *Taylor v. Tamina*. There is not that union here. The plaintiff had not the title, but the lessee has not been evicted; on the contrary, he has enjoyed his term and received all the benefit he was entitled to under his lease, and cannot be permitted to set up his landlord's want of title in defense. *Hodson v. Sharpe*, 10 East., 353. But in addition to this, at the time of the sale by the agent of the owner his right of possession under his lease, during the term, was recognized and expressly reserved to him, at the request of the plaintiff and his father, who was a joint purchaser with him. If not bound under his covenant to pay the present plaintiff, he will have enjoyed the use of the premises without paying rent to any one.

We perceive no error in the opinion of the judge who tried the cause.

PER CURIAM. Judgment affirmed.

Cited: McKesson v. Mendenhall, 64 N. C., 505.

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(29)

CULLEN SMITH v. CALEB SMITH.

1. Error will not lie for a refusal to nonsuit, except in a few cases in which the duty is imposed by statute.

2. A verdict on the merits of the case is to be set aside only for an error of the court practically prejudicial.

3. In an action of slander, charging that the defendant, speaking of a particular suit, affirmed that the plaintiff "had sworn to a lie," the particular evidence given by the plaintiff on the trial of the suit is never set forth in the declaration, and therefore need not be proved.

4. If the defendant had, in speaking the words, gone on to specify the matters testified by the plaintiff and the point on which he had sworn falsely, then it would have been incumbent on the plaintiff to have set forth the whole truly in his declaration; and if, upon the whole thus stated and proved, the matter to which the alleged false oath related appeared to be immaterial, the action could not be maintained.

5. In actions of slander evidence of the truth of the words spoken cannot be received under the general issue, even in mitigation of damages, though evidence of general bad character may be so received.

6. Whether after the defendant has closed his evidence the court will permit the plaintiff to offer evidence which might have been offered in the first instance is a matter of discretion for them, and their decision cannot be revised by an appellate Court.

APPEAL from the Superior Court of Law of PITT, at Fall Term, 1847, *Battle, J.*, presiding.

The action is for slander in indirectly imputing to the plaintiff the crime of perjury, by saying to him, when speaking in reference to the trial of an indictment against one Bryant Adams and to the examination of the plaintiff as a witness on the trial, "You swore to a lie, and I can prove it." Plea, not guilty.

In support of his declaration the plaintiff gave in evidence the record of an indictment against Adams for a battery on the present defendant, on which there was a trial and acquit-
(30) tal on not guilty pleaded, and proved that he, the plaintiff, was sworn and examined as a witness for Adams. He also gave evidence that the day after the trial the present defendant, speaking in reference to it and to the examination of the plaintiff on it, said to the plaintiff, "You swore to a lie, and I can prove it."

The plaintiff there stopped his case, and thereupon the counsel for the defendant insisted that the plaintiff was bound further to show what evidence he gave on the trial of Adams, so that it might appear to have been to some material point; and for the want of such proof he moved the court to nonsuit the plaintiff. The court refused the motion.

Then, for the purpose of showing that he did not intend to charge the plaintiff with perjury, but with a mistake only, and to rebut the imputation of malice, the defendant gave evidence that on the trial of Adams he, the defendant, was a witness for the State and swore that Adams struck him, and that the plaintiff swore that Adams did not strike him.

The defendant, for the purpose of further rebutting the imputation of malice and mitigating the damages, offered to prove also that Adams did, in fact, strike him. To that evidence the counsel for the plaintiff objected; and the court refused to admit it.

The plaintiff then offered evidence that the defendant had subsequently repeated the charge against him. The counsel for the defendant opposed its reception, on the ground that, after having once closed his case, the plaintiff could not give evidence

of malice in the defendant. But the presiding judge admitted it, in answer to that given on the other side, for the purpose of showing the absence of malice. There was a verdict for the plaintiff, and from the judgment the defendant appealed.

Stanly for plaintiff. (31)
No counsel for defendant.

RUFFIN, C. J. There are several reasons why the defendant can take nothing on his first point.

In the first place, error will not lie for a refusal to nonsuit, because the court is not bound to do so in any case, but has the discretion to leave the matter to the decision of the jury; except in the few cases in which the duty is imposed by statute. The defendant should have asked an instruction to the jury, and then he might have brought his case here for a wrong direction given or a right one refused. In the second place, if the objection had been good at the time it was taken, it was immediately overruled by the defendant's own proof that the evidence of the plaintiff on the trial of Adams was material, and, indeed, that it went to the gist of the matter. The defendant himself thus shows that the error of which he complains, if an error at all, was merely abstract and harmless in this case, under the facts actually existing; and a verdict on the merits is to be set aside only for an error practically prejudicial.

But, lastly, the decision was not erroneous, but per- (32) fectly correct in itself. The plaintiff was not bound to prove more than his declaration ought to contain. As the words did not directly import a charge of perjury, but only that the plaintiff was forsworn, it was necessary to allege, as inducement, that there was a judicial proceeding, in which the plaintiff gave evidence as a witness, and that the defendant referred to that in making the charge. But the particular evidence given by the plaintiff is never, we believe, set forth in the declaration, and therefore need not be proved. In practice, plaintiffs have never been called on for such proof. The precedents contain, after the inducements and colloquium, the words spoken, and the averment that the defendant thereby meant to charge that the plaintiff in giving his evidence committed perjury. *Whitaker v. Carter*, 26 N. C., 461; 2 Chit. Pl., 621. If, indeed, the defendant had, in speaking the words, gone on to specify the matters testified by the plaintiff, and the point in which he had sworn falsely, then it would have been incumbent on the plaintiff to have set forth the whole, truly, in the declaration; and if, upon the whole thus stated and proved, the matter to which the alleged

false oath related appeared to be immaterial, the action could not be maintained, since no intention to charge a perjury can be inferred from words that, taken together, legally import that there was no perjury.

But this defendant charged in general terms that in the evidence which the plaintiff gave as a witness in the prosecution against Adams, he "swore to a lie," which, connected with the inducement, the colloquium, and the innuendo, imports the charge of perjury, and imposes it on the defendant to show what the plaintiff did swear, and that it was corruptly false. Hence, the defendant, in his plea of justification, must state the evidence given by the plaintiff, and then negative the parts
(33) in which it is alleged the perjury consisted, just as in an indictment for that offense. 3 Chit. Pl., 1033, 1037. To this effect the language of *Mr. Justice Ashurst* in *Coleman v. Godwin* is very pointed, as quoted by *Chancellor Walworth* in *Power v. Price*, 16 Wen., 450: "The effect of the words upon the hearers is what is to be considered, and the determinations in the old books are a disgrace to the law. If one charges a witness with having sworn false in relation to a particular fact in a cause, which fact would not necessarily be immaterial and irrelevant, the natural effect of the words is to convey to those who hear them the impression that the witness has committed perjury; and if the defendant wishes to show that he did not intend to impute the crime of perjury to the plaintiff, but merely that he had perverted the truth in relation to an immaterial fact, the burden of showing that the fact testified to was not material to the issue, and that it was not intended to impute to the plaintiff false swearing in the suit in the ordinary sense of the term, rests upon the defendant." And that doctrine is fully sustained in *Power v. Price*, by the Chancellor and the majority of the Court. The plaintiff, therefore, gave all the evidence the law required of him, and it would have been erroneous to nonsuit him.

In actions of this kind evidence of the truth of the words cannot be received under the general issue. *Smith v. Richardson*, Willes, 20, and *Underwood v. Parks*, Str., 1200, are the leading cases on this subject. They were decided upon consultation of all the judges, and have been considered ever since as settling the point. *Roberts v. Camden*, 9 East., 92. Evidence of bad character may reasonably be heard in mitigation of damages, because less is due to a blemished than an unblemished name, and one is supposed to be at all times prepared to establish his general character. But unless the defendant pleads the truth of his charge it would be a surprise on the other party to allow

him to give evidence of it. And as to its repelling the implication of malice, which is incident to the publica- (34) tion of a slander, it has no such effect. For, as was well observed by *Mr. Justice Holroyd* in *Fairman v. Ives*, 5 Barn. and Ald., 645, by showing the truth of the slanderous matter which is the subject of the action, you do not show that it was not maliciously spoken or published, but merely that the party is not entitled to damages, because he is guilty of the charge imputed to him. There is often as much malice, ill-will and design to hurt, towards another, in speaking truly as falsely to his disparagement.

The last evidence given by the plaintiff was properly admitted as evidence in reply to that of the defendant, as mentioned by his Honor.

But if it had not been of that character its reception could not constitute an error for which the judgment might be reversed. The evidence was in its nature competent, and the objection to it was solely the period at which it was offered. Now, that concerns only the orderly proceeding in trials, about which there is no positive rule of law, like those touching rights, but only a course of the courts established for convenience and dispatch of business. To that course the courts generally, and very properly, adhere with strictness. But from it they in their discretion sometimes may, and under circumstances which require it, will depart for the advancement of justice; and an appellate court cannot undertake to control or regulate the discretion. It is the more safely and beneficially exercised by those who preside at trials, and can best appreciate, both the inconvenience from and, in particular cases, the necessity for admitting an irregularity of proceeding. *Kelly v. Goodbread*, 4 N. C., 468.

PER CURIAM. Judgment affirmed.

Cited: S. v. George, post, 329; *Carlton v. Byers*, 71 N. C., 334; *Sowers v. Sowers*, 87 N. C., 306; *Lerenson v. Elson*, 88 N. C., 184; *Knott v. Burwell*, 96 N. C., 278; *Brown v. King*, 107 N. C., 316; *Gudger v. Penland*, 108 N. C., 600; *Upchurch v. Robertson*, 127 N. C., 128.

(35)

THE STATE v. THOMAS NASH.

1. In an indictment for a capital offense, the court having previously ordered one hundred tales jurors to be summoned, on the trial the original panel was first perused and exhausted, and the court then directed thirty-six of the tales jurors to be drawn, and, these being exhausted by challenges, directed the remaining tales jurors to be drawn, the prisoner at the time making no objection: *Held*, that there was no error in this nor ground for a new trial.

2. The mother of the prisoner being introduced by him to prove an *alibi*, the court charged the jury "that the law regarded with suspicion the testimony of near relations when testifying for each other; that it was the province of the jury to consider and decide on the weight due to her testimony, and, as a general rule, in deciding on the credit of the witnesses on both sides, they ought to look to the deportment of the witnesses, their capacity and opportunity to testify in relation to the transaction, and the relation in which the witness stood to the party": *Held*, that this charge was not erroneous.

APPEAL from the Court of Law of MONTGOMERY, at Fall Term, 1847, *Caldwell, J.*, presiding.

The prisoner was indicted for murder. The day before the trial the presiding judge, at the instance of the solicitor of the State, ordered a special writ of *venire facias* to issue to the sheriff, commanding him to summon one hundred jurors. In forming the petit jury the original panel was first perused, and, a jury not being made, the clerk was directed by the court to put into the box, from whence the names of the jurors were drawn, thirty-six scrolls, containing the names of that number of the special venire. This was done, and *they* were all drawn without making a jury, because of the challenges. The scrolls containing the names of the remainder of the special *venire* were then put into the box by the order of the court, out of which a jury was made. To this mode of making up the jury
(36) no objection was made at the time or during the trial.

On the trial the prisoner introduced his mother as a witness, to prove an *alibi*, and she swore to his absence at the time it was alleged the murder was committed. The court charged, "That the law regarded with suspicion the testimony of near relations, when testifying for each other; that it was the province of the jury to consider and decide on the weight due to her testimony, and, as a general rule, in deciding on the credit of the witnesses on both sides, they ought to look to the deportment of the witnesses, their capacity and opportunity to testify in relation to the transaction, and the relation in which the witness stood to the party."

STATE *v.* NASH.

The prisoner was convicted, and moved for a new trial for error of the court in forming the jury and error in the charge. This motion was overruled, and the prisoner then moved in arrest of judgment, and, that being refused, appealed.

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

NASH, J. We perceive nothing in the manner in which the jury was formed or in the charge of the presiding judge to induce us to disturb the verdict in this case. The error alleged as to the former consists, as we are told, in the fact that, after failing to procure the jury from the original panel, the court directed the names of thirty-six of the tales jurors to be put into the box, instead of ordering the whole to be deposited together, as it was the right of the prisoner to have an opportunity of having all the tales tendered to him. If it (37) be true that, upon the failure to procure a jury from the original *venire*, the prisoner had a right to have tendered to him the whole of the special *venire*, and that upon his demand it would have been erroneous to refuse it (a point we do not decide), yet here there has been no error, because he did not demand it, and he was not in fact deprived of any right belonging to him. The jury was not formed out of the thirty-six names first deposited in the box, but after that panel was exhausted the names of all the remainder of the tales jurors were deposited and drawn from. So that in fact he had an opportunity of having all the jurors tendered to him, and it was precisely the same as if the names of all the jurors had been put into the box at the same time. *S. v. Lytle*, 27 N. C., 61.

The presiding judge was fully sustained in his charge as to the evidence of the mother of the prisoner by *S. v. Ellington*, 29 N. C., 61. The charge in the latter case was, in principle, what it is here, and the reasons are there so fully stated that it is sufficient to refer to it.

We have looked carefully into the record, and are unable to perceive in it any reason for which the judgment should be arrested.

PER CURIAM. Ordered to be certified accordingly.

Cited: S. v. Nat, 51 N. C., 117; *Flynt v. Bodenhamer*, 80 N. C., 208; *S. v. Hardee*, 83 N. C., 622; *S. v. Jenkins*, 85 N. C., 547; *Buxly v. Buxton*, 92 N. C., 484; *Ferrall v. Broadway*, 95 N. C., 559; *S. v. Byers*, 100 N. C., 518; *S. v. Lee*, 121 N. C., 544.

(38)

WILLIAM J. STEVENS' HEIRS v. JAMES M. SMITH.

Where a tenant for a year was ejected by force of the statute in relation to forcible entry and detainer, whatever the errors and unlawfulness of the proceedings against such tenant may be, the landlords, not being parties to the proceedings, have no right to intervene by writ of *certiorari*.

APPEAL from the Superior Court of Law of SAMPSON, at Fall Term, 1847, *Caldwell, J.*, presiding.

The plaintiffs obtained a *certiorari*, which the defendant moved to quash because it was improvidently issued. The court allowed the motion, and the plaintiffs appealed. Upon the affidavits and record the case is this: The plaintiffs were, for several years, in possession of a tract of land, claiming it in fee and as descended from their father; and they leased it to Charles Turnage for 1845, and he took possession under his lease. On 27 January, 1845, the defendant, Smith, before a justice of the peace, instituted proceedings against Turnage under the statute for a forcible entry and detainer, and such proceedings were had thereon that on 8 February following Turnage was found guilty, and the magistrate ousted him and put Smith into possession. Immediately afterwards Turnage accepted a lease of the premises from Smith, for the residue of the year, and entered and held under it. The plaintiffs then applied for the *certiorari* that was issued in this case.

The court dismissed the *certiorari* and the plaintiffs appealed.

No counsel for plaintiffs.
Strange for defendant.

RUFFIN, C. J. It is evident enough on the affidavits that the proceeding for a forcible entry and detainer in this case
(39) was a flagrant abuse of that remedy, and it is equally plain that there are gross errors in the proceedings, for which they ought to be reversed. We cannot but regret that it is not in our power to deal with the case upon its merits. But the Court is obliged to sustain the decision of his Honor, inasmuch as Turnage, who was the party, does not complain, and his original landlords cannot intervene in a criminal proceeding to which they were not parties.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF J. C. B. EHRINGHAUS v. MARMADUKE CARTWRIGHT.

1. A devised as follows: "I give to my said son Thomas and my daughter Patsy, who was also born before I married her, and is now the wife of Charles Brite, all the remaining part of my land, to be equally divided, in fee simple": *Held*, that, notwithstanding this declaration of illegitimacy, it was competent for those who claimed as heirs of Patsy to show that she was born in lawful wedlock, and that this mistaken description in the will was controlled by the other more certain description which identified her as the devisee intended.

2. If she were illegitimate, her brother Thomas, who was a bastard, could not inherit from *her* legitimate daughter.

3. No part of a description is to be arbitrarily rejected, but every part of it is to be respected; and especially when a person can be found answering the whole description. But when there is no such person, and where the will or other instrument describes the party in several distinct particulars, by some of which that person may be entirely known from all others, then a mistake in some other one of those particulars will not defeat the disposition.

APPEAL from the Superior Court of Law of PASQUOTANK, at Fall Term, 1847, *Dick, J.*, presiding.

This was an action of ejectment, in which the follow- (40) ing case appeared:

In 1805 Thomas Cartwright the elder devised the premises to his son, John Cartwright, in fee, who entered and lived thereon until his death. On 26 December, 1832, John, the son, executed his will, and therein, amongst other things, he devised as follows: "Secondly, I give to my son Thomas, whom I had by my wife before we were married, and who, unfortunately, is a cripple, four acres of land, to be laid off in such manner as to include all the buildings I occupy for my residence; to him and his heirs. Thirdly, I give to my said son Thomas and my daughter Patsy (who was also born before I married her mother, and is now the wife of Charles Brite) all the remaining part of my land, to be equally divided between them, in fee simple." Shortly afterwards the testator (John) died, and Thomas, the son, and Brite and wife made partition, and the premises now in controversy were allotted to Mrs. Brite as her moiety under the will. After entering into possession in severalty, Brite and his wife died, leaving an only child, a daughter, who died an infant and without issue. *After her death Thomas Cartwright* the younger claimed the premises as her heir, and the lessor of the plaintiff claims under him. Afterwards, the defendant in this suit, being a brother of the testator, John Cartwright,

claimed the premises as the heir of Miss Brite, and took possession; and then this action was brought, and was tried on not guilty.

On the trial the defendant offered evidence that when John Cartwright was married his wife had but one child, who was the said Thomas the younger, and was then about four weeks old; and that afterwards they had two other children born in wedlock, namely, Sarah (who died in infancy and without issue), and then the said Patsy Brite. To the admissibility of the evi-
dence the counsel for the plaintiff objected; but the court
(41) received it, and instructed the jury that if they believed
it Thomas Cartwright the younger was not the heir of Patsy Brite's child, and the plaintiff ought not to recover. There was a verdict for the defendant, and judgment, and the plaintiff appealed.

No counsel for plaintiff.
A. Moore for defendant.

RUFFIN, C. J. In no aspect of the case is the plaintiff entitled: whether Mrs. Brite was legitimate or illegitimate, or whether she took under the will or by descent from her father, or did not take at all. If she was illegitimate, as the plaintiff contends, then her brother Thomas, who is admitted to be a bastard, cannot inherit from Mrs. Brite's legitimate daughter, according to the construction given to the 10th Rule of Descents by the majority of the Court in *Sawyer v. Sawyer*, 28 N. C., 407. But, if that were otherwise, the Court is clearly of opinion that the plaintiff cannot recover, because it was competent for the defendant to show by witnesses that Mrs. Brite was born in wedlock, so that, for that reason, her illegitimate brother Thomas could not be her heir or her daughter's. For the statement in the will, that the daughter Patsy was born before the testator married her mother, is but a mistake in a part of the description of a devisee, who is otherwise sufficiently described and fully identified; and such a mistake does not defeat the gift. Indeed, upon this point the plaintiff is in a dilemma, and must fail, whether the illegitimacy of Mrs. Brite be or be not an essential part of her description. The will does not prove that she was illegitimate. It only describes her to be so. One who claims to be a devisee must by evidence *aliunde* be brought within the description. If that be a material part of this description, then to entitle Mrs. Brite under the will the burden was on the plain-
tiff to bring her within the description, by showing that
(42) she was born before the marriage of her parents, just as

much as he was obliged to show that this person was the daughter of the testator's wife, was named Patsy, and was the wife of Charles Brite. Here that was not and could not be done, but, on the contrary, it was established to the satisfaction of the jury that she was born, not before, but some years after, the marriage of the testator and her mother. Thus, Mrs. Brite did not answer that part of the description; and, if it were indispensable that the devisee should come up to every part of the description literally, she could not take under this will, nor her brother Thomas derive title through her. If Patsy did not take under the will, then the testator died intestate as to that moiety of the land; and in that event the son Thomas did not succeed to it as the heir of the testator, by reason of the illegitimacy of the son.

But the Court holds, clearly, that Mrs. Brite did take under her father's will, being sufficiently identified as the person meant. It is true that no part of a description is to be arbitrarily rejected, but every part of it is to be respected; and especially when a person can be found answering the whole description. But when there is no such person, and where the will or other instrument describes the party in several distinct particulars, by some of which that person may be certainly known from all others, then a mistake in some other one of those particulars will not defeat the disposition. *Falsa demonstratio non nocet*, is an ancient maxim applicable to such cases, provided there be enough to make the person certain before that was added, and to leave the person certain after rejecting the mistaken reference. That is the established rule of construction, in respect either of the designation of persons or the description of things; and extrinsic evidence is necessarily resorted to in order to apply the designation or description to the persons claiming or the things claimed. Many of the rules respecting boundaries are examples of preferring one part of the (43) description, turning out to be true, to another part turning out to be untrue. *Proctor v. Pool*, 15 N. C., 370, is an instance of the application of the rule to a general description of the thing devised—the Court holding that the effect of the true description was not to be weakened by a further and unnecessary false description. The case of *Standen v. Standen*, 2 Ves. Jr., 589, applied it to persons, and is a precedent perfectly apposite to the case in hand. There the testator gave pecuniary legacies, and a moiety of his real estate, and of the residue of his personalty to "C. M. Standen and C. E. Standen, *legitimate* son and daughter of Charles Standen." Those persons were in fact ille-

gitimate. Yet it was held that the wrong description, in calling them legitimate, did not defeat the gifts to them *nominatum*, because their identity was sufficiently established by their names, according to *Lord Bacon's* rule, that *veritas nominis tollit errorem demonstrationis*. Here the daughter is *e converso* described as illegitimate, when she was legitimate, and the case falls directly within the principle. That false description cannot hurt, because there is no one to fill it, and because this person is further and sufficiently designated truly as being the daughter of the testator and his wife, and by her name of Patsy and her state as the wife of a man named Charles Brite. Those circumstances concurring make it absolutely certain what person was intended by the testator, and uphold the devise. The daughter, therefore, took under the will, and being legitimate, and her brother illegitimate, he could not inherit from her nor trace a right to inherit through her.

PER CURIAM. Judgment affirmed.

Cited: Barnes v. Simms, 40 N. C., 397; *Joiner v. Joiner*, 55 N. C., 72; *McBryde v. Patterson*, 78 N. C., 416.

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(44)

ELLISON G. MANGUM v. WILLIAM J. HAMLET.

1. An officer who levies on personal property and leaves it in possession of the defendant in the execution only loses his lien as against other executions under which the property is seized and taken in possession.

2. Therefore, where A, a constable in Orange County, levied on personal property and left it in possession of the defendant in the execution, and B, a constable in another county, with the assent of the defendant, but without any legal process in Orange, removed the property to his own county and there sold it under executions issuing in that county: *Held*, that A was entitled to recover from B in an action of trover and conversion.

APPEAL from the Superior Court of Law of ORANGE, at Spring Term, 1847, *Manly, J.*, presiding.

The action was trover for two mares, a colt and some corn, and was tried on the general issue. Several points were made for the defendant on the trial, on which the presiding judge gave opinions; but it is only necessary to state one of them, as the counsel here abandoned all the others. As to the point insisted on in this Court, the case is as follows: The plaintiff was a constable in Orange County, and had in his hands several

fi. fas. on justices' judgments against John Boling; and on 6 October, 1842, he levied them "on a cream-colored mare and her colt, the defendant's crop of corn, say from 25 to 40 barrels, and crop of fodder." The plaintiff left those things in Boling's possession on his plantation in Orange. He afterwards received other executions against Boling's property, and on 3 November, 1822, he levied them "on a sorrel mare, the defendant's crop of tobacco hanging in the barn, his crop of corn in the field, supposed to be 30 or 40 barrels, and five stacks of fodder"; and these things also the plaintiff did not remove, but left them on the place in the possession of Boling. The plaintiff then gave evidence that the defendant, as a contrivance between him (45) and Boling to defeat the levies of the plaintiff and give the defendant the benefit of the property, removed the mares and colt and the corn, on 4 and 5 November, 1842, out of Orange to the defendant's residence in Person County, and there had them sold.

On the part of the defendant evidence was given that on 3 November, 1842, he obtained judgments against Boling before a justice of the peace in Person, and sued out *fi. fas.*, and that as he carried this property into that county it was seized under them by a constable of Person, and afterwards duly advertised and sold.

The counsel for the defendant moved the court to instruct the jury that by leaving the property in the debtor's possession the plaintiff abandoned his levies, especially on the cream-colored mare and colt, or was guilty of a fraud by which he lost his property in the articles seized by him. But the court refused to give the instruction, and on the contrary directed the jury that by coming into Orange and taking the property there, without process, and with the view of depriving the plaintiff of it, the defendant was guilty of a conversion, which entitled the plaintiff to recover, although Boling might have assented to it and assisted in its removal out of the county. A verdict was given for the plaintiff, and from the judgment the defendant appealed.

J. H. Bryan, *McRae*, *W. H. Haywood* and *E. G. Reade* for plaintiff.

Norwood and *Waddell* for defendant.

RUFFIN, C. J. The Court thinks the judgment must be affirmed. The instruction is impeached on the author- (46) ity of *Roberts v. Scales*, 23 N. C., 88. But the defendant does not bring himself within that case, for the reason pointed out by his Honor.

There each party was a creditor proceeding on process, so that the one who last levied and took the property into actual possession showed rights which might be affected by the fraud or laches of the other officer. But on whom can this plaintiff be charged with a fraud? Certainly, it was not a fraud on Boling to leave him in possession; and so far as the defendant acted under Boling's directions, or by his consent, he must stand in Boling's shoes. If, however, he could get clear of that connection, he would then be a mere wrongdoer in taking the property in Orange without any legal authority operating in that county; and as he acted with a view of depriving the plaintiff of the property, such taking and the removal of the property was in itself a conversion, which entitled the plaintiff to this action. If the defendant wished to impeach the plaintiff's levy he should have obtained executions in Orange, which would have authorized him to seize the property. Until he did so he had no right or authority to intermeddle, and could not in a legal sense be prejudiced by the act of the plaintiff.

PER CURIAM. Judgment affirmed.

Cited: Bland v. Whitfield, 46 N. C., 125; *Woodley v. Gilliam,* 67 N. C., 240; *Sawyer v. Bray,* 102 N. C., 83.

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(47)

EDWIN SMALL v. JOSEPH H. POOL.

In an action of deceit in the sale of a slave, alleging her unsoundness, it is competent for the defendant to give in evidence, as a matter to aid the jury in assessing damages, what the plaintiff gave for the slave and what he afterwards sold her for.

APPEAL from the Superior Court of Law of PASQUOTANK, at Fall Term, 1846, *Dick, J.*, presiding.

The case presents but a single point. The plaintiff claims damages of the defendant for a fraud in the sale of a slave named Tamar. In order to show the amount to which he was entitled the plaintiff introduced witnesses, who testified that the difference between such a slave as Tamar was, if she had been sound, and such as she actually was, was one-half. So far as is disclosed by the case, this was all the evidence upon that point given to the jury. The defendant offered to prove what the plaintiff gave for the negro, in January, and what he sold her for in the succeeding July in Richmond. This evidence was

objected to by the plaintiff and rejected by the court. There was a verdict and judgment for the plaintiff, and the defendant appealed.

A. Moore for plaintiff.
No counsel for defendant.

NASH, J. The refusal of the judge to receive the evidence offered by the defendant is the error of which he complains. We think his Honor erred, and that the testimony ought to have been received. In actions sounding in damages the jury, in general, have a discretionary power in awarding them, subject to the control of the court. But in a case of deceit in the sale of property the law has adopted as the rule by which (48) the jury are to be governed, and the damages estimated, the difference in the value of the article sold, as sound or unsound, at the time of the sale. The price given by the purchaser, and that for which he sold it, do not, conclusively, fix the amount of damages. But it is competent as *some* evidence of the value of the property at the respective times of the purchase and the sale, and as such the jury had a right to have it. *Clare v. Maynard*, 32 E. C. L., 714. It does not establish the value, but may aid and assist the jury in their inquiries upon the point. More particularly was it admissible in this case, as the plaintiff had furnished the jury with no evidence upon which they could understandingly act.

He did not show what sum Tamar was worth at the time of the sale, either as sound or unsound.

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

Cited: Boggan v. Horne, 97 N. C., 270.

THE STATE v. MARLEY, A SLAVE.

1. From the judgment of a justice of the peace on an offense committed by a slave of which he has original jurisdiction, an appeal by the master lies to the County Court, but not from thence to the Superior Court.

2. But the master may, as in other decisions by an inferior tribunal, have the case re-examined in the Superior Court, upon a writ of *certiorari* or writ of error.

STATE *v.* MARLEY.

APPEAL from the Superior Court of Law of NEW HANOVER, at Fall Term, 1847, *Caldwell, J.*, presiding.

(49) This is a criminal proceeding against a slave. Upon application to a justice of the peace a warrant was issued against the defendant for insolence to and an assault and battery upon a white man. He was adjudged guilty and sentenced to receive five and twenty stripes. From this judgment his master appealed to the Court of Pleas and Quarter Sessions. He was there tried and, being convicted, was sentenced by the court to receive the same punishment. His master again appealed to the Superior Court, where he was again tried and convicted; and the judgment being arrested by the presiding judge, the case is brought here upon the appeal of the State.

Attorney-General for the State.

No counsel in this Court for defendant.

NASH, J. By arresting the judgment we understand that the proceedings were dismissed and the defendant discharged.

All the laws existing in this State, previous to 1836, upon the subject of offenses committed by slaves were, at the session of the Legislature held in that year, thrown into one act, and re-enacted, Rev. St., ch. 111. By that act such offenses were divided into three classes, and the cognizance of them committed to three separate and distinct tribunals. Those which "were of such a trivial nature as not to deserve a greater punishment" than whipping were, by section 41, trusted to a single magistrate; while by section 42 such as were of a higher degree were committed to the "original and exclusive jurisdiction of the Courts of Pleas and Quarter Sessions," except in cases in which the punishment might extend to life, and those within the benefit of clergy. These latter by section 43 are committed to the original and exclusive jurisdiction of the Superior Courts. The policy of the law in this distribution of power is very obvious.

(50) The offenses entrusted to a justice of the peace were of a nature deemed by the law too trivial to need the attention and occupy the time of a court of record, and required speedy and cheap action. They were committed by a portion of our population mingling in all our domestic relations and whose conduct required a constant supervision to keep them in a proper state of subordination. The courts of record met only at stated periods and at designated points, while the justices, being spread over their respective counties, were prepared to act at any time, were accessible at all times, and in their action were bound to the observance of few forms. As the of-

fenses rose in magnitude they required, in the infliction of punishment, increased care and form in the prosecution. The power, however, was not only divided, but each tribunal under the act of 1836 exercised it without control by appeal; the jurisdiction of each on this subject was original and exclusive. That this was the intention of the Legislature is manifest from the language used, from the silence of the act as to any appeal, and from the fact that no appeal from either to the court above was, as far as we are apprised, ever attempted until 1842. In that year the previous policy was departed from and the Legislature, by an act, ch. 4, authorized an appeal by the master of a slave, convicted by a single justice of the peace, to the County Court. The question presented to us is, Has the master of the slave Marley a right to appeal from the County to the Superior Court? We think he has not. The object of the Legislature in the enactment of 1836 is so evident and its policy so consistent with the peace and safety of the community that we feel no disposition to extend the act of 1842 further than its words authorize us, because we believe that it was not the intention of the Legislature so to extend it. By the words of that act the appeal granted is to the County Court, and nothing is said of any other or further appeal. The jurisdiction of the County Court, in these matters, under the act of 1836, is *original* and *exclusive*, and when, by the act of 1842, they (51) acquired an appellate jurisdiction the latter must be exercised by them to the same extent as the former. Unless it is otherwise ordered in the law, it must be exclusive, in the sense of being final; and for the plain reason that the Legislature, in increasing their jurisdiction, has not altered the exclusive nature of it. If it were not so, this singular anomaly would be presented, that slaves brought before them for the higher offenses would have no right to ask the judgment of a higher tribunal, while the perpetrators of those of the lowest and most trivial character would be so entitled.

We are of opinion that under the act of 1842 the master of the defendant had no right to appeal from the County to the Superior Court, and that the presiding judge ought to have dismissed the appeal as improvidently granted, and remanded the case to the County Court, and bound over the defendant for his appearance there, so as to subject him to the sentence of the County Court.

It will be understood that this opinion is confined to an appeal from the County Court, by the owner of a slave, as a matter of right; and it is not meant to interfere with the general doctrine,

that the proceedings of all inferior tribunals may, upon a proper case, be re-examined in the Superior Courts upon *certiorari* or on writ of error.

PER CURIAM. This opinion will be certified to the Superior Court of Law of New Hanover.

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(52)

KENNETH B. MURCHISON ET AL. *v.* JOSEPH WHITE.

1. Trover will not lie except for one who has the immediate right of possession at the time of the conversion.
2. It is not sufficient to support this action that an unwarrantable injury has been done to his right of property. The right of property and the right of immediate possession must both concur.
3. For such an injury the plaintiff may recover in another form of action.
4. Thus where A claimed under a mortgage of personal property, executed 19 January, 1843, but not registered until the second Monday of the next April, and B, a sheriff, in March, 1843, levied an attachment on the property and sold it without any order in the cause: *Held*, that though B's act in selling may have been without authority of law, yet A, being entitled only from the registration of his mortgage, could not maintain an action of trover against B.

APPEAL from the Superior Court of Law of PERSON, at Fall Term, 1847, *Caldwell, J.*, presiding.

The action is trover for sundry chattels, and the plea not guilty. The articles had belonged to John Douglass, and the plaintiffs claim title under an instrument which they alleged to be a mortgage to secure the payment of $300. It was executed on 19 January, 1843, and registered on the second Monday of April following. The goods were the tools and stock of timber and carriages of Douglass, who was a coachmaker, and retained the possession until he absconded in March, 1843; at which time one Plunket sued out against him an original attachment from Anson County Court, which the defendant, as sheriff, levied on a house and lot in Wadesborough and on the goods which are the subject of this action. In June, 1843, the defendant sold the goods levied on, and in July judgment was rendered for Plunket for $82 and the costs, and he took out a *renditioni expo-*
(53) *nas* against the house and lot only; and under it the defendant sold them in October following for a price which satisfied the execution.

This suit was commenced on 14 March, 1845. On the trial

the counsel for the defendant insisted, amongst other things, that this action would not lie. But the court held that it would, and a verdict and judgment were given for the plaintiff, and the defendant appealed.

Strange for plaintiff.
Winston for defendant.

RUFFIN, C. J. It is unnecessary to consider any other point made for the defendant but that relative to the action, as the opinion of the Court is with him on that. The seizure by the sheriff in March was rightful, as the mortgage was not registered until about the middle of April, and by the statute it inured only from its registration, and without any relation back. There is no doubt, however, that, notwithstanding the sheriff's special property and possession, the conveyance to the plaintiffs was effectual to pass the property to them from the period of its registration, subject only to that special property for the purpose of satisfying the attaching creditor. *Payne v. Drew*, 4 East., 523; *Alexander v. Springs*, 27 N. C., 475. And if any of these articles had remained in the sheriff's hands after satisfying the execution he could have been sued in trover for them if he refused to deliver them up, as might any one else in whose hands the property is, or who has converted it (54) since the attachment debt was paid. *Popleston v. Skinner*, 20 N. C., 293. But the defendant has not any part of the effects, having sold them in June, 1843, while the attachment was still pending. That was a wrongful sale, as it was made without an order in the cause, and unquestionably the plaintiffs have a remedy for the injury to their right of property. But the question is whether they can maintain this particular action of trover, when the sale and conversion by the defendant were at a time when the attachment formed a valid lien and entitled the sheriff to the possession of the goods and excluded the plaintiffs from the right of present possession. We think not. The gist of the action is the conversion, and that must have been constituted, if at all, by the sale of the goods in June; for they never came to the defendant's hands afterwards. It is laid down both in the most approved text-books and in adjudications that, in order to support trover, the plaintiff must, at the time of the conversion, have the right to immediate possession. Mr. Chitty states that to be the rule in his Practice and Pleading, 1 vol., 174; and he refers to *Gordon v. Harper*, 7 T. R., 9, in which it was so held, because the declaration alleges that the plaintiff "was lawfully possessed." In *Pain v. Whitaker*, R. and M., 99,

Chief Justice Abbott lays down the principle to be that the plaintiff must have the right of possession of the goods at the time they are taken, which there meant, converted; and he gives the same reason for it, namely, that if he has not, the allegation, "that he was lawfully possessed," will not be supported by the evidence. It is true that in *Gordon v. Harper* the action was brought before the expiration of the term for which the plaintiff had hired out the furniture, and, therefore, that was not a direct decision that the general owner might not have trover after the term of hiring ended. In *Andrews v. Shaw*, 15 N. C., 70, that point was expressly left open. But it was because it is a habit of caution in the Court not to go out of the case before
(55) us and lay down a broader rule than is necessary for its determination, and not on account of any doubt about it. It is nowhere found to have been said, either in the books or from the bench, that trover may or may not be sustained, according to the period at which the action is brought. That is not the criterion. On the contrary, the rule, as already quoted, gives the action to one entitled to the present possession when the conversion took place, and refuses it (at any time) to one who is not entitled to such possession. Indeed, it is nearly certain that in *Pain v. Whitaker* the suit was brought after the month ended for which the pianoforte was let. And in delivering the judgment of the Court in *Bloxam v. Sanders*, 4 Barn. and Ald., 941, *Mr. Justice Bayley*, after stating that the property vested in the buyer of goods by the contract, but that he was not entitled to the possession till the payment of the price, laid it down that for that reason the plaintiffs could not maintain trover for the conversion by the defendants in reselling the crops without the assent of the buyer or the rescinding of the contract. He said that the buyer might act upon his right of property if anything unwarrantable is done to that right, as, for instance, if the vendor resell when he ought not, the buyer may bring a special action for the injury sustained by such wrongful sale, and recover damages to the extent of such injury; but he can maintain no action in which right of property and right of possession are both requisite, and trover is an action of that description. In the case before us it has turned out that the injury to the plaintiffs' right of property, by the unauthorized sale of the defendant, was to the full value of the goods; yet, as the conversion by that sale was committed before the plaintiffs were entitled to the possession, they cannot have this remedy.

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

Cited: Wentz v. Fincher, 34 N. C., 299.

(56)

MICHAEL T. HALL *v.* MALACHI B. ROBINSON.

1. The act of 1807, giving a right to one surety to recover at law his ratable proportion of the debt of the principal, does not enlarge the rights of the surety who pays the debt, nor deprive the cosurety of any just grounds of defense which would before have been available to him in equity.

2. The only exception is that, from the necessity of the case, the Court of Law cannot take cognizance of the complicated case of one or more of the sureties at law, when they exceed two, but that it restricts the recovery to an aliquot part of the debt, according to the number of sureties.

3. When two or more embark in the common risk of being sureties for another, and one of them subsequently obtains from the principal an indemnity or counter-security to any extent, it inures to the benefit of all.

4. Where A, a surety for B, received from B his (A's) debt, and A was to pay to B a debt to which A was surety, and afterwards it being discovered that A was surety for other debts of B, and it was then agreed that A should pay those other debts, as well as the first, *pro rata* in proportion to the debt he had owed B; and C, being a cosurety with A in the first debt, also received a certain sum from B in discharge from his liability, and A had to discharge the whole of the first debt: *Held*, that A was entitled to recover from C the sum so received by him from B.

APPEAL from the Superior Court of Law of CARTERET, at Fall Term, 1847, *Bailey, J.*, presiding.

This is an action of *assumpsit* and was tried on the general issue. The case appeared to be as follows:

The plaintiff and defendant were cosureties for Jesse W. Lee in a promissory note to Peter Pelletier for $497.25. The plaintiff was indebted to Lee on a note $492.30, payable 20 March, 1840. After those notes had fallen due, it was ascertained that Lee was unable to pay all his debts, and was insolvent; and it was agreed between him and Hall that the former should surrender to the latter his note for $492.30, and that he (Hall) should pay the amount due on it in discharge of the debt to Pelletier, and Lee immediately delivered to Hall his (57) note.

At that time Hall was also the surety for Lee for a debt of $114.05 to Moore & Jackson, and a cosurety with three other persons in a note of $1,000, held by one of the banks; and, shortly after, having received his note from Lee, the plaintiff ascertained that these latter debts were subsisting, and that he would be liable on them; and in consequence thereof he came to a new agreement with Lee on 15 September, 1840, that the

sum due on Hall's note should be applied, *pro rata*, to the debt to Pelletier and the other debts for which the plaintiff was a surety as aforesaid. On 16 September, 1840, Robinson, the defendant, received effects from Lee to the value of $128.20, and gave Lee his engagement to pay that sum on the debt to Pelletier. Afterwards Hall was compelled by execution to pay Pelletier his whole debt, principal, interest, and costs; and then he brought this suit for contribution.

The court instructed the jury that after deducting a *pro rata* share of Hall's debts to Lee, the plaintiff was entitled to recover one-half of the residue of the sum paid to Pelletier, and also one-half of the sum of $128.20, which the defendant had promised to pay on that debt. The jury found, accordingly, for the plaintiff, and assessed the damages to $238.97, and from the judgment the defendant appealed.

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

RUFFIN, C. J. The Court is of opinion that the jury was not properly instructed. It seems clear that the plaintiff was entitled to recover the whole of the sum received from Lee by the defendant. It is a fund provided by the principal for the payment of his debt, which the defendant undertook to pay
(58) on it, and did not, but left the plaintiff to pay the whole debt. It is true the plaintiff had before received from the principal a sum nearly, if not quite, sufficient to discharge the debt, and that he received it for that purpose; and it was insisted for the defendant that, as between the plaintiff and him, the debt was to be considered as paid from the time the plaintiff received that fund, and, therefore, that the plaintiff could not recover anything, unless it might be one-half of the excess, if any, of the amount due on the note to Pelletier over that due on the note of Hall to Lee. Although that might have been the result had the case stood on the first transaction between Lee and Hall, yet it cannot be admitted when that and the subsequent transactions are considered together. For, though it may be true that Lee and Hall, after appropriating the money in Hall's hands to the debt to Pelletier, could not change its destination, to the prejudice of the defendant, yet before it was paid to Pelletier it was certainly competent to them to deal with it as suited themselves, as far as such dealing did not affect the interest of third persons. Now, the agreement to divert to other purposes a part of the fund held by Hall could not prejudice the defendant, if its place was supplied by the deposit of an equal

fund in his own hands. To the extent of the sum received by the defendant the agreement for applying a part of the debt of Hall to the satisfaction of other debts for which he was bound was rendered a just and proper agreement, and the plaintiff did, and could do, no wrong to the defendant in so applying that part. That left in his hands, applicable to Pelletier's debt, $128.20 less than he paid on it, and he might have his action against Lee therefor; and as the plaintiff cannot effectually recover against him, this action lies against the defendant, who received that sum for this debt, and cannot in conscience, and ought not in law, to keep it.

But the Court is further of opinion that the recovery (59) was right in respect only of that sum of $128.20, and beyond that is erroneous.

Before the act of 1807 the remedy between cosureties was in equity only. That act does not enlarge the rights of the surety who pays the debt nor deprive the cosurety of any just grounds of defense which would before have been available to him. It was intended merely to change the jurisdiction, or, rather, to enlarge that of the courts of law—not upon any arbitrary principle, but, for the amendment of the law, giving a less expensive and more expeditious remedy by action in addition to that given in equity. As far as the jurisdiction is concurrent the right of recovery and of defense should be the same in both courts. It has been held, indeed, that, from the necessity arising out of the imperfection of the jurisdiction of a court of law, the act cannot be extended to the complicated case of the insolvency of one or more of the sureties, when they exceed two, but that it restricts the recovery to an aliquot part of the debt, according to the number of the sureties. *Powell v. Matthis*, 26 N. C., 83. It does not, then, carry the legal to the extent of the equitable remedy, in some cases. But in no case was it meant to carry it further, so as to make one surety responsible to another in an action at law when there would not be a decree against him in equity. Indeed, the act expressly adopts one of the most important principles of equity respecting the recourse of one surety on another, which is, that it shall not be had unless the principal be insolvent; and by providing that the plaintiff may recover a just and ratable proportion of the sum paid by him, leaves it to the courts, under the particular circumstances, to determine what that is, upon the principles of right and justice. Of course, the construction must be that the act had reference to those known principles which had before been applied between parties standing in this relation; and the action is therefore to be treated as an equitable one, in which nothing can be (60)

recovered but what *ex equo et bono* the defendant ought to pay, as far as his defenses are, in their nature, examinable in a court of law.

Having arrived at the foregoing conclusion, it is not difficult to adjust the right and liabilities of these parties. The relief between cosureties in equity proceeds upon the maxim that equality is equity, and that maxim is but a principle of the simplest natural justice. It is a plain corollary from it that when two or more embark in the common risk of being sureties for another, and one of them subsequently obtains from the principal an indemnity or counter-security to any extent, it inures to the benefit of all. The risk and the relief ought to be coextensive. *Moore v. Moore*, 15 N. C., 358; *Gregory v. Murrell*, 37 N. C., 233. To the extent of the fund in Hall's hands, and applicable to it, the debt to Pelletier is to be considered as discharged, as between these parties, and the plaintiff with that sum in his hands ought not to raise the money from the defendant. *Kerns v. Chambers*, 38 N. C., 577. If, therefore, there had been only the first agreement between Hall and Lee, it is clear the plaintiff could not recover in respect of as much of the money paid by him as his own debt covered. It is next to be considered whether the second agreement between those persons altered the rights of the present parties, as between themselves. The opinion has been already given that the defendant by receiving effects from Lee rendered himself liable, *pro tanto*, for the debt to Pelletier, and to an equal extent put it in the power of Lee and Hall to appropriate the fund held by Hall to other purposes. But the agreement between Lee and Hall could not *per se* have that effect, nor bind the present defendant further than, by his own consent or act, he should bind himself. As far as it affected their own interest, Hall and Lee were competent to make the arrangement they did. But they were not competent to make it, as far as it affected the defendant, with-
(61) out his concurrence. It is to be recollected that the indemnity, as soon as it was obtained, inured to the benefit of both sureties. It was precisely the same as if it had been expressly declared to be for their joint benefit. If it had been so declared no one would argue that one of them could deal with it to his own advantage and to the prejudice of the other, without consulting him. It was held in *Kerns v. Chambers* that the cosurety had the right to be consulted, and that the other, by holding up the security unreasonably and for his own purposes, without the assent of the former, made the security his own, and could not proceed to sell the cosurety's property. The surety who gets a counter-security into his hands is, in respect

to a remedy against a cosurety, exactly on a footing with a creditor who gets an additional security, in respect of his remedy against a surety for the debt. The same reasoning applies equally to both. Giving a collateral security upon the property of the principal devotes that property to the payment of the debt, and the surety has an interest in it immediately, as well as the creditor; and it follows that the creditor cannot willfully discharge it or deprive a surety of the benefit of it, even for the purpose of letting in another debt of his own. *Cooper v. Wilcox,* 19 N. C., 90; *Nelson v. Williams, ib.*, 118; *Smith v. McLeod,* 38 N. C., 390. In like manner one surety, who gets an indemnity, is a trustee for a cosurety, and cannot deal with the fund to his prejudice without his consent. These cases are like all others in which one man undertakes to dispose of the property of another. He cannot do it without the owner's authority. Upon these equitable principles it is clear the plaintiff ought not to recover more than the defendant is liable for in respect of the sum received by him from Lee.

Those equitable principles have been already incorporated into the law of this case by an adjudication in an action founded on the statute. *Fagan v. Jacocks,* 15 N. C., 263. The principal there made an assignment of effects in trust to (62) indemnify the plaintiff, and upwards of half the debt was discharged by the proceeds of those effects; and then the plaintiff, having been compelled to pay a part of the residue of the debt, brought his action against his cosurety to recover back what he had paid, although the defendant had paid more of the residue than the plaintiff had. It was held, on these grounds, that the plaintiff could not recover, because the sum raised out of the effects assigned was not, within the meaning of the law, paid by the plaintiff, but by the debtor himself, and discharged the debt, *pro tanto*, in exoneration of all the sureties. Indeed, when one attentively considers the act it is apparent upon its own terms, without invoking the doctrine of equity, that each of these sureties is entitled to the benefit of the fund in the hands of the other, as far as it is necessary to his indemnity. For, how can this plaintiff allege that Lee was insolvent, and for that reason that he was obliged to pay this money, and cannot recover it back, when in fact he has securities belonging to the principal to the value of the debt? When the act speaks of the insolvency of the principal, which creates the right of contribution between his sureties, it does not mean a general insolvency, whereby the principal may be unable to pay all his debts, for that does not concern the sureties for a particular debt, provided the principal pays or secures that debt. As far as he pays or secures

the debt for which they are bound, he cannot be called insolvent within the sense of the Legislature, so as to give one of the sureties an action against the other. But here the case is simpler than if the principal had provided collateral securities for the indemnity of his sureties. It is as simple as it can be, being a case in which money was put into the hands of one and effects of a certain value sold to the other, and engagements given by them to pay those several amounts on the debt for which they were bound. To those amounts the plaintiff and the de-
(63) fendant, respectively, thereby became the real debtors, as between themselves, and therefore, *pro tanto*, the one ought not to recover from the other.

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

Cited: Pool v. Williams, post, 288; *Draughan v. Bunting*, 31 N. C., 14; *Parham v. Green*, 64 N. C., 437; *Threadgill v. McLendon*, 76 N. C., 27; *Mason v. Wilson*, 84 N. C., 54; *Comrs. v. Nichols*, 131 N. C., 504.

JAMES W. HARDING v. HENRY SPIVEY.

1. A *fieri facias* binds property from its *teste*, and this lien is continued if regular *alias* writs of *fi. fa.* are issued.

2. Therefore, where a *fieri facias* issued against one who was a joint owner of slaves with others, and afterwards, upon the petition of all the joint owners, the slaves were directed by a court of competent jurisdiction to be sold for a division and under that order were sold, the lien of the sheriff, acting under the original and *alias fi. fas.*, was not divested, but he had a right still to sell the undivided interest of the defendant in his executions.

3. It never was meant, by the acts of our Legislature in directing the mode of proceeding for the partition of slaves, to interfere with the just rights of persons not parties to the proceeding for partition, whether arising upon a claim of property by adverse title or upon the lien of a creditor's execution.

APPEAL from the Superior Court of Law of NORTHAMPTON, at Fall Term, 1847, *Battle, J.*, presiding.

(64) The action is trespass for taking and selling four negro slaves; and the defendant justified, as the Sheriff of Northampton County, under the execution hereinafter mentioned. On the trial the case was agreed to be as follows:

The plaintiff, one Archelaus Tisdale, and other persons were tenants in common of the slaves, and at the County Court of

Northampton, held on the first Monday of March, 1842, they filed their petition for partition, and to that end for a sale of the slaves; and the sale was decreed accordingly, and the present plaintiff appointed the commissioner to make it. On 2 April next following the slaves were sold by the plaintiff and bid off by one William Harding, at the request and as the agent of the plaintiff, and on 15 April William Harding made a conveyance of them to the plaintiff. At the next term of the court, held the first Monday of June, the plaintiff reported the sale to William Harding. On the third Monday of March, 1842, George Cooper obtained a judgment in the Superior Court of Nash County against Archelaus Tisdale, and issued thereon a *fieri facias*, tested of that day and directed to the Sheriff of Northampton, which was, on 17 April, 1842, delivered to the defendant, then the sheriff, and was returned *nulla bona*. *Alias* and *pluries* writs of *fi. fa.* regularly issued from term to term on the judgment, on all of which the sheriff returned *nulla bona*, until the last, and on it he seized the negroes in question and sold the share of said Tisdale therein—the plaintiff forbidding him to do so, and claiming the negroes as his.

At June Term, 1842, of the County Court George Cooper applied to have the bonds for the purchase money deposited in court and for an order that the debt to him due on his judgment, and the execution then in the sheriff's hands, should be satisfied out of Tisdale's share of the bonds, when collected. At the same term the present plaintiff opposed the motion and claimed that share of the bonds under a purchase and assignment (65) from Tisdale. At September Term following the sale was confirmed without objection, and at September Term, 1843, the County Court (after a decision upon appeal by the Supreme Court) ordered the money to be paid to the several tenants in common, and the share of Tisdale to the present plaintiff. After that the sheriff made the sale, for which this action is brought.

The parties agreed that, if upon this case the court should be of opinion for the plaintiff, judgment should be entered for $190.35, and if otherwise, then a nonsuit should be entered. The presiding judge held that the plaintiff was entitled to recover, and he had judgment accordingly, and the defendant appealed.

No counsel for plaintiff.
B. F. Moore for defendant.

RUFFIN, C. J. The case turns upon the operation of the original *fieri facias*. For if that created a lien on this property

it was preserved by the *alias* writs which regularly issued, and related to the teste of the first writ. *Brassfield v. Whitaker*, 11 N. C., 309; *Arrington v. Sledge*, 13 N. C., 359. This is so even against another execution. *Yarborough v. Bank*, 13 N. C., 23. That a *fieri facias* binds the property of the debtor so as to avoid any alienation by him after the teste is, as a general rule, so undoubtedly true as to need no authority to support it. The cases, however, of *Stamps v. Irwine*, 9 N. C., 232, and *Finley v. Lea*, 20 N. C., 307, may be mentioned, in which the point was directly decided in ejectment and trover; and there are many other cases, both here and in England, at common law. It lies, then, on the plaintiff to show an exception to the rule which will cover this case. No direct decision has been adduced to support such an exception, nor, as it seems to us, any reasons offered on which it can be established. The most plaus-
(66) ible mode of putting the argument is that both sales, that under the decree for partition and that under the execution, are judicial sales; and, therefore, that the former, having been first ordered and first made, must be held effectual. It is true that in some instances of sales under the process of the law that which is first made will, for that reason, be upheld. For example, if property be taken under one *fieri facias*, and then another of prior teste come to the sheriff's hands, it is his duty to sell and apply the money to that of the elder teste; yet, if there had been a sale under the execution of the younger teste, before the other was delivered, the sale would be good and the money applicable to the writ on which it was raised. Nay, if the creditor in an execution of older teste deliver it to the sheriff, but by directions to him prevents it from being acted on, it will not hinder the sheriff from proceeding to sell the debtor's property under a junior execution and applying the proceeds to it. *Green v. Johnson*, 9 N. C., 309; *Palmer v. Clark*, 13 N. C., 354. In those cases, however, it is to be remarked that there are the meritorious claims of creditors on both sides. If one of them will not sue out his execution, or will not sell on it, another ought not to be hindered from doing so, but he shall be at liberty to sell, and a purchaser under his execution is armed with the rights of the creditor and gains a title which the other creditor cannot defeat by his execution of older teste. The reason of that is that the law will not allow its process of execution to be obstructed, even by a like process, on which the party will not act; and therefore it holds it to be a fraud in a creditor who is entitled to a preferable execution if he uses it to protect the debtor's property from other executions, instead of raising

his own debt, by a sale, and leaving the residue of the property accessible to others. *Palmer v. Clark, supra; Ricks v. Blount,* 15 N. C., 128. But this reasoning has no application to an alienation by the debtor himself, for that, on the other hand, is considered a fraud by the debtor, as tending to (67) defeat the process of the law for the recovery of judgment debts; and the purchaser is regarded in like manner, because, from necessity, the rule as to him is *caveat emptor. Finley v. Smith,* 24 N. C., 225. That may work a hardship in cases of actual innocence in the purchaser. Hence, the law was altered in England by the statute of frauds. But, it may be remarked, that even changes only the period to which the lien relates from the teste to the delivery of the writ—still creating a lien before the seizure of the property, and, therefore, still applying the maxim *caveat emptor.* But we have no such statute, and the common law is still in force. Then, the inquiry is, whether a sale of this kind, though made under the authority of a decree, is, in respect of an execution, to be treated as if it were a sale under execution, or is to be regarded as an alienation by the party. It seems to the Court that it cannot be likened to the sales under execution of which we have been speaking, but that it partakes essentially of the latter character. There is, by the decree, no recovery of the property by one person from another, nor is there a sale for the benefit of a creditor, whereby the property or its value is taken in *invito.* But the whole proceeding is at the instance of the owner, and for his benefit in effecting partition. It is in reality but a mode of sale by the owner himself. *Smith v. Brittain,* 38 N. C., 347. If the owners be all of age, they can sell of themselves, and such a sale, though for the purpose of division, would not impair the lien of a *fieri facias.* The act (Rev. Stat., ch. 85, secs. 18, 19) was only intended to meet the inconveniences of the disability or obstinacy of some of the tenants, and facilitate the conveyance to a purchaser. It was never meant to interfere with the first rights of persons not parties to the proceeding for partition, whether arising upon a claim of property by adverse title or upon the lien of a creditor's execution. For the decree for the sale does not profess in itself to divest the title out of the parties, but (68) simply to order the sale of the thing as their property. Nor does it profess to guarantee the title, but, in the words of the act, the sale is only to pass "such title, interest and estate in the negro or chattel sold as the joint tenants or tenants in common had," and, of course, under the liens or encumbrances and in the plight in which they had it. It would be very mischievous

if an owner of property, belonging to more than one, should be declared able to exempt his share from execution and immediate sale by exhibiting a petition for partition and procuring a decree for a sale for that purpose. It would open a wide door for frauds on executions. On the other hand, but little hardship is imposed on the purchaser by treating this as the party's own alienation in law, as it substantially is in point of fact. The contract is not conclusive until it be reported and confirmed by the court, for the want of an objection or of a sufficient objection to it. This gives the purchaser, in almost every instance, the certain opportunity of knowing before the sale is finally closed whether there is an execution of a teste that would overreach his purchase; and if there be, he may have the contract rescinded. This plaintiff, indeed, had knowledge of the execution, and acted with his eyes open. But the opinion does not depend on that circumstance, but solely on the lien of the *fieri facias*. As the plaintiff's knowledge of the execution did not add to its force against him, so, on the other hand, the confirmation of the sale, with the knowledge and without the opposition of Cooper, did not impair the efficacy of his writ. The Court has already decided, *Ex parte Harding,* 25 N. C., 320, that Cooper could not intervene in that proceeding, and, therefore, he could not object to the confirmation. Moreover, if that were otherwise, the sheriff might still insist on the justification to himself, by virtue of the writs in his hands.

It is also, perhaps, proper to advert to the case of a decree for the sale of a lunatic estate, which it was held in *Latham*
(69) *v. Wiswall,* 37 N. C., 294, would prevent a creditor from taking the property under an execution of a teste subsequent to the date of the decree. It may be observed first, that there is a distinction between that case and the present, in this: that there it was found necessary to restrain the creditor by injunction, which implies that he had the right at law to proceed on his execution. But the material difference is that the jurisdiction of the Court of Equity is peculiar over the property of idiots and lunatics, and that it is the duty of the court to dispose of it or sell it as may be deemed the most advantageous for the support of the owner and his family and the payment of his debts. The decree for sale is, therefore, in effect a proceeding *in rem* for the benefit of creditors, as well as of the helpless debtor; and for both reasons the Chancellor is bound to sustain his decree, and the proceedings under it, against an attempt to render them ineffectual and frustrate the administering of the effects under the directions of the court.

PER CURIAM. Judgment reversed, and judgment of nonsuit, according to the agreement.

Cited: McIver v. Ritter, 60 N. C., 607; *Horton v. McCall*, 66 N. C., 162; *Sawyer v. Bray*, 102 N. C., 84; *Alsop v. Moseley*, 104 N. C., 63.

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(70)

DEN ON DEMISE OF WILLIE JONES ET AL. v. GUILFORD LEWIS.

1. A court of record has a discretionary right to amend its records at any time, *nunc pro tunc*, and it is the duty of the clerk not simply to enter such order of amendment, but *actually to make the amendment*, as directed by the court.

2. The law points out no specific mode in which a sheriff shall conduct his sales on executions, but he is bound by general principles to sell the property levied on in such a way as will probably raise the most money.

3. Where a sheriff had an execution against two persons, each owning an undivided fifth part of a tract of land, and he sold both their interests at one bid: *Held*, that this sale was not void in law, but, if objected to, should have been left to a jury to determine, as a matter of fact, whether the sale was properly conducted or not.

4. Where a deed from a husband and wife for the real estate of the wife had on it only the following certificate from the Clerk of the County Court as to its execution, to wit: "The private examination of H. J., wife of J. C. J., taken by Charles A. Hill, a member of the court, which being satisfactory, it is ordered to be recorded," and signed "C. A. Hill, J. P.," and a proof of the execution of the deed by the subscribing witness and an order of registration: *Held*, that the interest of the wife in the lands did not pass.

APPEAL from the Superior Court of Law of FRANKLIN, at Fall Term, 1847, *Battle, J.*, presiding.

The plaintiff's case, as alleged, is as follows: Hixie Jones died in 1823, seized and possessed of the premises in dispute, leaving five children, to wit: Willie Jones, Lydia Witcher, Eliza Jones, John C. Jones and Atlas Jones. He claims three undivided fifth parts as lessee of the three first-named children, and two undivided fifth parts as lessee of Jesse Person. To show and make out the title of Jesse Person, the plaintiff gave in evidence the transcripts of several judgments in the (71) County Court of Franklin at the instance of several persons against John C. Jones, and the transcripts of several judgments in favor of several plaintiffs against Atlas Jones. All of these judgments were rendered on attachments but one against

John C. Jones. Executions issued and were, by the sheriff, levied on the undivided interests of John C. and Atlas Jones in the premises, which consisted of several tracts. The land was sold under all the executions, and at the sale each tract was set up separately, and the interest of the defendant sold in it at one bid. Jesse Person was the purchaser, and to him the sheriff executed a deed.

The judgments upon all the attachments were taken by default, and in all but two against John C. Jones and one against Atlas, the attachments pointed out no time or place for the appearance of the defendants. And after the institution of this suit the County Court amended the attachments so as to make them regular. The defendant also claimed title to the premises by a conveyance from Hixie Jones and her husband, James C. Jones, who died in January, 1844. This deed was offered in evidence, and upon it is the following endorsement: "The private examination of Hixie Jones, wife of James C. Jones, taken by Charles A. Hill, a member of the court, which being satisfactory, it is ordered to be recorded; signed, C. A. Hill, J. P. March Term, 1823, Court of Pleas and Quarter Sessions." After this, but at the same term of the court, is the clerk's certificate of the probate of the deed, by William Arendel, one of the subscribing witnesses, and an order of registration. The defendant objected that the attachments were void by reason of the defects already mentioned, and also that the sales under the attachments were not regular. Under the charge of the court the jury found a verdict for the plaintiffs, and the defendant appealed.

(72) No counsel for plaintiffs in this Court.

W. H. Haywood, G. W. Haywood and *H. W. Miller* for defendant.

NASH, J. The objection cannot avail the defendant. We have been so repeatedly called on to express our opinion upon this subject that we had hoped it would have been well known to the profession. The language of the Court in *S. v. King*, 27 N. C., 204, is emphatic—"the power resides in every court to amend the entry on its minutes, or the records of its orders and judgments, *nunc pro tunc*, and that no court could *incidentally* question the verity of the record as amended." When the amendment is ordered it is the duty of the clerk to obey the order, not by entering it on the record to be amended, but altering the record itself, so as to answer to the amendment, and, when so amended, it stands as if it never had been defective.

When, therefore, the clerk gives a transcript of the record it must be so amended, exclusive of the order; and if he sets forth in the transcript when and how he altered it, it is surplusage, being no part of *that record*. We must take the record to be as it is certified to us by the proper officer; we are not at liberty to look beyond it to inquire how it came to be as it is. *Galloway v. McKeethan*, 27 N. C., 12.

The second objection is that the interests of John C. and Atlas Jones in the land were sold at one bid, instead of being sold separately. There is no allegation of fraud in the transaction, nor is there any complaint on the part of the owners of the land that their interests have been injured by the mode pursued. We admit it is unusual, but we do not see that it is therefore contrary to law. The law points out no specific mode in which a sheriff shall *conduct* the sale, but he is bound, by general principles, to sell the property levied on in such way as will probably raise the most money. The office of sheriff is a highly responsible one, and much discretion must, in many cases, be allowed him. In this case John C. and Atlas (73) Jones were owners of two undivided fifths of the lands sold; it might have been beneficial to them to have their respective interest sold by the same bid; the land thereby might have produced more. But this was a question of fact which, if pertinent to the case, ought to have been submitted to the jury, and we cannot say, as a matter of law, that the sale, for that case, is absolutely void. After the sale the owners were each entitled to one-half of the proceeds, and it was the duty of the sheriff to have applied the money to the executions accordingly. *Wilson v. Twitty*, 10 N. C., 44; *Thompson v. Hodges*, *ib.*, 51; *Davis v. Abbott*, 25 N. C., 139. It is admitted by the defense that the land was liable to be sold under the executions, the objections to the amendment of the attachments and the one we are now considering being removed. The owners of the land do not complain, and the purchaser is seeking to enforce his rights under it.

This brings us to the last objection made by the defendant to the plaintiff's right of recovery. He alleges the title to be in himself, and, to prove it, produced on the trial a deed from Hixie Jones and her husband, James C. Jones, to one Harrison, under whom he claims. It is admitted that without a private examination of a *feme covert* had in one of the modes pointed out by the act of the General Assembly, her deed conveys no estate in her lands. In *Burgess v. Wilson*, 13 N. C., 306, the manner in which, in every case, the private examination is to be conducted is so fully and distinctly pointed out that we con-

tent ourselves by referring to it. The very point we are now called on to decide is settled in that case, that when the wife is capable of attending court the deed *shall* be acknowledged by both husband and wife in court, and then the wife be privily examined by some one of that court. In the case before us Mrs. Jones was present, but there was no acknowledgment of the execution of the deed in court, either by her or her hus-
(74) band. Nor, indeed, as far as the certificates or the conveyance show, does it appear she ever has legally acknowledged the execution of the deed or been privily examined as required. *Lucas v. Cobb,* 18 N. C., 228. It is void, and conveyed to Harrison no estate in the land, and the defendant's claim under it is of no avail.

PER CURIAM. Judgment affirmed.

Cited: Freeman v. Morris, 44 N. C., 289; *Bevan v. Bird,* 48 N. C., 398; *McDowell v. McDowell,* 92 N. C., 230; *McCanless v. Flinchum,* 98 N. C., 364.

BENJAMIN BROOKSHIRE v. WILEY BROOKSHIRE.

1. A power of attorney, though under seal, may be revoked by parol.

2. A plaintiff in an action of *assumpsit* cannot be nonsuited, though the verdict of the jury is for less than $60, if he files an affidavit in the words of the act of Assembly, Rev. St., ch. 31, sec. 42, "that the sum for which his suit is brought" (being over $60) "is really due, but for want of proof he cannot make recovery."

3. What number of witnesses shall be taxed for a party who recovers is a matter of discretion in the court below, and cannot be reviewed in the Supreme Court.

APPEAL from the Superior Court of Law of RANDOLPH, at Fall Term, 1847, *Bailey, J.,* presiding.

This was an action of *assumpsit* brought in the Superior Court of Randolph.

The following was the case: The plaintiff was employed by the defendant and others, as an agent to go to Alabama and settle the estate of their brother and receive from the
(75) executor his share thereof, and bring it to this State. The appointment of the plaintiff was by deed. He made one trip, and after returning home he made a second, when he was shown by the executor a letter from the defendant revoking the power, before given, so far as he was concerned. The action was brought to recover the defendant's aliquot portion of the

expenses of both trips, and also the commissions of 10 per cent on the distributive share of the defendant. It was admitted by the defendant that he was bound for one-sixth part of the expenses of the first trip, but insisted he was bound for no part of the second, as upon the return of the plaintiff he had revoked the power of attorney by parol. There was contradictory evidence of the parol revocation. On the part of the plaintiff it was contended that the power under which he acted, being an instrument under seal, it could not be revoked but by an instrument of equal dignity, and that, therefore, whether the revocation was attempted by parol after the termination of the first trip, or by the letter upon his return to Alabama, it was equally inoperative, and he was entitled to recover the defendant's share of the expenses of both trips.

His Honor charged the jury that if they believed there was a parol revocation of the power of attorney before the plaintiff started upon the second trip to Alabama, they should allow damages to the amount of one-sixth of the expenses of the first trip; and if they should find that there was no revocation before the plaintiff left on the second trip, but that the power was revoked by letter after he reached Alabama, in that case they should allow damages for the expenses of the first trip, and also for his expenses in going to Alabama the second time, but not his expenses home.

The jury returned a verdict for $43.16, being the defendant's share of the expenses of the first trip and his share of his expenses out, the second. The defendant then moved to nonsuit the plaintiff, whereupon the plaintiff filed an affidavit, under the act of Assembly, Rev. St., ch. 31, sec. 42, set- (76) ting forth that the sum of $152, for which his suit was instituted, was justly due him from the defendant, but that he had failed to recover said sum for the want of proof of the amount really due. The court refused the motion. A motion was then made by the defendant to tax the plaintiff with such of his witnesses (there being in all twenty-three) as were not necessary to prove his account, and such as were examined as to the commissions. The motion was refused, upon the ground that they all were examined and testified to some material fact.

The plaintiff then moved for a new trial for misdirection of the judge in charging the jury that the power of attorney could be revoked by parol or by letter. This motion was also overruled, and both parties appealed.

J. H. Haughton for plaintiff.
Iredell for defendant.

NASH, J. It is not denied by the plaintiff that, in this case, it was within the power of the defendant to put an end to his agency by revoking his authority. Indeed, this is a doctrine so consonant with justice and common sense that it requires no reasoning to prove it. But he contends that it is a maxim of the common law that every instrument must be revoked by one of equal dignity. It is true an instrument under seal cannot be released or discharged by an instrument not under seal or by parol, but we do not consider the rule as applicable to the revocation of powers of attorney, especially to such an one as we are now considering. The authority of an agent is conferred at the mere will of his principal, and is to be executed for his benefit; the principal, therefore, has the right to put an end to the agency whenever he pleases, and the agent has no right to insist upon acting when the confidence at first reposed in him is withdrawn. In this case it was not necessary to enable the
(77) plaintiff to execute his agency that his power should be under seal; one by parol, or by writing of any kind, would have been sufficient; it certainly cannot require more form to revoke the power than to create it. Mr. Story, in his treatise on agency, page 606, lays it down that the revocation of a power may be by a direct and formal *declaration* publicly made known, or by an *informal writing,* or by parol, or it may be implied from circumstances, and he nowhere intimates, nor do any of the authorities we have looked into, that when the power is created by deed it must be revoked by deed. And, as was before remarked, the nature of the connection between the principal and the agent seems to be at war with such a principle. It is stated by Mr. Story, in the same page, that an agency may be revoked by implication, and all the text-writers lay down the same doctrine. Thus, if another agent is appointed to execute powers previously entrusted to some other person, it is a revocation, in general, of the power of the latter. For this proposition Mr. Story cites *Copeland v. Insurance Co.,* 6 Pick., 198. In that case it was decided that a power given to one Pedrick to sell the interest of his principal in a vessel was revoked by a subsequent *letter of instruction* to him and the master to sell. As, then, an agent may be appointed by parol, and as the appointment of a subsequent agent supersedes and revokes the powers previously granted to another, it follows that the power of the latter, though created by deed, may be revoked by the principal by parol. But the case in Pickering goes further. The case does not state, in so many words, that the power granted to Pedrick was under seal, but the facts set forth in the

case show that was the fact, and, if so, is a direct authority in this case. This is the only point raised in the plaintiff's bill of exceptions as to the judge's charge.

We presume the motion intended to be made by the defendant, with respect to the costs, was that he should (78) not be taxed in the will with more than two of the plaintiff's witnesses, to prove each fact necessary to sustain his case. The act of 1836, Rev. Stat., ch. 31, sec. 76, after providing that the person in whose favor judgment shall be given shall recover his costs, further goes on to say, "provided that the party cast shall not be obliged to pay for more than two witnesses to prove any single fact." The practice upon this section of the law has uniformly been not to throw upon the successful party the payment of any of his witnesses, because he has testified to a fact already proved by two others, provided he also proves some other material fact. His Honor has certified that such was the case here. The defendant's motion was therefore properly overruled for this reason. Besides, this Court cannot undertake to review decisions upon such questions.

The defendant's motion to nonsuit the plaintiff was properly overruled. The Legislature has limited the jurisdiction of the Superior Courts, in matters of contract, to all sums over $60, when due by open account, etc., and to $100 when due by bond, note, or liquidated account (Rev. Stat., ch. 31, sec. 40), and by the 42d section it provides that if any suit shall be commenced in any Superior Court *for a greater sum than* is due, with an *intent* to evade the law, and by the verdict of a jury it shall be ascertained that a less sum is due to him than the Superior Court has jurisdiction of, it shall be the duty of the court to nonsuit the plaintiff, unless he files an affidavit that the sum for which his suit is brought is really due, *but for want of proof*, etc., he cannot make recovery; in which case he shall have judgment for the sum ascertained by the verdict. In this case the affidavit of the plaintiff, in the words of the act, was made and filed.

PER CURIAM. Judgment affirmed on each appeal, and each appellant must pay the costs of his appeal.

Cited: Martin v. Holly, 104 N. C., 39.

(79)

WILLIAM CARRAWAY v. MOSES COX.

1. Where a witness is equally interested on both sides he stands indifferent.

2. And, therefore, where the plaintiff alleged that one W was indebted to him and the defendant agreed to pay the debt: *Held*, that W was a disinterested and therefore a competent witness.

APPEAL from the Superior Court of Law of WAYNE, at Fall Term, 1847, *Manly, J.*, presiding.

This was an action of *assumpsit*. The only question presented in the case is as to the competence of a witness. One William Westbrook, being indebted to the plaintiff, it was, as the plaintiff alleges, agreed between him and the defendant that the latter should pay the debt. No question is made as to the sufficiency of the consideration for the promise of the defendant or to its being by parol. On the trial Westbrook was tendered as a witness to prove the agreement between the plaintiff and the defendant. Objection was made to his competence and sustained by the court, and the plaintiff was nonsuited. And from the judgment the plaintiff appealed.

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

NASH, J. We think there was error in the opinion given by his Honor below.

It is the well-settled rule that when the witness is equally interested on both sides he stands indifferent. *Smith v.*
(80) *Harris*, 3 E. C. L., 238. There the action was for giving a false credit to Hollingsworth. His testimony was objected to, on the ground that he was interested, but was received by the Court, as he stood indifferent, being liable to the plaintiff for the goods sold if the action against the defendant failed, and liable to the latter if it succeeded. Upon the same principle the witness was held competent in the cases of *Martineau v. Woodland*, 12 E. C. L., 32, and in *Hewitt v. Thompson*, 12 E. C. L., 178, and in *Collins v. Gwynn*, 23 E. C. L., 380. In *Lovet v. Adams*, 3 Wendell, 380, a co-obligor was held to be a competent witness for the plaintiff to prove the execution of the bond. In this Court the same point has been decided in the cases of *Ligon v. Dunn*, 28 N. C., 133, and *Cummins v. Coffin*, 29 N. C., 196. And *Justice Savage* in *Bank v. Hillard*, 3 Cow., 160, lays down the rule we are discussing, very much as *Lord Kenyon* does. To apply the principle of these cases to the present. The money

sought to be recovered by the plaintiff was originally due from Westbrook, and the defendant, for a sufficient consideration, agreed with the plaintiff to pay it to him. Westbrook then stood entirely indifferent between the parties. If Cox paid the money to the plaintiff it would be either a voluntary payment made by him, which would give him no claim upon Westbrook for its return, or he would pay the money as a surety, in which case he would have a claim, and in neither case was Westbrook an incompetent witness. If the plaintiff failed in the action against Cox, Westbrook was still liable to him upon the original contract; if he succeeded he would be liable to Cox, not only for the amount of the debt, but for the costs expended by him in this case, so that his interest lay more in defeating than in sustaining the action.

We have looked into the authorities cited by the defendant, but do not think they interfere with the prin- (81) ciple which governs this case.

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

Cited: Gidney v. Logan, 79 N. C., 217.

WILLIAM T. OWEN v. GEORGE T. BARKSDALE.

1. In order to support the title of a purchaser at an execution sale he must show a judgment, execution and conveyance to him by the officer by whom the sale purports to have been made.
2. The deed of a sheriff, reciting a judgment, execution and sale, is not evidence of those facts.
3. The sheriff is a competent witness to prove that there was a sale.
4. Where the sheriff's deed is an ancient one and possession has been held under it, a presumption of a sale may arise from the contents of the deed.

APPEAL from the Superior Court of Law of SAMPSON, at Fall Term, 1847, *Caldwell, J.*, presiding.

This is an action of trespass *quare clausum fregit*. On the trial, in order to show title, the plaintiff offered in evidence the transcript from the records of the County Court of Sampson, showing a judgment and *renditioni exponas* in behalf of Holmes and Bunting against one Harman Owen, and a sheriff's deed covering the land in question. The defendant insisted that no sale being endorsed on the execution, or otherwise made to appear, the sheriff's deed was not evidence of the fact. (82)

It was further insisted by the defendant that it did not appear by the sheriff's deed, or otherwise, that any sale had been made by the sheriff under a *venditioni exponas* corresponding with the judgment in favor of Holmes and Bunting. The sheriff's deed to the plaintiff, which is made a part of the case, recites as his authority for selling the land a *venditioni exponas* against Harman Owen, but does not set forth the name of the plaintiff, and was for a different sum from that in the execution produced; nor does it appear that any execution in the name of Holmes and Bunting against Harman Owen ever was in the hands of the sheriff. The presiding judge was of opinion that, under the circumstances, the sheriff's deed conveyed no title to the plaintiff, who thereupon submitted to a nonsuit, and appealed.

No counsel for plaintiff.
Strange and *W. Winslow* for defendant.

NASH, J. In the opinion of the judge below we entirely concur. The plaintiff claims to be a purchaser at an execution sale made by the sheriff. In order to sustain his title, it is sufficient for him to show a judgment, execution sale and the sheriff's deed. He did show a judgment in favor of Holmes and Bunting against Harman Owen and an execution, but he has entirely failed to show that that execution, or any other sufficient one, ever was in the hands of the sheriff, or was so at the time of the alleged sale. The sheriff's deed is not evidence of the fact, nor does it set forth that execution or any other valid one. It is true the recital in a sheriff's deed is no part of it; the deed is good without it, and of course if he misrecite the execution under which he sells, or recites no execution, his sale is nevertheless good if, at the time he makes it, he has in his hands a
(83) valid one. But a more serious objection to the plaintiff's recovery is that there is no evidence in the case that the sheriff ever did make any sale of the land in dispute. When a sheriff receives an execution it is his duty to levy it, and make public sale of the property so levied on; he cannot deliver it to the plaintiff in the execution in satisfaction of his debt, nor can he sell it at private sale; and until he does sell it as the law directs his deed can convey no title to the purchaser. It is the judgment, execution, sale, and conveyance by him that completes the conversion of the property.

There is no return upon the *venditioni exponas* by the sheriff of any sale, nor is it essential there should be. When made it is not conclusive on the parties, but may be controverted, and if omitted, may be supplied by testimony *aliunde*. The sheriff

himself would have been a competent witness to prove the fact. *McEntire v. Durham*, 29 N. C., 152; *Carter v. Spencer, ib.*, 14; Here there is not the slightest evidence of any sale by the sheriff, apart from his deed, nor is it shown he ever had in his hands any valid execution whatever. If the deed were an ancient one, and possession had been held under it, a presumption of a sale might arise from the contents of the deed.

PER CURIAM. Judgment affirmed.

Cited: Hardin v. Cheek, 48 N. C., 137, 138; *Isler v. Andrews*, 66 N. C., 555; *Jones v. Scott*, 71 N. C., 193; *Pemberton v. MacRae*, 75 N. C., 500; *Edwards v. Tipton*, 77 N. C., 225; *Rollins v. Henry*, 78 N. C., 348; *Wainwright v. Bobbitt*, 127 N. C., 277.

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(84)

THE STATE v. WILLIAM S. PRIDGEN.

1. Where A had possession of a tenement, consisting of a main building and a shed attached, and locked the door of the shed in which he had some tools, etc., and, leaving a tenant in possession, went away, intending to return; and afterwards the tenant admitted B into the peaceable possession of the main building: *Held*, that B was not indictable for a forcible entry in breaking into the shed and assuming possession of that.

2. When the main body of the house ceased to be, in law, the dwelling-house of A, each room lost that character.

APPEAL from the Superior Court of Law of NEW HANOVER, at Fall Term, 1847, *Caldwell, J.*, presiding.

This is an indictment at common law for a forcible entry into the dwelling-house of one Kitchin.

The house was situated on a tract of land which had belonged to one Herring, who contracted to sell it to Kitchin, and covenanted to convey in fee upon the payment of the purchase money; and he let him into possession. After Kitchin had been in possession about three months a difference arose between him and Herring about their bargain, and the latter then conveyed to the defendant, Pridgen. The dwelling-house contained several rooms in it, and there was attached to it a shed, one end of which was open and used as a piazza, and at the other end there was a room in which Kitchin kept a trunk, some tools and other articles. He hired a man named Caudle and his wife to work and cook for him, and they lived in the dwelling-house with Kitchin. On a particular day Kitchin, being about to

leave home, locked the door of the shed-room and took the key. He then went away, leaving Caudle and his wife in the
(85) house, and directing them not to let any one in. After he had gone the defendant came to the house with Caudle and another person to take possession of it, and the defendant was let in by Caudle and took possession without objection from Caudle. After he had thus taken possession he asked where Kitchin's property was, and was told by Caudle that it was in the shed-room, and the defendant then broke open the door of that room and, with the assistance of Caudle, removed the things out of the room.

The court instructed the jury that if Caudle was left in possession of the main body of the house, and had let the defendant into it, the defendant was not guilty on that part of the case; but that if Kitchin had put his property in the shed-room, and locked it, and carried away the key, then the breaking open the door of that room and taking out Kitchin's property made the defendant guilty of a forcible entry on that part of the case. The defendant, being convicted, appealed.

Attorney-General for the State.
Strange for defendant.

(86) RUFFIN, C. J. The Court is not, upon this appeal of the defendant, called on to speak of the position first laid down to the jury. Perhaps its correctness might be found to depend much upon some inquiries of fact to be passed on by the jury, as to a dishonest concert of Caudle with the defendant to surrender to him his employer's possession. It is the other part of the instruction, on which the verdict was founded, that is now before us. It does not seem to the Court to be correct; and on that ground, without considering any other point made at the trial, we think the verdict must be set aside.

That part of the instruction, taken in connection with the evidence and with the previous part of the charge, assumes that in fact and law the defendant had peaceably and justifiably entered the house, and was peaceably possessed of all that part of it which is called the main body. That being so, the defendant, we think, was not guilty of an indictable trespass in breaking into the other room. That room had never been severed from the other parts of the house so as to make it a several tenement and give it a distinct character as the dwelling-house of Kitchin. The whole was but one dwelling-house, and it was the dwelling-house of Kitchin exclusively, for Caudle had no possession of his own, but was there merely as a servant. *S.*

v. Bennett, 20 N. C., 170. When the defendant had (87) gained peaceable admission into the house, and claiming as owner, and having in fact the title, had taken actual and peaceable possession of the whole, except the one room, we think that room, though locked, cannot be treated as a distinct tenement, and as the dwelling-house, separately, of Kitchin, to which the new possession did not extend. Under such circumstances it seems clear that it could not be laid as his dwelling-house in an indictment for burglary by a third person. When the main body of the house ceased to be, in law, the dwelling-house of Kitchin, each room lost that character. The whole was but one tenement; and when the defendant took the possession, that of Kitchin ceased throughout, and the defendant was not guilty of successive forcible entries, as from one room he entered into another.

PER CURIAM. *Venire de novo ordered.*

Cited: Watson v. McEachin, 47 N. C., 211.

(88)

FRANKLIN H. HOOKS v. AARON F. MOSES.

1. Where on a warrant against an administrator for debt the magistrate before whom it was returned made the following entry: "Judgment confessed to the officer by the administrator for the sum of, etc. April 24, 1845." Signed by the magistrate: *Held*, that this was a valid judgment against the administrator.

2. One against whom a judgment before a magistrate has been obtained cannot attack that judgment, on the ground that he was not duly served with process or notified of the day and place of trial. But to avail himself of these objections the defendant must impeach the judgment directly by application to the magistrate or to a higher tribunal to set it aside or to reverse it.

3. In this case in an action upon the judgment the defendant cannot plead *plene administravit*, being fixed with assets by the judgment.

APPEAL from the Superior Court of Law of WAYNE, at Fall Term, 1847, *Manly, J.*, presiding.

The plaintiff issued a warrant in debt on a note against the defendant as the administrator of John J. Briggs, deceased. It was returned by the constable "Executed," and the justice of the peace made thereon the following entry: "Judgment confessed to the officer by the administrator, Aaron F. Moses, for the sum of $15, with interest from 1 January, 1843, and costs. 24 April,

1845. L. Cogdell, J. P." On the same paper the magistrate made further entry: "Execute the goods and chattels of the deceased, and sell to satisfy the above judgment and costs. 24 April, 1845. L. Cogdell, J. P."

The constable returned thereon *nulla bona*. On 10 June, 1847, the plaintiff brought the present writ by warrant in
(89) debt on the above, as a judgment, suggesting a *devastavit*, and seeking to recover from the defendant *de bonis propriis;* and, after a judgment for the plaintiff, out of court and appeals, the case came on to be tried in the Superior Court on the plea of *nil debet,* that there was no such judgment, and fully administered.

For the defendant it was insisted that the entry on the original warrant of 24 April, 1845, was not a judgment by the magistrate, but simply a memorandum of a conversation between him and the officer and nothing more; and, secondly, that if to be considered a judgment, it was not valid against the defendant, because he was not summoned to appear for trial at any particular time or place. The first point the court reserved by consent of the parties. On the other the defendant offered the constable who returned the warrant as a witness; and he deposed that he did not give the defendant notice of the time and place of trial, but that the reason was that, when he served the warrant, the defendant told him he did not wish to attend the trial, and was willing a judgment should be rendered against him. Upon this evidence the court directed the jury to find the issues for the plaintiff, which was done. But the court, being afterwards of opinion for the defendant on the point reserved, set aside the verdict, and ordered a nonsuit, under the agreement, and the plaintiff appealed.

