NORTH CAROLINA REPORTS.

VOL. 31.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

DECEMBER TERM, 1848

TO

JUNE TERM, 1849

(BOTH INCLUSIVE).

REPORTED BY

JAMES IREDELL.

(9 IRE.)

ANNOTATED BY

WALTER CLARK.

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CASES REPORTED.

CASES CITED.

CASES AT LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

DECEMBER TERM, 1848.

NANCY TUBBS ET AL. v. HORATIO N. WILLIAMS, EXECUTOR, ETC.

When a debtor has been discharged under the bankrupt law, a surety who might have come in under the commission cannot afterwards recover from the debtor. Consequently, where the surety appointed the debtor his executor, the residuary legatees of the surety cannot make the executor accountable for the debt.

APPEAL from the Superior Court of Law of PASQUOTANK, *Bailey, J.*, presiding.

This was a petition to recover residuary legacies from the defendant as executor of William D. Tubbs, in which the following case agreed was submitted to the court:

William D. Tubbs, in his lifetime, became the surety (2) of H. N. Williams and C. C. Green, who were merchants and partners trading, in Elizabeth City, under the firm and style of H. N. Williams & Co., on a note signed by them, H. N. Williams & Co., payable to Lovey S. Pool, executrix of Thomas Pool, for the sum of $5,000, and interest from 1 February, 1842. The said William D. Tubbs, by his last will and testament, appointed the said H. N. Williams his executor, and died in 1840. The said Williams duly qualified as executor and took possession of the legacies bequeathed to the petitioners and others. At the Fall Term, 1842, of Pasquotank judgment was obtained on the said note against the said Williams and Green and against the said Williams as executor of William D. Tubbs; execution issued thereon and was subsequently enjoined. Shortly after the rendition of the said judgment on the said note the de-

fendant Williams was decreed a bankrupt, as was also the said Green, and received his certificate of discharge at Fall Term, 1842, of the District Court of the United States for the district of North Carolina, at Edenton. The said Williams retained the possession of the negroes and other legacies bequeathed to the petitioners, and hired them out and received the hires, according to the report of W. W. Griffin as herewith filed, up to 1 June, 1847. Execution issued on said judgment from Fall Term, 1842, of Pasquotank, against H. N. Williams and C. C. Green, merchants and partners, trading under the firm and style of H. N. Williams & Co., and H. N. Williams, executor of William D. Tubbs, returnable to Spring Term, 1843, of said court, which was enjoined by a writ of injunction issuing from the District Court of the United States for the district of North Carolina, at Edenton.

(3) The plaintiff in the said execution proved her said debt regularly before the commissioner in bankruptcy for the county of Pasquotank, and received the dividends declared from the assignee and endorsed the same as credits on her said claim. The plaintiff in the said judgment afterwards issued her *scire facias* against the defendant Williams, as the executor of William D. Tubbs, on her said judgment, returnable to Fall Term, 1846, of Pasquotank, at which term her judgment was revived for the amount then due on the same against the defendant, as the executor of W. D. Tubbs. Execution issued on the said judgment returnable to Spring Term, 1847, of Pasquotank, and by virtue of which the sheriff of Pasquotank levied on the negroes in the hands of the defendant, as executor of W. D. Tubbs, and which were the same given in the will of the said Tubbs to the petitioners. The negroes so levied upon were subsequently sold under a *renditioni exponas,* returnable to Fall Term, 1847, of Pasquotank, issued on said judgment. As will appear by the report of W. W. Griffin, the sum of $1,556.71, of said W. D. Tubbs, which came to the hands of the defendant Williams as executor of said Tubbs, which amount arose from the legacies and were part of the legacies bequeathed to the petitioners, was applied to the satisfaction of the balance due on said judgment and execution in favor of the said Lovey S. Pool, to and upon which debt Tubbs is admitted to have been surety only.

Now, if upon the foregoing case agreed his Honor shall be of opinion that the defendant H. N. Williams, notwithstanding his certificate and discharge as a bankrupt, is liable to account to and with the petitioners for the said sum of $1,556.71, applied as aforesaid to the payment of the balance due as aforesaid

on the execution aforesaid, then judgment is to be rendered in favor of the petitioners for $1,776.94, with interest from 23 October, 1848. But should his Honor be of a differ- (4) ent opinion, and hold that the defendant is only liable for the balance reported by said W. W. Griffin, to wit, $220.23, then the report is to be confirmed and judgment accordingly.

His Honor being of opinion that the defendant Williams was only liable for the said balance of $220.23, as found and reported by said Griffin, gave judgment and decreed accordingly, from which judgment and decree the plaintiff prayed for and obtained an appeal to the Supreme Court.

No counsel for plaintiff in this Court.
Heath for defendant.

PEARSON, J. It is provided by the bankrupt act that, under a commission against the principal, a surety may prove the debt, and the certificate is a discharge of the principal, from the cause of action or claim, as well of the surety as of the creditor; so that if Tubbs, the surety, was living, and (5) had been forced to pay the debt, he could not recover from the defendant. This, it seems to us, is decisive of the case. The petitioners apply for their legacies; the defendant insists that a large part of the assets which would otherwise have been applicable to their legacies has been taken by a judgment creditor. The petitioners reply that was a debt upon which our testator was your surety. The defendant rejoins, "True! but I was discharged as a bankrupt, your testator had no cause of action against me, and you, who stand in his place, can have no higher claim." We concur with his Honor.

PER CURIAM. Judgment affirmed.

JONATHAN TWIDY v. JESSE SAUNDERSON.

1. A hired a negro from B and gave his sealed note as follows: "On 1 January, 1848, I promise to pay to B $130—the slave is hired on the same terms as other slaves—for the hire of the boy Evartson": *Held*, that this writing only referred to the price of the negro, and was not a memorial of any other terms of the agreement, and that, as to these latter, parol evidence was admissible.
2. And in such a case, in order to recover damages for a breach of the agreements not mentioned in the note, an action on the case and not an action of covenant is the proper remedy.

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

(6) This was an action on the case, in which the plaintiff proved by parol evidence that, on 1 January, 1847, he hired to the defendant a negro man for the year 1847; that the agreement was made in the county of Tyrrell, and by the terms of the agreement the defendant was not to risk the slave on water or to carry him out of the county of Tyrrell; that at the same time and place many other slaves were hired by other persons, and the same terms were openly and expressly agreed upon by the respective parties.

The plaintiff further proved that during 1847 the defendant hired the slave to one Spruill, who carried him to the county of Martin, where the negro was killed.

This action was commenced on 8 January, 1848, and the plaintiff declared in case for permitting the negro to be carried out of the county, and also in trover.

The defendant offered in evidence a note under seal which he had executed to the plaintiff for the hire of the negro. The note was in these words: "On 1 January, 1848, I promise to pay to Jonathan Twidy $130—the slave is hired on the same terms as other slaves—for the hire of the boy Evartson."

The defendant objected to the parol evidence offered by the plaintiff, upon the ground that it was not admissible to explain the written contract under seal. His Honor admitted the evidence.

The defendant also contended that the action was misconceived, and should have been covenant and not case. His Honor held that the action could be maintained, and instructed the jury that if it was a part of the contract that the slave should not be carried out of the county, and he nevertheless was carried out of the county and killed during the time of hiring, the plaintiff was entitled to recover, and the measure of the damage was the value of the slave. The jury found for (7) the plaintiff, and assessed the damage at $832.56.

Biggs for plaintiff.
Heath and *E. W. Jones* for defendant.

PEARSON, J. The case as made up presents but two exceptions on the part of the defendant: one as to the admissibility of parol evidence; the other, as to the form of action; and this Court is necessarily confined to these two questions, for it is to be taken for granted that the case was made up in reference to these two questions alone.

When parties reduce their agreement to writing, it is a rule

of evidence that parol testimony is not admissible to contradict, add to, or explain it; for although there be no law requiring the agreement to be in writing, still the written memorial is the surest evidence.

The rule is not applicable to the case under consideration, for the agreement was not reduced to writing. The note is not a memorial of the *entire* agreement, but is simply a part execution on the side of the defendant by giving a security for the price, the plaintiff having executed his part of the agreement by giving possession of the negro, leaving the terms of the agreement—as to the length of time for which the negro was hired, the clothing to be furnished, and other stipulations—open for parol proof.

Admit that the note, as far as it purports to contain the agreement, excludes parol testimony; it contains the agreement as to the price, to wit, "$130 for the hire of the boy Evartson," and therefore parol evidence would be inadmissible to show that a greater sum was to be given. It contains a general expression as to the terms, to-wit, "the slave is hired on the same terms as other slaves." These words must either be rejected as vague and unmeaning, or they must make a direct reference to what is out of the writing, that is, the terms upon (8) which other negroes were hired at the same time and place, and this, of necessity, is to be ascertained by proof *aliunde;* so that the writing by its terms contemplates and makes necessary a resort to other evidence in order to ascertain the agreement. In any point of view the parol evidence was admissible.

The next question as to the form of action is a more difficult one, and involves the necessity of deciding whether the note under seal of the defendant contains as well the terms of agreement as the price; for, if so, the simple contract is merged in the specialty.

It is argued that the note does contain the terms of the hiring, by reference to something else, and that its legal effect is the same as if the agreement had been set out at large, for *id certum est quod certum reddi potest,* and that the action must be upon the deed even when it is necessary, on account of the reference, to resort to parol evidence. The reply is that the reference in this instance is so vague and uncertain as to be entirely unmeaning. If the words had been, "the slave is hired on the same terms as he was hired the year before, or as the negroes of A. B. are hired this year," the terms could be made

certain; but the words, "on the same terms as other slaves," announce a mere generality, unrestricted by time, place or circumstance.

A latent ambiguity may be explained by parol evidence, as, in a bequest of *my* white horse, if the testator has two horses, it may be shown by parol evidence which of the two he meant, for the difficulty arises from a circumstance *dehors* the will; so if a deed calls for a black-oak tree marked as a corner, and there be two black-oak trees marked as corners, evidence *aliunde* must be resorted to to ascertain which tree was meant. Such evidence must be resorted to in every case to *fit* the *thing* to the *description;* but if the description be uncertain—
(9) which is what is called a patent ambiguity—parol evidence is not admissible, for that would not be fitting the thing to the description, but making by parol a better one than was furnished by the writing.

We think it clear that in this case the words in reference to the terms are to be rejected as unmeaning, and that the note does not contain the terms of hiring, except the price. We, therefore, concur with his Honor in both propositions.

It may be proper to add that as no objection is taken to the rule of damages laid down by his Honor, we are to suppose there was evidence to authorize it, and are not to understand his Honor as ruling that the *value* of the slave is the measure of damage as of course; for there may be circumstances under which the slave might have been killed, and the defendant be not liable to the extent of his value, although his agreement be violated. The case does not state the manner in which the slave was killed, so as to show that the death was not a natural consequence of the slave having been carried out of the county.

PER CURIAM. Judgment affirmed.

Cited: Sample v. Bell, 44 N. C., 340; *Manning v. Jones, ib.,* 370; *Bell v. Bowen,* 46 N. C., 320; *Daughtry v. Boothe,* 49 N. C., 88; *R. R. v. Leach, ib.,* 344; *Knox v. R. R.,* 51 N. C., 417; *Murray v. Davis, ib.,* 343; *Flynt v. Conrad,* 61 N. C., 194; *Woodfin v. Sluder, ib.,* 203; *Perry v. Hill,* 68 N. C., 420; *Kerchner v. McRae,* 80 N. C., 221; *Braswell v. Pope,* 82 N. C., 60; *Terry v. R. R.,* 91 N. C., 242; *Sherrill v. Hagan,* 92 N. C., 350; *Ray v. Blackwell,* 94 N. C., 12, 13; *Nickelson v. Reeves, ib.,* 563; *Meekins v. Newberry,* 101 N. C., 19; *Moffitt v. Maness,* 102 N. C., 461; *McGee v. Craven,* 106 N. C., 356; *Quin v. Sexton,* 125 N. C., 453; *Log Co. v. Coffin,* 130 N. C., 436; *Cobb v. Clegg,* 137 N. C., 156; *Evans v. Freeman,* 142 N. C., 65; *Brown v. Hobbs,* 147 N. C., 77.

(10)

WILLIAM C. DRAUGHAN v. THOMAS BUNTING ET AL.

1. Where A has a cause of action against another, and B makes a parol promise to indemnify A, which promise is *superadded* to the claim which A has on his original cause of action, the statute making void parol promises to indemnify against the default, etc., of another, will apply.

2. But if there is no debt for which another is or is about to be answerable, or if the debt of the other is discharged and the promise is *substituted*, the statute does not apply.

3. A surety who seeks to recover from a cosurety a ratable part of money paid must take care to do no act which will prevent the cosurety from having recourse against the principal. If, therefore, he release the principal, it is a discharge of the cosurety.

4. If A is indebted to B and puts money in the hands of C to pay B, B may sue C for money had and received to his use.

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

This was an action of *assumpsit*, in which the plaintiff declared in several counts:

1. On a promise to indemnify the plaintiff on a note for $600.

2. On a promise to indemnify the plaintiff on a note for $479.43.

3. On a promise to indemnify the plaintiff on a judgment of the Bank of Cape Fear against David Underwood, John Sellars and William C. Draughan.

4. To receive money paid on a judgment obtained on a note endorsed by the plaintiff, at the instance and request of the testator, John Sellars, as supplemental surety, and not as cosurety with said John Sellars on a note of David Underwood.

5. To recover money laid out and expended for the use and benefit of the testator, John Sellars.

6. To recover money had and received by the testator, (11) John Sellars, for the use of the plaintiff.

The defendants pleaded the general issue and the statute of frauds. For the plaintiff it was proved that he endorsed a note for $600, payable to the Bank of Cape Fear, in which David Underwood was principal and the defendant's testator, John Sellars, surety, which was renewed from time to time until the note for $479.43 was given. It was further proved that a judgment was obtained on this note and the plaintiff was compelled to pay the sum of $278.21, which he sought to recover of the defendants. The plaintiff then proved by Underwood, the prin-

cipal in the note, that when he applied to the plaintiff to endorse for him he declined doing so unless he could be indemnified, which he (Underwood) promised should be done; that thereupon John Sellars, the testator, in consideration that Underwood would convey to him a large number of slaves to secure him as his (Underwood's) surety in this and other debts for which he (Sellars) was liable as his surety, promised to indemnify the plaintiff and save him from all loss in becoming endorser on Underwood's note; that Underwood did accordingly execute an absolute bill of sale to Sellars for a large number of slaves, and the plaintiff then endorsed the note for $600, and that the negroes were afterwards sold by Sellars, and he acknowledged he had in his hands funds with which to discharge the debt for which the plaintiff was liable as endorser. The defendants objected to the competency of Underwood as a witness to prove these facts, which objection was sustained by the court. Whereupon the plaintiff executed to him a release, and the defendants pleaded it since the last continuance in bar of the action. A motion was then made by the defendants' counsel that the plaintiff should be nonsuited, both on the ground that they were discharged by the release and that the defendants' liability, if any,

(12) was for the debt, default or miscarriage of another and not for his own debt, and the plaintiff could not recover because the promise was not in writing, as required by the statute of frauds.

The court expressed an opinion that the action could not be sustained, and the plaintiff submitted to a judgment of nonsuit and appealed.

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

PEARSON, J. We concur with his Honor that an action cannot be maintained upon the parol promise of indemnity. That is void by the statute of frauds. Underwood was under a legal liability to indemnify the plaintiff as his surety, and the promise, superadded by the intestate, comes within the words and meaning of the statute; it is a promise to answer for the default of another, and there being a consideration makes no difference; it required no statute to make void a promise not founded upon a consideration.

The true test is, Has the plaintiff a cause of action against another, to which the promise in question is superadded? If so, the statute applies. But if there is no debt for which another is already or is about to become answerable to the plain-

tiff, or if the debt of the other is discharged and the promise in question is *substituted,* the statute does not apply; as, when a creditor discharges a debtor who is in custody, upon a promise of a third person to pay the debt, the original cause of action is gone by the effects of the discharge; the new promise is *substituted.*

We are of opinion that the effect of the release was misconceived. So far as there was a cause of action arising from the relation of cosuretyship under the act of 1807, the release to the principal is a bar; for a surety who seeks to recover from a cosurety a ratable part of money paid must take care to do no act which will prevent the cosurety from having re- (13) course against the principal, inasmuch as his right to contribution involves the duty of transferring to his cosurety a right to recover from the principal the amount which he is called upon to pay. If, therefore, he releases the principal, it is a discharge of the cosurety.

The case must be viewed as if no promise of indemnity had been made, for that is void by the statute; and as if no relation of cosuretyship had existed, for that is destroyed by the release.

There is, however, a fact in this case, to which the attention of the learned judge seems not to have been called, which entitles the plaintiff to recover upon the count for money paid, and as the nonsuit was submitted to, from the intimation of his Honor that the plaintiff could not recover upon the facts stated, the judgment must be reversed.

The intestate received property from Underwood, sold it, and acknowledged that "he had in his hands funds to discharge the debt." As soon as the intestate received the money the bank, although it had a cause of action on the note, had a new and distinct cause of action against the intestate, upon a promise implied by law from the receipt of the money to pay the debt.

It is well settled that if A is indebted to B and puts money in the hands of C to pay B, B may sue C for money had and received. 1 Chitty Pl., 4, and the cases there cited.

The plaintiff, who was forced to pay the bank, can truly allege that he has paid money which the intestate was under legal liability to pay, in consequence of the receipt of the money, and this, according to the authorities, gives him the equitable action, as it is termed, for money paid to the use of the intestate (Smith's Leading Cases, 1 vol., 55, note and cases cited). It cannot be objected that the plaintiff paid the money officiously, and falls under the rule that no one can make (14)

another his debtor without his consent; for, as his surety on the note, he was liable to the bank, and has been forced to pay a debt which the intestate ought to have paid.

In *Hall v. Robinson*, 30 N. C., 56, a surety, having paid a part of the debt out of his own funds, was held to be entitled to recover of a cosurety the amount placed by the principal in the hands of the latter to be applied to the debt, for the reason that, "having received it to pay the debt, he could not in conscience and ought not in law to keep it"; he was, in fact, to that amount the *real debtor*. The cause of action did not arise out of the relation of cosuretyship and depend on the act of 1807, for the principal having provided funds could not be said to be insolvent, nor was the action for a ratable proportion. That case, like the present, rested upon the broad principle that the defendant having received money to pay a debt, which the plaintiff was afterwards forced to pay, was the *debtor* of the plaintiff.

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

Cited: Hoke v. Fleming, 32 N. C., 268; *Stanley v. Hendricks*, 35 N. C., 86; *Britton v. Thrailkill*, 50 N. C., 331; *Stimson v. Fries*, 55 N. C., 161; *Hicks v. Critcher*, 61 N. C., 355; *Combs v. Harshaw*, 63 N. C., 199; *Dixon v. Pace, ib.*, 605; *Parham v. Green*, 64 N. C., 437; *Threadgill v. McLendon*, 76 N. C., 27; *Straus v. Beardsley*, 79 N. C., 68; *Mason v. Wilson*, 84 N. C., 54; *Whitehurst v. Hyman*, 90 N. C., 490; *Peacock v. Williams*, 98 N. C., 328; *Haun v. Burrell*, 119 N. C., 547; *Board of Education v. Henderson*, 126 N. C., 694; *Voorhees v. Porter*, 134 N. C., 605.

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(15)

JAMES AND SUSAN LEA v. JOHN JOHNSON.

1. The courts have no authority to have the lands of the citizens taken for a cartway, without the consent of the owner, except in the instance provided for by the statute: "If any person shall be settled upon or cultivating any land to which there is no public road leading or no way to get to or from the same, other than by crossing other persons' land."

2. Therefore, where there was a public road to which access might be had, though not so convenient for the petitioner as the cartway he prays for, the court cannot grant the petition.

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

LEA *v.* JOHNSON.

This was a case originally commenced in the County Court by a petition for a cartway, and thence carried by appeal to the Superior Court of Caswell County. The petition set forth that the petitioner James was the owner, and was cultivating a valuable tract of land, on which was situated a public mill, on Cobb Creek, which runs through the said land; that the said land was situated about a mile and one-half to the nearest point of it from Leasburg, and the mill about two miles; that he himself resided in Leasburg and had no wagon nor cartway to his said plantation or mill, without going the Roxboro Road into Person County about a half mile, and then along the Goshen Road in Person County about three miles, and then a crossroad to the mill about a mile, making in all four and one-half miles; and to the main part of his plantation was still farther and more inconvenient than to the mill.

And the petition further showed that for a great many years there had been a cart and wagon way from Leasburg to his plantation and then turning from the Milton Road about half a mile from Leasburg, running through the lands of the petitioner Susan and the defendant John and the petitioner (16) James, to the mill, which said way has been stopped up by the defendant John, and he now refuses to allow any passage over that way.

The petition further stated that the said way would not only be a great convenience to the petitioner James, but also the neighborhood generally; that the citizens of Leasburg had no other way to the said mill than that described, and the neighbors on the courthouse side of Leasburg were thrown still further out of the way.

The petition further set forth that the petitioner James had no other way of going to his said mill and land without going over the lands of others, than as above described, and it was not necessary to establish a public road, and the petitioners prayed an order to lay off a cartway from the Milton Road, etc.

The County Court dismissed the petition on the motion of the defendant, and the plaintiffs appealed to the Superior Court. The appeal coming on to be heard before the judge of the said court, his Honor ordered that judgment be entered against the defendant in the said petition for costs, and that the prayer of the petitioner be granted and that a writ of *procedendo* issue to the County Court accordingly. From which judgment the defendant appealed to the Supreme Court.

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

PEARSON, J. When this case was heard on the circuit I was so entirely satisfied that the cartway petitioned for would be
(18) a matter of great convenience to the petitioners and other citizens of Leasburg and its vicinity, by giving them a road to mill not exceeding two miles in distance, instead of a round-about road, over bad ground, exceeding four miles, that my attention was diverted from a particular examination of the statute, and I contented myself with a general impression that the meaning of the act was to establish a third sort of road, called a cartway, intermediate between a public road, which was to be kept up at the public expense and used by all the citizens, and a mere private way, which, when acquired by grant or prescription, was to be used by the grantee and those having his estate.

After the argument in this Court, and by the assistance of the great learning and long experience of the *Chief Jus-*
(19) *tice* and my brother *Nash*, I have satisfied myself that I was wrong. "Hard cases are the quicksands of the law"; in other words, a judge sometimes looks so much at the apparent hardship of the case as to overlook the law.

However convenient it may be, in many instances, to have a cartway, when it may not be necessary to establish a public road, we are unable, by the most liberal construction of the act, to find any authority given to the courts to have the land of the citizens taken without the consent of the owner for the purpose of a cartway, except in the instance expressly provided for: "If any person shall be settled upon or cultivating any land to which there is no public road leading and no way to get to and from the same other than by crossing other persons' lands." In this case there is a *public road leading to the mill and land* of the petitioners; it, therefore, does not come within the words of the act, and if we depart from the words, there is no stopping short of an unlimited discretion by which the land of one man may be taken for the use of another. To authorize this there should be a plain expression of the legislative will. In the absence of such provision, individuals must be left to depend upon the courtesy of good neighborship or the acquisition, by grant, of the right of private ways.

Let the decision of the court below be reversed and the petition be dismissed with cost.

PER CURIAM. Decreed accordingly.

Cited: Caroon v. Doxey, 48 N. C., 24; *Burgwyn v. Lockhart*, 60 N. C., 266; *Warlick v. Lowman*, 103 N. C., 124; *Burwell v. Sneed*, 104 N. C., 121; *Collins v. Patterson*, 119 N. C., 604.

(20)

THE STATE TO THE USE OF JACOB HUBBARD v. STEPHEN WALL.

1. When a claim was put into a constable's hands for collection, during the year 1839, and he was guilty of a breach of duty in not collecting it during that year, and he was reappointed for the year 1840, and the claim still remaining in his hands, he was again guilty of a similar breach of duty: *Held*, that the party injured had his election to sue on the bond of either year or on both bonds.

2. *Held further*, that the circumstance that the party injured had it in his power to recover on the second bond, if he had chosen to do so, did not mitigate the damages he had a right to recover on the first bond.

3. A constable is the agent of the creditor only during the year he continues to be a constable. For his receipts after that period the creditor is not chargeable.

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

This is an action of debt on a constable's bond, to recover the amount of a claim put in his hands for collection; and the breaches assigned were, failing to collect, collecting and not paying over, and not returning the note.

It was shown that on 16 April, 1839, one Sedbury, being appointed a constable for one year, executed the bond sued on, and the testator, Wall, was one of his sureties. On 1 February, 1840, the relator placed in Sedbury's hands for collection a note, due to him by John and James McAlister for $75, and took his receipt to collect or return as constable. The plaintiff proved that James McAlister, one of the obligors, had property out of which the money might have been collected; that in June, 1841, Sedbury ran off from the country; that in 1845, a short time before the writ issued, he made a demand of the (21) testator. The defendant proved that on 15 April, 1840, Sedbury was again appointed constable, and executed the usual bond with surety for that year; that in May, 1841, Jane McAlister paid to Sedbury, who still had the papers and ran off a short time afterwards, the sum of $75 in part payment of the debt.

It was admitted that in 1842 the bond which is now sued on was put in suit by Alexander Little, as relator, who had put claims in Sedbury's hands; that the testator, who was the defendant in that action, relied upon the defense that the record of Sedbury's appointment was defective, and obtained a verdict on the plea of *non est factum*, on which there was judgment,

and, upon an appeal to the Supreme Court, the judgment was affirmed. The defendant's counsel insisted: (1) That the effect of the verdict and judgment of the Supreme Court was a rejection of the bond by the sovereign power, and therefore the act of 1844 could not have the effect to reinstate it as a bond. (2) That the verdict and judgment operated as an estoppel and barred this action. (3) That as Sedbury was appointed constable in April, 1840, and continued to hold the paper, the action should have been on the bond given in 1840, and not on the bond of 1839. (4) That if the plaintiff could recover on the bond of 1839 for failure to collect from 1 February, 1840, to 16 April, 1840, the damage should be nominal, or, at most, only $26.45, the balance of the relator's debt after deducting the $75 paid by Jane McAlister in May, 1841.

The court was of opinion against the defendant on all the points, and thought the relator entitled to recover the whole of his claim, inasmuch as the payment of the $75 was made after Sedbury's second year had expired. There was a verdict for the plaintiff. Motion for new trial for error, refused, (22) and judgment; appeal to Supreme Court.

Winston for plaintiff.
Strange for defendant.

PEARSON, J. There is no error in the proceedings of the court below. The first and second exceptions are clearly untenable, and were not pressed in this Court.

Although Sedbury was reappointed in 1840, and continued to hold the paper, so that there was a clear breach of the bond given for that year, this did not amount to a release of any cause of action to which the plaintiff was entitled upon the bond given for the year 1839.

It is true, as is held in *Miller v. Davis,* 29 N. C., 200, "the different bonds given by a constable are not cumulative, as in the case of guardians, but are distinct and separate, each to secure the performance of the duties stated in them"; that is, the bonds are not given to secure the performance of the same duties, but of different duties; still, if there be a breach of both bonds, the plaintiff has his election and can sue upon either or both.

The neglect to collect or take any steps for two months and a half after the paper was put into his hands was a breach of the bond given in 1839; and the only question is as to the amount of damages. The plaintiff has lost his entire debt;

but the defendant says the fact that he has a remedy upon the bond of 1840 should go in mitigation and reduce the damages to a nominal amount. If the plaintiff had pursued his remedy and obtained satisfaction upon the bond of 1840, it would go in mitigation, but it is difficult to conceive how his damages can be lessened merely because he has a remedy upon another bond. So if the plaintiff had received the money or any part of it from his debtor, or if it had been received by Sedbury during his second year, when he was the agent of the plaintiff, and authorized to receive it, that would go in (23) mitigation, as is held in the case above cited.

But the money was not received by Sedbury until he went out of office and had ceased to be the agent of the plaintiff. The new contract of agency, implied from his reappointment and his being allowed to keep the papers the second year, terminated with his official year. A constable is the creditor's agent only during the year he continues to be a constable. *Respass v. Johnson,* 29 N. C., 77. The law will not imply an agency for a longer time than the appointment, which gives rise to it, is to continue.

PER CURIAM. Judgment affirmed.

DOCTOR COLE v. WILLIAM HESTER.

1. When the contract is for the delivery of a certain quantity of tobacco, deliverable at a certain place and for a certain price, in order to entitle the purchaser to recover for a breach of the contract, he must allege and prove that he was ready to perform his part of the contract.

2. Where it appeared that A raised the tobacco on his mother's land, and was to have one-sixth for his labor, etc.: *Held*, that A was not a tenant in common with his mother, as to one-sixth, and had no property in it or lien on it.

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

This is an action of *assumpsit* to recover damages for the breach of a contract because of the nondelivery of a crop of tobacco, alleged to have been sold by the defendant to (24) the plaintiff in the winter of 1845.

Several witnesses testified that they heard the defendant say he had sold his crop of tobacco to the plaintiff for $4 per hundred to be delivered at the Franklinton depot. A witness, intro-

duced by the plaintiff, testified that he went with him to the plantation of one Mrs. Hester, the mother of the defendant, and where he lived as an overseer, to see him in relation to the tobacco, about 1 April, 1845; that the defendant was prizing it; that the plaintiff said, "Are you going to let me have your tobacco?" That the defendant replied, "Our contract was that you were to get Kennedy's tobacco, and by the sale of it get money to pay me; and as you failed to get it, I concluded to prize mine, and I shall go on with it"; that the plaintiff rejoined, that made no difference, for he could pay the money without getting Kennedy's tobacco; that the plaintiff then offered defendant twenty cents per hundred for the prizing he had done—to which the defendant did not assent.

Another witness, on the part of the plaintiff, testified that in March, 1845, the defendant came to the plaintiff's factory at Franklinton; that witness said: "What! are you come to get off, too?" The defendant said, "No, I have come to get tighter on"; that the plaintiff and defendant had a conversation to one side, and he heard the plaintiff say to defendant, "As soon as I get Kennedy's tobacco, prize it and send it off, I will be ready to take yours." Several witnesses testified that tobacco had risen in price between the winter and 1 April, 1845, and all proved that the defendant lived with his mother as an overseer, and was to have the one-sixth of the crop for his wages, and that he raised no other crop; also, that he had been acting as his mother's agent and selling her crops for some two years, and that
(25) this was generally known in and about Franklinton. It also appeared that in the winter and spring of 1845 the plaintiff was reported to be in failing circumstances.

There was no evidence that the plaintiff had got Kennedy's tobacco or any part of it.

The defendant insisted that his obligation to deliver the tobacco depended on a contingency that had not happened, namely, the failure on the part of the plaintiff to get Kennedy's tobacco; and that he was therefore not liable on this part of the case. And further, that the contract was made by him as the known agent of his mother, and the suit ought to have been brought against her. The plaintiff, on the contrary, insisted that the contract did not depend on any condition or contingency; that it made no difference if the plaintiff were able to pay when the tobacco was delivered. And, on the other *ground*, the plaintiff insisted that the contract was an individual one with the defendant; but, even if it were otherwise, he was entitled to recover for the nondelivery of one-sixth of the tobacco, though there was no evidence that the crop had been divided

and the defendant's portion set apart to him. The court charged that if it were the contract between parties that the defendant must deliver the tobacco at Franklinton depot apart from any condition or contingency, it was the duty of the defendant to tender it there within a reasonable time; and if he failed to do so, the plaintiff would be entitled to damages, the measure of which would be the difference between the contract price and the rise in the price, if any had taken place; and if no rise had taken place, plaintiff would be entitled to recover at least nominal damages. On the other point, the court charged, if the contract were that the delivery depended on the plaintiff's getting Kennedy's tobacco, prizing it and selling it off, and the plaintiff had not procured said tobacco, the defendant would be entitled to their verdict. And the court also (26) charged that if the contract were made with the defendant as the agent of his mother, that the plaintiff could not recover, even for the one-sixth of the crop. The jury returned a verdict for the defendant.

A new trial was moved for and refused, and the plaintiff appealed.

Busbee, McRae and *Miller* for plaintiff.
Gilliam and *W. H. Haywood* for defendant.

PEARSON, J. The first proposition laid down by his Honor is too general, and ought to have been qualified.

If the contract was unconditional, and the defendant had failed to deliver the tobacco, the plaintiff was entitled to recover, *provided* he was ready and able to pay the price. The delivery of the tobacco and the payment of the price were concurrent acts; and, to entitle the plaintiff to recover, it was necessary for him to aver or prove that he was ready to perform his part of the contract. The plaintiff, however, cannot complain of this error, as it was in his favor.

The second proposition, "if the contract was that the delivery of the tobacco depended on the plaintiff's getting Kennedy's tobacco, prizing it and sending it off, and plaintiff had not procured said tobacco, the defendant would be entitled to a verdict," is certainly true. There was some evidence tending to show that the contract depended upon the plaintiff's getting Kennedy's tobacco, but the evidence was slight, and we cannot help thinking that if particular instruction had been asked for, and the attention of the jury had been directed to the distinction between what circumstances enter into and form a part of a contract, so that the contract may be said to depend on them,

and what are merely collateral, the jury would have arrived at the conclusion that the contract in this case did not de-
(27) pend upon the plaintiff's getting Kennedy's tobacco, so as to make that a condition precedent. If A agrees to buy the tobacco of B, provided he can borrow $500 from C, the agreement is conditional; it depends upon A's being able to borrow the money from C. But if A agrees to buy the tobacco of B, and, by way of assuring B that he will be able to pay for it, A tells B that he expects to borrow money from C, this is a mere collateral circumstance—the contract does not depend on it. It makes no difference how A gets the money; it is sufficient if he has it ready.

This point does not seem to have been made at the trial, and is not presented by the case as made up; for which reason the plaintiff cannot have the benefit of it.

The third proposition, "if the contract was made with the defendant, as the agent of his mother, the plaintiff could not recover, even for one-sixth of the crop," is unobjectionable. The mother owned the whole crop; the defendant was not a tenant in common as to one-sixth, he had no property in it or lien upon it (*S. v. Jones,* 19 N. C., 544), and might well sell the whole as her agent, and look to her for his sixth part of the price.

PER CURIAM. Judgment affirmed.

Cited: Grandy v. McCleese, 47 N. C., 145; *Plank Road Co. v. Bryan,* 51 N. C., 85.

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(28)

LOUIS A. NIXON v. HENRY NUNNERY.

1. In a proceeding under the insolvent laws, when the debtor has been arrested on a *ca. sa.*, it is too late for him, after giving bond and joining in an issue of fraud, to take exception to the writ of *ca. sa.*

2. Although the *ca. sa.* may be void, yet the court has jurisdiction of the subject-matter, and objections to any part of the proceedings must be made in apt time.

3. When the creditor alleges fraud, if his specification be not sufficiently certain, and a defendant, before issue joined, objects to it, and the court should refuse to make it certain, it would be error. But an objection to the specification is too late after issue joined. The verdict cures the defect.

4. The rule is that the verdict cures all omissions or defects which must necessarily have been passed upon by the jury.

5. A verdict is not too vague when it responds to the issue.

6. It is not necessary that the land alleged to have been fraudulently conveyed by the debtor should be over the value of $10. The law does not permit the debtor to convey, with intent to defraud, land or any other *visible* property, no matter how small the value.

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

This was a proceeding upon a *ca. sa.* returned originally to the County Court, where the proceedings were ordered to be dismissed upon the motion of the defendant, and from this judgment an appeal was taken to the Superior Court. In this court the following specifications on a suggestion of fraud were made by the plaintiff, to wit: "That the defendant, Henry Nunnery, conceals and now is the owner of horses, cows, ton timber (several thousand feet), four mules, notes, judgments and accounts, and that he is also the owner of land or has an interest in land."

The following issues were submitted to the jury (the two first not necessary to be inserted, as the jury found on them for the defendants):

3. Did the defendant own land or any other interest (29) therein at the time of issuing *ca. sa.?*

4. Did the defendant convey any land with intent to defraud his creditors since the issuing of the *ca. sa?*

5. Did the defendant convey any land with intent to hinder, defraud or delay the plaintiff in this action, since the issuing of the *ca. sa.?*

The jury found the third, fourth and fifth issues in favor of the plaintiff, that is to say, that the defendant did own land, and did convey land with intent to defraud his creditors since the issuing of the *ca. sa.;* and they further found that the defendant did convey land with intent to hinder, delay and defraud the plaintiff in this action, since the issuing of the *ca. sa.*

Upon the trial the defendant moved to quash the proceedings upon the ground that the *ca. sa.* was void. The court being of opinion that the defendant had waived any irregularity by joining in the issue tendered by the plaintiff, refused the motion to quash, and for the further reason that the motion to dismiss had been heretofore adjudicated in this Court. Upon the charge of the court the jury returned a verdict in favor of the plaintiff. The defendant then resisted the judgment upon the ground that the finding of the jury was too general and indefi-

nite. The court overruled the objection, and gave judgment that the defendant be imprisoned, etc. From this judgment the defendant appealed to the Supreme Court.

W. B. Wright and *Husted* for plaintiff.
D. Reid for defendant.

PEARSON, J. There is no error in the proceedings of the court below.

After giving bond and joining in an issue of fraud it is too late to take exception to the writ of *ca. sa.* This is settled by more than one case.

(30) The defendant's counsel attempted to distinguish this case by insisting that the *ca. sa.* was not simply irregular, but void; that a void *ca. sa.* cannot confer jurisdiction, and that jurisdiction could not be acquired by express consent, much less by consent implied from a waiver or neglect to take exception in apt time.

If the court derived its jurisdiction from the *ca. sa.*, there would be force in the argument. But jurisdiction of the subject-matter is conferred by law; the *ca. sa.* and bond are only the means of process to bring the party into court. Any defect in process may be waived.

The argument proves too much, if the court, when a *ca. sa.* is void, has no jurisdiction and the proceeding is a nullity. Debtors who have taken the oath and been discharged may be arrested again; and should they rely upon the discharge, the answer will be, it is a nullity; the *ca. sa.* was void, and the court had no jurisdiction.

The next objection is that the specification was too vague, as no particular land was set out. Specifications are not required by statute, but have been adopted by the courts to aid defendants and inform them to what to direct their proofs.

If a specification be not sufficiently certain, and a defendant, *before issue joined,* objects to it, and the court should refuse to require it to be made certain, it would be error. But if a defendant does not object, and goes to trial, it is too late—he has taken his chance. The verdict cures the defect, for it must be taken for granted that evidence was offered which proved that the defendant had conveyed some particular land with an intent to defraud, otherwise a verdict could not have been rendered. The rule is that a verdict cures all omissions or defects which must have necessarily been passed upon by the jury.

A declaration in trespass for breaking the plaintiff's close in the county of Wake, is not too general, unless by special plea

the plaintiff is forced to reassign. So, trespass for an (31) assault is not too general, if defendant will go to trial on the general issue.

The last objection is that the verdict is too vague because it does not describe any particular land, or find that the value is over $10. The verdict is responsive to the issue. But it was argued that the land should have been identified to enable the defendant to make a "full and fair disclosure."

The law punishes the defendant for his fraud by imprisonment; it does not undertake to enable him, by a verdict, to make a "full and fair disclosure." When he applies a second time for the benefit of "the act," he is to make a clear conscience, under the penalty of a second imprisonment.

If the specification and verdict be certain, and the defendant makes a disclosure coming fully up to it, still, if the plaintiff is able to show any other property which has been fraudulently conveyed, the defendant will be again imprisoned until he makes a "full and fair disclosure," which is a condition precedent to his discharge.

The other ground is equally untenable. The act does not allow a debtor to convey, with an intent to defraud, land or any other visible property to the value of one cent. It provides, if the debtor has no *visible* estate, real or personal, and shall make oath that he hath not the worth of $10 in any worldly substance, either in debts owing to him or otherwise, over and above his wearing apparel, etc., and that he hath not at any time since his imprisonment or before, directly or indirectly, sold or otherwise disposed of *any part of his real or personal estate*, to defraud, etc.

This language need only to be read to be understood.

PER CURIAM. Judgment affirmed.

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(32)

JOHN B. FREEMAN v. JOSHUA SKINNER.

Where A contracted to deliver to B one hundred fish-stands of a certain description, and upon tendering them, B received fifty, but refused to receive the other fifty, because they were not made according to the contract: *Held*, that this receipt of the fifty stands did not make B responsible for the other fifty which were not made according to the contract.

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

The plaintiff agreed to make for the defendant one hundred fish-stands, and to deliver them at Colerain, a fishery on the Chowan, between 1 and 20 March, 1848, at the price of $1.50 apiece. The stands were made and delivered within the time specified, and the defendant received fifty of them, not in person, but by an agent. The case states that the stands were not made agreeably to contract, and the defendant refused to receive the remaining fifty.

His Honor, the presiding judge, instructed the jury that if the plaintiff made the stands according to contract and delivered them at Colerain within the time specified, he had a right to recover the amount the defendant agreed to pay; that if they were not made according to contract, and the defendant had received fifty of them, then they should find a verdict for whatever they were worth. The jury found a verdict for the plaintiff for the sum of $134.69, of which $125 was principal.

Judgment being rendered accordingly, the defendant appealed.

Biggs for plaintiff.
Heath for defendant.

NASH, J. There is much want of precision and clearness in the statement of the alternative portion of the charge.
(33) By the rules of grammar the last relative pronoun *they* ought to refer to the next antecedent with which it is connected, that is, fifty stands. But such was not the understanding of the jury. If it had been, they could not have given the plaintiff damages for a sum exceeding $75, for that would have been the price of fifty stands, if made agreeably to contract; on the contrary, they have given him $125 as the value of the casks received by the defendant. The jury must have understood the court as instructing them that the defendant, by receiving a part of the stands, had made the whole number his, and was bound to pay for the whole, although the remaining fifty were not made according to contract. That they must so have understood the charge is manifest from the fact that they allowed the plaintiff damages to the amount of $125, as the value of the stands he was bound to pay for. Now, they could not have valued the fifty stands which the defendant had taken, at that price, for at $1.50 per stand—the stipulated price—they could have been valued at but $75. But the jury had said that the whole one hundred were defectively made and not according to the contract. They must, then, have valued the whole lot, upon the principle that the defendant had, by receiving

fifty stands, received the whole and was bound to pay for the whole what they were worth. If it was not the intention of his Honor so to charge them, he should have rectified their misconception of his meaning; if he did so intend, he erred in point of law. The stands were delivered at the place and within the time specified; upon inspection, they were found to be made not according to the contract. The defendant might have refused to receive any of them, and the plaintiff would have had no right to complain. But he did take such a portion (34) of the stands as were made nearest to his agreement—refusing the remainder. This he did without objection from the plaintiff. The contract was for one hundred stands, at the price of $1.50 per stand, and not for $150. The stands were to be delivered between 1 and 20 March. Suppose the plaintiff had delivered to the defendant fifty of them at one time, made as he had contracted they should be made, and on another day tendered fifty more, badly made, not coming up to the contract, would the defendant have been obliged to receive them, though badly made? Certainly not. If by receiving the first fifty he was bound to receive the last, it would be because he had precluded himself from refusing them, having already accepted them. The defendant, by receiving the fifty stands, did not receive the other fifty, and is only bound to pay for them what they were worth.

There was, then, error in his Honor's charge.

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

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(35)

JACOB HAMLIN v. WILLIAM B. MARCH.

1. The law requires that a writ (as in this case, on execution) shall be returned to the court and not to the clerk.

2. It is true the clerk is the officer of the court to receive the writ, and whatever may be raised upon it, as his office is the place where the records of the court are kept and preserved.

3. If the clerk will not receive the return, when tendered to him, the officer, to discharge his duty, must return the precept and the money, if he has made it, to the court. They will, upon a proper representation, make such order as the case may require, and, in a proper case, direct their officer to receive the process.

4. The death of the clerk during term-time is no excuse for not making the return.

HAMLIN *v.* MARCH.

APPEAL from the Superior Court of Law of DAVIE, at Fall Term, 1848, *Moore, J.*, presiding.

Under the proceedings in this case the plaintiff seeks to recover from the defendant, who is the Sheriff of Davie County, $100, the penalty given by Laws 1836, ch. 109, sec. 18, for not returning process. It appears that the plaintiff recovered a judgment in the County Court of Davie, at May Term, 1845, against Nathan Hamlin, upon which a *fieri facias* issued, returnable to August Term following, which in due time came to the hands of the defendant's deputy, who collected the money. Early in the term of the court to which the writ was returnable the plaintiff applied to the deputy, in whose hands the process was, for his money, which he refused to pay to him. On Wednesday evening of the term the deputy, with the plaintiff, went to the clerk of the court, and the former offered to return the process and pay the money to him. The clerk remarked he was then busy, and directed the plaintiff to call at his office the
(36) latter part of the week and he would then receive his money. At this time no return was endorsed on the execution. The clerk was taken ill on Friday evening and died on Saturday—on both of which days the plaintiff attended at the courthouse, to get his money. On the Monday following the deputy stated he had not returned the *fi. fa.* During the August Term the plaintiff obtained a judgment *nisi* for the penalty given by the act against the defendant for not making a due return of the writ. Upon that judgment the *sci. fa.* in this case issued. On the execution was endorsed, "August Term," etc. To the *sci. fa.* the defendant pleaded *nul tiel record*, tender to the clerk and refusal, death of the clerk during term.

The court adjudged there was such a record, and submitted the other issues to the jury, instructing them to ascertain from the evidence whether the defendant did return the execution in due time, as he was required by law. If they found he had done so, the plaintiff was not entitled to recover. The jury were further instructed that the offer by the deputy to return the execution to the clerk, on the Wednesday evening of the court, was not sufficient to discharge him from the penalty, unless the plaintiff had agreed to enlarge the time within which the sheriff was required by law to make the return. If the plaintiff had so agreed, the defendant was entitled to their verdict. The jury found a verdict in favor of the plaintiff, and the defendant appealed from the judgment thereon.

Rufus Barringer for plaintiff.
Lillington for defendant.

NASH, J. We do not concur with his Honor, the presiding judge, in the charge he gave to the jury. In the first part of it he submits to them to ascertain whether the process had been duly returned according to law. The defendant had not tendered such a plea. If he had it would have been the (37) province of the jury to ascertain the existence of the facts relied on as constituting a return, and the duty of the court to instruct them as to their sufficiency in law to have that effect. So with respect to the other portion of the charge. The jury was instructed, if the plaintiff had concluded to enlarge the time within which the defendant was to make his return, it would be a discharge. There was no such defense made by the pleas. These, however, are errors, if they be such, which operate no injury to the defendant; for, from the case agreed, the plaintiff is very clearly entitled to judgment against him according to his *sci. fa.*

We are entirely satisfied that neither of the pleas to the country can avail the defendant. The first is, that he had tendered the execution to the clerk, who had refused to receive it; the second, that the clerk died during the term, meaning, we presume, that, in consequence thereof, he was unable to make a return. To these pleas the plaintiff might and ought to have demurred. If true, they were no answer to the charge. The law requires that the writ shall be returned to the court and not to the clerk. The language of the *fi. fa.* is, "and have you the said moneys, besides your fees for this service, before our said court to be held, etc., etc., and have you *then* and *there* this writ." The precept, then, is to be returned to the *court* from which it issued, and not to the clerk. It is true, the clerk is the officer of the court to receive the writ, and whatever may be raised upon it, as his office is the place where the records of the court are kept and preserved. If the clerk will not receive the return when tendered to him, the officer, to discharge his duty, must return the precept and the money, if he has made it, to the court. They will, upon a proper representation, make such order as the case may require, and, in a proper case, direct their officer to receive the process. That this is so is shown by the fact that if, as in this case, the clerk should (38) suddenly die, it would exonerate the sheriff from making any returns whatever until another clerk should be chosen, whereby much loss might be sustained, not only by plaintiffs in execution, but by other suitors. Neither, then, was the tender to the clerk and his refusal to receive the process a due return by the defendant, nor was his death any excuse.

PER CURIAM. Judgment affirmed.

THE STATE v. JAMES A. JONES.

1. An indictment which charges that "A. B., late, etc., etc., with force and arms, on, etc., did publicly curse and swear and take the name of Almighty God in vain, for a long time, to wit, for the space of two hours, to the common nuisance of all the citizens of the State, and against the peace and dignity of the State," cannot be supported.

2. To render the offense of profane swearing indictable, the acts must be so repeated and so public as to become an annoyance and inconvenience to the public, for then they constitute a public nuisance.

3. It is not sufficient to the conviction of a defendant in such an indictment that the State should show by its evidence that the defendant has been guilty of a nuisance; the indictment must charge it; it must set forth specially the whole fact with such certainty that the court may be able to see, judicially, that it rests on sufficient grounds. Nor will it be sufficient if the indictment charges that the acts were done "to the common nuisance of all the good citizens of the State," unless the facts so charged amount in law to a nuisance.

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

(39) This was an indictment for a common nuisance. It appeared on the trial of this prosecution that a quarrel took place in Madison, a village of Rockingham, between the defendant and another individual; that the defendant was drinking, and after the quarrel and separation of the parties he cursed and swore in a loud tone of voice for some time; that he used very profane language, calling the name of Almighty God in vain; that his especial abuse was directed at the individual in question, and his family; that the house of the said individual was situated two hundred yards from where the defendant was; that the said individual and his family were disturbed thereby; that so loud was the cursing and profane swearing of the defendant, he was heard throughout the said village, and that his conduct was well calculated to disturb the citizens thereof.

The court charged the jury, if they believed the witnesses, they ought to convict the defendant. The jury returned a verdict of guilty. The defendant moved for a new trial because of misdirection, which was refused. Judgment was pronounced, and the defendant appealed.

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

NASH, J. The indictment in this case charges "that James A. Jones, late of, etc., at, etc., in said county, on 25 March, 1848, did publicly curse and swear and take the name of Almighty God in vain, for a long time, to wit, for the space of two hours, to the common nuisance of all the citizens of the State, and against the peace and dignity of the State." The indictment further charged the defendant with going armed with a loaded gun during the same time. The defendant was convicted.

For single acts of profane swearing the laws of this (40) State have provided a remedy which is, by the legislative power, deemed adequate to its punishment, to wit, a fine for each act, to be imposed by a single magistrate, upon conviction before him. Rev. St., ch. 118, sec. 2. To render the crime indictable the acts must be so repeated and public as to become an annoyance and inconvenience to the public, for they then constitute a public nuisance. *S. v. Ellar*, 12 N. C., 207; *S. v. Deberry*, 27 N. C., 371. The perpetrator is, in that case, subject to an indictment. Thus, if a man is an habitual profane swearer and indulges in the vice in public, so as to become an annoyance and inconvenience to the public, in the language of *Chief Justice Taylor* in *Ellar's case*, or to become inconvenient and troublesome, in that of *Judge Gaston*, in *S. v. Baldwin*, 18 N. C., 197, he commits an offense against the criminal law and is indictable. *S. v. Waller*, 7 N. C., 229. But it is not sufficient to the conviction of the defendant that the State should show by its evidence that the defendant has been guilty of a nuisance; the indictment must charge it; it must set forth specially the whole fact with such certainty that the court may be able to see, judicially, that it rests on sufficient grounds. Nor will it be sufficient if the bill charges that the acts were done "to the common nuisance of all the good citizens of the State," unless the acts so charged, in law, amount to a nuisance. This is shown by the authorities before referred to. In *Waller's case* the charge was that the defendant "was a common, gross and notorious drunkard," etc., and "on divers other days and times," etc., "got grossly drunk and committed open and notorious drunkenness." Judgment was arrested, because drunkenness becomes amenable to the municipal law as a crime only when it is practiced openly and in the view of the public, which was not charged in the indictment. The case of *Ellar* is a stronger one, and more directly in point. There, the charge was that the defendant being an evil disposed (41) person, "did, in the public street of Jefferson, profanely curse and swear and take the name of Almighty God in vain, to

the evil example," etc., and "to the common nuisance of the good citizens of the State." There the judgment was reversed because the indictment did not charge that the defendant was a common profane swearer, and did not set forth acts amounting to a common nuisance. This decision took place in 1837, and has ever since been followed and considered as sound and correct. It has been repeatedly decided by this Court that profane swearing is not punishable by indictment, in this State, when committed in single acts; but to make it so, it has been intimated by several judges, it must be perpetrated so publicly and repeatedly as to become an annoyance and inconvenience to the citizens at large. *S. v. Brown,* 7 N. C., 224; *S. v. Baldwin,* 18 N. C., 195. In the case before us the indictment does not charge the defendant with being a common and notorious profane swearer; neither do the acts set forth in themselves imply, necessarily, that they were done in public, so as to be an annoyance to the citizens at large. For anything appearing on the indictment, in connection with this charge, the cursing and swearing might have been on the public highway, and not in the hearing of any person whatever. We have seen that the word public or publicly will not supply the averment of the presence of people to be annoyed, for if the act complained of can be considered free from legal guilt, it shall be so considered, until the contrary is made to appear. We consider the act set forth in the indictment as coming under the statute punishing profane swearing by a penalty.

The indictment further charges that the defendant "did then and there go armed with and carry a certain gun, loaded with powder and lead, to the great terror of all the good citi-
(42) zens then and there assembled." Upon this charge no evidence was given.

The appeal in this case was for error in the charge of his Honor, the presiding judge. For the same reason upon which we have held the indictment insufficient we must hold the evidence did not establish an indictable offense.

Judgment must, therefore, be reversed, and a *venire de novo* awarded.

PER CURIAM. Ordered to be certified accordingly.

Cited: S. v. Pepper, 68 N. C., 261, 2, 3; *S. v. Barham,* 79 N. C., 648; *S. v. Brewington,* 84 N. C., 785; *S. v. Crisp,* 85 N. C., 831; *S. v. Sherrard,* 117 N. C., 716.

N. W. ARRINGTON v. BENJAMIN SCREWS.

1. A legacy in the hands of an executor, due to a married woman, cannot be attached for a debt of the husband. It is not his until he reduces it into possession.

2. Process of attachment operates only on such interests of the debtor as exist at the time it is served, and not on such as may afterwards arise.

APPEAL from the Superior Court of Law of NASH, at Fall Term, 1848, *Dick, J.*, presiding.

This is an action of debt, commenced by original attachment. The case is this: Peter Arrington, deceased, bequeathed the sum of $300 to each of his grandchildren, Mary Drake, Adeline Drake, Richard Drake and Mourning Screws, the wife of the defendant, with the following limitation over: "It is my will, if either of said grandchildren die without leaving issue, then the property given to such one be equally divided between the survivors." The legacies were paid to the (43) grandchildren respectively; and afterwards Adeline died intestate, without having had issue, and leaving the others surviving, and Kelly Rawls became her administrator and received assets to a greater value than $300; and, being summoned as a garnishee in this suit, he stated the above case in his garnishment.

The plaintiff moved for the condemnation of one-third part of the sum towards the satisfaction of his recovery; but the motion was refused and the garnishee discharged, and the plaintiff appealed.

Miller for plaintiff.
B. F. Moore for defendant.

RUFFIN, C. J. The Court concurs in the opinion of his Honor. An attachment may be served in the hands of any person indebted to the defendant or having any of his effects. But this interest of Mrs. Screws in the hands of her sister's administrator is not a debt to the defendant, her husband, but belongs to him and her in her right. It cannot become his but by reducing it into possession. Regarding this interest as a debt, there is an inconsistency in attaching it as a debt to the husband, since, while outstanding, it cannot legally be his. He might, indeed, release the demand or assign it in equity; but unless he collects the money or disposes of the interest the right of the wife continues and would survive to her or her representa-

tive. He could not recover it in his own name, and it follows that it cannot be attached as a debt to him. Process operates only upon such interests of the debtor as exist at the time it is served, and not on such as may afterwards arise. *Gentry v. Wagstaff*, 14 N. C., 270; *Flynn v. Williams*, 23 N. C., 509.

PER CURIAM. Judgment affirmed.

Cited: McLean v. McPhaul, 59 N. C., 17.

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(44)

WARREN HARPER v. JAMES M. DAVIS.

Where more damages are recovered than are demanded, the plaintiff will be permitted to remit the excess and have judgment for the proper sum, on paying the costs of this Court.

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

The case began by warrant before a justice of the peace for "the sum of $12 due by *assumpsit*." Upon *nonassumpsit*, the verdict for the plaintiff and the damages assessed to $12 for principal money and for interest $1.50; and from a judgment accordingly the defendant appealed.

The defendant excepted to the instructions to the jury, but it is not material to state the point, as his counsel abandoned it here, and moved to reverse the judgment because there was an excess of damages recovered above those demanded. On the part of the plaintiff there is a motion to remit the excess and to have judgment for the residue.

Strange for plaintiff.
D. Reid for defendant.

RUFFIN, C. J. *Williamson v. Canady*, 25 N. C., 343, is in point for the plaintiff, on the payment of costs in this Court. Besides the reason there given, it is substantially doing only what the court would be bound to do on the motion of the defendant. For, if damages be improperly assessed, as, for
(45) example, in a popular action, the judgment may be rightly rendered for the penalty without the damages; and, if rendered for both debt and damages, upon error brought, the judgment is not reversed *in toto* and judgment arrested for the incongruity between the declaration and the verdict, but it is reversed as to the damages only, with costs in the court of error.

and affirmed for the debt and the costs in the court below. *Frederick v. Lookup,* Burr., 2018. The reason is that the higher court is to give such judgment as, upon the whole record, ought to have been given in order to terminate the litigation according to the right apparent between the parties. That is the jurisdiction of this Court under the statute, and therefore the judgment of the Superior Court must be reversed as to the sum of $1.50 assessed for damages above the sum demanded in the warrant, with costs in this Court, and affirmed for the sum of $12, thus demanded, and all the other costs.

PER CURIAM. Judgment accordingly.

Cited: Norville v. Dew, 94 N. C., 46.

JOHN C. McKENZIE v. ALEXANDER LITTLE.

The only jurisdiction conferred on this Court in cases at common law is appellate, after a judgment in the Superior Court. Where there has been no such judgment, the cause will not be entertained in this Court.

CASE TRANSMITTED from ANSON Superior Court of Law, at Spring Term, 1839.

This is an action of debt on an award made on the submission of the intestate Jennings, to which the defendant pleaded the general issue. He afterwards pleaded a special plea, (46) since the last continuance, to which the plaintiff demurred. Without any trial of the issue or any judgment on the demurrer, the parties agreed to send the case to this Court for decision on the demurrer, and on certain agreed facts.

No counsel for plaintiff.
Winston for defendant.

RUFFIN, C. J. The only jurisdiction conferred on this Court, in cases at common law, is appellate, after a judgment in the Superior Court. The present cause, therefore, cannot be entertained; but the parties must proceed in the case remaining in the Superior Court. Each party will pay his own costs in this Court.

PER CURIAM. Judgment accordingly.

CHARLES DUFFY v. ELIJAH MURRILL, JR.

1. Our act of Assembly in relation to replevin (Rev. St., ch. 101) does not repeal nor supersede the common-law remedy of replevin.

2. At the common law an action of replevin could only be maintained in cases of actual taking. Under our statute taking is not necessary to entitle the party injured to his remedy.

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

This is an action of replevin brought to recover a slave. The plaintiff, in taking out his writ, did not make any affida-
(47) vit, as required by the act of 1836. Rev. St., ch. 101, sec. 1. For this cause, on the motion of the defendant, the presiding judge ordered the cause to be dismissed, and the plaintiff appealed.

No counsel for plaintiff.
W. A. Wright for defendant.

NASH, J. The error into which his Honor was betrayed consisted in considering the proceedings as instituted under the act of 1836, when, in truth, it is a proceeding at common law, in which no affidavit is required. The act does not repeal the common-law action, nor supersede it, but simply applies the remedy by replevin to cases to which it did not before extend. By the common law a *taking* by the defendant was necessary to authorize this remedy, and such is the language of the writ: "We command you that, justly and without delay, you cause to be replevied the cattle of B. which D. took and unjustly detains," etc. 1 Fitz. N. B., 68. Without a trespass by the defendant the writ could not be used. If the defendant came into possession by bailment, the plaintiff was driven either to his action of trover or detinue. By the latter alone the *possession* of the property detained could be regained, and, even then, after much delay and subjecting the plaintiff often to inconvenience and loss, which the tardy recovery would not compensate. Much the most valuable portion of the personal property owned by individuals of this State consists of slaves, who, by artful and designing men having or pretending a claim of right, can be induced to leave the possession of the proprietor and go into that of his opponent. To such a case the common-law remedy by replevin could not apply, because the defendant had not *taken* the slave; he did but detain him. It was the intention of the Legislature to remedy this evil by giving this writ, where-

by the plaintiff might more speedily and surely regain (48) the possession of his property. The words of the act are very broad: "Replevin for slaves shall be held and deemed sustainable in all cases, etc., where actions of detinue and trover are now proper." It is unnecessary to inquire here whether these words, broad as they are, can embrace every case in which actions of detinue or trover for a slave may be sustained. It is sufficient for our present purpose to show that the act of 1836 was intended, not to repeal the common-law remedy of replevin in such cases, but to apply it when, by the common law, it could not be used. The writ, in this case, is not issued under the act; if it had been the affidavit required in the proviso to the first section would have been necessary, and his Honor would have been right in holding that the plaintiff's proceedings could not be sustained; but it is at common law. The writ is "then and there to answer the said Charles Duffy, of the taking and detaining," etc. This is the language of the writ as set forth in the *Natura Brevium*. A taking is charged, and without proving it on the trial the plaintiff cannot entitle himself to a verdict, if the defendant pleads *non cepit*. *Cummins v. McGill*, 6 N. C., 357.

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

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(49)

ARCHIBALD MUNROE v. JACOB STUTTS, ADMINISTRATOR, ETC.

1. Where the declarations of one, alleged to be an agent, are offered to be given in evidence, it is incumbent on the judge to determine at least so far as to say whether there is such *prima facie* evidence of agency as to render the acts and declarations of the proposed witness those of the plaintiff.

2. It is the province of the court to pass on every question of the admissibility of evidence.

3. Merely serving a warrant for debt, issued by a justice, is no evidence that the officer was the agent of the plaintiff in the warrant.

4. Where there are more pleas than one, and the jury find on them all, and error is alleged in the charge of the court only as to one, this Court must affirm the judgment below.

APPEAL from MOORE Superior Court of Law, at Special Term in spring of 1848, *Settle, J.*, presiding.

In April, 1838, a warrant was brought in the name of Archibald Munroe, guardian of the infant children, etc., and to the

use of Cornelius Dowd, trustee, etc., against William Barrett and others, for $49 and interest, due by note. It was executed by one Hedgepeth, a deputy sheriff, and on 5 May following judgment was rendered against Barrett, and stayed on 14th of same month. The present suit was commenced on 15 December, 1843, by warrant on the above-mentioned judgment. The pleas were *nil debet,* payment, *plene administravit.* Upon the trial in the Superior Court a witness for the defendant deposed that he was a constable in 1838 in Moore County (where the parties lived), and that in the latter part of the year one Sowell delivered to him some papers against Barrett, which Sowell said he got from Hedgepeth, who was then sick; that he, the witness, took a negro on the papers and committed him to jail, and either returned the papers to Hedgepeth or left them
(50) with the jailer. He could not say that the judgment now sued on was one of the papers; and it did not appear that any execution had ever issued on it, nor that Hedgepeth ever had the judgment in his possession. The witness further stated that in a short time afterwards Barrett had the negro again in possession; and that early in 1839, Hedgepeth, after selling a wagon belonging to Barrett, said that he had collected a great deal of money from Barrett, and had received all the debts he had against him, and that soon afterwards Hedgepeth left this State. The counsel for the plaintiff objected to the declarations of Hedgepeth, because he was not the plaintiff's agent and had no authority to receive this money. Upon cross-examination the witness said that he had no knowledge that Hedgepeth ever had the original judgment, or had anything to do with the matter further than to serve the warrant, as appeared from his return on it. The court admitted the evidence, and then instructed the jury that if they were satisfied that Hedgepeth had received the debt under an execution, or as the agent of the plaintiff, they should find for the defendant. The court then submitted the question of agency to the jury with directions that Hedgepeth's endorsement on the warrant was not of itself sufficient to establish his agency; but that if they found it from all the circumstances, their verdict should be for the defendant; if otherwise, then they should disregard his declaration and find for the plaintiff.

The jury found all the issues for the defendant, and the plaintiff appealed from the judgment.

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

RUFFIN, C. J. The evidence set forth in the exception, and the questions made upon it, related altogether to the plea of payment, and it is to be regretted that the form of (51) the verdict does not allow a decision to be made exclusively on those questions, as the Court is of opinion that the decision in the Superior Court was erroneous. Upon the objection to the competency of Hedgepeth's declarations it was incumbent on the judge to determine, at least so far as to say whether there was such *prima facie* evidence of agency as to render the acts and declarations of Hedgepeth those of the plaintiff. 1 Phil. Ev., 103; *Roberts v. Gresley*, 3 Carr and Payne, 380. It is the province of the court to pass on every question of the admissibility of evidence. But supposing the submitting the question to the jury to imply a decision that there was such *prima facie* evidence of agency, then that decision seems to us to be erroneous also. There is no evidence of an authority in Hedgepeth to receive the money. He served the warrant, and that is all. It does not appear that he ever had in his hands the bond on which the warrant was brought, nor that he held the judgment when rendered; and it is expressly stated that no execution was issued on it. The case on this point is exactly that of *Williams v. Williamson*, 28 N. C., 281. Indeed, the jury were told that the service of the warrant was not sufficient to establish the agency. Yet it was left to them to find it upon "all the circumstances," when there was no other circumstance relevant to the point. The witness spoke of "some papers" delivered to him by one Sowell, which he said he got from Hedgepeth. But Sowell's declaration was not competent to establish that fact, and, besides, the witness could not say that those papers had anything to do with this claim. There was, then, no evidence that Hedgepeth collected this debt, nor that he was authorized to collect; and the judgment would be reversed if that were the whole case.

But the jury found all the issues for the defendant, as (52) well those on *nil debet* and *plene administravit* as on the plea of payment. Whatever error may have occurred in respect to the last issue was harmless. The other two pleas constitute independent bars, and no error is suggested in them. Therefore, according to the cases of *Bullock v. Bullock*, 14 N. C., 260, and *Morrisey v. Bunting*, 12 N. C., 3, the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Royal v. Sprinkle, 46 N. C., 506; *Creach v. McRae*, 50 N. C., 125; *S. v. Dick*, 60 N. C., 445; *Grandy v. Ferebee*,

68 N. C., 361; *Davis v. Hill,* 75 N. C., 228; *Francis v. Edwards,* 77 N. C., 274; *Johnson v. Prairie,* 91 N. C., 164; *Smith v. Kron,* 96 N. C., 296.

ABNER COLTRAINE v. JOSEPH SPURGIN, ADMINISTRATOR, ETC.

A brought a suit on a note in which B was the principal and C surety. B was dead and the suit was against his administrator and C. At the return term A entered a *nolle prosequi* against the administrator of B and took judgment against C alone. C, having paid the debt, brought suit against the administrator of B, who in the meantime had disbursed all the assets in the payment of other debts of equal dignity with that of A: *Held,* that the administrator of B had committed no *devastavit* as regards C; that C, as a surety, had no further rights than A had possessed, and A having relinquished his lien upon the assets of B by discontinuing his suit against his administrator, the right of the surety, as the substitute of his principal, to obtain priority, could only accrue from the commencement of his action against the administrator of B.

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

The following case agreed was submitted to the court:

Jesse Harper held a note on defendant's intestate as principal, and plaintiff as surety, on which suit was brought against
(53) defendant and plaintiff, and the writ, executed on both, returned to Randolph County Court at May Term, 1843. The defendant, on return of said writ, had assets sufficient to pay said debt, but craved nine months before pleading. Whereupon the said Harper discontinued as to the defendant, and at August Term, 1843, took judgment on said bond, which judgment plaintiff paid on 7 February, 1844, then amounting to $601, to recover which this suit is brought.

Between the May Term, 1843, of said County Court and the bringing this suit defendant paid out all the assets in satisfaction of bonds of his intestate on which writs were issued after May Term, 1843, and recovery had before this suit was instituted.

If on the foregoing statement of facts the court should be of the opinion with the plaintiff, he is to have judgment for $601, with interest from 7 February, 1844. Otherwise, judgment for defendant that he has fully administered.

It is considered by the court, upon the case agreed, that the amount of the plaintiff's debt is $601, with interest from 7

February, 1844; that the defendant hath fully administered the assets of his intestate, and that he recover his costs against the plaintiff, to be taxed by the clerk.

It is further considered by the court that the plaintiff recover his debt and costs of suit out of the real estate of the defendant's intestate, in the hands of his heirs at law; from which judgment the plaintiff prayed and obtained an appeal to the Supreme Court.

Morehead for plaintiff.
Iredell for defendant.

NASH, J. This is an action of debt. The only question presented by the case is as to the manner in which the defendant has disposed of the assets of his intestate. It is admitted that they have been exhausted in the payment of the just (54) claims of the creditors. The plaintiff contends that in administering them the defendant has been guilty of a *devastavit*, and must answer his claim *de bonis propriis*. The situation of an executor is one full of peril, and it often requires great caution to discharge correctly his trust. The law—whether wisely or not, is not now to be inquired of—has made a discrimination between the debts of a deceased person, as to the order in which they shall be paid; and if, in discharging them, this order is knowingly violated by the executor it subjects him to the liability of paying, out of his own property, the creditor who has been injured. Among debts, however, of equal dignity it is his privilege to pay which he chooses, and, if there be not assets sufficient to pay all, he does no legal injury to any one. The privilege is taken from him by the bringing of an action at law or the commencing of a suit in equity by the equal creditor. His hands are then tied as to a voluntary payment, without suit. In this State all bonds, bills and promissory notes and liquidated accounts, settled and signed, stand in the same rank, and have precedence, in the course of administration, over open accounts and verbal promises or liabilities created by operation of law. If we understand the ground upon which the plaintiff attempts to charge the defendant with a *devastavit*, it is that the bringing of the suit by Mr. Harper so fixed the assets in the hands of the defendant that he could not pay a debt of equal dignity without a violation of his duty. So far as Mr. Harper was interested the position is correct, but unfortunately for the argument, Mr. Harper has no longer any interest in this matter. At the return term of his writ he entered a *nol. pros.* as to the defendant, cut himself loose from him and abandoned, so far

as his prior claim extended upon the assets of Hoover, all claim upon the defendant. Immediately upon this discharge
(55) the administrator was at liberty to pay any debt due from the estate, of equal dignity, and this privilege continued until suit was brought against him upon some claim of the same or some higher class. By the common law a surety who pays the specialty debt of his principal, whether with or without suit, has a claim against his principal for so much money paid to his use. 2 Wil. on Exrs., 669. The law is altered with us as to the administration of assets. Rev. St., 113, sec. 4. In such case the statute declares, "the claim of the surety against the executor or administrator of his principal shall have the same priority against the assets as belonged to the demand of the creditor." The most this action has done is to transfer to the surety, against the executor or administrator, the right of him whose claim he has discharged. Beyond this it does not go, nor did it intend to go, and before the privilege conferred by it can be claimed the debt must be discharged by the surety. This was not done by the plaintiff until after all the assets had been administered in the payment of bond creditors. His right was not and could not be greater than Harper's. And by the *nol. pros.* the latter had abandoned his lien, and stood upon an equality, and only upon an equality with other bond creditors, as if he had not brought that action. Until he commenced upon his bond another suit, the right of the administrator to prefer another creditor, equal in degree, was not disturbed. 1 Saun., 332 a, n. 8. In the case before us the judgment against the plaintiff was obtained at August Term, 1843, of Randolph County Court. After that term it was discharged by him on 7 February, 1844. He commenced this action 10 February, 1844, after the exhaustion of the assets in the payment of debts of equal dignity.

The defendant, in paying those debts, violated no duty, and was guilty of no *devastavit*.

(56) His Honor, after giving judgment in favor of the defendant, upon his plea of fully administered, went further, and gave judgment that the plaintiff recover his debt and costs of suit out of the real estate of the defendant's intestate in the hands of his heirs at law; from which judgment plaintiff appealed. We are, therefore, to consider that the latter judgment was not asked for by the plaintiff; the case does not so state, and we cannot suppose, in the absence of all evidence in the case, to the contrary, that he appealed from his own judgment.

This was an error on the part of the presiding judge, for which the judgment must be reversed and the case remanded, that the plaintiff may take a judgment *quando*, or against the land at his option, or neither.

RUFFIN, C. J. The question upon the case agreed depends simply upon the operation of the act of 1829, on the plea of *plene administravit*. It enacts that the claim of a surety who pays the debt shall have the same priority against the assets in the hands of the principal's executor as belonged to the demand of the creditor, which was thus discharged. Rev. St., ch. 113, sec. 4. The whole effect of that is to keep up the dignity of the debt, though paid, for the benefit of the surety, as it was in the hands of the original creditor. *Chaffin v. Hanes*, 15 N. C., 103. This debt was due by note, and it never attained a higher dignity against the principal or his administrator. Until the administrator was sued he could apply the assets to any other note or bond. After the suit brought and discontinued, he had the like liberty; for the case was then the same as if no suit had been brought. When sued on other specialties, the administrator could not defend the actions by pleading the former suit on this note, for it no longer bound the assets, and the pleas in the subsequent suits must state the assets truly at the time of the pleas. Clearly, then, as the administrator could not resist the recoveries of the other bond creditors, he would (57) not have been liable to Harper for the assets applied to their discharge, had he brought a second suit on the note after those recoveries. The same rule is applied by the statute to the debt in the hands of the surety for whose benefit the dignity of the debt, acquired in the hands of the creditor, is retained, but is raised no higher. Upon these grounds I concur with my brother *Nash*, that the defendant was entitled, upon the case agreed, to judgment on his plea of fully administered.

For the reasons given by him, I am also of opinion it was erroneous, without a prayer to that effect, to give judgment in such a form as to compel the plaintiff to go against the lands descended; and that, to that extent, the judgment must be reversed, so as to let in the plaintiff to take that judgment or one *quando*, at his election. And to enable him to proceed on either of those judgments the more conveniently, the case must be remitted to the Superior Court, so that the judgment may be entered there, in order that the *scire facias* on it may issue from that court instead of this.

PEARSON, J. I concur in this opinion.

PER CURIAM. Remitted to the court below.

(58)

THE PRESIDENT AND DIRECTORS OF THE LITERARY FUND v. JOHN CLARK.

1. Where a grant begins on a lake, and thence runs a certain course and distance, then again a certain course and distance, then a third line a certain course and distance, thence "with the windings of the lake-water to the beginning": *Held*, that although the distance mentioned in the third line should fail before the lake was reached, yet it must be continued to strike the lake, and then the boundary be along the lake.

2. If the course of the third line would not go to the lake, then from the termination of the distance on that line, a direct course must be taken to the lake.

3. A plat, annexed to a grant, cannot control the calls of the grant, where it does not lay down a natural boundary therein called for.

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

This was an action of ejectment, in which the plaintiffs claim under the acts of Assembly granting the vacant swamp lands in the State to the Literary Board and the defendant, under a grant to one Solomon Smith, issued in 1786.

The question in this case is upon the construction of the grant to Smith, which is mentioned in the pleadings. The description is this: "Lying on Pungo Lake, and beginning on the lakeside, at a place known by the name of the Old Landing, and thence south 80 poles; thence west 400 poles; thence north 80 poles; thence east 400 poles, with the windings of the lake-water to the beginning, as by the plat hereto annexed doth appear." The plat referred to is a parallelogram formed by lines from the cardinal points, 80 poles by 400, and does not
(59) lay down any part of Pungo Lake. The court below nonsuited the plaintiffs, and they appealed.

B. F. Moore for plaintiffs.
J. H. Bryan and *Shaw* for defendant.

RUFFIN, C. J. The decision depends on the length and course of the third line, "north 80 poles." It must be extended, beyond the distance called for, to the lake in some direction; because the next line from its termination is described as not only being "east 400 poles," but, furthermore, as running "thence with the windings of the lake-water to the beginning" on the lake. For it has been decided in a great number of cases, so as to be settled in this State, that the mathematical calls in a deed must give way to those for visible objects capable of being identified;

as, for example, marked trees, and, with yet more reason, natural boundaries, as they are called, such as rivers or other streams, mountains, rocks or other enduring monuments. Indeed, the rule has been found to have been laid down in the statute-book itself, as early as 1715, in the provisions for resurveying prior patents, which direct that "the surveyor shall proceed by marked trees, if the same can be found, or by natural boundaries, if any mentioned; and if there be not marked trees, then he shall follow the courses mentioned in the patent, so as the intention of the party first taking up the land may be observed as near as may be." Ire. Rev., 1715, ch. 29. The reason thus given makes it plain that the rule rests upon a presumption that there is less probability of a mistake having been committed in a line identified by marked trees or by a stream than in one to be ascertained by the chain and compass merely; and, therefore, that by having regard to those natural objects the intention of the party will more probably be fulfilled than by respecting the courses and distances only. Then, if the third line here, instead of being described as "north 80 (60) poles," had gone on further "to the lake," there could be no scruple in extending the line to the lake, though it be three or four times the distance. But in truth the calls, taken together, amount substantially to that supposed; for, although the third line is in itself described by course and distance only, yet the line from its termination goes *"thence with the windings of the lake to the beginning,"* which necessarily carries the third line itself to the lake. Indeed, the case is precisely the same as *Haughton v. Rascoe*, 10 N. C., 21, in which one of the points was on this description: "then north 12 degrees, east 530 poles, then along the thoroughfare to the first station"; and it was held that the line, north 12 degrees, east 530 poles, went to the thoroughfare, and the next with the thoroughfare to the beginning.

It was, however, argued at the bar that the plaintiffs were entitled to judgment upon the case agreed, because, at all events, the patent did not cover all the land claimed by the defendant, inasmuch as the line was to go from the point at which the distance gave out, the nearest way to the lake, which is at a point considerably east of that where the third line intersects the lake, when extended due north. But the position is not correct in this case. It would be true, if the third line, pursuing its course, would not touch the lake at all; for, in that case, after completing the distance called for on the third line, the lake, on which the land must be bounded, could only be reached by changing

the course, and then the most direct course must be adopted, forasmuch as there can be no other certain one. But neither course nor distance can be departed from further than the one or the other is necessarily controlled by other calls. In all other respects they stand as if they were the sole terms of description. Here the error in the distance—80 poles— is the only one which is apparent, and that is corrected by carrying the
(61) line to the lake. But as the line, when protracted north, actually intersects the lake, that course must be pursued, because there is nothing to turn the line in any other direction.

However the plat annexed to a grant may, in some cases, aid in the interpretation of ambiguous calls, it cannot have any effect in this case, since it does not purport to lay down the lake at all, although the accompanying description calls for it twice, and the act of 1777 expressly requires water courses crossed or touched, and other remarkable places, to be set down. The omission renders it highly probable that the plat was made without actual survey, and thus deprives it of whatever credit it might otherwise be entitled to. But, at all events, there is nothing on it which can prevent the lines which call for the lake from going to or with it.

PEARSON, J. I concur in this opinion.

NASH, J. The question raised in this case was decided in the year 1795, in that of *Sandifer v. Foster*, 2 N. C., 237. The call of the third line in that case was "thence south to a white oak, *then along the river to the beginning.*" The white oak stood half a mile from the river, yet the Court decided that the river was the boundary. In a very recent case the same point was decided, and that of *Sandifer* referred to and approved. *McPhaul v. Gilchrist*, 29 N. C., 169. There the calls of the grant were: beginning at a red oak on Drowning Creek, thence south three degrees west 179 poles to a pine, thence north eighty-seven degrees west 179 poles to a hickory, *thence the courses of the swamp to the beginning.* The distance called for in the third line gave out before reaching the swamp, nor could any hickory be found, either at the termination of the distance or at the swamp. There the decision was that the *swamp* was the boundary and constituted the back line to the begin-
(62) ning, and that the third line was to be extended to it.

In each of these cases the Court rested their decisions upon the calls of the grant. It was apparent, in the first case, that the river was intended to be the terminus, and the swamp

in the latter. Those cases differ from the present only in the fact that the grants in the former called for trees as corners; here there is nothing but course and distance. The calls of the Solomon Smith grant, under which the defendant claims, are as follows: lying on the east side of Pungo River and on Pungo Lake, beginning on the lakeside, and running thence south 80 poles, then west 400 poles, then north 8 poles, thence east 400 poles, *with the windings of the lake-water* to the beginning. If the third line stops when the distance gives out, and you then run directly to the beginning, due east, it is manifest the land will not touch the lake, except at the beginning point; and two important descriptions of the grant as described, to wit, "lying on Pungo Lake" and "the windings of the lake-water," are omitted. The grant has assigned to the third line three descriptions—the course, distance, and the lake. The latter, if called for, controls both the former; this is admitted. It is as much called for in the Smith grant as it was in the grants in either of the cases cited, and those cases establish the law to be that in such a description the natural object is sufficiently called for to designate it as the boundary intended. Adopt the plaintiffs' construction, and the rule is reversed; the artificial boundaries overrule and control the natural—the strong yields to the weak, the permanent to the transient. The plaintiffs' claim to the land in question rests on the act creating a fund for the establishment of common schools, and an act to drain the swamp lands of the State and create a fund for common schools—the first part in 1825, the second in 1836. Rev. St., chs. 66, 67. It is contended that the third line of the Smith grant must stop at the end of the distance, and that the home line (63) must run directly west from that point to the beginning, and the plat annexed to the grant is adduced as proof that it was so actually run. The plat is no part of the grant, and cannot control its calls, nor is there any evidence of an actual survey according to course and distance; but if there was, it could not control the call for the natural boundary. *Hurley v. Morgan*, 18 N. C., 425, and many other cases. We see no error in the judgment of the court below.

PER CURIAM. Judgment affirmed.

Cited: Cooper v. White, 46 N. C., 207; *Spruill v. Davenport*, *ib.*, 392; *Campbell v. Branch*, 49 N. C., 314; *Mizell v. Simmons*, 79 N. C., 188; *Redmond v. Stepp*, 100 N. C., 219; *Brown v. House*, 118 N. C., 876; *Higdon v. Rice*, 119 N. C., 634, 638; *Rowe v. Lumber Co.*, 133 N. C., 437; *Whitaker v. Cover*, 140 N. C., 284.

JOSEPH B. G. ROULHAC v. JOHN WHITE ET AL.*

1. The declarations of a slave at any particular time, as to the state of his health, are from necessity admissible in evidence.

2. Whenever the bodily or mental feelings of an individual, at a particular time, are material to be proved, the expression of such feelings, made at or soon before that time, is evidence—of course, subject to be weighed by the jury.

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

The action is in case for fraud in the sale of a slave named Jack. The plaintiff purchased the slave from the defendants, in January, 1842, and he died in the following fall, of consumption. To show that Jack was unsound at the time of the sale the plaintiff produced a Dr. Barron, who stated that he saw Jack in the fall of 1841; that his appearance, then, indicated to him that his health was bad. In answer to his in-
(64) quiries, Jack said he then had a sharp pain in his breast, and from the sickly appearance of his skin and his hurried respiration the witness had no doubt he was then laboring under the incipient stages of consumption. Dr. Armistead and Mr. Capehart also saw the negro in the fall or winter of 1841, while in the possession of White, one of the defendants, before the plaintiff bought him, and testified to the declarations of Jack as to his *then* situation. The defendants objected to the admissions of the declarations of Jack at the time they were offered; the court overruled the objection. The jury found a verdict for the plaintiff, and the defendants moved for a new trial because the court had admitted the declarations of Jack, and the court overruled the motion, and the defendants appealed.

Heath for plaintiff.
(65) No counsel for defendants.

NASH, J. There can be no doubt that his Honor was correct in admitting, as evidence, the declarations of the slave as to the state of his health at the time they were made. The question was as to the health of Jack before and at the time of the sale. And whenever the bodily or mental feelings of an individual, at a particular time, are material to be proved, the expression of such feelings, made at or soon before that time, is evidence.

*NOTE.—The *Chief Justice*, being related to one of the parties, gave no opinion in this case.

Whether they were real or feigned is for the jury to decide. 1 Greenleaf Evidence, 178. Upon this principle it is that the declarations of a wife, made immediately after receiving an injury, are receivable as evidence in an action by her and her husband—not to show who did the injury, but as to its extent. *Thompson v. Trevanion,* Skin., 402. Inquiries by medical men and the answers to them are evidence to show the state of health of the individual—it is admissible from the very nature of the thing. *Aveson v. Lord Kennaird,* 6 East., 188. So, in an action for an assault and battery, what the plaintiff has said to his surgeon, of what he has suffered from the assault, is competent evidence. 1 Phil., 332. Such declarations made by a white man, then, are clearly admissible in evidence. Is the principle varied when proceeding from a slave? From the nature of the evidence, we think not. It is admitted from necessity, and as being in the nature of *pars res gestæ.* In *Clancy v. Overman,* 18 N. C., 402, the declarations of a slave were admitted in evidence. He had been bound apprentice to the defendant, to learn the trade of a carriage maker, and the action was brought to recover damages for not teaching him the trade; the defense was that the boy would not learn, and his declarations to that effect were admitted; and the court say they are admitted because they are evidence of his disposition and temper, (66) which are the subjects of the investigation, and these cannot be ascertained except in that way. *Gray v. Young,* 4 McCord, 38, is a direct authority. That was an action for breach of a warranty of the soundness of a slave. His declarations, that he had a pain in his side, by which the disease was detected, were held to be admissible. So in *Turner v. Knox,* 7 Munroe, the same doctrine is held. The act of Assembly upon the subject of persons of color being witnesses against white persons does not apply.

PER CURIAM. Judgment affirmed.

