NORTH CAROLINA REPORTS.

VOL. 33.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

JUNE TERM, 1850

TO

DECEMBER TERM, 1850

(BOTH INCLUSIVE).

REPORTED BY

JAMES IREDELL.

(11 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.

JUNE TERM, 1850.

SAMUEL H. CHRISTIAN v. BARNABAS NIXON ET AL.

In general, a vendor of land is bound to prepare the conveyance and tender it or offer to do so; but where, from the nature of the contract, it appears that those to whom the title was to be made were unknown to the vendor, but known to him who made the purchase, the latter is bound to give the necessary information to the vendor, or, if he fails, to pay the price contracted for.

APPEAL from the Superior Court of Law of RANDOLPH, at Special Term in July, 1849, *Battle, J.*, presiding.

No counsel for plaintiff.
G. C. Mendenhall for defendant.

PEARSON, J. Phineas Nixon, Sr., owned a tract of land (2) to which the plaintiff alleged he had acquired title under a sale for taxes. After the death of the said Phineas, his executors, Phineas, Jr., Barnabas Nixon, in behalf of their testator's estate, proposed to buy the claim of the plaintiff; and $50 was finally agreed on as the price. The contract was closed by a letter from Phineas Nixon to the plaintiff, in which he says: "Thou may'st consider this as our promise to pay thee $50 for thy quit-claim belonging to the estate of our father." Signed, "Phineas Nixon, exr. of Phineas Nixon, dec'd."

Phineas Nixon, Jr., afterwards died, and the defendants administered upon his estate. The plaintiff called on the defendant Barnabas for the $50, and told him he was ready to execute

the quit-claim deed, if he knew to whom to make it, and asked who were the persons entitled as heirs of Phineas Nixon, Sr., and to whom he should make the deed. The defendant refused to pay the money and declined giving the information requested.

(3) The plaintiff then issued a warrant for the $50. His Honor was of the opinion that the plaintiff had not made out a case. In this there was error.

The payment of the money and the execution of the deed were concurrent acts; and the plaintiff was not entitled to the money until he had performed, or offered to perform, his part of the agreement.

As a general rule, it is the duty of the vendor to prepare the deed and deliver, or offer to deliver it, to the vendee, this being embraced in what he has agreed to do in consideration of the price. The case is different in England, in consequence of the peculiar circumstances existing in that country which make conveyances extremely complicated. Those circumstances do not exist here, and we are governed by the rule that each party must do or offer to do all he has undertaken before he can require performance of the other. The preparation of the deed is considered a part of the vendor's undertaking, unless the terms of the contract furnish an inference to the contrary. When the land to be conveyed and the person to whom the deed is to be made are certain, so that the vendor knows how to make it, it is his duty to do it; but when the contract is general and the person to whom the vendor may wish the deed made is not ascertained, then it is the duty of the vendee to prepare the deed, or at all events to give the vendor such information as will enable him to do it. This is necessarily implied from the fact that the contract is left open in this particular; for otherwise the vendor would be required to do an impossibility, and the refusal of the vendee to give this information, which lies within his knowledge, evinces a desire on his part to have a pretext for avoiding his contract.

In this case the contract was made in behalf of those who were entitled to the land as devisees or heirs of Phineas Nixon,

(4) Sr. The plaintiff is not presumed to know them, but the fact is within the knowledge of the defendants. It was their duty to give the information; by withholding it they put it out of the power of the plaintiff to make the deed. They cannot take advantage of their own wrong, and thus escape from the performance of a contract of their intestate.

PER CURIAM. There must be a *venire de novo*.

Cited: Gwathney v. Cason, 74 N. C., 9.

JOHN PATTERSON v. WILLIAM BODENHAMMER ET AL.

The action of trespass *quare clausum fregit* is a remedy for an injury to the possession, and therefore cannot be maintained by one who had not the possession at the time the injury was alleged to have been committed.

APPEAL from the Superior Court of Law of GUILFORD, at Spring Term, 1850, *Battle, J.*, presiding.

The following is the case sent up from the Court below:

This was an action of trespass *quare clausum fregit*, to which the defendants pleaded not guilty.

The plaintiff relied upon both an actual and constructive possession of the *locus in quo* at the time when the trespass was alleged to have been committed. To show a constructive possession, founded on title, he produced a grant to John Talbot, dated in 1847, and a deed from Talbot to George Mendenhall, dated in 1793. He then produced the deed from one Robert Stewart to Eli Pugh, dated 14 November, 1830; a deed from the said Pugh to John Horney, dated 11 November, 1834; a deed (5) from said Horney to Jeffrey Horney, dated September, 1835, and a deed from said Horney to John Lamb, dated September, 1840, and then a deed from the said Lamb to the plaintiff, dated 25 April, 1843, all of which included the *locus in quo*. It was testified that the land included in the deed to Stewart was open forest, no part of which was in cultivation, but he and the successive proprietors after him occasionally cut rails upon it for the use of other plantations. It was stated that Jeffrey Horney cut rails upon it every year, while he owned it, and hauled them off to a plantation which he cultivated about three miles distant. It was stated, further, that Lamb built a house upon the land in April or May, 1839. The deed from Lamb to the plaintiff conveyed a small half-acre lot, situated in the town or hamlet of Florence, upon which was an unfinished house, built by William Patterson, a son of the plaintiff. It was then shown that the defendants moved this house from the lot in March, 1846; and it was for this that the action was brought, the writ having been issued 17 June, 1846.

To show an actual possession the plaintiff introduced a witness who testified that, immediately after the plaintiff's purchase, he went and nailed boards across the space intended for a chimney and windows, which were open, and put some empty boxes and barrels in the house.

The defendants contended that the plaintiff had shown no such title as gave him a constructive possession of the house and lot

in question, and that at the time when the house was removed it was in the actual possession of them or one of them, and therefore the action could not be sustained. To prove this possession, they called as a witness one Thomas Barnum, who testified that the defendant Bodenhammer came to his residence in Westminster and requested him to go and see him take
(6) possession of the house in question; that he went and saw the said defendant tear off the boards which the plaintiff had nailed across the windows and put out the plaintiff's boxes and barrels, and agreed with the defendant Dillon, by parol, that he might have the house for twelve months at sixpence per month, each party being at liberty to put an end to the lease by giving the other notice. This was in May, 1844. Another witness testified that the defendants Dillon and White had some timber and a wagon in the house, and that a man named Beard also kept a wagon in it, being kept open; and that it was used for no other purpose than as a repository for such things.