Mordecai for plaintiff.
Husted for defendant.

RUFFIN, C. J. The Court does not concur with the opinions given by his Honor. The proceedings before single magistrates are generally informal, and the Legislature requires that they shall be favorably considered, if they can be seen to be
(90) substantially sufficient. It seems to be straining this entry most unreasonably when it is read as nothing more than a memorandum of a conversation between the magistrate and the constable. To what end would a memorial be made of such a conversation? Would the justice have thought of issuing an execution on it? Or can we understand the justice to have supposed that the constable could take a confession of judg-

ment, to be entered by the magistrate afterwards? Is it not rather to be understood that the justice meant to say that he did not give a judgment by default, but that the defendant confessed the debt to the constable, and that he, the magistrate, gave the judgment on the evidence of the constable? This last seems to the Court to be the fair and reasonable interpretation of what was done by the justice. The entry was intended as a judgment by some one, and whether the magistrate entered it as the judgment of himself or of the constable, cannot be seriously doubted. The judgment must, therefore, be reversed, and judgment entered for the plaintiff upon the verdict.

What has been said is sufficient to dispose of the cause. Yet we think it incumbent on us to say further that the defendant ought not to have been allowed to attack the judgment on the other ground, that he was not duly served with process or notified of the day and place of trial. Doubtless those are proper grounds for impeaching the judgment, but that must be done directly upon an application to the magistrate, or to a higher tribunal, to set it aside or reverse it for that cause, and is not open to the party collaterally when an execution is issued or debt brought on the judgment. Such is conclusively settled to be the law in respect of judgments of courts of record. *Skinner v. Moore*, 19 N. C., 152; *Burke v. Elliott*, 26 N. C., 356. It is true that it was otherwise at common law in respect of the proceedings of inferior tribunals, not proceeding according (91) to the course of the common law. But that has been altered here by the Rev. St., ch. 31, sec. 108, which, in re-enacting 4 Hen. IV, ch. 23, altered it by including judgments before a single magistrate having jurisdiction of the subject, and putting them on the same footing with those in a court of record. It is implied, then, until the judgment be set aside or reversed, that the magistrate found that the warrant was not only executed, but duly executed by the appointment of some certain day and place of trial, and that judgment proves itself to be right and the matter cannot be inquired of incidentally.

It is to be further remarked that the plaintiff is entitled to judgment notwithstanding the verdict is silent on the issue on the plea of *plene administravit*, for that plea was immaterial, as the former judgment is conclusive of assets. *Erving v. Peters*, 3 T. R., 685; Laws 1828, Rev. St., ch. 46, sec. 25.

PER CURIAM. Judgment for plaintiff.

Cited: McKee v. Angel, 90 N. C., 63; *Spillman v. Williams*, 91 N. C., 490; *Brown v. McKee*, 108 N. C., 393; *Whitehurst v. Transportation Co.*, 109 N. C., 345.

(92)

PATRICK McDOWELL v. STEPHEN BRADLEY.

1. Where a party, appealing from the County to the Superior Court, has given but one surety on his appeal bond, the Superior Court may supply this defect by permitting the appellant to give a bond with two sureties in the latter court.

2. On such a bond the same summary judgment may be rendered as if it had been regularly taken in the County Court.

APPEAL from the Superior Court of Law of EDGECOMBE, at Fall Term, 1847, *Battle, J.*, presiding.

This suit was brought in the County Court, and after a verdict and judgment against the plaintiff, he appealed to the Superior Court; but he gave bond with only one surety. At the term at which the transcript was filed the defendant moved to dismiss the appeal because there was but one surety to the appeal bond. The plaintiff then showed that the defendant had, during that term, summoned witnesses, and, by leave of the court, he filed a new bond with two sufficient sureties for the prosecution of the appeal. Whereupon the court refused the defendant's motion, but allowed him an appeal.

No counsel for plaintiff.
B. F. Moore for defendant.

RUFFIN, C. J. The Court thinks the decision of his Honor right. No weight is allowed to the circumstance that the defendant took out subpœnas, as he might not then have known of the deficiency in the bond; and the motion, we think,
(93) is in due time at the first term and before the trial begins.

It is not within any of the cases in which it has been held that the appellee waived his right to a better bond by his laches, for in neither of them was the motion at the first term. *Ferguson v. McCarter,* 4 N. C., 544; *Wallace v. Corbit,* 26 N. C., 45. Unless waived by his delay, the statute expressly requires that number at least; and the court would have been bound to dismiss this appeal if such a bond had not been given. But we think the new bond was an answer to the defendant's motion, for it fully meets the purposes of the act and the ends of justice by effectually securing the appellee, and, substantially, by the means prescribed in the statute. Although the proper bond was not taken at the proper time, yet the Court has the power to supply the omission, as was done with respect to *certiorari* bonds in the cases of *Fox v. Steele,* 4 N. C., 48, and *Rosseau v. Thornberry,* 4 N. C., 326. The act of 1810, Rev. Stat., ch. 4, sec. 16,

requires the clerk of the County Court to take the bond, as in cases of appeals, and send it up with the record; yet upon a motion to dismiss for the want of such a bond the plaintiff in the *certiorari* was allowed to give a proper bond in the Superior Court.

It was argued that this plaintiff should have been put to his *certiorari*, because on the bond then to be given there would be a summary judgment, which cannot be on the present one. If there were the difference in the remedy supposed it does not follow that the delay and expense should be thrown on the plaintiff, which would arise from dismissing the appeal. But, we think, the objection is founded on a mistake as to the remedy. It is clearly in the power of the court to require from time to time further security for the costs from the plaintiff, and the sureties in the new bonds are bound for all the costs, at whatever period accrued; and, certainly since the act of 1831, Rev. St., ch. 31, sec. 133, they are liable summarily. The acts giving the summary judgments, being remedial, are to be (94) construed literally, as authorizing judgments on motion upon all bonds given at any stage of the case for the prosecution of a suit on an appeal.

This opinion will be certified to the Superior Court.

PER CURIAM. Ordered accordingly.

Cited: Robinson v. Bryan, 34 N. C., 183; *Russell v. Saunders*, 48 N. C., 432; *Stickney v. Cox*, 61 N. C., 496; *Wall v. Fairly*, 66 N. C., 386.

STATE TO THE USE OF ATKINSON JEFFREYS v. THOMAS L. LEA.

A sheriff cannot apply money in his hands, which he has collected on an execution in favor of A. to the satisfaction of an execution in his hands against B. though *it seems* he may levy an execution on money in the possession of the debtor.

APPEAL from the Superior Court of Law of CASWELL, at Fall Term, 1847, *Bailey, J.*, presiding.

Debt on the bond given by the defendant Lea, as sheriff of Caswell. The breach assigned is in not paying to the relator a sum of money collected by a deputy of the defendant on a *fieri facias* on a judgment of a justice of the peace in his favor against one Palmer. Plea, conditions performed. On the trial the defense was that the deputy had at the same time a *fieri*

facias on a judgment of a justice of the peace for a larger
(95) sum in favor of Palmer against the relator, and that on receiving the money for the relator on his execution he applied the same to the satisfaction of the execution against him. Upon evidence to that effect the defendant prayed the court to instruct the jury that he was not liable in this action. But the court refused to give that instruction, and directed the jury that the defendant was liable in this action for the sum collected for the relator, unless he consented to the application which the deputy made of the money. Verdict and judgment against the defendant, and appeal.

Morehead for plaintiff.
E. G. Reade for defendant.

RUFFIN, C. J. It seems to be the received doctrine in England that money cannot be taken on a *fieri facias.* It has, however, been laid down by the highest court in this country that, when in possession of the debtor, it may be. *Turner v. Fendall,* 1 Crouch, 117. On that point, we believe, that case has been generally approved. It also determined that the sheriff cannot apply to the satisfaction of an execution against a person money which he received on an execution in favor of that person. For, until it be paid over to the party, it is not his goods. The courts have exercised a jurisdiction, where there are mutual judgments between two persons, to have one set against the other and satisfaction accordingly entered—especially when one of the parties is insolvent. That is not at all under the statute of set-off, as the judgments are already existing, and the opportunity for pleading the set-off has passed. It is an instance of a summary equitable jurisdiction over suitors, exercised for the saving of expenses and the promotion of justice. So, too, there have been cases in which money, raised on an execution for a person, has been applied by the court to a judgment there against that person or to an execution in the hands of the sheriff. But
(96) this last is not obligatory on the court in every case. *Overton v. Hill,* 5 N. C., 47. Indeed, more recently the notion seems to be prevailing in England that it ought not to be done in any case. *Knight v. Criddle,* 9 East., 48; *Williams v. Barr,* 2 N. R., 376. However that may be, the jurisdiction, supposing it to exist, belongs to the court and not to the ministerial officers. He cannot go out of his writ, and has no power to apply money, which he owes to or has received for a defendant, in discharge of an execution against him or his property. There is no authority for such a power in the sheriff, and that

of *Turner v. Fendall* is a most respectable one against it. It has, moreover, been several times decided in this State that money thus in the hands of a sheriff cannot be attached. *Overton v. Hill*, 5 N. C., 47.

PER CURIAM. Judgment affirmed.

Cited: Williamson v. Neely, 119 N. C., 431.

SHEM KEARNEY v. ELIZABETH JEFFREYS.

In proceedings under the act directing how damages may be recovered for injury done by stock to inclosed grounds, if one of the parties appeal to the County Court from the judgment of the magistrate, the case must tried by a jury as in other suits, and there can then be no objection received to any irregularity in the proceedings before the magistrate.

APPEAL from the Superior Court of Law of GRANVILLE, at Special Term in November, 1847, *Battle, J.*, presiding.

This is a proceeding under the act giving damages to (97) the owner of stock which has been injured by another. Rev. St., ch. 48, sec. 3. The plaintiff alleges that his stock has been injured by the defendant, within her enclosed grounds, or by others acting under her authority. From the assessment made by the magistrate and freeholders, and the judgment rendered thereon, the defendant appealed to the County Court, and from the judgment of that tribunal to the Superior Court. In each court a motion was made by the defendant to quash the proceedings for error. The error assigned in the case is that the magistrate in his warrant designates the name of one of the freeholders to be summoned.

In the Superior Court the motion was overruled. From this judgment she was allowed to appeal.

McRae and *Waddell* for plaintiff.
Gilliam for defendant.

NASH, J. In Laws 1777, ch. 121, the Legislature declare for what trespasses committed by the stock of one man upon the enclosed grounds of another the latter shall be entitled to compensation in damages, and how they shall be ascertained. Section 2 declares what shall be a sufficient fence in law to give the owner a right of complaint for being trespassed on, and

section 3 directs that upon complaint made to a magistrate he shall cause two freeholders to be summoned, who, together with himself, shall view the fence of the person complaining, where the trespass is alleged to have been committed, and ascertain whether it is such as the law requires, and if it is, what damage he has sustained, and certify the same under their hands and seals. The damages so assessed are made recoverable before any tribunal having cognizance of them. Section 4 makes
(98) provision for the recovery of damages by the owner for injury committed to it, and directs the same proceedings as in section 3. It is under this section that these proceedings have been instituted. This act gave no appeal to either party. The report made by the magistrate and the two freeholders was conclusive. *Nelson v. Stewart*, 6 N. C., 298. The oppression and injustice which might be effected under a proceeding so contrary to the principles of the common law came under the consideration of the Legislature at its session in 1831. Ch. 2, secs. 2, 3. This act changed the mode of obtaining judgment for the damages assessed by the magistrate and freeholders, and authorized the magistrate to give a judgment forthwith if the damages were not immediately paid. It also removed the objectionable feature of the old law by giving the right of appeal to either party. And it directs that when the case is carried into the County Court the trial shall *be in all respects de novo;* the parties are permitted to plead, and issues are to be made up, as in cases of actions of trespass. This provision extends to injuries of both kinds. In either case the cause in the appellate court becomes, as to all subsequent proceedings, a regular suit. The proceedings before the magistrate and the freeholders, then, answer no other purpose than as the foundation of bringing the case into court, and the court could take no notice of any defect in the certificate of the magistrate and the freeholders, because it is superseded by the appeal. This results from the special provisions of the act of 1831. But it does not follow that the party considering himself aggrieved by the judgment of the magistrate cannot have a revision of any errors in the proceedings. Two remedies are provided him, if any does exist in the proceedings out of court: The party injured may remove his
(99) case into the Superior Court by a writ of false judgment, where the errors complained of may be rectified; or, if he wishes to place himself upon the merits of his cause and to controvert the facts, he may demand a trial by a jury, in the way pointed out in the act. If the defendant in this case had chosen the former course, there is little doubt the proceedings would have been quashed for the want of seals to the certificates

of the magistrate and freeholders. Then, as to the alleged defect in the warrant, while it is admitted that in every case the process, which stands in the place of a declaration, must show a case substantially within the jurisdiction of the magistrate, yet we think the particular objection here made cannot avail. It refers, exclusively, to the mode of designating the freeholders, and, therefore, if a good objection at all, is immaterial to the controversy in the present stage of it, since, as we have already shown, the proceedings of the freeholders were vacated by the appeal. Consequently it is of no importance now how they were summoned.

We see no error in the interlocutory judgment appealed from.

PER CURIAM. No Error.

Cited: Bailey v. Bryan, 48 N. C., 358.

(100)

JOHN B. ETHERIDGE v. WALTER R. JONES ET AL.

Under our wreck laws, the master, owner, merchant or consignee of wrecked vessels or other property has a right to take possession of them and dispose of them as he may think proper, without any responsibility to the wreck master for commissions or in any other respect.

APPEAL from the Superior Court of Law of CURRITUCK, at Fall Term, 1846, *Pearson, J.*, presiding.

The plaintiff was, by the County Court of Currituck, duly appointed a commissioner of wrecks for District No. 4, and in 1845, while acting as such, the brig Moon was wrecked within that district. The plaintiff demanded of the defendant Kinsey, who was the captain, to be allowed to take into his custody the goods then on the beach, and such as might thereafter be saved from the wreck. This was refused by the captain, who told him he could save the goods for the owners himself, and did not need his assistance. The plaintiff never did take any of the goods into his custody, but they were all reshipped by the captain, and the other defendants assisted him in so doing. The action is brought under the act of the General Assembly passed at their session of 1844-45, ch. 58.

The court instructed the jury that the plaintiff had no right to any commissions, as he had neither taken the wrecked goods into his possession nor had he sold them. But under the act of Assembly he had a cause of action against the defendants for

any interference with his rights and privileges as commissioner, and that the refusal to let him take into his charge and custody the wrecked goods was such an interference. Under this (101) charge the jury found a verdict for the plaintiff, and from the judgment thereon the defendants appealed.

Heath and *Jordan* for plaintiff.
A. Moore for defendants.

NASH, J. The whole case turns upon the construction to be given to the act under which the action is brought. We do not concur with his Honor in the view he has taken of it. Section 4 of the act is as follows: "In future the commissioners of wrecks shall be the only proper persons to take charge of, advertise or sell any vessel, cargo or other wrecked property that may be stranded or cast on shore in their respective districts: *Provided*, that the owner, captain, merchant or consignee, or their agent, may, in the absence of the commissioner, etc., take charge of, or sell, or remove, such vessel, cargo or other wrecked property." Section 5, under which this action is brought, provides, "and any person who shall interfere with the rights and privileges of any commissioner shall be liable to such commissioner, in an action on the case, for such damages as the commissioner shall sustain by reason of such interference." The act is obviously intended to prevent any officious intermeddling, with property so situated, by irresponsible persons. The commissioner is the officer of the law to take the property into possession and see justice done the owners. If others have assisted in saving it, in his absence, he may demand it of them, and a refusal on their part to deliver it is a violation of his rights, for which an action may be sustained. But by the proviso, in section 4, recited above, the master, or owner, or merchant, or consignee, is not such an officious intermeddler; to each is reserved the right, in the absence of the commissioner, to take charge of the stranded property. From the case we gather that the captain did take possession of the goods in the *absence* of the commissioner, (102) for it states "that the commissioner demanded of the defendant Kinsey, who was the captain, to be *allowed* to take into his custody the goods, etc." If they were not already in the possession of the captain, where was the necessity of any demand? If, however, the goods were not actually in the possession of any one, and the captain or owner had refused to suffer the plaintiff to take them into his custody, and had himself taken possession, we do not believe his act would have been a tortious one. The act of Assembly is badly drawn, and we

must give to it such a construction as we think the Legislature intended and which is to be gathered from all the language they use and the purposes of the act. The goods, then, were rightfully in the possession of the defendant Kinsey, who was, *pro hac vice*, the owner. Does the act require him to deliver them up to the commissioner upon his demand? Surely not; to what purpose should he do it? The latter part of the same section provides that "every commissioner shall receive for selling any wrecked property 5 per cent, etc., and in case of the *removal* of any wrecked property by the owner, merchant, consignee, or their agent, from the custody of any commissioner without a sale, the commissioner shall receive 2½ per cent, etc." This 2½ per cent commissions are given to the commissioner as a compensation for his trouble and the responsibility incurred by him in taking possession or custody of the property. He did not take possession or have the custody of the property, and therefore his Honor in his charge properly instructed the jury that he was not entitled to any commission. But he further instructed them that he was entitled to an action against the defendants for interfering with his rights. What rights? The only right interfered with was the right, as it is alleged, to take the property out of the possession of the captain. And for what purpose? Not to secure them, not to sell them, but simply to entitle him to his commission of 2½ per cent; for the captain, if he had surrendered them, was at liberty, by (103) the act, immediately to withdraw them from the commissioner. Surely such was not the meaning of the Legislature. They could not have intended to take from the unfortunate owner a portion of that which the sea had spared, and he had saved, to present it as a douceur to one who had rendered no services and incurred no liability in saving the goods.

If the principle contended for in this case on the part of the plaintiff be correct, it will lead to this result, that all the commissioner has to do is to arrive after the goods have been all saved by the captain or owner, demand the possession, and if delivered to him, he immediately redelivers them back and pockets his commissions; if refused, he does not pocket the commissions, *eo nomine*, but damages to their amount, for the rule of damages would be the loss he would sustain by the nondelivery.

We cannot believe such to be the true construction of the act. The interference intended to be punished by the law, in damages, is an unlawful interference. The act of the captain in taking possession of the wrecked property, in this case, was a lawful act, and he was not bound to surrender them to the plaintiff on his demand. His refusal to do so was no interference with any

right or privilege secured to the plaintiff, and the other defendants who acted under his authority are protected by his immunity. The act was intended, not for the benefit of the commissioners of wrecks, but for that of the owners of the property. If, when the goods are stranded, there is no one of the persons enumerated in the act present, the law places the property in the hands of the commissioner, and no one can rightfully withhold it; if the captain or owner is present, and chooses to save the property without the aid of the commissioner, it can-
(104) not be the intention of the act to forbid their so doing, or to punish them if they do.

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

THE STATE TO THE USE OF THE COUNTY TRUSTEE OF BRUNSWICK v. ROBERT W. WOODSIDE ET AL.

1. Under the Acts of Assembly, relating to the county of Brunswick, where a majority of the magistrates are required to do any act and they do not attend, those who are present may take the sheriff's bond and also lay taxes, and do all other things required by the general law to be done by a majority of the justices.

2. Where a court consists of more than two members, a majority is competent to do all the business which the court can do when all the members are present, unless the Legislature otherwise directs.

3. Although the clerk may not deliver to the sheriff an official copy of the list of taxables, yet if he proceeds, without such official list, to collect the taxes, he and his sureties on his bond are bound for the amount he may so collect, notwithstanding he could not have enforced the collection without such certificate from the clerk.

4. Under Laws 1844, ch. 43, sec. 1, any acknowledgment or admission of the sheriff or other officer, where admissible against him, is also admissible against his sureties in an action on their official bond.

APPEAL from the Superior Court of Law of NEW HANOVER, at Spring Term, 1847, *Battle, J.*, presiding.

(105) This was an action of debt upon the official bond of the defendant as sheriff of Brunswick.

The defendant Woodside was the sheriff of the county of Brunswick, whose duty it was to collect the county taxes for 1842. The action is brought on his official bond, against him and his sureties, the other defendants. Two breaches are assigned: one, for collecting and not paying over to the relator

the county, poor and school taxes; secondly, for failing to collect and pay over. Upon the trial the relator, in order to show the assessment of taxes for 1842, produced the records of the March Term, 1842, of the County Court of Brunswick, from which it appeared that three magistrates only were on the bench when the taxes were laid for that year. To show that the defendant Woodside had duly received the list of taxables the relator proved that a copy of it had been handed to him from the clerk of the County Court, but that it was not signed or in any other way authenticated by him. This evidence being objected to, it was proved that the defendant Woodside had acknowledged that he had received the taxes for that year and had failed to pay them over. On the part of the defendants it was objected: *first*, that it required a majority of the magistrates of the county to lay the taxes, and, as only three were on the bench at the time the taxes were laid in 1842, the assessment was illegal, and, in fact, no taxes were assessed for that year; *secondly*, if the taxes were legally laid, the only warrant or authority which the sheriff could have to collect them was a copy from the list filed in the office of the County Court Clerk and properly authenticated by him, without which he could not collect; and *thirdly*, that his acknowledgment, as above stated, could not dispense with the copy of the tax list, nor was it any evidence against the sureties.

The court being of opinion with the defendants, the (106) plaintiff submitted to a judgment of nonsuit, and appealed to this Court.

Iredell for plaintiff.
Strange for defendants.

NASH, J. We do not concur with his Honor in the view he took of this case. The first objection urged by the defendants was fully answered by the plaintiff. By Laws 1831, ch. 154, sec. 1, the Court of Pleas and Quarter Sessions of Brunswick County are required to arrange themselves in classes of five persons for the purpose of holding the terms of the said court. By section 3 it is enacted "that the justices appointed under this act to hold the said county courts shall be competent to do and perform any matter and exercise all the power and authority which, by the existing laws of this State, seven justices are authorized to do," etc.

By section 6 it is provided "that in any case where (by the existing law) a majority of the magistrates are required, and do not attend, those who are present may proceed to take the sher-

iff's bonds, *and do any other business that a majority is required to do, which shall be as valid as if done by a majority of said justices.*" This act would seem to be sufficiently explicit. When a court consists of more than two members a majority is competent to do all the business which the court can do when all the members are present, unless the Legislature otherwise direct. *S. v. Lane*, 26 N. C., 450. But to remove all doubt, if any should exist, by Laws 1835, ch. 43, sec. 4, it is specially provided "that the justices appointed under this act to hold said courts, or a *majority* of them, shall be competent to do and perform any matter and exercise all the authority and power which by the existing laws a majority or seven magistrates are required
(107) to do." By Laws 1790, ch. 331, sec. 1, and 1814, ch. 872, sec. 18, a majority of the acting justices of the county were required to be present to lay the county taxes, and these two acts were embodied together into one act in 1836, and in that form are re-enacted. Rev. St., ch. 28, sec. 1. But the acts of 1831 and 1835 were not affected by the act of 1836, for it is provided "that no act of a private or local character, etc., shall be construed to be repealed" by it. Rev. St., ch. 1, sec. 8. The acts of 1831 and 1835 are local laws, and are in full force in the county of Brunswick, and the tax laid by the court in 1842 was legally assessed.

We think the second objection made on the part of the defendants is equally untenable as the first, so far as the question involved in this case is concerned. It is made the official duty of the several sheriffs of the State to collect the taxes within their respective counties (Rev. St., ch. 102, sec. 43), and the several clerks of the county courts are required, within a limited time, to make out and deliver to the sheriff of his county "a fair and accurate copy of the returns made, designating therein the separate amount of taxes due and accruing from each species of property and the amount due from each individual." To enable the sheriff to *enforce* by distress the collection of the taxes from the individual who has given in his property as required by law, he must be provided with a copy of the returns in the office of the clerk, duly certified by the clerk, that the taxpayer may see the amount which he is bound to pay; otherwise he may refuse to pay, and the sheriff cannot distrain his property; the certified copy is his warrant of distress to collect the taxes. *Slade v. Governor*, 14 N. C., 365; *Kelly v. Craig*, 27 N. C., 131. And it is the duty of the sheriff to apply to the clerk in proper time for such a copy. But it is not necessary for him to have the copy, so certified, to enable him to receive the taxes, or, indeed, any copy. Any individual may, if he

please, pay to the sheriff the amount of his taxes, and his receipt will be a sufficient discharge, and will be sufficient to charge the sureties of the sheriff and make them answerable, because the citizen, by reference to the returns in the clerk's office, may see what amount of taxes is due from him, and the sheriff is the only person who can rightfully receive them. (108)

On the third point we think the defense fails. Section 1, ch. 43, Laws 1844, provides "that in actions brought upon the official bonds of sheriffs and other public officers, etc., when it may be necessary to prove any official default of any of the said officers, any receipt or acknowledgment of such officer or any other matter or thing which by law would be admissible and competent for or toward proving the same, against such officer himself, shall in like manner be admissible and competent" against his sureties in any action where they are defendants. It cannot be questioned that the acknowledgment of the sheriff, Woodside, was admissible against him, and therefore it was equally competent against his sureties.

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

Cited: S. v. Woodside, 31 N. C., 499; *S. v. McIntosh, ib.*, 311; *Winslow v. Morton*, 118 N. C., 491; *Peebles v. Taylor*, 121 N. C., 44; *S. v. R. R.*, 141 N. C., 853.

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(109)

WILSON READ v. JOSIAH GRANBERRY.

1. Where in a lease for a fishery it is stipulated that the lessor, as a consideration for the lease, shall be entitled to all the offal, the lessees may put up their fish *whole*, so as to leave no offal, there being no stipulation in the lease that the fish should be cut, and no general custom proved that the fish put up at such fisheries were usually cut.

2. Where the *meaning* of a word in a covenant is to be explained by a custom, the custom must be proved to be so general that the parties to the contract must be presumed to have reference to it.

3. Nothing is offal at a fishery which is fit for food, and is consumed or sold for that purpose.

APPEAL from the Superior Court of Law of PERQUIMANS, at Fall Term, 1846, *Pearson, J.*, presiding.

This is an action of covenant, contained in a lease granted

by the plaintiff, Read, to the defendant, Granberry, in 1837. Read leased to Granberry a fishery, adjacent to his farm, on Chowan River, and Granberry covenanted as follows: "And I, the said Josiah Granberry, do for myself, my heirs and assigns, promise and bind ourselves that the said Wilson Read shall have and enjoy, for and in consideration of the above-named privileges, all the offal of said beach, etc." Two breaches were assigned, as follows: *First*, that the defendant had not permitted the plaintiff to haul all the offal off the beach, and *secondly*, that the defendant had diminished the quantity of offal by putting up in gross, without cutting and trimming, seven hundred barrels of herrings during the fishing season of 1845. Nixon was a partner with Granberry in the lease. On the part of the defendants it was insisted that they had a right to put up as many herrings in gross as they thought proper. To rebut this de-

(110) fense the plaintiff contended that in 1837, when the covenant was executed, and always before that time, the practice of the fisheries on the Albemarle Sound and its tributaries, where this fishery is situated, was to cut and trim all the herrings that were put up. In order to establish the existence of this custom the plaintiff introduced two witnesses; by one he proved that, previous to 1837, such was the custom at two specified fisheries on that sound, both when leased out and when worked by their owners; but in neither case was the witness able to testify that, when leased, the herrings were cut and trimmed at those fisheries, under a covenant in the lease or under any general custom. He further stated that there were many other fisheries on the Albemarle Sound, but he had no knowledge of any such custom or practice at them. The other witness proved that, previous to 1840, he had very little knowledge of the fishing business; that it was not until 1842 that the fishermen commenced putting up gross herrings, but it was admitted that, before 1837, the fishermen did put up what are called roe-herrings for family use which were not cut or trimmed.

The defendants insisted that there was no such ambiguity in the lease as to authorize the introduction of parol evidence of any usage or custom to explain it, and that there was no evidence of *any* usage or custom that would give to the words of the lease an artificial meaning; that the word *offal* had a precise and definite meaning, and that there was no evidence to authorize the jury to infer that it was used in the covenant in any other sense.

His Honor instructed the jury that the word *"offal,"* used in this lease, might be explained by evidence of the custom of cutting and trimming fish that were caught at the fisheries on the

Albemarle Sound, at and before the date of the lease; that it was in evidence before them that, at and before the date of the lease, it was the custom at the *large* fisheries on that sound for the fishermen to cut and trim all the herrings they caught, except a few barrels of roe-herrings, *put* up for family (111) use; that it was for them to say whether the evidence proved the custom or whether the contract was not made in reference to such usage; if they did, they would find for the plaintiff.

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

Iredell for plaintiff.
A. Moore for defendant.

NASH, J. We think his Honor erred in his instructions. The word *offal*, if not in general a word of art, may be such in the relation in which it is used in this particular business, and, therefore, may admit of parol evidence to show in what sense, according to the custom of fishing, it is used. But here there can be no pretense that there was any evidence of a general custom among the fishermen upon the subject. Two witnesses were examined to this point. The first stated that for nine years before 1837 he had lived as an overseer upon a plantation to which was attached a fishery, which was under lease during a portion of that time, and that both the lessee and the owner, after the expiration of the lease, were in the habit or custom of cutting and trimming the herrings for market; and that the same custom existed in an adjoining fishery, but he expressly stated that he did not know whether the lessees of those fisheries cut and trimmed their herrings "in conformity to an existing custom or in execution of the terms of their lease." He further stated "that there were *many* other fisheries on the Albemarle Sound, but that he had no acquaintance with any practice observed at them of cutting and trimming all the herrings caught at them." The other witness stated "that, previous to 1840, he had *very little acquaintance* with the fishing business, and that it was not until 1842 that the fishermen began to put up fish in gross." Neither of these witnesses prove the exist- (112) ence of any general custom upon the subject. Out of the many fisheries on the Albemarle, the plaintiff has selected two—how near to the one leased by the defendant is not stated—and asks to hold them bound by the course pursued at them. The second witness knows nothing of any custom of any kind previous to 1840. If the above evidence was properly received by the court, it certainly was not such as would authorize the

jury in finding the existence of any such general custom as would control the plain and natural import of the words used in the lease. Nor is there anything in the case to show, if such a custom did exist, that it was so general that the parties in contracting this lease must be presumed to have had reference to it. 3 Pk. on Ev., 1410 and 1412; *Heald v. Cooper*, 3 Greenleaf, 32, cited there. What, then, is the natural meaning of the word *offal?* The best lexicographers define it to be "waste meat, carrion, refuse, that which is thrown away as of no value or fit only for beasts." When used in a covenant of this kind it must mean that portion of the product of the seine which is not used for food, and all the portion of *that* which is used for food, and which is taken from it in preparing it for market, or merchantable fish, as by exposure has become unfit for such use. Thus it often happens that many fish are caught which are not fit for food, and very often, from the great abundance that are caught, many become spoilt; all these, as well as the cuttings and trimmings, are *offal;* and these constituted what the defendants covenanted the plaintiff should enjoy. We consider nothing as *offal* at a fishery which is fit for food, and is consumed or sold for that purpose. Have they been guilty of the first breach assigned in the plaintiff's declaration? We think not. Is the second breach sustained, by proof that in barreling their fish whole they have violated their contract? We see no
(113) restriction in the covenant as to the mode of preparing their fish for market. It is proved by the plaintiff that all the fish caught previous to 1837 were not cut and trimmed, for many were barreled, as roe-herrings for family use. Herrings so put up are neither cut nor trimmed. They do not, therefore, furnish near so much offal as those which are so prepared for market. What if the defendants, instead of putting up a few barrels of roe-herrings, had so prepared for market all that were fit for such purpose: would it have been a violation of his covevant, even though one-half or two-thirds of all he caught were so prepared? Certainly not; and yet the profits of the plaintiff would, in that case, be as much diminished as they are now, according to his complaint.

We are of opinion that, under their lease, the defendants had a right to prepare their fish for market in any way their own interest might dictate, and that in barreling them in gross they have not violated any right which the plaintiff has reserved to himself. The plaintiff might, if he had so chosen, have expressed in the covenant in what manner the fish should be prepared for market. They were his property, and the defendant could not have thrown them away unless the plaintiff had been

guilty of unnecessary delay in removing them, nor have given them away, or sold them, or in any manner appropriated them to his own use.

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

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(114)

THOMAS ASHFORD v. JOHN ROBINSON.

1. In an action upon a guaranty in the following words, "This is to certify that I pass over the following notes to S. A. for value received, and I agree to make them good should any of them not be so" (naming the notes): *Held*, that this was a guaranty, not only that the notes were good at the time they were passed, but that they would be good when payment should be required in a reasonable time.

2. Even if this were a contract within the statute of frauds (Rev. Stat., ch. 50, sec. 10), it would not be requisite that the written contract should set forth the particular consideration; but to this contract the statute does not apply. It is a debt of the defendant himself, arising upon a new and original consideration of loss to the plaintiff and benefit to the defendant by means of the contract between these parties.

3. Notwithstanding gross negligence in the holder, the guaranty will be continued or revived by a new promise, made with a full knowledge of the facts.

4. The contract of guaranty is not like that of indorsement in the strictness of their conditions to be observed or in the consequence of their nonobservance. A guarantor is not discharged simply by the negligence of the other party, but he must also show a loss by it; if a particular loss, he is exonerated *pro tanto;* if no loss, he remains liable for the whole debt.

APPEAL from the Superior Court of Law of SAMPSON, at Spring Term, 1847, *Battle, J.*, presiding.

This is an action upon a guaranty of the note of David Underwood, which the defendant passed to the plaintiff's intestate in part payment for his crop of cotton, and was tried on the general issue. The guaranty is in these words: (115)

CLINTON, 1 May, 1840.

This is to certify that I pass over the following notes to Street Ashford for value received, and I do agree to make them good, should any of them not be so. One note of J. S. Chesnut for $136.05. One note on, etc. The above notes are made payable to me. JOHN ROBINSON.

It appeared upon the trial that Ashford issued a writ against Underwood, in the name of the defendant, on the note in question, on 4 February, 1841, returnable to the County Court on the third Monday of that month, and that it was not executed in consequence of Underwood's having gone out of the county on business. The plaintiff gave evidence that an *alias* was issued, and that the defendant was about serving it, and was prevented by the present defendant, who told him not to do so, as Underwood was insolvent, and he (Robinson) would have to pay the debt, and did not wish to be put to any further costs.

Afterwards the plaintiff brought another suit against Underwood, and got judgment in November, 1841, but was unable to levy the money, as all Underwood's property was sold under executions on 15 April, 1841, and he was afterwards insolvent. The defendants afterwards mentioned to the sheriff that he made himself liable for the debt through ignorance, and he sent word to the plaintiff that he would still pay it if the plaintiff would take a certain claim on another person. The plaintiff declined doing so, and demanded the money from Robinson, who refused to pay it; and this action was brought in February, 1843.

The counsel for the defendant contended that, as the guaranty did not express the consideration on which it was given, it was void under the statute of frauds. But the court held otherwise. He further insisted that the defendant had only bound himself for the solvency of Underwood at the time the guaranty (116) was given, and that, as he did not fail until nearly a year afterwards, this action would not lie. And also, that the defendant was, at all events, discharged for the want of due diligence of the plaintiff and his intestate in endeavoring to collect the money from Underwood.

The court instructed the jury that, by the proper construction of the contract, the defendant was bound to make good the notes, provided the plaintiff could not collect them by due diligence. The court further stated to the jury that the plaintiff had been guilty of laches in respect to Underwood's note, which would prevent a recovery from the defendant, unless they should find from the testimony that he had waived his right to take advantage of it, and that, if they should believe the evidence, that he did so waive his right and promise to pay the debt, the plaintiff ought to recover. Verdict and judgment for the plaintiff, and the defendant appealed.

Badger for plaintiff.
Strange for defendant.

RUFFIN, C. J. If this were a contract, within the act for the prevention of frauds, Rev. Stat., ch. 50, sec. 10, it would not be requisite that the written contract should set forth the particular consideration, but it is sufficient to aver and establish it by proof *aliunde*. *Miller v. Irvine*, 18 N. C., 103. But this is not a case within the act. Although, in one sense, it is a promise to answer the debt of another, yet it is not simply and merely that, but is, in another sense, the debt of the defendant himself, arising upon a new and original consideration of loss to the plaintiff, and benefit to the defendant, by means of the contract between these parties. To such promises the act does not apply; and the defendant's oral engagement would have bound him. *Cooper v. Chambers*, 15 N. C., 261; *Adcock v. Fleming*, 19 N. C., 223; *DeWolfe v. Rabaud*, 1 Peters, 476; 3 (117) Kent Com., 122 (5 Ed.).

The meaning of the guaranty cannot be doubted for a moment. It is said that "not *be* so" restricts the guaranty to the solvency of the debtors at the time of the contract. But an agreement *"to make* a debt *good, should* it not *be* so," taken even literally, is not merely an engagement that it *is* good at the moment of speaking. The party is to answer, *"should* the debt not *be* good." When? Why, certainly, when payment shall be required in a reasonable time. The intention was that if the money could not be collected from the debtor by due diligence, then the defendant should make the note good, that is, by paying the money himself.

Upon the other point the Court may, perhaps, be unable to administer strict justice between the parties by reason of the omission of the plaintiff to set forth in his exception the period at which Underwood's note came to maturity, so that it might be seen whether the plaintiff has discharged the defendant by his laches. Upon the supposition that he had, we do not, indeed, see any error in the opinion given by the court, that, if the evidence were believed, he had waived the laches and bound himself by his interference with the proceedings against Underwood and his voluntary promise to pay the debt, without any further proceedings of the plaintiff. The defendant knew all the facts when the note fell due, and was transferred, when the suit was brought, and the insolvency, at that time, of Underwood. It is a settled rule in respect to the undertaking of an endorser that his promise, with a knowledge of the facts, binds him, though, but for the promise, he would be discharged by the laches of the holder. It is not seen that there can be a distinction in that respect between a liability upon an endorsement of a note and upon a guaranty of it by a separate instrument. In

Smith v. Morgan, 14 N. C., 511, it seems to have been taken for granted that a subsequent promise to pay the debt
(118) would excuse previous laches. And the Supreme Court of Massachusetts has directly decided the point that, notwithstanding gross negligence of the holder, the guaranty will be continued or revived by a new promise made with a full knowledge of the facts. *Sigourney v. Wetherell*, 6 Metcalf, 553. The plaintiff was obliged to use the name of the defendant in suing Underwood, and it must be understood as a part of the contract that he was at liberty to do so. By his orders to the sheriff, then, not to serve the writ, the defendant, in truth, interfered with the rights of the plaintiff by a violation of his agreement and laid a just ground for an unconditional promise from him to pay the money.

But, for the reason before mentioned, if there were an error in the last point, the judgment could not be reversed for it, because, as the facts are stated, no laches can be inferred, and the real error in the case was in advising the jury, upon these facts, that there had been laches. The contract of guaranty is not like that of endorsement, in the strictness of the conditions to be observed or in the consequences of their nonobservance. Exact punctuality in presenting the note for payment and giving notice of its dishonor to an endorser is indispensable to charge him, and he is not obliged to show that he has incurred any loss by the want of it. But a guarantor is not discharged simply by negligence of the other party, but he must also show a loss by it; if a partial loss, then he is exonerated *pro tanto;* if it has produced no loss to him, he remains liable for the whole debt. Story Prom. Notes, sec. 400. Here the defendant says he sustained a loss by the neglect to sue Underwood before his insolvency in April, 1841. But he does not show that the plaintiff could not have sued, so as to have put his execution on the debtor's property, before the sale of it; for the Court cannot assume that the note was due before February, 1841, or that the plaintiff had increased the defendant's risk by granting in-
dulgence to the debtor, or that the plaintiff could have
(119) done better to secure the defendant from loss than by the suit, which the defendant stopped by his directions to the sheriff and his engagement to pay the money, without any further pursuit of Underwood.

The whole foundation of the defense, therefore, failed.

PER CURIAM. Judgment affirmed.

Cited: Farrow v. Respass, 33 N. C., 174; *Nichols v. Bell*, 46 N. C., 33; *Jenkins v. Peace, ib.*, 417; *Rowland v. Rorke*, 49

N. C., 339; *Kenyon v. Brock,* 72 N. C., 557; *Thornburg v. Masten,* 88 N. C., 295; *Tunstall v. Cobb,* 109 N. C., 325; *Sullivan v. Field,* 118 N. C., 360; *Haun v. Burwell,* 119 N. C., 547; *Hall v. Misenheimer,* 137 N. C., 188; *Satterfield v. Kindley,* 144 N. C., 461.

HALL, McRAE & CO. v. ROBERT W. WOODSIDE ET AL.

Where, on a *sci. fa.* against bail, the pleas were, no *ca. sa.* issued and payment, and the jury found all the issues in favor of the defendant, this Court will not inquire into the correctness of the charge of the judge as to one of the pleas only, that of the validity of the *ca. sa.*

APPEAL from the Superior Court of Law of BRUNSWICK, at Spring Term, 1847, *Battle, J.,* presiding.

This was a *scire facias* against the Sheriff of Brunswick County as special bail for one David Treadwell, against whom the plaintiffs had recovered a judgment. The defendants pleaded *nul tiel record,* payment, statute of limitations, no *ca. sa.* issued, no *ca. sa.* returned. Much controversy existed as to the sufficiency of the *ca. sa.* The presiding judge charged the jury that the *ca. sa.* produced was void, as not corre- (120) sponding with the judgment; whereupon they returned a verdict in favor of the defendant on *all* the issues; and from the judgment the plaintiffs appealed.

No counsel for plaintiffs.
Strange for defendants.

NASH, J: Whatever error the judge may have committed in the opinion he expressed as to the insufficiency of the *ca. sa.* produced in evidence, the Court cannot look into it. Among other defenses, the defendant pleaded that the debt recovered by the plaintiffs was paid; and the jury have found that plea to be true, as well as the others. This finding puts the construction on the *ca. sa.* out of the question. *Morrisey v. Bunting,* 12 N. C., 3, and *Bullock v. Bullock,* 14 N. C., 260, are direct authorities. And this we must especially hold, because it appears from the case that the debt was, in fact, paid; for the debt and costs amounted to the sum of $209.36, and upon a *fi. fa.* the sheriff returned the sale of a negro for $307.

PER CURIAM. Judgment affirmed.

NOTE.—The cases of *Patrick Murphy* and *Isaac Northrop* against the same defendants, depending upon the same principle, were determined in the same way at this term.

(121)

JAMES BENNETT ET AL. v. GEORGE WILLIAMSON.

1. Where slaves are bequeathed, the statute of limitations, in behalf of one who has purchased them from a stranger and kept them in possession the requisite time, gives a title against the executors, and a subsequent assent by him to the legacy will not enable the legatees to sustain an action for the slaves at law.

2. The saving of infancy, in the statute of limitations, as to slaves is meant for one who has an original cause of action at law.

APPEAL from the Superior Court of Law of CASWELL, at Fall Term, 1847, *Bailey, J.*, presiding.

The plaintiffs are the children of Lucy Bennett; and the action is detinue for a slave, Sylvia, and several of her children. Pleas, *non detinet* and statute of limitations.

The negro Sylvia formerly belonged to Emanuel Wicks, of Nottoway County, in Virginia; and two or three years before his death he lent her to his daughter Lucy, then the wife of Walker Bennett, of the same county. Soon afterwards Walker Bennett removed to Caswell County, in this State, and brought the slave, then a girl, with him. On 15 January, 1818, Emanuel Wicks made his will, and therein bequeathed as follows: "I give and bequeath unto the children of my daughter, Lucy Bennett, Sylvia and her sister Mary; all of which, with their future increase, I give to them and their heirs forever. It is my will that Walker Bennett shall not have the use or control over the negroes given as above to my daughter Lucy's children;
(122) but if she survives him, then my daughter, Lucy, may have the use of the said negroes during her widowhood, and no longer." The testator died in 1819, and his will was proved and letters testamentary granted to the executors in February, 1820. Walker Bennett continued in possession of Sylvia in Caswell County until some time in 1821; and he then sold and conveyed her to the defendant, Williamson, who has since been in possession of her and her issue, as they were born, up to this time, claiming them as his own. Walker Bennett died in 1835 and Lucy Bennett in 1845. The youngest of the plaintiffs came to full age in 1839, and this action was brought in October, 1846, after a demand. There was no evidence of an express assent of the executors to the legacy to the plaintiffs. On the part of the plaintiffs the depositions of the executors were taken in this cause, and they identify the plaintiffs as the children of Lucy Bennett, and also the woman Sylvia, now in the defendant's possession, as the negro given by the grandfather's will to the plaintiffs.

Upon the foregoing case the counsel for the plaintiffs insisted that the jury might find that the executors did not assent to the legacy until after the death of the mother, Lucy Bennett, and that, if the jury should so believe, the plaintiffs were entitled to recover. And the counsel moved the court so to instruct the jury. The court refused the motion, and instructed the jury that the plaintiffs ought not to recover, whether the executors assented to the legacy or not, or whether such assent was given before or after the death of the mother of the plaintiffs. Verdict and judgment for the defendant, and the plaintiffs appealed.

E. G. Reade for plaintiffs.
Norwood and *Kerr* for defendant.

RUFFIN, C. J. If there was no assent of the execu- (123) tors, the plaintiffs, of course, have no title at law. To maintain their action, then, an assent at some time must be supposed; and it is admitted on the part of the plaintiffs that the action is barred if the assent be not shown or presumed to have been given after the death of Mrs. Bennett in 1845. Now, nothing whatever is seen to fix that as the period of the assent. It is stated that neither party gave direct evidence of an assent at any time. Why, then, should the particular period mentioned be assumed as the true one. It has already been decided upon this will that the gift to the children was immediate and absolute, and that the mother was not intended to take any legal estate. *Bennett v. Williamson*, 18 N. C., 282. There was no reason, therefore, arising out of the contingent provision for her, why the executors should retain the legal title or withhold their assent to the gift to the children until their mother should die. It appears, indeed, plainly enough, upon the depositions of the executors, that they then considered and spoke of the negroes as belonging to the plaintiffs under the will. But it appears as plainly that they did not then so treat or consider them for the first time; but that they had always so regarded them, from the death of the testator, for they speak of Sylvia as having been then at Walker Bennett's, where the plaintiffs lived, and as belonging to the plaintiffs, and they give no intimation that they ever took or wished to take the negroes into possession or interfered with them for the purpose of paying the testator's debts or for any other purpose. Such a course of conduct by the executors for nearly twenty-seven years affords the highest evidence of an assent, and excludes an implication that it was given in the last of those years rather than in the beginning, or when it was first ascertained that the executors

did not need the negroes for the payment of debts, and left them in Bennett's possession with his children. On this
(124) ground, therefore, the court properly refused the instruction asked, and might have rested the case.

But, supposing the assent of the executors to have been given in 1845, and not before, the Court thinks that even then the jury was correctly advised that the plaintiffs ought not to recover. For the executors had lost their legal title before 1845 by the adverse possession of the defendant, and therefore their assent then could not vest a title in the plaintiffs. The saving of the statute of limitations, as to persons beyond the seas, does not include these executors, although they may have resided in Virginia and have never been in this State (*Earl v. McDowell*, 12 N. C., 16); and consequently, under the act of 1829, Rev. Stat., ch. 65, sec. 18, an adverse possession by the defendant for twenty-four years gave him the title from them. To this it is objected that infant legatees are thereby deprived of the benefit of the saving in their favor. But the saving of infancy is meant for one who has an original cause of action at law. It does not extend to a legatee; for there is no occasion for it, since by his appointment the executor takes in the first instance the personal estate, though specifically bequeathed, for the purpose not only of doing justice to creditors, but also for the further purpose of guarding the interest of the legatees, and especially of those under disability. The right of the legatee is not recognized at law until he gets the assent of the executor; but the legatee is like a *cestui que trust*, and is represented by the executor, who has the legal estate as a trustee. The legal title of the legatee is derivative and comes to him through the executor, and, consequently, it never can arise after the title of his trustee, the executor, has been extinguished. It was further objected that Walker Bennett came to the possession of the negroes as a bailee, and therefore that his possession could not become adverse to the bailor upon a mere claim of them as his own (*Collier v. Poe*, 16 N. C., 55), and it was thence
(125) inferred that the possession of the defendant, derived from Bennett, must be of the same character. But the inference is not a just one, for by the sale and purchase between Bennett and Williamson there was an express conversion, and the latter took a new possession in his own right. *Powell v. Powell*, 21 N. C., 379; *Green v. Harris*, 25 N. C., 210.

PER CURIAM. Judgment affirmed.

DAVID W. SANDERS v. SAMUEL SMALLWOOD.

1. To avoid a plea of a discharge under the bankrupt law, the plaintiff must show not merely a mistake or omission in making the inventory on the petition of the bankrupt, but a fraudulent and willful concealment.

2. Upon a case agreed, on such a plea, the Court cannot give a judgment for the plaintiff, unless the case states in terms a willful concealment, or unless such willful concealment *necessarily* results from the facts stated.

3. Where a marriage settlement had been made on a wife, and the husband afterwards obtained a certificate of bankruptcy and did not inventory the property so secured, and where it appeared also that the marriage settlement had not been properly registered, and was therefore void against creditors, but it did not appear that the husband knew of this defect in the registration, or, if he did, was aware of its operation in law: *Held*, that he could not, by the court, be declared to have been guilty of a fraudulent concealment in regard to such property.

APPEAL from the Superior Court of Law of ONSLOW, at Spring Term, 1847, *Pearson, J.*, presiding.

Debt on a bond, and plea of a certificate of bankruptcy (126) to the defendant as a voluntary bankrupt, granted by the District Court of the United States. The plaintiff replied that, at the time the defendant exhibited his petition in bankruptcy, he was seized of a certain tract of land specified, and owned certain slaves also specified, and that he did not set forth the same as a part of his property in the petition, or any inventory annexed thereto, but fraudulently and willfully concealed the same, and by means of such fraudulent and willful concealment of the said land and slaves procured the said court to declare him a bankrupt and decree him the certificate of his discharge.

Under these pleadings the parties drew up a case agreed, stating the following facts: Mary Boyd owned the land and negroes specified in the replication, and intermarried with Smallwood, the defendant, on 17 October, 1835; but, before the marriage, by a deed of marriage settlement made by and between herself, Smallwood and George Boyd, she conveyed the land in fee, and the slaves to George Boyd as a trustee, in trust for herself until the marriage, and afterwards in trust to and for her separate use, free and clear of any interest, control or power of the intended husband, and in trust to convey the same to any persons she might appoint in her lifetime, or by her last will, as if she were sole, and in case she should fail to make an appointment of any part of the property, then in trust as to it for her

next of kin. The deed was proved before the clerk of the County Court, 16 November, 1835, and registered the same day. The defendant did not include in his inventory any part of the land or negroes mentioned in the deed, and omitted, failed, and neglected to set out or disclose the same in any part of the proceedings in bankruptcy.

It was agreed between the parties that if the court should, upon these facts, think the plaintiff was entitled to recover, judgment should be entered for the principal money men-
(127) tioned in the bond, and interest; and if otherwise, then judgment for the defendant.

The court was of opinion with the defendant, and gave judgment accordingly, and the plaintiff appealed.

J. W. Bryan for plaintiff.
(130) *Stanly and Rodman* for defendant.

RUFFIN, C. J. The deed was not properly proved before the clerk, and, not being duly proved according to the directions of the act, it was void as against the husband's creditors. *Sanders v. Ferrill*, 23 N. C., 97; *Smith v. Garey*, 22 N. C., 42. But, admitting the property to have been in the defendant for the benefit of his creditors, it is not the necessary consequence that his certificate of bankruptcy can be impeached and avoided for the omission to insert that property in his inventory or
(131) otherwise disclose it to the court sitting in bankruptcy. For such omission may have been innocent, as the defendant might not have been aware of the legal insufficiency of the probate, or, indeed, might not have known how, in point of fact, the deed was proved; and the act of Congress does not invalidate the discharge for every omission of property, but only "for some fraud or willful concealment of property contrary to the provisions of this act." As the previous parts of the act require the party to file with his petition "an accurate inventory of his property, rights and credits, of every name, kind and description, and the location and situation of each and every parcel and portion thereof," it could hardly be expected that any discharge would stand, if the mere failure to give in some one article of property, however inconsiderable, and though unknown to the bankrupt, would invalidate it; for no person, or very few indeed, can furnish such inventory, including by accurate description *every* parcel or portion of his property or rights. Therefore, although it is made his duty to give such an inventory upon his oath—and he ought to come as nigh the exact truth as he can—yet a mistake or omission in making the

inventory is not to affect the certificate, but only a fraudulent and willful concealment. The certificate is avoided by the act as a punishment for the dishonesty of the applicant, and that is solely the policy of the provision. For the insertion or the omission of property in the inventory is of no consequence to the rights of the assignee or creditors, except as it may promote the convenience or inconvenience of getting it in and disposing of it, since the bankrupt act, unlike our insolvent act, vests in the assignee "all the property and rights of property, of every name and nature, and whether real, personal or mixed," and not merely that which is inserted in the schedule. It is plain, therefore, that the term "willful concealment" means, in this act, a fraudulent and dishonest attempt to withdraw from the use of his creditors property which the bankrupt knew they were entitled to have, and that, to that end, he corruptly (132) and knowingly omitted to disclose it. The replication in this case puts the point on the *quo animo*, and does so correctly; and, therefore, it was incumbent on the plaintiff to establish the bad purpose imputed to the defendant. That is properly an inquiry for a jury; and it is not perceived how the Court could give a judgment for the plaintiff upon a case agreed, in which the willful concealment was not stated in terms or did not *necessarily* result from other facts stated. *Prima facie*, there is a presumption in favor of innocence. But in the present case the fraud of the defendant is not directly admitted, nor can it be reasonably inferred; but, on the contrary, the honesty of his error and omission is hardly to be questioned. It was not his part to have the custody of the deed, nor to have it proved, nor to take any control over the property; nor does it appear that he had any reason to believe that the deed was not properly proved and registered, or that he ever set up any claim to any part of the property. Although, then, the property itself may be subject to the claim of his creditors through the assignee, yet the defendant himself and his subsequent acquisitions are protected from prior debts.

PER CURIAM. Judgment affirmed.

Cited: Knabe v. Hayes, 71 N. C., 111.

(133)

DEN ON DEMISE OF NANCY FOLK ET AL. V. WILLIAM R. WHITLEY.

A, in 1791, devised as follows, "I lend unto B. W. all the lands I own in Conehoe Island, etc., during his natural life, and after his death I give the above-mentioned land to his heirs lawfully begotten, to them and their heirs forever; and in case he should die without lawful issue of his body, then I lend the above-mentioned land to his bother, H. W.," etc.: *Held*, that the words here used, "heirs lawfully begotten," were words of limitation and not of purchase; that B. W. therefore took an estate tail, which by the act of 1784 was converted into a fee simple, and that the remainder over was void: *Held*, also, that the words "to them and their heirs," superadded to the words "his heirs lawfully begotten," did not affect this construction of the devise.

APPEAL from the Superior Court of Law of MARTIN, at Spring Term, 1847, *Bailey, J.*, presiding.

Both parties claim the premises under the will of Benjamin Whitley, the elder. It was executed on 10 July, 1791, and thereby the testator devised as follows:

"I lend to Henry Whitley, son of Elizabeth Nobles, a parcel of land, etc., during his natural life, and after his death I give the aforesaid land to his heirs lawfully begotten of his body, to them and their heirs forever; and in case the said Henry should die without issue lawfully begotten, I lend the said lands and plantation to his brother Benjamin Whitley, in the same manner as before mentioned to him.

"Item. I lend unto Benjamin Whitley, son of Elizabeth Nobles, all the lands I own in Conehoe Island, etc." (being the premises now in controversy), "during his natural
(134) life, and after his death I give the above-mentioned land to his heirs lawfully begotten, to them and their heirs forever; and in case he should die without lawful issue of his body, then I lend the above-mentioned land to his brother Henry Whitley, in manner as aforesaid."

By other clauses the testator lent land to Mary Whitley "during her natural life, and in case the said Mary should die without lawful issue begotten of her body, that then the said land lent to her to return to her sister, Lydia Whitley, in manner as aforesaid, to her heirs lawfully begotten of her body, to them and theirs forever"; and also lent land to Lydia Whitley, "and in case the said Lydia should die without lawful issue begotten of her body, my desire is that the whole of the land lent to her to return to Mary Whitley, her sister, in the same manner as aforesaid; and if Mary Whitley and Lydia each should die

without heirs lawfully begotten of their body, then the land before lent to them to return to Henry and Benjamin Whitley, in the same manner as the lands before lent to them, to their heirs lawfully begotten of their body, to them and their heirs forever."

There are then the following dispositions: "I lend Nancy W. Brooker a tract of land, etc., and my will is, if the said Nancy should have lawful issue of her body the land to be theirs and their heirs forever; and in case she should die without issue I give the said land to Henry Whitley, to him and his heirs forever. I lend to my brother John all my land on the north side of Conehoe Creek during his life, and at his death to be at his disposal. My will is that four acres of land I bought from, etc., be sold and the money given to my son Henry Whitley. Whereas I purchased a piece of land from W. Piner and he refuses to make a title, my will is that my executors bring suit for the land, and, if recovered, to be equally divided between Henry Whitley and Benjamin Whitley, to them and their heirs forever."

The testator then directs four young negroes to be pur- (135) chased, and he gives one of them to Henry Whitley, "the value of which to be taken out of his part of my estate," and that his working tools, hands and horses to be kept for the purpose of cultivating his lands, and that Elizabeth Nobles and her children, Henry, Benjamin, Mary and Lydia Whitley, have a sufficient support therefrom until Benjamin arrive at twenty-one. He also lends Elizabeth Nobles a negro man, Mose, during her life; and he gives to her and to each of her said children, and to Mary W. Brooker, Fanny Brooker and Lydia Deacon, by distinct clauses, several legacies of specific chattels, such as horses, cattle, beds and furniture.

Then came the following clauses: "Whereas the many legacies that I have already lent out, my desire is that if either of the parties should die without issue lawfully begotten of their body, to the survivor or survivors of the living parties, equally to be divided in manner aforesaid, to them and their heirs forever.

"It is my will and desire that all the rest and residue of my estate that I have not before given or lent be equally divided between Elizabeth Nobles' four children, Henry, Mary, Lydia and Benjamin, when my son Benjamin shall attain to twenty-one years."

Benjamin Whitley, the younger, entered into the lands devised to him and continued in possession of them until his death, which happened in 1846; and after that event the defendant

entered, claiming the premises under the said devise to him, or as being the heirs of his body lawfully begotten. They were the children of one Milly Brewer, born out of wedlock; and the said Benjamin, the younger, was their reputed father and intermarried with their mother in 1822, but had no issue afterwards. In 1823 he procured a private act of Assembly to be passed to legitimate the defendants as his children and heirs; and in 1839, upon his petition filed for that purpose in the Superior
(136) Court of Martin and due proof, they were declared legitimate by that court.

Henry Whitley died in 1843 and the lessors of the plaintiff are his children and heirs at law; and claiming as such, they brought this suit in February, 1847.

The case was submitted to the Superior Court on the foregoing facts, stated in a case agreed, and, the court being of opinion for the defendant, judgment was entered for him, and the plaintiffs appealed.

No counsel for plaintiffs.
No counsel for defendant.

RUFFIN, C. J. It is not necessary to consider the effect of the statute and decree of legitimation, nor whether the defendants could under them be regarded as answering the description of the heirs of Benjamin Whitley, lawfully begotten of his body, supposing them to take as purchasers, because the Court is of opinion that those are not words of purchase, but of limitation, by force of which, under the act of 1784, Benjamin Whitley, the younger, took an estate in fee, and therefore the limitation over, under which the lessors of the plaintiffs claim, is void. Undoubtedly a devise to one for life, remainder to the heirs of his body, is a proper estate tail, according to the rule of law called the rule in *Shelley's case*. It is precisely the same as a devise to one and the heirs of his body. That is the devise here, except that to the words "heirs of his body lawfully begotten" are superadded the words of limitation "and their heirs"; and we believe it is perfectly settled that unless such superadded words of limitation change the course of descent into another line or channel, they do not operate so as to convert the first words of limitation into words of purchase. In *Shelley's case* itself, 1 Rep., 93, there were such superadded words of limitation. It was a recovery suffered by Edward Shelley, a tenant in tail, to the use of himself for life, remainder
(137) to another for twenty-four years, and then to the use of "the heirs male of the body of the said Edward lawfully

begotten and of the heirs male of the body of such heirs male lawfully begotten," and then over. He had two sons, of whom the elder was dead, leaving his wife *enceint* of a son; but before he was born Edward died and his younger son entered; and the question was whether the elder brother's son, when born, had not the better right. It was held he had, as the heir of the body of his grandfather by descent, and not by purchase. There are many other cases to the same effect. *Wright v. Pearson*, 1 Edm., 119, and stated and commented on by Mr. Fearne, Cont. Rem., 126, was a devise to T. R. for life, remainder to trustees to preserve contingent remainders, remainders to the heirs male of the body of T. R. lawfully to be begotten "and their heirs": provided, that in case T. R. die without leaving issue male, then over; and it was held T. R. took an estate tail. The terms of that will are much like those now before us, except that in *Wright v. Pearson* trustees to support contingent remainders were interposed; but that, *Lord Keeper Henley* said, was a distinction without a difference, and therefore did not rely on that circumstance. In the more modern case of *Measure v. Gee*, 5 Barn. and Ald., 910, there was the same circumstance of a remainder to such trustees, and it did not affect the construction of the devise, which was to T. for life, remainder to trustees to support contingent remainders, "and after the death of T. to the heirs of the body of the said T., his, her or their heirs and assigns forever; but in case there should be a failure of the issue of T.," then over, upon which it was held that T. took an estate tail. Besides those, there are the accordant cases of *Goodright v. Pullyn*, 2 Ld. Raym., 1436, and *Den v. Shenton*, Cowp., 410, which are both strong, and particularly the former, where the devise was to A. for life, and after his decease unto the heirs male of the body of A. and his heirs for- (138) ever; but if A. should happen to die without such heir male, then over; and it was held to be an estate tail in A., and that the words "*his* heirs for default of such *heir* male," engrafted on "heirs male of the body of A.," did not qualify them so as to prevent the operation of the general rule. It is clear, therefore, that Benjamin, the son, took an estate tail by the words of the devise to him, and, consequently, that the limitation over to Henry was after an indefinite failure of the issue of Benjamin. The effect, then, is that the fee into which the act of 1784 turns the estate tail became absolute in Benjamin, and Henry and his heirs take nothing.

It was argued, however, for the plaintiff that the subsequent general clause changed the character of the limitation over in that respect by confining the time to the lives of the children

by force of the words "survivors or survivor." It is difficult to understand the clause referred to or apply it to any purpose. But, at all events, it seems impossible to say that it was thereby intended to qualify the previous devises of particular lands to one child with a limitation over to another one by converting the limitation into one to all the children, or to the "survivors or survivor of the living parties," to whom any gift was made. That provision must be referred to those dispositions in the will to which no special limitation over was annexed. But, however that may be, it is clear that lessors of the plaintiff are not within the clause in question, for the "survivors or survivor" necessarily means some or one of the donees who were living at the making of the will. The words are, "if either of the *parties* should die without issue, to the survivors or survivor" of *the living parties,* so as to make the limitation over, under this clause, contingent upon the event of survivorship. Now, Henry Whitley, under whom, as his heirs, the lessors of the plaintiff claim, died before Benjamin, and, of course, nothing (139) could vest in him or descend to his heirs under that clause.

PER CURIAM. Judgment affirmed.

Cited: McBee, Ex parte, 63 N. C., 334; *King v. Utley,* 85 N. C., 61; *Smith v. Brisson,* 90 N. C., 287; *Leathers v. Gray,* 101 N. C., 164, 166.

THE STATE TO THE USE OF SAMUEL McINTOSH v. JOHN G. BETHUNE ET AL.

1. As a certificate of bankruptcy may be pleaded in all courts, it may be impeached for fraud in any court in which it may be set up as a bar.

2. Where a son, being insolvent, conveyed property to his father for an apparently valuable consideration, and was permitted to remain in the continued possession and exercise of ownership over it for a number of years, a presumption of fraud is raised, either that the conveyance, though absolute upon its face, was not *bona fide* for the benefit of the father, but upon some secret trust for the insolvent vendor or donor, or, at the least, that there was intention to give the son a false credit. The presumption is not a conclusive legal one establishing the fraud, but must be submitted to a jury.

3. It is not every omission of property in the schedule of a bankrupt that invalidates the decree of discharge, but only a fraudulent conveyance or willful concealment of it.

STATE *v.* BETHUNE.

APPEAL from the Superior Court of Law of MOORE, at Fall Term, 1847, *Caldwell, J.*, presiding.

This is a *scire facias* to revive a judgment. The defendant McNeill pleaded a certificate of bankruptcy granted on his application by the District Court of the United States for this district. Replication, that the said defendant had (140) fraudulently conveyed to certain persons his lands, goods and credits, with intent to hinder the relator and his other creditors of their debts, and that he did not make a true and accurate inventory of his property, rights and credits, in his petition, but was guilty of the fraudulent and willful concealment thereof; and it then specifies sundry tracts of land and chattels which the defendant then owned and did not include in his inventory, and willfully concealed, and had before that time conveyed with the intent to defraud the relator. Rejoinder, and issue.

The original judgment was rendered in August, 1838, in a suit commenced in November, 1836. The petition in bankruptcy was filed in July, and the certificate granted in October, 1842. On the part of the plaintiff evidence was given that in February, 1838, the defendant conveyed to his father three tracts of land and a wagon, four horses, and gear; and that no part of that property was included in the defendant's inventory. Evidence was further given on the part of the plaintiff, tending to show that the conveyance to the father was made without any valuable consideration, or, if for any, for an inadequate one, and that the defendant continued in the possession and enjoyment of all the land, the wagon, horses and gear, up to the time of the trial in August, 1847, using them as his own. On the part of the defendant evidence was then given, tending to show that the conveyance from him to his father was founded upon a real sale for a fair price. Evidence was further given on the part of the defendant that in 1840 the lands which he had conveyed to his father were sold under a *fieri facias* against the defendant's property, and were purchased by one Morrison, who, however, had never taken a deed or possession.

Upon that evidence the counsel for the defendant insisted that the conveyance to the defendant's father was made in good faith and upon a sale for an adequate valuable con- (141) sideration; and, further, that the sheriff's sale to Morrison divested any title that might then have been in the defendant, or, at least, excused him for not including the property in his schedule; and, finally, that the certificate of bankruptcy was a conclusive discharge from this debt. Upon these points the court instructed the jury that the certificate of bankruptcy was not conclusive, but might be impeached in this suit for fraud

in the defendant's conveying his property without a valuable consideration, and to hinder his creditors, and willfully concealing the same in the proceedings in bankruptcy; that if the defendant retained the possession and enjoyment of the property after he had conveyed it to his father, as deposed to by the witnesses, it raised a presumption that the conveyance was fraudulent; but such presumption would be repelled if the jury believed that the conveyance was executed *bona fide* and for the considerations stated by the witnesses on the part of the defendant. And lastly, that the purchase of Morrison did not divest the title of the defendant, if he had any, and that the case was not affected by that transaction.

The jury found that the conveyance from the defendant to his father was made to defraud the defendant's creditors, and that the defendant did not make a full and fair surrender of his property and estate in his schedule, but willfully and fraudulently concealed parts thereof, to wit, the land, the wagon, horses and gear that had been so conveyed to his father, and, by means thereof, fraudulently obtained the certificate of bankruptcy. Judgment was rendered thereon for the plaintiff, and the defendant appealed.

No counsel in this Court for plaintiff.
Strange, with whom was *Kelly*, for defendants.

(142) RUFFIN, C. J. The instruction, respecting the operation of the decree and certificate of bankruptcy, is sustained by the express provisions of the act of Congress of 19 August, 1841. The first section provides for both a voluntary application of all debtors to be declared bankrupts and for an application by creditors of certain classes of debtors, to have them so declared. In a case of the latter kind it is, contrary to the rule in England, enacted in the close of the section that the decree passed by the court, as therein directed, "shall be deemed final and conclusive as to the subject-matter thereof." But the provision is different as to a case of the former kind. Though it may be in the power of Congress to discharge insolvents from their debts, at their own instance, it was, we believe, a new principle in the law of bankruptcy, and so strongly tends to encourage men dishonestly to contract debts which they do not expect nor mean to pay, as to make it highly proper, as far as possible, to guard the courts from imposition and protect creditors from fraud in obtaining a discharge. It is enough to put it in the power of a man, after running in debt, to spend all his property and then, upon his own motion and upon his

own oath, free himself and his future acquisitions from liability to his creditors. The law should therefore see, at least, that the party had no property, or that he had freely surrendered all that ought to go towards the satisfaction of his debts. It is a just and fitting requital to one who attempts to get (143) a discharge by denying that he owns property, when in fact he does, or by purposely concealing any part of what he does own, to refuse him, in the first place, the discharge upon any terms, and, in the next place, to hold a discharge obtained by such means ineffectual and void, whenever the fraud shall appear. Accordingly, the act of Congress contains several provisions intended to counteract the mischiefs that might arise from this new principle. The first section requires the debtor to set forth in his petition "an accurate inventory of his property, rights and credits of every name, kind and description, and the location and situation of each and every parcel and portion thereof." The fourth section enacts "that every bankrupt who shall *bona fide* surrender all his property" (with certain exceptions, not material here) "for the benefit of his creditors, and shall comply with the orders of the court, shall be entitled to a full discharge from all his debts, to be decreed and allowed by the court which has declared him a bankrupt, and a certificate thereof granted to him by such court accordingly, upon his petition filed for that purpose. And if any such bankrupt shall be guilty of any fraud or willful concealment of his property or rights of property, or shall have preferred any of his creditors, contrary, etc., he shall not be entitled to any such discharge or certificate." Thus far the act provides only for the grant or the refusal of the certificate by the court of the United States proceeding in bankruptcy. One who has been guilty of fraud or the willful concealment of property "shall not be entitled to a discharge or certificate." The bar to the discharge is not temporary, or until the debtor shall supply the omission in his inventory, or make a further and full disclosure, but it is peremptory and perpetual, at least, in respect of that application, as a penalty for the attempt to commit a fraud on the act by a fraudulent conveyance or willful concealment of property. But that is not all; for the Legis- (144) lature was aware that such dishonest practices might escape the vigilance of the most cautious judge, and intended, if they should, that notwithstanding the success in his application, the dishonest party should not permanently have the immunities meant for honest insolvents; and, therefore, it was provided further "that such discharge and certificate, when duly

granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, etc., and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, *unless the same shall be impeached* for some fraud or willful concealment by him of his property or rights of property as aforesaid, contrary to the provisions of this act, on prior reasonable notice, specifying in writing such fraud or concealment." The remedy of the creditor is not, therefore, an application to the court of bankruptcy, upon the ground of fraud newly discovered, but it is by replying the fraud of the bankrupt to his plea of the certificate, so as thereby to avoid the bar. As the certificate may be pleaded in all courts, it follows that it may be impeached in any court in which it may be set up as a bar. There was, therefore, no error in this part of the instructions to the jury.

The Court concurs, also, in the opinion with respect to the inference to be drawn from the continued possession and use by the defendant of the property he conveyed to his father. The whole was conveyed at once, and the personalty consisted of the perishable articles of a wagon and team. There was a conflict of testimony as to the consideration and purposes of the conveyance, whether there was an adequate or even any valuable consideration or not. In that state of facts, and when it appears that the defendant was at the time indebted in sums which remain unpaid to this day, and which, the defendant (145) says, he is unable to pay, a continued possession and exercise of ownership for upwards of nine years over all the property conveyed to his father, and, as far as appears, without any act or claim of ownership by the father, do surely raise a presumption of a fraud; that is to say, either that the conveyance, though absolute upon its face, was not *bona fide* for the benefit of the father, but upon some secret trust for the insolvent vendor or donor, or, at the least, that there was an intention to give the son a false credit upon his continuing apparent ownership of the property. The presumption is not, indeed, a peremptory and conclusive legal one, establishing *per se* the fraud. But, in the language of his Honor, those facts "raised *a* presumption" that the conveyance was fraudulent, which, however, would be repelled if upon the whole evidence, including the continued possession and enjoyment of the property, the jury thought that the conveyance was executed for an adequate valuable consideration and *bona fide*. Formerly, indeed, it was held that the continued possession of personal chat-

tels by a vendor, after an absolute conveyance, was *per se* fraudulent in law—so strong was the presumption then supposed to be. It is true, *Edwards v. Harben,* 2 Term, 587, and that class of cases have not been sustained in their whole extent for many years past. Yet they are not so far departed from as to authorize the Court to say that such continued possession and enjoyment do not create a presumption of covin, either by way of a secret trust or the giving of false credit. On the contrary, the ground on which such facts are allowed to go to the jury is that a presumption of fraud does arise from them, though it may or may not be sufficient to authorize the finding of the fraud, as it may be fortified or impaired by other evidence. Indeed, in the present case, the presumption of a fraud was cogent, considering the relation of the parties and the duration of the enjoyment; for a possession, derived from a father, of the (146) wagon and team, and continued so long, is, by presumption of law, a gift, unless the contrary be clearly proved; and a principal ground for that rule is the security of the son's creditors. *Carter v. Rutland,* 2 N. C., 97.

The purchase of Morrison, without taking a deed, did not divest the defendant's title to the land. Yet, it is not every omission of property in the schedule that invalidates the decree of discharge, but only a fraudulent conveyance or willful concealment of it. It might have been an honest mistake in the defendant in supposing that he ought not to inventory the land which Morrison had purchased. On the other hand, the delay of the purchaser for seven years to take a deed from the sheriff, and the enjoyment during that period by the defendant, afford reasonable grounds for suspecting the fairness of the purchase, and that some interest remained with the defendant. It was, therefore, as we think, a proper point to be left to the jury, whether the defendant had not some interest in the land and willfully concealed it; and, if the case depended on that point, the Court would feel obliged to award a *venire de novo.* But the point in respect to that land became immaterial by the finding of the jury as to the wagon, horses and gear; for, although the defendant may have innocently omitted his naked legal title to the land, if it was purchased *bona fide* by Morrison, yet that did not excuse the omission of the chattels, which Morrison did not buy, but which belonged to the defendant for the purposes of his creditors, and, as the jury found, were willfully concealed by him. Such concealment of those articles as effectually excludes the party from the benefit of the certificate as if he had also fraudulently concealed the land; and, therefore, the presid-

ing judge was right, as it turned out, in saying that Morrison's purchase of the land did not affect the case; and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: McCanless v. Flinchum, 89 N. C., 375; *Laffoon v. Kerner*, 138 N. C., 287.

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(147)

BOAZ ADAMS v. JAMES C. TURRENTINE.

1. An action of debt will lie against a sheriff under our statute for a negligent escape of a prisoner confined for debt, even though there was no actual negligence.

2. There are only two kinds of escape known to our law, of a prisoner confined for debt: one voluntary and the other negligent, except where the prisoner has escaped by the act of God or of the enemies of our country.

3. The only difference as to the liability of the officer between the two kinds of escape is that in the case of voluntary escape he is liable absolutely: in the case of negligent escape he has a right to retake the prisoner, and, if he does retake him upon fresh pursuit, he is not liable to an action of debt brought after such recapture, and when he has the prisoner in custody.

4. The meaning of the term "negligent escape" in our statute is the same that was given to that term at the common law.

5. It is a rule for the construction of statutes that when they make use of words and phrases of a definite and well-known sense in the law, they are to be received and expounded in the same sense in the statute.

APPEAL from the Superior Court of Law of ORANGE, at Special Term, on the second Monday of December, 1847, *Battle, J.*, presiding.

This action is debt against the sheriff of Orange for the negligent escape of Mordecai Flemming, committed to the defendant in execution. Plea, *nil debet*, and issue thereon. The plaintiff obtained judgment against Flemming in Orange County Court, and afterwards, at November Term, 1839, the bail brought him into court and surrendered him, and on the motion of the plaintiff he was committed in execution and was received by the defendant, who was then sheriff of Orange, and confined (148) him in the gaol of the county until 1 November, 1844, when the debtor escaped. It was admitted by the parties

that during the whole period of Flemming's detention, and when he escaped, the defendant was the sheriff of Orange; that the gaol was new, well constructed and strong, and that when the prisoner escaped the doors of the gaol were locked, and that he made his escape by cutting asunder two iron bars of the grating of a window of the debtor's room, and thereby made an opening through which he passed; that there was no apartment in the prison for a gaoler's residence, and that the escape took place in the night-time and without the knowledge or consent of the defendant; and that, from the form of the window, the position of the grating and the manner in which the bars were sawed, it appeared that Flemming was assisted to escape by some person on the outside of the prison.

Upon the foregoing facts the counsel for the plaintiff contended that he was entitled to recover, because the defendant was bound to keep the debtor safely, and that nothing would excuse him for not doing so but the act of God or of the enemies of the country. On the other hand, the counsel for the defendant insisted that, upon a proper construction of the act of Assembly, the defendant was not responsible in this action, as the debtor escaped without any actual negligence of the defendant or his gaolers. Of this latter opinion was the presiding judge, and he so instructed the jury, who found accordingly for the defendant, and from the judgment the plaintiff appealed.

J. H. Bryan, with whom was *Morehead,* for plaintiff.
Waddell and *Norwood* for defendant. (149)

RUFFIN, C. J. The action is founded on Laws 1777, ch. 118, which gives debt against a sheriff who shall "willfully or negligently suffer" a debtor taken in execution to escape. The question turns on the meaning of the term "negligently" in the statute. It seems a little singular that at this day a definition of that expression should be called for in ref- (150) erence to an escape. It is true, the statute does not directly define it, but the meaning, we think, is not the less clear. It seems to have been used as a word before appropriated to one kind of escapes, which was then the subject of legislation, and as already having a definite meaning in respect to that subject, and, therefore, not then needing explanation. At all events, it must be so understood, for it is an ancient rule for the construction of statutes that when they make use of words and phrases of a definite and well-known sense in the law they are to be received and expounded in the same sense in the statute. This has been applied to statutes creating crimes, and especially when the

enactments are merely affirmative; as in the act of 1779, making the "stealing" of a slave a capital felony. *S. v. Jernigan,* 7 N. C., 12. Indeed, this rule is not confined to the construction of statutes, but extends to the interpretation of private instruments. There are exceptions to it, where it is seen that a word is used in a sense different from its proper one in instruments made by a person *inops consilii.* But that is a condition in which the Legislature cannot be supposed, and, therefore, although the intention of the Legislature, as collected from the whole act, is to prevail, a technical term, having a settled legal sense, cannot be received in any other sense, unless, at the last, it be perfectly plain on the act itself what that other sense is. This principle, which is as well one of common sense as of common law, seems to be decisive of the present question.

There are, at the common law, two kinds of escapes: the one, willful, or voluntary, as it is oftener called; the other, negligent. Whether before or after judgment, the common law gave an action on the case for an escape of either kind. The difference, and the only difference, between the consequences of voluntary and negligent escapes of a debtor in execution was that (151) in the former case the sheriff could not retake the party, whereas in the latter he might; and if he did so upon fresh pursuit, and subsequently kept the party in safe custody, the reception formed a defense to an action afterwards brought. In that state was the law when the statutes 13 Ed. I., ch. 11, and 1 Rich. II., ch. 12, passed, and gave debt against sheriffs and the warden of the fleet for escapes of debtors in execution. Immediately the principles of the common law, touching the two kinds of escapes, became applicable to the construction of the acts, and they were applied to the actions given by the statutes as they had been to those given by the common law. The action of debt was held to lie as well for negligent as for voluntary escapes; and, indeed, evidence of the one might be given upon a count for the other. Nothing could purge a voluntary escape, when prosecuted in either form of action; and in both recaption before action brought for a negligent escape was a bar. *Ridgeway's case,* 3 Rep., 52; *Bonafous v. Walker,* 2 T. R., 126. The statutes were merely affirmative, only giving a cumulative remedy for escapes, without undertaking to define them; and, consequently, they were, as to their diversities in nature and in their defenses, left to be ascertained by the common law. What was before a willful escape remained so still; and to the action of debt for it there was no defense that would not have equally barred an action on the case. So, likewise, it was with respect to a negligent escape. It was constituted as before; no old bar

was taken away nor any new one given. The liability of the officer in debt depended, then, entirely upon the inquiry whether he would be liable in the action on the case. Recourse was, therefore, necessarily had to the common law to determine what is an escape, and what a willful or a negligent one. Whenever a person, once under arrest, is at large, unless by the consent of the creditor or the authority of law, it is an escape. It is said by *Mr. Justice Buller* in *Bonafous v. Walker* to be voluntary when it is by the consent or default of the officer. (152) All other escapes are negligent. To the same purposes respectable text-writers speak. Mr. Phillips says: "If it be with the knowledge or consent or by the default of the gaoler or sheriff's officer, it is a voluntary escape; if without his knowledge, it is a negligent escape." 2 Phill. Ev., 397. Mr. Stephens' N. P., 1212, states "that an escape is negligent when the party escapes without the consent of the sheriff or his officer; voluntary, where the sheriff or his officer permits him to go at large." And the words of Mr. Selwyn, N. P., 456, are that "voluntary escapes are such as are by the express consent of the gaoler; negligent, when the prisoner escapes without the knowledge or consent of the gaoler"; and he adds, upon the authority of *Stonehouse v. Mullins*, Str., 873, "that in either of those cases an action of debt may be maintained against the sheriff." In pleading, also, the same distinction is kept up. In a plea of fresh pursuit and recaption it is stated "that the said L. S. (the debtor) forcibly, wrongfully, privily, and without the permission, consent, knowledge, or default of the said defendant, escaped," etc.; and the replication is that the defendant "permitted and suffered" (or "voluntarily permitted and suffered") the said L. S. to go at large, whither he would, and to escape out of the custody of the defendant, etc. Chitt. Pl., 957, 958, 959, ch. 1170; 7 Went., 553, *et seq.*; 5 Went., 228. Though differing slightly in words, these various passages agree in substance that every going out of prison, with the knowledge or default of the keeper, is a voluntary escape, and that without his knowledge or default it is a negligent one; and that, for the purposes both of the action on the case and of debt. Indeed, it was so held in express terms by the Court of Common Pleas, in *Alsept v. Eyles*, 2 H. Bl., 108, in Trinity Term, 1792; and in so holding the Court proceeded on a long train of authorities from a remote period up to that time, and not weakened by a single one to the contrary. It is remarkable that at the same term the question was also before the Court of King's Bench (153) in *Elliott v. Duke of Norfolk*, 4 T. R., 789, in which, without hearing the plaintiff's counsel, the Court sustained a

demurrer to a plea that a mob of divers persons, riotously and feloniously, with force (the said force being so great and violent that the defendant could not resist it) demolished the prison and rescued the debtor against the will of the defendant, and although he did as much as in his power lay to prevent the same. It is thus seen that in the action of debt, as well as in case, the officer is liable for either kind of escape, except that when the escape is only negligent the action will not lie unless brought before recaption, and except, further, that it will not lie at all when the escape was occasioned by the act of God or the public enemies. Although these positions were not disputed by the defendant's counsel, but were admitted to be law in England, yet it was necessary to advert to them particularly for the better understanding of the grounds on which they rest and their bearing on the construction proper to be placed on our statute. For, while it was admitted that such was the nature of the escapes for which the common law gave and gives the action on the case, and for which debt is also given in England, by her statutes, it was contended in argument that by reason of the difference in the language of those statutes and ours, and of the difference in the condition and policy of the two countries, ours should receive a different construction—one whereby the sheriff is to be liable for such negligent escapes only as spring from "actual negligence," or from "gross and culpable negligence," as was contended for in another case against this defendant at the present term. But neither one nor the other of those reasons can, we think, produce the effect insisted on. So far from it, the difference between the enactments shows an intention to make ours the more explicit against the sheriff.

(154) The language of the Statute of Westm. II. is, "Let the sheriff take heed that he do not suffer (*non-permittat*) him to go out of prison without assent of his master; and if he do, and thereof be convict, he shall be answerable to his master of the damages done to him by such servant, according as it may be found by the country, and shall have his recovery by writ of debt." The statute, 1 Rich. II., after reciting that persons, divers, "at the suit of the party, commanded to the prison of the Fleet by judgment, be oftentimes suffered to go at large by the warden of the prison, sometimes by mainprise or by bail, and sometimes without any mainprise with a baston of the fleet, etc., without their assent, at whose suit they were judged, and without their gree thereof made, whereby a man cannot come to his right and recovery against such prisoners, to the great mischief and undoing of many people," then ordains, "that from henceforth no warden of the fleet shall suffer any prisoner,

there being by judgment at the suit of the party, to go out of prison, without making gree to the said parties of that whereof they were judged, unless it be by writ or other commandment of the King, upon pain to lose his office. And, moreover, if any such warden from henceforth be attainted by due process, that he hath suffered or let such prisoner to go at large against this ordinance, then the plaintiffs shall have their recovery against the same warden by writ of debt." The recital in the latter statute is only of escapes that are clearly voluntary, and the operative words of the former are, "*suffer* to go out of prison," and of the latter, "*suffer or let* such prisoner go at large," and, therefore, it might very plausibly have been contended (as it was, as late as the case of *Alsept v. Eyles*) that by a fair construction they only gave debt for escapes with the knowledge and actual permission of the officer. Yet the contrary has been uniformly deemed the proper construction; and it was held, first, that debt would lie for a negligent escape, and, secondly, that in order to support the action it was not necessary to show any specific act of negligence, as every escape (155) not arising from the act of God or the King's enemies was in law a negligent escape at the least. Why was this? The answer is obvious. It is that the statutes merely give a new remedy for escapes generally, without undertaking to define them, and without excepting a negligent escape; and, therefore, that the action must lie for whatever was by the common law an escape, for which an officer was, at the common law, liable in damages. Hence, Lord Coke makes no distinction between voluntary and negligent escapes, in his comments on the statutes, 2 Inst., 382. And *Lord Loughborough*, in delivering the judgment of the Court in *Alsept v. Eyles*, cites a case from the year book 33 Hen. VI., of an action of debt for an involuntary escape. The same point was expressly decided in *Stonehouse v. Mullins*, and in the other more modern cases already cited. Thus the statutes were construed in reference to the common law; and in giving debt for "an escape" they were necessarily held to mean whatever was legally an escape, whether voluntary or negligent. Then, how much more conclusively is the Court here bound to take the terms of art employed in our act, according to their previous legal acceptation, as equally embracing both kinds of escape as understood at the common law, when it does not merely say that debt shall lie if a sheriff "suffer" a debtor to "escape," but its tenor is, that it shall lie if he "willfully *or negligently* suffer such escape"? How is it possible for us to suppose that the Legislature meant in this act a different kind of negligence from that which was known to the common law and had been

applied to the statutes of Ed. I. and Rich. II.? It was argued, indeed, that inasmuch as the English statutes were in force here, some difference is to be implied from the fact of passing a statute here on the subject, and that the implication is strengthened by the change of phraseology in ours; and then, as our
(156) policy is less stringent than that of England in enforcing payment of debts by process against the person, it is insisted that it is a reasonable hypothesis that the difference intended was that in the case of a negligent escape the negligence must be actual, gross and culpable. But that course of reasoning is not just, according to the analogies of the law, nor in furtherance of justice and good morals. Very sufficient reasons may be assigned for the enactment or re-enactment by our act, without recurring to the considerations supposed. It does not appear that the statutes of Edward and Richard were ever in use here, and it is not certain that, from their terms, they would have been deemed in force. At any rate, they were couched in terms that had in some degree become obsolete, and were in themselves so vague as to have made it necessary to resort to a latitudinous equitable construction in order to embrace cases and persons that were within the mischief, though not the letter of those statutes. It is more consonant with modern and just legislation that the statute laws should plainly and directly provide for all they are intended to cover, instead of employing the vague generalities of the early ordinances of Parliament. Besides, our act was necessary in order to extend the remedy for escapes to cases of attachments or executions for money decreed in chancery; and, again, to make the action survive, as well against the executor of the sheriff as for the creditor's executor, which was not the case in England. Dyer, 271, 322; 1 Raym., 399. These considerations sufficiently account for the enactments of our statute and for its particular provisions.