Cited: Lusk v. McDaniel, 35 N. C., 487; *Wallace v. McIntosh,* 49 N. C., 435; *Bell v. Morrisett,* 51 N. C., 179; *Gardner v. Klutts,* 53 N. C., 376; *S. v. Harris,* 63 N. C., 6.

DEN ON DEMISE OF THOMAS MORISEY *v.* THOMAS HILL.

The lien of a *fieri facias* upon the equitable interest of a debtor commences only from the time of its issuing, and not from its *teste*.

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

The lessor of the plaintiff claimed the premises as a purchaser of them as the lands of Harold Blackmore, under a judgment rendered against him and a *fieri facias* bearing teste the fourth Monday of September, 1843. The execution
(67) was levied on 20 October, and the land was sold in March, 1844, when the lessor of the plaintiff purchased and took the sheriff's deed and then brought this action. The plaintiff further gave evidence that Sarah A. Pasteur was seized in fee of the premises, and by her agent, Alexander Stanford, contracted to sell them in fee to Blackmore on 27 April, 1841; for the performance of which Stanford executed his covenant to Blackmore, and that Blackmore immediately entered into possession, and afterwards paid the purchase money. The plaintiff further proved that in October, 1843, Blackmore contracted with Hill for the sale of the premises to him in discharge of a debt which he owed Hill, and assigned to Hill Stanford's covenant, but dated the assignment as of 1 July, 1843, in order that it might appear to have been made before the judgment recovered against Blackmore; and that thereupon Blackmore went out and Hill went into possession of the premises.

Upon the foregoing case the defendant's counsel prayed the court to instruct the jury that the plaintiff had no title and could not recover. But the court refused so to do, and instructed the jury, if they found that Hill went into possession under Blackmore, that then the plaintiff was entitled to recover; for that it would only be necessary for the plaintiff to show the judgment and execution, sheriff's sale and conveyance to the lessor of the plaintiff, to enable him to recover against Blackmore, were he in possession; and that the same was sufficient to entitle him to recover from any person who went into possession under Blackmore. The jury found for the plaintiff, and the defendant appealed from the judgment.

W. Winslow for plaintiff.

W. H. Haywood and *W. A. Wright* for defendant.

RUFFIN, C. J. The instruction would have been correct if Blackmore had been in possession at the time of the sale and

the defendant had afterwards entered under him: for (68) the privy in estate is bound by the estoppels which affect the person under whom he derives the estate. So, too, it would be if Hill went in after the day to which the execution related, for a sale does not affect the lien of the execution, and the purchaser holds subject to it, as his vendor did. But this case is not of either of those kinds. Blackmore was out and Hill in possession at the time of sale. Then, as to the relation of the execution, the case is that it bore teste as of September Term of the court, but the plaintiff did not show the day it was sued out, but only that it was levied on 20 October, and that the defendant purchased in October, but whether before or after 20 October the plaintiff did not establish. That being so, it was erroneous to hold that the plaintiff was entitled absolutely to recover; for Blackmore's interest in the premises, being a trust, though liable to be sold under execution (*Henderson v. Hoke*, 21 N. C., 119), was not, like a legal estate, bound from the teste of the execution, but only from the time of execution served, under the act of 1812. *Hall v. Harris*, 25 N. C., 289. It was incumbent on the plaintiff, relying on the lien of the *fieri facias*, to show that it overreached the day of the defendant's purchase—that is, supposing that purchase not to be fraudulent, as was assumed to be the fact in the instructions. For, no doubt, the defendant is at liberty to insist that the debtor's interest was not liable to the lien of the execution at the time of his purchase. For example, that he purchased the legal estate before the teste of the execution or before the delivery of a justice's execution; and so, in like manner, that the debtor had sold and transferred the trust before execution sued, and that the trustee was no longer seized in trust for him, but for his assignee. This was laid down in *Hall v. Harris*. But, in truth, the plaintiff here relieved the defendant from proving the nature of Blackmore's interest by giving the proof (69) himself. The case was, therefore, but the common one in which both parties claim under the same person, and, for that reason, neither can deny the title of that person, and the question is simply which of them derived the better title from their common vendor.

The defendant's purchase, certainly, operates only from the day it was in fact made. If it shall turn out that the execution had then been issued, there is an end of the question, and the plaintiff must recover by force, simply, of its lien. But if the purchase was prior, the plaintiff can only recover by showing

that it was not for the payment of a just debt or other valuable consideration or otherwise not *bona fide,* but fraudulent.

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

WILLIAM R. POOLE, CHAIRMAN, ETC., *v.* ANDREW COX ET AL.

When a term of office (as that of sheriff) is for more than one year, the bonds given for the faithful discharge of the duties of his office, at the time of the appointment, and the new bonds given from time to time afterwards, are cumulative; that is, the first bonds continue to be a security for the discharge of the duties during the whole term, and the new bonds become an additional security for the discharge of such of the duties as have not been performed at the time they are given.

APPEAL from the Superior Court of Law of WAKE, at Fall Term, 1848, *Dick, J.,* presiding.

(70) This was a case agreed, and the following are the facts:

James Edwards was elected sheriff of the county of Wake, for two years, commencing at August Sessions, 1846, when he gave a bond in the penal sum of $5,000 for the collection and payment of the county, parish and school taxes. At August Sessions, 1847, he executed a bond, for the same purposes, in the penal sum of $5,000, in conformity with the law requiring a renewal of his official bonds, and died about 20 September following, without having made any settlement for the said taxes or any portion of them.

The sheriff, at his death, had collected, on account of said funds $7,770.86, of which $1,095.18 was on account of the common-school fund, and the residue for county and parish taxes. On 28 January, 1848, the plaintiff, William R. Poole, as chairman of the board of superintendents of common schools, having demanded the money due that fund, of the defendants as sureties on the official bond of August, 1847, and they refusing to pay the same, instituted this suit by giving notice to them of an intended motion for judgment against them, at February Sessions, 1848, for the said sum of money; which was done; a motion made, judgment of the County Court rendered therefor, and an appeal taken to the Superior Court, where the cause pended until this term.

After the institution of this suit an action was commenced in the County Court of Wake on the bond of August, 1846, at the instance of the trustees of the said three funds, and judg-

ment confessed on the said suit for the entire penalty of the bond, to wit, $5,000. At this term of the court the defendants pleaded, since the last continuance of the cause, the said judgment of the County Court in bar of the plaintiff's (71) recovery.

If, upon the foregoing case, the plaintiff, in the opinion of the court, shall be entitled to recover, it is agreed that he shall have judgment for the said sum of $1,095.18, with interest from 1 October, 1847; and if the opinion of the court shall be with the defendants, then judgment of nonsuit shall be entered.

And the court being of opinion that the plaintiff is entitled to judgment, judgment was rendered *pro forma*, by consent of parties. Appeal by defendants.

B. F. Moore for plaintiff.
G. W. Haywood, McRae and *Iredell* for defendants.

PEARSON, J. We consider the principle well settled that where a term of office is for more than one year, the bonds given for a proper discharge of the duties of the office, at the time of appointment, and the new bonds, given from time to time afterwards, are cumulative, that is, the first bonds continue to be a security for the discharge of the duties as at first intended, and the new bonds become an additional security for the discharge of such of the duties as have not been performed at the time they are entered into.

This principle is deduced from two considerations: The new bonds are not required for the relief of the sureties upon the first bonds, but are taken for the benefit of those who may be concerned in the proper discharge of the duties (72) of the office; and when the office is to continue for more than one year, it was presumed that the bonds taken at first might become insufficient from the insolvency of the sureties or other causes; hence the Legislature took the precaution to require new bonds to be given from time to time, and the courts, in order to give effect to the intention of the lawmakers, consider the new bonds not as taking the place of the old ones, but as additional thereto.

Bell v. Jasper, 37 N. C., 597, and other cases settle this principle as to the bonds of guardians. *Oates v. Bryan*, 14 N. C., 451, settles this principle as to the bonds of clerks. The same principle is applicable to the bonds of sheriffs. We presume the question would not have been raised but for the fact that formerly sheriffs were appointed annually, and then their bonds were not cumulative, for each appointment was a new

office, and the sureties of one year were no more bound for the duties of a former year, when the same man was appointed a second time, than if another person had received the appointment; but when the law was changed, so that the sheriffs are elected for two years, and are required to renew their bonds annually, then the principle of cumulative bonds clearly applied. When there is the same reason, there is the same law.

The counsel for the defendants attempted to take a distinction between bonds like the present, given at the expiration of the first year for the collection of county, poor and school taxes, and the then bonds of a sheriff; insisting that bonds like the present are prospective—that this bond, given in August, 1847, was a security for the taxes collected in 1848, and the bond given in August, 1846, a security for the taxes collected in 1847.

We are unable to see any ground for this distinction. The principle, which has been established, is that the new
(73) bonds are additional securities for the discharge of all such duties as have not been performed at the time they are entered into, as well such as have been commenced, but are not completed, being "in *fieri*," as those which have not been entered upon. In this case the duty of collecting, receiving and accounting for the taxes collectible in 1847 had been commenced, but was not completed, and it falls within the words of the bond and within the principle above announced.

The defense of a former judgment is wholly untenable. The parties in this action are not the same, the bond is not the same, and, by the case agreed, the damages to be recovered in this action are not the same with those recovered in the other action, being merely the excess above what is covered by the former judgment; so that even if that judgment had been *satisfied*. there would be no bar.

PER CURIAM. Judgment affirmed.

Cited: Moore v. Boudinot, 64 N. C., 193; *Coffield v. McNeill,* 74 N. C., 537; *Comrs. v. Nichols,* 131 N. C., 502; *Fidelity Co. v. Fleming,* 132 N. C., 335.

CATHARINE G. MEARES v. THE COMMISSIONERS OF THE TOWN OF WILMINGTON.

1. A municipal corporation which has authority to grade the streets is liable to any damages which may accrue to an individual from having the work done in an unskillful and incautious manner.

2. An action in *tort* will lie against a corporation.

APPEAL from the Superior Court of Law of NEW HANOVER, at a Special Term in January, 1847, *Manly, J.*, presiding.

This was an action on the case to recover damages of the defendants for causing one of the streets in the town of Wilmington to be cut down to the depth of four or five feet, by which the earth of a certain lot lying on the said (74) street was caused to fall, bearing with it sundry brick walls on the said lot, and rendering it necessary to the plaintiff to be at great expense in reconstructing said walls, and either to grade down the said lot to its former relative level with the street or construct additional walls and steps to render it as valuable to the plaintiff as before the digging.

The proof was that the lot in question was a dwelling-house lot, which had been occupied for the purpose of a dwelling-house lot, with a house upon it, between twenty and thirty years, by the plaintiff and those under whom she claimed; that a fire occurred, by which the said dwelling-house, in common with many others in the town of Wilmington, was consumed, leaving a part of the walls of the house, which had been built for more than twenty years, still standing, and also a brick wall or fence which had been built some seven or eight years; and that, by the digging, which had been done under the direction of the defendants, the earth of the lot, which was a body of deep sand, had given away, and the walls of both kinds above mentioned had fallen, and that it had become necessary, to enable the plaintiff to use the said lot as before, to rebuild said walls, and also to grade down the said lot, or to build other walls to sustain the embankment and put steps thereto; and that, to make the repairs and additions thus rendered necessary, the plaintiff had been compelled to lay out between $1,500 and $2,000.

The defendants showed that they, being commissioners of the town of Wilmington, deemed it expedient to grade Chestnut and Front streets, shortly after the fire above mentioned, as they contended they were empowered to do by sundry acts of Assembly passed in relation to the town of Wilmington; and had passed an order accordingly to grade Front Street; and that, in

(75) pursuance of said authority and order, persons under their direction had proceeded to cut down Front and Chestnut streets, at the southeastern intersection of which streets the plaintiff's lot stood, as described above. And they contended:

1. That the plaintiff was not entitled to recover against them, thus acting under public authority, whether due caution was used or not.

2. That due caution had been used, and the injury to the plaintiff, if any, had been the consequence of washing rains, and not the natural result of the defendants' acts.

3. That the plaintiff had, in fact, been benefited and not injured by the grading of the streets, in doing which the digging complained of by the plaintiff had been necessary.

4. They insisted that the plaintiff was only entitled to damages for the destruction of such superstructures as had been standing twenty years, if to any damages at all.

The plaintiff insisted that the acts of the defendants were altogether unlawful, and that no proper authority had, at any rate, been given to grade Chestnut Street; and if lawful, it had been done in so unskillful or incautious a manner as to produce the injury complained of, and that she had sustained loss thereby to the amount stated above or more.

His Honor charged the jury that the acts of the defendants were lawful, provided they were done with ordinary skill and caution, and it was for the jury to say whether such ordinary skill and caution had been used; if they had not, and injury resulted to the plaintiff for want of such ordinary skill and caution, she was entitled to recover, provided, further, that her injury had been the direct consequence of such want of skill or caution; for, if the fall of her lot or walls had been the consequence of high winds or washing rains, as had been urged (76) at the bar, and not the mere natural results of the defendants' want of skill or caution, plaintiff would not be entitled to damages. But that if, in the main, they should find for the plaintiff, they ought to consider further, whether, upon the whole, the plaintiff's lot had been increased in value by the defendants' acts to the full amount of her injury; and, if so, she would not be entitled to damages; and if the injury, if any, was greater than the increased value given to the lot by the defendants, then they should deduct such increased value from the amount of injury, and give to the plaintiff a verdict for such difference.

A verdict having been rendered for the plaintiff for $500 damages, and a rule for a new trial having been discharged, the defendants appealed.

Strange, W. H. Haywood, Meares and *Iredell* for plaintiff.
Badger and *W. A. Wright* for defendants.

PEARSON, J. We think the charge of his Honor was fully as favorable to the defendants as they had a right to ask. The whole of it is in their favor, except the instruction: "That if, in doing the work, ordinary skill and caution had not been used, and the plaintiff was damaged thereby, she was entitled to recover."

It is true, his Honor did not instruct the jury what would amount to ordinary skill and caution; but no such instruction was asked for, and the defendants have no right now to except because it was not given.

Our consideration is, therefore, confined to the single instruction above stated.

His Honor instructed the jury that the acts of the defendants were lawful, provided they were done with ordinary skill and caution. He assumed that the defendants, as commissioners, were vested, by the several acts of the Legislature upon the subject, with full power to cause the grading to (77) be done, and to levy a tax upon the citizens of the town to defray the expense; and he put the plaintiff's right to recover upon the question whether ordinary skill and caution had been used.

If the defendants had caused the grading to be done with ordinary skill and caution, and, by the erection of a substantial wall as the excavation proceeded, had so managed as to prevent any caving-in of the plaintiff's lot, so that the damage, if any, would have resulted, not from a want of ordinary skill and caution, but merely from the fact that, by reason of the grading, the lot was left higher above the level of the street, and so was more difficult of access, and therefore less valuable, the case would have presented a very grave question; and we are strongly inclined to think, with his Honor, that the plaintiff would have been without remedy; for, as it was lawful for the defendants to do the work, *if it was done in a proper manner*, although the plaintiff was damaged thereby, it would be *"damnum absque injuria,"* and give no cause of action. To subject the defendants to an action for exercising in a proper manner power vested in them by the sovereign authority, for the convenience of the public, would seem to involve an absurdity; hence, if the prop-

erty of one is made less valuable by being left too high, and that of another is made less valuable by being left too low, the parties must submit to the loss for the convenience of the public, unless the law authorizing the act to be done contains some provision for making compensation, as in justice it should do, whenever the work, although done in a skillful and proper manner, will be productive of special damage to an individual; but there can be no provision made for damage which is the result of a want of ordinary skill and caution in doing the work, as it cannot be anticipated. And this furnishes a strong argument for giving an action to recover damage which is the result of a want
(78) of ordinary skill and caution, although no action will lie when the work is properly done, and the individual must submit to the damage, unless his case is specially provided for. It is apprehended that there was error in not adverting to this distinction in the decision of some of the cases which were relied upon in the argument, and to which attention will be called in the course of this opinion; for which reason it has been dwelt upon somewhat at length.

The jury has found that the defendants did not use ordinary skill and caution in doing the work, and, as the plaintiff has been compelled to erect the walls, which proper skill and caution made it the duty of the defendants to have erected, in order to protect the lot from the effect of their act, it seems clear that she is entitled to recover. Suppose the case of two individuals: if one digs a ditch or cellar upon his own land so as to cause the land of another to cave in or walls of houses to fall, he violates the maxim, "One must use his own so as not to do damage to another," and is as clearly liable to an action as one who erects a dam upon his own land and thereby ponds the water back upon the land of another. The defendants insist that if the plaintiff had a cause of action it is against them as individuals and not in their corporate capacity, for, as they contend, a corporation cannot be sued in "tort."

It is true that it was formerly so held, and the reason given in the books is that the usual process in an action of *tort*, to wit, the *capias ad respondendum*, could not be served upon a corporation. The law, however, has been settled to the contrary, and the idea, that corporations are less accessible and less responsible to actions than individuals (which, by the by, was one reason why corporations have always been looked upon by the public with so much jealousy and so little favor), has yielded to
(79) common sense, and it has been held, ever since *Yarborough v. Bank*, 10 East., 6, when the matter underwent a full discussion, and all the objections to the action were satis-

factorily disposed of, that corporations were as liable as individuals to be sued in contract or in tort, or to be indicted.

In the United States the liability of corporations to actions of tort is well settled; indeed, the charters of all corporations in this State provide for the manner and name in which they shall sue and be sued, and no distinction is made between actions in contract and in tort.

We think the plaintiff had her election to sue the individuals who did the work or to sue the defendants as a corporation, in which capacity they procured the work to be done, and are liable for the damage done by their agent, under the rule *respondeat superior*. A superior is not liable for the willful act of his agent, but is liable for the damage resulting from a want of skill and due caution in doing the work.

If the work be done according to the directions of the superior, and the agent is sued and pays damage, he has his redress against the superior; if the work is done contrary to the directions of the superior, and the superior is sued and pays damage, he has his redress against the agent.

It is not necessary to decide whether the action could have been maintained against the defendants as individuals. Certainly it is better for the defendants to be sued as a corporation; for the question, how far they have a right to pay the damage out of the funds of the corporation, will be presented in a more favorable point of view than if they had been sued as individuals.

The defendants further insist that, admitting that the plaintiff could maintain an action for the damage supposed, against a private corporation, as a railroad or canal company, yet no action will lie against them, they being a municipal or public corporation, for an exercise of the power vested in them by the sovereign authority for the convenience of the (80) public; and contend for this distinction because, in the former case, the act is done for the benefit of the private corporation, to enable it to make money for the individuals composing the corporation, while in the latter the act is done for the benefit of the public at large. This distinction is taken in several cases cited in the argument for the defendants, and appears at the first suggestion to be plausible, but will not bear examination, and is more fanciful than real.

The inducement on the part of the sovereign to grant the power is, in both cases, the benefit which the public will derive. The inducement on the part of the grantees to solicit and accept the grant of the power is, in *both cases*, the benefit which the grantees will derive.

When the sovereign grants power to a private corporation to construct a railroad, the grant is made for the public benefit, and is accepted because of the benefit which the corporation expects to derive by making money. So when the sovereign grants power to a municipal corporation to grade the streets, the grant is made for the public benefit, and is accepted because of the benefit which the corporation expects to derive, not by making money directly, but by making it more convenient for the individuals composing the corporation or town to pass and repass in the transaction of business, and to benefit them by holding out greater inducements for others to frequent the town and thereby add to its business. The only distinction, then, is that in the one case money is received directly; in the other, indirectly; but in both cases the individuals composing the stockholders, and the citizens of the town, derive special benefit from the work, which is not shared in by the citizens of the State, and, for this reason, the corporation, in both cases, is at the *expense of making the work;* and this is the surest test by which to find out for whose special benefit the work is
(81) done.

The proposition contended for on the part of the defendants is that a public or municipal corporation is not liable to an action for doing a work which the law authorizes to be done, and that individuals sustaining loss thereby have no redress, unless the law provides for compensation. This proposition is admitted, with the qualification, *provided the work is done in a proper manner*, and the only question is, Is the proposition to be *thus qualified?* It has been already suggested, as a reason for requiring the qualification, that compensation can be provided for loss necessarily resulting from the work, as taking land for the location of a road or other loss which will result, if the work be done in the most proper and skillful manner, whereas compensation cannot be provided for loss resulting from a want of skill and caution, for want of skill and caution cannot be anticipated—at all events, the degree in which it will be wanting cannot be known; it was also suggested, as a reason for requiring the qualification, that the distinction attempted to be drawn between a private and a public corporation, by which the one might be made liable in such case and the other not, was not tenable. It is now added, and seems to be conclusive in favor of the qualification, that the grant to do the work necessarily implies a condition, that the *work is to be done in a skillful and proper manner*, so that if the work be not done with ordinary skill and caution the corporation has not acted

in pursuance of the power vested in it; its act is not lawful, but is wrongful, and the damage sustained by an individual is "*damnum et injuria*," for which an action will lie. By way of illustration, power is given to a corporation to grade a street, by making an embankment across a valley through which a small branch runs; is it not implied that the work is to be done in a skillful and proper manner by making a culvert, through which the branch can discharge itself? or is the power unconditional, to make the embankment in any way that (82) the corporation may see proper—to fill up the bed of the branch, make no culvert, and leave the water to pond back upon the lots above, unless the owners choose to be at the expense of making a culvert, even if it be lawful for them to do so, by interfering with a work which the sovereign has made it lawful for a municipal corporation to erect?

The bare statement of such a case is a sufficient argument for requiring the qualification; and yet it is, in effect, the case we have under consideration, and we would, without hesitation, decide in favor of the qualification upon the reason of the thing, unless the authorities have settled the law to the contrary too clearly to allow of such a decision.

The authority mainly relied on as being directly in point is a decision in the State of New York. *Wilson v. New York*, 1 Denio, 595. It is admitted that this case, if correctly decided, is in point; but with proper respect we conceive that the decision was erroneous, and that it is not supported by the case of *Plate Manufacturers v. Meredith*, 4 Term, 796, upon which the Court base their opinion. The error, it seems to us, is in holding that the power to do an act is unconditional; whereas we think there is always a condition implied that the work shall be done properly. The case was: The plaintiff owned a lot at the intersection of Fortieth Street and Seventh Avenue; the defendants having power to raise and grade the street and avenue, raised them eighteen inches, *without making any drain or sewer*, whereby the water from the street and avenue, and the adjacent lots, flowed upon the plaintiff's lot and there remained in a pond, and could not flow off, because of the obstruction presented by the street and avenue so raised, and for the want of a drain or sewer. The plaintiff in his declaration alleged that the work was done carelessly, and proved the facts (83) as above stated. The court was of opinion that the action could not be sustained, and the plaintiff was nonsuited, assuming the broad ground that the corporation was not liable for damage done to individuals in the exercise of its power to

raise and grade the streets, and without leaving the fact to be decided by the jury, whether the work had been done "carelessly" and with a want of ordinary skill and caution, of which we think there was full proof.

Plate Mfrs. v. Meredith, 4 Term, 796, upon which the above case is made to rest, was this: The plaintiff owned a lot on High Ground Street, upon which he had three warehouses, with an arch and gateway under one of them, leading from the street under and through into his yard behind, and used it for loaded wagons to pass from the street into the yard, for which purpose it was of sufficient height. The defendants, who acted under the authority of the commissioners of the town, who were authorized to raise and grade the streets by an act of Parliament, and who had previously taken a level and decided upon the height to which it was necessary to raise the street opposite the warehouse and gateway of the plaintiff, in strict pursuance of their directions raised the street 2 feet and 1 inch; whereby the gateway of the plaintiff was made so low above the street that loaded wagons could not enter as before, and it became necessary to unload the wagons in the street and carry the articles through to the backyard. The arch could not be made higher without injury to the house. The special case, made after a verdict for the plaintiff, stated, as facts agreed, the facts above, and also this further fact: That the height to which the street was raised opposite plaintiff's gate was necessary to make a regular inclined plane with a fall of 1 foot in 17, and "the work could not be *effected* if done in *any other way*. (84) The line, so made, was necessary and proper, and any alteration of the inclined surface of the street *less material* was not sufficient to render the *street safe* for carriages."

Lord Kenyon held that neither the defendant nor the commissioners were liable for doing the work, although the plaintiff was thereby damaged, and put his decision upon this ground: "It does not seem to me that the commissioners acting under this act have been guilty of any *excess of jurisdiction*."

Buller, Judge, put his decision upon the ground that the act gave a particular remedy, by making provision for compensation, but inclined to concur with the *Chief Justice*, that the plaintiff would have been without remedy if no provision for compensation had been made; concluding "that if the thing complained of was lawful, no action can be sustained against the party doing the act. In this case express power was given to the commissioners to raise the pavement, and not having exceeded their power, they are not liable to an action for having done it."

Grose, Judge, put his decision upon the provision for compensation, and expressed no opinion on the general question.

So that in this case the work was properly done, and no want of ordinary skill and caution was alleged. And the case of *Wilson v. New York* is placed in this predicament. If the work was properly done, then it is sustained by the above case, upon which it professes to be grounded; but is not in point as an authority in the case now under consideration, where a want of ordinary skill and caution is expressly found by the jury. But if the work was *not* properly done, then, although in point, yet it is not sustained by the case above stated.

Bailey v. New York, decided in the Supreme Court of (85) that State, 3 Hill, 531, and again decided in the Court for the Correction of Errors, 2 Denio, 433, was also cited, not as a case in point, for the decision was against the corporation, but as recognizing the exception contended for, in favor of municipal corporations, by putting the case upon special grounds, which, in the opinion of the Court, made it an exception to the general rule.

The case was that the plaintiff owned land, mills, etc., on Croton River, below the point where the defendants had caused a dam to be erected to turn the water out of the river for the purpose of taking it to the city, in pursuance of powers vested in them by the act of the Legislature. A freshet in the river carried away the dam and caused great damage to the plaintiff, by washing away his land, mills, etc. The plaintiff, in the court below, offered to prove that the dam was negligently, unskillfully, etc., constructed, by reason of which the dam was swept away, etc. The judge below rejected the evidence and directed a nonsuit. Upon an appeal to the Supreme Court a new trial was granted, the Court being of opinion that, although, as a general rule, a municipal corporation is not liable to the action of an individual for acts done under a power vested in it by law, yet this case formed an exception, for although the public might derive a common benefit from the erection of the work, still the grant of the power was made for the private advantage and emolument of the corporation, inasmuch as the water was to be sold; and so the corporation was liable as an individual or a private corporation would be. Upon the second trial, the same facts being proved, the jury found for the plaintiff and assessed damage to $62,888.73. The case was then taken to the court for the correction of errors, where the decision of the Supreme Court was affirmed, and the Court, admitting as a general rule that a municipal corporation is (86)

not liable to the action of an individual for acts done under a power vested in it by law, was of opinion that this case formed an exception: not upon the ground taken in the Supreme Court for making it an exception, but upon a distinct and different ground—that the corporation owned the land upon which the dam was erected, and was, therefore, liable for its improper construction. In both courts it was taken for granted that the work was not properly done, and instead of coming to the same conclusion upon grounds so distinct and different, the two courts might safely have adopted the common ground, that an act which gives power to a corporation to do a certain work implies that the work is to be done properly; and hence, a corporation, whether private or municipal, whether the act is done with a view to the receipt of money directly or only for indirect or collateral advantages, and whether the land belongs to the corporation or is only to be used and kept up as streets, in any and all of these cases is liable for any damage resulting from a want of ordinary skill and caution in doing the work; although it is not liable, when the work is properly done and in strict pursuance of the power vested in it, for any damage which necessarily results from the work, and does not depend upon the *manner* in which it is done. In such cases individuals must submit to the loss, "*salus populi suprema est lex*," which maxim, softened down, means that the interest of individuals must give way to the accommodation of the public. But as the maxim is somewhat harsh in its mildest sense, we are not disposed to extend its application, especially when no provision is made for compensation.

PER CURIAM. Judgment affirmed.

Cited: *S. v. Matthews*, 48 N. C., 458; *S. v. Dibble*, 49 N. C., 116; *Winslow v. Comrs.*, 64 N. C., 221, 5; *Hill v. Charlotte*, 72 N. C., 27; *Peebles v. Guano Co.*, 77 N. C., 236; *Bunch v. Edenton*, 90 N. C., 434; *White v. Comrs.*, *ib.*, 441; *Salisbury v. R. R.*, 91 N. C., 494; *Wright v. Wilmington*, 92 N. C., 159; *Bridgers v. Dill*, 97 N. C., 226; *Moffitt v. Asheville*, 103 N. C., 254; *Adams v. R. R.*, 110 N. C., 330; *Staton v. R. R.*, 111 N. C., 286; *Tate v. Greensboro*, 114 N. C., 404; *Wolfe v. Pearson*, *ib.*, 630; *Willis v. New Bern*, 118 N. C., 137; *Ridley v. R. R.*, *ib.*, 1002; *Thomason v. R. R.*, 142 N. C., 306, 308; *Jones v. Henderson*, 147 N. C., 123; *Dorsey v. Henderson*, 148 N. C., 425; *Quantz v. Concord*, 150 N. C., 539.

(87)

DEN ON DEMISE OF ABNER SCOTT ET AL. v. JOHN B. SEARS.

1. One of several lessors in an action of ejectment has a right to have his name erased from the declaration.

2. He is liable to his co-lessors for his proportion of the costs; but if judgment be ultimately rendered in favor of the plaintiff, he is entitled to be reimbursed for such proportion of the costs recovered from the defendant.

APPEAL from the Superior Court of Law of WAKE, at Fall Term, 1848, *Dick, J.*, presiding.

The declaration of ejectment, in this case, was returnable to August Term, 1845, of Wake County Court, and contained but one demise, and that in the name of Scott and wife. At that term the defendant appeared and entered into the common rule and pleaded not guilty. Upon motion of the plaintiffs by their attorney, they were permitted to amend their declaration by adding a count in the name of Ann Jones; and the counsel, on the demand of the defendant, produced a power of attorney from Ann Jones, authorizing him to use her name for that purpose. Whereupon the defendant's counsel produced to the court a power of attorney subsequent in date to that shown by the plaintiffs, authorizing and empowering him to strike out her name from the declaration. Upon the motion of the defendant's counsel the demise in the name of Ann Jones was stricken from the declaration. Whereupon the plaintiffs moved that she pay the costs, which was refused, and the plaintiffs appealed to the Supreme Court.

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

NASH, J. The case is before us upon the interlocutory (88) order authorizing Ann Jones to have the demise in her name erased from the declaration. If it was a matter of discretion in the court, we have no authority to interfere with its exercise; our only business, on appeals, is with the legal errors committed or alleged to be committed. We, however, consider it a matter of right on the part of Mrs. Jones. If she had been the only lessor of the plaintiff it cannot be questioned she would have had the right to dismiss the action. We cannot perceive in what manner that right was taken from her, so far as the demise in her name was concerned, by its being joined in the declaration with one from Scott and wife. The demises are separate and distinct, and in no way dependent on each other.

The motion here was similar in its character to entering a *nolle prosequi.* Where a plaintiff perceives he cannot support his declaration in whole or in part he may enter a *nol. pros.,* either to the whole or part of his cause of action. Tidd Pr., 681; 1 Ch. Pl., 609; 2 Sellon Pr., 458; *Fray v. Fray,* 2 Bl., 815. In this case Mrs. Jones did not, by withdrawing from the declaration the demise in her name, interfere with the action as to any right the other lessors of the plaintiff had to prosecute it. We think there was no error in permitting the demise in the name of Mrs. Jones to be stricken from the declaration.

But we think the court ought to have made an order on this party for the payment of her share of the costs incurred on the part of the plaintiffs. She gave an express consent to a count in her name, and, although she cannot be prevented from discontinuing the action so far as it is hers, she is obliged, in common honesty, to pay the other lessors of the plaintiffs or their common attorney her aliquot part of all the costs. *Jackson v. Stiles,* 5 Cowen, 419. For this reason the judgment must be reversed, with directions to the Superior Court to correct
(89) the order appealed from, in the matter here pointed out.

If the plaintiff should ultimately succeed, she will be entitled to receive back the costs so paid by her, out of those collected from the defendant.

PER CURIAM. Ordered accordingly.

Cited: Blount v. Wright, 60 N. C., 91.

JAMES CARROLL, ADMINISTRATOR, v. EDWARD E. HUSSEY.

Where an execution issues against A. and is levied *bona fide* on property in the possession of B. on the allegation that the property is really in A. the action of replevin will not lie against the sheriff.

APPEAL from the Superior Court of Law of DUPLIN, at Fall Term, 1848, *Settle, J.,* presiding.

This is replevin for a slave which the defendant avowed taking as sheriff of Duplin under a *fieri facias* from the County Court, against the property of Edward A. Houston. At the time of the seizure the slave was in the possession of the plaintiff, and the only question at the trial was whether the action would lie. A verdict was taken for the defendant, subject to the opinion of the court on that point; and the court afterwards gave judgment on the verdict, and the plaintiff appealed.

D. Reid and *W. A. Wright* for plaintiff.
W. Winslow for defendant.

RUFFIN, C. J. In *McLeod v. Oats*, 30 N. C., 387, the (90) case did not require the Court to go further than to say that replevin would not lie against an officer for goods seized in the possession of the defendant in execution; and the decision was confined to that point. But the reasoning on which the opinion was adopted embraces the present case also, in which the actual possession was not in the debtor. The rule, which is laid down by writers of high character, that goods taken in execution are not repleviable; the want of precedents of such actions in the old books, and the very grave inconveniences which would arise from extending the action to property in *custodia legis*, all concur in producing the conviction that it will not lie in any case. It was argued for the plaintiff that if the goods seized be not the debtor's property, the process is no justification, but the officer is a trespasser *ab initio;* and therefore that replevin as well as trespass ought to lie for such a wrongful taking. In the first place, that is a misapplication of the doctrine alluded to, for it properly belongs to a case of abuse of process, which authorizes the officer to do a particular act, and in doing it he transcends his authority, and therefore no part of his act is justifiable. But execution against the goods of one person is no authority whatever for taking the goods of another; and therefore the sheriff in such a case is an actual trespasser from the beginning, and not merely by relation from subsequent *malfeasances*. Besides, the argument is completely a *petitio principii*, for it assumes that the goods belong to the plaintiff in replevin, whereas the controversy in such a case always must be, whose property they are; and therefore the inquiry arises, whether this action, when brought against the officer, is a proper, convenient and legal mode of trying that question.

That the statute does not help the plaintiff was shown in the case before cited. But it seems, on the contrary, to furnish an additional argument against any straining in (91) favor of the action which would create such impediments to the execution of process; because, by the statute, the owner of the slave may bring replevin against the purchaser from the sheriff, which amply secures to him the slave specifically.

PER CURIAM. Judgment affirmed.

Cited: Gaither v. Ballew, 49 N. C., 492; *DuPre v. Williams*, 58 N. C., 101.

EX PARTE MAKEPEACE ET AL.

Spinning machinery used in a factory constitutes a part of the improvements of real estate required to be assessed for taxation under our revenue laws.

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

This was an application to reduce the valuation of a piece of land assessed for taxation in Montgomery County for 1847. The case appears to be this: Samuel H. Christian was seized in fee of a tract of land on the Pee Dee River, and in 1845 entered into a contract of copartnership with George Makepeace to erect and work thereon a mill or factory for spinning cotton, to be driven by the water or river, on the following terms: Christian was to erect a suitable house and attach to it the machinery necessary to work the mill, such as a large water wheel and other wheels, etc.; and Makepeace was to furnish the spinning machinery and fix it in the house so as to answer the purpose. The copartnership was to continue ten years under the firm of "Swift Island Manufacturing Company." A certain
(92) sum was to be paid annually by the firm to Christian for the use of the ground and house, and then the profits be divided between them; and at the end of the term Makepeace was to remove the machinery furnished by him. In 1846 the house was built and the large wheels and the spinning machinery fixed in it and the factory put into operation; and it so continued until the period for taking the tax list for 1847. The land was then given in by the firm, stating the factory to be an improvement thereon; and the board of valuation valued the land with the improvements thereon at $6,000, including therein the value of the machinery for spinning, as well as the values of the land itself and of the mill house and of the other wheels and machinery, besides that more particularly called the spinning machinery.

Upon the return of the list to the next County Court Makepeace and Christian moved the court to reduce the valuation, upon the ground that the spinning machinery was not a part of the improvements on the land, and that, therefore, too high a valuation had been put on the premises. On hearing the motion it was established that the spinning machinery itself was affixed to the floors of the building by iron bolts and screws, and that by removing the screws and bolts the machinery could

be detached from the house and taken away without injury to the said machinery or the house. The court refused to reduce the valuation.

Makepeace and Christian then took up the case by *certiorari* to the Superior Court; and it was there held that the machinery for spinning was not subject to taxation, and the order of the County Court was quashed and a *procedendo* awarded to that court to reduce the valuation of the land and improvements, by deducting therefrom the value of that part of the machinery. From the decision an appeal was allowed to the solicitor on behalf of the State and county. (93)

Winston for Makepeace.
Iredell for the county.

RUFFIN, C. J. The question is whether the machinery for the spinning of the cotton, separate from the wheels which set it in motion, is no part of the "improvement" on the land, and so exempt from taxation, or whether the house, the main water wheel and other wheels, and the spinning machinery, constituting together the factory, be not, as a whole, such an improvement on the land as to be liable to assessment, within the meaning of the revenue laws. The opinion of the Court is that it is thus liable.

Formerly land was not taxed *ad valorem* in this State, with the exception of town lots. But since 1814 the land tax has been laid according "to its value, including improvements thereon." Rev. Code, ch. 872. The term "improvements" had been before applied to town lots as subject to taxation according to their value. Ired. Rev. * * * 1784, ch. 1; and it must have meant the buildings on them. Under various acts since 1814 the owners of land gave in their lists, describing the situation and number of tracts and the quantity, and affixing also the value of the land and the improvements. But in 1836 it was enacted that the value should not be given in by the owner, but that a board of valuation, consisting of a justice of the peace and two freeholders, should upon oath ascertain the cash value thereof and return it to the County Court, subject to correction there, at the instance of persons aggrieved by too high a valuation. By the first section of the act the tax is laid on the land with the improvements thereon. Probably different views were taken on the point, what constituted "improvements" in different parts of the State, to the prejudice of the revenue, so as to give occasion for the act to provide for (94)

the reassessment of land in 1846, ch. 75. That enacts that the board of valuation for 1847 should ascertain on their own view or the oath of witnesses, as accurately as practicable, the cash value of land with the improvements, and that they should annex to their return an affidavit that the valuations of the land with the improvements thereon are, in their judgment and belief, the actual value thereof in cash. Although the Legislature has in no one of the acts defined what are the improvements on land which are to be taken into consideration in setting a value upon it, either by the owner or the board of valuation, yet it seems manifest that the term was used in all the acts with the intent to embrace all such buildings and erections as add to the value of the estate and would pass as a part of it under a sale and conveyance. Hence dwelling-houses, barns, granaries, stables and other farm buildings, houses of business and trades, such as shops, warehouses, tanneries, vats, mills and the like, must certainly come within the description of improvements on land. With respect to mills, the Court is quite clear in holding that whatever is parcel of one of any kind, whether a saw or grist mill, a carding, spinning or weaving mill, forms a part of that improvement on the land, and for the time being is to be taken into the estimate of its value for the purposes of taxation. The rules respecting the right to fixtures of the character of this machinery, as between landlord and tenant, or between the owners of a particular estate and the remaindermen, can have, it is conceived, but little application to the point in this case. Our inquiry is, How are these fixtures to be regarded, as to their nature, when the premises and fixtures are in the possession and enjoyment of the legal owner of the land itself? If Mr. Christian were the sole and absolute owner of the factory and occupied it, then, undoubtedly, every part of the machinery,

(95) whether that more especially called the spinning machinery, or the large water wheel or other wheels by which the works are moved, would form a part of the realty.

Trespass *quare clausum fregit* would lie for an injury to any part of it, and no one would think of bringing trespass *de bonis asportatis* in such a case. A constable could not enter the mill with a *fi. fa.* and detach the frames and other parts of the spinning apparatus from the house by taking out the bolts and screws which confine them, and sell them as personal chattels. This machinery seems for many purposes of the same character with the screens, bolting chests, millstones, and the other apparatus in a gristmill, and precisely of that character for the pur-

poses of this case. It forms parcel of the cotton mill or factory as the others do of the grain mills, and, without some reservation, would pass by a conveyance of the mill; and, consequently, ought to form parts of the mill for taxation. It is of no consequence that the contract between the parties authorizes one of them at a future period to sever the machinery from the house and carry it away. When thus severed, or, perhaps, when the time of severance shall have come, it may be regarded as exclusively the property of him who has the right to remove it, and consequently would then be reckoned personalty. But at present the land, with the house on it and the machinery attached to it, is occupied by these two persons as the temporary owners of the whole, who are to give in the land with the improvements for taxation; and while they thus occupy it they ought to give it in precisely as the sole owner in fee would.

The Court is, therefore, of opinion that the order of the Superior Court was erroneous and must be reversed, and that the original order of the County Court should stand, which must be certified to the Superior Court, to the end that a writ of *procedendo* may thence issue to the County Court, where the tax books remain, in order that those books may be duly (96) and finally settled in this respect.

PER CURIAM. Ordered accordingly.

Cited: R. R. v. Comrs., 84 N. C., 507.

JOHN PATTERSON v. WILLIAM BODENHAMER ET AL.

A, by a verbal contract, agrees to convey a tract of land to B upon condition that B would erect a house upon it. Before this was done C levies an execution he had against B upon his interest in the land. A then conveys the land to D, and, with a view of overreaching C's execution, antedates the deed: *Held*, that the mere antedating the deed did not make it fraudulent and void: *Held*, secondly, that B, having only a parol contract for the sale of the land, had no equitable claim against A which was liable to execution under our act of Assembly subjecting equitable interests in land to sale by execution.

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

The action is in trespass to recover damages for injury to land. The circumstances of the case are as follows: In 1843 a man by the name of Lamb agreed, verbally, to convey the land

in question, of which he was the owner, to William Patterson, upon condition that he would put a house upon it and finish it. Before that was done McConnell and Lindsay obtained a judgment against William Patterson, and in July, 1843, caused the execution which had issued on the judgment to be levied on the land. An order of sale was obtained at August Term, 1843, and under the *venditioni exponas* it was sold in Novem-
(97) ber, and the defendant Bodenhamer became the purchaser. In order to defeat the levy, Lamb, by the directions of William Patterson, conveyed the land in August, 1843, to John Patterson, the plaintiff, who was the father of William, but dated it so as to overreach the levy. The trespass consisted in removing the house from the land.

The presiding judge charged the jury that if the deed to John Patterson was antedated for the purpose of overreaching the levy of the execution, it would be a fraud on the part of the plaintiff, and such an one as would vitiate and defeat his right to recover.

Under the charge of the court the jury found for the defendant, and the plaintiff appealed.

J. T. Morehead for plaintiff.
Iredell for defendant.

NASH, J. We think his Honor erred. We do not believe the antedating the deed, as stated in this case, did have the effect of making it void. The date of the deed is not an essential part of it. It is customary to insert one in every deed, as one and the most certain mode of showing when it took effect—and *prima facie*, it is evidence of the time of delivery, but, like all such evidence, may be contradicted. But a deed is good without any date, or with an impossible one, for it takes effect from the delivery, and only from that time. The date inserted is, however, so far a part of the deed that if, after its delivery, it be altered by any person claiming an interest under it, without the knowledge of the grantor, or, in case of a bond, of the obligor, it is rendered utterly void, and this because it ceases to be the deed of the person executing it. It is considered by the law out and out a forgery. In this case the title of the land in question was in Lamb, and he made the deed to the plain-
(98) tiff, and, though the object or purpose for which it was antedated was a dishonest one, still, between them, it was valid and passed the title to the plaintiff, at least so far as to enable him to maintain an action of trespass against a wrongdoer, and such we consider the defendant. He, doubtless, acted

under the belief that his title to the land was good; but it was not so. William Patterson, his debtor, had no such interest in the land as was subject to an execution. So far as the case discloses the facts, he never was in possession. Lamb had verbally promised he would convey the premises to him, upon certain conditions with which he had not complied. But in addition to this his contract was void, being in parol. Rev. St., ch. 50, sec. 8. If it had been in writing, and he had complied with its terms so far as they were conditions precedent to be performed by him, he could have enforced a conveyance of the legal title from Lamb, and, therefore, would have had such an interest, under section 1 of the act of 1812, as would have been liable to the *fi. fa.* That act is not confined to express trusts, but extends to all cases in which any person is in any manner seized in trust for a defendant in an execution, as in the case of sale by articles in writing, where the vendee has paid the purchase money and done all the acts to be performed by him. *Henderson v. Hoke,* 21 N. C., 138. Several cases in this Court establish the doctrine that section 1 of the act of 1812 extends to no trust where the *cestui que trust* has not a right to call for an immediate conveyance of the legal estate. *Thorpe v. Hicks,* 21 N. C., 617. If the purchase by the defendant conveyed to him the legal title, then he would hold it, under section 1 of the act, discharged of any claim by Lamb, for that section acts upon the estate. In whatever way we consider the case, William Patterson had not such interest in the land as could be reached by an execution at law, and the defendant acquired nothing by his purchase, and in removing the house was a mere (99) wrongdoer, and liable to the plaintiff in damages.

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

JOEL E. HORNE ET AL. v. JAMES HORNE ET AL.

1. If a testator knows what he is doing and to whom he is giving his property, his mental capacity is sufficient to enable him to make a will.

2. The domicil of origin of a person continues until he acquires another, by actual removing to another country with the intention of remaining in the latter altogether or for an indefinite period.

3. Two things must concur to constitute a domicil: first, residence, and, secondly, the intention to make it a home.

4. And if these two concur, it makes no difference how short his residence may be in the new domicil.

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

This was an issue of *devisavit vel non* upon a paper-writing offered for probate by the plaintiffs as the last will and testament of Joel Horne, deceased, in which paper-writing the said plaintiffs were named as executors and only legatees. Three objections were raised by the defendants, to wit:

1. That the supposed testator was not of sufficient capacity to make a will, for want of a sound disposing mind and memory.

2. That if not actually incapable of making a will, he (100) was unquestionably a man of very feeble intellect, and executed his paper-writing under influence and through fraud and circumvention.

3. That the supposed testator was domiciled in Chesterfield District, South Carolina, and not in Anson County, North Carolina, at the time of executing said paper-writing; and that the paper-writing was not executed according to the laws of the former State.

Upon the first point one of the subscribing witnesses testified fully to his belief of the sanity of the supposed testator at the time of signing the said paper-writing, and the proof of the *factum* and subscription by two witnesses, according to the laws of North Carolina, was full, although the second subscribing witness said that he had no distinct opinion whether the supposed testator was sane or not—he having but little means of judging, having never seen him until called upon to witness his will, though he discovered nothing to make him doubt his sanity. Other witnesses, on the part of the plaintiffs, testified to their belief of his capacity to make a will, though all concurred in the belief that he was a man of weak understanding. One witness testified that, three or four years before, the testator had expressed a purpose to give his property to the plaintiffs, who are, in fact, the only legatees in the will; and several of the witnesses spoke of his intention to give a part of his property to the plaintiff Joel E. Horne, together with others, and this at different times. On the part of the defendants four witnesses proved that he was, in their judgment, incapable of making a will; and of these were his attending physician and two persons who had for some time resided in the same house with him. It was in proof that he had sixteen or seventeen slaves; that one of them had great influence over him; that he had many relations equally near with the plaintiff, to several of

whom he had expressed his intention of giving property, as well as to the plaintiff Joel E. Horne, and to one witness his intention to give his property to other relations, as near (101) as Joel E., without mentioning him at all, and at another time a determination to make no will at all. The supposed testator was a native of Chesterfield District, South Carolina, where he had resided all his life, until a few weeks before his death, upon the part of the same plantation on which he had been born, and where both his parents had lived and died and were buried; that he lived in a very uncomfortable way among his negroes, without any white family, having never married; that his farm was small and poor, and his slaves were so unproductive as to render it necessary for him to borrow money, which was furnished him to some extent by Joel E. Horne; that when 36 years of age he fell into a very bad state of bodily health, and was advised by his physician to seek a place where he would be more comfortable; that accordingly, upon the invitation of Mrs. Worley, who lived in North Carolina, near the line, as was the residence of the testator in South Carolina, he went to her house, where he remained a few weeks and became discontented, but while there proposed to young Mr. Worley, her son, to bring his slaves to Mrs. Worley's, work them upon the farm, and make some division between them of the profits; but young Worley declined the arrangement, saying that his negroes were unmanageable, and he did not wish to have anything to do with them. He was then removed to Nancy Horne's, in South Carolina, she being the widow of his brother, Thomas Horne, who had several children, and while there was kindly treated, for which he expressed himself grateful, as well as for that at Mrs. Worley's, and to one or two witnesses expressed his intention of rewarding them in his will, although at the time of making his will, three or four weeks afterwards, he expressed himself dissatisfied with them, and determined to give them nothing. Within a few days after his coming to Mrs. Nancy Horne's he was removed, together with his slaves, (102) by the plaintiff J. E. Horne to the plaintiff William Horne's, in Anson County, North Carolina, early in December. Before leaving South Carolina the last time he observed to a witness that his place was too poor for him to live on; that he had rented William Horne's old place in Anson County, N. C., where he was going to make a crop, and Joel E. Horne was going to superintend his hands; to another witness he said he was going to stay a while, but would return again; to the subscribing witnesses to the will he said he was about to rent, or had

rented, William Horne's old place, and Joel E. Horne was to superintend his affairs. The witness was not clear whether he said he had rented or was about to rent. On 14 December the will was executed, and after that day no witness deposed to having seen him, though it is believed he died about Christmas following the making of the will, but whether at William Horne's residence or at the place spoken of as having been rented by him, did not appear, nor did it appear whether he or any of his slaves had ever been on the William Horne old place. His will was proven in common form at January Term, 1841, being the next term of that court after his death, which occurred on the second Monday of January. There were but two subscribing witnesses to the will, and it was proved that by the law of South Carolina three were necessary to a will, either of realty or personalty.

His Honor charged the jury that if they believed the evidence touching the paper-writing, it was duly proved according to the laws of North Carolina, and they should find it to be the last will and testament of the testator, Joel Horne, deceased, unless one of the three objections raised by the defendants existed in fact, the first of which was that the supposed testator, Joel Horne, was not of sound and disposing mind and memory.

Upon this point the court informed the jury that it was in evi-
(103) dence that Joel Horne was always a man of weak intel-
lect, and especially during his last illness; that weakness of mind was not itself a valid objection, as the law did not undertake to weigh the size of men's intellects; that it did not require that he should be a wise man; that if he was between the wise and foolish sort, although he inclined rather to the foolish, he was, in law, capable of making a last will and testament; that to enable a man to make a disposition of his property by last will and testament he must do it with understanding and reason, and that if the jury should be satisfied that, at the time of executing the paper-writing, Joel Horne had not understanding and reason, they should find a verdict against the will; that if the supposed testator knew what he was doing at the time of making the supposed will, and that he was giving his property to the plaintiffs, and that they would be entitled to it, provided the forms of the law were complied with, then they should find in favor of the will. As to the second objection, the court instructed the jury that if they should be satisfied that the plaintiffs or either of them, or his negro woman Hannah, had had such control and dominion over the supposed testator, and had exercised that control and dominion illegally

and fraudulently, in the disposition which he had made of his property, then the paper-writing offered for probate would not be his will, but the will of those exercising such improper influence, and, if they should be satisfied that that was true in this case, they should find against the will. But, although the jury should be satisfied that there had been importunity and persuasion on the part of the plaintiffs, or either of them, or the negro woman Hannah, and the supposed testator had yielded to such an importunity and persuasion because he was convinced it was right, it would not render the will invalid. But if the importunity was so great that the testator was too weak to resist its influence, and his free agency was taken away, then (104) they should find against the will.

As to the third objection, the court instructed the jury that a man's residence *prima facie* was his domicil; that wherever his residence was there was his home, his domicil *prima facie*, but not being conclusive, it was susceptible of explanation; that residence and domicil were not convertible terms; that a man might have his residence at one place and his domicil at another, and that the domicil of origin continues until it is changed for another; that the testator's domicil of origin was in South Carolina, and it continued still to be in South Carolina, unless it was proved that he had changed it; that if he had left South Carolina for this State for a temporary special purpose, not with a view of making it his home, but of returning to South Carolina, then he had not lost his original domicil, and of course had not acquired a new one here, and if they should so find, then they should render a verdict against the plaintiffs, because the will had not been proved according to the laws of South Carolina; but if they should be satisfied from the evidence that the testator had abandoned his home in South Carolina, and come to Anson County, in this State, for the purpose of settling there either permanently or for an indefinite time, although he had not consummated that purpose, but was prevented from doing so by death overtaking him, his domicil would be in this State.

The defendant's counsel then requested the court to charge the jury that if the supposed testator was so deficient in memory as not to remember who his relations were, as appeared must be the case from his speaking but a few days before of giving them his property and now not mentioning them at all, he was incapable of making a will. The court refused so to charge, but told the jury that if he understood what he was doing when he made the will, so as to know he was giving his

(105) property to the plaintiffs, he had such a sound and disposing mind as would enable him, in law, to make a will. A verdict having been returned in favor of the plaintiffs, and a rule for a new trial having been discharged, the defendants appealed to the Supreme Court.

Iredell for plaintiffs.
Strange for defendants.

NASH, J. This was an issue of *devisavit vel non* to try the validity of a paper-writing purporting to be the last will and testament of Joel Horne, deceased.

Three objections were made by the defendants, the caveators: (1) That the deceased had not mental capacity; (2) if he had, his mind was so weak that he was easily influenced, and executed the paper under influence and through fraud and circumvention; and (3) that the supposed testator was, at the time he executed the paper, a citizen of South Carolina, and had his domicil there, and that the paper-writing was witnessed by only two subscribing witnesses, whereas by the laws of that State three were necessary.

The defendants' counsel then requested the court to charge the jury that if the supposed testator was so deficient in memory as not to remember who his relations were, as appeared must be the case, from his speaking but a few days before of giving them his property, and now not mentioning them at all, he was incapable of making a will. The court refused so to charge, but told the jury that if he understood what he was doing when he made the will, so as to know that he was giving his property to the plaintiffs, he had such a sound and disposing mind as would enable him, in law, to make a will.

In his charge the presiding judge went fully into the evidence upon each question raised in the cause, and it was fairly left to the jury. Upon the questions of law embraced in the (106) first and second objections, although his Honor might have been more explicit, we think he was sufficiently so, and that the charge, in those particulars, was substantially correct. As to the mental capacity of Joel Horne, his language is, "that if the supposed testator knew what he was doing at the time of making the said supposed will, and that he was giving his property to the plaintiffs, and that they would be entitled to it, provided the forms of the law were complied with, they should find in favor of the will." We do not see that the defendants have any right to complain of what is here laid down. If the deceased had the portion of mental capacity here re-

quired, he had such a mind and memory as the law required to enable him to dispose of his property by will. As to undue influence, or the papers being obtained from the deceased by fraud and imposition, there was no evidence whatever to sustain the objection, and his Honor ought so to have informed the jury.

The instruction asked for by the counsel of the defendants was not such as the court could give. It required the judge to pronounce an opinion upon a matter of fact, to wit, "that, a few days before making his will, the deceased spoke of giving his property to his relations, and now not mentioning them at all." Whether he had so spoken was a fact, to which the jury alone could respond. We think, therefore, the instruction was properly refused. Where instructions are prayed, if granted, they must be put as the counsel requires; otherwise they are not what he demanded.

We concur with his Honor in his instructions to the jury upon the third objection. It is unquestionably true that if Joel Horne was, *at the time the paper-writing was executed*, still domiciliated in South Carolina, it would not be a good will in North Carolina. For it had not the requisite number of witnesses, there being but two, and the laws of South Carolina requiring three. It was important, then, to ascer- (107) tain whether, under the circumstances detailed by the witnesses, the deceased had acquired a domicil in this State, and thereby lost that of origin. On the part of the plaintiffs it was contended such was the fact, and on that of the defendants that the origin of birth still continued. After stating to the jury the facts bearing on this point, the court left the intent with which Joel Horne had come to this State as a matter of fact for their inquiry. Upon the law he instructed them that South Carolina, being the domicil of origin to the deceased, it continued so until he had acquired another; it could not be lost until then. And to enable them to come to a proper conclusion he instructed them that if the deceased had left South Carolina and come to this State with a view to a temperary purpose, and with the intent, when that purpose was served, to return to his native State, he had acquired no domicil here; but if he had come to this State with the intent to live permanently in it, he had acquired a domicil here, and lost it in South Carolina, and the will was executed with the forms entitling it to probate here. To this charge we see no just exception. The domicil of a testator must govern the form in which a will is executed.

The term domicil, in its ordinary and familiar use, means the place where a person lives or has his home; in a large sense,

it is where he has his true, fixed and permanent home, to which, when absent from it, he intends to return, and from which he has no present purpose to remove. Two things, then, must concur to constitute a domicil: first, residence, and second, the intention to make it a home—the fact and the intent. In this case Joel Horne had a domicil in South Carolina—a domicil of origin, which continued up to a short period before his death, and up to that time, unless he had lost it by acquiring a new one in this State. This was the point to be decided by the jury, and to it their attention was drawn by the court. There
(108) was one circumstance which, we think, was nearly conclusive upon the question—it is, that the deceased himself considered North Carolina his domicil. In his will he styles himself "Joel Horne, of Anson County, North Carolina." The law governing the question was plainly and correctly stated to them. The plaintiffs relied much upon the fact that, at the time the deceased executed the paper-writing, his residence was in North Carolina. They were instructed that residence did not constitute a domicil, though it was *prima facie* evidence of it; thus guarding them from a mistake as to that fact. In concluding his charge upon the question of domicil, his Honor instructed the jury, "if the deceased had come to Anson County, in this State, for the purpose of settling there permanently or for an indefinite time, his domicil would be there, *although prevented from doing so by death.*" There is some confusion in the latter clause. It is obvious, however, from the context of the whole sentence, his Honor did not mean, if he had been prevented by death from reaching this State; if he had died *in transitu*. In that case his domicil of origin would still have continued, for he would not have acquired a new one, and he had already told the jury that a domicil could not be lost until another was acquired. And in the same sentence he had stated to them, if the deceased had abandoned his home in South Carolina and *had come to Anson, etc.* We presume the intention of the charge in this part was to instruct the jury that the length of time during which the deceased enjoyed his new home was not material to the question of the new acquisition. In this view the charge was correct. Residence, for however long a time it may be continued, cannot constitute a domicil, without the intention of permanently making it a home, nor can the shortness of time in which the new home is enjoyed de-
(109) feat the acquisition when accompanied with the intention, for in the latter there would be the *factum et animus*. These views are sustained by the cases of *De Bonneville v. De*

Bonneville, 7 Eng. Eq., 502; *Craige v. Lewin, ib.*, 560; *Plummer v. Brandon*, 40 N. C., 190, and Story Conflict of Laws, ch. 3.

PER CURIAM. Judgment affirmed.

Cited: Lawrence v. Steel, 66 N. C., 587, 8; *Wheeler v. Cobb*, 75 N. C., 25; *Horne v. Horne, ib.*, 101; *Paine v. Roberts*, 82 N. C., 453; *Barnhardt v. Smith*, 86 N. C., 484; *Bost v. Bost*, 87 N. C., 479; *Fulton v. Roberts*, 113 N. C., 426; *Jones v. Alsbrook*, 115 N. C., 52; *Bond v. Mfg. Co.*, 140 N. C., 384; *In re Thorpe*, 150 N. C., 492.

WILLIAM J. ARMSTRONG AND WIFE v. MOSES BAKER AND OTHERS.

1. A probate of a will in common form cannot be set aside on a partition for a re-probate, without showing some reason why the former probate was wrong and should not have been allowed.

2. The mere fact that all the parties interested in the estate of the deceased were not cited in the original probate is not, of itself, a sufficient ground for a re-probate.

3. Especially the Court will not set aside the probate in common form, upon the petition of the widow, who admits that the will was properly proved, but desires a re-probate to enable her to enter her dissent within six months thereafter.

APPEAL from the Superior Court of Law of EDGECOMBE, at Fall Term, 1848, *Dick, J.*, presiding.

This is an application to call in the probate of a script as the will of David G. Baker, deceased, which was granted to Moses Baker as the executor. The deceased died in September, 1844, leaving a widow, Catharine, and their four infant children. There is no copy of the instrument in the proceedings; but it appears from the allegations that it was executed (110) in the last illness of the deceased, and shortly before his death, and that it was attested by two witnesses; that by it the deceased gave his estate to his wife during her widowhood, and, at her death or marriage, to his children, with a provision that as the children came of age they should have certain shares of the property allotted to them respectively; and that Moses Baker, the father of the deceased, was appointed executor and guardian of the children. It was proved by the oath of the ex-

ecutor and the subscribing witnesses in the County Court at November Term, 1844. Under it the widow remained in possession of the estate, consisting of land, slaves, and other chattels, until her intermarriage with William J. Armstrong on 3 February, 1846. They instituted the present proceedings on the 12th of the same month.

The allegation states: That the probate was had without citing the party, Catharine, to be present at the propounding of the script; that for a considerable time after the death of her husband she was so overwhelmed with grief at her bereavement that she took little interest in ascertaining her rights either under the instrument or in respect to its probate; that some months before her second marriage she was advised that she might have the probate revoked, and that the script should be repropounded in order that she might offer such objections to the same as she should be advised, or, in case she could not successfully oppose it, that she might be enabled to dissent from it after its proper probate; that she omitted to institute proceedings immediately for that purpose by reason of an agreement of the executor and guardian, Moses Baker, to come to a compromise with her at November Term, 1845, of the County Court, with which he afterwards refused to comply.

The allegation then insists that, as widow, the party, Catharine, had a right to a day in court to show cause against
(111) the probate of the supposed will; and that, by reason that the probate passed without any citation to her, it was not binding on her, and she was entitled of common right to have the same called in.

Moses Baker put in a responsive allegation. It states that the party deceased duly executed the instrument as his last will and testament, when he had perfect disposing mind and memory, and that it was duly attested by the witnesses; that the party, Catharine, had full knowledge of the contents of the instrument, and, indeed, that it was made at her request and in her presence, and that the dispositions were adopted chiefly at her suggestion; that after the death of the deceased she expressed herself to be fully satisfied with the provision for her, and the desire that the instrument should be proved at the next court, and that she knew it would then be propounded; and, in fact, one of the subscribing witnesses went to court at her instance and by her assistance, that he might then prove it; that it was for those reasons, and those alone, that this party did not take out a citation for the said Catherine; that immediately after court she was informed by the party, Moses, and several

other persons, that the will had been proved, and also that she might dissent from it within six months after the probate; that during the whole period she rejected the advice with displeasure, and declared her determination not to dissent, as the will had been made in conformity with her wishes, expressed to her late husband, and she was satisfied with it; that she continued so to express herself for some months after May Term aforesaid, and until she began to receive the attentions of suitors and conceived the purpose of marrying again; that the party, Moses, made no compromise nor any agreement for a compromise in the premises.

Both in the County and Superior Courts there was an order to call in the probate, and the executor appealed (112) to this Court.

B. F. Moore for plaintiffs.
Whitaker for defendants.

RUFFIN, C. J. Armstrong and wife took no proofs. The executor examined several witnesses, but it is not necessary to state their evidence particularly, or further than to remark generally that it substantially sustains the case made in the executor's allegation. The Court, however, deems the original allegation so essentially defective that upon its face it ought to have been rejected—taking into consideration the vagueness of the terms in which the compromise is spoken of in it and the total failure of proof on the point. The whole force of the allegation consists in the fact that probate was granted without formal citation to the widow. It is contended that of common right she may, for that reason alone, have the probate recalled and require one in solemn form.

The Court does not accede to that position. It is clear that in England a sentence in a probate court concludes all who are privy to the proceedings, that is, who have a knowledge of them, either actual or by an allegation put in by the party, or by a citation on file, or by proof of witnesses. The cases on the subject were all looked into in *Redmond v. Collins*, 15 N. C., 430, and the rule stated as it now is. These cases had been, to a considerable extent, recognized here in *Dickerson v. Stewart*, 5 N. C., 99; *Moss v. Vincent*, 4 N. C., 298, and *Jeffreys v. Alston*, *ib.*, 438; in which it was held that the application for re-probate, by one not a party to the probate, must be supported by an affidavit of merits, as there was a discretion in ordering a second probate, and, therefore, the Court must look to all the circumstances. It ought, therefore, to appear in an allega-

(113) tion of this kind that the person was not cognizant of the probate complained of, or, at all events, some other satisfactory cause must be assigned for not having intervened. Without such a statement it must be assumed that the party was privy to the propounding of and probate of the will. This says, indeed, that she was much overwhelmed with sorrow at the time, and took no concern in the probate and provisions of the will. But the probate was about a month after the husband's death, and, without evidence to the contrary, it must be supposed that in the course of that period she became capable of giving such attention to the rights and duties arising out of her condition as a widow and a mother, at least, as to seek proper advice respecting them. It appears, in fact, in the executor's allegation and proofs that she not only had knowledge of the contents and probate of the will, but was active both in procuring its execution and probate. If this, then, were the application of one, as next of kin, instead of being that of the widow, it would not be sufficient to disturb a probate obtained thus, at the party's instance.

But the principle would seem, in our law, to operate more strongly against the widow than the next of kin. For the right to interfere in a question of probate belongs to a party in interest, which must mean some person whose rights will be affected by the probate of the instrument to the prejudice of the party. But the statute allows a widow to dissent from her husband's will, and, if she signify it within six months after the probate, remits her to her dower and distributive share. Hence, it would appear that, in a legal sense, she can have no interest in contesting the probate; for it is at her own election to abide by or refuse the provision for her. Therefore widows never become parties to issues of *devisavit vel non* in opposition to the will—having no interest in the dispute. This is the first instance that is known in which a widow has in any way attempted to
(114) interfere with a probate. By dissenting she gets clear of the will at once, whether it be good or bad. By not doing so she elects to take under it, and, it would seem, ought to be concluded from asserting any right in opposition to it.

But, whether these suppositions be correct or not, the Court holds it clear that in the case made in this allegation the widow has no right to disturb the probate. There is no statement in it which in the least impeaches this instrument as not being in fact and law the will of the party deceased. No reason whatever is assigned why it should not be admitted to probate, either in respect to the *factum* or capacity of the party. Indeed, it is

admitted by the counsel that the will is good, and the party would not oppose another probate, but allow it to pass, of course. Then, to what purpose shall the probate be revoked? It is avowed that it is for the single one of enabling the party to enter her dissent. It could not be yielded, without further examination, that the widow is not concluded by her not dissenting in due time from the first probate, and that her time might be enlarged to six months from the re-probate. But, supposing it could, the probate ought not to be called in for such a purpose merely. A proceeding of this kind is sustained upon the principle that injustice has been done to those who would be entitled to the estate if there were no will, by improperly admitting to proof a paper as a will which in truth was not the will of the deceased. The sole foundation for recalling a probate is that by allowing it to stand it would be a prejudice to persons who would succeed to the property if there were no will, and who can show that this is no will, if allowed the opportunity. That is the only consideration which ought to induce a court of probate to annul its previous acts, for the probate in common form is not void, but is valid unless impeached; and it ought not to be impeached by any one who cannot allege that in point of fact or law it was wrong. Therefore, a widow, at all (115) events, cannot have one probate of her husband's will recalled merely to let another pass—as it must do upon the case made by her. For, in such a case, the prejudice does not arise from the first probate of a good will, but from her election to take under it or her laches in not signifying her dissent. To authorize such a proceeding it ought to be really for the purpose of determining a question between a will and an intestacy, and not for that of merely affording to the widow another election to hold under or against the will.

For these reasons the Court holds that the decisions in the courts below were erroneous, and must be reversed, and the original probate must stand. This must be certified to the Superior Court to the end that a *procedendo* may thence be awarded to the County Court to make the proper orders in accordance herewith.

PER CURIAM. Ordered accordingly.

Cited: Etheridge v. Corprew, 48 N. C., 18; *Randolph v. Hughes*, 89 N. C., 429; *In re Beauchamp*, 146 N. C., 256.

(116)

JOHN MYERS AND SON *v.* JEREMIAH BEEMAN ET AL.

Where A had, in an attachment against B, been summoned as a garnishee and admitted that he owed B in a certain negotiable note dated 1 April, 1836, payable six months after date, and it appeared that before the issuing of the attachment the note, not then being due, had been *bona fide* transferred to an endorsee: *Held*, that a judgment against A, the garnishee in the attachment, was no bar to the right of the endorsee to recover on the note.

APPEAL from the Superior Court of Law of PITT, at Fall Term, 1848, *Dick, J.*, presiding.

This was an action of *assumpsit* upon a promissory note. The pleas: general issue, statute of limitations, and specially that on 15 April, 1846, the defendants were garnisheed at the instance of one Pitt, and former judgment since the last continuance.

The note sued on was dated New York, 1 April, 1846, and was payable to one Taylor six months after date. The execution by the defendants as makers was admitted. The plaintiffs proved the endorsement by Taylor to Ingles, *8 April*, 1846, by Ingles to Adams and by Adams to the plaintiffs, who commenced this suit on 7 October, 1848.

The plaintiffs offered evidence to show that the endorsement by Taylor was for valuable consideration.

The defendants proved that on *15 April*, 1846, one Pitt sued out an original attachment against Taylor as a nonresident debtor, and on the same day had the defendants garnisheed,

(117) who at May Term of the County Court of Edgecombe admitted their indebtedness to Taylor by reason of said note, and such proceedings were had that, at November Term, final judgment was rendered in favor of Pitt against Taylor, and the debt now sued on was condemned in their hands for the payment thereof.

The defendants alleged "that the endorsement by Taylor to Ingles was fraudulent and without valuable consideration, and proposed to prove declarations of Ingles, that the note was received from Taylor as collateral security for a debt which Taylor owed him." This testimony was rejected.

The court charged that if the endorsement of Taylor on *8 April* was *bona fide* and for valuable consideration the plaintiffs were entitled to recover, notwithstanding the defendants had been garnisheed on *15 April* and final judgment rendered against them at the November Term of the County Court of Edgecombe.

A verdict was rendered for the plaintiffs, judgment, and appeal by the defendants.

MYERS *v.* BEEMAN.

Rodman for plaintiffs.
Biggs for defendants.

PEARSON, J. We see no error in rejecting the declarations of Ingles. If made *after* his endorsement, they were clearly inadmissible. It does not appear by the case when they were made, and it was incumbent upon the defendants to show that they were made *before* the endorsement and to have that fact stated in the case as a foundation for their exception.

The instruction, that if the note was endorsed by Taylor *bona fide* before the defendants were garnisheed the proceedings under the attachment of Pitt would not bar the recovery, is entirely correct. Taylor had the same right to transfer the note by endorsement, provided it was not colorable and for his own benefit, as he had to transfer any article of property before a lien had attached to it by the *teste* of an execution (118) or otherwise; and, admitting that a garnishment creates a lien upon all debts due to the original debtor from the time notice is served, in this case it had been transferred some days before and was no longer a debt due to Taylor.

It was the folly of the defendants to admit an indebtedness to Taylor at May court upon a negotiable note made one month before. The admission ought to have been qualified—they were only indebted to Taylor, provided the note had not been endorsed. It is true, they had no notice of the endorsement, but an endorsee is under no legal obligation to give notice to the maker, even when the endorsee and endorser are nonresidents. The endorsee is not to anticipate that an attachment will issue.

The defendants were guilty of still greater negligence in allowing a final judgment in November, which was after this action was commenced. An application should have been made to amend by withdrawing the admission of indebtedness to Taylor as soon as they were informed of the endorsement, and the amendment ought to have been allowed; truth required it, for as soon as the note was endorsed the defendants ceased to be the debtors of Taylor and became the debtors of the endorsee.

It may be that the defendants can be relieved against the judgment of Pitt by a writ of error *coram nobis* for error as to the fact of their indebtedness to Taylor, but this is a matter in which the plaintiffs have no concern; they are the owners of the note and have a right to collect it.

PER CURIAM. Judgment affirmed.

Cited: Ormond v. Moye, 33 N. C., 567; *Shuler v. Bryson*, 65 N. C., 203; *Rice v. Jones*, 103 N. C., 233.

(119)

RICHARD H. MOSBY v. CHARLES G. HUNTER.

1. A declared against B for the breach of an agreement in writing signed by B in the following words: "R. H. Mosby has promised to procure for my mother a pension from the Government of the United States, supposed to be due to her as the widow of Lieut. Charles Gerard; and in the event of his doing so, I promise and oblige myself to give the said R. H. Mosby one-half of the money due her on account of the said pension. Given under my hand this 3 December, 1838. Charles G. Hunter": *Held*, that this agreement referred to a pension to which the widow was then entitled or supposed to be entitled, and not to a pension to which she became entitled under an act of Congress subsequently passed: *Held*, further, that although the sales of pensions are by law prohibited, yet the court could not infer from this agreement, though a jury might, that the agreement was made by the son, as the agent of his mother; it did not transfer any title to any portion of the pension, and therefore was not, on that account, in itself invalid.

2. *Held*, also, that upon a count for work and labor done, A could not recover from B, because his services did not inure to the benefit of B, and therefore the law would not imply a promise.

APPEAL from the Superior Court of Law of WARREN, at Fall Term, 1848, *Dick, J.*, presiding.

This was a special verdict, subject to the opinion of the court upon the following facts: The plaintiff declared in *assumpsit* in two counts. In the first count, upon a written agreement, signed by the defendant in the following words:

"R. H. Mosby has promised to procure for my mother a pension from the Government of the United States, supposed to be due her as the widow of Lieut. Charles Gerard; and in the event of his doing so, I promise and oblige myself to give the said R. H. Mosby one-half of the money due her on account of said pension.

"Given under my hand, this 3 December, 1838.

"CHAS. G. HUNTER."

(120) The second count was for the common one for work and labor done.

The plaintiff thereupon proved that after the said agreement of the defendant, and in consideration thereof, the plaintiff undertook and agreed to act as the agent of Mrs. Hunter, the mother of the defendant, in preparing the proper documents and procuring the proofs required for asserting the said Mrs. Hunter's claim to a pension of $320 per year for five years, to which she was or might be entitled, under the acts of Congress,

as the widow of Charles Gerard, who was a lieutenant in the Second North Carolina Regiment in the Army of the United States, to take rank as such from 1 June, 1778, under and by virtue of a commission dated 6 March, 1779. Accordingly, on 3 December, 1838, the plaintiff wrote or caused to be written the necessary declaration of the said Elizabeth Hunter, and compiled evidence in support of her claim to a pension under the act of Congress of 7 July, 1838, entitled "An act granting half pay and pensions to certain widows," which said declaration and proofs aforesaid the plaintiff presented and filed at the proper department of the Government at Washington City, and prosecuted the said claim before the said department. The said claim remained some time in the said department, undetermined, and on 24 August, 1842, the said application was called up for a decision by the Commissioner of Pensions, at the instance of the Hon. R. M. Saunders, a Member of Congress, and determined in favor of the said Elizabeth Hunter on 29 August, 1842. It was proved that the said determination was made upon the proofs compiled and filed by the plaintiff, and without any other additional proofs or documents, excepting that the Hon. R. M. Saunders testified to the credit and good character of a witness, whose affidavit had been heretofore filed by the plaintiff in support of the said Elizabeth Hunter's claim;
and it was further proved that the Hon. R. M. Saunders (121) called up said claim for a decision and procured the same
by the solicitation of the plaintiff, and at his request, the said plaintiff acting or professing to act as the agent of Mrs. Hunter as aforesaid. It was further proved that, pending the application aforesaid before the department for the allowance of pensions, and before a final determination thereon, to wit, on 23 August, 1842, Congress had passed an act that the marriage of the widow, after the death of her husband, for whose services she claims a pension under the act of 7 July, 1838, shall be no bar to the claim of such widow to the benefit of that act, she being a widow at the time she makes application for a pension. It appears from the proofs and documents filed by the plaintiff in Mrs. Hunter's case that she was married to Charles Gerard, on 28 October, 1789, who died on 6 October, 1797; that she was married to Henry Hunter on 25 June, 1805, who died on 13 August, 1823; that she was a widow at the passage of the act of 7 July, 1838, and also at the date when she made her application for a pension. It was further proved that the said Mrs. Hunter obtained a pension certificate on 29 August, 1842, as aforesaid, and that the same has been paid, to wit, $320 per year for five years, making $1,600; but the same was neither allowed

nor paid until after the act of 23 August, 1842. The defendant, upon demand afterwards, refused to pay the plaintiff the one-half of the said sum so recovered by Mrs. Hunter, his mother, and in like manner refused to pay the plaintiff anything for his agency and services in the premises, and afterwards this action was brought, etc.

Upon the trial the defendant contended that the plaintiff had no right to a verdict on the second count of his declaration, and the court, being of the opinion with the defendant, directed the jury to find for the defendant on the said count, because (122) the plaintiff should have brought his suit against Mrs. Hunter for the matters in said count, and cannot maintain an action against the defendant, except upon his *special* agreement.

The defendant further insisted that, as to the first count in the plaintiff's declaration, he cannot recover: (1) Because the said agreement with the plaintiff, although made by the defendant, was in contravention of the act of Congress and in violation of the policy of the Government and the acts of Congress, which declare all assignments or sales of pensions void, and that the said agreement, although made with this *defendant* and in consideration of the plaintiff's undertaking to prosecute the said claim and not with the pensioner herself, is upon its face an evasion of the act of Congress and the policy of the Government. (2) Because the said agreement, although made with and by the said defendant, did not stipulate for the payment of any sum of money to the plaintiff, except it might be for procuring in her behalf a pension *due* to the defendant's mother, at the time of the said agreement, to wit, 3 December, 1838, and that the pension in fact procured for his said mother was not due to her at the time aforesaid by force of any act existing at that time, but that the pension procured for her became due to her by force of the act passed 23 August, 1842, and that, according to the true interpretation of the laws of the United States, the said pension became due to her after the said agreement, and, therefore, the defendant, according to the true interpretation of his said agreement in writing, did not become bound to pay the plaintiff.

It was agreed that the said verdict might be taken, subject to the opinion of the court upon the points reserved; and that, if the court should be of the opinion that the law was in favor of the defendant, the verdict was to be set aside and a nonsuit entered. If otherwise, judgment to be entered for the plaintiff for the amount of the said verdict and costs; and if, upon (123) consideration, the court should be with the defendant

upon the points reserved in the first count, the plaintiff has leave to move for a new trial for misdirection in respect to the second count.

Upon consideration of all the said matters the court, *pro forma*, adjudged the points reserved to be all in favor of the plaintiff, and judgment accordingly is entered in favor of the plaintiff for $1,096, with interest on $800 from 16 October, 1848, until paid, and costs.

From this judgment the defendant appealed to the Supreme Court.

W. H. Haywood for plaintiff.
Whitaker for defendant.

RUFFIN, C. J. The declaration has two counts: the one, on the special agreement, and the other, the common one for work and labor. The verdict was given for the plaintiff on the first count, subject to the opinion of the court on points reserved.

On the first of those points this Court concurs with his Honor. There are several acts of Congress which avoid a sale, assignment or transfer of a pension, or any part of it, under all circumstances and to all intents; and, of course, if the court could find, as a matter of law, that this was a contract of that character, it would be held to be void, as contravening the policy and enactment of the statutes. To constitute a sale or assignment of a right, it is essential that the contract for that purpose should be that of the person to whom the right belongs, either made by the owner in proper person or by some other on behalf or with the knowledge and concurrence of the owner. The mere unauthorized bargain of a stranger can have no effect whatever in transferring the pension. It cannot be denied that, considering the relation of a mother and son, and the provisions of the acts of Congress touching transfers of pensions, and (124) the terms of this agreement, it seems highly probable the treaty was made with the mother, or with the son on her behalf and with her privity, and that it was put purposely into this form as a shift and device to evade and defraud the law by keeping out of sight the real intent, and giving the transaction the appearance of a contract with the son and in his name, while there was in reality an understanding between the plaintiff and the mother and son that the whole was done on the mother's account, and that she would fulfill her son's engagement. If such was the truth of the case, there is no doubt that it would come within the statutes. But it is competent for a jury only to draw inferences of the pensioner's privity from

those circumstances. They might ask, if the object was not to evade the law, why the plaintiff did not bargain with the mother directly, instead of the son, for the payment to the plaintiff of one-half of the pension itself; and, nothing appearing to the contrary, they might, with much reason, infer, as a fact, that such was the object, and that the mother was cognizant of the contract and was to be bound by it. But the Court cannot, as a matter of law, infer the same thing; for it is possible that the defendant might have treated without his mother's privity, and from filial regard might have been moved to pay out of his own pocket one-half as much as the mother might gain; and, for aught the Court can see in the instrument, such might be the fact in this instance. If so, it could not be deemed the assignment of the mother; and, if it be not hers, it is not an assignment or transfer at all, and, so, not within the acts of Congress.

Upon the second point reserved the Court is of opinion, from the terms and scope of the contract, that it referred exclusively to a right to a pension then subsisting or supposed to subsist;

(125) and that, as there was no right at the time, the bargain and the subject of it failed together. The defendant had no notion of employing the plaintiff, nor had the plaintiff any intention of engaging to solicit from Congress the grant of a pension to this lady. But the purpose was to establish her right, as the widow of an officer of the Revolution, to one already granted, as they understood. The language is that the plaintiff "promised to procure for the defendant's mother a pension, *supposed to be due her* as, etc., and, in the event of *his doing so*," the defendant promised to pay him one-half the pension. This language agrees with what might have been expected from the nature of the subject. It is not uncommon—though not at such prices, it is to be hoped—to employ persons to discover and prepare the requisite proofs to entitle one to a pension under a law already passed. But it is, we believe, quite unusual, if not unknown, to appoint one as a solicitor to Congress to procure the passing of a law granting pensions. Indeed, it is not pretended that the plaintiff performed any such service as that. The claim is that under evidence prepared to establish, as was supposed, an existing right to a pension, the lady was decided to be entitled to a pension granted four years afterwards. Such a case was not at all in the view of the parties. They were not treating for the division of the bounty of the country, which might never be granted and was altogether un-

certain in amount, but for that of a known amount. Both the words of the agreement and the circumstances repel the plaintiff's claim.

As the plaintiff's services did not inure to the benefit of the defendant, he is liable only as far as he expressly agreed. In such a case the law cannot imply a promise. There was, therefore, no error in directing the jury to find for the defendant on the second count.

But as there was an error in the finding on the first (126) count, the judgment must be reversed; and, under the agreement in the record, judgment must be entered for the defendant as upon a nonsuit.

PER CURIAM. Judgment accordingly.

CHARLES W. CULLIFER v. JOHN R. GILLIAM ET AL.

1. The power of an arbitrator is derived, entirely, from the agreement of the parties as expressed in the submission, and their award must be made in strict accordance with it, and must neither go beyond nor omit anything embraced in it.

2. Where the words of an arbitration are ambiguous, such a construction ought to be given to them as will best coincide with the apparent intention of the arbitrators.

3. Where the submission was in the following words, "We hereby bind ourselves to abide the damage awarded to C. C. by C. J. and W. W. for the overflowing a certain tract of land by our millpond, this 4 July, 1847. Signed by G. and B.," and the award was, "We, the undersigned, have this day viewed the land belonging to C. C., covered by the water of the mill, *late* the property of G. and B., and do assess the damages which the said C. C. has sustained for the year 1847 at $26.26, for the year 1848 at $23, for the year 1849 at $23, for the year 1850 at $16, and for the year 1851 at $16, and due respectively the January succeeding each year, that is, the damage for 1847 due 1 January, 1848, and so for each year": *Held*, that the arbitrators exceeded their powers and the award was void, because the apparent intention of the submission was only to refer the amount of damages due at the time of the submission.

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

This was an action of debt, commenced by warrant (127) upon the following award: "We, the undersigned, have this day viewed the land belonging to Charles M. Cullifer, covered by the water of the mill, *late* the property of John

R. Gilliam and Levin Butler, and do assess the damages which the said Cullifer *has* sustained, for the year 1847 at $26.26, for the year 1848 at $23, for the year 1849 at $23, for the year 1850 at $16, and for the year 1851 at $16, and due, respectively, the January succeeding each year, that is, the damage for 1847 due 1 January, 1848, and so for each year." Signed and sealed by the arbitrators, 7 January, 1848. The submission on the part of the defendants is as follows: "We hereby bind ourselves to abide the damages awarded to Charles Cullifer by Charles Jacocks and William Williams for the overflowing of a certain tract of land by our millpond, this 4 July, 1847." Signed, Gilliam and Butler. The submission on the part of the plaintiff bore the same date and was of similar import. The action is brought to recover the assessment of the damages for 1847. The jury found a verdict for the plaintiff, subject to the opinion of the court, and the court being with the defendants, a judgment of nonsuit was entered, from which the plaintiff appealed.

P. H. Winston, Jr., and *Biggs* for plaintiff.
W. N. H. Smith for defendants.

NASH, J. The power of an arbitrator is derived only from the agreement of the parties as expressed in the submis-
(133) sion, and their award must be made in strict accordance with it, and must neither go beyond nor omit anything embraced within it. The first inquiry in this case is as to the nature and extent of the submission. The defendants were owners of a mill, and their dam ponded the water on the land of the plaintiff and occasioned an injury to it. On 4 July, 1847, the parties entered into an agreement to refer the matter in controversy. They selected two gentlemen in whom they had confidence, to settle the dispute between them, in order, we presume, to avoid the delay and expense of a lawsuit. What, then, did they submit? The language of the agreement is not so explicit as it might have been, but sufficiently so, we think, to show their intention. The defendants bind themselves to abide the damages awarded to Charles Cullifer by Charles Jacock and William Williams for the overflowing of a certain tract of land by their millpond. We understand the parties to mean that the arbitrators should assess the damages then sustained, to wit, 4 July, 1847. There is nothing in the submission which looks to damages to be sustained after that time. They wished to make a lumping matter of it, and that they might know what sum, *in solido*, they should pay for *all the present* injury. This

was not done by the arbitrators; but they give their judgment that the defendants shall pay a certain sum, that for which the action is brought, as damages for the whole of 1847.