The defendants offered in evidence a paper for the purpose of showing that William Patterson had an interest in the house and lot which was liable to be sold for the payment of his debts, and also for the purpose of showing that upon William Patterson's failing to comply with his contract, the defendant Dillon, who had bought from Lamb the residue of the tract of land, was entitled to take possession of the *locus in quo;* but it being admitted that William Patterson had failed to comply with the terms of his contract, and that the defendant Dillon had no deed covering the house and lot in question, the court rejected it, holding that it was immaterial, as they had already been permitted to show themselves, as far as they could, to have been in the actual possession of the house at the time of its removal.

The court was of opinion, and so charged the jury, that the plaintiff had not shown a complete title, so as to give him a constructive possession, but that, if the evidence were believed, he had shown an actual possession, against which the defendants had proved nothing to prevent his recovering in this action. The plaintiff had a verdict, whereupon the defendants moved for a new trial for the rejection of testimony and for
(7) misdirection in the charge, which motion was overruled and a judgment given, from which the defendants appealed.

Kerr for plaintiff.
G. C. Mendenhall for defendants.

NASH, J. The judgment in this case must be reversed. The plaintiff has shown neither an actual nor constructive possession of the premises in question. To avail himself of the latter, he must prove the legal title in himself at the time the alleged trespass was committed. In this he has not succeeded, and the jury were so instructed by his Honor who tried the cause. It is, however, in the second branch of the charge that the error lies of which the defendants complain. After informing the jury that the legal title was not in the plaintiff, the charge proceeds, "that if the evidence is believed, the plaintiff had shown an actual possession, against which the defendants had proved nothing to prevent his recovery in this action." We do not concur with his Honor. At the time that Lamb, who claimed title to the premises, conveyed to the plaintiff in 1843, there was on them an unfinished house. The plaintiff put into it some empty barrels and boxes and nailed plank over the spaces left in the walls for a window and fireplace. This was the only possession he ever had, as far as the case discloses. A year after, in May, 1844, the defendant Bodenhammer pulled off these boards, and threw out the articles put there by the plaintiff, and leased the house for twelve months to one of the other defendants, who put into it some wagon timber. In this condition the premises remained until March, 1846, when the house was removed by the defendants; and the case states that this removal constituted the trespass for which the action was brought. It is very clear it cannot be sustained. Whatever possession the plaintiff may have acquired by putting into an unfinished house, which had never been inhabited by him or any other person, some empty barrels and boxes and nailing on the boards as set forth in the case, was lost to him by the acts of Bodenhammer of a similar character. If they were sufficient to give Patterson the actual possession, similar acts on the part of the defendant were sufficient to divest him of it and place the actual possession in the latter. The acts were of the same character and must carry with them the same effects. Two years after Bodenhammer had dispossessed the plaintiff, and while his possession, so acquired, continued, the house was removed. To enable the plaintiff to (9) maintain an action for the removing of the house, he ought to have re-entered before the house was removed and thereby revert the possession in himself. The action of *quare clausum fregit* is a remedy for an injury to the possession (*Dobbs v. Gullidge*, 20 N. C., 197), and therefore cannot be maintained by one who has it not. *Tredwell v. Reddick*, 23 N. C., 56.

His Honor erred in directing the jury that at the time the house was removed Patterson, the plaintiff, was in the actual possession of it and could maintain his action.

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

Cited: Brooks v. Stinson, 44 N. C., 75; *London v. Bear,* 84 N. C., 273, 4; *Harris v. Sneeden,* 104 N. C., 377; *Drake v. Howell,* 133 N. C., 166; *Gordner v. Lumber Co.,* 144 N. C., 111.

B. T. DAVIS ET AL. v. SAMUEL HILL ET AL.

When a petition is filed to discontinue an old road between certain points and establish a new one between the same points, and the petition is opposed, and the court, upon the hearing, refuse to discontinue the old road and establish the new road as prayed for, but direct another road to be opened, passing over only a part of the route prayed for by the petitioners: *Held,* that the defendants were entitled to recover their costs.

APPEAL from the Superior Court of Law of RANDOLPH, at Spring Term, 1850, *Battle, J.,* presiding.

No counsel for plaintiffs.
Mendenhall for defendants.

(10) PEARSON, J. The plaintiffs in their petition allege that the public convenience would be promoted by making a new road from Cunningham's old place to a fork near William Bingham's plantation, running by Davis' tanyard, John Hammond's and on by Ferguson's smithshop, and by discontinuing the old road between those two points. The prayer is that a new road be established between the two points, passing by the places designated, and that the old road be discontinued. The defendants object to the change in the road. They oppose the new road and insist that the old road should not be discontinued.

The County Court ordered the new road to be laid off and the old road to be discontinued. The defendants appealed, and the Superior Court refused to establish the new road or to discontinue the old road, but it was ordered that a new road be laid off from Ferguson's smithshop to the fork near William Bingham's plantation; and it was further ordered that the defendants pay the costs, from which latter order they appealed.

The defendants were certainly left "in possession of the field of battle," and we are at a loss to see upon what ground they were required to pay the costs. Whether under this proceeding the court had the right to establish the road which is ordered to be laid off, is not submitted to us, as the appeal is only from the judgment as to the costs. But it might well have been questioned. There was no petition in writing setting forth that such a road would promote the convenience of the public, and no notice was given that application would be made for it; so that although there was proof of its utility, it was *"probata" sed non "allegata."* An application for a road from one point to another does not include a road from one of the points to any intermediate point; for, grant that the road, if laid out the whole distance, would be useful, *non constat* that, if it stopped halfway, it would be of any manner of use; in general it would not. A fence enclosing the whole field would protect the crop, but if it stops halfway it is of no use. In this case (11) it only appears incidentally that there is a road to Fayetteville which passes by Ferguson's smithshop, into which the new road will lead.

Waiving this question, the controversy was, Shall the old road be discontinued between certain points and a new road made in its stead? This was decided in favor of the defendants, and they were entitled to recover their costs. There is a plain distinction between an application for a road and an ordinary action at law, in which the plaintiff seeks to recover the whole and *every part* of his demand; for a road is an *entire thing.* If the petitioners, in the event that the whole is not established, desire that it be established to an intermediate point, this should be set forth in the petition, and then it would appear whether the defendants opposed *the part* as well as the whole. In this case it does not appear that the *defendants made any objection* to *the road which his Honor ordered be laid out,* and it can make no difference that this road happened to pass over a part of the ground over which the road applied for was to run. It is true, "the whole includes all of its parts," but that supposes that the whole has an existence; here "the whole" was refused, and it is an obvious fallacy to say, in reference to this question, that the road established by the Superior Court is a part of the road which the petitioners applied for.