That the language used in it is to receive a different interpretation from that which it ought and would, were it an enactment of the British Parliament, because in the habits of our country and the course of our legislation it is supposed a policy is seen less favorable to the rights of creditors than that which has prevailed so steadily in the mother country, is altogether in-
(157) admissible. In a republic, as much, at least, as in a monarchy, the laws as made and as administered should make men honest in the payment of their debts and officers faithful in the performance of their duties. Nay, it is of more consequence in a republican government, for its stability and wholesome operation depend more essentially on the virtue of the people, and nothing is more speedily or certainly destructive

of private and of public virtue than to relax the obligation of contracts and render the rights of creditors insecure. It is doing some evil and, we think, much injustice to our institutions to suggest that such a course has been settled on here, or that there is a tendency to it. The supposition cannot be tolerated that the law is of less binding force here than in any other country. The judiciary, at all events, can never adopt it, unless it should become—that greatest of curses which can befall an unhappy and degraded country—dependent, and then, necessarily, the weak or pliant instrument of popular impulses. The courts can act upon no such principle further than they may be compelled by positive and unequivocal constitutional enactments. None such have as yet passed, and we trust they never will. The statute now under consideration is, on the contrary, an honorable monument to the purpose of sustaining the modes derived from our forefathers of enforcing the satisfaction of recoveries by judgment. It seems, indeed, to be somewhat characteristic of the present age to regard with less severity than formerly the contracting of debts which the party is not able in the event to pay. The world is making an experiment how far the morals of mankind can be preserved, while persons shall be exempted from bodily restraint or punishment for such delinquencies. Our Legislature, like others, has to some extent ventured on this experiment. The issue can be made known with certainty only by time. But all the changes as yet made in our law profess to be for the relief only of honest insolvents—
that is to say, honest in the sense, at least, of having no (158) property, or of giving up what they have. There may
be a difference of opinion about the policy of that degree of immunity for obtaining a credit to which one was not entitled, and the details of the system may be defective in not sufficiently guarding against fraud in contracting debts and disposing of the debtor's property. If that be so it only shows that the system needs amending. But it is very far from showing a legislative intention or popular purpose, either to exonerate dishonest debtors—those who have property but conceal it, and will not surrender it for the benefit of creditors—from imprisonment altogether, or to subject them only to the insecure custody of an irresponsible keeper. As to such debtors the principles of the laws of our ancestors, whether the unwritten or the written laws, are preserved in full vigor here. We have the same executions against the body; and if the debtor cannot or will not avail himself of the benevolent provisions of the acts for the relief of insolvent debtors, he is liable to the same close and safe custody which the policy and the morality of the common law prescribed

as the means of enforcing payment of debts. It follows, if the gaoler will not execute the law in that respect, but from any cause, which he was not incapable of counteracting, "suffers or lets prisoners to go at large" (as expressed in St. 1, Rich. II.) "without their assent at whose suit they be judged, whereby a man cannot come to his right and recovery against such prisoners, to the great mischief of many people," that the creditor ought to have redress against the gaoler; and that, not merely in damages, which the jury may, in the dark, suppose to be adequate to the loss or inconvenience to the creditor, but to prevent such defaults, voluntary or negligent, and to render the redress effectual by giving to the party, in the words of *Mr. Justice Buller*, that remedy against the gaoler which he had against the debtor. Such is the plain and expressed in-
(159) tention of the act of Assembly. Unfortunately, too, for the argument drawn from the supposed opposition in the policy of our present and former governments, these provisions were not first introduced into the statute book by the act of 1777. They form parts of an act of 1755, ch. 2, found in the revisal of Davis, printed in 1765. By section 21 a summary judgment on motion is given against a sheriff who hath levied or received any money on execution, or hath taken the body of any defendant upon execution and "suffered him or her to escape with the consent of such sheriff"; and by the next section it is enacted "that where any sheriff shall have taken the body of any debtor in execution, and shall willfully or negligently suffer such debtor to escape," the creditor and his executor may have an action of debt against the sheriff and his executor. The act thus evidently preserved the legal ideas of the different kinds of escape—in effect defining that which is willful to be an escape "with the consent of the sheriff," and, consequently, that a negligent escape was one without such consent. If the term "negligent" is to be understood in any other sense than its ancient one, we ask, in what other signification did the Legislature use it, as far as can be collected from the act? What is meant by "actual," or "gross and culpable" negligence, in reference to escapes? The law had said that there was negligence which made the sheriff culpable and liable to the party's action if the escape occurred without the act of God or the public enemies; and there is nothing in the act to say that it should not be so deemed. Sheriffs are not the only persons of whom the same degree of diligence is exacted. It is required also of common carriers—the law properly putting both on the same footing, because the same reasons apply equally to both. *Lord Coke* so treats them in *Southcote's case*, 4 Rep., 83. They each under-

take a duty for reward, and it is a duty of such a nature as to present constant opportunities and strong temptations to betray the trust, if evidence of collusion or of some particular omission of due care and caution were necessary to charge (160) them. The security of those who employ common carriers and keepers of prisons from the most mischievous unfaithfulness renders it indispensable that they should be insurers, and, therefore, the law pays them, and justly holds them responsible, as such.

There is another consideration which presses strongly against receiving "negligent escape" in the act in any new sense. It is that it would put an end at once to the beneficial and well-established doctrine of recaption or fresh pursuit. Although the law will not allow the sheriff to imprison and enlarge the party at his caprice from time to time, and, therefore, after a voluntary escape the sheriff cannot retake the party, yet it is otherwise when the escape is without the connivance of the sheriff and merely negligent. In this latter case the debtor has no claim on the benignity of the law, even against the sheriff, for exoneration from reimprisonment, and therefore the sheriff is allowed to retake him. If the creditor choose to hold back and not sue the sheriff for the escape until he shall have been at the trouble and expense of a recapture and incurred the further risk of the debtor's detainer thenceforward until he satisfy the judgment, the law may well, and does, deny any action for the previous escape. But it is manifest that this supposes that an action lay for the escape thus purged by the recaption; and hence arise the interest, power and duty of the sheriff to recapture. Therefore, if in any case the creditor could not have his action against the sheriff for the escape itself, there would be no motive or obligation on the sheriff to retake the debtor. For the law does not give the action of debt for a default of the sheriff in not taking the body in execution or retaking it, but only for an escape from custody. Hence, if there be an escape by the act of God or the public enemies, no action arises therefor; and if in such case the debtor appear openly, there is no question that the right to the action of debt would (161) not arise for the default of the sheriff in not retaking him, but the creditor would be put to another *ca. sa.* Now, if the action does not, by our statute, accrue upon the fact of the escape, as legally importing negligence, but only when it is shown that there was "gross and culpable negligence," and committing the debtor to a new prison that was supposed to be secure and locking him in, is to defeat the action as the act of God or of the public enemies does, it follows that the sheriff is

not obliged, in this case more than in the other, to retake the debtor in order to give him a bar to the creditor's action—for, upon this hypothesis, the action of debt never arose. It is true, the creditor might issue a new *ca. sa.;* but that would only be effectual if the debtor remained within the jurisdiction, and, indeed, would give that sheriff no authority to go out of his county. The Legislature can never be supposed to have intended that a sheriff should be thus excused for an escape, though he make no effort to retake the debtor, and that recoveries by judgment should be thus defeated. Moreover, that the escape took place from a new and sufficient gaol is no palliation, but, upon legal analogy, an aggravation of the negligence by which it happened. Thus, a sheriff may return a rescue upon *mesne* process, as he carries the party to gaol; yet, if he get him once within the prison, though the custody be by *mesne* process only, he must hold him at all events, and a rescue will be no excuse, unless it be by the public enemies. This is laid down by *Chief Justice Pratt* in *Crompton v. Ward,* Str., 429, as law, not to be disputed. It is as indisputably law that a rescue of one taken in execution, and on the way to gaol, cannot be returned, unless it be by public enemies, for a sheriff is bound, in such case, to have his *posse* sufficient to overcome all force from rioters or mobs. Dyer, 241; *May v. Probi,* Cro. Jac., 419. By parity of reasoning it follows that still less can a rescue
(162) excuse the sheriff after he has the additional security of the walls of the prison for the custody of his prisoner in execution.

This question has been discussed thus elaborately, not because it appeared to the Court to have any intrinsic difficulty, but from the respect due to the opinion to the contrary of the learned judge who presided at the trial, and to the zealous, full and able argument at the bar; and, moreover, because the point is of importance in itself. No member of the Court, however, has entertained any doubt on it; but we have all (including our late brother *Daniel,* who heard the argument) considered it plain, both upon the general reasons here given and as concluded by adjudications in this State. We know that there have been many recoveries on the circuits both in case and debt for negligent escapes, as understood at common law. The propriety of them was never questioned, except in the single case of *Rainey v. Demming,* 6 N. C., 386; and there the eminent judge who sat it the Superior Court did not hesitate, as soon as he had the opportunity of looking into the authorities and conferring with the other judges, to retract his opinion and become the organ of the court to reverse his judgment. The case was decided at the

last term of the Supreme Court, as formerly constituted, and both *Judge Daniel* and I were members of it, and remember that neither of the five judges then on the Court had the least doubt of the law as there laid down, and of its application to the action of debt as well as to the action on the case then before the Court. It would be strange, indeed, if that which is in law a negligent escape in one action should not be a negligent escape in another action.

All the considerations, then, that can weigh with a court, the just principles for the interpretation of statutes, the authority of adjudications, and ancient writers on the law, and a regard to sound policy and good morals, concur in producing the conviction that the judgment is erroneous.

PER CURIAM. Judgment reversed, and *venire de novo* (163) awarded.

Cited: Mabry v. Turrentine, post, 205; *Willey v. Eure,* 53 N. C., 321; *S. v. Partlow,* 91 N. C., 552; *Smithdeal v. Wilkerson,* 100 N. C., 53; *Randall v. R. R.,* 104 N. C., 413; *S. c.,* 107 N. C., 750, 752; *Hood v. Sudderth,* 111 N. C., 224; *Patterson v. Gallither,* 122 N. C., 514.

DEN ON DEMISE OF WILLIAM A. WHITFIELD ET AL. v. HATCH WHITFIELD.

1. In an action of ejectment, where an arbitration had been agreed upon, and the award was not made until after the death of one of the lessors of the plaintiff: *Held*, that the award was void.

2. Though John Den by fiction of law may be the ostensible plaintiff in an action of ejectment, the Court will not suffer such a fiction to work an injury to the parties really interested.

APPEAL from the Superior Court of Law of WAYNE, at Fall Term, 1847, *Manly, J.*, presiding.

This was an action of ejectment, in which the following facts appeared:

The declaration contains three several demises, the first (164) from W. A. Whitfield, the second from James Herring, and the third from Buckner Hill. The defendants entered into the common rule, and pleaded not guilty. At Fall Term, 1846, the following order of reference was made: "This case is referred to James Griswold and Nicholson Washington, with leave to

choose an umpire in case they disagree, and their award or that of their umpire to be a judgment of this court." Between the referring of the case and the making of the award James Herring, the lessor of the plaintiff in the second demise, died. At Fall Term, 1847, the arbitrators returned their award. A motion was made on the part of the defendant for a judgment on the award, and the plaintiffs moved to set it aside. Both motions were overruled by the court, and the defendant appealed.

Mordecai and *Bryan* for plaintiffs.

(165) *Strange* for defendant.

(166) NASH, J. We concur with his Honor in his opinion. The arbitrators decide, upon a careful examination of the evidence, that W. A. Whitfield, the lessor of the plaintiff, in purchasing the land at the sheriff's sale, made under an execution against the defendant, Hatch Whitfield, issued on a judgment obtained by him against said Hatch, had been guilty of a fraud, and that the suit should be dismissed at the costs of the lessors of the plaintiff. In effect it is an award that a judgment of nonsuit should be entered by the court against the lessors of the plaintiff. This is a definite and distinct judgment pronounced by the arbitrators upon the case as submitted to them, and was certain and conclusive so far as this action was concerned. In *Blanchard v. Lilly* and *Rex v. Blanchard*, 9 East., an award directed that certain actions should be discontinued, and each party should pay his own costs. It was decided that the award was final and good, it being in effect an award of a *stet anteprocessus*. *Hartwell v. Hill*, Forrest, 73. There is, however, a fatal objection to the Court giving a judgment upon this part of the award. The arbitrators state that at the time they made the award James Herring was dead. His death was a revocation of the submission, so far as he was concerned. It is answered, however, by the defendant that John Doe is, in law, the plaintiff, and as *he* never dies, the trial of an ejectment is not delayed nor the case abated by the death of his lessor. This, in practice, is true. The action of ejectment is pretty much a fiction, resorted to by the courts to try the right of possession to land, and John Doe is a fictitious person. But the courts will never suffer their own fictions to work a positive wrong. The question is not, here, as to the abatement of the suit or of the demise from James Herring, but it is of the revocation of a power given by him to certain persons to try a certain cause; and it cannot admit of a doubt that the power of an arbitrator is determined by the death of the party to the submission.

or any one of them. 2 Tidd Pr., 877; 2 Chit. Pr., 432. (167) The Court, therefore, cannot give judgment for the defendant upon this portion of the award. Neither can the Court give judgment upon that portion which, as the arbitrators tell us, was the result of an equitable view of the case. It is not within this submission. When parties intend to submit all disputes the terms of the reference ought to be "of all matters in difference between the parties," and when the difference is intended to be of the matter embraced in a particular case, it should be "of all matters in difference in the cause," or words to that effect. *Smith v. Muller,* 3 Term , 624. Of the latter character is the order of reference in this case; *this* case is referred, etc. The case is one of ejectment, and there is nothing in the order looking out of the case. With a view to settle all the differences between the parties, the arbitrators have assumed the jurisdiction of the Court of Equity, settled their accounts and adjusted balances, and ordered and directed the payment of the moneys adjudged by them. This was not within the scope of their authority, as exhibited in the order of reference. If there was any other reference, the parties must enforce the award by some appropriate action in the proper court.

The Court, therefore, cannot grant to the defendant any judgment upon the award, but, in the language of his Honor below, "leaves the parties to such remedies as they may respectively have thereon."

We see no error in the interlocutory judgment of the court below.

PER CURIAM. Ordered accordingly.

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(168)

THE STATE UPON THE RELATION OF A. H. SAUNDERS, TRUSTEE, ETC., v. JAMES L. GAINES ET AL.

1. A clerk and master who sells land under an order of a court of equity for the purpose of partition acts under such order as an officer of the court, and is liable on his official bond for any breach of duty in not complying with the orders of the court in relation thereto.

2. Therefore, where a clerk and master sold land under such an order, received the proceeds, and was directed by the court to pay over to the persons properly entitled by law, and the heirs did not make their claim within three years: *Held*, that he was bound to pay the same, under the provisions of the first section of the seventy-sixth chapter of the Revised Statutes, to the trustee of

the county of whose court he was clerk and master, and that, for a default in doing so, he and his sureties might be sued on his official bond.

3. *Held*, however, that where the court had not directed the disposition of the money received on such sale, though it had remained in his office for three years, he was not liable to the county trustee.

APPEAL from the Superior Court of Law of MONTGOMERY, at Spring Term, 1847, *Battle, J.*, presiding.

A petition was filed in the Court of Equity for Montgomery County, of which the defendant was clerk and master, to sell land for the purpose of partition. The defendant was appointed a commissioner to make the sale, and he accordingly made the sale and returned his report to court. The last order made in the case was as follows: "Report of sale filed and confirmed, and ordered that the clerk and master of this court proceed to the collection of the purchase money, that he make title to the purchaser, and that he proceed, on the collection of said purchase money, to pay it over to those entitled to receive (169) the same." It is admitted that under this order the clerk and master has in his hands the sum of $100, and has had it more than three years. It is further admitted by the defendant that he has in his hands another sum of $10, which he has had more than three years, arising also from the sale of lands made by him as commissioner, upon a petition for that purpose, in which no final decree has been made, and which he retains under an interlocutory order made in the case, and that no one has applied for either sum, under the decrees. The relator, as Trustee of Montgomery County, demanded these two sums of money from the defendant, which he refused to pay. The action is brought in debt, on the official bond of the defendant, and the breach assigned, the refusal to pay. The pleas are conditions performed and not broken.

Section 1, ch. 76, Revised Statutes, makes it the duty of the clerks of the County, Superior and Supreme Courts, and every clerk and master, at the first court of which he is clerk, which shall be held after the first day of August in each year, to produce to the court a statement of all moneys remaining in his hands which were received by him officially three years or more previously thereto.

Section 2 directs that these balances shall be paid over to the officers appointed to receive and disburse the county funds; and, by section 3, the clerk failing to make the required payment is, together with a penalty, rendered liable to pay such moneys as he may be chargeable with under the provisions of the act. On the part of the defendant it is alleged he is not liable under this

act, because he did not receive the money as clerk and master, but as the commissioner of the court. Upon the case, as agreed between the parties, the court below was of opinion, and so gave judgment, that the defendant was liable upon his official bond for the $100 mentioned in the case, but not for the $10.

From this judgment both parties appealed. (170)

No counsel for plaintiff.

Strange for defendants.

NASH, J. We concur with his Honor on both points. The question now presented was before the Court in the case of the *Judges v. Dean,* 9 N. C., 132. That was an action of debt, brought against the defendant as one of the sureties to the official bond of Howell Jones, who was the Clerk and Master of Hertford County. A decree had been obtained under a bill for the sale of land, and the clerk and master was appointed to make it; a sale was made and the report confirmed, and an order made that the clerk and master should pay over to the complainants the bonds taken at the sale; and for a breach of this order the action was brought. On behalf of the defendant it was contended, there as here, that the act complained of was not a breach of his official duty; that the clerk had received the bonds, not as clerk, but as a commissioner; as an individual selected by the court for the performance of a certain act. The defense was not sustained by the court; it was decided that in every part of the business the clerk acted officially, and more particularly as to that part of the decree which required he should pay over the bonds, etc., for the reason that his office was the proper place for their deposit. In this case the order of the court is "that the clerk and master of *this* court proceed to the collection of the purchase money, that *he* make title to the purchasers, and that *he* proceed on the collection of the purchase money, to pay it over to those entitled to receive the same." Throughout this order the court speak to their own officer, as clerk and master, and not as commissioner. As clerk and master he is to make title, receive the purchase money, make distribution. It is impossible to conceive duties more (171) official than those to be performed under this order. In not paying over to the relator the $100, on his demand, the clerk was guilty of a breach of his bond. He was, by the decree, directed to pay the money to the parties who were entitled. It had been in his hands, as clerk and master, three years, without any one appearing to claim it, and, under the act referred to, the relator was entitled to have it delivered to him.

We see no error in the judgment of the court as to the $10. It was not sufficient to enable the plaintiff to recover that it should appear the money had remained in the office three years and that the defendant had refused to pay it; but it must further appear that it was money payable to some particular person. These are the words of the act. The case states that it was retained by the clerk and master under an interlocutory order of the court. What that interlocutory order was we are not informed; it may have been one requiring the clerk to retain it until the further order of the court; to enable the court, for instance, by a proper inquiry, to ascertain to whom it belonged. In such a case the refusal to pay it to the relator would not be a breach of his bond; the action of the court upon it was not final. We cannot, in this case, in relation to that money, see that the defendant has been guilty of any breach of his official bond.

PER CURIAM. Judgment affirmed.

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(172)

WILLIAM A. HAMLIN v. DANIEL MCNEILL ET AL.

1. Under the plea of *nul tiel record* to a *scire facias* against bail no evidence can be given of any objection to the bail bond. The bail bond is no part of the record.

2. A plea that the defendants were not bail is not a good one.

3. If the persons alleged to be bail wish in any way to avoid the bond, they must plead *non est factum*.

APPEAL from the Superior Court of Law of CHATHAM, at Fall Term, 1846, *Battle, J.*, presiding.

This is a *scire facias* against Daniel McNeill, John McNeill and Henry Arnold, as the bail of James McNeill, in an action of covenant brought by the plaintiff against James and Daniel McNeill. Among other pleas were that of *nul tiel record*, and also that John McNeill and Henry Arnold were the bail of Daniel McNeill, and not of James McNeill.

Upon the trial the plaintiff produced the record of his recovery against the principal, James McNeill. It appeared thereon that the action was brought against James McNeill and Daniel McNeill, to September Term, 1840, of the Superior Court, and that at March Term, 1841, the plaintiff entered a *nolle prosequi* as to Daniel, and afterwards recovered judgment against James, as set forth in the *scire facias*.

The defendants then gave in evidence the bond which, as they alleged, was that they entered into as the bail bond. It purported to have been given by James McNeill, Daniel McNeill, John McNeill and Henry Arnold, with a condition "that if the above bounden James McNeill and Daniel McNeill do make their personal appearance at, etc., then and there to answer William Hamlin of a plea of covenants broken to (173) his damage," etc.

The counsel for the defendants thereupon insisted that from the bond itself it appeared that Daniel McNeill was one of the defendants in the action of covenant, and executed the bond as a principal, and not as the bail of the other principal, James McNeill; and, therefore, that as the *scire facias* alleged that the three defendants were the bail for James McNeill, there was such a variance between the *scire facias* and the bond that the plaintiff could not recover in this action against any of the defendants. Other points were made by the counsel, but the court gave no opinion on any one but that here stated; and on that the opinion of the presiding judge was for the defendants. From a judgment accordingly the plaintiff appealed.

No counsel for plaintiff.
D. Reid, Strange, Kelly and *Haughton* for defendants.

RUFFIN, C. J. As the bond was not put upon the record by over, nor its execution, contents or operation put in issue by the plea of *non est factum*, the point decided could in no way arise. It was argued, indeed, that the bail bond was by law returned with the writ, and, therefore, that it makes part of the record, which the plaintiff was obliged to produce under the issue on *nul tiel record*. But it has been expressly decided to the contrary. *Mason v. Cooper*, 4 N. C., 83. So far from its being part of the record within that issue, the act of 1777, Rev. St., ch. 10, sec. 6, assumes that the plea must be *non est factum* in order to put a bail bond in issue, and prohibits its admission unless upon affidavit of its truth. If it formed part of the record its execution could not be contested at all; and the consequence would be that a person would be concluded (174) by the return of the sheriff. It is not like the cases cited from the English courts of *nul tiel record* pleaded to *scire facias* on recognizance of bail, for the recognizance is a judicial act of record, but the bail bond is an act *in pais* by the sheriff. Such being the case, there was no mode in which the defendants could legally get the bond before the court on these pleadings. The plea, that the defendants were not the bail of James Mc-

Neill, is but collaterally traversing the operation of the deed executed by the defendants themselves, which cannot be done, for as the liability arises upon the deed, it is to be put in issue by the party upon *non est factum* only. On that plea advantage may be taken of a variance in the tenor or legal effect of the instrument from that stated in the pleadings.

Of course, under those circumstances, it is unnecessary, if not improper, that the Court should discuss or decide on the correctness of the opinion given in the Superior Court.

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

Cited: Jones v. McLaurine, 52 N. C., 394.

(175)

GEORGE NORTHAM v. WILLIAM R. TERRY ET AL.

1. A sheriff has no authority to take a bond for keeping the prison bounds from a person arrested, until after he has been committed to close custody; and a bond so taken is void.

2. When a summary judgment is moved for on such a bond, it is not necessary for the defendants to plead *non est factum*, but they may give the whole matter in evidence to the court.

APPEAL from the Superior Court of Law of RICHMOND, at Spring Term, 1847, *Dick, J.*, presiding.

This was a motion in the Superior Court for judgment on a bond given to the sheriff for keeping the prison bounds. The plaintiff produced the bond, which had a condition in the usual form, reciting the arrest of William R. Terry on a *ca. sa.* at the suit of the plaintiff, and to be void "if the above bounden, W. R. T., shall keep himself continually within the rules, etc., until he shall be discharged therefrom according to law." In opposition to the motion the defendants gave evidence that the sheriff did not commit him to prison, but took the bond when Terry was arrested and before committing him to prison, and thereupon discharged him from custody; and they insisted that the bond was for that reason void. The plaintiff, on the contrary, insisted that the bond was, notwithstanding, good; and also that the defendants could not raise the objection, as they had not pleaded *non est factum* and supported it by affidavit.

The court being of opinion with the defendants, refused the motion, and the plaintiff appealed.

(176) *Strange* for plaintiff.

No counsel for defendants.

NORTHAM *v.* TERRY.

RUFFIN, C. J. The act of 1777, Rev. St., ch. 109, sec. 19, makes all bonds, taken from persons in their custody by sheriffs by color of their office, void, unless they be taken payable to the sheriff as such, and dischargeable upon the prisoner's appearance, etc., or upon "such persons keeping within the limits and rules of any prison"—unless, in any special case, any other obligation shall be directed. That act and those of 1741 and 1759, which provide for laying out the prison bounds, taking the bond, and the remedy on it, are *in pari materia* and to be construed together; and they show very clearly that when the bond is taken the party is not only to be a prisoner in custody, but also a prisoner in gaol. The act of 1741 provides that, "for the preservation of the health of such persons as shall be *committed to prison,*" the court may lay out limits; and every *prisoner,* not *committed* for treason or felony, giving good security to the sheriff to "keep within the said rules," *may walk therein out of prison,* and *such prisoner,* keeping continually within the rules, is declared a true prisoner. So the preamble of the act of 1759 recites that of 1741 as enacting that every person *committed to gaol,* not for treason or felony, upon giving bond and security to the sheriff, may have the liberty of the rules of the prison *to which he is committed;* and then it enacts the remedy by motion on bonds given by persons *committed*—not taken—on a *ca. sa.*

It further enacts that no person *committed to gaol* on execution on a judgment or the prison-bounds bond shall be allowed the rules. It is clear, therefore, that it was not the object of these acts to prevent the imprisonment of persons taken in execution; but, on the contrary, both the words and the policy of the statutes show the purpose to be simply to preserve the health of those who are so unfortunate as to be in prison. By taking a bond from a person in that situation, the sheriff is guilty of no escape in letting him out of the walls of the (177) prison, for he does only what the law requires of him, and the party is deemed a true prisoner while he keeps within the rules. The law supposes that he will thus continue a prisoner, under the obligations of the bond which it authorizes, and that if he forfeits the bond, it will, at least, not be with the concurrence of the sheriff, and *eo instanti* that it is given. But it is manifest that there can be no such idea when a bond is taken from a person before he is carried to prison. The purpose of such a bond can be no other than to indemnify the sheriff for a voluntary escape of his prisoner. This is set in a clearer light by supposing that the bond here had been conditioned that the debtor "should without delay go to the prison and thereafter

keep within the limits." It would be plain upon its face that it was taken for the illegal purpose just mentioned, of securing the sheriff for *not committing* the party to prison, and leaving him at large, to go or not to go there, as he pleased; and therefore it would be void by the express words of the act of 1777. It follows that as the fact does not appear in the bond, it may be averred and proved, for when a statute avoids an instrument for any cause, it can create no estoppel, but the facts which bring it within the statute may be shown by plea, as in a case of usury or of a bond taken by a sheriff contrary to the St. 23, Hen. VI.—from which, indeed, our act of 1777 was taken. It is apparent, then, that the bond was taken for ease and favor to the debtor, and to relieve the sheriff from the labor and risk of carrying him to prison, by indemnifying him for the escape. Consequently it is void, and the sheriff cannot discharge himself from his liability for the escape by assigning the bond, to be enforced by the creditor.

The manner of making the defense was also proper. The proviso, that the obligors shall not plead *non est factum* unless upon affidavit of its truth, is inaccurately expressed, for, (178) as the proceedings are summary, without process or declaration, there can, strictly speaking, be no plea. The meaning is that the obligors shall not be allowed to deny the execution—the *factum*—of the bond, returned on his oath by the sheriff, without doing so on their oaths. But they are not precluded from other defenses because they cannot deny the execution of the bond. It would, for instance, be a good answer to the motion for judgment, that the creditor had assented to the debtor's going out of the rules, or that the latter had paid the debt, or been in any other manner discharged. So, certainly, the defendants may insist that the bond, though given, is void because it is insensible or contrary to the statute. Objections of the last kind cannot in general be taken upon *non est factum*. If they appear upon the bond and declaration the defendant may demur or move in arrest of judgment. *Samuel v. Evans*, 2 Term, 569. That seems to be peculiar to cases arising under the Stat. 23, Hen. VI., for in other cases, as in usury or gaming, appearing on the instrument, the defendant cannot demur, but must plead the facts and insist on the statute specially. 1 Saund., 295; 1 Chit. Pl., 520. No doubt the defendant may also avail himself of defects apparent on the bond, and not stated in the declaration, by pleading *non est factum*, and thus compelling the plaintiff to produce the bond on the trial and exhibit its variance from the declaration or its intrinsic vice. But when its illegality, as here, does not appear in the bond, the

proper and established course is to put the facts on the record by plea, which will bring the case within the statute, concluding, "and so the said J. C. says the said writing with the said condition, etc., by virtue of the said statute is altogether void and of no effect in law; and this," etc. *Lenthall v. Cook*, 1 Saund., 156. As the present proceeding, however, is by motion, the whole matter is open to evidence without plea, excepting only that the creditor is not bound to prove the bond, unless the other party shall deny its execution on oath. The usual course is to hear affidavits on each side on which the (179) court acts. No doubt, however, that in a proper case, as when it is doubtful how the facts are upon the proofs, the court may direct an action to be brought or direct an issue to be tried by a jury. But the facts are not even disputed here, and the sole question was as to the validity of the bond, upon those facts, under the statute.

PER CURIAM. Judgment affirmed.

Cited: Whitley v. Gaylord, 48 N. C., 288; *S. v. Pearson*, 100 N. C., 417.

THE STATE ON THE RELATION OF LEWIS CLARK, ADMINISTRATOR OF JORDAN, v. WILLIAM S. CORDON.

1. Where in a suit on a guardian bond it appeared that the account between the guardian and the ward had been settled, and that the guardian gave his own bond to the ward, which was received by the latter in satisfaction of the balance due, and he then gave his guardian a receipt: *Held*, that this was a sufficient defense to the suit on the guardian bond.

2. The same defense which might be made to an action at law or suit in equity, brought in the name of the ward himself against the guardian, is good in an action brought on the bond.

APPEAL from the Superior Court of Law of BEAUFORT, at Spring Term, 1847, *Battle, J.*, presiding.

This is an action of debt on a bond given by Cordon (180) and the other defendants as his sureties, for his guardianship of the relator. The only breach assigned is the nonpayment of the sum of $1,092, a balance due from the guardian. Pleas, conditions performed and satisfaction. The facts were agreed and the jury gave a verdict subject to the opinion of the court upon the facts, with an agreement that the verdict should ultimately be entered according to the opinion of the court.

The case is as follows: In August, 1842, after the ward came of age, he and the guardian came to a settlement of the account between them, and Cordon was found in arrear in the sum of $2,228 for money of the ward that had come to his hands. In satisfaction thereof he assigned to Jordan notes of third persons to the amount of $1,136 and executed his own single bill under seal for $1,092, payable one day after date to Jordan, who accepted the same in satisfaction of the balance, and executed a receipt in full to Cordon, but not under seal. At the same time Jordan received from Cordon his negroes and other specific chattels belonging to him. Cordon was then the owner of large estates and was generally thought to be perfectly solvent, though it was known that he was a good deal in debt. He made some payments on his bond, reducing the sum due on it to $892, when Cordon, in 1844, failed and made an assignment of his property, and this suit was brought.

The court was of opinion that as Jordan had taken Cordon's bond in satisfaction of his debt, he could not recover in this suit, and directed the verdict to be entered for the defendants. From a judgment accordingly the relator appealed.

J. H. Bryan and *Shaw* for plaintiff.
Badger, Rodman and *Stanly* for defendant.

(181) RUFFIN, C. J. One is at some loss to conjecture why this suit should have been brought. The relator has a plain remedy against Cordon on his note, and if he were to recover against the sureties there could be little hesitation to relieve them in equity upon such dealings between their principal and his ward. However, that question is not before us now. But upon the question of law our opinion concurs substantially with that of his Honor.

The pleas are not drawn out, but according to a loose practice in which gentlemen of the bar indulge themselves there is a memorandum of "conditions performed and accord and satisfaction." It is, therefore, understood that proper pleas of those kinds are to be inserted in the record. It is contended for the relator that he was entitled to the verdict and judgment, because his receipt, not being under seal, is not an acquittance or release of the bond now sued on, and because one bond is not a satisfaction of another. Those rules are admitted; but they do not, we think, apply here. If this receipt had been an acquittance under seal it could not have been pleaded as a release of this bond. It does not purport to be such; and, indeed, the ward, not being the obligee in the bond, could not release it. It

purports to be an acquittance of the demand of the ward against his late guardian on the guardian account. Now, suppose it had been founded on actual payment in money, or to be in form a release of the balance of the account, pleas of payment or release of *this bond* would not be sustained thereby, considering this as an action of debt by the State and without connecting the relator with it. Yet no one can suppose that, after such payment or release, a suit would lie on the guardian bond in the name of the State, to recover, as damages to the relator for the breach of the condition, the very debt which he had received or released. So, likewise, in respect to the other objection, that one does not merge in another, it is plain that it does not touch this question, for the guardian bond is not a bond to the ward, and his demand against the guardian does not (182) accrue on it, but upon the receipt by the guardian of the ward's money. If, then, the ward were to sue for this debt in his own name it would be in *assumpsit* for money had and received, or upon an account stated, or in equity for an account; and, undoubtedly, in either of those actions it might be insisted that the single contract was merged in the higher security of the bond, and in equity the fair settlement would bar a decree for another account. Those defenses are not to be annulled by allowing the ward, instead of suing in his own name, to institute an action of debt on the bond in the name of the State, and, by technical refinements in pleading, exclude them. The actions on these official bonds are given to "any person injured or grieved," and, as was said in *S. v. Lightfoot*, 24 N. C., 306, the object is to afford a cumulative remedy, which the party grieved has, independent of the bond. The bond does not create or preserve a cause of action for the relator, but is intended only as an additional security for a demand otherwise arising, which might be recovered by the relator in another action directly in his own name. When he is entitled to no other suit, and has no demand which he could, himself, recover either at law or in equity, it would be an absurdity to hold that he was a person grieved, to whom the State gives the right of putting in suit the bond payable to her, or that damages are to be assessed as sustained by him by a breach. Of necessity, then, the Court is obliged to look at the purposes of the action and the nature of the recovery intended to be made in it. It is not given to every officious person, but only to such as may be injured, "to recover," in the words of the act of 1762, "all *damages* which *he* may have sustained by reason of the breach of the condition of the bond." The action on the bond is therefore answered by any matter establishing that the relator has no demand against the

guardian, and therefore that he has sustained no dam-
(183) ages. It is like a case of a bond with condition for the performance of an agreement or covenant, contained in another instrument. To an action on such a bond it is a good plea that the defendant performed all the covenants "in the said indenture" contained (*Gainsford v. Griffith*, 1 Saund., 51); or that the party discharged him therefrom. 3 Chitty Pl., 789; Doug., 684. Thus, whatever would answer an action on the covenants in the separate indenture will also answer the action of debt on the obligation; whether it be a performance, or discharge from the performance by release, or the satisfaction of the damages arising from a breach. For this suit is substantially for damages, and comes within the reasons in *Blake's case*, 6 Rep., 43, that the duty does not accrue to the relator in certainty by the bond, but by a wrong or default subsequent, together with the statute and the deed, gives him an action in the name of the State as the means of his recovering the damages to him from that default; and consequently a plea of satisfaction of *those damages*, or of a release of them, is good. It may be shown either that the damages never arose by reason of performance of the covenants or that the obligor had been discharged from performance, or that amends had been made for a breach of them to the relator. It could not have been the intention of the Legislature to enable one to recover in this form against the guardian and his sureties a demand for which he could not maintain a suit against the guardian by himself, either at law or in equity. The bond in itself creates no legal duty to the ward, but it is intended only to secure such as have otherwise accrued and continue to subsist independently of the bond.

PER CURIAM. Judgment affirmed.

Cited: Cabe v. Jameson, 32 N. C., 194; *S. v. Ellis*, 34 N. C., 266; *Ledford v. Vandyke*, 44 N. C., 481; *Harshaw v. McKesson*, 65 N. C., 694; *Cable v. Hardin*, 67 N. C., 475.

(184)

NATHAN WRIGHT v. THOMAS B. WHEELER.

1. Where a writ is signed by a clerk in blank and delivered by himself or his deputy to another person to be filled up and placed in the hands of the sheriff, the clerk is liable to the penalty of $100, under the act of 1836 (Rev. St., ch. 31, sec. 46), if no security for the costs has been given, especially after the writ has been returned and regularly docketed by the clerk.

2. In an action upon a statute to recover a penalty, the plaintiff must set forth in his declaration every fact which is necessary to inform the court that his case is within the statute.

3. Therefore, in an action on the statute (Rev. St., ch. 31, secs. 44, 46) against a clerk for not taking "sufficient security" for the costs, the declaration must set forth either that the clerk took *no security* or that he took insufficient security knowing it to be insufficient; otherwise a demurrer will be sustained or a judgment after verdict be arrested.

APPEAL from the Superior Court of Law of ROCKINGHAM, at Fall Term, 1847, *Bailey, J.*, presiding.

The defendant, in 1843, was and still is Clerk of the Court of Pleas and Quarter Sessions of Rockingham County. In that year a writ issued from his office, at the suit of one Charles G. Taft against the present plaintiff, Nathan Wright. The plaintiff's declaration states that the defendant did issue said writ, and caused it to be placed in the hands of the sheriff, "without having taken of him, the said Charles G. Taft, before issuing said writ, *sufficient* security, conditioned," etc. The action is brought under the act of 1836, Rev. St., ch. 31, to recover the penalty of $100, given in section 46. By section 44 "the clerk of every court of record, or his assistant in office, is required, before issuing any writ or other leading process, to take sufficient security of the person applying for it, conditioned," etc. Section 45 directs that the clerk, by himself or deputy, shall enter all writs issued by him in a book to be kept (185) for that purpose, together with the names of the plaintiff and defendant, and the place of their abode, and the names of the security or securities, and where they live, etc. By section 46 it is provided: "If any clerk, either by himself or his assistant in office, shall issue any writ, etc., otherwise than as by the two preceding sections directed, he shall pay to the defendant, etc., and shall also forfeit and pay the sum of $100, etc., for such offense so committed by such clerk or his assistant in office, recoverable, etc., one-half to the use of the person suing for the same, the other half to the use of the poor of the county." The action is brought to recover this penalty. The

case states that Mr. Read, a practicing attorney of the court, was furnished with a blank writ—by whom he did not know, but, he believed, by the deputy clerk—which was signed by the clerk, and that he filled it up and put it into the hands of the sheriff to be executed. It further appeared that it was executed and duly returned, and entered on the docket by the defendant, and the defendant afterwards executed a bond for the prosecution of the suit. Under these circumstances the presiding judge charged the jury that the plaintiff was entitled to their verdict, as it was a matter of indifference from whom Mr. Read received the writ, whether from the clerk, his deputy, or some member of the bar.

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

Waddell for plaintiff.
J. T. Morehead for defendant.

(187) NASH, J. In the opinion of the court below we entirely concur. The defendant, by signing the writ in blank, and suffering it, in that situation, to leave the office, became responsible for the act of the person who did issue it, without taking the security as directed by law. He thereby constituted Mr. Read his agent, or, in the words of the act, Mr. Read was his assistant in issuing it. The language of section 46 is, "If any clerk by himself or his assistant in office, etc.," and section 45 directs "that the clerk, by himself or his *deputy*, etc.," thereby recognizing in the act to be done by the clerk, before issuing the writ, a difference between the deputy and the assistant. The deputy is an officer, who must take an oath of office before he enters upon his duties, and those duties continue as long as his appointment endures. An assistant is one who is called in by the clerk, without any regular appointment, to aid him, either in conducting the business of the office generally or to aid him in some particular. A may be his assistant to-day, and B to-morrow, and they may both be assistants, either in doing the same matter or divers matters at the same time. But the defendant's liability in this case is conclusively shown by the fact that the writ was returned to him, and received by him, and regularly docketed. And he further became, after its return, the surety on the prosecution bond. By these acts he recognized and adopted the writ as regularly issued, and is concluded from the defense that it was done by one not authorized
(188) by him. Upon this latter ground the opinion of my brother *Ruffin* is founded on this part of the case. If there were no other objection to the plaintiff's recovery, we should,

without hesitation, affirm the judgment. But, unfortunately, the record discloses an error for which the judgment must be arrested. It is a principle in pleading that the declaration must set forth a good title to that which is sought to be recovered; if it does not, the defendant may demur, or move in arrest of judgment, or bring a writ of error. Archb. Civ. Pl., 109. In an action upon a statute, to recover a penalty, the plaintiff must set forth in his declaration every fact which is necessary to inform the court that his case is within the statute (Arch. Civ. Pl., 106); and it is laid down by Mr. Chitty in his treatise on pleading (1st vol., 405), that it is necessary in all cases that the offense or act charged to have been committed or omitted by the defendant appears to have been within the provision of the statute, and that *all the circumstances necessary to sustain the action must be alleged.* In *Bigelow v. Johnston,* 13 Johns., 429, the same principle is recognized, and the Court state it to be a well-settled rule in pleading that, in declaring for offenses against penal statutes (when no form is expressly given), the plaintiff is bound to set forth, *specially,* the facts on which he relies to constitute the offense. Here no form is presented by the statute. So in *McKeon v. Lane,* 1 Hall, 324, it is decided by the Court that the declaration must have sufficient certainty on its face to enable the Court to know what has been done. Facts are to be stated, not inferences or matters of law, and the party succeeds upon his facts as alleged and proved; nor will the conclusion *contra formam statuti* aid the omission. 1 Saund., 135, n. 3; 13 East., 258. In the case before us the declaration states the omission of duty on the part of the defendant to consist in not taking *sufficient security* before the writ was issued, but it does not inform us of what that insufficiency consists. Did it consist in not taking any bond (for that would come within the meaning of the statute), or did it consist (189) in taking security which was known to the defendant, when he took it, to be insufficient? The insufficiency meant by the Legislature must have been one of these two, and could not refer to any deficiency in goodness, arising after the bond taken, for it would come neither within the letter nor the meaning of the statute; that evidently refers to the state of the facts at the time when the security ought to have been taken. The declaration, then, is defective; it does not set forth specially the *facts* upon which the plaintiff relies to constitute the offense; it has not that certainty on its face as will enable the Court to see what has been omitted. The plaintiff has satisfied himself by stating only the inference which the law draws from the facts. *McKay v. Woodle,* 28 N. C., 353. For anything that appears

on the declaration the defendant may have taken a bond for the prosecution. If he did, the penalty was not incurred, according to the true construction of the act, although the surety might not, in fact, have been sufficient, unless the defendant willfully received him, knowing him to be insufficient. For it was certainly not the intention of the act to visit the clerk with the penalty, over and above damages to the party, for an innocent mistake as to the sufficiency of the surety. Therefore, the declaration ought to allege either that the defendant took no bond at all or that he took a bond from persons that were not sufficient, to the knowledge of the clerk. For it is not enough to bring a case within the words of the statute, but it must be brought within its meaning and legal effect, and as if the words had fully expressed the meaning. As it is the duty of this Court to look into the whole *record* and pronounce such judgment thereon as the court below ought to have done, the judgment must be arrested for the defect in the declaration.

PER CURIAM. Judgment arrested.

Cited: Croom v. Morrisey, 63 N. C., 592; *Turner v. McKee,* 137 N. C., 259; *Stone v. R. R.,* 144 N. C., 222.

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(190)

THOMAS M. CARTER v. MATTHEW PAGE.

1. Where A grants a license to B to flow the water from B's land through A's ditch, B has no right to increase the quantity of water so flowed, either by adding to the number of his ditches or clearing new land or enlarging his ditches, so that the flow of water will be greater than it was when the license was granted; and A may recover damages for any injury sustained thereby.

2. License to turn one stream upon A's land is not an authority to stop that, at the party's pleasure, and turn another in its stead.

APPEAL from the Superior Court of Law of CHOWAN, at Fall Term, 1847, *Pearson, J.,* presiding.

This is an action on the case for a nuisance, by the defendant's causing water to flow from his land on an adjoining tract belonging to the plaintiff, whereby the plaintiff's land was flooded and injured and the crops growing thereon destroyed. It was brought 27 March, 1844.

The facts were that one Haughton, under whom the plaintiff derived title, agreed orally in 1839, with the defendant, that he might cut two large ditches through Haughton's land, into which

he might open ditches at the upper end from the defendant's own land, so as to drain the water from the defendant's land into those larger ones, and thence through Haughton's tract. The defendant immediately cut the ditches from the line between himself and Haughton, through the plantation of Haughton, until they came together in the plantation, and thence to a swamp without the plantation. Haughton expressed himself satisfied with the ditches, when done; but it was further agreed that if they should prove insufficient to drain both plantations, the defendant should extend the large ditch lower (191) down the swamp.

The defendant then cut small ditches on his own land, so that, by means of some leading into the larger ones through Haughton's land, he drained the land he then had in cultivation, and, according to the evidence, caused a greater quantity of the water to pass off the defendant's land through Haughton's plantation than otherwise would.

In December, 1839, Haughton died, and the plaintiff entered into his tract under a purchase of the fee from his executors.

In 1840 the defendant opened a ditch from his land through one Rascoe's, in an opposite direction from the plaintiff's land, by means of which a considerable quantity of the water drained from the defendant's plantation which otherwise would have passed through the ditches on the plaintiff's land. In the spring of 1842 the defendant cleaned out several of the ditches on his own land, leading into those through the plaintiff's land, whereby a greater quantity of water was drained from the defendant's land into the plaintiff's, and with more rapidity than otherwise would have been.

In the early part of July, 1842, there was a very heavy rain, and the quantity of water that flowed down the main ditches from the defendant's land, besides that which ran into them from the plaintiff's own land, was so great as to become ponded at the lower end of the ditch, at the swamp, and to flow over the banks of the ditch and cover several acres of the plaintiff's land; and in August following a similar occurrence happened. On 11 July, 1842, the plaintiff gave the defendant notice that, after 1 January, 1843, he would resort to measures to protect his lands against the water by which they were flooded by the two ditches running from the defendant's farm, and that he should hold the defendant responsible for such damages as he had sustained or might suffer in consequence of such (192) flooding.

During December, 1842, and January and February, 1843, the defendant cleared fifty acres more of his land, and dug

ditches through the same, so as to turn the streams and water falling thereon, and cause them also to flow from his land into the ditches through the plaintiff's land; and at the same time he cleared out the ditches that he had before made, as above mentioned, so as to increase considerably the quantity of water flowing from his onto the plaintiff's land.

The counsel for the defendant insisted that the notice was not sufficient to enable the plaintiff to recover, and that, at all events, he was not entitled to damages for the loss sustained from the overflowing of his land by the rain and storm of July, 1842, before the notice was given; and, finally, if the jury should believe that, by means of the ditch through Rascoe's land, as much water was diverted from the plaintiff's land that would have gone on it from the defendant's old cleared land as he caused to flow on the plaintiff's land from his new clearing by the ditches through it, that then the plaintiff had no cause of action. But the court held otherwise on each of those points, and from a verdict for the plaintiff and judgment thereon the defendant appealed.

A. *Moore* for plaintiff.
Heath for defendant.

RUFFIN, C. J. This is the same case which was here in June, 1844, 26 N. C., 424. But upon the second trial the facts have turned out to be very different from those formerly stated. There the action seemed to have been brought because the defendant merely left things standing as they were when Haughton's license for the enjoyment of the easement expired (193) by the death of that person, for the defendant had done nothing afterwards. We held the defendant could not be sued for being thus merely passive under such circumstances; at all events, without previous notice to abate the nuisance by stopping his drains or diverting the water. We still think that position was right, though we were aware at the time that it carried the effects of a license once granted, but terminated, to the extreme verge of the law, and upon very nice distinctions. As the case now stands, however, all ground for a notice has sunk; for the defendant, since the license ended, has been active in continuing and increasing the nuisance by scouring his old ditches and opening new ones, whereby there is a much larger flow of water on the plaintiff's land than there would have been had the defendant really been passive. The defendant was, therefore, clearly liable for all the damages arising from such increase of water; indeed, for all the damages sustained from

the water, since by acting, when he had no license to increase the quantity of water, he adopted the nuisance as it then stood and made himself responsible for all consequences. No doubt, a license to drain one's land, by carrying the water on the land of another, includes the power to make ditches for that purpose, and also to cleanse them, while the license is in force. But, when it is determined, there is no more power to scour an old ditch, whereby the flow of water is increased, than to make a new one. They both stand on the same footing, being unauthorized.

It is very clear that the last point made is also against the defendant. In 1840 he turned in another way a part of the water that he had once been authorized to drain through the land that now belongs to the plaintiff. That was so much the better for the plaintiff, certainly; and the defendant may be entitled to his thanks for it. Two years afterwards the defendant cleared other land, not before drained through the plaintiff's canals, and turned the water from it upon the (194) plaintiff. That is the state of the case; and when sued for this latter act, which was wholly unauthorized, the defendant asks an abatement of the damages or a verdict for him because he has not done the plaintiff more damage by this injury than he would have suffered if the defendant had not done him the favor two years before. Amends cannot be made in that way for trespasses and nuisances, even if it be supposed that the defendant had been at liberty to allow a continuing flow of the water through the plaintiff's land which he carried through Rascoe's. License to turn one stream upon my land is not an authority to stop that at the party's pleasure and turn on another in its stead. The two acts are entirely independent, and no deduction can be made from the damages, accruing from one, on account of a benefit derived from the other.

PER CURIAM. Judgment affirmed.

Cited: Parker v. R. R., 123 N. C., 73.

(195)

THE STATE v. JOHN SHEPHERD.

1. A deed for land duly proved and registered is evidence, under our statute, of the transfer of the land, upon every occasion on which it may be offered—as in this case, upon the trial of an indictment for murder.

2. An indictment for murder which charges that the homicide was committed on the "*twefifth* day of August," instead of the *twelfth* day of August, is good, if not at common law, yet at least under our statute (Rev. St., ch. 35, sec. 12).

3. An order of removal, directing that "the *trial* of the prosecution shall be removed," etc., is sufficient without directing further that "*a copy of the record* of the said cause be removed," etc.

4. In an indictment for murder, if the time stated be anterior to the indictment, it is material and only material in one respect, and that is that the day of the death, as laid, is within a year and a day of that of the wounding.

5. If that appears from the stating of the month, the *day* of the month is immaterial—according, at least, to the proper construction of our act of Assembly, Rev. St., ch. 35, sec. 12.

APPEAL from the Superior Court of Law of COLUMBUS, at Fall Term, 1847, *Caldwell, J.*, presiding

The prisoner was convicted upon an indictment for the murder of James Flowers, and moved for a *venire de novo*, and then in arrest of judgment; and after a disallowance of the motions, and sentence of death, he appealed.

On the trial evidence was given on the part of the State that the deceased was found, late in the evening, lying by himself on the ground, near the prisoner's house, and badly wounded by stabs in the breast; and he said he was dying and that the prisoner had killed him, and desired that the prisoner should

(196) be called. The witness called the prisoner; and after having at first refused, he came to the deceased, and on being asked why he had served the deceased so, he replied "that he meant to do it," and then showed a knife, with which, he said, he had inflicted the wounds. On the part of the State evidence was further given that the prisoner had antecedently said that the deceased had bought his land at sheriff's sale, and that the day after he should get a deed for it he would kill him, unless he gave it up. And then the solicitor for the State offered in evidence a sheriff's deed to the deceased for the land, duly proved and registered, and offered to prove that it had been delivered by the deceased to the register, to be registered the day before the homicide. The counsel for the prisoner objected to

the deed being received in evidence, unless its execution was proved on the trial. But the court received the evidence.

The indictment was found in Robeson Superior Court, at a term beginning on the first Monday after the fourth Monday of September, 1846, and runs thus: "The jurors, etc., present, that John Shepherd, late, etc., on the *twelfth* day of August, in the year of our Lord one thousand eight hundred and forty-six," etc., made the assault on the deceased, "then and there being," and, "then and there" with a knife gave a mortal wound of, etc., of which, etc., "the said James Flowers then and there instantly died."

On the affidavit of the prisoner, that he could not obtain justice in Robeson, the court, on his motion, ordered "that the trial of this prosecution be removed to the county of Columbus, and that the trial be had on Tuesday of the next term of said court, and that the sheriff, etc., have the prisoner, etc., on Monday of the said Superior Court of said county of Columbus," etc.

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

RUFFIN, C. J. A deed for land, duly proved and (197) registered, passes the land by the express words of the act of 1715; and it is necessarily evidence to that purpose upon every occasion on which it may be offered. For the purposes of this trial, indeed, it would only have been necessary to show that the deceased professed to have a deed for the prisoner's land, and it would be immaterial whether it was genuine or not. But here it was *prima facie* genuine, and therefore was, at all events, properly received.

The Court has had some doubt of the sufficiency of the indictment, by reason of the false spelling of the day of the month. But, after consideration, we think ourselves obliged to let the sentence stand. We are inclined to the opinion that the indictment is good at common law, because, although the word "twelfth" is spelt wrong, by transposing the letter *f*, and placing it before, instead of after *l*, yet it is impossible to mistake the meaning. The false spelling makes no other word that could mislead. But at all events the act of 1811, Rev. St., ch. 35, sec. 12, cures the defect, if it be one. That makes the indictment sufficient if it "contain the charge expressed in a plain, intelligible and explicit manner," and forbids it "to be quashed or judgment arrested for or by reason of any informality or refinement, where there appears to the court sufficient, in the face of the indictment, to induce them to proceed to judgment." It would

certainly be much more satisfactory to the Court if the act had specified the omissions or defects which in the opinion of the Legislature ought not to invalidate the indictment, as has been done in England, by an act on the same subject—that of 7 and 8 Geo. IV., ch. 64. Among other things, that provides that no judgment shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for omitting to state the time at which the offense was committed in any case
(198) when time is not of the essence of the offense, nor for stating the time imperfectly. At common law it was indispensable that the indictment should fix some certain day at which every material fact constituting a crime occurred. But, although that was the form of the indictment, yet the authorities fully show it was only material that the time laid should be before the bill found, for, whatever time was laid, it was sufficient to prove on the trial that the offense was committed before the prosecution commenced—unless in those cases in which the time enters into the offense, and, of course, must enter into the description of it—as when an act is made criminal if done in the night, or between such and such days of the year, or the like. In respect to murder, the time is material in one respect, and but in one, which is, that it must appear on the bill that the day of the death, as laid, is within a year and a day from that of the wounding. For, if it be not so laid, the indictment does not charge murder, as the law attributes the death, not happening within a year and a day, to some other cause than the wounding. The present indictment is sufficient in that respect, for, upon the supposition that there is no day of the month laid, it lays the time of the felonious assault and stabbing to be in August, 1846, and that Flowers "then and there instantly died" thereof. The whole, therefore, occurred before the bill found, which was in the latter end of September or first of October following. The question then is, whether the act of 1811 will support an indictment which fails to lay a certain *day* as that of committing the crime, but plainly charges it to have been done in a certain month before the bill found. The Court is of opinion that in order to give effect to the clear purpose of the Legislature, and advance the policy of the act, it must receive that construction. The indictment is perfectly plain and intelligible as it is, for we see clearly that the crime of murder is charged, and that, as charged, it was perpe-
(199) trated before the bill was found. We know not what defect can come within the terms "informality or refinement," if the omission of the particular day of the offense committed do not; since, if it had been inserted, its only office

would be to show *a* time before the finding of the indictment, and the proof might be of any other day, provided only it also be before the finding of the bill. It has been heretofore held, under the act, that the indictment need not charge any matter which need not be proved on the trial. *S. v. Moses,* 13 N. C., 452; *S. v. Green,* 29 N. C., 39. Upon the same reasoning it follows that it is sufficient to lay any matter in the bill in the manner in which it is necessary to prove it, for that is the substance of the thing. If the bill here had laid the twelfth of August, 1846, as the day of the offense, proof that it was done in August, either before or after the 12th, or without specifying any day, would suffice. Then the indictment is unnecessarily formal, if it go into further particulars to which no proof need be adduced. To what good end, as the law stands upon the statute, would such an averment in the bill tend? None, unless it be to render the profession more studious of the precedents and emulous of perfect pleading. But that is a good result to the attainment of which we are not at liberty to sacrifice the intention of the Legislature, that the execution of justice shall not be delayed, nor offenders escape punishment by "exceptions in themselves merely formal," and technical niceties.

We probably do not perceive the point of the objection to the order of removal. It has occurred to us that possibly it was founded on the language of the order, being different from that of the statute, in this, that the order is, "that *the trial* of the prosecution be removed," whereas the language of the act is, that the court shall order "a copy of the record of said cause to be removed to some adjacent county for trial." But in substance the act is that the place of *trial* is changed, and (200) the other part of the enactment is merely directory as to the document on which the trial is to proceed, namely, on a transcript instead of the original record. Upon the whole order it appears that the prisoner and the cause were removed for trial in the Superior Court of Law of Columbus County, and it is seen in the record from Columbus (which is that before us) that a transcript from Robeson Superior Court was afterwards filed in the Court of Columbus, and the prisoner tried and convicted on it. Those things certainly show a full compliance with the law.

The Court therefore perceives no error in the judgment.

PER CURIAM. No error.

Cited: Phillips v. Lentz, 83 N. C., 243; *S. v. Morris,* 84 N. C., 763; *S. v. Anderson,* 92 N. C., 754; *S. v. Behrman,* 114 N. C., 804.

(201)

JOHN P. MABRY v. JAMES C. TURRENTINE.

1. Where one has been appointed coroner of a county, though it may appear he has not renewed his official bonds, as required by law, yet his acts as coroner *de facto* are valid, at least as regards third persons.

2. Nothing can excuse the sheriff for the escape of a debtor, committed to his custody, but the act of God or of the enemies of the country.

3. A recovered a judgment in Surry County Court against B, and issued on it a *ca. sa.* to Surry County. The sheriff returned "*Non est inventus*—the defendant in Hillsborough jail." A then sued out a *sci. fa.* against the bail of B, and they pleaded that "their principal was then confined as lawful prisoner in the jail of Orange County," and the jury so found. The following entry was then made of record: "It being made to appear to the court that B is now confined under legal process in the jail of Orange County, and it appearing that the said B is indebted to A in the sum, etc., it is therefore ordered that notice be issued to the sheriff and jailer of Orange County, commanding them to retain the said B in prison until he shall pay and satisfy the said debt and costs to the said A, or until the said B be otherwise discharged by due course of law." Notice of this order was duly served on the sheriff of Orange: *Held*, that by virtue thereof, the said B was duly committed to the custody of the sheriff of Orange, as on a *ca. sa.*, and that upon the escape of the said B the sheriff of Orange was responsible to the said A in the same manner and to the same extent as if B had been committed on a *ca. sa.*

4. Although this order may have been made, nominally, in the suit against the bail, yet that suit was in law but a continuation of the suit against the principal.

APPEAL from the Superior Court of Law of DAVIDSON, at Spring Term, 1847, *Bailey, J.*, presiding.

This is an action of debt for the negligent escape of Mordecai Flemming, committed in execution to the defendant, the (202) sheriff of Orange, by the Superior Court of Davidson on a judgment rendered in that court in October, 1839, for $604.30, with interest, etc., and $16.08 for costs. It was tried on *nil debet*, and the facts are stated as follows:

In May, 1839, one Adams recovered a judgment against Flemming, in Orange County Court, and at the succeeding November Term the bail of Flemming in that action brought him into the County Court of Orange, and surrendered him in discharge of themselves; and on the motion of the plaintiff, Adams, a *committitur* in execution was entered in that suit, and the present defendant, then the sheriff of Orange, took Flemming into custody thereon and committed him to prison.

The writ in the original suit of Mabry against Flemming was served in Surry County, where Flemming resided and gave

bail. On 12 February, 1840, Mabry sued out a *ca. sa.* on his judgment, directed to the sheriff of Surry and returnable to April Term, 1840; and it was returned, "*Non est inventus*—the defendant is in Hillsborough jail." The plaintiff sued a *sci. fa.* against the bail, and at the next term (April, 1841) they pleaded that the principal, Flemming, was then confined, under lawful process, a prisoner in the jail of Orange County, and so the jury found. The following entry was then made of record:

"It being made to appear to the court that Mordecai Flemming is now confined under legal process in the jail of Orange County, and it appearing also that the said Flemming is indebted to the plaintiff, John P. Mabry, in the sum of $604.30, with interest thereon from October Term, 1839, and also in the sum of $16.08 for costs: It is therefore ordered that notice be issued to the sheriff and jailer of Orange County, commanding them to retain the said Flemming in prison until he shall pay and satisfy the said debt and costs to the said plaintiff, or until the said Flemming be otherwise discharged by (203) due course of law."

A copy of the order was issued by the clerk and served on the defendant on 23 November, 1841, by Pride Jones, as returned by him under his hand as coroner. The counsel for the defendant objected to receiving the return in evidence, because, as he alleged, the said Jones was not coroner in November, 1841; and in support of the objection he gave in evidence a copy of the record of the appointment of Jones as coroner at February Term, 1840, and of his then taking the oaths of office and giving bond; and it not appearing of record that any bond had been subsequently accepted by the court, the counsel for the defendant insisted that the said Jones was not legally in office at the time his return purported to be made, and, therefore, that the return was not evidence. On the part of the plaintiff a bond was then introduced and its execution proved, bearing date in May Term, 1841, of the County Court, which purported to be the official bond of Jones, as coroner, and his sureties; and the clerk of the County Court proved that when he came into office after 1841 he found it among the records and papers in his office. The court overruled the objection, and received the return in evidence.

The plaintiff then gave further evidence that the defendant was the sheriff of Orange from 20 November, 1839, to 1 November, 1844, inclusive, and that on the latter day Flemming escaped from jail, after having been detained a prisoner there by the defendant from November, 1839.

On the part of the defendant evidence was then given that the

jail of Orange was new and strong, and that Flemming had effected his escape therefrom at the time mentioned by sawing asunder two iron bars of the grate in a window, and thereby making an opening large enough to get through; and also that the doors of the jail were locked on the evening before
(204) the escape. And he gave further evidence tending to show that Flemming was assisted to escape by some one outside the jail.

Upon the foregoing evidence the counsel for the defendant insisted that he was not liable in this action unless upon proof of a willful participation in the escape of Flemming, or of gross and culpable negligence of the defendant, and, also, that the order of the Superior Court of Davidson was not a sufficient commitment in execution to render the defendant liable in this action; and he prayed the court so to instruct the jury. But the court refused to give such instructions, and instructed the jury that Flemming was duly committed in execution on the plaintiff's judgment, and that the defendant, after being served with a copy of the *committitur*, was bound to keep him a prisoner in execution therefor, and was liable for his escape, although the jail was new and as good as any in the State, and although Flemming might have been aided in escaping by persons outside—unless such escape was effected by the act of God or the public enemies. The plaintiff had a verdict and judgment, and the defendant appealed.

J. H. Bryan and *Morehead* for plaintiff.
Waddell and *Norwood* for defendant.

RUFFIN, C. J. The coroner's return was properly admitted. The Rev. St., ch. 31, secs. 126-7, requires sheriffs and coroners to serve all notices in any cause or proceeding, and enacts that their returns on the notices shall be evidence of the service. But the objection is that Jones was not coroner, because he did not renew his bond, or the court did not accept a new bond from him, and that, therefore, he was not capable of holding the office, according to the statute. Rev. St., ch. 25, sec. 3. It is no part of the objection that Jones, who had been duly appointed and admitted into office originally, was not acting as coroner,
(205) and so recognized generally by the public authorities and the community.

Therefore, those facts are to be assumed; and, so assuming, it is clear that the want of an official bond does not impair the validity of his acts as *de facto* the coroner, in reference, at least, to third persons. *Burke v. Elliott*, 26 N. C., 355; *Gilliam v. Reddick*, *ib.*, 368.

In *Adams v. Turrentine, ante,* 147, the Court has already decided, at this term, that nothing can excuse the sheriff for the escape of a debtor, but the act of God or of the enemies of the country.

The remaining point is whether Flemming was duly committed to the custody of the defendant in execution on the plaintiff's judgment. Objection is made, both to the authority of the court to commit in this case and also to the form of the commitment. The authority of the court is questioned upon the strength of the provisions of Laws 1777, ch. 115, sec. 22, which provides that if a sheriff shall return upon a *scire facias* against bail that the principal is imprisoned by virtue of any process, civil or criminal, the court to which such *scire facias* is returnable shall, on motion of the plaintiff or bail, order that "such principal be retained where he shall be a prisoner until the plaintiff's judgment and costs shall be paid, or be otherwise discharged by due course of law; and that a copy of the order served on the keeper of such prison, before such prisoner's releasement, shall be sufficient authority for him to retain such prisoner until such order be complied with." The act further provides that this shall be deemed a surrender of the principal and a discharge of the bail. It is said that this gives a special authority to commit under the particular circumstances of a *scire facias* against bail and the return thereon of the sheriff of the imprisonment of the principal by him; and that, as the sheriff did not so return on this *sci. fa.*, and indeed could not, inasmuch as the imprisonment was in another county, the Superior Court of Davidson could not, in the debtor's and sheriff's absence, commit in execution. But we think the (206) nature of this enactment is entirely mistaken, and that the object was not to confer a jurisdiction or authority on the court in a particular case, but to give a privilege, in that case, to the bail, rendered necessary by the situation of our country and by our judiciary system, and to make it imperative upon the court to act on certain evidence to that end. It is an ancient common-law jurisdiction to commit in execution, by order of record, such persons as are surrendered by their bail, or upon a judgment recovered against one already in prison. The regulations of the modes of proceeding are not prescribed positively by statutes, but exist as rules of practice adopted by the courts from time to time, for the convenience of the suitors, bail and officers, to prevent surprise on the one hand and oppression on the debtor on the other hand. The subject is well treated and the nature of the jurisdiction well explained in Tidd Pr., 286, 364, and 2 Sellon Pr., 100 to 111, both as to the modes of committing and

to the *supersedeas*. Now surrenders may even be made before a judge at his chamber and he may order the *committitur;* and for any irregularity the debtor has his *supersedeas*. It is unnecessary to comment particularly upon those passages, as they have no obligation here, and are only referred to as showing the nature of the jurisdiction and the practice under it. The *committitur* is, in substance, a *capias ad satisfaciendum*, and therefore within the power of the court at common law to award, and is often indispensable where the party cannot resort immediately to his *ca. sa.;* for example, when the principal is surrendered during the term in which the judgment is taken. As the *ca. sa.* does not go until the term ended, the commitment in execution is absolutely necessary to the security of the creditor. Now, in England the course is to bring up a prisoner from another jail by *habeas corpus*, in order to his surrender and to charge him in execution; and it is generally highly proper in order (207) to identify him to the court and to the officer, and to justify the latter as to the person, if sued for detaining the wrong person, as well as for other reasons. But there is nothing in the nature of the thing to prevent the court from making an order of commitment of a person not present in court; and in many cases in this State the power to make such an order is absolutely necessary to the convenience of parties and the advancement of justice. By the act of 1777 bail have the right to surrender the principal; but it can be done only to the sheriff who made the arrest or in open court. But if the principal be in prison in another county, he cannot be surrendered to the sheriff who arrested him; and in many cases it would be impossible and, in most, highly inconvenient to bring him to the court in person. For our counties are so numerous and so distant from each other, and the terms of our courts so short, that after process served on the bail and returned, the *habeas corpus* could not issue and the party be brought in time to relieve the bail. True, the *habeas corpus* might be made returnable to a subsequent term; but that would be highly mischievous, as the sheriff cannot take bail after judgment, and would be compelled to retain the prisoner the whole time under all circumstances. Besides, the provision of the act extends to all cases, whether in the County or the Superior Court. Therefore, in cases in which a debtor is lawfully imprisoned in one county, and his bail is proceeded against in the court of another county, it was a justice done to the bail that he should be relieved upon showing those facts, without being required to make an actual surrender in court. It was the purpose of the Legislature to require such relief for the bail from the courts, and

also to make the return of the sheriff on the *scire facias* against the bail sufficient evidence. But, certainly, it was not intended to make that the only evidence, nor to say that (208) in the case of such a return only should the court order the *committitur*, or order it in the absence of the party. Why should it have been so enacted? It is possible, indeed, that the person in prison may be mistaken, and may not be the debtor. But suppose the fact, the prejudice can be no greater to him than would result from his arrest as the debtor under a *ca. sa.*, and his remedies would be as ready and as complete. In either case he would get a *supersedeas* or *habeas corpus;* in the latter he would have his action also against the sheriff, and in the former against the creditor or bail. But, at all events, the Legislature has positively enacted that, as is admitted, it may, and, as we think, shall be done in one case; and therefore there can be no reason why the courts may not mould their practice on this subject so as to make it, in other cases, conform in principle to the legislative enactment and promote the convenient administration of justice. In *Granbery v. Pool*, 25 N. C., 155, it was taken for granted that by the sound construction of the act of 1777 orders for commitment in execution might be made in all cases where the principal was imprisoned within the State, and a copy of the order served on the sheriff would justify his detention. It is impossible the act is to be restricted to the narrow limits contended for in this case. For, suppose the sheriff refuse to return the imprisonment, although the fact be so, is the bail to lose the benefit of the fact and be forced to trial at the first term and fixed with the debt? Surely not. The substance of the provision is that if the principal be imprisoned, so that the bail cannot surrender him personally in court, when the bail is called to answer for the debt he may make the fact appear, and he shall be discharged as upon a surrender. Indeed, the act says such imprisonment shall be *deemed* a surrender, and therefore it may be pleaded and relied on as having that effect. If the bail be discharged thereby it is a necessary (209) consequence that the creditor has a right to demand a *committitur* as a security for his debt. It may well be that the court is not bound and, therefore, would not accept a surrender of this kind from the bail before a step taken to charge the bail by *scire facias*, inasmuch as it may be in the power of the bail to surrender the principal when the creditor shall call for him. But in the case before us the bail was clearly entitled to be exonerated, since the creditor was seeking to fix the bail, and would have done so unless the principal's imprisonment authorized an

exoneration; and the exoneration of the bail gives the creditor the right in justice, and according to the act of 1777, to require the debtor's detention in execution.

It is the opinion of the Court, therefore, that the *committitur* was rightly made upon the facts found, when it was ordered.

But whether it was so or not, and admitting it to have been erroneous for the reason that it was not founded on a proper return of the sheriff, yet that would not excuse the escape. For the subject was within the jurisdiction of the court and the sheriff could not tell that the court had not acted on a case within the words of the act, and ought not to be prejudiced by any error of the court in that respect; and, therefore, the *committitur*, when served on the sheriff, was "a sufficient authority for him to retain the prisoner." If the sheriff be justified in detaining the prisoner, it is perfectly settled that he is bound to do so when there is a judgment. As he is not chargeable for the error in the judgment or process, such errors cannot excuse him, unless they be such as render the whole absolutely void, as for want of jurisdiction and the like. It is not for the sheriff to allege that the Superior Court made the order upon insufficient evidence. Moreover, it appears in this case that, in point of fact, Flemming, the plaintiff's debtor, was lawfully
(210) imprisoned under the custody of the defendant in the jail of Orange at the time that in the Court of Davidson he was so found to be, and ordered to be retained by the defendant. No injustice, then, was done to any person by the *committitur*, and the defendant was duly served with a copy of it.

It was further said that the order was made in the suit against the bail, and not in that between Mabry and Flemming, and for that reason that it was not a commitment on the judgment in the latter case. We do not know that we can understand that the order was made on the record of either suit, after it was made up and engrossed. We presume it was put on the minutes in the usual way during the term, and that it is to be considered a part of the record, to which it properly belongs ultimately. But we do not deem that at all material, as the suit against the bail is founded on the first judgment—being a *scire facias* on that record, to which *nul tiel record* is pleadable; and the whole is so much one suit that after judgment against the bail, execution may issue against the principal and the bail jointly. Rev. St., ch. 10, sec. 3. The order was therefore made in the suit against Flemming. It specifies the debt and costs, and substantially conforms to the precedents, as modified by the act, directing the court to "order the defendant to be retained where

he is prisoner until the plaintiff's judgment and costs shall be paid or be otherwise discharged by due course of law." It is in effect a *ca. sa.* and ought to render the defendant chargeable in like manner for an escape, as is settled in England, and has been held by this Court. *Lash v. Ziglar,* 27 N. C., 702.

PER CURIAM. Judgment arrested.

GENERAL RULES ADOPTED AT JUNE TERM, 1847.

In consequence of the changes made necessary by the act of the General Assembly, passed at the late session, whereby a term of the Supreme Court is required to be held at Morganton, and the period of holding one of the terms at Raleigh is altered, the Judges of the Supreme Court find it proper to make and publish the following rules:

I. All applicants for admission to the bar must present themselves for examination within the first two days of the respective terms.

II. All causes which shall be docketed before the eighth day of a term shall stand for trial during that term. All appeals which shall be docketed afterwards shall be tried or continued at the option of the appellee. All suits in equity transferred to this Court for hearing, and not docketed before the eighth day of a term, shall be continued at the option of either party.

III. During the two first days of the term the Court will hear motions and try causes by consent of the counsel on both sides. On the third day of the term the court will proceed regularly with the dockets: first, with that of the State; second, the equity; and third, the law causes.

IV. For the Court held at Raleigh, the clerk will docket the causes in the following order, namely: Those from the Fifth Circuit shall be placed first, then those from the Fourth Circuit, and so on to the First Circuit.

V. For the Court held at Morganton, the clerk will docket the causes in the following order, namely: Those from the Seventh Circuit shall be placed first, and then those from the Sixth Circuit, and then those from other counties.

VI. When causes are called they must be tried or continued, unless for special cause the Court should extend the time for the argument, and except that equity causes under a reference may be kept open a reasonable time for the coming in of the reports and filing and arguing exceptions.

E. B. FREEMAN,
Clerk.

MEMORANDUM.

The Honorable JOSEPH JOHN DANIEL, one of the Judges of this Court, died at Raleigh 10 February, 1848, aged about sixty-five years.

He was a native of Halifax County in this State. He was graduated at the University of North Carolina, and studied law under the late General Davie. Soon after coming to the bar his talents and attainments gained him a high eminence, and in 1816 he was appointed a Judge of the Superior Courts of Law and Equity, the judges of which courts at that time exercised the functions of a Supreme Court. In 1832 he was appointed a Judge of the Supreme Court, under its new organization.

The following proceedings of the Bench and Bar of the Supreme Court, upon the occasion of his death, are extracted from the minutes of the Court, where they were ordered to be recorded:

SUPREME COURT,
12 February, 1848.

Court met pursuant to adjournment. Present: the Honorable THOMAS RUFFIN, C. J., Honorable FREDERIC NASH, J.

On the opening of the Court, the Hon. James Iredell presented the following proceedings of the bar, and requested their Honors to order them to be entered on the minutes:

At a meeting of the Bar of the Supreme Court, held in the court-room on Friday, 11 February, 1848, in consequence of the death of Judge JOSEPH JOHN DANIEL, on motion, Hon. John H. Bryan was appointed chairman and Perrin Busbee secretary.

Hon. James Iredell moved that a committee of six be appointed to report resolutions expressive of the feelings of the meeting.

The chairman thereupon appointed the following gentlemen, viz.: James Iredell, Charles Manly, H. W. Husted, George W. Mordecai, George W. Haywood and Henry W. Miller.

Mr. Iredell subsequently reported in behalf of the committee the following preamble and resolutions, which were unanimously adopted:

The members of the Bar of the Supreme Court, now in attendance, have learned with deep grief the great loss which this Court and the country have sustained in the death of the Honorable JOSEPH J. DANIEL.

A judge so learned in the law, so patient in his investigations, so pure in his purposes, so gentle in temper, and so generous in his acts, could not be called from his labors without causing the most sincere sorrow in the hearts of those who have so long honored and loved him. Such sorrow we now feel, and but feebly express in the following resolutions:

1. That in the death of the late Judge DANIEL the Supreme Court of North Carolina has lost a learned and able jurist and the State an eminently good and useful citizen.

2. That in token of our respect for his memory we will wear the usual badge of mourning for thirty days.

3. That these proceedings be presented to the Court, at their first meeting, with a request that they be entered on the minutes.

4. That the Chief Justice be requested to communicate a copy of the foregoing resolutions to the family of the deceased, with the assurance of our sympathy with them under their sad bereavement.

JOHN H. BRYAN, *Chairman.*

PERRIN BUSBEE, *Secretary.*

To which Chief Justice RUFFIN, on behalf of the Court, replied as follows:

The surviving members of the Court receive with deep sensibility the proceedings of the bar in commemoration of our late and lamented brother. They but express our own emotions upon that melancholy event, and are no more than a just tribute to the unsullied purity of his personal character, his learning, and long and useful official labors.

He served his country, as a judge, through the period of very nearly thirty-two years; and he served acceptably, ably, and faithfully.

He had a love of learning, an inquiring mind, and a memory uncommonly tenacious; and he acquired and retained a stock of varied and extensive knowledge, and, especially, became well versed in the history and principles of the law. He was without arrogance or ostentation, even of his learning; had the most unaffected and charming simplicity and mildness of manners, and no other purpose in office than to "execute justice and maintain truth," and, therefore, he was patient in hearing argument, laborious and calm in investigation, candid and instructive in consultation, and impartial and firm in decision.

With these properties and his long experience, it is no wonder that he should have proved so eminent on the bench as to endear himself to his associates, gain the high respect and regards of the profession, and the confidence of the country. He did so to such a degree that few men, if any, were in life more honored among us, or in death, we think, will be more deplored.

Fully sharing in these sentiments and feelings, the Court readily joins in the expression of them, and yields to the wish of the bar that these proceedings should be entered on the minutes, and also communicated to the bereaved children of our late venerated friend and brother.

Mr. Mordecai, on behalf of the bar, requested that the response of the Chief Justice to their proceedings might also be spread upon the minutes of the Court, and it is ordered accordingly.

EDMUND B. FREEMAN, *Clerk.*

CASES AT LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

JUNE TERM, 1848.

DANIEL FREEMAN v. DOCTOR M. LISK ET AL.

1. After a debtor, arrested upon a *ca. sa.*, has given bond with sureties to take the benefit of the insolvent debtors' act, and has joined in an issue tendered by the plaintiff upon a suggestion of fraud, it is too late for him or his sureties to bring forward an exception to the writ of *ca. sa.* under which he was arrested.

2. Where a debtor, alleging that he is insolvent, appears in court under an arrest and bond given, he can only be discharged by taking the oath prescribed by law, or by the act or consent of the creditor.

3. If an issue of fraud has been made up, there can, upon that, be no nonsuit.

APPEAL from the Superior Court of Law of MONTGOMERY, at February Term, 1848, *Bailey, J.*, presiding.

The plaintiff obtained a judgment against the defend- (212) ant Lisk for the sum of $34.40, with interest from 6 September, 1838, on a warrant from a justice of the peace, whereupon a *capias ad satisfaciendum* issued, dated 10 January, 1845, upon which the defendant was arrested and gave bond for his appearance at the Court of Pleas and Quarter Sessions, to be held for said county on the first Monday of April, 1845, with Thomas Williams, Green Smith and Alexander Zachary as his sureties; and at said term the defendant proposed to take the oath prescribed for the relief of insolvent debtors, which was objected to by the plaintiff, and thereupon an issue of fraud

was made up; and there being no trial by jury in the County Court, the case was transferred to the Superior Court for trial, and at February Term, 1846, of that court the defendant Lisk appeared, and by his counsel moved to nonsuit the plaintiff. The plaintiff was then called and a nonsuit entered of record. At the subsequent term of the Superior Court, viz., at August Term, 1846, the plaintiff offered an affidavit that he had employed an attorney to attend to his cause against the said D. M. Lisk, and that his said attorney had omitted to enter an appearance for him. Whereupon, the court ordered that the cause be reinstated. The cause was not reached, and was continued at that term, and continued until Spring Term, 1848. The cause then being called, the plaintiff's counsel had the defendant Lisk called and, he failing to appear, moved the court for judgment against him and his sureties. This was opposed by the defendant's counsel, who objected, first, because of the invalidity of the *ca. sa.*; secondly, because the court had no power to set aside the nonsuit upon the affidavit made, and reinstate the case upon the docket. These objections were overruled by the court and judgment given against the defendant Lisk and his sureties for the sum of $52.31, to be discharged upon the payment of
(213) $31.11 and costs.

From which judgment the defendants prayed an appeal to the Supreme Court, which was granted.

No counsel appeared in this Court for plaintiff.
Iredell for defendants.

BATTLE, J. The first objection urged in the court below to the rendition of a judgment against the defendants cannot be sustained. After giving bond with sureties for his appearance in court to take the benefit of the act passed for the relief of insolvent debtors, and joining in an issue tendered by the plaintiff upon a suggestion of fraud, it is too late for the debtor or his sureties to bring forward an exception to the writ of *ca. sa.* under which the arrest was made. It was so decided in *Dobbin v. Gaster*, 26 N. C., 71, where the time and manner of taking such an exception are pointed out, and where the reasons why it cannot be urged with success, unless taken in apt time and by a proper mode, are fully and clearly stated.

The other objection was founded upon a mistaken apprehension of the effect of the judgment of nonsuit, rendered against the plaintiff at Spring Term, 1846. That judgment was irregularly and improvidently given, and was properly set aside, upon the application of the plaintiff at the ensuing term of the court,

for, this being a proceeding upon final process, a judgment of nonsuit could not in a technical sense have been given. After a debtor who has been arrested under a writ of *ca. sa.* has given bond for his appearance in court to obtain the benefit of the act for the relief of insolvents, he must pursue the course prescribed in the act in order to entitle him to take the oath and be discharged. The creditor who is to be affected by his discharge has a right, if he chooses to avail himself of it, to be present to see whether all the requisitions of the law have been complied with, and to object to the discharge if they have (214) not. If fraud be suggested by the creditor and an issue made up to try the specifications, the plaintiff may insist upon the trial, or he may withdraw, or, perhaps, by his neglect abandon the issue; but neither a withdrawal nor an abandonment of the issue will render it unnecessary for the defendant, the debtor, to take the oath, or entitle him to be discharged without taking it. The failure of the plaintiff to appear when the cause is called for trial is not a ground for a judgment of nonsuit against him, and the utmost effect it can have will be to give to the defendant the right to have a jury impaneled to try the issue and to have a verdict found in his favor for the want of testimony on the part of the plaintiff; or perhaps to treat it as a withdrawal or waiver of the issue by the plaintiff, so as to enable him to take the oath and be discharged. Unless he obtain his liberty by the act or consent of the plaintiff, which will be a satisfaction of the debt (*Hawkins v. Hall*, 38 N. C., 280), he can be discharged from liability on his bond only by taking the oath, and he must be prepared to do so whenever in the regular course of the business of the court he is called upon for that purpose; and if he fail to appear, when so called, his bond is forfeited, and judgment may be entered against him and his sureties.

His Honor, therefore, did right in overruling the defendants' objections, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Houston v. Walsh, 79 N. C., 40.

(215)

WILLIAM S. ASHE v. ALEXANDER MURCHISON.

1. An agent, as such, is not necessarily incompetent to testify for his principal. He can only be excluded on the ground of interest.

2. Where a principal is sued for the negligence of an agent, a *prima facie* case of responsibility to his principal should be shown before the agent is excluded as a witness, and then the principal ought to be permitted to examine him on his *voire dire* to explain his real situation.

APPEAL from the Superior Court of Law of NEW HANOVER, at Special Term in January, 1848, *Manly, J.*, presiding.

This was an action on the case against the defendant, Alexander Murchison, as the owner of a raft of timber, to recover damages for an injury done by said raft to a toll-bridge, the property of the plaintiff, William S. Ashe. The declaration stated that the plaintiff was the owner of a certain bridge over the Northeastern branch of the Cape Fear River, about a mile and a half above the town of Wilmington, and entitled to collect toll from passengers crossing the same; and that the defendant being the owner of a large raft of lumber, carelessly, improperly and negligently permitted his said raft to strike against the said bridge belonging to the plaintiff, so as to break down and destroy a large part thereof, etc. Plea, not guilty.