This, we think, was error, as giving damages for time not embraced in the submission. It is, however, urged on the part of the plaintiff that from the words used in the award it was the intention of the arbitrators to confine their judgment to damages sustained previous to 4 July, 1847, and that the award will well bear that construction. When the words of an award are ambiguous, such a construction ought to be (134) given them as will best coincide with the apparent intention of the arbitrators. Watson on Awards, 105. Here, however, the arbitrators do not leave us in doubt as to their meaning; they say they assess the sum of $26.26 "for the damages which the said Cullifer has sustained for the *year* 1847." In this language there is no ambiguity; if there was, it is made plain by their going on to assess damages for the next succeeding four years, and give no damages for the time between 4 July, 1847, and 1 January, 1848.

It is further argued that it was the intention of the parties to the award that the arbitrators should assess the damages under the provisions of the act of Assembly, and that such was the view taken by them. If this be so, the award is not the less defective. Section 13, ch. 74, Rev. St., directs the jury to "make up their verdict as to the sum which the petitioner is entitled to receive as an annual compensation for the damages sustained," etc., "which verdict shall be binding between the parties for five years, unless the damages should be increased by raising the water or otherwise, if said mill is kept up." It is not the intention of the law that the judgment for the damages shall, in every event, be binding on the parties for five years. If the defendant increase the injury within that time by raising his dam the plaintiff may have his damages increased; if the defendant should abate the nuisance altogether, he may, by an *audita querela* or some other action, set aside the judgment for the residue of the damages. *Gilbert v. Jones*, 18 N. C., 339. If it was the intention of the parties that the arbitrators should pursue the provisions of the act, and of the arbitrators so to do, they have not made their award in conformity to them. They have made no provision whereby the plaintiff can be redressed should the dam be raised, nor for the defendants (135) if they should have taken it down the day after the award was made. The award, therefore, in this view of it, is de-

fective. It does not embrace all the matters referred and is not final in any aspect. In whatever light we consider the award it is defective, and the plaintiff cannot support his action.

PER CURIAM. Judgment affirmed.

Cited: Metcalf v. Guthrie, 94 N. C., 451.

JOHN L. LEE v. EDWARD PATRICK, ADMINISTRATOR, ETC.

1. Where a party moved to be permitted to show a paper to the witness for the purpose of refreshing his memory, which motion was refused and an appeal taken, it must appear in the case sent up what were the contents of the paper, that the Court may see whether they were such as were calculated to have the effect proposed.

2. Section 17, ch. 26, Rev. St., in relation to administrators, was intended for the ease and security of the administrator, and a strict performance is required on his part.

3. Where in an action against an administrator, a reference is made to a commissioner to take an account of the administration of the assets, and the commissioner makes a report, which is confirmed, this report is conclusive, and the administrator is not required to produce an outstanding judgment stated in the report, the amount of which was more than sufficient to cover the balance of the assets in his hands.

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

This was an action in *assumpsit*, to recover for work and labor done for the defendant's intestate. The defendant pleaded the general issue, fully administered, and the act for the
(136) protection of administrators. The plaintiff having proved his cause of action, the defendant showed that he took out letters of administration upon the estate of his intestate at May Term, 1842, of Craven County Court, and also proved that within two months thereafter he caused an advertisement for the creditors to present their claims for payment to be posted up at the door of the courthouse of Craven County, also at the county wharf in New Bern. Copies of these advertisements, properly proved, were produced to the court held for the county of Craven at its August Sessions, 1842, and ordered to be filed. He then offered in evidence the copy of another advertisement, similar to the other two, upon which was the affidavit of one Green, made at the November Term, 1842, of Craven County

Court, and which had been ordered by the County Court to be filed with the records. This latter evidence was ruled out by the court. The defendant then offered to prove by one Stephenson that he had seen an advertisement, signed by the administrator of John Patrick, notifying the creditors to present their claims, but in what year or month he could not tell. This testimony was rejected. For the purpose of refreshing the memory of Stephenson as to the time, the defendant proposed that he should look at the copy certified by Green; this the court refused.

The cause had been referred to James G. Stanly, who made a report, which, not being excepted to by either party, had been confirmed by the court. The commissioner, in stating the debit and credit side of the administrator's account, strikes a balance of $930 as the amount of assets in the defendant's hand. He goes on, however, and states that the defendant claims to retain that balance to satisfy the following sums, etc., 3 August, 1844, namely, at "May Term, 1843, of Greene County Court, by J. M. Patrick, by his guardian, Willis Dixon, judgment *quando* against Ed. Patrick, administrator of John Patrick, $1,281.88½." The defendant's counsel contended that by (137) the commissioner's account and report the defendant had fully administered, and that the balance of the assets, as stated in the body of the account, was subject to the payment of the judgment *quando* against him, in preference to the plaintiff's demand, and requested the court so to charge the jury. The court instructed the jury that it appeared from the report that there was a balance of assets in the hands of the defendant sufficient to satisfy the plaintiff's demand; that it was incumbent on the defendant to show the existence of the judgment *quando* by producing a copy of the record, and as he had failed to do so, they might find for the plaintiff, if he had established his claim to their satisfaction.

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

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

NASH, J. Section 16, ch. 46, Rev. St., requires executors and administrators, within two months after their qualification, to advertise creditors to bring in their claims within the time prescribed by law, and requires that the advertisement shall be made at the courthouse door and other public places. Section 17 provides the manner in which the evidence to prove the fact may be perpetuated. The defendant in this case proved the adver-

tisement at the courthouse door and one public place, and the evidence to show it had been made at a second was insufficient under the act. The notice, certified by Green, was not filed in the office at August Term of the court, which was the term next succeeding the qualifying of the defendant, as required by the act, but at the November Term succeeding. Neither, as
(138) far as the case discloses, did the affidavit of the witness Green, on the notice, show at what time he saw it posted up, nor where. The testimony of Mr. Stephenson was equally uncertain as to time; the nearest he could come to it was that he saw the advertisement posted up at his house, which was a public place within the county, within six or twelve months after the death of the intestate. The defendant failed to show a compliance with the requisitions of the act, and was thrown back upon his right to prove the fact in some other way. The court committed no error in rejecting the evidence he did offer. The provision in section 17 is obviously made for the ease and security of the administrator, and a strict performance ought to be and has been required of him. *McLin v. McNamara*, 22 N. C., 82.

For the purpose of refreshing the memory of the witness Stephenson the defendant proposed to show him the notice certified by Green, which was refused by the court. If the court erred in rejecting the testimony, we cannot reverse the judgment for that reason, as the case does not set forth the notice, so as to enable us to see that its contents were such as were calculated to have the effect proposed. It was not suggested to the court in what way the notice could refresh the memory of the witness as to the time he saw the notice which he speaks of, nor can we perceive its relation to it. *Burroughs v. Martin*, 2 Camp., 112.

In the progress of the trial a reference was made by the parties to Mr. James Stanly, to take an account of the defendant's administration of the assets of the intestate. The commissioner made his report, which was confirmed by the court, neither party having made any exception. The referee, after stating the receipts and disbursements of the defendant, reports that there were assets in his hands to the amount of $930.31, a sum more than sufficient to satisfy the plaintiff's debt. But
(139) he goes on and states that the defendant claims to retain that balance to pay certain sums due to him from his intestate, and to pay an unsatisfied judgment *quando* rendered against him as administrator of Ed. Patrick, at May Term, 1843, of Greene County Court, at the instance of John M. Patrick, by his guardian, Willis Dixon, for the sum of $1,281.88½. The defendant's counsel requested the court to charge the jury,

as set forth in the case, that the defendant had a right to retain the amount reported as in his hands to pay the *quando* judgment. This was refused upon the ground that the defendant had not produced the record of the judgment. In this we are of opinion his Honor erred. The reference to Mr. Stanly was not a matter of right belonging to either of the parties, the action not being on the administrator's bond, but was made by them as a satisfactory and expeditious mode of ascertaining the state of the assets.

We are of opinion that, as the plaintiff used the report to charge the defendant, the latter was entitled to use it to his discharge, and that his Honor erred in refusing the instructions prayed for. The plaintiff gave no other evidence of assets, and the question turned upon the construction of the report. That we understand clearly reports standing demands, preferable to the plaintiff's to a greater amount than the balance of $930.31. For it refers to certain depositions and records, establishing certain demands to the amount of $837.81½ against the estate in favor of the defendant.

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

Cited: S. v. Pierce, 91 N. C., 609.

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(140)

THE STATE *v.* JOHN P. WILLIAMS.

1. An indictment will lie under our statute for feloniously taking and carrying away a runaway slave, "with intent to dispose of him to another," etc., even though the taker did not know who was the owner of the slave.

2. The possession of a stolen thing is evidence to some extent, against the possessor, of a taking by him. Ordinarily, it is stronger or weaker in proportion to the period intervening between the stealing and the finding in possession of the accused; and, after the lapse of a considerable time, before a possession is shown in the accused, the law does not infer his guilt, but leaves that question to the jury under a consideration of all the circumstances.

3. Where there were different counts in a bill of indictment, one charging a taking by the prisoner with violence, and another by seduction, and each of them also charging a conveying away, with the intents required by the statute, the jury are not bound to find in which way the taking was had, but the verdict might be general, though there were other defective counts.

4. An indictment, in a case under our statute, for the abduction of negroes, which charges that the defendant "by violence, feloniously took," is as good as if it had averred that the defendant "feloniously by violence took," etc.

5. In an indictment relating to the larceny or abduction of a slave, in describing him as the property of A. B., you may use indifferently the phrases, "then and there being the property or of the proper goods and chattels of A. B.," etc., or "the property of A. B.," after laying the value, etc., of the slave.

6. In an indictment for stealing, etc., a slave, under our statute, the words "with an intent to sell and dispose of the said slave" are sufficient.

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

The prisoner was indicted in eleven counts. The first (141) charged that he, "a certain male slave named Jim, of the value of $10, and the property of William D. Cobb, feloniously did steal, take and carry away, contrary to the form of the statute," etc. Another count charged that he "did, by seduction, feloniously take and carry away a certain male slave named Jim, of the value of $10, and the property of William D. Cobb, with an intention to sell or dispose of said slave Jim to another, contrary to the form," etc. Another count charged that he "did by violence feloniously take and carry away a certain male slave named Jim, of the value of $10, and the property of William D. Cobb, with an intention to sell or dispose of said slave Jim to another country," etc. The other eight counts alleged a taking of the negro by violence, or by seduction, respectively, with an intent to sell or to appropriate to the prisoner's own use, without charging a conveying away; or alleged a conveying away by violence or by seduction, respectively, with an intent to sell or to appropriate, without charging a taking.

On the trial there was evidence that on 3 April, 1848, the slave ran away from the owner, Cobb, who lived in Wayne County, about nine miles from Goldsboro, where the prisoner lived, and there was a depot of the Wilmington Railroad; that about 10 o'clock on 23 April (as stated in the exception) the prisoner took passage to Wilmington and entered one of the cars, and two negro men also entered another car, in which negroes were generally transported, and after going about two miles the prisoner paid his own fare and that of the two negroes to Wilmington, and they proceeded to that place in the train; that about 10 o'clock of 23 April, just after the cars arrived from Goldsboro, the prisoner, who was then unknown to the collector of the port, took passage on board a steamer belonging

to the line, to Charleston for himself and two negro men, (142) and signed a manifest, describing them, in the name of "John Williamson"; that in due course the steamer would arrive at Charleston in time for a passenger to reach Hamburg on the railroad from Charleston to that place in the night of 24 April; and that on 25 April, 1848, the prisoner sold the negro Jim and another negro to one Trowbridge in Hamburg, the prisoner then calling himself "John Smith"; and that in October following, suspecting that the negroes had been improperly carried away, Trowbridge brought them back to Wayne, and Cobb claimed Jim as his, and he was identified by others.

The prisoner called several witnesses to establish an *alibi*, and their evidence was left to the jury on the point.

The counsel on the part of the State contended that if the jury should believe that the slave was in the possession of the prisoner twenty days after he ran away, then, in the absence of evidence to rebut it, the law raised a presumption that the prisoner had stolen him or feloniously taken him by violence or seduction.

The counsel for the prisoner, on the other hand, insisted that, as the slave had run away, the owner had lost his possession, and that, as lost property, he could not be stolen, especially if the prisoner did not know the owner; and there was no evidence that he did know the owner, or even that the negro was a slave.

The prisoner's counsel further insisted that the prisoner's conveying away the slave from this State and selling him would not authorize his conviction, but that he must also have taken him feloniously; and that there was no evidence from which the jury could infer that the slave was stolen or was taken by violence or seduction by the prisoner from the possession of the owner; and, even admitting a runaway slave to be in the possession of the owner for the purposes of this indictment, yet that, for aught in the evidence, the slave might have been and probably was stolen or taken by some other person (143) and delivered to the prisoner at Goldsboro; and that in such a case the prisoner could not be convicted, because the jury ought not to be allowed to guess how the fact was.

The court instructed the jury that to raise a presumption that the possessor of stolen property had stolen it, the possession must be so recent after the theft that the possessor could not have well come by it unless he had stolen it himself; and that, when the property was a negro man, who had run away twenty days before the possessor was first seen in possession, the

time was too long for the court to lay it down as a rule of law that the possessor was to be presumed to have been the taker; and in such case it was to be passed on by the jury, as an open question of fact, upon the evidence.

The court further instructed the jury that to justify a conviction of the prisoner they must find both a taking of the slave by him from the owner and also a conveying away, for the two acts must concur in order to constitute the offense; that in this case the color of the negro raised a presumption to every one that he was a slave; and that stealing, or taking him by violence or seduction, and conveying him away, with intent to sell or dispose of him, was a felony within the statute, though the negro was a runaway at the time and the prisoner did not know the owner; and that it was for the jury to determine, upon the evidence, whether the prisoner did in fact steal or take the slave by violence or seduction and convey him with the intents charged; and that if the prisoner met with the slave while he was a runaway and then took him by violence, or seduced him to go with him with the intent supposed, that would be a taking within the act; and that if the prisoner, holding himself out as the owner or as the person having the charge of the negro, caused him to get into the cars and paid his fare and thereby enabled him to pass along the rail-
(144) road, that would be a conveying within the act, although the prisoner was in one car and the negro in another. And the court further instructed the jury, in reference to the manner in which the prisoner might have come into possession of the slave, that if the prisoner had an accomplice, who stole or took the negro and brought him to the prisoner, and the prisoner's part was then to convey him away and sell him, there would not be a stealing by the prisoner, nor a taking within the statute. But that if the prisoner got some agent to carry messages to the slave, as a go-between, and in that manner seduced the slave to come to him at Goldsboro and get into the cars, the agent or go-between not having taken possession or any control over the slave, then that would be a taking by the prisoner; and that it was for the jury to decide from all the evidence whether the prisoner himself took the slave or seduced him by messages sent by an agent to come to him and then took him, or whether the slave was taken by another person and delivered to the prisoner; and that if they were not satisfied either as to the taking of the slave by the prisoner in the modes mentioned or the conveying away by him with the intents charged, they ought to find the prisoner not guilty. But if the jury should find such taking and conveying by the prisoner, inasmuch as there were

counts in the indictment to meet the different aspects of the case, it was unnecessary for the jury to decide in which particular way it was effected.

The prisoner was convicted and, after sentence, he appealed to this Court.

Attorney-General for the State.
W. H. Haywood and *Meares* for the prisoner.

RUFFIN, C. J. Under the instructions it is to be assumed that the prisoner did not know the negro belonged to Cobb, though we think it might well have been left to the jury (145) that he did. The residence of those persons within nine miles of each other in the same county, that of the prisoner being at a very public place, and the extreme probability that the prisoner, if before ignorant, would inquire and learn from the negro who his owner was, and where he lived, in order to shape his course so as to avoid him, would seem to afford a fair presumption that the prisoner had information in whom the property was. It is, however, now to be taken otherwise; and then the question is, whether a slave, under those circumstances, can be the subject of larceny. The Attorney-General argued, indeed, that if that be not so, yet under the statute the offense of taking by violence or seduction and conveying away, with the intents mentioned, is constituted without any reference to the condition of the slave as being in the owner's actual possession or a runaway at the time. But the act applies the words "steal" and "by violence or seduction take and carry away" to the same subject, namely, "a slave, the property of another"; and, therefore, if a runaway slave be not the property of another, so as to be the subject of stealing, we suppose he cannot be deemed his property, so as to be the subject of a taking by violence or seduction. This point has not been distinctly presented before so as to be directly decided. But it is by no means new, and has been involved to some extent in other cases, so as to elicit opinions on it. It seems to us, when it was held in *S. v. Hall*, 3 N. C., 105, that a moral and intelligent being was the subject of larceny, because he was a slave, and in *S. v. Davis*, 4 N. C., 271, and *S. v. Jernigan*, *ib.*, 483, that when the owner was known, a runaway slave was also the subject of larceny, that it was virtually decided that every taking and conveying away a slave *causa lucri*, and *clam et secrete*, constitutes a larceny. *Chief Justice Taylor* strongly puts it in his report (146) of the argument of the Attorney-General in *Jernigan's case* that the reason given by Hawkins why it is not larceny to

take lost goods, namely, because the party is not much aggrieved when nothing is taken but what he had lost before, does not apply to a runaway negro; because the owner is much aggrieved when, after his slave has run away, his chance of regaining him is lessened and perhaps destroyed by his asportation. He adds the forcible general remark, that whenever the principles of the criminal law are applied to a species of property unknown to the people who instituted that law, it is absolutely necessary to consider the reason and spirit of the law, and so interpret it that slaves may be effectually protected; and that it was evident that an adherence to the letter of the law, without regard to its spirit, would leave slave property unprotected, as the common law knew no such property. Upon reasoning of that kind, the courts came to the resolutions in the cases cited; and the same reasoning reaches the present question. For, when it is inquired whether a runaway slave can be stolen if the owner be not known, it is implied that the taker knew the negro to be the slave of some one, and that the taking was *causa lucri*. Admitting those points, the necessity for securing the rights of ownership in negroes imperatively requires that such a taking of a runaway should be held to be larceny, and the impossibility of holding that a human being has any just similitude to an inanimate chattel that is lost, or to a brute that has strayed from its pasture, prevents an exception founded merely on the want of knowledge in the taker, who, in particular, was the owner of the slave. This subject was incidentally under consideration in *S. v. Roper*, 14 N. C., 473, and *Chief Justice Henderson* expressed himself pointedly in terms which cover the whole ground. He said that runaway slaves do not fall within the description of lost property; for, from their nature, being intelligent (147) beings, they are incapable of becoming estrays, in the legal meaning of the word, and in their runaway state they more closely resemble that class of lost property than any other. The same idea pervades the statutes regulating the arrest and disposition of runaway negroes and the punishments for harboring them; for it is not only indictable to entice or persuade a slave to absent himself from the service of the owner —in which case a knowledge of the owner is implied—but also to harbor or maintain, under any pretense whatever, "*any* runaway slave," thus clearly placing the latter crime upon the state of slavery merely of the negro, without regard to the party's knowledge of the ownership. In an indictment or declaration for harboring a runaway a *scienter* of the ownership is never laid, but only that the negro was a runaway slave, the property of some other person; for it is alike unlawful to harbor such a

slave, whether the owner be known or not. Indeed, it is incorrect to say that, for any rights or powers over the slave by one who takes him, a runaway is without a known owner; for the statutes require that the runaway shall, when taken up, be committed to jail, and if an owner do not appear in a prescribed time the slave is to be sold for public uses; so that the public, if no one else, may be regarded as the owner. At all events, the taker up can, under no possible circumstances, rightfully keep the possession of a runaway slave longer than is requisite to convey him to prison, or gain a property of the most special kind in him, but is at most entitled only to a reward for taking up. This is a remarkable feature in the condition of a runaway slave which distinguishes it from that of lost goods or stray beasts; for in these last the finder gets the property until the owner appears, and therefore the idea of larceny by using the property in any manner is repelled. But that wholly fails in the case of a runaway slave, as the person who takes him must know that he has no interest in the slave, and that, (148) as against him, the public, at all events, has the right, and that it is his duty to provide for the proper disposition of the slave, and not convert him to his own use. Therefore, in such a case, the appropriation of the slave in the manner and under the circumstances, which usually indicate a felonious intention, is as criminal as if the slave had not been a runaway. Hence, we believe the understanding is almost universal, in every class of the community, that slaves cannot be reckoned among lost things, and that a runaway is, therefore, as much a subject of larceny as any other slave; and the Court so holds.

It was further argued that, supposing the slave the subject of larceny or of a taking under the statute, there were other objections to the conviction. It was said, first, that the court ought not only to have refused the instruction asked for the State, but ought to have given an instruction that a possession twenty days after the negro ran away was no evidence of a taking by the prisoner. The argument is fully answered by the fact that no such instruction was requested, and the court was not obliged *ex debito justitiæ* to give it. But, in truth, it ought not to have been given; for the possession of a stolen thing is evidence, to some extent, against the possessor of a taking by him. Ordinarily, indeed, it is stronger or weaker in proportion to the period intervening between the stealing and the finding in the possession of the accused; and after the lapse of a considerable time before a possession is shown in the accused the law infers not his guilt, but leaves that question to the jury under a consideration of all the circumstances. But in the case of a run-

away slave the possession can be called neither recent nor remote, because, although the negro may have been long run away, it does not appear when he was taken by the prisoner or any one else; and, therefore, the jury must judge from the (149) attendant circumstances, coupled with a possession of the prisoner, and the fact that a possession is shown in no one else, when the slave was taken and by whom. In this case the negro was never seen from the time he ran away until the night he was put into a car by the prisoner for transportation to a distant place, to which he was carried with all speed by the prisoner, who there under a false name sold him. Considering the subject to be an intelligent being, from whom such information might be obtained as would lead to the obtaining of competent evidence of a previous taking by some one else, if the fact were so, and that no such evidence is produced, nor likelihood of the fact shown, and considering the manner in which the prisoner proceeded on his journey and in the sale, this is not only not a case in which there was no evidence of a taking by the prisoner, but it is one in which there is no evidence of a taking by any other person and a high probability of a taking by the prisoner. In all cases of presumption from possession and time much often depends on other and minute circumstances. We think, therefore, that the position taken at the bar cannot be maintained, that there could not be a conviction without distinct evidence of the taking by the prisoner himself, inasmuch as the taking might have been by some one who delivered the negro to the prisoner. If that were true, it would be impossible to convict any person of stealing a runaway, but upon the evidence of an accomplice; for, being moral agents, they may be seduced and got into possession with such privacy as to render it impracticable otherwise to establish directly the exact time or the precise means of effecting it. The court went far enough in "allowing the jury to guess," without any evidence to the point, that the negro might have been delivered to the prisoner, and so was not taken by him; and we think the complaint on the part of the prisoner is entirely unfounded, that the court submitted to the jury the consideration whether the prisoner (150) might not have prevailed on the negro to come to him by message through an agent; for, although it be true that there was no proof to that point, and therefore it was not strictly proper to leave it to the jury, yet the prisoner has no right to complain of it, since he was the cause of it; for there was as little proof or probability that the prisoner, as he contended, had received the negro from another person; and, therefore, when the court, at the instance of the prisoner, left the

inquiry upon this last point to the jury it was not improper to enable them to distinguish between the case of a delivery of the negro to the prisoner by one who had taken and acquired full dominion over him, and that in which the prisoner was the first taker, though enabled to become so by means of messages through a person—another slave, for example—who merely delivered them, without aiming at or acquiring any dominion over the slave for himself. The position laid down to the jury was correct in point of law, according to *S. v. Hardin*, 19 N. C., 407, and the prisoner sustained no injury from it, though there was no evidence to which it was applicable; for it was at his own instance that anything was said on the subject.

It was also insisted that there was error in telling the jury that it was not necessary for them to decide in which particular way the taking by the prisoner was effected, inasmuch as some of the counts are defective; for, it is argued, the case is not within the rule that there may be judgment on an indictment containing defective counts, if there be a good one; because that proceeds on the ground that there was evidence to authorize a conviction upon each and all of the counts, whereas, here, the jury were told, it is said, that they might convict upon all, if they thought the prisoner guilty upon any one. If that be true, there ought to be a *venire de novo*, certainly; for, unquestionably, the eight counts are bad in which a taking (151) without a conveying, and a conveying without a taking, are respectively charged. But it is clear that the supposed error was not committed, for the court explicitly put those counts out of the case, in the very beginning of the charge, by telling the jury that the acts of taking and conveying must concur to authorize a conviction. The meaning evidently was, and the jury could not have mistaken it, that if they found a taking of the negro by violence or by seduction, and also a conveying away by the prisoner, with the requisite intents, then it was not material that they should find in which of the modes the taking was effected, but the verdict might be general. The instruction, therefore, plainly applied only to the counts which charged the stealing, or the taking by seduction and conveying away, or the taking by violence and conveying away; all of which are good. It assumed that the jury should be satisfied that the prisoner was guilty in one of the modes well charged; and, if so, it was manifestly of no consequence whether the conviction was on any one or all of these counts, since the offenses were of the same grade and the punishment the same. The instruction might relieve the jury of some trouble in their investigation, but could work no prejudice to the prisoner.

Some objections were taken to the insufficiency of the evidence of the identity of the slave of Cobb with the negro carried on the road, and also the apparent discrepancy in the statements as to the times of leaving Goldsboro and Wilmington. But they were points arising upon the evidence, and were proper for the jury and not for this Court.

A motion has also been made here in arrest of judgment on several grounds. One of them is that the indictment does not apply the term "feloniously" to the violence and seduction, as well as to the taking. But it clearly does, for the expres-
(152) sion, that one "by violence feloniously took," is the same as that he "feloniously by violence took," it being impossible that the thing can be taken feloniously by violence unless the violence—the means of taking—be felonious.

Another is that it is not directly averred that the negro was the property of Cobb, as by the words, "then and there being the property, or of the proper goods and chattels of," etc., but only adds the averment after laying the value, "and the property of," etc. But both forms of expression have the same meaning, and they are used indifferently. This indictment follows in this respect that in *S. v. Sparrow*, 4 N. C., 530, and that was held good on a motion in arrest.

A third ground is that the indictment is uncertain and repugnant in charging an intent to "sell *and* dispose of" the slave, as a disposition may be by other means than that of a sale. But in that respect the indictment is sustained by the precedent in *S. v. Haney*, 19 N. C., 390, and the opinion there given on the very point.

Upon the whole, then, the Court sees no error in the record. Indeed, we have had no difficulty whatever but on the question whether a runaway slave be the subject of larceny or within the act of 1779. If the former, he certainly is the latter. But we own that, were it *res integra*, we should hesitate to hold that the common law could recognize such a thing as the larceny of a man, and perhaps feel bound to leave it to the Legislature to make a fit provision for the case. But for upwards of half a century it has been held by the highest tribunals to be law here, and has been tolerated and affirmed by the Legislature as a salutary security of a very important portion of the property of the citizen; and therefore the Court now feels bound to follow up the principle thus established.

PER CURIAM. Certificate ordered to the court below.

Cited: S. v. Groves, 44 N. C., 193; *S. v. Hester*, 47 N. C., 87; *Childers v. Bumgarner*, 53 N. C., 300; *S. v. Beatty*, 61

N. C., 53; *S. v. Tisdale, ib.*, 222; *S. v. Baker*, 63 N. C., 281; *S. v. Worthington*, 64 N. C., 597; *S. v. Parker*, 65 N. C., 459; *S. v. Turner, ib.*, 593; *S. v. Speight*, 69 N. C., 73; *S. v. Collins*, 72 N. C., 145; *S. v. Johnson*, 75 N. C., 124; *S. v. Rights*, 82 N. C., 678; *S. v. Smiley*, 101 N. C., 711; *S. v. Toole*, 106 N. C., 740; *S. v. Smith, ib.*, 651.

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(153)

DEN ON DEMISE OF KINCHEN POWELL ET AL. V. WILLIAM T. BAUGHAM.

Where an execution from a justice of the peace has been levied on land and returned to the County Court, where judgment is rendered for the plaintiff, he may either have an order of sale, under which he can only sell the land levied on, or he may take an execution as in other cases of judgments.

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

Both parties claim title to the premises under Morris Baugham, who conveyed them to Jesse Blanchard, and he conveyed to the lessor of the plaintiff. On the part of the defendant it was alleged that the deed to Blanchard was made in fraud of Morris Baugham's creditors, and the defendant set up a title under a sale and conveyance to him by the sheriff. In support of his title the defendant gave in evidence the record of a judgment before a justice of the peace against Baugham, and a *fieri facias* thereon levied on the premises and returned to the County Court, and, after notice to the debtor, a judgment of the County Court affirming that of the justice of the peace for the debt and costs, and a *renditioni exponas* thereon for the sale of the premises levied on.

On that evidence the counsel for the plaintiff objected that the writ of *renditioni exponas* was inoperative, because the County Court had made no order of sale or any special award of the writ; and of that opinion was the court, (154) and directed the jury to find for the plaintiff. There was a verdict accordingly, and judgment thereon, and the defendant appealed.

B. F. Moore for plaintiffs.

Whitaker and *W. N. H. Smith* for defendant.

RUFFIN, C. J. Under the act of 1794 a *renditioni exponas* was the only execution that could be issued from the County Court upon a levy of a justice's execution on land; and that could only be had by the special order of the court. If satisfaction was not obtained by the sale of the land, the plaintiff was obliged to proceed again before the justice of the peace. That was often a serious inconvenience, and, to remedy it, the act of 1822 was passed to require the court, on the application of the plaintiff, to enter a judgment there for the debt and costs. It is then added that "if by the sale of the land levied on a sufficient sum shall not be produced to satisfy the judgment, the plaintiff may sue out execution from the court for the residue in the same way as if the judgment had been originally rendered by the court." The opinion held in the Superior Court was that, since that act, in addition to a judgment for the debt and costs, there must still be a special order of sale to entitle the plaintiff to a *renditioni exponas*. This Court entertains an opinion to the contrary. No doubt the creditor may still limit his motion to an order of sale; and, if so, he can have nothing but the *renditioni exponas*. But if he take judgment in court for his debt and costs, then, *ex vi termini*, he may have any execution which, under like circumstances, he would be entitled to upon any judgment in court, unless the act restrains him in some respect; which, we think, is clearly not the case. What, then, is the state of such a case? It is that the plaintiff has a general judgment for his debt, with a lien on the land levied on for its satisfaction. The (155) Legislature did not mean to discharge the lien by reason that the creditor took a general judgment instead of an order of sale; and it was, no doubt, to show that such was not the meaning, that the words were added respecting the sale of the land levied on. It is precisely like the case of a judgment in original attachment; upon which the words of the act of 1777 are, that "if the judgment shall not be satisfied by the goods attached the plaintiff may have execution for the residue"; and it has always been held that upon such a judgment the plaintiff might either have a *renditioni exponas* or a *fieri facias*, though if he take the latter writ the property attached is discharged. *Amyett v. Backhouse*, 7 N. C., 63. It was to prevent that inference from the judgment's being general in the County Court that the particular provision was inserted in the act of 1822, which has been quoted. But, without such special words, the just construction of the act would have led to the same result; for the act is remedial and, therefore, is to be favorably interpreted; and why should not the creditor be en-

titled upon such a judgment to any execution which he would be entitled to upon any other judgment, when there is a lien on particular property? The record shows the debt, and the levy on the land, just as they appear when the levy is returned by the sheriff on a *fieri facias;* and, therefore, a *venditioni exponas* may be sued by the party, according to the course of the court, without any special award of it in the one case as well as in the other. Indeed, the case is exactly that of a judgment in attachment. In *Burke v. Elliot*, 26 N. C., 355, the judgment and execution were like those now before us, and the Court said that, upon a judgment rendered in the County Court for the debt, the creditor, at his election, could have execution against the land levied on or against the person or property generally of the debtor. In *Borden v. Smith*, 20 N. C., 27, it was held that a *venditioni exponas* might issue upon such a judgment. It is mentioned further in that case, as if there were (156) some uncertainty about it, that a *fieri facias* clause might be inserted in the *venditioni exponas*. Why any hesitation should have been felt on that point we are now at some loss to say; for a special *fieri facias* may be added to a *venditioni exponas* whenever a *fieri facias* itself may be sued out. That upon the judgment in the County Court the plaintiff may immediately have a *venditioni exponas* seems necessarily to result alike from the nature of the case and the particular terms of the act of 1822.

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

Cited: May v. Getty, 140 N. C., 317.

JOHN C. RANKIN ET AL. v. THANKFUL RANKIN ET AL.

In a probate of nuncupative wills every requisition of the statute ought to be faithfully observed; and especially the probate will not be good if the next of kin are not cited.

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

This is an application to call in the probate of a nuncupative will of William Rankin, who died in September, 1829, leaving a widow, who is one of the defendants, and two daughters, who were infants. It was on 22 September reduced to writing in this form: "The nuncupative will of William Rankin, deceased. It was his will and request that the old planta-

(157) tion be sold and the old wagon and still and all the stock that his wife could spare, to pay his debts; and the remainder of the property to be at his wife's disposal; and for her to get one of his or her friends to assist her, or whom she pleases. He mentioned that he was not able to do it himself. William Rankin related these words on 7 September, 1829, and died on 17th of the same month. Teste: Samuel E. Donnell, David Wilson."

At November Term of the County Court of 1829 probate was taken thereof in the following form: "This nuncupative will of William Rankin, deceased, was duly proved in open court by the oaths of Samuel Donnell and David Wilson, the subscribing witnesses thereto; and it is ordered to be recorded." There was no citation to the children, nor any guardian appointed to defend their interests. At the same time administration with the will annexed was, at the request of the widow, granted to her and John Rankin, a brother of the deceased; and after the payment of the debts Mrs. Rankin continued in possession of the estate, consisting of eight slaves, stock, household furniture, and other things, claiming them as her own under her husband's will. Her daughters likewise lived with her until their marriages, which took place while they were respectively under age; that is to say, that of one of them, Hannah to John C. Rankin, in December, 1833, and that of the other, Nancy to Thomas Rankin, in December, 1840. Hannah had four children, and died in May, 1845; and Nancy had two children, and died in April, 1844. After the respective marriages Mrs. Rankin gave to each of her daughters some slaves by parol and put them into possession of their husbands. But after the deaths of the daughters differences took place between that lady and her sons-in-law, and she brought actions of detinue against them and recovered the negroes. They then administered on the estates of (158) their respective wives, and instituted the present proceeding in August, 1846.

The allegation impeaches the probate of the will upon the ground that there was no process to call in the children to contest it, nor were they otherwise parties to the proceeding or privy thereto, and also because it does not appear in the probate that the will was made under such circumstances as the law requires to make it valid, and, particularly, that the witnesses were specially required to bear witness thereto by the testator himself. Furthermore, the allegation impeaches the will itself, because the witnesses were not in fact thus specially required to bear witness to the will by the testator.

Mrs. Rankin and John Rankin put in the responsive allegation, and therein admit that the probate took place without process sued out to bring in the children or their being otherwise actually before the court. But Mrs. Rankin states that in fact the daughter Hannah, then 14 years old, was present when the will was made and knew its provisions; and that she and Nancy, then 7 or 8 years old, knew when she went to court to have the will proved, and were immediately informed that it had been proved, and that they both acquiesced in it during their lives, and, particularly, that Hannah did, notwithstanding repeated efforts of her husband to render her dissatisfied, and notwithstanding the peace of her life was disturbed by his importunities to her to fall out with her mother and set up a claim to the property given to her by the will. Mrs. Rankin states that the will was made by her husband at his own house, in his last sickness, and in the presence of herself, her daughter Hannah, David Wilson, Samuel E. Donnell, and the wife of Donnell; and that the testator called all of them to his bedside and said, "I want you all to take notice of what I say, and bear witness that this is my will." And both she and John Rankin state that the witnesses, Donnell and Wilson, both deposed to the court, when the will was offered for probate, (159) that the deceased did thus call on them and the other persons to take notice as above set forth. Mrs. Rankin furthermore states that the present applicants, after their intermarriages with her daughters, saw a copy of the will and probate frequently at her house, and were fully informed in respect thereof; and that, although they repeatedly applied to her, she constantly refused to make them conveyances for any of the negroes, and that they submitted to such refusals during the lives of their wives and until December, 1845; and that then they again applied to her for a title to the negroes, when she informed them that she would not make any, but intended to let them enjoy the slaves during their lives, and then to give them to her grandchildren; whereupon they threatened to have the will set aside, and she brought suit for the negroes.

In support of the allegation, David Wilson, one of the subscribing witnesses, has been examined, and he deposes that the will was made in the presence of Donnell, himself, his wife, and Mrs. Rankin, and was correctly reduced to writing; but that he has no recollection that either he or Donnell or any other person was called on by the testator to remember or bear witness to what he said; and that he feels confident that they were not

thus called on, because he is sure that he put into writing all the testator did say; and that neither he nor Donnell was examined or made any statement to the court on that point.

On the contrary, John Rankin deposes that, being called on by his sister-in-law to assist her in the management of the estate, he was led to inquire into the circumstances under which the will was made, and that he was informed by Wilson and Donnell that they were called on by William Rankin to bear witness that that was his will, which was by them afterwards reduced to writing; that he employed respectable counsel (160) to have the will proved properly; and that he was present in court upon the occasion, and both Donnell and Wilson then swore that the testator disposed of his property in the manner in which they wrote the will down and that they were both called on to bear witness to it. He states, further, that Donnell is dead.

Both of these witnesses are proved, by several respectable persons, to have very good characters; but most of the witnesses say that Mr. Rankin was so deaf in 1829, and ever since, that his hearing was very indistinct.

The cause was brought by appeal to the Superior Court, and there the probate was set aside and an appeal then taken to this Court.

Kerr and *Iredell* for plaintiffs.
Morehead for defendants.

RUFFIN, C. J. Nuncupative wills were found to give rise to so many frauds and perjuries that it was necessary to guard them by many requisites in respect to their execution and their probate. *Cole v. Woodhunt*, 4 Ves., 196; note 2, Bl. Com., 501. To render the protection safe against those evils, the court ought faithfully to observe every one of the provisions of the statute. As one of them, and not the least important, the act prohibits probate of a nuncupative will "until process has been first issued to call in the widow, or next of kin, or both, if conveniently to be found, to contest the same if they think proper," in order to prevent surprise on those interested in the estate. It was not intended that there should be a probate of such a will in common form, when one in solemn form could be had, nor that the privity of the next of kin should be inferred from supposed opportunities of knowledge, or established by parol proof, as in some other instances it may be. For, in the former case, there might be surprise, and in the latter perjury; and (161) the danger of each was so obvious that the Legislature

deemed it politic to exclude the opportunities of committing them. Here the next of kin might have been conveniently found, being within the jurisdiction, and indeed resident with the party offering the will. It is true, they were infants, and if brought in by process could not have conducted the inquiries on which their rights depended. But that did not excuse the other party from bringing them in, because then it would have been the duty of the court, thus informed of the state of the next of kin, to appoint a guardian to defend for them. This case itself shows the importance that this requisite of the act should have been attended to at the proper time, for if it had the conflict would have been avoided which now exists between the witnesses upon the essential point whether the supposed testator gave the requisite evidence that his words were not uttered in loose discourse, but *animo testandi*, by calling on persons to bear witness to that intention. At this day there can be no certainty, it seems, on that point, as the examination at the probate was *ore tenus*, and one of the witnesses, a respectable man, deposes that there was no such calling on anybody, and that neither he nor the other witness deposed or was examined to it at the probate; while another person, equally respectable, states, although he cannot prove that the deceased did call in that manner on the witnesses, that yet both of them swore on that occasion that he did. Thus it is seen that the very evil has in this instance been produced against which the wholesome enactment in the statute was directed. It is said, indeed, that the probate imports that this evidence was given, as it states that the will was "duly proved," which could not be without the evidence; and that it gives also the greater credit to the witness Rankin. But there is very little weight to be given to that expression in an *ex parte probate*, and especially when it is clear that in one respect, at least, it was not duly proved, (162) inasmuch as the next of kin were not called in nor any inquiry made for them upon process. Besides, Wilson's statement is much corroborated by the omission of any such words in the supposed will, inasmuch as he states positively that everything was reduced to writing which the party deceased said on the subject. Whether regard be had, then, to the form of the proceeding in the probate cause or to the sufficiency of the instrument as constituting a will, the probate was improperly passed.

If acquiescence could supply in such a case the intrinsic defect of the probate from the omission to call in the next of kin, we think there is nothing to establish such an acquiescence as

can bar the children from demanding a re-probate. There is no statute of limitations applicable to the case. The bar, if any, must arise solely from the presumption of abandonment, or of satisfaction of the claims of the parties as next of kin. It is clear there is no satisfaction. None is pretended. As to the abandonment, the mother says only that the husbands, as well as her daughters, knew of the will and probate. But it is not established that they were properly aware of their rights and intended to waive them. On the contrary, the daughters were never *sui juris*, having been infants when they married and under coverture at their deaths; and it is certain that the husbands were not satisfied and did not intend to acquiesce finally in what had been done, but expressed themselves otherwise from time to time, to the extent even of domestic disquiet, according to the allegation of the mother herself. They intended in some way to assert the right of their wives to shares of the negroes, if the mother would not make something like a fair distribution of herself; and, as soon as she finally refused, they instituted the present suit. As administrators of their wives, they are entitled to have the probate revoked and leave the other (163) party to propound the instrument again, if she shall still think proper to set it up as a will. The sentence in the Superior Court is affirmed with costs; and this will be certified to that court, in order that the parties may make up an issue, if they think proper, or that such other steps shall be taken for the administration of the estate as the law requires.

PER CURIAM. Judgment affirmed.

Cited: Haden v. Bradshaw, 60 N. C., 261; *Bundrick v. Haygood*, 106 N. C., 472.

KENION T. WEST ET AL. V. JOHN TILGHMAN.

1. Where an owner of a slave stands by and sees the slave sold by another, having no title, and makes no objection, yet he is not thereby estopped from asserting his legal title.

2. The title to a slave can only be conveyed, according to the laws of this State, by a sale in writing, except when delivery accompanies the sale, or by a gift evidenced by a written instrument, the written instrument in each case to be attested by a subscribing witness and proved and recorded.

3. Whenever a suit will survive to a wife she may be joined with her husband in the action.

WEST *v.* TILGHMAN.

APPEAL from the Superior Court of Law of CRAVEN, at Fall Term, 1848, *Settle, J.*, presiding.

The case is as follows: Joseph Watson, by his will, gave his son, John A. B. Watson, after the death of his wife, a negro slave named Reuben and a negro woman named Sylva. By a subsequent clause he directs that, at her death, all the property he had lent her should be equally divided between his son John and his daughters Teresa and Susan, with survivorship, upon either dying without leaving issue. John died without (164) issue, after his mother's death, having by deed conveyed to a trustee, for the payment of his debts, all his property, including the negroes Reuben and Sylva. Among the debts secured was one to West, the plaintiff, who had married Teresa, and some to Kilpatrick, who had married Susan. The trustee took the property into his possession, after the death of John A. Watson, which took place in 1835, hired out the negroes in the month of ..... until the succeeding term of the County Court of Lenoir, when he sold them at public auction, and the defendant purchased the slave Reuben, and Kilpatrick, the plaintiff, the negro Sylva. But West and Kilpatrick knew that the slaves were conveyed in trust, and knew of the sale; both were on the ground when it commenced, and the latter continued there during the whole time, and each received a portion of the money raised by the sale, as secured creditors.

His Honor charged the jury that if they collected from the evidence that the plaintiffs knew of the execution of the deed of trust, the hiring of the boy Reuben by the trustee for one month, and of his intention to sell him, and that they attended at the time and place of sale, and that one of the plaintiffs (Kilpatrick) purchased the negro Sylva, conveyed in the same deed of trust with Reuben and subject to the same claim the plaintiff now set up to him, and that if West, the plaintiff, left the place of sale without forbidding the sale or setting up any title to the slave Reuben, and that the plaintiffs, West and Kilpatrick, by their act and conduct, induced the defendant and others to believe that the title of the trustee to the slave Reuben was undisputed, and if they further believed that the plaintiffs received, each of them, from the trustee a portion of the money arising from the sale of Reuben, they were not entitled to (165) recover.

Verdict for the defendant, and appeal to the Supreme Court.

No counsel for plaintiffs.

J. H. Bryan for defendant.

NASH, J. The instruction given to the jury, in substance, is, if the facts enumerated did exist, in *law* the plaintiffs could not recover. This could not be, we think, unless *they* had transferred the slave to some other person. It is admitted that the legal title to the slave had been in the plaintiffs; have they, in any mode known to the law, parted with it? By the law of this State all sales of slaves must be in writing, except where delivery accompanies the sale, or it is void; and all gifts must be evidenced by a bill of sale. In neither of these modes have the plaintiffs parted with their title. But it is alleged that the circumstances proved in the case amount either to an estoppel or to a conveyance by them. We think neither conclusion is correct. The fact that a person was present, when property claimed by him was sold, without making known his title, amounted to an estoppel, was decided in *Bird v. Benton,* 13 N. C., 180. That case, however, has been overruled by those of *Governor v. Freeman,* 15 N. C., 474, and *Lentz v. Chambers,* 27 N. C., 587. The principles governing this case are laid down by the Court in the case of *Jones v. Sasser,* 18 N. C., 462. There it was contended that the plaintiff, by his concealment and *misrepresentations* of the ownership of the property, was estopped and concluded from setting up any claim to the injury of those whom he had thus imposed on and deceived. It was ruled that even misrepresentation, coupled with concealment, was no estoppel, and that there was no such rule of *law* which precluded the plaintiff from showing his title. In this (166) case there is no pretense that the plaintiffs were guilty of either concealment or misrepresentation; there is no evidence that they knew of their title. For, although it is under the will of Joseph Watson that they claimed, yet it was a matter of construction; and that they were ignorant of it is strongly implied by one of the acts upon which the defendant relies, to wit, the purchase by Kilpatrick of the negro Sylva, to whom their title was just as good as that to Reuben, both being included in the deed of trust. It is difficult to imagine a motive, in making the purchase of her consistent with a knowledge of their title, unless upon the ground of fraud, which is not pretended. But even if they did know it, it would not alter the case in this Court. The case of *Sasser* further decides that to hold that the representations or misrepresentations of a party could transfer the title to another person would be to violate the positive law of the State. That case is supported by that of *Pickard v. Sears,* 33 E. C. L., 117. That was an action of trover for machinery. The property had belonged to one Metcalf, who had mortgaged it to the plaintiff to secure a debt due

to him. Metcalf was permitted to retain the possession and use the machinery. While so in his possession it was levied on to satisfy an execution against him, and at the sale the defendant purchased. It was proved on the trial at *nisi prius* before *Lord Denman* that the plaintiff, before the sale, had frequent conversations with the attorney of the defendants concerning the machinery, and advised with him as to the best mode of *raising money* on it to pay off the execution, and that he knew of the intention to sell, but at no time made known the fact of the mortgage. His lordship refused to leave it to the jury to say whether the plaintiff had not concurred in the sale, on the ground that there was no evidence of such concurrence. In delivering the opinion of the King's Bench upon a rule for a new trial, he says that the plaintiff, having a "good (167) title to the machinery, could not be divested of it but by a sale or gift." He concludes, as to the ground upon which a new trial was granted, as follows: "We think his (the plaintiff's) conduct, in the standing by and giving a kind of sanction to the proceedings under the execution, was a fact of such a nature that the opinion of the jury ought to have been taken whether he had not, in point of fact, ceased to be owner." Not that the facts set forth, themselves, deprived the plaintiff of his title, but whether they were not of such a nature as to satisfy them that, before the sale, he had in fact divested himself of the title to the property in one of the ways known to the law, and previously stated by him, to wit, by gift or sale.

We are of opinion that the judge below erred in stating to the jury that if they believed the circumstances existed, as enumerated by him, the plaintiffs could not recover. Those circumstances might be some slight evidence of the fact that, before the sale, the plaintiffs had, by the means known to the law, transferred their title to Reuben to some other person, and thereby ceased to be the owners. Sitting in a court of law, we cannot enter into questions of equity or hardship. These are considerations which belong to another and distinct tribunal. *Sasser v. Jones*, 38 N. C., 19. We think the action was properly brought in the names of the wives as well as in those of the husbands. Wherever the suit will survive to the wife she may be joined in the action. *Dunstan v. Burweld*, 1 Wil., 224.

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

Cited: Lamb v. Goodwin, 32 N. C., 322; *Tilghman v. West*, 43 N. C., 184; *Smith v. Chitwood*, 44 N. C., 448, 9; *Mason v. Williams*, 53 N. C., 481; *May v. Hanks*, 62 N. C., 314; *Clark v. Moore*, 126 N. C., 7.

(168)

AUGUSTINE CULLY v. LOVICK JONES ET AL.

Where on petition of an executor, in pursuance of the directions of his testatrix, an order was passed in 1805 by the County Court, "that the said executor have leave to emancipate his said slave, he first giving bond and security as required by law," and the bond was not given till 1816, and ever since that order, until the year 1846, the said slave and her children had been permitted to enjoy all the rights of free persons of color: *Held*, that neither the executor, whose duty it was to give the bond, nor any person claiming under or through him, can take advantage of that omission, much less a mere wrongdoer, after the lapse of so many years.

APPEAL from the Superior Court of Law of CRAVEN, at Fall Term, 1848, *Settle, J.*, presiding.

This was an action of trespass *vi et armis* for false imprisonment. The defendant pleaded that the plaintiff was a slave, upon which issue was joined. By the will of Jane Thompson, to whom Phebe, the mother of the plaintiff, belonged, Reuben Jones, her executor, "was directed to obtain the freedom of Phebe, if practicable, on account of her meritorious services." In pursuance thereof, Jones filed a petition in the County Court of Carteret. Whereupon it was ordered by the court, at November Term, 1846, "that the said Jones have license to liberate the slave Phebe, he first giving bond and security as required by law." From and after that date Phebe was permitted by said Jones to act as a free person, and she and her children have ever since, up to a short time before this action was brought in 1846, been treated as free persons. Jones neglected to give bond as required until 1816, when, at the August Term of said court, it was ordered "that the said Jones file his bond for the emancipation of the negro woman, Phebe, pursuant to
(169) the grant of this court at November Term, 1806, with James T. Jones as security," which was accordingly done.

The plaintiff, Augustine, was a child of Phebe, born in 1808, and always acted and was treated as a free person until just before the commencement of this action, when she was seized by the defendant and claimed as a slave. Judgment for the plaintiff, and appeal by the defendants.

J. H. Bryan and *J. W. Bryan* for plaintiff.
No counsel for defendants.

PEARSON, J. It might be urged, with much force, that the bond given in 1816, by order of the court, had relation back, so as to make effectual the act of emancipation under the order of

1806, and that the plaintiff, although born before the bond was executed, was free by the force and effect of the emancipation of her mother. But, admitting that the sovereign, if such was its pleasure, might insist that the act of emancipation was not valid, because of the omission to give the bond, we are clearly of opinion that Reuben Jones, the executor, whose duty it was to give the bond, and no one claiming under or through him, can take advantage of that omission; much less can a mere wrongdoer, after the lapse of so many years. More than forty years have been allowed to pass from the act of emancipation and the birth of the plaintiff, before any claim was made to hold her as a slave, during all which time she passed as a free person and was so treated and considered by the community in which she lived. After so long an acquiescence almost anything will be presumed in order to give effect to the act of emancipation.

There was no error in the court below.

PER CURIAM. Judgment affirmed.

Cited: Stringer v. Burcham, 34 N. C., 43; *Allen v. Allen*, 44 N. C., 63; *Jarman v. Humphrey*, 51 N. C., 31.

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(170)

WILLIAM A. WHITFIELD v. WILLIAM B. HURST.

1. The propounder of a will of a married woman should properly file allegations in writing and on oath, setting forth the instrument or facts relied on, so as to put on the record such a case as would show that the paper propounded might be the will of the party deceased, notwithstanding her coverture.

2. In like manner the party contesting should put in his allegations in writing, pleading a former sentence as a bar to any further litigation, and, of course, to ordering another issue, or denying the existence of any alleged agreement or of any right in the wife to bequeath.

3. And these are preliminary matters proper for the court to decide, and not matters for the jury.

4. A court of probate cannot construe a marriage settlement so as to determine whether it vested a separate estate in the wife or not.

5. But where a marriage agreement gives a color to the act of the wife in making a will, that is sufficient to induce the court of probate to admit the paper, leaving it to the Court of Equity ultimately to

construe and enforce the articles and compel the execution of the will, if made, in the view of that court, under a sufficient authority, or by virtue of a sufficient estate in the wife.

6. After an issue of *devisavit vel non* is submitted to a jury there cannot be a definitive sentence upon a paper offered as a will, but upon the verdict of the jury, unless the issue is itself set aside.

7. After such an issue made up either party has a right to insist on a verdict.

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

This is a proceeding to obtain the probate of a paper as the testament of Sarah B. Hurst, a married woman, which is opposed by the administrator of the husband, who died since the death of his wife.

Just before the marriage the intended husband executed to the lady, then Sarah B. Whitfield and a widow, an agreement in the following words:

(171) "Know all men that we, John B. Hurst and Sarah B. Whitfield, of the county of Wayne, have, this 6 April, 1826, made and entered into the following agreement, to wit: That we have consented to wed in holy wedlock, and by the laws of North Carolina in such case the right of property is changed: Now, know ye that we, the said John B. Hurst and Sarah B. Whitfield, before entering into the bonds of matrimony, have agreed that all the right, titles and interest of the property now belonging to the said Sarah B. Whitfield shall not be changed or so altered as to become subject to the control of the said John B. Hurst, as respects being subject to the payment of any debt of the said John B. Hurst which he may now owe or may hereafter contract, or be subject or be liable to be sold by the said John B. Hurst. Nevertheless, the said John B. Hurst has full power and authority to use the property of the said Sarah B. Whitfield at all times in such manner as may be most conducive to the benefit of the said Sarah B. Whitfield, and a reasonable portion of the products of the property, as aforesaid, shall be made use of by the said John B. Hurst for the better support of the said Sarah B. Whitfield."

The instrument was signed and sealed by John B. Hurst alone, and delivered, and the marriage took place, and the parties cohabited until some time in 1840, when the wife died. A script was then found, which was altogether in the handwriting of Mrs. Hurst, bearing date 24 July, 1837, purporting to be her will and to be made under the powers and rights vested in her by the marriage contract aforesaid, wherein she gave eleven negroes to

her son William A. Whitfield and the residue of her property to her husband, and appointed her husband and another person the executors. In 1840 the script was carried into the County Court by William A. Whitfield, the legatee, and the executors were called on to take probate thereof; but they declined, and then William A. Whitfield propounded the paper as his mother's will, and its validity was contested by John B. (172) Hurst, and the usual issue made up between them. It came on for trial in February, 1841, before the jury, when the counsel for Hurst "objected to the instrument on the ground that it was made by a *feme covert*, who had no authority to execute it; and the plaintiff offered to prove by witnesses that the instrument was executed by the said Sarah B. Hurst, but the court, for the reasons assigned by the defendant's counsel, refused to admit the same, whereupon the plaintiff submitted to a nonsuit."

In November, 1844, the party, William A. Whitfield, repropounded the paper in the County Court, and it was then contested by William B. Hurst, the administrator of John B. Hurst, and an issue of *devisavit vel non* made up. Upon the trial there was a verdict in favor of the paper, and Hurst appealed to the Superior Court. Upon the trial in the latter court it was insisted on the part of Hurst that the proceedings in the County Court, when the paper was first propounded, were conclusive against it, and he moved the court so to pronounce. But the court was of a contrary opinion, and refused the motion. It was further insisted on the part of Hurst that the paper was void as a will, because the supposed testatrix was a married woman and had not capacity to make a will, unless by virtue of some agreement or consent of her husband, and that the contract of 6 April, 1826, aforesaid, did not enable her to make one. But the court was of opinion that the agreement gave Mrs. Hurst the separate use of the property mentioned, and that she had the right to dispose of the beneficial interest in the property by a will, or a writing in the nature of a will, without any further assent or license of her husband. Thereupon evidence was given of the execution of the instrument by Sarah B. Hurst as her will, and the jury gave a verdict in accordance therewith, and from the judgment in favor of the will Hurst ap- (173) pealed.

Mordecai and *J. H. Bryan* for plaintiff.
Strange and Husted for defendant.

WHITFIELD *v.* HURST.

RUFFIN, C. J. Although the points were not presented in the most formal and convenient method in the Superior Court, yet the opinions given on them were, we think, substantially correct, and therefore the judgment must be affirmed. Proceedings of this kind have been so rare here that no practice has been settled for them. The statute says, indeed, that "the validity of every contested will shall be tried by a jury, upon an issue made up under the direction of the court. But it is manifest that such questions as those made in this case do not properly enter into the issue of *devisavit vel non*. For, is it not to be referred to a jury, whether, for example, the court of probate had before pronounced for or against this paper as a will, depending, as it does, upon matter of record; or whether the wife had such a separate property as gave her, as an incident to it, the right of disposition by will, or was otherwise licensed by her husband, so as to confer on her a testable capacity? Those are purely questions of law, not fit for a jury. They would seem properly to stand for decision by the court, as a preliminary step to making up the issue under the statute, so as to limit the inquiry before the jury to the *factum*, the mental capacity, or the free exercise of will by the party. Such, no doubt, would be the course, were the proceedings in probate courts here in no part *ore tenus*, but by special allegations in writing. Then the propounder, by reason that the general rule of law denies to a *feme covert* the capacity to make a will, would be obliged to plead upon oath the instrument of facts relied on to impart the capacity, so as to put on the record such a case as would show that the paper propounded might be the will of the party deceased, notwithstanding her coverture. In like manner the party contesting
(174) might plead the former sentence as a bar to any further litigation, and, of course, to ordering another issue, or might deny the existence of the alleged agreement or of any right in the wife to bequeath. That would enable the parties to have distinct decisions on those points, which would be liable to review; just as the course is now on applications to repropound an ordinary will, or to call in one probate, that there may be another in solemn form. Although we are not aware that such a method of proceeding has been adopted in such a case as this, and believe that, at all events, there is no such settled practice, yet it is so obviously useful and, indeed, necessary to the due order of business, the prevention of surprise and the proper operation of an adjudication in a cause of this kind, as to incline the Court very strongly to require it in future. In the present case the defects of the proceedings in those respects fortunately

do not prejudice the justice due to the parties, but rather promote it; for, in whatever form or stage of the cause the decisions of the court ought to have been made on these points, it seems clear that they ought to have been in favor of the propounder.

In the first place, the Court holds that the marriage contract is to be deemed in this proceeding an authority to the wife to make a will. We do not mean that we now put a final construction on that instrument, and determine that it vested a separate estate in the wife, either absolute or temporary; for those are points not proper for the consideration of the Court in a probate cause. It is true that this Court exercises, as an appellate tribunal, the functions both of the court of probate and the Court of Equity; and, therefore, it might be supposed that it would be well to decide all the questions that could arise on that instrument at once. But in the form in which the case is now before us the Court can only deal with such matters as (175) were cognizable before the County Court in this very case, because we are not proceeding originally, but reviewing the decisions of that and the Superior Court. Therefore, we put no construction on the paper further than to say that it, at least, gives a color to the act of the wife; for that is sufficient to induce the court of probate to admit the paper, leaving it to the Court of Equity ultimately to construe and enforce the articles and compel the execution of the will, if made, in the view of that court, under a sufficient authority or by virtue of a sufficient estate in the wife. *Braham v. Burchell*, 2 Eccl., 515; Chitty's Genl. Pr., 503.

In the next place, it is clear that there was no definitive sentence against this paper in February, 1841. After an issue *devisavit vel non* there could not be such a sentence but on the verdict of the jury, unless the issue were itself set aside. It appears, indeed, that upon the trial of the issue the court gave an opinion that the paper was not a will, because the party deceased was married when she made it, and on that ground refused to admit proof of its execution. If the court had then gone on to discharge the jury, set aside the order for the issue, and pronounce against the instrument upon the ground that no authority appeared to enable the wife to make it, there would have been a definitive adjudication. That, however, was not done; but the issue was allowed to stand, though the jury was discharged from rendering a verdict, and no further motion was made by either party. If the party contesting had insisted on a verdict, as he had a right to do (*St. John's Lodge v. Callender*,

26 N. C., 335), he must have had one for him, as the case then stood, and that would have settled the matter. But he did not so insist, but allowed the other side to suffer a nonsuit, as it was called; that is, the parties mutually, though tacitly, agreed to proceed no further in that cause or at that time. The (176) propounder may have been induced to take that course because he had not alleged or established in that proceeding the marriage articles; for it nowhere appears in the transcript of the first cause that any allusion was made to them, except in the will itself; and the other side may have been willing he should bring forward his whole case before a sentence should be pronounced, so that, when given, it should determine the whole dispute. So it is, at all events, that no sentence was given in either way—either in the form of a verdict or of an act of court. Nor did either of the parties insist there should be.

It is said, however, that, in that point of view, the propounder should have gone on in the first cause, and not have instituted a second original proceeding. The answer is that no objection was taken in the second cause in the courts below on that ground; and, indeed, the pendency of a suit is no bar to a second for the same subject, but only matter of abatement. But in reality this does not appear to be the same cause precisely, since now the propounder alleges the articles as giving validity to the wife's will, whereas in the first suit they were not noticed, and therefore the cases are essentially different.

PER CURIAM. Judgment affirmed.

Cited: Winslow v. Copeland, 44 N. C., 19; *Wood v. Sawyer*, 61 N. C., 271; *Hutson v. Sawyer*, 104 N. C., 3.

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(177)

JOSEPH HARDY ET AL. v. JOHN WILLIAMS, ADMINISTRATOR.

1. Where A rents out land belonging to B, B cannot recover against the lessee upon a count on the agreement for rent of the land, because there was no privity between the latter and B, unless B can show that A acted as his agent.

2. For the same reason a count upon an implied *assumpsit* cannot be maintained by B against the lessee, there being no privity between them, and there being an express contract by the lessee with A.

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

HARDY *v.* WILLIAMS.

This is an action on the case in *assumpsit*. The declaration had three counts: (1) A special agreement for the rent of land; (2) for use and occupation of land; (3) for money had and received. The plaintiffs proved that they owned the land as the heirs at law of Edward Hardy; that in the year .... one W. W. Cherry, acting as the agent of Mrs. Hardy, who was the administratrix of their father, rented the land to one Holly, at the sum of $.... per annum, for three years; that Holly assigned the lease to said Cherry and the intestate of the defendant, who occupied the premises one year, when they assigned to one Wilson Cherry, who occupied it one year. It does not appear whether any rent was paid or to whom, nor does it appear who occupied the premises the third year.

The defendant read in evidence a decree in a suit of the plaintiff against Mrs. Hardy, in which she was charged with the rent of the land. It did not appear that the decree had been satisfied.

His Honor instructed the jury that the decree was no defense, and that if the evidence was believed the plain- (178) tiffs were entitled to recover. The jury found for the plaintiffs, assessing damages for the three years. Judgment for the plaintiffs, and the defendant appealed.

No counsel for plaintiffs.
W. N. H. Smith for defendant.

PEARSON, J. His Honor erred in holding that the plaintiffs were entitled to recover. Upon the first count they could not recover, because there was no privity between them and the intestate of the defendant. To create a privity it was necessary to prove that Mrs. Hardy, in renting the premises, acted as their agent, in which case they would be allowed to sue in their own names, the contract being made for them, although the agency was not expressly made known at the time of the renting. There is, in this case, no proof of an agency. The fact that the land belonged to the plaintiffs had no tendency to prove it. Indeed, Mrs. Hardy seems to have acted under the impression that she had a right to rent the land as the administratrix of Edward Hardy. It was at the election of the plaintiff to treat her as a wrongdoer or as their agent, but they are not at liberty, by *supposing* her to be an agent, thereby to affect the rights of third persons and make a privity when none before existed. The defendant's intestate as lessee of Mrs. Hardy was estopped from denying the title of his lessor, and in an action by her could not defend by showing title in a third person, and that he had *paid* the rent to that third person.

The same objections apply to the second count, assuming that an action on the case for rent can be maintained upon an implied *assumpsit*, on the authority of the case of *Hayes v. Acre*, 1 N. C., 247, and *Cummings v. Noyes*, 10 Mass., 443, which are opposed to the English cases, unless the contract is ad-
(179) mitted by the pleadings. *Mason v. Beldham*, 3 Mod., 73; *Shuttleworth v. Garnet*, *id.*, 240; Buller's *Nisi Prius*, 138. In England the action is given by 11 Geo. II., ch. 13. In this case there is no privity between the plaintiffs and the defendant's intestate from which a contract can be implied. It is true that in many cases, for the sake of the remedy, a tort may be waived and *assumpsit* brought on an implied contract, but that is never allowed when there is an express contract with a third person, for it involves an absurdity to imply a contract to pay one person when there is an express contract to pay another, and the implied contract will be no answer to the action of the latter, as it would not be in this case, for the reasons above stated.

The third count cannot be sustained, for there is no proof that any money was received by the defendant's intestate.

It is unnecessary to notice the other point in reference to the decree. This action seems to have been brought by the plaintiffs, who are infants, instead of being brought by Mrs. Hardy, with whom the contract was made, to avoid the statute of limitations. We think the action will not lie in their names.

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

Cited: S. c., 33 N. C., 501.

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(180)

DEN ON DEMISE OF HENRY J. TOOLE ET AL. V. ISHAM PETERSON.

1. The question of identity, where different names are alleged to relate to the same person, is one exclusively for the jury.

2. Per NASH, J. A witness who has known a town for a great number of years may give evidence of a general and uniform reputation and understanding that the town was covered by a particular grant.

3. PEARSON, J., and RUFFIN, C. J. The evidence cannot be received for that purpose, but it is competent to show that what was once called the town of N. was now called the town of W.

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

TOOLE *v.* PETERSON.

This was an action of ejectment for lot No. 30, in the town of Wilmington.

The lessors of the plaintiff claimed under a grant to *John Whatson* made in 1735, and a deed from John *Watson* to Joshua Grainger, executed in 1737. The lessors of the plaintiff alleged that John *Whatson* and John *Watson* were the same person, and to prove the identity they introduced, after objection to it on the part of the defendant, the register's books, and exhibited nineteen deeds from *J. Watson* and *J. Wattson* to different persons in the town of Wilmington, and then proved that the descendants of Joshua Grainger, Jr., the grandson of Joshua Grainger, Sr., claimed and occupied lots on Market Street, alleged to have been conveyed by the same deed as that under which the lessors of the plaintiff claimed. They also proved that no such person or family as that of *John Whatson* ever was living within the knowledge of the witnesses in Wilmington. They, then, after objection to it, introduced (181) Iredell's Revisal, and showed therein the *title* of an act passed in 1739 to change the name of Newton into that of Wilmington. They then contended that, from these facts, and especially from its not being shown by the defendant, from the production of the register's books or otherwise, that there ever were any deeds to or from *John Whatson*, the jury ought to presume the identity of John Whatson and John Watson, and after the lapse of one hundred years the jury should be instructed that a *prima facie* case of identity was made out. The court instructed the jury upon this point that they must inquire into the fact of the identity; that the lessors must prove it to their satisfaction, and that, if they had not so proved it, they could not recover; but that if it were established to their satisfaction that John Whatson, the grantee, was the same person who, under the name of John Watson, sold to Joshua Grainger, the difference of names would make no difference in the title.

The lessors of the plaintiff, in order to locate the grant under which they claimed, after having shown that from lapse of time no corner or line tree could be found, and that no person could be found who had ever heard of a line tree or corner of the grant, offered to prove by Dr. DeRosset, who had lived in the town of Wilmington eighty years, that for sixty or seventy years—ever since the witness was able to recollect—it was a matter of common reputation and notoriety in Wilmington that the town of Wilmington, including the lot now sued for, was covered by the grant under which they claimed. This evidence was objected to by the defendant and rejected by the court.

After a verdict for the defendant the lessors of the plaintiff moved for a new trial, upon the ground that the court had misdirected the jury upon the question of identity, and had
(182) improperly rejected the evidence of Dr. DeRosset. The motion was overruled, and judgment given, from which the lessors of the plaintiff appealed.

W. H. Haywood and *W. A. Wright* for plaintiffs.
Strange and *D. Reid* for defendant.

NASH, J. The first exception to the judge's charge is upon the evidence as to the identity of John Whatson and John Watson. The plaintiffs claimed title to the land in question under a grant issued in 1735 to one John Whatson. The deed of conveyance to his ancestor, Joshua Grainger, in 1737, was executed by John Watson. To show that these two names belonged to one and the same person—that is, the identity of John Whatson and John Watson—the plaintiffs proved that no such person or family as Whatson ever was living in the town of Wilmington, within the knowledge of the witnesses. They offered in evidence the register's books, which, after objection by the defendant, were received by the court, and from them showed nineteen deeds from John Watson and Wattson to different persons in the town of Wilmington; and they further proved that the descendants of Joshua Grainger, Jr., the grandson of Joshua Grainger, Sr., claimed and occupied lots on Market Street, alleged to have been conveyed by the same deed as that under which the plaintiffs claimed. The lessors of the plaintiff then introduced Iredell's Revisal, and showed therein the title of an act, passed in 1739, to change the name of Newton into that of Wilmington. This latter evidence was also objected to. The counsel for the plaintiffs moved the court to instruct the jury that from the foregoing evidence and the entire absence of any testimony showing any deed whatever from John Whatson, and after the lapse of so long a time a *prima facie* case of
(183) identity was made out. His Honor refused so to charge, but instructed the jury that the lessors of the plaintiff must prove it to their satisfaction, and if they had not so proved it they could not recover. I concur with his Honor, both in receiving in evidence the books of the register and in his instruction to the jury upon the question of identity. The books were offered, not to prove title in the lessors of the plaintiff, but to show that such deeds had been made and memorials of them preserved among the public records, and that they contained no copy of a deed executed by John Whatson, as circumstances

which, taken in connection with others, might assist the jury on the question of identity. The fact that a man by the name of John Watson had conveyed portions of the same land to several persons, though collateral, was connected with the transaction, from which an inference might be reasonably drawn as to the disputed fact, particularly after the lapse of so long a time. But it was an inference which the jury alone could draw, and it was properly left to them.

In connection with the above exception was the reception of the title of the act of 1739 in evidence. It became important to the plaintiffs to prove that the name of the town of Newton had been changed to that of Wilmington, for the conveyance to Joshua Grainger, the ancestor of the lessors of the plaintiffs and under whom he claimed, was of lots in the former. For this purpose he offered in evidence the title of the act in question. This was admitted by the court, though objected to by the defendant. The act, from the title, appeared to be a private one, of which the court could not, judicially, take notice, and the title was no evidence of its existence or contents. But upon referring to Davis' Revisal we find that the change of name was effected by an act passed in 1756, and which was public in its nature. The act of 1739, passed for that purpose, was, with many others, repealed by an order in council of the King. Afterwards, yielding to the representations of the colo- (184) nial authorities, his Majesty authorized and directed "the Governor of the Province to give *his* assent to any act which shall be passed by the Council and Assembly for re-establishing the several towns, precincts and counties," etc. In consequence of the permission thus given, the act of 1756 was passed. It enacts "that the several divisions, precincts and districts of this Province, which heretofore have belonged to the several and respective counties and towns, aforesaid, before the repeal of the before-enacted act of Assembly, shall and they are hereby directed to be re-established in counties and *towns*, by the several and respective names by which each division, etc., was known and denominated at the time of the repeal of said acts." Davis' Revisal, ch. 9. This act not only changed the name of Newton into that of Wilmington, but enacted and established the boundaries of several counties. It was, therefore, a public law, of which the court was bound to take judicial notice. The error into which his Honor fell was unimportant, and, in a measure, unavoidable. The act of 1756 is not brought forward in any of the Revisals subsequent to that of Mr. Davis', and that is to be found in few private libraries.

The question, however, most pressed upon the Court here was the admissibility of the testimony of Dr. DeRosset.

The object of his evidence was to complete the title of the lessors of the plaintiffs to the lot in question by showing that it was out of the State. To do this it was important, not to show the metes and bounds of the Whatson grant, but that the town of Wilmington was on it. This, it appeared to me, had been already sufficiently done. The grant to Whatson, after locating the land, describes it as "called Newton." The deed to Grainger in 1737 describes the grantors, John Watson and his wife, as "living in Newton" or Newtown, and conveys
(185) a number of lots, and then conveys "twenty-five acres of the island opposite to the *said town*," leaving no doubt that the lots conveyed were in the town of Newton. In 1756 the name of the town was changed to Wilmington, which it has borne ever since—a period of ninety-three years. It is then shown to mathematical demonstration that Wilmington is on the land covered by the Whatson grant. But it was thought necessary by the plaintiffs' counsel to fortify this position by showing that such had been the common rumor on this subject for many years past. Dr. DeRosset, who had lived in the town for eighty years, was tendered to the court to prove that sixty or seventy years—indeed, as long as he could recollect anything—it was the common report and belief that Wilmington was covered by the Whatson grant. To pave the way for this testimony, the plaintiffs had shown that from lapse of time no corner or line tree could be found, nor could any person be found who had ever heard of a corner or line tree of the grant. It appears to me that the evidence of Dr. DeRosset was competent, and ought to have been received. From necessity, our courts have departed from the strict rules of the common law in questions of boundaries. *Sasser v. Herring*, 14 N. C., 340. It is now the well-established law of this State that the declarations of a single deceased witness, as to a line or corner, are admissible evidence as common reputation. This case goes a step further, and is justified on the same principle, to wit, necessity. The exclusion of such testimony would, in many cases of lots in our ancient towns, and of land adjacent to them, put it out of the power of the owners to make title; and this would necessarily result where the boundaries are natural objects of such a perishable nature as most of ours are. While it is admitted that there is no direct precedent for the admission of such testi-
(186) mony as that in question, it is very clearly within the reasoning of the Court in *Mendenhall v. Cassells*, 20 N. C., 43. There the plaintiff offered to prove "that it was the rep-

utation of the neighborhood, where the land in controversy lay, that the premises in question were in the boundaries of the grant under which he claimed." This testimony was rejected; the plaintiff had made no survey or attempt to survey the grant, and relied solely on the report. In assigning their reasons, the Court say: "We receive it (that is, hearsay) in regard to *private* boundaries, but we require that it have something definite to which it can adhere, or that it should be supported by proof of correspondent enjoyment and acquiescence." Both of these conditions were absent in the case of *Cassells*, and both are present here. The grant to Whatson is for 640 acres of land in New Hanover Precinct, "called Newton, and opposite the thoroughfare to the Northwest River," and it called for a line along the river to the first station. The land said to be covered by it was, and had been for upwards of one hundred years, in different portions, in the possession of those who claimed under it. Newton was a town in 1735, when the grant issued to Whatson, which called for it as embraced in its boundaries. In 1756 the name was changed to Wilmington, which it has borne ever since. Various lots, both in Newton and Wilmington, were conveyed to different persons, and those conveyed to Grainger, or some of them, in 1737, were taken possession of by his descendants. It is a matter of history that Wilmington is, and has been for many years, a populous town, possessing a large shipping interest, and of much commercial importance. The two requisites, then, pointed out by the case of *Cassells* as being either of them sufficient to authorize the admission of hearsay evidence of this kind, exist in this case. The testimony of Dr. DeRosset was, then, clearly competent. If received, it would have proved that for seventy years it had been and was the general rumor and common report that Wilmington was located on the land conveyed by the Whatson grant. (187) Long and notorious possession is very strong presumptive evidence of right, and in questions of boundary authorizes the inference of any fact which can properly be inferred to make such possession consistent with right. *Norcum v. Leary*, 25 N. C., 54. It must be recollected that the inquiry was not as to the metes and bounds of the Whatson grant, but to show that the town of Wilmington was on the ground covered by it, and thereby to prove that the State had parted with its title. If the lot sued for, instead of being vacant, had been enclosed, and in the possession of the defendant or other individuals for sixty years, could there be any doubt a jury would have been instructed to presume a grant? This case bears a strong analogy to that class of cases which, by writers upon the law of evidence,

is treated as forming an exception to the general rule excluding hearsay evidence. The exception is that when the subject in controversy is of public or general interest, then hearsay evidence, as to the boundary, under certain restrictions, is admitted. Where all the citizens of the State are interested, the interest is public; where the whole are not interested, but it affects a less, though still a large, portion of them, the interest is general, as in questions arising out of right of common. *Weeks v. Sparks*, 1 Ma. and Sel., 690. That was an action of trespass *quare clausum fregit*. The defendant pleaded in bar a prescriptive right of common in the *locus in quo;* the plaintiff replied, prescribing in right of his message to use the ground for tillage. It appeared that many persons, beside the defendant, had a right of common there, and for that reason hearsay evidence of the plaintiff's right was admitted, it being derived from persons conversant with the neighborhood. But the case most nearly resembling this is that of *Rogers v. Wood*, 2 Barn. and Ad., 245. There the question was whether the city
(188) of Chester anciently formed part of the county Palatine. Testimony of reputation was offered, and rejected, not because in itself not competent, but because it proceeded from persons who had no particular knowledge of the fact, that is, of the reputation. And in the *Duke of Newcastle v. Broseboro*, 4 Barn. and Ad., 273, such evidence was received. The question there was whether the castle of Nottingham was within the hundred of Broseboro. The case before us is one of private right, and the cases referred to are, therefore, *no authority*, but they are so similar in their circumstances that the same reasoning upon which hearsay evidence was admitted in them applies with equal force here. 1 Greenleaf Ev., 217.

I should hold that the existence of a town for the length of time that Wilmington has existed, and for a much shorter time, would be legal evidence from which a jury would be directed to presume a grant to the land on which it was located—that the State had parted with its title.

Dr. DeRosset lived in the town of Wilmington, but the case—and I am not permitted to look beyond it—nowhere states that he owned any real estate in it. He was, therefore, a competent witness to testify to the facts to which he was called, as he had no interest involved in the controversy. 1 Phil. Ev., 55, 57. And the evidence was competent.

His Honor erred in rejecting the testimony, and there ought to be a *venire de novo*.

PEARSON, J. The question of identity was a matter for the jury. There is no rule of law which would have authorized the judge to instruct the jury that a *prima facie* case of identity was made out, and the plaintiff has no ground to complain of the charge. I think, however, that if the plaintiffs had been allowed the benefit of the testimony of Dr. DeRosset the jury could not have hesitated one instant in finding that (189) the *John Whatson*, to whom a grant was made covering the town of Wilmington in 1735, was the same individual as the *John Watson* who, in 1737, made a deed to Grainger for many lots, among others, the lot sued for, in the town of Wilmington; and if the plaintiff was entitled to the benefit of this testimony, there ought to be a *venire de novo*. I do not think that it is competent to prove by tradition and general reputation that a town is covered by a grant to A. B. That would be, in effect, to locate a grant merely by tradition and general reputation. The fact that a town is upon the land which a certain grant is *alleged* to cover can make no difference, and does not tend to prove the *allegation*. The object in this case was not to ascertain the boundaries of a town—it was admitted that the lot sued for was in the town—but to locate the grant. The existence of the town raises a presumption that the land was granted to some individual, but has no tendency to show who the grantee was.

The question, in my opinion, is settled by the case of *Mendenhall v. Cassells*, 20 N. C., 43. "The tradition must have something definite to which it can adhere, or be supported by correspondent enjoyment and acquiescence." "A *tree* may be shown to have been pointed out by persons of a bygone generation as the corner of an old grant or deed." The *tree* is something to which the tradition can adhere. "A field may be shown to have been reputed the property of a particular man, and to have been claimed, enjoyed and occupied as such." The occupation supports the tradition.

In that case, as in this, the old grant called for certain water courses and corners and lines, but the *tradition did not* refer to either, and therefore had nothing to which it could adhere; and many tracts of land had been long occupied within the supposed boundaries of the old grant, but the occupation was in nowise connected with the old grant, save by the tradition, which was held to be too loose a connection for a jury to act (190) upon. So, in this case, the grant which it was attempted to locate had no connection except by the tradition with the town, the boundaries of which were known.

I think, therefore, his Honor was right in holding the evidence incompetent as an abstract proposition. But there were circumstances in this case which, I think, made it competent for the purpose of establishing the proposition which it was necessary for the plaintiff to make out. It was admitted that the lot sued for was in the town of Wilmington. It appeared from the face of the grant that the grant included the town of Newton, and if, then, Newton and Wilmington were the same, the grant included Wilmington, and of course the lot. The proposition, then, which it was necessary for the plaintiff to make out was that Newton and Wilmington were the same. The effect of the testimony of Dr. DeRosset was to prove that fact, for as the grant, upon its face, included Newton, and Newton and Wilmington were the same, it got to be the tradition and general reputation that the grant included Wilmington.

It is perfectly clear that the names of mountains, rivers and towns may be proved by reputation; in fact, that usually is the only way in which names can be proved. So, a change of the name of a river or town may be proved in the same way; and it was clearly competent to show by tradition that the name of Newton had, many years before, been changed to Wilmington. But, in this case, there was, in truth, no occasion to resort to reputation to prove the change of the name, for the change was made by a public law, of which the court was bound to take notice. The name of Newton was changed to Wilmington by an act of Assembly, passed in 1756. Davis' Revisal, ch. 9, which was a public act, and established the boundaries of several counties, etc.

I am of opinion there ought to be a *venire de novo*.

RUFFIN, C. J. I concur in the judgment of the Court (191) and in the course of reasoning which my brother *Pearson* has adopted. Upon the questions on which the decision below was favorable to the plaintiff we, of course, give no opinion, as they are improperly here on the appeal of the plaintiff.

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

Cited: Smith v. R. R., 68 N. C., 116; *Yow v. Hamilton*, 136 N. C., 359; *Rowe v. Lumber Co.*, 138 N. C., 466.

DEN ON DEMISE OF HARDY AND BROTHER v. JAMES C. SKINNER.

Where A made a deed of trust to secure creditors, and it was stipulated in the deed that a sale should not take place for three years, and, in the meantime, the trustor should remain in possession of the property, consisting of lands, negroes, etc., and on the trial of a suit the creditor, impeaching the trust, admitted that there was no actual fraud, but contended that the deed on its face was fraudulent in law: *Held*, by the Court, that whether the deed was fraudulent or not was a matter for a jury, under all the circumstances, but that the court could not, from what appeared on the face of the deed, say it was fraudulent in point of law, because there might be many circumstances in which such a deed would be good, and the creditor admitted that it was not fraudulent in fact.

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

The plaintiff claimed the premises under a purchase by his lessors in 1845, under two judgments and executions against William R. Skinner—one, at the instance of (192) Mather and Lecompte for $232.51, and the other at the instance of the lessors of the plaintiff for $1,388.66. The defendant also claimed the premises under a deed to him from William R. Skinner, made 26 April, 1841. It recites that the maker was indebted to James C. Skinner, the defendant, in different sums on three notes, due 1 July, 1837, 27 October, 1840, and 5 April, 1841, and amounting together to $5,142.92; and also that he was indebted upon two other notes for $337.53, each, to fall due 22 September, and 22 December, 1841, which the defendant had endorsed to other persons; and that he was indebted to six other persons, named in different sums, which fell due at several periods in 1837, 1839, 1840, and March and April, 1841, amounting in the whole to $1,990.38; all which debts, making the sum of $7,828.36, constituted the first class of debts secured by the deed. It further recites that the maker was indebted to thirteen other persons, named, in various sums, which fell due in 1839 and 1840, amounting to $3,440.35, whereof two were the debts to Mather and Lecompte and the lessors of the plaintiff, on which the sheriff sold the premises in dispute; which thirteen debts constitute the second class secured by the deed. It then conveys to the defendant 400 acres of land, whereon the maker then lived, 11 slaves, 4 horses, and small stocks of cattle, hogs and sheep, farming tools and household and kitchen furniture, upon the following trusts: That if, at the expiration of three years thereafter, any portion of the debts of the second

class should remain unpaid, and the trustee should be required by such a part of the creditors of the second class as should represent the greater interest, he should sell at public sale on six months' credit as much of the property as would discharge the debts of the first class and interest; and that he should in like manner sell the remaining property, if any, and with the proceeds pay the debts of the second class, if sufficient, (193) or, if not, *pro rata;* and that if any of the creditors whose debts are mentioned in the deed and for which the defendant was bound should require payment of his or their debts before the expiration of three years, then the trustee might at any time sell as much of the property as would satisfy such debts; and, further, that all the property conveyed should be and remain in the possession of William Skinner until it should be required for sale, according to the terms of the deed; and the trustee should not be responsible for it while the possession should thus continue.

The defendant, in further support of the issue on his part, proposed to give evidence that the deed was made *bona fide* to secure the debts mentioned in it, and not to delay, hinder or defeat creditors. Thereupon the counsel for the plaintiff declared that he did not impute any actual fraud to the parties, other than what appeared from the deed itself; but he insisted that the deed was upon its face fraudulent in law, no matter what the defendant might show, and that the court was bound so to pronounce. It was then agreed that a verdict should be taken for the plaintiff, subject to be set aside and a nonsuit entered, if the court should be of opinion against the plaintiff upon the question whether the deed was to be deemed fraudulent upon its face, although the defendant might be able to show that there was no fraud in fact. The court subsequently set aside the verdict and ordered a nonsuit; and the plaintiff appealed.