PER CURIAM. The judgment below must be reversed, and the defendants must have judgment for their costs.

(12)

GROVES M. BRAZIER v. JAMES ANSLEY.

1. To sustain the action of trover, the right of property in the thing claimed and of possession, at the time of the alleged conversion, must be vested in the plaintiff.

2. A cropper has no such interest in the crop as can be subjected to the payment of his debts while it remains in mass; until a division, the whole is the property of the landlord.

3. The doctrine of appropriation, as constituting a delivery and thereby passing the title to the purchaser, arises in cases of a sale of goods generally, as distinguished from the sale of a specific chattel. And when a less quantity out of a larger is the subject of the contract, then no property passes to the purchaser until a delivery, for until then the goods sold are not ascertained.

4. The vendor may appropriate the quantity purchased by separating it from the bulk; but the appropriation is not complete until the vendee assents to take the separated portion.

APPEAL from the Superior Court of Law of CHATHAM, at Spring Term, 1850, *Battle, J.*, presiding.

The following is the case sent up from the court below:

This was an action of trover for a parcel of corn. Plea, not guilty.

On the trial the plaintiff introduced a witness named Brown, who testified that, during 1845, he worked with the defendant on a farm of the latter and was to have a fourth part of the corn made upon it for his services; that before the corn was gathered he sold his interest in it to the plaintiff for $40; that, wishing to leave the farm, the plaintiff sent some hands to assist in

(13) gathering the crop, but the defendant objected to the arrangement; whereupon it was agreed between the plaintiff and defendant that the latter should gather the crop, for doing which he was to have five barrels of corn, and that he would notify the plaintiff at each division. Upon cross-examination the witness stated that he became indebted to the defendant for some articles furnished him during the year, and that he agreed to pay the defendant when he sold his corn. Another witness, Mr. Marks, was then called and stated that some time in the fall of 1845 he was called upon to see the corn measured; that both the plaintiff and the defendant were present, when the latter measured the corn by putting three-fourths of it in one heap and the remaining fourth in another, and that he then claimed to take five barrels and a sufficiency to pay Brown's account from the smaller heap, to which the plaintiff objected,

saying that the five barrels ought to be taken from the whole quantity before division, and that there was no claim upon it for Brown's account. The parties disputed for some time about this matter, when the plaintiff went off, saying he would have nothing more to do with it. The witness stated further that if all the defendant claimed had been allowed, there would have remained only a few bushels of corn for the plaintiff, and that there was no final delivery of any part of it to the plaintiff.

The plaintiff having closed his case, the defendant moved that he should be nonsuited upon the ground that the action of trover could not be maintained because no part of the corn had ever vested in the plaintiff, and that there was no demand before suit brought.

The motion was resisted upon the ground that the defendant was estopped to deny that the plaintiff had acquired Brown's share of the corn, for the reason that he had ratified the contract made by the plaintiff and Brown.

The court being of opinion that the action could not be maintained, the plaintiff submitted to a judgment of nonsuit and appealed. (14)

Haughton for plaintiff.
W. H. Haywood for defendant.

NASH, J. To sustain the action of trover, the right of property in the thing claimed and of possession at the time of the alleged conversion must be united in the plaintiff, and he must prove that, while the property was his, the defendant converted it. *Gordon v. Harper,* 7 Term, 9; *Harwood v. Smith,* 2 Term, 750; *Lewis v. Mobley,* 20 N. C., 467. In this case it is denied by the defendant that the plaintiff had any title to the corn sued for or that he has converted it. As to the title, the plaintiff urges that the facts proved show that an appropriation was made by the defendant, the landlord, of one-fourth of the crop to Brown, the cropper, which was a delivery in law, or at any rate the evidence ought to have been left to the jury, under the instruction of the court. A full and complete answer is furnished by the case to each position of the plaintiff. It is a well settled principle of law in this State, that a cropper has no such interest in the crop as can be subjected to the payment of his debts while it remains *en masse.* Until a division the whole is the property of the landlord. *S. v. Jones,* 19 N. C., 544; *Hare v. Pearson,* 26 N. C., 77. The defendant was the owner of the land on which the corn was raised, and a man by the

name of Brown cropped with him. The latter transferred his interest to the plaintiff for a valuable consideration. After the corn was matured it was agreed between the plaintiff and the defendant that the latter should gather the corn, and for so doing should have five barrels. The corn was gathered by the defendant, and placed by him in two separate heaps or piles, one containing three-fourths and the other one-fourth.
(15) From this pile the defendant claimed to take his five barrels for gathering. To this the plaintiff objected, alleging they ought to come out of the whole crop. With this dispute we have nothing to do, as it regards the proper construction of the previous agreement. It is sufficient for our present inquiry that a controversy did arise, and that the plaintiff would not agree to the construction put upon it by the defendant. The case states that the plaintiff "went off, saying he would have nothing more to do with it." Brown, the cropper, was present, but in no way interfered, and what afterwards became of the corn we are not informed, except that it is stated in the case that no part of the corn was finally delivered to the plaintiff. There certainly was here no appropriation by the landlord of any specific portion of the crop to the use of Brown or the plaintiff, and therefore there was no delivery to the latter. The doctrine of appropriation, as constituting a delivery and thereby passing the title to the purchaser, arises in cases of a sale of goods generally, as distinguished from the sale of a specific chattel. And where a less quantity out of a larger is the subject of the contract, there no property passes to the purchaser until a delivery, for until then the goods sold are not ascertained. To constitute a delivery in such cases the vendor may appropriate the quantity purchased by separating it from the bulk. But the appropriation is not complete until the vendee assents to take the separated portion; his assent is equivalent to accepting possession under the contract. 1 Chap. Cont., 375. In a case like this, which in principle is similar to that of a sale of a lesser part out of a larger, the appropriation by the landlord was incomplete until ratified by the cropper or his agent and vendee, the plaintiff. It would be manifestly unjust to suffer the landlord to be the sole judge of the rights of his cropper. Not only was the assent of the plaintiff withheld, but he positively refused to receive the corn set apart
(16) for him or his principal. The title to the corn never vested in him, and he cannot, under this evidence, support the action of trover. The cases cited in the argument for the plaintiff abundantly prove that a delivery may be proved

by an appropriation by the vendor, but in none of them is it said that it is complete without the assent of the vendee.

We agree with his Honor that the action cannot be sustained.

PER CURIAM. Judgment affirmed.

Cited: Warbritton v. Savage, 49 N. C., 385; *Harrison v. Ricks,* 71 N. C., 11; *Rouse v. Wooten,* 104 N. C., 231; *S. v. Austin,* 123 N. C., 750.