John Mills, a witness called by the plaintiff, testified that on .. November, 1845, about a little before sunrise, he was at the bridge of the plaintiff, when he observed a very large raft of lumber within twenty feet of the bridge, and coming against it on the floodtide. No person was on the raft, and it struck the bridge and carried away sixty-eight feet of it. On one end of the raft there was a piece of grapevine, which looked
(216) as though it had been cut. He believed there was a small piece of rope at the other end of the raft, but as to this he was not positive. He further testified that the bridge was the property of the plaintiff, he being then in possession of it and collecting toll from passengers.

M. Lewis was then called as a witness for the plaintiff. He testified that during the day, on the morning of which the raft had struck the plaintiff's bridge, as testified to by the first witness, or during the next day, he was at the bridge, when one H. McKeller (who it was admitted was the agent of the defendant) came to the bridge for the purpose of securing the raft and carrying it to Wilmington; that, while at the bridge and on the raft, he (McKeller) said that the raft was the property of the defendant, who resided in the county of Cumberland. He fur-

ther testified that the raft was one of the largest he ever saw; and that the bridge was the property of the plaintiff, who had been in possession of it and receiving toll from passengers over it for many years. In answer to questions by the defendant's counsel, he stated that the stream over which the bridge was built was a navigable stream, and that the bridge had been broken three or four times by rafts or flats.

The plaintiff then introduced one P. Tilley, who testified that he was at the bridge with the plaintiff while the raft spoken of was lying against it, and McKeller, defendant's agent, was on the raft; that some conversation ensued between the plaintiff and said McKeller, in which McKeller remarked, "he did not care a damn if the raft had broken down the whole of the bridge." This testimony was objected to by the defendant, but admitted by the court.

Other witnesses were examined, who testified as to the extent of the damages done to the bridge.

The defendant then offered H. McKeller as a witness. The examination of the witness was objected to by the plaintiff, for the reason that the witness, being the admitted (217) agent of the defendant, was responsible over to the defendant for the damages which the plaintiff might recover in this suit, and that the witness was therefore interested in defeating the recovery of the plaintiff. The court refused to permit the witness to be examined. The defendant's attorney of record offered to release or discharge the witness from any liability which he might be under to the defendant; but the court was of opinion that the attorney of record could not execute such a release for the defendant. The defendant then offered to examine the witness on his *voire dire*, to show the extent of his agency and that he would not be liable over to the defendant. This was also refused by the court.

The defendant insisted, and so asked the court to charge the jury:

1. That if the plaintiff's bridge was erected over a navigable stream, used by the public in conveying their produce to market, he must show a right to such bridge by grant or otherwise.

2. That if the plaintiff's bridge, erected over a navigable stream, had been built in a weak and insecure manner, so as to be liable to be broken down by ordinary rafts, it was the plaintiff's own folly, and he could not recover.

3. That if the injury resulted from pure accident, and without any negligence on the part of the defendant, then it was a case of loss without injury, and the plaintiff could not recover.

The court charged the jury upon the first point: That for

the purposes of this action, so far as the plaintiff's title to the bridge was involved, it was sufficient for the plaintiff to show that he was in the peaceable possession of the bridge and receiving the tolls.

Upon the second point he charged: That if the bridge was weak, it only affected the measure of damages, but not the plaintiff's right to recover.

(218) And upon the third point: That to entitle the plaintiff to recover, he must satisfy the jury that there was negligence on the part of the defendant, either by himself or his agent—defendant being bound to use ordinary care and diligence in the management of his raft; that the testimony made out a *prima facie* case of negligence in the defendant in permitting his raft to drift at large on the river without any person in charge of it, whereby the plaintiff was injured, and it was for them to say whether the defendant had explained this *prima facie* evidence of negligence on his part by showing that the condition and situation of the raft was the result of accident, which could not have been avoided by ordinary care on his part. And the whole circumstances were submitted to the jury.

The jury returned a verdict in favor of the plaintiff. Whereupon a rule upon the plaintiff was granted that he should show cause why a new trial should not be granted upon the ground of misdirection and the rejection of proper evidence; and upon argument the rule was discharged and the judgment given according to the verdict. The defendant prayed an appeal, which was allowed.

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

(219) BATTLE, J. Upon the question whether H. McKeller, a witness called for the defendant, was competent to testify for him under the circumstances in which he was offered, we differ from the judge who presided at the trial. The case states that it was admitted that the witness was agent for the defendant; but whether he was a general or special agent, whether he was an agent only to carry the raft of timber to Wilmington or only an agent to receive it there and sell it for the benefit of his principal, is not shown. An agent, as such, is not necessarily incompetent to testify for his principal. He can be excluded only on the ground of interest. If an action be brought against his principal for an injury sustained by reason of the agent's negligence or misconduct, then he is directly interested in the event of the suit, because he is responsible over

to his principal for the amount of the damages recovered against him. 1 Stark. on Ev., 112, 113. Now, in this case there was no evidence that the injury to the plaintiff's bridge was caused by the negligence or misconduct of the witness. It does not appear that he had charge of the raft at the time when it was carried by the tide against the bridge. From all that is shown, the raft might then have been under the charge of the defendant himself or of another agent. The first that we hear of McKeller is the day after the injury, when he went to the bridge for the purpose of securing the raft and carrying it to Wilmington. He then admitted his agency, but when it was assumed and what was the nature and extent of it was not stated. It seems to us that the facts and circumstances making out a *prima facie* case of responsibility to his principal should have been shown before the witness was excluded; and if such had been shown, then the defendant ought to have been permitted to examine him on his *voire dire*, to explain his real situation. 1 Stark. on Ev., 123. (220)

For the improper exclusion of the testimony of the witness McKeller a new trial must be granted; and as the case may then assume a very different aspect from that which it now presents, it is unnecessary for us to decide the other questions presented in the record. The judgment is reversed and a new trial granted.

PER CURIAM. Judgment reversed and new trial granted.

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(221)

DEN ON DEMISE OF WILLIAM L. COLLAIS v. REBECCA MCLEOD ET AL.

1. Where a judgment and execution from a justice were for a certain sum and costs, and for want of goods and chattels the execution was levied on lands, and returned, as by law directed, to the County Court, and an order for *venditioni exponas* to issue, etc., and the *venditioni exponas* directed the sheriff to levy and sell for the amount returned by the justice, and also *for interest on the justice's judgment: Held*, that the execution was not valid, even as to the purchaser at the execution sale.

2. An execution cannot require the collection of interest, when the judgment upon which it is issued does not give it.

3. Where a judgment is recovered by a sheriff, and the execution thereon is issued to him, any sale made by him under such execution is absolutely void and vests no title in the purchaser.

APPEAL from the Superior Court of Law of CUMBERLAND, at Spring Term, 1848, *Bailey, J.*, presiding.

COLLAIS *v.* MCLEOD.

This was an action of ejectment, in which the plaintiff claimed under a judgment, execution, *renditioni exponas* and sheriff's sale and sheriff's deed. The judgment was for $40.20 —the *venditioni exponas* for that sum *and interest.* The judgment and execution are in the name of Alexander Johnson, who was the sheriff of Cumberland; but it was proven by the sheriff (his testimony being objected to by the defendant, but allowed by the court) that although the judgment was in his name, it was originally, in equity, the property of the lessor of the plaintiff, except the sum of $5.20, and that before the sale, and even before the last *venditioni exponas* issued, the lessor of the plaintiff had purchased of and paid the said sheriff for all
(222) his said interest, and the said sheriff from thenceforth ceased to have any other or further interest in said judgment than he had in any other judgment upon which an execution had come to his hands.

A verdict was rendered for the plaintiff, subject to the opinion of the court whether there was such variance between the judgment and execution under which the plaintiff claimed as to vitiate the sale, and whether the sale, being made by the sheriff under the above-mentioned circumstances, was invalid; and the court being of the opinion upon those points with the defendants, directed a nonsuit, and the plaintiff appealed.

Strange for plaintiff.
W. Winslow and *McRae* for defendants.

BATTLE, J. Two objections were taken to the recovery of the lessor of the plaintiff on the trial of this case in the court below. The first was, that the writ of execution under which the lot of land in question was sold did not correspond with the judgment, and could not, therefore, be supported by it. From the transcript of the record it appears that Alexander Johnson recovered a judgment bearing date 23 December, 1840, against the defendant Rebecca McLeod for the sum of $40.20 and costs, upon which an execution issued, which, for want of goods and chattels, was levied on the lot of land now sued for, and due return thereof was made to the then ensuing term of the County Court. At that term the judgment of the justice was "affirmed for $40.20" and costs, and an order was made that a writ of *venditioni exponas* should issue for the sale of the land levied upon. The writ of *vendi. expo.* was issued accordingly, but in it the sheriff was commanded to make the amount of the said judgment "with interest from 23 December, 1840, until paid"
(223) and costs. It was contended that the execution did not

pursue the judgment, because it ordered the collection of interest, with regard to which the judgment and justice's execution were silent. We think that the objection is well founded. At common law a judgment did not carry interest when an execution, or a *scire facias* to revive it, was issued upon it. But if a new action were brought upon the judgment, then interest was allowed. *Anonymous,* 3 N. C., 26; *Deloach v. Work,* 10 N. C., 36. The act of 1807 (1 Rev. St., ch. 31, sec. 95) was passed for the purpose of amending the law in this respect. It provides that "in all actions brought to recover money due by contract, except on penal bonds," the jury shall distinguish by their verdict what is due as principal money from what is due as interest, and that judgment shall be rendered thereon that the sum due as principal money shall carry interest until paid. Whether this applies to actions brought by warrant before a single justice, where there is no jury, or whether a fair interpretation of the "Act concerning the power and jurisdiction of justices of the peace" (1 Rev. St., ch. 62) confers a similar power in such cases upon a single justice, it is unnecessary for us to decide. It is clear that an execution cannot require the collection of interest when the judgment upon which it is issued does not give it. The writ of *vend. expo.,* then, in this case varies from the judgment in this particular; and it being incumbent upon a purchaser, claiming under a sheriff's sale, to produce, besides the sheriff's deed, a judgment and an execution corresponding therewith, the title of the plaintiff is defective. *Dobson v. Murphy,* 18 N. C., 586; *Ingham v. Kirby,* 19 N. C., 21; *Blanchard v. Blanchard,* 25 N. C., 105.

The second objection presents a question of more difficulty; but, after much reflection and after consulting all the authorities bearing upon the subject to which we have been referred in the argument or which we could ourselves (224) find, we have been led to the conclusion that this is also fatal to the title of the lessor of the plaintiff. It is well established that at the common law process should be issued to the coroner in all cases where the sheriff is a party, either plaintiff or defendant; and that if, in such cases, it be issued to the sheriff, it will be set aside as irregular, upon the application of the other party to the court from which it was issued. 1 Black. Com., 349; 1 Sir W. Black., 506; 4 Inst., 271; Watson on Sheriffs, 37. Our Legislature evidently proceeded upon the supposition that such was the law, in passing the acts of 1779 and 1821 (1 Rev. St., ch. 25, sec. 7, and ch. 31, sec. 59), which provide for the execution of process in all cases where there is no proper officer in any county to whom it can or ought to be

directed. *Anonymous*, 2 N. C., 423. But admitting that such is the law, and that upon the application of the defendant in this case the writ of *vend. expo.* would have been set aside, it has been contended before us that the sale made by the sheriff was valid, and that the plaintiff's lessor acquired a good title by his purchase. We think that upon principle it ought not to be so, and upon authority it is not so. Self-interest is so strong a principle of action, and its tendency to pervert the judgment and improperly to control the conduct of all men is so direct, so constant, and oftentimes so overpowering, that the law absolutely and totally prohibits a party to a suit from being a judge in his own case; and, with a few exceptions founded upon special reasons, he is equally prohibited from being a witness for himself. The danger of being drawn aside from the line of propriety, where the execution of process, whether mesne or final, is committed to a party, is nearly, if not equally, great. The law, then, should equally exclude him from acting in such a case; and this can be most effectually accomplished by holding the process, and everything done under it, null and void. We accordingly find that though there are some ancient cases (225) to the contrary, it was adjudged in 37 Eliz. in *Candish's case* (cited in a note to *Sir Ralph Rowlett's case*, Dyer, 188, pla. 8) that if a sheriff has a statute extended, and a *liberate* is directed to him, it is void. See, also, to the same effect, *Elston v. Britt*, Moore, 547, and Viner Ab., Tit. Sheriff, Letter P, sec. 5.

We have been unable to find any case in the modern English reports bearing directly upon this question, and our search among the reports of the United States and of the several States has been almost equally fruitless. The reason, doubtless, is that such cases are of very rare occurrence. We have, however, found a case in the Kentucky reports where it was decided that a deputy sheriff could not legally execute a *fieri facias* which issued in his own name and for his own benefit, and that his levy under it upon a personal chattel was void. *Chambers v. Thomas*, 1 Littell, 268. The assignment of all his interest in the judgment by the sheriff, before he sold the land in question, makes no difference. He still continued the legal owner of it, and his sale under the execution in his own name was therefore null and the purchaser acquired no title. *May v. Walters*, 2 McCord, 470.

PER CURIAM. Judgment affirmed.

Cited: Fleming v. Dayton, post, 455; *Rutherford v. Raburn*, 32 N. C., 147; *Bowen v. Jones*, 35 N. C., 27; *McNeill v. R. R.*, 138 N. C., 4.

(226)

THE STATE v. JOHN CLARK.

1. In an indictment for larceny the goods alleged to be stolen may be described by the names by which they are known in trade, and the same principle extends to articles known by particular names in all the arts, pursuits and employments of life.

2. Where a man was indicted for stealing a "bull tongue," and it appeared in evidence that he had stolen a particular kind of ploughshare, usually known in the neighborhood in which he resided by that name: *Held*, that the allegation of the indictment was well supported by the evidence.

APPEAL from the Superior Court of Law of RANDOLPH, at Spring Term, 1848, *Pearson, J.*, presiding.

The defendant was tried at Randolph, on the last spring circuit, before his Honor, *Judge Pearson*, on the following bill of indictment:

STATE OF NORTH CAROLINA—Randolph County.

Superior Court of Law, Spring Term, 1848.

The jurors for the State upon their oath present that John Clark, late of said county, on 1 May now last past, with force and arms in the county aforesaid, one bull tongue of the value of sixpence, and one piece of iron of the value of sixpence, of the goods and chattels of one Thomas Winslow, then and there being found, feloniously did steal, take and carry away, against the peace and dignity of the State.

The testimony on the part of the State proved that the defendant had stolen a ploughshare belonging to the prosecutor; that the ploughshare in question was a long piece of iron, sharpened at the point and widened and flattened in the middle, so as to be in the shape of the tongue of a bull, and that it was usually called a "bull tongue," though it was some- (227) times also called a gopher.

Upon this testimony the defendant's counsel moved the court to instruct the jury that the allegation of the article stolen, being a piece of iron, was not supported by the evidence, and that the allegation of its being "one bull tongue" was too vague and indefinite to justify a conviction, for the reason that "bull tongue," as applied to a species of ploughshare, was a mere local term. His Honor instructed the jury as requested, upon the first point, saying that although the article stolen "was made of iron, yet when it was shaped and formed into a distinct article, such as a ring, or clevis, or ploughshare, it was no longer a mere piece of iron." Upon the second point he charged "that if the

jury believed from the evidence that the defendant had stolen a ploughshare, which was usually called a bull tongue, the charge in the indictment was sufficiently specific to justify a verdict." The jury found the defendant guilty, when he moved for a new trial, which was refused. He then moved in arrest of judgment, which was also refused, and judgment being pronounced, he appealed.

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

BATTLE, J. In an indictment for larceny the article charged to be stolen must be properly and sufficiently described, so that there may be no doubt of its identity. This is required for the purpose of enabling the court to see that the article is of value, and also for the protection of the accused, by informing him of the distinct charge against him and furnishing him with the means of showing, if subsequently indicted for the same offense, that he has already been convicted or acquitted (228) of its commission. *S. v. Godet*, 29 N. C., 210. And the evidence must correspond with the description of the property laid. *Ibid.* Many nice questions have been raised on this subject, and some of the cases have turned upon distinctions savoring of almost too much refinement. See the note to the case of the *King v. Halloway*, 1 Carr. and Payne, 127 (11 Eng. C. L., 341). Goods may be described by the name by which they are known in trade. *King v. Nibbs*, R. and Ryan, 25; Arch. Crim. Pl., 170. The same principle must extend to articles known and used in all the arts, pursuits and employments of life. In the note to the case of *King v. Halloway*, above referred to, the reporter, after stating that it is particularly necessary to be precise in an indictment with regard to the description of stolen property, says that it is best, at least in one count, to call the thing by the name by which the witnesses will call it in their testimony. This is certainly in furtherance of the main purposes for which a definite description is necessary, that is, to inform the accused of the precise charge against him, and to enable him to defend himself against a subsequent indictment for the same offense.

In the case before us it would have been better, undoubtedly, to have described the stolen article as one ploughshare, commonly called and known by the name of a bull tongue. But we think that the appellation simply of "bull tongue" is sufficient. A certain species of ploughshare, made in the shape of the tongue of a bull, was, as the witness stated, *usually* called

a bull tongue, and though it appeared that it was *sometimes* called by another name, yet the defendant could hardly have been mistaken as to the article with the stealing of which he stood charged.

The counsel, indeed, objected that the name applied was a mere local one, but it does not appear that the name of the article stolen is less extensive than its use. We think, therefore, that there was no error in the charge of the court upon this point, which is the only one necessary for us (229) to decide.

The reasons for the motion in arrest of the judgment are not stated, and we see none.

PER CURIAM. No error.

Cited: S. v. Horan, 61 N. C., 573; *S. v. Patrick,* 79 N. C., 656; *S. v. Bragg,* 86 N. C., 690; *S. v. Credle,* 91 N. C., 645.

THE STATE v. MORDECAI LAMB.

Upon an indictment under the act relating to fences (1st Rev. St., ch. 48) it is the province of the court, where the jury have ascertained the facts, to pronounce whether those facts show that the fence was such a one as is required by the statute, or whether the navigable stream, water course, etc., was sufficient in lieu of the fence.

APPEAL from the Superior Court of Law of RANDOLPH, at Spring Term, 1848, *Pearson, J.,* presiding.

The defendant was tried at Randolph Superior Court on the Spring Circuit of 1848, before his Honor, *Judge Pearson,* for failing to make and keep up during crop time a sufficient fence about his cleared ground under cultivation, "there being no navigable stream or deep-water course that might be (230) deemed sufficient instead of a fence."

From the testimony given on the trial it appeared that the defendant was the owner of a field lying in Randolph County on Deep River, and cultivating a crop of corn in it during the time mentioned in the indictment. The field was surrounded on three sides by a sufficient fence, but on the fourth side, bounding on the river, it had no fence. The lands on the opposite side of the river belonged to different persons, and were in woods and unenclosed. The river is an unnavigable stream, full of rocks and shoals. Just below the defendant's field there was a

milldam, which had been kept up for many years, the effect of which was to form a pond in the channel of the stream, which was generally about five feet deep and from twenty-five to fifty yards wide. It appeared further that other persons besides the defendant had fields along the pond, some of whom had fences on the side next to it, while the rest had none; and that, for several years before this indictment was found, the hogs belonging to the neighboring planters were in the habit, during the crop season, of swimming across the pond and getting into the unenclosed fields lying on it, and doing much damage to the growing crops, and being themselves much injured by dogs. It was proved, however, that for the last two or three years the only hogs which crossed the pond into the defendant's field belonged to the prosecutor, and that horses and cattle were never known to cross the pond at all.

The counsel for the defendant contended that, whether the pond, which bounded on one side of the defendant's field was to be deemed a deep-water course, and sufficient instead of a fence, within the meaning of the act upon which the indictment was framed, was a question of fact for the decision of the jury; but that if it were not a question of fact for the jury, then, as a question of law, it must be deemed sufficient.

(231) His Honor was of opinion, and so charged the jury, that the sufficiency of the pond to answer, as a deep-water course, instead of a fence, was a question of law, and that the testimony in the cause, if believed to be true, showed that the pond was not sufficient for that purpose. The jury, under the charge of the court, found the defendant guilty, and from the judgment pronounced upon the verdict he appealed.

Attorney-General for plaintiff.
No counsel for defendant.

BATTLE, J. We think that there can be no doubt of the correctness of the opinion expressed by his Honor. The act "concerning fences" (1 Rev. St., ch. 48) requires "that every planter shall make a sufficient fence about his cleared ground under cultivation, at least five feet high, unless where there shall be some navigable stream or deep-water course that may be deemed sufficient instead of a fence, as aforesaid; and section 42 of the act "concerning crimes and punishments" (1 Rev. St., ch. 34) makes every person indictable for neglecting to keep and repair his or her fence during crop time, in the manner required by the act concerning fences. What is a sufficient fence, and what kind of navigable stream or deep-water course is to be deemed suf-

ficient instead of a fence, within the act, must be questions of law, because the interpretation of statutes and the ascertaining of the meaning of all the terms employed in them are confided to the courts. This duty they discharge by pronouncing what is the true construction of a whole statute, or the sense of any particular section, phrase or word contained in it, upon the facts found by the jury in any case arising under it. His Honor, then, did right in assuming to decide upon the sufficiency of the pond to answer as a deep-water course instead of a fence. The inquiry remains, Was the question of sufficiency rightly decided? We think it was. It is manifest from a view (232) of all the provisions of the act which we are discussing, taken together, that its purpose is to prevent horses, mules and other stock, not more than ordinarily addicted to mischief, from breaking into fields under cultivation and damaging the crops which may be growing in them, and also to protect such stock from being killed, maimed or otherwise injured by the owners of the fields. To accomplish this purpose a sufficient fence, at least five feet high—unless there be some navigable stream or deep-water course that will answer instead of such fence—is required. The object is to keep out horses, hogs and other stock. Can any fence, stream or water course be deemed sufficient that will not, under ordinary circumstances, secure the accomplishment of this object? Surely not. Otherwise the court must be guilty of the absurdity of pronouncing that to be *sufficient in law* which proved to be *insufficient in fact.*

It must be certified to the Superior Court that there is no error in the judgment appealed from.

PER CURIAM. No error.

(233)

JOHN SMITH ET AL. v. MALCOLM SHAW.

1. Where a writ is brought in the name of A. B. & Co., and it is afterwards amended so as to substitute in place of A. B. & Co. the names of A. B., C. D., and E. F., composing the firm of A. B. & Co., it *seems* this will operate as a discharge of the bail.

2. Where a *scire facias* against bail does not set forth how the defendant became bound as bail, nor recite the cause of action, nor the court in which the judgment against the principal was obtained, it is fatally defective.

APPEAL from the Superior Court of Law of ANSON, at Fall Term, 1846, *Settle, J.*, presiding.

SMITH *v.* SHAW.

This was a *scire facias* against the defendant as the bail of one Laurence Moore. It commenced in the County Court, and recited that "Whereas it appears that at April Term, 1845, a judgment was obtained by John Smith, Joseph P. Smith and William G. Smith, trading and acting under the name and style of John Smith & Co., against Laurence Moore for the sum of $93.44 principal money and $24 interest, also $10.75 for costs that accrued therein, and that Malcolm Shaw was bound as bail for the appearance of Laurence Moore, and the said judgment being in full force, not satisfied, you are hereby commanded to make known to Malcolm Shaw his liability in the premises, that he may appear, etc." The defendant appeared and pleaded *nul tiel record,* a release and discharge of bail; and upon his motion the *scire facias* was quashed, whereupon the plaintiff appealed to the Superior Court. And in that court the plaintiffs were permitted to demur to the plea of discharge of
(234) bail, "for the reason that the plea did not state in what manner the bail was discharged—whether by death, surrender of principal, or otherwise." Afterwards, the cause coming on to be tried at Fall Term, 1846, of the Superior Court of Law for Anson County, it appeared in evidence that John Smith & Co. sued out their writ against Laurence Moore, returnable to January Term, 1845, of Anson County Court. The writ was issued in the name of "John Smith & Co." and commanded the arrest of Moore to answer them of a plea of trespass on the case, and under it he was arrested and gave the defendant Malcolm Shaw as bail. At the ensuing April Term of the said court the plaintiffs obtained leave to amend, and did amend, this writ so as to make it run in the names of John Smith, Joseph P. Smith and William G. Smith, trading and acting under the name and style of John Smith & Co., and in that name they obtained a judgment against the said Moore. Under the charge of the court the jury found that there was no release, and the court adjudged that there was such a record that the demurrer to the plea of discharge of bail be sustained; and a judgment was given against the defendant according to the *scire facias,* from which he appealed to the Supreme Court.

Winston for plaintiffs.
No counsel appeared in this Court for defendant.

BATTLE, J. The *scire facias* and the pleadings thereupon in this case are so imperfect and defective that the question relative to the discharge of the bail by reason of the amendment of the plaintiffs' writ, which was intended to be presented in the

court below and which has been mainly discussed in the argument here, cannot arise. There is no allegation in the *scire facias* of the bond by which the defendant, Shaw, became bound as the bail of Moore. It was merely recited that (235) he "was bound as the bail for the appearance of Laurence Moore," without stating that it was by bond, or that it was according to the provisions of the act of the General Assembly "concerning bail in civil cases." The defendant, then, had no opportunity of putting in any plea by which the question of his discharge, on account of the alteration of the writ, could be presented. Had such an opportunity been offered him his proper plea would have been that of *non est factum,* for, upon the trial of the issue arising upon that plea, the question could have been distinctly presented whether a bail bond given in a suit brought in the name of John Smith & Co. could sustain a declaration upon the *scire facias* reciting a bond executed in a suit brought and prosecuted to judgment by John Smith, Joseph P. Smith and William G. Smith, trading and acting under the name and style of John Smith & Co. And this, we think, must have been decided against the plaintiffs. *Bryan v. Bradley,* 1 N. C., 177; *Levett v. Kibblewhite,* 6 Taun., 483 (1 Eng. C. L., 459); Tidd Practice, 294, 450; Petersdorff on Bail, 417. But as the point does not arise, we do not decide the case upon it.

Upon an inspection of the record brought before us by the appeal of the defendant it appears that judgment was rendered against him according to the *scire facias* for $117.44, of which sum $73.44 is principal money. That judgment cannot be sustained. The *scire facias* (and, of course, the declaration, which must conform to it) is fatally defective, both in form and substance. Besides not setting forth how the defendant became bound as the bail of Moore, it does not recite the cause of action, nor even the court in which the judgment against the said Moore was obtained. These are certainly essential statements, and for the want of them the judgment must be arrested. The judgment rendered against the defendant in the Superior Court is therefore reversed, and judgment in this Court (236) is arrested.

PER CURIAM. Judgment arrested.

Cited: Malpass v. Fennell, 48 N. C., 82; *Cohoon v. Morton,* 49 N. C., 258.

OLIVER WYLIE, CHAIRMAN, ETC., *v.* JESSE SMITHERMAN, ADMINISTRATOR, ETC.

1. The presumption is that a person who is entitled to a deed has it in his possession, until the contrary be shown: and the contrary may be shown by the affidavit of the person so entitled.

2. In actions of trespass for the destruction of property the proper measure of damages is the value of the property destroyed, unless the trespass is committed wantonly or maliciously, when the jury may, if they think proper, give vindictive damages; but that is a matter for them to decide and not for the court.

APPEAL from the Superior Court of Law of RICHMOND, at Spring Term, 1848, *Bailey, J.*, presiding.

This was an action of trespass *vi et armis quare clausum fregit*, brought by the plaintiff, as the Chairman of the County Court of Montgomery, to recover damages for the burn-
(237) ing of the courthouse of that county by the defendant's intestate. Pleas, the general issue, *liberum tenementum* and license.

Upon the trial it was proved that the courthouse of Montgomery County was burnt on 31 March, 1843, between the hours of 9 and 12 o'clock at night, and testimony was then given tending to show that the act was done, or was procured to be done, by the defendant's intestate. The plaintiff then introduced a properly certified copy of a private act of the General Assembly, passed in 1815, for the purpose of removing the courthouse and other public buildings from the town of Henderson to some more suitable place. To that end certain persons were appointed commissioners, with authority to them, or a majority of them, to purchase fifty acres of land at the place which they might select, and they were then directed to lay off the land, so purchased, into town lots and make sale of them at public auction, retaining two acres for the use of the county, upon which it was made their duty to have a courthouse and other necessary public buildings erected; and they, or a majority of them, were further directed to make title in fee simple to the purchasers of the lots, and to execute a conveyance to the chairman of the County Court and his successors forever for the two acres reserved for the use of the public. Mr. Deberry was then called as a witness for the plaintiff and testified that he was one of the commissioners appointed in the act aforesaid; that the duties therein enjoined were performed, among which was that of causing to be erected the courthouse, for the burning of which this action was brought, and that the commissioners then exe-

cuted a deed for the land upon which it was built to Joseph Parsons, who was then the acting chairman of the County Court. He testified further that this deed was duly proved and registered, and then delivered to John B. Martin, the then clerk of the County Court, to be filed among the records of his office; but whether Joseph Parsons knew of the deed or not the witness could not tell. He stated that it was proved in (238) 1817, but at what term of the court in that year he could not recollect. Another witness testified that he succeeded Mr. Martin as clerk of the County Court, and that in 1839 or 1840 he saw a paper in the office endorsed, "A deed from Davidson and others, commissioners, to Joseph Parsons, chairman," and he thought that he had read it, but he could not state its contents. The plaintiff then proposed to prove by Mr. Deberry the contents of the said deed, but the testimony was objected to, on the ground that the loss of it had not been sufficiently accounted for, the presumption being that it was in the possession of Joseph Parsons or of the present plaintiff, and further that there was no affidavit by the plaintiff of its loss or destruction. The objection was overruled and the testimony received. It was then proved that the present plaintiff was appointed chairman of the County Court in 1841, and a record made of it, but this record, together with all the other records of the office, was destroyed in the conflagration of the courthouse. A witness called for that purpose testified that the courthouse could not have been rebuilt for less than $1,000, though it would not have sold for more than $200. Much more testimony was given, and several objections raised, which it is unnecessary to state, as they are not adverted to in the opinion of this Court.

The defendant's counsel contended that the plaintiff could not recover at all, but, if he could, the utmost extent of his damages would be $200. The court charged the jury that if they found a verdict for the plaintiff "the measure of his damage was not that for which courthouse would have sold, but the amount it would have taken to rebuild such a courthouse at that place as was destroyed." The jury returned a verdict for the plaintiff, assessing his damages to $1,250. A motion for a new trial was made and overruled, and from the judgment given against him the defendant appealed. (239)

Strange for plaintiff.
Mendenhall and *Iredell* for defendant.

BATTLE, J. The objection to the testimony of the witness who was offered to prove the contents of the deed from the com-

missioners to Joseph Parsons was well founded and ought to have been sustained. The deed may possibly have been, and probably was, among the records of the County Court, and was destroyed by the fire which consumed the courthouse. Such, however, was not distinctly and sufficiently proved, and as the presumption was that the person who was entitled to the deed had it in his possession, he ought to have rebutted the presumption by proving that such was not the fact, which he was at liberty to have done by his own affidavit. In *Harper v. Hancock*, 28 N. C., 124, the rule is so laid down, and the reasons upon which it is founded are fully stated. Nor is this affected by the act of 1846, ch. 68, for that only makes a registered copy of a deed evidence, without requiring the party who is entitled to the original to account for its nonproduction, but contains no provisions for proving the contents of the original deed by parol testimony. The charge of the court upon the question of damages was also erroneous. The proper measure in actions of this kind is the real value of the property destroyed, unless the trespass is committed wantonly or maliciously, when the jury may, if they think proper, give vindictive damages. *Duncan v. Stalcup*, 18 N. C., 440. It may be that this was a proper case for such damages, but whether they should have been given or not was a question which ought to have been sub-
(240) mitted, with proper instructions, to the jury.

The judgment of the Superior Court must be reversed and a new trial granted.

PER CURIAM. Judgment reversed.

Cited: Rippey v. Miller, 33 N. C., 25; *Sowers v. Sowers*, 87 N. C., 307; *Remington v. Kirby*, 120 N. C., 325.

WILLIAM HALCOMBE v. JOHN A. ROWLAND.

A sheriff may be amerced for not returning process at a term subsequent to that to which the return should have been made.

APPEAL from the Superior Court of Law of SURRY, at Fall Term, 1847, *Pearson, J.*, presiding.

This is a *sci. fa.* against the defendant, who was the Sheriff of Robeson County, to recover of him the sum of $100 for not returning a writ of *capias ad respondendum*. The case is as follows: A writ was duly issued from the office of the Clerk of

the Superior Court of Surry, returnable to the Spring Term, 1846, and came to the hands of the defendant, who was then the Sheriff of Robeson County, to whom it was directed, more than twenty days before the return term. The defendant failed to return it according to law, and, at the Fall Term following, a judgment *nisi* was entered up against him for $100, (241) and this *sci. fa.* issued. The defendant objected that the court had no power to fine a sheriff at one court for a default at a former one. This objection was overruled by the court, and judgment being rendered for the plaintiff, the defendant appealed.

Boyden for plaintiff.
Strange for defendant.

NASH, J. There is nothing in the objection. The proceedings are instituted under section 61 of the Revised Statutes. It is provided "that any sheriff and coroner who shall fail duly to execute and return all process to him directed shall be subject to a penalty of $100 for each neglect, to be paid to the party aggrieved, by order of the court, upon motion and proof that the process was delivered to him twenty days before the sitting of the court to which it was returnable, unless the sheriff or coroner can show sufficient cause to the court for his failure, at the court next succeeding *such order.*" The act does not require that the judgment for the penalty shall be rendered at the term to which the writ is returnable, nor can any good reason be assigned why it should. The judgment is a conditional one, to be enforced only on the failure of the officer, at the term succeeding, to show a sufficient reason for his delinquency. Being granted on motion without personal service of any notice of the intention to make it, it is final to no purpose, except, perhaps, that of the failure to return, but leaves, by the express provision of the act, to the officer the privilege of showing any "sufficient cause for his failure," provided he applies to be heard at the proper time, to wit, the term succeeding the making of the *order for the amercement;* and that is the object of the *sci. fa.* Its language is, "then and there to show cause, if any he has, why the said plaintiff, William Halcombe, shall not (242) have execution thereof, etc." Upon the return of the *sci. fa.* a full defense is open to the sheriff; he may show that the writ never came to his hands, or that he did not receive it until after the return day, or that by some inevitable accident he was prevented from making his return, or, in the language of the act, any sufficient reason. If the sheriff be actually

present in court when the motion to amerce is made, the court would no doubt then hear his excuse, but his defense is not, fortunately for him (in this particular), confined to that time. The act not only gives to the party injured the sum of $100 for each failure, but likewise subjects the delinquent officer to an indictment. With equal propriety it might be argued that the prosecution must be commenced at the return term of the writ.

We see no reason to disturb the judgment.

PER CURIAM. Judgment affirmed.

Cited: Hyatt v. Allison, 48 N. C., 535; *Person v. Newsom*, 87 N. C., 144.

(243)

WILLIAM MITCHELL v. MOSES WALKER.

1. The action of *assumpsit* is a liberal action, and where, by the obligations of justice and equity, the defendant ought to refund money paid to him, the action will be sustained; but where he may, with a good conscience, receive the money, and there was no fraud or unfair practice used in obtaining it, though it was money he could not have recovered by law, it cannot be recovered back.

2. The jurisdiction of a single justice extends to all cases for the recovery of money, when the amount is within the sum designated in the act of the General Assembly, when a general *indebitatus* will lie, whether the contract is expressed or implied by law.

APPEAL from the Superior Court of Law of PERSON, at Spring Term, 1848, *Pearson, J.*, presiding.

The case is as follows: In 1835 the plaintiff hired from one Brooks a negro, for the sum of $16, and gave his note, with the defendant as his surety for its payment. The plaintiff was the agent of one Shelton, for whose use the negro was hired. Of this fact the defendant was ignorant, at the time the note was given, and, upon learning the truth, insisted that Brooks should give up the note to him, which was done upon Shelton assuming to pay the debt. Soon after Shelton did pay the money to Brooks. The defendant kept the note in his possession nine years, when he sent it for collection to an officer in the State of Virginia, where the plaintiff lived. The latter, upon being apprised of the fact, went to see the defendant, and told him he had expected Shelton would have paid off the note. Defendant assured him Shelton had not so done, but that he had been compelled to pay it, and looked to him for the amount.

Upon this representation the plaintiff paid the amount (244) claimed to the defendant, who undertook to collect it from Shelton and pay it over to the plaintiff.

To recover the amount so paid by the plaintiff to the defendant this action was brought by a warrant before a single magistrate.

The defendant moved the court to charge the jury that, as the payment by the plaintiff was a voluntary one, he could not recover it back; but if he could, it could not be done by warrant. This instruction the presiding judge refused to give, but charged the jury that, although the money was paid by the plaintiff when under no legal coercion so to do, yet if he acted under a mistake of facts, falsely represented by the defendant, he had a right to recover it back, and in this form of action.

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

E. G. Reade and *T. B. Venable* for plaintiff.
Kerr for defendant.

NASH, J. To the plaintiff's recovery two objections are urged: first, that the payment by him to the defendant was voluntary, and, secondly, if he could recover, a single magistrate had not jurisdiction. The action for money had and received rests upon equitable principles, and whenever there is a privity between the payer and receiver, and the latter has received money to which the former is in justice and equity (245) entitled, the law implies a promise to pay it, and gives this action. 2 Stark. on Ev., 63. It is true that in one sense the payment by the plaintiff was voluntary. He did not pay it under duress of his person, nor did he pay it under process of law; but was it voluntary in that sense which, in law, disqualifies him to demand it back? In order to have this effect the payment must be made with full knowledge of the facts or full means of obtaining that knowledge. *Waite v. Legget,* 6 Con., 195; *Clarke v. Dutcher,* 9 Con., 674. And when the money has been paid, not with this full knowledge, and it is shown to have been unjustly paid, it may be recovered back. *Chatfield v. Paxton,* 2 East., 471; *Pool v. Allen,* 29 N. C., 120. In the case before us it is not pretended that the plaintiff knew the facts; on the contrary, he had the best reason to believe that the statement of the defendant was true. He was the surety to the note; the plaintiff lived in Virginia, and the defendant was the only person in this State who, upon the face of the note, was

liable to its payment, and who, upon discharging it, was entitled to its possession. The possession of the note, therefore, by defendant, nine years after it fell due, was to the plaintiff evidence that he had paid it. It is true that by applying to Shelton or to Brooks, the payee of the note, he might have ascertained the truth of the transaction. But the fraud perpetrated by the defendant superseded the necessity of so doing, and deprived the defendant of that defense. By his own falsehood he put the plaintiff asleep and threw him off his guard, and now asks to be protected in his fraud. The action of *assumpsit* is a liberal action, and where, by the obligations of justice and equity, the defendant ought to refund money paid to him, the action will be sustained; but where he may, with a good conscience, receive the money, and there was no fraud or unfair
(246) practice used in obtaining it, although it was money he could not have received by law, it cannot be recovered back. 4 Johns, 249, in note to *Hall v. Schulty*. *Myher v. Duncan*, 13 E. C. L., 293, cited at the bar, is a strong authority upon the point we are considering. A bill of exchange had come by endorsement to the defendant, Duncan, who by his negligence in not presenting it for payment in proper time had made it his own. Afterwards discovering, as he honestly thought, that the bill was void for being drawn on an improper stamp, he demanded from the plaintiff, from whom he had received it, the amount due. The case states that both the plaintiff and defendant were ignorant of the fact that the bill was an Irish bill and did not need an English stamp. The plaintiff paid the defendant the amount due upon the bill, and, upon discovering that it was an Irish bill, brought the action of *assumpsit* against the defendant for money had and received to his use.

Littledale, J., in giving his opinion, states that the plaintiff "had means of knowing that the bill was drawn in Ireland, for he might have inquired of the prior endorser, but there being nothing on the face of the bill to lead him to suppose that it was drawn in Ireland, he was not bound to make any inquiry"; and the *postea* was delivered to the plaintiff. In the present case, not only had the defendant full knowledge of all the facts, but the plaintiff was ignorant of them, and his ignorance was founded upon the unequivocal and positive falsehood of the defendant.

But it is further objected by the defendant that if an action can be sustained upon such a transaction, a warrant cannot be sustained. The case of *Ferrell v. Underwood*, 13 N. C., 111, is a full answer. The jurisdiction of a single justice extends to all cases for the recovery of money, when the amount is with-

in the sum designated in the act of the General Assembly, when a general *indebitatus* will lie, whether the contract (247) is expressed or implied by law.

PER CURIAM. Judgment affirmed.

Cited: Winslow v. Elliott, 50 N. C., 113; *Houser v. McGinnas,* 108 N. C., 635.

LEWELLEN BOWERS ET AL. v. SALLY A. BOWERS.

1. Where on a petition for dower in the County or Superior Court the jury have made a report and that report is confirmed, the heirs cannot, at a subsequent term, file a petition to set aside this allotment of dower.

2. If there be errors in the allotment, the redress, if any, is not by petition.

APPEAL from the Superior Court of Law of MARTIN, at Spring Term, 1848, *Caldwell, J.,* presiding.

The defendant, the widow of James L. Bowers, filed her petition in the County Court of Martin at January Term, 1847, for the purpose of having allotted to her her dower in the lands of which her husband died seized and possessed. Such proceedings were had in the case that, at the April Term, 1847, the jury of freeholders, who had been previously summoned by the sheriff in obedience to an order of the court, made their report, assigning to the widow her dower in the lands set forth in the petition, and the report was at the same term confirmed, and the sheriff duly put her in possession.

This petition was filed at October Term, 1847, of the (248) Court of Pleas and Quarter Sessions, and prays that for the errors set forth therein the court will "set aside the report of the said sheriff and jury, and order a reallotment and assessment of the said lands."

The court below dismissed the petition, because the objections to the confirmation of the report of the jury ought to have been made at the court to which the said report was returned and confirmed, and upon the further ground that, if there was a remedy to correct an improper allotment of dower, after the term of the court at which the report was made and confirmed, the proceeding in question was not the proper one. The plaintiff appealed.

Biggs for plaintiff.
P. H. Winston, Jr., for defendant.

NASH, J. The relief *so* sought cannot be granted. Although the original proceedings commenced by petition, yet they are on the common-law side of the court, and any error which may have been committed by the court cannot be corrected by petition.

It is unnecessary to look into the various modes of assigning dower at common law. The proceedings in this State are under our own statute, Rev. St., ch. 121, sec. 2, which gives to our common-law courts, either County or Superior, jurisdiction of the subject. Its object was to secure to the widow a shorter and more simple mode of asserting her claim. Wherever the law has given to a party a right to go into a court of law to ascertain by petition a mere equitable right there, as the proceedings are such as are in use in equity, they must be governed by the rules of chancery practice. If, therefore, in a petition for a distributive share, a witness be summoned by either party, he must be paid by the party summoning him, because that (249) is the rule and practice in chancery. *Ryder v. Jones,* 10 N. C., 24. So a decree made in such a case may be reheard on petition. *This,* however, is a case entirely at law, and is to be governed by the rules and practice of a court of law.

It is said, however, that this petition may be regarded as a writ of error, and that the court will so regard it, to save delay and expense. There are two answers to this proposition: the first is, that it does not purport to be a writ of error, having none of its features; and in the second place, the errors complained of, if they exist, are errors of law, and a county court cannot issue a writ to correct such errors in its own judgment. By Rev. St., ch. 4, sec. 17, power is given to the Superior Courts to grant writs of error for correcting the errors of law of inferior courts. We do not give any opinion as to whether there were any errors in the allotment of dower complained of, but agree with his Honor, who tried the cause, that if there were errors, this is not the mode in which they can be reached.

PER CURIAM. Judgment affirmed.

(250)

THE COMMISSIONERS OF WILMINGTON v. H. A. ROBY.

1. For the purposes of local police, the charter of a town may constitutionally authorize the inhabitants to tax themselves or to do so through persons chosen by them.
2. The charter of the town of Wilmington, authorizing the commissioners to tax transient traders, for purposes of police, is not unconstitutional.
3. But the tax for that purpose, authorized by the act of 1811, ch. 64, must be laid annually.
4. By coming within a town and acting there a person becomes liable as an inhabitant and member of the corporation.

APPEAL from the Superior Court of Law of NEW HANOVER, at Special Term in January, 1848, *Manly, J.*, presiding.

This suit was commenced by warrant on 14 February, 1846, to recover the sum of $25 for a town tax, claimed from the defendant as a transient person keeping a shop in the town of Wilmington.

A private act, passed in 1784, provided for the election of commissioners of the town, and incorporated them and their successors, with the usual powers of appointing the necessary town officers, making ordinances and regulating the police of the town. It enacted that the commissioners "shall annually lay a tax not exceeding ten shillings on every £100 value of taxable property in the town, and also a poll tax," etc., to be collected and by the commissioners applied to various enumerated public purposes in the town.

By an act of 1806 it was, among other things, enacted that the Commissioners of Wilmington, if they deem the same necessary, may have power annually to lay a tax not exceeding £10 on each transient trader or shopkeeper who shall retail goods in the town, with a proviso that no person shall (251) be deemed such transient trader who shall be returned on the list of taxables for New Hanover County, or who will make oath, when the tax is demanded, that he has come into the town for the purpose of carrying on a permanent trade therein.

In 1811 a third act was passed, enacting that the commissioners may enlist a guard and night watch, "and that for the purpose of enabling the commissioners to support such guard they are hereby empowered to lay an additional tax," as follows: on each horse kept within the town, not exceeding fifty cents; on each four-wheeled carriage, not exceeding $2; on all two-wheeled carriages for hire or pleasure, not exceeding $1; on all drays and carts employed for hire, not exceeding $2; and on

all transient persons keeping stores or shops in the said town, $25.

The plaintiffs further gave evidence that a town guard was kept up, and that on 2 January, 1844, seven persons who were chosen commissioners for 1844 qualified, and then passed the following ordinance:

"*Resolved,* and it is hereby ordered that a tax of $25 be laid on all transient persons keeping stores or shops in the town of Wilmington, according to an act of Assembly of 1811."

The plaintiffs further gave evidence that early in January, 1846, the defendant came with a stock of merchandise from Virginia to Wilmington for the purpose, as he then said, of temporarily selling the goods there; and that he remained there, as a trader, and retailed the goods for five or six weeks, and then went away; and that during that time the treasurer of the town demanded from him the sum of $25 for a tax, and the defendant refused to pay it.

(252) On the trial the counsel for the defendant objected to a recovery on several grounds, of which it is necessary to notice only two, as the opinion of the Court is confined to them. They are, first, that the Legislature could not constitutionally authorize the commissioners to lay this tax; and, secondly, that no tax was imposed for the year 1846. The presiding judge ruled those points, as well as the others, against the defendant, and from a verdict and judgment accordingly he appealed.

No counsel for plaintiffs.

Strange for defendant.

(253) RUFFIN, C. J. The Court sees no reason to doubt that, for the purpose of local police, the charter of a town may constitutionally authorize the inhabitants to tax themselves, or do so through persons chosen by them. It is a convenient and almost a necessary power, and has been almost universally delegated and exercised, and, we believe, never questioned before. We perceive no objection to it. In the argument it was urged as an objection to it in this case that it could not extend to the defendant, who is a stranger, but is to be confined to the members of the corporation. But the objection does not seem to us to be sound. In the first place, it is to be remarked that the charter and ordinance are not directed against the defendant as coming from Virginia. They make no distinction between the citizens of this and other States or countries, as they operate alike on all persons not before settled in the town, unless they go there to become permanent traders or were inhabitants of

New Hanover and assessed for taxes in that county. Then, it is also not true that the defendant is to be treated as a stranger, so as not to be bound by the ordinance. For it is settled that by coming within the town and acting there a per- (254) son becomes liable as an inhabitant and member of the corporation. *Commissioners v. Pettijohn,* 15 N. C., 591; *Whitfield v. Longest,* 28 N. C., 268. It is just that it should be so, for as the defendant has in the security of his property the benefit of the night watch and of the other police establishments, he ought to contribute reasonably towards their expense; and this tax allowed by the Legislature, or viewed in itself as an annual imposition, cannot be deemed unreasonable.

But, while the power of self-taxation may be rightfully conferred on municipal corporations, it is undoubtedly true that the power may be restrained and regulated by law, and that commissioners of a town can only exercise it in the manner and within the limits prescribed by the Legislature. On this ground we think the defendant was entitled to judgment, as he became a trader in the town in 1846, and there was no tax laid for that year—at least, not lawfully. Each of the statutes given in evidence enacts that the commissioners shall "annually lay" the taxes mentioned in them. Such are the express terms of the acts of 1784 and 1806. The reasons for thus restricting the power are sufficiently plain. No more revenue ought to be levied than may be requisite for useful expenditures; and as the latter may and probably will vary from year to year, so ought the former. Besides, the commissioners themselves are chosen annually, and it is natural to expect that the power of taxation by each set of commissioners should be limited by their term of office, because by that means there is secured to the inhabitants of the town a wholesome check against oppressive taxation and extravagant expenditures. These considerations are not, indeed, necessary to aid in the construction of the two first acts, for, as has just been mentioned, both that of 1784 and 1806 are positive that the taxes shall be *laid* annually. The language of that of 1811, it is true, is not quite so explicit. By it the commissioners "are empowered to lay an addi- (255) tional annual tax, as follows:" and one of those enumerated is that of $25 on transient shopkeepers. Possibly, if this act stood by itself it would admit of an argument that it did not mean that the tax should be imposed annually, but only that, whenever imposed, not more than that sum should be levied in and for any one year. But when construed with the parts of the charter contained in the two preceding acts, and with reference to the considerations of policy before adverted to, we think

the just interpretation of the last act clearly is, like the others, that the tax must both be laid annually and be limited to the sum of $25 annually. No reason can be conceived why the taxes authorized by the act of 1811 on horses, carriages, drays, carts and transient traders should be permanent, while all others were to be laid from year to year, so as to correspond with the annual exigencies of the town and the varying ability of the people. On the contrary, all the acts, being *in pari materia*, are to be construed together; and they mean that all the town taxes should be laid, as well as collected, year by year. The ordinance of 2 January, 1844, does not purport to extend to 1846, and, possibly, was not intended to operate beyond 1844. If, however, it was so intended, then the commissioners exceeded their power, and for the excess, at all events, the ordinance was void. In either case the defendant did not owe the tax demanded of him; and therefore the judgment must be reversed and a *venire de novo* awarded.

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

Cited: Comrs. v. Capeheart, 71 N. C., 160; *Hendersonville v. Price,* 96 N. C., 426, 427.

(256)

THE STATE v. EPHRAIM LANE.

A free person of color who is employed to carry a pistol from one place to another, and who claims no right to use the instrument and has no intention of doing so, does not come within the provisions of the act of 1840, prohibiting free persons of color from having arms in their possession without a license from the County Court.

APPEAL from the Superior Court of Law of PERQUIMANS, at Spring Term, 1848, *Settle, J.*, presiding.

The defendant, a free man of color, was indicted under the act of 1840, ch. 30, for unlawfully carrying about on his person, and unlawfully keeping in his house, a pistol, without having obtained a license therefor from the proper authority. By the special verdict it is found that the defendant usually resides in the county of Perquimans, and at the time the alleged offense was committed was in the employment of a white man by the name of Barker, getting shingles in the county of Pasquotank. Barker also lived in Perquimans, and had hired the defendant to carry the pistol, with other articles of his, to the county of Pasquotank, where they were pursuing their work. While so

employed in carrying the pistol and other property it was seen in his possession. For this possession the defendant was indicted, and did not pretend that he had any license therefor from the County Court of Perquimans. Upon this special verdict the court pronounced the defendant not guilty, and the solicitor for the State appealed.

Attorney-General for the State.
No counsel appeared in this Court for defendant.

NASH, J. It appears to us that a mere statement of (257) the facts is an answer to the charge. At the time the act complained of was committed the defendant was the servant of Barker, and as a hireling was engaged in *his* business in carrying the pistol and other articles from the place of his residence to that of his employment. It is not pretended that this employment was simulated, and intended or used as a cloak to avoid the law. We must presume, therefore, that the contract was made in good faith between Barker and the defendant, and that the latter in good faith was executing it. Can it be possible that under the act of 1840 the defendant was guilty of a criminal act? The object of the Legislature was to prevent the owning or possessing, by this class of persons, of the offensive weapons enumerated, as dangerous to the peace of the community and the safety of individuals. But that they did not intend that they should not be owned or possessed by any person of color is evident from the fact that they have rendered the possession lawful in one contingency. Degraded as are these individuals, as a class, by their social position, it is certain that among them are many worthy of all confidence, and into whose hands these weapons can be safely trusted, either for their own protection or for the protection of the property of others confided to them. The County Court is, therefore, authorized to grant a license to any individual they think proper, to possess and use these weapons. It is an old maxim in the construction of statutes that he who sticks to the letter adheres to the bark. Every legislative act ought to receive a reasonable construction —such as carries out the legislative will. The act charged against the defendant does not come within the limit or scope of the statute of 1840. He did carry with him a pistol, but it was not unlawfully carried. He was complying with a contract he had a right to make, the mere carrier of the pistol for hire, claiming no title to the instrument or right to use it, and without any purpose or intention so to do.

PER CURIAM. No error. (258)

THE STATE v. DOUGALD MUNROE ET AL.

Although a *certiorari* has once been issued upon a suggestion of a defect in the record, and returned, yet the court may, upon a further suggestion, a second time or oftener, direct writs of *certiorari* to issue, if it sees reason to think the transcript defective.

APPEAL from the Superior Court of Law of CUMBERLAND, at Spring Term, 1848, *Bailey, J.*, presiding.

The indictment in this case was returned to the June Term, 1846, of Cumberland County Court, and the defendants, being convicted, appealed to the Superior Court. Upon a suggestion of a diminution of the record in the latter court, a writ of *certiorari* was, on motion, ordered to bring up a more perfect transcript. Upon the return of this writ an affidavit was filed by the prosecutor alleging the transcript was still defective, whereupon the court ordered another or an *alias* writ, as it is
(259) termed in the proceedings, to issue. From this order the defendants were allowed to appeal to this Court.

Attorney-General for the State.

Strange, D. Reid and *McRae* for defendants.

NASH, J. An appellate court acts upon the transcript of the record from the court granting the appeal, and it is the duty of the court to have before them a true copy, in order that justice may be done between the parties. Upon its being made to appear that the copy is not a true and full copy, the court has the power, and it is its duty, to cause a perfect transcript to be filed. This is not denied, but it is said the power of the court is exhausted by the first order. For this position no reason is or can be assigned. In truth, the same reason exists for a second or third *certiorari* as the first—the duty of the court to have before them a full copy. The want of truth is the only suggestion that can authorize the court to require another transcript. If that suggestion be made a second time, or oftener, *and the court sees reason to think the transcript defective*, it *may* order other writs of *certiorari* to issue. *S. v. Reid*, 18 N. C., 382. The court, in this case, did see reason to believe that the second transcript was defective, and, in the legitimate exercise of its power, ordered a second *certiorari* to issue. In this we see no error.

PER CURIAM. No error.

(260)

HENRY GODSEY v. JAMES BASON.

1. Where a debtor removes out of a county with intent to defraud his creditors, a person who, knowing of such intent, helps him by carrying him or his property a part of the way in order to assist him in getting him out of the county, becomes bound for his debts (under our act of Assembly), although he did not convey the debtor or his goods entirely out of the one county into another.

2. Where a person who has removed a debtor out of a county is sued by a creditor it is not necessary to show that this person had a knowledge of any particular debt due by the debtor, but it is sufficient if the circumstances of the case induce the jury to believe that the removal was made with a view to defraud creditors.

3. In an action under our act of Assembly, concerning the fraudulent removal of debtors, the measure of damages is the amount of the debt due by the debtor to the plaintiff.

APPEAL from the Superior Court of Law of ROCKINGHAM, at Spring Term, 1848, *Pearson, J.*, presiding.

This is an action on the case brought 28 February, 1845, on the act of 1820, for aiding and assisting in removing one Thomas Sharp from Rockingham County, with the intent to hinder and defraud the plaintiff of a debt which Sharp owed him. Pleas, not guilty, release, and accord and satisfaction.

On the trial the plaintiff gave evidence that in November, 1841, he paid for Sharp, and as his surety, the sum of $94.56 to the present defendant, as the agent of the person to whom the money was due, and that both the plaintiff and Sharp, and also the defendant, lived in Rockingham from that time until the removal of Sharp, which is the subject of this action.

The plaintiff gave further evidence tending to show an agreement between Sharp, the defendant, and his brother, Isaac Bason, that the two latter should assist Sharp to (261) remove from the county and State to the Holstein River, in Virginia, in order to avoid his creditors, and that, in execution of it, Isaac Bason furnished a wagon which, at a time agreed on, he had in readiness at a place in Rockingham, about five miles from Sharp's residence; and that, on a certain day in August, 1843, Sharp and his family, with the knowledge of the defendant, absconded on foot, in the night-time, and went from Rockingham into Stokes County, and on the same night the defendant, at Sharp's request, carried a bed and furniture and a box with sundry articles in it from Sharp's residence to the wagon, at the place appointed, and delivered them to the wag-

oner, to be carried, and by the defendant's directions they were carried, that night, to Sharp in Stokes County, and thence with him and his family to the Holstein.

Evidence was then given on the part of the defendant that when Sharp went off he was very much involved in debt, and had but little property, and that consisted of household and kitchen furniture and a small stock, of all of which he disposed before he left, except a cow, which the defendant got, and the goods which the defendant carried to the wagon and some articles which Sharp and his family carried with them.

The defendant further gave evidence that, soon after Sharp went away, the plaintiff said Sharp gave him up papers before he left, and if he succeeded in collecting them he hoped he would not lose much after all.

The counsel for the defendant thereupon moved for the following instructions:

1. That if the jury believed that Sharp had paid or satisfied the plaintiff's debt before his removal, they ought to find for the defendant. The court informed the jury that there was no evidence of such payment or satisfaction, and for that reason declined giving any further instruction on that point.

(262) 2. That as an action arose to the plaintiff against Sharp in November, 1841, and so was barred by the statute of limitations when this suit was brought in February, 1845, the plaintiff could not recover in this suit; or, at all events, that the jury might take that circumstance into consideration on the plea of satisfaction. But the court refused to give either part of the instruction.

3. That as the defendant did not remove the goods of Sharp out of the county of Rockingham, he was not liable in this action, although he removed them five miles within that county, in part performance of a general plan for a removal out of the State with intent to hinder Sharp's creditors. The court refused also to give this instruction.

4. That there was no evidence that the defendant knew, at the time of the removal, that Sharp was indebted to the plaintiff, and that, without such knowledge on the part of the defendant, he was not liable to the plaintiff.

The court refused to give the instruction as prayed for, and instructed the jury that it was not necessary the creditor should prove that a person aiding his debtor to remove was expressly notified of the existence of the debt, but it was sufficient if he had knowledge of any facts that would put him on inquiry, whereby he might find out the debt; and, further, if they should find that the plaintiff, as surety for Sharp, paid the debt of

$94.56 to the defendant, and that all those persons lived in the same county, and that Sharp was generally reputed, from the time of the payment to his removal, to be insolvent, that those circumstances were sufficient to put the defendant on such inquiry.

Lastly, the counsel for the defendant moved the court to instruct the jury that if they should find for the plaintiff, they might take into consideration the state of Sharp's property, and assess only the actual damages sustained by the plaintiff from the removal of an insolvent debtor. But the court refused, and instructed the jury that the amount of the (263) debt was the proper measure of damages.

The plaintiff obtained a verdict and judgment, and the defendant appealed.

Morehead for plaintiff.
Kerr and *Iredell* for defendant.

RUFFIN, C. J. The Court is of opinion that neither of the exceptions can be sustained, and that the judgment must be affirmed. It is true, if the plaintiff had received payment from Sharp, so that no debt existed, this action would not lie. But it was held correctly that there was no evidence from which the payment could be justly inferred. The declaration of the plaintiff, that Sharp left "some papers" with him, and if he could collect them he hoped not to lose much, is too vague to authorize a finding of satisfaction. There is nothing to point out what the "papers" were, or that they were received in satisfaction. If it may be assumed that they were securities for money deposited with the plaintiff as an indemnity, it does not appear that they were on solvent persons, nor what was their amount, nor that they were then, or even now, due, much less that they had been collected. Under such circumstances it could not be judicially held that any part of the debt had been paid.

Upon the point respecting the statute of limitations it is to be noticed that two years had not elapsed between the payment of the money by the plaintiff and the removal of Sharp. It is unnecessary, therefore, to consider whether a person, sued for fraudulently removing a debtor, can insist on the defense that the statute would, at the time of the removal, have barred an action against the debtor; or, if he can, whether it may be done on the general issue or must be pleaded. Those points do not arise in the case, for the plaintiff was entitled both to his debt and to his action against Sharp when he was (264) removed.

By removing him an action arose against the present defendant for the debt, which might be brought at any time within three years; and the plaintiff was under no obligation to prosecute Sharp further. Consequently, it cannot affect the remedy against the defendant that, afterwards, the time ran so as to become a bar to an action against the original debtor. The remedies are of different natures and independent, and while the debt exists the creditor may take his remedy against either of the parties, or, indeed, proceed separately against both of them at the same time.

It is true that removing a debtor from one to another part of a county, though with the intent and expectation at the time that the debtor should remove out of the county, is not within the act, if the debtor do not actually carry the intention into execution; for it is the removal out of the county which makes the person removing a debtor liable for his debts, and the parties may change their purposes. But that was not the case here, as the fact was undisputed that Sharp did go out of the county, according to the original design; and, in such a case, a person who helps him by carrying him or his property a part of the way, in order to assist him in getting out of the county, becomes bound for his debts, although he did not convey the debtor or his goods entirely out of the one county into another. The statute is remedial, for the prevention of frauds on creditors, and is entitled to a liberal interpretation. It would be a fraud on it to allow it to be evaded by carrying the debtor to the county line. But, in truth, the case is within the words as well as the meaning of the act; for, not only removing, but "aiding or assisting" in removing a debtor with intent to defraud his creditors makes a person liable for all debts in the county.

(265) The Court concurs also in opinion that the circumstances mentioned by his Honor were sufficient to be left to the jury to charge the defendant with a knowledge of the plaintiff's debt, if such knowledge were necessary to that purpose. But we think very clearly that it is one who removes a debtor with the fraudulent purpose to put him or his property beyond the reach of his creditors generally that is liable for all he owes in the county, though he have not specific notice of particular debts, nor even suspects their existence. The language of the act is, that any person who shall remove a debtor out of any county with intent to defraud "the creditors of such debtor, shall be liable to pay all debts" which the debtor may justly owe in the county, and not those only of which he knew or had reason to believe the existence. It is necessary, indeed,

that the party should have some knowledge or belief of an indebtedness of the person removed in order to authorize an inference of an intent to defraud creditors. But when, from direct evidence or from the circumstances of the case, such as the generally known pecuniary condition of the person removed and the secret manner of the removal, the jury is satisfied of the general purpose to help the debtor to escape from his creditors, the act attaches, and gives to every creditor this remedy, although he who removed the debtor might have had no knowledge of the particular debt, and could, therefore, have had no intent to defraud one creditor in particular. A contrary construction would defeat the act altogether, as it must be almost impossible to fix the party with precise knowledge of the various debts, or even to show enough to put him on inquiry as to the specific debts. The true principle of construction of this act is that applied to Stat. 13 Eliz., which is that what is fraudulent as to one creditor is fraudulent as to all creditors, or, at least, all existing at the time. Both the policy and the words of the act of 1820 require this construction.

With respect to the measure of damages, the language (266) of the act leaves no discretion in the court or the jury. The enactment is positive that a person removing or aiding in removing a debtor "shall be liable to pay *all debts*" in the county, "which *debts* may be recovered by the creditors respectively by an action on the case."

PER CURIAM. Judgment affirmed.

Cited: Moore v. Rogers, 48 N. C., 95; *Moss v. Peoples*, 51 N. C., 142.

THE STATE v. JOHN BISHOP ET AL.

Keeping a gaming table, called "shuffle-board" is not indictable, under our act of Assembly concerning gaming, the jury having found that this is not a game of chance, but one of skill.

APPEAL from the Superior Court of Law of NEW HANOVER, at Spring Term, 1848, *Bailey, J.*, presiding.

The indictment charges that the defendants did erect, keep up and use a certain public gaming table, called by the name of shuffle-board, at which games of chance were played, contrary to the form of the statute. The jury found specially that the

defendants kept up the public gaming table called shuffle-board, as charged, and that divers persons played thereat and bet spirituous liquors on the games, but that the said games were not games of chance, but were altogether games of skill, (267) and referred the question to the court whether in law the defendants were guilty or not guilty. The court was of opinion with the defendants and gave judgment accordingly, and the solicitor for the State appealed.

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

RUFFIN, C. J. The game which is the subject of the indictment is, probably, the same that is mentioned in Stat. 16 Car. I., ch. 7, under the name of "shovel-board." But that is only conjecture, as the members of the Court know nothing of either game; and we should be altogether unable, without explanatory evidence, to judge of the character of that under consideration. But the jury have found it not to be a game of chance; and if it be otherwise the verdict does not set forth the mode of playing it, so as to enable the Court to see any contradiction in the verdict. Therefore it must be taken that shuffle-board is not a game of chance. That settles the question in favor of the defendants under this indictment and under the statute on which it is founded; for the act only makes the keeping of those public tables indictable at which games of chance are played; and the indictment, properly following the act, charges that at this table "games of chance were played." The verdict then negatives the indictment, and takes the case out of the act; and there was no error in the judgment.

PER CURIAM. Ordered to be certified accordingly.

Cited: S. v. Taylor, 111 N. C., 682.

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(268)

SIMON M. SMITHWICK, CHAIRMAN, ETC., v. HENRY WILLIAMS.

1. Wardens of the poor, who are elected by the County Court, under the provisions of the act of 1846, ch. 64, are not subjected to any penalty for refusing to accept the appointment.

2. Penal statutes cannot be extended by equitable construction beyond the plain import of their language.

APPEAL from the Superior Court of Law of MARTIN, at Spring Term, 1848, *Caldwell, J.*, presiding.

The action is debt for a penalty of $20 for refusing to serve in the office of warden of the poor, to which the defendant was elected by the County Court of Martin at April Term, 1847. Many objections to the recovery were taken for the defendant, among which was one that the defendant, having been elected under the act of 1846, ch. 64, was not liable to a penalty. A verdict was taken for the plaintiff subject to the opinion of the court on that and other points of law. The presiding judge afterwards held that the penalty existed under the act of 1777, of which that of 1846 was an amendment, and judgment was entered against the defendant, and he appealed.

No counsel appeared in this Court for plaintiff.
Biggs for defendant.

RUFFIN, C. J. Without adverting to any other of the points reserved, the Court deems the judgment erroneous, upon the ground that no statute imposes a penalty on the defendant. That of 1846, under which he was elected by the County Court, gives none. The case, then, depends on the pre- (269) vious acts. Up to 1846, wardens of the poor were elected by the freemen of each county, and in case any so chosen refused to serve, or died or removed, others were appointed in their stead by those who did act—as provided in Laws 1777, ch. 117, and 1783, ch. 191. The former required overseers of the poor to elect two of their members wardens, and it gave a penalty of £5 against an overseer "elected according to this act" for refusing to serve, to be recovered by the wardens to the use of the poor; and it also gave a penalty of £20 against a warden for refusing to serve, to be recovered by an informer, one-half to his own use and the other half to the use of the poor. The act of 1783 provided that all the overseers should be wardens of the poor, and that all persons "duly elected" wardens, and refusing to qualify, should forfeit £10, to be recovered in any court of record by the county trustee, and applied to the use of the county. In the revision of 1836, ch. 89, those two acts are re-enacted as to the periods and modes of electing these officers; and in respect to the penalties it is provided "that every person *elected a warden of the poor according to this act*, who shall refuse or neglect to qualify, shall forfeit the sum of $20, to be recovered in any court of record by the chairman of the County Court, in an action of debt to the use of the county." Then

comes the act of 1846, "to alter the modes of electing wardens of the poor," which provides that the county courts shall, at the first term after 1 January, 1847, elect wardens to serve for three years, and repeals so much of the first section of chapter 89, Revised Statutes, as relates to the time and manner of electing wardens.

From this compendium of the previous legislation it seems clear, upon the principles of construction applicable to penal enactments, that no one of the acts covers this case so as to subject the defendant to this penalty. Those of 1777 and
(270) 1783 gave penalties of different amounts and recoverable by different persons. Besides, those acts were not in force after January, 1838, when the Revised Statutes went into operation. Therefore, the Rev. St., ch. 89, is the only one that bears on the point. That does not, like the act of 1783, give the penalty against all persons "duly elected," who shall refuse to qualify; but section 4 adopts the terms used in the act of 1777, that every person, "elected according to *this* act," who shall refuse to qualify, shall forfeit $20, to be recovered by the chairman of the County Court. Penal statutes cannot be extended by equitable construction beyond the plain import of their language; and the words here expressly restrict the penalty to the wardens elected according to that act, that is to say, by the people of the county or by the acting wardens in case of vacancies by refusal, removal or death. Judging from the special terms of the repealing clause in the act of 1846, it is very probable, as was said in argument, that the Legislature had no intention to abolish the penalties of the act of 1836. Indeed, it may be true that persons appointed by the acting wardens to supply vacancies may still be liable for those penalties. But that does not enable the Court to include wardens, elected by the County Court, within an act which in special terms expressly gives the penalty against such wardens as were elected by the people, or by the court of acting wardens, and refused to serve. The silence of the act of 1846 as to new penalties on the persons elected under it, or as to the extension to them of the penalties of the act of 1836 against the wardens chosen as therein directed, may probably be another example of inadvertent omission and imperfect legislation, incident to attempts to effect particular changes by persons who are not fully informed or who will not take into view the whole subject to which a bill relates. Certain it is, however, that the act of 1846 creates no penalty, and that while it does not expressly repeal those
(271) given by the act of 1836, yet the words of the act of

1836, in themselves, do not include the case of the defendant, but are strictly confined to persons elected in a different manner.

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

Cited: Coble v. Shoffner, 75 N. C., 43; *S. v. Midgett*, 85 N. C., 541; *McGloughan v. Mitchell*, 126 N. C., 683; *Turner v. McKee*, 137 N. C., 258.

THE STATE v. JOHN GUPTON.

The game of tenpins is not a game of chance, and therefore persons playing at it are not indictable under our act of Assembly, Rev. Stat., ch. 34, sec. 68.

APPEAL from the Superior Court of Law of NASH, at Spring Term, 1848, *Caldwell, J.*, presiding.

The defendant was indicted, with two others, for playing together, "at a certain public gaming place called a *tenpin alley*, a certain game of chance called tenpins, and betting money thereat," contrary to the statute. Upon not guilty pleaded the defendant was tried alone.

Evidence was given for the State that a tenpin alley (272) was kept up at a public place, where spirituous liquors were retailed, and that the defendant, with others charged, played the game of tenpins for money. Evidence was further given that the game is thus played: Tenpins or blocks of wood are set up at one end of a platform sixty feet long and four feet wide, and the players stand at the other end and thence bowl a wooden ball at the pins, and he who knocks down the greater number of the pins is the winner.

For the defendant it was contended that the case proved was not within any statute. But his Honor was of opinion that, under the broad words of the act of Assembly, the facts constituted an indictable offense, and the jury convicted the defendant, and after sentence he appealed.

Attorney-General for the State.

No counsel for defendant.

RUFFIN, C. J. The Legislature has wisely set its face against the idle and vicious practice of gaming, and to that end has passed various laws, calculated more or less to suppress it. But

no one of them, we believe, reaches the present case. Besides avoiding all securities for money won at play, certain kinds of gaming are made criminal. Playing at cards in a public house, and betting thereon, and suffering such gaming at cards by the keeper of the house, or supplying the players with refreshments, are forbidden and distinctly made indictable. Against public gaming tables, also, there are several provisions. E. O., A. B., and A. B. C., faro banks, pass die tables, or any other table or bank of the same or like kind under any denomination are forbidden to be used in this State, and heavy penalties given against any one who keeps or uses them or who suffers games to be played at them in his house; and authority is given to certain officers to destroy the tables, and seize all money
(273) staked or exhibited. Rev. St., ch. 34, sec. 64, etc. None of those enactments sustain this indictment. Except as to gaming at cards, forfeitures and pecuniary penalties alone are enacted, and not indictment. To supply that omission the Legislature passed the act of 1835, which is incorporated into the present statute. Rev. St., ch. 34, sec. 68. It is the only provision on which reliance is placed in support of this indictment, and is, no doubt, the one on which the indictment was drawn. It enacts that, in addition to the penalties before prescribed, any person who shall construct, erect, keep up or use any public gaming table or place at which games of chance shall be played, by whatever name called, and every person who shall play at any of the forbidden gaming tables any game of chance and bet thereon, shall be guilty of a misdemeanor, and upon indictment and conviction shall be punished as prescribed by the act. The question, then, is the narrow one, whether "ten-pins," as it is described in the exception, is a game of chance or not. The phrase, "game of chance," is not one long known in the law and having therein a settled signification, but was introduced into our statute-book by the act of 1835. As it had no technical meaning, as a legal expression, it must have been used by the Legislature in the sense in which persons conversant in games, or the world at large, give to it in classing the different kinds of games. Therefore it is apparent that those games are specified in contradistinction to other games which are not games of chance. In other words, those terms must be understood in their plain, popular sense, as descriptive of a certain kind of games of chance in contradistinction to a certain other kind, commonly known as games of skill. Though our knowledge on such subjects is very limited, yet we believe that, in the popular mind, the universal acceptation of "a game of chance" is such a game as is determined entirely or in part by lot or

mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted (274) by chance. As intelligible examples, the games with dice, which are determined by throwing only, and those in which the throw of the dice regulates the play, or the hand at cards depends upon a dealing with the face down, exhibit the two classes of games of chance. A game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory. Of this kind of games chess, draughts or chequers, billiards, fives, bowls, and quoits may be cited as examples. It is true that in these latter instances superiority of skill is not always successful—the race is not necessarily to the swift. Sometimes an oversight, to which the most skillful is subject, gives an adversary the advantage; or an unexpected puff of wind, or an unseen gravel in the way, may turn aside a quoit or a ball and make it come short of the aim. But if those incidents were sufficient to make the games in which they may occur games of chance, there would be none other but games of that character. But that is not the meaning of the statute, for, as before remarked, by the very use of those terms the existence of other kinds of games, not of chance, is recognized. The incidents mentioned, whereby the more skillful may yet be the loser, are not inherent in the nature of the games. Inattention is the party's fault and not his luck, and the other obstacles, though not perceived nor anticipated, are occurrences in the course of nature, and not chances. They are, indeed, sometimes inaccurately called so, as one hears "chances of war" used to excuse losses by means not foreseen, but which might, and, though out of the usual course of things, ought to have been foreseen and provided against. For the art of war is surely a science, and the results of certain powers, movements and combinations may be almost mathematically calculated. In the same manner, comparing small things with great, these are games of skill—purely such, although the better player may, in particular instances, fail to win, from such causes (275) as those mentioned, the want of attention or energy, and not the blindness of chance. In that sense tenpins, as understood by us from the description in the case, is not a game of chance, but of skill. Nothing is referred to chance; but, as in billiards, a just estimate of distances and angles, steadiness of hand and a due application of strength constitute, under ordinary circumstances, the judicious and successful player. We take this game to be one species of the game known in England, and spoken of in her statutes, under the general term of *bowls;*

and if it be, there is legal authority for holding it not to be a game of chance. The phrase is found in a statute of 5 Geo. IV., which enacts that every person playing or betting, in any open or public place, at or with any table or instrument of gaming, "at any game or pretended game of chance," may be punished as a vagrant. Mr. Chitty states that playing at bowls is not within the act. 3 Chit. Cr. L., 673. So in *Sigel v. Jebb*, 3 Stark., ch. 1, *Chief Justice Abbott* held that all games for money, "whether of skill or of chance," were unlawful within the meaning of St. 9 Anne, and remarked particularly that playing at bowls had been held to be within that statute, "and yet that was not a game of chance." In like manner bowls and tenpins are certainly within our act avoiding gaming contracts. But, for the reasons assigned, we do not think that those and other games of the like kind are games of chance within the other act of 1835, so as to render the players indictable.

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

Cited: S. v. Taylor, 111 N. C., 682; *S. v. King*, 113 N. C., 632.

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(276)

JAMES BEAL v. MARRIOTT ROBESON ET AL.

1. Where in an action for a malicious prosecution it became material to inquire whether a party was drunk at a particular time, he may give evidence by witnesses, who have known him long and intimately, that he was not addicted to drunkenness; but he cannot give in evidence his general reputation of being a sober man.

2. In civil cases the general rule is that unless the character of the party be put directly in issue by the nature of the proceeding, evidence of his character is not admissible.

3. In an action for a malicious prosecution, in order to rebut the imputed malice the defendant may show that he had consulted counsel learned in the law, upon a full and fair statement of all the facts of the case, and acted according to his advice; but it is incompetent for him to prove that he consulted with an unprofessional man and followed his advice, in order to show that he acted *bona fide* and without malice.

APPEAL from the Superior Court of Law of CHATHAM, at Spring Term, 1848, *Pearson, J.*, presiding.

After the new trial granted in this case at June Term, 1847 (see 29 N. C., 280), it was again tried at Chatham, on the Spring Circuit of 1848, when the defendants had a verdict and judgment, and the plaintiff appealed. In the bill of exceptions

it is stated that, upon the question of probable cause, much testimony was given on both sides, but it is not set forth, for the reason that his Honor charged that there was no probable cause for the prosecution, and no exception was taken to the charge.

To show that the defendants had acted with malice the plaintiff contended that the defendant Robeson had not been robbed at all; that he went from Pittsboro very drunk, and on his way home fell from his horse and hurt his head, and thereby received the injury, which he swore that the plaintiff (277) and his associates had inflicted upon him. As to the fact whether he was drunk when he left Pittsboro, the testimony was contradictory, one witness swearing that he was very drunk, another that he was only intoxicated, and a third that he was neither drunk nor intoxicated, but had only taken a dram.

The defendant Robeson then offered to prove by witnesses, who had known him intimately for the last thirty years, that he was not addicted to drunkenness, and that although he would take a dram, they had never known him to be drunk, and that he bore the character of being a sober man. This testimony was objected to by the plaintiff, but was admitted by the court.

To disprove the allegation of malice, the defendant Robeson offered to show by one Isaac Holt that the witness was a justice of the peace in the county of Orange and had acted as such for many years; that the defendant formerly lived near him, and was in the habit, as were the other neighbors, of advising with him on legal questions; that the defendant afterwards removed to the county of Chatham, and the next day after he had received the injury complained of, the witness, who was in the neighborhood on a visit, called to see him, and the defendant then stated to him the circumstances under which he had been robbed, and the facts tending to show that the plaintiff was one of the persons concerned in the act, and asked his advice as to the proper course for him to pursue; and the witness advised him that it was his duty to take out a State's warrant against the plaintiff. This testimony also was objected to by the plaintiff, but admitted by the court. After the verdict for the defendants, the only ground upon which a new trial was asked was for the improper admission of testimony. A new trial was refused, and the plaintiff appealed.

McRae for plaintiff.
Waddell for defendants. (278)

BATTLE, J. The testimony offered by the defendant to prove, by witnesses who had known him long and intimately, that he was not addicted to drunkenness, was properly admitted. This

habit in the use of ardent spirits was a fact which might well be within the knowledge of the witnesses, and to which they might testify, as it was relevant to the subject of inquiry, to wit, whether the defendant was drunk at the time spoken of by the other witnesses. But we think that there was error in admitting the testimony for the purpose of proving that the defendant had the character of being a sober man. "In civil suits the general rule is that unless the character of the party be put directly in issue by the nature of the proceeding, evidence of his character is not admissible. *McRae v. Lilly*, 23 N. C., 118. Here the character of the defendant for sobriety was not put directly in issue, and we can see no reason to take the case out of the general rule.

The other testimony, offered by the defendant to disprove malice, was inadmissible and ought to have been rejected. When a party consults counsel learned in the law, upon a full and fair statement of all the facts of the case, and acts according to his advice, that circumstance may be proved to show that he acted *bona fide* and without any malicious intent. *Blunt v. Little*, 3 Mason, 102; *Hewlett v. Cruckley*, 5 Saund., 277 (1 Eng. C. L., 107); 2 Stark. Ev., 495. We have neither seen nor heard of any case where the opinion of an unprofessional man, taken by the defendant, has been admitted to show that he acted in good faith and without malice. In the case of *Blunt v. Little, supra, Judge Story* says that "it is certainly going a great way to admit the evidence of any counsel that he advised a suit upon a deliberate examination of the facts, for the purpose of repelling the imputation of malice and establishing probable cause"; and in *Hewlett v. Cruckley, supra,* the (279) rule is laid down by the Court, after an *advisari*, with evident caution and with some doubts as to its correctness. We do not feel at liberty to carry it further, by admitting testimony of the opinion of any gentleman, however respectable, who has not qualified himself for giving advice upon questions of law, by studying it as a science and pursuing it as a profession. This Court certainly did not intend to do so when this case was formerly before it. The persons, to consult whom it is stated, in the opinion then delivered, to be the duty of a party who conceives himself aggrieved and is about to institute a criminal prosecution, are gentlemen of the legal profession, and not those who in point of qualification to advise upon such questions stand no higher than the party himself.

PER CURIAM. Judgment reversed and new trial.

Cited: Bottoms v. Kent, 48 N. C., 155.

(280)

DEN ON DEMISE OF JOHN R. GILLIAM v. JOHN W. BIRD.

1. It is an inflexible rule that whenever both parties claim under the same person neither of them can deny his right, and then, as between them, the elder is the better title and must prevail.

2. A house, or even the upper chamber of a house, may be held separately from the soil on which it stands, and an action of ejectment will lie to recover it.

3. A street in a town or any other highway, though now dedicated to the use of the public, may have been and probably was once the subject of private property, and therefore the ordinary doctrine of estoppel will apply to it.

4. A deed from A to B estops not only A, but all who claim under him.

5. A plaintiff in ejectment is entitled to a verdict if he can show a wrongful possession in the defendant of any part, no matter how small, of what he claims in his declaration.

APPEAL from the Superior Court of Law of BERTIE, at Spring Term, 1848, *Settle, J.*, presiding.

This was an action of ejectment brought to recover a house and lot of land in the town of Windsor. The lessor of the plaintiff showed in evidence a deed from one David Ryan to himself, and proved that the building and lot mentioned in that deed are the same as those described in the declaration. The said deed is dated 4 February, 1841. He then proved that in 1843, at a sale of said David Ryan's property, one George S. Holley was present and requested John Freeman, the sheriff, to put up for sale the interest of the said David Ryan, either in the building alone or in it and the ground on which it rested, and the said lot of land; whether he requested anything more than the building to be put up, there was conflicting testimony. The said John Freeman thereupon complied (281) with said request, and the said George S. Holley became the purchaser. The said Holley afterwards rented the said house to Dr. Robert H. Smith, who went into possession as tenant of said Holley, and continued in possession up to the time of the bringing of this action; first as the tenant of said Holley, and then as the tenant of the defendant, who had purchased of Holley whilst Smith was in possession. The defendant proved that the ground on which the building stood, and the said lot of land, formed, as early as 1815, a part of one of the public streets of the town of Windsor; that in 1832 or 1833 the building was placed where it now stands; that from the said year 1815 up to 1835 or 1836 the said street continued to be

used as a public street, except that part of it covered by the said building after the year 1832 or 1833; that in 1835 or 1836 the fence enclosing said lot of land was put up. It was then proved that Smith, as the tenant, first of Holley, then of Bird, who purchased of Holley, had been in possession of the said building three years next before the beginning of this action. The defendant contended that the plaintiff could not recover: first, because Smith, the tenant of Holley and Bird, having been in possession of the said building more than three years before the commencement of this action, then if the jury should believe from the evidence that the building only was sold, and not the ground on which it rested, nor the lot, the building is to be considered as personalty, and the defendant is protected by the statute of limitations. Secondly, that this action cannot be sustained for the building without the ground on which it rests or the lot of land. Thirdly, that the plaintiff had not made out a title for the ground on which the building was, and the lot belonged to the public. Fourthly, that the ground on which the building stood, and the said lot, being part of a street, (282) was not the subject of a grant, and therefore no estoppel could arise, although both parties might claim under the same person. Fifthly, as no deed was shown from said Freeman, sheriff, to said Holley, nor from Holley to the defendant, the defendant was not estopped. Sixthly, if the jury should be satisfied from the evidence that Holley claimed only the building, and not the ground on which it stood, nor the lot, the defendant was not estopped.

His Honor instructed the jury that the statute of limitations applied to the form of the action, and as this was an action of ejectment, the right of entry of the real owner was not barred until after seven years' adverse possession of the defendant under color of title; that whether the deed conveyed the house or the lot of land was a question for the court and not for the jury; that the deed from Ryan to the plaintiff conveyed an interest in real estate which could be recovered in an action of ejectment only; that as to the third, fourth, fifth and sixth objections made to the plaintiff's recovery, his Honor instructed the jury that the land upon which the house stood, though formerly a part of the public street of the town of Windsor, was the subject of a grant, as all land in the State not covered by water was subject to entry; that though the plaintiff might not have the real title, yet as the plaintiff purchased the property of Ryan, if Holley purchased it as Ryan's property, and, claiming title under Ryan, leased it to Smith, and afterwards sold it to the defendant Bird, that Bird would, as against the plain-

tiff, be estopped to deny Ryan's title, and that, in order to create an estoppel, a deed was not always necessary. But whether Holley claimed the title of Ryan, and whether he afterwards leased it to Smith, were facts for them to find.

The jury rendered a verdict for the plaintiff. Rule for a new trial. Rule discharged and judgment according to the verdict. Appeal to the Supreme Court.

[*Copy of the Deed from Ryan to Gilliam.*] (283)

I have this day bargained and sold to Dr. John R. Gilliam for and in consideration of the sum of four hundred and fifty dollars, all my right, title and claim to the building now occupied by negro Tom and formerly occupied by Dr. John Haywood and known as Haywood's shop, and do convey all the interest that I may have had to the ground occupied or covered by the house as well as the land enclosed by the fence around the building. In witness, etc., 4 February, 1841.

DAVID RYAN, (SEAL.)

Iredell for plaintiff.