Heath for plaintiff.
W. N. H. Smith for defendant.

RUFFIN, C. J. Although this is a singular and extremely suspicious transaction, yet the Court thinks the plaintiff gave up his case by admitting that there was no fraud in fact, and that everything might be taken in favor of the deed which (194) could show that it was *bona fide.* The debts were all overdue at the date of the deed, except two small ones, for which the trustee was liable and which were to fall due in the course of that year, and as to which the trustee might sell property when the creditors might require. For the residue of

the debts, however, there was to be no sale for three years; and after that there was to be a sale for the satisfaction of the first class of debts, not at the instance of the creditors to whom those debts were owing, but at that of the second class of creditors; and during all that time the deed stipulates that the debtor shall retain the possession. This is a very extraordinary provision, certainly; and it would seem that a jury, viewing it as men of common sense, and inferring further from the deed the probability that the maker was insolvent or greatly embarrassed, would hardly doubt upon the deed itself that it was an object of the deed to provide for the debtor. The Court has often held that when this is the purpose of a deed, or one of its purposes, it is fraudulent and void under the statute. *Moore v. Collins*, 14 N. C., 126; *Harper v. Irwin*, 23 N. C., 490; *Cannon v. Peebles*, 24 N. C., 449; *s. c.*, 26 N. C., 204; *Dewey v. Littlejohn*, 37 N. C., 495. An unusual and unreasonable postponement of the sale, the debtor in the meanwhile taking the profits, affords very strong evidence of fraud, in that it denotes a part of the purpose to have been to *secure* a benefit to the insolvent debtor, whereas the purpose ought to have been to devote the whole of the property to the satisfaction of the debts. The counsel for the plaintiff contends that it is such strong evidence of *mala fides* as to be conclusive; that it is express fraud, and does not admit of explanation. The Court, however, cannot go that far, as it is quite conceivable that cases may exist in which such a provision as this would not be fraudulent. It would not, indeed, be sufficient that the debts mentioned were just; for it is a fraud not to apply the debtor's property to their satisfaction in a reasonable time, but reserve it for his use; and, certainly, a reservation for three years is startling and *prima facie* (195) for the debtor's benefit. If the party was insolvent, so that the jury should believe he was aware that the debts could not be paid but by a sale of the property, it is plain the stipulation for a possession for three years would be but a provision for so much longer enjoyment of the property by the debtor, and it would be clearly fraudulent. It is true that the land might be sold under execution as an equity of redemption. But the remedy derived therefrom by the creditor would be merely illusory in respect to the period of the possession to be enjoyed by the debtor, as in most cases it would take the three years for the creditor to reduce his debt to judgment, make a sale and bring an ejectment to trial. Besides, this deed complicates land, negroes and other chattels together, and in respect to the latter the creditors would have no means of enforcing a sale but the

dilatory and expensive remedy in equity. When the debtor merely continues in possession by the sufferance of the trustee and creditors, it affords a presumption of fraud only as it tends to prove a secret trust for the debtor; and that is capable of being rebutted by evidence of the debtor's ability to pay his debts or the power of the creditors to require a sale at any time. But a stipulation in the deed for possession by the debtor, for a long time, is an express trust for him; which might lead to great abuses, if tolerated, and must be *prima facie* fraudulent, unless the period should be so short as to leave it indifferent whether it was for the convenience of the trustee or the benefit of the estate on the one hand, or, on the other, for the benefit of the debtor. But, notwithstanding these bad appearances, we think the intent is open to evidence, either direct or arising out of facts and circumstances; and it cannot be inferred absolutely, as a dry matter of law, by the court. There are several (196) reasons why it cannot be done, as is stated in the cases already referred to. Though it be probable, for example, that this deed conveyed all or nearly all of the maker's property, and that it was not of value sufficient to pay his debts; yet those facts do not appear upon the instrument itself, and therefore could not be assumed by the court, though they might be presumed by a jury. Now, if this person was not insolvent, but had other property amply sufficient to cover all his debts, and these creditors wished to keep their money at interest, and in consequence thereof the day was deferred at their instance and not that of the debtor, it could not be argued that the deed was void; for it would work no hindrance to other creditors who might go against the other property. Again, the defendant might have been able to show, for aught to be seen to the contrary, that in fact the debtor was bestowing his labor, and laying out money of his own or of the secured creditors in making improvements on the estate, which would greatly enhance its value and require the three years to complete. Or it might be that the debts mentioned in the deed, among which are the two for which the premises were sold, were all the maker owed, and that the deed was made in this form with the privity and full concurrence of all the creditors. In those or other similar cases, which may be supposed, it would be clear that there was no fraud. For in the one case the debtor was rather serving the creditors than himself, by remaining on the property; and in the other, one could not allege covin in a provision of which he himself was the author. Although, then, as far as the case proceeded at the trial, it might have authorized a verdict for the

plaintiff, yet the transaction was susceptible of explanations, which might have repelled the suspicion of fraud and entitled the defendant to the verdict.

Therefore the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Young v. Booe, 33 N. C., 352; *Hardy v. Simpson*, 35 N. C., 139; *Gilmer v. Earnhart*, 46 N. C., 560; *Grimsley v. Hooker*, 56 N. C., 7; *Starke v. Etheridge*, 71 N. C., 247; *Cheatham v. Hawkins*, 76 N. C., 337; *Bobbitt v. Rodwell*, 105 N. C., 244; *Helms v. Green, ib.*, 259; *Booth v. Carstarphen*, 107 N. C., 403; *Stoneburner v. Jeffreys*, 116 N. C., 85.

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(197)

JOHN BRITT v. JOHN PATTERSON ET AL.

Where an attachment was issued by a justice of the peace for a sum above his jurisdiction to try, and was made returnable before him or some other justice, and where the County Court permitted the plaintiff to amend the process by making it returnable to the County Court, and the County Court also permitted the defendant to appeal, upon his giving bond, etc., though he had not replevied: *Held*, that the defendant was entitled to appeal, notwithstanding he had not filed a replevin bond: and *Held*, secondly, that where it appeared that the defendant was not able at the time to procure sufficient securities for an appeal, he was entitled to a *certiorari*, without showing any merits in fact, the case disclosing that there were questions of law which he had a right to have decided by the Superior Court.

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

The plaintiff sued the defendant by attachment. The sum demanded was $450. The writ was issued by a single magistrate, and made returnable before him or some other justice of the peace. The attachment was directed to a constable, who had levied it on property belonging to the defendant. In the County Court the defendant, by his counsel, moved to dismiss the proceedings, which was refused by the court, and the plaintiff moved to amend so as to make the writ returnable to the County Court. This was objected to by the defendant, but allowed by the court. From this judgment the defendant prayed an appeal to the Superior Court, which was granted, on condition of his entering into bond for $1,000, with sureties, which he failed to do. The defendant moved his cause into the Superior Court by *certiorari*, and in his petition states (198)

the foregoing facts, and that his failure to procure sureties was owing to the magnitude of the sum required, and, as he was informed and believed, to the improper interference of the plaintiff, Britt. In the Superior Court Britt filed his affidavit, admitting the facts set forth in the petition, except as to his interference to prevent the defendant from procuring the requisite sureties. He further states that his counsel in the County Court objected to the right of the defendant to appear or be heard in the court until he had made himself a party by replevying the property levied on, according to the act of Assembly, and as he was not a party to the suit he was not entitled to appeal from the judgment of the court and, consequently, had no right to a *certiorari*. His Honor, the presiding judge, being of this opinion, the *certiorari*, on motion of the plaintiff, was dismissed, and the defendant appealed.

Husted and *J. H. Bryan* for plaintiff.
Rodman for defendant.

(200) NASH, J. In the case sent to this Court it is stated that the plaintiff moved to dismiss the *certiorari* because the defendant, not having replevied the property levied on, was not in court, and on the other grounds set forth in his affidavit. The first inquiry is, under the circumstances of this case, was the defendant entitled to an appeal from the County to the Superior Court? We think he was. The act of 1777 is very broad and comprehensive in its terms in granting appeals—"if any person, either plaintiff or defendant, *or who shall be interested* in any judgment, sentence or decree of any county court shall be dissatisfied," etc., he may appeal, etc. Here the defendant was a party, and the only party defendant—against him alone the attachment issued. Before he was entitled to plead it was necessary he should replevy, because the attachment is to compel an appearance. The judgment, from which the defendant appealed, was not one denying him the right to plead, but from one dismissing the *certiorari*, denying him the right to bring his case before the Superior Court in that way, because not entitled to appeal. Under the act of 1777 he was entitled to the appeal. The next inquiry is, had he a right to the writ of *certiorari*, under the circumstances of his case? The petition states, and the answer of Britt does not deny it, that the County Court granted the appeal, upon the defendant's giving bond and good sureties in the sum of $1,000, and he was unable to give the bond, in consequence of the magnitude of the sum designated. The sum was a large one, being more than double the

amount of that demanded in the writ. Whether there was any oppression in this or not, is not now to be decided. The defendant swears that he endeavored to procure sureties (201) and failed, and by that inability was deprived of the right secured to him by law. But the law does not suffer any man to be deprived of his rights by frauds, accident or mistake, and the ordinary use of the writ of *certiorari* is to supply the place of an appeal, where a party has been deprived of it from either of the causes above enumerated. *Brooks v. Morgan,* 27 N. C., 484. The same cause assigned here by the defendant for not availing himself was assigned by the plaintiff in the case of *Trice v. Ray,* 26 N. C., 11, to wit, inability to procure sureties to his appeal bond. But it is said that the defendant had not sworn that he has a good defense to the action, or to merits. In this case we do not deem it necessary that he should state other merits than those apparent in the record. They raise questions of law of material import in the cause, which were proper for the consideration of the Superior Court, to wit, whether the property was not discharged by the alteration of the attachment by the magistrate, and whether the amendments were properly made in the County Court, and for the want of a prosecution bond, after the alteration by the magistrate, besides others. *Collins v. Nall,* 14 N. C., 224. The defendant was deprived of the remedy provided for him by the act of 1777, by no fault of his, and the *certiorari* was the only mode by which he could be placed in a situation to have his cause heard.

We are of opinion his Honor erred in the judgment given.

PER CURIAM. Judgment reversed, and cause remanded.

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(202)

WILLIAM BARNES v. ASAEL FARMER ET AL.

In an action for harboring a slave, to which the statute of limitations was pleaded, the plaintiff could not prove any act of harboring within three years before the commencement of the action, but proved that the defendant had harbored the slave for several years before that period: *Held,* that the court should have instructed the jury that there was no evidence to rebut the plea of the statute of limitations, or from which the jury could infer any act of harboring within the three years.

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

BARNES *v.* FARMER.

This was a suit to recover damages for harboring a slave. It appeared in evidence that the said slave had belonged to the defendant Asael Farmer, and had been sold under execution in 1835, and purchased by the plaintiff; that he took the said slave into possession, and, immediately thereafter, he absconded and remained out until January, 1845. The witness, on examination, testified to various acts of harboring, from shortly after the said slave ran off until the fall of 1842, such as seeing him on the plantation of the defendants, at and about their house and outhouses—seeing caves and a shelter on their lands, and one near their house, having the appearance of being used as places of concealment by some one; and one witness testified that he had seen the slave at a camp on the land of the defendants, in company with the defendant William, while he was out, and the said William then spoke of him as a runaway. This suit was commenced on 15 September, 1846.

The counsel for the defendants moved the court to charge the jury that the statute of limitations barred the plaintiff's
(203) right to recover damages for any harboring previous to 15 September, 1843; and that there was no evidence after that time to subject the defendants. The court declined so to charge, but told the jury that, though the statute did protect the defendants as to any harboring before 15 September, 1843, yet they might look to the antecedent acts of the defendants, and if they believed from them that the harboring was continued after 15 September, 1843, the plaintiff would be entitled to recover for the loss of the services of the said slave after that time.

The jury returned a verdict for the plaintiff. The defendants moved for a new trial because of misdirection, which was refused, and they appealed.

B. F. Moore for plaintiff.
Whitaker for defendants.

NASH, J. The only question presented is as to the charge upon the statute of limitations. We think the defendants were entitled to the instructions they asked, and that his Honor erred in refusing them. In proportion to the atrocity of conduct imputed to any one ought to be the care with which we should guard ourselves against the feelings it naturally excited. The crime imputed to the defendants—for it is a criminal act, punishable by indictment—is little less than that of stealing, and only less because the law does not make it a felony. The slave had been sold to pay the debts of the defendants, and for seven years the plaintiff had been by them fraudulently deprived

of his services. The feelings naturally excited by such conduct should not be permitted to obscure our judgment. Criminal as the defendants certainly were, and deserving of all the punishment which the law affixed to their actions, they are still entitled to the protection which the law throws around their persons. The statute, which makes the harboring of a (204) slave an indictable offense, also gives to the owner an action for the damages he may have sustained. The time within which such action shall be brought is regulated by the general statute of limitations. By it it is enacted that actions upon the case must be brought within "three years next after the cause of such action or suit occurred, and not after." Every act of harboring a slave is a fresh cause of action, but an action when brought covers all such acts for three years next before the bringing of the suit, for the law does not countenance the splitting up of actions. In this case the writ issued on 15 September, 1846, and embraced all the time between that period and 15 September, 1843, and could not, by force of the statute, extend any further back. This was the opinion of the presiding judge, and he so charged, but he proceeded "that they might look to the *antecedent* acts of the defendants, and if from them they believed that the harboring continued after 15 September, 1843, the plaintiff would be entitled to recover for the loss of the services of the slave after that time." This was stating to them that the acts of harboring, down to the fall of 1842, were evidence of a harboring after 15 September, 1843. In this opinion we do not concur. It is, in effect, holding that the defendants, having been fixed with acts of harboring at any time before the action was brought, were to be considered as still harboring, not only down to the time when the statute of limitations would begin to run, but to the bringing of the action. Such a construction would virtually repeal the statute in every case where there was more than one act of harboring. Nor can we see why, if correct, it should not have that effect in every case. A dozen acts of harboring in 1842 is no more evidence of a harboring after 15 September, 1843, than would be one such. If, in measuring the time which the statute covers, we pass 15 September, 1843, where shall we stop—in 1842, 1841, 1840, (205) or where else? It is impossible that a transgression of the law, in either of those years, can be evidence of such transgression in 1843. A., in 1842, steals the negro of B., who regains the possession of him; in 1843 it is alleged he stole the slave again. Could it be pretended that, on an indictment for the latter offense, the first taking could be given in evidence to convict? Again, in an action for usury, evidence of other

usurious contracts of the defendant, either with the same or another person, would not be evidence. 7 East., 108; *Spencely v. Willott.* The general replication in this case to the plea of the statute is, that within three years next before the bringing of the action the defendants did harbor the slave. Is the replication supported by evidence that he harbored him four years before the action was brought? In an action of fraud in the sale of personal property, if the defendant plead the statute of limitations, it is no sufficient replication that, within three years next before the bringing of the action, the defendant acknowledged the fraud. *Oathout v. Thompson*, 20 John., 277. That was an action of *tort* for fraud in the sale of a slave; this is an action for a tort in harboring a slave. In the former the confession referred to the time of the sale, when the fraud was committed, which was not within the time limited by law for bringing such actions. If, in this case, the defendants had confessed, after 15 September, 1843, that they had harbored the slave previous to September, 1842, it would, according to the case cited above, be no evidence to bring the case within the statute. Much less could the *fact* of harboring, previous to the fall of 1842, be any evidence of a harboring after 15 September, 1843, more than a year thereafter. The plaintiff, by his replication, undertook to show that the defendants had committed the offense within the three years next before the bringing of the

(206) action; and he must prove an *act* of harboring within that time, either by positive evidence or by proof of such circumstances occurring within that time as could justify a jury in so finding. It may be that the law ought not to shield from punishment the perpetrators of such offenses. Yet it has been the pleasure of the Legislature to limit to two years the prosecution of all misdemeanors, with a few exceptions. If this, instead of being a civil suit, were a criminal prosecution for this offense, would the proof of an act of harboring in the fall of 1842 support an indictment commenced in 1845; or would it be correct to refer the jury to the act in 1842 as justifying a conclusion by them that the offense had been perpetrated within two years next before the preferring of the indictment? It is true, these are certain facts which are of such a nature that the law presumes their continued existence until it is shown that they do not exist. Thus a man who is shown to be in life at a certain time is presumed to be still in life until it is shown that he is not in life, either by proving his death or such a lapse of time, since he was last heard of, as raises a counteracting presumption of death. So, also, sanity, when established previous to doing a particular act, is presumed to continue at the time

the act is done, until the contrary is proved. But harboring a slave is not a continuous act, and no presumption arises, from the proof of one such act, that another, at a subsequent time, has taken place. If the slave had been seen on or near the premises of the defendants after 15 September, 1843, the acts of harboring previous thereto would be evidence, not to increase the damages, but to show the nature of the act of being at the place at that time.

RUFFIN, C. J. The declaration was for harboring the slave from 1835 to 15 September, 1846; and the prayer of the defendants' counsel was for instructions upon two points. The first, that for the harboring which occurred before (207) 15 September, 1843, that is, three years before suit brought, the action was barred by the statute of limitations; and the second, that there was no evidence of any harboring after that day. The presiding judge declined giving the whole instruction, as prayed for, including both propositions. But he gave it as asked, in respect to the first point; and then he left the case to the jury on the second point with instructions that they might look to the antecedent acts of the defendants, and if they believed, from them, that the harboring was continued after 15 September, 1843, the plaintiff would be entitled to recover for such harboring as took place after that day. Such is my understanding of the case stated in the exception; and therefore it strikes me as not being precisely correct to say that his Honor had refused to apply the statute of limitations to the plaintiff's demand. For I consider that he did so in direct terms, to the full extent required by the party and the law; so that the jury were obliged to understand that they could give damages for only such harboring, if any, as actually took place after 15 September, 1843. The question, then, as it strikes me, is whether there was evidence of a harboring within that time. His Honor thought there was, because it might be inferred by the jury that the defendants had harbored the slave from 15 September, 1843, to 15 September, 1846, inasmuch as they had harbored him from 1835 to the autumn of 1842. So, the point is, as it seems to me, simply this: whether the previous harboring constitutes such circumstantial proof of a subsequent harboring as ought to have been left to the jury as competent to establish it. If it was competent, the verdict ought to stand, because it is the province of the jury to weigh and determine the effect of evidence, as enabling them to infer one fact from another, with this proviso, however, that the fact from which the other is inferred would be such as affords a fair presump-

(208) tion of the required fact. It is that proviso which raises the question of the competency of circumstantial evidence in any case, for it is a question of just reasoning, what inference may be made from an admitted or established fact. Therefore, if the fact sought cannot be rationally deduced from the circumstance relied on, the circumstance itself ought not to go to the jury, because its consideration cannot serve the justice between the parties, but may mislead the jury. Suppose, in this case, the declaration to have been only for the harboring from 15 September, 1843, so as to make the statute of limitations altogether inapplicable—which, indeed, is the state of the case under the opinion given on that point to the jury; the question then would be a naked one, whether the harboring laid would or could be established by the previous harboring. It is often a delicate point to determine what may or may not be justly inferred from particular premises; and persons will frequently differ upon it. When I see that a learned judge thought that a harboring up to the time of the action might be presumed, and that twelve gentlemen were able to affirm on their oaths its actual existence, because it had been practiced for several years before and down to 1842, I cannot but be somewhat diffident of my own conclusions to the contrary, and reluctant to disturb the verdict on that ground. But, as the law does not allow a question to be submitted to a jury without evidence, which means, also, with such evidence as, taken in the whole, will not fairly authorize a verdict in favor of the party offering the proof—in other words, evidence on which a judge must say he could not find a verdict—it seems to be the imperative duty of the Court here to reverse the judgment, when a case in that situation has been left to the jury. Now, it seems to me, notwithstanding the previous connection between the slave and the defendants, that one cannot justly and with any reason-
(209) able confidence affirm that the connection continued for four years after the last visible trace of its existence. And after the expiration of that period it may be fairly contended, I think, that, if the harboring did not continue during the whole period, it did not exist at all within it; for it is a much stronger presumption now that it did not exist, for instance, in 1843, than it was in that year, because then it might be said there were not opportunities and that time had not been allowed to discover direct proof. But, now, the negro has been taken and could point out the means of establishing the fact, if it had occurred, and there has been full scope for inquiry in other quarters for nearly six years, in all, since the latest day to which the direct proof brought down the harboring; and the

whole period affords not the slightest vestige of a harboring or correspondence of any kind after the autumn of 1842. If it appeared that the caves and other places of secret resort, once used by the runaway, had been still in use by some one, or that this negro had been seen in the neighborhood of the defendants, although personal intercourse might not be directly shown, there would be something for the mind to act on, and, possibly, the case might have been fit for a jury's deliberation. But, with nothing further than the naked facts, that ten years before the negro had belonged to the defendants, and that four years before they had entertained and concealed him, the case is too bare of proof to go to the jury. There is nothing within the time; and the previous circumstances, thus solitary and antiquated, afford a presumption too remote and inconclusive to be the ground of judicial determination.

I concur in holding that the judgment must be reversed and a *venire de novo* awarded.

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

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(210)

STATE TO THE USE OF HENRY G. PARISH v. ELLISON G. MANGUM.

In an action against a constable for a breach of his official bond in not collecting a debt, the relator is entitled to recover at least nominal damages, when he shows neglect and unreasonable delay in the collection, although the plaintiff may have received the amount of his debt from the constable after the commencement of the action.

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

Debt on constable's bond. The breach assigned in the declaration was want of diligence in the collection of a judgment. On 3 March, 1842, the plaintiff put into the hands of the defendant a judgment rendered by a magistrate against Thomas D. Crane. The execution was taken out by the defendant on 16 same month, but he proceeded no further on it until the month of June succeeding, when he levied on the land of the defendant in the execution. At the time the execution issued Crane had personal property abundantly sufficient to discharge it, which was known to the defendant; Crane died on 17 April, and on the day succeeding the sheriff levied on his personal

property to satisfy other executions, and sold it, and applied the money raised to satisfy them. The constable's execution, with the other papers, with the levy made by him, was duly returned to the County Court, and after a lengthened litigation and much delay, the land levied on was sold under a *venditioni exponas*, and the plaintiff received the amount of his debt from the constable, the defendant, in 1846. At the same time he protested against receiving it in satisfaction of his cause of action
(211) in this suit, which was then pending in Orange County Court.

The defendant's counsel moved the court to charge the jury that the evidence, if true, did not show a breach of the defendant's bond, as the plaintiff had got his money. This was refused, and the jury was charged that, if the evidence was true, a breach of the bond, in not using proper diligence on the part of the officer, was shown, which gave the plaintiff a good cause of action against him, and that the receipt of the money afterwards could only have the effect of mitigating the damages to a nominal sum.

Verdict for the plaintiff to that effect, and appeal by the defendant to the Supreme Court.

Norwood for plaintiff.
McRae for defendant.

NASH, J. We concur with the presiding judge in his charge. The instruction required could not be given. The official bond of the defendant was broken, although the money was received by the plaintiff subsequently to the bringing of this action in the manner and under the circumstances set forth in the case. The law requires that all process shall be served by the officer into whose hands it may come, with all convenient speed and in the manner prescribed. By the act of 1794, Rev. St., ch. 62, sec. 16, it is directed that the officer to whom a justice's execution is directed must levy upon the goods and chattels of the defendant, or, for want of them, on his lands and tenements. The primary fund for the payment of debts, by the law, is the personal property of the defendant. Nor can a constable, without a gross violation of his duty, pass that by and levy on the land; the latter is not to be touched by him until he can on his oath say that no goods and chattels of the defendant could be
(212) found by him. It is his duty to go to the residence of the debtor and seek for personal property. At the time the defendant took out the execution Crane had personal property, much more than was sufficient to discharge it, and this was

within the knowledge of the officer. Why he did not seize it he does not explain. In consequence of the levy he did make, the plaintiff was thrown into a tedious, prolonged contest in court, and, instead of the speedy remedy provided for him by the law, was compelled to pursue the one which the unreasonable conduct of the officer had rendered necessary. After a litigation of near four years he received his money, which he might have done in ten days after 17 April, if the law had been obeyed. For the delay in the collection of the money the plaintiff was not entitled to any damages—the interest which accrued is considered sufficient for them; but for his additional expenses in prosecuting his suit in court, over and above those which were taxed against the defendant, he would be entitled to compensation. He, however, has proved nothing paid by him, and, therefore, is entitled to nothing for them. The reception of the money by the plaintiff did not defeat his action, for it was received under an express exception by the plaintiff that it should not have such effect, and a tacit assent thereto by the defendant. But the plaintiff is entitled to the damages the law implies in every breach of official duty, which in this case is but nominal.

RUFFIN, C. J. When this suit was brought, the contest was no doubt a real one, whether the defendant was liable for the relator's debt, as he would unquestionably have been if the money had not been made from the land. It is not material to consider whether that recovery could be given in evidence under the plea of conditions performed, inasmuch as the relator admitted satisfaction *pro tanto* of the damages arising from the breach suggested in the declaration, and only (213) claimed a verdict for enough to carry the costs. Whether he had sustained any damages which remained unsatisfied was the point. That he had, in legal contemplation, seems clear; for, although the money was ultimately raised, it was effected at an expense of money or labor which would not have been incurred if the defendant had pursued the direct and legal method of taking the goods. Ordinarily, indeed, the creditor has no concern whether a sheriff levy on goods or land, for it is not material to him, so that he gets his money at the return of the writ; and he, in fact, gets it without either more or less cost in any way, whether the sheriff take the one or the other kind of property. But it is not so with respect to executions issued by a justice of the peace, for the creditor is necessarily injured to some extent if the constable fail to levy on the goods when he can, and, instead of doing so, levy on land. It is so because a constable can sell goods and obtain satisfaction without any

further agency, direct or indirect, of the creditor, further than finally to secure his money; whereas, by levying on the land, he compels the creditor to be at the expense of employing an attorney to get the judgment affirmed or an order of sale and sue out execution, or, at least, puts the creditor to the trouble of attending in person to perform those acts for himself. It seems plain that in this way the creditor has an interest—one that is pecuniary—that a constable should levy on the personalty, when accessible to him, and not on the land, as by the former the creditor gets his debt without the loss of either time or money, while by the latter a loss of one or the other is unavoidable. Therefore, the relator must have sustained, at the least, the nominal damages assessed; and on that ground I agree with my brother *Nash*, that the judgment should be affirmed.

PER CURIAM. Judgment affirmed.

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(214)

DEN ON DEMISE OF SAMUEL ANDERS v. TIMOTHY ANDERS.

1. Where an award has been made by referees, under a rule of court, and confirmed by the court, it is binding on all parties, and while it remains unreversed the judgment cannot be contradicted.

2. Where a tenant in common holds over after partition, his possession shall not be considered adverse until a demand is made by the other tenants, unless he does some act amounting to an actual exclusive possession, which could give notice that he intended to keep out all others, or some act amounting to a disclaimer of the rights of the other tenants.

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

This is an action of ejectment to recover the land mentioned in the plaintiff's declaration. Both parties claim under John Anders, Jr., who died in 1814, leaving several children, among them the defendant and James Anders, who died in the year ...., leaving the plaintiffs and several other children. In the year .... a petition for a division of his real estate was filed by the heirs of John Anders in the County Court of Bladen County where the land lay. At ..... Term five commissioners were appointed by the court to make partition, who made their report to February Term, 1835, and at the same term it was confirmed and ordered to be recorded and registered. The present defendant, at the May Term succeeding, filed his petition to rehear the decree so made, and at August Term succeeding it was, by an order of the court, dismissed, and the petitioner appealed to the Superior

Court, where the case was continued from term to term, until October Term, 1839, when it was referred to the ar- (215) bitrament of Robert Strange and Owen Holmes, Esqrs., who made their award, under their hands and seals, to Spring Term, 1840, when it was confirmed by the court and ordered to be certified, enrolled and registered, which was accordingly done. The arbitrators incorporated into their award the report made by the commissioners to the County Court in 1835. It appeared from the award that the submission was made by the parties and under a rule of court. It recites, "This cause, by consent of parties and under a rule of court, being referred to Robert Strange and Owen Holmes, with power, etc., and their award to be a judgment of the court, and that the parties, agreeable to said award, and if so required, are to execute new title deeds, so as to pass and vest the title to the disputed premises, agreeable to said award." The arbitrators then award "that the lands of John Anders, Jr., be and they are hereby divided among the said parties as they were heretofore divided by William H. Beatty," etc. Mr. Beatty and the other persons mentioned in the award were the commissioners appointed by the County Court of Bladen to make partition. By that partition, lot No. 2, the land in dispute, was allotted to the heirs of James Anders. Before this action was commenced the plaintiffs had demanded the possession of the land from the defendant, who refused to deliver it up. The demand was made at the town of Elizabeth, which is twenty miles from the premises.

The plaintiff claims the lot in question, as one of the heirs and as a purchaser from the other heirs. The defendant claimed to have been in the adverse possession of the lot when those deeds were executed, and that they conveyed nothing to the plaintiff, and denied that the arbitrators had any right, under the submission, to divide the land of John Anders, Jr., and the demand, as proved, was not sufficient.

His Honor instructed the jury that the demand was (216) sufficient, and that if, at the time the lessor of the plaintiff purchased from the other heirs, the defendant was in possession of the land, claiming it adversely, the deeds passed no title, and the plaintiff could not recover but one-sixth of the lot in question; but if the defendant did not hold adversely, at the date of the deeds, then, if they were satisfied that lot No. 2 had been allotted to the heirs of James Anders by the commissioners, and the defendant was in possession and refused to give it up on the demand, which was made, the plaintiff was entitled to recover the whole of said lot, and they should find the defendant guilty.

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

Strange for plaintiff.
W. H. Haywood and *W. Winslow* for defendant.

NASH, J. Exception is taken to the charge of the presiding judge upon the ground that he erred in his instruction to the jury as to the allotment of No. 2, in the partition made by the commissioners. After the case on the petition to rehear had gotten into the Superior Court the parties agreed to refer the case to the arbitrament of two gentlemen, selected by themselves, to wit, Messrs. Strange and Holmes, which was made a rule of court. These referees, in their award, adjudge "that the lands of John Anders, Jr., deceased, be and they are hereby divided among the parties as they were heretofore divided by William H. Beatty," etc. Mr. Beatty and the other persons mentioned in the award were the commissioners appointed by the County Court to make partition of the lands of John Anders, Jr., among his heirs, and in their report the lot No. 2, the one in question, was allotted to the heirs of James Anders. It (217) is contended by the defendant that the arbitrators exceeded their authority in making partition of the land. This may be so, but the objection is not now open to him. The award was returned to the court and confirmed by a judgment of that tribunal. As far as the case discloses the fact, the defendant made no opposition, and acquiesced, not only in the report, but in the judgment. Then was the time for him to have made known his objections. That judgment is still in full force and unreversed, and while it continues in force, being a record, it cannot be contradicted, because it imports absolute verity as to everything embraced in it. By the judgment of the Superior Court, then, on the award, the lot in question, No. 2, was allotted to the heirs of James Anders.

The defendant further excepts to the charge because his Honor instructed the jury if lot No. 2 was allotted to the heirs of James Anders, that the plaintiff was entitled to recover the whole lot. The plaintiff was one of the heirs of James Anders, and claimed to have purchased the shares of all the other heirs. To the conveyances from them the defendant objected that he was, at the time of their execution, in the adverse possession of the land. The question was left by his Honor to the jury to ascertain whether the defendant's possession was adverse or not; of this the defendant had no right to complain. To the time of the partition made he was in possession as a tenant in common

with the other heirs of John Anders, and held the possession for them as well as for himself. The partition, it is true, severed the joint possession, but by itself it did not make the possession of the defendant adverse. He held over by the sufferance of the heirs to whom it was allotted, in which case notice to him was necessary before he could be converted into a wrongful holder or make his possession tortious. He held the lot No. 2 for the heirs of James Anders. In this case we see no evidence of any act done by the defendant amounting to (218) an actual exclusive possession, which could give notice that he intended to keep out all others, nor any act amounting to a disclaimer of the right of the heirs of James Anders to the lot. *Love v. Edmundson*, 23 N. C., 152; *Murray v. Shanklin*, 20 N. C., 431.

The defendant had not such a possession as to reduce the title of the heirs of James Anders to a mere right, and the conveyances by them to the plaintiff were not void, but transferred to him what right was in them. The demand, stated in the case, was sufficient notice to the defendant, and his refusal to deliver possession made him a wrongdoer.

PER CURIAM. Judgment affirmed.

DAVID KIME v. JOHN T. BROOKS.

The signing, sealing and delivery of a deed by an agent, except where the authority is by an instrument under seal, will only be valid when they are done in the actual presence of the principal.

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

This is an action of debt on a bond of one Hamlin and the defendant's testator, and was tried on *non est factum* pleaded. To establish the execution of the bond by the testator, his daughter was called as a witness, and she deposed that (219) a servant of Hamlin brought a letter to her father, the testator, at his house, inclosing the paper now sued on, which was then signed and sealed by Hamlin, and had a seal for another name, and requesting the testator to sign it, with a view to raise money on it; that her father, by reason of age and infirmity, could not write, and directed her to sign the paper for him; and that for that purpose he laid the paper down on a table in the house and turned away and went out into the yard, and she then signed his name and delivered it to the

servant, who took it away; that at the time she signed the paper she heard her father conversing with his wife in the yard, and that she did not then see him, nor believe that he could see her; and that no objection was afterwards made by her father to what she had done. The witness further stated that she had been in the habit of signing her father's name by his directions to Hamlin's notes and those of other persons.

The court instructed the jury that there was such a presence of the testator as would make the signing by the daughter binding on him, and that if the paper was left on the table with the intent that the daughter should hand it to the servant when signed, then her delivering it, as stated by her, was a good delivery, though the testator was in the yard at the time. There was a verdict for the plaintiff, and the defendant appealed from the judgment.

Morehead for plaintiff.
Haughton for defendant.

RUFFIN, C. J. This Court does not concur in the instructions to the jury. The Touchstone, 57, states the rule upon which the case depends in a short, but very clear manner: "Where one person delivers an instrument as the act of another person, who is present, no deed conferring an authority is requisite. But a person cannot, unless authorized *by deed*, execute an in-
(220) strument as the act of a person who is absent; and every letter of attorney must be by deed." The plain meaning of the passage is that what a person does in the presence of another, in his name and by his direction, is the act of the latter, as if done exclusively in his own person; but that what is done out of his presence, though by his direction and in his name, cannot in law be considered an act in *propria persona*, but one done by authority; and that when the authority is to execute a deed by signing, sealing and delivering it for the party, and especially the delivering, it cannot be oral, but must be by deed. There are some instances in modern times in which judges have been moved by the hardship and justice of the case to depart in some degree from this rule, though so precise in its terms and so wholesome in its general application. But in this State it has been scrupulously adhered to, when it operated to the prejudice of claims as just in all respects as the present, if not more so. Thus in *Davenport v. Sleight*, 19 N. C., 381, it was held that an instrument signed and sealed by the defendant in blank and delivered to an agent, with directions to purchase a vessel for the defendant, and fill up the instrument with the price to

be agreed on and deliver it, was not a good bond, though the defendant afterwards declared his approbation of what had been done. It would afford admission to too many abuses, especially upon infirm and illiterate persons, to admit parol evidence of an authority to execute and deliver deeds. It has been thought that it was going further than principle would justify to allow of a delivery as an escrow, unless the final delivery be authorized by deed. But that seems to stand on firm ground, for the absolute delivery by the party himself rests in the testimony of witnesses, and the conditional delivery by him may, therefore, well depend upon the like proof. But when the (221) party himself does no act, but the whole transaction is performed by another in his name and in his absence, the security of titles requires that the authority to act should be by deed, as a permanent evidence of its nature, which cannot so easily be fabricated or misconstrued. The law may well be different with respect to notes and other contracts not under seal, because their operation is generally barred, unless used in a period comparatively short. But deeds are of enduring efficacy, and one, executed like the present, may be set up at any distance of time, when the conditions or circumstances under which it was authorized are incapable of proof. Besides, deeds operate without proof of consideration and *proprio vigore*, while it is otherwise with simple contracts. The Court holds, therefore, that it was indispensable to the validity of this instrument, as a bond, that the party should have been present at its execution and delivery. That he was not present seems evident and certain. The daughter says she did not, at the time she signed the paper and delivered it, see her father, nor did he or could he see her, as she believes. They could not, therefore, be said in any just sense to be in each other's presence. The act of the daughter could not be said to be her father's, in that he saw or knew or could know of his own knowledge that she was in fact doing what he directed her; but it rested in his confidence that she would pursue his directions, and in her testimony that she did pursue them. The father could know only from her relation, and not for himself, what she had done. Therefore, it is plain that her acts were not in his presence. In the execution of wills it has always been held that, under the statute which requires the attestation of the witnesses in the presence of the testator, the attestation must be at least in the same room with the testator, or, if not, in such a situation as to be in fact within his sight, as in the case of the lady who sat in her (222) carriage while the witnesses wrote their names at a window within her view. But here the witness proved, and the

court assumed, that the father was not in the room nor in sight of the daughter when she executed and delivered the instrument; and if so, he was not present. For if the person cannot see or know for himself, at what distance shall he be said to be present, and at what absent? There can be no rule but the one that he must be in such a situation as to know what is done, and be able at the instant to control the agent.

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

Cited: Devereux v. McMahon, 108 N. C., 140; *Moose v. Crowell*, 147 N. C., 552.

JOHN HOLDFAST v. WILLIAM B. SHEPARD.

1. Where a recovery in ejectment is effected on the demises of two only out of several tenants, and afterwards is brought for mesne profits, none but the shares of such mesne profits to which those two tenants are entitled can be recovered.

2. And it makes no difference whether the action for the mesne profits be brought in the name of the fictitious lessee or of his lessors.

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

The action is trespass for *mesne* profits, brought in the name of the plaintiff in ejectment, after his lessors were put into possession under a *habere facias possessionem* from this Court in the case reported, 6 Ired., 361. The judgment was there given on the first count, which was on the demise of two per-
(223) sons who were, with others, the heirs at law of Jeremiah M. King, from whom the land descended. The demise was of the whole of the premises and the verdict was a general one of guilty. The present action is brought at the instance of the two persons on whose demise the recovery in ejectment was made. On the trial the defendant moved the court to instruct the jury that they could find only such aliquot parts of the rent and damages as those two persons were entitled to, as some of the heirs of King. But the court refused to give the instruction prayed for, and directed the jury to assess the damages to the whole value of the profits from the day of the demise to that of the plaintiff's lessors going into possession. From a verdict and judgment accordingly the defendant appealed.

Iredell for plaintiff.

J. H. Bryan for defendant.

RUFFIN, C. J. The Court thinks the law was not correctly laid down to the jury. It is certainly most proper and generally best answers the purposes of justice that the verdict should specially state the interests of the lessors of the plaintiff, when these are several, or when only some of the tenants in common bring the suit. But as the party may not be prepared always to show his particular share, and the defendant is guilty, if he hath ejected the plaintiff from any part of the land to which he was entitled under the lease, it has become a practice to render the verdict in a general form, even when the whole of the premises is demanded. The reason is that the Court deems the action fictitious to many purposes, and therefore keeps it under its control, and will, in a summary way, correct any abuses committed under color of such general demise and verdict. Hence, it has been commonly said in such cases that the lessors of the plaintiff take possession at their peril. Upon that ground it was that the judgment was affirmed in the suit (224) between these parties, as was then stated (*Holdfast v. Shepard*, 28 N. C., 361); and in so holding the court only followed previous cases. In *Cottingham v. King*, 1 Bur., 629, *Lord Mansfield* mentioned that in the fictitious action of ejectment the plaintiff is to show the sheriff and to take possession, at his peril, of only what he has title to; and if he take more than he recovered or showed title to, the court will in a summary way set it right. He said the same in substance in *Connor v. West*, 5 Bur., 2674; and in *Roe v. Dawson*, 3 Wils., 49, the defendant was restored to certain shares to which the lessors of the plaintiff had not entitled themselves. There can be no doubt, then, if the sheriff in this case turned out the defendant from the premises altogether, and put the two lessors of the plaintiff into possession of more than their shares, that he did wrong, and the court upon application would order restitution; for the recovery of one tenant in common is not a recovery for all of them, and does not entitle him to take possession for all. That is clear from the fact that one tenant in common may recover from another in this general form and may then bring his action for *mesne* profits. *Cutting v. Derby*, 2 Wm. Bl., 1077. Indeed, one of the tenants in common may be barred of his entry by the statute of limitations and the other not, because, as here, she was a *feme covert*. A person thus entitled to but a share is let in according to his title. How the fact in this case is does not distinctly appear. If the parties only entered according to their title, they certainly cannot recover in respect of the shares of which the defendant remains in actual possession. But we rather understand the case to be that the defendant was

put out altogether. Even in that case, however, we hold that no more than the shares of the parties who brought the former and present actions can be recovered; for, properly, they (225) are in possession only of their own shares, and the possession of the other undivided parts is, by legal intendment, either in the other heirs of King or the present defendant. If in the latter, then plainly the action will not lie in respect to those parts; and if in the former, they may still sue for their shares of the profits, and the defendant could not plead in abatement to their suit, after having omitted to do so in the present. Taking the case, then, any way, the recovery ought to be for only the proportion of the profits which belong to these as some of the owners. The manner of bringing the action in the name of *Holdfast* can make no difference, for he can have no better right than his lessors had.

There was also a question made upon the statute of limitations; but the facts appear so imperfectly in the transcript sent here as not to be entirely understood, and therefore nothing can be said on it.

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

Cited: Lenoir v. South, 32 N. C., 242; *Pearce v. Wanett, ib.*, 453; *Camp v. Holmesly*, 33 N. C., 212; *Thomas v. Kelly*, 35 N. C., 45; *Blount v. Wright*, 60 N. C., 90; *Lenoir v. Mining Co.*, 106 N. C., 477.

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(226)

DEN ON DEMISE OF HARRIS S. PHELPS *v.* JOSEPH B. LONG.

1. Where a person, already in possession of land, takes a lease from another, and holds over after his term has expired, whether this is a case coming within the provisions of the act, Rev. St., ch. 31, sec. 51, requiring bonds from tenants refusing to surrender possession, etc. *Quere*.

2. But in all cases where the landlord wishes to avail himself of the provisions of that act, he not only must state the lease and that the term has expired, but he must also set forth in his affidavit explicitly, or in such a manner that the court may necessarily or fairly draw the inference, that the tenant, after the term expired, had *refused* to surrender the possession.

3. What notice to quit, from a landlord to a tenant, is required in this State. *Quere*.

4. Where a person was sued as casual ejector, and the court improperly refused him permission to plead, upon the ground that he was a tenant holding over, and therefore bound to give a bond as

required by the act, Rev. St., ch. 31, sec. 51, when it did not appear that he had refused to deliver possession, and thereupon entered judgment by default against them: *Held*, that he was entitled to an appeal.

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

The declaration is entitled of September Term, 1848, and was served on Long, as the tenant in possession, 24 August of that year. The demise is laid as of 10 February, 1844. At September Term Long applied to be admitted as defendant, offering to give bail and enter into the common rule and plead not guilty. But the counsel for the plaintiff objected to his being allowed to plead, and in support of the objection he filed the affidavit of the lessor of the plaintiff, in which he stated "that in 1839 Joseph Long proposed to rent of him the tract of land which the affiant had bought of John Chesson, and on which the said Long then lived, being the premises described in the declaration; that they agreed upon the (227) sum of $25 per annum, and Long gave his note for the amount, which he paid in 1840; that he continued in possession in 1841, and gave his note for the like amount and continued to occupy it, and gave notes for the rent in 1841 and 1842; and that in August, 1843, affiant gave notice to said Long to quit possession and to stop the tenancy." Thereupon the court ordered that Long should not plead unless he gave a bond with sufficient penalty and sureties, with condition that he would pay the lessor of the plaintiff all such costs and damages as should be recovered in the suit; and, Long declining to give such bond, judgment final was rendered against the casual ejector, and Long appealed.

W. N. H. Smith for plaintiff.
Heath for defendant. (229)

RUFFIN, C. J. The point is whether this is a case within the act of 1823, Rev. St., ch. 31, sec. 51. It provides that the tenant in possession shall not be entitled to plead unless he give a bond as required in this case, but that there shall be judgment against the casual ejector, if the lessor of the plaintiff shall file an affidavit at the first term that the tenant in possession entered into the premises as his tenant, and that his term therein has expired, and that the tenant refuses to surrender the possession of the premises to the lessor of the plaintiffs, with the privilege to the tenant of offering counter-affidavits.

One question on the act is whether the acceptance of a lease by one already in possession is within it: as if the owner of

land sell it, and, without going out of possession, takes a lease from his vendee; or if a tenant under one person takes a new lease from the assignee of the reversion. Literally, the act is confined to the case in which the entry was at first under the lessor of the plaintiff. No doubt, the reason is that each of those persons has a precise knowledge of the contract, thus made by himself personally; so that neither can be under a mistake as to his rights or those of the other party. Therefore, holding over against the demand of the lessor must be in bad faith on the part of the tenant, and he ought not to hinder the landlord's remedy to regain the possession without securing the rent, damages for waste and costs. Though that principle may not, more than the letter of the act, take in the case of an assignment of the reversion, yet when one, though before in as owner or as lessee of another, takes a lease from his alienee or a new lease from the assignee of the reversion, it seems substantially to fall so entirely within the mischief against which the act is directed as to be within its fair construction. For it would be (230) very idle that the tenant should go out for an instant, and then return, for the sake of creating such a tenancy as would, under the act, tend to prevent the tenant from holding over. The Court, therefore, inclines strongly to the opinion that the bond might have been required from Long, notwithstanding he did not go into possession under a lease from Phelps, but only continued in possession under a lease granted by him after he became owner of the land. Yet the points need not be now adjudged, as it is not necessary to the decision of this case, inasmuch as the Court holds the affidavit insufficient by reason of defects in other essential points.

The act does not give this security to a landlord when the tenant merely holds over, but only when he refuses to surrender the premises to the lessor after his term therein expired. The lessor of the plaintiff must, therefore, establish the two further facts, that the term has expired and that still the tenant refuses to deliver up the possession. The affidavit here contains no such statement in either respect. Perhaps it ought to be required to say so in terms. At all events, the statements in it should be such that the court would be obliged to infer those facts by a fair, if not a necessary, construction. For the court ought not to require a bond to secure the rent and damages in any case in which the jury would be unable, upon evidence to the same facts, to give them, according to the subsequent provisions of the act. Those provisions are, that in such cases the jury shall inquire whether the defendant refused to surrender the premises after his term therein had expired, and if they find

affirmatively on those points, then they are to assess the damages, including the value of the occupation from the expiration of the term and damages for waste during the holding over; for which there is to be a summary judgment given on the bond. Very clearly, then, those facts ought distinctly and affirmatively to appear on the affidavit. Here they do not; nor can they be reasonably implied. Certainly, holding over (231) merely will not amount to a refusal to surrender the premises, for the assent of the landlord may be presumed, unless the contrary appear. There must be an express refusal, or a demand of possession or something else that will turn the tenant into a trespasser. According to the words of the act, the jury must find that the party "*refused* to surrender the premises *after* his term expired," which would seem to imply a demand and refusal at the expiration of the term, or so soon afterwards as to rebut an implication of the acquiescence of the landlord. And this must certainly be so when the term is for a definite period, and therefore no notice is necessary to determine the tenancy; for in such a case, if possession be not demanded at the end of the term, or an explicit declaration made beforehand to the tenant, that the landlord will require him to go out at the expiration of the term, there will be nothing to give to the holding over the character of a refusal on the part of the tenant to restore the possession, but by such holding over he becomes tenant from year to year. It may be admitted that, if the lease here were definitely for the year 1843, the notice to quit, given in August, might be a sufficient demand of the possession at the end of that year, so as to be evidence that the subsequent holding over amounted to a refusal of the demand. But that is not the nature of the lease, as stated in the affidavit. It is explicit only in setting forth a letting in 1839 at an annual rent of $25; and that under it the defendant occupied until 1843, giving notes in 1839, 1840, 1841 and 1842, respectively, for a year's rent, and subsequently paying them. It does not specify at what period of the year the contract was made, nor any definite term, either as to its beginning or ending. Then, it was plainly a tenancy from year to year; but from what day the year was to be reckoned no one can say upon the face of the affidavit. Now, if it be admitted that in a tenancy from year to year there need be no demand of the possession distinct from (232) the notice to quit—and so we suppose the law to be—yet clearly, we think, that effect can only be allowed to such a notice as is valid and effectual to determine the tenancy. Here the notice was given some time in August, 1843; and it is impossible to say that it was due notice. It has not been directly decided

in this State, as far as we are aware, what is the proper notice; and it may be possible that less than the half year, required in England, may be deemed reasonable, or that different periods may be adopted according to the situation of the premises, the interests of agriculture or the seasons at which the terms may expire. The Court gives no opinion on those points, further than to say that it is at least prudent to be on the safe side by giving a half year's notice. But there must, at all events, be some reasonable notice in such cases from the landlord to the tenant, or *vice versa*, to prevent mutual disappointment and loss. Now, as it does not appear on what day in August, 1843, the notice was given, nor when the current year would be out—that is, at the end of 1843, or at an earlier or later day—it is impossible to determine whether the notice was for half a year or any other period in particular. Consequently, the court could not determine that it was reasonable, so as to put an end to the tenancy or convert the lessee into a trespasser, and make his continuing in possession until 10 February, 1844, evidence of a refusal to surrender the premises after his term had expired. It is to avoid the danger of the court's acting upon vague conjectures on those points that the act requires that the lessor of the plaintiff shall swear distinctly that the term had expired, and that after such expiration the tenant refused to deliver up the possession. Nothing less ought to be deemed sufficient to preclude the person in possession from the common right of defense. The tenant might have held over upon
(233) a fair claim of right, on the ground that the notice was not such as made it binding on him to go out; whereas the case within the purview of the act is that of a willful wrong by the tenant in withholding from the landlord his land after a lawful demand of the possession.

It was suggested at the bar that Long could not appeal, as he had not been admitted to defend, and, therefore, was not a party to the record. But the Court holds otherwise. It may be true, if the tenant does not appear and apply to be admitted as defendant, that he cannot bring error or have an appeal, which are rights belonging to parties and privies. But even in that case the tenant's rights are noticed so far that, upon his subsequent application, the judgment against the casual ejector will be set aside for irregularity, and a writ of restitution awarded. But when he appears it is of common right he should be admitted to defend upon the usual terms; and if that be refused to him, undoubtedly it is an error, which he may have corrected by a higher court. So it is here; for, although the statute authorizes the imposition of other terms in certain cases,

this is not one of them; and therefore the tenant had a right to be heard before being deprived of his possession, and to be heard upon giving bail and entering into the common rule, according to the course of the court.

The judgment against the casual ejector was, therefore, erroneous, and is reversed; and the case is remitted to the Superior Court to proceed further therein according to law and right.

PER CURIAM. Ordered accordingly.

Cited: Shannonhouse v. Bagley, 48 N. C., 229.

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(234)

DEN ON DEMISE OF WILLIAM JORDAN v. ROBERT MARSH.

A, by virtue of an order of the County Court, founded on a judgment before a justice and an execution thereon levied on 8 March, 1842, issued a *venditioni exponas*, bearing teste of May Term, 1842, under which the land of B was sold and A became the purchaser; C issued a *venditioni exponas* tested of May Term, 1842, pursuing a *fi. fa.* tested of February Term, 1842, under which the same land of B was sold and D became the purchaser, and having effected a recovery in ejectment was about to turn B out of possession, when B accepted a lease from D and continued in possession: *Held*, that, in an action of ejectment by A against B, although D, who had been admitted to defend as landlord, could make no defense which B could not have made, yet B himself might have given in evidence these circumstances to rebut A's claim to recover, by showing D's title to be paramount to A's, and that he (B) was D's tenant.

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

In this action of ejectment the following bill of exceptions was sent up by the judge of the Superior Court:

On the trial of the issues joined the counsel for the plaintiff produced and gave in evidence, in support of the said issue on the part of the plaintiff, the record of a judgment in the Court of Pleas and Quarter Sessions, whereby it appeared that one John Edwards obtained, before 8 March, 1842, a judgment before a justice of the peace of Chatham against Alfred Fleming, upon whom the declaration was served; that an execution duly issued thereon, and, for want of goods and chattels to satisfy the same, was duly levied upon the premises in the said declaration mentioned on the said 8 March, 1842; that the said execution and levy, with the warrant and other papers relating thereto, were duly returned to the said Court of Pleas and

(235) Quarter Sessions at its May Sessions thereafter, and that such proceedings were had in the said court afterwards, to wit, at February Sessions in 1843, that the judgment of the justice was confirmed, and an order duly made for the sale of the premises so levied upon; that a *renditioni exponas* issued thereupon, returnable to the May Sessions following, and the said premises were sold on 9 May to the said William Jordan, the lessor of the plaintiff; and the plaintiff's counsel, in further support of the said issue on his part, produced and gave in evidence to the jury a deed, duly executed by the sheriff, conveying the premises to the said William Jordan, and proved that, at and before the service upon the said Fleming of the said declaration, he was in the possession of the said premises. And thereupon the counsel for the defendant, in support of the said issue on his part, offered to prove that at the February Sessions, 1842, of the said Court of Pleas and Quarter Sessions, one Amos Brewer duly obtained a judgment against the said Alfred Fleming, and duly caused to be issued thereupon an execution, called a *fieri facias*, tested of the said February Sessions, and returnable at the May Sessions thereafter; that the said execution was duly returned at the said May Sessions; that a part of the moneys specified therein only had been made; that an *alias* execution was thereupon issued from the said May Sessions, returnable to the August Sessions thereafter; and that the sheriff, under the same, duly sold the said premises on the second Monday of July following, and that at the said sale the defendant became the purchaser; that the said *alias* execution was duly returned, and a deed made by the sheriff to the defendant for the said premises; that the said Alfred Fleming, refusing to surrender the possession, the defendant afterwards,

(236) to wit, on 19 January, 1844, brought an action of ejectment against the said Fleming in the said Court of Pleas and Quarter Sessions to recover the same; that the said Fleming appeared and was made defendant in the said suit, and pleaded not guilty; and that afterwards, at February Sessions, 1845, a judgment was duly rendered against the said Fleming for the recovery of the possession of the said premises. And the counsel for the defendant further offered, in support of the said issue on his part, to prove that afterwards, when the said defendant was entitled to have a writ of possession against the said Fleming on the said judgment, and before issuing out the same, the said Fleming agreed to become the tenant of the premises under the said defendant, and accordingly did on 10 March, 1845, accept a written lease from the defendant until 9 October next thereafter, and gave his note for the rent, and a bond,

conditional for the surrender of the premises to the defendant at the expiration of his term. And the defendant's counsel prayed the judge to admit and allow the said matters to be proved and given in evidence to the jury as relevant and competent to maintain the said issue on the part of the defendant. But the plaintiff's counsel objected to the said evidence and insisted that the defendant, having been admitted a defendant in the room and stead of the said Fleming, and as his landlord to defend his possession, was not entitled to the benefit of any evidence which should not in law be admissible on the part of the said Fleming, had he been the party to the said issue; and that in law the said Fleming could not offer such evidence in support of such issue; and the judge, being of opinion with the plaintiff's counsel, refused to allow the matters so offered on the part of the defendant to be proved and submitted to the jury, to which opinion and refusal the defendant by his counsel excepted, and thereupon the judge, at the request of the defendant's counsel, hath set his hand and seal to this bill of exceptions, containing the said matters, and it is ordered to be annexed to the said record, this third Monday of March, (237) 1847, at the courthouse of the said county.

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

Waddell and *J. H. Haughton* for plaintiff.
Badger, G. W. Haywood and *W. H. Haywood* for defendant.

PEARSON, J. The bill of exceptions presents two questions: Was Marsh, who, by order of the court, was substituted and made defendant in the room and stead of Fleming, entitled to the benefit of any evidence which would not in law be admissible on the part of the said Fleming? It is not necessary to decide this question, because we think there was error in the decision of the second question, and it is sufficient to say that we see nothing to take this case out of the general rule, that a landlord who is admitted to defend is confined to such defense as the tenant could have made.

The second question is: Was the defendant, supposing him to be confined to such defense as Fleming was in law allowed to make, entitled in law to rely upon the matters on his part to support the issue? We fully recognize the correctness of the general rule, that a purchaser at a sheriff's sale is entitled to recover in ejectment against the debtor, whose estate he has bought, upon showing a judgment, an execution sale, and sheriff's deed in pursuance thereof. For having paid his money in

satisfaction of the defendant's debt, he is entitled to whatever estate the defendant owned, and to the possession which he had, and it is right that he should be put into possession without any contest with the defendant as to the title.

(238) We can, however, see no reason why, in the case under consideration, Fleming, who had taken a lease and thereby in effect acquired a new possession under a third person, who had brought an action of ejectment and was about to turn him out of possession after the purchase by the lessor of the plaintiff, should not be allowed to make defense, by showing that the person under whom he acquired the new possession had a paramount legal title. If he had been put out of possession, and then accepted a lease and entered in pursuance thereof, it would be clear that he could make such defense. For what end should he be required to go through the useless form of being put out of possession, merely to be at the trouble of going back again?

A lessee for years, or other particular estate, during the continuance of the estate and while he holds the possession acquired under it, is not allowed to dispute the lessor's title. After the expiration of the estate he must give up the possession to him of whom he got it, before he is at liberty to set up title in himself. When he has done so he may assert title, either one which existed before he accepted the estate and possession or one subsequently acquired; but he cannot do so before, on account of the privity of estate. It would be treachery and bad faith to attempt to withhold possession from him of whom he received it.

There is no reason for applying this doctrine in its fullest extent to a debtor in possession of land sold at sheriff's sale. He is not the tenant of the purchaser—there is no privity of estate—nor did he receive the possession from him. The rights of the purchaser are sufficiently secured by holding that he acquired whatever estate the debtor owned and has a right to the possession which he had at the time of the sale. As long as matters remain in *statu quo* the debtor's possession is not adverse, but there is no treachery or bad faith in his acquiring a

(239) new possession under a paramount title in the manner offered to be proved by the defendant in this case.

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

Cited: Lyerly v. Wheeler, 33 N. C., 290; *Grandy v. Bailey,* 35 N. C., 224; *Hunsucker v. Tipton, ib.,* 482; *Gilliam v. Moore,* 44 N. C., 97; *Hassell v. Walker,* 50 N. C., 271, 2; *Sinclair v. Worthy,* 60 N. C., 116; *Credle v. Gibbs,* 65 N. C., 193.

THOMAS BELL v. WILLIAM CLARK ET AL.

In an issue of *devisavit vel non* where the subscribing witnesses to the supposed will disagree as to the capacity of the supposed testator, other proof may be given as to that fact and the jury must decide upon the whole evidence.

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

This was an issue of *devisavit vel non* as to an instrument dated 28 November, 1843, and propounded as the will of Elijah Bell. It had two subscribing witnesses, and they were both examined. One of them, Lassiter, deposed that he was sent for by the deceased to write his will, but that he was unable to do so because he had the rheumatism, and that the deceased then requested his brother, Thomas Bell, to write it, and he did so; that he, the witness, was present when the will was written, and thought the testator had understanding and capacity to make a will; that he was, however, drinking during the time, and became a good deal intoxicated, but that he knew what he was doing, and dictated the dispositions of property contained in the will; that after it was written it was read over to (240) the deceased and approved and executed by him, and at his request then attested by himself and the other witnesses; that the deceased then handed the paper to this witness to keep, and that he kept it in his possession until April, 1847, when one Farrow brought him a message from the deceased, requesting him to carry the will to him; that he accordingly did so, and that the deceased asked that it should be read to him, which the witness did in the presence of Farrar, and that the deceased then said he was satisfied with it, and directed that it should be put into his desk, which was done, and that it was found there upon the death of the party in June following.

The other subscribing witness, Neal, deposed that on the day the will bears date he went to the house of the deceased for the purpose of collecting money from him, as a constable, and the deceased requested him to witness a paper, which he acknowledged; and that he did so without knowing the character of the paper, though he suspected that it was a will; and that Thomas Bell and the witness were present. He further stated that the deceased was drinking at the time and considerably intoxicated, and in his opinion was not capable of transacting business generally.

Farrar testified that he was a neighbor of the deceased, and that in April, 1847, the deceased was sick and sent for him, and that he went and stayed with him two or three days; that the

deceased was then perfectly sober, not having drunk any spirits for several weeks; that he requested the witness to call on Lassiter and ask him to bring him his will; and that he did so, and Lassiter immediately brought it; that it was then read by Lassiter to the deceased in the presence of the other witness, and he said it was his will and that he was satisfied with it, and directed that it should be put into his desk; that the
(241) deceased was then of sound mind, and died in June thereafter.

A physician deposed that he attended the deceased six or seven days before he died; that he was then rational, and told over to him the contents of his will, which corresponded with it when he heard it read after his death.

Another witness stated that he lived with the deceased in 1844; when drinking he frequently spoke of his will, and told the witness its contents, and they corresponded with the will as read on the trial.

Another witness deposed that the deceased told him before the will was made that he intended making one, and that about three weeks after it was made the deceased told over its provisions to him, and that he was rational at the time of those conversations.

The deceased was unmarried and had no children, and, after giving away parts of his property to several collateral relations, he gave the bulk of it to his brother, Thomas Bell, whom he made residuary legatee and executor, and who is the propounder.

The counsel for the caveators contended that unless both of the subscribing witnesses testified to the capacity of the deceased, the paper was not well proved; and that the subsequent declarations and conduct of the deceased were not sufficient, within the provision of the statute requiring two witnesses to a will. But the court was of a different opinion, and instructed the jury that if they found upon the whole evidence that the deceased was of sound mind and memory at the time he executed the paper, they ought to find for the paper as a good will. The jury gave a verdict in favor of the will, and from the judgment accordingly the caveators appealed.

McRae for plaintiff.

(242) *Waddell, J. H. Bryan* and *J. H. Haughton* for defendants.

RUFFIN, C. J. The Court thinks that the judgment ought to be affirmed. The law makes two subscribing witnesses to a will indispensable to its formal execution. But its validity does not depend solely upon the testimony of those witnesses. If their

memory fail, so that they forget their attestation, or they be so wanting in integrity as willfully to deny it, the will ought not to be lost, but its due execution and attestation should be found on other credible evidence. The leading case on this point is that of *Lowe v. Joliffe*, 1 Bl., 365, which was a remarkable one, and fully establishes this position. It has never, we believe, been questioned, but has been always spoken of with approbation. In *Jackson v. Christman*, 4 Wend., 277, it was laid down as undoubted law that if the subscribing witnesses all swear that the will was not duly executed, yet it may be supported by other witnesses or circumstances. In this Court *Lowe v. Joliffe* has been always understood to be law. *Crowell v. Kirk*, 14 N. C., 355. For, although the law requires all the witnesses to be called, if within the jurisdiction, it would be most unreasonable to conclude the party calling them, as to the execution of a will more than in respect to any other instrument. The obligee must call the subscribing witness to a bond; but as his testimony that it was executed does not conclusively prove it, so his denial of his attestation or of the execution by the obligor does not absolutely destroy it, but the parties may give other evidence, that it was or was not duly executed. *Holloway v. Lawrence*, 8 N. C., 49; 1 Phil. Ev., 475, and the cases cited. The same reason applies to a will with even more force. As was said in *Crowell v. Kirk*, the subscribing witness to a will is rather the (243) witness of the law than of the party calling him, and therefore the party is not bound to take his testimony as true, but ought to be at liberty to contradict and discredit him. It is impossible the Legislature should mean that one of the most solemn acts of a man's life should be defeated by the perjury of one man, or, indeed, any number of men; and much less by his defect of memory or of a discrimination to judge correctly of the party's strength of understanding. For as it is in respect of the fact of execution, so it must be in respect to the capacity of the party deceased, whether the defect be alleged to arise from insanity or the less permanent cause of intoxication. The jury are not confined to the opinions given by the subscribing witnesses on that point, nor to the facts on which they say they formed their opinions, but may take their judgment from other sources on which they rely more. Here the subscribing witnesses concurred in the facts which go to make up what is called the execution; but they differed as to the degree of intoxication and of its effects on the party's mind and memory. The weight due to their respective opinions must depend on their intelligence and the opportunities they had of knowing how far the party's faculties were ordinarily overcome by intoxication, and,

particularly, the actual effects at the time of executing this instrument. Perhaps the jury might well have decided as they did, on the comparison in those respects of the two witnesses. But, at all events, when they thus differed it must have been proper to let the jury see by other means that in fact the party had a disposing memory and knew what he was about, and that he was only fulfilling a previous purpose, and that of what he did he was so conscious and had such a perfect recollection that he was able at different times for several years afterwards, both when sober and when drinking, to recite correctly the (244) provisions of the paper. It is not uncommon that subscribing witnesses should not agree entirely in opinion as to the capacity of the party deceased, or as to the facts upon which they found their opinion; and in such cases it is certainly reasonable that either side should show, either by collateral circumstances or by direct proof, that one of them is more credible than the other, or that one of them is mistaken in his facts and the other not. *Clary v. Clary*, 24 N. C., 78.

PER CURIAM. Judgment affirmed.

Cited: Boone v. Lewis, 103 N. C., 43.

ATLAS J. DARGAN v. JAMES W. WADDILL.

1. A stable in a town is not, like a slaughter-pen or a hog-stye, necessarily or *prima facie* a nuisance. But if it be so built, so kept, or so used as to destroy the comfort of persons owning and occupying adjoining premises and impairing their value as places of habitation, it does thereby become a nuisance.

2. If the adjacent proprietors be annoyed by it in any manner which could be avoided, it becomes an actionable nuisance, though a stable in itself be a convenient and lawful erection.

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

This was in case for erecting stables so near the dwelling-house of the plaintiff as, by the noise of the horses and the smell of the litter, etc., to render the plaintiff's house uncomfortable to live in, and thereby much impair its value. The plaintiff proved that his wife, then Mrs. Bates, about 1839, purchased a (245) dwelling-house and lot, situate on one of the main streets in Wadesboro, and being the northwest corner lot of the square immediately west of the courthouse. The square, com-

mencing on the street in front of the courthouse, runs 120 yards on Wade Street and 140 yards south on Green Street, and the plaintiff's lot had a front of 40 yards on Wade Street and extended back about 70 yards. The dwelling-house purchased by the plaintiff's wife fronted on Wade Street, and had been erected and used for a dwelling for thirty years or more. Mrs. Bates had the house moved some five or six yards back so as to have a small front yard, and refitted it and made some additions.

The defendant, in 1841, purchased the house and lot situate immediately opposite the courthouse, and being the northeast corner lot of the square above described. It extended 40 yards on Wade Street and 70 yards on Green Street. The defendant refitted and made many additions to the house, so as to fit it for a hotel.

The lot between the plaintiff's and the defendant's lots, which was 40 yards on Wade Street and extended back 70 yards, had several small buildings on it in front, which had been used as storehouses and shops for mechanics, and in the rear there was a small stable, fit for one or two horses, which had been used for some fifteen years, without a plank floor. In 1841 the defendant purchased this middle lot, removed the small houses in front, with a design of using the lot by erecting a stable suitable for his hotel. Mrs. Bates notified the defendant of her objections to his putting stables so near her dwelling, but the defendant, notwithstanding, erected a large frame stable at the southwest corner of the lot, 50 feet long and wide enough for two rows of stable. The stable was within three feet of the line alongside of the plaintiff's garden, and near a small stable and privy of the plaintiff. The distance from the back piazza of the plaintiff's dwelling to the nearest corner of the stable was 33 yards. The balance of the lot the defendant used as a stable or horse lot, and also built upon it a small log (246) stable fit for two horses between the large stable and the plaintiff's dwelling, the nearest corner being about 12 yards from the plaintiff's piazza, near his kitchen and smokehouse.

The plaintiff married Mrs. Bates in 1841, and resided afterwards with her in the said dwelling-house. The defendant's stable was completed and put in use on 1 March. The large stable had a plank floor, and could hold fifty horses. It was proved that the noise from the tramping of the horses, particularly on public occasions, could be heard by all residing on this square and the adjoining squares, night and day, and rendered the dwelling-house of the plaintiff uncomfortable and disagreeable, and that Mrs. Dargan, who was a nervous lady and in delicate health, was very much annoyed by it. Some evidence

was offered tending to show that, before the writ issued, a disagreeable smell, arising from the defendant's stables, could be perceived in the house of the plaintiff in damp weather, when the wind was blowing from the south to the house, and that, although the defendant had a privy on his other lot, many persons used the stable for that purpose. Some evidence was offered tending to show that, before the writ issued, the defendant kept a stallion in the small stable, but not until the last of the summer, if at all, until the writ issued. The witnesses considered the value of the plaintiff's house, as a dwelling, impaired by the erection of the stables so near to it.

The court charged that a stable, like a kitchen or a privy, being a necessary appendage to a hotel, the defendant, in the reasonable exercise of his rights, was at liberty to erect the stables, taking the evidence as to the location of the several buildings to be true, provided he did so in such a manner as to cause no unnecessary damage to the plaintiff. A man is not required to forego the reasonable use of his own, although by using it he does damage to his neighbor to some extent. (247) It is damage *absque injuria*. A stable differs from a slaughter-pen, tanyard, or hogpen, because the latter are unnecessary and unfit for towns and should be put in remote and out-of-the-way places. If the defendant, before the writ issued, by neglecting to have his stables cleansed at proper times, had suffered the filth to accumulate and become noisome, the plaintiff would be entitled to recover. So the defendant had no right to use the little stable, which was so near the plaintiff's dwelling, as a stand for his stallion, and if he did so, before this writ was issued, the plaintiff would be entitled to a verdict.

Verdict for the defendant. Motion for new trial for error in the charge, which was refused. Judgment, and the plaintiff appealed to the Supreme Court.

Strange for plaintiff.
P. H. Winston and *Iredell* for defendant.

RUFFIN, C. J. It was, we think, a fair inference for the jury from the instructions, as a whole, that the defendant's stable was not a nuisance to the plaintiff, because the act of the defendant in building it was but a reasonable use of his own in erecting an useful appendage to his hotel, and therefore the damage to the plaintiff was not unnecessary. Thus regarded, the Court does not concur in the instruction. It is true that a stable in a town is not, like a slaughter-house or a stye, necessarily and *prima facie* a nuisance. There must be places in

towns for keeping the horses of the people living in them or resorting thither; and if they do not annoy others, they are both harmless and useful erections. But, on the contrary, if they be so built, so kept or so used as to destroy the comforts of persons owning and occupying adjoining premises and impair their value as places of habitation, stables do thereby become nuisances. They are not (necessarily) so; but they may become so, and we think that of the defendant was in (248) fact so. Therefore, the instructions, as applied to this particular case, were calculated, we think, to mislead the jury. In respect to the filth and smells which might or did arise from it, the Court entirely concurs with the directions to the jury; and we suppose the jury must have thought that no serious inconvenience was sustained by the plaintiff's family from that cause. For in that respect a stable may be likened to a privy, which decency and convenience render indispensable. But the proprietor cannot protect himself under that plea if, by neglecting to cleanse it, he allows it to become offensive in the adjacent houses or grounds. So care must be taken to prevent a stable from incommoding the neighbors from the ordure deposited in it. But if the adjacent proprietors be annoyed by it in any other manner, which could be avoided, it in like manner becomes an actionable nuisance, though in itself a stable be a convenient and lawful erection. This stable, it appears, was a wooden building, with a plank floor so constructed that the stamping of the horses on it created such a noise day and night as could be heard, not only throughout the square on which it and the plaintiff's house were situated, but on all adjoining squares, and, in the opinion of the witnesses, impaired the value of the plaintiff's house as a dwelling. That, we think, amounts in law to such a disturbance and annoyance as to be an actionable nuisance. In *Bradley v. Gill*, 1 Lut., 69, it was held that building a smith's forge so near another's house and making such noises with the hammers that the owners could not sleep, was a nuisance, for which an action would lie; for, though the trade of a smith be a necessary one, it must be carried on so as not to injure others in the neighborhood. That case is cited and approved by *Chief Baron Comyns*, Com. Dig., Action on the case for a nuisance, A; and, indeed, the principle is in itself so reasonable that every one must admit it. If that be (249) true of a blacksmith's shop, because the noise of the hammers at unseasonable times deprived a person of his rest, it must be much worse from the stamping of fifty horses on boards laid on sleepers, so as to make a loud sound. It is obvious that the effect complained of must have arisen from the structure of the

building. The defendant might have built his stable with an earthen floor, and thus avoided this annoyance. If it be said that probably a greater evil might have arisen from the greater difficulty of cleansing the stable, the answer is that the defendant had his choice at his risk, for, in truth, he had no right to erect a nuisance in either way, whether by noisome smells or disturbing noises. He cannot excuse one nuisance by urging that, if not committed in that form it might have been worse in another. But, in reality, neither was unavoidable. For, if the situation was such that the horses ought not to stand on the ground, the defendant might have paved the floor, or laid the boards on the earth, or used such as were so thick as not to sound under the hoofs of the horses so loud as to disturb or destroy the repose of the neighboring inhabitants and thereby lessen the value of their property. It appeared affirmatively, then, that the defendant had done "unnecessary damage" to the plaintiff; and we think it would have been proper so to instruct the jury. Therefore, in order that the inquiry may be submitted to them with proper explanations of the rights and duties of the parties, there must be a *venire de novo*.

Of course, it will be understood that an action will not lie in such a case for noises that are barely audible and only occasional, but only for such as really annoy the plaintiff's family and would annoy persons generally who might dwell in the house, so as to impair their rest and comfort materially.

PER CURIAM. Judgment accordingly.

Cited: Hyatt v. Myers, 73 N. C., 237; *Privett v. Whitaker*, *ib.*, 556; *Thomason v. R. R.*, 142 N. C., 313.

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(250)

JAMES IREDELL TO THE USE OF JOHN M. FAUCETT v. WILLIAM BARBEE.

1. A stranger may accept the delivery of a bond, and it is good, unless the obligee refuse to ratify the delivery, but in the absence of proof to the contrary, such ratification is presumed.

2. In construing a deed all useless and unmeaning words are to be rejected, provided enough remains to make the deed sensible. Thus, where a bond, purporting to be a guardian bond, was made to "I., Governor, etc., justices of the Court of Pleas and Quarter Sessions, etc., in the sum of, etc., to be paid to the said justices or the survivors of them," the words "justices of the court," etc., "to be paid to the said justices," etc., are to be rejected as unmeaning, and the bond is payable to I.

3. Where a court has no power to appoint a guardian, but does appoint him, and he gives bond with sureties and takes possession of the estate of the ward, it is not competent for any of the obligors in such bond to object to its validity on the ground of want of power in the court to make the appointment.

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

This was an action of debt upon the following bond:

STATE OF NORTH CAROLINA—Orange County.

KNOW ALL MEN BY THESE PRESENTS, That we, Nathaniel King, William Barbee and David B. Alsobrook, all of Orange County, in the State aforesaid, are held and firmly bound unto James Iredell, Esq., Governor, etc., justices of the Court of Pleas and Quarter Sessions for the county of Orange, in the sum of $10,000, to be paid to the said justices or the survivors of them, their executors or administrators, in trust for the benefit (251) of the child hereafter named, committed to the tuition of the said Nathaniel King; to which payment well and truly to be made we bind ourselves, and each of us, each and every one of our heirs, executors or administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 30 May, 1828.

The condition of the above obligation is such that whereas the above bounden Nathaniel King is constituted and appointed guardian to Elizabeth Fann; now, if the said Nathaniel King shall faithfully execute his said guardianship, and particularly shall well and truly secure and improve all the estate of the said Elizabeth Fann that shall come into his possession for the benefit of the said Elizabeth Fann, and shall render a plain and true account of his said guardianship, on oath before the justices of our said court, in all cases as required by act of Assembly, and deliver up, pay to or possess the said Elizabeth Fann of all such estate or estates as she ought to be possessed of, when lawfully required by said Elizabeth Fann, or such other persons as shall be lawfully empowered or authorized to receive the same, and the profits arising therefrom, then this obligation to be void; otherwise, to remain in full force and virtue.

(Signed and sealed by) N. J. KING,
W. BARBEE,
D. B. ALSOBROOK.

The breach assigned in the declaration was that the said N. King had failed to deliver and pay over to the said E. Fann a

large amount of property which he had received as her property. Pleas, general issue, conditions performed and not broken.

In support of the action it was proved that the defendant had signed and sealed the bond in suit, and had handed
(252) it to the Clerk of Orange County Court as his bond, and that it had remained among the records of that office until this suit was brought. It was further shown, by a copy of the record from Orange County Court, that at May Term of that court, 1824, a jury, purporting to act upon a writ of lunacy, found Elizabeth Fann to be in a weak and debilitated state of mind, and that it was unsafe and injurious to those interested in the property subject to her control that it should remain longer in her possession; that upon that finding one John Wilson was appointed her guardian, and upon his death Nathaniel J. King was appointed her guardian at May Term, 1828, and entered into the bond now sued upon. It was further shown that Elizabeth Fann was dead and that the relator was her administrator. And the report and account of the commissioner to whom the matter had been referred was offered in evidence to show the amount of the plaintiff's damages.

On the part of the defendant it was shown that no petition or writ of lunacy could be found among the records in the County Court in the matter of Elizabeth Fann.

And it was contended by the defendant that this action could not be sustained: *First,* because there was no delivery of the bond; *secondly,* because the bond was void for uncertainty and repugnance; and, *thirdly,* because the verdict of the jury did not find Elizabeth Fann to be either an idiot or a lunatic, and therefore that the appointment of the guardian by the court was a nullity and this bond given by the defendant was void. And his Honor was requested so to charge the jury.

But it was agreed by the counsel of the parties that his Honor should reserve the questions of law, and that the case should be submitted to the jury, and if they should find for the plaintiff, and his Honor, upon consideration, should be for the defendant upon the questions reserved, then the verdict should be
(253) set aside and a nonsuit entered.

The jury found for the plaintiff; and on another day of the term his Honor delivered his opinion adverse to the plaintiff's right of recovery. Whereupon the verdict was set aside and judgment of nonsuit entered, from which the plaintiff appealed to the Supreme Court.

Norwood for plaintiff.

Waddell and *J. H. Bryan* for defendant.

PEARSON, J. Such a construction should be given to every deed as to give it effect and carry out the intention of the parties. *"Ut res magis valeat quam pereat"* is a well-settled maxim of law, formed upon good sense and calculated to promote the ends of justice.

It is clear that King was enabled to take possession of a large estate belonging to Mrs. Fann in consequence of his entering into the bond now sued on, and that the defendant, as one of his sureties, undertook that he would pay over the estate to such persons as might be lawfully authorized to receive it. King did accordingly take possession of the estate, and has failed to account for it to the representative of Mrs. Fann. It would be a matter of regret if, from any defect in the bond or any legal objection, the defendant could evade the performance of an undertaking deliberately entered into by him, and throw the loss upon Mrs. Fann's estate.

The defendant has put himself upon his legal rights, as he was at liberty to do, and the question is whether he is in law bound to make good the loss.

The counsel for the plaintiff properly admitted that the paper could not be sustained as an official bond, and declared upon it as a common-law bond.

It was proved that the bond was signed and sealed and delivered to the Clerk of Orange County Court by the defendant. We think this was a sufficient delivery. A (254) stranger may accept the delivery of the bond, and it is good unless the obligee refuses to ratify the delivery, but in the absence of proof to the contrary such ratification is presumed.

The second objection is that the bond is void for uncertainty and repugnance. *Utile per inutile non vitiatur* is a maxim of law by which all useless and unmeaning words are to be rejected, provided enough remain to make the deed sensible. The words, "justices of the court," etc., "to be paid to the said justices or the survivors of them," etc., are useless and unmeaning, and convey no definite idea, and are, therefore, to be rejected, leaving an obligation to pay James Iredell the sum of $10,000. *Fitts v. Green*, 14 N. C., 291; *Vanhook v. Barnett*, 15 N. C., 263; *Richardson v. Wall*, 23 N. C., 297, are cases in point and fully sustain this position.

The third objection is that, as the verdict of the jury did not find Elizabeth Fann either a "lunatic" or an "idiot," the appointment of a guardian by the court was a nullity, and this bond, given by the defendant, was void.

It is true, the court had not power to appoint King the guardian of Mrs. Fann and authorize him to take her estate into his possession, but the defendant will not be heard to make this objection; he concurred in the act; his bond solemnly asserts it. King was appointed guardian and had power to take the estate into possession, and after King has taken the estate into possession and wasted it, it is not for him to say that it was unlawful, and, therefore, that he is not bound by his undertaking deliberately entered into. Upon that agreed state of facts "his mouth is shut," and he shall not be allowed to take advantage of his own wrong.

The *technical* rules of the doctrine of estoppels are said to be odious, but there is no rule better calculated to do justice and exclude dishonesty than that by which, when one solemnly (255) admits a fact either by his own words or acts, and it is acted upon, he shall not escape from liability by being heard to gainsay it. It violates all idea of justice for the defendant to say that it was against the policy of the law for him to give the bond, and thereby enable King to invade the rights of Mrs. Fann, and, therefore, that he should not be bound to answer for the acts of King as he had undertaken to do. Mrs. Fann might have complained that he has no right to do so. The illegal appointment was not the consideration, nor was the bond the inducement for making the appointment; it was a collateral security taken to insure a faithful discharge of *duties incident* to the appointment. *United States v. Manin*, 2 Brock., 115, is directly in point. In that case Manin had been appointed to an office by the Secretary of War, and had given bond with the other defendants as sureties; it was admitted that the appointment was void, and was against the law and its policy, as the appointment ought to have been made by the President, by and with the advice and consent of the Senate; but it was held that the defendants could not avail themselves of the illegality of the appointment, and were liable for all moneys received and not accounted for. In delivering the opinion, *Chief Justice Marshall* uses this language: "The appointment is illegal, but does that render the bond void? It was given in the confidence that James Manin was legally appointed to office. Does the illegality of the appointment absolve the person appointed from the legal and moral obligation of accounting for public money which has been placed in his hands in consequence of such appointment? If the policy of the law condemns such appointments, does it also condemn the payment of moneys received under them?"

The judgment below must be reversed, and a judgment entered for the plaintiff upon the verdict, according to (256) the agreement of the parties.

PER CURIAM. Judgment reversed and judgment for the plaintiff.

Cited: Kissam v. Gaylord, 46 N. C., 298; *Shuster v. Perkins, ib.*, 326; *Reid v. Humphreys*, 52 N. C., 261; *S. v. Edney*, 60 N. C., 469.

JOHN McNORTON ET AL. *v.* JOHN A. ROBESON.

1. A petition to set aside the probate of a will, on the ground of the want of citation of the next of kin, will not be granted for that cause alone, but merits must be shown, and it must appear that the former proceedings resulted wrongfully, and that the interests of the petitioners, if under disability themselves, were not duly defended by those who undertook to defend them.

2. A petition to set aside the probate of a will, on the ground of newly discovered testimony on points to which evidence was given at the probate of the will, will not be granted unless such testimony not only repels the adversary's charge, but also destroys his proofs, by showing that the former verdict was obtained by surprise and perjury.

APPEAL from the Superior Court of Law of BLADEN, at Fall Term, 1845, *Caldwell, J.*, presiding.

This is an application to set aside the probate of an unattested script as a will of John Kea, deceased, disposing of his personal estate. It is made by three of his nieces, who are the children of a sister of the party deceased, who died before him. Their names were Lydia, Elizabeth and Sarah King, and they and their husbands bring this suit. The allegation states that the paper was propounded in 1833, and that it was contested by some of the next of kin of the deceased and an (257) issue was made up of *devisavit vel non*, which was tried in the County Court, and on appeal in the Superior Court, and that thereon sentence was pronounced for the paper in 1833, and the executors named in it obtained letters testamentary thereon. The allegation further states that at that time the parties, Lydia, Elizabeth and Sarah, were respectively under the age of twenty-one, and "were never legally cited to witness the probate of the said paper-writing, nor were they in any proper manner made parties to the said contest, and that since the said paper was established they have intermarried with the

other petitioners, the said Sarah being, at the time of her marriage, under the age of twenty-one; and they submit, therefore, that they are in no way bound by the said proceedings." The allegation further states that these parties have been informed and believe that the script was neither in law nor in fact the will of the deceased, but was a forgery; that within six months before instituting this suit they had learned, and believed they would be able to prove, that shortly after the death of John Kea, John A. Robeson (in whose handwriting the will is, and who is one of the executors and the father of a lad to whom one-half of the estate is given by the paper) and William Jones (who is the father of another lad to whom the other half of the estate is given) held a secret meeting in a room of the said Jones, in which one Hamilton Davis and one Benjamin Davis were accustomed to sleep, and that they were ordered by Robeson and Jones to leave the room, which they accordingly did, but not until they were enabled to discover that the said Robeson was engaged in framing some instrument of writing, though they could not tell what, but discovered that the said parties, Robeson and Jones, were anxious to conceal it; that these parties expect to prove by a number of witnesses, whose knowledge of the matter has recently come to their ears, that the (258) signature to the paper is not in the handwriting of John Kea. The allegation also states other matters which the parties say they were at the bringing of this suit able to prove, which it is not material to mention, as no evidence is given respecting them. There is no affidavit in support of the allegation, except that of McNorton, the husband of the party Lydia, who swears that he believes the several matters set forth in the allegation to be true.