THOMAS BILES v. MOSES L. HOLMES ET AL.

1. Ordinary care, reasonable time and probable cause, the facts being established or proved, are questions of law, to be decided by the court.

2. The declarations of a slave as to his health and the condition of his body are admissible in evidence in an action brought by his master to recover damages for an injury done to him.

THIS is an action on the case, in which the plaintiff claims damages for an injury to his slave named Green, which has greatly impaired the usefulness and lessened the value of the said slave. The plaintiff declares in many counts; in one set he alleges that the injury arose from the negligence of the defendants; in another set he alleges that the injury arose from the negligence of the agent of the defendants; in a third set he alleges that the injury arose from the want of ordinary care on the part of the defendants; and in a fourth set he alleges that the injury arose from the want of ordinary care of the agent of the defendants, and alleging in each count that the (17) defendants were the bailees of the plaintiff, the defendants having hired from the plaintiff the said slave, to wit, at the gold mines of the defendants, and were bound to take that care of Green which an ordinary man would take of his own property. This suit was instituted by Thomas Biles, as plaintiff, against Moses L. Holmes, John McCoffin, and others, as defendants. The plaintiff introduced John Cauble as a witness, who proved that the defendants had hired from the plaintiff his slave Green, to work at the mine of the defendants at Gold Hill; that he (Green) had been put to work at the bottom of a shaft about one hundred and eighty feet deep, from which the defendants were taking gold ore; that buckets about three feet deep, each capable of holding sixty gallons, were alternately let down and drawn up; as the one was ascending the other was descending, being used to bring up either ore or water to the

surface of the earth; that the witness was in the service of the defendants and was employed as their "lander" at the mouth of the shaft, it being his duty to receive and unload the ascending buckets and to fix and let down the descending buckets, and to put in the descending buckets whatever was to be sent down the shaft; that these buckets were used to bring up water and ore; that in the bottom of the buckets was an aperture four inches square, over which was a valve six or eight inches square and fastened at one end to the bottom of the bucket, which valve being raised at the other end when the bucket was brought up and landed, the water escaped; that when these buckets were used to bring up ore, or to carry down implements to work with, the aperture was closed with a wooden plug nailed in from the outside, and as a further security against anything falling through the bottom of the bucket, the valve was nailed down over the aperture on the inside; that without the valve
(18) on the inside, or iron hoops on the bottom, securing the plug in the aperture, the buckets are not safe, and are not in a condition to be used with safety to those who are working at the lower extremity of the shaft; that about 9 o'clock in the morning on 28 January, 1848, as one of the buckets commenced descending, the witness, who was the *"lander"* of the defendants, dropped into it four iron drills, each weighing five pounds, which instantly passed through the aperture in the bucket at its bottom and one of them struck Green on the head, and fractured his skull, which made the operation of trepanning necessary, and a large piece of the skull bone was cut out. Green was working at that time at the bottom of the shaft directly below the bucket. The witness knew that Green and a white man were then working there together; that drills are implements used by miners in getting the ore; that at the time the drills were put in the bucket there was no valve in the bucket, and there was no iron hoop or strap at the bottom of the bucket to secure the plug; that the witness had been engaged from 12 o'clock at midnight until 9 o'clock the next morning, when Green was injured, the witness being employed during that period as the lander of the defendants in landing and unloading the buckets at the mouth of the shaft; and during the said period the witness had not looked into either of the said buckets, or put his hand in either of them, to ascertain if the aperture at the bottom was properly secured.

Another witness was introduced by the plaintiff and was asked if Green did not complain much of headache when exposed to the sun, and if Green did not state his inability to work in the sun, or to work in any laborious employment. These declara-

tions of the said slave were opposed as evidence in the cause by the counsel for the defendants, and they were excluded by the court.

His Honor charged the jury that this was a bailment (19) beneficial to both parties, and that if the defendants had hired the slave Green from the plaintiff, they (the defendants) were bound to take that care of Green which a prudent man would take of his own property; and if the injury complained of in this case arose from an omission on the part of the defendants or their agent, or that care which a prudent man would take of his own property, which was a question for the jury, then the defendants were liable in this action. But if they believed that the defendants or their agent had not omitted on this occasion that care of Green which a prudent man would take of his own property, then they should find for the defendants. The jury rendered a verdict in favor of the defendants. Rule for new trial. New trial refused and rule discharged. Judgment for the defendants, from which judgment the plaintiff prayed an appeal to the Supreme Court, which was granted.

No counsel for plaintiff.
Mendenhall for defendants.

PEARSON, J. What amounts to "ordinary care" is a question for the court. The judge below erred in leaving it to the jury. Whether the proof establishes particular facts is for the jury; but what is the legal effect of these facts, supposing them to exist, is for the court. Accordingly it is settled that ordinary care, reasonable time, and probable cause, the facts being admitted or proved, are questions of law. *Herring v. R. R.*, 32 N. C., 402; *Swain v. Stafford,* 26 N. C., 293.

If these were not questions of law, no rule could ever be established, and the legal effect of certain facts, like their existence, would in all cases depend on the finding of a jury, with no mode of having its correctness judged of by a higher tribunal.

Had the jury come to a correct conclusion, the error of the judge in submitting the question to them, instead (20) of deciding it himself, would have been immaterial; but, taking the evidence to be true, there was manifestly a want of ordinary care. A large bucket, with a hole four inches square in the bottom, the fastenings of which were liable to be knocked off, is used nine hours without any examination, and as the bucket commenced descending, four pieces of iron, weighing five pounds each, are *dropped* into it, without looking to see—as might have been detected by a mere glance—that the fastenings

were off and the hole open; and this, too, when the lives of two men were at stake. "Ordinary care" required that the fastenings should have been examined and the pieces of iron should have been put, not *dropped,* in the bucket crossways or in such a manner as to prevent them from falling out or dropping through.

As the case will be tried again, it is proper to notice the question of evidence, as to which his Honor also erred.

The object of the plaintiff was to show the condition of his slave: that he had not recovered from the effect of the blow and was permanently injured. For this purpose it was competent to prove how he acted, how he looked, and of what he complained. In fact, this is almost the only kind of evidence by which the condition of body or mind can be ascertained; it is natural evidence or the evidence of facts, as distinguished from personal evidence or the testimony of witnesses. Best on Evidence.

The declarations of a patient to his physician are strong evidence of the state of his health, and only differ from his declarations to a third person because it is less probable that he will feign or state falsehoods to one by whom he hopes to be relieved; but this consideration only affects the degree of credit due to such declarations, and does not affect their admissibility.