P. H. Winston, Jr., for defendant.

BATTLE, J. Many objections were urged against the recovery of the plaintiff's lessor in the court below, and have been again pressed in the argument before us. We have given to them a due consideration and have carefully examined the reasons which have been brought to their support. But, after all, we are compelled to say that they do not satisfy us that the defendant's case can be exempted from the operation of the inflexible rule, that whenever both parties claim under the same person, neither of them can deny his right, and then, as between them, the elder is the better title and must prevail. *Murphy v. Barnett*, 4 N. C., 14; *Ives v. Sawyer*, 20 N. C., 179. The defendant's counsel, acknowledging the force of this rule in all the cases to which it can apply, has tasked his ingenuity to show that his case does not come within it. Let us see to what extent he has succeeded. The first and second objections may be considered together, for whatever is an answer to one is an answer to both. They must assume that a house, separate and distinct from the ground on which it stands, is personal property. But that is not so. The ownership of land is not con- (284) fined to its surface, but extends indefinitely, downwards and upwards. *Cujus est solum, ejus est usque ad cœlum.* 2 Black. Com., 18. It includes not only the ground or soil, but everything which is attached to the earth, whether by the course

of nature, as trees and herbage, or by the hand of man, as houses and other buildings. Co. Lit., 4a. A house, or even the upper chamber of a house, may be held separately from the soil on which it stands, and an action of ejectment will lie to recover it. 3 Kent Com., 401, note e. The other objections are urged more particularly against the application to this case of the doctrine of estoppel. It is said that the lot upon which the house in controversy stands is a part of one of the public streets of the town of Windsor; that a public street is not the subject of a grant by the State, and cannot, of course, become the property of a private individual, and that, therefore, no estoppel can arise in relation to it. In support of this argument the counsel relies upon the proposition laid down by this Court in *Collins v. Benbury*, 25 N. C., 285, that "it is very clear that a grant of a several fishery in the ocean or other navigable water by an individual who could not acquire it from the State must be merely void, and therefore it cannot estop." The cases are widely different, and the admission of the one furnishes no ground of support for the other. A several fishery in the ocean or in a navigable stream is not, and never has been, the subject of private ownership in this State, because land covered by a navigable water course has always been expressly excluded from entry, and a grant of it by one individual to another would therefore exhibit on its face its own nullity. But a street or any other highway, though now dedicated to the use of the public, may have been, and probably was, once the subject of private property, and a grant of the soil over which it passes need not, and ordinarily would not, expose its own invalidity. (285) This being so, the decisive answer to the defendant's argument is that he is just as much estopped from showing that the title is out of the plaintiff's lessor, and in the public, as that it is in any private person. It is said again that the defendant is not estopped, because it does not appear that Holley, from whom he purchased, ever took a deed from the sheriff, or that he ever executed one to him. This objection is founded upon a misapprehension of the manner in which the estoppel arises in this case.

The deed from Ryan to the plaintiff's lessor estops Ryan from disputing his grantee's title, and the same estoppel extends to all persons who claim from or under Ryan, whether by deed or otherwise. *Murphy v. Barnett, ubi supra.* Holley took possession, by means of his tenant, of the house which he purchased at the sheriff's sale as the property of Ryan, and until the contrary appears he must be presumed to have entered under

the title acquired by his purchase. He cannot then dispute the title of Ryan, and that title had been previously conveyed to the plaintiff's lessor.

Another position is assumed in the argument here, that the deed from Ryan to the plaintiff's lessor conveys only a life estate, and that Holley purchased only the reversion in the house, that being all the interest which Ryan then had in it, and that the estoppel could not extend to such reversion. All this may be true, and yet it cannot avail the defendant, because his vendor, Holley, entered into possession of the house immediately after his purchase, and he must, therefore, be taken to have claimed a present and not a reversionary interest.

The last objection is clearly untenable. In the argument it is said that Holley purchased and took possession of the house only, and not the lot on which it stood, and that consequently he could be estopped for the house only. But that is sufficient for the lessor's purpose. He is entitled to a verdict if he can show a wrongful possession by the defendant of any (286) part, no matter how small, of what he claims in his declaration. *Huggins v. Ketchum*, 20 N. C., 550. The verdict and judgment in an action of ejectment do not necessarily specify the part for the trespass upon which the defendant is found guilty, and the lessor of the plaintiff must, in such case, take out his writ of possession at his own peril.

We have thus considered all the objections urged by the defendant against the recovery of the plaintiff's lessor, and finding them untenable, we must affirm the judgment.

PER CURIAM. Judgment affirmed.

Cited: Johnston v. Watts, 46 N. C., 230; *Feimster v. McRorie, ib.*, 549; *Hays v. Asken*, 50 N. C., 65; *Worsley v. Johnson, ib.*, 74; *Trustees v. Chambers*, 56 N. C., 277; *Stancel v. Calvert*, 60 N. C., 106; *Wharton v. Moore*, 84 N. C., 481; *Christenbury v. King*, 85 N. C., 234; *Ryan v. Martin*, 91 N. C., 469, 470; *Asheville Division v. Aston*, 92 N. C., 587; *Davis v. Strand*, 104 N. C., 489; *Brown v. King*, 107 N. C., 315; *Thomas v. Hunsucker*, 108 N. C., 723; *Collins v. Swanson*, 121 N. C., 68.

JAMES H. POOL v. JAMES WILLIAMS.

1. An indemnity obtained from a principal by one of two cosureties, after the risk is incurred, inures equally to the benefit of both.

2. But where the surety merely had a deed of trust for certain property, as an indemnity, executed by the principal, and neglected to have it registered, so that the property was sold by other creditors, the cosurety is not entitled, on account of this *laches*, to make him responsible for the value of the property.

APPEAL from the Superior Court of Law of PERQUIMANS, at Spring Term, 1848, *Settle, J.*, presiding.

(287) This is an action on the case, brought, under the statute, by one surety of an insolvent principal against a cosurety for contribution.

The case was as follows: The firm of H. N. Williams & Co., composed of H. N. Williams and C. C. Green, did business as merchants in Elizabeth City, and made several promissory notes to different persons, which were also executed by the plaintiff and the defendant and one Proctor as sureties. The principals became insolvent, and some of the notes were afterwards paid by the plaintiff, and after giving the defendant notice thereof and demanding an aliquot part of the sum paid by him, he brought this suit.

The counsel for the defendant in opening his case stated that he claimed that the value of certain slaves, which Williams and Green had conveyed to the plaintiff, should be deducted in the first instance from the amount paid by the plaintiff, and that he was liable only for a share of the balance that would remain after such deduction. And in support of that defense the counsel for the defendant offered to give in evidence a deed of trust, made by Williams and Green to the plaintiff, dated 16 March, 1841, and proved and registered 2 December, 1842, purporting to convey to Pool seven slaves in trust to indemnify him from loss by reason of his having become one of the sureties in the notes of H. N. Williams & Co. before that time made and mentioned in the deed, being the same that were paid by the plaintiff and given in evidence in this action. And the counsel offered further to prove that at the time the deed was executed Williams remarked to Green: "Mr. Pool will not have the deed proved and registered, unless it becomes necessary to do so for his security," and the plaintiff then assented thereto; and further, that a memorandum in pencil on the deed in the following words, "To be proved and registered when I say so," was in the handwriting of the plaintiff; and further, that the

said slaves remained, after the execution of the deed, in the possession of Williams and Green and became liable (288) to be sold and were sold for the satisfaction of the debts of Williams and Green, by reason that the said deed was not sooner proved and registered; and further, the counsel offered to prove the value of the said slaves. But the court refused the evidence, because it was irrelevant and incompetent to establish a defense at law, and only made a case of equitable cognizance. There was a verdict for the plaintiff, and after judgment the defendant appealed.

Heath for plaintiff.
Iredell for defendant.

RUFFIN, C. J. *Fagan v. Jacocks,* 15 N. C., 263, and *Hall v. Robinson, ante,* 56, establish that there is no difference between the law and equity applicable to the rights and liabilities of cosureties, as they are involved in this suit. The jurisdiction is made concurrent for the sake of the remedy merely, and not to change the rules which fix the rights of the parties. From the nature of things, where two courts are required to take cognizance of the same subject, both courts, in determining the right, must proceed on the same principles of law and justice; otherwise, although the jurisdiction be the same, the decisions will be in conflict. However perplexing, therefore, some of the questions that may arise between sureties may be to a court of law, they must, in general, be entertained and decided as well as we can. As far, then, as the reason goes on which the evidence was ruled out, the Court does not concur in the decision.

Nevertheless the Court is of opinion that the judgment ought not to be reversed, because the evidence, if received, could not establish the defense, but admitting it all to be true, the plaintiff would be entitled to recover without any deduction, either at law or in equity.

The argument for the defendant is based on the equi- (289) table principles that sureties are upon an equality, and hence that an indemnity, not stipulated for when the risk began, obtained by one surety, inures to the benefit of another. The soundness of those principles cannot be contested, and by the statute they are incorporated into the law. But the difficulty is to apply them to this case, so that the defendant can derive any benefit from them. It is to be noted that the plaintiff has not misapplied a common fund to his own benefit, nor even given up the debtor's property, which had been effectually conveyed. The plaintiff then says, in answer to the defendant's

claim, that he is willing to divide the deed of trust with him; nay, that he is welcome to the whole deed, to make the most of it. But that does not satisfy the defendant. He does not want the deed, which was all the plaintiff got, but he wants something more, which is, that the plaintiff should account with him for what the plaintiff might have made by the deed if he had been as diligent as he might have been, or even as most men are, in guarding against loss. That is altogether a different principle from those before spoken of, and is new to us. We do not see how one surety can resist making contribution by showing that the other had it in his power to secure both, and did not. No such doctrine is found to have been laid down, and it does not appear to rest upon any reasons of justice or benevolence. The obligation of one surety to divide with another what he gets from the principal arises out of their connection in a common risk. It is said, and every one feels, that all standing in that relation ought to make common cause, and that one cannot with a good conscience selfishly provide for himself and leave others to lose. It is his duty to remember his fellow sufferer with himself. Hence, when he can get a counter-security he ought to take it to both; and if he take it to himself only, the other has a right to claim it, and equity treats it, as if it were made to both, or got by a common
(290) agent for the benefit of both. But one surety cannot ask another to do more for him than he does for himself. It is a plain violation of the benevolence that ought to subsist between sureties for one of them to insist that he should be relieved from loss and the whole thrown on another, because the latter did not, when he might, get a security, or an effectual security. In claiming the benefit of the deed the defendant treats the plaintiff as his agent in getting a good security. How, then, can he disavow the agency when the security turns out not to be effectual? He claims that the deed, though not so expressed, inured to his benefit, on the principle of equality; and yet, at the same time, he would break in on that equality by deducting the value of the negroes from the debt, so as to give him a benefit, while the plaintiff gets none. There seems to be nothing to uphold such a doctrine. The true principle is that sureties are to fare alike. If one gets a security, it is a security for all. But they must take it in the state in which they find it. If good for one, it is good for all. What right has the defendant to complain of the *laches* of the plaintiff? They were no greater than his own. The one made no attempt to get a security, and the other made a partial attempt, but did not carry it through. It is said, however, that the conduct of

the plaintiff may have been to the prejudice of the defendant, as it may have prevented the principal, upon the defendant's application, from giving him a security, inasmuch as they had already executed that to the plaintiff which secured both. That is answered, first, by the fact that there is no evidence of such an application by the defendant; and, next, that if there had been such a transaction, that by itself would not help the defendant's case; for upon hearing of the deed to the plaintiff—it being in law for their joint benefit—it would have been as much his duty as that of the plaintiff to advise and see to its completion by registration. If he had applied to the plaintiff to register the deed or let him have it done, and (291) the plaintiff had refused, the defendant might have more cause to complain—not, indeed, of a violation of a duty of benevolence on the part of a cosurety merely, but because of the positive wrong of preventing the defendant from perfecting a conveyance in which he had equitably as much interest as the plaintiff and as much right to control. There seems to be a plain distinction between wantonly frustrating the wish and effort of the defendant to make their common security effectual, and a mere passive omission to do so on the part of the plaintiff.

Then it is said the plaintiff was guilty of a fraud in agreeing not to make the deed public by registration. But that is a fraud on the principal's creditors, who claimed against the deed, and not on the defendant, whose claim is under the deed.

Finally, the Court holds that, as a cosurety, the plaintiff was only bound to act for the defendant as he did for himself, and that, as the plaintiff derived no benefit from the deed, the defendant cannot; and, therefore, that the plaintiff was entitled to recover an aliquot part of what he paid without any deduction on account of the slaves conveyed, or, rather, intended to be conveyed by the deed.

PER CURIAM. Judgment affirmed.

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(292)

DEN ON DEMISE OF JOHN C. BARNES v. SPENCER M. MEEDS.

Where one purchases land at an execution sale at a great sacrifice, in consequence of a fraudulent combination between him and the sheriff who conducted the sale, as, by reason of this fraud, he obtained no title, so a *bona fide* purchaser from him, without notice of the fraud and for a valuable consideration, will likewise obtain no title.

APPEAL from the Superior Court of Law of PASQUOTANK, at Spring Term, 1848, *Settle, J.*, presiding.

The premises mentioned in the declaration were sold by the sheriff of Pasquotank under a *fieri facias* against the present defendant, and were bid off by John J. Grandy, who took the sheriff's deed and recovered them in an action of ejectment against one Morris, who was at that time in possession under Meeds. The sheriff went to the premises to execute the writ of possession, and, finding Meeds again in possession, he put him out and delivered the possession to Grandy's agent. Meeds then applied to the agent to allow him to stay there a short time, until he could get another place; and the agent assented, and the defendant returned into possession. Soon afterwards Grandy conveyed the premises to the lessor of the plaintiff, and he demanded possession from the defendant, and, upon his refusal, brought this suit.

In answer to the foregoing case the defendant called as a witness the former sheriff of Pasquotank, at whose sale Grandy purchased. He deposed that he levied the execution on two tracts of land, about half a mile apart, on one of which Meeds resided; and that after due advertisement he offered them (293) separately for sale at the place of Meed's residence (under a private act for that county), and Grandy became the purchaser of each at fifty cents. The witness further deposed that the day of sale was very rainy, and that Meeds was from home, and no other person was present but Grandy and himself. And the witness further deposed that he, the witness, and Grandy and some other persons were bound as sureties for Meeds for other debts (not in execution), and that it was their object to make Meeds' property pay his debts, and it had been agreed, if it could not be sold under execution for its value and Grandy should become the purchaser, that he should resell it, and, if an advanced price could be got, it should be applied to the debts for which he, the sheriff, Grandy, and the other persons were bound for Meeds.

The counsel for the defendant moved the court to instruct the jury that if they believed that Grandy and the sheriff combined to make a sale of the defendant's land so that Grandy could purchase at a great sacrifice, then the pretended purchase of Grandy was void, and the plaintiff could not recover. The court refused to give the instruction, and, on the contrary, directed the jury that if those persons did combine to sacrifice the land it would not affect the right of the plaintiff in this action, if they believed the lessor of the plaintiff was not a party to the combination and had no notice of it, and was a *bona fide* purchaser for a valuable consideration. The jury found for the plaintiff, and he had judgment; and the defendant appealed.

Iredell for plaintiff.
Heath for defendant.

RUFFIN, C. J. There was no evidence of any price given by the lessor of the plaintiff to Grandy, much less that it was a fair one, so as to make him a meritorious purchaser for (294) a valuable consideration. It is error to leave it to the jury to find a fact without any evidence tending to establish it; and, therefore, the judgment would be reversed if the other and more important part of the instruction were right.

But the Court holds the residue of the instruction to be also erroneous. The testimony of the sheriff raised a strong suspicion of an illegal conspiracy and injurious practice between him and Grandy to get the title of the defendant's property vested in Grandy at a great undervalue, for their joint benefit and to the prejudice of both the creditor and the debtor in the execution. Without leaving the inquiry of fact to the jury, but assuming it to be as alleged by the defendant, and impliedly admitting that, by reason of the conspiracy and the low price of the land, Grandy got no title by his purchase, his Honor nevertheless held that Grandy's conveyance to the lessor of the plaintiff gave him a good title, if the latter had no notice of the fraud and paid a fair price. That seems to be against first principles, for he who has no title can convey none. A bad title is not made good by the ignorance of the purchaser of its defects or his want of knowledge of the better title. A purchase of the legal title for value and without notice of an equity may prevent the purchaser from being held to be a trustee. But in respect of legal estates the rule is *caveat emptor*, for the better title never can be destroyed by another's want of knowledge of it.

An attempt was made, in the argument, to assimilate this to a purchase from a fraudulent grantee under St. 27 Eliz. But the cases are not of the same kind. They are, indeed, opposed to each other. The owner of the land, fraudulently sold, was not a party to the fraud, but the victim of it. Consequently he may aver the fraud and avoid the deed. But a fraudulent grantor is a party to the fraud, and he and all others are bound by his deed, except subsequent purchasers from (295) him. It has been held, also, that a purchaser from the fraudulent grantee shall hold, because the object of the act is to protect purchasers, and therefore it inures to the benefit of a purchaser from either the grantor or the grantee, provided he be the first purchaser. For the fraudulent grantee has a title, and consequently can convey; and in so doing he wrongs no one,

there being then no second purchaser from the grantor. To make a case under the statute at all like the present it should appear that, after a conveyance by the grantor to a second purchaser, a vendor of the first fraudulent grantee would have a good title merely because he was ignorant of the fraud in his vendor's title and of the second conveyance of the original fraudulent grantor. But there is no such decision, and cannot be, for it would be absurd to suppose that, after a good title had been derived from either the fraudulent grantor or grantee, the other could in any manner make a good title to a third person. The doctrine laid down at the trial derives, then, no support from the rule respecting conveyances by fraudulent grantees; and it is in itself erroneous in affirming that one who, by reason of his fraud on the owner, gets no title by the sheriff's deed, may yet convey a good legal title to another. This defect of title is like all others and must be attended by the like consequences. If, for example, the sheriff had no valid execution, or conveyed without having made a public sale, his alienee would take nothing by the deed, and consequently he could convey no title. So it is in any other instance in which one person undertakes to convey land which belongs to another: the grantee gets nothing, and the title of the true owner continues.

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

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(296)

TROTMAN H. WARD v. ELIJAH SMITH.

Where in an action of trover for the conversion of a negro the declaration designates the negro by the name of *John*, he must prove on the trial that the negro converted was named *John*.

APPEAL from the Superior Court of Law of CHOWAN, at Spring Term, 1848, *Settle, J.*, presiding.

The plaintiff declared in trover for the conversion of a negro named John. It appeared that on a Saturday night the defendant delivered to the jailer of Chowan County, at the jail in Edenton, a negro boy, and said he was hired by the plaintiff, and that he was a runaway. The jailer received the boy, put him in jail and kept him there until Monday morning, when upon the application of the plaintiff he delivered him to him on his paying his prison fees, $2. It was not proved that the name of the negro was John, and there was no evidence that the plaintiff had any interest in any other negro than the one spoken of by the witness.

The defendant insisted that the plaintiff could not recover, for two reasons: first, because there was no evidence of the conversion of any negro boy; and, secondly, because there was no evidence of the conversion of the negro boy John. The presiding judge charged the jury that there was evidence of a conversion, and, if from the evidence they found that the defendant so converted a negro boy, and that it was John, belonging to the plaintiff, they should find for him.

Under this charge the jury found a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

Heath for plaintiff. (297)
Iredell for defendant.

NASH, J. It is unnecessary we should express any opinion upon the first objection, as our judgment is founded exclusively on the second. The negro, for the conversion of whom the action is brought, is described in the declaration as negro boy John. Having thus identified him, the plaintiff was bound to show that the negro converted was John. This was necessary to the defendant's safety against another action for the same conversion. The case clearly states that there was no evidence that the negro delivered to the jailer by the defendant was named John, or was known by that name. But one witness, and that the jailer, appears to have been examined, and he stated that he did not know the boy's name. The case then proceeds and states "there was no evidence that the plaintiff had an interest in any other negro than the one spoken of by the witness." From this statement we gather that there was no evidence whatever upon that point. Whether, therefore, the plaintiff owned but that one negro, was not proved; according to the case he might have owned fifty. If, however, he had shown affirmatively that he had but one negro, to enable him to recover under his declaration it was necessary to prove that *his* name was John. There was no evidence to be left to the jury "that it was John, belonging to the plaintiff," who was converted. His Honor, therefore, erred in that part of his opinion.

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

(298)

SPENCER M. MEEDS *v.* JOB CARVER.

1. The lawfulness of an arrest does not depend upon what an officer says, but upon the authority he has to make the arrest.

2. A deputy of a sheriff is so far bound by precepts in the hands of his principal that neither he nor his principal is liable to an action for false imprisonment in detaining a man in prison, arrested upon one process and discharged on that, when another valid process is in the hands of the principal, on which he was subject to arrest: and this although neither the deputy nor the person arrested knew that the sheriff had such process.

APPEAL from the Superior Court of Law of CAMDEN, at Spring Term, 1848, *Settle, J.*, presiding.

The action is trespass for false imprisonment in the gaol of Pasquotank in July, 1844. The defendant pleaded, in justification, two writs of *capias ad satisfaciendum*, directed to him as sheriff of that county. On the trial the defendant gave in evidence the two *ca. sas.* One of them was issued by a justice of the peace, and commanded the sheriff to take the body of the plaintiff and two other persons, and "them safely keep, so that you have them before some justice of the peace for said county, to show cause, if any they have, why they will not satisfy a judgment which lately, on 1 May, 1844, before Sion Culpepper, esquire, one of the justices of the peace for said county, Joseph H. Pool recovered against them for the sum of $30, with interest thereon from 25 August, 1842, and also the sum of twelve shillings for costs, besides your fees. Herein fail not and make due return. Witness, etc. 2 July, 1844." The other was a writ of *ca. sa.* in due form, issued from the County Court of Pasquotank against the plaintiff and two others, on a
(299) judgment recovered in that court against them by Joseph Jones for $8, and also $8.45 for costs adjudged. It bore teste the first Monday of June, 1844, and was returnable to the next term of the court, to be held on the first Monday of September, 1844, and was issued 17 June, 1844. On the part of the defendant evidence was given that Jones' execution was delivered to him on 20 June, and that a man named John J. Grandy, who claimed an interest in the other judgment, delivered the other process to one Hunter, a deputy of the defendant, on the day it bears date, and that on that or the next day Hunter arrested the plaintiff and committed him to prison.

The said Grandy was then called as a witness, and deposed that in a few days after the plaintiff was arrested he heard of it, and went to the gaol and informed the plaintiff and one

Burgess, who kept the gaol under the defendant, that the plaintiff might be discharged on the payment of the sheriff's fees. That on the next day he called again at the prison, and found the plaintiff still confined, and was informed that the plaintiff was about giving bond for his appearance at court under the insolvent debtor's act, and had procured one person to agree to be his surety and was looking out for another; and that the witness then directed the gaoler to take the bond of one surety, as he did not care for a second.

A witness was then called for the plaintiff, who stated that the witness Grandy directed the gaoler to discharge the plaintiff from imprisonment upon payment of the fees, and that he, the witness, thereupon offered to pay them for the plaintiff, in order that he might be discharged; but that the gaoler refused to turn him out until he could see the sheriff, because he said he had been so instructed by the defendant; and that afterwards the witness and others became sureties for the plaintiff's appearance under the other execution above mentioned, and the plaintiff was let out of prison.

On the part of the plaintiff evidence was further given (300) that the *ca. sa.* in favor of Jones was returned to the next court in the name of the defendant by his deputy, E. H. Hunter, "Executed on Spencer S. Meeds and bond filed herewith"; and that at court the defendant understood that this was a *ca. sa.* issued on a judgment rendered on a bond taken under a former *ca. sa.*, and thereupon altered the return by striking out the first and entering "Not taken."

The counsel for the plaintiff moved the court to instruct the jury that the process in the name of Pool was void and did not authorize the arrest of the plaintiff; or if that were not so, that it was illegal to detain the prisoner on it, after the creditor had directed him to be discharged upon the payment of fees, and the offer to pay them. The court held that the process was valid as a *ca. sa.* and authorized the arrest and detention of the plaintiff. But the court further informed the jury that, whether that were true or not, the other *ca. sa.* in favor of Jones, though in the hands of the defendant and not in those of his deputy, Hunter, who made the arrest, or known to him or the gaoler, yet justified the defendant in this action for the arrest and detention of the plaintiff until he gave the bond for his appearance, when he was discharged from custody. There was a verdict for the defendant, and after judgment the plaintiff appealed.

Heath for plaintiff.
Iredell for defendant.

RUFFIN, C. J. The judgment must be affirmed, without reference to the point of the validity or invalidity of the justice's execution; for, admitting it to be void, yet the other was a full authority for all that was done, as the validity of that is not questioned. As to it the objections are that the plaintiff was not informed that he was arrested on it, and, in fact, (301) that he was not, for it was in the hands of the defendant himself, and was not then known to the plaintiff, nor to Hunter, who made the arrest. But that is not at all material, for if the officer expressly declares that he arrests under an illegal precept, and on that only, yet he is not guilty of false imprisonment if he had, at the time, a legal one, for the lawfulness of the arrest does not depend on what he says, but what he has. *S. v. Kirby,* 24 N. C., 201; *S. v. Elrod,* 28 N. C., 250. Undoubtedly, if the gaoler had discharged the plaintiff, the sheriff would have been liable for an escape on Jones' execution; for the gaoler is the sheriff's deputy, and bound to take notice of the writs in the hands of his superior, and a detention by the gaoler is justified, if one by the sheriff himself would have been by the same process. No doubt the *ca. sa.* from the County Court caused the defendant to order the gaoler not to let out the plaintiff without notice to him, as he knew it was his duty to detain him until he paid that debt also. It would have been more creditable to the defendant to have left the writ with the gaoler, so that the plaintiff might have had his discharge in the defendant's absence, upon payment or giving bond. But he was not bound to do so, and, in his own hands, it justified the defendant's servants in arresting and detaining the plaintiff. The subsequent alteration of the return, though very improper, can make no difference, for it was made after the plaintiff was let at large, and cannot affect the process as an authority for his arrest and detention, while he was in prison. To that purpose it was sufficient, whether the sheriff made a true or false return on it or none at all.

PER CURIAM. Judgment affirmed.

Cited: Hailes v. Ingram, 41 N. C., 479; *S. v. Lutz,* 65 N. C., 505; *S. v. James,* 80 N. C., 372.

(302)

MOSES EDWARDS v. HAMPTON SULLIVAN, ADMINISTRATOR, ETC.

1. To impeach the credibility of a witness by proving that he swore differently as to a particular fact, on a former trial, it is not necessary that the impeaching witness should be able to state all that the impeached witness then deposed to; it is sufficient if he is able to prove the repugnancy as to the particular fact with regard to which it is alleged to exist.

2. Proof of the handwriting of a subscribing witness to a deed, who resides out of the State, is sufficient proof of the execution of the deed.

3. Where a witness has been examined on one side it is not competent for the opposite party to introduce evidence to show his bias, feeling or partiality towards the person introducing him, unless the witness has been previously questioned himself as to that point.

APPEAL from the Superior Court of Law of CUMBERLAND, at Spring Term, 1848, *Bailey, J.*, presiding.

This was an action of debt upon a bond for the payment of $750, dated in July, 1843, to which the defendant pleaded the general issue. It was commenced in the County Court and carried by appeal to the Superior Court, in which it was tried at Cumberland on the last circuit. In support of the affirmative of the issue the plaintiff called the subscribing witness, who testified that on a certain occasion he was riding along the public road in Cumberland County, and saw the plaintiff and defendant seated on a log by the roadside; that the plaintiff, on seeing him, remarked, "Let us have a witness," to which the defendant assented, and, after acknowledging the execution of the bond in question, handed the witness a pen and ink, with which he subscribed his name to the instrument as a witness. He was then asked by the defendant's counsel (303) whether his testimony then was not different from what it was in the County Court, to which he replied that it was not. He stated further, on his cross-examination, that the defendant Sullivan said that the bond was given for the plaintiff's interest in his mother's estate, notes and other things, and that he now owned all that Edwards, the plaintiff, was worth, and would soon own him. The witness stated further that, at the time, there were many papers lying on the ground near the parties. Much conflicting testimony was then given on both sides relative to the handwriting of the defendant Sullivan and the character of the witness Bryant.

On the part of the defendant one Richardson was then introduced to prove that the witness Bryant had given testimony on

the trial in the County Court different from what he gave on this trial, but he was objected to, because he said that he could not state the substance of all Bryant's testimony on the former trial. The court nevertheless permitted him to state that Bryant swore on that trial that Edwards and Sullivan were seated near the root of a pine, and had a jug of whiskey between them, whereas on this trial he had stated that they were seated on a log, and was silent as to the jug of whiskey.

The defendant next offered in evidence a deed from Edwards to him, Sullivan, purporting to have been executed in May, 1842, and to convey, in consideration of the sum of $5 paid, all Edwards' interest in the estates of both his father and mother. The deed was offered for the purpose of showing that, at the date of the bond sued upon, Edwards was insolvent, and also for the purpose of contradicting and discrediting the witness Bryant. And the defendant offered further to establish the deed by proving the handwriting of the subscribing witness thereto, who lived out of the State. The plaintiff objected to the introduction of the deed in evidence at all, and he further objected to its being received upon proof of the handwriting of
(304) the subscribing witness, but the court overruled both objections and received the evidence. The defendant then proposed to prove by one Thomas that he, the witness, on a certain occasion pending this suit, applied to the witness Bryant for some money which Bryant owed him, and that Bryant said, in reply to the application, that he had no money there, but that he had a good many witness tickets in this case, and if the suit went as he expected they would be fat tickets for him. The testimony was objected to by the plaintiff, for the reason that, if it were introduced to impeach the witness Bryant, it was incompetent, because he had not been previously asked whether he had made such a statement to the witness Thomas, but it was admitted by the court. A verdict was returned for the defendant, and a new trial being moved for and overruled, and judgment given, the plaintiff appealed.

D. Reid for plaintiff.
Husted and *W. Winslow* for defendant.

BATTLE, J. It seems to us that there is no difficulty in any of the objections to testimony made by the plaintiff, except the last. The first objection is directly and fully answered by the case of *Ingram v. Watkins*, 18 N. C., 442, where it was held that to impeach the credibility of a witness, by proving that he swore differently as to a particular fact on a former trial, it is

not necessary that the impeaching witness should be able to state all that the impeached witness then deposed. It is sufficient if he is able to prove the repugnancy as to the particular fact with regard to which it is alleged to exist.

The deed from Edwards to Sullivan was certainly competent for the purpose for which it was offered. The witness Bryant had stated that, at the time he subscribed the bond in question as a witness, Sullivan told him that it was for the purchase of all the interest of Edwards in his mother's estate. The deed, then, was material to show that Edwards had, (305) at that time, no such interest to be the subject of a contract, and also to show the falsity of the witness Bryant or the frailty of his memory. The cases of *Selby v. Clark*, 11 N. C., 265, and *Bethel v. Moore*, 19 N. C., 311, without adverting to others, show that the proof of the handwriting of the subscribing witness who lived out of the State was sufficient proof of the deed to justify its introduction. The last objection raises a question of much practical importance, relative to the manner in which a witness may be impeached for a supposed bias in favor of one of the parties to a suit. The question is whether, after a witness has given his testimony for the party who calls him, another witness may be asked by the adverse party to state whether he has not heard the first witness make a statement or declaration showing his bias, feeling or partiality in favor of the party who has examined him, without having first asked such witness whether he has made such statement or declaration. We think that this question must be answered in the negative, both upon principle and upon the authority of adjudged cases. The only legitimate object of a trial is the ascertainment of the truth of the matter in issue between the litigating parties, and all the rules which are or may be established for conducting its proceedings, particularly for the manner of examining, cross-examining, attacking and supporting witnesses, ought to have this great end in view. Among these rules there is scarcely one which requires to be settled with more care than that which is intended to regulate the mode by which the credibility of a witness, either while under examination or after his examination has closed, may be impeached. It is undoubtedly necessary and proper that the adverse party should have every fair opportunity, by cross-examination or otherwise, of testing the fairness and impartiality of a witness offered against him, as well as of inquiring into the extent and accuracy of his memory, his opportunities of observation and the (306) respectability of his character. But such witness ought, at the same time, in justice both to himself and to the party

who calls him, to be protected from having his testimony and his character misrepresented and misunderstood by the introduction of evidence on a sudden and by surprise, which from its nature he could not be expected to come prepared to meet, and which, had he been apprised of it, he could easily and satisfactorily have explained. Of such a character is the evidence which is offered for the purpose of showing by the statement or declaration of a witness made previous to the trial that he has an undue leaning towards the party who has called him. This kind of testimony partakes in many respects of the character of collateral evidence, though from its bearing directly upon the cause in affecting the credibility of the witness it is exempted from the operation of the rules relative to testimony purely collateral. But being in many respects collateral, neither the witness nor the party who calls him can be expected to be prepared to meet and explain it, and therefore ought not to be required to do so unless the attention of the witness is drawn to it by a question put directly for that purpose. Accordingly, we find it stated by all the judges of England on the Queen's trial, 2 Brod. and Bing., 314 (6 Eng. C. L., 130), that it is the usual practice of the courts below, and a practice to which there is no exception, that if it be intended to bring the credit of a witness into question by proof of anything that he may have said or declared, touching the cause, the witness is first asked upon cross-examination whether or no he has said or declared that which is intended to be proved. The same question was decided by this Court in *S. v. Patterson*, 24 N. C., 346. In that case the defendant's counsel proposed to introduce a witness to prove that

(307) Jacob and Daniel Cluck, who had been examined for the State, had told him that the prosecutor had paid them for coming from Tennessee to this State as witnesses.

These witnesses had been previously asked, on cross-examination, whether the prosecutor had not paid them, but they had not been asked whether they had so stated to the defendant's witness. The testimony was objected to and rejected by the court. After his conviction the rejection of this testimony formed one of the grounds on which the defendant based a motion for a new trial. But the motion was overruled in the court below, and the decision was sustained on an appeal to this Court. *Judge Gaston*, in delivering the opinion of the Court, after remarking upon the character of the testimony and the purpose for which it was properly admissible, to wit, to impeach the credibility of the witness, compared it to the mode of attacking his credibility by proving inconsistent declarations as to his temper, disposition or conduct, in relation to the cause or the

parties, and concluded by pronouncing, in effect, that the two modes were similar, if not identical, in character, and therefore subject to the same rule. To the same effect are the remarks made by the *Chief Justice* in delivering the opinion of the Court in *Pipkin v. Bond,* 40 N. C., 107. But it may be objected that if the adverse party fail, from inadvertence or other cause, to put the preliminary question to the witness upon his cross-examination, he will lose the opportunity of introducing testimony important in ascertaining the truthfulness of the witness. To this it may be replied that the court may, and in a proper case undoubtedly will, permit him to recall the witness for the purpose of asking the necessary question. And if it be further objected that the witness may have left the court, upon the supposition that his attendance is no longer necessary, so that he cannot be recalled, then it may be answered that it is much better for the purposes of justice that the oversight of the party should operate to the exclusion of the impeaching testimony than that the witness who is proposed to be im- (308) peached, and the party who calls him, should be subjected to the great injustice which would often be done if evidence of this sort could be adduced without any opportunity for explanation being afforded to such witness or party. Indeed, if there were reason to believe that the witness had left the court by collusion with the party who has introduced him, then the presiding judge might, and no doubt would, dispense with the preliminary question. In the case before us the testimony, which we must suppose was offered by the defendant to impeach the credibility of the witness Bryant by showing his leaning in favor of the plaintiff, was received by the court, after objection, without requiring the previous question to be put to the witness, which we think was erroneous.

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

Cited: S. v. Barfield, post, 352; *Hooper v. Moore,* 48 N. C., 429; *S. v. White,* 50 N. C., 231; *S. v. Oscar,* 52 N. C., 506; *Miller v. Hahn,* 84 N. C., 227; *S. v. Williams,* 91 N. C., 602; *S. v. Pierce, ib.,* 611; *S. v. Dickerson,* 98 N. C., 711; *Floyd v. Thomas,* 108 N. C., 96; *Burnett v. R. R.,* 120 N. C., 519; *S. v. McLaughlin,* 126 N. C., 1082.

(309)

BENJAMIN SHERROD v. BRYAN BENNETT ET AL.

To take a case out of the statute of limitations, pleaded in an action of *assumpsit*, the promise or acknowledgment must be an express promise to pay a particular sum either absolutely or conditionally, or such an admission of facts as clearly shows, out of the party's own mouth, that a certain balance is due, from which the law can imply an obligation and promise to pay, or that the parties are yet to account and are willing to account and pay the balance then ascertained.

APPEAL from the Superior Court of Law of MARTIN, at Spring Term, 1848, *Caldwell, J.*, presiding.

This was an action of *assumpsit* upon a *quantum meruit* for work and labor done by the plaintiff for the testator of the defendants. Pleas, the general issue and the statute of limitations.

It appeared upon the trial that the plaintiff had lived with the defendants' testator, serving him in the capacity of a manager or overseer, from January, 1828, until January, 1844. The suit was commenced in November, 1846, and the plaintiff, for the purpose of repelling the bar of the statute of limitations, called several witnesses to prove acknowledgments of the debt and promises to pay it by the testator within less than three years before the writ was issued. One of these witnesses testified that a year or two before the testator's death, which occurred in August, 1846, the testator said to him that the plaintiff had lived with him a good while, and he intended he should be paid for his services. Another witness stated that, just before the plaintiff left the employment of the testator, the latter told the witness that the plaintiff's wages were not limited, and he intended to make his compensation at his (the testa-
(310) tor's) death. A third witness testified that the testator told him, in the year 1844 or 1845, that the plaintiff had not been paid for his services, but he intended to pay him, and he hoped, at the day of his death, the plaintiff would be satisfied. And to a fourth witness he said, the winter before his death, that the plaintiff had lived with him a long time, had done him more service than he could have expected from him, and, if he lived, the plaintiff should be paid. The plaintiff was not present on any of the occasions spoken of by the witnesses.

The defendants insisted that nothing was proved which could prevent the operation of the statute of limitations. The court charged the jury that to remove the bar created by the statute

it must appear that the testator expressly promised to pay the plaintiff for his services, or made such an explicit acknowledgment of a subsisting debt that a promise to pay might be implied from it; that if the jury believed the witnesses, there was proof, at least, of such an acknowledgment of a subsisting debt from which a promise to pay might be implied. The jury, under this charge, returned a verdict for the plaintiff for the amount of his whole claim. A new trial was moved for, because of misdirection by the court, which was refused, and a judgment rendered, from which the defendants appealed.

Biggs for plaintiff.
Rodman for defendants.

BATTLE, J. We cannot affirm the judgment in this case without violating those salutary principles which the later decisions of this Court have established upon this subject. In *Peebles v. Mason*, 13 N. C., 367, it is said by the Court that, to take a case out of the operation of the statute of limitations, "the promise or acknowledgment must be an express promise to pay a particular sum, either absolutely or conditionally; or such an admission of facts as clearly shows, out of the party's (311) own mouth, that a certain balance is due, from which the law can imply an obligation and promise to pay; or that the parties are yet to account, and are willing to account and pay the balance then ascertained." The principles thus clearly and explicitly stated have been reasserted and sustained by the subsequent cases of *Smallwood v. Smallwood*, 19 N. C., 330; *Rainey v. Link*, 25 N. C., 376, and perhaps by others. In the case now before us the testimony does not show that the testator acknowledged that any particular sum was due the plaintiff, much less that he promised to pay it. It contains no admissions of facts so as to show out of the testator's own mouth that a certain balance was due; and there is not the slightest intimation that there was an account between the parties which the testator was willing to settle and to pay the balance. His declarations to every witness were vague and indefinite; and some of them are of such a character as to leave us somewhat in doubt whether he considered the plaintiff as having claims upon his bounty or his justice. To permit such expressions to repel the bar of the statute would be to let in all the evils against which it was intended to provide. The cases cited by the plaintiff's counsel are decisions of our sister States, and however high may be the

respect which we entertain for the courts which made them, we cannot permit them to overrule, or even to modify, those of our own Court.

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

Cited: McBride v. Gray, 44 N. C., 421; *McRae v. Leary*, 46 N. C., 93.

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(312)

JAMES R. LEMIT v. ARTHUR S. MOORING.

To render a sheriff liable to an amercement for making a false return it must appear that the return is false in point of fact, and not false merely as importing, from facts truly stated, a wrong legal conclusion.

APPEAL from the Superior Court of Law of WASHINGTON, at Spring Term, 1848, *Settle, J.*, presiding.

This is an action of debt to recover $500 as a penalty incurred by the defendant for making a false return of a writ of *capias ad respondendum*, returnable to the Superior Court of Washington, in which Joseph Long was plaintiff and Joshua Long defendant, which was delivered to the defendant, then Sheriff of Martin County. Plea, *nil debet*.

The return was in these words: "This writ came to hand on 22 February, 1847, during the term of Martin Superior Court of Law, and from that day until Friday, inclusive, of that court, I and my deputies were engaged, so that I could not serve said writ on the defendant, who lives fifteen miles from the courthouse, at Williamston, my place of residence, and during all which time I did not see the defendant."

On the part of the plaintiff evidence was given that Martin was a large and populous county, and that the defendant in the writ, Joshua Long, lived about fifteen miles from the courthouse and in a part of the county in which it would be difficult for the sheriff to get a deputy, but that among the number of persons attending Martin Court that week it was highly probable that he might have procured some one to execute the
(313) writ as a deputy. It was agreed that Washington Superior Court began on Monday, 8 March, 1847.

The court instructed the jury that the defendant was bound to procure and have at all times deputies in number sufficient, with himself, to meet the exigencies of his office; and if they believed that the defendant could have executed the writ him-

self, or could have procured any one to execute it, by the use of reasonable and proper diligence, it was his duty to do so, and failing to do so, the return would be false, and he would be liable in this action, notwithstanding the defendant and the deputies which he had were engaged in attending the Superior Court of Martin from the time the writ came to his hands until it was too late to execute it.

There was a verdict for the plaintiff, and the defendant moved to set it aside and for a *venire de novo* for error in the instructions to the jury. But the court refused the motion and gave judgment, and the defendant appealed.

Heath for plaintiff.
Biggs for defendant.

RUFFIN, C. J. The act of Assembly imposes two duties on sheriffs in respect to process coming to their hands. The one is that they shall make *due* return of it under penalty, for not making such return, of being amerced $100 by the court, on motion, for the benefit of the person grieved. The other is that they shall make *true* return, under a penalty for every *false* return of $500, to be recovered by action of debt, one moiety to the party grieved and the other to him who will sue for the penalty. Rev. St., ch. 109, sec. 18. Upon the construction of the act the opinion of the Court differs from that entertained by his Honor who presided at the trial. The return may not be a due return, perhaps; and thus it may fall within the first branch of the statute, for anything to be said to (314) the contrary in this case. But we think very clearly that it is not such a false return as is meant in the statute, so as to make the sheriff incur the heavy penalty of $500. To have that effect it must be false in point of fact, and not false merely as importing, from facts truly stated, a wrong legal conclusion. The act was designed to punish sheriffs for putting on process deceptive returns, such as mislead the parties in point of fact and baffle them in the execution of their process. It may be true in this case that the sheriff would be liable to the action of the plaintiff in the writ for not executing it, or for an amercement for not making a proper and legal return. But it does not appear that any part of the return, as made, is untrue as to the matter of fact. No evidence was given of the number of the defendant's deputies, or that he or any one of his deputies could, without a dereliction of duties previously incurred to the court, have gone to serve this writ during term-time. Without such evidence there is a presumption in favor of the return as

to the truth of the facts stated in it; and therefore it is to be assumed that the writ came to hand, as stated; that the term of the court began and continued, and the residence of the defendant in that suit was, and the engagements of this defendant and his deputies were, also as stated. If so, the return, though it may be legally insufficient, is substantially true in fact, as what follows—"so that I could not serve this writ on the defendant"—is barely a conclusion or inference from the preceding facts, and purports only to be so, and could not deceive the plaintiff as to the acts of the sheriff or with respect to his recourse on him. The counsel for the plaintiff supposed the case to fall within those of *Lemit v. Freeman,* 29 N. C., 317, and *Hauser v. Hampton, ib.*, 333. But they are not at all alike. The returns in both of those cases were directly false in point of fact. In the latter case there was a return of *non est* (315) *inventus,* when the sheriff or his deputy, which is all one, had actually been in conversation with the defendant in his county. And in the former, without returning the day of receiving the writ, and concluding from it that "so the writ was not in time to be served," the sheriff took upon himself to state the fact directly and positively, "too late to execute," when in truth the writ was in his hands seventeen days, as proved on the trial. Both returns were, therefore, proved to be false, and the plaintiff was entitled to recover. But here it is quite otherwise; for, as far as shown on the trial, not a statement in the return, purporting to be a statement of a fact, was in the least untrue.

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

Cited: Hassell v. Latham, 52 N. C., 466, 467; *Harrell v. Warren,* 100 N. C., 265; *Mfg. Co. v. Buxton,* 105 N. C., 77.

THE STATE v. MINCHEE WHITFIELD.

An indictment for forcible entry is good at common law when it charges "that the defendant, unlawfully and with strong hand, did break and enter into a certain house of J. D., he, the said J. D., being then and there in peaceable and quiet possession of the same."

APPEAL from the Superior Court of Law of PERSON, at Spring Term, 1848, *Pearson, J.*, presiding.

The defendant was convicted upon an indictment which (316) charged that he and another unlawfully, forcibly, injuriously, and with strong hand, did break and enter into a certain kitchen of J. D., he, the said J. D., being then and there in peaceable and quiet possession of the same; and having so as aforesaid broken and entered into the said kitchen, then and there being in the actual possession of the said J. D., unlawfully, forcibly, injuriously, and with strong hand, did then and there continue and remain for one day, the said J. D. being then and there actually present and forbidding them so to do. The indictment concluded at common law; and, on motion of the defendants' counsel, the judgment was arrested, and an appeal was taken for the State.

Attorney-General for the State.
E. G. Reade for defendants.

RUFFIN, C. J. The reason for the motion in arrest of judgment is not stated in the record, and the Court does not perceive any.

Since *Bathurst's case,* cited in *Storr's case,* 3 Bur., 1698, and *Wilson's case,* 8 T. R., 357, it seems to have been considered settled that for a violent entry into the possession of the house of another, laid to be done *manu forti,* an indictment will lie at common law. The latter was a solemn decision on demurrer. In this State the doctrine has been adopted. In *S. v. Fort,* 20 N. C., 332, it was, indeed, held that the indictment was not good which charged only that the defendants broke the window of the prosecutor's house, though laid *manu forti,* because the facts themselves only amounted to a civil trespass, and not to a breach of the peace, nor tended directly to it nor to the terror of the owner, as they might do if the owner were present. But it was distinctly laid down that "the violent taking or withholding of the possession of a man's house is a public offense," and that "strong hand" is technically appro- (317) priate to designate the degree of violence which renders it so. In the language of *Lord Kenyon* in *Wilson's case,* "God forbid that such an act should not be an indictable offense. The peace of the whole country would be endangered if it were not so." To the decision of this Court, just cited, are to be added the subsequent cases of *S. v. Pollok,* 26 N. C., 303, and *S. v. Tolever,* 27 N. C., 452, which are in point.

After those cases we cannot suppose the decision of the Superior Court was made upon the ground that the act laid in the indictment is not an offense, if done by a stranger and mere

wrongdoer. Indeed, the counsel here takes a different objection, and informs us that upon that the judgment was arrested by his Honor. It is that it does not appear upon the indictment that the defendants were strangers and wrongdoers; and therefore they may have been the owners of the house and had the right to enter as they did. The objection is founded on the passages in 1 Hawk. P. C. B., 1, ch. 28, sec. 1, and 4 Bl. Com., 148, that at common law one disseized has a a right to enter into his lands by force, if he can do so without committing a battery on the person in possession. It is not necessary to say here how that is, but we may leave it to be decided when the question shall arise, as was done in *Rex v. Wilson*. For, admitting that doctrine, the indictment is sufficient without a direct negative averment that the defendants had no title to the lands. In general, negative averments are not necessary in pleading, unless to meet some exception or proviso in a statute (1 Chit. C. L., 283); and *Wilson's case* is a direct authority that the indictment is good in this case without it. There the indictment charged that the defendants "*unlawfully and injuriously, and with strong hand*, entered into a certain mill and lands and houses, *being in the possession of M. L., etc.*," without any other reference to the defendant's right; and the Court said, when speaking of the passage in Hawkins, that, it appearing by the indictment that the defendants *unlawfully* entered, the (318) Court could not intend that they had any title. If they had, and that would prevent their entry upon the prosecutor's possession from being an offense, it was matter of defense upon evidence at the trial, and, as the case comes here, we must presume they showed no title; otherwise they would have brought up the question in a different form. It was erroneous, therefore, to arrest the judgment; and this must be certified to the Superior Court, that sentence may be given on the verdict.

PER CURIAM. Ordered accordingly.

Cited: S. v. Ross, 49 N. C., 318; *S. v. Mosseller*, 106 N. C., 497.

LUCAS M. SUTLIFF v. DAVID LUNSFORD.

In cases brought to the Supreme Court, when the error assigned is in admitting or rejecting evidence, the exception must set out the evidence itself, which was improperly admitted, or offered and improperly rejected.

APPEAL from the Superior Court of Law of JOHNSTON, at Spring Term, 1848, *Caldwell, J.*, presiding.

This is an action of slander, in which the words laid in the declaration are, "he has forged my name to a note." Plea, not guilty.

The case states that on the trial a witness for the (319) plaintiff gave evidence that in a conversation between the witness and the defendant, respecting the plaintiff, the defendant said either "he has forged my name to a note," or, "he has forged my name on a note, and has gone to the South, and I believe will not come back"; but whether it was the one expression or the other, the witness was unable to say.

The case further states that the defense was that the defendant had been innocently led to believe that the plaintiff had written the defendant's name as an endorser of a note by one William Moody, and that he spoke the words while under a mistake in that respect. And in order to sustain that defense a witness was called, who produced the note alluded to, and it appeared to have been made by Moody to a person who endorsed it to the plaintiff, and it had on the back of it in writing the words, "Wm. Moody, David Lunsford's overseer." And the witness testified that the words, "David Lunsford's overseer," were in the handwriting of the plaintiff; and that, "soon after the endorsement to him, the plaintiff, then about going North, placed the note in the hands of the witness, a constable, for collection. And the witness further deposed that, seeing the name of the defendant on the note, and not being able to read the word "overseer," he took out a warrant against Moody as maker and Lunsford as endorser, and went to Lunsford's and served it on both of them; and that he then showed the note to the defendant, who could read writing, but was at the time very sick and in bed. The counsel for the defendant then proposed "to prove by the witness the conversation that took place between the witness and the defendant at that time," which was opposed on the part of the plaintiff, and rejected by the court.

The jury returned a verdict for the plaintiff, with $500 damages; and the defendant moved for a *venire de novo* upon the

(320) ground that the court rejected proper evidence; and, after a refusal and judgment, he appealed.

Miller, J. H. Bryan and *W. H. Haywood* for plaintiff.
B. F. Moore, Busbee and *G. W. Haywood* for defendant.

RUFFIN, C. J. The Court is under the necessity, though reluctantly, of affirming the judgment.

It is easy to conceive that the constable may have given to the defendant, who was then sick abed and might not have read the paper or been in a condition to judge for himself, such information as to the tenor of the endorsement and the handwriting as would leave no doubt on the mind of the defendant that the words were written by the plaintiff, and purported to be an assignment of the note by the defendant to the plaintiff. That probability is rendered quite strong by the circumstances that the witness deposed that he thought so at the time, and took out the warrant accordingly. If, then, the defendant, under those circumstances, honestly believed so from the declarations of the plaintiff's agent, and, soon afterwards, before he was better informed or had the opportunity of inquiring into the truth from the plaintiff—then out of the State—he spoke the slanderous words, he would certainly be less culpable than if he had framed the tale of his own invention, or even had received his impression from a source apparently not entitled to so much confidence. But, admitting all this, yet the judgment must stand, as the Court cannot proceed on probabilities of this sort, and assume, because the testimony of the witness might, that, therefore, it would have been of that character. On the contrary, the presumption of law is favorable to the judgment, that it is right, until the contrary appear; and it is incumbent on the appellant to show affirmatively that there is error. To do that it is not sufficient to state in the exception that the de-
(321) fendant offered to prove "the conversation that took place between the witness and the defendant at that time"; but it is obviously indispensable to set out what the conversation was which it is alleged the court erred in rejecting. Without putting down the conversation it cannot be seen that it was competent or relevant, or that a prejudice could have arisen to the defendant by excluding it. In other words, when the error assigned is in admitting or rejecting evidence, the exception must set out the evidence itself which was improperly admitted, or offered and improperly rejected.

Another error was urged in the argument, namely, that the

plaintiff's evidence did not support the declaration, because the latter alleges substantially a charge of forging a note purporting to be made by the defendant, while the evidence leaves it uncertain whether the charge was not one of forging an endorsement of a note by the defendant, which is a different forgery. But, for similar reasons, the Court cannot sustain this objection. It was not raised on the trial. The exception is exclusively to ruling out the evidence. The Court cannot know but that much other evidence was given as to the speaking of the words, and must presume there was, if necessary to support the verdict. It has been frequently decided that it is not necessary to support the verdict by showing a sufficient case made on the trial to justify it; and that the judgment must stand, in respect of matters *dehors* the record, unless by exception it appear that the court erred in point of law in receiving or rejecting evidence, or giving or refusing some direction to the jury.

PER CURIAM. Judgment affirmed.

Cited: Otey v. Hoyt, 48 N. C., 411; *Straus v. Beardsley*, 79 N. C., 63; *Gadsby v. Dyer*, 91 N. C., 316; *S. v. Pierce, ib.*, 609.

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(322)

MARTIN WOOLARD'S EXECUTORS v. RANSOM WOOLARD ET AL.

1. A case was brought from the County to the Superior Court by *certiorari*. After the trial of the issues in the Superior Court the appellant's sureties at the same term suggested his death, but the court, notwithstanding, gave judgment against them for the costs, the verdict having been against their principal: *Held*, that the judgment was right, *first*, because the sureties, not being parties to the suit, had no right to make the suggestion; *secondly*, because, as the issues had just been tried, it must be assumed that the death had taken place during the term.

2. A separate judgment may be rendered against the sureties on an appeal bond or the judgment may be against them jointly with their principal.

APPEAL from the Superior Court of Law of PITT, at Spring Term, 1848, *Caldwell, J.*, presiding.

This was an issue of *devisavit vel non*, made up and tried in the County Court, where a verdict was found in favor of the propounders of the will. It was afterwards carried by the caveator, Ransom Woolard, to the Superior Court by a writ of

certiorari, upon his entering into bond with Thomas Latham and David P. Perry as his sureties. In the Superior Court the issue came on to be tried at Pitt, on the last circuit, when the jury found a verdict establishing the will. Immediately after the entry of the verdict upon the record appears the following: "Death of Ransom Woolard suggested by Thomas Latham and D. P. Perry. On motion, judgment against Thomas Latham and D. P. Perry, obligors in the *certiorari* bond, for the costs to be taxed by the clerk, from which judgment Thomas Latham, and D. P. Perry pray an appeal to the Supreme Court, which is granted." Then follows the usual order for certifying the probate of the will to the County Court, etc.

(323) *Biggs* for plaintiffs.
Stanly and *J. H. Bryan* for defendants.

BATTLE, J. We cannot discover any error in the judgment rendered against the defendants Latham and Perry. One of their objections to it is that their principal was dead at the time when the judgment was given, and that it could not regularly be entered up *instanter* upon the appeal bond, without making his personal representative a party. There are two decisive answers to this objection. The first is that we have no judicial knowledge that the principal was dead. His sureties were no parties to the suit, and had, therefore, no right to suggest his death, and the entry of their suggestion on the record is a mere nullity. But if this were not so, and the death of the principal were properly brought to our notice, we are bound to assume that he died after the commencement of the term at which the issue was tried, and when the suggestion of his death was made. Upon no other supposition can the proceeding of the court in trying the issue and ordering the certificate of the probate to be sent to the County Court be upheld; for if the caveator died before the commencement of the term, the verdict and judgment were rendered against a dead man, and therefore erroneous, which we are not to presume. Another objection to the judgment is that, supposing their principal died after the commencement of the term, judgment ought to have been rendered against him as well as against the sureties upon the appeal bond. The prevailing party may pursue that course if he chooses, but is not bound to do so. He may take a judgment against the principal upon his liability as a party to the suit, and then another and a separate judgment against the sureties on the appeal

bond. If he choose to pursue the latter course, the sureties have thereby no greater burthen thrown upon them, and therefore have no right to complain. (324)

PER CURIAM. Judgment affirmed.

Cited: Cohoon v. Morton, 49 N. C., 257.

THE STATE v. GEORGE, A SLAVE.

1. Where evidence of inconsistent statements of a witness is introduced by the adverse party it is proper to permit the party who called the witness to prove other statements conforming to the testimony given on the trial.

2. And the witness attacked may himself be examined on that point.

APPEAL from the Superior Court of Law of PERSON, at Spring Term, 1848, *Pearson, J.*, presiding.

The prisoner was indicted in Granville for the murder of James Meadows, and upon his affidavit his cause was removed to Person, where it was tried on the last circuit.

After introducing testimony to show that the dead body of James Meadows was found at the drawbars, about eighty yards from his dwelling-house, on a certain morning in September, 1846, much cut, bruised and lacerated, the solic- (325) itor for the State called as a witness Seth Meadows, a son of the deceased. He stated that he was about nine years old when his father was killed; that his father, his sister Susannah, who was about fifteen years of age, several other children, and himself, lived in a small log house, containing but one room with two doors, one facing the north and the other the south, and no window; that on a certain Sunday night in September, 1846, his father and himself were sleeping in a bed near the north door, while his sister Susannah and the other children slept in another bed near the opposite door; that about two hours before daybreak he was awakened by the struggles of his father, when he saw three men drag him out of the bed, and take him out of the house through the northern door, one having hold of his head and the other two of his legs, and he thought that one of the men who had hold of his father's legs was the prisoner, because he was yellow, was built like him and was about his size. The witness stated further that as soon as they got out of the door he, being much alarmed, went to the

bed where his sister Susannah was sleeping and waked her up, and told her that some persons had carried their father out of the house, when she made one of the other children get up and shut the door, which they had left open. He stated further that it was a bright moonlight night, and that he was well acquainted with the prisoner, who was a low, thick-set bright mulatto. The solicitor then asked the witness if he told his sister, when he went to her bed and waked her up, who he thought it was that had carried his father out of the house. This question was objected to by the prisoner's counsel, but the court permitted the witness to answer, when he said that he told his sister that some men did it, but did not tell that he thought the prisoner was one of them. The solicitor then asked the witness whether he told his sister next morning who (326) he thought one of them was. This question was also objected to by the prisoner's counsel. The solicitor then remarked that he was aware that the prisoner's counsel expected to prove that the witness, although several times interrogated upon the subject before the jury of inquest, did not state, until after the prisoner had been arrested, that he thought, from the color or other description, that either of the persons was the prisoner; but, on the contrary, had stated that he did not know who the persons were. The prisoner's counsel admitted that they expected to make the proof as suggested by the solicitor, but they contended that although they had the right to impeach the witness by proving that, when on oath or not on oath, he had made statements different from those made on the trial, yet that it was not competent for the State to sustain him by proving that when not on oath he had made the same statement as he had made on the trial. The court permitted the question to be asked, and the witness answered that about daybreak in the morning, some two hours after his father had been taken out of the house, he told his sister that two of the men were black like negroes, and the other was a yellow man like George, the prisoner. A similar question was permitted to be asked, after objection, whether the witness had told one William Philpot, the next morning, who he thought it was; and Philpot was then introduced and permitted to state, after objection, that the witness Seth Meadows had told him, on the morning the dead body was found, that one of the persons who committed the act was yellow like George, the prisoner.

The prisoner's counsel then introduced witnesses who stated that when the witness Seth Meadows was under examination before the jury of inquest he was asked several times whether he knew who took his father out of the house, to which he replied

that he did not. They stated further that he persisted in this answer until after the prisoner was arrested the next day, and that he then stated to the jury, on oath, that one of the persons was yellow, and that from his color, build and (327) height he took him to be George, the prisoner.

The jury returned a verdict of guilty. A motion for a new trial was made upon the ground that the court had received improper testimony, but it was overruled by the court. A motion in arrest of judgment was then made "because the certificate of the Clerk of the Superior Court of Law in and for the county of Granville, after the transcript had been sent to this (Person) Court, and during the term of this court, and after verdict, was altered by the Clerk of the Superior Court of Law in and for the county of Granville, under his hand and seal of said court, at the courthouse in Roxboro, in Person County, so as to make it read 'Clerk of the Superior Court of Law,' instead of 'Clerk of the Superior Court, etc.'" This motion was also overruled, and sentence of death pronounced, from which the prisoner appealed.

Attorney-General for the State.
E. G. Reade and *Gilliam* for defendant.

BATTLE, J. The objections to the admission of testimony, made by the prisoner on the trial, raise two questions for our consideration, of which one is subordinate to the other. The first and main question is whether, when a witness is sought to be impeached by proof of former statements, inconsistent with his testimony on the trial, it is competent for the party or prosecutor who has introduced him to prove other consistent statements for the purpose of corroborating him. Upon this question the English authorities are conflicting, and it is very difficult, if not impossible, to reconcile them. 2 Hawk. P. C., ch. 46, sec. 46, and Gilbert Evidence, 150 (4 Ed.), followed by 1 MacNally, 378, and the case of *Luttrell v. Regnell*, 1 Mod., 284, support the affirmative, while *Judge Buller* in his *Nisi Prius*, 294, doubts of, and in *Parker's case*, 3 Doug., 242 (328) (20 Eng. C. L., 95), dissents from the position, and declares for the negative; in which it is said that he has the sanction of the great names of Lords Redesdale and Eldon. The modern writers on the subject of evidence, in this conflict of authorities, have endeavored to effect a compromise by laying it down as a rule that, when the counsel of the opposite party imputes a design in the witness to misrepresent, from some motive of interest or friendship, it may, in order to repel such

imputation, be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of facts. 1 Phil. Ev., 293; Roscoe Crim. Ev., 142. But however it may be in England, we consider it settled in this State that such confirmatory testimony is admissible. In *Johnson v. Patterson*, 9 N. C., 183, *Chief Justice Taylor* declared that where evidence of inconsistent statements of a witness is introduced by the adverse party it is proper to permit the party who called the witness to prove other statements conforming to the testimony given on the trial; and in support of this he relied upon the authority of Gilbert. In *S. v. Twitty*, 9 N. C., 449, the Court extended the rule, and held that in all cases where the credibility of the witness is attacked, from the nature of his evidence, from his situation, or from imputations directed against him in cross-examination, confirmatory evidence of this kind is admissible. In neither of these cases is the distinction, taken in Phillips and Roscoe, adverted to; and we think that it is a distinction which applies more properly to the *weight* than to the *competency* of the testimony. No objection was made on the trial, and none is insisted on in the argument here, to the time when the testimony was offered. As soon as the prisoner's counsel announced their intention to introduce the discrediting testimony, it became (329) proper to bring forward the confirmatory evidence. But if it had been improper then, it was made competent afterwards by the introduction on the part of the prisoner of the impeaching testimony. *Smith v. Smith, ante*, 29. Upon the main question of evidence, then, we all agree in opinion with the judge in the court below.

The subordinate question is whether such confirmatory testimony can be given by the impeached witness himself, that is, can he testify to his own former declaration, consistent with his testimony given on the trial? The majority of us (*Nash, J., dissent.*) hold that he can, and we so hold because we are unable to discover any principle by which the testimony can be excluded. We have all just agreed that the question is a proper one to be asked of *some* witness, and why may it not be answered by *any* witness, who is not forbidden to answer it on any one or more of the grounds of objection to the competency of witnesses? These grounds—and they are said by the highest authority to be the only grounds—are want of reason, defect of religious belief, infamy, and interest. *Lawrence, J.*, in *Jordaine v. Lashbrook*, 7 Term, 610; 1 Phill. Ev., 18. The witness here is obnoxious to none of these objections. The testimony,

it is true, is obviously of so weak and unsatisfactory a character that we are surprised it was offered; but having been offered, and being of a kind proper in itself, and sworn to by a witness competent to testify in the cause, we can perceive no reason why it should have been excluded.

There is certainly no pretense for arresting the judgment for the cause assigned. The transcript of the record is duly certified to us, and it is now perfect, and we cannot inquire how it became so. *S. v. King*, 27 N. C., 203. Besides, a judgment can be arrested only for errors or defects apparent on the record, but not for such as require to be brought to the notice of the Court by proof *aliunde*. (330)

PER CURIAM. No error.

Cited: S. v. Dove, 32 N. C., 470; *Mills v. Carpenter, ib.*, 300; *Hoke v. Fleming, ib.*, 266; *Marsh v. Harrell*, 46 N. C., 331; *S. v. Marshall*, 61 N. C., 51; *Jones v. Jones*, 80 N. C., 250; *S. v. Blackburn, ib.*, 478; *S. v. Whitfield*, 92 N. C., 834; *S. v. Freeman*, 100 N. C., 434; *Burnett v. R. R.*, 120 N. C., 517.

THE STATE v. JOHN, A SLAVE.

1. In a case of homicide, testimony to prove that the prisoner's wife had been in the habit of adultery with the deceased, not that he caught them in the act of adultery at the time of the homicide, is not admissible, because, if admitted, it does not extenuate the offense from murder to manslaughter.

2. Nothing but finding a man in the very act can mitigate the homicide from murder to manslaughter.

3. Voluntary drunkenness will not excuse a crime committed by a man, otherwise sane, while acting under its influence.

4. It is not error to poll the jury, and when each juror agrees to the same verdict, to enter it as the verdict of the whole jury.

APPEAL from the Superior Court of Law of CRAVEN, at Spring Term, 1848, *Dick, J.*, presiding.

The prisoner was indicted for the murder of Ben Shipman, a slave, and was tried at Craven on the last circuit.

The solicitor for the State examined, first, a negro (331) woman slave, named Flora. She stated that she was the wife of the prisoner, and had been so for about six years; that the prisoner, although a slave, was permitted to keep house,

and she was permitted to live with him; that she and the prisoner had frequent quarrels, and sometimes separated and came together again; that, some three or four days before the homicide, the prisoner, complaining that his dinner was not properly prepared, got angry and gave her a whipping and turned her out of his house, saying that she should not live with him any longer; that she then went to live with her mother; that about 10 o'clock of the night of the homicide, and about half an hour before it was committed, the prisoner came to her mother's house and told her, the witness, that he intended to kill Ben Shipman the first time he saw him; that at the request of her mother, she and her sister Sophia, a little girl about ten years of age, went to the house of Ben Shipman, which was about ten steps distant from her mother's, and which they found open, with a good firelight in it, but Ben was not at home; that they sat down by the firelight and commenced sewing; that shortly after Ben came in, when she told him of the prisoner's threat against him; that Ben then shut the door and locked it and went into an adjoining room and lay down on a mattress, leaving her and her sister Sophia sewing by the firelight; that shortly afterwards the prisoner came to the door and knocked, when she asked "who was there," to which he replied, "A person"; she asked what the person wanted, to which he replied, "Open the door, or I will break it down"; that he thereupon did break it down, and came in and walked up to the deceased and knocked him down with a piece of iron which he held in his hand; that he struck the deceased several times while on the floor; that she became much alarmed and ran to call her brother from her mother's house, and that her brother
(332) came immediately and got the prisoner out of the house of the deceased.

Sophia and several other witnesses were then examined for the State, as to the circumstances attending the homicide, but the testimony did not materially vary the case made by the statement of the first witness. From their examination it appeared that the piece of iron with which the blows were inflicted was about the size of a man's thumb, and from a foot to eighteen inches long, and that Ben died that night from the effect of the blows.

The prisoner's counsel then announced the grounds of the defense:

1. That at the time the homicide was committed the prisoner was laboring under mental alienation to such an extent as to render him incapable of committing a crime.

2. That there had been, and was, an adulterous intercourse carried on between Flora, the wife of the prisoner, and the deceased, which would extenuate the offense to manslaughter.

3. That the prisoner was drunk when the homicide was committed, and that it was proper for the jury to take his intoxication into consideration as a circumstance to show that the act was not premeditated.

To show the prisoner's insanity and drunkenness, his counsel called several witnesses, among whom were slaves Hardy and Dausey. Hardy stated that he had been acquainted with the prisoner seven or eight years; that the prisoner was a house painter, and he had worked with him about two years; that during that time the prisoner was in the habit of talking to himself, and frequently swearing as if he were angry; that he had seen the prisoner throw down and spill his bucket of paint, and heard him the next day inquire what had become of it; that sometimes when he and the prisoner were at work on different parts of a house, he, the witness, would think from the loud talk and swearing of the prisoner that he was quar- (333) reling with some person present, but, on inquiring, the prisoner would tell him that he was talking to himself. This witness testified further that he saw the prisoner at about 10:30 o'clock of the night when the homicide was committed, and that the prisoner was then so drunk that he had to keep himself steady by holding onto the fence; that he seemed to be crazy and not in his right mind, and that he had no weapon, so far as the witness saw. Dausey testified that he saw the prisoner about 9 o'clock of the night of the homicide; that he was talking to himself and seemed angry, and at times talked foolishly; that he seemed to be much enraged, and said he would have his wife out of Ben's house, towards which he was then going. Several witnesses were then called on the part of the State for the purpose of showing that the prisoner was not insane.

The prisoner's counsel then proposed to prove that an adulterous intercourse had been carried on for some time preceding the homicide between the deceased and Flora, the wife of the prisoner, and insisted that a knowledge or belief of such adulterous intercourse by the prisoner would mitigate his crime from murder to manslaughter. The court rejected the evidence. The prisoner's counsel then proposed to prove by the declarations of the prisoner, made some time before the homicide, as well as by declarations made on the night of the homicide, that the prisoner was laboring under monomania on the subject of the adultery of his wife with the deceased. The court rejected the declarations of the prisoner made some time before the hom-

icide, but admitted those made on the night of the homicide and before it took place, to show the state of the mind of the prisoner. The witness Dausey was then examined as to those declarations, and gave the same account as is contained in his testimony above stated.

(334) The court charged the jury that if the facts and circumstances testified by the witnesses were believed and satisfied them beyond a reasonable doubt that the prisoner slew the deceased, then the prisoner was guilty of murder, provided he was sane at the time when he committed the act; and that the law presumed every man to be sane until the contrary was proved; that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind as not to have known the nature and quality of the act he was doing, or, if he did know it, that he did not know that he was doing wrong. The court instructed the jury further that voluntary drunkenness would not extenuate a crime, and that, therefore, the fact of the prisoner's being drunk a short time before the homicide was committed would not lessen his guilt, if they believed that he was sane before he became drunk.

The jury having retired under the charge of the presiding judge to consider of their verdict, returned into open court to deliver it, whereupon, on motion of the prisoner's counsel, the court ordered that the jury should be polled and that each juror of the panel should answer for himself what was his verdict in this prosecution, and the jurors of the jury aforesaid, having been polled and called separately and individually, did each and severally upon their oath say that the prisoner was guilty of the felony and murder in manner and form as charged upon him in the bill of indictment.

The prisoner's counsel moved for a new trial—

1. Because the court rejected the evidence offered to prove the adultery of the prisoner's wife with the deceased.

2. For misdirection of the court on the subject of drunkenness.

3. Because the court rejected a part of the evidence tending to show that the prisoner was laboring under monomania

(335) on the subject of his wife's adultery with the deceased.

The motion for a new trial was overruled by the court, whereupon the counsel moved in arrest of the judgment for a defect on the face of the bill of indictment. This motion was also overruled and sentence of death pronounced, from which the prisoner appealed.

Attorney-General for the State.
J. H. Bryan for defendant.

BATTLE, J. We have considered the questions presented by the counsel for the prisoner in his bill of exceptions with all that care and anxiety for a right decision which their importance, both to the prisoner and to the State, imperatively demanded. We have, nevertheless, been unable to find in the errors assigned anything of which the prisoner has a right to complain. The first exception is that the court erred in rejecting "the evidence offered to prove the adultery of the prisoner's wife with the deceased." This testimony was offered to prove, not that the deceased was found by the prisoner in the act of adultery with his wife at the time when the homicide was committed, but that "an adulterous intercourse had been, for some time preceding the homicide, carried on between them"; and the counsel insisted that a knowledge, or even belief, of such adulterous intercourse, by the prisoner, would mitigate the crime from murder to manslaughter. No authority has been produced in support of this position, and so far as we can learn all the authorities are directly against it. Hale, Foster, East and Russell all agree in stating that to extenuate the offense the husband must find the deceased in the very act of adultery with his wife. And so it must be upon principle. The law extends its indulgence to a transport of passion justly excited, and acting before reason has time to subdue it, but not to a settled purpose of vengeance, no matter how great the injury or gross the insult which first gave it origin. A belief—nay, a knowledge—by the prisoner that the deceased had been carrying on an adul- (336) terous intercourse with his wife cannot change the character of the homicide. The law on this subject is laid down with much clearness and force by Foster, Crown Law, 296; and with him all the other writers substantially agree. "A husband finding a man in the act of adultery with his wife, and in the first transport of passion killeth him; this is no more than manslaughter. But had he killed the adulterer deliberately and upon revenge, *after the fact and sufficient cooling time*, it had been undoubtedly murder. For let it be observed that in all possible cases deliberate homicide, upon a principle of revenge, is murder." As, then, the evidence which was offered to show the adulterous intercourse between the prisoner's wife and the deceased could not, if received, have changed the nature of the offense, the court did not err in rejecting it. But it is argued here that the prisoner had just reasons for believing that the

deceased was engaged in the act of adultery with his wife at the very time when he broke into the house of the deceased and killed him. It may well be doubted whether the testimony given on the trial supports this view of the case, but if it were admitted that it did, it could be of no avail to the prisoner. It is the sudden fury excited by finding a man in the very act of shame with his wife which mitigates the offense of the husband who kills his wrongdoer at the instant; but to the offense of one who kills upon passion excited by a less cause—by a mere belief of the act—the law allows of no mitigation.

The second exception is "for misdirection of the court on the subject of drunkenness." All the writers on the criminal law from the most ancient to the most recent, so far as we are aware, declare that voluntary drunkenness will not excuse a crime committed by a man, otherwise sane, whilst acting under its influence. Even the cases relied upon by the counsel for the prisoner, *Rex. v. Meakin*, 7 Car. and Payne, 297 (32 Eng. (337) C. L., 514); *Rex v. Thomas, ib.*, 817 and 750; 1 Russ on Crimes, 8, all acknowledge the general rule, but they say that when a legal provocation is proved, intoxication may be taken into consideration to ascertain whether the slayer acted from malice or from sudden passion excited by the provocation. Whether the distinction is a proper one or not we do not pretend to say. It has been doubted in England (*Rex. v. Carroll*, 7 Car. and Payne, 145; 32 Eng. C. L., 417), and it is a dangerous one and ought to be received with great caution. But whether admitted or not, it has no bearing upon the present case. There is not a particle of testimony to show that the prisoner was acting, or can be supposed to have been acting, under a *legal* provocation; and there was, therefore, no cause for the application of the principle for which the counsel contends.

The third exception is "because the court rejected a part of the evidence tending to show that the prisoner was laboring under monomania on the subject of his wife's adultery with the deceased." The testimony offered and rejected was "the declarations of the prisoner made some time before the homicide." We are not sure that we correctly understand this exception in the connection in which it was made. One of the grounds of defense taken by the prisoner was that he was insane at the time when he committed the homicide, and, so far as we can discover, he was allowed to introduce all the testimony in his power to sustain it. Of that and of the charge of the judge in relation to it no complaint is or can be made by the prisoner. Monomania is one among the various forms of insanity; it is a par-

tial insanity upon one particular subject. As a species of insanity, it was competent for the prisoner to have proved it, and he was not restricted in his proof of it so long as he insisted on it under the defense of insanity. It was not until after he had closed his testimony on that subject, and also on the subject of drunkenness, that he offered the testimony which was rejected. We do not well see how the one could be sepa- (338) rated from the other. The declarations, too, what were they? Were they statements of facts by the prisoner offered as evidence of those facts? If so, they were clearly inadmissible. Were they wild, incoherent and disjointed exclamations in relation to his wife's adultery, evincing that they proceeded from an unsound mind? If so, the prisoner should have offered them as proof under his defense of insanity, and they would doubtless have been received. If we are to judge of their nature from the declarations which were received, as having been made on the night of the homicide, and proved by the witness Dausey, then they ought to have been rejected as the mere idle ravings of a drunken man. Our difficulty in understanding the exception is still further increased by the apparently inconsistent grounds of defense assumed for the prisoner. One ground, which we have already considered, is that his wife was actually guilty of adultery with the deceased. Now, if by *monomania* on that subject is meant that the prisoner was laboring under mental delusion that his wife was guilty, when in truth she was innocent, then the fact of her innocence is directly opposed to what was asserted and offered to be proved by the prisoner's counsel. But if the prisoner's wife was guilty, and the insane delusion of his mind was that he had the right to kill her paramour, then it would raise a most important and interesting question, whether insanity to that extent only would render him irresponsible for crime. It seems to be settled by the highest authority in England that it would not (Stark. on Non Compos, 66). Note to *Regina v. Thigginson*, 1 Car. and Kir., and 47 Eng. C. L., 130. But we do not wish to express an opinion upon it until the question is brought directly before us. In this case we are compelled to decide against the prisoner, because he has not shown us that he has been deprived of any benefit or advantage to which by law he was entitled. An exception has been taken here to the manner in which the verdict was (339) rendered against the prisoner. It is contended that the verdict is a nullity because it was rendered by each juror severally, instead of by the whole jointly. We think that exception is not sustainable. The jury retired together, consulted

together, came into court together, to render their verdict jointly. At the instance of the prisoner's counsel they were polled and each was called upon to say for himself whether he found the prisoner guilty or not guilty. Each answered for himself that he found him guilty. Surely, such finding of each constituent member of the whole body is in fact and in law the verdict of the jury, just as much as if they had returned their verdict in the usual manner through their foreman, and had then been polled and had spoken each for himself. The cases cited by the counsel (*Blackley v. Sheldon*, 7 Johns., 32, and *Watts v. Brains*, Cro. Eliz., 778) only show that after the verdict is received, but before it is recorded, the jury may, if the court please, be examined by the *poll*, and then either of the jurors may disagree to the verdict. But here neither of them did disagree, and when the verdict was received and recorded it became the joint verdict of the whole jury. Indeed, the verdict might have been, and should have been, entered in the usual form, without stating upon the record that the jury had been polled. A motion was made in the court below, and has been renewed here, to arrest the judgment for a defect alleged to be apparent on the face of the bill of indictment. The defect has not been pointed out to us, and the closest scrutiny has not enabled us to detect it ourselves.

PER CURIAM. No error.

Cited: S. v. Samuel, 48 N. C., 76; *Howard v. Howard*, 51 N. C., 238; *S. v. Harman*, 78 N. C., 519; *S. v. Sheets*, 89 N. C., 550; *S. v. Potts*, 100 N. C., 465.

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(340)

JACOB HIATT v. ELISHA WADE.

Under our act of Assembly of 1840, ch. 28, a purchaser from a fraudulent grantor to a prior grantee shall not be protected in his purchase unless he has purchased for a full value and without notice of the fraudulent conveyance.

APPEAL from the Superior Court of Law of GUILFORD, at Spring Term, 1848, *Pearson, J.*, presiding.

This is trover for two stacks of hay. Plea, not guilty. Upon the exception the case appears to be as follows:

Adam Sharp owned a tract of land in fee, containing 409 acres, and resided on it. He had a son named Samuel, and he

permitted him, upon his marriage, to build also on the land and cultivate the greater part of it. The father and son kept separate houses and cultivated distinct portions of the land. After they had thus continued many years, Adam Sharp, in May, 1842, conveyed the whole tract in fee to Samuel Sharp in consideration of $2,000 paid, as expressed in the deed; and that was a fair price for it. Just before his death, in November, 1843, Samuel Sharp, in consideration of love and affection, conveyed the premises in fee to the plaintiff and his wife, who was the daughter of Samuel. Adam Sharp continued to live on the land and to cultivate his portion of it, as he had before, until May, 1845, when he removed from the State. When going away, he sold and conveyed to the defendant the crop of grass growing on the meadow in his occupation, in consideration of the sum of $50, which was its full value and then paid. After the conveyance to the plaintiff and his wife, the plaintiff immediately entered into those parts of the land before occupied by Samuel Sharp, and as soon as Adam Sharp went away the plaintiff took possession of the residue of the land, and shortly (341) afterwards cut the grass and stacked the hay on the meadow. In a few days the defendant carried it away, and the plaintiff brought this action. On the part of the defendant evidence was given that many years before 1842, Adam Sharp, as surety for another person, became bound in a bond for $30,000, and that a suit was pending against him thereon when he made the deed to his son in May, 1842, and that it was in 1844 compromised for the sum of $1,200 paid by the same Adam; and evidence was further given that the consideration of $2,000 mentioned in the deed to Samuel was not in fact paid, but that only a bond was given for it; and that afterwards the parties, Adam and Samuel, stated to a witness that it was never meant that it should be paid, as the father had always intended to give the land to his son, and made the deed to that intent, but put it in the form of a sale and took the bond for the price in order to keep the land from being sold under execution, in case judgment should go against the said Adam in the suit then pending; and evidence was further given that at the same time and upon the ground of such understanding as aforesaid, the witness, by the direction and in the presence of Adam and Samuel, entered on the bond a credit for the sum of $1,800, without any part of it being paid and in order to prevent Samuel, upon the death of his father, from being liable for that sum to the other members of the family.

On the part of the plaintiff evidence was then given that when the defendant purchased the grass from Adam Sharp he was informed of the deed from him to his son Samuel, and from the later to the plaintiff and his wife.

The counsel for the defendant moved the court to instruct the jury that, notwithstanding the defendant's knowledge of the deed from Adam Sharp to Samuel, the same was void, as against the defendant, if the jury believed that he was a purchaser for full value and that the deed was voluntary and made (342) with an actual intent to defraud. The court refused the instruction, and directed the jury that, admitting the deed to have been made in fraud of Adam Sharp's creditors, and also with intent to defraud subsequent purchasers from the grantor, it was, nevertheless, valid against the defendant, if he had notice of it when he bought. The plaintiff obtained a verdict and judgment, and the defendant appealed.

Iredell for plaintiff.
Morehead for defendant.

RUFFIN, C. J. A point obscurely appears in the case, of which something might, possibly, have been made for the defendant if it had been urged on the trial. It is that Adam Sharp, by the consent of his son and the plaintiff, actually occupied parts of the land he had conveyed, including the meadows on which the grass grew, and, as he remained on the land for about five months of 1845, that he was entitled to the grass then growing, and could, consequently, sell it. However that might be, the question was not raised on the trial, and therefore cannot be considered here.

On the point which was made, the decision is clearly supported by Laws 1840, ch. 28. The St. 27 Eliz., ch. 4. enacts that conveyances of land, made with intent to defraud purchasers, shall only, as against purchasers for good consideration, be void. Under the act it was, of course, held that notice of the fraudulent deed did not impeach the title of the purchaser, because the bad faith of the deed vitiated it, and, with notice of the deed, the purchaser had also notice of the fraud. But the Legislature thought proper in 1840 to alter that, and declare that no person shall be deemed a purchaser within the meaning of the former act unless he purchase the land for the full (343) value thereof, without notice, at the time of his purchase, of the conveyance by him alleged to be fraudulent. This language is as precise and positive as it can be. It is not

open to construction, and is decisive against the defense. The counsel for the defendant has, however, zealously argued against it, because thereby a transaction, expressly designed to defraud the donor's creditors, and essentially dishonest, becomes good as if it had been founded on honest purposes, merely from the fact that the purchaser from the fraudulent grantor had knowledge of the deed, though at the same time he had knowledge also of the dishonesty of it. It was contended that the Legislature could not have meant to adopt a principle in support of contracts so immoral. But it is in vain upon any such reasoning to struggle against the express words of an act of Assembly. Besides, the legislative purpose in the act seems to be misunderstood. It was not simply to give efficacy to fraudulent conveyances. They were before valid against the parties and all the world, except two classes of persons, namely, creditors and purchasers for value. Now, in respect of the latter class, the act of 1840 changes the policy thus far, that conveyances shall be good against them, as against the rest of the world, unless they buy for a full price and without knowledge of the fraudulent conveyance. In other words, the act means that such a purchaser shall not take advantage of the prior fraud, because he was not, himself, a meritorious purchaser, since he either did not give a fair price or bought with his eyes open and to enable the vendor to defeat his own prior conveyance. Which is the better policy of the two, and tends the more to moral ends, it was for the Legislature to consider. The courts must administer the law as it is given to them by the Legislature.

PER CURIAM. Judgment affirmed.

Cited: Garrison v. Brice, 48 N. C., 86; *Triplett v. Witherspoon*, 70 N. C., 595; *s. c.*, 74 N. C., 476; *Bynum v. Miller*, 86 N. C., 563; *Taylor v. Eatman*, 92 N. C., 606; *Bank v. Adrian*, 116 N. C., 549; *Pass v. Lynch*, 117 N. C., 455; *Brinkley v. Brinkley*, 128 N. C., 514.

(344)

THE STATE v. JOHN BARFIELD.

1. It is perfectly settled that no words or gestures, nor anything less than the indignity to the person of a battery, or an assault at the least, will extenuate a killing to manslaughter. To constitute an assault there must be an attempt or offer to strike by one within striking distance.

2. On a trial for murder, evidence of the general character and habits of the deceased, as to temper and violence, cannot be received. The only exception to this rule, if there be one, is where the whole evidence as to the homicide is circumstantial.

3. An affidavit for the removal of a cause ought no more to be inserted as a part of the record than one for a continuance.

4. It is not necessary that the record should show a *venire facias*, either original or special, to the term of the court at which a prisoner is tried.

APPEAL from the Superior Court of Law of JOHNSTON, at Spring Term, 1848, *Caldwell, J.*, presiding.