John A. Robeson, the surviving executor, put in a counter allegation, in which he states that the will was executed by John Kea, and that upon the trial of the issue the fact was fully proved by himself and others, and that many witnesses were examined to the handwriting of the said Kea; and that all the next of kin of John Kea were parties to the issue, including the three nieces, Lydia, Elizabeth and Sarah King, who appeared and were made parties in the County Court by their father and guardian, Solomon King; and that the cause was prosecuted both in the County and Superior Courts with earnestness and vigor on both sides, and without collusion in any respect between the parties or either of them on the opposite sides. In support of the allegation on that point, Robeson exhibits a transcript of the appointment of Solomon King to be the regular guardian of his two younger daughters, Elizabeth and Sarah, by the

County Court in February, 1832; and also the transcript of the record of the court, in which it appears that the will was propounded by the legatees named in it, and was "contested by Lydia King, Elizabeth King and Sarah King, by their guardian, Solomon King, and by Kinchen Kea," and by others; and that Solomon King prayed the appeal and entered into the bond for its prosecution.

Upon the hearing in the Superior Court, the court refused to call in the probate and dismissed the allegation, and the cause was brought here by appeal.

Strange for plaintiff. (259)
W. H. Haywood for defendant.

RUFFIN, C. J. The cause wholly fails, so far as it is sought to have a retrial of the issue on newly discovered evidence. The testimony of the Messrs. Davis is entirely inconclusive; and, besides, it is fully explained and repelled by other persons who were in the room with Robeson and Jones at the time to which they refer. Some witnesses have been examined as to the handwriting of the signature to the will, who give the opinion that it was not that of Kea, the party deceased, and some express doubts of it. But evidence of that kind will not suffice; for it is only further evidence to the same point which was in contest on the trial, and of the same character with that then given. The rule is correctly and forcibly laid down for such cases in *Peagram v. King*, 9 N. C., 295, that it is not sufficient that the newly-discovered evidence goes to repel the adversary's charge, but it must destroy his proofs; and that is explained in the same case, when it subsequently came up (9 N. C., 605), to mean that it must show the former verdict was obtained by surprise and perjury. Indeed, the argument here put the appellant's case entirely upon the ground that these persons were infants at the trial and were not parties to that proceeding. But it is a mistake to say they were not parties. The record shows they were; and they appeared by their father, and it is certain that he prosecuted the case on their behalf *bona fide*, and the present allegation contains no suggestion to the contrary. The argument proceeds on the technical ground that there is no citation on file for them, nor order of record appointing a guardian *ad litem*, and therefore that they were not "in any proper manner" made parties. However that might be a ground for a writ of error in a proceeding according to the course of (260) the common law, it cannot be listened to as the foundation of an application of the kind now before us. That must rest

upon merits; and it cannot be granted, unless it be shown that the former proceeding resulted wrong and that the interest of these persons was not duly defended by those who undertook it. If this were the sole ground for impeaching the former trial, to which these persons were, at all events, nominal parties, and of which they do not pretend they had not personal knowledge at the time, it may be well asked why they delayed this application for more than seven years—for a longer period, it is to be observed, than would bar a writ of error. But, in truth, if this were a writ of error, this would not be a reason for reversing a judgment. In probate causes there is, properly, no plaintiff nor defendant, but all persons are actors; and it has never been the course in this State to have a previous order appointing a *prochein ami* to prosecute a suit of any kind for an infant. The court has a control over persons who undertake to sue for an infant; and if he be an improper person, or brings an improper suit, the court will remove him and appoint another to carry on the suit, and make the first pay the costs improperly incurred. But it is not error, even if the appearance of an infant defendant be entered by guardian before obtaining a rule of the court for it, but only a misdemeanor in the attorney. 1 Cromp., 158; 2 Sellons Pr., 135, 141. The appearance must, indeed, be entered as being by guardian, or *prochein ami*, and not by attorney; but, though it be regular to have a rule for the purpose, the rule does not form a part of the record, technically speaking, as it is ultimately enrolled. When the infant appears to act in the cause by *prochein ami* or guardian, it is sufficient; for it must be supposed that he was duly appointed and approved by the court, or he would have been, otherwise, removed.

(261) Viewing the case in any light, therefore, we can see no reason to disturb the probate, and the sentence of the Superior Court must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Etheridge v. Corprew, 48 N. C., 19; *Randolph v. Hughes*, 89 N. C., 429.

THE STATE TO THE USE OF ALFRED M. TREDWELL *v.* HENRY A. ELLISON ET AL.

1. Where a defendant has been arrested upon *mesne* process and gives bail, and, after judgment, the bail surrenders him to the sheriff, out of term-time, no execution having been issued on the judgment nor any *committitur* prayed by the plaintiff, if the sheriff releases him upon a bond to appear at court and take the benefit of the insolvent law, the sheriff is liable for an *escape*.

2. The act, Rev. St., ch. 58, in this respect, only applies to cases where the debtor, upon surrender of his bail, is ordered into custody by the court.

3. After such surrender, if the creditor, upon reasonable notice, will not charge the party in execution, either a *habeas corpus* or a *supersedeas* would be issued by the court.

APPEAL from the Superior Court of Law of BEAUFORT, at Fall Term, 1848, *Settle, J.*, presiding.

This is an action of debt on the bond of the defendant as sheriff of Beaufort, and the breach assigned is the voluntary escape of one Davis, a debtor to the relator. The case is this: After judgment in an action by the relator against Davis, his bail surrendered him to the defendant in vacation; and he took from Davis a bond in the penalty of $429.53, payable to the relator, reciting that the relator had recovered judgment against Davis in the County Court for $281.76, and the (262) latter had been surrendered by the bail, and with the usual condition for the appearance of the debtor at the next County Court to take the oath of insolvency; and the sheriff then set Davis at liberty. At the next court Davis appeared and was admitted by the court to take the oath, though it was opposed by the relator. Evidence was given that when Davis was surrendered he had property to the value of $30. The relator moved the court to instruct the jury that he was entitled to recover such damages as, in the opinion of the jury, he had sustained from Davis being let at large. But the court directed the jury to find for the defendant, and they did so; and the relator appealed from the judgment.

Shaw, with whom was *J. H. Bryan*, for plaintiff.
Rodman and *Stanly* for defendants. (274)

RUFFIN, C. J. The Court is of opinion that the instruction was erroneous. The act of 1822, according to the letter, provided only for the discharge of debtors taken upon a *capias ad satisfaciendum;* and it was contended in *Smallwood v. Wood*,

19 N. C., 356, that it was confined to that single case of an arrest upon a writ of execution. But the Court held that its true interpretation extended it to that case, which was, that the debtor was surrendered in court by his bail after judgment, and the creditor prayed him in custody as in execution. It was so held because that was substantially a *ca. sa.*, requiring the sheriff to keep the debtor in close custody, and rendering him liable in debt for an escape. It happened that while that case was *sub judice*, the Legislature was passing in 1836 on the Revised Statutes, and there were added, after *"capias ad satisfaciendum,"* these other words, "or be in custody by surrender of bail after judgment." Upon those words, we presume, the sheriff acted and his Honor founded his opinion in this case. But we think that is putting on them an erroneous construction. We have reason to know that the amendment was made for the purpose of covering the point which had then arisen in *Smallwood v. Wood*, and for that purpose merely. The object was to make the act express to that point; which the Court, however, held, a few months afterwards, to be within it, according (275) to a sound construction, without those words. Although the words of the amendment are general, yet it is to be considered from the subject-matter and context, what sort of custody and surrender by bail is meant in the act. It seems to the Court clearly that it is a custody at the instance of the creditor, which can only be when it is ordered by the court upon his motion, as in execution. The provisions of the act of 1822 in other respects remain unaltered, and they plainly point to such a custody as that mentioned. The bond is to be for the debtor's appearance at the court "to which the execution shall be returnable," and "in twice the amount of the debt." If the surrender be in court and the debtor be committed in execution, the sheriff has the means of knowing his duty in those respects, just as if he had a writ of execution. But when the surrender is to the sheriff in vacation, how can he know at what court the appearance is to be or in what sum the bond is to be taken? He has nothing in his hands to inform him on those points; and it may be that the court in which the judgment was rendered is in a distant part of the State. That is a material consideration, for, if the sheriff can discharge the debtor out of custody in any particular case, he is bound to do it. We think it clear that the law could not mean that the sheriff should be obliged to let the debtor at large at his risk, without furnishing him in every such case with the certain means of knowing for what sum and with what provisions he must take the bond. But the act provides for no such things in the case of a sur-

render out of court. On the contrary, it constantly speaks of the debtor within its purview being one in custody "at the instance" of the creditor. That is so when it directs to whom the bond shall be payable, and the notice given, and in other parts. Besides, there was no necessity for any further provision as to persons in custody for want of bail than that in the court law of 1777, which authorizes their discharge "by (276) rule of court"—a provision made, no doubt, in reference to the practice in similar cases in England, whereupon a rule for a *supersedeas* is awarded for such a prisoner, if the creditor unreasonably delay to declare, or to proceed to trial, or to charge in execution after judgment. 1 Tidd Pr., ch. 15. Upon a surrender by the bail in term, the court would discharge the debtor if the creditor upon notice declined praying him in custody, as in execution. If the surrender be to the sheriff in vacation, the party would in like manner be discharged on *habeas corpus*, if upon reasonable notice the creditor would not deliver a *ca. sa.* or a *committitur* under section 22, ch. 115, Laws 1777; or, doubtless, the courts may make rules for a *supersedeas* upon such a surrender to the sheriff, if the creditor, after reasonable notice, will not charge the debtor in execution. But to charge him in execution must be the act of the creditor. The debtor cannot place himself in execution, nor can his bail, so as to deprive the creditor of his execution against the property of the debtor, which the creditor might prefer, at least for the time. It cannot be supposed that the law meant that the sheriff should, without any process to guide him, or any authoritative means of ascertaining the creditor's demand or wishes, be obliged, or be at liberty of his own head, to let the debtor at large. There is another very material consideration to be taken into account on this subject. After a discharge from custody under a rule of court, the creditor is not concluded from proceeding against the body; but he may have any execution against the property or person which he may deem at the time most likely to be effectual. But by this other mode it may be so contrived that the debtor may presently and conclusively discharge himself, and that, in view of soon having the means with which he might be compelled to pay the debt, if the creditor could by a *ca. sa.* get at him. If the debtor be actually imprisoned (277) for want of bail, even before judgment, he may take the oath of insolvency after twenty days, by the act of 1773; and so he may, if he be thus imprisoned after judgment, whether for the want of bail originally or upon a surrender. Both of the cases stand precisely on the same footing. The Legislature never meant to compel a creditor to take the debtor in execution,

and thereby cut himself off from other process, nor enable the debtor, without going to prison, by any concert with his bail or the sheriff, to conclude the creditor as if he had taken the other party in execution. What the law means, in the first place, is that the creditor shall not keep his debtor in prison indefinitely without charging him in execution; and, in the next, that when the debtor is charged in execution he may keep out of prison by giving a bond with good securities to pay the debt, or to give up all he has towards its satisfaction and to take an oath that he has nothing, or no more. For aught that we can see in this case, the debtor might have transferred to the relator the little property he had, if the sheriff had not discharged him.

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

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

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(278)

ANN HENRY ET AL. v. CHARLES HENRY ET AL.

1. Per NASH and PEARSON, J. The word "distributees" may be properly used in a petition, calling an administrator to an account, to denote those who are entitled to succeed to an intestate's estate under our statute of distributions.

2. Per RUFFIN, C. J. The word "distributees" is not to be found in any English dictionary or in any law book, and conveys no definite idea. It, therefore, cannot be intended by the court to mean those who are entitled to distribution of an intestate's estate.

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

The petitioners allege that they are the "heirs at law" and "distributees" of Hezekiah Bonham, who died intestate; that the defendants are the administrators of the said Bonham, and, as such, took into their possession negroes, bonds, money and other personal property to a large amount. The prayer is for an account and distribution.

The defendants admit that they are the administrators *de bonis non* of Bonham, but they allege that administration upon his estate had been before granted to one Neil Henry, who had died intestate; that one Nathan Bonham is the administrator of the said Neil Henry. They therefore insist that they are liable to account with the said Nathan Bonham, and not with the petitioners, Ann Henry or her children. They further allege that Neil Henry committed a *devastavit* to the amount of about $800, and they are the sureties on his administration

bond; "they maintain that the estate of the said Neil Henry is responsible for this deficiency, and the defendants having the share of the estate of the said Hezekiah Bonham in (279) their hands, to which the representatives are entitled, they have a right to retain the same, or so much thereof as shall be sufficient to pay, satisfy and discharge the said deficiency."

A reference was made to the clerk to take an account. The clerk made a report, to which the defendants filed an exception. The case came on to be heard upon the petition, answer, report and exception. The exception was overruled and the report was confirmed, and a decree for the petitioners, from which the defendants appealed.

Strange and *W. A. Wright* for plaintiffs.
No counsel for defendants.

PEARSON, J. The petitioners claim the personal estate of the intestate as his "heirs at law" and "distributees." The word "heirs" is used to denote the persons who are entitled, by descent, to the real estate of a deceased ancestor. It is appropriated to that purpose, and when used in pleading, in reference to personal estate, it has no meaning, and must be rejected as surplusage.

The other word, "distributees," is new in pleading, but my brother *Nash* and myself deem it admissible to denote the persons who are entitled under the statute of distributions to the personal estate of one who is dead intestate.

No one word has heretofore been used for that purpose, and it has been necessary, in order to convey the idea, to make use of a paraphrase or set of words. "Widow" and "next of kin" are sometimes used in pleading, but these words are insufficient to convey the idea; for "next of kin" means nearest of kin, and does not include those who are entitled by representation. The statute of distributions uses the words "next of kin of the intestate, who are in equal degree, and those who legally represent them." To avoid the use of so many (280) words, it is certainly desirable to have one word to convey the idea in reference to personal estate; and as there is a necessity for *making a word*, we can see no objection to the word "distributees." It commends itself, because it is new and has not been appropriated to any other use, and is as fit and seemly a word as feoffee, mortgagee, bargainee, bailee, endorsee, etc. We know the word "distributee" is now in common use among the legal profession, and the fact that it has been adopted by the profession and the Legislature, notwithstanding the severe

rebuke given to it by *Chief Justice Henderson* in *Croom v. Herring*, 11 N. C., 393, is a convincing proof that the necessity for a new word really existed.

But yielding to the petitioners the benefit of this word, they have not entitled themselves to a decree, because there is no proof that they are distributees. The answer does not admit it, and no depositions have been taken; and we should reverse the decree made below and dismiss the bill, but for the fact that the answer is equally defective, and we feel disposed to extend great indulgence to proceedings commenced in the County Court. The answer does not state the ground upon which the defendants maintain their right to retain the share of the estate to which the representatives of Neil Henry are entitled. Nor does it state upon what ground Neil Henry became entitled to a share of the estate of Hezekiah Bonham. We conjecture from what is stated, for the first time, in the decree, that Neil Henry was the husband of Ann Henry, the petitioner, and that the defendants wish to raise the question whether, as husband, he was not entitled to her distributive share; but there are no allegations to raise the question and no proofs whatever.

The decree made below must be reversed, with costs in this Court, and we will then direct the cause to be remanded (281) upon the motion of the petitioners, so as to let in amendments and give an opportunity to make proofs of the allegations. If no such motion is made at this or the next term, the petition will be dismissed.

RUFFIN, C. J. Having the misfortune to differ in opinion with my brothers on one point in the case, I must take the liberty of stating my reason; and to make myself the more intelligible, I will state the case as it appears in the record. This is a petition for an account and distribution of the personal estate of an intestate, Hezekiah Bonham. It was filed in the County Court by Ann Henry, Nathaniel Bonham, and six other persons, in December, 1842, and it states: "That Hezekiah Bonham died some years since intestate and possessed of or entitled to many negroes and to money, notes, bonds, and other personal property; that your petitioners are the distributees and heirs at law of the said Hezekiah; that after his death administration of his personal estate was granted to Neil Henry, and that he had it in possession a considerable time longer than in law he was entitled to keep it, and then died; and that the said administration was thereupon granted to Charles Henry and Archibald F. Murphy; that the said estate required very little delay in settling with the heirs, your petitioners; for your petitioners

show that there were no difficulties or very little to prevent the said administrators from paying and settling with the heirs aforesaid; that the said Henry and Murphy continue to detain the said negroes and other property, although called on by your petitioners to settle with them as the distributees and heirs as aforesaid." The prayer is that the administrators may be decreed to settle and pay over "to said heirs their portion, or to settle with the court, so that your petitioners may receive their due proportions; and also that your worships will appoint three commissioners to divide the said negroes among the heirs as aforesaid," and for general relief.

The answer admits that Neil Henry administered on (282) the estate of the intestate Hezekiah Bonham, and states that the defendants were his sureties for the administration, and that the said Neil died intestate and Nathan Bonham is his administrator. It then insists that the defendants "are bound to account to the administrator of Neil Henry, and not the present petitioner, Ann Henry or her children"; and it proceeds further thus: "These defendants show that Neil Henry committed waste in the management of the estate to the amount of about $800, and is responsible to the distributees of the said Hezekiah therefor; and they maintain that the estate of the said Neil is responsible for this deficiency, and that these defendants, having the share of the estate of the said Hezekiah in their hands, to which the representatives are entitled, they have a right to retain the same or so much thereof as shall be sufficient to satisfy the said deficiency."

In June, 1844, it was referred to the clerk "to take an account"; and in September following he reported: first, an account between Neil Henry, the first administrator, and the estate, on which a balance of $1,673.39 was found due to the estate on 1 January, 1841; and, secondly, an account between the present defendants as administrators and the estate, on which a balance of $2,179.78 was found due to the estate on 13 July, 1844, arising from the hire of negroes, sales of property and money received on bonds to the intestate.

The defendants excepted to the report because "they are not liable for the amount reported to be due from Neil Henry, but only responsible as administrators *de bonis non* for such sums as have been by them received."

From a decree in the County Court in favor of the plaintiffs, the defendants appealed; and in the Superior Court the exception was overruled and the report confirmed, and a decree made, in which it was declared "that the petitioners are entitled to distribution of the estate of Hezekiah Bonham, deceased, and

(283) that Neil Henry administered on the said estate and gave for sureties to his administration bond the defendants, Charles Henry and Archibald F. Murphy; that the said Neil died intestate without having administered the said estate of the said Hezekiah and made distribution thereof among his next of kin; at the time of his death the said Neil had in his hands of the said estate the sum of $1,673.39 unadministered, on which he was accountable for interest from 1 January, 1841, making up to this sum of $709.51; that there is in the hands of the defendants, Henry and Murphy, as administrators *de bonis non* of the intestate Hezekiah, the sum of $2,179.78, without taking into account the balance in the hands of Neil Henry at the time of his death, with the interest thereon; for which balance with interest as aforesaid the defendants are liable; and that the whole liability of the defendants to the plaintiffs is for the sum of $4,562.68, with interest on $2,179.78 from 10 September, 1844, and on $1,673.39 from this time until paid." There was a decree accordingly for payment to the plaintiffs and for costs in both courts; and the defendants appealed.

It has been stated at the bar that Ann Henry, one of the plaintiffs, is a daughter of the intestate Bonham, and the widow of Neil Henry, the first administrator of Bonham; and that the questions made at the hearing, and which the parties desired to present here, are whether the distributive share of the wife vested in her husband or survived to her; and whether the defendants are chargeable in this suit for the *devastavit*, if any, of Neil Henry. But a preliminary difficulty exists as to the facts necessary to raise those questions. It is not stated in the pleadings that Neil Henry was the husband of the petitioner Ann, or had any connection with the intestate's estate, except as administrator. There is a vague statement in the an-

(284) swer that the defendants are bound to account to the administrator of Neil Henry, and not to the petitioner, Ann, or her children. But why he should account to one in preference to the other, or, indeed, to either, is not suggested, and can be conjectured only from the information communicated by the bar. The Court cannot, then, determine the question as between the husband and wife, as the marriage is not alleged, and consequently could not be declared.

So in respect to the other question, the inquiry is necessarily presented in the first instance, whether the plaintiffs have a right to the estate, before it can be considered whether the defendants are to be charged with this or that demand. It is indispensable that a plaintiff should in his pleading give him-

self a title to the thing he demands, for the court cannot declare one which is not set up. These plaintiffs say they are the "heirs at law and distributees" of the intestate Bonham, and they pray that the defendants may be decreed to pay to "the said heirs" their portions of the estate, and that the negroes may be divided "among the heirs as aforesaid." The plaintiffs, therefore, claim as "the heirs and distributees" of the intestate. The statute distributes the personal estate of an intestate among his "widow and children or next of kin in equal degree or their legal representatives," and not to the heirs. The term "heirs" has no proper signification in respect to the right of succeeding to personalty. It is often used in wills and in inaccurate conversation to signify, in an improper sense, children, sometimes, and at other times, descendants, or issue, or nearest of kin, or the persons entitled under the statute of distributions; and these different meanings are arrived at from the context. But it, surely, would not be tolerated in pleading as expressing either of those senses, or constituting a title under the statute to the personal estate of an intestate, after debts paid. Upon that point, however, my brethren and I concur.

The other term by which the plaintiffs describe themselves and make title is yet more objectionable, as I conceive. "Heirs" is an English word and a term of the law, and is therefore understood, though improperly applied to this subject. But "distributees" is not a word at all known in the law or the language. Until my brothers told me that they understood what it meant, I must humbly beg pardon for saying that I looked upon it as a newly invented barbarism, and without any settled sense. Indeed, I do not now understand from what source the meaning of the term is derived. I believe it is a phrase which is sometimes used in common parlance by persons who are not of the profession and do not aim at accuracy in speaking on legal subjects. Some members of the bar may have, thence, fallen into the use of it sometimes in discussion, when precision of expression is of the less importance, as there is opportunity for explanation. But those who indulge themselves in that mode of speech are so sensible of its impropriety that, as *Judge Henderson* remarked, in *Croom v. Herring,* 11 N. C., 393, they seldom use "distributee" without an apology; knowing that it is not to be found in any English dictionary or English book—much less in a law book. I believe I may add that, up to this day, it has not obtained admission into any American dictionary, though at least one of them has been supposed to have taken in every word that could possibly be tolerated. But when used it has not seemed to me, at least, to be

(285)

in any definite sense. Like "heirs" in reference to personalty, it has appeared to be intended sometimes to designate children by it; at others, the widow and children, or all the kindred or a single one that may be entitled to distributive shares or the whole property by original right or by representation, or even a person entitled to a share by assignment. I know I have heard a single child called "sole distributee," and also that one who had purchased a share "had become a distributee."

(286) So, I had really supposed that there was no meaning attached to the word by itself, in the mind of any one, but that it varied in vulgar use with the context; and that, therefore, it was wholly inappropriate to describe a title to property in pleading and entries. In wills or contracts the courts would be obliged to receive it in some sense, and would endeavor to discover that which would subserve the intention in the particular case. If, perchance, it were to find its way into a statute, the judicial duty would be the same. But that would not render it proper to transfer it into judicial proceedings. For legislators, like testators, take the right to puzzle judges as much as they please, and often do not trouble themselves much in the selection of terms. The same latitude, however, is not to be claimed by pleaders and clerks. Pleadings and the entries of judgments and decrees ought to be in the language of the law. For them there are *precedents*, settled long ago by the wise and the learned, and used from generation to generation by those who were and are as discreet and well informed as any among us can claim to be. I think it, and always thought it right to observe them, myself, and would fain beg the respect of others for them; asking, why despite should be done to forms venerable for their antiquity, certain in their meaning, and, for those reasons, insuring order and precision in the dispatch of business and the sense of records? The lawyer who scorns to follow forms may depend upon it that he will not long love the law itself, for in refusing to conform to the patterns set by the law, he does despite to its essential elements of precision and certainty, and to some extent brings into disrepute the science itself. Why should terms, in which pleadings and entries have been expressed time out of mind, be rejected, and in their room words made and adopted which no two men here always use in the same sense, and which would be altogether unintelligible, for example, in Westminster Hall, and, indeed, in all

(287) other countries where our law and language prevail? I own, I can see no reason for it; but, on the contrary, I am sure that it would greatly promote the ease of pleaders and judges and the certainty of the law to adhere to the prece-

dents as examples of the forms of proceeding, as well as standards for settling the principles of the law itself. One departure from the rule invites another, and this proceeds until no rule is left. I think judges, with whom is the charge of preserving the law in its integrity and administering it uniformly, ought to reverence its established forms and steadfastly insist on their due observance as the best guards of the law itself. It is always safe, *stare super antiquas vias.* In this case, for instance, if an inquiry were directed to ascertain who are entitled to the personal estate of the deceased, and in what proportions, it surely would not be ordered in the terms of the petition, that is, to inquire "who are the heirs and distributees of the intestate Bonham." If it would, I must say it would be for the first time in this Court since I have been a member of it. The word has now and then been in bills, but always with something else which enabled the Court to reject it and then have enough to give the parties a title, as by saying that the plaintiffs were the children of the intestate, or the like. But I am nearly confident that no decree or order has passed under my notice with "distributees" in it, nor decree made upon a bill describing the title of the plaintiffs by it alone. I feel bound, therefore, to express the opinion that the petition ought to be dismissed with costs. I should, perhaps, have no objection to remanding the case, if it had been asked, so as to let in amendments; as it is probable the plaintiffs may be the widow and children of Bonham. But in truth, the petition is so defective and all the proceedings in the cause so very loose and informal that the needful amendments would amount to much the same as a new (288) petition. Besides, the questions between the parties can be better raised by a bill making the administrator of Neil Henry a party, so as to make his estate, if any, directly liable for his *devastavit.* But as my brothers think differently, the cause must, of course, be disposed of as they may order.

PER CURIAM. Petition to be dismissed, unless the plaintiffs apply at the next term to hear the cause remanded.

Cited: Boyd v. Small, 56 N. C., 42.

DEN ON DEMISE OF JAMES L. BATTLE ET AL. v. JOHN F. SPEIGHT.

1. A made his will in 1837, in his own handwriting, but unattested, and it was placed among his valuable papers. Afterwards, in 1849, being about to leave this country, he deposited this will, together with other papers, with a friend for safe-keeping: *Held*, that this did not of itself amount to a republication of the will, and that therefore land acquired after 1837 did not pass under it.

2. The act of 1844, ch. 83, making devises to operate upon such real or personal estate as the testator may own at the time of his death does not apply to wills executed before the passage of this act.

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

Louis D. Wilson made his will on 26 May, 1833, and therein devised to Eliza Cotten two lots in the town of Tarboro, which he then owned. He also devised to John F. Speight, the chairman of the County Court of Edgecombe, and his successors in office, the residue of his estate, both real and personal,
(289) for the use and benefit of the paupers of that county, to be appropriated and managed under the superintendence of the justices of the peace of the county. The will was in the testator's own handwriting and signed by him, and at the time deposited by him among his valuable papers. In 1847, being about to leave the State, he deposited with a friend, for safe-keeping during his absence, his valuable papers, including his will, and he died while absent. Eliza Cotten died before 1847, and, between the making of the will and 1847, the testator purchased a tract of land. The defendant claimed both the land thus purchased and the lots devised to Eliza Cotten, under the residuary clause in the will; and they are also claimed by the lessors of the plaintiff, who are the testator's heirs at law, and have brought this suit for them. On the trial the court held that the premises passed under the will to the defendant; and the plaintiff suffered a nonsuit and appealed.

B. F. Moore for plaintiff.
Whitaker for defendants.

RUFFIN, C. J. If the heirs at law be not entitled, it must be by force of a republication of the will, or the operation on it of the act of 1844, ch. 83; for nothing was better settled under the former statute of wills than that land purchased after the making of the will did not pass by it, however general the terms of the devise might be. The reason was that a devise is

a conveyance, and therefore must operate on a specific subject. For the same reason, if a devise failed by the death of a devisee before the testator, the land did not fall into the residue, but went to the heir at law; for, although land may pass under a residuary clause of a will, as well as personalty, yet there is this difference in the operation of that clause on realty and personalty, that it takes in everything of the latter kind that is not well disposed of; whereas, in respect to the former, (290) it takes in only what is not before given away in the will—for each gift of land, whether so in terms or not, is in law specific, and one cannot be enlarged by the failure of the other, unless there be a limitation over in the event that happened. *Morris v. Underdon*, Willes, 293; *Howe v. Dartmouth*, 7 Ves., 137. It was one purpose of the act of 1844 to alter the law in that point. The question, then, really is, from what time this will operated.

Nothing appears in the probate of the will to show that the Court of Probate undertook to determine that question; and, as far as it is stated, it was proved as a will speaking in respect of the land from its date, and not by force of a republication. In *Jiggetts v. Maney*, 5 N. C., 258, it was held that a will of this kind, unattested and written by the testator and deposited among his valuable papers, did not operate from his death, but from its date. It was strongly argued that, as the date was an immaterial part of an instrument, the publication was to be referred to the period at which the will became of force. But the court thought that the publication was to be referred to its date, and that the preservation of it by the testator among his valuable papers was not a republication of it from day to day as long as he lived, but only the recognition of it as a subsisting will, in the same manner as his keeping it would be regarded if it had been an attested will. The same principle seems to apply with equal force to what was done in this case—if that question now be open for the decision of the Court, as we suppose it to be. We do not mean to say, if a testator deliver his holograph will of a prior date to a person for safe-keeping, in such terms as show an intention that it shall speak as a will from that time, that such acts and declarations may not amount to a publication or republication then. How that would be we do not at present undertake to consider, though we suppose it would (291) amount to publication. But we conceive that if a publication can be thus shown, there must be a plain expression of purpose that what is then said and done should be a republication; by which we mean that the party meant the instrument to operate as an instrument of that date, and not of that which

it bears upon its face. It requires strong proof of the intention, because it is in apparent conflict with the instrument itself, which he is taking the means of preserving in its original form, and which, therefore, it is to be supposed, *prima facie*, at least, he meant to operate according to its form. Here the case states simply a delivery by the testator to another person of a number of valuable papers for preservation during an absence of uncertain duration in a distant country, and that among these papers was this will. But it does not seem that a single word was said of the will in particular, or that the friend even knew that one of the papers was a will. It was in truth nothing more than a mode of preservation of conveyances, securities, and this will in the strong box of a friend, instead of his own, and is barely a recognition of the papers as a subsisting will, without any reference to the time from which its subsistence was to be reckoned, but leaving it to speak for itself on that head. It is no more a republication of this than it would have been of an attested will. No doubt a codicil would be a republication, and, if that had been executed according to the act of 1784, in either way, it would have had that effect. But that would be an act of an explicit character, though it was once much contested whether a codicil would be a republication of a previous will. In the case here there is nothing whatever by which more can be collected than that the party treated this paper as a will in 1847; but, without something more, it must be taken that he treated it, not only as then being so, but as having been
(292) so from the time he made it. If it had been without date, it would necessarily be otherwise; but as it is, the court holds that the instrument is, as a will of lands, to be referred as to the period from which it operates, in respect of its publication merely, to the date of it.

It was further contended for the defendant that the case is governed by section 3 of the act of 1844, which enacts that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. The rule of construction laid down by the statute is clear enough; but still it remains to be ascertained to what wills it is to be applied. Undoubtedly, it has no application to wills before consummated by the death of the maker. The Legislature did not mean to touch vested rights by changing the meaning which the law gave to an instrument at the time it was executed and went into operation. The question is, whether it was intended to change the meaning and legal effect of a provision from what it was

when it was made, into something else, because the party lived to the time at which the Legislature said that such provisions should have a meaning different from that imported by the instrument at its inception. We conceive that it was not so intended, and that the construction there prescribed applied only to wills *thereafter to be executed or* published. *Salter v. Bryan*, 26 N. C., 494, it is true, is not an authority in point, because the statute on which the question then arose used the words, "made after" such a day. But that only made the point the clearer, because it expressed what, upon all just rules of interpretation, would be implied without it. It is true that in the *Matter of Elcock's will*, 4 McCord, 39, it was held that a will executed properly, according to the law existing at its execution, is not good unless it be also in the form prescribed by the law existing at the death of the maker, and that (293) decision is noticed without disapprobation in the opinion given in the case in this Court. But that was merely an incidental remark, accompanying the observation, that the case was distinguished from that before the court, inasmuch as our statute used the words "made after," while that in South Carolina did not. We had no concern with that case then, except to distinguish ours from it. But upon an examination of that case, we own the reasoning does not satisfy our minds, and that both on principle and authority we adopt the opposite conclusion. The English statute of frauds enacted that "from and after 24 June, 1677, no action shall be brought to charge any person upon any agreement, etc., unless such agreement be in writing"; and in another section it enacted in the same words that "from and after 24 June, 1677, no devise of land should be good, unless," etc. An action was brought after the statute upon a parol agreement before the statute, and it was held that it would lie; for, although the power of the Parliament extended that far, the court said it would not be presumed that the act had a retrospect to take away an action to which the plaintiff was entitled; and the court went on to say, "if a will had been made before 24 June, and the testator had died afterwards, yet the will had been good, though it had not been in pursuance of the statute." *Gilmore v. Shooter*. This case is reported in 2 Mod., 310, and by several other reporters of that day, and, we believe, has never been seriously questioned in England. On the contrary, it has been approved and its principle acted on by *Lord Hardwicke* in several cases which arose under similar provisions in the mortmain acts. *Attorney-General v. Andrews*, 2 Ves., 224; *Ashburnham v. Broadham*, 2 Atk., 36, and *Attorney-General v. Lloyd*, 3 Atk. We conceive that

those decisions are precisely in point here. For, although the Stat. 29 Charles II. fixes a time, 24 June, 1677, and ours
(294) is silent in that respect, yet it is precisely the same thing. Because the English act does not say no will made after 24 June shall be good, but that after that time no devise shall be good, unless the will be written, signed by the testator, and as prescribed. It was therefore held in the manner it was, upon a principle of sound construction, as if the word "made" had been in the act, because the court presumed the Legislature had in view only such instruments as had their origin after the statute. Now, our act, though upon its face it fixes no time expressly for the execution of the wills to which its rule of construction is to apply, yet, by the general law, it is to be supposed to have in it a provision that it shall operate thirty days after the rise of the Assembly; and with such a provision it would, in this respect, be exactly like the St. 29 Chas. II. There is another observation on the act of 1844 that seems decisive of this question. The different sections are not so many independent provisions; but, being upon the same subject, they are to be construed together. Then if it is asked, for example, to what wills the rule of construction prescribed in the third section refers, it is plain, we think, that it refers to wills of the same kind, in respect to the period of their execution, as those spoken of in the preceding parts of the act. Now, the first section authorizes devises of certain interests not before capable of being devised, including real estate acquired subsequently to the execution; and the language of that section clearly makes it operate prospectively only. It is, "that it *shall* be lawful for any testator," etc.; and "that the power *hereby given shall extend*," etc. In fine, we are satisfied that when a party used words to which the law annexed a certain sense at the time they were used, it was not the intention of the Legislature to say that, by the party's living to a certain day, it should be understood that he used them in a different sense. We
(295) think the enactment was altogether prospective; and therefore deem the judgment of the Superior Court erroneous.

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

Cited: Williams v. Davis, 34 N. C., 23; *Sawyer v. Sawyer*, 52 N. C., 139; *Robbins v. Windley*, 56 N. C., 389; *Jenkins v. Mitchell*, 57 N. C., 209; *Williamson v. Williamson*, 58 N. C., 143, 4; *Mordecai v. Boylan*, 59 N. C., 368.

MARDREE *v.* MARDREE.

JOSEPH MARDREE ET AL. v. JOHN MARDREE.

1. A distributive share, accruing to a wife during the coverture, does not vest in the husband, but will survive to the wife, unless reduced into possession by the husband.

2. Where the wife is the sole next of kin and the husband the administrator, and the debts of the intestate are paid or assumed by him, and there are no reasons why he should hold any longer as administrator, the presumption is very strong that he held as husband, and consequently for himself.

3. Where there are other next of kin besides the wife, the husband being administrator, in order to entitle him to the property in his own right, he must appear by some act to be exercising a dominion over it, not according to his duty as administrator or in the discharge of functions of a representative character, but for his own benefit and as personally the owner. Thus when the husband and the other next of kin, there being other funds for the payment of the debts, had agreed to employ the negroes, etc., on the lands of the intestate and at the end of the year to divide the proceeds of the crop among them "according to their rights as distributees": *Held*, that this was a sufficient reduction into possession by the husband to prevent any right of survivorship in the wife.

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

Joseph Dail died intestate in January, 1847, leaving a (296) widow, Celia, an only daughter and child, then the wife of Wilson Mardree, and also leaving a number of slaves, stocks of various kinds, which were on two plantations in Perquimans, where he had resided and died. One tract of the land belonged to him (Dail) in fee, and the other belonged to his wife in fee. Administration of his estate was taken in May, 1847, by the son-in-law, Wilson Mardree. The intestate left cash and good bonds to the amount of nearly $1,000, which was more than sufficient to pay the debts, and came to the hands of the administrator Wilson. Upon the death of the intestate it was agreed between Mrs. Dail and Wilson Mardree that the latter should sell nothing as administrator, but that they would keep the slaves and other personal property on the two plantations and plant and make crops thereon for that year on their joint account, and divide the crops in proportion to their distributive shares in the property. On 9 August following, an instrument was drawn up by Wilson Mardree and executed by Mrs. Dail in the following words:

"Whereas, Wilson Mardree has taken out administration upon the estate of my late husband, Joseph Dail, of which the only distributees are myself and the said Wilson in the right of his wife Harriet, who is the daughter of the said Joseph; and whereas it was agreed between the said Wilson and myself to keep the personal estate together and to cultivate the lands during the present year: Therefore, know all men, that I, Celia Dail, do, for and in consideration of the premises, agree that the personal estate of the said Joseph shall be kept together and the crop that was planted at the death of the said Joseph, as well as that which was planted after his death, shall be cultivated for the benefit of the estate of the said Joseph; and that the proceeds of the crops, after paying expenses and charges, shall be divided between the said Mardree and myself,
(297) according to our rights as distributees of the said Joseph Dail."

The plantations were managed by Wilson Mardree through the year 1847, until his death in the latter part of October. But he did not reside on either of the plantations; and Mrs. Dail lived on that on which her husband died. In November, 1847, John Mardree obtained letters of administration on the estate of Wilson Mardree and also became administrator *de bonis non* of the first intestate, Dail. He sold the crops of 1847 and the stock and paid all the debts, and has a surplus of cash in hand of about $1,500 after paying all the debts of Dail—being the proceeds of the stock and other chattels (except slaves) that had belonged to Dail, and of the said crops; and he has also in possession the slaves.

In September, 1848, Mrs. Dail and Mrs. Mardree, the widow of Wilson Mardree, filed their petition against John Mardree, as administrator *de bonis non* of Joseph Dail, for an account and distribution of the estate. The defendant insisted in his answer that Mrs. Mardree owned no part of the slaves or other specific property left by her father, but that her slaves became vested in her late husband by force of his possession of the property and the use of it as his own. On the hearing the judge of the Superior Court was of that opinion and decreed accordingly, and Mrs. Mardree appealed.

Jordan for plaintiffs.
(302) *Heath* for defendant.

(304) RUFFIN, C. J. The Court is of opinion that the decree was right and ought to be affirmed. A distributive share, accruing to a wife during the coverture, does not vest in

the husband, but will survive to the wife, unless reduced into possession by the husband. *Revel v. Revel,* 19 N. C., 272; *Poindexter v. Blackburn,* 36 N. C., 286. When the administrator is some other person than the husband, it is generally not difficult to determine whether the husband has or has not possessed himself of the share, or the things of which it consists, so as to change the property by extinguishing the wife's right and vesting it in the husband; for, usually, the share consists of money which the husband received and for which he gives a receipt, or it consists of stock or specific things, which are divided and a share thereout allotted to the wife or the husband for her, and transferred or delivered to him. But we suppose it is not necessary there should be an actual division between the next of kin to enable the husband of one of them to take, and exclude the wife's right by survivorship. All that is requisite is that the share should be got out of the hands of the administrator, as such, and should be held, either in severalty or in common with others, as the husband's own. For, if, instead of a division of the property by the administrator and a delivery by him of the shares to the next of kin severally, it be agreed by the next of kin that they will take the property from the administrator undivided, and the administrator accordingly give it up to all them together, then clearly the next of kin hold the things absolutely as their own property, and the husband of the next of kin is then to be regarded as in possession of his wife's share for himself and as his own property. For it must be noted that no act of the wife is necessary to vest her property in her husband, nor can she in any manner prevent it. The act is the husband's own; and, though he must reduce the chose into possession, yet any act of dominion over it is sufficient which shows that the husband undertakes to use (305) or dispose of it as his own presently, whether the possession be several as to one share or jointly with some or all of the next of kin. When the title of the administrator becomes extinct, that of the next of kin is made absolute. But it is not, ordinarily, so easy to determine this question when the same person is the administrator and the husband of one of the next of kin. Where the wife is the sole next of kin, and the debts of the intestate are paid or assumed by the husband, and there is no reason why the husband should hold any longer as administrator, the presumption is very strong that he held as husband, and, consequently, for himself. But when there is another person besides the wife entitled to share in the estate, it would seem to require some unequivocal act on the part of the hus-

band, who is the administrator, to terminate the title in himself as administrator and in his wife as one of the next of kin, and vest it in himself as husband. Yet, clearly, there must be some way in which it may be done; and we think it is not difficult to settle the principle which will determine whether the husband has done an act which was meant by him, and in its nature is sufficient, to denote that he holds as husband, and thereby to terminate the title of administrator and merge his wife's right in his own. It is this, that he shall appear by some act to be exercising a dominion over the property, not according to his duty as administrator or in the discharge of functions of a representative character, but for his own benefit and as personally the owner. For, unless that be sufficient, we do not perceive how the right can ever be vested in the husband except by a suit to which the wife is a party. Therefore, whenever the husband and the other next of kin divide the property, or they take it undivided and apply it to uses having no reference to the office of administrator and contrary to its duties (306) but for the benefit of the persons who are next of kin or in their right, it seems manifest that the possession is that of all the persons who are next of kin, and not of that one who is administrator and in his representative capacity. If it be not so, what else could the husband do which would more completely vest the possession in him as husband? Now, the husband here and Mrs. Dail contracted respecting this property as owners, saying that they are "the only distributees," and as such entitled to dispose of the property for their own benefit; and therefore they agreed that the slaves, instead of being sold or hired in course of administration, should work on the land belonging to those parties respectively, and that the profits should be divided in certain proportions between them. The administrator did not merely finish the crops planted by his intestate, but the parties in their own right planted other crops and employed the slaves and stock in their culture. It is true, the article says that it should be for the benefit of the estate; but the meaning of that, it is obvious, was not to provide a fund for the purposes of the estate, as the payment of debts—since there were none not already provided for—but it was to prevent either of the parties from claiming a greater share of the produce than in proportion to his or her share of the estate under the statute of distributions. For, immediately after saying that it should be for the benefit of the estate, the article adds, "and the proceeds of the crops shall be divided between the said Mardree and myself, according to our rights *as distributees.*"

It seems to us, therefore, that this was as unequivocal an election by the next of kin and the husband to hold in their personal rights as they could, under the circumstances, have evinced.

PER CURIAM. Decree affirmed with costs.

Cited: Arrington v. Yarborough, 54 N. C., 79; *Brandon v. Medley, ib.,* 316; *Ferrell v. Thompson,* 107 N. C., 428.

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(307)

THE STATE TO THE USE OF MOORE COUNTY v. EVANDER McINTOSH ET AL.

1. Notwithstanding the language of the private act passed in 1835, relative to the county trustees and sheriff of Moore County, an action in the name of the State to the use of the county will lie against the sheriff for not collecting and accounting for the county taxes.

2. Although a sheriff is a defaulter when he is reappointed, yet his reappointment is not thereby void.

3. It is the duty of a sheriff to apply to the Clerk of the County Court in proper time for a certified copy of the tax list, and if he does not, neither he nor his sureties can avail themselves of the neglect of the clerk to furnish such list.

4. A demand is not necessary, before action brought, for money collected by a sheriff for public purposes.

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

This is an action of debt, brought on the bond of the defendant McIntosh and his sureties, executed on 16 August, 1836, as Sheriff of Moore County. Several breaches were assigned, but those mainly relied on were for failing to collect and failing to account for the county taxes, imposed by the County Court of Moore at May Sessions, 1836, for 1835, but collectible in 1836; the defendant McIntosh acting at the time in the double capacity of sheriff and county trustee, by virtue of a private act. On the trial it appeared that he had been sheriff from 1834 until 1839, and during that time had made several settlements with the committee of finance for Moore County. It also appeared that the tax list was delivered to him in due time in 1836 by the clerk of the County Court, but it was not signed or in any way certified by him. It also appeared that, on a (308) settlement had with the committee of finance in 1837, the defendant McIntosh had collected a portion of the taxes under

the tax list of 1836, but what amount does not distinctly appear. It also appeared that when he executed his bond in August, 1836, he was a defaulter to some amount for the preceding years, but the default was made up by payments in 1837. It also appeared that some time in 1841, and before the commencement of this suit, one Archibald Munroe, a member of the committee of finance, called on the defendant McIntosh and demanded a settlement on account of the balance in his hands due the county for the years during which he had been sheriff, and that he would pay over the same to him or the said committee.

Several objections were taken by the defendants to a recovery.

In the first place, it was insisted that the county of Moore could not sue as relator on the bond in question, neither under the act of 1793 nor by virtue of the act of 1831; that the chairman of the County Court of Moore was the proper relator, according to the provisions of the private act of 1835.

In the second place, it was insisted that as it appeared that the defendant was a defaulter at the time he executed his bond in August, 1836, the County Court was prohibited from taking said bond, and it was, therefore, void.

In the third place, it was insisted that no tax list certified by the clerk, or in any way authenticated by him, as a warrant authorizing the collection of taxes, had been placed in the hands of the defendant McIntosh in 1836, or at any other time, and, therefore, the defendant and his sureties were not liable on the said bond.

And in the fourth place, it was insisted that no demand had been made on the defendant by any person authorized
(309) to make one—that it should have been made by the chairman of the County Court or the succeeding sheriff.

These several objections were taken during the trial, but by consent of counsel were reserved; and a verdict was taken for the plaintiff, subject to the opinion of the court thereon. On consideration, the court set aside the verdict and ordered a nonsuit, and judgment being rendered thereon, the plaintiff appealed to the Supreme Court.

Strange for plaintiff.
Kelly, D. Reid and *Haughton* for defendants.

NASH, J. Several exceptions were taken in the court below to the plaintiffs' right to recover in their action, which have been argued before us. We shall consider them in the order in which they are stated in the bill of exceptions.

The first is that the action cannot be sustained in the name of the county of Moore, but that it ought to have been brought in the name of the chairman of the County Court, according to the provisions of a private act passed in 1835 respecting the county of Moore.

It is admitted that under the general law the action is properly brought, but it is contended that under the private act of 1835 the action can only be brought to the use of the chairman of the County Court. As early as 1777, Rev. St., ch. 29, sec. 1, the several county courts within the State were empowered to appoint a county trustee, and among his duties was that of collecting all moneys due their respective counties. This is still the law in most of the counties. In some, and Moore is among them, the law was altered, and a different system adopted. By the private act of 1835 it is provided that the office of county trustee shall be abolished in the county of Moore, and the sheriff shall perform all his duties, "as are now prescribed by law," "and in all cases where suits are by law directed to be brought in the *name* of the county trustee, such suits (310) shall be brought in the name of the chairman of the County Court." It is important to the decision of this exception to ascertain in what *manner* the county trustee, at that time, was required to sue those who were indebted to the county. By section 3 of the act of 1777 the county trustee is required "to sue for, recover and collect" from all persons all money due his county, but no direction is given as to the person in whose name it shall be brought. Nor is there any other public act, that we are apprised of, prescribing the form. At the time, then, the private act of 1835 was passed, no law existed directing the trustee, in so many words, to sue in his own name for money due the county. In 1831 the Legislature passed an act, ch. 31, sec. 83, see Rev. St., ch. 28, sec. 30, directing all suits to recover money due the county to be brought in the *name of the State to the use of the county.* This was the law when the act of 1835 was passed. This latter act abolishing the office of county trustees was not repealed by the general law of 1836 re-enacting that of 1831, as there is an express provision in section 8 of ch. 1 of the Rev. Statutes that no private or local act shall be repealed by section 2 of the same chapter. That act is in full force, but does not affect the question here. The framers of the private act of 1835 were mistaken in supposing there was at that time any law directing the trustee to sue in his own name.

The second exception is that at the time the bond was given, upon which this action was brought, and when the defendant was appointed sheriff for the period embraced in it, he was a defaulter; and by the law of the State the court was prohibited from taking the bond, and it was, therefore, void.

We do not feel the force of this exception. It is true, the court is by the act of 1836, Rev. St., ch. 109, sec. 7, re-
(311) quired not to permit a person, who has been a former sheriff, to give the bonds required by law or re-enter upon the duties of the office until he has produced before them a receipt in full from every officer to whom it is his duty to pay the public taxes. But the act is merely directory, and nowhere declares that if such a bond is given it shall be void. The consequences would be too serious both to the public and to private individuals. The officer in this case was admitted into the office and became the sheriff *de facto,* and ought not to be permitted to take advantage of his own wrong. It is sufficient, however, to say the law has not declared a bond, given by the sheriff under such circumstances, void.

The third objection is that no tax list, certified by the clerk of the County Court, or properly authenticated by him for the taxes of 1835, had been placed in the hands of the sheriff; and he, therefore, had no power to collect the taxes, nor were he or his sureties bound for them.

It is true, the tax list, properly certified, is to the sheriff his warrant to collect the taxes, without which he cannot compel their payment. *S. v. Woodside,* 30 N. C., 104. But he may receive the tax due from any citizen; for the latter may, by application at the clerk's office, ascertain what he does owe, and if the sheriff does receive it, he does so officially, and both he and his sureties are liable for it on their bond. In this case the declaration contains two counts, one for not collecting and the other for collecting and not accounting, and the case states he did collect some. It is immaterial on which count the verdict was given. It was as much his duty to collect as to pay over the taxes to the proper officer, and to enable him to do this it was his official duty to qualify himself by applying at the clerk's office for a list of the taxes properly certified; and there is no evidence he made such application.

(312) The fourth exception was for want of a demand before the action was brought. The money here collected was public money, and for it no demand was necessary. It is a part of the official duty of the sheriff to pay over to the officer authorized to receive it all public money collected by him, at the times

required by law. With the same propriety it might be held to be the duty of the public treasurer to demand from the several sheriffs the public taxes collected by them.

PER CURIAM. Judgment reversed, and judgment for the plaintiff on the verdict.

Cited: S. v. Woodside, post, 505; *Little v. Richardson,* 51 N. C., 307; *Vann v. Pipkin,* 77 N. C., 410; *Comrs. v. Magnin,* 86 N. C., 287.

DEN ON DEMISE OF MARY ETHERIDGE v. JAMES M. FEREBEE.

1. A deed is acknowledged by husband and wife; two justices of the peace thereupon take the private examination of the wife and report to the court and the court acts upon the report: *Held,* that the inference is irresistible that the two justices were members of the court, appointed for that purpose, though no special order of appointment appears.

2. It is sufficient if the certificate of the private examination of a *feme covert* states that upon such examination she declared that she had voluntarily *executed* the deed, without saying that *she doth now voluntarily assent thereto.*

3. If upon the privy examination the wife states that though she was willing to convey when she executed the deed, yet she had changed her mind and was then unwilling, of course, the assent of the wife could not be certified.

4. It is immaterial whether the acknowledgment or the private examination be first recorded.

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

This was an action of ejectment. The plaintiff offered (313) in evidence a deed from John D. Cook and Lydia Cook to Joseph Cowell, also a deed from Joseph Cowell to Alfred Perkins, and from Perkins to the defendant James M. Ferebee. It was proved that the defendant was in possession of the *locus in quo,* and that Lydia Cook was dead, having had no child by John D. Cook, and that Mrs. Etheridge, one of the lessors, was the daughter and only heir at law of Lydia Cook by another husband. The sole question in the cause was whether the examination of Lydia Cook was legal so as to convey her title. The following is the only entry upon the minute docket at February Term,

1837, in relation to the deed from Cook and wife to Cowell, to wit: "Deed from John D. Cook and wife, Lydia, to Joseph Cowell was duly acknowledged in open court, and the private examination of the *feme covert* taken in open court and ordered to be registered," and it appeared at the opening of the court that C. Etheridge and J. Forbes and one other were justices presiding, and the above entry was the minute order, and the minutes do not show that the above justices were appointed to take the private examination of the *feme covert*.

The following is a copy of the probate as it appeared on the back of the deed, to wit:

CURRITUCK—February Term, 1837. Personally appeared before us privately and aside from her husband Lydia Cook, wife of John D. Cook, and acknowledged that she assigned the within deed of conveyance to Joseph Cowell with her own free will and accord and without any compulsion of her husband, John Cook, and ordered to be registered. J. FORBES, J. P.
C. ETHERIDGE, J. P.

(314) STATE OF NORTH CAROLINA—Currituck County, February Term, 1837. This deed from John D. Cook and wife, Lydia, to Joseph Cowell was acknowledged in open court and the examination of *feme covert* taken and ordered to be registered. J. W. HUGHS, C. C. C.

A verdict of the jury was rendered in favor of the plaintiffs, subject to the opinion of the court whether the deed from John D. Cook and wife, Lydia, passed the title to the land from said Lydia, she being at the time one of the owners of the land.

The court being of opinion that the deed of Mrs. Cook did not pass her title, by reason of the defect in the examination, gave judgment for the plaintiff, and defendant appealed.

Heath for plaintiff.
(315) No counsel for defendant.

PEARSON, J. If the deed, alleged to have been executed by Mrs. Cook, is valid in law to convey her estate, the plaintiff is entitled to recover. His Honor was of opinion that the deed was not valid. We have come to a different conclusion.
(316) It is objected to the probate of the deed that it does not appear that the two justices who certified to the examination of the *feme covert* were members of the County Court or were appointed by the court for that purpose.

The record shows that the deed was acknowledged in open court by the husband and wife, and that a report was made to the court at the same time by Forbes and Etheridge, two justices of the peace, as to the privy examination of the wife, and that thereupon the court ordered the deed to be registered.

The County Court is held by the justices of the peace in the several counties. Any three are sufficient to make a court, and any justice has a right to go upon the bench and be a member of the court. Indeed, any justice who is present in the court-room and takes part in the proceedings of the court, as one of the court, *ipso facto,* is one of the court.

A deed is acknowledged by husband and wife in open court; two justices of the peace thereupon take the privy examination and report to the court, and the court acts upon the report. The inference is irresistible that the two justices were members of the court, appointed for that purpose. If they had taken the examination *officiously* the court would not have received their report and *acted upon it.* In this case the record shows that the two justices, Forbes and Etheridge, were members of the court when the court opened on that day, but it is not necessary to call that circumstance in aid of the conclusion that they were members of the court, appointed to take the privy examination.

The other objection is that it appears from the report that the justices examined the wife as to whether she *executed* the deed voluntarily, but it does not appear that they examined her as to whether she *doth voluntarily assent thereto*—in other words, that the examination appears to have been as to a *past* act, whereas it should have been as to her *present* assent; and the idea is suggested that the law intends to give the (317) wife a *"locus penitentiæ"* between the execution of the deed and the privy examination; so that, although she *executed* the deed voluntarily, yet she should be at liberty to change her mind before the privy examination.

The novelty of this objection is an argument against it; for several cases, in which the report of the examination is expressed as it is in this case, have been examined by this Court, and all objections supposed to be at all feasible were raised, and many similar cases have, no doubt, occurred on the circuits. And yet, this idea has now been suggested for the first time. In *Joyner v. Faulcon,* 37 N. C., 386, the certificate made by *Judge Daniel* is, "she acknowledged that she executed the within deed freely," etc. In *Burgess v. Wilson,* 13 N. C., 307, the certificate is, "she acknowledged that she executed the deed of her own free will," etc., and although many objections were taken, the one now under consideration was not stated.

The act of Assembly gives no form in which the certificate or report of the privy examination is to be made. It simply provides that the judge, or member of the County Court, shall privily examine the wife, "whether she doth voluntarily assent thereto"—that is, to the execution of the deed, which she had just before acknowledged in the presence of her husband. And it can make no difference whether the judge or member of the court, in making the certificate or report of the privy examination, uses words in the past or present tense; in truth, the past tense would seem to be most proper. In the provision made for taking the examination of the wife who is sick, the words in the commission are in the past tense—"whether she executed the deed freely and of her own accord," etc., and it is probable that from this circumstance most of the judges and members of the courts have fallen into the mode of expressing the cer-
(318) tificate in the past, which is really the most natural manner of stating the fact, as the examination comes *after* the acknowledgment of the deed.

If upon the privy examination the wife states that, although she was willing to convey when she executed the deed, yet she had changed her mind, and was then unwilling, of course, the assent of the wife would not be certified or reported.

The word "assigned" is used by the parties in this case instead of the word "executed." We think it immaterial, the former being used as synonymous with the latter.

So it is immaterial whether the acknowledgment or the examination be first recorded. In *Joyner v. Faulcon,* before cited, the privy examination is written first, but it was held, "the certificate states a single transaction—all therein mentioned occurred at the same time, and it is immaterial what part of it is mentioned first in the certificate."

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

Cited: Beckwith v. Lamb, 35 N. C., 402; *Freeman v. Hatley,* 48 N. C., 119; *Robbins v. Harris,* 96 N. C., 559; *Sellers v. Sellers,* 98 N. C., 18; *Kidd v. Venable,* 111 N. C., 538.

MEMORANDA.

At the late session of the General Assembly the Honorable RICHMOND M. PEARSON was elected a Judge of the Supreme Court in the place of the Honorable Judge DANIEL, deceased; and was also elected a Judge of the Supreme Court for the unexpired time of the Honorable WILLIAM H. BATTLE, temporarily appointed by the Governor and Council, and who resigned on 30 December, 1848.

At the same session the Honorable AUGUSTUS MOORE, who had received a temporary appointment as one of the judges of the Superior Courts of Law and Equity, from the Governor and Council, was elected to the same office, but in a few days sent in his resignation.

At the same session the Honorable JOHN W. ELLIS was elected one of the judges of the Superior Courts of Law and Equity, to supply the vacancy occasioned by the resignation of the Honorable AUGUSTUS MOORE.

At the same session the Honorable WILLIAM H. BATTLE was elected a judge of the Superior Courts of Law and Equity, to supply the vacancy occasioned by the promotion of JUDGE PEARSON to the Supreme Court bench.

At the same session BARTHOLOMEW F. MOORE, Esquire, was elected Attorney-General of the State, having been previously appointed to that office by the Governor and Council, 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 RALEIGH.

JUNE TERM, 1849.

JEREMIAH BROWN'S ADMINISTRATORS v. JAMES K. HATTON.

1. The clerk of a district court of the United States furnished certain transcripts of record to a collector of the customs, who applied for them officially, and, as he stated, by the direction of one of the auditors of the United States Treasury: *Held*, that the clerk could not hold the collector personally responsible for his fees, but must look to the United States Government for what was due him.

2. The construction of a written instrument belongs to the court and not to the jury.

APPEAL from the Superior Court of Law of CRAVEN, at Spring Term, 1849, *Battle, J.*, presiding.

The plaintiff's intestate, Jeremiah Brown, was Clerk (320) of the United States District Court for the district of Pamlico, and the defendant collector of the customs at Washington. On 4 November, 1845, the defendant addressed to the intestate a letter, of which the following is a copy: "SIR.—I have to request that you will furnish *this office*, as early as you can find it practicable and convenient, a certified *list* of all custom-house bonds from Washington, N. C., on which judgments in favor of the United States are had in the United States District Court for the district of Pamlico at New Bern. Also, all such as may have been in suit, if any such there be, with the date on which they fell due, the names of the makers and sureties, the amount for which said bonds were originally made, the

amount of each payment and date thereof, and the amount still due on principal," etc. This letter is signed, "James K. Hatton, Collector," and addressed, "J. Brown, Esq., Clerk of the U. S. District Court, New Bern, N. Carolina." On 11 November, 1845, the defendant again wrote to the intestate as follows: "SIR.—On the 4th ultimo I requested you to furnish to *this office* a certified *list* of all bonds or judgments belonging to this office, stating at the same time that the *list furnished by you* to T. H. Blount, Esq., late collector, was, according to his statement, incomplete, inasmuch as it did not contain all bonds and judgments in *your office* belonging to this," etc. This letter then states, "My object was to get a correct *list*, that I might comply with a request made to me from the First Auditor of the United States Treasury *for the same*. Your failing to comply with that simple request has greatly disappointed me, and may subject me to some considerable loss." It then makes the request for the *list* in the same terms as before. The third letter, written on 20 November, 1845, was addressed by the defendant to the intestate, repeating the request for the *list*, as stated in the preceding ones. These two last are addressed as the
(321) first, and signed as that was. These letters were produced in evidence by the plaintiff, who further proved that the intestate, in consequence of the request contained in them, had made out and sent to the defendant copies of the records required. The plaintiff's declaration, which was in *assumpsit*, contained two counts: the first, upon an account for the copies of the records sent, etc.; the second, for work and labor done.

The defendant insisted that the contract was made with him as an officer and agent of the General Government, and he was not personally answerable.

The presiding judge was of opinion that from the testimony produced by the plaintiff it appeared the credit given by the plaintiff was to the General Government, and that there was nothing to show that the defendant intended to become personally responsible.

In consequence of this opinion the plaintiff submitted to a nonsuit and appealed.

James W. Bryan for plaintiff.
(325) No counsel for defendant.

NASH, J. There can be no doubt that a public agent, acting in behalf of the public, may render himself personally liable. The inquiry here is whether the defendant has done so.

The act of Congress, passed in 1791, ch. 128, pointing out the duties of collectors of the customs, is of no further use in this investigation than as it may serve to explain the anxiety, expressed by the defendant, that he might be enabled, through the aid of the intestate, to comply with the (326) request from the Treasury Department. It appears that Mr. T. H. Blount had preceded the defendant in the office of collector of the port of Washington, and in the list furnished him by the intestate were several omissions of bonds and judgments. This list was embodied in his report, we presume, to the office. With a view to supply this deficiency and to ascertain if there were any further omissions, the requisition was made upon the defendant by the department. The plaintiff's intestate, Mr. Brown, is distinctly apprised of these facts, and is informed that nothing is needed but a *list* of the bonds and judgments, etc., not for the purpose of enabling the defendant to comply with his duty to the public, for the act of 1791 required him only to make a due return of the bonds *in his office*. and the case shows that the bonds in suit in the district court never had been in his office since his appointment, but had been put in suit by his predecessor. The information sought to be obtained by the defendant was of no personal interest to him, any further than, as a faithful public servant, he was bound to aid the department in ascertaining what was due from its debtors. In all his letters he informs Mr. Brown for whom the information is needed and why. The bonds are described as belonging to the office at Washington, and the letters are signed by the defendant as collector. There is not in any part of the written evidence the slightest proof that the defendant intended to make himself personally responsible, and that responsibility must be explicitly undertaken. *Hite v. Goodman*. 21 N. C., 365; *Gidly v. Palmerston,* 2 Bro. and Bing., 275. The plaintiff contends that the records were made out by him, not for the Government, but for the defendant, to enable him to execute his official duty, and relies upon the language used by the defendant, expressive of his fears that he would suffer in consequence of the plaintiff's neglect in complying with his request. We do not so read the letters. The defendant, in each (327) of his communications, appears to guard against any idea that the work was for his benefit. On the contrary, in each application he states it is made to enable him to comply with a *request* from the department, and that the application is rendered necessary by the plaintiff's intestate's own neglect, as he had been informed, in not making out a perfect list for Mr. Blount. As to his fears of being injured by Mr. Brown's delay,

it might arise to him in several ways without embracing the idea that the list was necessary to him. We are of opinion that the work was done at the instance and for the use of the General Government, and to it the plaintiff must look for remuneration, the defendant not having made himself responsible, either by contract or fraud.

The plaintiff further contends that his Honor erred in not leaving the construction of the letters to the jury, as a matter of fact to be found by them. The letters were produced in evidence by the plaintiff to show the defendant's liability, as containing the contract under which the services were rendered. The contract, then, was in writing, and the intention of the parties is to be ascertained from it. This is admitted by the defendant's argument; he does not pretend that, if left to the jury, they could have looked out of the letters. If so, then it was a pure matter of construction to be placed upon a written instrument, containing in itself everything necessary to its being properly understood. We think his Honor committed no error in the instruction he gave the jury—it was a question of law and not of fact. The case now before us is not as strong as that of *Dameron v. Irwin*, 30 N. C., 421, and the whole defense here is covered by it.

PER CURIAM. Judgment affirmed.

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(328)

JAMES FLINN v. TIMOTHY ANDERS.

1. A count for a forcible entry may be joined with a count for an assault and battery.

2. The law permits each tenant in common a peaceable entry upon every portion of land held in common, but it does not justify any actual force applied to the person of his cotenant.

APPEAL from the Superior Court of Law of BLADEN, at Spring Term, 1849, *Caldwell, J.*, presiding.

The defendant and one Meredith were tenants in common of the tract of land where the trespass was committed. The plaintiff was in possession of a part of the land as the tenant of Meredith. While so in possession the defendant, together with others, who were aiding and assisting him, entered the house in which the plaintiff lived, and forcibly turned him out. In doing so they committed an assault upon his person. The declaration contained two counts: the first for a trespass to the plaintiff's close; the second, for the trespass to his person. The

jury were instructed that the plaintiff was not entitled to a verdict on the first count, and that they could give no damages except such as arose to the plaintiff because of the personal injury to him.

The jury found a verdict for the plaintiff on the second count, and from the judgment upon it the defendant appealed to the Supreme Court.

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

NASH, J. It is unnecessary for us to express an opinion as to the correctness of the charge upon the first count. The defendant, the appellant, does not complain of it (329) and it forms no part of his bill of exceptions.

We cannot well perceive where the error in law lies in the charge upon the second count. There can be no doubt that the two counts can be joined; and there is as little doubt that one tenant in common of land may commit an assault and battery upon the person of his cotenant. While the law permits to each tenant in common a peaceable entry upon every portion of the land held in common, it does not justify any actual force applied to the person of his cotenant. The case states that the defendant did commit an assault and battery upon the person of the plaintiff.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF JAMES MEREDITH v. TIMOTHY ANDERS.

A testatrix devised as follows: "For the love and affection which I have for J. M., and to enable him to take care of my two old negroes, B. and R., who I wish to remain where I now live and support themselves, I give and bequeath the land whereon I now live," etc.: *Held*, that J. M. took a valid legal estate in the land, notwithstanding the objection made, that J. M. was to take and hold the land in trust for the negro slaves.

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

The lessor of the plaintiff claims under the will of Elizabeth Locke. The testatrix devised as follows: "For the love and affection which I have for James Meredith, and to (330) enable him to take care of my two old negroes, Ben and Rachel, who I wish to remain where I now live and support

themselves, I give and bequeath the land whereon I now live, with all and singular the improvements, containing two hundred acres," etc. "Should the said Meredith find it necessary for his own convenience and the good of the neighborhood to remove said negroes to his own house, I wish him to do so." The counsel for the defendant moved the court to instruct the jury that the devise was not to the lessor of the plaintiff, but to the two old negroes, or in trust for them, and was therefore inoperative and void. The court declined to give the instructions prayed for, but charged that the land was devised to the lessor of the plaintiff, and not to the two negroes, nor in trust for them.

The jury returned a verdict for the plaintiff, and judgment being rendered, the defendant appealed to this Court.

D. Reid for plaintiff.

Strange, W. H. Haywood and *Warren Winslow* for defendant.

NASH, J. The only question presented to this Court is as to the devise of the two hundred acres. The construction put upon it by the presiding judge in the court below was correct. The land is, by the will of Elizabeth Locke, given to the lessor of the plaintiff, and the cause assigned, to wit, her love and affection for him, and to enable him to take care of the old negroes. But it is insisted by the defendant that, if this be so, it is a devise to him in trust for the two old negroes, and it is consequently void and inoperative. Be this as it may, the question cannot arise in this case. We are now in a court of (331) law, and the legal title must prevail. By the will that title is in the lessor of the plaintiff.

We see no error in the opinion of the court below, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

WILLIAM A. HARDISON v. SAMUEL C. BENJAMIN.

Although the bond of a person, arrested upon a *ca. sa.* within twenty days of the term of a court, should be conditioned for his appearance at the next succeeding term, yet the debtor may waive this privilege and give a bond for his appearance at the first term, and this bond shall be valid.

APPEAL from the Superior Court of Law of MARTIN, at Spring Term, 1849, *Settle, J.*, presiding.

HARDISON *v.* BENJAMIN.

A *ca. sa.* issued against the defendant, Benjamin, by a justice of the peace, on 1 December, 1848. At January Term of the County Court of Martin the constable returned the *ca. sa.* and a bond in the usual form for the appearance of the said Benjamin, to take the benefit of the insolvent law. The bond was dated 1 December, 1848, and recites that "Benjamin being then arrested," etc. Benjamin, being called, failed to appear, and a motion was made for judgment on the bond; judgment was entered accordingly, and the defendant appealed to the Superior Court. The defendant's counsel resisted the judgment in that court, and proved that the bond, although dated on 1 December, 1848, was not executed until the Monday of January court, 1849, and was dated back. The plaintiff (332) proved that the defendant had been arrested thirteen days before the court, and by an arrangement with the officer, entered into at the defendant's request, he was allowed to go at large, the officer taking his promise that he would execute the bond on the Monday of January court, which he did accordingly. His Honor gave judgment for the plaintiff, and the defendant appealed.

Biggs for plaintiff.
No counsel for defendant.

PEARSON, J. As the arrest in this case was made within twenty days of the January Term, the bond ought "to have been conditioned" for the debtor's appearance at April Term. This provision is made for the benefit of the debtor, to enable him to prepare his schedule and to give notice to all of his creditors. We can see no reason why this, like other benefits given by law, may not be waived, if the party see fit to do so. In this case it was agreed that, if permitted to go at large until court, he would then execute "the bond," by which we understand the bond in question, dated as of 1 December, 1848, and reciting that he was *then arrested*. This being voluntarily done, the party must abide by it. If the officer, upon arresting the debtor thirteen days before January court, had refused to take a bond for his appearance at April Term, and insisted upon holding the debtor in custody, unless he would execute a bond dated 1 December, and for his appearance at January Term, the bond so executed would have been void, as obtained by duress. But in this case the bond was given after the debtor was out of custody, in pursuance of an arrangement entered into at his instance.

Bail bonds are required to be taken in a particular form by the statute of 23 Henry VI., ch. 9; and the statute de-
(333) clares that all bonds not taken in that form shall be void. There is no provision of the kind in reference to a *ca. sa.* bond taken by a constable. The debtor is left to his remedy, by motion at the appearance term, to set aside the bond, if taken contrary to law, by duress or otherwise, and has his action against the officer; but the court ought not to set aside a bond voluntarily given in pursuance of an express arrangement made for his ease and favor.

PER CURIAM. Judgment affirmed.

Cited: Robinson v. McDougald, 34 N. C., 137.

JAMES HILL v. HENRY JACKSON.

The passage of the several acts of Assembly enlarging the time within which grants shall be registered, makes them good and available by relation back from the time when they are dated, as much so as if they had been registered within two years.

APPEAL from the Superior Court of Law of RANDOLPH, at Spring Term, 1849, *Dick, J.*, presiding.

This is an action of trespass *quare clausum fregit*. The plaintiff claimed to hold the land in question under a grant, issued in 1843, to Jesse Walker and Marsh Dorsett. The defendant claimed to hold under a grant issued in 1783 to Absalom Tatum and William Moore, which also covered the land in dispute; and, to sustain his allegation, offered in evidence the copy of a grant issued by the Secretary of State to Tatum
(334) and Moore, which was registered by the register of Randolph County during the trial. This evidence was objected to by the plaintiff's counsel, because the copy offered did not appear to be full and complete; and, if complete, it had not been registered within the time prescribed by law; and, if valid after registration, it could not by relation extend back so as to defeat the plaintiff's title under Walker and Dorsett. The court admitted the evidence, and instructed the jury that the copy read in evidence, from the office of the Secretary of State, did relate back so as to defeat any title in Walker and Dorsett, derived under their grant.

The defendant further introduced evidence showing that he entered upon the land under a lease from the devisees of Wil-

liam Moore and the heirs of the other deceased devisees. The plaintiff entered into a vacant house upon the lands in question, but no evidence was offered tending to show that he entered as the tenant of Walker and Dorsett, or in any manner claimed under their authority; and the court so instructed the jury.

The presiding judge instructed the jury that, inasmuch as no connection was shown between the plaintiff and Walker and Dorsett, the former would not in law be in possession of the lands contained in the Walker and Dorsett grant, but only of the house and land in his enclosures; and if they believed that no trespass was committed on these, the defendant was not guilty. A verdict was rendered for the defendant.

Rule for a new trial, first, because the judge erred in receiving as evidence a copy of the grant from the secretary's office.

Secondly, because of error in instructing the jury that the registry of the copy of the grant from the secretary's office related back so as to defeat any title derived by Walker and Dorsett under their grant.

Thirdly, because of error in instructing the jury that (335) there was no evidence that the plaintiff entered under Walker and Dorsett, inasmuch as it had been proved that an angry altercation took place between the defendant and Marsh Dorsett, at which the plaintiff was not present, in which Dorsett was complaining of the defendant's conduct and threatened him with a suit.

Rule discharged, judgment for the defendant, and appeal.

J. T. Morehead for plaintiff.
No counsel for defendant.

NASH, J. The first objection is that the copy of the grant to Tatum and Moore, which was offered in evidence by the defendant, was incomplete, and had not been registered in the county of Randolph within the time prescribed by law. The first branch of the objection is not true in point of fact—the copy is complete. As to the second branch, the facts were that the copy was not registered until the sitting of the court. The grant is dated in 1783, and ought by the terms of the act of 1783 to have been registered within twelve months from its date. But the Legislature has uniformly, with one omission, passed laws at every session to enlarge the time. The omission alluded to was at the session of 1819, but it was supplied at the session of 1821, and care has been taken that there should be no such failure since. The copy of the grant offered in evidence was registered in Randolph County in March, 1849, and at the pre-

ceding session of the Legislature, held in 1848, the usual act for prolonging the time for registering grants was passed; so that, in truth, the grant was registered in Randolph County within the time prescribed by law; and, when so registered, Laws 1836, ch. 42, sec. 24, makes it evidence.

(336) The second objection cannot avail the plaintiff. The passage of the acts, to which reference has been made, prolonging the time within which grants shall be registered in the county, has practically the effect of rendering nugatory that clause in them, and must continue to have that effect as long as the Legislature shall continue to pass them. I mean that it renders nugatory the effect that the neglect to register the grant, within a limited time, might have. The grant, then, may be registered at any time, if, at that time, there be any law authorizing the act, which is not denied in this case. If the registration of the grant was legal, then it must have the effect of relating back; this is a necessary consequence, and daily recognized in our practice. *Scales v. Fewel*, 10 N. C., 16. There is scarcely one grant in a hundred which is registered within two years from its date. Nor is it even thought necessary to examine into the date of its registration. It can make no difference that the grant in this case was not registered before the action was brought. If the intention of the registry acts is to give notice to the citizens of the county what lands are vacant, and if it be desirable that such notice should be given, the policy of the continuing acts may be well questioned, but our duty is to execute the law as we find it.

The third objection is not sustained. There was no evidence that the plaintiff entered as the tenant of Walker and Dorsett, or in any manner claimed under their authority. The altercation between the defendant and Dorsett was entirely irrelevant.

We see no error in the opinion of his Honor on the points brought here.

PER CURIAM. Judgment affirmed.

Cited: Isler v. Foy, 66 N. C., 551; *Janney v. Blackwell*, 138 N. C., 439.

(337)

CHARLES G. HAUGHTON ET AL. v. WILLIAM H. BAYLEY ET AL.

Where two persons, each out of his own stock, delivered goods to a third person to be peddled, and took a bond payable to themselves jointly for the faithful accounting therefor: *Held*, that they could recover upon a bond so taken, notwithstanding each had a separate individual interest.

APPEAL from the Superior Court of Law of BERTIE, at Spring Term, 1849, *Manly, J.*, presiding.

This was debt upon a bond executed by the defendants for the sum of $500 and payable to the plaintiffs, dated 30 November, 1847, with a condition that "William H. Bayley, having this day received of Charles G. Haughton and Joseph G. Godfrey a stock of goods, to peddle with: now, if the said Bayley shall well and truly pay unto Charles G. Haughton and Joseph G. Godfrey the just and full amount of the stock of goods on 1 April next, then the above obligation to be void," etc.

The breach was a failure to pay for the goods. Pleas, condition performed and no breach. The plaintiffs offered to prove that each of them owned a store in the county of Bertie, the one about six miles from the other. That each from his individual effects, in which the other was admitted to be in no way interested, furnished to the defendant Bayley a parcel of goods on the day the bond was executed, for which the said Bayley was to account, and pay them respectively; and that Bayley had commenced peddling, and disposed of the goods, and failed to account and pay over.

His Honor "deemed the evidence inadmissible." The plaintiffs submitted to a nonsuit, and appealed.

Biggs for plaintiffs.
No counsel for defendants.

PEARSON, J. We think the view taken of the case in (338) the court below was wrong. As the goods were the individual effects of the plaintiffs, and were delivered by each in separate parcels, the regular way was for each to take a bond payable to himself, and, if no bond had been taken, they would have been compelled to bring separate actions; but the parties saw fit to cover the whole transaction by one bond, and there can be no good reason why an action may not be maintained upon it. The object of the evidence was to show what goods Bayley had received of the plaintiffs on that day, and for which it was intended the bond should be a security.

If the plaintiffs had been partners and had jointly delivered a parcel of goods to Bayley, the bond would most fitly have applied to them, to the exclusion of individual goods separately delivered by each. But there was no copartnership, and the question is whether the bond be wholly inoperative as having no subject to apply to, or whether it be applicable to goods separately delivered by the plaintiffs to Bayley on that day. Clearly it was the intention of the parties that the bond should apply to these goods, as there are no others to fit the description more nearly, and these goods fall under the general words of "a stock of goods to peddle with, received by Bayley of Charles G. Haughton and Joseph G. Godfrey, on the day the bond was given."

The nonsuit must be set aside and a *venire de novo* issued.

PER CURIAM. Judgment accordingly.

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(339)

WILLIAM A. DARDEN, EXECUTOR, ETC., v. JOHN JOYNER.

Where on a divorce *a mensa et thoro* the wife is allowed, in part of alimony, the rent of certain lands, out of which she makes an annual saving, the husband has no right to the amount accumulated out of such saving.

APPEAL from the Superior Court of Law of GREENE, at Fall Term, 1848, *Settle, J.*, presiding.

This was an action of *assumpsit*. The questions were presented to the court upon the following case agreed:

Elizabeth Rogers, the wife of Stephen Rogers, the plaintiff's testator, in 1837 was divorced from bed and board, and allowed, as alimony, one-third of the annual rent of a tract of land and the service of three negroes.

Her part of the rent amounted to $60 per annum, which she regularly received. In 1838 she sold the negroes to one Vines for $1,000, and gave him a bill of sale with warranty of title. In 1841 Elizabeth Rogers made a paper-writing in the nature of a last will and testament, which was, after her death, admitted to probate in 1845. By it she disposed of such money, notes and effects as she had at her death, making the children of the defendant, with whom she had boarded since her divorce, *without charge*, her legatees. The defendant took out letters of administration with the will annexed, and possessed himself of her estate, amounting to $2,046.21. The items consisted of the $1,000, and interest, received of Vines for the sale of the

negroes; several notes, which were her savings out of the amount of the rent of the land, annually received; a few articles, acquired by her own industry, such as bedquilts, etc.

After the death of Elizabeth Rogers, Stephen Rogers instituted an action against Vines, the vendee of the negroes, and recovered and received from him their value. See (340) *Rogers v. Vines*, 28 N. C., 293. Rogers died in 1847, having appointed the plaintiff his executor. The defendant, without suit, paid to Vines the $1,000 and interest which he had paid Mrs. Rogers for the negroes and for which he held her warranty, after the recovery by Stephen Rogers. Plaintiff demanded of defendant the entire sum of $2,046.21. Defendant refused to pay any part.

It is agreed that if the plaintiff be entitled to recover of the defendant the amount received by Mrs. Rogers for the negroes with interest, and the amount saved by her out of the rent, the plaintiff should have judgment for $2,004.62. If the plaintiff be entitled to recover the price of the negroes with interest, but not the savings out of the rent, then judgment is to be entered for $1,562.37. If the plaintiff be entitled to recover the savings out of the rent, but not the price of the negroes, then judgment is to be entered for $442.03, unless the defendant be entitled to commissions, which deduction would leave a balance of $332.53, for which judgment is to be entered. If the plaintiff be entitled to neither sum, then judgment to be entered for the defendant.

His Honor directed judgment to be entered for the plaintiff for the sum of $332.53, from which judgment both the plaintiff and defendant appealed.

J. H. Bryan and *J. W. Bryan* for plaintiff.
Rodman for defendant.

PEARSON, J. We think the plaintiff was not entitled to recover, either the price of the negroes or the savings of his testator's wife, out of the annual rent received by her, and that judgment should have been entered for the defendant.

As to the price of the negroes, the plaintiff was not entitled to recover. Rogers had received of Vines the value of (341) the negroes, thereby repudiating the sale made by his wife, and in no point of view could the money paid by Vines to Mrs. Rogers be considered the money of her husband. After the divorce, the wife had a right "to sue and be sued, claim redress for and be made liable upon contracts, as though

she were a *feme sole.*" By the sale of the negroes, although the sale was wrongful, the money became hers, and she was liable upon the warranty.

The view presented by the plaintiff's counsel is not tenable, for, admit "the contract of sale to have been a perfect nullity," the money handed to Mrs. Rogers was not the money of Rogers, but was the money of Vines, received for the use of Vines.

As to the savings out of the rent, we think the plaintiff was not entitled to recover. After the divorce the wife had "capacity to acquire and dispose of such property as she might procure by her own industry, or as might accrue by descent, devise, etc., or in any *other manner.*"

It might be urged with much force that "these savings" fall under the words "property acquired by her own industry," for, if a wife pays her board by working, and thereby is enabled to save a part of the sum annually allowed for her maintenance, it is the same thing as if she had paid her board out of the sum allowed and received wages for her work. But the right of the wife to her savings is unquestionable, upon the ground that the decree of alimony vests the title in her. If there is no reconciliation, she has an absolute right to the sum allowed and received annually for her maintenance; in which respect it differs from *specific property* assigned to her separate use. If the allowance be too much, the court has power at any time to reduce it—if too little, to increase it; and thus it is at all times subject to the control of the court, and it tends to make the wife industrious and economical to allow her to have the savings.

(342) It is not necessary to decide whether the wife had capacity to make a will under the word "dispose." If she had capacity, she has exercised it. If the word "dispose" is confined to sales or gifts in her lifetime, so that she died without making a disposition, the act provides that her estate "shall be transmissible in the same manner as though she were *unmarried.*" This *excludes* the *husband,* and, take it either way, he has no right.

The judgment below must be reversed and a judgment be entered for the defendant.

PER CURIAM. Judgment accordingly.

THE STATE v. GRIFFIN STEWART.

1. It is in the discretion of the Attorney-General, on the trial of a capital case, to introduce on behalf of the State only such witnesses as he may think proper.

2. If, on the trial of a slave for a capital offense, the counsel for the prisoner does not ask the court to give to a mulatto witness, introduced on the part of the State, the charge required by the act of Assembly, Rev. St., ch. 111, sec. 51, advantage cannot afterwards be taken of the omission of the judge to make such charge.

3. Whether such a charge was or was not given cannot appear upon the record, unless placed there by the exceptions of one or the other party.

APPEAL from the Superior Court of Law of NASH, at Spring Term, 1849, *Settle, J.*, presiding.

The prisoner was indicted for murder in killing Penny Anderson.

The State proved that the prisoner and Penny Ander- (343) son had lived together for several years as man and wife, although not married; that in October, 1848, Penny Anderson was, on Monday night, at home with the prisoner. During the night blows were heard and much lamentation, as of a person suffering under a violent beating and begging for mercy. The outcry was in the direction of the prisoner's house, and the cries were in the voice of a female. The next morning Penny Anderson was missing; and the prisoner, being asked where she was, said: "She had gone to one Hale's," who lived about ten miles off. Upon search, it was found she had not been at Hale's, nor could she be found anywhere. In about six weeks afterwards her body was found, partially buried in an out-of-the-way place some five hundred yards from the house of the prisoner. The body, although putrid, exhibited many marks of violence, particularly about the throat, as if she had been choked to death. The body was identified by a ring on a finger, by several articles of clothing, by a broken finger, and by other modes of identification. The State proved many other circumstances tending strongly to show that the prisoner had murdered her.

The prisoner was of a black complexion. He had lived in the neighborhood about ten years, and during all that time he passed for and was treated as a free negro; and the case states that he was treated as a free negro during the whole trial, and spoken of as such by the counsel. The jury found the prisoner guilty of murder.

It was in evidence that no person was at the house of the prisoner on the night of the alleged murder, except the prisoner,

the deceased, and a little boy, the grandson of the deceased, between seven and eight years of age. Several of the State's witnesses were mulattoes. In the opening address to the jury the counsel for the prisoner *strongly* urged that, as the State had not examined the boy, who was the only person pres-
(344) ent, every presumption should be made against the prosecution, because a witness was kept back whom it was the duty of the State to have called and examined. The Attorney-General was permitted by the court to interrupt the counsel and say: "The boy was in court, he had examined him, and did not call him as a witness because he was satisfied he was too ignorant to be competent; but the prisoner's counsel was at liberty to offer him to the court that his capacity might be judged of, and to call him as a witness on the part of the prisoner." The prisoner's counsel declined the proposition, and moved the court to instruct the jury that they should not convict upon circumstantial evidence, as there was a person present at the alleged murder who was a competent witness, so far as it judicially appeared, and could give direct testimony. The court refused to give the instruction.