(21) Whether expressions of pain are real or feigned must be determined by the jury. 1 Greenleaf Ev., 126.

If it be material to ascertain the mental condition of an individual, his conversation at different times is admissible. Upon the same ground, it being material to ascertain the bodily condition of the slave, his complaints of headache when exposed to the sun, and his declarations that he was unable to work in the sun, or to endure hard labor, are admissible. True, one may feign the language of a madman, or may utter false complaints of pain, but the law does not on this account exclude what may be the only mode of proof. It is left to the good sense of the jury, connecting the declarations with the acts and looks of the party and other circumstances, to say how far such evidence is to be relied on.

The statute excluding the testimony of a slave or free person of color against a white man, has no application. The distinction between natural evidence and personal evidence or the testimony of witnesses is clear and palpable. The actions, looks and barking of a dog are admissible as material evidence upon a question as to his madness. So the squealing and grunts or other expressions of pain made by a hog are admissible upon a question as to the extent of an injury inflicted on him. This

can in no sense be called the testimony of the dog or the hog. The only advantage of this natural evidence, when furnished by brutes, over the same kind of evidence, when furnished by human beings, whether white or black, is that the latter, having intelligence, may possibly have a motive for dissimulation, whereas brutes have not; but the character of the evidence is the same, and the jury must pass upon its credit.

PER CURIAM. There must be a *venire de novo.*

Cited: Heathcock v. Pennington, post, 642; *Lusk v. McDaniel,* 35 N. C., 487; *Hathaway v. Hinton,* 46 N. C., 246; *Brock v. King,* 48 N. C., 48; *Wallace v. McIntosh,* 49 N. C., 435; *Gardner v. Kluttz,* 53 N. C., 376; *S. v. Harris,* 63 N. C., 6; *Pleasants v. R. R.,* 95 N. C., 203; *Emry v. R. R.,* 109 N. C., 592; *Miller v. R. R.,* 128 N. C., 28.

(22)

LUKE CARTER v. JAMES WOOD.

1. Where a person sued *in forma pauperis,* and recovered a verdict, but the judgment was for the amount of the verdict only, and not for the costs, he cannot afterwards, upon a rule, have an order that execution shall issue against the defendant for his costs.

2. While a suit is in progress the witnesses have a right to demand, from the party at whose instance they are summoned, the payment for their attendance at the end of each term, or as soon as the suit is disposed of. Their claim after judgment is not against the person summoning them, but against the person bound to pay the costs under the judgment, unless the party so bound is insolvent.

APPEAL from the Superior Court of Law of ROBESON, at Spring Term, 1850, *Settle, J.,* presiding.

This was a rule which had been served on the defendant to show cause why he should not be taxed with the costs of the plaintiff's witnesses in a case which had been tried between the same parties. The plaintiff had brought an action of trespass *vi et armis, in forma pauperis,* against the defendant, in which there was a verdict for the plaintiff and judgment for the amount of the verdict only. Some of the plaintiff's witnesses had drawn their tickets from the office, brought suits on them before a magistrate, after the determination of the original suit, and recovered judgments, from which the plaintiff appealed to the Superior Court, when the witnesses recovered

judgment. And the present plaintiff prayed an appeal to the Supreme Court, but being unable to find sureties, the cases were not taken up. The plaintiff paid some of his witnesses,
(23) and some of the tickets still remain in the office unsatisfied. The rule being argued at this term, his Honor discharged the rule, on the ground that a plaintiff who sues *in forma pauperis* neither pays nor recovers costs.

The plaintiff prayed an appeal to the Supreme Court, which was granted.

Troy for plaintiff.
Strange for defendant.

NASH, J. We have listened with pleasure to the argument submitted to us in behalf of the plaintiff. The case does not, however, properly present the question designed to be raised. That a person suing *in forma pauperis,* in general, neither pays nor recovers costs, has been considered the established law of this State ever since the case of *Clark v. Dupree,* 13 N. C., 411. But whether under that rule the attendance of his witnesses is embraced has not been decided. The case before us does not present the point. The plaintiff had been permitted to sue *in forma pauperis* and had recovered a verdict. The case states that judgment was rendered *only* on the verdict. None was asked for against the defendant for any costs. The notice is to show cause why "an execution should not issue against him, the defendant, for the costs of the witnesses in the case." Under the act of 1777, ch. 115, sec. 90, "the party in whose favor judgment should be given, etc., shall be *entitled* to full costs," etc. To reap the benefit of this provision, the party must have a judgment, not only on the verdict for the sum awarded him by the jury, but also one for his costs. In general, it is a matter of course for such a judgment to be entered, and, if the case had been silent on the matter, we might have presumed that such was the fact here. But we are not permitted to make any such presumption. We are told none such was asked for and
(24) none such rendered. Whether, therefore, the word "costs" in the act of 1836, ch. 31, sec. 47, which is a transcript of the statute of Henry VIII., embraces the attendance of the plaintiff's witnesses, we do not feel at liberty to decide. In order to have brought the question before the court, a motion for a judgment for those costs ought to have been made to the court before whom the cause was tried. The case further states that, after the judgment was rendered, some of the witnesses for the plaintiff warranted him upon their tickets and obtained

judgments, which he paid; others he paid without process, and some of the tickets are still in the office of the clerk. The proceedings are had for the purpose of subjecting the defendant to the payment of these several claims by an execution. In addition to the answer already given, why the court cannot order the execution as required, it may be said, the plaintiff, as far as the case discloses, was not answerable for any of those claims, not because he was suing *in forma pauperis,* but because the original suit was ended. While a suit is in progress the witnesses of the parties have a right to demand, from the party at whose instance they were summoned, the payment for their attendance at the end of each term, or as soon as the suit is disposed of. If they do not choose so to do, they ought to deposit their tickets at each term in the clerk's office, that they may be regularly taxed in the bill of costs. Their claim, after judgment, is not against the person summoning them, but against the person bound by the judgment to pay the costs under the judgment, unless the party so bound is insolvent. *Office v. Lockman,* 12 N. C., 146; *Stanly v. Hodges,* 1 N. C., 203. Here, we repeat, there is no judgment for costs; and the judgment of the court below is affirmed and rule discharged.

PER CURIAM. Judgment accordingly.

Cited: Revel v. Pearson, 34 N. C., 245; *Morris v. Rippey,* 49 N. C., 535, 6; *Belden v. Sneed,* 84 N. C., 245.

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(25)

WALTER F. BURNS v. BENJAMIN ALLEN.