The prisoner was indicted in Sampson County for the murder of Alfred Flowers, and, after plea of not guilty, on his motion and affidavit, the trial was removed to Cumberland. He was there tried and convicted, but, upon an appeal to this Court, the judgment was reversed, and a *venire de novo* awarded. 29 N. C., 299. At the next term of Cumberland Court, in November, 1847, the prisoner offered an affidavit on which he moved for another removal of the trial, and the court ordered it to be removed to Johnston Superior Court.

On the trial the widow of the deceased gave evidence for the State, in substance and almost literally, the same as that
(345) given by her on the former trial, as stated in the report of the case in this Court.

On the part of the prisoner, Robert Flowers was examined as a witness. He was a son of the deceased, and was fifteen or sixteen years old at the time of the homicide; and he stated: That he was not at home until late in the day on which the homicide was committed; that when he went into the house he saw the prisoner sitting on a table with a gun in his hand, and that he requested the prisoner to give it to him, and he immediately complied; that he went out of doors, and when he came back he found the prisoner lying on the bed, and that his father sent him to draw some liquor, and when he returned he found his father sitting on a chair near the door; that some angry words passed between his father and the prisoner, and that the latter was standing near the middle of the room and cursed the

liquor; that his father rose up and took a light chair in his hand and pitched it over the head of the prisoner without touching him, and, as the witness believed, without intending to strike the prisoner; that in doing so his father staggered and fell, when the prisoner rushed upon him instantly and stabbed him; that he did not see the prisoner have a knife in his hand when he first came towards his father, but he saw the prisoner draw it from his pocket at or about the time his father raised the chair; that immediately after his father was stabbed, he got up and went towards the door, and the prisoner followed him, and stabbed him in the back, and his father then went to the bed, laid down, and in a few minutes died; that he did not see his mother assist his father to get up, or to get to the bed, and that he thought, if it had been so, that he would have seen it; that after his father was dead he went out of the house and saw the prisoner at the gate, and asked him "why he had killed his father," to which the prisoner replied, "that if he did not clear out he would send him off with a cut throat."

The case further states that the prisoner then examined (346) as a witness John Flowers, another son of the deceased, a little younger than his brother Robert, and that he testified to the same facts, except that he said the prisoner was advancing on his father when he raised the chair.

The counsel for the prisoner then offered to prove by a witness who had formerly lived with the deceased, that his general character was that of a violent, overbearing and quarrelsome man, and that such were his domestic habits. On objection made on the part of the State, the court rejected the evidence.

On the part of the prisoner a witness named Cobb was examined, and stated that he was one of the jury at the coroner's inquest over the body of Flowers, and that Mrs. Flowers swore on that occasion that she was not in the house when the fatal rencounter took place, but that she became alarmed and had left the house before it happened.

On cross-examination he was asked whether he had not told two persons, named Hicks and Lane, that Mrs. Flowers swore before the jury of inquest that she was in the house and saw the transaction; and he denied that he ever made such a statement to them or either of them. On the part of the State Hicks and Lane were afterwards called to prove that Cobb did state to them that Mrs. Flowers swore before the jury that she was in the house and witnessed the rencounter. This testimony was objected to by the prisoner's counsel, but received by the court.

The counsel for the prisoner insisted before the jury that Mrs. Flowers was not entitled to credit; and that, taking the case on the testimony of the two sons, there was such a provocation as mitigated the killing to manslaughter.

The presiding judge charged the jury that, if Mrs. Flowers was to be believed, the prisoner was guilty of murder; but if they did not believe her, then they would look to the testimony of Robert and John Flowers in order to ascertain the
(347) degree of homicide; and in relation to their evidence, the court stated to the jury that if the deceased pitched the chair over the head of the prisoner without intending to strike him, and that was manifest to the prisoner, there was no such legal provocation as would mitigate the killing to manslaughter, but the prisoner would, in that view of the case, also, be guilty of murder.

The jury convicted the prisoner of murder, and his counsel moved for a *venire de novo* because of the rejection of the evidence offered by him and of the admission of that of Hicks and Lane to contradict Cobb, and for misdirection. The court refused the motion, and, after sentence of death the prisoner appealed.

Attorney-General for the State.
J. H. Bryan for defendant.

RUFFIN, C. J. Although it was not contended on the trial that the offense of the prisoner did not amount to murder, if the account given by the widow of the deceased was true, yet, as the case comes here, that question is one of those to be considered by this Court. Upon it we must say that it admits of no doubt that it was murder, according to her account. She stated that after some angry words on each side the prisoner, with his knife drawn, approached the deceased, thrusting at him, and that the deceased then raised the chair and pitched it over the other's head, but without striking or intending to strike him, and that in making that effort he staggered from drunkenness and fell, and that then the prisoner, who, though he had been drinking, was not drunk, rushed on the deceased, while down, and stabbed him several times; and, moreover, that she assisted her husband to rise, and that, after he had done so, the prisoner pursued him and again stabbed him in the back once or twice. This represents the prisoner, in every respect, as
(348) the aggressor, and grossly so; intending, and in the act of making on the deceased, a deadly assault with a drawn knife, as the beginning of the affray, and executing that inten-

tion (without receiving a blow from the deceased or an attempt to give one) by stabbing the man to death, while he was helpless on the floor, or, after rising, while retreating. Thus represented, there is nothing in the transaction to extenuate the killing from murder of a very dark hue, perpetrated in a cruel and diabolical fury.

The character of the killing does not seem to be materially varied, in a legal sense, by the testimony of the sons. One of them said expressly that the prisoner was advancing on the deceased when he raised the chair. The same is to be implied from the testimony of the other, "that he did not see the prisoner have a knife in his hand when he *first* came towards the deceased, but saw him draw it at or about the time his father raised the chair." Then, it must be taken that the prisoner, upon angry words, was advancing in a hostile manner upon the deceased, and drew his knife as he went, and that, at or about that instant, the deceased raised and pitched a light chair over the prisoner's head, without intending to strike him, but only in order to check the attack, and although it was "manifest" to the prisoner that the deceased did not intend to strike him, and in fact he had not done so, that the prisoner continued to press on the other, who had reeled and fallen, and killed him by repeated stabs before and behind, the deceased being all the time down and unresisting, or retreating. If necessary, it might well be considered whether a killing in this ferocious manner a man in the condition of the deceased would not be murder, though there had been a slight blow with a chair, given by him when so drunk and weak as not to be able to stand up, to another then advancing for the purpose of combat with a deadly weapon drawn before receiving the blow. But we do not pursue that view of the subject, because, in fact, no blow was given (349) to the prisoner, nor any intended; and, therefore, there could be no provocation to palliate the killing from murder, since, from a reasonable regard for the security of human life, it has been long and perfectly settled that no words or gestures, nor anything less than the indignity to the person of a battery, or an assault at the least, will extenuate a killing to manslaughter. To constitute an assault there must be an attempt or offer to strike by one within striking distance. And here both the witnesses and the jury concur in saying there was no intention to strike, and that it was clear and evident to the prisoner that there was not. The Court is, therefore, of opinion that there was in the instructions to the jury no error to the prejudice of the prisoner.

It is of great importance to the due dispatch of business and the correct decision of controversies that no evidence should be heard which is foreign to the issue; and this rule is no less applicable and useful in criminal than in civil cases. Upon this principle, and because, if received, the evidence of the general character and habits of the deceased as to temper and violence could not rationally and legally affect the degree of homicide in this case, but might mislead the jury, the Court holds that it was properly excluded.

The law no more allows a man of bad temper and habits of violence to be killed by another, whom he is not assaulting, than it does the most peaceable and quiet of men. But it is said that it ought to be heard as some evidence—to weigh with the jury—that the deceased, being habitually a brawler and breaker of the peace, was, probably, in this particular controversy, the aggressor, or, at least, that the slayer might for that reason have thought himself in danger from him, and acted on that apprehension. Now, no such principle or decision is found as that a person may kill another because from his former course of life, as a fighter, he apprehends an assault from him, (350) though it be even a violent one. A person may, indeed, receive such sure information of the intention of another to attack his life upon sight as to cause him fully to believe it; and, in a moral point of view, he may in such a case be excused for getting the advantage on a favorable opportunity and killing first, or even for seeking private means of killing the other, in order, as he thinks, to save his own life. The pardoning power would, doubtless, be strongly moved by those palliating considerations to stay the punishment annexed by the law to the offense. But it is clear that the legal guilt would be that of murder, because there was not at the time a pressing necessity to kill, arising out of an assault and immediate danger to the person killing, nor any accompanying provocation to arouse the passions and acted on before the passions had cooling time. It would be murder, because the killing would be deliberate; and we know of no deliberate killing that is not murder, unless it be commanded by the law or justified by the urgent necessity of self-defense, when the party is in impending peril of the loss of life or great bodily harm from an actual and unavoidable combat. It is too much to stake the life of one man upon the fears of another of danger from him, merely upon his character for turbulence, and when he is making no assault. Such would be the case here if the evidence had been received, for the prisoner's own witnesses proved that there was no assault on him. It is the fact, and not the fear of an assault, that extenuates the

killing, upon the supposition that it instantly rouses the resentment to an uncontrollable pitch. It is possible, when the case is one of circumstantial evidence and there is no direct proof of the quarrel and combat, that evidence of the character of the deceased might be mercifully left to the jury in aid of their inquiries into the origin and progress of the conflict in which the prisoner took the other's life. It was allowed, and on that principle, in *S. v. Tackett,* 8 N. C., 211. That is the only instance in which, even in a case of circumstantial evi- (351) dence, such proof was held to be proper, as far as our re- searches and those of the bar have discovered. It is stated in the notes on the American edition of Phillips on Evidence, as a solitary case, and as one in which the Court admitted that such evidence must be confined to the killing of slaves. Cowen and Hill's notes to Phill. on Ev., 461, note 345. Although the case is not, we think, obnoxious to the sneer of the annotator in respect to its application to the killing of slaves alone, yet we cannot act on it as an authority in this case. It does not profess to be founded on any precedent, and the reasoning of the Court confines its application to the case of presumptive evidence before it, in which there was "not any direct proof" of the immediate provocation or circumstances under which the homicide was committed. In such a case the Court say if the general behavior of the deceased was marked with turbulence and insolence, it might, in connection with the threats, quarrels and other existing causes of resentment against the prisoner, *increase the probability* that the latter had acted under strong and legal provocation; while, on the contrary, if the behavior of the deceased was usually mild and respectful towards white persons, nothing could be added by it to the force of *the other circumstances.* It is plain, therefore, that the decision is put distinctly upon the ground that the case was one of circumstantial evidence only, in which the existence or want of provocation was matter merely of presumption, to be deduced, therefore, by the jury from every slight thing that could add a shade to the presumption favorable to the accused. The case has never come directly under consideration hitherto, though it was urged in *S. v. Tilley,* 25 N. C., 424, where evidence nearly of the same kind was rejected, and in which the judges meant to intimate their doubts of it by saying that temper and deportment, "if they were evidence at all," were to be established as facts, and not by reputation. But whether *S. v. Tackett* be (352) law or not, it has no application here, because this is a case of the opposite kind—one in which three witnesses were present from beginning to end, who depose directly to the dif-

ferent occurrences, and even those who were called by the prisoner prove affirmatively that the deceased did not make an assault or give the prisoner any legal provocation, but that the prisoner was the aggressor. What possible legitimate end could evidence of the character and temper of the deceased answer in that state of facts? If good, and there was direct evidence that the deceased assaulted the prisoner, it would not aggravate the prisoner's guilt and make it murder. So, if bad, it could not mitigate it to manslaughter, where it appears directly that notwithstanding his temper he was for that time, at all events, not in fault, but that the prisoner was. The evidence of the deceased's character neither disproves the facts proved by the witnesses nor impeaches their credibility. For these reasons, and because we think, if there were any such general rule of evidence as that urged for the prisoner, it would have been laid down in some one of the numerous treatises on this branch of the law, the Court holds the evidence was properly rejected.

Upon the other point of evidence the opinion of the Court has been given in *Edwards v. Sullivan, ante*, 302; and the reasons are there so fully stated as to leave nothing to be added.

There is, therefore, no ground for a *venire de novo*. But, upon the supposition that he might fail on that part of the case, the counsel for the prisoner here also moved in arrest of judgment.

The first reason assigned is, upon the authority of *S. v. Twitty*, 9 N. C., 248, because the affidavit of the prisoner, on which he moved and the court ordered the removal of the trial to Johnston, is not set forth in the transcript from Cumberland.

(353) If that were material, it would be the duty of the Court to have the omission supplied and the transcript completed by the insertion of the affidavit. *S. v. Upton*, 12 N. C., 513; *Ballard v. Carr*, 15 N. C., 575; *S. v. Reid*, 18 N. C., 377. But since *S. v. Seaborn*, 15 N. C., 305, it has been considered by all the judges of this Court, and we believe, by the profession generally, that the affidavit for removal ought no more to be a part of the record than one for continuance. It is evidence to the presiding judge, and his determination of the question of removal, for the causes suggested, is final, like every other decision of a matter of fact by him.

A second reason in arrest is that the record does not show a *venire facias*, either original or special, to the term of Johnston Court, at which the prisoner was tried, but merely sets forth a jury of twelve freeholders, who tried and convicted the prisoner. That is sufficient. It is according to the settled course, to which

no exception is remembered. It is the practice in making up the record to set forth the *venire* at the term at which the indictment was found, in order, we suppose, to show that the grand jury was properly constituted. That practice it is well enough to continue, though it does not seem essential, as it has been often decided that objection can be taken to the competence of grand jurors only before plea in chief, or, at all events, before trial. Therefore, after conviction it must suffice if the record show a grand jury of the requisite number of good and lawful men, upon whose oaths the accusation was presented, without designating the mode of their selection. But in no instance has the *venire* been set out in the record in order to show a proper constitution of the petit jury. If it happen that the trial is at the term at which the indictment is found, then the *venire* appears. But even then, if one or more talesmen be of the jury, it will not appear how he or they were selected; and when the trial is at a subsequent term, no *venire* for that term ever appears in the record, but only that a jury com- (354) posed of twelve certain good and lawful men upon their oaths found the prisoner guilty. The reason is that in our law a *venire* is not issued for each case, either originally or to supply a defect of jurors. The statute directs a general *venire* for not less than thirty nor more than thirty-six freeholders, to attend the court during the whole term or until discharged; and, further, in order that there may be no defect of jurors, that the sheriff shall summon, from day to day, of the bystanders, other jurors, being freeholders, to serve on the petit jury during that day, "for the trial of all cases," and not any particular one. In respect to talesmen, then, there is no venire, but any freeholder in court is competent and may be called in (*S. v. Lamon*, 10 N. C., 175); and as the whole jury may be constituted of talesmen, the *venire facias* for the original panel need not be set out, since, whether the jury be constituted of persons taken from it or from the bystanders, it is equally legal. It is true, both the State and the traverser have the right to a jury of the original panel, if it can be had; and it is, therefore, error to refuse it. But when a question of that kind arises it may be put on the record with a statement of the facts directly on which the exception is founded. It is not necessary that it should in the first instance appear that the jury was or was not composed either wholly or in part of the original panel; but it is presumed the court proceeded rightly and regularly in forming the jury, and in the trial, unless the contrary appear.

PER CURIAM. No error.

BATTLE, J., *dissentiente*. I cannot concur with the majority of the Court upon the question of the admissibility of (355) the testimony offered by the prisoner to show the character of the deceased for violence. It is with unaffected diffidence that I place my opinion in opposition to theirs, but in doing so I am consoled by the reflection, so often felt and expressed by judges placed in a similar situation, that the conclusion to which I have been led, however erroneous, will at least be harmless. A homicide committed otherwise than by virtue of a legal precept, must be either murder, manslaughter or excusable homicide. With malice it is murder, and even in the absence of express malice it is still murder, unless the prisoner can show from the attendant circumstances that it was prompted by legal provocation, committed by accident, or rendered necessary in self-defense. Every fact and circumstance which surround the main fact of the homicide become, therefore, matters of vital importance, and ought to be admitted in evidence when they can throw the least light upon it. It seems to me that the character of the deceased for violence is one of those attendant circumstances which will always have some, and often an important, bearing upon that which must necessarily be the subject of investigation, that is, what were the motives which impelled the slayer to act? Take first the case, where the prisoner defends upon the ground that he killed his assailant in his necessary self-protection. To sustain his defense he must show to the satisfaction of the jury he was assailed and that he had retreated, as far as he could with safety to his own life, before giving the mortal stroke, or that the violence of the assault was such that retreat was impracticable. Is it not manifest that his apparent danger would depend much upon the character of the assailant for mild and amiable temper or for violent and ungovernable passion? With an assailant of the former character he would have little to fear under circumstances in which with the latter his life would be in great peril. Let it be (356) recollected, too, that he has to judge and to act at the instant, upon the most tremendous responsibility. If he strike too soon he is condemned to a felon's death upon the gallows. If he strike too late he falls by the hands of his adversary. Surely, the jury who tries him ought not to require from him proof of the same forbearance when attacked by a man of blood as when attacked by a man of peace. His danger would undoubtedly be greater in the one case than in the other; why, then, not allow him to prove it? There is certainly nothing in the nature of the testimony which ought to forbid it. Proof of

the superior physical strength of the deceased is always admitted; why, then, not admit proof of that which gives to the physical strength much of its force and all of its danger? It appears to me, too, that the privilege which the prisoner has of giving in evidence his own peaceable general demeanor is of an analogous nature. Testimony of the kind is not only admissible for the prisoner, but it has been said by very high authority that it is often testimony of much weight. *Chief Justice Henderson* says, in *S. v. Lipsey*, 14 N. C., 493, that "the peaceable and orderly character which the prisoner had ever borne had, I think, more *'than but little weight'* which the judge in the court below had been disposed to allow, when the facts attending the homicide had been positively sworn to." The character of the prisoner is offered only as presumptive evidence, and the character of the deceased is offered for no more, but as presumptive evidence, it does seem to me to be as strong, and, therefore, ought to be as readily admitted as the other.

If I have been successful in showing that the testimony of the violent character of the deceased ought to be admitted for the prisoner, when he defends upon the ground of killing in self-protection, the same process of reasoning will lead to the conclusion, though in a less striking manner, that it ought to be admitted to show that the prisoner acted upon a (357) legal provocation. That which would be considered legal provocation when offered by a man apt to strike and ready to shed blood, might very properly not be so regarded when offered by one of a contrary disposition. But it is said that the right to kill does not depend upon the character of the slain; that the law throws its mantle of protection equally over the violent and the gentle, as the rain falls from heaven equally on the just and on the unjust. That is admitted, but it proves nothing. It is true that the killing of a violent and bloodthirsty man, without provocation or excuse, is as much murder as the killing of any other person; but in ascertaining the fact whether there was such provocation or excuse, I contend that the character of the violent man affords important presumptive testimony in favor of the accused. It is urged, again, that where the proof is positive and clear that there was no legal provocation the evidence of character can have no effect, and on that account ought to be rejected. To this I answer that plenary proof on one side can never justify the rejection of testimony, otherwise competent, on the other. The argument confounds the *effect* and the *competency* of testimony. Testimony which is competent, which may be introduced at all, may be introduced no matter how

little may be its effect; nay, even if it be perfectly manifest in the particular case that it can have no effect whatever. It is urged further in the case before us that the jury have found that there was no legal provocation, and therefore the evidence must be rejected as being entirely immaterial and useless. The reply is that it was offered before the *jury had so found*, and if it had been admitted it is possible that their deliberations might have led them to a different conclusion. But it is urged, finally, that there is no authority in favor of the admissibility of such testimony. However this may be elsewhere, I contend (358) that it is not so in this State. In *S. v. Tackett*, 8 N. C., 210, the prisoner was indicted for the murder of a slave. No witness was present when the homicide was committed; and the testimony against the prisoner consisted principally of his declarations, and of circumstances connected more or less remotely with the transaction. In the progress of the cause the prisoner offered to prove "that the deceased was a turbulent man, and that he was insolent and impudent to white people; but the court refused to hear such testimony unless it would prove that the deceased was insolent and impudent to the prisoner in particular." The prisoner having been convicted and having appealed to this Court, it was decided that the testimony was proper and ought to have been admitted. *Taylor, C. J.*, delivered the unanimous opinion of the Court, in which, after remarking upon the character of the testimony and the nature of the inquiry, he said: "It cannot be doubted that the temper and disposition of the deceased, and his usual deportment towards white persons, might have an important bearing upon the inquiry, and, according to the aspect in which it was presented to the jury, tend to direct their judgment as to the degree of provocation received by the prisoner. If the general behavior of the deceased was marked with turbulence and insolence, it might, in connection with threats, quarrels and existing causes of resentment he had against the prisoner, increase the probability that the killer had acted under a strong and legal provocation." Here there is a case in which it was distinctly declared that the character of the deceased might be offered in evidence on behalf of the prisoner. An attempt is made to destroy the effect of this decision and of its applicability to the case before us by saying that it is an authority only in a case where the deceased was a slave, and where there was no direct testimony as to the provocation under which (359) the prisoner acted. To the first of these objections the reply is that the Court certainly did not assign the fact of the deceased being a slave as a reason for admitting

the testimony. It is true that a slighter cause would be a legal provocation in the case of a slave than in the case of a white man; but they did not intimate that the provocation was to be proved by a different kind or degree of testimony. The second objection is better founded, but I can see no reason for the distinction. The testimony as to character may perhaps be stronger in the case where there is no direct and positive evidence as to the provocation than where the evidence is only circumstantial, but its object and its office are the same in both cases, that is, to ascertain whether the slayer acted upon or without a sufficient provocation. If admissible, then, in one case, it ought not to be rejected in the other.

Upon the whole, I am of opinion that testimony of the character of the deceased for violence may be offered by the prisoner in all cases where the inquiry is whether he acted from malice or upon legal provocation or excuse.

PER CURIAM. No error.

Cited: Bottoms v. Kent, 48 N. C., 155; *S. v. Hogue*, 51 N. C., 384; *S. v. Douglass*, 63 N. C., 501; *S. v. Carter*, 76 N. C., 23; *S. v. Charis*, 80 N. C., 357; *Boyden v. Williams*, 84 N. C., 610; *S. v. McNeill*, 92 N. C., 817; *Emery v. Hardee*, 94 N. C., 789; *S. v. Hensley, ib.*, 1031; *S. v. Byrd*, 121 N. C., 687.

Modified: S. v. Turpin, 77 N. C., 476, 479; *S. v. Exum*, 138 N. C., 607.

(360)

ANDERSON P. ADCOCK AND WIFE *v.* JOHN R. MARSH AND WIFE.

1. When slanderous words are uttered the law *prima facie* implies malice, except in the case of a privileged communication, which is where the party is acting under a duty, either legal or moral, towards the person to whom he makes the communication. In such a case malice must be proved by the plaintiff, and it is a question of fact for the jury.

2. In an action of *tort*, where the plaintiff seeks to recover and is entitled to vindictive damages, he may give in evidence the pecuniary circumstances of the defendant.

APPEAL from the Superior Court of Law of CHATHAM, at Spring Term, 1848, *Pearson, J.*, presiding.

This is an action to recover damages for words spoken. It appears that the plaintiff Joseph Ann is the second wife of the plaintiff Adcock, and that the latter had, by his first wife, two

daughters, one of whom was named Sally. It further appears that the first Mrs. Adcock had requested the defendant Emeline Marsh, with whom she was very intimate, to give her daughters advice. Accordingly the defendant Mrs. Marsh, after the intermarriage of the plaintiffs, advised Sally Adcock that she and her sister ought not to live at her father's, giving as her reason that her stepmother was reported to be a loose woman, and too intimate with an individual whose name was mentioned, and advised her to mention it to her father. And to Mary Moore, the maternal aunt of Sally Adcock, she made use of language much stronger. No question is made but that the words used by Mrs. Marsh, on both occasions, were in themselves *prima facie* actionable.

The plaintiffs' declaration contains two counts, one for the words spoken to Sally Adcock and the other for those
(361) spoken to Mary Moore. With a view to vindictive damages the plaintiffs' counsel offered to prove that the defendant Marsh was worth between $2,000 and $3,000. This testimony was objected to, but received by the court. Much testimony was introduced to discredit Mary Moore, and the defendants' counsel insisted that the plaintiffs were not entitled to a verdict on the count framed on the words spoken to her, and asked the court to charge the jury, on the first count, that the confidential relation existing between the witness Sally Adcock and Mrs. Marsh, and the occasion for using the words, rebutted the implication of malice. The court refused so to charge, but instructed the jury that when slanderous words were spoken, malice was implied, unless the occasion and relation of the parties rebutted the implication, and that in this case there was no evidence showing such an occasion for speaking the words or such a relation between the defendant Emeline and Sally Adcock as would rebut the implication of malice. For, supposing the mother of Sally Adcock had requested Mrs. Marsh to give her daughters advice, still, as their father had placed over them, by his second marriage, a stepmother, there was no excuse in law for Mrs. Marsh speaking to the witness the slanderous words of the plaintiff, however much it might mitigate the damages.

The jury returned a verdict for the plaintiffs, and the defendants moved for a new trial, because the court received improper evidence, and for error in law in the charge. From the judgment on the verdict the defendants appealed.

McRae and *Waddell* for plaintiffs.
Kerr for defendants.

NASH, J. We are relieved from any consideration of the case growing out of the charge contained in the second count in the declaration. The case, as presented to us, is confined to the first count, for it is the error committed or alleged to be committed by the presiding judge in considering the case, (362) under that count, to which our attention is directed.

We think his Honor was correct in refusing to give the charge requested, and that he erred in the latter part of his instruction upon this point. The instruction requested assumed that the question was one purely and entirely of law, for it was "that the confidential relation existing between the defendant Mrs. Marsh and the witness, and the occasion for using the words, rebutted the implication of malice." This instruction the court could not give, because it involved an inquiry of fact which it was the province of the jury alone to make. And we think his Honor, in instructing the jury "there was *no evidence* showing such an occasion for speaking the words, or such a relation between the witness and the defendant as would rebut the implication of malice," erred, for the same reason, because in this case malice was a question of fact for the jury, which his Honor could not decide. He must have meant, in the latter part of this charge, that, although the mother of Sally Adcock had requested Mrs. Marsh to advise her daughters, that did not make her communication a privileged one. In this there was error. We hold that it was a privileged communication, if made by Mrs. Marsh in good faith, and of the *bona fides* the jury were the exclusive judges, and it ought to have been left to them. The idea seems to have been that the communication was not a privileged one, because the defendant had no interest in the matter and stood in no relationship to the witness, but was, in every respect, a volunteer. In general, when words slanderous in themselves are uttered of another, whether written or verbal, the law implies malice. But there is a class of cases in which, although the words are actionable, yet from the relation in which the party publishing stands to the individual to whom they are published, or to the subject-matter, the idea of malice is rebutted and the words cease to furnish (363) the foundation of an action. These are called privileged communications, that is, the party making them has, in law or in morals, the right to make them; but if he acted in bad faith and used his privilege as a cloak under which to cover his malice, the communication ceases to be a privileged one, and he must answer the consequences. And whenever, in an action for slander, the defense rests upon the question of express

malice on the part of the defendant, the jury are the sole triers. We have found no case exactly like this, but several in which the principles governing them were similar to those arising here. In *Wright v. Woodgale*, 2 C. M. and R., 513, and also reported in 1 T. and G., 12, *Baron Parke* observed: "The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff." The same eminent judge in *Cockayne v. Hodgkisson*, 5 Car. and P., 543, observes that "whenever the writer of a libel is acting under any duty, legal or *moral*, towards the person to whom he writes, his communication is a privileged one"; and no action, says Mr. Stephens, will lie for what is there written, unless the writer is actuated by malice. 2 Stephens N. P., 22, 25. So, in *Story v. Challands*, 8 Car. and Pay., 234, it was ruled by the Court that a communication by letter, made by a son-in-law to his mother-in-law, respecting her proposed marriage with the plaintiff and containing imputations upon him, though volunteered, was privileged, from the moral obligation resting upon him to protect her from injury. Many other cases are cited by Mr. Stephens to the same purpose. Was the communication made by Mrs. Marsh to Sally Adcock a privileged one? She was not connected with her by any ties of consanguinity, nor had (364) she any personal interest in the matter; nor was it necessary in order to her protection that the duty she was discharging should have been a legal one. Was it a moral one? Can there be a doubt? What higher moral duty than to warn the young, to guard the innocent, to direct the unwary? The stepmother of Sally Adcock was believed by Mrs. Marsh to be an impure woman, whether justly or not is not now the question; and, in compliance with the request of the departed mother, she made the communication to the daughter. What more perilous situation could the child of her friend be placed in? Daily exposed to the contaminating society of a woman loose in her morals, whose position invested her with a commanding influence over her, if the time and the occasion ever could come when, obeying the voice of duty, she was to warn the witness of her danger, it had come. Nor could the fact that the individual against whose society she was warned was her stepmother, change in the least the obligation of the defendant; the danger to the safety of the witness was by the connection increased in a tenfold degree, and the obligation on the defendant increased in proportion. It will be recollected that,

in the preceding remarks, we do not, in the most remote manner, mean to be understood to say or intimate that there was just cause for the opinion which Mrs. Marsh entertained of Mrs. Adcock; it is not pretended. All we intend, all we mean, is that Mrs. Marsh, holding, honestly, these opinions of Mrs. Adcock, was, by the law, justified in making them known to Sally Adcock; and that her communication, so made, was what is termed a privileged one. And we further hold that, without any request from the mother, she would, under the other circumstances, have been justified. When, however, a communication is shown to be a privileged one, as flowing from a legal or moral obligation, the plaintiff may, if he can, prove that it was not made in good faith, but from malice. If he succeed in doing so, it is stripped of the protection of the law and (365) ceases to be privileged. The rule was adopted for the protection of good morals, and must not be perverted to the purposes of vice. But it is the duty of the plaintiff to prove this malice by competent evidence, and it then becomes a question of fact for the jury. It is their province to say whether the defendant, in making the communication, has acted *bona fide*, intending honestly to discharge a duty, or whether he has acted maliciously, intending to do an injury to the plaintiff. *Patterson v. Jones*, 15 E. C. L., 305; *Coxhead v. Richards*, 52 E. C. L., 568. Enough appears in the case to authorize the Court to treat the communication to the daughter as so far privileged as to leave the question of good or bad faith with which it was made to the jury, especially as the defendant had desired the witness to inform her father, that she might have the benefit of his advice. We think, therefore, it ought to have been put to the jury to say whether the words were spoken to the witness for the honest purpose of warning an innocent young woman of the danger to her reputation and morals from a longer intimate association with one whom the speaker believed to be a lewd woman, or for the malicious purpose of aspersing her character. Such ought to have been the instruction given to the jury. His Honor, however, charged that there was *no evidence* to rebut the malice implied in law by speaking of the words. In this we think he erred. If he meant, what the words imply, that there was *no such evidence*, he was manifestly wrong, for it existed in the relation in which the parties—the witness and the defendant—stood towards each other, as stated in the case. If he meant there was not sufficient evidence, then he erred in taking upon himself the decision of a matter of fact.

It is further urged by the defendant that the court erred in

permitting evidence to go to the jury as to his circumstances. On this question we concur with his Honor. Such evidence has been repeatedly admitted in actions of *tort*, to influence (366) the damages to be given. In 2 Star. Ev., 496, it is laid down that, in an action for malicious prosecution, the plaintiff, with a view to vindictive damages, may give in evidence the length of time he was imprisoned, his situation in life, and *his circumstances*. He may also give in evidence the circumstances of the defendant. Bul. N. P., 13; 2 St. Ev., 252.

The only case we can find to the contrary is that of *James v. Biddington*, 25 E. C. L., 553; 8 Car. and Pay., 589. There *Alderson, Baron*, ruled out the testimony. He cites no authority for his opinion, and admits it had often been received. The case, which was for criminal conversation, does not show what were the attendant circumstances. In such actions vindictive damages are not necessarily given; they are dependent on the circumstances attending the transaction. If the plaintiff, by his negligence, has contributed to his own dishonor; if he and his wife lived unhappily together and in other cases of a similar character, he is not entitled to vindictive damages, and the evidence would not be admissible. Such may have been the case upon which we are commenting. Be that, however, as it may, we prefer the opinions previously given as more in accordance with justice and right reason. The object of the law in giving damages in actions of *tort* is to compensate the plaintiff for the injury he has sustained; and in giving vindictive damages to punish the defendant for his iniquitous conduct. In neither case ought justice to be lost sight of, and in neither case does the law contemplate or intend the ruin of the defendant. Without a knowledge of his circumstances, the jury might give damages against him utterly ruinous, and such, as against another of greater property, would not be felt.

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

Cited: Reeves v. Winn, 97 N. C., 249, 251; *Johnson v. Allen*, 100 N. C., 139; *Bowden v. Bailes*, 101 N. C., 613; *S. v. Hinson*, 103 N. C., 376; *Hudnell v. Lumber Co.*, 133 N. C., 173.

(367)

HENRIETTA HOWARD v. ROBERT THOMPSON.

A guardian of a lunatic may, by order of the County Court, rightfully sell the personal property of his ward for the payment of his debts, provided there be no fraud in the proceeding.

APPEAL from the Superior Court of Law of ORANGE, at a Special Term in December, 1847, *Battle, J.*, presiding.

This was an action of detinue for seven slaves, to which the defendant pleaded the general issue and statute of limitations. It was tried at the Special Term of Orange County in December last, when the plaintiff proved that she was entitled to the slaves in controversy under the will of her father; that they were in the possession of the defendant and had been demanded of him before the commencement of the suit. She then produced the records of the County Court of Orange, at November Term, 1845, showing that she had been regularly declared a lunatic, and that one Thomas D. Oldham had been appointed her guardian. The defendant claimed the slaves under a sale made by one Stephen Glass as the guardian of the plaintiff, in November, 1827. He then produced the records of the County Court of Orange, at August Term, 1826, showing that the plaintiff was then declared a lunatic and the said Glass appointed her guardian, and he also produced the records of August Term, 1827, upon which appeared the following order:

"Ordered, that Stephen Glass, guardian, etc., have leave to sell Patience and her three children, the property of Ritta Howard, his ward, for the purpose of paying debts."

He then introduced witnesses to show that Glass, the (368) guardian, sold the slaves mentioned in the order, at public sale in November, 1827, when one Richard Howard became the purchaser, and afterwards sold them to him; and that he had kept them and their increase ever since, claiming them as his own. The fairness of the sale made by the guardian was attempted to be impeached by the plaintiff, and testimony was introduced for that purpose, but it is unnecessary to state it, as the case was decided upon another ground. The defendant contended that he acquired a good title to the slaves under the sale made by the plaintiff's guardian, Glass, to Richard Howard and his purchase from Howard; but that, if his title had been originally defective, it was made good by so many years of adverse possession. He also objected that the action could not be sustained in the name of the plaintiff alone, without joining her guardian or some person as next friend.

For the plaintiff it was insisted that the action was properly brought in her name, and that, if it were not so, the objection could not be taken upon the trial after a plea in bar; that the defendant had not acquired any title under his purchase: (1) Because the County Court had no power to make an order for the sale of the slaves. (2) That if it had, it was a special authority, which must be strictly pursued, by the court's ascertaining the debts for which the sale was to be made, which it was contended had not been done in this case.

The court charged the jury that the County Court had no power to make the order in question, because it had not pursued the special authority conferred upon it, and that the defendant had, therefore, acquired no title to the slaves under his purchase from the vendee of the guardian; that the statute of limitations had no operation, because the plaintiff was a lunatic during the whole time of the defendant's possession, (369) and that the action could be sustained in the name of the plaintiff alone. Under this charge the plaintiff had a verdict and judgment, and the defendant appealed.

No counsel for defendant.
Waddell and *Norwood* for plaintiff.

BATTLE, J. When this case was on trial before me while presiding in the court below, the main objection to the title set up by the defendant, under the sale made by the plaintiff's first guardian, Glass, was that the authority conferred upon the county courts by the acts of 1784 and 1801 (1 Rev. St., ch. 57, secs. 1 and 2) was a special one, which must be strictly pursued, and that the County Court of Orange, in making the order in question, had exceeded the authority with which it was invested; and that, therefore, the order and all the proceedings under it were void. In support of this position the counsel for the plaintiff cited and relied upon *Leary v. Fletcher*, 23 N. C., 259, in which it was held that the County Court, in proceeding under the act of 1789 (1 Rev. St., ch. 63, sec. 11), authorizing an order to issue to a guardian, empowering him to sell the property of his ward for payment of the debts of the ward, must first ascertain that there are debts due by the ward which render the sale of the property expedient; and that the court must also select the part or parts of his property which can be disposed of with least injury to the ward, and that, therefore, an order in the following words: "Ordered, that A. W., the guardian, have leave to sell as much of the lands of S. M., deceased, as will satisfy the debts against said deceased's estate," is unauthorized

and void, and a purchaser of the land under a sale made by the guardian in pursuance of such order acquires no title. The difference between the general power of the county courts, acting *quoad hoc* as courts of chancery, by virtue of the (370) authority conferred upon them by the General Assembly, in ordering the sale of the *real* estates of wards by their guardians, and their power in ordering the sale of *personal* property, was not distinctly presented to the court in the reply of the defendant's counsel, nor was the case, *Harris v. Richardson,* 15 N. C., 279, brought to its notice. Upon seeing the latter case, and considering the principles upon which it was decided, I am satisfied that I erred in my charge to the jury upon the question now under consideration.

The facts of that case were that certain slaves had been sold by the guardian of the plaintiff, Susan Harris, under an order of the County Court, made upon his petition, which set forth that his ward had no other property than the said slaves, and that they were all expensive to her. The defendant claimed under a sale made by the guardian, and the plaintiff obtained a verdict and judgment in the court below. But this Court reversed the judgment and granted a new trial, holding that a guardian appointed by the Court of Chancery might, by order of the court, rightfully sell the *personal* property of his ward; and that the act of 1762, 1 Rev. St., ch. 54, confers the same power on the county courts, so that a guardian appointed by the latter might, under a similar order, also sell the personal estate of his ward. The act of 1801, above referred to, gives to the county courts the power to appoint guardians of lunatics and idiots, and invests the guardians so appointed with "the same powers to all intents, constructions and purposes" as have been conferred upon guardians of orphans, appointed by the county courts by virtue of the act of 1762. It follows from this that *Harris v. Richardson, supra,* is a direct authority in favor of the order and sale, under which the defendant claims; and we hold that if the sale was made fairly and in good faith by his vendor, he acquired by it a good title to the slaves now sued for. We think it proper, however, to repeat the (371) remarks made by the Court in the case just referred to, that "such sales are so unusual, the occasions which would justify them are so rare, the dangers of imposition on the court by misrepresentations of the guardian and of corrupt combinations between him and the ostensible purchasers so obvious, that the vigilance of courts and jurors should be extended in detecting any fraud which may infect the proceeding."

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

EMSLEY DONNELL ET AL. v. WILLIAM T. SHIELDS ET AL.

Where there are two or more parties defendants in an action of trover, an appeal by less than the whole number of parties cannot be supported, although they pleaded severally. If the verdict is against all, the judgment must necessarily be against all for the whole sum found in damages.

APPEAL from the Superior Court of Law of GUILFORD, at Fall Term, 1847, *Bailey, J.*, presiding.

(372) This was an action of trover brought by the plaintiffs against James M. Patterson and three other defendants, to recover damages for the conversion by them of several slaves. The defendant pleaded severally the general issue, not guilty, and upon the trial of the issues in the Superior Court of Law, at Guilford, on the Spring Circuit of 1848, the jury found the defendants "severally guilty," and assessed the plaintiffs' damages to $2,048.60, and judgment was rendered that the plaintiffs recover, etc. From this judgment the defendant Patterson, alone, appealed to the Superior Court, where the counsel for the plaintiff moved to dismiss the appeal for the reason that the other defendants had not joined in it.

Kerr and *Iredell* for plaintiffs.
Waddell and *J. T. Morehead* for defendants.

BATTLE, J. Upon the direct authority of *Hicks v. Gilliam*, 15 N. C., 217, and *Dunns v. Jones*, 20 N. C., 291, and for the reasons therein given, which it is unnecessary for us to repeat, we are bound to allow the motion made by the plaintiffs' counsel, and to dismiss the defendants' appeal. It is true that the defendants, in the court below, pleaded severally not guilty, and the jury found them severally guilty, yet the damages assessed were for one entire sum against all, as they ought to have been (*Sir John Haydan's case*, 11 Coke, 5; *Lawfield v. Brancroft*, Strange, 910), and the judgment thereon was, of course, a joint one against all. Nor can the cases of *Stiner v. Cawthorn*, 20 N. C., 640, and *S. v. Justices*, 24 N. C., 430, cited for the defendant, help him. Both those cases fully recognize the authority of *Hicks v. Gilliam* and *Dunns v. Jones*, and are

(373) decided upon principles not applicable to them nor to this case. The motion to dismiss the appeal from this Court, in *Stiner v. Cawthorn, supra*, was refused upon the ground that though there were other defendants in the County Court, yet, as no motion was made to dismiss Cawthorn's appeal from the

Superior Court, and that court did, in fact, entertain jurisdiction of the case, and gave judgment against him alone, his appeal to the Supreme Court was proper, and could not be dismissed from that court. The other case of *S. v. The Justices* was put upon the intelligible and proper ground that the suit against the justices was not against them as several persons, acting as individuals, but as a corporate body, acting through the medium of a majority of its members. The judgment was therefore against them in the same capacity, and an appeal from it by a majority was in effect an appeal by the whole body.

PER CURIAM. The appeal dismissed.

Cited: Jackson v. Hampton, 32 N. C., 604; *Kelly v. Muse*, 33 N. C., 183.

(374)

DEN ON DEMISE OF THOMAS G. WATKINS ET AL. v. ANDREW FLORA.

1. A testator devised certain lands to his wife during her widowhood, and after her marriage or death to his wife's heirs by consanguinity, with the exception of one sister, Elizabeth. The wife was pregnant at the time of making the will, though unknown to the testator. Afterwards this child was born, and died in the lifetime of its mother. The mother then died, leaving brothers and sisters, her only heirs: *Held*, that on the birth of the child the remainder vested in him, to the exclusion of the brothers and sisters of the wife, and on his death vested in his heirs at law.

2. The construction of a will must be upon the will itself, and cannot be controlled by parol proof of an intention as to particular persons to take under the devise, for in effect that would be to make the will by parol; though the construction may be aided by evidence of the state of the family.

3. A devise to one person cannot be color of title to another claiming adversely to the devisee.

APPEAL from the Superior Court of Law of CURRITUCK, at Fall Term, 1847, *Dick, J.*, presiding.

Henry Bright was seized in fee of the premises in the declaration described, and on 15 April, 1836, he made his will, and therein devised and bequeathed as follows:

He directed a tract of land and three slaves to be sold and the proceeds to be applied to the payment of his debts, and the surplus, if any, he gave to his wife, Polly. The will then proceeds thus: "I lend the tract of land I now live on," being that in dispute, "unto my wife during the time she remains my

widow. I also lend negro woman Chary and child, Pleasant, Major, Sylvester, Ann, and Amanda, to my wife, Polly, as long as she lives my widow. I lend the use and benefit of all (375) my stock of every denomination, all the produce of every kind, all the household and kitchen furniture, and farming utensils of every description to my said wife as long as she remains my widow. Immediately after the marriage of my widow, or directly after the death of my wife, Polly, I give and bequeath all the before-mentioned estates, within doors and without, to my loving wife Polly's heirs by consanguinity, with the exception of Elizabeth McPherson, and I give and bequeath to her $1. I appoint my wife, Polly, whole and sole executrix of this my will."

The testator died on 15 May, 1836, and his will was proved on the fourth Monday of that month, and his wife then entered her dissent to it. The testator or his wife had no issue born at the making of the will, but she was at the time pregnant. In August, 1836, the widow intermarried with the defendant, Flora, and she was afterwards delivered of the child of which she was pregnant in the testator's lifetime; and the child lived about six months and died. At that time the defendant was in possession of the land, and dower was allotted to his wife in one-third of it, which he claimed in her right. The defendant afterwards made a parol contract for the purchase of the reversion of the third allotted for the dower, and of the other two-thirds in possession in fee, from Narcissa Halstead, and Rachel, Solomon and Robert Charlton. They were, together with said Elizabeth McPherson, the brothers and sisters of the testator's wife, and were living at the making of the will, the death of the testator, and the marriage of his widow. Under those titles and a deed from Solomon Charlton for his share of the premises, executed about two years before the suit, the defendant held the premises for about ten years before the commencement of the action, claiming in right of his wife, or under her brothers and sisters for himself. Mrs. Flora died shortly before (376) this suit; and the lessors of the plaintiff are the heirs at law of the testator and of the posthumous child *ex parte paterna*.

On the trial the foregoing facts were agreed by the parties. Then the counsel for the defendant offered furthermore to prove by witnesses that the testator, at the time of making his will, was ignorant of the pregnancy of his wife, and that it was his intention, by his will, to give the premises to the said brothers and sisters of his wife (except Elizabeth McPherson) after the death or marriage of his said wife. But the court rejected the

evidence, and upon the facts stated was of opinion with the plaintiff, and a verdict and judgment were rendered accordingly, and the defendant appealed.

Heath and *J. H. Bryan* for plaintiffs.
Iredell for defendant.

RUFFIN, C. J. A title at law cannot be set up for the afterborn child, under the act of 1808, in favor of children born after the making of their parent's will. For, if the child took by the will, it was provided for by the father, and the case would not be within the act; and if the child did not take under the devise, but the mother and her brothers and sisters took the whole property, then the proceedings were not had which the act prescribes for vesting the seizin in the child.

Upon the construction of the will it is contended for the defendant, either that the testator's widow took the fee or that it was limited over in remainder, upon the death or marriage of the wife, to her brothers and sisters, except Mrs. McPherson. That depends upon the operation of the words, "my wife's heirs by consanguinity." We do not think they gave the inheritance to the wife. It is plain, from the testator's giving everything he had to his wife and her blood, that he did not intend his estate to go to his own family, as such. Then, as he gives the property over, upon the marriage of his wife, as well as upon her death, to her heirs by consanguinity, there (377) would seem to be a pretty strong inference that the testator did not mean those persons to take in the quality of his wife's heirs, that is, by succession after his death; because then, upon the marriage of the wife, the whole property would go to the testator's own heirs and next of kin, for the interval between the wife's marriage and death. Perhaps that of itself would not be sufficient to prevent the application of the rule in *Shelley's case* to this devise. But when to those considerations is added this other, that the testator expressly excepts from the wife's heirs to whom the limitation is made, a certain sister of the wife, one cannot be mistaken in saying that the words were not used as words of limitation of an estate to the wife, but as words of purchase, denoting who were to take in remainder after the wife; for by the exception it is manifest that the sister was understood by the testator to be within the general terms of description, and that she might take but for the exception. If she did take, it would be as one of the wife's heirs, and others in equal degree must, in like manner, come in under the same words. But by excluding that sister, and leaving the others in

equal degree to take, the testator shows that he did not mean them to take as heirs by descent from his wife, since the course of descent cannot thus be altered by admitting some and excluding other heirs. The wife's estate, therefore, was only that expressly limited to her during life or widowhood, and the heirs took by purchase in remainder.

Then the question is, Who did take as purchasers under those words? There are no other persons who can set up a claim but the after-born child, and the other brothers and sister of the wife, besides Mrs. McPherson. Here it may be remarked that the construction must be upon the will itself and cannot be controlled by parol proof of an intention as to the particular persons to take under the devise, for in effect that would be to make the will by parol. The question is not the abstract one,
(378) what the testator intended, but what was his meaning by the words used by him. The evidence as to the intention was therefore properly excluded. On the other hand, it has been decided that the construction may be aided by evidence of the state of the family. *Gibbons v. Dunn*, 18 N. C., 446. Hence, it was competent to prove that the wife was only pregnant at the making of the will, and perhaps, that the testator did not know of it. But we do not look into the latter point, because, for the reasons that will presently appear, in our opinion, his ignorance of the fact could not affect the devise; and, therefore, the exclusion of that evidence was of no consequence.

Between the two sets of claimants, the wife's after-born child and her brothers and sisters, the opinion of the Court is for the former. The testator uses words, "my wife's heirs by consanguinity," which embrace the child as well, in case it was out of the way, as they do the brothers and sisters. The child being in *ventre matris*, was *in rerum natura* capable of taking by descent, and also by purchase under the description of "child" or "heir" of another. *Doe v. Clark*, 2 H. Bl., 399; *Wallis v. Hodgson*, 2 Atk., 117; *Thelluson v. Woodford*, 4 Ves., 227. Then, what is to exclude the child? It is to be remembered that whoever takes does so as purchaser; and that, as by the marriage of the wife the remainder would fall into possession during her life, the person who takes does not take as being the heir absolutely of the wife, but only as her heir apparent or presumptive. The brothers and sisters claim as filling the latter character, while the child was undoubtedly heir apparent. It is asked again, What is to exclude it? If the testator knew that it was in *ventre matris*, the defendant gives up the argument. But it is insisted that he did not know it; and the presumption is very

cogent on the face of the will that he did not, and it is thence inferred that the testator could not mean the child to take, and that he did mean the brothers and sisters to do so, as heirs presumptive. There can be but little doubt, we (379) think, that the testator expected the brothers and sisters to take, as he then naturally looked upon them as the wife's nearest relations, and the exclusion of one of them shows that they were in his view. But that is not the whole inquiry. We are to consider not only whether he intended those persons might or should take, but whether they, and no one else, should. How can those broad words, "my wife's heirs," be narrowed down to three or four particular persons, though those persons may have been in the testator's contemplation? The argument for the defendant is founded on the state of the testator's knowledge at the time he used this language; and thence is deduced his expectation, and thence, again, his intention, on this subject. The position is that he meant the brothers and sisters, because he knew them. It would follow that he could only mean those brothers and sisters whom he did know. But suppose the words had been "my wife's brothers and sisters," and there had been one of whom the testator had no knowledge, it would be impossible to exclude one that came so expressly within the description. Again, as these brothers and sisters say that they take under the description of the "wife's heirs," for the same reason another brother or sister, though unknown to the testator, must also take under the same description. Suppose, further, that after the making of the will all the brothers and sisters had died in the lifetime of the testator, leaving children. The devise would certainly not fail, but those children would come in, as answering the description, when the will took effect and vested the estate. The gift is not to particular persons, as the sole objects of the testator's bounty, but to a class of persons; and whoever came within it when the will took effect and the estate vested take under it, and none others. So the child of the wife took under this description, because, though unknown to the testator, it alone answered the description, for it was in being when the will was made, and when (380) the testator died and the wife married, and was heir apparent; and thereby the brothers and sisters ceased to be heirs presumptive. The exclusion of one of the sisters, though sufficient to show that if the brothers and other sisters took at all, they were to take as purchasers, does not prove that they were to take at all events, to the exclusion of all others. Whenever they should take, as being the heirs presumptive of the wife,

Mrs. McPherson, though in equal degree, should not take. But it would still be a question between those brothers and sisters and a child of the wife, then in *ventre matris*, which most nearly answered the description of "heir of the wife," and certainly the latter did, as being her heir apparent.

The lessors of the plaintiff are therefore entitled to the premises as heirs of the after-born child, who took the fee. The defendant's possession was without color of title, and therefore is not a bar to the right of entry. He took a deed from only one of his vendors, and that only two years before the suit. If, indeed, they had color of title, then the defendant's possession under them would have been sufficient. But, as was intimated in *Montgomery v. Wynns*, 20 N. C., 667, we think the will cannot be color of title to the brothers and sisters, however doubtful the construction, for it is impossible that a devise to one person can be color of title to another claiming adversely to the devise.

PER CURIAM. Judgment affirmed.

Cited: Flora v. Wilson, 35 N. C., 345.

(381)

THE STATE TO THE USE OF CHARLES BALDWIN v. ASA JOHNSTON ET AL.

Where an administrator dies without having finally administered the estate of his intestate, an action will not lie by one of the next of kin for his share of the estate against *his* administrator, but must be brought by the administrator *de bonis non* of the original intestate.

APPEAL from the Superior Court of Law of WASHINGTON, at Spring Term, 1848, *Settle, J.*, presiding.

James Baldwin died in the year —— intestate, without issue, leaving a widow and one brother, the relator, who were entitled to his personal property. Letters of administration were duly granted to James Bennett, who entered into bond, with the defendants as his sureties. The personal estate of Baldwin was large, and the administrator possessed himself of it, and after paying the debts of his intestate, and the widow her third, had in his hands a considerable sum unadministered. Bennett died, and this action is brought on the administration bond, by the brother, the relator, to recover the money so remaining in the hands of the administrator.

His Honor was of opinion that the relator could not maintain the action, but that it ought to have been brought by the administrator *de bonis non*. In submission to this opinion the plaintiff took a nonsuit, and, a motion for a new trial being refused, appealed to this Court.

Heath for plaintiff.
Iredell for defendants.

NASH, J. We see no reason to doubt the correctness of the judgment appealed from. Upon the estate of every intestate there must be an administration, in order to its (382) due and proper settlement. The administrator is the personal representative of the deceased, and upon him devolves the duty and responsibility of collecting the assets and paying the debts and making distribution. He alone is recognized as legally entitled to the assets, and to him must the creditors and next of kin look. If he dies before these ends are attained, an administrator *de bonis non* must be appointed, and to him the like rights, duties and responsibilities attach; and so on, as often as the representative dies without closing his administration, and the action at law to collect the unadministered assets must be brought in the name of the administrator *de bonis non*, and not in that of the next of kin. *Taylor v. Brooks*, 20 N. C., 273.

We agree with his Honor, that the relator cannot maintain this action.

PER CURIAM. Judgment affirmed.

Cited: S. v. Baldwin, 33 N. C., 112; *S. v. Moore, ib.*, 162; *Duke v. Ferebee*, 52 N. C., 11; *Latta v. Russ*, 53 N. C., 113; *Goodman v. Goodman*, 72 N. C., 509; *Ham v. Kornegay*, 85 N. C., 121.

(383)

JONATHAN B. CAPEHART v. A. H. JONES, EXECUTOR, ETC.

A contracted with B, a fisherman, that he would pay him so much *per annum* for a certain number of years for the offal of the fishery, and then it was stipulated that A should have the offal as long as the fishery was continued: *Held*, that by no proper construction of this contract could A be entitled, after the expiration of the said period and after the death of B and the sale of the premises for division, to demand damages for the non-delivery of the offal.

APPEAL from the Superior Court of Law of BERTIE, at Spring Term, 1848, *Settle, J.*, presiding.

This was an action of covenant upon the following instrument, to wit:

We, William Bryan and Henry L. Williams, fishing under the firm of Bryan & Williams, and Jonathan B. Capehart, have made the following bargain, viz.: The said Capehart agrees to give the said Bryan & Williams $300 for the offal from their fishery at the head of the Albemarle Sound, payable as follows, viz.: $100 on 1 January, 1834, and $100 on 1 January, 1835, and $100 on 1 January, 1836, provided the said Bryan & Williams have the fishery fished every year, and catch 500 barrels of fish, a fishing season; but should they fail to catch 500 barrels of fish, then the said Capehart is only to pay for the offal in proportion; and should they fail to fish previous to the last payment, then the said Capehart is not to pay any more. In witness whereof we have affixed our hands and seals, this 9 August, 1831. It is further understood the said Capehart, his (384) heirs and assigns, are to have the offal of the said fishery as long as it is fished.

Witness: (SEAL.)

L. S. WEBB to Williams' Seal and to Capehart's Seal. HENRY L. WILLIAMS, (SEAL.)

J. B. CAPEHART, (SEAL.)

A. OXLY to do.

The breach of the covenant assigned by the plaintiff was the failure of the defendant's testator, Williams, to permit him to take the offal from the fishery mentioned in the instrument, during 1846. The defendant pleaded the general issue and conditions performed and not broken.

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

Upon the trial some testimony was given in relation to the execution of the instrument, but it is unnecessary to state it, as the opinion of the Court is confined to the question arising upon the construction of the covenant. It was proved that Bryan & Williams carried on the business of fishing every year, from the time when their contract with the plaintiff was entered into until the death of Bryan in 1843, and that the plaintiff paid the $300, as agreed upon, and took the offal from the fishery up to that time. After the death of Bryan the land and fishery were sold under a decree of the Court of Equity for

Bertie County, upon the petition of the said Bryan's heirs and Williams, when it was purchased by one Abraham Riddick, who subsequently sold to Kader Biggs. It was proved, further, that the fishery was kept up and the fishing business carried on during 1845, by Williams & Riddick, and that Williams recognized the right of the plaintiff to the offal during that year. But Biggs took possession of the land and fishery, and carried on the business of fishing himself, during 1846, and refused to let the plaintiff have the offal of that season, (385) for which he brought this action against Williams, which, upon his death in the fall of 1846, was revived against his executor.

The defendant's counsel contended that, according to the proper construction of the contract, the plaintiff was entitled to have the offal of the fishery only so long as it was fished by Bryan & Williams, but the presiding judge was of a different opinion, and, under his instructions to the jury, the plaintiff obtained a verdict for the value of the offal during 1846.

P. H. Winston, Jr., for plaintiff.
W. N. H. Smith for defendant.

BATTLE, J. The construction placed upon the covenant in question by the presiding judge makes it operate so unequally upon the different parties, and produces effects so disastrous to the estate of one of them, that nothing but the plainest language in the instrument could induce us to adopt it. According to that construction, the plaintiff will be entitled to recover damages from the defendant during an indefinite number of years, for not permitting him to have the offal from the fishery mentioned in the covenant, while it shall be fished, although it may become the property of another person, and the estate of the defendant's testator may have no interest in it and derive no profit from it. Surely, the parties to the contract, supposing them to be men of ordinary understanding, never contemplated such a result; and we think that their contract, when fairly interpreted, does not lead to it. The covenant was executed on 9 August, 1831, and stipulates that for the sum of $300, payable by three equal annual installments, commencing 1 January, 1834, the plaintiff shall have all the offal from the fisheries of Bryan and the defendant's testator, provided they catch as many as 500 barrels of fish *per annum;* but if they (386) catch less than that number, then the plaintiff is to pay only in proportion; and, if they fail to fish previous to the last payment, then he is to pay no more. So far, the contract seems

plain, and to be nothing more than a purchase by the plaintiff, at an agreed price and upon certain specified terms, of all the offal from the fishery of the other parties up to the close of 1836. And there the contract seems at the time to have ended, for the attestation clause immediately follows. But after that is added the clause under which the plaintiff claims to recover in this action. It states that, "It is further understood the said Capehart is to have the offal of the said fishery as long as it is fished." Fished by whom? Certainly by the owners of the fishery who are contracting to let the plaintiff have the offal. That is the natural construction, and it is the only reasonable and fair one; for if the construction contended for by the plaintiff be adopted, it will have the extraordinary effect, in the events which have happened, of giving him something like a perpetual annuity of the yearly value of the offal out of the estate of the defendant's testator. We think that the contract terminated, at the latest, when Bryan & Williams ceased to be the owners of the fishery, and that the recognition of it by Williams, while he and Riddick were fishing in 1845, was founded in a clear mistake of its true meaning and intent.

PER CURIAM. Judgment reversed.

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(387)

JOHN A. McLEOD v. JOHN OATES.

An action of replevin will not lie, either at the common law or under our statute, against an officer who seizes property by virtue of an execution.

APPEAL from the Superior Court of Law of MOORE, at Spring Term, 1848, *Bailey, J.*, presiding.

This is an action of replevin for a slave named Ephraim. The defendant entered into bond according to the statute, with condition to perform the final judgment, and pleaded *non cepit*, and also avowed the taking under a *fieri facias*, issued by a justice of the peace on a judgment obtained by J. B. K. against Neil McLeod for $51, with interest, etc., which was delivered to the defendant, he being a constable, etc., and that by virtue thereof the defendant on, etc., seized the slave as the proper goods and chattels of the said Neil, and then in the possession of the said Neil, to satisfy, etc. Whereupon he prayed judgment, etc. The plaintiff pleaded that the slave was his property and not that of Neil McLeod.

On the trial evidence was given for the plaintiff that on 30 August, 1839, Neil McLeod conveyed the negro to the plaintiff by deed, which purported to be made in consideration of $600 then paid. Much evidence was given, tending on the part of the plaintiff to show that Neil McLeod, who was the plaintiff's father, owed him $600 for money paid or agreed to be paid for him before or at the time of the conveyance, and tending on the part of the defendant to establish that the conveyance was voluntary or nearly so, and was intended to defraud the father's creditors; on which several questions were made by the parties. But as the opinion of the Court does not (388) proceed upon that part of the case, it is unnecessary to state the points or the facts particularly, further than to say that, after the execution of the bill of sale to the plaintiff, his father continued in possession of the negro, and he was in possession of him on 2 August, 1844, when the defendant took him under the execution mentioned in the avowry.

The counsel for the defendant insisted, first, that the conveyance to the plaintiff was fraudulent and void as against creditors; and, secondly, that the plaintiff could not maintain this action of replevin against him. The court left the question of the consideration to the jury, with directions that if they found that the plaintiff had paid or agreed to pay money for his father to the full value of the slave, the conveyance to him was not fraudulent, but valid in law; and that if the plaintiff had, at the time of the taking by the defendant, the right to the immediate possession of the slave, then he was entitled to recover in the action. The jury found for the plaintiff, and assessed the value of the slave at $600 and the damages at $178; and there was judgment accordingly for the value, to be discharged, etc., and for $356 damages, being double the amount assessed by the jury; and the defendant appealed.

D. Reid and *Mendenhall* for plaintiff.
Kelly for defendant.

RUFFIN, C. J. Upon the question of fraud we think it only necessary to remark that it seems singular that it should have been left to the jury, without laying the proper stress on the long-continued possession of the father after making the deed, as a circumstance tending to show that the conveyance was upon a secret trust for the father, and especially as being deceptive to creditors by keeping up a false credit for the father. But although the possession is not further adverted to as (389)

an element of fraud, avoiding the plaintiff's title, yet it is material, perhaps, on the other point made at the trial, as to the plaintiff's right to bring replevin.

The old authorities all agree that goods taken in execution from a court of record are not repleviable. Com. Dig., Replevin, D. Indeed, the sheriff subjects himself to an attachment by making replevin of them. Bul. N. P., 53. The same law holds of warrants of distress on convictions and process of execution on judgments given by magistrates having jurisdiction. *Rex v. Monkhead*, 2 Str., 1184; *Wilson v. Miller*, 1 Brod. and Bing., 57. The reasons for this are of that imperative nature that make the rule indispensable to the administration of the law. Execution has been called the end of the law. But it will be only the beginning, and there would be no end of the law, if after a person has established his right by judgment the defendant's effects may be rescued from the execution at his will by suing out a writ of replevin. No case is found in England of replevin maintained by any person for goods taken by virtue of an execution against the plaintiff in replevin or any other person. In New York it was held, in *Thompson v. Button*, 14 John., 84, that goods of A. taken out of the possession of A. upon execution against the property of B. may be replevied at the suit of A., but no authority was cited for the position, and the decision put expressly on the ground that by taking goods out of the possession of one person, upon execution against another, the officer undertakes to show that they were the property of the defendant in the execution; and the Court explicitly states the general principle that goods taken in execution are in *custodia legis*, and "it would be repugnant to sound principles to permit them to be taken out of such custody when the officer found them in and took them out of the possession of the defendant in execution." It is true that a contrary
(390) rule is laid down by one of the judges in *Clark v. Skinner*, 20 John., 465, who held the broad doctrine that the principle only applied between the officer and the defendant in execution, and that a third person might replevy on his right of property, although the seizure was made while the thing was in the debtor's possession, provided only the plaintiff in replevin had the right to take possession when the officer took it. That opinion was then extrajudicial, as the case was that the officer took the things from the possession of the plaintiff's servant while employed in his master's business, upon an execution against the servant. Therefore, the actual possession, in a legal sense, was in the master and not the servant; and the former might have had trespass as well as trover for the taking,

and on that ground the majority of the judges rested their decision. Subsequently, indeed, the broader doctrine gained favor, and in the case of *Dunham v. Wicks*, 3 Wend., 280, it was held by the Supreme Court that every person having the property in goods and the right to reduce them to possession may have the action against an officer who takes them by execution out of the actual possession of the defendant in execution, notwithstanding an express recognition of the contrary doctrine by the same Court just one year before, in *Judd v. Fox*, 9 Cowen, 259. It may, therefore, we suppose, be considered settled in that State. The extension of this action to the case where one man's goods are taken upon execution against another, prevails also in Massachusetts, but upon much more legitimate grounds than those on which it has been placed in New York. By a statute of 1789 it was there enacted, when any goods of the value of more than $20, which are attached on mesne process or taken in execution, are claimed by any person other than the defendant in the suit in which they are so taken or attached, such owner or other person may cause them to be replevied. It may be remarked that the very passing of that act is incon- (391) sistent with the idea that the common law gave the action in such cases; and *Chief Justice Parsons* lays it down clearly that it did not. *Ilsley v. Stubbs*, 5 Mass., 280. But after the act the courts in Massachusetts were obliged to sustain the action, for, although the Chief Justice could not help remarking, the alteration of the common law had been productive of much practical inconvenience, yet it rested with the Legislature to decide whether the common law should or should not be restored. With this declaration of the opinion and experience of a judge so learned and wise before us, there ought to be little inclination to depart from the common law further than compelled by legislative authority. Accordingly, in this State it was held that the action of replevin would only lie by the common law for a taking of goods from the possession of the plaintiff, and not upon a finding, though the owner was entitled to the immediate possession. *Cummings v. McGill*, 4 N. C., 535. Therefore, at common law we should hold that this action would not lie, both because the goods when taken were not legally in the possession of the plaintiff, but actually in that of his father, not as his son's servant, and because the taking was by virtue of an execution against the property of the possessor.

It is contended, however, for the plaintiff that the common law is altered here also by statute, as respects slaves, and that he is now entitled to the action. The act is that of 1828, Rev. St., ch. 101, and enacts that writs of replevin for slaves shall

be held and deemed to be sustainable against persons in possession of such slaves in all cases where actions of detinue or trover are proper: *Provided*, the plaintiff shall make oath that he had been in the lawful possession of the slaves within two years preceding the issuing of the writ, and that he has been deprived of such possession without his permission or consent. Then follow various provisions with respect to the plaintiff's
(392) giving bond for the return of the slave, and for the defendant's giving bond for the performance of the judgment, if he chooses to keep possession during the suit. It is then enacted that in case the plaintiff recover, the jury shall assess the value of the slave and the damages for the taking and detention, and that there shall be judgment for the value (to be discharged by the surrender of the slave when kept by the defendant) and for double the damages assessed; and when not kept by the defendant, then for the double damages and costs; and when the possession is delivered to the plaintiff, and the verdict is for the defendant, that then the damages sustained by the defendant from being deprived of his property shall be assessed and judgment rendered therefor and the costs against the plaintiff and his sureties. Such are the provisions of the act; and the argument is that detinue or trover would be proper here, and, therefore, replevin will lie. The conclusion is not exactly logical, for in coming to it one loses sight of the proviso. That restrains the generality of the enacting clause and by a necessary construction gives the action only when detinue or trover would lie for such an owner of a slave as had been in lawful possession within two years before suit, and had been deprived of such possession without his consent. The action is still founded on an injury done to the possessor of a slave, though that injury need not be by "taking" out of the owner's actual possession, but may be by finding or enticement and then keeping the slave from him. It might, therefore, be well questioned whether the plaintiff might not have been barred of his action, upon the ground that his father, and not he, had the possession independent of the authority under which the defendant acted. But however that may be—and it is not necessary here to say—the Court is clearly of opinion that it cannot be maintained upon a taking under execution from the
(393) actual possession of the defendant in execution. The enacting words cannot be received in their full latitude, as that would produce the absurdity of allowing the debtor himself to bring replevin against the officer, because he might sue in trover. True, the act does not absolutely replevy the goods,

but the defendant may retain them by giving bond. But the bond is to answer the judgment, which is very severe, being not only for the slave or the value, and costs, but for double damages. Now, the Legislature could never have intended that an officer who acts on oath and is presumed to intend to act honestly and legally, should, by reason of some unobserved defect in process, be made liable beyond the actual damages arising from his acts. We may assume it certain, then, that it was not meant thus by a side wind to prostrate the efficiency of final process, and to make the officer liable for extraordinary and arbitrary damages for an act, as he supposed, in the discharge of his duty. Therefore, although the words be thus large, we conclude that the Legislature did not intend, either that the defendant in execution might by this means regain the possession of his property or subject the officer to such penalties, if by chance the process should prove defective; and to that extent, at least, the sense of the words must necessarily be limited. The same reasons operate with much the same force when goods are taken on execution against one to prevent another from having this action; and there are some, in addition, arising out of the interest of the defendant in execution. Suppose A. and B. to have adverse claims to a slave in the possession of A., and the sheriff to take him under an execution against A., it cannot be conceived that the Legislature meant that B. (although he may have been in possession within two years) should have replevin against the sheriff in order to try the title between him and A., as the action is regulated by the statute, rather than in the ordinary and adequate way by detinue or (394) trover against A., or the sheriff, or the purchaser. The mischiefs of such a construction are so numerous and obvious as to preclude it, unless absolutely forced on the courts by the words and spirit of the act united. If the negro were delivered to the plaintiff in replevin, then the defendant in the execution would have his services during the period of litigation, and would have an uncertain and circuitous remedy for the damages sustained by him, supposing the title to be found for him. But if the sheriff gave bond and retained the slave, as, perhaps, after seizing he would become bound to do, the consequences would be still worse, for if the title were found for the plaintiff in replevin, he would get double damages, although the sheriff dare not, during the whole time, put the slave to work, and could not get anything for maintaining him while he kept him; and if the title were found against the plaintiff, yet the defendant in the execution and the true owner must have the services

of the slave during the period and also pay for his maintenance or the sheriff keep him for nothing, after the day on which he might have been sold, had there been no replevin. In the same manner, if a slave be attached, it is very certain that the former convenient and direct method of trying the title, by interpleading, will no longer be resorted to, when by replevin the plaintiff can get immediate possession or double damages against the officer. In every respect, then, the inconvenience of sustaining the action against an officer acting under legal process is so great as to satisfy the mind that the act was passed *divero intuitu*, and that its proper construction will prevent its application to such cases. That is rendered yet more manifest by attending to the state of the law here in respect of this action, as lying against other persons besides officers, and the reasons assigned in the preamble of the original act for passing it. They are, that slaves are frequently *seduced* (395) from the possession of their owners under a pretence of right, by persons who were insolvent and intended to convey them beyond the jurisdiction of the courts of this State, whereby great injury was produced to the *bona fide* holders of slaves, as the writs of sequestration issuing from courts of equity in such cases were tedious, expensive and frequently ineffectual; therefore, it was enacted that replevin may be sustained for slaves where detinue or trover were then proper. Detinue and trover were not effectual remedies in such cases as those recited in the preamble, as the defendant was only held to bail, and might carry the slaves where he would, and upon judgment against him the only redress was against his body, and that would, probably, not produce satisfaction. It has already been noticed that it had then recently been decided, in *Cummings v. McGill*, 4 N. C., 535, that replevin would lie only on a *taking* from the owner, and not where the possession was obtained by finding, or, consequently, by seduction. It is also known that many cases occurred of great hardship, where owners were defeated of the property by dishonest and insolvent men seducing slaves and carrying them out of the State after having given bail. It was therefore manifestly proper and necessary to the purposes of justice that, in such cases, notwithstanding the *mode of getting possession*, a remedy should be given in the common-law courts whereby the owner could be better secured of regaining the slave taken or seduced from him, or of recovering the value and exemplary damages. That such was the object of the act is to be inferred, too, from the provision that in case the plaintiff fail in the action, he is liable for

only actual damages to the defendant, while if the result of the suit be different, the defendant is made liable for double damages—no doubt, for the reason of the unfairness of the means whereby he obtained his possession. The object of the act was really, then, to give the action where it would not lie before by reason, merely, of the mode by which the defendant got possession; and in sustaining the action in the cases of (396) possession gained by "seduction," as well as by "taking," the whole purpose of the act is fulfilled, without extending it so as to embrace cases in which the action was held not to lie by reason that the goods, though "taken," were taken under process. It was not intended to interfere with the law, as it withheld the action *on the ground of the authority* under which the defendant got possession. For example: the action would not lie at common law when the defendant came into possession by bailment from the plaintiff, though he may improperly refuse to return the goods (*Galloway v. Bird*, 4 Bing., 299); and the act did not intend to alter that, for it is express that the plaintiff must have been deprived of the possession without his permission or consent. So it was not intended to interfere *with the authority of the law itself* to its officer to seize the property in execution. That was not within the grievance contemplated by the Legislature; and therefore the Court holds that the action will not lie against the defendant.

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

Cited: Carroll v. Hussey, 31 N. C., 90; *Gaither v. Ballew*, 49 N. C., 492; *Dupree v. Williams*, 58 N. C., 101; *Jones v. Ward*, 77 N. C., 338, 339; *Mitchell v. Sims*, 124 N. C., 414.

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(397)

THE STATE TO THE USE OF H. G. SPRUILL, ADMINISTRATOR, v. ASA JOHNSTON ET AL.

Where assets have remained in the hands of an administrator for more than seven years unclaimed by the next of kin, and the administrator dies, the Trustees of the University cannot recover in their own name from the representative of such administrator. The assets can only be recovered by an administrator *de bonis non*, who is immediately answerable over to the trustees, provided no claim be set up on the part of the next of kin.

APPEAL from the Superior Court of Law of WASHINGTON, at Spring Term, 1848, *Settle, J.*, presiding.

SPRUILL *v.* JOHNSTON.

This was an action of debt brought upon the administration bond which J. D. Bennett gave, with the defendants as his sureties, upon obtaining letters of administration upon the estate of one James Baldwin. The plaintiff proved the execution of the bond. The evidence showed that the said Baldwin emigrated to this country from England in 1816; that about 1820 he came to the town of Plymouth, where he constantly resided up to the time of his death, which took place in 1836, and that, shortly after his death, administration was committed to the said J. D. Bennett; that Bennett reduced his personal estate into possession, paid off the debts, and had a large balance in hand, due the distributees of said Baldwin, more than seven years before the commencement of this action; that the said Baldwin, at his death, left a wife, who was at the time of his death the only person known to be a distributee of the said Baldwin, and that Bennett had, before the commencement of this suit, paid
(398) over to one Asa V. Gaylord, with whom the widow of said Baldwin had intermarried, the distributive share due said Asa V. in right of his wife, say one-third of the said Baldwin's personal estate; that no claim was ever made of the residue of the said estate by any other next of kin until shortly before the commencement of this action, when administration *de bonis non* was taken out upon the estate of the said Baldwin by the plaintiff, Bennett having died some three or four years ago. The evidence showed that one Charles Baldwin, who is a resident of England, was the only next of kin of the said James Baldwin, except the widow, and that it had been more than seven years since the debts of the said intestate Baldwin had been paid off before the bringing of this action. The defendants objected that the plaintiff could not recover because the funds had remained in the hands of the administrator more than seven years, and that the Trustees of the University were the only persons who could recover. His Honor, *Judge Settle*, charged the jury that the relator of the plaintiff was entitled to recover, under the pleadings in the case. A verdict was rendered for the plaintiff. Judgment accordingly. Appeal to the Supreme Court.

Heath for plaintiff.
Iredell for defendants.

RUFFIN, C. J. The executor of Bennett, the first administrator of the intestate Baldwin, is liable to account to some person for two-thirds of the assets remaining at the death of Bennett in his hands; and the only question is, to whom he

ought to account. For the defendants are liable, we suppose, on the administration bond to the same extent and to the same person in this action as the executor would be in a suit against him directly.

It seems to the Court that precisely the same reasons apply as between the Trustees of the University and an administrator *de bonis non* which do between the latter and the (399) next of kin. The rule is inflexible that next of kin cannot call for an account and distribution of an intestate's estate, nor recover the specific property, without having an administrator before the court. *Goode v. Goode,* 4 N. C., 684; *Taylor v. Brooks,* 20 N. C., 273. For the next of kin have only a right to the clear surplus after payment of all debts, and for protection of creditors an administrator must be before the court. It was even doubted whether, upon the death of one of two administrators or executors, the representatives of the dead one were not so exclusively accountable to the survivor that the next of kin of legatees could not sue them together. It was, indeed, held that they could, upon the equitable principle of following the fund into whatever hand held it. *Bratten v. Bateman,* 17 N. C., 115. But there the administrator of the first intestate is a party, as well as the representative of the dead one. It may be admitted that in like manner, when there is but a single administrator, and he dies, the next of kin may in a bill for an account join the representatives of the first administrator with the administrator *de bonis non,* and recover from each what he has. But there seems to be no case in which a distributive share, as such, can be recovered but from an administrator, either original or *de bonis non.* Now, the Trustees of the University take the place of legatees and next of kin in claiming the estate, and can only recover by the same remedies. They cannot, for example, bring an action at law for the surplus, as a creditor might sue for his debt. Suppose the estate here to have consisted of slaves on hand at the death of Bennett; undoubtedly the trustees could not have maintained trover or detinue for them against any one else, more than they could against Bennett himself. It is said, indeed, that here the debts were paid. But that must mean all known debts, and cannot change the principle. The subject-matter, being the administration of an estate, is of equitable cognizance, and the accounts must be duly taken before it can be known what the resi- (400) due is. If the Trustees of the University have obtained a decree against Bennett in his lifetime, and it remained unsatisfied, that might be a breach of the administration bond for which the trustees could put it in suit against Bennett's execu-

tors and sureties. So, perhaps, if it appeared that Bennett had committed an actual *devastavit*, the trustees might have had this action upon a suggestion of that breach in Bennett's lifetime. But for a balance merely remaining in his hands, unadministered and not demanded before his death, no claim, we think, can be made by the trustees but through an administrator *de bonis non*. That is so on principle, and it is likewise so upon the statute under which the trustees derive their title. The act of 1836 provides that all the estate remaining in the hands of any executor or administrator for seven years after his qualification, unrecovered or unclaimed by creditors, legatees, or next of kin, shall *by the said executor or administrator* be paid to the Trustees of the University. Rev. St., ch. 46, sec. 20. Those words, construed even without reference to the previous rules of law or legislative enactments, plainly give a claim to the trustees only against a representative of the first intestate or testator, and not against the representative of the former representative. True it may be that after one administrator has held the estate seven years it is not to rest seven years more in the hands of an administrator *de bonis non*, but the trustees may treat the latter as administering in trust for them, as, but for the statute, he would have done for the next of kin. But, still, the provision is precise, that the estate is to go to the trustees from the hand of an executor or administrator of the original owner; and that such was the intention of the act is not only to be deduced from the words as they now stand, but is rendered evident by the contrast in that respect between the act of 1836 and that of 1809, from which the latter one was taken.

(401) The original act, Rev. Code, ch. 763, authorized the trustees to sue for and collect the estate from any executor or administrator of a deceased person, *or the representative of such executor or administrator*. Though no suit by the trustees is remembered against an administrator of an administrator, without having an administrator *de bonis non* before the court, yet, we suppose that by force of the positive provision of the act of 1809 such a suit would have lain. But as it required a statute to change the law in that respect, it must be inferred that in omitting that provision in the revision of 1836 there was a purpose to restore the old rule, as necessary to the harmony of the different parts of the law. At all events, that is the effect of the repeal by the act of 1836 of that part of the act of 1809; and there can be little question that the reason for the repeal was to reinstate the salutary principle that to the admin-

istration of any and every part of an intestate's estate an administrator of some kind is indispensable. Therefore, the judgment ought to be affirmed.

PER CURIAM. Judgment affirmed.

Cited: *S. v. Baldwin*, 33 N. C., 112; *S. v. Moore, ib.*, 162; *Ferebee v. Baxter*, 34 N. C., 65; *Morton v. Ashbee*, 46 N. C., 314; *Duke v. Ferebee*, 52 N. C., 11; *Strickland v. Murphy, ib.*, 245; *Lansdell v. Winstead*, 76 N. C., 369; *Hardy v. Miles*, 91 N. C., 133.

(402)

LEWIS FUTRELL v. CHARLES VANN.

1. A master of an apprentice cannot assign or transfer his right over the apprentice to another person.
2. It being unlawful to remove a colored apprentice from one county to another, no action, founded on a contract for such removal, can be supported.

APPEAL from the Superior Court of Law of HERTFORD, at Fall Term, 1847, *Dick, J.*, presiding.

The plaintiff lived in the county of Northampton. A colored boy by the name of Joe Walker was bound to him for a term of years by the court of that county. Before the expiration of the term of service the plaintiff sold the unexpired residue to the defendant, who lived in the county of Hertford, and where the contract was made. By the contract it was stipulated, "if the boy did not serve the whole of the unexpired period, then the defendant should pay for the time the boy did serve, at the rate he was to give for the whole of the time for which he had contracted." The defendant had the boy in his possession in Hertford County, where he was carried by the plaintiff. Before the expiration of the time for which the boy was indentured, he returned to the possession of the plaintiff. The action is brought to recover compensation for the services of the boy, Walker, for the time he was in the actual employment of the defendant. The plaintiff proved that his account was presented to the defendant, who objected that he was entitled to a credit for some clothing furnished the boy, and he promised, *if the plaintiff would allow him that credit, the account would be correct and he would pay it.* The (403) credit was allowed by the plaintiff.

The defendant objected to the plaintiff's recovery, first, because the contract was a specific one for the whole remaining

portion of the term of apprenticeship, and that he had deprived the defendant of the benefit of his contract by *receiving* the boy before the term expired; second, because the consideration upon which the contract rested was illegal, as, by the terms of indenture, it was unlawful for the plaintiff to remove the boy out of the county of Northampton, and that, under the contract, the boy had lived with and served him, in the county of Hertford, about fourteen months.

His Honor, the presiding judge, instructed the jury that if the contract was that the boy should serve the defendant the whole of the unexpired portion of the time for which he was bound to the plaintiff, and that contract had not been modified or altered by the parties, the plaintiff could not recover. But if, at the time it was made, it was agreed that the defendant should only pay for the time the boy served him at the rate he was to pay for the whole time, or if the contract was subsequently altered or modified by the parties so as to make the defendant liable only for the time the boy served him, then the plaintiff would be entitled to recover for the services of the boy for the time he actually served the defendant.

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

No counsel for plaintiff.

W. N. H. Smith for defendant.

NASH, J. We see no just ground of complaint, on the part of the defendant, of the charge. The law, we think, has been properly administered, and we agree entirely with the presiding judge. His Honor has not given us the reason upon (404) which his decision rests, nor could he, indeed, with any propriety so do, as they properly constitute no part of the case. Our only inquiry is whether there is error in the law as charged by him. In this case the charge is precise, lucid and unencumbered with extraneous matter.

If the original contract had been, as it is treated by the defendant, one for the unqualified transfer to the defendant of the unexpired term of the apprentice, the first objection raised by the defendant would unquestionably be sound, and the plaintiff could not recover. The binding out of an apprentice to a particular person is from confidence in the party to whom he is committed that he will not only instruct him in his trade or business, but will also be careful of his health and safety. It is, therefore, such a personal trust that the master cannot assign

or transfer it to another. 4 Bac. Abr., Tit. Master and Servant, Letter E, page 577; *Hall v. Gardner*, 1 Mass., 177; *Davis v.* ————, 8 Mass., 299; *Coventry v. Goodall*, Hobarts, 134.

The second objection on the part of the defendant is equally true in principle. By the act of 1801, Rev. St., ch. 5, sec. 7, "when the County Court shall bind out any orphan child of color, they shall take bond with sufficient security in the sum of $500, from the master or mistress, that they shall not remove said child out of the county, etc." It is therefore illegal for any master or mistress to *remove* such apprentice out of the county wherein he was indentured; and, such removal being illegal, no action can be founded on a contract for such removal. *Sharp v. Farmer*, 20 N. C., 255, and *Blythe v. Lovinggood*, 24 N. C., 20, cited at the bar by the defendant's counsel, fully sustain his proposition. But, we think, the case before us steers clear of each of those objections. The action is not brought to enforce the contract originally made; that was illegal and could not sustain an action. But it is brought upon the *assumpsit* of the defendant, made after the original contract was rescinded, as it appears, by mutual or tacit consent and (405) upon a sufficient legal consideration.

From the terms of the original contract the parties seem to have been fearful they were doing what the law would not sanction, and therefore it is provided that if the boy did not serve out his full term the defendant should pay only for the time he did serve. A *locus penitentiæ* is therefore provided for the plaintiff. He availed himself of it, and the contract was put an end to. But the defendant has enjoyed the services of the plaintiff's servant, and in consideration thereof the defendant agreed to pay him for those services an ascertained sum, to wit, the amount of the account presented by the plaintiff. The case of *Sharp v. Farmer*, above cited, was where the action was directly upon the original contract. The next of kin of one ———— Farmer agreed that the defendant, without administering, should sell the property and pay the debts and divide the residue among those entitled, the plaintiff being one. The action was brought for his distributive share. The Court declared the contract void, because in violation of a public law. So in *Blythe v. Loringgood, supra*. At a sale of public lands, where the terms were if the highest bidder did not comply with his bid the next highest should have the land, the plaintiff was the highest and the defendant the next highest bidder. It was agreed between them that the plaintiff should refuse to comply with his bid, and in consideration thereof the defendant should

give him $120, for the payment of which he executed his note; and the conveyance of the land being made to the defendant, the action was brought upon the note, and the Court decided that the agreement was a fraud upon the State and the note was void. In each of these cases the action was upon the original contract. Here the original contract was put an end
(406) to by the parties themselves, and the action is brought upon one made subsequently, and, as we think, upon a sufficient consideration.

In his first objection, in addition to the ground that the assignment was void, the defendant insists that the plaintiff received the boy back into his care before the time had expired for which he had contracted, and that thereby the plaintiff had deprived him of the benefit of his contract. The answer is that by the terms of the contract he was to pay only for the time he had the boy. As before remarked, the parties had provided *locus penitentiæ*. They contracted in view of the fact that the boy might not serve out his time with the defendant, and the contract was by mutual consent rescinded.

PER CURIAM. Judgment affirmed.

Cited: Owens v. Chaplain, 48 N. C., 324; *Musgrove v. Kornegay*, 52 N. C., 75; *Biggs v. Harris*, 64 N. C., 417.

MEMORANDA.