The prisoner's counsel moved for a new trial because the court refused to give the instruction prayed for, and because the court permitted the Attorney-General to make the interruption.

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

PEARSON, J. There was no error in refusing the instruction. The counsel for the prisoner fell into an error in supposing that circumstantial evidence was *secondary* evidence. In *S. v. Martin,* 24 N. C., 120, it is held "to be in the discretion of the prosecuting officer what witnesses he will examine." "If other witnesses can shed more light on the controversy, it is competent for the prisoner to call them." We think it was entirely proper for the court to allow the Attorney-General to make the interruption, and it was proper for that officer, seeing the prisoner's counsel had fallen into an error, to set him right, and
(345) give him an opportunity to call the witness, if competent.

Another ground upon which a new trial was asked was that the prisoner, being *black,* was *prima facie* a slave, and, if a slave, the court had committed error in not admonishing the mulatto witnesses, as required by law. This point was not made until after the trial; it was then too late. If the prisoner wished to be tried as a slave, the question should have been started "in time." There was evidence to rebut the presump-

tion, and he was treated as a free negro during the whole trial. It would be trifling with the administration of justice to allow a prisoner to pass himself off as a free negro and take his chances for a verdict, and then turn around and insist that he was a slave. Again, the act of Assembly was intended for the benefit of the party against whom mulattoes are called as witnesses on the trial of slaves; consequently, the benefit may be waived, and the proper course is to object to the competency of witnesses before they give testimony, if they had not been admonished.

But, again, it does not appear from the record that the mulatto witnesses were not admonished. The record need not show *affirmatively* all the incidents of the trial. The trial is presumed to have been conducted regularly and according to law, unless the party excepts and has the act of omission or commission complained of spread upon the record.

Another ground was taken in this Court, that if the prisoner was a slave, notice should have been issued to his owner. The same reply is applicable to this objection; and further, it not appearing who the owner was, the act provides that the court may appoint counsel and proceed with the trial as if the owner had been notified.

There is no error in the record, and we presume this is one of the cases where an unfortunate prisoner, availing himself of the act of Assembly allowing appeals without (346) security for costs, *appeals without hope*.

PER CURIAM. Ordered to be certified that there is no error in the record.

Cited: S. v. Haynes, 71 N. C., 84; *S. v. Baxter*, 82 N. C., 606.

HULDAH SNOW v. WILLIAM J. WITCHER AND WIFE.

1. In an action of slander, when the charge is made directly, the plea of justification should aver the truth of the charge as laid in the declaration; but when the charge is made by insinuation and circumlocution, so as to render it necessary to use introductory matter to show the meaning of the words, the plea should aver the truth of *the charge* which the declaration alleges was meant to be made.

2. In an action of slander by a single woman, under the act of 1808, Rev. St., ch. 110, where the words charged were "that she had lost a little one," "Z. S. is a credit to her," the said Z. S. being

notoriously an incontinent person, and "she better be listening to the report about herself losing a little one": *Held*, that it was sufficient for the defendant to plead and prove that the plaintiff was an incontinent woman.

APPEAL from the Superior Court of Law of SURRY, at Fall Term, 1848, *Moore, J.*, presiding.

This is an action on the case, under the act of 1808, for a charge of incontinence. The first count alleges that the defendant Judith, who is the wife of the other defendant, made the charge by using the words, "she had lost a little one." The second count, by using the words, "Zilphy Sims is a credit to her," Zilphy Sims being a woman whose general character was that of a base, lewd and incontinent person. The third
(347) count, by using the words, "She better be listening to the report about herself losing a young one."

The defendants pleaded justification, and, on the trial, introduced a witness who swore that he had, on several occasions, had criminal intercourse with the plaintiff. The court charged that the plea of justification should aver the truth of the charge, as laid in the declaration, and that this evidence, if believed, did not establish the plea.

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

No counsel for plaintiff.
Boyden for defendants.

PEARSON, J. Assuming that the declaration contains a colloquium and introductory matter sufficient to warrant the innuendoes, we think the judge erred in holding that the evidence, if believed, did not make out a justification. When the charge is made directly, the plea should aver the truth of the charge as laid in the declaration; but when the charge is made by insinuation and circumlocution, so as to make it necessary to use introductory matter to give point to and show the meaning of the words, the plea should aver the truth of *the charge* which the declaration alleges was meant to be made. If the words are, "Britain is as deep in the mud as Welch is in the mire," and the declaration, with proper introductory matter, alleges that these words were meant to make a charge of passing counterfeit money, the plea should aver that the plaintiff was guilty of passing counterfeit money. In this case, the declaration alleges that the words used were meant to make a charge of incontinence, and the plea should aver that the plaintiff was incontinent, which averment would be fully proved by the evidence of

the defendants' witness, if believed. His testimony, if true, showed that the plaintiff was not one of those "innocent," chaste women, whose "unsullied purity" the recital de- (348) clares it was the intention of the act to protect.

But it is insisted that the words, "she had lost a little one," not merely charge that the plaintiff was incontinent, but that she had brought forth a bastard child, and that the plea should aver this fact and the evidence show it to be true.

Conception and delivery are the mere effects of nature—there is no harm in them *per se*. The guilt lies in the criminal intercourse, which is made neither greater nor less by the collateral circumstances of conception and delivery, although these circumstances may be considered unfortunate, as leading to detection and exposure. Criminal intercourse is the gist of the charge, and is all that the plea need aver or the evidence establish.

The learned judge erred in holding that conception and delivery, which are in themselves innocent, constituted a part of the substance of the charge, and ought to have been averred and proved.

In the second count the charge is that the plaintiff was a "base, lewd and incontinent woman." The words "base and lewd" are not actionable, for "lewd" means "lustful, libidinous," but does not import criminal indulgence; so that "incontinent" is the actionable word which, by the evidence, was established.

In the third count the charge is, "She better be listening to the report about herself losing a young one." The defendants are not called upon to prove that there was such a report, nor would it avail them as a justification if they did. They must aver and prove the matter alleged to have been reported, to be true, to wit, that the plaintiff was incontinent and unchaste.

The *gravamen* of the action is a false and malicious charge of incontinence and a want of chastity.

It is unnecessary to allude to the other points made. (349)

The judgment must be reversed, and a *venire de novo* be issued.

PER CURIAM. Judgment accordingly.

Cited: Watters v. Smoot, 33 N. C., 316; *McAulay v. Birkhead*, 35 N. C., 32.

DEN ON THE DEMISE OF ADDERTON ET AL. *v.* MATTHIAS MELCHOR.

In an action of ejectment, where the declaration contained several counts, some of which were on the demises of persons who had died before the action was brought: *Held*, that the court below did right in ordering these counts to be stricken from the declaration.

APPEAL from the Superior Court of Law of STANLY, at Spring Term, 1849, *Caldwell, J.*, presiding.

The declaration in this action of ejectment had many counts. Among others, there were counts on the several demises of John and Thomas Carson and William Moore, laid in 1796. At the return term, spring of 1848, the defendant, upon affidavit that the said John, Thomas and William were dead, and had died as far back as 1810, obtained a rule to show cause why the counts, upon their demises, should not be struck out of the declaration. The plaintiff alleged that the other lessors claimed under the said John, Thomas and William. Upon argument, the rule was made absolute, and the plaintiff appealed.

(350) *Strange* for plaintiffs.
No counsel for defendant.

PEARSON, J. There was no error in making the rule absolute. Indeed, the counsel for the real parties admits that the idea of laying a demise in the name of one who had died many years before the institution of the suit was an "experiment." The experiment ought not to have succeeded. It was obviously an attempt to pervert a fiction of law from its true purpose and intent. The proper time for making the motion was at the appearance term, but the court should, at any time (at least before verdict), have allowed the application, and should have permitted the plea and consent rule to be withdrawn, if necessary, to enable the defendant to make the motion.

The action of ejectment is admirably adapted to try questions of title to land, and the fiction of "lease, entry and ouster" is a beautiful illustration of the fact that a fiction of law "works wrong to no one," and is never introduced into legal proceedings except for the purpose of avoiding useless delay and expense and furthering the ends of justice. It is true "John Doe and Richard Roe" are very much abused by persons who are not well acquainted with them, but they are deservedly favorites with those who have cultivated their acquaintance. No one who

comprehends the full scope and object of the fiction can fail to be struck with it as an enduring monument of the wisdom and clear-sightedness of the fathers of our law.

After it became common for freeholders, instead of bringing *real actions*, to enter upon the land and make leases for years, so that the lessees might bring ejectment, it occurred to the courts that the fact of making the "entry and lease" was unnecessary, and was attended with useless expense and delay. How was this to be avoided? If the lease and entry were supposed, and the action was brought against the tenant in (351) possession, he had a right to enter his plea, and could not be called on to make any admissions. The expedient adopted was to bring the action against the *casual* ejector; let him give notice to the tenant in possession, who, when he applied to be made defendant, might be required to admit "lease, entry and ouster" as a condition of his being allowed to defend. He had no right to complain—he was not required to admit anything that would prejudice his right, but simply to admit those things to have been done which the lessor might easily have done by increasing the trouble and expense. But to require him to admit a thing which could not have been done at the institution of the action—for instance, that a lease had been made by a *dead* man—would be unreasonable. The proposition would have shocked *Chief Justice Rolle*, who, nearly two centuries ago, had the honor of inventing the action of ejectment in its present form. 3 Bl. Com., 199, 207.

Besides being unreasonable, as requiring the admission of an impossibility, it would be a palpable violation of a fundamental principle of the action of ejectment. "The lessor must not only have title at the date of the demise, but must have title and a right of entry at the commencement of the suit." At the death of the proposed lessors the title passed out of them to their heirs or some one else. When this action was instituted the dead lessors had neither title nor right of entry.

The decision of the court below must be affirmed.

RUFFIN, C. J. Besides the reasons given by my brother *Pearson* for affirming the judgment, there are others which render it plain that the counts in question ought not to be suffered to remain in the declaration.

There is no instance in which a count on the demise (352) of a person who was dead at the time of bringing suit has been sustained; and it is contrary to reason that it should be.

If there were a verdict for the plaintiff on those counts, who could be put into possession under it? Very clearly, the lessors

of the plaintiff in the other counts could not; for the titles of the several lessors in the different counts are distinct and independent, and hence the necessity of laying the various demises in different counts. It is true, indeed, if a lessor of the plaintiff die pending the action, that does not affect the proceeding, but the case goes on to trial on the demise to the plaintiff, which the lessor, since dead, was capable of making as it is laid, and when the suit was brought. In such a case, therefore, there can be no difficulty in permitting the lessor's heirs or devisees, on a title thus accruing *pendente lite*, to proceed in the name of the plaintiff of record to execution. But that can never authorize a person to bring a suit on the supposed demise of a person who was dead at the time, instead of doing so on his own. If the person actually instituting the action have a connection with the dead person, he must have derived his title or claim from him before the suit was brought; and therefore there is no occasion for using the dead man's name, instead of his own, or in addition to it. If, on the other hand, he cannot deduce title from the dead person, upon what possible ground can he assume to use his name to disturb the party in possession, who has the right to continue in possession against all but the real owner? It is obvious, indeed, if the other lessors of the plaintiff could recover and take possession under the imaginary demises of the dead persons, that the present defendant would then have just the same right to bring suit immediately against those other parties, on the demises of the same dead persons, and, thus, in turn evict them. The absurdity of such a seesaw shows
(353) the impossibility of allowing such an abuse of the legal fictions in ejectment as was here attempted.

PER CURIAM. Ordered to be certified accordingly.

Cited: Skipper v. Lennox, 44 N. C., 190; *Elliott v. Newbold*, 51 N. C., 10; *McLennan v. McLeod*, 70 N. C., 367.

DEN ON DEMISE OF THOMAS ETHERIDGE ET AL. V. SOLOMON ASHBEE.

Where a deed of a married woman had on it only the following entries as to its probate: "State of North Carolina, Currituck County, February Term, 1832. Personally appeared Lydia Cook, wife of John Cook, and in open court acknowledged that she assigned the within deed of her own free will without any constraint whatever. Let it be registered. (Signed) W. D. BARNARD."

ETHERIDGE *v.* ASHBEE.

STATE OF NORTH CAROLINA,
Currituck Sessions, February Term, 1832.

This deed from John Cook and Lydia to *Samuel Ferebee*, was exhibited and proven in open court by John L. Scurr, subscribing witness. At the same time Lydia Cook, the *feme covert*, personally appeared in open court, and being privately examined by W. D. Barnard, one of the court appointed for that purpose, who reported that the said Lydia Cook acknowledged the execution of said deed of her own accord and without any constraint whatever, etc. On motion, ordered to be registered.

S. HALL, C. C. C.

And there was also the following entry on the minute docket of the same term: "A deed from John D. Cook and wife, Lydia, to William C. Etheridge was proven as to John Cook and wife by the oath of John Scurr, a witness thereto, and her private examination taken in open court. Ordered registered": *Held*, that these entries afforded no evidence that the wife had been privily examined as required by law.

APPEAL from the Superior Court of Law of CURRITUCK, at Spring Term, 1849, *Manly, J.*, presiding.

Both parties claim under Lydia Cook, the wife of John (354) Cook. It is admitted that if a deed from Cook and wife to William C. Etheridge is valid to pass the title of Lydia Cook, then the plaintiff is not entitled to recover. If the deed be not valid, then the plaintiff is entitled to recover.

The deed is in the usual form, signed and sealed by both Cook and Lydia Cook, attested by John L. Scurr. Upon the back of the deed are the following endorsements:

STATE OF NORTH CAROLINA,
Currituck County, February Term, 1832.

Personally appeared Lydia Cook, wife of John Cook, and in open court acknowledged that she assigned the within deed of her own free will, without any constraint whatever. Let it be registered. W. D. BARNARD, [J. P.]

STATE OF NORTH CAROLINA,
Currituck County, February Term, 1832.

This deed from John Cook and Lydia Cook to *Samuel Ferebee*, was exhibited and proved in open court by the oath of John L. Scurr, subscribing witness. At the same time Lydia Cook, the *feme covert*, personally appeared in open court, and being privately examined by W. D. Barnard, one of the court appointed for that purpose, who reported that the said Lydia

acknowledged the execution of the said deed of her own accord, and without any constraint whatever, etc. On motion ordered to be registered. S. HALL, C. C. C.

Registered, 15 May, 1832. THOS. S. LAND, P. R.

On the docket of the Court of Pleas and Quarter Sessions for Currituck, February Term, 1832, was the following entry:
(355) "A deed from John D. Cook and wife, Lydia, to William C. Etheridge was proven, as to John D. Cook and wife, by the oath of John L. Scurr, a witness thereto, and the private examination taken in open court and ordered to be registered."

A verdict was returned for the plaintiff, subject to be set aside and a nonsuit entered should the court be of opinion that the deed was valid to pass the title of Lydia Cook. The court, being of that opinion, directed the verdict to be set aside and a nonsuit entered. The plaintiff appealed.

Heath for plaintiff.
Jordan for defendant.

PEARSON, J. His Honor was of opinion that the deed was valid to pass the title of Mrs. Cook. With every disposition to give effect to the deeds of *femes covert,* we cannot concur in that opinion. The privy examination was not taken as the law requires.

Suppose W. D. Barnard was a member of the County Court, appointed to take the privy examination of Mrs. Cook, his certificate is not that she was privily examined by him, but that "*in open court* she acknowledged," etc.

So, the certificate of the clerk is inconsistent and repugnant, as endorsed on the deed. It says: "this deed from John D. Cook and wife, Lydia, to *Samuel Ferebee* was exhibited," etc. This is inconsistent, for the deed, upon which the endorsement is made, is a deed from John Cook and Lydia Cook, his wife, to *William C. Etheridge.* The description is wrong, or else the endorsement is made on the wrong deed.

Again, it says: "Lydia Cook, being privately examined by W. D. Barnard, one of the court appointed for that purpose, who reported that she acknowledged the execution of the said deed," etc. It is not stated that Barnard reported that
(356) upon *her privy examination before him* "she acknowledged," etc. But suppose this is to be inferred from the certificate of the clerk: then it is repugnant, for the certificate of Barnard is that she made the acknowledgment "*in open court.*"

Nor is it aided by the entry upon the docket (admitting that the entry can be called in aid), for the entry is that the deed was proven and "her *private* examination taken *in open court.*" It is not stated by whom the examination was taken, and for aught that appears the husband was present.

We are of opinion that the deed was not valid to pass the title of Lydia Cook.

The judgment must, therefore, be reversed, and a judgment be entered for the plaintiff, according to the verdict.

PER CURIAM. Judgment accordingly.

Cited: Beckwith v. Lamb, 35 N. C., 403; *Kidd v. Venable,* 111 N. C., 537; *Cook v. Pitman,* 144 N. C., 531.

THE STATE v. EDWIN ROBBINS.

1. In an indictment for selling to a slave in the night-time, it is not necessary to negative an order of the owner or manager, the offense having been committed in the night-time.

2. In such an indictment the slave is sufficiently identified by his name; a further description, by giving the name of the owner, is not necessary.

APPEAL from the Superior Court of Law of EDGECOMBE, at Spring Term, 1849, *Settle, J.,* presiding.

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

STATE OF NORTH CAROLINA—Edgecombe County. (357)

Superior Court of Law, Fall Term, 1848.

The jurors for the State, upon their oath, present that Edwin Robbins, a licensed retailer of spirituous liquors, by a measure less than a quart, late of the county aforesaid, at and in said county, on the first day of September, in the year eighteen hundred and forty-eight, and in the night-time of said day, between the hours of sunset thereof and sunrise of the day next ensuing, to a slave named Sampson, one pint of spirituous liquor unlawfully did sell and deliver, to the common nuisance of the good citizens of the State, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State. MOORE, *Attorney-General.*

On motion of the defendant, the judgment was arrested, and the Attorney-General appealed.

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

PEARSON, J. There is no ground upon which the judgment ought to be arrested. On the contrary, the Attorney-General has framed an indictment, unencumbered by useless words, which, from its brevity and clearness, may well be adopted as a precedent.

The averment that the defendant "unlawfully did sell and deliver" to the slave would not be supported by proof of a sale and delivery to the slave as the agent and for and on account of his owner; nor is it necessary to negative an order of the owner or manager, the offense having been committed in the night-time. *S. v. Miller*, 29 N. C., 725, decides both points.

The slave is sufficiently described by his name. A further description, by giving the name of the owner, is not nec-
(358) essary. The law only requires "certainty to a certain intent in general" in indictments for this offense.

The court below erred in arresting the judgment. There must be a judgment for the State.

PER CURIAM. Ordered to be certified accordingly.

Cited: S. v. Johnston, 51 N. C., 485.

THE STATE TO THE USE OF WILLIS F. REDDICK v. GEORGE W. B. SATTERFIELD.

An infant being entitled to a sum of money arising from the sale of a tract of land sold under a decree of a court of equity, and the same having been received by her guardian, conveyed it by a deed of trust to her separate use, and if she died without leaving a child, to her intended husband. She married and died under age and without a child: *Held*, that in a court of law, at least, her personal representative was entitled to recover the money so received by the guardian.

APPEAL from the Superior Court of Law of GATES, at Spring Term, 1849, *Manly, J.*, presiding.

This was an action of debt on a guardian bond. Sarah Ann Hunter, the intestate of the plaintiff, and the ward of the defendant, in 1847, before her marriage, executed a deed, conveying all her estate, among other things the proceeds of the sale of a tract of land sold under the decree of the Court of Equity for partition, which was in the hands of the defendant, her

guardian, to a trustee for her separate use, and if she died without a child living at her death, then to the use of her contemplated husband, one Willis F. Reddick.

The intestate intermarried with the said Reddick, and (359) had a child born alive, but it died before the intestate.

At the date of the deed and at the time of her marriage the intestate was about sixteen years of age. She died at the age of eighteen.

The breach assigned was a refusal to pay the amount of about $1,000, the sum received by the defendant as guardian, together with interest thereon from 19 May, 1840; at which time the defendant, as guardian, had received the said amount, being his ward's share of the land sold under the decree of the Court of Equity for partition.

His Honor was of opinion that the plaintiff could only recover the interest upon the sum received by the defendant as guardian; and a verdict and judgment were entered for the plaintiff for the penalty of the bond, to be discharged by the payment of the sum of $549, which was the interest upon the sum received by the defendant.

Heath for plaintiff.

No counsel for defendant.

PEARSON, J. We think his Honor was mistaken in the view which he took of the case. Admit that the deed of the intestate was void by reason of her infancy, his Honor seems to have been under the impression that the fund was to be treated as land, and that the plaintiff, as personal representative, could only recover the profits or interest up to the time of the death of the intestate, which, we presume, he considered was for the benefit of the husband, but that the principal belonged to the heirs at law.

Without deciding how the rights of the parties may be considered in a court of equity, we are of opinion that in a *court of law* the defendant, having received money belonging to his ward, was, after her death, bound to pay it over to her personal representative; and that his refusal to do so was a clear breach of the bond to the amount of *principal* and in- (360) terest.

The judgment must be set aside, and a *venire de novo* issued.

PER CURIAM. Judgment accordingly.

Cited: Allison v. Robinson, 78 N. C., 224.

THE STATE v. JOSEPH BOGUE ET AL.

1. Where several persons are indicted for a trespass, it is not a matter of right for any of the defendants to insist, on the trial, that the jury should be required to pass upon the guilt or innocence of any of the others, before they pass upon the whole. This is a matter of discretion in the presiding judge—a discretion rarely, if ever, used, except in cases where there is no evidence against a part of the defendants, or where the court is satisfied that persons are made defendants to prevent their being examined in the case.

2. From the exercise of a discretionary power in the court no appeal lies.

APPEAL from the Superior Court of Law of PERQUIMANS, at Spring Term, 1849, *Manly, J.*, presiding.

The defendants were indicted for a forcible trespass in entering the yard of the prosecutor and there shooting his dog. The prosecutor and his family, and a man by the name of Crothers, were present, and the latter was a witness for the State and examined before the jury. It was proved that the three first-named defendants came up first, and together entered the yard, and the three last came up together, soon after the entry was made, and stood while the dog was killed—one of them being the son of the first-named defendant. Upon the closing
(361) of its case by the State, the defendants' counsel moved the court to direct the jury to pass upon the cases of the last-named defendants, in order that the others might have the benefit of their testimony.

This was refused by the court, and the case being submitted to the jury as to all the defendants, they returned a verdict of guilty as to the two first, and not guilty as to the others. Judgment and appeal.

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

NASH, J. The error complained of was in the refusal of the presiding judge to direct the jury to pass upon the case as required. The separation of the cases, after the jury was charged, was not a matter of right, as claimed by the defendants, but entirely one of discretion in the judge—a discretion rarely, if ever, used, except in cases where there is no evidence against a part of the defendants, or where the court is satisfied that persons are made defendants to prevent their being examined in the case. An instance of this is where the prosecutor includes in the prosecution unnecessarily all the persons who were pres-

ent, thereby cutting off from the accused every chance of bringing the truth of the transaction fully before the court and jury. But even in that case the court will move with great caution in allowing the favor, and only for the purposes of justice. A prosecutor is not compelled to leave out any person he may honestly believe to be a party in a joint trespass, in order that he may be used by the other defendants; and, on the other hand, if he give no evidence against any particular person so included, the court may, in its *discretion*, direct the jury to pass upon his case; but even then it is a matter of sound discretion. Tidd Pr., 861; Peake Ev. (5 Ed.), 148, and 1 Phil. Ev. (6 Ed.), 68. It has been repeatedly ruled by this Court that with judgments of the Superior Court, rest- (362) ing on discretion, we cannot interfere. But, in this case, we think there was not only some evidence against the defendants, in whose favor the motion was made, but strong evidence.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF JOHN W. JOHNSON v. WILLIS BRADLEY.

A. being tenant by the curtesy, sells land belonging to his wife, by deed of bargain and sale, in fee, with general warranty: *Held*, that the right of the heir of the wife to the land was not rebutted by the warranty.

APPEAL from the Superior Court of Law of EDGECOMBE, at Fall Term, 1848, *Dick, J.*, presiding.

The action is for an undivided moiety of the premises described in the declaration.

On the trial the case was agreed as follows: The land descended in fee from John Williams to his two daughters, Martha and Sally. Aaron Johnson purchased the share of Martha and took a deed to himself in fee. He also married Sally, and they had issue, the lessor of the plaintiff; and then the said Aaron, being in possession, sold the whole tract to the defendant, and conveyed it to him by a deed of bargain and sale, in fee, with general warranty. Sally, the wife, subsequently died; and Aaron by another marriage afterwards had several children, and died intestate in 1846. Land descended from him to his children, of which the share of the lessor of the (363) plaintiff was of the value of $175. The lessor of the plaintiff also received a distributive share of his father's personal estate to the amount of $300. The price and value of one

moiety of the land purchased by the defendant was $200. In November, 1847, the lessor of the plaintiff demanded of the defendant to be let into possession of a moiety of the land, as a tenant in common with him; but the defendant, claiming the whole tract as his own in severalty, refused to admit the lessor of the plaintiff into a share of the premises; and then this action was brought. The court was of opinion for the plaintiff, and from a judgment accordingly the defendant appealed.

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

RUFFIN, C. J. Were the case to be governed by the statute of Gloucester, it would seem to be for the plaintiff. For by that act the warranty of tenant by the curtesy bars the heir from recovery of the mother's land only when assets in fee simple descend from the father, regard being had to the value. Of course, that excludes all notice of the personalty which came to the son from the father's estate. And, as to the realty, *Lord Coke* lays it down that, to constitute a bar, "assets" must at the time of descent be of equal value with the premises warranted, or more (Co. Lit., 374), which is not the case here. But that point is not to be considered at this day, as the statute 6 Ed. I., ch. 1, is superseded by the subsequent inconsistent act of 4 Anne, ch. 16, sec. 21, which covers the whole ground. Indeed, in our Revisal the statute of Gloucester is omitted, and that of Anne alone re-enacted. No regard is had in it to assets. It enacts generally, that all warranties by a tenant for life shall be void as against any person in reversion or remainder; and that (364) all collateral warranties by any ancestor, not having an estate of inheritance in possession, shall be void against his heirs. Rev. St., ch. 43, sec. 8. That is an express provision for the case before us; and, certainly, it promotes the justice due to all persons concerned. The statute avoids the warranties mentioned in it, as warranties, properly and technically speaking; that is, as real contracts of the ancestor, which rebut the heir or on which he may be reached; and it has no other effect. That is obvious when it is noted that those warranties are not absolutely void, but only against the reversioner, remainderman, or heir, claiming the land; and, therefore, that they are valid, as covenants, on which damages may be recovered, against the covenantor himself and his executors. It follows thence, that, as such covenants, they would bind the heir also to answer in damages for their breach to the extent of assets descended. But, then, all the heirs would be equally and

together liable, which would be just and equitable, instead of throwing the whole loss—at least, at law—on one of the heirs, by rebutting him from the recovery of his mother's land, as is attempted here. The statute works no hardship on the purchaser, as it leaves him an adequate redress in a personal action on the covenant; and it deals impartially between the covenantor's children by drawing the compensation for the breach of covenant from a fund, in which they are all equally interested, either as next of kin or heirs at law of the father.

PER CURIAM. Judgment affirmed.

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(365)

JOHN STURDIVANT v. EDMUND L. DAVIS, EXECUTOR, ETC.

1. Where a deed is absolute on its face, but it is alleged that it was on a secret trust for the donor, with intent to defeat his creditors, it must be left to the jury to ascertain the existence of such trust. But where a deed, made without consideration by a debtor, expresses on its face that it is made for the benefit of the debtor and his family, the court can itself pronounce it fraudulent and void as against a creditor then existing.

2. A fraudulent donee of personal property, which he has in possession after the donor's death, is answerable as executor *de son tort*.

APPEAL from the Superior Court of Law of ANSON, at Spring Term, 1849, *Caldwell, J.*, presiding.

This is an action of debt brought 18 June, 1844, against the defendant, as executor of Isham Davis, deceased, on a bond given by him and Edmund McLindon for $100, dated 13 March, 1839, and payable one day after date. Pleas, former judgment and *ne unques* executor.

In support of the first plea the defendant gave in evidence a warrant issued by a justice of the peace on 14 June, 1841, against Edmund McLindon and the present defendant, as executor of Isham Davis, deceased, purporting to be on a bond for $100; that it was returned "executed" by the constable; and that the magistrate gave a judgment thereon in the following words: "10 July, 1841. Judgment against the principal, Edmund McLindon, for $81 with interest from," etc. The defendant also called the magistrate who gave the judgment, as a witness. But he stated that he had no recollection of what took place at the trial as to the defendant. The court held that it did not appear that there had been a former judgment between the present parties on this bond.

(366) In support of the second issue on the part of the plaintiff, he gave evidence that on 18 May, 1834, Isham Davis conveyed to his son, the present defendant, in fee, a tract of land containing 116 acres, being the land on which the father then resided and continued to reside until his death, and being all he had; and that the land was of the value of $700, and that the consideration expressed in the deed was fifty cents. And the plaintiff gave further evidence that on 5 November, 1839, by a deed, expressed to be made in consideration of the age and infirmities of himself and his wife, and their inability to attend to their own business, the said Isham conveyed to the defendant one bay horse, five head of cattle, twenty hogs, twenty-five sheep, his household and kitchen furniture, plantation tools, crops of corn, fodder, and other things (being all the property of the said Isham), in trust for the said Isham and his wife Elizabeth, and for their support at their usual place of abode. And it was thereby further agreed that the said Edmund should move, and live with his father and mother, and manage all matters and things relative to the property thereby conveyed for their support and benefit. And the plaintiff gave further evidence that Isham Davis died in 1841, and that, upon his death, the defendant held, used and enjoyed the said personal property as his own.

The counsel for the defendant insisted that there was no fraud in fact intended by the parties in the execution of the deed of November, 1839, and that it was the province of the jury to judge thereof; and prayed the court to instruct the jury that if they should be of that opinion, they ought to find for the defendant.

The presiding judge refused so to instruct the jury, but directed them that the said deed for all the personal prop-
(367) erty of the father was fraudulent in law, and that, consequently, the plaintiff was entitled to recover. Verdict and judgment for the plaintiff, and the defendant appealed.

Ashe for plaintiff.
Strange for defendant.

RUFFIN, C. J. There does not appear to be error in the opinion given by his Honor on either point.

Whatever may have been the intention of the magistrate at the time, it is certain that the judgment, as expressed, does not purport to be a termination between the plaintiff and the present defendant. Even if the defendant could be aided by evidence *dehors* the judgment, the witness produced by him and

examined, apparently without objection, gave none which could affect the case. Indeed, the defendant seems to have failed to give evidence even to the essential point, that the bond, on which the former warrant was brought, is the same now sued on.

Whether the defendant be answerable as executor *de son tort* was correctly made to depend on the question whether the conveyance under which he took and holds the personalty be fraudulent against the plaintiff as a creditor of the father; for that is the only way in which the creditor can, after the death of his debtor, reach chattels fraudulently conveyed by the debtor. Therefore, it has been long settled that the creditor shall have this action against a fraudulent donee. We hold that conveyance to be undoubtedly fraudulent, and that it was the duty of the presiding judge so to pronounce it. A deed is declared by the law to be fraudulent and void which is made with intent to defeat a creditor, or to hinder him, or delay him. Generally speaking, a deed made by one person to another simply and absolutely, is, *prima facie*, to be taken as *bona fide* and made upon due consideration, as expressed in the deed, and for the benefit of the person to whom it is made. But if it (368) was not in fact made for the benefit of that person, but for that of the maker of the deed, or, without any valuable consideration, for the benefit of some member of his family, it is obviously unjust and fraudulent if, thereby, a creditor, existing at the time, is prevented or delayed from obtaining satisfaction of his debt by process of execution. Ordinarily, the benefit intended for the donor and his family is not expressed in the deed, but rests in a secret confidence or trust; and the reason is that their interest may be concealed and the creditor thus deprived of evidence of its existence. In such cases the creditor is compelled to have recourse to such extraneous proof as he can make of the secret trust for his donor; and, of course, the question, thus depending upon proof by witnesses, must be left to the jury. But it is, then, only left to them as to the existence of the supposed trust, and not to the effect of it. For, if the jury find that this deed was not truly made for the benefit of the donee, as it purports to have been, but for that of the donor or his family, it is a matter of law that it is fraudulent, and the court is bound so to tell the jury. For, if the deed stand, the creditor cannot take the property upon execution, although his debtor have the whole benefit of it; and, therefore, he could not have any motive for thus parting with the legal title, but to create an impediment to the creditor. The case, then, plainly falls within the very definition of fraud. When, however, the parties do not even conceal the trust, but set it out in the deed

itself, there is nothing to be left to the jury. The deed speaks plainly the fact, which in the other case was a subject of inquiry for the jury, and on the finding of which the instruction followed, that the deed was fraudulent within the statute; and when the deed thus discloses the trust, it is alike the province and the duty of the judge to declare that in law it is
(369) fraudulent. *Gregory v. Perkins*, 26 N. C., 50. It was said, indeed, at the bar that the defendant had no bad intent in accepting this conveyance, but, on the contrary, the pious and benevolent one of obeying and serving his parents; and, therefore, that he ought not to be branded with fraud, but his conduct left to the charitable construction of a jury. But that argument is founded on a misconception of the nature of fraud in the eye of the law. It is very certain that, in many cases, that which is deemed fraud in law is perpetrated upon motives much less base than it is in others; and the present may be stated as an example of conduct the least criminal in a moral point of view, among cases of this kind. Still, it is illegal and a prejudice to honest creditors, and to that extent, at least, immoral. For, it is a contrivance which, if successful, would protect the property from being reached by execution at law, although the owner of the legal title took no beneficial interest in the property, but the whole was secured to the debtor. It is true that by the act of 1812 such trusts may be sold on execution. Yet it may be a serious question whether the deed is not in all cases to be viewed as fraudulent when the trust declared is for the maker himself, although the judgment and sale under execution be in the debtor's lifetime, as the purchaser may be embarrassed in equity by accounts between the trustee and his *cestui que trust*. But, however that may be, it seems certain that it may be so treated when the debtor is dead before judgment. For after the debtor's death the only way in which the debtor's property can be reached is by treating the trustee in possession as executor *de son tort;* because in no other way can a judgment be obtained establishing the debt and authorizing process against the property as that of the deceased debtor. So that, unless it can be reached in that way, upon the ground of the fraud, the creditor would be without any remedy at law in such case.

(370) It was further contended for the defendant that Laws 1840, ch. 28, sec. 4, restrains the court from pronouncing the deed fraudulent in law, and that in all cases the question is to be left as one of actual intent, to the jury. But that is only so when the donor is not indebted at the time of the conveyance, or retains property sufficient and available for the

satisfaction of all the creditors he then had. When sufficient property is thus retained, then the intent, as a matter of fact, is for the jury as to the creditors, as it is in all cases, by the second section, as to purchasers. But here the debt had been previously contracted, and the case states that the donor had no property, real or personal, but that conveyed to the son. The conveyances, therefore, cannot but be fraudulent under those circumstances.

PER CURIAM. Judgment affirmed.

Cited: Young v. Boone, 33 N. C., 350; *Isler v. Foy,* 66 N. C., 551; *Burton v. Farinholt,* 86 N. C., 267.

WALTER BURNES v. BENJAMIN ALLEN.

A promise made *after* a covenant, is merged upon the same ground that a promise made *before* is merged, when the promise and the covenant are precisely the same, because the covenant, being a deed, is the surest and highest evidence.

APPEAL from the Superior Court of Law of ANSON, at Spring Term, 1849, *Caldwell, J.,* presiding.

This is an action of *assumpsit.* In 1839 the plaintiff purchased of the defendant a tract of land, and the defendant executed a deed with a covenant of general warranty. (371) Upon a survey, afterwards made, it was found that twenty-two and a half acres of the land were covered by the plaintiff's title and sixteen acres by the title of one Parker. All the premises are barred by the statute of limitations, except that proven by the testimony of one Turner. He swore that in March, 1843, he heard a conversation between the plaintiff and defendant, in relation to the land, when the defendant said "he did not wish to be sued; he was willing to do what was right, and would be up, on a certain day, to see the plaintiff and settle with him."

His Honor charged "that the plaintiff had a cause of action upon the covenant, and if the jury believed from the testimony of Turner that the defendant promised to pay the plaintiff for the land, as to which the title was defective, because of forbearance to sue until a given day, the plaintiff was entitled to recover in this action, and was not obliged to sue on the covenant."

A verdict was rendered for the plaintiff, and from the judgment thereon the defendant appealed.

Winston for plaintiff.

Strange and *Iredell* for defendant.

PEARSON, J. We think his Honor erred. Admit there was a cause of action upon the covenant; admit, also, that to "settle with him" meant to pay the value of the land, as to which the title was defective (about both of which propositions we have serious doubts); this was a promise to do *precisely* what the covenant bound him to do. A promise, made *after* a covenant, is merged, upon the same ground that a promise made *before* is merged, when the promise and the covenant are *precisely* the same; because the *covenant*, being *a deed*, is the surest and highest evidence.

(372) An obligor promises the obligee to pay the amount of a bond, if the obligee will forbear to sue. No action lies upon the promise, because it is merged in the bond, being a promise to do precisely the same thing which his bond obliges him to do.

In *Wilson v. Murphy*, 14 N. C., 352, there was a covenant in the lease that the lessor would pay for all the necessary rails made and put on the fence, at the price of fifty cents per hundred. The parties had a settlement, ascertained the number of rails, and the amount due for them at fifty cents per hundred, and the defendant (the lessor) promised to pay the amount. In an action on the promise, it was decided against the plaintiff, because the action ought to have been on the covenant; and the opinion states that no case can be found in which, the performance of a duty being secured by deed, and the deed remaining in full force, an action was maintained upon a promise to perform the duty; for precisely the same evidence will support both actions, and for the certainty of the contract, the *specialty* ought to be taken rather than the verbal agreement. No action will lie on a promise merged in the existing deed, for the same reason that it will not lie on a promise merged in a deed or judgment subsequently taken for the same debt.

It is true, in this case there was a new consideration, the forbearance; but there was already a sufficient consideration, and the new consideration was merely surplusage, unless the promise was to do a thing not already provided for by the covenant—as if the amount of damage had been fixed at a certain sum, to be paid at a certain time; in which case the promise would have been to do a thing not precisely provided for by the deed. In *Wilson v. Murphy*, if the covenant had been to pay for the necessary rails, *no price being fixed*, and the parties had agreed upon the number and *price*, an action would have been maintainable upon the promise, for the promise fixed the (373) price, which was not provided for by the covenant.

In this case the promise is to do "what is right and to settle." Nothing is fixed. All is left *precisely* as provided for by the general words of the covenant.

PER CURIAM. A *venire de novo* awarded.

Cited: Carter v. Duncan, 84 N. C., 679.

WILLIAM SNOWDEN AND WIFE v. WILLIAM F. BANKS, EXECUTOR.

A bequeathed a negro woman to his daughter, and afterwards sold her and kept the amount received from the sale, as alleged from the petition, to be given to the daughter in lieu of the negro sold; but he made no alteration in his will: *Held*, on demurrer to the petition, that the daughter had no right to the price of the negro.

APPEAL from the Superior Court of Law of PASQUOTANK, at Spring Term, 1849, *Manly, J.*, presiding.

This was a petition filed originally in the County Court and carried by appeal to the Superior Court, in which the facts were alleged as follows:

Richard Wadkins bequeathed to his daughter, Mrs. Snowden, a negro woman named Ary; and then, in his lifetime, he sold her for the sum of $325. This is a suit brought by the daughter against the executor for the $325; and the petition states that the testator sold the negro "for some good and sufficient cause, and not for the purpose of defeating the interest of the plaintiff in the same, and that he kept the said sum of $325 in his possession and did not dispose thereof, but intended it (374) should be given to the plaintiff under his will, in the place of the woman Ary." Upon demurrer, the petition was dismissed, and the plaintiff appealed.

No counsel for plaintiffs.

Heath for defendant.

RUFFIN, C. J. The gift is specific of a particular negro by name. Of course, if the testator had no such negro the gift would necessarily fail. It is equally well settled that, if he had the thing at the making of the will, and it be afterwards destroyed, or disposed of by the testator, the legacy likewise fails by what is called an ademption. There is in neither case anything to answer the description in the will; and therefore the will passes nothing. It is said, indeed, that this testator kept

the identical money got for the negro, and intended the daughter to have that, instead of the negro. That is very probable; but, if it were true, the testator never put that intention into the will, so as to become a part of it and enable the plaintiff to make this claim under a testamentary disposition—as she must do in this suit. It is impossible that, under the gift of a specific negro, a sum of money can pass; and therefore no intention to that effect can be averred against the express words of the will.

PER CURIAM. Decree affirmed with costs.

Cited: Starbuck v. Starbuck, 93 N. C., 185, 187.

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(375)

THE STATE v. WILLIAM McCAULESS AND AUGUSTUS MARTIN.

1. The gist of the offense of forcible trespass is a high-handed invasion of the possession of another, *he being present:* title is not drawn in question.

2. If two are in the same house, the law adjudges the possession in him who has title; but not so as, by relation back, to make the other guilty of a forcible trespass, when the entry was without force.

3. Where there are two counts in an indictment, one good and the other defective, and there is a general verdict against the defendants, the judgment will be presumed to have been given upon the good count alone. But when both counts are good and the court gives erroneous instructions to the jury as to one of the counts, it is presumed that the judgment was given upon both counts, and a *venire de novo* will be awarded.

APPEAL from the Superior Court of Law of SURRY, at Spring Term, 1849, *Ellis, J.*, presiding.

The indictment contains two counts: one for a forcible trespass into the house of the prosecutor; the other for an assault and battery.

In March, 1847, the prosecutor let the house and field to one Mitchell to make a crop. Mitchell transferred his interest in the premises to Mrs. Mitchell, his mother, who took possession and lived in the house until November, 1847, when she let the premises to the defendant McCauless for the balance of the year.

The prosecutor, on the night before the alleged trespass, went to the house, while Mrs. Mitchell was still living in it, and entered, but without force, and slept there on a bed, which he carried there for the purpose. In the morning, being 1 Novem-

ber, he went off, announcing his intention to go and get other household property and bring it to the house. While he was gone the defendants came and entered with the permission of Mrs. Mitchell. The prosecutor returned and came into the house. In a short time his sons arrived with his (376) household property, and were in the act of bringing it into the house when the defendants objected, and tried to prevent it by shutting the door. This was opposed by the prosecutor, and a fight ensued between the prosecutor and the defendants.

His Honor instructed the jury that Mitchell and those claiming under him were not entitled to the premises for the entire year, but only up to the usual time for making and gathering a crop, and if that time had expired when the prosecutor entered, his entry was lawful, and the defendants, according to the evidence, were guilty of a forcible trespass, notwithstanding they had entered the house while the prosecutor was absent, with the permission of Mrs. Mitchell, and claiming under her.

The defendants were found guilty on both counts. Motion for a new trial was refused; judgment for the State, and the defendants appealed.

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

PEARSON, J. The gist of the offense of forcible trespass is a high-handed invasion of the actual possession of another, *he being present;* title is not drawn in question. According to the evidence in this case, Mrs. Mitchell was, on the morning of 1 November, in possession of the house. The defendants entered with her permission and acquired the possession from her, in the absence of the prosecutor, and, although he came afterwards and entered into the house, and the defendants there opposed his bringing in his household goods, it did not make them guilty of a forcible trespass. It may be they were guilty of a forcible detainer.

If two are in the same house, the law adjudges the (377) possession in him who has title; but not so as, by relation back, to make the other guilty of a forcible trespass when the entry was without force.

We think his Honor erred in the instructions given.

It is insisted that the defendants, being properly convicted upon the second count, that will sustain the judgment, notwithstanding the error in the charge in reference to the first count. It is true, when one count in an indictment is defective and

another count is good, and there is a general verdict, a motion in arrest cannot be sustained; for the good count warrants the judgment, and, although the punishment is *discretionary,* the judgment is presumed to have been given upon the good count.

In this case both counts are good. There was error in the instruction given on one of the counts, by reason whereof the defendants were improperly convicted upon that count, and are entitled to a *venire de novo;* for, as his Honor thought the conviction was proper on both counts, and both counts are good, we must presume that the amount of the fine imposed was fixed on in reference to both counts; whereas, if the defendants had been acquitted upon the first count, as they should have been, in our opinion, the punishment would have been imposed in reference to the last count only, which was much the less aggravated offense. Indeed, the attention of the court and jury seems to have been directed exclusively to the first count; and the court believing that, according to the evidence, the defendants were guilty upon that count, it made no difference how the jury found upon the second count, which was included in the first.

PER CURIAM. Let there be a *venire de novo.*

Cited: S. v. Ward, 46 N. C., 293; *S. v. Caldwell,* 47 N. C., 470; *S. v. Hester, ib.,* 87; *S. v. Morgan,* 60 N. C., 245; *S. v. Beatty,* 61 N. C., 53; *S. v. Baker,* 63 N. C., 281; *S. v. Hanks,* 66 N. C., 614; *S. v. Covington,* 70 N. C., 74; *S. v. Laney,* 87 N. C., 537; *S. v. Smiley,* 101 N. C., 711; *S. v. Webster,* 121 N. C., 586; *S. v. Leary,* 136 N. C., 578.

Overruled (in part): *S. v. Toole,* 106 N. C., 641.

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(378)

THE STATE v. PLEASANT BLACK ET AL.

Under the statute against gaming, Rev. St., ch. 34, sec. 69, the place of gaming and the place of retailing must be the same house, or, at least, parts of the same establishment. "The premises" mean those places only which are occupied by the retailer with the house in which he retails, as one whole.

APPEAL from the Superior Court of Law of ROCKINGHAM, at Spring Term, 1849, *Dick, J.,* presiding.

Pleasant Black and four others were indicted for playing at cards together and betting money thereon, in a house situate on the premises occupied by Marshall S. Black, in which he retailed spirituous liquors.

On the trial the evidence was that the defendant Pleasant Black owned two adjoining lots in the village of Madison, Nos. 28 and 29, fronting on the same street. He occupied both as one tenement, his dwelling-house being on one of them, and on the other a store or shop, situate on the street on front, and a barn and stables situate on the back lines. He let the shop to Marshall S. Black, who retailed merchandise and spirituous liquors therein, and who was also to have the privilege of a place near the shop for laying his firewood. But Pleasant Black continued to occupy all the other parts of both of the lots as he had done before, including the barn and stables; and the gaming charged in the indictment was in the barn.

The counsel for the defendants moved the court to instruct the jury that if Marshall S. Black had no power or control over the barn in which the gaming took place, the defendants were not guilty. But the court refused to give that instruction, and directed the jury "that under the act of As- (379) sembly the defendants were guilty, if they played in a house situate on the premises on which the retail shop stood."

The defendants were accordingly convicted, and after sentence they appealed.

Attorney-General for the State.
Morehead for defendants.

RUFFIN, C. J. The statute makes it a misdemeanor to game at cards "in a house where spirituous liquors are retailed, or in any outhouse attached thereto, or any part of the premises occupied with such house." Rev. St., ch. 34, sec. 69. The next section makes the retailer indictable for suffering such gaming in his house or any part of his premises. This language renders it perfectly clear that the place of retailing and the place of gaming must be the same house or, at the least, parts of the same establishment. "The premises" mean those places only which are occupied by the retailer with the house in which he retails, as one whole. They cannot include a place not occupied by him nor even let to him. It is nothing that the two places of retailing and gaming were once occupied together by some one as parts of the same premises; for, if severed and occupied by different persons, when the gaming occurred, they were then not the same premises. That was the case here. The lessee's rights were restricted to the shop itself, with only the liberty of laying firewood near it; and the residue of both lots was occupied by Pleasant Black in severalty. Suppose he had

leased the barn and stables to a third person. Clearly, each lessee would occupy his share in severalty; and it would be the same as if he had sold and conveyed to each lessee his own particular premises in fee. The one would not be liable to
(380) be indicted for gaming on the premises of the other; and, of course, persons gaming on one parcel on which spirits were not retailed would not be within the statute, although retailing was carried on upon the other. The case is the same when the owner continued in possession of those parts of the lots which he had not leased. They were his premises and not the lessee's. The barn could not be laid as Marshall S. Black's in an indictment for burglary or arson. Indeed, the instruction assumed that he had no control over it; and it follows, necessarily, that it could not be a part of the premises occupied by him.

The judgment was therefore erroneous, and there must be a *venire de novo.*

PER CURIAM. Ordered to be certified accordingly.

Cited: S. v. Keisler, 51 N. C., 74.

JOHN G. SUTTON v. HARDY ROBESON.

An offer to compromise is not evidence to charge the party on the original cause of action. But a concluded agreement of compromise must, in its nature, be as obligatory in all respects as any other, and either party may use it whenever its stipulations or statements of facts become material evidence for him.

APPEAL from the Superior Court of Law of BLADEN, at Spring Term, 1849, *Caldwell, J.,* presiding.

This is an action of debt on a former judgment, brought against the executor of Henry Robeson, deceased. Plea, payment by the testator.

(381) On the trial the defendant gave evidence tending to prove that the testator had paid the judgment. In order to rebut that inference the plaintiff offered in evidence a written instrument, signed and sealed by the defendant, in the following words:

"Whereas there are several suits now pending in the Superior Court of Law of Bladen County, wherein John G. Sutton is plaintiff and I am defendant, and the same have been settled between the said Sutton and myself. This may certify, that in consideration that the said Sutton will not attempt to receive

the full amounts claimed by him in the said suits, I hereby agree with the said Sutton that, in all the said suits, judgments for seven-eighths of the amounts or sums claimed by said Sutton may be entered against me and for all costs; and the said Sutton agrees that the said judgments for seven-eighths shall be in full discharge of the whole amounts claimed."

To the admissibility of the instrument the defendant objected on several grounds. First, because, at a former term the plaintiff obtained a rule on the defendant to show cause why judgment should not be entered in this suit according to the agreement, and the same was afterwards discharged; which he contended was an adjudication against the validity of the said agreement. Secondly, that the agreement was obtained by fraud, and, if introduced, it would involve the trial of a collateral issue on that question. Thirdly, that it was a distinct cause for another action. The court rejected the evidence, and a verdict was given for the defendant; and after judgment the plaintiff appealed.

Strange for plaintiff.
D. Reid for defendant.

RUFFIN, C. J. The Court is of opinion that the evidence was admissible. It was relevant to the issue, as an agreement to pay part of a debt affords some presumption (382) that the party had not before paid it in full; and it was for the jury to judge of the force of the presumption, according to the situation of the parties, the evidence of actual payment, and the circumstance attending the execution of the agreement. The objections taken to its reception at the trial are entirely insufficient. It was very proper to discharge the rule for judgment which the plaintiff had obtained, because the court could not enforce the agreement in that way against the will of the defendant. But that was not *res judicata,* that the agreement was not the deed of the defendant or not duly executed. Indeed, the ground for refusing the summary redress may have been, and probably was, that the court ought not to determine those questions of fact, but leave the parties to a remedy in which issues on them could be taken to the country.

We are somewhat at a loss to understand the second objection, in reference to a supposed collateral issue upon the mode of obtaining the agreement. We take it for granted that the court did not reject the agreement upon evidence that it was not fairly obtained; because that assumes that its execution was proved and that it was impeached by other evidence, in which

case the question was for the jury exclusively, as in every case which involves the validity of an instrument, whether it be a deed on *non est factum* pleaded, or an acquittance offered as evidence in support of the plea of payment. We suppose, therefore, that the defendant founded his objection on his allegation, that a fraud had been practiced on him in getting the instrument, and that the court thought it best to exclude the agreement, because, if admitted, it would give rise to a controversy, or a collateral issue, as it was called, on the truth of that allegation. But that is manifestly no reason for not receiving the paper, since that controversy arises in every case of a receipt offered or an acknowledgment of indebtedness, as the (383) party offering them must prove them in the first instance, and it is, of course, open to the other party to offer opposing evidence, and the jury must decide, under the direction of the court upon matters of law, upon the fact and sufficiency of the agreement.

There is as little in the third objection. For there is nothing inconsistent in having two securities for the same debt; and when one is given long after the other it is evidence to a jury that the debt was not paid before it was given, and that the first security is still subsisting.

The counsel for the defendant in this Court, indeed, yielded those objections, and took another: that the agreement was one of compromise, and therefore was not admissible. But we find no such rule of evidence. It is true that an offer to do something by way of compromise is not evidence to charge the party on the original cause of action; for it is but a proposal of a peace offering, which was not accepted, and therefore ought not to bind or in any degree prejudice the proposer. But when the parties admit distinctly certain facts to be true, or where, instead of an unaccepted offer of compromise, there be an express and final agreement upon the matter, there is no reason why either party should not be at liberty to insist on such admission or agreement, whenever it may serve his interest, as on any other admissions or agreements. The argument which would exclude it as evidence here would equally affect it in an action on the agreement; and yet it is one of the considerations of agreements most favored in law, that it was the compromise of doubtful rights. A concluded agreement of compromise must, in its nature, be as obligatory, in all respects, as any other, and either party may use it whenever its stipulations or statements of fact become material evidence for him. Such seems (384) to us to be the good sense which should determine the

rule on this subject; and we are happy to find that it was so held in a modern case in the Court of Exchequer in England. *Froysell v. Llewellyn,* 9 Price, 122.

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

Cited: Hughes v. Boon, 102 N. C., 162; *Peeler v. Peeler,* 109 N. C., 635.

THE STATE v. WHITMELL DEMPSEY.

The term "free person of color," in our penal statutes, is to be understood in our law to mean a person descended from a negro, within the fourth degree, inclusive, though an ancestor in each intervening generation was white.

APPEAL from the Superior Court of Law of BERTIE, at Spring Term, 1849, *Manly, J.,* presiding.

The defendant was indicted as a free man of color for carrying arms without a license. On behalf of the State a witness deposed that he formerly knew one Barnacastle, who was a very old man, and died some years before the institution of this prosecution; that the said Barnacastle lived many years in the neighborhood of the defendant and his father, and was well acquainted with the defendant's father and his family; and that he, the witness, heard Barnacastle say that he knew the paternal great-grandfather of the defendant, who was called Joseph Dempsey, alias Darby, and that he was a coal-black negro. To the admission of this evidence the defendant objected; but the court received it.

The defendant then gave evidence that the mother of (385) Joseph Dempsey, the defendant's great-grandfather, was a white woman, and that said Joseph was a reddish copper-colored man, with curly red hair and blue eyes; that the said Joseph's wife was a white woman, and that they had a son, named William; that the said William also married a white woman, and had issue, a son, by her, named Whitmell; and that said Whitmell married a white woman, and they are the parents of the defendant.

Upon this evidence the counsel for the defendant moved the court to instruct the jury that, although the father of Joseph Dempsey was a negro, the defendant, nevertheless, was not a free person of color within the statute. But the court refused to give that instruction, and instructed the jury that, supposing Joseph Dempsey to be of half negro blood, the defendant, being

his great-grandson, was in the fourth generation from negro ancestors, and therefore within the prohibition of the statute.

The jury found for the State, and after sentence the defendant appealed, upon the grounds that improper evidence was admitted, and that the jury was misdirected.

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

RUFFIN, C. J. The indictment is founded on the act of 1840, ch. 30, which makes it a misdemeanor in "any free negro, mulatto, or free person of color" to carry about his person or keep in his house any shotgun or other arms, specified, "unless he obtain a license from the County Court." The only question at the trial was whether the defendant was such a person as came within the description in the act. The Court is not prepared to say whether the evidence given by the State on that point be competent or not. The question is not one of pedigree in the ordinary acceptation of the term, as the descent (386) of the defendant from Joseph Dempsey was admitted on both sides, and the dispute was simply upon the fact, whether Joseph Dempsey was, as contended by one side, a negro or a mulatto, that is, one begot between a white and a black, as contended by the other side. We are not aware that hearsay from a stranger has been received as to a point of fact of that nature, and we are not disposed to say it ought to be admitted, without further consideration. The Court does not, however, mean to intimate an opinion that it is inadmissible; for, in our country, so little attention is paid to the registry of births and deaths and pedigree generally as to make it extremely difficult, and in some cases impossible to prove the blood of a person even for four generations in any other way. Necessity may, therefore, perhaps, compel the admission of such evidence. The Court, however, is not called on to give to the point further consideration in this case, because we hold that the defendant was properly convicted upon his own showing; which, therefore, rendered the first point immaterial, and in that way prevented an error on it from being prejudicial to the defendant, and a ground for reversing the judgment, as has been frequently ruled. For, if a party will not rely on an exception by itself, which he takes, but will go on and prove the case for the other side, and put the whole in his bill of exceptions, he must abide the consequences. It would be preposterous to disturb a conviction which was proper, and must have been rendered independent of the alleged error, and upon the party's own proofs or admissions.

That the defendant was guilty, according to his own evidence and the construction placed on it by himself, we hold upon the same ground which his Honor took on the trial—namely, that the defendant was descended within the fourth degree from a negro ancestor, and so is within the act. The evidence on the part of the defendant did not carry the white blood of Joseph Dempsey farther back than his mother; and, ad- (387) mitting it to be mixed, it is a fair inference against the defendant, who is most likely to be cognizant of the truth and able to prove it, that Joseph Dempsey derived no white blood through his father. Indeed, the defendant contended for nothing of the kind on the trial, but prayed an instruction which yielded in terms that Joseph's father was a negro, and, consequently, that he must have been half and half, or a mulatto, properly speaking. That being so, and the great-grandfather being, thus, in the first degree from a negro, the defendant is necessarily in the fourth degree; and that brings him within the act, although the mother of each generation was a white woman. It is true that the defendant is not a negro, who is a black person, entirely of the African race. Nor is he a mulatto, according to the proper original signification of the term, which has just been explained. And the Court could hardly undertake of itself to construe the expression "person of color," so as to bring one within the statutes creating felonies, or otherwise highly penal, merely because he derived from some remote ancestor a tinge of color that was not white; and the judiciary could not be regulated by degrees in such cases without some legislative authority. There is, however, abundant authority of that kind, which relieves the Court from all difficulty in this respect, by distinctly defining who are mulattoes in our law or persons of color, as the subjects of our disabling or penal statutes. Thus in the act of 1777 the evidence of "mulattoes or persons of mixed blood," namely, those "descended from negro ancestors, to the fourth generation inclusive," is made incompetent except against negroes, Indians, mulattoes, or such persons of mixed blood. In a great number of States "free negroes" and "mulattoes" and "persons of mixed blood," or "per- sons of color," are subjected to disabilities or punishment. (388) They are to be found in the Revised Statutes under several heads, but mostly under that of "slaves and persons of color"; and in section 74 of that act, taken from that of 1826, it is enacted that "all free mulattoes, descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person, shall come

within the provisions of the act." The Constitution, likewise, in the third section of the first article of the amendment, describes in the same manner the free mulattoes or free persons of mixed blood, who are not admitted to vote for representatives in the Legislature. It is thus very clear that the term "free persons of color" in the act of 1840, and in that of 1823, making it a capital felony for a person of color to make an assault with intent to commit a rape on a white woman, and in other penal statutes, is to be understood in our law, at this day, to mean a person descended from a negro within the fourth degree inclusive, though an ancestor in each intervening generation was white. Therefore, this conviction and sentence ought to stand.

PER CURIAM. Ordered to be certified accordingly.

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(389)

JAMES ALBRITTON, ADMINISTRATOR, v. WILLIAM SUTTON.

A testator devised as follows: "I give to my son, Benjamin D. Harper, all my estate after settling my debts, except the $300 above mentioned. If Benjamin does not live till of age, then I dispose of my estate as follows: I give to my sisters," etc. Benjamin died under age: *Held*, that he was entitled to the profits of the estate (except the $300) during his life.

APPEAL from the Superior Court of Law of GREENE, at Fall Term, 1848, *Settle, J.*, presiding.

Hugh J. Harper made his will and therein bequeathed $300 to Samuel W. Scarborough, and then disposed as follows: "I give unto my son, Benjamin D. Harper, all my estate after settling my debts, except the $300 above mentioned. If Benjamin does not live till of age, then I dispose of my estate as follows: I give to my sisters, if alive, or their children, etc.: all to have an equal share."

The testator's estate consisted of land, negroes and other chattels, and some debts, and cash. The defendant, Sutton, was appointed the guardian of the infant Benjamin, and in that character entered into the land, and also settled with the executor of the testator and received the slaves and other personal property on behalf of his ward. Benjamin afterwards lived several years, and then died under 21; and the plaintiff administered on his estate, and filed this petition, praying for an account of the profits of the estates accrued during the life of his intestate, and payment of the balance that might be found due, after deducting disbursements for the maintenance of the

infant. The defendant put in a demurrer, which, on (390) argument, was overruled, and the defendant appealed.

Rodman for plaintiff.
J. H. Bryan and *J. W. Bryan* for defendant.

RUFFIN, C. J. The decree must be affirmed; for, although it be a general rule that when particular legacies are payable at a future day, the legatee is not entitled to interest before the day, yet there is an established exception to that, when the gift is to an infant child, and the parent makes no other provision for his maintenance in the meanwhile. *Crickets v. Dalby,* 3 Ves., 10; *Chamber v. Goldwin,* 11 Ves., 1; *Wynch v. Wynch,* 1 Cox., 433; *Heath v. Perry,* 3 Atk., 101; *Sheldon v. North,* 3 Atk., 430.

But here the words plainly import an immediate gift of the whole estate, except a small pecuniary legacy, and vested it immediately in the son, but defeasible upon the contingency of his dying under 21; and that in case it is perfectly settled that the legatee takes the profits until the divesting of his estate by the happening of the contingency. *Nicholas v. Osborne,* 2 P. Wms., 419; *Shepherd v. Ingram,* 1 Amb., 448; *Skeoy v. Barnes,* 3 Meriv., 340; *Turner v. Whitted,* 9 N. C., 613; *Spruill v. Moore,* 40 N. C., 284.

PER CURIAM. Decree affirmed with costs.

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(391)

THE STATE v. CÆSAR, A SLAVE.

1. If a white man wantonly inflicts upon a slave, over whom he has no authority, a severe blow or repeated blows, under unusual circumstances, and the slave, *at the instant,* strikes and kills, without evincing, by the means used, great wickedness or cruelty, he is only guilty of manslaughter, giving due weight to motives of policy and the necessity for subordination.

2. The same principle of extenuation applies to the case of the beaten slave's comrade or friend, who is present and instantly kills the assailant without in like manner evincing, by the means used, great wickedness or cruelty.

RUFFIN, C. J., dissented.

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

This was an indictment for murder in the words and figures following, to wit:

STATE OF NORTH CAROLINA—Martin County.

Superior Court of Law, Fall Term, 1848.

The jurors for the State, upon their oath, present, that Cæsar, a slave, the property of John Latham and Thomas Latham, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fourteenth day of August, A. D. eighteen hundred and forty-eight, with force and arms, at and in the county of Martin aforesaid, in and upon one Kenneth Mizell, in the peace of God and the State then and there being, feloniously, willfully and of his malice aforethought, did make an assault, and that the said Cæsar, with a certain large stick, which by the said Cæsar in both his hands then and there had and held, him the said Kenneth
(392) Mizell, then and there feloniously, willfully and of his malice aforethought, did strike and beat, giving to him, the said Kenneth Mizell, then and there, by striking and beating him as aforesaid, with the stick aforesaid, in and upon the left jaw and the left side of the neck of him, the said Kenneth Mizell, one mortal bruise, of the breadth of two inches and of the length of six inches, of which said mortal bruise the said Kenneth Mizell from the said fourteenth day of August in the year aforesaid, until the fifteenth day of the same month in the year aforesaid, at and in the county aforesaid, did languish and, languishing, did live; on which said fifteenth day of August, in the year aforesaid, the said Kenneth Mizell, in the county aforesaid, died; and so the jurors aforesaid, upon their oath aforesaid, do say that the said Cæsar the said Kenneth Mizell, in the manner and form aforesaid, feloniously, willfully and of his malice aforethought, did kill and murder, contrary to the peace and dignity of the State.

On which indictment the prisoner, being arraigned, pleaded not guilty.

The prisoner being put on his trial, the State first examined one Brickhouse, who stated that he went, in company with the deceased, to Jameston, in the county of Martin, in the afternoon of 14 August, 1848; that the deceased and he (the witness) drank spirits in the town of Jameston, until they were both intoxicated; that they went to the house of Mr. Cahoon about dark for the purpose of staying all night; that he (the witness) and the deceased went to bed together, and, after sleeping some short time, he was awoke by the deceased, who proposed that they should get up and walk out; that they did so, and crossed an old field and went into the town of Jameston; they had a bottle of spirits with them, and each took a drink

while crossing the old field; that near a storehouse in Jamestown they found two negro men lying on the ground; that the witness was not acquainted with either of them, but had since learned that they were the prisoner and a man (393) named Dick; the witness informed the prisoner and Dick that he and the deceased were patrollers, and he (the witness) took up a piece of board and gave the prisoner and Dick each two or three slight blows; that he (the witness) then entered into a conversation with the prisoner and Dick, and, while conversing with them, a third negro came up, who, he has since understood, is named Charles; that he (the witness) asked Charles if he knew they were patrollers, and took hold of Charles and ordered Dick to go and get a whip for him to whip Charles with; Dick went off a few steps and stopped; witness let Charles go and took hold of Dick; witness then received a violent blow on his head, which made a wound about an inch in length, and stunned him; when he recovered he saw the deceased lying on the ground at full length and the negroes all gone; witness called the deceased, but received no answer; witness then went to the house of Cahoon to get a gun, but failing to do so, returned where he had left the deceased, and found the deceased some twenty yards from where he left him; deceased was lying on the ground; the deceased got up and took his (witness') arm and witness conducted deceased to the house of Cahoon; deceased asked for some water, which witness procured for him, and he and the deceased went to bed together; after they were in bed the deceased asked witness if he would go with him on Thursday night after the negroes, and further remarked that he could not talk much longer. Witness further stated that, being considerably intoxicated, he fell asleep and was awoke about 2 or 3 o'clock in the morning by Mr. Cahoon. The deceased was dying, and *blood and froth* running from his mouth and nose on the pillow where he lay. Deceased died in a few minutes after witness awoke.

The slave Dick was next examined on the part of the (394) State. Dick stated that he and the prisoner were lying on the ground near a storehouse about 11 o'clock at night; that two white men, strangers to him, came to the place where he and the prisoner were lying; that one of them, who, he has since learned, was Mr. Brickhouse, said they were patrollers, and Brickhouse took a piece of board and gave the witness and the prisoner each two or three slight blows, which did not hurt the witness, and the witness thought it was done in sport by Brickhouse. Brickhouse then asked the witness if he could not get some girls for them, and further remarked that he had money

a plenty; witness declined doing so. About that time Charles came up; Brickhouse asked Charles if he knew they were patrollers, and took hold of Charles and ordered witness to go and get a whip to whip Charles with; witness moved off a few steps and stopped; Brickhouse then let go Charles and took hold of witness, and the deceased also took hold of the hand of witness; Brickhouse then began to beat the witness with his fist and struck several blows on the head and in the side of witness, which hurt him, and he begged Brickhouse to quit. Witness further stated that while Brickhouse was beating him with his fist and the deceased holding his hand, the prisoner went to the fence and got a rail and struck in among them, and they all came down together, and he got up and ran off.

Charles was next examined by the State. Charles stated that he heard a conversation and went to the place, where he found two white men and Cæsar and Dick engaged in conversation; Brickhouse asked him (the witness) if he knew they were patrollers, and took hold of him (the witness) and told Dick to go and get a whip; Dick moved off a few steps and stopped; Brickhouse let witness go and took hold of Dick and began to beat him with his fist, and the deceased also took hold of
(395) Dick; the prisoner remarked to witness that he could not stand that, and ran to the fence and got a rail, and with the rail in both hands struck Brickhouse on the head; the rail broke in two pieces, leaving a piece of the rail three or four feet long in the hands of the prisoner; the prisoner then struck Mizell, the deceased, with the piece in his hands and felled him to the ground at full length; the prisoner then ran off and Brickhouse pursued him; witness also ran off, leaving the deceased lying at full length on the ground. This witness was then examined as to the size and quality of the rail used by the prisoner. He stated that it was a fence rail of the usual length, was fit for fencing, and was part of a fence when taken by the prisoner, and was about the size of a piece of timber in the courthouse, pointed out by the witness, which piece of timber was about four inches wide by two and a half inches thick. The witness further stated that the rail aforesaid was of sap timber and tolerably rotten, and that it had rained the day before.

Whitmell, a slave, was next examined by the State. He stated that on the night of the homicide the prisoner came to his house in Jameston and asked him (the witness) how he was. Witness replied he was very well. Witness then asked the prisoner how he was. The prisoner replied, "Bad enough," and went on to say that he had knocked down one white man and crippled an-

other; and further said the white men were beating Dick; that he took a rail and knocked them down, one for dead; that the other white man called the one he had knocked down, but he did not answer, and he (the prisoner) did not know whether he was dead or not; the prisoner further stated that the white men gave them two or three licks round and walked off, and he (the prisoner) and Dick laughed; the white men came back and fell to beating Dick; that he (the prisoner) asked Charles if he could stand that; Charles said nothing; prisoner said to Charles, with an oath, that he could not stand it; he got (396) a rail and struck them, and left one of them for dead.

The prisoner was a man of ordinary size, and it was in proof that he was employed in getting timber. It was also in proof that he was obedient to white persons, so far as the witness knew or had heard.

The Attorney-General insisted that, upon this evidence, it was a case of murder.

The prisoner's counsel contended that whilst an ordinary assault and battery by a white man on a slave would not be sufficient to extenuate the crime from murder to manslaughter, yet this was a case in which we were obliged to resort to the primary rule, which pronounces on the character of provocations, and that the application of this principle was left to the intelligence and conscience of the jury; that the circumstances of this case, the time, the manner, the drunken situation of the white men, their conduct on that occasion, being utter strangers to the negroes and the negroes to them, were naturally calculated to provoke a well-disposed slave into a violent passion, and, therefore, the crime was extenuated to manslaughter.

The prisoner's counsel further contended that, if the jury believed the deceased and Brickhouse, having whipped the prisoner, then violently assaulted Dick, without provocation or justification, and was in the act of severely beating him (Dick begging), so as naturally to provoke the anger of the prisoner, being a well-disposed negro, and, under the excitement of passion thus produced, the prisoner gave the deceased a blow which produced death, it was only manslaughter; that if the jury believed the deceased and Brickhouse, without authority or justification, having whipped the prisoner, then were in the act of severely beating Dick, the comrade of the prisoner (Dick then begging), and the prisoner, with the intent of releasing Dick from further violence, struck the deceased, it was only manslaughter; that if the jury believed the deceased and (397) Brickhouse, without authority or justification, whipped the prisoner, as stated by the witness, and then the deceased and

Brickhouse, without authority, provocation or justification, were violently beating Dick, the comrade of the prisoner (Dick then begging), and the prisoner, under the excitement of passion thus produced and with an intent only to relieve his comrade, Dick, from further violence, struck the deceased, it was only manslaughter; that if the jury believed the prisoner struck with the intent only of preventing a felony upon Dick by Brickhouse and the deceased, it was only manslaughter; that if the jury believed the prisoner struck while smarting under the influence of passion caused by the infliction of blows given him by Brickhouse or Mizell, under the circumstances it was only manslaughter. The prisoner's counsel further contended that from the evidence in this case the weapon used was not a deadly one, and that the jury were to decide that question, and argued to the jury that at least it was doubtful whether the weapon was deadly or not.

The court charged the jury that if the evidence submitted to them satisfied their minds beyond a reasonable doubt that the prisoner at the bar slew the deceased with a fence rail or a part of a fence rail, under the circumstances detailed by the witnesses, it was a case of murder.

If the witnesses had given a correct description of the rail or piece of rail with which the prisoner inflicted the blow on the deceased, it was an instrument, in the hands of a stout man, calculated to produce death or great bodily harm, and was, therefore, in law, a deadly weapon. The court further charged the jury that if the evidence of the witnesses Dick and Charles were true as to what took place preceding the blow inflicted by the prisoner on the deceased, it would not amount to legal provocation so as to extenuate the killing from murder to man-
(398) slaughter—the prisoner being a slave and the deceased a free white man. The blows inflicted by Brickhouse on the prisoner, as detailed by the witness Dick, and the blows subsequently inflicted on Dick by Brickhouse, were, taking the evidence to be true, nothing more than ordinary assaults and batteries; and an ordinary assault and battery, inflicted by a free white man on a slave, would not amount to such legal provocation as would extenuate the killing of a free white man by the slave from murder to manslaughter, however worthless and degraded the white man might be.

The jury, under the charge of the court, found the prisoner guilty in manner and form as charged in the bill of indictment. After sentence of death, the prisoner appealed to the Supreme Court.

Attorney-General for the State.
Biggs for defendant.

PEARSON, J. The prisoner, a slave, is convicted of murder in killing a *white man*. The case presents the question whether the rules of law by which manslaughter is distinguished from murder, as between white men, are applicable when the party killing is a slave. If not, then to what extent is a difference to be made?

The general question is now presented directly for the first time. In *S. v. Will*, 18 N. C., 121, the person killed was the overseer, who stood in the relation of master. In *S. v. Jarrott*, 23 N. C., 86, the general question was discussed, but the decision did not turn upon it.

These being the only two cases in this Court where it was necessary to discuss the question, while it renders our duty the more difficult, cannot fail to strike every mind as a convincing proof of the due subordination and good conduct of our slave population, and to suggest that, if any departure from the known and ordinary rules of the law of homicide is (399) to be made, it is called for to a very limited extent.

It is clear that the killing of the deceased is neither a greater nor less offense than would have been the killing of the witness Brickhouse. He was the most forward and officious actor, but the deceased had identified himself with him. They set out upon a common purpose. When a false word was told, in saying "they were patrollers," the deceased acquiesced by silence; when the slight blows were given with the board, the deceased gave countenance to it; when Brickhouse seized Dick and began to beat him, the deceased caught hold of his hands and held him while his coadjutor beat him.

To present the general question by itself, and prevent confusion, it will be well to ascertain what would have been the offense if all the parties had been white men. Two friends are quietly talking together at night; two strangers come up; one strikes each of the friends several blows with a board; the blows are slight, but calculated to irritate; a third friend comes up; one of the strangers seizes him, and orders one of the former to go and get a whip that he might whip him. Upon his refusing thus to become an aider in their unlawful act, the two strangers set upon him; one holds his hands while the other beats him with his fist upon the head and breast, he not venturing to make resistance and begging for mercy; his friend, yielding to a burst of generous indignation, exclaims, "I can't stand this," takes up a fence rail, knocks one down, and then

knocks the other down, and without a *repetition of the blow* the three friends make their escape. The blow given to one proves fatal. Is not the bare statement sufficient? Does it require argument or a reference to adjudged cases to show that this is not a case of *murder?* or "of a black," diabolical heart,
(400) regardless of social duty and fatally bent on mischief? It is clearly a case of manslaughter in its most mitigated form. The provocation was grievous. The blow was inflicted with the first thing that could be laid hold of; it was *not repeated,* and must be attributed, *not to malice,* but to a generous impulse, excited by witnessing injury done to a friend. The adjudged cases fully sustain this conclusion. In 12 Coke, 87, "two are playing at bowls; they quarrel and engage in a fight; a friend of one, standing by, seizes a bowl and strikes a blow, whereof the man dies. This is manslaughter, because of the *passion* which is excited when one *sees his friend assaulted.*" This is the leading case; it is referred to and approved by all the subsequent authorities. *King v. Huygot.* 1 Kel., 59; 1 Russ. on Crimes, 500; 1 East. P. C., 328, 340.

As this would have been a case of manslaughter, if the parties had been white men, are the same rules applicable, the party killing being a slave? The lawmaking power has not expressed its will, but has left the law to be declared by the "courts, as it may be deduced from the primary principles of the doctrine of homicide." The task is no easy one, yet it is the duty of the court to ascertain and declare what the law is.

I think the same rules are not applicable; for, from the nature of the institution of slavery, a provocation which, given by one white man to another, would excite the passions and "dethrone reason for a time," would not and ought not to produce this effect when given by a white man to a slave. Hence, although if a white man, receiving a slight blow, kills with a deadly weapon, it is but manslaughter; if a slave, for such a blow, should kill a white man, it would be *murder;* for, accustomed as he is to constant humiliation, it would not be calculated to excite to such a degree as to "dethrone reason," and must be ascribed to a "wicked heart, regardless of social duty."
(401) That such is the law is not only to be deduced, as above, from primary principles, but is a necessary consequence of the doctrine laid down in *S. v. Tackett,* 8 N. C., 217. "Words of reproach, used by a slave to a white man, may amount to a legal provocation, and extenuate a killing from murder to manslaughter."

The reason of this decision is that from our habits of association and modes of feeling, insolent words from a slave are

as apt to provoke passion as blows from a white man. The same reasoning by which it is held that the ordinary rules are not applicable to the case of a white man who kills a slave, leads to the conclusion that they are not applicable to the case of a slave who kills a white man.

The announcement of this proposition, now directly made for the first time, may have somewhat the appearance of a law *made after the fact.* It is, however, not a *new law,* but merely a new application of a well-settled principle of the common law. The analogy holds in the other relations of life—parent and child, tutor and pupil, master and apprentice, master and slave. A blow given to the child, pupil, apprentice or slave is less apt to excite passion than when the parties are two white men "free and equal"; hence, a blow given to persons filling these relations is not, under ordinary circumstances, a legal provocation. So, a blow given by a white man to a slave is not, under ordinary circumstances, a legal provocation, because it is less apt to excite passion than between equals. The analogy fails only in this: in the cases above put, the law *allows* of the *infliction of blows.* A master is *not indictable* for a battery upon his slave; a parent, tutor, master of an apprentice is *not* indictable, except there be an excess of force; whereas the law *does not allow a white man to inflict* blows upon a slave who is *not his property;* he is liable to indictment for so doing. In other words, in this last case, the blow *is not* a legal provocation, although the party giving it *is liable* to indictment; while in the (402) other cases, whenever the blow subjects one party to an indictment it is a legal provocation for the other party. This is a departure from the legal analogy, to the prejudice of the slave. It is supposed a regard to due subordination makes it necessary, but the application of the *new principle* by which this departure is justified should, I think, be made with great caution, because it adds to the list of constructive murders, or murders by "malice implied."

Assuming that there is a difference, to what extent is the difference to be carried? In prosecuting this inquiry, it should be borne in mind that the reason of the difference is that a blow inflicted upon a white man carries with it a feeling of degradation, as well as bodily pain and a sense of injustice, all or either of which are calculated to excite passion; whereas a blow inflicted upon a slave is not attended with any feeling of degradation, by reason of his lowly condition, and is only calculated to excite passion from bodily pain and a sense of wrong; for, in the language of *Chief Justice Taylor,* in *S. v. Hale,* 9 N. C., 582, "the instinct of a slave may be, and generally is, turned

into subserviency to his master's will, and from him he receives chastisement, whether it be merited or not, with perfect submission, for he knows the extent of the dominion assumed over him, and the law ratifies the claim. But when the same authority is wantonly usurped by a stranger, nature is disposed to assert her rights, and prompt the slave to resistance."

We have seen that the general rule is that whenever force is used upon the person of another, under circumstances amounting to an indictable offense, such force is a legal provocation; otherwise it is not.

By this rule *S. v. Will*, 18 N. C., 121, would have been a case of murder; for it was settled in *S. v. Mann*, 13 N. C., 263, that a master is not indictable for a battery upon his own
(403) slave, however severe or unreasonable. But *Will* was held guilty of manslaughter only, the court feeling itself constrained to make some allowance for the feelings of nature. By this rule, if a slave who has been guilty of insolence receives a blow from a white man, it is a legal provocation; for the white man has committed an indictable offense. *S. v. Hale*, 9 N. C., 582. This case would be as strong an authority to show that the case above put was but manslaughter, except for reasons of policy and the necessity of keeping up due subordination, as *S. v. Mann, supra*, was to show that *S. v. Will* was a case of murder, except for an allowance for the feelings of nature.

In the case above put, a blow is supposed, unaccompanied by bodily pain or unusual circumstances of oppression, the only incentive to passion being a sense of degradation, which a slave is not allowed to feel. When bodily pain or unusual circumstances of oppression occur, one or both is sufficient to account for passion, putting a sense of degradation out of the question, and there would be legal provocation.

I think it clearly deducible from *S. v. Hale, supra*, and analogies of the common law, that if a white man wantonly inflicts upon a slave, over whom he has no authority, a severe blow or repeated blows under unusual circumstances, and the slave *at the instant* strikes and kills, without evincing, by the means used, great wickedness or cruelty, he is only guilty of manslaughter, giving due weight to motives of policy and the necessity for subordination.

This latter consideration, perhaps, requires the killing should be *at the instant;* for it may not be consistent with due subordination to allow a slave, after he is extricated from his difficulty and is no longer receiving blows or in danger, to return and seek a combat. A wild beast wounded or in danger will turn upon a man, but he seldom so far forgets his sense of inferiority

as to seek a combat. Upon this principle, which man (404) has in common with the beast, a slave may, without losing sight of his inferiority, strike a white man when in danger or suffering wrong; but he will not seek a combat after he is extricated.

If the witness Dick, while one white man was holding his hands and the other was beating him, had killed either of them, there would have been no difficulty in making the application of the above principles, and deciding that the killing was but manslaughter, and of a mitigated grade, contrasted with *Will's case,* who, although he did not seek the combat, but was trying to escape, killed his *owner* with a knife, after being guilty of willful disobedience; and the conclusion would derive confirmation from the reasoning of *Judge Gaston,* in *Jarrott's case,* where the prisoner had it in his power to avoid the combat, if he would, and struck *several blows after the white man was prostrated.*

In making the application of the principles before stated to the case of the prisoner, another principle is involved. The prisoner was not engaged in the fight; he was the associate and friend of Dick, and was present and a witness to his wrongs and suffering.

We have seen that had he been a white man, his offense would have been but manslaughter, "because of the *passion* which is *excited* when one sees his friend assaulted." (See the case cited from 12 Coke, 87, and the other authorities.) But he is a slave, and the question is, Does that benignant principle of the law by which allowance is made for the infirmity of our nature, prompting a parent, brother, kinsman, friend, or even a stranger to interfere in a fight and kill, and by which it is held that, under such circumstances, the killing is ascribed to *passion* and not to *malice,* and is manslaughter, not *murder;* does this principle apply to a slave? or is he commanded, under *pain of death,* not to yield to these feelings and impulses of (405) human nature under any circumstances? I think the principle does apply, and am not willing, by excluding it from the case of slaves, to extend the doctrine of constructive murder beyond the limits now given to it by well-settled principles. The application of this principle will, of course, be restrained and qualified to the same extent and for the same reasons as the application of the principle of legal provocation before explained. A slight blow will not extenuate; but if a white man wantonly inflicts upon a slave, over whom he has no authority, a severe blow, or repeated blows under unusual circumstances, and another, yielding to the impulse natural to the relations

above referred to, strikes at the instant and kills, without evincing, by the means used, great wickedness or cruelty, the offense is extenuated to manslaughter.

In 1 East. P. C., 292, and in 1 Russell on Crimes, 502, it is said: "After all, the nearer or more remote connection of the parties with each other seems more a matter of observation to the jury, as to the probable force of the provocation and the motive which induced the interference of a third person, than as furnishing any precise rule of law grounded on such a distinction."

The prisoner was the associate or friend of Dick; his general character was shown to be that of an obedient slave, submissive to white men; he had himself received several slight blows, without offense on his part, to which he quietly submitted; he was present from the beginning; saw the wanton injury and suffering inflicted upon his helpless, unoffending and unresisting associate; he must either run away and leave him at the mercy of two drunken ruffians, to suffer, he knew not how much, from their fury and disappointed lust (the hour of the night forbade the hope of aid from white men) or he must yield to a generous impulse and come to the rescue. He used force
(406) enough to release his associate and they made their escape, without a *repetition* of the *blow*. Does this show he has the heart of a murderer? On the contrary, are we not forced, in spite of stern policy, to admire, even in a slave, the generosity which incurs danger to save a friend? The law requires a slave to tame down his feelings to suit his lowly condition, but it would be savage to allow him, under no circumstances, to yield to a generous impulse.

I think his Honor erred in charging the jury that, under the circumstances, the prisoner was guilty of murder, and that there was no legal provocation. For this error the prisoner is entitled to a new trial. He cannot, in my opinion, be convicted of murder without overruling *Hale's case* and *Will's case*. It should be borne in mind that in laying down rules upon this subject they must apply to white men as a class, and not as individuals; must be suited to the most *degraded* as well as the most orderly. Hence, great caution is required to protect slave property from wanton outrages, while, at the same time, due subordination is preserved.

It should also be borne in mind that a conviction of manslaughter is far from being an acquittal; it extenuates on account of human infirmity, but does not justify or excuse. Manslaughter is felony. For the second offense life is forfeited.

I think there ought to be a new trial.