Where A sold to B a tract of land, conveyed by a deed containing a covenant for quiet enjoyment, and, upon discovery that a part of the land previously belonged to B, A offered to pay to B the value to this part of the land, so as to avoid a suit on the covenant: *Held,* that an action of *assumpsit* would not lie on this proposition, because B had not acceded to it.

APPEAL from the Superior Court of Law of ANSON, at Spring Term, 1850, *Settle, J.,* presiding.

Winston for plaintiff.
Strange and *G. C. Mendenhall* for defendant.

NASH, J. There is nothing in the case which in the opinion of the Court would justify an interference with the judgment

below. The defendant sold to the plaintiff a tract of land for a specific sum of money, and the deed contained a covenant for quiet enjoyment. After the conveyance the land was surveyed according to the metes and bounds contained in it, when it was discovered that it covered twenty-two acres of land owned by the plaintiff. This fact was communicated to the defendant by a witness in the case, who was requested by him to tell the plaintiff he did not wish to be run to any costs, but was willing to pay for the land. To other witnesses he stated he did not wish Burns to sue him: he would do what was right—he was willing to pay the value of the land. The action is in *assumpsit,* and the declaration contains two counts. The first is on a promise by the defendant, in consideration of forbearance on the part of the plaintiff to sue, to pay the plaintiff the value of the land. The second is on a promise to indemnify the plaintiff for his loss in purchasing his own land. There is nothing in
(26) the case to show that the plaintiff and defendant ever entered into any *agreement* respecting the land, after the execution of the surveyance, or that, after that time, they ever had any communication on the subject. The case presents simply an offer on the part of the defendant to settle in the way indicated by him, without any action on the part of the plaintiff, acceding to it, and without any evidence to show that it was ever made known to him. Neither count in the declaration is sustained. An *assumpsit* is a contract, which requires the assent of both the contracting parties. This was a mere offer to make one, which might have been withdrawn by the defendant at any time before it was accepted by the plaintiff. *Routledge v. Grant,* 4 Bing., 653.

PER CURIAM. Judgment affirmed.

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(27)

SAMUEL LONG v. JOHN BONNER.

An action of *assumpsit* for the use and occupation of land will not lie in this State unless there be an express promise to pay rent.

APPEAL from the Superior Court of Law of PERQUIMANS, at Spring Term, 1850, *Ellis, J.,* presiding.

The action is *assumpsit* for the use and occupation of a piece of land belonging to the plaintiff. Plea, *non assumpsit.*

On the trial evidence was given that, in pursuance of a decree of the Court of Equity in a cause duly constituted, the land was sold in the latter part of December, 1847, by the clerk

and master, as belonging to the plaintiff in fee, and the defendant was accepted by the master as the purchaser, and executed bonds for the purchase money, and entered into possession of the premises on 1 January, 1848. In April following it came to the knowledge of the defendant that the plaintiff was not entitled in fee absolutely, but that there was a limitation over to other persons upon the contingency of the plaintiff's death under twenty-one and without leaving issue; and upon the ground that the plaintiff was still an infant and had no issue, the defendant then applied to the Court of Equity to rescind the contract of sale—which was accordingly done. The defendant thereafter continued to occupy the premises for the residue of the year, and made a crop thereon. It is for a reasonable satisfaction for the occupation for the year 1848 the action is brought.

The counsel for the defendant moved the court to in- (28) struct the jury that the plaintiff was not entitled to recover, upon the ground, among others, that the action would not lie. But the court refused to give the instruction, and directed the jury that, even if the defendant were a trespasser on the land, the plaintiff could waive the trespass and maintain this action for compensation in the nature of reasonable rent for the use and occupation of the land, and much more when the defendant entered under the plaintiff or under the court, acting for him. From a verdict and judgment against him the defendant appealed.

No counsel for plaintiff.
Jordan for defendant.

RUFFIN, C. J. Undoubtedly, it is incorrect to suppose that this action could be maintained against a trespasser. It would not lie for the hire of a personal thing against a trespasser; but the owner would have to resort to the action of trover or trespass. If, indeed, a trespasser sell the thing, the owner may waive the trespass and affirm the sale and bring *assumpsit* for the price as money had and received; and so, for money received by the trespasser for hire by him to another person. But for the trespass itself in taking the thing, or for the enjoyment of it by the trespasser, *assumpsit* will not lie, as no contract, express or implied, exists between the parties. So, with respect to land, if the trespasser let it and receive rents, we will not say that he would not be liable therefor as money had and received to the use of the owner. But for the injury of illegally entering into the land of another and keeping him out, the remedy is by action of trespass for the mesne profits after the owner

regains the possession. No action *ex contractu* lies, as there is nothing from which a contract can be implied. That,
(29) however, is not material to the present purpose, as this defendant was not a trespasser, but entered under authority of law upon a supposed or intended purchase of the premises. The question is whether the action of *assumpsit* will lie under such circumstances; and the opinion of the Court is that it will not.

There are most respectable authorities that this action cannot be maintained by a vendor against one who entered and occupied under a contract of purchase, after the contract has been rescinded or abandoned, although it might lie upon a parol lease, not reserving a certain rent. Those decisions go on the ground that compensation for the use of land is in truth rent, and can only arise where there is the relation of landlord and tenant, and that such relation does not subsist where the contract is for a sale and purchase. Hence, the law leaves the parties to their remedies on that contract, or to provide by proper stipulations for what may be just between them upon their rescinding it. And it is somewhat surprising and to be regretted that provision was not made for the new state of things when the defendant was discharged by the court from his purchase, by requiring him to take the land for the year, if the infant's estate should so long continue, at a proper rent. But that point need not be further considered, as it is the opinion of the Court that in our law *assumpsit* will not lie for use and occupation of land unless upon an express contract of leasing, and, therefore, that this plaintiff cannot recover.