In May, 1848, the Governor, with the advice of the Council of State, appointed the Honorable WILLIAM H. BATTLE, one of the Judges of the Superior Courts, to be a Judge of the Supreme Court, to supply the vacancy occasioned by the death of the Honorable Judge DANIEL.

At the same time and by the same authority, AUGUSTUS MOORE, Esquire, of Edenton, was appointed a Judge of the Superior Courts of Law and Equity, to supply the vacancy occasioned by the promotion to the Supreme Court Bench of the Honorable WILLIAM H. BATTLE.

And BARTHOLOMEW F. MOORE, Esquire, of Halifax, was appointed Attorney-General, to supply the vacancy occasioned by the resignation of EDWARD STANLY, Esquire.

CASES AT LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT MORGANTON.

AUGUST TERM, 1848.

THE STATE v. JOHN COLLINS.

1. It is never the duty of a judge to charge a jury upon a fact purely hypothetical. If he does, it is an error, which can and will be corrected if it act to the injury of the accused, and against which the judge ought to guard, as it is irremediable if calculated to prejudice the prosecution.

2. Whether, on the trial of an indictment for homicide, the weapon alleged to have been used is a deadly weapon or not, is a question for the Court, not for the jury.

3. Where, on the back of a bill of an indictment, the clerk of the court has certified that certain witnesses were sworn and sent to the grand jury, that is sufficient evidence that the bill was sent to the grand jury.

4. Where the jury, on a trial for homicide, state that the *prisoner at the bar* is guilty, and the clerk, in recording the verdict, calls him the *prisoner at the bar*, this is sufficient evidence from the record to show that the prisoner was actually in court when the verdict was rendered.

APPEAL from the Superior Court of Law of McDOWELL, at Spring Term, 1848, *Battle, J.*, presiding.

The prisoner is indicted for murder. The case states (408) that the prisoner and the deceased, with many other persons, were assembled at the house of a Mrs. Gardiner, to shuck corn. While at dinner a quarrel arose between the prisoner and one Morrison, in which the deceased, who was present, did not interfere. The prisoner left the table and the house, with

the avowed intention of going home. He was at that time under much excitement, and observed to the company, "Boys, do not follow me." After he had gotten within about fifty yards of the corn-heap, where he had left his coat, the witnesses on behalf of the prosecution stated that the deceased, with several of the company, overtook him, when a conversation ensued between the prisoner and the deceased, in which, at its close, the deceased observed to the prisoner, "You can get over the fence and eat some shallots," adding some rude expression, and immediately turned off from him and advanced towards the corn-heap, when the prisoner advanced several steps towards the deceased and drew his knife, and while his back was to him gave the deceased the fatal stab of which he died within a week. After giving the mortal wound the prisoner wiped his knife and put it into his pocket. For the defense the prisoner's son, Zachariah Collins, swore that upon the quarrel between his father and Morrison "the prisoner went out, telling the boys not to follow him"; that the deceased and others followed on behind him, and the deceased came up to him and took hold of him by the shoulders and told him that he might get over into the little patch and eat as many shallots as he pleased (adding the offensive expression as stated by the witnesses for the State); that at the time this took place the prisoner and deceased were standing side by side, and that they stood so three or four minutes; that witness went on past them and did not see the stab given, and had gone eight or ten steps when he heard the exclamation that the deceased was stabbed. Noah Connipe,
(409) another witness for the prisoner, swore that he saw the prisoner as he came out of the house; that he said he was mad, very mad; that witness carried him his hat, when he said he was going home as soon as he could get his coat, which he said was near the corn-pile, and he started off in a sort of trot, telling the young men, among whom was the deceased, not to follow him. The witness also told them not to follow him, and his wife exclaimed, "For God's sake, boys, don't follow him." The counsel for the prisoner contended that the testimony of Connipe and Zachariah Collins was true, and that the jury must be satisfied from it that the deceased was engaged, with the other young men who were at the corn shucking, in laughing at and making sport of the prisoner; that the deceased had not only caught the prisoner by the shoulder, as stated by his son, but had used other violence to his person, by jerking him down, and that the fatal stab was given while laboring under the excited feelings thereby occasioned, and that, therefore, he was not guilty of murder, but only of manslaughter; and, further,

that the instrument used was not a deadly weapon and that the death caused by it was accidental, and for that reason, also, the prisoner could only be guilty of manslaughter. The instrument used was a pocket knife with two blades, one small and the other larger, and the latter was used and the blade was two inches and a half long and ground sharp.

The presiding judge charged the jury that if the statement of Zachariah Collins were rejected as untrue, the homicide was undoubtedly a case of murder; that if Collins' testimony were believed, the mere catching the prisoner by the shoulder and using the language attributed to the deceased would not, of itself, amount to a legal provocation; they must be satisfied from the testimony of Collins, taken in connection with the other testimony in the cause, that the deceased had used more violence than that stated by the witness Collins; that the jury must be satisfied that the deceased had jerked the pris- (410) oner down, as contended for by the prisoner's counsel; that that fact need not be distinctly proved, but might be distinctly and fairly inferred from other facts and circumstances proved, but it ought not to be merely guessed at or conjectured. The judge further charged that with regard to the knife with which the stab was given, some weapons were deadly or otherwise, according to the persons by whom they were used; that a knife which, in the hands of a boy two years of age, might not be deemed a deadly or dangerous weapon, might in the hands of a strong man be so; that if the jury believed that the knife used by the prisoner was not, in his hands, a deadly weapon, then the homicide was manslaughter; but if they thought, as used by the prisoner, it was calculated to inflict a mortal or a dangerous wound, the killing, in the absence of a legal provocation, was murder.

The prisoner was found guilty of murder, and by his counsel moved for a new trial, on the ground that the court had misdirected the jury, both on the ground of the legal provocation and the nature of the weapon used. The motion was refused, and the prisoner appealed.

Attorney-General for the State.
Bynum for defendant.

NASH, J. The prisoner complains that his Honor ought to have instructed the jury that the provocation received by him was a legal one, and reduced the homicide from murder to manslaughter. When the testimony actually given to the jury is separated from the suggestions of his counsel of what might

have taken place, the insufficiency of this defense is apparent. In his argument in the court below the counsel for the prisoner insisted that from the testimony of Connipe and Collins "the deceased had not only caught the prisoner by the shoul-
(411) der, as stated by his son, but had used other violence to his person by jerking him down." Of this additional violence, in jerking the prisoner down, no witness spoke. Collins himself, the son of the prisoner, saw nothing of it, nor did any other witness. It was, therefore, a mere assumption on the part of the counsel, forming no part of the evidence, and could not be taken into consideration as in any respect qualifying the homicide. His Honor, in charging upon this portion of the defense, stated to the jury that they must be satisfied from the testimony of Collins, taken in connection with other testimony in the case, that the deceased used more violence than that stated by the witness Collins; that the jury must be satisfied that the deceased had jerked the prisoner down, as contended for by the prisoner's counsel. In submitting to the jury an inquiry as to the existence of this alleged fact, his Honor went further than in strictness he was bound to do in favor of the prisoner. It is never the duty of a judge to charge a jury upon a fact purely hypothetical; if he does, it is an error, which can and will be corrected, if it act to the injury of the accused, and against which the judge ought to guard, as it is irremediable if calculated to prejudice the prosecution. *Benton's case*, 19 N. C., 169. It *was* a mere assumption of a fact upon the part of the defense, entirely unsupported by any evidence whatever.

The catching the prisoner by the shoulder by the deceased was, under the testimony in the case, no assault. It is not stated by any witness to have been done in a rude and angry manner. The language of Collins is that when the deceased came up to the prisoner "he *took* him by the shoulder"—not that he *caught* him. It does not appear that the witness considered it any violence, nor that the prisoner did, for according to the statement of the son, the parties "stood side by side for three or four minutes," during which time, and during the time, it took the witness to walk eight or ten steps; he does not testify to hearing any angry words or any scuffling what-
(412) ever. The subsequent instruction upon this part of the case, that the fact of "jerking down" need not be distinctly proved, but might be taken "for true from other facts and circumstances proved," was, as a general proposition, true, but had no application to the cause before the jury; there were

no such "facts and circumstances" proved as to authorize the jury to draw any such inference or to justify the leaving the question to them.

We *think* his Honor, also, from tenderness to the prisoner, erred in his charge as to the nature of the instrument used by the prisoner. It is submitted to the jury, as a question of fact, whether a knife two inches and a half long was a deadly weapon, then the homicide was manslaughter; but if they thought, as used by the prisoner, it was calculated to inflict a mortal or a *dangerous* wound, the killing in the absence of a legal provocation was murder. We agree with his Honor as to the nature of a deadly weapon. The latter part of the definition is not such as is usual. It is generally described by writers as a weapon likely to produce death or great bodily harm. There are no precise terms, however, appropriated in the law to the description of such an instrument; it must be shown to be one capable of producing the effects described. No one can doubt but that a dangerous wound is a great bodily injury or harm. The description, therefore, given in the charge was correct. The error of his Honor consisted in leaving that to the jury as a question of fact which is strictly one of law. This is decided in *S. v. Craton*, 28 N. C., 165. The Court, in speaking upon the point now before us, says: "If the instruction had been prayed in reference to doubt about the instrument being a deadly weapon, as we conceive, the court ought not to have given it to the jury." Whether the instrument used was such as is described by the witnesses, where it is not produced, or, if produced, whether it was the one used, are ques- (413) tions of fact; but, these ascertained, its character is pronounced by the law. His Honor's error consisted in leaving the latter questions to the jury. But though in the charge upon the points we have noticed there was error, it was not such an one as was calculated to do the prisoner any injury. On the contrary, it gave him the full benefit of a defense which did not arise in the case, in the one instance, and left to the jury in the other, as a matter to be found by them, a question which the law had pronounced against him. In neither case, then, has he a right to complain, and, of course, no right to a *venire de novo*. *S. v. Swink*, 19 N. C., 9; *Reid v. Moore*, 25 N. C., 310.

The prisoner has before us further moved to arrest the judgment, and assigned the following reasons: First, because it does not appear from the record that the bill of indictment had been sent from the court to the grand jury, or how they got it into

possession; secondly, that it does not appear that the prisoner was present in court during the trial. As to the first objection, if it could be taken in this form, we should not think it sufficient. Upon the back of the bill of indictment is the following endorsement: "State v. John Collins, murderer. Calvin Gardin, James Ingles and others, witnesses, sworn, *sent* and bound. S. B. Erwin, C. S. C. L. A true bill. D. Glass, foreman." From this endorsement it appears that the witnesses in behalf of the State were sworn in court and sent to the grand jury, with their names endorsed as having been so sworn upon that bill. This sufficiently shows that the bill was sent to the grand jury by the court. The second objection is equally unavailing to the prisoner. It is very certain that it is essential to the legal trial of a man upon a charge of life and death, that he should be present, to avail himself of any objection that might occur on the trial, and to confront the prosecutor and
(414) witnesses against him. Bill of Rights, sec. 7.

The question here, however, is not whether the prisoner was entitled to be so present, but whether it sufficiently appears on the record that he was present. The record does not set forth, with that fullness it might have done and such as is usual, what did occur on the trial. But "it is sufficient if it be certain, to a certain intent, in general; it is not necessary that it should be certain to a certain intent in every particular, so as absolutely to exclude every possible conclusion, all argument, presumption or inference against it." This is the language of the Court in *S. v. Christmas*, 20 N. C., 545. The record in this case shows, in language sufficiently intelligible, that the prisoner was present at the conclusion of the trial. It states the names of the jurors who were sworn and charged to try the case; it then proceeds, who find: *"John Collins, the prisoner at the bar*, guilty," etc. It is answered on the part of the prisoner that this does not ascertain with sufficient certainty his presence during the trial.

Under the rule laid down in the case of Christmas, we think it does; and that we are bound, from it, to believe that he was present during the trial. *S. v. Craton*, 28 N. C., 165, is an authority on this point. The language of the Court in that case is: "But although it is the more correct that the presence of the accused should be expressly affirmed, yet we conceive it is sufficient" if it appear by a necessary or reasonable implication. In this case the accused is called by the jury, in their verdict, the prisoner at the bar, and the clerk, in recording it, calls him the prisoner at the bar. It would be too violent a

supposition that he had been brought to the bar simply to hear the verdict pronounced, when his right to be present the whole time is secured to him by the fundamental law of the country; and when such is the uniform practice, if not a necessary, it is a reasonable implication that such was the fact, and we so understand it. It has, however, been argued before us that the expression, the prisoner at the bar, is satisfied by his (415) being in the custody of the sheriff. The prisoner, it is true, is in the custody of the sheriff after his arrest until duly discharged, unless he escape; but the term, the prisoner "at the bar," is used to designate *where* he is in his custody, to wit, at the bar, in the presence of the court and jury.

We cannot disturb the verdict nor arrest the judgment.

PER CURIAM. Ordered to be certified accordingly.

Cited: Brown v. Patton, 35 N. C., 447; *S. v. Robbins*, 48 N. C., 255; *S. v. Matthews*, 78 N. C., 532; *S. v. Chavis*, 80 N. C., 357; *S. v. Speaks*, 94 N. C., 874; *S. v. Wilson*, 104 N. C., 873; *S. v. Fuller*, 114 N. C., 899; *S. v. Sinclair*, 120 N. C., 605, 606.

STATE ON THE RELATION OF HENRY MARTIN v. RICHARD W. LONG AND OTHERS.

Where, upon an action against a sheriff and his sureties on his official bond, it appeared that the relator was a defendant in a writ directed to the sheriff and in his hands, and that the sheriff did not take a bail bond, but, in lieu of that, took a deposit in money: *Held*, that the sureties of the sheriff were not liable, although the said defendant offered to surrender himself and demanded the money of the sheriff.

APPEAL from the Superior Court of Law of ROWAN, at Spring Term, 1848, *Manly, J.*, presiding.

The action is debt on the bond given by the defend- (416) ant Long, as sheriff of Rowan, and by the other defendants as his sureties, suggesting breaches, pleas, conditions performed and conditions not broken. At the trial the case was that Long arrested the relator upon a *capias ad respondendum* at the suit of Vincent Reid, and took from him a bail bond with sufficient sureties, who were not freeholders. He told the relator at the time that he would then accept that bail bond, provided the relator would, within six days thereafter, give other sufficient bail who were freeholders, or deposit with him

gold bullion to the value of the sum demanded in the writ. At the expiration of the six days the relator failed to give a new bail bond, whereupon he was required by Long to make the deposit of gold with him as security to Long for not taking bail, and the relator accordingly placed in the hands of Long 825 pennyweights and 16 grains of gold and took his written acknowledgment therefor, expressing that he had received it "as a deposit for said Martin as security on a writ of Vincent Reid against him and others." Afterwards, Long returned the writ and with it the bail bond originally taken by him. Before this action was brought the relator offered to surrender himself to Long in discharge of the bail in the action of Reid, which was still pending, and also demanded a return of the gold or its value, which Long failed to make.

The counsel for the sureties moved the court to instruct the jury that upon the case proved they were not liable in this action. But the court refused to give the instructions, and the jury found for the plaintiff and, after judgment, the defendant appealed.

Bynum, *Clark* and *Alexander* for plaintiff.
Craige, *Osborne* and *H. C. Jones* for defendants.

RUFFIN, C. J. The facts here make a flagrant case of oppression and fraud, and the recurrence of many such would form a strong ground of appeal to the Legislature to alter the terms in which the sureties of a sheriff become bound for him, or (417) to provide some other fit protection from such imposition on ignorant men in custody. But, however gross the wrong may be, or however otherwise the sheriff may be liable to answer for it, we believe the relator cannot have the redress he seeks on the sheriff's official bond. The question was remarkably well argued at the bar, and all the cases and reasons bearing upon it adduced. It was principally and ingeniously insisted on the part of the plaintiff that the relation between the sheriff and his sureties, by reason of the privity of contract in the bond, was the same or much the same with that between the sheriff and his deputy; and it was thence inferred that the sureties are liable for the sheriff in every instance in which the sheriff would be liable for the same act or omission of his duty. Cases were then cited in which the sheriff was held answerable for almost everything that a bailiff could do under a warrant to him, or while he held it, as for taking the property of A. under an execution against that of B.; for money received from the debtor on service of the writ to pay the debt; for false imprison-

ment by the bailiff in taking the body of a debtor, after selling his property on a *fi. fa.* and putting him in gaol; for cruelly misusing a prisoner and assaulting him, and others the like misfeasances. The propriety of the rule on which the sheriff is held responsible for the acts of his under sheriff or bailiff, under color, or even pretense of a writ placed in his hands by the superior, which the possession of the writ enables him in some degree to accomplish, is not at all doubted by the court; though in some cases it seems to have been carried to an extreme beyond what one could have expected, as in holding the sheriff liable for the wanton and willful trespass of the bailiff in arresting a debtor on a *fieri facias*. But the rule is founded on its necessity and a principle of public policy, and may be made as broad as those purposes require, when any proper occasion for its application shall arise. It is (418) otherwise, however, as between the sheriff and his sureties. The latter are liable upon a contract expressed in definite terms, and their liability cannot be carried beyond the fair meaning of those terms. Those required by the statute and contained in this bond are, that the sheriff will execute and due return make of all process to him directed; that he will pay and satisfy all fees and sums of money by him received, or levied by virtue of any process, into the proper office into which the same, by the tenor thereof, ought to be paid, or to the person to whom the same shall be due; and in all other things will truly and faithfully execute the office of sheriff. It seems to us quite clear, upon the terms *per se* and upon previous adjudications on them, that the present case does not come within any of them. There has been no failure to execute and return process here. The clause for the payment of money received or levied is obviously restricted to money thus received or levied under and by virtue of process commanding the sheriff to make the money, because it requires that he shall pay it into the office or to the person to whom, by the tenor thereof—that is, of the writ—it ought to be paid, or may be due. Here he had no such writ or process, and the money was received wholly without authority of law, except the authority which was derived from the contract of the parties. The remaining provision only binds the officer affirmatively to the faithful execution of the duties of his office. It is thus seen that there is no clause to cover the case of an abuse or usurpation of power. There are no negative words that the sheriff will commit no wrong by color of his office nor do anything not authorized by law. In many cases, therefore, it has been held that the sheriff's

sureties were not liable for the sheriff, when he undoubtedly would be for his deputy. As familiar instances, the following may be mentioned: For the defaults of the deputy in (419) not returning, or making a false return, of a writ, the superior is answerable in fines, amercements and penalties at common law. But it was not so with respect to the sureties, and it required the express enactment of the statute of 1829 to make them liable on the bond. So if a sheriff collect taxes not duly laid, or for a year when the duty of collection belonged to another person, as former sheriff, the sureties cannot be made responsible. *Fitts v. Hawkins,* 9 N. C., 394; *Slade v. The Governor,* 14 N. C., 365; *Dudley v. Oliver,* 27 N. C., 227; yet there can be no question that in either of those cases the sheriff would be bound to make good any sums collected by his deputy as taxes. So, again, it was repeatedly decided before the act of 1818 that the sureties of a constable were liable to make good such money as he had authority to receive, and not liable for such as he had no lawful warrant to receive, nor the debtor bound to pay him, that is, when the constable had no execution. The same law still holds in respect to money received by a sheriff on a writ in discharge of the debt sued for, as we have been obliged to hold at this term in *Ellis v. Long, post,* 513, on the same bond now sued on. Yet one of the cases cited for the plaintiff decides that the sheriff would be liable for such money if received under like circumstances by his deputy.

With regard to the false imprisonment by a sheriff, or a battery by him on a prisoner, we know of no case deciding that the sureties could not be reached, but we have never heard it supposed that they could, and we believe there is no such impression in the profession. Applying these principles to the present case, it seems to us the action cannot be sustained. If it be looked at as a contract between a defendant in custody and the sheriff that the latter shall become bail, as in our law he does, by not taking and returning sufficient bail, and the debtor will indemnify him for thus becoming bail, by a deposit, the (420) sheriff's sureties cannot be bound for the return of the deposit, although they may be liable to the plaintiff in the action for his recovery against the sheriff as bail. As between the debtor and the sheriff, the contract is merely personal and in their natural capacities, as if the indemnity had been in the form of a mortgage of specific property; in which case we think clearly that the sureties could not be held bound for a slave, for instance, if the sheriff should sell it. But, no doubt, if the writ had been served by a deputy sheriff, who did not

take bail, but received a deposit or mortgage by way of indemnity, that the sheriff would thereby become the bail and consequently be entitled to the benefit of the indemnity, and responsible for it. But we think the plaintiff has a right to consider this, not as a case of a voluntary contract between persons in *equali jure*, but as one imposed on him, which he was compelled to enter into by the power of the sheriff over him while in custody, and afterwards felt himself obliged to comply with. He might justly treat it, therefore, if it would advance his case, as an undue and oppressive use of the sheriff's power illegally to obtain his property from him. But in doing so it does not appear to us that he makes out a case for damages for which the sheriff's bond is a security, because no one of its provisions fairly cover it, judging either from its terms in themselves or from prior constructions of them.

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

Cited: S. v. Brown, 33 N. C., 144; *Mills v. Allen*, 52 N. C., 566; *Covington v. Buie*, 53 N. C., 32; *Eaton v. Kelly*, 72 N. C., 113; *Holt v. McLean*, 75 N. C., 349; *Prince v. McNeill*, 77 N. C., 403; *Rogers v. Odom*, 86 N. C., 436.

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(421)

JOHN DAMERON v. JOHN IRWIN AND OTHERS.

1. Where a plaintiff declares upon a specific covenant under seal to do a work in a certain time, he cannot recover for the price stipulated in that contract unless he shows he has performed his work within the time contracted for.

2. Where it appears from the contract that it was made by public commissioners in behalf of the public, whether they were commissioners for the county or for the State, such commissioners are not personally bound by their contract.

APPEAL from the Superior Court of Law of CLEVELAND, at Fall Term, 1847, *Settle, J.*, presiding.

This is an action of debt upon a covenant. The plaintiff undertook and built a courthouse in the town of Charlotte for the county of Mecklenburg, and brings this action to recover the price agreed to be paid. The defendants were commissioners appointed by the County Court to make the contract, and the action is against them, upon the ground that by the deed executed by them they are personally bound for the money. The covenant is as follows:

CHARLOTTE, 30 July, 1842.

Know all men by these presents, that we, Stephen Fox, etc., *commissioners for and on behalf of the county of Mecklenburg,* of the one part, and John Dameron of the other part, witnesseth, that whereas the said John Dameron hath agreed to build a courthouse for the county of Mecklenburg, in the town of Charlotte, according to the specifications marked A, etc., the said Stephen Fox, etc., *for and in behalf of the county of Mecklenburg,* on their part do agree that upon the execution of said contract fully, and according to the terms thereof, etc., by 1 January, 1844, *then, and in that case,* to pay to the said John Dameron, etc. It is further understood and agreed that (422) the *commissioners aforesaid* may make payment, etc.

It is admitted that the building was not erected within the time specified for its completion, nor according to the specifications; but that the departures from it were made with the knowledge and consent and by the directions of the defendants, and that the building was, after the summer of 1844, used and occupied by the court in the transaction of public business. It was further admitted that the lot upon which the building was to be erected was not purchased by the defendants until 27 April, 1843.

Upon intimation from the court that the plaintiff could not maintain his action, he submitted to a nonsuit and appealed.

Avery, Guion and *Alexander* for plaintiff.
Osborne and *Wilson* for defendants.

NASH, J. The action is in debt, and the plaintiff claims the money to be paid for building the courthouse. Two objections are urged against his right of recovery: one that the defendants are not personally liable, and the other that the plaintiff did not perform his contract by building the house within the time and according to the terms specified. Both objections are fatal.

The plaintiff sues upon the sealed instrument, and in his declaration must set forth the terms of it, or its legal effect, and in general practice it is usual to set forth the words of the contract. 1 Chitty Plead., 299, 302. In the contract in this case the plaintiff was bound to finish the courthouse by 1 January, 1844, at which time, also, the money was to be paid, if the work was done. The defendants agree that upon the execution of said contract, fully and according to the terms thereof, the specifications, etc., by 1 January, 1844, then and in that case to pay, etc. It is admitted that the courthouse was not erected according to the specifications nor within the time prescribed.

There was, then, a fatal variance between the allegation (423) and the proof. The latter did not support the former. The plaintiff, however, says that the variations were all made by the directions of the defendant, and that the house was not finished within the time because the defendants did not furnish the ground until 27 April, 1843, and that the courthouse was received and used by the court. There is no doubt that the plaintiff is entitled to receive the value of his work and labor done, and materials found by him; but not in this action, which is brought on the covenant to pay. He cannot declare on one contract and recover on a different one. The defendants expressly agree that the money shall be paid upon the execution of the work at the time specified and according to the specifications. The covenant to pay the money is dependent upon the execution of the work according to the agreement. The plaintiff, then, cannot recover in this action without an averment of performance. *Clayton v. Blake*, 26 N. C., 497; *Glassbrook v. Woodrow*, 8 Term, 366. The other objection is equally fatal to the plaintiff's recovery. The defendants in entering into this contract were acting as public agents—agents or commissioners of the county of Mecklenburg. They are, therefore, not personally bound, not because public agents cannot make themselves, by their contracts for their principals, personally responsible, but because in this instance they have not. The doctrine on this subject was very elaborately and ably argued before the Supreme Court of the United States in the case of *Hodgson v. Dexter*, 1 Cranch, 345. The defendant was, at the time of making the contract upon which the action was brought, Secretary of War, and as such leased from the plaintiff certain buildings in the city of Washington for the use of the public, and covenanted, for him and his successors, "to keep in good and sufficient repair," etc. This covenant was signed and sealed "Samuel Dexter," without any addition whatever. The premises were burnt down during the lease, and the action was (424) to recover damages under the covenant to repair. *Chief Justice Marshall*, in delivering the opinion of the Court, says: "It is too clear to be controverted that when a public agent acts in the line of his duty, and by legal authority, his contracts made on account of the Government are public and not personal," and the reasons given for the judgment in that case apply with entire propriety to this. The plaintiff's counsel, there as here, admitted the general doctrine, but denied its application to that case, alleging that the defendant had made himself personally liable. In answering that argument the Court admitted the terms of the instrument. In this case, as

in that, it is admitted the building was for the use of the public and that the defendants had a right to make it, and in every part of the deed they show for whose use and under whose authority they were acting. In the binding part of the covenant the language is certainly explicit: "and the said Stephen Fox, etc., acting for and in behalf of the county of Mecklenburg, etc." In a subsequent part they say it is further understood and agreed that the *commissioners,* etc. Whenever, then, in the course of the instrument they are obliged to mention their own names they state themselves to be commissioners and acting for the county of Mecklenburg, and where they execute it they execute it as commissioners. There is no allegation nor is there any reason to believe that the plaintiff preferred the private responsibility of the defendants to that of the county. It is further alleged by the plaintiff's counsel why the case of Dexter does not apply to this, that it was the case of a known agent of the Government, and the defendants here were the agents, not of the Government, but of the county. This objection is answered in *Hite v. Goodman,* 21 N. C., 364. In that case the defendant, with other magistrates of Gates County, had offered, in behalf of the county, a large reward for (425) the apprehension of certain runaway slaves. The plaintiffs had captured some of the slaves and sued in equity in consequence of the obstacle to a recovery at law stated in the bill. His Honor, *Judge Gaston,* in giving the opinion of the Court, recognizes no distinction between an agent for the Government and any other public agents, but considering the defendants as public agents, extends to them the protection of law as such. He says: "We consider it settled law that an action will not lie against a public agent for any contract entered into by him in his public character, unless he undertake, explicitly, to be personally responsible." Among the cases cited by him is that of *Dexter.* We consider this case decisive of the one before us. The defendants were the agents of the county of Mecklenburg in making the contract, so style themselves in the contract in every instance in which they refer to their action, and so seal and deliver the covenant.

We see no error in the opinion of the presiding judge.

PER CURIAM. Judgment affirmed.

Cited: Brown v. Hatton, 31 N. C., 327; *Tucker v. Iredell,* 35 N. C., 435; *Dey v. Lee,* 49 N. C., 240.

(426)

WILLIAM F. COWAN v. SAMUEL TUCKER.

In an action for a slave, where a child claims on the ground that the slave was put in his possession by his parent, and that the parent afterwards died intestate without resuming the possession, evidence of the declarations of the parent made after the possession was transferred and not in the presence of the child, that he had lent and not given the slave, is inadmissible.

APPEAL from the Superior Court of Law of IREDELL, at Fall Term, 1847, *Pearson, J.*, presiding.

The action is detinue for two slaves, and, on the general issue pleaded, the evidence at the trial was that the defendant married a daughter of one Allison, the plaintiff's intestate, and that upon the marriage Allison sent home with the defendant's wife the two negroes, and that they remained in the defendant's possession until the death of Allison, which happened about twenty years afterwards. Upon this evidence the defendant insisted that the slaves were to be considered as having been given as an advancement from his father-in-law to him, and of that opinion was the court. To repel that inference the plaintiff alleged that the negroes were not given, but were expressly lent to the defendant, when they were put into his possession; and in support of that position the plaintiff offered to prove by a witness that, some short time after the negroes went into the defendant's possession, Allison told the witness (neither the defendant nor his wife being present) that he had lent the negroes to the defendant, and had not given them to him. But upon objection by the defendant, the court rejected the evidence. The defendant obtained a verdict and judgment, and the plaintiff appealed.

(427)

Clarke for plaintiff.
Osborne and *Guion* for defendant.

RUFFIN, C. J. We think the act of 1806 does not alter the rule of evidence before applicable to such cases, and, therefore, that the evidence here was properly rejected. In this very case it has heretofore been decided that parol gifts are alone within the purview of the proviso to the act of 1806 (27 N. C., 78). Therefore it was competent for the plaintiff to prove that the negroes were lent and not given. The question is, by what sort of evidence may the plaintiff establish the fact that the defendant received them on those terms? Evidence to the fact of the loan at the time the negroes were delivered, or the declarations of the defendant at any time, or those of the parent, imme-

diately or a week or two preceding the transfer of the possession, of the intention to lend the negroes (*Moore v. Gwyn*, 26 N. C., 275), are competent and relevant to that point. But it seems to us that it would be against principle and dangerous to admit the declarations of the parent made after he had parted with the possession, and in the absence of the child and never communicated to the child, as evidence of the fact of the loan, contrary to the rational and legal presumption of a gift. For, at common law, a gift of a slave was inferred if the father put it into the possession of the child upon coming of age or marrying, unless upon distinct proof to the contrary. As a gift was presumed, the parent could not recover the slave in an action against the child. It follows that he could not give himself or his executor an action by a declaration, not assented to by the child, that he never had given, but had only lent, the negro. But it is very ingeniously put by the counsel for the plaintiff that under the act of 1806 the most positive parol gift is but a bailment at the will of the parent, and may be terminated at his pleasure, during life by recovering the possession, or at his death by leaving a will; and, therefore, that after delivering
(428) the possession to the child the parent has a continuing interest on which his declaration may operate and ought to operate, since he could have no motive to make an untrue one. The distinction would be a sound one if there were anything in the statute which allowed the parent to terminate his parol gift by declaration or by anything short of changing the possession or disposing of the slave by a sale or conveyance to some one else, or by a bequest; for, before the act, the subsequent declaration of the parent was excluded, because the presumptive gift was a total alienation and conclusive upon him; and it is not so to every purpose since the act, but the parent may treat the gift as null in either of the ways mentioned, that is, by an express bailment or by taking or disposing of the slave. His creditors may also, no doubt, treat the slaves as the parent's. But we do not think it was the intention of the act that the right of the child should be defeated in any other way. For, if there be an express gift to the child, or one implied from the delivery without anything being said, then the act makes it a gift from the beginning, as it was before the act, provided only the possession continues with the child until the death of the parent, intestate. To use the language of *Judge Henderson*, the Legislature not only withdrew the case within the proviso from the operation of the act, but validated and made it a good gift. *Stallings v. Stallings*, 16 N. C., 298. It is the same as if the act had never passed; and the gifts are made

effectual from the time of the first delivery, and are to be accounted for as advancements at that time. Then, plainly, upon principle, evidence of subsequent oral declarations of the parent ought not to be admitted to divest the presumptive title of the child—at least, unless made to the child. For the means whereby, according to the terms of the statute, the parent may terminate the inchoate gift to the child are open and solemn acts, done either to the child or in such manner as to put (429) their existence and purpose beyond dispute and without much danger of fraud and perjury, namely, the demanding or resuming possession, or a disposition by sale or will. Hence, *Judge Henderson* reasoned that the circumstances stated in the proviso are, in the estimation of the Legislature, evidence equal to that of the writing required in the first section to make a valid gift, and that the mischiefs intended to be prevented by the first section—that is, the setting up of spurious gifts by perjury and misconception—would not arise in the case excepted by the proviso. That is true, for there can be scarcely a possibility for falsehood or mistake to go undetected in setting up a parol gift under the circumstances mentioned in the proviso, as the possession is in its nature notorious, the presumption of a gift from it natural, and that presumption fortified so as to become almost an absolute certainty, by the failure of the parent to make any other disposition during his life. But while fraud or misapprehensions are thus avoided in setting up gifts to children, a wide door will be opened to attempts to defeat even such as are within the words and meaning of the proviso, by setting up spurious loans upon the testimony of false or mistaken witnesses as to the secret declarations of the parent. The reception of such evidence would indirectly introduce many of the mischiefs the statute was intended to prevent. There is a plain difference between such private declarations, almost to be called mental reservations, and those made distinctly to the child, or the acknowledgments of the child. For the child, although he knows the parent may revoke his gift, or that the creditors may repeal it, expects on just grounds that such will not be the case; and, therefore, he is willing to accept the slaves and be at the expense, perhaps, of rearing a family from them with the view to the ultimate completion of his title as from the beginning, either by the intestacy of the parent or by a donation in his will. But it might be far otherwise if the child were informed by the parent that he had (430) not given and did not intend to make a gift, but only a loan; for, then, he might be altogether unwilling to retain the slaves and rear others for other members of the family. It

would be an act of plain imposition practiced on the child by a parent who would thus deal with him; but it would, probably, oftener be an act of injustice to the child and to the memory of the deceased parent, in his representatives setting up, by false evidence of the dead man's declarations in secret, the pretense of a loan where the parent had intended a gift, as proved by the enjoyment which he allowed the child to have (as here) for twenty years under the expectation and belief that he was to have the absolute property, and without any intimation to the child of the contrary in the parent's lifetime or at his death. Hence, the conclusion before stated seems to us to be the proper one, that as by the proviso of the act the case of a parol gift is taken out of the enacting clause when the possession of the slave accompanies the gift and the parent dies intestate, so as to make the gift good in itself, and from the time of the possession acquired, as it was before the act passed, so no posterior declarations merely by the parent of a loan can be received now to defeat the operation of the proviso by setting up a loan instead of a gift, more than they could before the act of 1806.

PER CURIAM. Judgment affirmed.

Cited: Meadows v. Meadows, 33 N. C., 150; *Hicks v. Forest,* 41 N. C., 530.

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(431)

WILLIAM WHITESIDES v. R. S. TWITTY ET AL.

1. It is incumbent on a party excepting, when the error alleged consists in rejecting evidence, to show distinctly in it what the evidence was, in order that its relevancy may appear and that it may be seen that a prejudice has arisen to him from the rejection.

2. In like manner, when the alleged error consists in admitting evidence, the exception must set forth the evidence actually given, as it is the only means whereby the court can ascertain whether or not the admission did or might have done the party a harm.

APPEAL from the Superior Court of Law of RUTHERFORD, at Fall Term, 1847, *Settle, J.,* presiding.

The action is debt on a bond for $704.40, given by the defendants to the plaintiff, dated 12 July, 1843, and payable twelve months after date, with the interest from date. Plea, usury.

On the trial the defendants gave evidence that one Anderson Staton was indebted to the plaintiff upon several justice's judg-

ments, on which executions were in the hands of one Morris, a constable in Rutherford County; and that it was agreed between Staton and the plaintiff that Morris and a son of the plaintiff should go to South Carolina and bring thence into Rutherford a slave and a wagon and team which Staton had there, and that when brought into this State Morris should seize them under the execution and hold them "to secure the said debts until the said Staton would give other security," and that, accordingly, the plaintiff employed Morris and his son for that purpose and paid Morris $10 for his services and also paid the expenses of the trip. The defendants gave further evidence that afterwards it was agreed by and between Staton and the plaintiff and the present defendants that, in consideration that the said Staton would execute a bond to the defendants for the same amount and secure the same by a mortgage (432) on certain property, they, the defendants, would give their bond to the plaintiff for the debt which Staton owed him upon the judgments and the plaintiff would accept the same and discharge Staton therefrom; all which was accordingly then done, that is to say, on 12 July, 1843; and the bond now sued on is that which was so given by the defendants to the plaintiff, and was made for the sum due to the plaintiff for the principal money and lawful interest thereon mentioned in the judgments, and did not include the costs. The defendants further gave evidence that on 11 July, 1843, Staton gave the plaintiff a note for $20, and the defendants offered the said Staton as a witness to prove that the same was corruptly accepted by the plaintiff as usurious interest for the forbearance of the day of payment. But he was objected to on the part of the plaintiff, on the ground that he was interested in the event of the suit, and was rejected by the court. The said Staton thereupon executed to the defendants a release of all rights and every equity then existing in or that might arise to him from the determination or result of this suit; but the court, nevertheless, rejected him again. The plaintiff then offered in evidence the declaration of the said Staton, made both before and after the execution of the bond declared on, "to show the consideration of the same note for $20." They were objected to by the defendants, but received by the court. The plaintiff had a verdict and judgment, and the defendants appealed.

Gaither for plaintiff.
Baxter for defendants.

RUFFIN, C. J. If the opinions given on the trial were erroneous, yet, as the case is stated in the bill of exceptions, it is not in the power of the court to assist the defendants, and it is therefore unnecessary and improper to decide the ques-
(433) tion of evidence. From the nature of a bill of exceptions, as has been frequently declared by this Court, it is incumbent on the party excepting, when the error alleged consists in rejecting evidence, to show distinctly in it what the evidence was, in order that its relevancy may appear, and that it may be seen that a prejudice has arisen to him from the rejection. In like manner, when the alleged error consists in admitting evidence, the exception must set forth the evidence actually given, as it is the only means whereby the Court can ascertain whether or not the admission did or might have done the party a harm; for verdicts and judgments are presumed to be right and according to law and justice, until the contrary be shown; and the bill of exceptions is required to state all the facts necessary to show the error clearly, since the party excepting is presumed to state the case as strongly against the other party and for himself as he can, consistently with the truth. It would be unsafe for a court of error to proceed upon any other principle, for it is improper and, indeed, impossible in practice to set forth in every bill of exceptions the whole case made at the trial, or to do more than to raise the points made at the trial on which the decisions are complained of. But it is indispensable to state the facts on which those points arose, since, otherwise, it will not appear that the decisions were practically injurious, and for such errors only can judgments be reversed, and not for any upon merely abstract questions, not legally affecting the rights in controversy. In the present case one of the errors assigned is in rejecting a witness who was to prove that a certain note for $20 was given by Staton to the plaintiff on 11 July, 1843, for usurious interest "for the forbearance of the day of payment"; but it is not stated what debt was forborne nor for what period, so as to connect it with the bond sued on in such a manner as to render it void under the statute.
(434) It is left to inference merely that the witness would have proved that the plaintiff required or accepted that note as the consideration of his agreement to take the defendants for his debtors instead of the plaintiff, and to defer the payment a year in order to induce them to give their bond for the debt with interest. If that were the truth of the case, it would raise the question whether the defendants, who are not alleged to have been parties to or cognizant of that part of the agree-

ment, could avail themselves of the statute so as to avoid their bond subsequently given to the plaintiff for the sum really due to him, and for a sum truly owing from the defendants to Staton, the plaintiff's original debtor. Upon it, perhaps, it might be necessary to hold affirmatively, in order to prevent evasions of this beneficial statute; but we do not propose to give an opinion on it at present, nor have we, indeed, considered it, as it is not necessary to the decision we have to make. For, clearly, in order to affect their bond with usury the defendants must at least establish that the agreement on which the note for $20 was given as the illegal premium for forbearance had reference to the bond they were to give. That they have not done, nor would have done if the witness had been admitted and had sworn to what the exception says he was offered to prove, and it cannot be supposed he would have proved more. For it is not competent for this Court, without any direct allegation of the party to that purpose on the trial, to infer that, besides proving "that the note was given for the forbearance of the day of payment" of some debt, the witness would also have proved that the forbearance purchased was prospectively of this debt, by giving twelve months' time to the defendants on their bonds. Such an inference the Court could not, perhaps, draw in any case, but certainly not in this. For here the note for $20 and the bond of the defendants were given, not only by different persons, but on different days; and, secondly, there were two distinct agreements for forbearance established upon the defendants' evidence: the one, on the judgments and exe- (435) cutions under which the property was to be seized and held in this State until the debtor could give other security in a reasonable time; and the other, on the bond of the defendants afterwards given at twelve months. For which of those forbearances the note was given, it is impossible to tell, as there is nothing to distinguish; and, therefore, it must, or, at least, may be taken to have been the former. If so, then, according to many authorities, we think the plaintiff is entitled to recover; for it is settled that to avoid a security as usurious it must be shown to have been originally so, as if a bond be given for the sum lent and afterwards there be an agreement for illegal interest, the first bond continues good and may be recovered on, though the agreement for the excessive interest is void, or the lender may incur the penalty if he receive the usurious interest. Then, in this case, the plaintiff was legally entitled to enforce his judgments for every cent appearing to be due on them, as they were only for the principal and lawful interest and costs

actually owing to him; and, consequently, a new security, taken only for the sums thus lawfully due on the judgments, could not be infected with usury any more than the judgments themselves, unless, at all events, there was an agreement for an usurious premium for forbearance on the new security, and not merely a prior payment or security of such a premium for past forbearance on the prior valid security. As there was no usury in the judgments, there can be none in a bond given for them and nothing more. Therefore, the evidence rejected could not have maintained the issue on the part of the defendants, and its exclusion deprived them of no advantage, and furnishes no reason for ordering another trial.

For similar reasons, the admission of Staton's declarations, however incompetent, furnished no ground of reversal, because it does not appear what his declarations were, and that (436) they could have had any effect on the jury. It is stated that they were declarations "to show the consideration of the note for $20," but the exception does not set forth what was the consideration thus declared. It is impossible to conjecture, even, what it was said to have been. It may be that it was proved that Staton declared it was given for the forbearance to the defendants. It was incumbent on the defendants to have set out the substance of the alleged declarations themselves, as, without knowing what they were, the Court cannot undertake to say that they did or might mislead the jury.

Therefore, no error to the prejudice of the appellants being perceived in the judgment, it must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Bland v. O'Hagan, 64 N. C., 473; *Street v. Bryan,* 65 N. C., 622; *S. v. Purdy,* 67 N. C., 378; *Straus v. Beardsley,* 79 N. C., 63; *Knight v. Killebrew,* 86 N. C., 402; *S. v. Lanier,* 89 N. C., 520; *S. v. Barber, ib.,* 525; *Gadsby v. Dyer,* 91 N. C., 316; *S. v. Pierce, ib.,* 609; *Watts v. Warren,* 108 N. C., 517.

E. CANTRELL v. C. C. PINKNEY.

1. Where a person resides in another State during the greater part of the year, but has a domicile in this State in which he also resides three or four months of the year, during which time he keeps slaves here, he is liable during the time he resides in this State to the requisition of the overseer of the road for the services of those hands, being of the description of hands bound by the general laws of this State to work on the road.

2. But persons merely passing through the State or visiting it for purposes of profit or pleasure, and remaining, for days, weeks, or even months without having any fixed home, are not persons whom the overseer of the roads are authorized to summon as being within their districts.

APPEAL from the Superior Court of Law of HENDERSON, at Spring Term, 1848, *Battle, J.*, presiding.

This was an action of debt, commenced by the plain- (437) tiff as overseer of a public road in the county of Henderson, by a warrant before a single justice, to recover from the defendant the sum of $12 for four days' work of three hands. A judgment was given against the defendant by the justice, from which he appealed to the Superior Court, where, at the Spring Term, 1848, the following case agreed was submitted to the presiding judge:

The plaintiff was duly appointed an overseer of a public road in Henderson County, and the defendant owned three male slaves, over the age of sixteen and under the age of fifty years, who were assigned by the Court of Pleas and Quarter Sessions of said county to work said road under the orders of the plaintiff. The defendant was duly notified to send said slaves to work on said road for four days each, which he failed or neglected to do; and, at the time when he was summoned to send said hands and for more than thirty days before, and at the time appointed to work on said road, the defendant, with said slaves, was temporarily living in Henderson County. The defendant alleged that he was a citizen of South Carolina, where he resides about eight months in each year, and where he has the principal part of his property and claims and exercises the right of suffrage. But he has a place of residence in Henderson County, which he annually visits, and occupies about four months in each year, embracing the months of June, July, August and September. The slaves who failed to work on said road are servants, whom he brings with him on his annual visits to his residence in Henderson County and takes back on

his return to South Carolina. The defendant, both before and after he had been summoned to send his said slaves to work on the road as aforesaid, in passing a gate on the Buncombe Turnpike Road, refused to pay his toll, alleging that he was a citizen of Henderson County and exempted by the charter of the Buncombe Turnpike Company from paying toll. The
(438) parties agree that if the court be of opinion that the plaintiff is entitled to recover upon the foregoing facts, a judgment shall be entered against the defendant for $12, otherwise, a judgment of nonsuit shall be entered. The presiding judge was of opinion that the plaintiff was entitled to recover, and gave judgment accordingly, whereupon the defendant appealed.

Baxter for plaintiff.
N. W. *Woodfin* for defendant.

BATTLE, J. The question presented in the case agreed is whether the defendant, whose citizenship and principal residence is in the State of South Carolina, but who has a dwelling-house in this State, where he resides with his family four months in each year, is liable to be called on to send his slaves to work the public roads of this State during the time of his residence in it. We are of opinion that he is, and we think so because he comes within the letter of our "act concerning the public roads," 1 Rev. St., ch. 104, and we can perceive nothing in its spirit to exempt him. The act provides, in section 8, that the several county courts shall appoint overseers of the public roads in each county, and section 10 makes it the duty of the overseers thus appointed to summon all white males between the ages of eighteen and forty-five, and free males of color and slaves between the ages of sixteen and fifty years, within their respective districts, to meet at such times and places and with such working tools as the overseers shall prescribe, for the working and repairing such roads as may be necessary. Each and every person so summoned is then required to attend, under pain of forfeiting $1 for each day's neglect, provided he shall have been notified three days before the time appointed for the meeting; and provided further, that for the neglect of any
(439) slave, his master shall be liable to pay the penalty. Section 12 of the act then declares that no such person as is above specified shall be exempted from working on the public roads, except such as is or shall be exempted by the General Assembly or by the County Court on account of personal in-

firmity, and except, also, such as shall send three slaves or three sufficient hands. The provisions of the act are very broad, and will certainly embrace the slaves of the defendant, unless it can be shown that the act was not intended to apply to them. This the defendant's counsel has attempted to do, and his main if not his sole argument is that the defendant is not a citizen of this State; that he has only a temporary residence here; that the act was intended to operate only upon our citizens, and that it requires express words to extend it to the citizens of other States. In support of this argument it is urged that the construction insisted on for the plaintiff would make the act include mere transient passengers and visitors as well as persons having a temporary residence, like the defendant. We admit that our Legislature had in view principally our own citizens, because they compose a vast majority of the persons upon whom the act could operate, and we admit, further, that persons merely passing through our State, or visiting it for purposes of profit or pleasure, and remaining for days, weeks and even months, without having any fixed *home* here, are not persons whom the overseers of the public roads are authorized to summon as being within their districts. Such persons are not fairly within the words of the act, and are certainly not within its meaning. Having no fixed place of abode within any particular district, and staying for no certain time, they could not have been contemplated as persons to receive the three days' notice required in the act; and having no working tools, they could not reasonably be required to attend with them. They are evidently, then, not the persons intended by the Legislature.

But the case of the defendant is very different. For four (440) months in each year—one-third of his whole time—he has a fixed place of residence in this State. The time during which he is to reside among us with his family and his slaves is ascertained and well known. The overseer of the road in whose district he lives can have no difficulty in learning when and where to summon his slaves so as to secure their attendance; and they are presumed to have tools with which they can work. He is surely, then, within the very words of the act, and why should he be exempted from its operation? The duty is only required to be performed during his residence in the State, and for that period he is or may be in the constant use of our roads and under the protection of our laws. We think, therefore, that he cannot be regarded as a mere transient passenger or temporary visitor. He certainly did not so regard himself when he claimed an exemption from paying tolls to the Buncombe

Turnpike Company, as being a citizen of Henderson County, which he could have justly claimed only by being such. But it is proper to say that we do not rely upon that fact, and we refer to it only to show the light in which such residents are generally regarded, the light in which they regard themselves, not as citizens for political purposes, but as citizens, while they reside among us, for many if not for all other purposes.

We have been unable to find any direct authority upon this question, but we think that the case of *Kinzey v. King*, 28 N. C., 76, has some analogy to it. It was there held that a witness who is summoned in this State, while casually here, but whose residence is in another State, cannot be amerced for nonattendance, if he has returned home and is not in the State when he is called out on his subpœna. But the Court say expressly that if the witness be in the State when he is called, "he is sub-
(441) ject to the same rules as the citizens of the State; in such a case he receives the protection of our laws, and it will be his duty to obey the mandates of our process." Now, the act declaring the manner in which witnesses shall be summoned, and enforcing their attendance, etc., shows clearly in all its provisions that it was intended to operate mainly upon our own citizens. 1 Rev. St., ch. 31, secs. 64 to 75, inclusive. Yet we see that it has been construed to extend to the citizens of other States, during the time of even a temporary visit to this State. It is manifest that the case before us is much stronger, so far as residence is concerned. We are, therefore, of opinion, upon a consideration of the whole case, that nothing has been shown on the part of the defendant to exonerate him from the penalty incurred by failing to send his slaves to work on the public road, under the circumstances stated in the case agreed.

PER CURIAM. Judgment affirmed.

Dist.: S. v. Johnston, 118 N. C., 1189.

MARTHA NEWELL v. WILLIAM B. MARCH.

Where money has been paid, when it was not due, under a mistake of facts, it may be recovered; otherwise, if paid under a mistake of law.

APPEAL from the Superior Court of Law of DAVIE, at Fall Term, 1847, *Pearson, J.*, presiding.

This was an action of *assumpsit* for money had and (442) received. Plea, *non assumpsit*.

On the trial it appeared that the plaintiff had obtained a judgment in the County Court of Davie against one Samuel Newell for $2,016.10, with interest and costs, and that an execution of *fieri facias* was issued thereon returnable to August Term, 1842, which was placed in the defendant's hands as sheriff, and was by him levied on a house and lot belonging to the defendant in the execution, but he did not sell it on account of an order to that effect from the plaintiff. Several writs of *renditioni exponas* were then issued from time to time until November Term, 1843, and were placed in the defendant's hands, but the execution of them was suspended by order of the plaintiff. From November Term, 1843, another writ of *fi. fa.* was taken out, and placed also in the defendant's hands, but likewise suspended by the plaintiff's order, and no other execution was ever issued on the judgment. In December, 1845, the defendant, who was still sheriff, called upon the plaintiff's agent for the costs, including his commissions, and exhibited a statement in writing, in which commissions were charged upon the sum of $2,449.08, that being the amount of the principal debt with the interest and costs thereon, the commissions amounting to $61.97. The agent paid the costs and commissions, and the action was brought, after a demand, to recover back the latter, either in whole or in part, upon the ground that the defendant was not entitled to receive them and they had been paid by mistake. It appeared further, on the part of the plaintiff, that both she and the defendant in the execution were nonresidents, and that he had no other property in the county of Davie than the house and lot levied on, and that they were not at any time worth more than $1,000.

For the defendant testimony was introduced to show that he had several times advertised the house and lot for sale, but had been prevented from selling by the orders of the plaintiff's agent, and that in October, 1843, while the last (443) execution was in his hands, Samuel Newell executed to the plaintiff a deed in fee simple for the house and lot, in which the consideration was stated to be $2,500.

The plaintiff's counsel contended that the defendant was not entitled to any commissions, or, at most, to commissions upon the sum of $1,000 only, the value of the house and lot levied upon; and he insisted that the plaintiff could recover back in this action either the whole or a part of what had been paid to the defendant, as having been paid by mistake. His Honor held, and so instructed the jury, that the defendant was entitled

to charge commissions upon the sum of $1,000 only, as that was the value of the property which he had levied on, but that the plaintiff could not sustain the action against him for the excess, because the payment was made upon a mistake of law and not of fact, and was a voluntary one, and could not be recovered back in the action for money had and received; and that the defendant's being sheriff at the time of the payment made no difference, as he had no process in his hands by which to coerce it. The defendant had a verdict and judgment, and the plaintiff appealed.

Osborne for plaintiff.
Craige and *Clarke* for defendant.

BATTLE, J. It is the settled law of England, and has been so considered ever since the case of *Marriot v. Hampton*, 7 Term, 265, that where money has been paid by the plaintiff to the defendant under the compulsion of a recovery at law, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received. The rule is necessary to prevent the repeated and protracted litigation of the same matter, it being better that one (444) person should occasionally suffer the wrong and inconvenience of paying an unjust claim than that every person should be rendered insecure in the fruits of a recovery at law. *Interest reipublicæ ut sit finis litium.* Upon a principle somewhat similar, it was said by *Mr. Justice Patterson*, in the case of the *Duke de Cadoval v. Collins*, 4 Ald. and Ell., 858 (31 Eng. C. L., 206), that "where there is *bona fides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." So it was held by *Mr. Justice Bayley*, in *Milner v. Duncan*, 6 Barn. and Cress., 671 (13 Eng. C. L., 294), that "if a party pay money under a mistake of the law, he cannot recover it back. But if he pay money under a mistake of the real facts, and no laches are imputable to him in respect of his omitting to avail himself of the means of knowledge within his power, he may recover back such money." Many other cases involving these principles have come before the courts of England, in some of which very nice distinctions are drawn, so as to make the decisions sometimes appear almost contradictory; but upon a review of the whole of them, Smith Leading Cases, 244, states these points to be clearly settled:

1. That money obtained by compulsion of law, *bona fide*, and without taking an advantage of the situation of the party paying it, is not recoverable.

2. That money paid with full knowledge of the facts is not recoverable, if there be nothing unconscientious in the retainer of it.

3. That money paid in ignorance of the facts is recoverable, provided there have been no laches in the party paying it.

The American notes to the same work show, on the same page, that the principles above stated have been recognized in several of the States of the Union. In this State there is no doubt that money paid under a judgment, or paid (445) under legal process before judgment, where no advantage is taken of the situation of the party paying, cannot be recovered back. And it has been decided that it may be recovered if paid under a mistake of the facts. *Pool v. Allen*, 29 N. C., 120. No case has been brought to our attention where our courts have held that if the money has been paid with a full knowledge of the facts, but in ignorance of the law, it can be recovered back. We have certainly, however, adopted as a principle of our law that necessary maxim that *ignorantia juris excusat neminem*, and we think it equally applicable to the payment of money under a mistake of the law as to any other case. If so, it must govern the case before us. Here the plaintiff's agent, having full knowledge of all the facts, paid the money to an officer, indeed, but to one who had and could have had no legal process against the plaintiff to compel the payment, and we think it not unconscientious that he should retain it.

PER CURIAM. Judgment affirmed.

Cited: Adams v. Reeves, 68 N. C., 136; *Lyle v. Siler*, 103 N. C., 265; *Houser v. McGinnas*, 108 N. C., 635; *Jones v. Jones*, 118 N. C., 447; *Worth v. Stewart*, 122 N. C., 261.

(446)

AMELIA PARHAM v. ELIZABETH BLACKWELDER.

A master is not responsible for a trespass committed by his slave, unless he ordered it to be committed or subsequently sanctioned it.

APPEAL from the Superior Court of Law of CABARRUS, at Fall Term, 1847, *Pearson, J.*, presiding.

This is an action of trespass, in which the defendant is charged with entering on the land of the plaintiff and cutting and carrying away a wagonload of wood. Plea, not guilty. At the trial the evidence was that a negro man, who belonged to

the defendant, went with her wagon and team to the land of the plaintiff, and cut and hauled away a load of wood, worth fifty cents, and carried it to the defendant's yard. The counsel for the defendant insisted thereupon that the plaintiff could not recover in this action, and moved the court so to instruct the jury. But the presiding judge refused to do so, and instructed the jury that though, in such a case, the defendant would not be liable in trespass for the act of a free servant, yet she was liable in this action, because the trespass was the act of an irresponsible *slave,* doing work for the benefit of the owner. There was a verdict for the plaintiff, and, after judgment, the defendant appealed.

Osborne and *Barringer* for plaintiff.
Thompson and *Coleman* for defendant.

RUFFIN, C. J. The question in this case is of much consequence in this country, and particularly to the owners of slaves.

(447) Though formerly discussed to some extent, we had supposed it to have been long at rest in the minds of the profession, and that, in a way, opposite to the opinion given to the jury on this trial.

The general principle is that if one command or procure a trespass to be committed, he is answerable for it, as if done by his own hand. So, likewise, is he if a trespass be committed without his previous procurement, but for his benefit, and he afterwards assent to it and take benefit by it. With those exceptions, we believe the law does not hold one person answerable for the wrongs of another person. It would be most dangerous and unreasonable if it did, as it is impossible for society to subsist without some persons being in the service of others, and it would put employers entirely in the power of those who have, often, no good-will to them, to ruin them. It is admitted in the instructions that such is the rule of law when the trespass is committed by a servant who is free; which is certainly true, and has been so deemed ever since the case of *McManus v. Crickett,* 1 East., 106, though the servant, at the time of the wanton act of trespass, was engaged in the master's business. But it is supposed when the servant is a slave the law should be different, upon the ground of the irresponsibility of such a servant for his trespasses. For the distinction no authority has been discovered after diligent research by the counsel for the plaintiff, and we suppose there is none. That *per se* furnishes a strong argument against the action, as slavery prevails so extensively in this country, and there can be no doubt that many

recoveries would have been sought and made if the law were as assumed for the plaintiff. But we think the distinction is not supported more by sound principle than by precedent. The ground of it is that a free servant is responsible for his trespasses, and a slave is not, and, therefore, that the master of the former is not to be held responsible, while the owner of the latter is. Now, there are two kinds of responsibility for trespasses, that is, *criminaliter* and *civiliter*. The latter alone is that referred to as furnishing the reason for the (448) distinction. The whole force of the argument consists in the necessity for responsibility on some one for lawless acts, in order to prevent their perpetration; and the inference is thence drawn that the responsibility must be thrown on the master, as there is none on the slave. But it must be perceived upon further consideration that the argument fails, since the slave, like the free servant, is subject *criminaliter*, when the act which is injurious to another amounts to a public offense, as is the case in respect to trespasses. Moreover, for the very reason that slaves are not liable for damages, our law renders them summarily punishable corporally in many instances in which free persons are not indictable. In restraint of wrongs by slaves, therefore, there is that most powerful consideration of responsibility personally, even to a greater degree than in the instance of free persons, in respect, at least, of minor offenses, and in equal degree in respect to all others; and that is, surely, the most effectual protection both of the public and individuals from injury. But passing by that and looking to the responsibility of the party alone for the private injury, it seems very manifest that the difference in that respect between an hired and an enslaved servant ought not to have the effect attributed to it. For, in general, the pecuniary responsibility of menials, though so by contract, is but nominal, and, in cases of aggravated injuries, it is altogether inadequate. The rule at common law could not have been founded on such a responsibility, for it would most commonly be merely illusory. The true ground of the doctrine of the irresponsibility of the master for the trespasses of his servant is that before adverted to, which is, that for acts wanton or willful of one person, another shall not be liable, though the former is the servant of the latter and engaged in his business at the time; for they are not acts done by the direction of the master, or with his assent, or in the due course of the servant's employment. It was never (449) argued on any other ground against the master in England, than the one that the servant must or might be presumed

to act by the master's orders, if at the time he was engaged in his master's employment. And that is the very point that was ruled in the negative in *McManus v. Crickett*, when the servant was driving the defendant's carriage, either after he had set him down or when he was going for him. This same reason applies as directly and cogently to the question of a master's liability for the trespass of his slave. It cannot turn upon the irresponsibility of the slave, for that would extend equally to his acts, when he was not as when he was engaged in the master's business; in the former of which cases the instructions to the jury imply that the master would not be liable.

Indeed, the contrary could not be held, unless upon the ground, as mentioned by *Chief Justice Taylor* in *Campbell v. Staiert*, 6 N. C., 389, that one is bound to keep up his slaves, as he is his beasts, to prevent their going on the premises of another—a doctrine as abhorrent to the feelings as it is contrary to the usages of the country. If a negro leaves his master's plantation without a permit, he may be taken up and punished; but the owner is not compelled either to keep him always in his presence or in close custody, in order to avoid being liable for his acts. This was distinctly held in the case just cited; and although it is not so stated in the report, that case was like the present, according to my recollection, in nearly all its circumstances, and the decision was intended and considered to be upon the broad principle that the master was not liable for the trespass of his slave, of which he was ignorant and to which he did not subsequently agree. Indeed, *Judge Daniel* expressly puts the case on the point that, although the slave was in his master's employment, the master was not liable, because the servant willfully committed the act, that is, without the direction of the master. That is the true criterion of the mas-
(450) ter's responsibility: whether he was, or was not, the cause of the trespass, by expressly ordering it or subsequently sanctioning it; and not whether the person injured can or cannot have an action against the servant. If it turned on the latter ground, the owner would be liable although he were present forbidding the servant and doing all he could to prevent him from doing the wrong. In fine, it would bind the master to answer in damages for all the acts of a bad negro, upon the presumption of an authority to commit them; a presumption which, as it seems to us, cannot be drawn from the relation of master and servant, in reference to one kind of servant more than to another. It is the misfortune of one who is injured in his person or property by another, that he cannot

obtain adequate pecuniary satisfaction; but the misfortune is no greater when the wrongdoer is a slave than when he is any one else who has no property. That he is not able in either case to have such redress against the perpetrator of the wrong affords no reason why he should recover from one who is as innocent as himself.

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

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(451)

KELSEY & BRIGMAN v. RESI JERVIS.

Where a petition is filed for a *certiorari*, upon the ground that a judgment has been improperly rendered by default in the court below, the petition must set forth, not only an excuse for the *laches* in not pleading, but also a good defense existing at the time when he ought to have pleaded.

APPEAL from the Superior Court of Law of YANCEY, at Spring Term, 1847, *Dick, J.*, presiding.

This was a petition for a writ of *certiorari*, in which the petitioner set forth that he had been sued in the County Court in an action of debt, and that, knowing it was not just, and thinking it was not legal that he should pay it, he spoke to an attorney of the court, who entered an appearance for him, but that afterwards, owing to some misunderstanding between his attorney and the other party, the attorney declined appearing on either side, in consequence of which a judgment by default was taken against the petitioner; that he had been misled by the course the cause had taken, and it had not on that account gone off on its merits. He therefore prayed for a writ of *certiorari* to bring up the transcript of the record of the case to the Superior Court. The writ was granted, and the case coming on to be heard upon the petition and affidavit accompanying the same, in the Superior Court at the Spring Term, 1847, it was ordered that the judgment by default should be set aside, with leave to the petitioner to enter his pleas and have the cause placed on the trial docket; and from this order the plaintiff appealed to this Court.

Gaither and *Francis* for plaintiff. (452)
J. W. Woodfin for defendant.

BATTLE, J. The only question presented on the record which we deem it necessary to consider is whether the petition for the

writ of *certiorari* set forth sufficient matter to entitle the defendant to the benefit of that remedy. A writ of *certiorari* has been allowed in certain cases as a substitute for an appeal, but it is not, like an appeal, a matter of right of which a party may avail himself for the mere purpose of delay. It has also been allowed where a judgment has been taken in the County Court by default, and upon it the judgment has been set aside and the defendant allowed to plead, but that can never be done unless the party show two things: first, an excuse for the *laches* in not pleading, and, secondly, a good defense existing at the time when he ought to have pleaded. *Betts v. Franklin*, 20 N. C., 602. In the case before us we need not inquire whether the defendant has shown a sufficient excuse for his *laches* in not pleading, because we are clearly of opinion that he has failed to show that he had a good defense at the time when he ought to have pleaded. The general allegation that, knowing it was not just, and thinking that it was not legal that he should pay the debt for which he was sued, he had employed an attorney to defend the suit, and that the cause "had not gone off on its merits," is certainly insufficient for that purpose. The defense, whatever it is, must be so set forth in the petition that the judge sitting at chambers, or the court to whom the application for the writ is made, may see that it is *prima facie* a good one, for if it appear to be otherwise the application ought to be refused. *Dougan v. Arnold*, 15 N. C., 99. The defendant in this case having failed to show in this petition what his defense was, the judge ought not to have granted the writ of *certiorari* in the first instance, but having done so, the Court to which the transcript of the record was returned ought to have dismissed it,
(453) instead of making the order complained of.

That order must, therefore, be reversed, and the same be certified to the Superior Court, in order that the plaintiffs may have their proper remedy against the defendant and the sureties to his *certiorari* bond.

PER CURIAM. Ordered accordingly.

Cited: Baker v. Halstead, 44 N. C., 44; *Lunceford v. McPherson*, 48 N. C., 177; *Rule v. Council, ib.*, 36; *McConnell v. Caldwell*, 51 N. C., 470; *Pritchard v. Sanderson*, 92 N. C., 42.

DEN ON DEMISE OF S. FLEMMING v. BASIL DAYTON.

1. A judgment confessed by a third person, to satisfy a fine and costs imposed on one convicted of an offense, is regular and proper.

2. But an execution upon such a judgment can only issue against the person who has confessed the judgment, and not against him jointly with the person against whom the fine and costs were awarded, and an execution issuing against them jointly is void, and a sale under it conveys no title to the purchaser.

APPEAL from the Superior Court of Law of YANCEY, at Spring Term, 1846, *Pearson, J.*, presiding.

This was an action of ejectment for a tract of land sold under two executions against the defendant and one Alfred Keith, and purchased by the plaintiff's lessor. On the trial it was admitted that the defendant was in possession of the land sued for, and the lessor rested his case, after showing the judgments, executions and sheriff's deed to himself. The judgments appeared to have been confessed by the defendant, Dayton, for the fine and costs of two indictments against Alfred Keith, (454) in which he was convicted and sentenced to pay a fine of $5 and the costs in each case, and for which he was ordered into custody until they should be paid. The executions were issued jointly against both Keith and the present defendant, Dayton.

The defendant's counsel contended that the judgments confessed by him were irregular and void, because he was not brought into court by any process; but if that were not so, the judgments were several, and the executions, being joint against both Keith and Dayton, did not conform to them, and consequently the sheriff's sale under the executions were void and did not convey any title to the purchaser. The presiding judge was of opinion that the latter objection was good, and the lessor of the plaintiff thereupon submitted to a judgment of nonsuit and appealed to this Court.

Avery and *N. W. Woodfin* for plaintiff.
Gaither for defendant.

BATTLE, J. The judgments confessed by the present defendant, Dayton, although there was no process to bring him into court, were regular and proper. *S. v. Lane*, 23 N. C., 264. But they were not connected with those against Keith, so as to make them joint against both. They were, indeed, given and accepted by the State as a payment of those against Keith, for which he was ordered into custody until the fine and costs which were adjudged against him should be paid. He could be discharged

by the consent of the State by payment of the judgments or by taking the oath for the relief of insolvents. *S. v. Johnson*, 2 N. C., 293. The State, by its proper officer, agreed to accept the judgments confessed by Dayton as a payment or satisfaction of those against Keith, in order that he might be discharged from custody. They were judgments against Dayton
(455) alone, and the executions issued upon them should have been against him only. Not having been so, the executions were irregular and void, and the purchaser of the land sold under them acquired no title by his purchase. *Dobson v. Murphy*, 18 N. C., 586; *Blanchard v. Blanchard*, 25 N. C., 105; *Collais v. McLeod, ante*, 221.

PER CURIAM. Judgment affirmed.

JOHN INGRAM v. EZEKIEL DOWDLE.

A sale of land by a trustee under a deed of trust, made for the purpose of satisfying debts secured by the deed, is governed by the "act to make void parol contracts for the sale of lands and slaves."

APPEAL from the Superior Court of Law of MACON, at Spring Term, 1848, *Battle, J.*, presiding.

This was an action of *assumpsit* for $210, being the price of a tract of land which Alfred Hester conveyed to the plaintiff, upon trust to sell and out of the proceeds pay certain debts mentioned in the deed. The plaintiff read the deed of trust in evidence, and offered further to give evidence by parol that he set the land up at auction for ready money, as directed in the deed, and that the defendant was the highest bidder at the sum of $210, and that, before bringing this suit, he tendered to
(456) the defendant a deed for the land in the fee simple, which he refused to accept. But the court refused to receive the evidence, being of opinion that the contract was not binding on the defendant, because it was not in writing, and the plaintiff was nonsuited and appealed.

No counsel in this Court.

RUFFIN, C. J. The counsel for the plaintiff endeavored to take the case out of the "act to make void parol contracts for the sale of lands and slaves," by assimilating a sale by a trustee in a deed of trust for securing and paying debts to a sale under

execution, in which latter case it was held in *Tate v. Greenlee*, 15 N. C., 149, that statute did not apply. But there is no analogy between the cases. The sale under an execution or a decree is that of the law, through its ministers, and upon that ground alone is founded the doctrine of the case cited. But in making his sale a trustee does not act under an authority from the law, but upon his own title simply; and it is immaterial, to this purpose, whether his title be to his own use or that of others. It is said, indeed, that the trustee has no real interest in the subject, but is merely an agent for others; and, therefore, that there are none of those dangers of fraud or perjury against which the statute meant to provide. But if he could be looked on apart from his title, a trustee is not the agent of the law, but of private parties, and the statute wisely applies equally to contracts of sale effected by agents or by the owners themselves.

PER CURIAM. Judgment affirmed.

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(457)

DEN ON DEMISE OF J. C. JACKSON v. ADAM HAMPTON ET AL.

A deed of trust for land, which has no consideration except that the land should be sold for the payment of debts for which the bargainee was bound as surety, will not operate as a bargain and sale.

APPEAL from the Superior Court of Law of RUTHERFORD, at Spring Term, 1848, *Battle, J.*, presiding.

The action was brought against Alley, who was the tenant in possession, and the other defendant, Adam Hampton, was admitted to defend with him. The plaintiff claimed title to the premises as follows: The defendant Alley, being in possession, made a deed to John W. Hampton and Samuel S. Hampton, thus expressed: "Know all men by these presents, that I, John H. Alley, have bargained and sold unto John W. Hampton and Samuel S. Hampton, of, etc., all my right and title to the land which I now live on, lying, etc., to them, their heirs and assigns, to be held by them for the following purposes, to wit, to raise from the said property the sum of $450, due from John H. Alley to the Bank of the State of North Carolina, for which Jonathan Hampton, Sr., is surety, and also to secure them, the said John W. Hampton and Samuel S. Hampton, for their becoming sureties for me, the said John H. Alley, for the sum of $500 to Robert G. Twitty; and so soon as it becomes necessary to

carry this agreement into effect and to raise the money from the sale of the property for the purposes above mentioned, then the said J. H. and S. S. H. are to take the same into possession and expose the same to sale for ready money, giving notice, etc., and out of the proceeds of sale pay," etc. Afterwards
(458) the trustees sold the premises to the lessor of the plaintiff for $500, and conveyed to him by deed purporting to convey the fee, with special warranty.

On the trial the counsel for the defendants raised several objections, among which one was that the deed from Alley passed nothing, because it was not founded upon any pecuniary consideration. The plaintiff then gave evidence that the deed was made in consideration that the other parties, J. W. H. and S. S. H., would become Alley's sureties for the debt to Twitty and to secure them in so doing, and also to secure the payment of the debt to the bank. Thereupon the court instructed the jury that the deed passed the land as against Alley; and the plaintiff had a verdict and judgment, from which the defendant appealed.

Baxter for plaintiff.
Bynum for defendant.

RUFFIN, C. J. Upon the opening of the case it struck us that the deed might be supported by the debts mentioned in it, as a consideration, the securing and paying them being the real motive for making it. But looking further into the point, it is found not to be so. If there were a proper consideration to raise a use in the intended trustees and under the statute to vest the legal estate in them, then those debts would sustain the deed as against creditors and purchasers, as far as its validity depended upon the *bona fides* and adequacy of the consideration on which it was executed. The same would, no doubt, be true, as making those debts a sufficient consideration to support this deed as a contract and equitable assignment of Alley's interest in the land, whatever it might be. But as a valuable consideration they are not sufficient to support the deed as a bargain and sale to the trustees. The deed can only operate as a bargain and sale, if at all, since there is no good consideration of
(459) blood to turn it into a covenant to stand seized, nor any to give it any other operation. But as a bargain and sale it must have a valuable consideration, that is, money or money's worth. Though not expressed in the deed, such a consideration may be averred, and, if established, it will make the deed good. *Mildmay's case*, 1 Rep., 25. Therefore, the evi-

dence was properly admitted here; but, unfortunately, it carried the consideration no further than the deed itself does, and the case is to be determined on the consideration therein expressed. Now, it was held early after the statute of uses, that if one, in consideration that another is bound as surety for him, bargain and sell his land to the latter and his heirs, it will not operate as a bargain and sale. *Ward v. Lambert,* Cro. Eliz., 394. That case was, that one reciting that A. was bound in recognizances and other bonds for him, bargained and sold land to him and his heirs, and it was found that there was no money paid. Whether that was a good bargain and sale was the question; and it was held not, because, in the words of *Walmsley, J.*, "in every bargain and sale there must be a *quid pro quo,* but here the vendor hath nothing for his land, and therefore it is void." Upon the authority of that case the doctrine is laid down as undoubted law by writers of the highest character (Shep. Touch., 222, Preston's Edition; Com. Dig. Bargain and Sale, B. 11); and by no one has it since been questioned. Indeed, it is obvious here that neither the bargainees nor any others were out of pocket one cent for this land—at least, for this bargain for it; nor did any one oblige himself to the bargainor to pay to or for him any sum as the price of it; a peppercorn would have answered; but as not even that was given or secured, no use could arise to the bargainees upon the contract on which the statute could operate, and nothing passed to them in law. The price paid by the lessor of the plaintiff to the trustees was given for their estate in the land and not for Alley's interest; and, indeed, he received nothing from either the trustees or the purchaser, in the view of the law, for (460) his interest, and therefore it continues in him.

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

Cited: Bruce v. Faucett, 49 N. C., 393; *Wiswall v. Potts,* 58 N. C., 189; *Salms v. Martin,* 63 N. C., 610; *Morris v. Pearson,* 79 N. C., 260.

SMITH & SHUFORD v. E. CUNNINGHAM.

Where there is a joint judgment against two defendants in the court below and one only appeals, the appeal will be dismissed on motion, no matter what steps have been taken in the cause after the filing of the appeal.

APPEAL from the Superior Court of Law of BUNCOMBE, at Spirng Term, 1848, *Battle, J.*, presiding.

This action is brought in *assumpsit* and commenced by warrant before a single magistrate against the defendant and one Henderson.

Judgment was rendered by the magistrate against both the defendants, and Cunningham appealed to the County Court, from which the case was transferred under the act of Assembly to the Superior Court. In the latter court the case was continued for several terms, without any motion being made in it on either side, though it appeared that the parties had summoned witnesses, at Spring Term, 1848. The plaintiff moved to dismiss the appeal because it was taken by one of the defendants only. This motion was resisted upon the ground that the plaintiff had waived the objection by their delay and by summoning witnesses in preparation for a trial. The court
(461) sustained the motion and ordered a writ of *procedendo* to issue. From which judgment the defendant appealed to this Court.

Baxter for plaintiff.

N. W. Woodfin and *J. W. Woodfin* for defendant.

NASH, J. That one defendant cannot appeal from a joint judgment has been considered as the settled law of this State since the case of *Hicks v. Gilliam*, 15 N. C., 217. That case has been repeatedly noticed in subsequent cases and approved. That the principle operates in many cases harshly has been felt and admitted, but the principle is considered as sound law. The objection made by the defendant cannot avail him. It was taken in *Dunns v. Jones*, 20 N. C., 291, and overruled. In that case the action was brought in the County Court of Franklin against one Ward and the defendant Jones. The defendants severed in their pleas, but the judgment was joint. Jones appealed and Ward refused to join him. At the ensuing term of the Superior Court, to which the appeal was returned, the plaintiff obtained an order for taking a deposition, and the cause was continued. At the next term of the Superior Court the appeal was dismissed on the motion of the plaintiff, upon the objection

that it was an appeal by one defendant from a joint judgment. His Honor's judgment was sustained by the Court. This case is recognized and approved in the subsequent case of *Stiner v. Cawthorn*, 20 N. C., 640.

PER CURIAM. Judgment affirmed.

Cited: Mastin v. Porter, 32 N. C., 2; *Jackson v. Hampton, ib.*, 604; *Kelly v. Muse*, 33 N. C., 183; *McMillan v. Davis*, 52 N. C., 221.

(462)

RICHARD LEDBETTER ET AL. V. L. O. GASH.

1. The law gives to tenants in common an absolute right to have their land divided.
2. A decree for partition should show on its face the particular land to be divided, and the portion or share of the land to which each of the tenants is entitled.

APPEAL from the Superior Court of Law of HENDERSON, at Spring Term, 1848, *Battle, J.*, presiding.

The petition is filed to procure a division of land. It sets forth that the petitioners are tenants in common in fee simple with the defendant, Gash, in three several tracts of land in the county of Henderson, on the waters of the French Broad River. The boundaries of the tracts are set forth in the exhibits filed with the petition, and the tracts are stated to contain 1,300 acres. The petitioners state that Alford, Augustus, Silas, Asais, Ephraim and Scion Ledbetter, who are infants and sue by their guardian, Charles Stagle, and John and Ann and Joseph Ledbetter and Ambrose Litton and his wife, Elizabeth, are entitled each to one-fifteenth of said land, and Richard Ledbetter and the defendant, Gash, are entitled to or own five-fifteenths in equal moieties. They pray a partition of the land so that each may hold his share or portion in severalty, as it will be to their interest, and pray for the appointment of commissioners for that purpose, according to law. The answer of Gash admits that he is a tenant in common, with the petitioners, of the lands set forth, and in the proportions stated. It denies that it will be to the interest of the parties to have partition (463) made, but states that the land ought to be sold and the proceeds divided. To this purpose he is about to file a petition in equity.

Baxter for plaintiff.
N. W. Woodfin for defendant.

BATTLE, J. The subpœna in this case was returned to the Spring Term, 1848, of the Superior Court of Law for Henderson County, at which term the defendant filed his answer, and the court adjudged there should be a partition as prayed for, and an order was made at the same time appointing commissioners to divide and allot the land, and from this judgment the defendant appealed. The defendant in his answer opposes the granting of the prayer of the petitions, upon the ground that it will be more to the interest of all the parties to have the land sold and the money divided, because of the smallness of one of the tracts and the small proportion which the good land bears to the poor in another. With this objection we have nothing to do. The law gives to the tenants in common an absolute right to have their land divided, and the plaintiffs here were entitled to have their judgment for the appointment of commissioners at the first term to which the defendants was brought in, the tenancy in common being admitted in the answer. His Honor, therefore, committed no error in adjudging that the petitioners were entitled to partition in the lands, and appointing commissioners for that purpose; but there was error in the form of drawing up the judgment. It should show upon its face the particular land to be divided, and the portion or share of the lands to which each of the petitioners and the defendant was entitled, and not leave those inquiries to the commissioners. In this case, according to the petition and the answer, the six minor heirs and the petitioners John, Ann and Joseph Ledbetter and Ambrose Litton and his wife, Elizabeth, are each entitled to one-fifteenth of the lands, and the petitioners
(464) Richard Ledbetter and the defendant, Gash, are entitled, each, to one-sixth part or interest in the whole. The only ground upon which the petition was opposed before us was that the court erred in hearing the case at the first term at which the answer was put in. We have already answered the objection. The proceedings in partition are summary, and made so with a view to save time and expense.

For these reasons the judgment must be reversed and the cause remanded.

PER CURIAM. Ordered accordingly.

Cited: Alsbrook v. Reid, 89 N. C., 153; *Alexander v. Gibbon*, 118 N. C., 804.

DEN ON DEMISE OF HARVEN AND WIFE *v.* HUNTER & SPRINGS.

1. Where a party who was entitled to the possession of deeds merely states on affidavit "that he did not know what had become of the originals, and that he had made due inquiry for them and was unable to obtain them," this is not sufficient to entitle him to introduce copies.

2. In order to authorize one, entitled to the custody of a deed under which he claims, to introduce a copy, it should appear that every place which the law deems its proper repository should be examined, and every person brought forward who by law had been entitled to the possession of the deed.

APPEAL from Special Term of MECKLENBURG, November, 1846, *Pearson, J.*, presiding.

The plaintiffs claim title to the lands in dispute (465) through Thomas Kendrick. They alleged that John Kendrick, the father of Thomas, devised to him and Green Kendrick, his brother, the land in dispute. To show title in John Kendrick the lessors of the plaintiff offered in evidence copies from the register's office of various deeds covering the land, and a similar copy of a deed from Green Kendrick to Thomas Kendrick of his moiety of the devised premises. Mrs. Harven, one of the lessors of the plaintiff, was the only child and heir at law of Thomas Kendrick, who died in 1829 intestate. At the time of his death his daughter, Mrs. Harven, was an infant, and was but seventeen years of age when she married the other lessor of the plaintiff. To entitle themselves to read the copies in evidence, the plaintiffs produced one Smith, who was the son-in-law and executor of John Kendrick, who proved that a few days before his death his testator delivered to him the original deeds, with the request that he would hand them to Thomas Kendrick, which he did, in whose possession they remained to the time of his death. Since then he knew nothing of them. The affidavit of W. Harven, one of the lessors of the plaintiff, was then read. It stated "that he did not know what had become of the original deeds to John Kendrick or of that from Green Kendrick to Thomas; that he had made *due* inquiry for them and was unable to procure them. The admission of the copies was objected to by the defendants, but allowed by the court. Objections to other evidence in the case were made below, but were abandoned here, and the only question submitted to this Court is as to the reception of the registered copies of the deeds.

Avery and *Osborne* for plaintiffs.
Wilson for defendants.

NASH, J. This cause was tried at the Special Term of Mecklenburg, held in the fall of 1846. The case, then, does
(466) not come under the operation of the act of the General Assembly passed at their session begun in that year (chapter 68, section 1), and the question is to be decided by the law as it existed before the passage of that act. The admissibility of such secondary evidence, upon a proper case, is not denied, but it is denied that the plaintiff has entitled himself to it here. In the many cases which have been from time to time ruled in our courts, the sound general rule, that the best evidence which the nature of the case admits of must be produced, has never been lost sight of nor relaxed beyond the manifest necessity of the case, and this necessity must be made clear to the court. The person who claims the benefit of the exception must swear that the higher evidence is not in his power and that he does not know where it is, and its destruction or loss must be proved by the *person* in whose custody it is presumed by the law to be. *Harper v. Hancock*, 28 N. C., 124. His Honor who tried the cause admitted the copies to be read, upon the presumption that, in the absence of the proof to the contrary, the title deeds passed to Mrs. Harven, the heir at law, and the husband was competent to make an affidavit to account for the nonproduction of the originals. Without deciding this question, the objection is as to the sufficiency of the affidavit itself, under the circumstances. The case does not profess to set forth the affidavit itself, but its contents. It states, not that he did not have the deeds in his possession, but simply that the affiant did not know where they were, and that he had made due inquiry for them and was unable to procure them. It may be that his possession is substantially and sufficiently denied, but the affidavit ought to have set out what inquiries he had made, where and of whom, that the court might judge whether they were sufficient. It will be recollected, also, that the plaintiff Mrs. Harven was at the time of her father's death very young,
and was but seventeen when she intermarried with Wil-
(467) liam Harven. If the County Court of Mecklenburg performed their duty, she had a guardian appointed, in whose custody the title deeds of her real property would probably be, and if we are to take the affidavit as true, those deeds may be in his possession still, for it does not appear that he delivered them to the plaintiff, the husband. It is true that in order to show that an original is not in being it is not necessary to prove that every place has been searched where it might possibly be, or every person examined who might, by any possibility, have it in possession; but every place which the law

deems its proper depository ought to be properly examined and every person brought forward who, by law, is entitled to the possession. 2 Steph., 1521. Nothing else ought to satisfy the court, as the introduction of secondary evidence is from necessity, that the ends of justice may not be defeated. As from the case of *Harper v. Hancock, supra,* it must clearly appear that the higher evidence was not within the party's power to produce, we are constrained to say that the copies of the deeds were in this instance inadmissible.

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

Cited: Robards v. McLean, post, 525.

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(468)

WILLIAM V. BIRCH v. HOWELL & ARMFIELD.

Where the principal sum in a promissory note is under $100, but the interest accrued makes the whole sum due on the note upwards of $100, the County Court has jurisdiction of a suit brought upon such note.

APPEAL from the Superior Court of Law of DAVIE, at Spring Term, 1848, *Manly, J.,* presiding.

This was an action of debt commenced in the County Court of Davie, upon a promissory note for $93.91, on which there was due for interest at the time when the writ was issued the sum of $8.21, making the total amount of principal and interest due on the note at that time $102.12. Upon the return of the writ a motion was made to dismiss the suit, because it was alleged to be commenced upon a promissory note for a less sum than $100, contrary to the provisions of section 41, chapter 31, Revised Statutes. The motion was sustained and the suit dismissed, when the plaintiff appealed to the Superior Court, in which a similar motion was made and sustained, and from the orders of dismission the plaintiff appealed to this Court.

Craige for plaintiff.
Clarke for defendants.