NASH, J. I concur with *Judge Pearson* in the opinion that the prisoner is entitled to have his cause reheard before another jury. The presiding judge erred in instructing the jury that the assault and battery, committed by the deceased and the witness Brickhouse upon the prisoner and his associate Dick, was an ordinary assault, and did not extenuate the homicide. The time, a late hour in the night, when all appeal to the interference of white men was cut off; the manner, two (407) drunken men, strangers to the prisoner, with their passions inflamed by lust and spirits—all show that it was not an ordinary assault and battery. It is not simply the force and instrument that are actually used which give to an assault its true character, but that character is derived in a great measure from the attending circumstances. Thus the touching of the person of a female in an indecent manner is considered as an aggravated offense; so a fillip on the nose. In each of these cases no force but that of a legal character is used. And yet the perpetrator has so far lost the protection of the law that, if slain immediately, the homicide is not murder, though a deadly weapon be used. His Honor, therefore, in my opinion, erred in telling the jury that the assault was an ordinary one. If he meant that no instrument or weapon of a dangerous character was used by the deceased and the witness Brickhouse, it was a fact that did not, necessarily, enter into the grade of the offense committed by them, and his language was well calculated to mislead the jury—to lead them to the conclusion that no assault upon a slave by a white man can be an aggravated one, or calculated to produce that *furor brevis* which dethrones reason for the time being and repels the idea of malice in the slayer, except when a deadly or dangerous weapon is used. If such an effect could be produced on the minds of the jury, and cases can be shown in which the slaying of a white man by a slave will be extenuated from murder to manslaughter where the assault and battery is an aggravated one, then there must be error in the charge, in point of law, and the prisoner is entitled to the benefit of the objection.

Suppose a parcel of drunken white men, say a dozen, meet a slave in the highway, in a lonely spot, and seize him, and while some hold him others of the party proceed to beat him. and in his terror and pain he kills one of them with a deadly weapon: could it be pretended the slayer would (408) be guilty of murder? It is said the law does not allow a slave to feel the degradation of a blow, when inflicted by a white man, to the point of dethroning reason; does the law equally deny him the privilege of pleading the dethronement of

reason from the passion of fear and apprehension? If this be so, then there was error in the charge. His Honor ought to have instructed the jury that an assault made by a white man upon a slave, which endangers his life or *threatens great bodily harm,* will amount to a legal provocation. *S. v. Jarrott,* 23 N. C., 86; *S. v. Will,* 18 N. C., 163. The prisoner was entitled to have the law bearing upon the case fully and correctly laid down by the court. This, in my judgment, has not been done in the matter now discussed; and as the verdict must have been affected by that error, the prisoner is entitled to a new trial.

But there is another and a graver question to be considered. At the time the prisoner struck the fatal blow he was in no immediate danger of further violence by the deceased and the witness Brickhouse. The witness Dick was, at the time of the killing, the sufferer—the blows were then being inflicted on him. If he had committed the homicide while being beaten, in my opinion his crime would have been manslaughter. Is the killing by Cæsar entitled to the same consideration? There is not the slightest evidence of any express malice; will the law, under the circumstances of this case, imply malice? Most certainly to my mind it will not. I have, in my preceding remarks, treated the case as if the blows inflicted on Dick, at the time the fatal blow was given, had been inflicted on the prisoner. I have done so because, if the prisoner were a white man, there is no doubt, at common law, his offense would have been manslaughter, and not murder. Upon this point the opinion of my brother *Pearson* is clear and conclusive. Does the fact that the pris-
(409) oner and his associate Dick are slaves alter the law? *This* point has not heretofore been decided by this Court. By the common law the prisoner's offense would clearly be mitigated to manslaughter. By what legislative act, I mean by what act of the legislative power of this country, has that rule been altered as to slaves? Has this Court power to legislate, to *establish* "a rule of action" by which the citizens of the country shall govern themselves? Is it not a legislative act to dispense with a rule of the common law which, in mercy to human frailty, has been adopted to save life? But I am called on not only to abrogate one rule, but, necessarily, to introduce another. If you say the prisoner is not entitled to the rule of the common law, which knows no difference of caste, then you not only strip him of a defense which the common law secured to him, but you establish another rule, that a slave shall, in no case, strike a white man for an assault and battery upon another slave, no matter in what relation he stands to him or what the force used

by the white man, or what the nature of the weapon used by him. I ask for the authority so to declare. I am referred to the degraded state of slaves; that what would arouse to phrensy a white man, he is brought up from infancy to bow to. I am told that policy and necessity require that a different rule should exist in the case of a slave. Necessity is the tyrant's plea, and policy never yet stripped, successfully, the bandage from the eyes of Justice. It does not belong to the bench, but to the halls of legislation. I fully admit that the degraded state of our slaves requires laws different from those applicable to white men, but I see no authority in the courts of justice to make the alteration. The evil is not one which calls upon the Court to abandon their appropriate duty, that of enforcing the law as they find it. The Legislature, and only the Legislature, can alter the law. It is not likely, however, that they will undertake the task, difficult as it is admitted to be, while they find the courts of justice willing to take from them the responsibility of (410) providing for the evil. There are several cases decided by this Court, upon the subject of homicide committed by white men on slaves, and by slaves on white men. It is not my purpose, nor would it become me to sit in judgment, on this occasion, upon their correctness; they were made by able men and profound lawyers—by good men, who could not be seduced from what they considered the path of duty; and when a case shall come before me which is governed by them, I may find it my duty to conform to them. This is a new case, and I feel not only justified but commanded to adhere to the common law. It sheds a steady light upon the path of the jurist, and gives him a safe and fixed rule to govern himself by. In all cases to which my attention has been drawn, the judges admit the difficulty of laying down any general rule different from that of the common law. The language of *Chief Justice Taylor* in *S. v. Hale*, 9 N. C., 582, is, "It is impossible to draw the line (speaking of what will constitute a legal provocation for a battery committed by a white man on a slave) with precision, or lay down the rule in the abstract, but, as was said in *S. v. Tackett*, 8 N. C., 217, the *circumstances* must be judged of by the court and jury, *with a due regard to the habits and feelings of society.*" And the late *Judge Gaston*, than whom an abler judge or better man never sat upon the seat of justice, in *Jarrott's case*, after admitting that no precise rule had been laid down by which to pronounce what interference of a white man, not the owner, shall be deemed a sufficient legal provocation, and remarking upon the difficulty of so doing, winds up by saying: "That is a legal provocation of which it can be pronounced,

having a due regard to the relative condition of the white man and the slave, and the obligation of the latter to conform his instinct and his passion to his condition of inferiority,
(411) that it would provoke well-disposed slaves into a violent passion. And the application of the rule must be left, until a more precise rule can be formed, to the *intelligence* and *conscience* of the *triers.*" The same profound judge, in *Will's case,* furnishes me with the rule for my judgment in this case, of which I gladly avail myself. Will was indicted for the murder of his overseer. His language is: "In the absence, then, of all precedents directly in point, or strictly analogous, the question recurs: If the passions of the slave be excited into unlawful violence by the inhumanity of his master or temporary owner, or one clothed with the master's authority, is it a *conclusion of law* that such passions must spring from diabolical malice? *Unless I see my way clear as a sunbeam,* I cannot believe that this is the law." Not only do I not see my way clear as a sunbeam, but my path, the moment I desert the well-known principles of the common law, is obscured by doubts and uncertainties. I look in vain to those who have preceded me for a safe guide. The common law tells me that, although the passion excited in the mind of the prisoner, by witnessing the cruelty inflicted on his associate and companion, did not justify his killing, yet, springing as it did from the ordinary frailty of human nature, rebuts the idea of malice, and extenuates it to manslaughter. Why should I desert this safe guide, to wander in the mazes of judicial discretion—and that, too, in a case of life and death; and which has been correctly designated by this Court, in a recent case, as the worst and most dangerous of tyrannies? The conclusion to which I have been brought is that this prisoner is entitled to a new trial for the error in the charge as to the nature of the assault and battery committed by the white man. If I were called on to lay down a rule by which a homicide committed by a slave on a white man in consequence of an assault and battery upon him should be mitigated to manslaughter, and were at liberty to do so, I should adopt the one stated by *Judge Pearson* in this case, as
(412) being safer and more distinct than any one yet suggested. Still, in the language of *Judge Gaston,* in *S. v. Jarrott,* 23 N. C., 86, "the application of the principle must be left, until a more precise rule can be formed, *to the intelligence and conscience of the triers.*"

In my opinion, the judgment must be reversed and a *venire de novo* awarded.

RUFFIN, C. J., *dissenting.* I am unable to concur in the judgment of the Court, and, upon a point of such general consequence, I conceive it to be a duty to state my dissent, and the grounds of it.

There are circumstances in the case which might be worthy of consideration, as being unlawful acts on the part of the slaves, prior to the violence on either side. They were from home without passes from their owners, and associated in the street of a village in the middle of the night. They were, thus, subject to be taken up by any one, and might be looked on as the first transgressors. But all observations upon those facts may properly be pretermitted, because, upon the supposition that Brickhouse and Mizell were wrongdoers throughout, it appears to me that upon adjudged cases and principles their acts, as far as they had gone, did not amount to a legal provocation; such as ought, or would ordinarily, rouse the angry passions in negro slaves and carry them to such a pitch as to dethrone reason and, under a sense of outrage and forgetfulness of their vast inferiority, prompt them, through the infirmity of nature, to slay a white man for the trespass.

It is very clear that the question turns on the difference in the condition of the free white man and negro slaves. For there is no doubt, if all the persons had been white men, that the conduct of the deceased would have palliated the killing by the person assaulted, or by his comrade, to manslaughter. It may also be assumed that if all the parties had been slaves the homicide would have been of the same degree. (413) But it has been repeatedly declared by the highest judicial authorities, and it is felt by every person, lay as well as legal, that the rule for determining what is a mitigating provocation cannot, in the nature of things, be the same between persons who are in *equali jure,* as to freemen, and those who stand in the very great disparity of free whites and black slaves. Thus in *S. v. Hale,* 9 N. C., 582, the point was whether a battery by a white man on the slave of another was indictable, and the language of the Court was "that as there was no positive law decisive of the question, a solution of it must be deduced from general principles, from reasonings founded on the common law, adapted to the existing condition and circumstances of our society, and indicating that result which is best adapted to general expedience." Hence the Court held that such a battery was a breach of the peace, and as such indictable; but explicitly declared further, "that, at the same time, it is undeniable that such offense must be considered with a view to the actual condition of society and the difference between a white

man and a slave, securing the first from injury or insult and the other from needless violence and outrage; and that from that difference it arises that many circumstances which would not constitute a legal provocation for a battery by one white man on another, would justify it if committed on a slave, provided it were not excessive." The learned *Chief Justice Taylor* would not pretend to frame a precise rule in the abstract, to be applied to every case, but added a reference to his own language in *S. v. Tackett,* 8 N. C., 210, "that the circumstances are to be judged of with a due regard to the habits and feelings of society." In *Tackett's case,* although the statute of 1817 enacted that the killing of a slave should partake of the same degree of guilt, when accompanied with the like circumstances, that homicide then did, it was held by the Court that the purpose was
(414) merely to make the manslaughter of a slave punishable in the same manner with that of a white person, and that the statute did not mean to declare that homicide, where a slave is killed, could only be extenuated by such a provocation as would have the same effect where a white person was killed. The Chief Justice says: "The different degrees of homicide they (the Legislature) left to be ascertained by the common law —a system which adapts itself to the habits, institutions and actual condition of the citizens, and which is not the result of the wisdom of any one man or society of men, in any one age, but of the wisdom and experience of many ages of wise and discreet men. It exists in the nature of things, that where slavery prevails the relation between a white man and a slave differs from that which exists between free persons; and every individual in the community feels and understands that the homicide of a slave may be extenuated by acts which would not produce a legal provocation if done by a white person. To define and limit those acts would be impossible; but the sense and feeling of jurors and the grave discretion of courts cannot be at a loss in estimating their force and applying them to each case, with a due regard to the rights respectively belonging to the slave and white man—to the just claims of humanity, and the supreme law, the safety of the citizens." The rules thus laid down, though not professing to assume the form of definitions and to suffice, in themselves, for the determination of every case, are rendered intelligible and material aids upon the point before us by the example which the Chief Justice adduces to illustrate his meaning. "It is," says he, "a rule of law that neither words of reproach, insulting gestures, nor a trespass on goods or lands are provocations sufficient to free the party killing from the guilt of murder, where he used a deadly weapon. But

it cannot be laid down that some of those provocations, (415) if offered by a slave, would not extenuate the killing, if it were instantly done, under the heat of passion and without circumstances of cruelty." The soundness of the reasoning on which the Court proceeded in those cases, and of the principles established by it, must be acknowledged, I think, by every candid mind. The dissimilarity in the condition of slaves from anything known at the common law cannot be denied; and, therefore, as it appears to me, the rules upon this, as upon all other kinds of intercourse between white men and slaves, must vary from those applied by the common law between persons so essentially differing in their relations, education, rights, principles of action, habits, and motives for resentment. Judges cannot, indeed, be too sensible of the difficulty and delicacy of the task of adjusting the rules of law to new subjects; and therefore they should be and are proportionally cautious against rash expositions, not suited to the actual state of things and not calculated to promote the security of persons, the stability of national institutions and the common welfare. It was but an instance of the practical wisdom which is characteristic of the common law and its judicial ministers as a body, that the courts should in those cases have shown themselves so explicit in stating the general principle on which the rules of law on this subject must ultimately be placed, and yet so guarded in respect to the rules themselves in detail. Yet it is of the utmost importance, nay, of the most pressing necessity, that there should be rules which, as rules of law, should be known, so that all persons, of whatever race or condition, may understand their rights and responsibilities in respect to acts by which blood is shed and life taken and for which the slayer may be called to answer at the peril of his own life. Whenever, then, the highest judicial tribunal of the country gravely declares its opinion upon a point applicable to a subject thus novel and difficult, great respect is due to it from succeeding judges. And when (416) a case is brought directly into judgment before such a tribunal, and, in its decision, certain principles are, after full deliberation, solemnly announced and acted on, the judgment ought to be regarded as settling the point decided. If upon any question, it is upon one like this that a well-considered precedent is of utility and binding force. The certainty of the law in respect to all matters of high importance requires, especially upon a question of this kind, that the Court should adhere to what is once resolved: more particularly when the resolution is of some years standing, and the sanction of the Legislature may be implied from the omission of that body, the source of the

law, to abrogate or modify it. And when an intelligible principle is explicitly laid down in an adjudication, or necessarily results from it, every consideration of judicial prudence, of the security of the citizen, and of that quiet of mind which a known law inspires in contradistinction to unknown and uncertain opinions, which successive judges may individually entertain, should impart to such principle the authority of law. It is under such impressions that I am led to the opinion that the prisoner is guilty of murder. It results almost necessarily, as it seems to me, from the doctrine of *Tackett's* and *Hale's cases,* as already quoted. But I consider that, in pursuance of the reasons and rules of those cases, it was expressly decided and the rule laid down in *S. v. Jarrott,* 23 N. C., 76, nearly in the very language in which the instructions were given to the jury in this case. After stating that no precise rule had been before laid down, as to the unlawful interference with the person of a slave by a white man, which should be deemed a legal provocation, extenuating the killing of the assailant to manslaughter, and after acknowledging it to be no easy task to prescribe one for all cases, consistent at once with the policy and the humanity of the law, the Court explicitly declared that the law
(417) "clearly forbids that an ordinary assault and battery should be deemed, as it is between white men, a legal provocation." To my apprehension that is directly applicable to the case before the Court and decisive of it. The proposition is conceived with clearness and expressed with precision; and as far as it goes, it affords a safe footing upon firm ground gained in a morass. Why abandon it, not knowing on what we are next to tread? It is said, indeed, that the principle laid down is not obligatory, because the adjudication in the case was not in conformity to it, inasmuch as a *venire de novo* was awarded. Certainly, it was not considered at the time to be an extra-judicial dictum of the judge who delivered the opinion; but the point was deliberately discussed and the conclusion clearly concurred in by every member of the Court. Indeed, whoever will take the pains to examine the case carefully will find it to be a mistaken supposition that the point was not in judgment there. The opinion given may be erroneous, but undoubtedly it was not an unadvised nor an extra-judicial determination. For it will be noticed that there were four exceptions taken for the prisoner, each one of which it was alike the duty of the Court to consider; and that, in reference to one of them, the position under consideration was relevant, and as such was laid down. The judgment was indeed reversed; but it was because the judge refused to instruct the jury, upon the

prisoner's prayer, that, for the insolent language given by the prisoner, the deceased had no right to assault him with a sharp knife and a fence rail, as the deceased repeatedly did. That refusal was the ground of one of the exceptions; and the Court held that although insult in words or manner, from a slave to a white person, may excuse or justify a moderate battery, yet it would not authorize one that was excessive or one with the dangerous weapons which the deceased attempted to use. For such an assault, the party assailed, though a slave, might, upon the instinct of self-preservation or under the fury (418) which so wanton an attempt upon his limb or life would excite, slay the assailant without incurring the guilt of murder. But upon the reversal of the judgment upon that exception, the prisoner was not discharged, but was sent back to another trial; and hence the Court was called on to dispose of the other exceptions, in order to meet the case as, it was seen, it must appear on the next trial. Hence the Court said that, under a sense of duty, they could not forbear examining the case on the other points, nor rightfully decline the declaration of "the decided judgment they had formed on them." This question of the provocation of a slave by a white man is not, then, directly presented in the present case for the first time. It was the subject of the three other exceptions in *Jarrott's case* in different forms, and it was discussed and the point decided by the Court in reference, expressly, to the effect the judgment was to have on that very man's life or death on his next trial. It was a decision demanded by the prisoner, and one which directly concerned the public justice to be administered to him, and which the Court was obliged to make. What was said on that occasion was, therefore, as little like an extra-judicial dictum as anything that ever fell from a court; and, as an authority, it is entitled to as much weight as any adjudication ever made by the Court. What, then, were the decisions on those exceptions? They were, first, that some matters, which would be sufficient, as provocations, to free a white man from the guilt of murder, would not be sufficient to have the same effect when the party slain is a white man and the slayer is a slave; secondly, that the distinction arose from the vast difference in the social condition of the whites and the slaves, and was inherent in the castes and not dependent on the character or merits or demerits of different white men; and, thirdly and specifically, that a battery by a white man which endangers a slave's life or (419) great bodily harm will amount to a legal provocation; but that clearly an ordinary assault and battery is not such a provocation. What an ordinary battery is, as meant by the

Court, it cannot be difficult to ascertain. The signification would seem naturally to be pointed out, by its being used in immediate and direct contradistinction to a battery endangering life or causing great bodily harm. The Court cannot be supposed to have an allusion to any act of indignity merely, such as giving a slave a fillip or pulling his nose in public, as that would be an absurd contradiction to the scope of all the reasoning on which the opinion rests, which was declared. An ordinary battery plainly means one which is described in the books by the term "moderate" in contrast to that of "excessive," used likewise in the text-books and in the passages quoted from the cases in this Court. There may be other instances in which, from the severity of chastisement or its cruel protraction, the smart of pain and the uncertainty of the extent of suffering to which the unoffending negro may suppose an intention to subject him, may properly be allowed to be a provocation transporting the slave beyond the control of his reason and habitual subordination and endurance of personal wrongs from the whites. To instances of that kind allusion is made in *Jarrott's case* as being injuries of various grades between the two extremes before mentioned; and as to them the Court, without undertaking *a priori* to frame a precise rule, ventures only to advance the general doctrine that an act is to be deemed a legal provocation of which it can be pronounced, having due regard to the relative condition of the white man and the slave, and to the obligation of the latter to conform his instinct and his passions to his condition of inferiority, that it would provoke well-disposed slaves into a violent passion. Without attempting to enumerate all the instances falling within those observations, or even to give further examples, it is sufficient that I should say, as his (420) Honor did, that there were here nothing more than ordinary batteries. If they be not of that character, it is difficult to conceive such as would fall within the description. At first some slight slaps with a light board were given, which were evidently in sport, or, if it be liked better, in wantonness, and certainly not to chastise or provoke the slaves—as the witness explicitly stated that they did not hurt him, and the prisoner told another witness that he laughed at them. It is true that the blows afterwards given with the fist did hurt. But no wounds are described or serious injury mentioned—the witness saying only that the first blows did not, and that the last did hurt. The extent of the hurt must, then, be estimated from the conduct the blows produced in the man on whom they were inflicted, and by those means it may be correctly estimated. Did they make his blood boil and transport him, so that, being

wrought into a tempest of passion, he attempted in retaliation to slay his assailant, or even to join battle with him with their natural weapons? Far from it. On the contrary, he acted precisely as slaves ordinarily do under such circumstances—in that very manner, indeed, which proves that the courts have hitherto rightly judged that slaves, not dangerously or excessively and cruelly beaten, will not so feel the degradation and outrage of a battery by a white man as to be prompted instantly to seek redress at the expense of the other's life. He sought no assistance, but submitted without a struggle, and begged; and, when freed from forcible detention, he made no effort to be revenged, nor showed any resentment, but merely escaped quietly. How, then, can a court by possibility hold that such a battery is legally a provocation to kill, when, from the evidence of the man upon whom it was made, we see clearly that in fact it was not, and produced in him no such impulse? As it appears to me, then, according to the rule of *Jarrott's case,* there was no such battery by either Brickhouse or Mizell as would have mitigated to manslaughter the killing of either by the person (421) assailed.

If, however, that rule were not to be deemed law in virtue of an adjudication, its intrinsic correctness is sufficient to sustain it. As has been already stated, it is founded on the difference of condition of free white men and slaves, according to our institutions and habits. There is nothing analogous to it in the relations recognized by the common law. *S. v. Tackett* and *S. v. Mann,* 13 N. C., 269. It involves a necessity, not only for the discipline on the part of the owner requisite to procure productive labor from them, but for enforcing a subordination to the white race, which alone is compatible with the contentment of the slaves with their destiny, the acknowledged superiority of the whites, and the public quiet and security. The whites forever feel and assert a superiority, and exact an humble submission from the slaves; and the latter, in all they say and do, not only profess, but plainly exhibit a corresponding deep and abiding sense of legal and personal inferiority. Negroes—at least, the great mass of them—born with deference to the white man, take the most contumelious language without answering again, and generally submit tamely to his buffets, though unlawful and unmerited. Such are the habits of the country. It is not now the question whether these things are naturally right and proper to exist. They do exist actually, legally, and inveterately. Indeed, they are inseparable from the state of slavery; and are only to be deemed wrong upon the admission that slavery is fundamentally wrong. Now, they must necessarily mod-

ify the rules of law regulating the relation of man to man, so as to render them applicable, without injustice, to the two classes and races of our people, and suit them to the exigencies arising out of their living together, with such different passions,
(422) prejudices, pursuits and privileges. How is that to be effected? In reference to the point in hand, it would seem that but one method could be devised or thought of, which is that to which every judge has resorted who has been called to make up a judgment on it. It is to ascertain, from careful observation, the actual effect on the bulk of one race of certain conduct on the part of those belonging to the other. Indeed, that is, alone, the ground on which the law classifies the different kinds of homicide. It is on that principle the law holds that, when one free person is smitten by another and kills him on the sudden, it is not murder; because the act is not fairly and generally attributable to malignity of heart, but to that infirmity which is common to men in general in that condition; and, therefore, it is fit that there should be a compassionate consideration for it. That principle is as applicable to contests arising between the white and slave castes as to the whites by themselves. The cases of children and apprentices, at the common law, do not rest upon an independent arbitrary rule, but are examples merely of the principle under consideration. It is found that when fathers and mothers correct those under their tutelage they are not ordinarily prone to resent by violent retaliation, much less to attempt to kill; but that, on the contrary, the young do the elder reverence. If, then, a child under punishment slays his parent, the conclusion is that he was not moved to it by heat of blood on the sudden, but by a malignant and diabolical spirit of vengeance. That is the effect of applying that test of common experience between persons in those relations. What will be the effect of applying it by a calm observer between free whites and negro slaves? Why, as laid down in *S. v. Tackett*, 8 N. C., 210, and *S. v. Mann*, 13 N. C., 260, in respect to a provocation from a slave to a white man, upon which death takes place, "every individual in the community feels and understands that the homicide of a slave may
(423) be extenuated by acts which would not constitute a legal provocation if done by a white person," and that "many circumstances, which would not constitute such a provocation for a battery by one white man upon another, would justify it if committed on a slave." That, we see, is the result of an application of the principle of the common law to the homicide of a slave by a white man—of that fruit of "the wisdom and experience of many ages of wise and discreet men, adapted to

the habits, institutions and actual condition of our citizens." And I think a judge in this country will find himself compelled to adhere to that rule whenever he is called to consider whether the offense of a white man, whom he is trying for killing a slave, is or is not extenuated by the abusive and insolent reproaches of the slave and his trespass on his property before his face. So it follows, as certainly as day follows night, that many things which drive a white man to madness will not have the like effect if done by a white man to a slave; and, particularly, it is true that slaves are not ordinarily moved to kill a white man for a common beating. For it is an incontestable fact that the great mass of slaves—nearly all of them—are the least turbulent of all men; that, when sober, they never attack a white man; and seldom, very seldom, exhibit any temper or sense of provocation at even gross and violent injuries from white men. They sometimes deliberately murder, oftener at the instigation of others than on their own motive. They sometimes kill each other in heat of blood, being sensible to the dishonor in their own caste of crouching in submission to one of themselves. That, however, is much less frequent than among whites, for they have a duller sensibility to degradation. But hardly such a thing is known as that a slave turns in retaliation on a white man, and, especially, that he attempts to take life for even a wanton battery, unless it be carried to such extremity as to render resistance proper in defense of his own life. Crowds of negroes in public places are often dispersed (424) with blows by white men, and no one remembers a homicide of a white man on such occasions. The inference is that the generality of slaves—those who are well disposed towards the whites, as are almost all—do not in truth and fact find themselves impelled to a bloody vengeance upon the provocation of blows with the fist or a switch from a white man. That is the experience of the whole country. In the course of nearly forty-two years of personal experience in the profession and a very extensive intercourse with other members of the profession from every part of the State, I have not known or heard of half a dozen instances of killing or attempting to kill a white man by a negro in a scuffle, although the batteries on them by whites have been without number, and often without cause, or excessive. Desperate runaways sometimes resist apprehension by a resort to deadly weapons. But the fact certainly is, negro slaves can hardly be said to be at all sensible to the provocation of an assault from a white man as an incentive to spill blood. Such being the real state of things, it is a just conclusion of reason, when a slave kills a white man for a battery not likely to kill,

maim or do permanent injury, nor accompanied by unusual cruelty, that the act did not flow from generous and uncontrollable resentment, but from a bad heart—one intent upon the assertion of an equality, social and personal, with the white, and bent on mortal mischief in support of the assertion. It is but the pretense of a provocation not usually felt. Therefore, it cannot be tolerated in the law, though acted on in this particular instance by the prisoner; just as the law will not allow any provocation of words, gestures or trespass on land or goods from one *in quali jure*—however grievous sometimes to be borne, and however they may have actually transported a particular individual—to extenuate a homicide, because, as it holds, a
(425) rational being is not too infirm to withstand such acts of provocation. Therefore we concluded in *Jarrott's case,* as I would now hold, "that the law will not permit the slave to resist"—that is, in a case of an ordinary assault and battery on him—"but that it is his duty to submit, or flee, or seek the protection of his master," as in almost every instance he would in fact do.

But it was further argued for the prisoner that *S. v. Jarrott,* 23 N. C., 76, is not in conformity with the previous cases of *S. v. Hale,* 9 N. C., 582, and of *S. v. Will,* 18 N. C., 121, and that for that reason it cannot stand. But I must say that it seems to me to be consistent with those two and all the other cases on this subject. I aided in the decision of most of them, and thought I understood them, and certainly I was not conscious of any conflict between them; nor am I yet. *Hale's case* decides that a battery on a slave by a stranger is indictable; and it decides nothing more. It was before my time; but I acknowledge its authority, and, indeed, heartily concur in it. But it proceeds further, upon a course of reasoning, to lay down a rule modifying that of the common law, as applicable to free equals, by saying—also correctly, as I think—that many things will excuse or justify a battery on a slave that would not have the same operation in the case of a white person; and it refers to *Tackett's case* as containing, in the passages already quoted from it, the true doctrine of our law, as held by the Court, on this subject. All that, as far as it goes, is but what was said precisely in *Jarrott's case.* Neither *Hale's case* nor *Tackett's* has a word as to what redress a slave may take into his own hands for a battery on him by a white man. On the contrary, as was said in *Jarrott's case,* it clearly follows *e converso* from the decision and rule of *Tackett's* and the doctrine of *Hale's case,* that many things which, between white persons, are grievous provocations, will not and cannot be so regarded

when proceeding from a white person to a slave, whose passions ought to be and are tamed down to his lowly (426) condition. No one has thought that there could not be a provocation from a white man to a slave which would not extenuate a killing of the latter. It was, indeed, at one time held that there could be no manslaughter of a slave by a white man, and that what would be only an extenuation of the killing of a white man by another, would excuse the killing of a slave by him. That, however, was altered by the Legislature; and the question, in relation to both kinds of homicide, has since been, what are legal provocations? With respect to the killing of a white man by a slave, we have thought those acts ought not to be recognized as provocations which, according to common experience, do not, in the actual condition of these people among us, produce in them that *furor brevis* which the law mercifully regards; and that a moderate chastisement was of that character; but, on the other hand, that, as in *Will's case,* forcible injuries might be so wantonly and excessively inflicted on a slave as to palliate his killing his oppressor, though a white man. That case strikes me as having as little similitude to the present as can exist between two cases of homicide in a sudden combat. There, in order to avoid threatened punishment, a negro man ran off from an overseer, who within a few steps brutally shot a whole load of his gun into his back, giving him a most dangerous and painful wound. The slave did not then turn on the assailant, but still endeavored to escape, and the deceased, with a party of slaves, pursued and headed him, and, after the prisoner had gone as far as he could, he was overtaken—all within a short period of six or eight minutes—when the overseer seized him for further punishment, and commanded the negroes to lay hold, when the prisoner drew a knife and first struck at one of the negroes and then at the overseer and killed the latter. Upon those facts the Court held there was a legal provocation; and there certainly was, if human nature has any (427) terror of death, instinct of self-preservation, or any sense, mental or corporeal, of the pain and injury of an unlawful and atrocious attempt to take life. Those were real provocations to any man, even one in his condition. But is it to follow therefrom that a slave who, for a stroke with a switch or a few blows with the fist, kills a white man with a deadly weapon, did so under provocation which might reasonably and in fact did rouse him to a pitch of furious passion which drove him to the deed? Far from it, in my opinion; and I fear that it is giving occasion unnecessarily to much bloodshed when it is so held. My conclusion is that if the man Dick had killed either of the white

men concerned in this unfortunate affair, it would have been murder. And I must express the hope that it will thus be seen that my opinion does not proceed upon a cold and rigorous policy of repressing in a slave an actual sense of the wrong done him by a wanton battery, in order more effectually to subjugate him; but that it rests on *the fact* that a common battery from a white man—such as was in this case committed—does not ordinarily provoke a slave to go to the extremity of taking life.

All the foregoing reasons apply with yet more force against the prisoner, as he was not engaged in any way, but was a mere looker-on. I believe this is the very first instance in which a slave has ventured to interpose, either between white men or between a white man and a slave, taking part against the white man. Why should he intermeddle upon the plea of resisting the unlawful power or redressing the wanton wrong of a white man, when he to whom the wrong was done is admitted to have been unresisting? Shall one slave be the arbiter of the quarrels witnessed by him between another slave and the whites? It seems to me to be dangerous to the last degree to hold the doc-
(428) trine that negro slaves may assume to themselves the judgment as to the right or propriety of resistance, by one of his own race, to the authority taken over them by the whites, and, upon the notion of a generous sympathy with their oppressed fellow-servants, may step forward to secure them from the hands of a white man, and much less to avenge their wrongs. First denying their general subordination to the whites, it may be apprehended that they will end in denouncing the injustice of slavery itself, and, upon that pretext, band together to throw off their common bondage entirely. The rule which extenuates the assistance given by a white man to his friend in a conflict between him and another white man—all being *in equali jure*—cannot, I think, be safely or fairly extended, so as to allow a slave, upon supposed generous impulses, to do the noble duty of killing a white man because he tyrannizes over a negro man so far as to give him a rap with a rattan and a few blows with his fists. I have never heard such a position advanced before, either as a doctrine of our law or as an opinion of any portion of our people.

For these reasons the judgment, I think, ought to be affirmed.

PER CURIAM. Ordered that the opinion of the majority of the Court be certified to the Superior Court of Law of Martin County, that it may proceed accordingly.

Cited: S. v. Davis, 52 N. C., 54; *S. v. Grady*, 83 N. C., 647; *S. v. Miller*, 112 N. C., 884.

(429)

THE STATE v. ROBERT HILDRETH.

1. In an indictment for homicide it is the province and duty of the court to inform the jury, upon the supposition of the truth of the facts, as being agreed on or found by the jury, what the degree of the homicide is.

2. Where the State, in a prosecution for a homicide, relies upon the ground of express malice, the witnesses can only prove the existence of previous malice or threats, but they cannot prove the existence of the malice up to the time of the homicide, and that the prisoner acted on it in slaying. It is the province of the jury to make those inferences, or not, upon the facts proved.

3. When persons fight upon fair terms, and, after an interval, blows having been given, a party draws, in the heat of blood, a deadly instrument and inflicts a deadly injury, it is manslaughter only; but if a party enter a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder.

4. It is the province of the court in which the trial takes place to judge of the truth or sufficiency of the causes assigned for a motion for a continuance or removal of a trial.

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

The prisoner was indicted in Anson for the murder of William Taylor; and David Hildreth was charged in the same indictment as being present, aiding and abetting. At the instance of the prisoner, his trial was removed to Richmond; and in Richmond the prisoner prayed for a second removal of the trial, upon his affidavit, which is set out in the bill of exceptions, stating various acts of sundry persons and other circumstances which had induced him to believe that he could not have a fair trial in Richmond. The court refused the motion. The prisoner then moved for a continuance, upon his affidavit, which is also set out in the bill of exceptions, stating the absence of divers witnesses, who had been summoned for him, by whom he expected to prove several material facts therein stated.
The court refused that motion also. It is stated in the (430) bill of exceptions that about one hundred persons were summoned as jurors in the case, and that the prisoner challenged a large majority of them for cause, before the jury was formed; and that the prisoner examined those, thus challenged, as to their indifference, and that more than fifteen of them had formed and expressed an opinion unfavorable to the prisoner.

Upon the trial one Edmund Taylor, a son of the deceased, and of the age of 21 or thereabouts, gave evidence on the part

of the State: That, after sunset on 5 September, 1848, he was in his father's cornfield engaged in stacking fodder with his father, a negro man and a younger brother (who had not age and capacity to be examined as a witness; that he (Edmund) was on a stack, which they were near finishing, and his father and the negro were throwing up fodder to him, when he saw the prisoner, riding about in the field of his uncle, John Taylor, to the north of them, and reeling as if drunk. At that time David Hildreth rode up to the fence on the south side of the field and asked if they knew where Robert was; and upon being told where he was, David called Robert, who answered him; and David then rode around the field into a lane between the fields of William Taylor and John; that the prisoner soon afterwards pulled down the fence and rode up towards the stack, so as to have the deceased between him and the stack; that then David came in a different direction, and stopped on the other side of the stack and about six or eight steps off; that the prisoner did not then appear to be drunk, and he asked if they had not done stacking fodder; to which no reply was made, as the witness and the deceased were displeased with him on account of a State's warrant he had taken out against them not long before; that the prisoner then used very obscene and in-
(431) sulting language to them, and turned his horse as if he were going to ride off; and the deceased then told him he would indict him for pulling down his fence and coming into his field, and ordered him out, upon which the prisoner got off his horse and made towards the deceased, who gave back and passed the stack; that as he passed he told the witness to give him his knife, which the witness refused; that David then said, "Take notice, I do not get off my horse." That the prisoner continued to advance on the deceased and the latter to retreat, when he said to the prisoner, "I'll kill you, if you don't go out of my field"; but that the prisoner still advanced, and the witness said to his father, "I would not let a man rush on me in my own field in that way," whereupon David said, "Hush, or I'll whip both of you," and the deceased picked up a doted chump and after giving back eight or ten steps, and while still giving back, he struck the prisoner about the head, when the witness saw the prisoner's hand strike the deceased in the breast, and then the deceased struck the prisoner again, and immediately exclaimed, "Bob Hildreth has killed me—he has cut my heart open!" and the deceased, bleeding very much, walked off about twenty steps and fell dead. The witness further stated that the fight occurred between sunset and dark, and that the moon was shining, so that it was daylight and moonlight; that

when the prisoner got off his horse he did not think he would hurt his father, as he noticed particularly to see if he had a knife or stick in his hand, and that he did not discover either, though he was on the stack; that he did not see the prisoner raise his hand while he was advancing on the deceased, and that he saw him strike but one blow, though there were two wounds; and that immediately afterwards he saw a bloody knife in the hand of the prisoner, with a blade four inches long.

Other witnesses gave evidence for the State that the (432) deceased was a small and infirm man, about sixty years old; that there were two wounds on the dead body—one on the breast, about one inch deep and penetrating the breast bone, and appeared to be a stab with a knife; the other on the left side, about three-quarters of an inch wide and six inches deep, which was mortal.

Further evidence was given that the prisoner leased a house from the deceased, situate about a quarter of a mile from that in which the deceased resided; and that, about four or five weeks before the homicide, the prisoner told a witness the deceased was in the habit of watching his house to catch him trading with slaves, and he asked if he would not be justified in whipping him, to which the witness replied he had better not do so, but appeal to the law. Other witnesses gave evidence that, on 13 August, 1844, the prisoner applied to a magistrate for a peace warrant against the deceased and his son Edmund, upon the ground that they threatened to burn his house and also to do him personal injury; that the magistrate endeavored to put him off, and the prisoner said if he did not grant him a warrant he would take the law into his own hands; that, thereupon, the warrant was issued on the prisoner's affidavit, and the defendants therein were arrested and on examination discharged. Another witness deposed that, about five weeks before the homicide the prisoner asked him several times if the deceased had not applied to him to watch the prisoner's house for the purpose of detecting him in trading with slaves, to which inquiries the witness replied that Taylor talked a great deal, and that it was not worth while to mind him; and that, during the conversation, the prisoner said two or three times, "I will kill the old rascal," and the last time he said, "I will kill him, and you may see it." Another witness gave evidence that, in the afternoon of 5 September, the prisoner and his brother David came on horseback to John Taylor's and drank (433) some cider, but neither was drunk; that the prisoner asked the witness if he had not heard William Taylor say that he intended to burn down his (the prisoner's) house, and the

witness replied that he had not; and then the prisoner said he would have him summoned, anyhow; that David then asked him if he ever heard Taylor say that a negro saw him (David) and his father lying in the road drunk, to which the witness replied that he had heard the deceased say something like it; upon which David said, "I will go over and beat old Bill Taylor nearly to death"; that the prisoner and David then left John Taylor's, about an hour and a half before sunset, and rode over to James Hildreth's, which was to the north and in sight of John Taylor's and about a quarter of a mile off. Another witness gave evidence that the two brothers got to James Hildreth's about an hour by sun, and that, after being there some time, the prisoner borrowed David's knife, saying he wanted to mend his bridle; that he opened and shut the knife twice and looked at it each time, and then put it into his pocket, and, without mending his bridle, rode off north, in a direction from the deceased's house and field; but that after going some distance he turned towards the deceased's plantation; and that in order to get there he would have to pull down three fences. Further evidence was given that the prisoner was arrested on a warrant the third day after the homicide, and was found in a thicket of briers in an old field, and that he had a slight wound on the forehead, and said that the deceased struck him there.

Upon this evidence the counsel for the prisoner moved the court to instruct the jury that it was a case of mutual combat, in which the offense was extenuated from murder to manslaughter. But the presiding judge refused to give that instruction, and told the jury that the rule was that if two persons
(434) engage in a sudden combat, and, after they become heated by the combat, one of them seizes a deadly weapon, or uses one in his hands, having no intent to use it when the combat commenced, and slay his adversary, it is but manslaughter. And after summing up the evidence, the court instructed the jury that if the witnesses in this case were to be believed, the prisoner was all the time advancing on the deceased and the deceased all the while giving back; and that the killing, according to the testimony, if true, was not manslaughter, but murder.

The jury convicted the prisoner of murder, and from the sentence he appealed.

Attorney-General for the State.

No counsel for defendant.

RUFFIN, C. J. The Court finds no error in the record. It is the undoubted province and duty of the court to inform the jury, upon the supposition of the truth of facts, as being agreed

or found by the jury, what the degree of the homicide is. Fost. Cr. L., 255; *S. v. Walker*, 4 N. C., 662. If it were not so, there would be no rule of law by which a killing could be determined to be murder, but the whole matter of malice or alleviation would fall to the discretion and decision of the jurors in each particular case, and there would be no mode of reviewing it, so as to reverse the decision, though erroneous. There could be no tyranny more grievous than that of leaving the citizen to the prejudices of jurors, or the discretion of judges, as to what ought to be deemed an offense which should or should not deprive him of his life. The only security for the accused is for the law to define *a priori* what shall constitute a crime, and, in the case of capital punishment, when it shall be inflicted. It is one of the praises of our law that such have always been its provisions. The presiding judge, therefore, did not (435) transcend his power, but performed simply his duty, in directing the jury upon the point whether the killing here amounted to murder or manslaughter, taking the facts to be as deposed to by the witnesses. The truth of the evidence, as far as appears, was not indeed contested on the part of the prisoner. On the contrary, he assumed it to be true when he prayed an instruction upon it, in general terms, that this was one of those cases of mutual combat in which the law holds a killing to be but manslaughter. The only question, then, is whether the court ought to have given the instruction asked, or whether that given was wrong; for an error in either respect would entitle the prisoner to a *venire de novo*. But we are of opinion that there is no such error; for, upon the supposition that the evidence was true, the Court holds clearly that the prisoner was guilty, not merely of manslaughter, but of murder in point of law; and that the malice necessary to constitute the killing murder was implied by the law and was properly declared by the court. It is true, there was evidence given of express malice, that is, of a previous ill-will of the prisoner towards the deceased and threats of killing him, and some evidence tending to show that the prisoner, up to the period of the homicide, harbored such ill-will and went to the place for the purpose of killing Taylor or doing him great harm. It may be that the evidence on that point might have been thought by the jury to establish the inferences to which it tended. Whether it was or not, it is purely a matter of fact whether, after such an interval between the threats and the killing, the prisoner acted on the old grudge on this occasion, as well as whether such previous malice existed, and neither the presiding judge nor this Court has authority to form an opinion upon it. His Honor, indeed,

left it to the jury whether the evidence was true or not, and gave his instruction upon the hypothesis that the jury
(436) found it to be true. They have said it was; but that only goes to the facts of the previous ill-will and threats, because to those alone did the witnesses depose. They did not, and could not, testify to the continuing of the ill-will up to the homicide, and that the prisoner acted on it in slaying. That is not capable of being directly proved by witnesses, but is an inference as to the actual state of the party's mind and intention upon which the act of killing was done; and it was, therefore, proper for the jury and not the court to draw it. If the case depended on that inquiry, and the killing would not be, or, rather, was not murder, without any reference to the evidence of express malice, we should hold it was erroneous to direct the jury that the prisoner was guilty of murder, without submitting to the jury the inquiry as to the continuing existence of the express malice. But we conceive that, independent of that point, and without any regard to such parts of the evidence as are relevant to it simply, the prisoner is guilty of murder upon the facts and circumstances attending the homicide, by themselves implying malice. From the admitted fact of the homicide the law presumes malice, and the matter of extenuation must arise out of the evidence of the killing itself, or must be otherwise proved by the prisoner. Here the whole turns on the testimony of Edmund Taylor, the only witness present at the fact, and upon the number and nature of the wounds. That must be assumed to be true, because the judge founded his instruction upon the supposition that all the evidence was true. Taking it to be true, the prisoner cannot deduce from it any alleviation of guilt short of murder. That which was insisted on for him is not tenable, namely, that it was a case of mutual combat, and therefore the offense was extenuated. There is no such rule of law; for, although in many cases of mutual combat, a killing is but manslaughter, because done upon sudden heat, yet there are many others in which a killing in such
(437) a combat is murder, because the circumstances show that the slayer was from the beginning actuated by malice, or, in other words, intended to take or endanger the life of the other by an undue advantage in an unequal combat. And the rule on the point was, we think, laid down with substantial correctness in this case. Here was provoking language and behavior on both sides; so that it would matter not which gave the first blow, if the fight was fair and intended by the prisoner, at the first, to be fair. But if one, upon a sudden quarrel, draws his sword and makes a pass at the other, whose sword is then un-

drawn, and then the latter draw his sword and a combat ensue in which he is killed, it is murder; for, by making his first pass, when the adversary's sword was not drawn, the assailant showed he sought the other's blood; and the endeavor of the other to defend himself, which he had a right to do, will not excuse the killer. Foster, 295. Mr. East states the rule to be that if on any sudden quarrel blows pass, without any intention to kill or injure materially, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, it is but manslaughter; but that when an attack is made with a dangerous weapon, the party assailing, without sufficient legal provocation, must put the party assaulted upon an equal footing in point of defense, at least at the onset. 1 East P. C., 242, 3. So Russell says that, although the use of a deadly weapon after the combat began will not make the offense more than manslaughter, if the combat was equal at the onset, yet the conclusion is different if there be any previous intention or preparation to use such a weapon in the course of the affray. 1 Russ. Cr. L., 446, 497. In those positions he is supported by the cases cited by him. In *Whiteby's case*, 1 Lewin's Cr. cases, 173, *Mr. Justice Bayley* states the law thus: When persons fight on fair terms, where life is not likely to be at hazard, if death ensue, it is manslaughter; and if persons meet originally on fair terms, and, after an interval, blows having (438) been given, a party draws in the heat of blood a deadly instrument and inflicts a deadly injury, it is manslaughter only; but if a party enter a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder. In *Anderson's case* the prisoner and Levy quarreled and went out to fight, and the latter was found to be stabbed in many places and died immediately, and it appeared that the prisoner had a knife, and that nobody else could have given the stabs, and the jury were told it was murder, if the prisoner used his knife privately from the beginning, or if, before the fight began, he placed the knife so that he might use it during the affray and used it accordingly. These principles and cases fully establish the correctness of the direction in this case. The prisoner, without exhibiting his knife or giving any notice of it, prepared the knife beforehand, or, at all events, drew it before any blow had passed, and in the dusk of the evening he pressed on the deceased, an infirm and weakly old man, who retreated eight or ten yards, and, as soon as the prisoner got near enough to strike, he gave the mortal stab. That he must have drawn the knife at the beginning, or, at least, before any blow on either side, is absolutely certain, if Edmund

Taylor told the truth; for the witness did not see the prisoner draw the knife, nor, indeed, see it at all until after the killing, and he says the stroke by the prisoner immediately followed that given by the deceased, and that the deceased then exclaimed that he was killed. That the deceased made defense as he did can make no difference; for, against such an assault, as *Mr. Justice Foster* says, he had a right to endeavor to defend himself. It does not appear that the weapon with which the deceased struck was of a nature that was likely to do much bodily harm, but, from the description of it and its effects, quite (439) the contrary. It is the case, therefore, of an attack by an armed man upon a feeble, unarmed man, in which the latter endeavored throughout to avoid the conflict, and the former gave a mortal blow with a deadly weapon, as soon as he was able to give a blow at all—the weapon not being drawn in the course of the scuffle, but being prepared before any actual scuffle or a blow on either side. The impulse to give the mortal stroke was not excited during and by a combat. It is clear that the prisoner sought and took that undue advantage in the fight which prevents the law from attributing the act of killing his fellowman to human frailty and the sudden transport of passion excited by the provocation of a blow or during an affray, and lays it to that malignity of heart which seeks the life of another without any legal provocation. The Court, therefore, holds that in point of law there was no error in either the instruction given or, of course, in refusing that asked.

It is the province of the court in which the trial takes place to judge of the truth or sufficiency of the causes assigned for a motion for a continuance or removal of a trial. It must be so; else it would be in the power of a prisoner to postpone a conviction indefinitely, however clear his guilt, by making affidavits with the requisite matter on the face of them. The temptation to perjury is so strong in capital cases that it is an established practice on the circuits to distrust affidavits after one continuance or removal, and scrutinize them narrowly. The presiding judge must dispose of such applications in his discretion; and, as in other cases of discretion, his decisions cannot be reviewed here, but are final.

PER CURIAM. Ordered to be certified accordingly to the Superior Court of Law of Richmond County.

Cited: S. v. Hill, 72 N. C., 352; *S. v. Matthews,* 78 N. C., 532; *S. v. Chavis,* 80 N. C., 358; *S. v. McNair,* 93 N. C., 498; *S. v. Johnson,* 104 N. C., 784; *Albertson v. Terry,* 109 N. C., 9; *S. v. Smarr,* 121 N. C., 671; *S. v. Quick,* 150 N. C., 824.

(440)

THE STATE v. DAVID HILDRETH.

1. One who is present and sees that a felony is about to be committed and does in no manner interfere, does not thereby participate in the felony committed. Every one may, upon such an occasion, interfere to prevent, if he can, the perpetration of the felony; but he is not bound to do so, at the peril, otherwise, of partaking of the guilt. It is necessary, in order to make him an aider or abettor, that he should do or say something showing his consent to the felonious purpose and contributing to its execution.

2. It is a general rule that the declarations of a party accused of a crime, made in his own favor, after the time of the alleged commission of the crime, are not evidence for him.

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

The prisoner was indicted for the murder of William Taylor, as being present, aiding and abetting Robert Hildreth, whose case has been before the Court at this term. As far as the evidence was stated in Robert's case, it is much the same with that which was given in this case. In addition, however, the witness, Edmund Taylor, stated that as soon as his father made the exclamation that he was killed, he (the witness) jumped off the stack and seized a fence rail to strike Robert, and that the negro took it from him. Robert then got on his horse and the witness cursed him for killing his father; whereupon David said: "Are you cursing me?" and the witness replied that he was not, but was cursing Robert, when David said again, "He is my brother, and if you curse him, I will put balls through you." Then Robert and David rode off together, at the instant William Taylor fell and expired.

Evidence was also given on the part of the prisoner (441) that Edmund Taylor was examined before the coroner's inquest, and then stated that the prisoner made use of the expression, "Take notice, I do not get off my horse," after the homicide, and not before or during the affray; and that he was of weak understanding, and that the prisoner had no pistol with him. On the contrary, evidence was given that he had competent capacity and a good character.

The credibility of Edmund Taylor was much discussed by the counsel on each side. The presiding judge summed up the several suggestions made at the bar on that point, and informed the jury that he had no right or wish to intimate an opinion on them, but that they were to be weighed by them. And he then instructed the jury that, in order to the conviction of the pris-

oner, it was necessary for the State to establish two things. The first was, that Robert Hildreth killed William Taylor as charged in the indictment—that is, murdered him. And upon that point the jury was instructed that, if upon the whole matter they were satisfied that Edmund Taylor was able and willing to tell the truth and had told the truth, Robert Hildreth was guilty of murder, and the State had made out the first allegation; otherwise, the prosecution was at an end, and the prisoner was entitled to an acquittal.

The second thing to be established was that the prisoner was present, aiding and abetting, at the murder. And the court thereupon instructed the jury that if one who is present does or says anything calculated and intended to make known that he would help, if need be, by taking a part in the fight, or by keeping off others, or by aiding an escape after the deed should have been done, that is an aiding and abetting; and that if the jury should believe that the prisoner made use of the words, "Hush, or I will whip you both," in the manner stated by the
(442) witness, with the intention of discouraging and deterring Edmund Taylor and the negro from interfering, that was sufficient to constitute aiding and abetting, and the prisoner would be guilty of murder or manslaughter, as they might find the facts to be on the other points following; that if the prisoner knew, before they entered the field, of the intention of his brother to attack Taylor and to use the knife in the fight, and there was an understanding between them that the prisoner should be present and aid, he would be guilty of murder, as well as his brother; and if there was no such previous understanding, and the prisoner, after he entered the field, discovered that his brother intended to use the knife in the fight in time to have prevented it, he was also guilty of murder; and that, in inquiring whether the prisoner had such knowledge the jury might consider, as a circumstance, that no expression of surprise or regret came from the prisoner after the act was done. But if the prisoner knew of the ill-will of his brother to Taylor, and that he intended to attack him, but did not know of his intention to use the knife in time to prevent it, and the fatal result was unexpected to him, then the prisoner, by reason of his engaging in the unlawful beating, would be guilty of manslaughter, but of no more.

The jury found the prisoner guilty of murder, and, after sentence of death, he appealed.

Attorney-General for the State.
Strange for defendant.

STATE v. HILDRETH.

RUFFIN, C. J. In *S. v. Robert Hildreth, ante,* 429, the Court had occasion to give an opinion on the degree of the guilt of that person, according to the evidence given by the witness, Edmund Taylor, which was in accordance with the instruction given in the present case, in which the Court confined the attention of the jury, upon that question, to the testimony of that witness only. The facts deposed to by him are substantially the same in both cases; and therefore there is nothing for this Court to add on that point. The only material difference in the cases is that on Robert's trial there was no attempt to discredit that witness, while on David's there was evidence given both of his weakness and of a falsehood or a mistake in his testimony. But no error, as we think, was committed by the presiding judge in respect to that part of the case; for he expressly avoided expressing any intimation of opinion on the credit due to the witness, and as expressly told the jury that it was exclusively for their consideration; and we hold that it was clearly within the appropriate powers and duties of the judge to lay distinctly before the jury the various considerations, arising out of the evidence, tending to sustain or impeach the credit of the witness—leaving it all the while to the jury exclusively to judge of their weight. (443)

The Court likewise agrees that aiding and abetting was properly explained to the jury, and that they might have found the prisoner guilty, accordingly, if he used the words deposed to with either of the intentions supposed; provided, there had been a previous understanding between the brothers that one of them should kill the deceased, or do him great bodily harm, and that the other should abet it by his presence and encouragement. If it could be seen that the verdict was founded on that ground, we should deem it undoubtedly correct in point of law. But that cannot be assumed; because the case was also left to the jury upon a supposition that there was no such previous understanding, and that Robert was guilty of murder upon the malice implied by the circumstances, merely, of the killing—in which case the jury was instructed, in the alternative, that the prisoner was guilty of murder if, after he entered the field, he discovered that his brother intended to use the knife in time to have prevented him. The jury may have given their verdict on this latter instruction; and, therefore, if it (444) ought not to have been given the conviction ought not to stand. The Court is of opinion that it ought not to have been given. It is to be observed, in the first place, that, upon the evidence, there was no opportunity for the prisoner to discover, "after he entered the field," that his brother had prepared or

meant to use a deadly weapon, until the rencounter commenced; for the two brothers came in opposite directions and had not been together in the field until the prisoner rode up and stopped eight or ten steps on one side of the stack, when Robert and Taylor were on the other. Again, it is apparent that he could not then have made the supposed discovery, until after the fight began, when Taylor retreated past the stack and Robert pursued, so as to bring the parties on the same side of the stack with the prisoner, and in his view. Such is the state of facts to which the instruction is to be applied; and, thus applied, we think it inaccurate. For, supposing the prisoner to have no previous concert with his brother, and that, during the combat, he first discovered that the other intended to use a deadly weapon, we think he was not guilty of murder, although he made the discovery in time to have prevented Robert from actually giving the stabs. For one who is present and sees that a felony is about being committed and does in no manner interfere, does not thereby participate in the felony committed. Every person may, upon such an occasion, interfere to prevent, if he can, the perpetration of so high a crime; but he is not bound to do so at the peril, otherwise, of partaking of the guilt. It is necessary, in order to have that effect, that he should do or say something showing his consent to the felonious purpose and contributing to its execution, as an aider and abettor. Therefore, the proper instruction, in the case supposed, would have been, that if the prisoner, after discovering the (445) deadly intention of his brother, instead of preventing its execution, deterred others from preventing it, or incited his brother to go on, then he would be guilty of murder. If the case had been so put explicitly to the jury, it seems highly probable they could not have convicted the prisoner of murder. For, upon the hypothesis assumed, that the prisoner discovered the fatal purpose of Robert for the first time during the combat, there is nothing to show that he used the expression, "Hush, or I'll whip you," after such discovery, or in any other way gave his sanction to the attempt or the deed. His presence did in no way contribute to the fact; or, at all events, it did not appear that he could have so intended. It is true that he uttered no expression of surprise or regret at the fact; which might, indeed, with other things, have some weight in inducing a belief of some concerted action between the brothers. But, of itself, it affords no evidence that the prisoner assented to or meant to encourage the perpetration of a murder, which he at that time first discovered. Even the witness, Edmund Taylor, expressed no such surprise or regret, though he says the event was unex-

pected by him, and that he endeavored to avenge it. Indeed, it seems to the Court, upon a calm consideration of the circumstances, there was no evidence upon which the case should have been left to the jury on the question whether the prisoner did aid and abet after his discovery of Robert's intention to use the knife, as already supposed; or, even, on the other question, whether the prisoner knew of such intention of Robert before he actually used the knife in giving the mortal blow. For the witness was in a much better situation to discover it than the prisoner was; and it appears that from the imperfect light, the cautious concealment of the instrument by Robert, and his sudden onset, the witness was unable to perceive the knife, although he looked particularly for that purpose. How, then, can it be inferred, without other evidence, that the prisoner, (446) on the other side of the stack and farther off, saw the knife and immediately knew the extremity to which the assailant would go with it? Upon these grounds the Court deems the conviction erroneous, and directs a *venire de novo*.

As the case may be brought to another trial upon the allegation of express malice and preconcert between the brothers, it seems proper to dispose of a question of evidence which arose on the former trial and might possibly be made on another. The point was this: The prisoner offered to prove by his sister that, after dark, on the night of the homicide, she heard Robert and David in conversation near their father's, and about three or four miles from Taylor's; and that, before they perceived her, and when the prisoner had no reason to think he was overheard, she heard the prisoner say to Robert, "You ought not to have done so," and that, from his voice, she knew that he was crying. The court rejected the evidence. We concur in the decision. The general rule is that a person's own declarations are not admissible for him. The rule is not founded on the idea that they would never contribute to the ascertainment of the truth; for, very often, they might be entirely satisfactory. But there is so much danger, if they were received, that they would most commonly consist of falsehoods, fabricated for the occasion, and so would mislead much oftener than they would enlighten, that it was found indispensable as a part of the law of evidence, to reject them altogether, except under a few peculiar circumstances. This case does not fall within any established exception. It is impossible to ascertain whether the prisoner had or had not perceived his sister; or whether he had no reason to believe that he was overheard by her or some other member of the family or some one else; or whether his tears were sincere or feigned. It was merely a declaration, subse-

(447) quent to the event alluded to—if the allusion was to this occurrence—and not forming part of the transaction; and, therefore, the objections on which the general rule rests apply with full force against its admissibility.

PER CURIAM. This opinion ordered to be certified to the court below, that they may proceed accordingly.

Cited: S. v. Boon, 82 N. C., 653; *S. v. Howard, ib.,* 628; *S. v. McNair,* 93 N. C., 630; *S. v. Gooch,* 94 N. C., 1014; *S. v. Rhyne,* 109 N. C., 795; *S. v. Edwards,* 112 N. C., 909.

PLEASANT BLACK v. LABAN WRIGHT, EXECUTOR, ETC.

1. Proof of the handwriting of a deceased subscribing witness to a bond is not, strictly, *prima facie* evidence of the execution of the bond, though it will authorize the reading of the instrument to the jury. But the jury must weigh this, together with the other circumstances given in evidence, and, from the whole, determine whether the alleged instrument was executed or not.

2. It is among the strongest circumstantial proof against a person that he omits to give evidence to repel circumstances of suspicion against him which he would have it in his power to give if those circumstances of suspicion were unfounded.

APPEAL from the Superior Court of Law of ROCKINGHAM, at Spring Term, 1849, *Dick, J.,* presiding.

This is an action of debt, commenced 27 January, 1844, on a bond to the plaintiff for $111, dated 11 January, 1838, and payable one day after date. Plea, *non est factum.*

On the trial the plaintiff produced the instrument, which purported to be executed by the testator by making his mark, and to be attested by John Wall, Jr., a son of the testator;
(448) and he proved the death of the subscribing witness and his handwriting.

The defense was that the alleged bond was a forgery. In support thereof the defendant gave evidence that the instrument was all in the handwriting of the subscribing witness, John Wall, Jr., and that he was a man of bad character, as early as 1838, and had the reputation of being a gambler, swindler and passer of counterfeit money, and was unworthy of credit. The defendant also gave evidence that in April, 1841, his testator gave to the plaintiff, on dealings between them, a bond for $71.74, and that in May, 1842, the plaintiff brought a warrant thereon and took judgment against the obligor, who stayed it,

and died in August following. The defendant also gave evidence that his testator could not write, but was a marksman; and he called one King as a witness, who stated that for the last twenty years of the testator's life he (the witness) had done the most of his business for him, such as writing and making settlements for him, and had often seen the testator make his mark to bonds and other instruments, so that he believed that he could distinguish it from the marks of other persons; and he deposed that, in his opinion, the mark of the alleged bond was not that of the testator.

The defendant offered further to give evidence that the plaintiff had a book account against the testator for dealings commencing in September, 1838, and ending in April, 1839, and that, at the latter day, the testator paid it and took the plaintiff's receipt thereon. But the court rejected the evidence.

The defendant offered further to give evidence that Wall, Jr., was dissatisfied with his father's will. But the court rejected this also.

The defendant then offered further to give evidence that the plaintiff had two other instruments, purporting to be bonds given to him by the testator, and to be witnessed (449) by John Wall, Jr., bearing different dates from that sued on in this action and subsequent thereto; and that they were all in the handwriting of John Wall, Jr.; and the defendant alleged that, in fact, the three instruments were written by the said John Wall, Jr., upon the same sheet of paper and at the same time, and that the same would so appear upon inspection of the instruments; and to that end the defendant offered the other two alleged bonds in evidence. But the court refused to receive any part of this evidence.

The plaintiff then gave evidence that John Wall, the elder, had said that his son John was running him in debt and would ruin him if he did not stop.

The court instructed the jury that the plaintiff had made out a *prima facie* case, by proving the death of the subscribing witness and his handwriting, which entitled him to a verdict, unless they were satisfied that the bond was a forgery; and that the only evidence tending to prove the forgery was the testimony of King and that relating to the bond for $71.74, and the bad character of John Wall, Jr.

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

No counsel for plaintiff.

J. T. Morehead for defendant.

RUFFIN, C. J. The Court thinks there ought to be a *venire de novo*. We are not satisfied with the instructions given to the jury on the case made by the evidence which went to them, and we are also of opinion that proper evidence was excluded.

Although proof of the signature of a dead subscribing witness is sufficient to allow the instrument to go to the jury, yet, where there is also evidence tending to disprove the execution (450) of the instrument, we think it is not correct to say that the evidence of the handwriting amounts to *prima facie* proof of the plaintiff's case, that is, as defined here to the jury, such as *entitled* the plaintiff to a verdict, unless the jury should be *satisfied* by the evidence on the other side that the instrument was a forgery. That is changing the *onus* of proof improperly, as it seems to us; for, in such a case, it must be a question for the jury to determine, according to the weight of circumstances on each side, whether in fact the instrument was or was not executed. It is to be remarked that, there being no direct proof on either side as to the execution, it is purely a question of circumstantial proof. The evidence of execution from the proof of the handwriting of the attesting witness is nothing more than a presumption that what the dead man witnessed was executed. It is so commonly true that the law allows it to be evidence to the jury on which they may find the fact. But it is not conclusive; nor has it, that we are aware of, any such peculiar virtue as to oblige the jury to find according to the probability it raises against opposing probabilities, unless the latter be of such a character as to leave no doubt with the jury to *satisfy* them that, in fact, the person whose bond it purports to be did not execute it. In such a case, as in others, the *onus* as to the execution is on the party setting up the deed; and, although he is entitled in law to read the paper to the jury, upon proof of the signature of the witness, yet there may be suspicious circumstances shown on the other side which may prevent the jury from being satisfied with the evidence of the handwriting of the witness, by itself, as *establishing* the execution—a thing to be done by the plaintiff before he can entitle himself to a verdict. Hence, in such cases of suspicion the plaintiff generally resorts to other evidence in support of the presumption from the handwriting of the witness, such as that he was a man of fair (451) standing; that he, the alleged obligor, acknowledged that he gave the bond, or that the signature is in the handwriting, or that there were dealings between the parties on which such a debt might probably have arisen, or the like. In fine, the presumption of execution from the proof of the handwriting of the witness cannot stand higher than direct proof of execu-

tion by the subscribing witness himself; and, as in the latter case, though the bond goes to the jury, yet they are to judge of the credit of the witness according to all the evidence; so, in the former case, all the presumptions on both sides are for the consideration of the jury, and unless they preponderate in favor of the plaintiff, it ought to be found that he failed to establish the issue on his side.

In like manner it was calculated to mislead the jury to instruct them that the testimony of King and that relating to the bond for $71.74, and the bad character of the son, was the *only* evidence tending to prove the forgery. It is true that was all the affirmative evidence on that point. Indeed, but a part of that was of that kind of proof; for the evidence as to the son's character and the small bond afforded only negative presumptions that the testator did not execute the bond in suit. But the circumstances afforded other evidence of the like negative character, relevant and material, which might have had much weight, had it been submitted to the jury in its proper connection. It is classed by writers upon the law of evidence and presumptions as among the strongest circumstantial proofs against a person that he omits to give evidence to repel circumstances of suspicion against him which he would have it in his power to give if those circumstances of suspicion were unfounded. 3 Stark. Ev., 487. Hence, when witnesses, for example, depose that the signature to a bond is not in the handwriting of the person sued, and the obligee and alleged obligor live near each other and in the immediate vicinity of the place of trial, and the latter is a man of extensive business, whose hand- (452) writing is generally known, and the former calls no witness to the point, when he might so easily do so if the signature were genuine, the omission affords the same kind of evidence against the deed that the omission of the possessor of property, recently stolen, to account for his possession does against him. It is true that it is not applicable to the case of a marksman; but it is but one example of that species of evidence in reply which the party might give, and, no doubt, would give, if his case were honest. For example, here the defendant gave evidence that, three years after the date of the instrument sued on, the testator gave the plaintiff a bond, and showed also the consideration on which it was founded, and that, without much indulgence, the plaintiff sued him on it. Why, then, did the plaintiff, if he at that time had the bond which is now in suit, indulge the testator on it for six years? To meet that circumstance, the jury might well require the plaintiff to show by his clerk, or some member of his family at least, that in fact the paper was

in his possession during that period; that there was a communication between him and the testator, and that the forbearance was extended at the latter's request; or that there had been at the date of the bond, or prior, a transaction on which the testator might have owed the sum. The total omission of all such proof furnishes, in itself, presumptive evidence of no slight force. It was, therefore, erroneous to lay it down that there was no evidence in the cause but the isolated circumstances enumerated.

The observations just made serve also to render it plain that the rejected evidence of the dealings in 1838 and 1839 was relevant and proper. It was in the nature of connected evidence of the dealings between the parties for several years, and the frequency of settlements and speedy collection of the sums due; and thus—especially in absence of all proof in re-
(453) ply—to render it less probable that the plaintiff would have waited so long for the debt now demanded, if it existed as early as January, 1838, and, thus, with the other circumstances, raise the inference that the bond was not given then, nor, by consequence, at any time.

Upon the same principle—and also for other reasons—the evidence ought to have been received in relation to the other bonds held by the plaintiff, on which he had probably instituted other suits against the defendant. It is true that evidence, simply, that the plaintiff or his subscribing witness had forged another bond on the testator would be no proof that the present instrument is a forgery. But the object here was to connect the three instruments together, and to show that the fabrication of the whole was one act. Keeping in mind that the plaintiff withheld three bonds on the testator, payable to the plaintiff; that they were all in the handwriting of the same subscribing witness, a man of very bad character; that they were of different dates, so as to purport that they had been made at different times; it certainly would be adding great and just suspicion to the transaction if it should appear that they were all made at one and the same time, and the plaintiff should still omit to show, by any dealings at any time, a fair origin for either. That they were written on the same sheet of paper made at the same time, though bearing different dates, might appear by direct proof; but that is hardly to be looked for in such a case; and certainly inspection is a mode in which the jury may to some extent judge, as from the color of the ink, the kind of pen, the watermarks on the paper, or the fitting together of the different pieces, as in the case of indentures anciently, that the work was all done at once. If such was the

fact, it increases the force of the presumptions from the defect of proof as to a consideration; as the greater the magnitude of the dealings, the greater the likelihood that they would be known and capable of proof; and, certainly, some (454) reason ought to be given in explanation of this extraordinary circumstance, that, notwithstanding the bonds were written and executed at the same time and on the same sheet of paper, they should be dated differently, so as to purport to have arisen from different transactions. We must say that, in our judgment, such evidence would have added greatly to the suspicions in the case, and was, therefore, fit to be laid before the jury, as tending to impair the presumption of execution which arose from the attestation of the writer of the several instruments.

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

Cited: Satterwhite v. Hicks, 44 N. C., 109; *Angier v. Howard,* 94 N. C., 29; *Hudson v. Jordan,* 108 N. C., 15; *Yarborough v. Hughes,* 139 N. C., 210.

THE STATE v. JOHN UPCHURCH.

1. Laws 1846, ch. 70, entitled "An act to protect houses and enclosures from willful injury," alters the act of 1836, 1 Rev. St., ch. 347, so as to reduce the offense of burning a mill-house, etc., from a felony to a misdemeanor, and substitutes the punishment of fine and imprisonment for that of death.

2. In this State, where one is indicted and tried as for felony, yet the facts averred in the indictment do not support the charge of felony, but amount to a misdemeanor, the court may give judgment for such misdemeanor.

3. Where a defendant was convicted on an indictment for a felony and appealed from the judgment thereon to the Supreme Court, and the error assigned in this Court was that the facts stated in the indictment did not amount to a felony, the Supreme Court, though it reverses the judgment for this error, yet will (under the provisions of the act establishing the court) give directions to the court below to give judgment for a misdemeanor, where it appears that is the judgment which should have been there rendered.

APPEAL from the Superior Court of Law of FRANKLIN, at Spring Term, 1849, *Settle, J.*, presiding.

The prisoner was convicted of arson, in feloniously, unlawfully, willfully and maliciously burning a sawmill- (455)

house, the property of Malthus D. Freeman; and when brought up for sentence his counsel insisted that no sentence could be passed on him because, since the act of 1846, the offense was but a misdemeanor, and because the indictment charged it to be a felony, and, therefore, there could not be judgment on it as for a misdemeanor. The court, however, proceeded to judgment of death, and the prisoner appealed.

Attorney-General for plaintiff.
No counsel for defendant.

RUFFIN, C. J. The principal question arises on section 1, ch. 34, Rev. St., and Laws 1846, ch. 70. The former enacts "that no person who shall be convicted of any willful burning of any dwelling-house or any part thereof, or any barn then having grain or corn in the same, or storehouse, grist or sawmill house, or any building erected for the purpose of manufacturing any article, shall be admitted to the benefit of clergy; but every person so convicted shall be excluded thereof and shall suffer death." The latter is entitled "An act to protect houses and enclosures from willful injury," and it enacts, "That if any person shall unlawfully and willfully burn any uninhabited house, outhouse or other building, or shall unlawfully and willfully demolish, pull down, deface, or by other ways or means destroy, injure or damage any dwelling-house, or any uninhabited house, outhouse or other building, or shall unlawfully burn, etc., any fence, etc., he or she shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine or imprisonment, or both, at the discretion of the court in which such conviction shall be had"; and it further enacts that it should be in force from the 1st day of March following.

(456) Several considerations induce the belief that by the act of 1846 it was in fact intended merely to supply those defects in the common and statute law whereby certain injuries to houses and enclosures were dispunishable as crimes and treated as civil injuries only. It had been held that burning and pulling down vacant houses or enclosures were not indictable, as for malicious mischief at common law; and the probability is, as urged by the Attorney-General, that the act meant simply to make acts of that kind indictable, and to leave those acts which were before crimes to the operation of those laws which constituted them crimes. The hypothesis is rendered plausible by the circumstances that the revised statute specifies certain buildings as the subjects of felonious arson, while that clause in the subsequent act which concerns burning

does not designate one of them by name; that it has no express clause of repeal, and makes no allusion in its title or body to the revised statute; that it was not to operate immediately, but to go into force at a future day, thus indicating a purpose to create offenses thereby and to give notice of them. Moreover, it is not known that any legislative dissatisfaction was expressed with the protection which the previous law afforded for dwelling-houses and the other erections enumerated in the act of 1836. Hence, it may be well argued that the intention was to protect buildings which were not before protected, and not to take away any protection then existing. But those considerations cannot authorize a construction in opposition to the plain words of the act. If it was a remedial statute and concerned private rights merely, they would have more weight and, perhaps, be sufficient to justify the court in reading the act so as to make it meet the mischief. In questions touching crimes and punishments, however, and especially where life is affected, statutes are to be received more literally, both in the provisions creating (457) or abrogating crimes and affixing punishments. The interpretation of such statutes is to be benignant to the accused; and, therefore, words in his favor cannot be rejected. It is perfectly settled as a rule of construction that if, by the common or statute law, an offense, for example, be a felony, and subsequent statute by an enactment merely affirmative lessen its grade or mitigate the punishment, the latter is to that extent an implied repeal of the former. If this act had said that the burning of any uninhabited house or outhouse should be a misdemeanor, then it would be clear that the dwelling-house—that is, an inhabited house—and its outhouses would have been left to the protection of the old law. The subjects of the enactments would be different and the two acts could not well stand together. But suppose that part of the act had said, in so many words, that the burning of any dwelling-house, uninhabited house, or outhouse, sawmill-house or barn should be a misdemeanor, punishable by fine or imprisonment. In that case it could not be argued that the former act was not repealed, which made the burning of a dwelling-house or mill a capital felony. The provisions would then be absolutely inconsistent in respect to one and the same building, mentioned specifically in both acts. In effect, it is the same thing here, at least as respects mills and the other erections mentioned in the act of 1836, excepting, perhaps, dwelling-houses. It is so by force of the words "other buildings" in the act of 1846, which are broad enough to include, and do, therefore, include them, unless excepted expressly or by a plain and almost necessary implication.

Perhaps a dwelling-house may be excepted out of the operation of the clause in the act of 1846 which relates to the burning of houses, and left under the act of 1836, because, in the clause which immediately follows, and relates to destroying or (458) defacing buildings, dwelling-house is one of those enumerated and protected. "Dwelling-house" was inserted there because, before, the defacing of it was not a crime any more than the defacing of an "uninhabited house," and therefore they alike required protection then; and hence the inference is rational that "dwelling-house" may have been omitted in the prior part about burning because it was already a felony to burn that. Perhaps that may be so; but it is at least doubtful, and it is to be hoped the Legislature will not allow such a doubt to rest upon so important a point as the security of men's habitations from the deliberate and diabolical act of burning, and the degree of punishment to be inflicted therefor. But if that structure of the two clauses of the sentence will justify that construction as to dwelling-houses, it must, necessarily, be restricted to them and cannot extend it to barns and mills; because neither barns nor mills are mentioned in either clause of the act of 1846, but in both are included, if at all, under the same description, "other buildings." For, when it is argued that those words, "other buildings," do not include dwelling-houses as the subject of arson, for the reasons just assigned, and, therefore, that they do not include barns and mills, since, like dwelling-houses, they also were protected by the act of 1836, the answer presents itself, that these barns and mills are not within any part of the act of 1846, and thus one of its main objects would be defeated. The analogy between dwelling-houses and barns and mills must necessarily be kept up throughout, if acted on at all; and, therefore, if a mill be not within "other buildings" as to the burning, because a dwelling-house is not, so neither can it be as to defacing or destroying, for the same reason. Yet it is very certain that the Legislature would be much surprised to hear that, notwithstanding they have enacted that willfully to demolish, pull down, deface, or by other means destroy any dwelling-house, uninhabited house or (459) *other building* should be a misdemeanor, yet the courts held it to be no offense to pull down a mill or for a mob to demolish a cotton factory. Undoubtedly, that part of the act does protect all buildings, including mills, from malicious destruction. It seems to follow necessarily that under the very same terms they must be included in the prior part of the section, although, in the one clause, the act creates a crime in respect to them, and in the other it lessens the crime previously

existing in respect to them and mitigates its punishment. It is possible this may not have been intended by the Legislature, and that the phraseology of the bill may have been adopted from inadvertence. If so, it is in the power of the Legislature to alter it. But, in the meantime, the courts must be governed by the language used, for that is the only light in this case to guide us to the intent. When the Legislature says expressly that the burning of any "uninhabited house or *other building*" thereafter "*shall* be deemed a misdemeanor," it is impossible for the Court to hold that, according to the law as it previously stood, the burning of another building, namely, a sawmill, is still a capital felony. The Court, therefore, holds that the prisoner's offense was not a felony, and that he was erroneously sentenced to be hanged.

The effect of the foregoing conclusion is now to be considered. For the prisoner it was contended that, although he was convicted of an act which is in law a misdemeanor, yet he could not be punished for it, because the indictment charged it as a felony. The reason does not strike one as very satisfactory; for the truth appears upon the record, so that the appropriate punishment for the offense, as it legally is, may and must be inflicted. It does not raise the grade of a crime, although the indictment does apply the epithet *"felonice"* to that which is not a felony. As, if an indictment charge that one "feloniously an assault did make" on another, it would still be but an indictment for an assault merely. It is true that in (460) England a count for a felony and one for a misdemeanor cannot be joined; for, by the law of that country, the modes of defense and trial are different. It is probable, too, that there an indictment might not be held good which charged a misdemeanor as a felony—especially if it appeared in the record that the party was tried as for a felony; because in that case the accused would not have had the benefit of counsel, to which he would have been entitled if tried for a misdemeanor. *Webster's case*, 1 Leach, 12; 1 Chitty Cr. L., 250. But those reasons have not the same force in our law. Our courts would no doubt not suffer the accused to be embarrassed by different counts of felonies and misdemeanors, and would put the prosecuting officer to an election to proceed on one or the other. But the accused is put to no disadvantage here by charging that as a felony which is not one. In the first place, as has been observed, charging it to be a felony does not make it one; and the trial might still be had as for the misdemeanor, and commonly would be. But if the trial were as for a felony, the accused would have no cause for complaint; for, instead of

impairing his rights, it would add to his privileges, as he would in each case be entitled to counsel upon a trial as for a felony, and he would have thirty-five challenges of jurors, whereas he is entitled to only four in other cases. We can see no ground, therefore, why, upon such a conviction, the Superior Court might not have sentenced the prisoner to fine and imprisonment.

Another inquiry follows, which is, whether that can now be done. The Court is of opinion that it may. At common law, the rule as to the effect of reversing a judgment for error in the judgment appears to be different in criminal and civil cases. In the latter, where the error is in the judgment merely, the Superior Court is wisely allowed to reverse that given (461) and then to give such judgments as the court below ought to have given; for the merits have been tried and further litigation is useless. But Lord Coke lays it down with respect to criminal cases, that "if the judgment be erroneous, both that and the execution and all former proceedings shall be reversed by writ of error," 3 Inst., 210; and the passage is cited by Sergeant Hawkins with approbation. 2 Hawkins P. C. B., 2, ch. 50, sec. 9. Although at one time the position seems to have been doubted, yet it has been more recently held that upon reversal for error in the judgment, as where the proper punishment was death, but that laid was transportation, the court of error had not power to pass the proper sentence, nor remit the case for that purpose to the court which tried it, but was obliged to discharge the prisoner. *Rex v. Ellis*, 5 B. and C., 395; *Rex v. Bourne*, 7 Ad. and Ellis, 58. So that, although the conviction be regular and proper, an error in a sentence precludes the power to give a right one; and from the recent case of O'Connell, such seems still to be deemed law by the highest tribunal in that country, as upon the reversal of the judgment in the House of Lords the accused was not sent back for a proper sentence, but discharged. We own that we can perceive no good reason for the rule; and therefore that we consider the Legislature of the State wise in having altered it, as we think has been done. In prescribing the jurisdiction of this Court, the statute enacts that the Court shall have power to determine all questions at law brought before it by appeal from a Superior Court, and in every case may render such sentence and judgment as on inspection of the whole record it shall appear to them ought in law to be rendered thereon; provided that, in criminal cases, the decision of the Supreme Court shall be certified to the Superior Court, which shall proceed to judgment and sentence agreeably to the decision of the Supreme Court and the laws of the State. It thus appears that this Court in

no criminal cases gives judgment—either modifying or (462) even affirming the judgment below. But it decides upon the whole record what ought to have been the judgment, and certifies that accordingly to the Superior Court, where, as the case may be, a *venire de novo* is awarded or the former judgment repronounced, or modified, as directed by this Court. The defendant is not before this Court at all, but remains below, and a transcript only is sent here; and our decision upon that is remitted to the Superior Court for further proceedings there in conformity to it. It is clear, therefore, that this Court may say, not only that a wrong judgment was before given, but what would have been the right one, and that the Superior Court is to proceed accordingly. The power of this Court in prescribing the judgment is, indeed, necessarily subject to the limitation that, where the punishment is discretionary, the kind only can be prescribed, leaving the measure to the judge on the circuit. Such has been the course since the Court was constituted, we believe. *S. v. Kearney,* 8 N. C., 53; *S. v. Yeates,* 11 N. C., 187, and *S. v. Seaborn,* 15 N. C., 305, are examples of it; and there have been many others.

The Court therefore holds that the judgment of death must be reversed, and the case remitted to the Superior Court with directions to proceed to pass sentence on the prisoner, upon the conviction, of fine or imprisonment or both, at the discretion of the Superior Court, and also to give judgment against him for the costs of the prosecution.

PER CURIAM. Ordered accordingly.

Cited: S. v. Clark, 52 N. C., 168; *S. v. Leak,* 80 N. C., 406; *S. v. Watts,* 82 N. C., 659; *S. v. Slagle, ib.,* 654, 5; *S. v. Perkins, ib.,* 683; *S. v. Eason,* 86 N. C., 676; *S. v. Staton,* 88 N. C., 655; *S. v. Lanier,* 89 N. C., 519; *S. v. Wright, ib.,* 510; *S. v. Edwards,* 90 N. C., 710; *S. v. Green,* 92 N. C., 784; *S. v. Goldston,* 103 N. C., 326.

(463)

THE STATE v. HENRY, A SLAVE.

1. There cannot be a constructive breaking, so as to constitute burglary, by enticing the owner out of his house by fraud and circumvention, and thus inducing him to open his door, unless the entry of the trespasser be immediate or in so short a time that the owner or his family has not the opportunity of refastening his door.

2. As where the owner, by the stratagem of the trespasser, was decoyed to a distance from his house, leaving his door unfastened, and his family neglected to fasten it after his departure, and the trespasser, at the expiration of about fifteen minutes, entered the house, without breaking any part, but through the unfastened door, with intent to commit a felony: *Held*, that this was not burglary.

RUFFIN, C. J., dissented.

APPEAL from the Superior Court of Law of ROBESON, at Spring Term, 1849, *Caldwell, J.*, presiding.

The prisoner is indicted in this case for burglary, in entering the dwelling-house of James McNatt on a certain night in January, 1849. The said McNatt and his wife were the only witnesses examined for the State as to the breaking, entering, robbery, and hour of the night. McNatt stated that about 4 o'clock in the morning he was awoke by the noise of some one not far from his house, as though in distress; that he got up and removed the chair with which the front door was fastened, and opened it, and heard from the same direction some one say something about fire; that he did not understand what was meant, and he advanced some seventy-five yards towards the person who made the noise, and asked, "What do you say?" and the reply was, "Jimmy McNatt, your mother's plantation is on fire"; that he immediately returned to the house, ordered his horse, put on his clothes and started to his mother's, dis-
(464) tant two miles, and ordered his servants to follow him as fast as possible; that he left no one at home, except his wife, child, and a small servant girl; that he went as fast as he could, it being very dark when he started; that he passed near the place from whence the noise issued, but saw no one; that when he got to his mother's, he found the family asleep; that there was no fire about the plantation, and had been no alarm about any; that in conversing with his mother, after he woke her up, they concluded that he might have been mistaken, and that the fire was at one Lancaster's, a near neighbor; that he went by Lancaster's and found there had been no fire there, nor did he know of any fire happening in the neighborhood that

night; that he returned home a little after daylight. Stated also that his neighbors and some of their negroes were in the habit of calling him Jimmy McNatt. Stated also that he had no money about his house; that he had sent off a raft of timber some time before by his brother, who had returned, but had not accounted with him. He testified as to the tin trunk, pocketbook and note on Gillis, as described in the bill of indictment, and that they were his property; that he had them in possession and saw them immediately before the transaction, but had never seen them since. On his cross-examination he stated that it was his constant habit to fasten his front door, or cause it to be done, with a chair, by putting it against the bottom of the door with the feet fixed in a crack in the floor, and the back door by a pin and a hole in the doorpost; that he found the front door so fastened when he got up, and he believed the back door was also.

Mrs. McNatt stated that her child became sick some time before day on the morning of the occurrence; that she directed a little servant girl, who slept in the house, to get up and make a light; that she got up herself with the child, and heard a noise not far from the house, but could not understand what was said; that she opened the door to ascertain and heard (465) something about fire; that she called to her husband and told him of it; that he got up and went to the door; that he went out, came back, gave the orders he deposed to; that he and the servants went off, leaving no one with her except the little negro girl. She stated that she opened the front door by removing the chair with which it was fastened, to ascertain more about the noise she had just heard; that it was their constant habit so to fasten the front door, as it was to fasten the back door by a pin stuck in the post of the door, and she believed the back door was so fastened. And she further stated that, after her husband left, she pushed to the front door, but did not fasten it, and in the space of ten or fifteen minutes after he left, a negro opened the door, put in his head, and muttered something, and she asked, "Who is there?" He then came in and said, "Have you any money here?" and she said, "No, there is none here"; that she became very much alarmed; that the negro again spoke and said, "Haven't you got some money here? If you don't give it to me I will kill you"; that she called on her Maker, and asked, "What shall I do?" and then said to the negro, "If I give you my husband's tin trunk, that contains his pocketbook and all his papers, will you spare me?" and the negro said, "Maybe so"; that she took the tin trunk out of the chest and put it on the table, and he took it off; and that she

had never seen the trunk nor its contents since. She stated that, some short time after the negro left, she started towards her mother's house with her child and the servant girl, and it was then dark; that the occurrence happened on Saturday morning before day. And she also stated that the prisoner was brought before her some time after this, and she knew him, and she swore to his identity on the trial.