It is clear that at common law it would not lie upon an implied promise, but only an express one. The reason is that there were higher remedies, namely, debt and distress. *Reade v. Johnson,* Co. Eliz., 242; 3 Woodeson Lectures, 79. Indeed, rent due on a parol lease is a specialty debt in the administration of assets. *Gage v. Acton,* 1 Salk., 325. This reason has been said to be technical, and that is true. But that is no ground for holding it to be insufficient for not allowing
(30) the action. The question is whether the law should imply a promise to pay rent, in order thereby merely to give *assumpsit* as a remedy, when the law had already provided the others just mentioned. It is plain that no such implication should be made, unless, for the same reason, a promise may also be implied to pay a sum of money which the party owed, by bond, by lease, by indenture, or by judgment. The reason against the one is as technical as that against the other, for, in truth, it is the same in each case. If, indeed, there be an ex-

press contract to pay rent, then it was held that *assumpsit* would lie thereon; and, therefore, when the promise laid in the declaration was admitted by demurrer, or confessed in the plea in bar, or appeared upon evidence upon *non assumpsit*, to have been expressly made, the plaintiff was entitled to judgment, because the promise was collateral and was to be taken as intended to give this additional remedy. *Dartnal v. Morgan*, Cro. Jac., 598; *Acton v. Symon*, Cro. Car., 414; *Johnson v. May*, 3 Leo., 150; *Mason v. Beldam*, 3 Mod., 73. In consequence of that state of the law, it was enacted in England, as a part of St. 11 Geo. II., ch. 19, that where the agreement is not by deed the landlord may recover in an action on the case for use and occupation. Since that time the action is common in that country, as founded on the statute. Before it, no instance is found in which it was sustained upon an implied promise. That act is not in force in this State. It is probable it may have been in use formerly or deemed to have been in force here, as it is stated by *Judge Taylor*, in *Hayes v. Acre*, 1 N. C., 247, that recoveries had been made in our courts upon implied promises, and, as we have seen, there was no other ground for them. In that case the plaintiff had judgment; but the report is very unsatisfactory, as the whole record was not here, and it does not appear whether the plea was *non assumpsit* or some other bar, or whether, if the former, an express promise was proved, (31) or whether the point arose on a motion in arrest of judgment. It is possible, indeed, that *Judge Taylor's* opinion was that a promise might be implied and the action lie on it, as he says that it did not appear from the verdict whether the action was founded on an express or implied promise, and, consequently, he must be supposed to have thought the plaintiff entitled to judgment in either case. But in both positions it is apparent that he was mistaken. For, after a verdict or upon demurrer, every promise laid in the declaration is necessarily taken to be express; and the objection that one could not be implied could only arise upon the evidence on *non assumpsit*, or upon a special verdict, as in *Reade v. Johnson*, that there was no special promise, but a leasing for years at a certain rent. In *Hayes v. Acre*, therefore, the Court was obliged, in the state of the record, to regard the promise as express; and it may be that the other judges rested their opinions on that. *Judge Taylor* was mistaken, likewise, in supposing that *Mason v. Beldam*, which he cited, was an authority that this action was maintainable at common law upon an implied promise for rent; for the promise was, of course, laid in the declaration as expressed, and the defendant demurred, and thereby admitted it

as laid. In such a case the Court said, in *Johnson v. May,* an express promise shall be intended, and not a bare promise in law.

Under such circumstances the Court finds itself wholly unable to sustain this action. It was denied by the common law, and we cannot undertake to give a remedy at common law which is directly against that law. As far as it ever prevailed here—and that, as far as we have experienced, must have been to a very limited extent—it probably proceeded upon some notion that the act of George II. authorized it here. If so, that ground entirely fails at present; because by the act of 1836, Rev. St., ch. 1, sec. 2, all the English statutes not then re-enacted,
(32) though in use here before, were repealed. It is to be regretted that the act of George II. was not enacted here, as it is a beneficial law. But it was not, and the case is, therefore, at common law, and the action does not lie.

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

Cited: Sessoms v. Tayloe, 148 N. C., 373.

THE STATE v. WILLIAMSON HAITHCOCK.

A free person of color is chargeable with the support of a bastard child begotten by him on a white woman.

APPEAL from the Superior Court of Law of ORANGE, at Spring Term, 1850, *Battle, J.,* presiding.

Attorney-General for plaintiff.
No counsel for defendant.

PEARSON, J. The defendant, who is admitted to be a free negro, was charged by a white woman with being the father of her bastard child. His counsel moved to quash the proceedings upon the ground that the bastardy laws did not apply to such a case. His Honor very properly overruled the motion.

We are at a loss to conceive of any reason why the defendant should be exempted from the operation of the bastardy laws merely because he is a free negro.
(33) Free negroes are capable of holding property, they can sue and be sued, and are bound to support their bastard children, whether begotten upon a free white woman or free black woman. They can set up no "exclusive privilege" in this behalf. The counties ought not to be charged with the support

of these bastards, until it is judicially ascertained, by exhausting the legal remedy, that the putative father is unable to do so.

The judgment below must be affirmed. Judgment against the defendant for the costs of this Court and a *procedendo* issued to the Superior Court.

PER CURIAM. Judgment accordingly.

THE STATE v. ALFRED SMITH.

Where on an indictment the defendant pleads a former conviction, it is competent for him to prove, by one who was not a witness on the former trial, what a witness who was examined on behalf of the State on that trial deposed to, though that witness was still alive and within the jurisdiction of the court, in order to show the identity of the cases.

APPEAL from the Superior Court of Law of COLUMBUS, at Fall Term, 1849, *Dick, J.*, presiding.

This was an indictment for assault and battery on one John Penny. The defendant pleaded not guilty and former conviction for the same offense. The State proved that the defendant struck one John Penny with a stick in the county of Columbus, within two years before the finding of the bill. The defendant then offered in evidence the records of the Court of Pleas and Quarter Sessions for Columbus County, from which (34) it appeared that a bill of indictment was found against the defendant at August Term, 1849, charging him with an assault and battery on one John Penny, and at the same term the defendant came into court and submitted and was fined by the court, all of which appears by the records of said court. The defendant alleged that one James C. Pearce was examined as a witness on the part of the State in the Court of Pleas and Quarter Sessions aforesaid, on the submission of the defendant, and the defendant proposed to prove by a witness what James C. Pearce swore in the County Court on said submission, and that what Pearce swore to in the County Court would show that it was the same offense. The defendant admitted that Pearce was then living within the county and the jurisdiction of the court and had not been summoned. The court rejected the evidence. The jury found the defendant guilty. The defendant moved for a new trial, because the court had rejected the evidence aforesaid, which was refused and judgment pronounced on the defendant, from which judgment the defendant prayed for and obtained an appeal to the Supreme Court.

Attorney-General for the State.
D. Reid for defendant.