BATTLE, J. We think that the court below erred in dismissing the plaintiff's suit. Sec. 40, ch. 31, Revised Statutes, enacts that no suit shall be originally com- (469) menced in the County or Superior Court "for any sum of less value than $100 due by bond, promissory note or liqui-

dated account signed by the party to be charged thereby," and the next succeeding section, to wit, the 41st, makes it the duty of the court, if any suit shall commence therein "for any sum of less value than $100 due by bond, promissory note," etc., to dismiss it. In the court below the *value* of a promissory note seemed to be considered the same as the principal sum due on it, without regard to the interest, and in that consisted the error. By the *value* of a note is meant what it is worth, and that must be both its principal and interest; otherwise, all notes for the payment of the same amount of principal money, whether much, little or no interest is due upon them, will be of precisely the same value. This is certainly not so in fact, and it is not understood to be so in common parlance. This suit, then, having been commenced in the County Court upon a promissory note of greater value than $100, that court had jurisdiction of it, and ought not to have dismissed it, by reason of anything contained in section 41 of the act referred to. But, perhaps, it may be contended sec. 6, ch. 62, Revised Statutes, "concerning the power and jurisdiction of justices of the peace," has taken away the original jurisdiction of the courts over cases of this kind. That section gives to a single justice, out of court, the power to take cognizance of and determine any suit commenced by warrant upon a promissory note, the principal sum due on which is less than $100, though that, together with the interest, may be more than $100; but the section does not expressly, nor by any necessary implication, take away the jurisdiction of the courts, and consequently it remains and becomes concurrent. These principles are fully sustained by the cases of *Griffin v. Inge*, 14 N. C., 358; *McCarter v. Quinn*, 26 (470) N. C., 43, and *Clark v. Cameron*, *ib.*, 161. The judgment of the Superior Court must be reversed.

PER CURIAM. Reversed.

Cited: Ausley v. Alderman, 61 N. C., 216; *Patton v. Shipman,* 81 N. C., 34.

Overruled: Hedgecock v. Davis, 64 N. C., 651.

DEN ON DEMISE OF W. P. WAUGH v. W. RICHARDSON.

1. A grant cannot be avoided upon evidence in ejectment.

2. The granting part of a deed is not avoided by a defect in the exception; but the exception itself becomes ineffectual thereby and the grant remains in force.

APPEAL from the Superior Court of Law of ASHE, at Spring Term, 1846, *Caldwell, J.*, presiding.

The plaintiff claimed the premises under a grant made to Jesse Ray, in 1829, for 3,000 acres of land, as a bounty for erecting iron works, under the act of 1788. The patent describes the land by buts and bounds, which, upon calculation, includes 8,699 acres; and after the description then follow these words, "including within its bounds 5,699 acres of land, which is excepted in this grant." The survey annexed to the grant contains the boundaries set out in the grant and designates the quantity of the land as 3,000 acres, but does not except any part or quantity of the land within the survey. But the plat attached to the survey has laid down, within the exte- (471) rior boundaries of the whole tract, a number of smaller plats, having no description annexed to them, except that within some of them are written "100 acres, 175 acres," and so on.

The defendant alleged that the grant was void, and offered to prove by witnesses that the requisites of the statute had not been complied with in various particulars in entering the land and having it viewed and surveyed. But the court refused to receive the evidence. The defendant then offered witnesses to prove what land it was intended to except, and that such exception included 50 acres which one Campbell had entered before Ray's survey, which was granted to the defendant in 1840. But the court rejected this testimony also.

The defendant then moved the court to instruct the jury that it was incumbent on the plaintiff to show with certainty the land excepted, and that without doing so he could not recover. But the court refused to give such instructions, and informed the jury that the plaintiff was entitled to recover, as the defendant had not shown an elder grant for the land in his possession.

Verdict and judgment for the plaintiff, and the defendant appealed.

Clarke for plaintiff.

H. C. Jones for defendant.

RUFFIN, C. J. There have been a great many cases following those of *Reynolds v. Flinn*, 2 N. C., 106, and *Sears v. Parker, ib.*, 125, and firmly settling the principle there laid down, that a grant cannot be avoided upon evidence in ejectment, notwithstanding the strong and general terms in which the act of 1799 declares them void, if obtained contrary to law. The court was right, therefore, in rejecting the evidence of a violation of the provisions of the act of 1788, since it could not legally impeach the grant. For the same reason the grant
(472) could not be affected by excess of quantity above the 3,000 acres, allowed as a bounty by the act. The case, therefore, depends upon the construction of the grant. Now, that must be made upon its own terms and cannot be altered by evidence *aliunde* of an intention to except particular land, which is in truth not excepted in the deed. The evidence offered for that purpose was, consequently, also properly rejected. Then, what is the legal construction of the grant upon its face? There is no doubt that, but for the exception, it passes all the land covered by the boundaries according to the calls, courses and distances, notwithstanding the quantity so far exceeds that mentioned in it, for the quantity is no part of the description and cannot control a definite description by metes and bounds, which is so well settled as to have become an elementary rule of construction. It follows thence that the question turns exclusively upon the operation of the exception, which is of "5,699 acres, included within the bounds," without specifying any particular portion as constituting the quantity reserved, or any part of it. We think the exception, thus vague and uncertain, must be inoperative and cannot restrain the general terms of the grant of the land according to the description in the patent. A grant of "5,699 acres, included in a county, or included within certain boundaries covering 100,000 acres," would be void for the uncertainty of the subject of the grant. So, when the grant clearly identifies the thing granted, it must pass all of it that is not properly and sufficiently excepted. The granting part of a deed is not avoided by a defect in the exception, but the exception itself becomes ineffectual thereby, and the grant remains in force. Such, we hold, to be the law of this case according to the terms of the patent. There is nothing in the plat and survey annexed to it which can aid the construction, supposing they could have the effect in any case of
(473) extending the sense of plain words in the body of the grant; for, in fact, the grant goes beyond the description in the survey in introducing an exception at all; and the whole

figure in the plat formed by the lines called for in the survey is occupied by smaller diagrams, in some of which there are numbers of acres set down, but there is no clew given therein to the inquiry, Which diagrams represent the part or parts excepted? These circumstances, together with the disregard of the enactments regulating the proceedings on entries for iron works, alleged by the defendant, may furnish sufficient grounds for impeaching the grant in another proceeding.

But in this action the law is that the grant is to be received as valid; and we think it is to be read as if there were no exception in it, since the exception as expressed is so vague as not to identify the part excepted, and is therefore ineffectual.

PER CURIAM. Judgment affirmed.

Cited: McCormick v. Monroe, 46 N. C., 14, 16; *Melton v. Monday*, 64 N. C., 296; *Robeson v. Lewis, ib.*, 738; *Gudger v. Hensley*, 82 N. C., 484; *Dugger v. Dickerson*, 100 N. C., 11; *Patton v. Educational Co.*, 101 N. C., 411; *Blow v. Vaughn*, 105 N. C., 204; *Brown v. Rickard*, 107 N. C., 644; *Mfg. Co. v. Frey*, 112 N. C., 161; *Hemphill v. Annis*, 119 N. C., 519; *Wyman v. Taylor*, 124 N. C., 430; *Lumber Co. v. Cedar Co.*, 142 N. C., 422.

R. J. ALLEN v. MARVEL MILLS.

Under the acts of Assembly establishing the county of Polk, connected with the act of 1836, Rev. St., ch. 31, sec. 39, a citizen of the county of Polk has no right to institute a suit in the Superior Court of Rutherford County against another citizen of Polk, and on plea the suit must be dismissed.

APPEAL from the Superior Court of Law of RUTHERFORD, at Spring Term, 1848, *Battle, J.*, presiding.

The writ is in case, and was issued from the office of (474) the Superior Court of Rutherford to the sheriff of Polk, by whom it was served on the defendant. Upon its return the defendant filed a plea in abatement, alleging that neither the plaintiff nor the defendant were residents of the county of Rutherford, but before and at the time of issuing said writ "he, the said plaintiff and this defendant were and from thence hitherto have been and still are residents of the county of Polk." To this plea there was a general demurrer. On argument, the court adjudged "that the demurrer be overruled and the defendant go without day." The plaintiff appealed to this Court.

N. W. Woodfin for plaintiff.
Baxter for defendant.

NASH, J. The controversy arises under the act of the General Assembly, passed in the year 1846-'47, for establishing the county of Polk. By the act of 1836, Rev. St., ch. 31, sec. 39, it is provided, among other things, "that all actions on the case shall be brought to the court of the county where both parties reside; and where the parties live in different counties, shall be brought to the court of either county, at the option of the plaintiff; and when any suit or action shall be brought otherwise than is herein directed, such action or suit may be abated on the plea of the defendant." The demurrer admits that both the parties, at the time the writ was issued, lived in the county of Polk, and the judgment of the court was clearly right, unless the act of 1846 has otherwise directed. In other words, the Superior Court of Rutherford has no jurisdiction of the case unless that act gives it. It is not pretended that any other does. Let us examine this act, then, and see what is the jurisdiction conferred by it on the Superior Court of Rutherford, as to the question before us. By chapter 26, 1846, the county of Polk is established and its boundaries prescribed, and by the supplemental act, ch. 29, its rights, privileges and immunities
(475) are secured to it. By the first section it is invested with all the rights, privileges and immunities of other counties in the State. By section 4 a Court of Pleas and Quarter Sessions is established, the times and place of holding its terms designated, and by the fifth its jurisdiction is pointed out. It declares that county courts "shall possess and exercise the same power, authority and jurisdiction as is possessed and exercised by the county courts in this State, and shall have exclusive jurisdiction of all crimes committed within the limits of said county, until a Superior Court shall be established for said county; and all suits at law now pending in the county courts of Henderson and Rutherford, wherein the citizens of Polk County are both plaintiffs and defendants, and all indictments in the county courts of Rutherford and Henderson, against citizens of Polk County, shall be transferred to the County Court of Polk, and all appeals from the County Court of Polk shall be sent to the Superior Court of Rutherford, where the plaintiff resides in that portion of Polk County taken from Rutherford, and to the Superior Court of Henderson, where the plaintiff resides in that portion of the county taken from Henderson." So far, then, as the police of the county, and the enforcement

and protection of the civil rights of the citizen and the punishment of crime of an inferior character and most frequent occurrence are concerned, the organization of the county was complete. By the act of 1836, ch. 31, secs. 5 and 40, the Courts of Pleas and Quarter Sessions "have full power and authority to determine all causes of a civil nature whatever at the common law within the county, where the original jurisdiction is not by any act of the General Assembly confined to a single magistrate or to the Supreme or Superior Courts." The original jurisdiction of the County and Superior Courts in civil matters is concurrent without any regard to the amount claimed, where it is not confined to a single magistrate, and an action can be brought in the County Court to recover any amount of money for which it can be brought in the Superior (476) Court. This jurisdiction is conferred, by the above section of the act of 1846, on the county of Polk, with the right of appeal, as pointed out in it.

The action in this case could have been brought in the County Court, and although no Superior Court was then organized, the suitors in it were not deprived of the right of having their cases revised. Provision is expressly made, securing the right of appeal, and at no greater costs as to the circumstances than existed before the erection of Polk County. It is evident it was not the intention of the Legislature to give to the Superior Court of Rutherford any but an appellant jurisdiction in cases of a civil character arising in Polk County, where the plaintiff resided in the latter. In other words, they did not intend to alter the general law governing the bringing of actions, as regulated by the act of 1836. Section 6 of the act of 1846 is, however, conclusive upon the question. No Superior Court had been organized for the county of Polk, and provision was to be made for the punishment of those higher offenses the jurisdiction over which, by the general law of 1836, is confined to those tribunals. Section 6 accordingly provides "that all criminal offenses which may be committed in the county of Polk, which are cognizable only in the Superior Court of Law, shall be and continue under the jurisdiction of the Superior Courts of Law of Rutherford, where the offender resides in that portion of Polk County which was taken off from Rutherford County, until a Superior Court shall be established for the county of Polk." It is thus seen that the Legislature, in this matter, did not act unadvisedly or without a due attention to the convenience and interest of the citizens of Polk County. In every case where the law would be enforced within the county, pro-

vision is made for its due execution, at the same time securing to suitors the same right of having their cases examined before a Superior Court as was enjoyed by those of all other (477) counties. And in those cases, when by the general law they could not be so examined into, provision is made for a resort in the first instance to a tribunal without the county, and in giving *this* original jurisdiction to the Superior Court of Rutherford they restrict it to criminal offenses and to those which, alone, are cognizable in the Superior Courts, and thereby denying it, impliedly, in civil cases.

PER CURIAM. Judgment affirmed.

THOMAS R. MILLER v. J. J. BATES.

A justice of the peace before whom an attachment is returnable has no right to refer the papers to the County Court, unless it appears that the plaintiff made oath before him that the garnishees owed to the defendnat some debt, or had property of his in their possession, or that they made such a statement of facts that the justice could not proceed to give judgment thereon. The process returned to the County Court, without some of these matters being certified by the justice, should be dismissed.

APPEAL from the Superior Court of Law of HENDERSON, at June Term, 1846, *Battle, J.*, presiding.

The plaintiff sued out an attachment against the defendant returnable before a single justice, and caused several persons, among whom was George Clayton, to be summoned as garnishees. They accordingly appeared before the justice, who, after examining them upon oath, made the following endorsement upon the attachment: "On examination of the within at- (478) tachment before me, Lincoln Fulton, an acting justice of the peace for the county of Henderson, the plaintiff and garnishees being present and having been examined on the garnishment on their oath duly administered, and declaring thereon that the plaintiff in this attachment can have no claims whatever upon any amount in their hands due James J. Bates, and I from examination rendered judgment against the plaintiff for costs, took his affidavit according to law, and transmit the same, together with the original attachment and all the papers thereto annexed, to the Court of Pleas and Quarter Sessions for Henderson County, that due justice therein may be rendered according to law. I have directed the officer to notify the parties that the same will be returned to the next County Court."

There was also an endorsement by the justice of his judgment against the plaintiff for costs, though he "found the debt of the plaintiff to be just for the sum of about $50." And another endorsement of a levy of the sheriff in these words, "Levied this attachment on James J. Bates' interest in one lot in Hendersonville and improvements, the lot on which George Clayton now lives, at the suit of Thomas R. Miller."

The attachment, with the proceedings thereon and other papers, were returned to the next County Court, from which they were transferred by virtue of the act of 1844, ch. 12, to the Superior Court, and, at the Special Term thereof in June, 1846, they were dismissed, upon the motion of the counsel for the garnishees, and the plaintiff appealed.

Francis for plaintiff.
Baxter for defendant.

BATTLE, J. We cannot see how the court below could have done otherwise than dismiss the attachment as having been improperly returned by the justice of the County Court. The "act authorizing attachments to issue for the recov- (479) ery of debts, and directing the proceedings thereon," 1 Rev. St., ch. 6, prescribes, in section 14, the mode of proceeding against garnishees in attachments returnable before a single justice. Among other provisions, it declares that "when any garnishee shall on his or her garnishment deny that he or she has in his or her possession any property of the defendant, and the plaintiff in such attachment shall on affidavit suggest to the justice that such garnishee owes to or has property in his or her hands belonging to the defendant, or when any garnishee shall on his or her garnishment make such a statement of facts that the justice before whom such garnishment shall be made cannot proceed to give judgment thereon, then, in either of these cases, the justice shall return the attachment and other papers to the next County Court to be held for his county, and the court shall order an issue or issues to be made up and tried by a jury, and the court shall give judgment on the verdict of the jury as in other cases." Now, in the case before us it does not appear that the plaintiff suggested on oath either of the things which authorized the justice to return the proceedings to the County Court. The justice says merely that he "took the plaintiff's affidavit according to law," but he does not state that the plaintiff swore that the garnishees owed to the defendant any debt, or had any property of his in their hands or that they made such a statement of facts that the justice could not proceed to give

judgment thereon. He, therefore, apparently, had no authority to return the attachment and accompanying papers to the County Court, and the garnishees had the right to have the proceedings dismissed as to them; particularly as it does not appear that the plaintiff, after the attachment and papers were returned to court, ever moved to have an issue made up to try the question of their indebtedness to the defendant or of their having any property belonging to him in their hands. Nor could the
(480) attachment be sustained before the court by virtue of the levy on the land of the defendant in the possession of George Clayton. It does not appear that the lot was shown, or offered to be shown, by the plaintiff to belong to the defendant; but if that had been done, the justice did not condemn the same for the satisfaction of the plaintiff's debt, as he was required by section 20 of the before-recited act to have done before he returned the attachment to the County Court. Therefore, neither the County Court nor the Superior Court, to which the cause was transferred, had jurisdiction of it, and the latter court did right in dismissing it.

PER CURIAM. Judgment affirmed.

D. F. RAMSOUR AND WIFE *v.* JOSHUA HARSHAW.

On an appeal from the judgment of a justice of the peace, if the defendant does not plead, so that an issue may be made up, the court may render judgment either with or without the verdict of a jury.

APPEAL from the Superior Court of Law of CHEROKEE, at Spring Term, 1848, *Battle, J.*, presiding.

The suit began by warrant before a justice of the peace for $25.85, due by account. From the transcript the case appears to be as follows: The suit was commenced on 5 March, 1845, and the defendant appeared before the justice and "pleaded the statute of limitations"; thereupon judgment was rendered
(481) for him, and the plaintiff appealed to the County Court.

At December Term, 1845, the plaintiff was nonsuited and appealed to the Superior Court; and in March, 1847, the case was submitted to a jury and the plaintiff was again nonsuited; but on his motion the nonsuit was set aside on the payment of costs. At March Term, 1848, a jury was again impaneled to try the issue on the statute of limitations, and while the trial was pending the defendant offered to plead a set-off, but

the court refused to receive the plea, and there was a verdict for the plaintiff. The defendant's counsel then moved in arrest of judgment because there was no issue joined on which a verdict could be given; but the court gave judgment, and the defendant appealed.

J. W. Woodfin and *Francis* for plaintiff.
Edney for defendant.

RUFFIN, C. J. The motion to plead a set-off was properly refused, whether it be regarded as a motion to plead *ab origine* or to add a plea to one before made. Being a motion addressed to the discretion of the Superior Court, the decision there is final. It has been often held so in respect to adding a plea. So it must be when the defendant does not plead in apt time and wishes to do so afterwards. The act of 1794 allows a trial by jury on an appeal from a justice on an issue made up in the County Court, but it directs that the issue shall be made up at the first term, and consequently the defendant, as a matter of right, cannot plead after that term. Upon this ground this Court could not reverse the decision, being on a matter of discretion, whatever we might think of its propriety. But under the circumstances and in that stage of the case the court very properly, in our opinion, refused to admit the plea tendered.

We think, likewise, that the court properly refused to arrest the judgment. The defendant insisted on the stat- (482) ute of limitations before the magistrate, and he entered it on the warrant as "the plea" of the defendant, and although no plea was formally drawn up and filed in the County Court, it is obvious that both parties treated that minute as a plea, on which issue was joined in both the County and Superior Courts. The plaintiff was twice nonsuited, because he was not ready to prove his case on that issue, there being no other, and he was compelled to pay the costs to the defendant in order to get his cause reinstated. The justice of the case, therefore, clearly required judgment to be given on the verdict, as upon an issue joined. But if it be admitted that there was no plea in court, the plaintiff would still be entitled to judgment for the want of a plea. From the nature of the jurisdiction of a justice of the peace, an appeal from him was to all the justices sitting in the County Court for a rehearing in a summary way, like that before had out of court. Such is the course on appeals to the Quarter Sessions in England. Accordingly, our acts of 1777, Rev. Code, ch. 115, 63, expressly provided for a rehearing or determination by the justices of the court without further process,

and in a summary way without a jury. The act of 1794, Rev. Code, ch. 414, directs, indeed, that an issue shall be made up and tried the first court by a jury. But it is obvious there can be no issue made up unless the defendant will tender one by plea, as without a suggestion from him the court cannot know on what point to make up the issue. Then, the question is, What is the proper course when the defendant will not plead? The plaintiff is not thereby to be deprived or delayed of a trial. In strictness we suppose the court might proceed to a summary adjudication according to the course of the common law and that prescribed in the act of 1777. But the practice, we believe, has been to call in a jury in such cases to ascertain the sum due the plaintiff, in the nature of an assessment of the dam-
(483) ages on a writ of inquiry upon a judgment by default.

Admitting the practice not to be founded on any express provision of the statute, yet it seems very proper in itself, as it is in aid of the judgment of the court and violates no principle, but is conformable to the general preference of the law for a trial by jury, either in determining an issue of fact or in ascertaining damages. It cannot be erroneous to impanel a jury in such a case; for if the court could, without a jury, give a summary judgment, there is no harm in adding to the judgment of the court the sanction of finding by a jury. From the provision in the statute for a jury to try an issue joined on an appeal, the power incidentally arises to the court to call in the aid of a jury to ascertain the debt, when there is no issue and the debt is uncertain upon the warrant. It follows that the plaintiff was entitled to judgment, though there was no issue, for if the court was satisfied that the sum of money was due to the plaintiff, there should be judgment for it, whether the court became thus satisfied by force, simply, of the evidence given in court or by that together with the concurring verdict of the jury.

PER CURIAM. Judgment affirmed.

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

(484)

WILLIAM KLINE v. JOHN SHULER.

It is no objection to an action for malicious prosecution that the party was arrested under a warrant having no seal, nor is it necessary in such an action to show that the name of the person who commenced the prosecution was endorsed on the bill of the indictment as prosecutor.

APPEAL from the Superior Court of Law of MACON, at Spring Term, 1848, *Battle, J.*, presiding.

This is an action for maliciously prosecuting the plaintiff and causing him to be indicted for stealing some sheaves of oats from the defendant. Plea, not guilty. On the trial the plaintiff gave in evidence a warrant issued against him for the offense by two justices of the peace, which was not under seal, but only signed by them, and the plaintiff further gave evidence that the defendant made oath that the plaintiff stole the oats, and applied to the magistrate for the warrant; and that the plaintiff was arrested thereon, and, upon examination had, was bound over by the magistrate to court on the charge, and that the warrant and recognizances were duly returned. The plaintiff further gave in evidence the record of an indictment found for the larceny, and his subsequent trial and acquittal thereon, and, also, that the defendant, upon the return of the process to court, appeared as a witness against the plaintiff, and was the only one sworn and sent to the grand jury upon the indictment; and that, pending the indictment, the defendant made a bet with another person that he would convict the plaintiff on the indictment. The counsel for the defendant insisted that the warrant was void, because it was not under seal, and therefore that the defendant could not be held responsible as the prosecutor on that, and that, for that reason, and because the de- (485) fendant was not marked on the indictment as the prosecutor and did not appear to have been a witness on the trial of the plaintiff, there was no evidence that the defendant was the prosecutor of the indictment; and he moved the court so to instruct the jury. The court refused the motion, and charged the jury that the defendant could not avail himself of the want of a seal to the warrant as showing that he did not cause the plaintiff to be prosecuted and indicted for the larceny, and that upon the warrant and record and the parol evidence, if believed by them, the jury might find that the defendant was the prosecutor of the indictment, if they were satisfied therefrom that such was the fact. The jury found for the plaintiff, and the defendant appealed from the judgment.

J. W. Woodfin for plaintiff.
Edney for defendant.

RUFFIN, C. J. If the magistrates had discharged the plaintiff and the action were for maliciously charging the plaintiff with the larceny before them and causing him to be arrested therefor, it is not seen that the defect in the warrant could have protected the defendant. For the charge alleged against the plaintiff was of an infamous offense, and the magistrates had cognizance of it as respected the arrest and examination of the person accused, and by the prosecution the plaintiff would have been prejudiced in his property and character. Upon those grounds it has been often held that after the discharge of the accused this action will lie, if the proceedings, though defective, were maliciously prosecuted without probable cause. *Chambers v. Robison*, Str., 691; *Elsee v. Smith*, 1 Dow. and Ryt., 99. But that is not material here, since the action is for the malicious prosecution of the indictment. Now, the defense is that the defendant was not, in point of law, to be taken as the (486) prosecutor of it, because he was not endorsed as such on the bill and the plaintiff did not prove that the defendant gave evidence against him on his trial. But, clearly, those circumstances do not determine the defendants' liability, as he may have promoted the prosecution and been the cause of it, though not avowedly the prosecutor appearing of record. He is liable if in point of fact the indictment was preferred at his instance. To establish the affirmative, the circumstances that the defendant in the first instance applied for a warrant against the plaintiff for the larceny and caused him to be arrested and bound over, and again attended and went before the grand jury as a witness against him and also made a wager that he would convict him on the indictment, certainly constituted evidence proper to be submitted to the jury. It not only tended to show that the defendant caused the indictment to be preferred, but to most minds it amounts to sufficient and convincing proof. It is plain that the defect in the warrant could not impair its force as evidence to the point now under consideration, namely, the defendant's connection with the preferring and prosecuting the indictment, for whether the warrant be good or bad, it was issued at the instance of the defendant and was the first move in the affair which ended in the indictment for the same charge, and he offers nothing to show that he repented of his agency in making the accusation and separated himself from it before the indictment was sent. However, the sufficiency of the proof is not a question for the court, but was exclusively for the jury,

and was left to them; and our province is merely to say whether the facts amounted to any evidence on which the case could be left to the jury, upon which the opinion of the Court is decidedly in the affirmative.

PER CURIAM. Judgment affirmed.

Cited: Kelly v. Traction Co., 132 N. C., 372.

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(487)

THE STATE v. F. SLUDER.

Notwithstanding the act of 1844, ch. 12, declares that there shall be no jury trials in the County Court of Buncombe, yet the County Court there still retains its original jurisdiction in bastardy cases, and if the defendant tender an issue the case must be removed to the Superior Court by *certiorari* that the issue may be tried.

APPEAL from the Superior Court of Law of BUNCOMBE, at Fall Term, 1847, *Settle, J.*, presiding.

The defendant was charged in Buncombe County with being the father of a bastard child, and was bound over to the County Court. He appeared and moved to be discharged upon the ground that the court had no jurisdiction of the case. But the court referred the motion, and made an order that the defendant should at certain stated days pay certain sums for the maintenance of the child, and also enter into bond in $200 with sufficient sureties for the performing of the orders of the court in the premises, and to indemnify the county against any charges for the maintenance of the bastard, from which the defendant appealed.

On motion of the solicitor of the State, the Superior Court dismissed the appeal and awarded a *procedendo* to County Court to carry into effect the orders of that court, from which the defendant again appealed to this Court.

Attorney-General for the State.
J. W. Woodfin for defendant.

RUFFIN, C. J. The question arises upon Laws 1844, ch. 12. It enacts that it shall not be lawful for the Courts of Pleas and Quarter Sessions for Buncombe, and other enumerated counties, to try any causes where a jury may be neces- (488) sary, nor to summon a jury to attend the courts. It further provides that all suits in those counties, whether civil or

criminal, shall originate in the Superior Courts, and all appeals from justices of the peace in civil cases and all recognizances by them taken in criminal cases shall be returned to the Superior Court; and that when a will is brought into the County Court for probate and is contested, a transcript of the proceedings, together with the original will, shall be sent to the Superior Court and the issue to be tried there; and that a certificate of the decisions and the will shall be remitted to the County Court and there recorded as evidence of the probate of the will or its rejection. A similar provision is made as to caveats of entries of land. Taking the act of 1844 in connection with the general laws regulating the local police, as administered in the county courts, and particularly with the bastardy act, it seems to the Court that, in the state in which this case was in the County Court, the jurisdiction of that court over it is not ousted. By the general act, Rev. St., ch. 12, the County Court is the tribunal to make the orders for the allowances necessary for the maintenance of a bastard child, and taking bond and security for the performance of the orders and indemnifying the county from charge therefor. It is true, an issue is allowed to the person charged, and an appeal is given to either side. But it has been the uniform course in cases of that kind, as in those of contested wills and road cases, after a decision in the Superior Court, to remit the cause with a certificate of the decision and directions to the County Court to carry it into effect. That is obviously the more convenient and proper method of proceeding in all those cases, and in construing the act of 1844 it must be assumed that this course was understood by
(489) the Legislature. These observations being premised, it seems to follow that the jurisdiction of a bastardy case remains exclusively in the county courts mentioned in that act, until the party charged deny that he is the father and an issue be made up whether he be or not. In the first place, it is to be remarked that when cases are to go immediately to the Superior Court the provision is made in explicit terms; and that this case does not fall within the words which transfer the jurisdiction to the Superior Courts. It is not an appeal from a justice of the peace, nor is it a civil suit that can originate in the Superior Court, nor, as was stated in *S. v. Carson*, 19 N. C., 368, is it a criminal case, but only a matter of police. Then, as no jurisdiction of this subject is directly conferred on the Superior Court, and, as far as the powers left to that court can extend, it must be exclusively exercised there. But it is said, as the defendant has a right to an issue to be tried by a jury, and as the County

Court, by the expressed words of the act, cannot have a jury, that court at all events cannot retain the jurisdiction of this subject. That inference, however, is inadmissible, if any other construction be possible, because we have already seen that the words of the act give no jurisdiction to the Superior Court, and, then, the effect would be that neither court could take cognizance of the case. But the duty of the Court is to receive the act in such a sense as will leave some court open to the citizen in this as in other cases, and to mould the proceedings in such a way as will ordinarily afford the most direct and cheapest remedy to both the public and the accused. Now, the difficulty suggested in respect of the trial of an issue can only arise when the party asks for one. If, therefore, this party had been sent up to the Superior Court, instead of the County Court, what end would it have answered? None, whatever, but the idle one of his being immediately sent down to the inferior court, in order there to have the proper bastardy orders passed and bonds taken. It would be simply a case of doing and undoing to no purpose. It is much better that the case should go to the (490) County Court in the first instance for the proper orders and bond, because there everything that is necessary can be done, unless the accused should interpose an application for an issue, and even then those orders must ultimately be made there. Until an issue there is not a case to be tried by a jury. But it is asked, What is to be done if the party tender an issue? It would be sufficient to say that it is not necessary to determine that point, as it has not arisen in this case. But as it has a bearing on the interpretation of the act, it seems proper to consider it. It may be admitted that, perhaps, it would have been better, in that event, if the act had expressly provided for transmitting the case for trial in the Superior Court on a transcript from the County Court, as is done in respect of caveats of wills and entries. But the omission of a clause of that kind ought not to defeat the accused of his right to deny that he is the father of the child, nor defeat the county of the right to have the issue tried somewhere, so that, if found against the party, he may be compelled to maintain his own offspring. No doubt, the issue cannot be tried in the County Court, because the power of trying a jury cause is expressly prohibited to that court; then it can only be tried in the Superior Court; and, as the statute provides no method for taking the case into that court, it is only by the common-law writ of *certiorari* that it can be done, and, *ex necessitate*, it must be done in that way. At

common law not only convictions are *re-examined* on that writ, but causes pending in inferior courts are brought up to higher courts for trial in order that there may be more sure and speedy justice. Bac. Abr., *Certiorari*, A.; 2 Hale P. C., 210; 4 B. Com., 320. This latter use of the writ has not prevailed in this State, because our law has provided the different method of appeal for obtaining a trial on the merits in the Superior
(491) Court. *Street v. Clark*, 1 N. C., 109. But it has been frequently used here whenever requisite to prevent the failure of justice, as in cases of persons affected in interest by *ex parte* proceedings (*Perry v. Perry*, 4 N. C., 617), or in other cases where an appeal lies. *Brooks v. Morgan*, 27 N. C., 481. And while at common law *certiorari* laid in every case (in which it is not expressly taken away) in order to prevent a partial and insufficient trial, and may be applied for by either the sovereign or the defendant, it cannot but be that it must be extended here to a case like this, in which there cannot be a trial at all by any other means.

Judgment affirmed; and this will be certified to the Superior Court, that a *procedendo* may issue thence to the County Court.

PER CURIAM. Ordered accordingly.

Cited: Fox v. Wood, 33 N. C., 214; *S. v. Jacobs*, 44 N. C., 220; *Harris v. Hampton*, 52 N. C., 598; *Buchanan v. McKenzie*, 53 N. C., 97.

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(492)

SILAS McNEELEY v. SAMUEL HART.

1. Articles of personal property, sold under execution, must be actually present, but they need not be literally in the sheriff's hands or directly under his hammer; it is sufficient if they are in such a situation that the bidders can see them and have an opportunity of examining their quality and value.

2. Upon the facts stated in evidence, the court should instruct the jury, if they believed the evidence, as a matter of law, that such facts did or did not make the property legally present. The court should not leave that conclusion to the jury as a matter of law.

3. The fact that an article of personal property had been previously, on the same day, shown to the bidders, cannot avoid the effect of their absence at the time and place of the sale.

4. The sale must be conducted in such a manner that every person who may come up before the article is knocked down by the auctioneer may see and examine it, so as to enable him to become a bidder, if he choose.

APPEAL from the Superior Court of Law of IREDELL, at Spring Term, 1848, *Manly, J.*, presiding.

This was an action of trover for the conversion of a quantity of corn and oats. The defendant pleaded not guilty, and, upon the issue thereon joined, the case was tried at Iredell on the last circuit.

The plaintiff claimed title to the property in question under a conveyance which, it was admitted, was void as against creditors and purchasers. The defendant claimed by purchase at a sheriff's sale, made subsequently to the conveyance to the plaintiff, under certain executions against the vendor. It was contended for the plaintiff that the sale made by the sheriff was irregular and void, and that, therefore, the defendant was not such a purchaser as could avoid the plaintiff's conveyance.

The testimony to show this was that the corn was sold (493) in a field only a part of which was visible from the point where the sale was made, and that the oats were sold by the bundle, lying in a barn upon the premises, at the distance from the place of sale of several hundred yards, according to one witness, or of a quarter of a mile, according to another. There was further testimony that other property was sold on the premises upon the same occasion, and that the bidders had had an opportunity of examining the oats and corn, which had been pointed out to them.

The court instructed the jury that to make a sheriff's sale of personal chattels valid it was not necessary that the sheriff should have them literally in his hands or under his hammer; it was sufficient if they were present in such a situation that the bidders could have a fair opportunity to inspect and examine them and to ascertain their quality and value. The court then left the validity of the sale to the jury, as a question of fact, and instructed them that if the sale were found to be valid upon the principles above stated, they should find for the defendant; otherwise, for the plaintiff. A verdict was returned for the defendant, and from the judgment rendered thereon the plaintiff appealed.

Osborne for plaintiff.
Clarke for defendant.

BATTLE, J. There can be no doubt that if the sheriff's sale, under which the defendant purchased, were void, the plaintiff was not bound by it. His donor could certainly have taken advantage of it, and he, claiming from the donor and standing in his place, must have had the same right. *Hollowell v. Skin-*

ner, 26 N. C., 165. The question then arises, whether the sale at which the defendant purchased was void. It is attacked upon the ground that the articles sold were not present at the time and place of the sale. The presiding judge held properly that they must be present, and equally so that they need (494) not be literally in the sheriff's hands or directly under his hammer—that it was sufficient if they were in such a situation that the bidders could see them and have an opportunity of examining their quality and value (*Ainsworth v. Greenlee*, 7 N. C., 470; *Smith v. Tritt*, 18 N. C., 241); but he erred in leaving as a question of fact to the jury, what he ought to have decided himself—that if they believed the testimony to be true, the oats, at least, were not present according to the principles which he had so clearly and properly laid down. According to the testimony of one witness, the oats were in a house on the premises, several hundred yards, and according to another, a quarter of a mile from the place where the sale was made. The bidders could not at the moment see them, nor examine their quality and value, and of course were invited to bid in ignorance of these essential particulars. Nor can the fact stated, that the articles sold had been previously on the same day shown to the bidders, avoid the effect of their absence at the time and place of the sale. For that must be conducted in such manner that every person who may come up before the articles are knocked down by the auctioneer may see and examine them, so as to enable him to become a bidder if he choose. To hold otherwise would be to give some of the persons present an advantage over others, and thus prevent that fair and open competition which the law so much desires in sales of this kind. For the error of the judge in failing to instruct the jury on a question of law material to the plaintiff's claim, which was presented by the testimony, there must be a new trial.

This renders it unnecessary that we should consider whether the sale of the corn was valid. Indeed, the facts respecting the sale of that article are not stated with sufficient fullness and precision to enable us to decide that question. The case does not mention whether the corn was standing or lying in heaps in the field when it was sold, whether it was sold all together (495) or by the bushel or other measure, nor how much of the field could be seen by the bidders from the spot where the sale took place. It was not necessary that the sheriff and bidders should have been in the field or immediately at it (*Skinner v. Skinner*, 26 N. C., 175), but they ought to have been in such a situation that they could see the probable quantity and

quality of what they were called upon to buy. These facts may be ascertained upon the next trial, when the Court will be prepared to pronounce the law applicable to them.

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

Cited: Shannon v. Jones, 34 N. C., 208; *Wormell v. Nason*, 83 N. C., 36; *Alston v. Morphew*, 113 N. C., 461; *Barbee v. Scoggins*, 121 N. C., 143.

WILLIAM W. BRADHURST *v.* A. H. ERWIN.

A writ was executed on A and B and the sheriff took from them a bond with a condition "that if the above bounden A and B do make their personal appearance before the Judge of the Superior Court of Law, etc., then and there to answer, etc., and there to abide the judgment of the said court, and not depart the same without leave first had and obtained, and if the securities shall well and truly discharge themselves as special bail of the said A and B, then the obligation to be void," etc. Afterwards a *nol. pros.* was entered as to A and a judgment obtained against B: *Held*, that this bond did not constitute A the bail of B.

APPEAL from the Superior Court of Law of BURKE, at Spring Term, 1848, *Battle, J.*, presiding.

This was a *scire facias* issued by the plaintiff to sub- (496) ject the defendant as the bail of one J. J. McElrath, and was submitted to the court upon the following case agreed: The plaintiff sued out a writ of trespass on the case in *assumpsit* against the present defendant and J. J. McElrath, which was delivered to the Sheriff of Burke County, who executed it on both the defendants therein and took from them a bond payable to himself for the sum of $800, with the condition "that if the above bounden J. J. McElrath and A. H. Erwin do make their personal appearance before the Judge of the Superior Court of Law to be held for the county of Burke at the courthouse in Morganton on the seventh Monday after the fourth Monday in March next, then and there to answer William W. Bradhurst of a plea of trespass on the case to the plaintiff's damage $400, and there to abide by the judgment of said court, and not depart the same without leave first had, and if the securities shall well and truly discharge themselves as special bail of said McElrath and Erwin, then this obligation to be void; else to remain in full force and virtue." This bond was assigned by the sheriff to the plaintiff in the usual manner. The writ was returned to the Spring Term, 1840, of the Superior Court, at which the defend-

ants appeared by their attorneys and entered their pleas to the action. Afterwards, at the Fall Term, 1845, of said court, a judgment of nonsuit was given against the plaintiff, which, on his motion, was set aside as to McElrath, but not as to the present defendant, Erwin, and at a subsequent term, to wit. Spring Term, 1846, of said court, the plaintiff obtained judgment against the said McElrath for the sum of $413.32, of which sum $296.46 was principal, to bear interest from 21 April, 1846. Upon this judgment a *ca. sa.* was issued against the defendant therein, and returned "Not to be found"; whereupon the present *sci. fa.* was sued out upon the above-mentioned bond, to subject the present defendant, Erwin, to the payment
(497) of the said judgment against the said McElrath as his special bail. Upon the return of the *sci. fa.* the defendant appeared by his attorney and pleaded *"nul tiel record"* and *"non est factum."* If the court be of opinion that the plaintiff is entitled to a judgment on his *sci. fa.* against the defendant, Erwin, then a judgment for the sum of $413.32, with interest on $296.46 from 26 April, 1846, until paid, is to be entered for him; but if the court be of opinion that the defendant, Erwin, cannot be subjected as bail for the said McElrath, then a judgment of nonsuit is to be entered. The judge presiding in the court below was of opinion that the defendant, Erwin, could not be subjected as bail for McElrath, and gave a judgment of nonsuit, from which the plaintiff appealed.

N. W. Woodfin for plaintiff.
Avery for defendant.

BATTLE, J. We concur in the opinion given upon the case agreed by the presiding judge in the court below. The plaintiff's counsel has contended that, as the writ in the original suit was against both McElrath and Erwin, and they, upon being arrested, gave a joint bond to the sheriff for their appearance to answer the action, they thereby became mutually bound as special bail for each other, and that consequently Erwin can be subjected in this manner as the bail of McElrath. But that cannot be so, because the obligation of Erwin as a principal is very different from what would be his obligation as special bail for the appearance of his codefendant McElrath. As principal, he was bound to appear, answer the action and stand to and abide the judgment of the court. From that he was discharged by the judgment of nonsuit against the plaintiff as to him. As special bail, he ought to have had the right secured to him by the bond of discharging himself as such by the sur-

render of his principal or otherwise according to law. (498) But such are not the terms of the bond, either express or by any fair implication; and, that being so, he cannot, according to the decision upon this point in the case of *Clarke v. Walker*, 25 N. C., 181, be subjected by the plaintiff as the special bail of McElrath.

We decline giving any opinion upon the question whether the sheriff himself can have any remedy upon the bond, if he should be subjected as special bail for McElrath in consequence of his having failed to take special bail upon making the arrest in the original suit.

PER CURIAM. Judgment affirmed.

Cited: Hamlin v. McNiel, 32 N. C., 306.

TIMOTHY RAGSDALE v. ALEXANDER WILLIAMS.

1. Any act of ownership over personal property taken which is inconsistent with the owner's right of dominion over it is evidence of a conversion.

2. But where no *act* is done, where there is no refusal to deliver, and no claim of right to the property, where, in truth, the defendant is wholly passive, though the property was found in his possession, this, *per se*, does not subject the defendant to an action of trover.

APPEAL from the Superior Court of Law of IREDELL, at Spring Term, 1848, *Manly, J.*, presiding.

Case in trover for a wagon. Property in the plaintiff was admitted. The plaintiff hired the wagon to one Baily, who swapped it away to a man by the name of Dowell. The latter, upon a visit to the defendant, who is his father-in-law, drove the wagon in question and left it on his premises, where it was found by the plaintiff and claimed. The defend- (499) ant told him how Dowell had brought it there, and how the latter had come by it, according to his statement, and where he might be found, and expressed a hope that Dowell and Baily might recant their bargain and the plaintiff get his wagon, provided Dowell got back the horse he traded for it. The plaintiff made an affidavit before a magistrate stating the transaction and also that the wagon was in possession of Dowell. This affidavit was read by him to a company assembled at the defendant's, and a demand was made of the wagon, but of no particu-

lar person. Upon its being read the defendant observed, "Dowell has no possessions here; these are my possessions." He further stated the plaintiff did not understand the laws of North Carolina as well as he did; that by those laws, if a man loaned a thing and it was sold, the owner could not get it back again. It was also testified by a witness that the defendant said on that occasion, "Keep the wagon, Dowell; I will see you out." Dowell removed from that part of the county, and nothing further was seen of the wagon. It was further in evidence that when the plaintiff returned from the defendant's he was asked if the latter set up any claim to the wagon, who replied he did not, but claimed that it was in his possession. It was insisted by the defendant's counsel that there was no evidence of a conversion by the defendant, and, if there were, it was not for his own use and benefit, and therefore the plaintiff could not recover of him, and asked his Honor so to instruct the jury, which was refused; and his Honor charged that it was not material for whose use the conversion was made; if the defendant deprived the plaintiff of the property, refusing to deliver it on demand, or if he co-operated with Dowell in conveying it away and withholding it from the owner, he would be liable. Mere arguments on the part of the defendant in favor of his son's rights would not amount to such a co-operation; there (500) must be some concert of understanding and action by which a joint conversion is effected, and in that case a joint liability would follow. The action of trover is an action of *tort*, and the whole *tort* consists in the wrongful conversion. To entitle the plaintiff to a recovery he must show a right of property in himself, either general or special, and a wrongful conversion by the defendant. In form it is a fiction; in substance, a remedy to recover damages for the property so converted.

There was a verdict and judgment for the plaintiff, and an appeal.

Guion for plaintiff.
Clarke for defendant.

NASH, J. The only question in this case is as to the conversion, the plaintiff's title not being disputed. Any act of ownership over the property taken which is inconsistent with the true owner's right of dominion over it is evidence of a conversion. Thus an asportation of the goods for the use of the defendant or of another person is a conversion, because it is incon-

sistent with the general right of dominion which the owner has in the chattel. So, also, if A. is in possession of a horse or other chattel property belonging to B., and upon demand refuses to deliver it, this refusal is evidence of a conversion, because there is an assertion of right inconsistent with B.'s, of general dominion over it. 3 St. N. P., 2667; 1 Dowell, 86. In this case the defendant did not take the wagon; it is found on his premises; he neither refused to deliver it nor is there evidence of any act of ownership over it exercised by him. On the contrary, he disclaims all ownership, and tells how it came on his premises, and acknowledges the right of the plaintiff. For, although he gives it as his opinion that, by the exchange between Bailey and Dowell, the plaintiff had lost his right to the wagon and Dowell had acquired it, yet he states how the latter had acquired it, showing plainly that he was mistaken in his (501) opinion, and that the right still remained in the plaintiff. In the first conversation between the plaintiff and defendant, then, nothing occurred to put the defendant in the wrong. In the second, the plaintiff and the defendant and Dowell are all present with the wagon—the true owner, the man on whose premises the wagon had been left, and he who had brought and left it there. A demand was made by the plaintiff, but on no one in particular. Upon the affidavit being read, asserting the wagon to be in possession of Dowell, the defendant observes, "Dowell has no possessions here; these are my possessions." They were then on the premises of the defendant, and he asserted nothing but the fact; still there is no assertion of title on the part of the defendant and no refusal to deliver the wagon, nor offer or threat to prevent the plaintiff from taking possession. There is, then, at this time no conversion or evidence of it. It is stated by *Baron Alderson* in *Foulds v. Willoughby*, 1 Dowl., 86, "if an *act* is done which does not call in question my general right of dominion over the chattel, it is no conversion." Here no act is done by the defendant from the first to last, no refusal to deliver, no claim of right to the property; in truth, throughout the whole transaction the defendant was entirely passive. We think, therefore, his Honor erred in refusing the first part of the instruction required. We concur with him in his charge, that it was not material for whose use the conversion was made (if made at all). In *Shipwick v. Blanchard*, 6 Term, 298, it is decided, to "maintain trover, the goods must be taken or detained with intent to convert to the taker's own use or the use of some other person. We agree further with his

Honor in the latter part of the charge, but there was no evidence that the defendant aided or assisted Dowell to take off the wagon.

(502) For the error pointed out, in the refusal to instruct the jury as required, there must be a *venire de novo.*

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

Cited: McDaniel v. Wethercut, 53 N. C., 99; *Smith v. Young,* 109 N. C., 227.

DEN ON DEMISE OF JOHN McDOWELL v. JAMES R. LOVE.

Where, in ejectment against a tenant, a person comes in and is admitted to defend, upon his affidavit "that the premises in dispute were his, that the tenant alleged to be in possession was his tenant, and that he was the landlord of the premises sued for," it is not necessary for the plaintiff to prove that the defendant was in the actual possession of the premises, that being considered as admitted by the landlord when he applied to be made a defendant.

APPEAL from the Superior Court of Law of HAYWOOD, at Spring Term, 1848, *Battle, J.,* presiding.

This was an action of ejectment, brought originally against one Joseph Chambers as tenant in possession, but in which the present defendant was afterwards permitted to come in and defend as landlord upon the following affidavit: "James R. Love comes into court and swears that the premises in dispute are his, he being the sole tenant of said premises; that Joseph Chambers went into possession as subtenant of his tenant, E. Chambers; that affiant swears that said subtenant has

(503) no title, and the same solely exists in this affiant, who is the landlord of the premises sued for."

The lessor of the plaintiff claimed under a grant from the State issued in 1810, which covered all the land mentioned in his declaration. The defendant claimed under a prior grant issued in 1805, which covered all the land contained within the boundaries of the lessor's grant, except a very small slip, as to which, however, there was no evidence, besides the defendant's affidavit, that he or his tenant was in possession at the commencement of the suit or at any other time. The principal contest was whether the plaintiff's lessor had not acquired the better title by an adverse possession of seven years of the part

covered by the defendant's grant, of which it was not denied that his tenant was in possession when the suit was brought. But the lessor insisted that, however the jury might find as to that, he was entitled to a verdict for the small slip of land not covered by the defendant's grant, upon the ground that by coming in to defend as landlord upon affidavit, the defendant had admitted himself to be in possession, and that no evidence of that fact was necessary on the trial. The court held otherwise, and the jury found a verdict for the defendant. The lessor of the plaintiff moved for a new trial for misdirection in the particular above stated, which was overruled, and a judgment given, from which he appealed.

N. W. Woodfin, J. W. Woodfin and *Bynum* for plaintiff.
Francis for defendant.

BATTLE, J. Ever since the decision of the case of *Albertson v. Redding,* 6 N. C., 283; *s. c.,* 4 N. C., 28, it has been considered the settled law of this State that, in all cases of ejectment, whether the consent rule be general or special, the lessor of the plaintiff is bound to prove the defendant to be in possession of the premises which he seeks to recover. This is (504) placed upon the ground that the defendant's being in possession of the premises is a material allegation of the plaintiff's lessor, which it is incumbent upon him to prove; and that the consent rule, by which the defendant is permitted to defend upon confessing lease, entry and ouster, does not supersede the necessity for such proof. But the rule is different where the defendant makes a distinct admission, before suit is brought, that he was in possession, as in the case of *Mordecai v. Oliver,* 10 N. C., 479; or where one, upon his own motion, procures himself to be made a defendant in an action brought against another, as in *Gorham v. Brennon,* 13 N. C., 174; so, in *Carson v. Burnet,* 18 N. C., 560, it was said by the Court *arguendo,* that it might not be necessary to prove the tenant to be in possession of any particular place as against the landlord, who admits him to be in possession, as his tenant, by engaging to defend him. The distinction between the necessity of proof of possession, as against the tenant and not as against his landlord, is founded upon this, that the tenant is brought involuntarily into court by the plaintiff's lessor, while the landlord comes forward of his own accord and admits the possession of his tenant. In the case before us the defendant, Love, came into court and swore that the "premises in dispute" were his; that Joseph Chambers went into possession as subtenant of his

tenant, E. Chambers, and that he was the landlord of the premises sued for. His own affidavit, therefore, supplied the proof of his tenant's possession of *all* the land contained within the boundaries described in the plaintiff's declaration. It is true that it is said, in *Belfour v. Davis*, 20 N. C., 443, that a landlord who is admitted to defend with or in the stead of his tenant, stands in his place and is entitled to his rights and subject to his disadvantages; but that is with respect to the title, and not to the proof of possession, which he admits by the (505) very fact of coming forward to defend the suit. Whether, when the tenant is in possession of, and claiming as such, only a part of the land sued for, the landlord would be permitted to come in upon this affidavit and defend only for such part, it is unnecessary for us to decide, as the question is not presented in the case now under consideration.

PER CURIAM. *Venire de novo.*

Cited: King v. Brittain, 32 N. C., 118; *Atwell v. McLure*, 49 N. C., 377.

GILBERT PRESNELL v. JACOB RAMSOUR.

1. Where a man who purchases land at an execution sale enters upon the premises, the original owner being in possession, he cannot justify this trespass on the mere ground that he was the purchaser at the sale, when he had not received the sheriff's deed till after the time of the alleged trespass.

2. The sheriff's deed has relation back to the time of the sale, as to the title, but not as to the action of trespass founded on possession.

APPEAL from the Superior Court of Law of LINCOLN, at Fall Term, 1847, *Pearson, J.*, presiding.

This was an action of trespass *quare clausum fregit*, commenced in the County Court of Lincoln, at December Term, 1846, of which the defendant appeared and pleaded not guilty; and afterwards, upon the trial of the issue, the defendant (506) obtained a verdict and judgment, and the plaintiff appealed to the Superior Court. In that court the case came on for trial at the Fall Term, 1847, when the plaintiff proved that in August, 1846, he was in possession of a house and lot, into the latter of which the defendant entered, drove out the plaintiff's stock and fastened up the gate.

The defendant then introduced testimony on his part to show that the house and lot once belonged to a man named Moornean, against whom a judgment was obtained, and, upon an execution issuing thereon, the sheriff sold the house and lot in June, 1846, when the defendant became the purchaser, but did not take a deed from the sheriff until July, 1847.

The defendant contended that the title to the house and lot passed to him by the sheriff's sale, in June, 1846, and the deed was a mere authentication of the fact, but that at all events the deed, executed in July, 1847, related back to the sale, so as to enable him to justify the trespass. A verdict was taken for the plaintiff, subject to the opinion of the court upon the question as to the effect of the sheriff's sale and relation of the deed. The court being of opinion in favor of the plaintiff upon the question, gave judgment on verdict, and the defendant appealed.

Guion for plaintiff.
Thompson for defendant.

BATTLE, J. The opinion given by the judge in the court below is fully sustained by the cases of *McMillan v. Hafley*, 2 Cr. L., 89, and *Davis v. Evans*, 27 N. C., 525, cited by the plaintiff's counsel. In the first of these cases the defendant claimed from the defendant in the execution under which the plaintiff purchased, and committed the trespass complained of between the time of the sheriff's sale and his execution of a deed to the plaintiff. The court held that as the plaintiff was not in actual possession and had no title in law at the (507) time of the commission of the trespass, he could not be considered as having a constructive possession, and consequently could not maintain the action. It is true that the correctness of this decision was doubted by *Henderson, Chief Justice*, in *Davidson v. Frew*, 14 N. C., 3, but he expressly declined to overrule it. *Davidson v. Frew, supra*, *Picket v. Picket*, 14 N. C., 6, and *Dobson v. Murphy*, 18 N. C., 586, referred to and relied upon by the defendant's counsel, all show that a sheriff's deed, when fairly executed at any time after the sale, has relation to it and operates to pass the title from that time. But in neither of them is it held that this relation will have the effect of giving the purchaser such a constructive possession as will enable him to maintain the action of trespass for an act committed before he has taken actual possession or obtained a deed. And we may infer from the case of *Davis v. Evans*, 27 N. C., 529, that such relation would certainly not be allowed to sustain an action commenced before the deed was executed. In that case, which

was an action of ejectment, it was said expressly that "whatever relation to the time of the sale a conveyance from the sheriff may have for some purposes, it cannot be carried to the unreasonable extreme of proving the title in an action that was brought before the deed was executed."

If that be so in the action of ejectment, which is founded on title, it is certainly so in the action of trespass, which is founded on possession; and the same principle will apply *e converso*, when the purchaser is sued for a trespass and pleads not guilty or *liberum tenementum*, before he has taken the deed. It cannot have the effect to put him into constructive possession, by relation, so as to enable him to support his plea.

PER CURIAM. Judgment affirmed.

Cited: Richardson v. Thornton, 52 N. C., 460; *Young v. Griffith*, 84 N. C., 721; *Cowles v. Coffey*, 88 N. C., 343.

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(508)

MARY H. SMITH v. JAMES H. DAVIS.

In trover for a slave it appeared that the plaintiff had had possession of the slave for more than three years, and that at the time she took possession she executed to the owner an obligation with the following condition: "That whereas the said Mary H. Smith hath this day received of said Houston a negro girl named Nell, which the said Smith is to have the entire service and peaceable possession of during her natural life for the sum of $350 to him in hand paid by the said Smith; now if the said Smith shall keep the said negro and her issue (if any) in the county and State aforesaid and sufficiently clothe and feed them and humanely treat them during their time of service, and the said Smith or her executors shall before or at her death return said negro or negroes to said Houston," etc.: *Held*, that the plaintiff had a title to the slave and her issue during her life.

APPEAL from the Superior Court of Law of MECKLENBURG, at Fall Term, 1847, *Pearson, J.*, presiding.

The action is trover for a female slave, Nelly, and several of her children. Plea, not guilty. At the trial the plaintiff gave evidence that, in June, 1827, she came into possession of the woman, and continued in possession of her, claiming her as her own for the term of her life, until November, 1844. The other negroes were the children of Nelly, born in the possession of the plaintiff, and held and claimed by her in like manner as their mother. At the latter period the defendant took the negroes from the plaintiff's possession and carried them to Mississippi.

The defendants then gave evidence that they claimed under one R. B. Houston; and further gave in evidence an obligation from the plaintiff to Houston dated 16 June, 1827, for the penalty of $350, with a condition as follows:

"The condition of the above obligation is such that, (509) whereas the said Mary H. Smith hath this day received of said Houston a negro girl named Nell, which the said Smith is to have the entire service and peaceable possession of during her natural life, for the sum of $350 to him in hand paid by the said Smith, the receipt whereof is acknowledged by the said Houston; now, if the said Smith shall keep the said negro and her issue (if any) in the county and State aforesaid and sufficiently clothe and feed them and humanely treat them during their time of service, etc., and the said Smith or her executors shall, before or at her death, return said negro or negroes to said Houston," etc.

Thereupon the counsel for the defendant prayed the court to instruct the jury that the title to the slaves was in Houston, and that the plaintiff's remedy was against him for the breach of his executory agreement, and that she could not maintain this action against the defendant. But the court refused to give the instruction, and from a verdict and judgment for the plaintiff for the value of the negroes for her life, the defendants appealed.

Osborne and *Wilson* for plaintiff.
Bynum and *Alexander* for defendant.

RUFFIN, C. J. This seems to be as plain a case for the plaintiff as can be. She has the property in the slaves, both under the act of 1792, which makes parol sales of slaves valid when accompanied by actual delivery, and that of 1820, which makes adverse possession for three years a good title, excepting only in the case of oral gifts. That the plaintiff claimed under a sale, and not a gift, is clear. It is true, she did not call witnesses directly to the fact of her purchase, nor does she produce a receipt under her vendor's hand for the price.

But the defendants established the fact for her by their own evidence. They produce from Houston the plaintiff's obligation to him for the proper treatment of the slaves (510) and their delivery at the plaintiff's death, wherein it is recited that the obligee, Houston, had sold the girl to the plaintiff at the price of $350, and that she had paid the same and received the negro. We say that the instrument recites a sale, because it says the plaintiff had received the negro from Hous-

ton and paid for her, and was "to have the entire service and possession" of the negro; and it is difficult to tell what is property in a slave if the right to the exclusive possession and service be not, whether it be for years or for life or forever. But it is said that a life estate merely in a slave cannot be created orally, but that a deed or writing is required by the act of 1823. That is admitted, without at all weakening the plaintiff's case. For the whole effect of the argument is that, although the parties intended for her only a life estate, yet that the legal operation of the transaction was to give her the absolute property at law. We think it very probable that the parties perfectly understood that such was the legal effect, as that would rationally account for the obligation coming from the plaintiff, reciting that she had purchased but a life interest, and obliging her to have the negroes delivered at her death, instead of such an obligation or executory contract on the part of Houston, as the legal owner, to let the plaintiff have the use or enjoyment of the negro for life. This circumstance makes this case the converse of *Smith v. Hargrave*, 10 N. C., 560, in which Smith received an absolute conveyance for the slave from Buckhart and at the same time executed the instrument granting the services of the negro to Buckhart for life; and it was held that Smith did not intend thereby to part from the property in the slave, because, being for the life of the grantee, it would, in effect, annul the whole transaction and place the parties as if no deed had been made at all. But here the instrument is executed by the plaintiff, not to give a life estate or the services for life to
(511) another, but to declare that she is really entitled to the possession and services of the slave but for her life, and contracting then to return, reconvey, her and her issue to the former owner. If, therefore, *Smith v. Hargrave* was law, which was much doubted, it rather supports than militates against the plaintiff's title; for, if she had not the title at law, the natural course would have been that Houston should give her some instrument as permanent evidence of his obligation to allow her the enjoyment, rather than that she should give the obligation she did to him. The executory contract was really from her to him, and not *vice versa*, and the judgment ought to be affirmed. It is to be remarked, although the plaintiff may have had the absolute legal title, that no injustice has been done by the verdict ascertaining the damages against the defendants who claim under Houston, since it expressly stated that the plaintiff only claimed damages for the conversion for her life.

PER CURIAM. Judgment affirmed.

A. FITCH v. MARY PORTER.

To support a declaration in an action of debt upon a judgment the exemplification of the judgment itself must be produced; it is not sufficient to show a *scire facias* to show cause why execution should not issue on the judgment and an award of execution according to the *sci. fa.*

APPEAL from the Superior Court of Law of MECKLENBURG, at Spring Term, 1848, *Manly, J.*, presiding.

This was an action of debt upon a judgment obtained (512) by the plaintiff against the defendant in the Court of Common Pleas for Richland District, in the State of South Carolina. Plea, *nul tiel record.* Upon an inspection of the exemplification of the record produced by the plaintiff, it appeared to be an execution issued 10 June, 1829, on a judgment recited therein to have been confessed by the defendant to the plaintiff for the sum of $260.50, with interest and costs; and two *scire faciases* issued in 1845 and 1846 against the defendant to show cause why the plaintiff should not have his execution against her upon the said judgment, with the sheriff's returns of *"nihil"* thereon, and then an award of execution by the court. The court below adjudged that there was no such record, and the plaintiff appealed.

Bynum and *Wilson* for plaintiff.
Osborne for defendant.

BATTLE, J. The court below was undoubtedly right in deciding that there was no such judgment as that upon which the plaintiff declared. The exemplification of the record produced showed no judgment at all, but merely an award of execution upon a judgment recited therein to have been before rendered. but the judgment itself was not produced. The plea of *nul tiel record* put in issue the judgment declared upon, and the plaintiff was bound to produce an exemplification of it in support of the affirmative of his plea.

PER CURIAM. Judgment affirmed.

(513)

THE STATE UPON THE RELATION OF ROBERT W. ELLIS v. RICHARD W. LONG ET AL.

A, having a writ served upon him, placed in the hands of the sheriff who served the writ a sum of money to discharge the debt for which he was sued, but the sheriff neglected to apply it for that purpose and A was compelled to pay the debt out of other funds: *Held*, the sureties of the sheriff were not bound to A for such neglect.

APPEAL from the Superior Court of Law of ROWAN, at Spring Term, 1848, *Manly, J.*, presiding.

This was an action of debt upon a bond executed by the defendant Long, on 5 August, 1844, for the discharge of his official duties as sheriff of the county of Rowan, and by the other defendants as his sureties. The breaches assigned were, first, that the defendant Long as sheriff had received from the relator the sum of $636 to be applied to the payment of a debt due to Charles Dewey, cashier, upon which a *capias ad respondendum* was issued against the relator, and came to the hands of the said defendant, and that he had failed to apply the said money as directed, so that the relator was compelled to pay the same a second time; and, secondly, that the said money was in his hands after an execution had been issued and come to his hands on a judgment recovered for the said debt, and that he had failed to apply it in satisfaction of the said execution, whereby the relator was compelled to pay it again. Pleas, *non est factum* and conditions performed and not broken.

On the trial the relator, in support of the breaches assigned, introduced testimony to show that on 26 January, 1844, a writ of *capias ad respondendum*, which had issued from the Superior Court of Law for Wake, returnable on the fourth Mon-
(514) day of March, 1844, against the relator, in favor of Charles Dewey, cashier, was placed in the hands of the defendant Long, as Sheriff of Rowan County, and that, on 22 March, in the same year, the relator handed to the said Long the sum of $636, and took his written receipt therefor, expressing therein that it was to be paid on a writ, Charles Dewey, cashier, against the relator. He showed further that the said writ was returned "Executed" by the said Long; that at the Fall Term following of Wake Superior Court a judgment was obtained against the relator for $655.50, and that an execution of *fi. fa.* was issued thereon and placed in the hands of the said

Long, and was never returned by him, and that, subsequently, on 3 February, 1846, the relator was compelled to pay the amount of said judgment on an execution directed to the sheriff of the county of Davidson. There was some other testimony given which it is unnecessary to state, as it does not at all affect the case in the view taken of it by the Court.

The defendants contended that, upon the testimony given for the relator, he could not recover in this action. A verdict was taken for him, however, subject to the opinion of the court as to whether the action could be sustained, upon which his Honor, being of opinion against the relator, directed the verdict to be set aside and a nonsuit entered, from which the relator appealed.

Clarke for plaintiff.
Craige, Osborne and *H. C. Jones* for defendants.

BATTLE, J. We agree with his Honor that this action cannot be sustained. At the time when the money was placed by the relator in the hands of the defendant Long he had no right to receive it in his official capacity. The precept which he then had commanded him to take the body of the relator and to keep him safely to answer the action, but it gave him (515) no authority to receive the relator's money. The sheriff, then, was but the private agent of the party to pay the debt, and he alone is responsible in his private capacity for his breach of trust. It is well known to the profession that, prior to the year 1818, constables and their sureties were not liable on the official bonds of the former for money paid to them without suit on claims put into their hands for collection; and that an act was passed in that year (1 Rev. St., ch. 24, sec. 7) to make them and their sureties liable, whether the money were paid with or without a suit. Even to this day neither constables nor sheriffs are liable officially for money collected by them on notes above the jurisdiction of a single justice. *Kesler v. Long,* 29 N. C., 379. The same principle is applicable to this case. But it is contended by the plaintiff's counsel that the defendant Long had the money when the execution came to his hands, and that he afterwards held it officially, and he cites *Bank v. Twitty,* 9 N. C., 5, as in point. But, unfortunately for the argument and the authority, there is no evidence that the money was in Long's hands after he received the execution. That was never returned by him, much less returned "Satisfied," as in *Bank v.*

Twitty. The law certainly will not raise the presumption that he kept the money for more than six months, in the absence of any proof to show it.

PER CURIAM. Judgment affirmed.

Cited: S. v. Long, ante, 419; *Mills v. Allen,* 52 N. C., 566; *Covington v. Buie,* 53 N. C., 32; *Eaton v. Kelly,* 72 N. C., 113.

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(516)

N. G. HOWELL v. P. EDWARDS.

In an action for maliciously arresting a party and holding him to bail, the declaration must show a legal determination of the original action.

APPEAL from the Superior Court of Law of CHEROKEE, at Fall Term, 1847, *Settle, J.*, presiding.

The action is for maliciously and without any reasonable or probable cause arresting the plaintiff and holding him to bail on a warrant issued by a justice of the peace. Plea, not guilty. On the trial the case appeared to be this: The defendant sued out a warrant against the plaintiff for a debt of $10.30, and required him to be held to bail thereon. On 30 March, 1846, the constable arrested the plaintiff and returned the warrant. The trial was postponed by the justice to the next day, and the constable then demanded bail from Howell, and, as he was about giving bail, Edwards told the constable he need not require a bond; and, therefore, the latter discharged the plaintiff from custody. On the next day the case was tried and the justice gave judgment for Howell, and Edwards appealed to the County Court. Shortly afterwards the plaintiff brought this suit, and subsequently Edwards directed the magistrate not to return the appeal; and he accordingly withheld it. Upon the evidence, the counsel for the defendant, among several objections, insisted that the action would not lie, because it was commenced before the original suit was determined; and he prayed the court so to instruct the jury. But the court refused the instruction, and informed the jury that the plaintiff might maintain his action, notwithstanding that objection. Verdict and judgment for the plaintiff, and an appeal by the defendant.

(517) *Edney* and *Francis* for plaintiff.

J. W. Woodfin and *N. W. Woodfin* for defendant.

MAXWELL *v.* WALK.

RUFFIN, C. J. In actions of this kind the declaration must show a legal determination of the original action; and here the plaintiff relies on a determination by a discontinuance and want of prosecution. But the evidence did not support the declaration in that point; for, admitting that the original action could be discontinued by the order not to return the appeal and was thereby ended, yet that order was not given until after the present action was brought, and there is nothing to give it a relation so as to make it operate legally as a discontinuance from any prior time. This suit was, therefore, commenced prematurely; and the judgment must be reversed, and a *venire de novo* awarded.

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

Cited: Johnson v. Finch, 93 N. C., 207.

MAXWELL & BROWN v. SAMUEL WALK.

In order to entitle a plaintiff to a writ of *capias ad satisfaciendum*, under our act of 1844, it is sufficient for him to make affidavit "that the defendant had fraudulently concealed his money, property or effects to defeat his debt," without further setting forth that the defendant had no property which could be reached by a *fieri facias.*

APPEAL from the Superior Court of Law of ROWAN, at Fall Term, 1847, *Pearson, J.*, presiding.

The defendant, Walk, was arrested under a *capias ad* (518) *satisfaciendum*, at the instance of the plaintiff, and gave bond for his appearance at May Term of Rowan Court of Pleas and Quarter Sessions, where, upon the motion of his counsel, the execution was set aside, on the ground that it did not appear from the affidavit that the defendant had no property which could be reached by a *fieri facias*. The plaintiff appealed to the Superior Court, and the presiding judge was of opinion that the affidavit did not comply with the requisitions of the act of 1844. The affidavit stated that the defendant, Walk, had fraudulently concealed his money, property or effects to "defeat the plaintiff's debt," and it did not further appear on the face of the affidavit that the defendant had no property which could be reached by a *fieri facias*. He dismissed the proceedings, and the plaintiff appealed.

Avery for plaintiff.
Clarke for defendant.

NASH, J. The question in this case arises under the act of 1844, ch. 31, which is as follows: "Hereafter no *capias ad satisfaciendum* shall issue, unless the plaintiff, his agent or attorney, shall make affidavit in writing, before the clerk of the court in which the judgment may be, or the justice of the peace to whom application is made for such process, that he believes the defendant has not property to satisfy such judgment which can be reached by a *fieri facias,* and has property, money and effects which cannot be reached by a *fieri facias,* or has fraudulently concealed his property, money or effects, or is about to move from the State."

In the case before us the plaintiff swore or made affidavit "that the defendant had fraudulently concealed his money, property and effects, to defeat the plaintiffs' debt." The presiding judge decided that the affidavit was insufficient, as it did not set forth *further* that the defendant had no property which could be reached by a *fieri facias.* He seems to think that no affidavit under that act will authorize a *ca. sa.* which does not on (519) its face show that the defendant has no property which can be reached by a *fi. fa.* We do not concur in this opinion; to us it appears that there are, in the act, three distinct grounds upon which a *ca. sa.* is authorized. The first is, when the affidavit of the plaintiff states that the defendant has no property to satisfy his judgment which can be reached by a *fieri facias,* and that he believes he has property, money or effects which cannot be reached by a *fieri facias;* secondly, when he swears that the defendant has fraudulently concealed his effects; and, thirdly, when he swears he is about to leave the State. The two first clauses in the act are coupled by the conjunction "and"—and, therefore, go together, and with much propriety. If the first clause stood by itself, constituting a substantial ground on which the *ca. sa.* should issue, the object of the act might in many cases be evaded. If a man has no property upon which a *fi. fa.* can be levied, he may be entirely insolvent, and honestly so. But it was the honestly insolvent debtor the law intended to protect in the first instance. It is not, therefore, sufficient for the affidavit to contain simply the first clause; it must go further and set forth that he has property, money and effects which cannot be reached by a *fieri facias,* and thereby show that he is not that honest debtor, for if he has the ability to pay, and will not, he cannot claim to be an honest man. But

on the second ground of issuing the *ca. sa.*, the Legislature authorizes it upon the fact that the defendant has fraudulently concealed his property. It does not require that the plaintiff should swear that he so conceals it that a *fi. fa.* cannot be levied on it, because property so concealed is by law liable to be sold under a *fi. fa.*, and also for another, and perhaps a little better reason, that the man who does fraudulently conceal his property is not deserving of protection against imprisonment; he is not the object intended to be favored. The third clause provides against those debtors who are endeavoring to evade the payment of their debts by leaving the State. No honest (520) man would so do. And if with a judgment obtained against him he endeavors to leave the State, and leave the judgment unsatisfied, it must be evident his object is a fraudulent one, and in such case it cannot be necessary to set out in the affidavit the first ground. The Legislature intended that that plan or purpose on the part of the debtor should, of itself, authorize the *ca. sa.* In all the provisions of the act the object of the Legislature is, while it protects from imprisonment the debtor who honestly surrenders up to his creditors his property of every description, not to shelter the knave or to assist him in carrying out his purposes or prevent the creditor from the use of all lawful means to procure satisfaction of his debt.

Judgment reversed. The opinion will be certified to the Superior Court that that court may issue a *procedendo* to the County Court to proceed in the case.

PER CURIAM. Ordered accordingly.

Cited: Bank v. Freeland, 50 N. C., 327.

WILLIAM WALTON v. MOSES SMITH.

It is the rule of this Court, as in every other court of errors, that he who alleges error must show it. The judgment appealed from must stand as correct unless it is shown to be incorrect.

APPEAL from the Superior Court of Law of HENDERSON, at Spring Term, 1846, *Pearson, J.*, presiding.

This is an action on a guarantee alleged to be con- (521) tained in a letter addressed by the defendant to the plaintiff. The case is as follows: The defendant lives in the county of Henderson, in this State, and in January, 1839, wrote to the plaintiff, who lives in the city of Charleston, a letter of credit

in favor of the two men, Posey and Lane. This letter was duly delivered to the plaintiff by Posey, and the plaintiff agreed to furnish him goods, which he did to the amount of $186, for which Posey gave him a note in the name of himself and Lane and payable six months thereafter. After this note came to maturity the plaintiff sued Posey and Lane upon it, obtained judgment, but failed to collect all that was due, in consequence of their inability to pay. This action was then commenced, and the plaintiff obtained a judgment for the balance due on the note, from which the defendant appealed to this Court.

N. W. Woodfin for plaintiff.
Baxter for defendant.

NASH, J. Many objections were made by the defendant to the recovery of the plaintiff, none of which is it necessary for us to examine, as an obstacle has arisen here growing out of the case as stated which is decisive of the cause. The defendant sets forth in his bill of exceptions that the plaintiff read in evidence a letter of the defendant, dated January, 1839, a copy of which, marked A, is sent as a part of the case. No such letter or copy of a letter is among the papers in the cause. At the last term of the Court, when we were called on to look into the case, its absence was detected and, supposing it might by mistake have been retained by the Clerk of Rutherford Superior Court, where the cause was tried, upon the suggestion of a diminution of the record, a *certiorari* was issued. A certified copy of the record, as it remains in his office, has been transmitted to us without containing the required paper. It (522) is evident, without it or an agreement between the parties as to its contents, the Court cannot determine the questions raised by the defendant. It is the foundation of the plaintiff's claim that was before his Honor who tried the cause, and the whole of the charge addressed to the jury was made in reference to it. It is the rule in this Court, as in every other court of errors, that he who alleges error must show it. The judgment appealed from must stand as correct until it is shown to be incorrect. The defendant has made that letter a part of his case; it is not here to be seen and considered by the Court; it is admitted to have been lost, and the parties cannot agree as to its contents. We are compelled, therefore, to say we see no error in the judgment below.

PER CURIAM. Judgment affirmed.

Cited: S. v. Orrell, 44 N. C., 218; *Davis v. Shaver*, 61 N. C., 18.

HORACE L. ROBARDS v. JOEL McLEAN.

1. To entitle a party to give evidence of the contents of a paper which, it is alleged, has been lost, it is sufficient to show that there is no reasonable probability that anything has been suppressed.

2. Thus, where a negro slave was taken into the defendant's stage on his way from Granville to McDowell County and afterwards absconded, it was competent for the defendant to show, by parol testimony, that the slave had a written permission to travel from Granville to McDowell, alone, he being on the ordinary road between Granville and McDowell when he was received into the defendant's stage.

APPEAL from the Superior Court of Law of McDOWELL, at Spring Term, 1848, *Battle, J.*, presiding.

The case is as follows: At the time the transaction (523) took place of which the plaintiff complains, he resided in the county of McDowell, and having gone into Granville County, took with him a negro slave, his property, by the name of Reuben. When about to return home Reuben complained of being unwell, and was left in the care of Dr. Robards until sufficiently recovered to travel. An agent was afterwards sent by the plaintiff for Reuben, who, finding him in the town of Oxford, directed him to get ready to return home the next day. That night Reuben left Oxford, without any permit in writing or otherwise, as alleged, and went to Hillsboro, near which place he was permitted by the defendant's agent to take a seat in the stage belonging to the defendant, and in which he was conveyed to Greensboro, whence he made his escape and never after returned to the plaintiff's service. The action is brought to recover damages for the loss of Reuben. One ground of defense was that the plaintiff had given his slave Reuben a written permit to return home alone, and, to prove it, the defendant introduced one Mr. Gibbony, who testified that he resided about four miles from the town of Greensboro, on the stage road leading to Salisbury, and on the direct route which Reuben would have to pass on his return home from Granville; that Reuben came to his house and presented him a paper, which, after reading, he returned to Reuben, the contents of which the defendant's counsel offered to prove, after showing that notice had been served on the plaintiff to produce it. This evidence was objected to by the plaintiff's counsel, on the ground that it was not shown that the paper was in the possession or under the control of the plaintiff. The court admitted the evidence, because the paper was in the possession of the plaintiff's own slave, and also

because it sufficiently appeared that it was lost by having been carried off by the slave. The witness then stated that the paper-writing was directed to him, in the form of a note or
(524) order, requesting him, if Reuben's mule should give out, he would furnish him with a horse and let him have $10, which John J. Shaver would return as soon as the boy should reach Salisbury, and also to give him any other assistance he might require, for which he should be compensated. A verdict was rendered for the defendant, a rule for a new trial discharged, and appeal was taken to the Supreme Court.

Avery and *Guion* for plaintiff.
N. W. Woodfin and *Gaither* for defendant.

NASH, J. The whole case turns upon the admissibility of the parol evidence to prove the contents of the pass or permit. We see no ground to complain of the judgment. Before us it has been urged that the notice to the plaintiff could not authorize the parol evidence of the contents of the alleged pass, because the case showed it was not in his possession. This may be true, but it was not upon the ground that the paper was then in his possession that the notice was given, but because the case showed it was last seen in the possession of his slave, and therefore under his control; and to this he answers that it is not in his possession nor under his control, because the boy Reuben had never returned to his possession; in other words, that he had run away and was lost to him. So that the plaintiff, himself, proves that the pass is lost. It is upon this ground, we think, his Honor's opinion was right. It has been further argued by the plaintiff's counsel that the pass, according to the testimony, was as much under the control of the defendant as of the plaintiff, and it is insinuated, rather than asserted, that before he could resort to the secondary evidence he ought to show that he had sent to Ohio, where it is understood Reuben is, and procured from him the pass; and the case of *Deaver v. Rice*, 24 N. C., 280, has been cited as an authority. That case decides that when an execution was shown to have been in the
(525) hands of a constable, it is not sufficient, to let in the secondary evidence of its contents, to show that the constable had removed to another State, and had left his papers generally with an agent, who testified that the execution would not be found among the papers so left. This decision was unquestionably made upon correct grounds. The party offering the secondary evidence had not shown that the execution was lost; it might still be in the possession of the constable, and it

was in the power of the plaintiff to procure his deposition. Here the negro Reuben had run away from his master. The case does not show where he is, and there is no presumption. if he was, as was alleged, in the State of Ohio, that he still had in his possession the permit or pass, nor was there any mode known to the law whereby the defendant could, if it was still in his possession, have obtained it or proved by Reuben its loss. To admit this secondary evidence it is sufficient to show that there is no reasonable probability that anything has been suppressed. *McGahey v. Alston*, 2 M. and T., 206; 2 St. N. P., 152. This case differs from that of *Harven v. Hunter, ante*. 464, in this, that in the latter case it does not appear sufficiently to the Court that the originals were lost; here that fact does affirmatively appear.

We have examined the cases to which our attention has been called by the plaintiff's counsel, and, while we admit their correctness, do not think them applicable to the case before us.

PER CURIAM. Judgment affirmed.

Cited: McAulay v. Earnhardt, 46 N. C., 504; *Plank Road Co. v. Bryan*, 51 N. C., 85.

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(526)

CULPEPPER LEE v. WILLIAM RUSSELL.

Where an action is brought for a breach of contract in not conveying land according to the contract, it is not necessary for the plaintiff to bring into court the price agreed to be given for the land. if he shows he complied with his part of the contract by tendering what he was bound to pay.

APPEAL from the Superior Court of Law of LINCOLN, at Fall Term, 1847, *Pearson, J.*, presiding.

The action is debt on a bond with condition, which, after reciting that the plaintiff had that day sold and conveyed to the defendant a tract of land, therein described, for the price of $448.59, proceeds thus: "Now, if the said Lee shall within two years from this date pay to the said Russell the said sum of $448.59, and the said Russell shall then convey the foregoing land to the said Lee, or if the said Lee shall not comply with the foregoing conditions within the said term of two years, then this obligation to be void; but otherwise to remain in full force."

The breach assigned is that on a certain day within the two years the plaintiff tendered the sum of $448.59 to the defendant

and requested him to convey the land, and that the defendant refused. Pleas, conditions performed and conditions not broken. On the trial the plaintiff gave evidence that he tendered the money and demanded the deed, as alleged in the declaration; and that the defendant refused to receive the money and execute a deed, saying that he was entitled also to interest on the money. The plaintiff gave further evidence that the land was worth $450, and that the defendant had received rents for the land during the two years, exceeding the interest.

(527) The counsel for the defendant thereon insisted that, besides the averment of the tender of the price, the declaration ought to have averred that the plaintiff had been always ready and was still willing and ready to pay the money, and that it should have been brought into court. A verdict was taken for the plaintiff's damages, $1, subject to the opinion of the court upon the point made; and, afterwards, the court set aside the verdict and ordered a nonsuit, and the plaintiff appealed.

Coleman and *Thompson* for plaintiff.
Barringer, *Osborne* and *H. C. Jones* for defendants.

RUFFIN, C. J. There would be more in the objections if the plaintiff was to recover in this action the land or a conveyance of it, as justice would require that he should, in that case, pay the price as when in equity there is a decree for specific performance. But that is not the nature of the action, which is for damages for the nonperformance of the agreement on the part of the defendant, namely, by his not receiving the price and conveying the land. It is not in affirmance of the contract, but for a breach of it, and it supposes the plaintiff to keep his money and the defendant to keep the land, and the plaintiff seeks his redress in damages for the loss sustained by him from that state of things, arising from the fault of the defendant in not performing his engagement, after the plaintiff had complied with the prior condition on his part. The measure of those damages is, obviously, the difference between the sum the plaintiff was to have given for the land, which in the event, however, he did not give, and the value of the land he would have got if the defendant had conveyed. It would, therefore, be to no use to bring the money into court. For, if that were required, then the plaintiff ought to recover the whole value of the land, and be allowed to take back his money in part thereof, which is precisely the same thing as not bringing it in at all, and

(528) having his damages assessed for the difference between

it and the value of the land. It is apparent, then, that the nature of the action was misconceived, for, certainly, it would comport neither with justice nor law that the purchaser should bring in the whole price for the vendor, and then get damages of $1, as here. As the plaintiff does not get the land nor its value, he is not bound to pay for it, nor, consequently, to keep the money ready for that purpose.

The judgment must therefore be reversed, and judgment entered for the plaintiff according to the verdict.

PER CURIAM. Judgment reversed.

THOMAS MURRAY v. ELISHA KING ET AL.

In an action of *assumpsit* to recover back money paid as usurious interest, the verdict was as follows: "We find all payments within three years, either on notes given before or otherwise, with interest thereon, in favor of the plaintiff, to wit, $558 and $100, with interest on the same." The judgment on that verdict was "for the sum of $935, of which $658 bears interest from 10 October, 1847, till paid": *Held*, that the judgment did not appear to correspond with the verdict, and, even if it did, the verdict is in itself insufficient and insensible.

APPEAL from the Superior Court of Law of BUNCOMBE, at Fall Term, 1847, *Settle, J.*, presiding.

The action was *assumpsit* for money had and received, in which the plaintiff sought to recover the excess above the principal and lawful interest, paid by him upon a contract alleged to have been made between the plaintiff and the defendant's intestate and to have been usurious. The pleas (529) were, *non assumpsit* and the statute of limitations.

The bill of exceptions is very long, containing the statements of much evidence and many points raised on the part of the defendants, against whom there was judgment. But it is unnecessary to state them, as the decision of the Court is on the single point following. The verdict is in these words, "who find all payments within three years, either on notes given before or otherwise, with interest thereon, in favor of plaintiff, to wit, $558 and $100, with interest on the same." Upon that verdict judgment was entered for the plaintiff for the sum of $938.34, of which $658 bears interest from 10 October, 1847, till paid, and costs; and therefrom the defendants appealed.

Edney and *J. W. Woodfin* for plaintiff.
Baxter and *N. W. Woodfin* for defendants.

STATE v. WARD.

RUFFIN, C. J. From reading the case appearing in the record, it would seem extremely difficult for the plaintiff to get on at law under the circumstances, whatever may be his merits, or however clear his remedy might be in another court. But we do not wish to prejudge the questions that may arise hereafter, and therefore the Court will not consider the points made at the trial, since under no circumstances can the verdict and the judgment be sustained as they are found in the record. The judgment does not correspond with the verdict, being for a much larger sum than that mentioned in the verdict. We suppose that addition is for the interest indicated in the verdict; but, supposing that that could be calculated by the clerk of the court, if the periods for which it accrued were designated, the verdict contains no such designation, and, therefore, there is nothing to govern in making the calculation. Besides, the ver-
(530) dict is in itself insufficient and insensible. It does not pass on the issues joined and assess damages to the plaintiff; but, unintelligibly, finds in favor of the plaintiff all payments (by whom or to whom is not said) within three years (from what time is not said), either on notes given before or otherwise (which is past comprehension), with interest thereon, viz., $558 and $100, with interest on the same (from or to what day, is not specified). Such a verdict cannot authorize any judgment, for even the sums mentioned in it are not assessed as damages due to the plaintiff, but found as payments in his favor. The judgment must therefore be reversed, and a *venire de novo* awarded.

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

THE STATE TO THE USE OF DOWDLE v. B. WARD ET AL.

The case of *State v. King*, 27 N. C., 203, reviewed and the decision there made confirmed.

APPEAL from the Superior Court of Law of CHEROKEE, at Spring Term, 1844, *Pearson, J.*, presiding.

This was an action of debt, brought at the instance of another relator upon the same bond which was sued upon in the case of the State upon the relation of John Hughes, decided at the December Term, 1844, of this Court, and reported in 27 N. C., 203. The defendants pleaded *non est factum*, and upon the trial of the issues thereon joined they raised several objections

to the recovery of the relator, among which was one that (531) the bond in question was never taken by any court. The objections were all overruled by the presiding judge, and the relator had a verdict and judgment, from which the defendant appealed.

Francis for plaintiff.
J. W. Woodfin and *Baxter* for defendants.

BATTLE, J. For the reasons given by the Court in the case of the State upon the relation of Hughes against the same defendants as those now before us, *S. v. King,* 27 N. C., 203, we deem the objection, that the bond was never taken by any court, to be fatal to the relator's right to recover in this action. The judgment must, therefore, be reversed, and a *venire de novo* awarded.

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

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