One White was called by the State, and he testified that, the Tuesday night before this transaction, he heard the pris-
(466) oner and one Barlow, a white man, in conversation; that the said Barlow said to the prisoner, "You must break open Jimmy McNatt's house and get his money," to which the prisoner made no reply; that the prisoner told Barlow to let him have two gallons of whiskey; that Barlow let him have them, and thereupon Barlow said, "If you don't do what you promised, I will kill you."

It was contended for the prisoner that there was no such breaking that would constitute burglary, supposing the doors to have been fastened, and that if the prisoner entered with the intent to steal money, he could not be convicted under the bill of indictment, as it charged a robbery of goods and chattels; and further that there was no evidence that the prisoner was the person who made the outcry.

The court charged that if the prisoner made the outcry deposed to, for the purpose of decoying McNatt out of the house, and told a falsehood about the plantation being on fire to decoy him off, with the intent to enable him to enter and steal and rob, and he entered the house at the time deposed to and committed the robbery deposed to, it would be such a fraudulent and constructive breaking as would constitute a burglary, if the door were fastened as stated by the witnesses. And the court further charged that, though the prisoner entered the house of McNatt with the intent to steal the money, yet if he committed a robbery as to the articles charged in the bill of indictment, it was well supported.

A new trial was moved for, because there was no evidence that the prisoner was the person who made the outcry, and because of misdirection on the part of the court as to what constituted a constructive burglary; and also because of misdirection as to the last point raised. A new trial was refused.

Judgment pronounced, and the defendant appealed.

(467) *Attorney-General* for the State.
Strange for defendant.

PEARSON, J. We concur with his Honor that there was evidence to be left to the jury (and we think strong evidence) that the prisoner was the person who made the outcry and gave the false alarm of "fire." We also concur with him that there was evidence to be left to the jury of the felonious intent charged in that indictment.

But as to that part of the charge which refers to the burglarious breaking, there is a difference of opinion between the members of this Court; and I proceed to give my own opinion.

The prisoner's counsel moved the court to charge "that there was no such breaking as would constitute a burglary."

The court charged "that if the prisoner made the outcry for the purpose of decoying Mr. McNatt out of the house, and told a falsehood about the plantation being on fire to decoy him off, with the intent to enable him to enter, to steal and rob, and he entered the house at the time deposed to, and committed the robbery, it would be such a fraudulent and constructive breaking as would constitute a burglary."

I am not willing to extend the doctrine of *constructive breaking* further than the decisions have already carried it. In my opinion, the charge of his Honor goes beyond any of the cases cited in the argument, and any that I have met with.

Constructive breaking, as distinguished from actual forcible breaking, may be classed under the following heads:

1. When entrance is obtained by threats, as if the felon threatens to set fire to the house unless the door is opened.

2. When, in consequence of violence commenced or (468) threatened in order to obtain entrance, the owner, with a view more effectually to repel it, opens the door and sallies out, and the felon enters.

3. When entrance is obtained by procuring the servants or some inmate to remove the fastening.

4. When some process of law is fraudulently resorted to for the purpose of obtaining an entrance.

5. When some trick is resorted to to induce the owner to remove the fastening and open the door, and the felon enters; as, if one knock at the door, under pretense of business, or counterfeits the voice of a friend, and, the door being opened, enters.

In all these cases, although there is no *actual breaking*, there is a breaking in law or by construction; "for the law will not endure to have its justice defrauded by such evasions." In all other cases, when no fraud or conspiracy is made use of or violence commenced or threatened *in order to obtain an entrance*, there must be an actual breach of some part of the house. 2 East, 484, 489.

A sixth class is added by statute 12 Anne, when one, being in a house, conceals himself, and at night rifles the house and *breaks out*.

Two remarks may be made upon all the adjudged cases of constructive breaking.

There is no case when the *entry* was not made *immediately* after the fastening was removed, or so soon thereafter as not to allow a reasonable time for shutting the door and replacing the fastening.

There is no case when the artifice resorted to was not *apparently* and *expressly* for the purpose of getting the fastening removed, whereby to gain admittance without breaking it, and so "defraud the law of its justice by an *evasion*."

In this case the entry was not *immediate*. Fifteen minutes expired, during which there was ample opportunity to re-
(469) place the fastening. It was gross neglect not to fasten the door and put the dwelling under the protection of the law, so far as the fastening was concerned. This highly penal law was not intended for the protection of those who neglect to fasten.

Upon this ground I think the charge was wrong. If a felon actually breaks, as by boring through and removing the fastening, on one night, and enters the next night, it is burglary; but if the owner finds it out and leaves it so, even although it be for the purpose of apprehending the felon, it would not be burglary, for the fastening was not relied upon.

I also think the charge was wrong upon the other ground. If one, intending to go at night and rob a house, tell the owner during the preceding day that some friend at a distance, say twenty miles, wishes to see him on urgent business, and, by this false word, induces him to leave home, and goes at night, finds the door unfastened, enters and steals, it is not burglary; because it was the neglect of the owner not to fasten his house, and because it could not be supposed to have been the *purpose* of the felon to *procure* the *door* to be *left unfastened* as well as to get the owner out of the way.

In this case the apparent purpose was to induce McNatt to leave home. It may be that the purpose also was to have the door unfastened, at the time it was the design of the prisoner to enter, but this latter was not the apparent purpose and was a remote and contingent circumstance, and, in all probability, was not calculated upon; for it was reasonable to suppose, after McNatt left home at night, his wife would in common prudence secure the door. At all events, whether this latter purpose was entertained by the prisoner, as well as the apparent purpose of inducing McNatt to leave home, was a matter of doubt.

As the interval between the time of the artifice and the entry increases, the probability that this double purpose existed diminishes. Here the interval was fifteen minutes, and it certainly was necessary for the jury to find that there was (470) this double purpose, to justify a conviction.

I admit the omission to charge in a particular way, or to draw the attention of the jury to a particular distinction, is not error, unless it is suggested and the judge is requested so to charge. But it is error to lay down a proposition which is not true and is calculated to mislead by inducing the jury to return a verdict without passing upon a material fact.

The charge is, if the outcry was made to decoy McNatt out of the house and the falsehood was told to *decoy him off*, with the intent to enable the prisoner to enter, it was a constructive breaking. What is the meaning of this? How was the prisoner to be enabled to enter? Obviously, by getting McNatt out of the house, and decoying him off, so that an entry could be made in his absence and without opposition by him. This is the only fact to which the jury were called upon to respond. The proposition does not involve the further fact, that the intention *was also* to enable the prisoner to enter, by having the door left unfastened, at the time he designed to make the entry; and, therefore, the proposition is not true in point of law. In other words, the jury were only to find the single intent of being able to enter by getting McNatt off, and not the double intent of being able to enter by getting him off and also having the door left unfastened, which latter fact is material to a conviction; admitting, for the sake of argument, that the entry need not be made immediately, or so soon after the door is opened as not to allow time to replace the fastening, as insisted upon in the ground first taken.

I think the judgment should be reversed, and a *venire de novo* awarded.

NASH, J. Burglary is defined to be a breaking and (471) entering the dwelling-house of another, in the night-time, with intent to commit a felony. To constitute the offense, the breaking and entering must combine. The common law has, in all times, regarded with peculiar tenderness the dwelling-houses of the citizens, and judges, to carry out what was considered the intention of the law, have in their adjudications of what shall be a breaking and an entry, resorted to a system of refinement which, in my opinion, is too regardless of human life. The struggle seems to have been, who should be the most ingenious in finding reasons for bringing cases within the grasp

of the law, rather than in finding reasons to temper its severity. The old decisions, as well as many of the modern, will, upon examination, justify the remark. The word break is one of familiar use and meaning. It means to separate by *violence* the parts of any particular substance or thing. To break a house, therefore, would, in common parlance, be to break by violence any part of it. This definition was, at an early period of the history of the law upon the subject, laid aside, and a breaking was adjudged to be any violation of that mode of security which the occupier had adopted. Thus, not only the picking of a lock, a turning of a key left in it, and thereby unlocking it, but the lifting of a latch or the raising of a window, kept in its place only by its own weight, have all been gravely adjudged to be an *actual* breaking. 1 Russ., 2; 4 Black. Com., 224. But another species of breaking was invented by the judges, called *constructive* breaking. It would seem that the lifting of a latch would have been sufficiently constructive. But cases were brought before the courts in which the proprietor of a house himself removed the fastening of his door and opened it, and when so opened the trespasser entered. It was adjudged that whenever the opening of the door was procured by fraud, threats, or conspiracy, it was in law a breaking. To (472) complete the crime, however, it was necessary that the felon should enter the house. In common understanding, to enter a house is to go into it. But we are told the law, which is common sense, does not mean such an entry. But, if in his effort to get in, after having so procured the door to be opened, or while it is shut, any portion of his person, or of his limbs, enter, however small the part be, or how small the distance may be that it has been within the four walls, the burglary, so far as the entering is concerned, is complete.

Thus when thieves came to rob a house, and having, by threats, induced the owner to open the door, a contest ensued, and in the struggle one of the prisoners discharged a pistol into the house, and, in doing so, his hand was over the threshold, but no other part of his person, "by great advice" it was adjudged burglary. In another case, where in breaking a window in order to steal something in the house, the prisoner's finger went within the house, it was a sufficient entry to constitute burglary. *Rex v. Davis,* Russ. and Rey, 499. This was decided as late as 1823. These cases are referred to as examples of the triumph of zeal and ingenuity over common sense. In a population so dense and corrupt as that of England, such refinement and severity may be necessary. It cannot be so here. I am utterly opposed to these constructive burglaries; and whilst I

acknowledge the authority of adjudicated cases, and might be constrained even to follow the finger case, I cannot consent to go one step further. While I am not disposed to take one stone from the heap, I am not disposed to add one to it. In my view, the prisoner's case does not come within any decision which has fallen under my notice. It is admitted that, if the felon enter through an open door, he is not guilty of burglary; because, say the authorities, he has committed no violence in making his entry. It was the folly or negligence of the owner to leave his door open or unfastened in any way. In this (473) case the door of the house was not fastened in the usual way, or in any way, when the prisoner entered. On behalf of the State it is admitted that the breaking by the prisoner was not an actual, but a constructive, breaking. The prisoner did unquestionably procure the door to be opened by fraud. To me, however, it appears to be adding another mesh to the net to hold that his entry brought him within the scope of the cases that have gone before. The case states that, upon the noise, made, no doubt, by the prisoner, the prosecutor opened the outer door of his house, which had been fastened when he went to bed in the way described in the case. After opening the door, he was induced to advance to a fence about seventy-five yards off, where he was informed that his mother's plantation was on fire. How long this conversation continued we are not informed. On receiving the information, he returned to the house, ordered his horse, and dressed himself. He immediately started for his mother's, leaving the outer door open or unfastened. Some ten or fifteen minutes thereafter the prisoner entered the house through the unfastened door. This, in law, is not a felonious breaking and entry, and amounts only to a trespass. We have seen that it is an essential ingredient in the construction of the burglary that the security, ordinarily provided by the owner of the house, shall be violated, and, according to the authorities, it makes no difference how slight that security may be. And if the entry be made through a window which is left open, or through a door which is open or left unfastened, which is the same thing, no burglary can be committed. It is the *negligence* of those to whom the law extends this extreme protection that strip them of its guardianship to the extent of taking the life of a human being. In the prisoner's case the prosecutor had ample time after returning to the house to provide for its security during his absence; and those of his family who were left behind had ample time after his departure to secure (474) the door in the way it was usually fastened.

To constitute burglary, where there is no actual, but a con-

structive breaking, the entry must be simultaneous with the opening of the door, or follow it so immediately as to preclude the owner from the power of shutting or refastening the door before the entry. I can find no case where this was not the fact in a constructive breaking; and it is right it should be so. The penalty is too high to be exacted in favor of him who will not take the ordinary care to protect himself. The case has been aptly put—suppose the prisoner had, at 12 o'clock the preceding day, informed the prosecutor that at 12 o'clock the succeeding night his mother's house was to be robbed; and, after night, he had gone to his mother's, leaving the door open, and the prisoner had then entered; would that amount to burglary? Suppose in this case the mother's plantation had been twenty miles off, and the alarm had been given by the prisoner an hour in the night, and the prosecutor had gone to his mother's, leaving the door open, and an hour before day the prisoner had entered—could that have been a burglarious entry? Suppose, again, that Mr. McNatt, after having been induced by the false representation of the prisoner, to open the door, had retired to bed, leaving the door open, and the prisoner had then entered—could that be a burglarious entry? I think it very clear in law it would not in either of the cases supposed. The owner of the house, in each case, would by his negligence have deprived himself of the *high* protection provided for him, and left the crime to be punished as a misdemeanor. In the last case supposed it surely was as much his duty to close and fasten his outer door, when he retired to rest the second time, as it was when he retired the first time. It may often prove very difficult to ascertain what time elapses between the opening of the door,
(475) so procured, and the entry of the prisoner; and still more difficult to fix judicially when entry is simultaneous with the opening. All I can say is that if such a length of time elapses between the acts as to enable the owner to close and secure his door, no attempt being made by the prisoner forcibly to prevent it, the prisoner will not be guilty of a burglarious entry, if the door be open or not fastened in some way when he does enter, which is the case here. I do not consider myself as traveling out of the record or the bill of exceptions. In his argument below, which is inserted in his exceptions, the prisoner's counsel insisted that, admitting the facts to be as the State claimed them to be, in law the prisoner was not guilty of burglary. It was not necessary he should ask from the court, more specifically, a charge to that effect. I agree with him. My remarks have been entirely confined to the burglarious part of the charge against the prisoner.

I agree with *Judge Pearson*, that there was error in law in the judge's charge, and for that error the judgment must be reversed and a *venire de novo* awarded.

RUFFIN, C. J., *dissenting*. Whether there was a breaking of the house by the prisoner, in the eye of the law, depends on the inquiry, whether by fraud he procured it to be opened, to the intent he might enter, and then, availing himself thereof, he did enter, pursuant to the first intent. For if one, finding a house shut and intending to enter it and steal therefrom, instead of getting it open by directly forcibly breaking it in his own person, effects his purpose of getting it open by a stratagem or trick on the inmates, whereby he is enabled to enter in the same manner as if he had broken the house from without, that is what is called a constructive breaking. Against its being so held there is no reason whatever. The meaning is, simply, that, by construction of the law, the accused virtually and in substance did break the house of which he effected the (476) opening by such fraudulent contrivances. The definition of burglary cannot mislead us at this day by the use of the term "breaking," since the same law which gives that definition furnishes us also with a definition of "breaking," as therein used, which includes both the actual and constructive breakings which are mentioned in the books. In truth, then, the one kind of breaking is, by the common law, just as effectual to constitute burglary as the other; and, therefore, the only question in such cases is whether there was a breaking of either kind. There is no doubt in this case as to the falsehood and fraud by which the prisoner contrived to get the house opened. Therefore, the remaining question is only whether, at the time of adopting the artifice, the object of the prisoner was by that means to obtain the entrance, which he so soon effected. As to the actual existence of the intent, the inquiry is purely one of fact, and fell to the jury; and it was properly left to them, if the circumstances under which the house was opened and the entry made are such as, in point of law, will allow an intention to enter to be inferred from them. It would seem to be very singular that it should be held that such an intention cannot legally be found when, probably, not one man in ten thousand would have a doubt in his own mind that the sole object of the prisoner was to rob the house, and to that end to get it open by the artifice with which he began his operations. The only fact on which a difficulty is made on the point is, that there was an interval of ten or fifteen minutes between the opening of the door and the entry of the prisoner. If the prisoner had forced

his way in as soon as McNatt undid the fastenings of the door, it is admitted that would be a breaking by construction of law. Why? Because the entry was so directly connected with the opening of the house that it was apparently the purpose of the artifice to get the house open, and the purpose of getting
(477) the house open to gain admittance. But how far, as a matter of rational inference, is the appearance of those purposes impaired by the lapse of a minute, of two minutes, of five, or fifteen, before the entry be actually made? It seems to me, in no degree whatever; especially, if it be seen that, during the interval, the owner of the house was kept in the same state of deception by which he was induced to open the house, and, by it, is prevented from closing it again. At all events, the force of the inference and of the delay which tends to rebut it is for the jury to estimate, according to the conduct of the party throughout and all the attendant circumstances. As indicative of the intent with which the opening of the house was procured, there is no rule of law or reason requiring that the entry should accompany or immediately follow the opening. It is sufficient, as it appears to me, when the felon gets the house open by fraud, that, by means thereof, he also keeps it open until he can conveniently *enter,* and he makes an entry so soon after the original opening as to constitute the whole one transaction, and satisfy the jury that, from the beginning, that was the purpose of getting the house opened. The law does not mean that the felon must rush into the house in the present moment of its being opened, so as not to afford the slightest opportunity for the owner or any member of his family to close the door. If it did, the whole doctrine of fraudulent openings would be at an end. Suppose it to be effected by the abuse of process; that the head of the family is required by an officer to surrender upon a warrant for a felony, and he opens the door, comes out, and places himself in custody; five minutes are spent in the yard in putting the man in irons, and no one of the party enters until the proprietor is bound and secured; but, as soon as that is done, they proceed to rifle the house. Surely, that is not the less burglary because the man of the house did not call to the inmates, as he came out, to shut
(478) the door behind him, or because anxiety for him brought his wife and children into the yard, making them forget to secure the house from robbers by locking the door against a company, pretending to act as the officers of the law, and therefore *prima facie* entitled to confidence. So, if the entry be by conspiracy with an inmate, upon an agreement that the house shall be opened and the entry made at midnight. The man on

the inside is punctual to his engagement, but the burglars find that people are still up in the house or neighborhood, and for that reason do not enter then, but do, when things get quiet, an hour afterwards, and commit the robbery. That is not the less burglary because the owner might have closed the door in the interval. For he could not be expected to do so, being asleep in bed; and for that reason the law will not deprive his habitation of its protection. If, indeed, the owner in the interval find his door open, and he will not close it, and the felons enter afterwards, that would be a different case; because the omission is not occasioned by the contrivance of the thief, but is the owner's own fault. But when the owner is in no fault, and the entry is ultimately made by means of the opening obtained through the perfidy of the servant, it is in reason the same thing, whether the entry and the opening be absolutely contemporaneous, or the former succeed the latter so soon as to show that it was its intended consequence. If, too, the opening be by the owner and obtained by artifice, and the owner leave the house open, and after he have reason to suspect a trick, a subsequent entry would not amount to a breaking. But if the first contrivance by which the man was led to open his house still operate to prevent him from closing it, and it was the intent that it should so operate, and an entry be made within a period which furnished no suspicion of the fraud, it is certainly competent to conclude, and fair, that the entry was the object from the beginning, and, therefore, that there was a breaking. If not, fraud is purged by its contrivance, and a deceived man (479) is regarded as a negligent one when the deception is such as would impose on the most wary. A man, for example, calls at another's gate in the country at midnight, and asks for lodgings as an acquaintance, or as a traveler who has lost his way. The householder, willing to admit one in distress, goes for a servant to take the man's horse, and at that hour it takes ten minutes to get up a servant, and when the host gets back he finds his pretended guest has plundered his house and gone. In such a case no human prudence would have suggested the necessity for locking the door, in order, during the party's absence on the errand, to keep out the man whom he is about to admit to the hospitalities of his house upon the plea of distress, which turns out to be false. Or, suppose in that case that upon the householder's getting to the gate the stranger falls on him and they make outcries, which alarm the family, and they, instead of closing the door, run out to afford assistance to the man who is down, and while they are engaged in examining his wounds the felon avails himself of the opportunity of entering: is it not fit

that the jury should consider whether this conduct of the robber was not designed from the first to bring about just the events by which he was able to enter and steal, although the transaction from first to last may have consumed five or fifty minutes or more? Here the prisoner fraudulently procured the door to be opened, and then falsely affirmed that the plantation of the prosecutor's mother was on fire; and he gave the information at such a distance and such a direction as was calculated to warrant the belief that the informer was hurrying to the fire, whereas he was skulking in the dark and on the watch to make entry at advantage. How can it be supposed, when he entered as soon as he thought it safe, that such was not his object at first and all along? It is said it ought to be inferred, be-
(480) cause the prisoner could not know that McNatt would go off and leave his house open, or that his wife would not shut it. Admit that he did not know it; yet he might hope for it, and be willing to take the chances for it, with the intention, should those things so happen, as they did, to avail himself of them, as he did. It was not the fault of McNatt or his family, under the fraud practiced on them, not to shut and bar the door against a man who, as he taught them to think, had gone to another place, and from whom they could have expected nothing but offices of good will. At all events, it was proper for the jury; and they have found the intention expressly, as I conceive. It is true, the presiding judge did not put it to the jury in the identical words, that they should inquire whether the prisoner made the outcry for the purpose of getting the house opened, with the intent that he might enter. But he did substantially; and it would seem impossible that the jury could have understood the instruction otherwise. The language used to the jury was, that if the prisoner made the outcry for the purpose of decoying McNatt out of the house, with the intent, etc., and he did enter as stated in the evidence, it would be a breaking for the purpose of this offense. As McNatt was in the house, and it was fastened inside, could the jury understand that he was to come out of the house in any other way than by opening the house? It was, indeed, added as a further inquiry for the jury whether the prisoner "decoyed off" McNatt with the same intent, which, perhaps, was unnecessary and had better have been omitted as an irrelevant matter. But whether it be or not, can make no difference, for it could work no prejudice to the prisoner, but might have been to his advantage, as the jury, under the instructions, must have thought that it was necessary they should find the prisoner did both of those acts as indicative of the intent, and therefore would acquit him unless

satisfied as to both. But the jury has found the prisoner (481) guilty, and therefore the intendment is that they did find both of the acts to have been with the intent supposed; and if both be, then each is, and the real point of inquiry is answered.

For these reasons, my opinion is that the judgment should be affirmed.

PER CURIAM. Ordered that the opinion of the majority of the Court be certified to the court below, that they may act accordingly.

Cited: S. v. Willis, 52 N. C., 193; *S. v. Johnson,* 61 N. C., 187; *S. v. Hughes,* 86 N. C., 665.

SARAH ROSS v. ALPHA SWARINGER ET AL.

Where a lease is made, the rent to be paid in a part of the crop, the contract is executory, and the title to the crop made is in the lessee until the lessor's part is separated and allotted to him, and, therefore, before that time the lessor has no right to take possession of any part of the crop without the consent of the lessee.

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

In the fall of 1845 the intestate of the plaintiff and the defendant agreed as follows: The defendant leased to the intestate a tract of land for the year 1846, and was to find two horses and food for them. He was also to supply the intestate with provisions for himself and family during crop time. The intestate agreed that the whole crop should be the property of the defendant—one-half he was to keep for the rent of the land and the use of the horses; the other half he was to keep until he was paid for the provisions and an old judgment, and (482) deliver to the intestate what was left.

The intestate entered and made a crop of corn, but died in the fall before it was gathered. The plaintiff, who was the widow of the intestate, gathered the crop. The defendant, although forbid by the plaintiff, took off most of the corn. The plaintiff then administered, and brought this action.

The court charged "that the crop belonged to the intestate, as incident to his lease, and although, at the time of the lease, in consideration of the lease and the horses and provisions which were to be furnished, and the old judgment, the intestate agreed

that the whole crop should be the property of the defendant, still the title to the crop did not pass. The crop was a thing not *in esse,* and the contract was not executed and could not be, from the nature of the subject-matter. It was *executory*—gave a right of action for a breach, but did not confer a right to take the corn against the will of the owner."

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

Iredell for plaintiff.
Strange for defendant.

PEARSON, J. It is not necessary to decide the broad question upon which the case is put in the court below, about which there is some diversity of opinion; for the case is clearly with the plaintiff, and the conclusion to which the court below arrived, that the contract was *executory,* and not *executed,* is sustained upon special grounds, which do not involve the general question.

First. The contract on the part of the defendant was executory as to furnishing the two horses and food and the provisions during crop time.

(483) Second. The contract on the part of the intestate, as to the payment of the rent, was executory from the very nature of rent. For, in speaking of rents, Lord Coke says: "The lessor cannot reserve parcel of the annual profits, as the vesture of herbage of the land, or the *like;* for that would be repugnant to the grant. Co. Lit., 142." It would be an *exception* of a part of the thing already granted and inconsistent with the grant. Therefore, such contracts as the present are necessarily construed neither as exceptions nor reservations, but as covenants or agreements of the lessee to give, *as rent,* as many bushels of corn as the half of the crop may amount to, or deliver, *as rent,* the one-half of the corn that may be made on the land. It is simply a payment of rent, agreed to be made in corn, instead of money; but it does not change the property in the crop, while growing or when gathered, until it is delivered to the lessor. *Deaver v. Rice,* 20 N. C., 567. It is like the case of an overseer whose wages are to be paid in a share of the crop. He has no right to the thing itself. The property is in the employer until a division and delivery.

It is clear, for these reasons, that the contract, as to the rent, is executory, and being entire, and executory as to a part, it is necessarily so as to the whole.

I think the judgment below should be affirmed.

NASH, J. This is an action of trover to recover damages for the conversion of a quantity of corn. The case is: The defendant by parol leased to the plaintiff for one year a parcel of land. It was agreed the defendant should furnish two horses to work in the crop, and their necessary food; and the defendant, for the rent, was to let him have one-half of the corn raised and to pay him, out of the residue, claims which he (the defendant) had against him. After the crop was raised and housed the defendant, against the will of the plaintiff, hauled it (484) away, or the largest portion of it.

His Honor instructed the jury "that if the intestate had leased the land for a year the crop belonged to him as an incident of his lease." We do not deem it necessary to notice the subsequent part of the charge in connection with this part; because we believe that, whether the reason given was or was not correct, the judgment must be affirmed. *Deaver v. Rice*, 20 N. C., 567, is decisive of the question. It was there decided that where, in a lease either by parol or in writing, the rent is reserved to be paid in kind or in a part of the crop, the lessor has no lien on the crop, when raised, and, until a portion be set aside and apart to the lessor, the whole belongs to the lessee. In this case the title to the crop of corn was in the intestate, and "the defendant" (in the language of the court) "had no right to take the corn against the will of the owner." His so taking it was a conversion and gave the plaintiff a right to maintain the action. If, after the crop was made, the lessee had refused to allot to the defendant his share, the latter could have maintained an action on the case for the violation of the contract.

In the course of the investigation of the case in this Court it was urged that the contract between the parties, as it respected the corn, was for an interest in the land, and, therefore, void under the statute of frauds. Rev. St., ch. 50, sec. 8. We do not think so. The agreement on the part of the defendant to receive his rent in a part of the crop did not constitute an agreement on his part for any interest in the land during the lease, and if, by any casualty, no crop was raised, he could have derived no benefit from his contract. This principle is decided in *Evans v. Roberts*, 5 Bar. and Cr., 829. There the question was whether the verbal sale of a then growing crop of potatoes was a contract or sale of land, or any interest in or concerning them, within section 4 of the statute 29 Charles (485) II. The court says it is not, but that it is a contract for the sale and delivery of things which at the time of delivery would be goods and chattels. That was a much stronger case

than this. The lease in this case was for one year, and although by parol, was good and valid. The rent being reserved in kind, that is, a part of the crop, the title to the whole crop, when made, was in the intestate Ross. It was contended by the defendant that under the contract he was entitled to one-half of the crop raised to pay his claims, as it was mortgaged to him for that purpose. The answer is that the property, the corn, was not in such a situation that it could be mortgaged. The plaintiff was entitled to maintain her action.

PER CURIAM. Judgment affirmed.

Cited: Hatchell v. Kimbrough, 49 N. C., 164; *Warbritton v. Savage, ib.,* 384; *Harrison v. Ricks,* 71 N. C., 11; *Howland v. Forlaw,* 108 N. C., 569.

THE STATE v. ALLEN HOWELL.

Upon a quarrel, one of the parties retreated about fifty yards, apparently with a desire of avoiding a conflict; the other party pursued with his arm uplifted, and when he reached his opponent, stabbed and killed him, the latter having stopped and first struck with his fist: *Held*, that this was a clear case of murder.

APPEAL from the Superior Court of Law of GRANVILLE, at Spring Term, 1849, *Dick, J.,* presiding.

The prisoner is indicted for the murder of one Henderson Floyd. The case is: The prisoner and the deceased, both
(486) men of color, lived with their families in the same house.

A quarrel took place between them, the deceased being in the house and the prisoner in the yard. The prisoner threatened to go into the house and whip the deceased, and started off to do so, when he was stopped by the persons present. After a short period the deceased came out and walked off in a different direction from where the prisoner stood, and observed to him, if he wanted the house he could take it. The deceased continued to walk off and had gotten about fifty yards, when the prisoner swore he would whip him anyhow, and started after him. The house intervened between the witness and the parties, and when he came in sight of them the deceased was standing still, and prisoner approaching him, with his arm raised in a striking position. As soon as he came within striking distance, the deceased struck the prisoner, who immediately returned the blow, and the deceased fell and died in a short time.

The witness interfered and saw a knife in the hand he struck with. The deceased had a deep wound in the breast and died in a few minutes. The knife was a double-bladed one, one of the blades being small and the other large, being about three inches long, and with this blade the wound was inflicted.

His Honor instructed the jury that the knife used was a deadly weapon, and if they were satisfied from the evidence that the prisoner opened it when he started after the deceased, with the intention of using it on him, and did use it in the manner described by the witness, and thereby slew the deceased, he was guilty of murder.

The jury found the prisoner guilty of murder; a motion for a new trial was made, because of error in law in the charge of the presiding judge, which being refused and judgment pronounced, he appealed to the Supreme Court.

Attorney-General for the State. (487)
No counsel in this Court for defendant.

NASH, J. This case is relieved from all doubt and uncertainty. The facts are few and simple, furnishing a full and complete instance, in themselves, of that malice which is essential to constitute a case of murder; of that *mala mens*, a mind regardless of the obligations of social duty and fatally bent on mischief. The parties lived in the same house. A quarrel, slight in its character, took place between them; the deceased, apparently with a wish to avoid a collision, left the house and the premises, was pursued by the prisoner, overtaken at the distance of fifty steps, and immediately stabbed. It is true that the deceased struck the first blow, but this does not mitigate the offense of the prisoner. In every stage of the transaction he was the assailant. When he approached the deceased his arm was raised in the attitude to strike, and with a deadly weapon. The law did not require the deceased to wait until the prisoner had executed his threat, but justified him in anticipating the premeditated assault. There cannot be a doubt but that the crime of the prisoner is that of murder. We have examined the record and perceive no error in it or in the charge.

PER CURIAM. Ordered to be certified accordingly.

Cited: S. v. Carter, 76 N. C., 23; *S. v. Chavis*, 80 N. C., 359; *S. v. Whitson*, 111 N. C., 700.

(488)

THE STATE v. THOMAS LONG.

1. One who appears at court to answer the charge of being the father of a child about to be born a bastard, may, before an issue is made up, move to quash the proceedings on the ground that the mother is a woman of color within the fourth degree.
2. If, upon such motion, the proceedings are quashed by the court, a subsequent warrant, charging the same person with being the father, issued after the birth of the child, cannot be supported.
3. The proper relief against the order to quash, if it was deemed erroneous, was by appeal or *certiorari*.

APPEAL from the Superior Court of Law of MARTIN, at Spring Term, 1849, *Settle, J.*, presiding.

This was a proceeding under the bastardy act. In May, 1848, a single woman, Lucinda Simpson, made oath before two magistrates that the child of which she was then pregnant was begotten by the defendant, Thomas Long. The magistrates issued a warrant against Long, and bound him to appear at the next term of the County Court, which was in July. The recognizance, together with the examination, was duly returned. The defendant, at the term of the court to which he was bound, and before the birth of the child, moved the court to dismiss the proceedings, for the reason that Lucinda Simpson was a woman of mixed blood, within the fourth degree, and therefore incompetent to give testimony against a white man. The court heard the testimony offered, and, being satisfied that Lucinda Simpson was a person of mixed blood and within the fourth degree, so adjudged and quashed the proceedings. Subsequently,
(489) in October, 1848, on the oath of Lucinda Simpson, another warrant was issued by two magistrates against Thomas Long as the reputed father of the same child, and the proceedings duly returned to the County Court. These proceedings were, on the motion of the defendant Long, dismissed by the court, upon the ground that the competency of Lucinda Simpson to give evidence in the case had been conclusively adjudicated in favor of the defendant in the preceding case. Upon appeal to the Superior Court, the judgment of the County Court was affirmed. From this judgment the State appealed.

Attorney-General for the State.
Biggs for defendant.

NASH, J. There is no one principle of law better established or more universally recognized by the profession than that a

matter once judicially determined by a tribunal of competent jurisdiction is binding between those who are parties or privies to it, while it remains unreversed. Between them its absolute verity cannot be collaterally impeached. The case we are considering is, as to the question now before us, controlled and governed by it. The County Court of Martin, at its July Term, was fully competent to decide the question before it. It is not necessary we should decide whether the magistrates who bound the defendant over to court could at that time hear any reasons or testimony on the part of the defendant why he should not enter into the recognizance required in such cases, or whether it was the duty of the defendant then to bring forward his defense. It is sufficient that he availed himself of the first opportunity given him, before the tribunal which alone could try the issue of his actual guilt, to make the objection. Nor is it any objection that the proceedings were dismissed on the motion of the defendant before the child was born. It (490) was open to him to submit a motion to quash at any time before issue joined, and it was competent to the court to hear it. The defendant came before the court, we think, in apt time and in apt order. It is not denied that this is a defect upon which the accused may insist, at some time and in some form. If known to the magistrates at the time they were called on to take the examination of Lucinda Simpson, they might and ought to have rejected her evidence; and, when brought into the County Court, the defendant was at liberty to take the exception at any time before he claimed the issue provided for him by law. *S. v. Ledbetter,* 26 N. C., 242; *S. v. Patton,* 27 N. C., 180. The motion to quash, made at July Term upon the first proceedings, was one which the court had full power to hear and try; and they, having adjudicated, both upon the law and the evidence, as they were necessarily bound to do, their judgment, while it stands unreversed, is binding upon the parties, and the proceedings were rightfully quashed in the Superior Court. The question as to the competency of Lucinda Simpson to give evidence against the defendant is one not open upon the present proceedings. Instead of instituting the second proceedings, the first case might have been brought up by an appeal or by a writ of *certiorari. S. v. Ledbetter, supra.*

PER CURIAM. Judgment affirmed.

(491)

DOE ON DEMISE OF REBECCA CRUMP v. JOSEPH H. THOMPSON.

1. A declaration in a deed that the land conveyed by it had been before granted to a certain person, is not evidence for the parties to the deed that in fact it was thus granted.

2. In cases of adverse possession of land, the statute of limitations begins to run from the ouster. If the one having the right be a *feme covert*, and the seven years have expired in the lifetime of her husband, she has three years, and only three, after the death of her husband, within which to commence her suit; when the seven years have not expired in the lifetime of her husband, the two periods of seven years from the ouster and three years from the death of the husband are concurrent, until one of them shall have run out; and then the *feme* is entitled to the other and longer period, to enter or sue.

APPEAL from the Superior Court of Law of DAVIDSON, at Spring Term, 1849, *Dick, J.*, presiding.

The action was commenced on 16 August, 1845. The plaintiff gave in evidence a grant for the premises to Thomas Monroe, dated on 27 November, 1792, and that he died many years ago, and that the lessor of the plaintiff was his only child and heir at law, and intermarried with Mark Crump.

The defendant gave in evidence a patent to one Henry Dolin, dated in 1752, for a large tract of land, and a deed from Dolin to Edward Williams for the same land, and a deed from Williams to Richmond Pearson for certain lands therein described by metes and bounds, and dated in 1791. The defendant gave no direct evidence to show what land the said patent and deed covered, or that they included any part of the premises in dispute. But the defendant gave in evidence a deed from
(492) the said Pearson to one Nathaniel Peebles, dated in 1817, conveying a certain tract of land in fee, which is therein described by metes and bounds and also as being part of a tract of land conveyed by Edward Williams to the said Pearson in 1791; and the defendant then gave evidence that the deed to Peebles covered that part of the land claimed by the plaintiff, of which the defendant was in possession, and that he, the defendant, entered and claimed under the said Peebles.

Thereupon the counsel for the defendant moved the court to instruct the jury that the recital in the deed from Pearson to Peebles was sufficient evidence to satisfy the jury that the patent to Dolin covered the premises in dispute. The court refused to give the instruction.

The defendant then offered evidence that in 1837 or 1838 the land conveyed by Pearson to Nathaniel Peebles was divided

between his heirs, and that the part thereof which is covered by the grant to Monroe was allotted to Hubbard Peebles, one of the heirs, under whom the defendant claims; that Mark Crump, then the husband of the lessor of the plaintiff, was present at the time, and objected to the allotment thereof, but that, nevertheless, the said Hubbard took the possession of the land in dispute immediately, and he and those claiming under him have continued in possession ever since. The defendant further gave evidence that Mark Crump died in November, 1838, after the said Hubbard had taken possession.

The counsel for the defendant thereupon prayed the court to instruct the jury that if they should believe that Hubbard Peebles and those claiming under him had seven years' continued possession of the premises before the commencement of this suit, the lessor of the plaintiff's right of entry was barred by the statute of limitations. But the court refused to give the instruction, and, on the contrary, directed the jury that, although the defendant's possession might have begun in 1837, yet the statute of limitations did not bar, because (493) the lessor of the plaintiff had seven years from the death of her husband in November, 1838, in which to enter or bring suit; and that it was immaterial to this purpose whether the possession of the defendant was under or in opposition to Mark Crump.

Verdict and judgment for the plaintiff, and the defendant appealed.

No counsel for plaintiff.
J. T. Morehead for defendants.

RUFFIN, C. J. The Court concurs with his Honor on the first point. One object of the defendant was to show the better paper title to be out of the lessor of the plaintiff, by virtue of a grant for the same land prior to that of Monroe. But the only evidence he gave that the two tracts or parts of them were identical was that Pearson's deed to Peebles, after describing the land by corners, metes and bounds, goes on to say that the land was part of a tract one Williams conveyed to Pearson. But there is no warrant of authority or reason for the position that a recital or description in a deed proves its own truth in favor of the party himself. Upon a question of boundary, it might perhaps be evidence, with other things, of the locality of a line of the patent, that the parties to an ancient deed therein called a particular line that of the patent. But, of itself, a

declaration in a deed that the land conveyed by it had been before granted to a certain person is not evidence for the parties to the deed that in fact it was thus granted.

On the point of the statute of limitations, however, the Court holds the opinion given to the jury to be wrong. It assumes that the defendant's possession may have begun in 1837, or so early in 1838 as to have continued for more than seven
(494) years before suit brought, and that it may have been adverse to Crump and wife at the beginning, yet it concludes that the statute did not bar, because the wife has seven years from the death of the husband to enter. But that is clearly erroneous—being in direct contradiction to the words of the act. The statute runs against all persons, as well *femes covert* as others, making the seven years, next after the right accrued, a bar; with a proviso, however, that a person who was a *feme covert* when her right first accrued shall and may, notwithstanding the seven years be expired, commence her suit within three years after discoverture. The language of the act is as plain as it can be. The seven years began to run from the ouster of the owner, when an action arose against the wrongdoer. The possession was taken by Peebles adversely to Crump and wife, and there is no doubt the husband might have entered in right of himself and his wife or have brought an ejectment. Had seven years expired in Crump's lifetime, the proviso is explicit that the *feme* should have three years more, and only three, to commence her suit. But when the seven years have not expired in the life of the husband, as was not the case here, the two periods of seven years from the ouster and three years from the death of the husband are concurrent, until one of them shall have run out, and then the *feme* is entitled to the other and longer period to enter or sue. She derives no benefit from the proviso, therefore, unless the seven years from the ouster shall have expired before the three years from her discoverture. It was, consequently, wrong to make the death of the husband the *terminus* from which the seven years began to run. It is only the three years which refer to that event; and the seven years never relate to it, but only to the period of the ouster. If, indeed, the defendant had entered under the husband, as upon a conveyance from him purporting to be for the fee, then the lessor of the plaintiff would have had seven years from
(495) the husband's death to bring suit. But that would be, not because the act gives the *feme* seven years from her husband's death to bring suit, but because it gives her seven years from her right of entry and action accrued, and that would not accrue until the husband died; for the possession of

the husband's alienee would be consistent with the estate of the lessor of the plaintiff until the death of the husband, and it would be upon that event only that the possession would become adverse to her, so as to entitle her to an action. But here the ouster was in the time of the husband, and the adverse possession continued for more than seven years from the ouster, and also more than three years from the death of the husband. The case, therefore, was within the express words of the enacting clause of the statute, and not within the saving of the proviso; and the jury ought to have been instructed that, upon the facts supposed, the statute was a bar.

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

Cited: Day v. Howard, 73 N. C., 4.

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(496)

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

1. Under the private acts of 1831 and 1835, relating to the county of Brunswick, any three or more justices, sitting in court, may lay the taxes.

2. As regards this, the act of 1835 does not repeal the act of 1831.

3. Every affirmative statute is a repeal, by implication, of a prior affirmative statute, so far as it is contrary to it. But the law does not favor these implied revocations, nor are they to be allowed unless the repugnancy be plain; and where, in the latter act, there is no clause of *non obstante*, it shall, if possible, have such construction that it shall not operate a repeal.

4. Although the tax list made out by the clerk and delivered to the sheriff may be defective, yet the sheriff who receives it and acts under it cannot make the objection.

5. It has been the universal practice in this State to permit an attorney in a cause to give evidence at the instance of his client.

6. Where a public officer collects money due to a county, no demand is necessary before suit brought.

7. The county trustee, where there is one, is the proper relator in an action to recover moneys due to the county, except when he is a defaulter or when he refuses to proceed against defaulters. In these cases suits may be brought by the committees of finance in the name of the State.

APPEAL from the Superior Court of Law of BRUNSWICK, at Spring Term, 1849, *Caldwell, J.,* presiding.

This is a suit against the defendants on the sheriff's bond of said Woodside, executed in September, 1843, and the breaches assigned are, that he collected and failed to pay over the county taxes, assessed in March, 1844, for the year 1843; and that he failed to collect and pay over the said taxes. It appeared from the record that there were but four magistrates on the bench of the County Court when the taxes aforesaid were imposed, and it was not alleged or pretended that the magistrates of
(497) Brunswick had ever been classified, as, by Private Laws of 1831 and 1835, they were directed to be; and it was insisted for the defendants, unless the said magistrates had been so classified no number short of a majority had the power of county taxation. It was admitted that some twelve or fifteen magistrates then resided in the county. The relator offered in evidence a document from the County Court clerk's office, which contained an aggregate valuation of the real estate in Brunswick and the number of black and white polls, which, the clerk then stated, was the data on which he made out the tax list for the year in question, and that the list he gave the sheriff contained the *names* and the *amount* collectible out of each taxpayer. It was objected to by the defendants, because the clerk had no right, on such a document, to issue a tax list to the sheriff; that a document, to sustain a tax list, ought to set forth the names of each inhabitant liable to pay taxes and the amount for which he was so liable. It was allowed to be read. D. B. Baker, Esq., the attorney of record for the relator, was introduced as a witness for the purpose of proving that, as county solicitor for Brunswick, he was directed by the County Court to call on the defendants for a settlement, in relation to the county taxes, and also to prove the admissions made by the defendants, or some of them, as to the collection of the said taxes by the said Woodside. His testimony was objected to, on the ground that an attorney of record was not a competent witness for his client. The objection was overruled. There was no evidence of record in the County Court that the relator in this case had ever been appointed county trustee, and, failing to show this, the plaintiff offered a bond he had executed as such, and also offered to prove that he acted as such, and had been treated by the defendants as such, in paying him a portion of the county taxes. This testimony was also objected to, but was received. The tax lists, taken by the magistrates in
(498) 1843, were offered in evidence to show that the clerk had authority, or some data to act upon, in making out the tax list delivered to the said Woodside. This testimony was objected to because they had not been recorded as directed by

law, but they were received. Upon the question whether a demand had been made on the defendant Woodside before suit was brought, B. D. Baker, Esq., stated that, as solicitor, he called on the defendants for a settlement about the county taxes before suit brought; that some settlement had taken place between the defendants and the committee on finance; that he had a paper of some kind in his hands when he endeavored to effect a settlement, showing that one had been had with a committee of finance. He also stated that Woodside *admitted* that he had collected the taxes. And the defendants offered in evidence a receipt signed by the relator, dated June, 1845, as evidence of a payment. The defendants insisted that this testimony, taken altogether, furnished no evidence that a demand had been made. The court thought there was evidence of a demand to be left to the jury. The defendants also insisted that the county trustee was not the proper person to relate, even if it had been made to appear by the record of the County Court that he had been appointed. This suit is for the bridge tax. All the objections raised in this case, by consent of the counsel, were reserved by the court, with liberty to enter a nonsuit. And the court, on consideration, ordered a nonsuit to be entered, and the relator appealed to the Supreme Court.

Kelly for plaintiff.
Strange for defendants.

NASH, J. The action is brought on the official bond of Robert Woodside, who was sheriff of the county of Brunswick, and his sureties. The breach assigned is for col- (499) lecting and not paying over the county taxes assessed for the year 1843. On the trial below, several objections were urged against the plaintiff's right to sustain his action, and, being all reserved by the court, by the consent of the parties, with liberty to enter a nonsuit, the duty is imposed upon us of considering the whole. We will proceed to do so in the order in which they stand.

The first objection is that no tax was legally imposed by the county of Brunswick for the year 1843, because, by the private acts of 1831 and 1835, the magistrates of that county were directed to divide themselves into classes for the purpose of holding the county courts, which had never been done; therefore, no number less than a majority could lay the tax, and in this case it was admitted that a majority was not present. This objection was substantially answered by this Court in the case of *S. v. Woodside,* 30 N. C., 106. That action was brought on the

official bond of the defendant Robert Woodside and his sureties, to recover the county taxes for the year 1842. The same objection was taken there as here, and being insisted on, as it is now, did not receive that specific answer it ought to have done. It was not, however, overlooked, as is supposed, but was considered to be overruled by the opinion given. It was decided that, under section 6 of the act of 1831, ch. 154, three magistrates were competent to hold the court and lay the county taxes. It is not stated in so many words in the opinion given that this might be legally done, although the magistrates had not classed themselves, but was so substantially, for the opinion states that the magistrates were required to class themselves. Section 6 of the act of 1831 expressly gives to the magistrates, who do attend, the power to do any business that a majority is required to do, which shall be as valid as if done by a majority. We were of opinion then, as we still are, that, although the
(500) magistrates were required to class themselves and had neglected so to do, a *court* composed of any number was competent to lay the taxes. One design of the act was to remedy an evil, felt and complained of by all who were in the habit of attending the county courts. It is an old trite saying that what is everybody's business is nobody's business. By the general law it is made the duty of all magistrates to hold the terms of the County Court, and it is found by experience that much delay occurs, in many instances, in organizing the court and in retaining a sufficient number of justices on the bench for the transaction of business. It was the object of the act of 1831 to remedy this evil, by causing the magistrates to divide their number into classes, containing five members, whose duty it should be to hold three respective terms of the court, and, when so classified, that a majority of the acting class should be competent to do and transact all the business that seven could do. But that they did not intend to confine the power to assess the taxes to the magistrates in their respective classes is manifest from the fact that, if that were true, the words quoted from section 6 would be tautological and unmeaning, as that power was granted to the classified members by the third clause of the act. It is, however, contended that the act of 1831 is repealed by that of 1835. To a certain extent this is so; wherever it makes provision for the same thing in a different manner it does repeal the act of 1831. Every affirmative statute is a repeal by implication of a prior affirmative statute, so far as it is contrary to it; for the maxim is *"leges posteriores priores abrogant."* But the law does not favor these implied revocations, nor is it to be allowed unless the repugnancy be plain, and

where, in the latter act, there is no clause of *non obstante,* it shall, *if possible,* have such construction that it shall not operate a repeal. 6 Ba. Ab. Stat., letter D, p. 373; 11 Rep., 63, *Foster's case.* The statute of 1835 is in *pari materia* (501) with that of 1831, and its provisions must be pursued when contradictory to the latter. Section 4 is the one relied on as bearing on this case—as repealing section 6 of the act of 1831. The first portion of the section we are considering, down to the first proviso, embraces, with an immaterial variation, section 3 of the act of 1831. The first proviso *secures to all the other magistrates of the county the right to hold the terms of the county courts,* which was omitted in the preceding act. The second proviso relates to the taking of the sheriff's bonds, giving to the justices, who are absent when the bonds are taken, time, until the succeeding term, to require additional sureties on the bonds, if they deem it necessary. So far, then, as that section makes arrangements different from and inconsistent with the provisions of the act of 1831, it is a repeal of it, but no further, as there is no *non obstante* clause in it. But in section 6 there is an important provision, entirely omitted in the act of 1835, and the latter contains nothing inconsistent with it; I mean the clause giving to *any three* magistrates power to do any act which, by law as it was at the time of the enactment of 1831, was required to be done by a majority of the acting justices. The latter provision is not repealed by the act of 1835, and the taxes were in this case assessed by a competent court.

The next objection is to the tax list furnished by the clerk. The case states that it was made out by the clerk from a document in his office, which contained an aggregate valuation of the real estate in Brunswick, and the number of black and white polls, with the names and amount to be collected out of each taxpayer. If the objection were a sound one, it does not lie in the defendants' mouths to make it. The sheriff received it as the tax list and under it did collect the taxes mentioned as due on it. Whether the tax list were a full and legal one or not is not important, for we have decided, in the case of (502) *S. v. Woodside,* that it is the duty of the sheriff to apply to the office and get a list, but it is not necessary for him to have the list when he collects the tax—he cannot, without a proper tax list, enforce a collection, but may receive without it.

The third objection is to the competency of Mr. Baker, the plaintiff's attorney, to give evidence for him in the case. It appears from the case of *Bundy v. Bullett,* 16 Mus. and Willy, 645, N., that such a rule has been adopted by the English courts.

It is to be remembered that in England there is a material difference between the office of counsellor and that of an attorney, and that in the case referred to it was an attorney whose testimony was offered in evidence. In this State there is no such distinction known—every attorney with us is also a counsellor. Be this as it may, it has been the uniform practice in our courts to receive such testimony. It is a practice not to be encouraged, and in most cases has, we believe, been accompanied by a surrender, on the part of the attorney, of his brief in the case.

The fourth objection is that there was no record showing that the relator ever had been duly appointed county trustee. From the state of the pleadings this objection is not open to the plaintiff. He has accepted a declaration from the plaintiff, and has not by any plea denied that the relator was the county trustee. His pleas are, *non est factum,* payment, and conditions performed. It would be a complete surprise on a plaintiff to suffer this defense to be sprung upon him under either of these pleas.

The fifth exception is answered in replying to the third.

The sixth objection is that the plaintiff had not shown any demand. It has been decided in this Court, in *S. v. McIntosh, ante,* 307, that where a public officer collects money due to the State no demand is necessary. It is the duty of the officer to pay it into the proper office, when collected, and it is a (503) breach of his official duty not to do so. Mr. Baker proved that the sheriff, Woodside, admitted to him he had collected the taxes for which this action is brought.

It was finally objected that the county trustee was not the proper person to relate in this case. *S. v. McIntosh* is relied upon to show that by the general law the county trustee cannot be the relator to recover the county revenue. That case is no authority for the position assumed. The portion of the opinion relied on is the answer to the defendant's first exception. The question was whether, in that action, the county of Moore or the chairman of the County Court was the proper relator. This depended upon the true construction of a private act passed in 1835 for the benefit of the county of Moore. In making this construction the court adverted to the peculiar phraseology of the private act, and also to that of section 3 of the act of 1777, directing "the county trustee to sue for, recover and collect" from all persons all money due his county. In commenting on that section the Court say: "But no direction is given *in whose name* the suit shall be brought." In the succeeding sentence the meaning of the Court is made manifest.

It is in these words: "At the time, then, the private act of 1835 was passed, no law existed *directing* the trustee, *in so many words,* to sue in his own name." The case is no authority for the objection assumed here.

The judgment below must be reversed and judgment given for the amount rendered by the jury in their verdict.

RUFFIN, C. J. Private Laws 1831, ch. 154, first provides that the justices of Brunswick shall classify themselves, and then it defines the powers, duties and responsibilities of the several classes. It then adds, as a substantive and independent provision, in section 6, that "in *any* case in (504) which a majority of justices is required and does not attend, those who are present may proceed to take the sheriff'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 the justices." The subsequent private act of 1835, ch. 43, again directs the justices of that county to arrange themselves in classes, and defines the duties and powers of those classes respectively, or a majority of them. But in no part of it is there any reference to the general provision of section 6 of the former act, already quoted, whereby any justices present—of course, to the number of three or more—received authority to exercise all the powers of a majority of the justices. Consequently, that general provision remains untouched; and, whether the justices classed themselves or not, any three of them could lay the county tax.

The action is also properly brought upon the relation of the county trustee, and the character of the particular person, Mr. Owens, as filling that office, is not open to dispute, as it is not put in issue by the pleadings. An analogous case is the familiar one of a suit by an executor, as such, in which he need not produce his letters at the trial, unless *ne unques executor* be pleaded. It results from the provision of the act of 1777, Rev. St., ch. 29, sec. 4, that the county trustee may "demand, sue for and recover" from the sheriffs and all other persons any money due for the use of the county; that he may bring the suit in his own name, no other form being prescribed. But it is supposed that the subsequent act of 1831, Rev. St., ch. 28, sec. 30, alters the former law, because it requires suits for money due the county to be "brought in the name of the State for the use of the county." The two provisions, however, relate to different cases and are clearly compatible, and therefore both may and must stand. The latter provision relates exclusively to suits instituted by committees of finance, whose appoint-

(505) ment is provided for and powers fixed by the act of 1831. It is clear that the committee was not intended to supersede the county trustee, for one of the duties of the committee is to settle with the county trustee. Besides, both of the acts of 1777 and 1831 are retained in the Revised Statutes, and, therefore, they must be construed so as to render them consistent, if possible. Now, that may be done by taking into consideration that in some counties the office of trustee is abolished, and in others it is left to the justices to abolish it; and, therefore, in those cases the committee of finance have to some extent the duties of settling, in his stead, with the receiving and disbursing officers of the county revenue, and, consequently, in some cases may have to institute suits. Indeed, when the county trustee himself is a defaulter, no one can sue him but the committee of finance, until the period of appointing a successor has arrived. And even if there be a county trustee, and he will not proceed against a sheriff in arrear, or other receiver, the fair construction of the act must be that the committee of finance may provide for the security of their county revenue by bringing suit. In any of those cases the action must, no doubt, be instituted by the committee in the name of the State for the use of the county, because the act of 1831 requires it. But when there is a county trustee, and, without any interference of the committee of finance, or its appearing even that there is one, very clearly it still continues his duty, by force of chapter 29 of the Revised Statutes, to sue for the money due the county, in the same manner as he might before the passing of the act authorizing the appointment of a committee and conferring on it the power of bringing suit. It was upon this distinction that the case of *McIntosh, ante,* 307, was in truth decided; and, instead of being for the defendants, as insisted, it is directly the other way. By a private act, 1835, ch. 78, the office of

(506) county trustee was abolished in Moore, and the duties transferred to the sheriff, who was required "to perform them under the same rules and regulations and restrictions as are now prescribed by law for the government of the county trustee"; "and," it is added, "in all cases where suits are by law directed to be brought in the name of the county trustee, such suit or suits shall be brought in the name of the chairman of the County Court." That, manifestly, has in view such suits as the sheriff, in the discharge of the functions of county trustee thereby conferred on him, should find it necessary to institute, and no others. There was no intention of interfering with the duties and powers of a committee of finance to settle with and sue any defaulting officer, and especially the sheriff himself,

in the form prescribed in the public act for the government of that committee. Well, McIntosh was in default as sheriff and county trustee, and a suit was instituted by the committee of finance against him and his sureties, and for these reasons the Court was obliged to hold that it was properly brought in the name of the State for the use of the county; since the general law expressly required suits instituted by the committee to be thus brought, and the provision in the private act was not intended to modify that provision of the general law, but only to say how the sheriff should bring the suit when he found it necessary to bring one as the substitute for the county trustee. The three provisions are, in truth, all distinct, for the different statutes or chapters direct the county trustee to sue in his own name; the committee of finance, in the name of the State for the use of the county; and the sheriff, in the name of the chairman of the County Court.

For these reasons, and those stated by my brother *Nash* on the other points, I concur with him that there should be judgment for the plaintiff upon the verdict.

PER CURIAM. Judgment reversed, and judgment for the plaintiff.

Cited: Simonton v. Lanier, 71 N. C., 504; *S. v. Cunningham*, 72 N. C., 477; *Comrs. v. Magnin*, 86 N. C., 287; *Muller v. Comrs.*, 89 N. C., 176; *S. v. Rivers*, 90 N. C., 739; *Hughes v. Boone*, 102 N. C., 163; *McGuire v. Williams*, 123 N. C., 356; *Greene v. Owen*, 125 N. C., 219; *S. v. Perkins*, 141 N. C., 807.

(507)

EMILY STAFFORD, ADMINISTRATOR, ETC., v. ALLEN NEWSOM.

1. Where an action was brought to recover the value of certain horses, alleged to have died from eating corn mixed with arsenic, which the plaintiff bought from the defendant: *Held*, that if the defendant had fraudulently concealed from the plaintiff the fact that arsenic was so mixed with the corn, yet the plaintiff could only recover damages to the value of the corn, provided he was informed, before he gave it to his horses, that arsenic had been mixed with it.

2. It is not sufficient, in an action in the nature of deceit, to prove that the representations of the defendant were *calculated* to deceive, but they must be made with *intent* to deceive.

APPEAL from the Superior Court of Law of MONTGOMERY, at Spring Term, 1849, *Caldwell, J.*, presiding.

STAFFORD *v.* NEWSOM.

This is an action on the case brought to recover damages because a certain quantity of corn, bought by the plaintiff of the defendant, was infected with arsenic, whereby the plaintiff lost three horses which had been fed on said corn.

The declaration contains several counts, but the one mainly relied upon is the count in deceit.

On the trial it appeared that the plaintiff went to the house of the defendant and, after some chaffering, agreed to buy of him six bushels of corn, and the price fixed on was eighty-two and a half cents per bushel; that it was kept in boxes in the back room of a storehouse, and was measured out to the plaintiff and put into his bags. By the testimony of a witness introduced by the plaintiff it appeared that after the price had been agreed on, and after the six bushels had been measured and put into the bags, the clerk of the defendant observed that
(508) arsenic had been put in two plates of meal in the said back room for the purpose of killing rats; upon which the plaintiff said that he did not like to take the corn, if it had been exposed to arsenic; that the defendant said there was no danger, that he had sent a part of the same corn to mill; that he would be responsible for all damages, but that the plaintiff had better not tell his wife of it, as women were timid; that the plaintiff took the corn home, fed it in small quantities to his horses; that they became suddenly sick, and in a short time died. By the testimony of the clerk, who was examined by the defendant, it appeared that after the price had been agreed on and about half the corn had been measured, he remarked that arsenic had been about; that some had been put in two plates of meal in the said room to kill rats; that the plaintiff said if that were the case he did not like to take the corn; that the defendant then remarked there was no danger, but, if he did not like it, to put it back in the box; that the balance of the corn was then measured and put into bags and taken off by the plaintiff. And the said clerk also testified that not more than ten grains of arsenic had been put into small plates of meal.

Sundry witnesses were examined in relation to the arsenic and the corn, and how it affected the defendant's hogs, and as to the defendant's knowledge of their being sick, and how and what quantity would affect a horse, and how the horses in question were affected.

The court charged the jury, to entitle the plaintiff to recover he must make it appear that the corn was infected with arsenic; that the defendant knew and concealed it, and that the plaintiff's horses died by reason of their eating the said corn. And the court also charged that if the defendant or his clerk told

the plaintiff that the corn had been exposed to arsenic, so as to put him on inquiry before the contract was completed, the plaintiff would not be entitled to recover; but if such (509) information were given after the property in the corn vested in the plaintiff, it would not avail, and left it to the jury to decide which of the witnesses was most to be relied on as to the time the subject of the arsenic was mentioned and as to other matters in relation to which they deposed. And the court further charged that if what the defendant said to the plaintiff about the arsenic was calculated to put him off his guard, rather than excite him to inquiry, then the talk about the arsenic would not avail the defendant.

The jury rendered a verdict in favor of the plaintiff for the value of the horses. A new trial was moved for, because of misdirection on the part of the court, and because the court omitted to charge the jury that the defendant was sued for a fraud, and not upon a contract.

The new trial moved for was refused, judgment rendered for the plaintiff, and the defendant appealed, and gave bond.

Strange for plaintiff.
Iredell for defendant.

NASH, J. The first portion of his Honor's charge is free from exception. To entitle the plaintiff to recover it was necessary for him to show that the corn was poisoned with arsenic; that the defendant knew it and concealed it; and that he was injured thereby. And it is correct, as charged, that if the defendant or his clerk told the plaintiff that the corn had been exposed to the influence of arsenic, so as to put him on inquiry, before the contract was completed, the plaintiff could not recover. So far all is correct. We do not concur with his Honor in the subsequent part of the charge. He proceeds: "But if such information were given after the property in the corn vested in the plaintiff, it would not avail." We think in this there was error. The plaintiff claimed damages to the amount of the value of the three horses which, it was (510) alleged, had been poisoned by eating the corn, and had died. Upon the supposition that a special action on the case can be maintained for the loss of the horses, the important inquiry in this case was as to the amount of damages. If a seller makes a fraudulent representation of an article, yet the purchaser cannot maintain an action for deceit if at the time of the contract, or before, he knows the fact to be otherwise than as represented. So in this case, if at the time the plain-

tiff fed his horses with the corn he knew, or had been informed, it was poisoned with arsenic, although that information came to him after the contract was made, he cannot maintain an action for their loss; because it was his folly to make the experiment after obtaining the information. The plaintiff, then, was entitled to damages, if the defendant did cheat him, only for the value of the corn, and not for that of the horses, for, either before or after the contract was closed and before the corn was used by him, he was apprised of the fact.

We think there was error also in the closing part of the charge. The jury were instructed that if what the defendant said to the plaintiff about the arsenic was *calculated* to put him off his guard, rather than excite to inquiry, then the talk about the arsenic would not avail the defendant. The action for deceit rests in the intention with which a representation is made or a fact not mentioned. It was not sufficient that the representation made should be *calculated* to mislead—for that may be done by the most honest communication—but the representation must be made with the intent to deceive. Moral turpitude is necessary to charge a defendant in an action for a deceit. *Hamrick v. Hogg,* 12 N. C., 350.

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

Cited: Thomas v. Wright, 98 N. C., 274; *Shields v. Bank,* 138 N. C., 188.

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(511)

EVANDER McINTOSH v. SAMUEL C. BRUCE ET AL.

The receipt of a deputy sheriff showing that he has, as deputy sheriff, received claims for collection, is good evidence in an action by the sheriff against the sureties in a bond which the deputy has given him for his indemnity.

APPEAL from the Superior Court of Law of MOORE, at Spring Term, 1849, *Bailey, J.,* presiding.

This is an action of debt on a bond given by the defendants to indemnify the sheriff against any damage he might sustain by reason of his appointment of one of the defendants as his deputy, to wit, one Hedgpeth.

The bond was duly proved and read in evidence. The breaches assigned were: First, that H. B. Hedgpeth did so demean himself as to cause the plaintiff, the Sheriff of Moore County, to be complained of, and sued in the name of the State of North Car-

olina on the relation of Thomas J. Buchanan, on the official bond of the plaintiff as sheriff, etc., and judgment was obtained, etc. Secondly, that the said Hedgpeth received judgments and notes, as deputy of the plaintiff, to collect for Thomas J. Buchanan, and did collect the same, and did not pay over, but absconded, and remains in parts unknown. Thirdly, that the said Hedgpeth, as deputy of the plaintiff, did receive notes and judgments to collect for the said Buchanan, or return, and omitted to collect and did not return said notes and judgments, but absconded, and is still absent in parts unknown. The plaintiff then gave in evidence the record of a judgment obtained in the Superior Court of Law of Chatham County, in the name of the State of North Carolina on the relation of the said Buchanan, against the plaintiff and his sureties on (512) his official bond as sheriff. The plaintiff then offered in evidence two receipts, in the usual form for the collection of debts as deputy sheriff, which were on file among the papers of said suit in Chatham Superior Court, which original receipts the plaintiff obtained leave of the said court to withdraw from the office; and also offered to prove that those were the receipts on which the said judgment had been obtained; but the testimony was objected to by the defendants, and the court observed that the witness should then stand aside—not deciding the question of admissibility at that time; intending to permit the introduction of the said witness again, should the plaintiff show any authority in Hedgpeth from the said Buchanan to collect the said claims. The plaintiff then proved that the said two receipts were signed by the said Hedgpeth, as deputy sheriff, and offered them in evidence; but they were objected to by the defendants and excluded by the court.

The plaintiff then introduced Brently Philips and one Spivey, who stated that they had been indebted to Thomas J. Buchanan either by note or judgment, they could not recollect which; and that the said Hedgpeth brought to them the notes or judgments, he being deputy sheriff, and stated that the claims belonged to the said Buchanan, and he was collecting them, as deputy sheriff, for the said Buchanan; and that the said witness paid the said debts to the said Hedgpeth, as deputy sheriff, for the said Buchanan, some time in 1838. This testimony was objected to by the defendants, when the court decided that the plaintiff might prove the payment of the money to Hedgpeth for Buchanan; but excluded the balance of the testimony, saying the plaintiff must show in some other way that Hedgpeth was authorized to collect the claims by Buchanan. The plaintiff insisted that the *acts* and *declarations* of Hedg- (513)

peth, when the claims were in his hands and when he was receiving their payment from the debtors, were parts of the transaction, and were evidence showing or going to show that the claims belonged to Buchanan, and that he (Hedgpeth) had authority to collect them.

The plaintiff then introduced Angus McCaskell, and presented to him the receipt dated 1 January, 1838, being one of the receipts before referred to and made a part of this case. McCaskell said he was well acquainted with the handwriting of H. B. Hedgpeth, and that the signature to the said receipt was in the handwriting of the said Hedgpeth, and was his genuine signature; and that everything written on the face of that receipt, except "H. B. Hedgpeth, D. S.," was in the handwriting of the said McCaskell. He was then asked if he had received the judgments therein specified from Buchanan, and gave them for Buchanan and at his request to the said Hedgpeth. He said he had no recollection of either receiving the judgments from Buchanan or of delivering them to Hedgpeth. He was also asked if looking at the receipt did not refresh his memory, and enable him to say that he had received the judgments from Buchanan and delivered them to Hedgpeth. He replied, "No!" He said he had no recollection of the matter separate and apart from seeing the receipt, but, well knowing the handwriting of Hedgpeth, and seeing his signature thereto, and seeing, also, that the whole receipt was in his own handwriting, he was then confident that he had received the judgments from Buchanan, and delivered them, at his request, to Hedgpeth to be collected for Buchanan; and he had no doubt of it, and that he was then acting as an officer. To this testimony of McCaskell the defendants objected, and it was excluded by the court. His Honor then observed that he did not see how the plaintiff could get along, being informed that Buchanan had removed from
(514) the State. The plaintiff insisted that the testimony of McCaskell was competent, but, under the intimation of the court, submitted to a nonsuit. The plaintiff moved for a rule on the defendants to show cause why the nonsuit should not be set aside and a new trial granted, and this being refused, the plaintiff prayed an appeal, which was granted.

Kelly for plaintiff.
Strange, Mendenhall and *D. Reid* for defendants.

PEARSON, J. The plaintiff made several exceptions upon the rejection of evidence. We put the decision upon one exception, because it is of the most general application.

To charge the defendants as sureties of his deputy upon a bond for the faithful discharge of his duties, the plaintiff offered in evidence a receipt, given by his deputy for the collection of claims, upon which receipt the plaintiff had been fixed with damages in the action against him.

We think the evidence was admissible. The *letter* of the act of 1844 does not embrace the case, but it comes within the mischief and the meaning of the act.

It had been a general practice in the Superior Courts to admit the *receipts* of constables and other officers as evidence against their sureties to establish the agency or undertaking to collect claims; and taking a receipt had become the mode universally adopted for the purpose of furnishing proof of that fact. This Court decided that their receipts were not admissible as evidence against sureties. *S. v. Fullenwider*, 26 N. C., 364. The Legislature, intending to change this rule of evidence, passed the act of 1844, declaring that such receipts should be evidence in the cases therein enumerated. The object was not to make exceptions to the rule in certain specific cases, but to change the rule itself; and, of course, the meaning was to include all cases of a similar kind and coming within the same mischief. "When there is the same reason, there is (515) the same law."

A deputy sheriff as a collecting agent stands on the same footing with a constable. Why should the receipt of a constable be evidence against his sureties, and the receipt of a deputy be evidence against the sureties of a sheriff, and yet the receipt of the deputy not evidence against his *own sureties?* No reason can be given. A construction which confines an act, changing a rule of evidence, to the cases particularly enumerated would be too narrow to carry out the meaning of the Legislature.

PER CURIAM. Nonsuit set aside, and a *venire de novo* to be issued.

(516)

The bargainor in a deed in trust has no right to vote on the ground of ownership of said property, nor has the creditor, nor the trustee, unless the latter is in actual possession.

In the matter of a contested election before the Senate of the State, between Hugh Waddell, contestant, and John Berry, the returned member, the following resolutions were adopted by the Senate, and the following response made by the Supreme Court through the Chief Justice:

SENATE, 17 January, 1849.

Whereas, there is a contested election depending before the Senate, in which the following questions of a constitutional character arise, on the making a correct determination of which the Senate feel great difficulty: Therefore,

Be it Resolved, That the said questions be respectfully submitted to the Supreme Court for their consideration, with a request that the said Court would furnish the Senate, as soon as practicable, their opinion on the same, viz.:

Question 1. Is or is not the vote of a bargainor in a deed of trust legal?

Question 2. Is or is not the vote of a trustee under a deed of (517) trust legal?

Question 3. Is or is not the vote of a *cestui que trust* legal?

CALVIN GRAVES, S. S.

A true copy from the Journal of the Senate.

H. W. MILLER, *Clerk, Senate.*

(518)

COMMUNICATION FROM CHIEF JUSTICE RUFFIN IN REPLY TO A RESOLUTION OF THE SENATE.

RALEIGH, 18 January, 1849.

SIR:—The resolution of the Senate, passed on the 17th instant, requesting the Judges of the Supreme Court to furnish the Senate with their opinions on certain questions therein mentioned, touching the qualifications of persons to vote for members of the Senate under the Constitution of this State, was laid before the Judges on the evening of yesterday.

Although not strictly an act of official obligation, which could not be declined, yet from the nature of the questions and the purposes to which the answers are to be applied—being somewhat of a judicial character—the Judges have deemed it a duty of courtesy and respect to the Senate to consider the points submitted to them and to give their opinions thereon. I am, accordingly, directed to communicate it.

WADDELL *v.* BERRY.

Three questions are proposed, which are thus expressed:

"First. Is or is not the vote of a bargainor in a deed of trust legal?

"Second. Is or is not the vote of a trustee under a deed of
(519) trust legal?

"Third. Is or is not the vote of a *cestui que trust* legal?

It is to be premised that categorical answers to these inquiries could not be useful to the Senate, for want of the precision in the terms of the questions themselves, which is usual and requisite in legal discussions. For neither the subject of the conveyance, nor the nature of the trusts, nor the estates of the bargainor and bargainee are specified. But, referring to the nature of the controversy before the Senate, as stated in the resolution, it is supposed that the case to which the Senate alludes is of this kind: That one entitled to at least fifty acres of land for life or some greater estate conveys it by deed of bargain and sale to a trustee to secure debts to other persons, with a power to the trustee to sell the estate and out of the proceeds to pay the debts. Then, supposing the proper residences of the parties, the points are whether the bargainor, the bargainee, or the creditor, and, if either, which of them, hath a right to vote for a member of the Senate.

The Judges would have been gratified to have heard, before forming their opinion, an argument on the part of the gentlemen concerned on opposite sides; and if the matter of law involved in the questions of the Senate were deemed by them doubtful, they would have been obliged to defer their answer until the parties or their counsel could submit their views. But as the Judges, upon conference, have found that their opinions entirely concur, and that no one of them entertains a serious doubt upon the subject, they have felt safe, and that it was proper, to deliver their opinion at once, in order to remove the difficulty felt by the Senate in determining the pending contest, as far as their opinion can contribute to that end.

The questions depend entirely upon the proper construction of the second clause of the third section of the first article of the
(520) amendments to the Constitution of the State. It is that "all freemen (except free negroes, etc.) who have been inhabitants of any one district within the State twelve months immediately preceding the day of any election, and possessed of a freehold within the same district of fifty acres of land for six months next before and at the day of election, shall be entitled to vote for a member of the Senate." This language is precise and positive that the right to vote belongs only to him who is possessed of a freehold. The first inquiry, then, naturally is, what is a freehold, and who is a freeholder, within the meaning of the Constitution?

The term "freehold" is a legal one, of very ancient use and of known signification in the common law. It means an estate in land, of which a freeman is seized for the term of his own life, or the life of another, at the least. In its proper sense, it is restricted to such an estate at law. In reference to private rights, it is always used in pleadings and statutes as applicable to legal rights and to legal rights only. It has likewise been used in the same sense in reference to the qualifications of voters. Long before the settlement of the colony of North Carolina, the right of voting for a member of Parliament was limited, by an ancient statute of England, to "freeholders." A conclusive proof that a freeholder, as meant in that statute, was as at common law, one who had the legal estate in himself, is furnished by

the facts that it required a subsequent statute in that country to enable a mortgagor of a freehold estate, continuing in possession, to vote, and another to disable the mortgagee from voting when he is not in the actual possession of the mortgaged premises or in the pernancy of the profits. So, by an act passed in the year 1760 by our Colonial Legislature, substantially following a previous one of the year 1743, it was thought necessary or useful to define the term "freehold" as descriptive of one entitled to vote for representatives; and therein it was provided that a person who *bona fide* hath an *estate real* for his own life or the life of another, or *an estate* of greater dignity, of a sufficient number of acres of land, should be (521) accounted a "freeholder," and entitled as such to vote; and in a subsequent clause it was further enacted that the voter must be "possessed of a freehold within the meaning of that act"—that is, *an estate real* for life at least—"in fifty acres of land." It is, thus, easy to see whence the framers of the Constitution, in 1776 and in 1835, derived the notion of the particular qualification of a freehold, and also the terms of its description. Certainly, the settled sense of the word "freehold," as a term of the law descriptive of an estate in land, and in like manner as descriptive of a property qualification of voters, both in the mother country and in this colony, is that in which it must be received when used in the Constitution when prescribing such a qualification for voters.

It may be thought by some persons that, in favor of the elective franchise, the Constitution should receive an equitable interpretation enlarging the term "freehold" so as to embrace also what is called an "equitable freehold." But that instrument is to be fairly construed and received according to the plain and popular import of its language generally, or according to their legal sense when it uses technical legal terms. It is not to be crippled by a rigorous adherence to the letter, on the one hand, nor stretched out of bounds on the other by a latitudinous construction of words of definite and well-known signification. The very fact of requiring a property qualification repels all attempts to fritter it away upon a plea of favor to the citizen. The Constitution forbids any such favor by the plain implication that such a qualification is deemed indispensably requisite to the security of the citizens or the stability of the government; and its provisions in this respect ought no more to be enlarged than restricted by construction. Now, "freehold" and "freeholder" are terms of art, of the definite signification in the law, hitherto mentioned, and therefore they ought so to be understood. It is true that writers on that peculiar branch of our jurisprudence which is called equity, in contradistinction to the common or statute laws, and also chan- (522) cellors sometimes use the expression "equitable freeholder." But in thus using it they speak not in a literal, but a figurative sense. They do not mean that there really is a freehold in equity, but only that one who, in the view of a court of equity, is entitled in *presenti* to the profits of land for life, of which another is seized, is to be regarded in that court, to many purposes, as if he were seized of the land, instead of being entitled to the use and profits merely. But that refers solely to the beneficial rights of property *in equity*, in respect to the enjoyment, disposition and transmission of the use by descent, or the like, and not at all to legal rights or political privileges. To such rights and privileges the clause in the Constitution relates; and its terms cannot, therefore, be controlled by any peculiar

sense in which a chancellor might figuratively use them in reference to certain equitable interests which, in some respects, have a similitude to freeholds in land, but are not really freeholds.

The foregoing considerations have so much weight in establishing the proposition that a bargainor in such a deed of trust as that supposed, or a mortgagor, is not entitled to vote for a member of the Senate, that the Judges would entertain that opinion on those grounds, were there nothing else bearing on the point. But there are various other reasons, arising out of the purposes of the provision in the Constitution and from the nature of such trusts and the rights of mortgagors, which strongly tend to the same result. Undoubtedly, the object in requiring the freehold qualification was to constitute one branch of the Legislature peculiarly the guardian of property by having it chosen by the owners of property. To answer that end the ownership of the property ought to be *bona fide* and substantial, and not colorable and covinous, or nominal merely. Then, it is to be observed that debtors frequently mortgage their estates or convey them in trust as a security for debts to a greater amount than the
(523) value of the land. In those cases they have such interests in the equity of redemption or resulting trust that, while they continue in the possession and enjoyment of the land, they may be called "the equitable freeholders" in the court of chancery, though their estates, or rather interests, are really of no value. It would be a gross abuse of the Constitution for such persons to vote, as they have neither a legal nor beneficial property. That might, indeed, be otherwise if the Constitution required a freehold of a particular value. In that case, possibly, the value of the land above the encumbrance might be deemed or declared to be the measure of the equitable freehold, as it is called. But there can be no such discrimination in this State. No act of the Legislature can add to the qualifications for voting or take anything away. No law can now declare what is a freehold, so as to make it different from that described and meant in the Constitution. As, therefore, debtors who convey their estates in mortgage or in trust to secure more than their value cannot, in any just sense, or by any intelligent and upright tribunal, be deemed freeholders, to the purposes of the Constitution, and as there is no power to create a distinction between such mortgages and deeds of trust and those in which the debts are less than the value of the estate, it appears to follow necessarily that no mortgagor or bargainor in a deed of trust of that kind is competent to vote. For, as all cannot be admitted at the polls, none can, since they all have rights of the same nature, though of different values in the market, and the Constitution refers exclusively to the quantity of the land and the nature of the estate in it, without regard to value in any case.

Moreover, if persons claiming equitable interests under express reservations or declarations of trust were entitled to vote, so, in like manner, would those entitled by way of resulting or implied trusts. Thus, upon a contract for the purchase of a freehold, the vendor before a conveyance becomes a trustee for the vendee, and the lat-
(524) ter the equitable owner of the land, provided he has paid the purchase money or performed the contract on his part. But it seems quite clear that it was not contemplated in the Constitution to make such nice and doubtful equities, as often arise out of such dealings, the subject of controversy at the polls, to be decided by the

judges of the election. On the contrary, it was proper that the title to vote should be defined clearly and rendered simple, so that the rights and duties of the citizen could be easily understood and readily determined. By viewing the Constitution in the legal and obvious sense of its language, the right to vote is thus defined, and vested in the owner of the land for life—"the freeholder"—in possession.

The conclusion of the Judges is, and they are all of opinion, that the bargainor in such a deed of trust as that supposed is not entitled to vote for a member of the Senate, in virtue of any trust or interest in the land or in the surplus of its proceeds, after payment of the debts, reserved or resulting to him.

It follows that a creditor secured by such a deed cannot, as a *cestui que trust*, vote for a Senator; for he has neither a legal nor an equitable right to the land, but only a right to have his debt raised out of it. Indeed, if a conveyance be made to one upon an express and pure trust for another for life, or any greater interest, the reasons already adduced upon the first point satisfy the Judges that the *cestui que trust* is not entitled to vote, because, in their opinion, merely equitable interests are not within the purview of the Constitution at all, but proper freeholds only.

Upon the remaining question as framed, namely, whether the bargainee or trustee in such a deed be entitled to vote, the opinion of the Judges is likewise in the negative. Such a person is a freeholder; and if that by itself would suffice, he would be entitled to vote. But, by the words of the Constitution, one must not only have a freehold, but be "possessed" of it. That is a material and, indeed, essential part of the provision. In legal language, "possessed" is (525) not the appropriate term to describe the quantity of an estate as being a freehold. Technically, he who has a freehold is said to be "seized," and we know thereby that he is fully invested of the estate. "Possessed," then, when applied to a freehold, means something more than that the party is seized for life, for such seizin is implied in the term "freehold," by itself. It can, therefore, only mean that the person must be in possession of the land as his freehold. "Possessed" is, therefore, very properly applied to the term "freehold" in the Constitution—not as denoting merely that a person hath a lawful right to the land, but further, that he is in the actual enjoyment by possession or perception of the profits, or, at least, that no one else is.

As has been already remarked, the policy of the Constitution is that voters for members of the Senate should have a substantial interest in the country in the form of a freehold in at least fifty acres of land. Now, there may be such a freehold which gives no beneficial interest to the freeholder, in whom the estate was vested for the use and benefit of another entirely. It is manifest that such a freeholder does not stand in such a relation to the property and the country as affords a reasonable expectation that he will exercise the elective franchise upon the motives and to the ends for which the property qualification is required. A mere mortgagee, that is, one not in possession, has the estate barely as a security for a sum of money; and a trustee in the like condition holds the title exclusively for the benefit of others. It often happens that the legal estate is outstanding in the trustee long after the debts are paid or other trusts are satisfied; in which cases the trustee cannot rightfully enter for any purpose, but is bound to reconvey the land upon request. If such a trustee were allowed to vote, it would plainly violate the policy and meaning

of the Constitution, and not less its language. If, however, a mortgagee take actual possession by himself or his lessees, he
(526) becomes thereby a freeholder in possession. Indeed, he has a substantial interest, as well as the estate, and is in fact enjoying it, and therefore his right to vote is unquestionable. It is not so obvious that a trustee in a deed to secure debts to others is within the fair sense of the Constitution, though he take possession; and it can hardly be doubted that were the Constitution such an instrument as deals in details, such a trustee would have been expressly excluded, or, had the case occurred to the convention, that to the words "possessed of a freehold" would have been added "to his own use," or some provision of similar import. But the Constitution, in fact, contains no such qualification upon the right of the freeholder in possession to vote; and, therefore, though not plainly within the reason of the Constitution, a trustee who is in possession or in the actual receipt of the profits, though not to its own use, is fully within the express words of the provision in the Constitution as it is, and consequently he must be admitted to his vote. For there is no authority for a judicial or legislative interpolation of an exception that the person must be "possessed to his own use," when the Constitution is not thus qualified, but is expressed in language not in itself of doubtful import, but having a clear and settled sense.

The question of the Senate has no reference to the possession of the land by the trustee; and it must, therefore, be understood as referring to the right of a trustee to vote by force, merely, of the conveyance to him vesting the legal freehold in him. Thus understood, the answer of the Judges to it is that, in their opinion, such a trustee is not entitled to vote.

But at the same time, they deem it their duty to say further, that they are likewise of opinion that if a mortgagee go into possession of the mortgaged premises or receives the profits, or if a trustee in such a deed as that all along supposed, actually enter into possession or take the profits for the requisite period, then the former, un-
(527) doubtedly, and, in the opinion of the Judges, the latter also, is entitled to vote for a member of the Senate.

It will be observed that the effect of these answers is that, except when the trustee is in possession, neither the bargainor nor the trustee can be allowed to vote; and it may, possibly, occur to the minds of some, as an objection to the principles laid down, that the land is thereby excluded from representation altogether, and in so doing that the Constitution is disregarded. But the objection, though it may at first appear plausible, has no real force. For the land is in no case represented. The right is in the owner. It is true, the right is conferred on him in respect of the land. But it is only for the security of his rights and interests as a citizen and owner of land; and he is not obliged by the Constitution to vote, or, after once acquiring the right to vote, not to part from it. The truth is that there is a great deal of land on which no one votes or can vote: as, for example, that belonging to single women and infants, and to persons residing in a different district from that in which the land lies. So, if one conveys his land in such a manner as not to leave in himself a "freehold," he, of course, parts with his right to vote, though he continue to occupy the land. But it does not follow that by depriving himself of that right he transfers it to the alienee of the freehold. For, while the former owner cannot vote, for the want of the

freehold, the new owner does not become entitled to vote by having the "freehold," unless he also become "possessed" of it. There is, consequently, no inconsistency in holding that neither of them is entitled, when the trustee is not in possession either actually or by receipt of the profits.

I am, sir, with very great respect,

Your most obedient servant,

THOMAS RUFFIN.

To the HON. CALVIN GRAVES,

Speaker of the Senate.

Cited: Lawrence v. Pell, 46 N. C., 349; *In re Marlin*, 60 N. C., 164; *In re Legislative Term of Office*, 64 N. C., 786; *S. v. Ragland*, 75 N. C., 13.

INDEX.