NASH, J. The defendant is indicted for an assault and battery. He pleaded a former conviction for the same offense. To sustain his plea he gave in evidence the record of an indictment against him in the Court of Pleas and Quarter Sessions of Columbus County for an assault and battery upon the same person who is the prosecutor in this case. The record showed a submission on the part of the defendant and a judgment of the court. To establish the fact that the assault and battery for which he was then tried and punished was the same for
(35) which he is now prosecuted, he called a witness to prove what a man by the name of Pearce, who was a witness in that case, had sworn to, and that it would show the offense to be the same. It was admitted that Pearce was alive and in the county. This evidence was rejected by the court. We are not informed upon what ground it was ruled out. If, therefore, a wrong reason should be suggested, our excuse must be the want of such information. We presume his Honor who tried the cause was led into error by applying to the testimony the general rule, that the best evidence the nature of the case admits is always required. Such is the general rule, and the reason upon which it is founded will show its improper application here. The law does not require the strongest possible of the fact in controversy, but that no evidence shall be admitted which, from the nature of the thing, supposes still greater evidence to be in the parties' power to produce, for the reason that it carries with it a presumption contrary to the intention for which it is produced. For it is a natural conclusion that a man will not rely on secondary evidence, having at his command that which is primary, if the latter will serve his purpose. In this case the evidence excluded was not secondary, but primary—of the same grade as that which could have been given by Pearce, the witness on the original trial. The general rule does not exclude evidence merely because it is not all that might be produced or the most satisfactory. The best application of this rule that I have met with is furnished by a decision of this Court in *Governor v. Roberts*, 9 N. C., 26. The Secretary of State was called as a witness to produce certain papers belonging to the office of the comptroller. The latter was absent on a journey, and before he left deposited the key of his office with the secretary, requesting him to attend to his office while he was absent, and answer any calls. The comptoller had
(36) not been summoned, and the secretary testified that he

attended, as his agent or on his behalf, with the papers. It was held that although the testimony of the comptroller would be more satisfactory than that of the secretary, yet both, being oral, were of the same grade, and therefore the testimony offered was competent. The inquiry here was not whether the testimony of Pearce would be more satisfactory to the jury than that of the witness tendered, but whether that of the latter was of an inferior grade. As in *Roberts' case*, the testimony from either witness was oral and of the same grade, and his Honor erred in rejecting the witness offered. 3 Stark. Ev., 391; *Liebman v. Pool*, 1 Stark., 467.

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

HENRY COOKE v. WILLIAM BEALE.

Where a guardian to an infant, appointed by a county court in this State, removes to another State, taking with him a part of the property of the infant, the court which made the appointment has the right to remove him, without notice, and appoint another in his place.

APPEAL from the Superior Court of Law of HERTFORD, at Spring Term, 1850, *Ellis, J.*, presiding.

W. N. H. Smith for plaintiff.
Bragg for defendant. (37)

NASH, J. The plaintiff had, by the County Court of Hertford, been appointed guardian of some minor children. Subsequently, he removed into Virginia, near the line, and took with him a part of the slaves belonging to his wards, and kept them in his own service and hired out the remainder in this State, and duly made his returns to court. Upon these facts and without any notice to the plaintiff, the County Court of Hertford removed him from his guardianship and appointed the defendant in his place. This was at the November Term, 1848. The order of the removal is in the following terms: "It appearing to the court that Henry Cooke, guardian, etc., hath removed out of the State, and without the order of this court, certain slaves, the property of his said wards, on motion it is ordered by the court that said Henry Cooke be removed from his said guardianship." At the same term the defendant, Beale, was appointed and gave the necessary bonds. An application was subsequently made by Cooke, the plaintiff, to remove Beale, the defendant,

upon the ground that the former had been improperly removed, and to appoint him (Cooke), which was accordingly done. Beale appealed to the Superior Court, where the order of the County Court was affirmed, and the defendant appealed to this Court.

The power of the county courts within this State, in appointing and removing the guardians of minor children within their respective counties, is full and complete, under the act of 1836, ch. 54, secs. 2 and 18. By the latter section a discretionary power is given to remove when, in their opinion, the guardian mismanages the estate of his ward. This power, however, is not without its limits and bounds—it is not an arbitrary one, to be used to the oppression and wrong of the citizen, but to be used for the protection of minors and their estates. This Court has no right to interfere in the exercise of a purely discretionary power by an inferior tribunal, unless brought under re-
(38) view by an appeal. But when it appears from the record that they have committed an error in law and exercised a power not granted to them, the court will interfere and correct the evil. In the act of 1836 there is no express limitation of the power of the County Court, but a limitation necessarily arises out of the nature of the appointment, and the duties to be performed by the court, in seeing that justice is done to the minors. By section 2 the power to appoint is given and also the right "to take cognizance of all matters concerning orphans and their estates." Various regulations are made as to the manner in which guardians shall manage the estates of their wards, renew their bonds, and make their annual settlements. And all these regulations it is the duty of the court to enforce. This obligation implies that the person appointed should be, at the time of his appointment, within the control of the court—that is, within the reach of its process. For by section 7 it is made the duty of the clerk of the court in which the appointment is made to issue *ex officio* a notice to every guardian who neglects to renew his bond as required by law, *in whatsoever county he may reside,"* etc. If the court may appoint an individual a guardian, who is not a resident of the State, how will it be in their power to discharge their duties or see that he executes his? If after making the appointment they leave the State, where is the limit? A man living in Vermont or Minnesota would be as legally eligible as one residing in Virginia, South Carolina or Georgia. From the nature of the trust, then, we conclude that a just construction of the act of 1836 requires that a person appointed to the guardianship of an orphan must be a resident of the State. When Mr. Cooke was appointed he did reside within the State, and it was therefore a proper appoint-

ment. But the same reasons which require a residence to receive, requires a residence to continue, the guardianship. And in removing him the court was performing a duty and obeying the law. The only objection is that no notice (39) was given to him. Was that requisite? We think not. We are of opinion that by the very act of removing, with a view to a permanent residence out of the State, he waived the necessity of a notice and authorized the court to act without it. If in such case a formal notice was necessary, much injury might result to the orphans. The act of 1836 evidently proceeds upon the ground that cases might occur requiring prompt action on the part of the court. By section 18 they are authorized to act upon their own information as well as upon the information of others. And when, as in this case, the fact upon which the conclusion of law is bottomed is not controverted, but admitted, the necessity of a notice is taken away. But Mr. Cooke not only removed himself, but took with him a part of the slaves of his wards. Now, if a part, he might carry the whole, and if he could carry the slaves to Virginia, he could carry them to Ohio or Indiana or anywhere else where slavery is not permitted. It is no answer to say that he has given bond for the security of the property, and that his sureties will have to make good any loss the wards may sustain. So they are, and equally so are they bound, if he does not make his annual returns, or renew his bonds, or in any manner mismanages the estate; yet for all or any of these omissions on his part the court may remove him. But further, it is the duty of the court to see that the property itself is safe, and that it shall not be carried beyond their jurisdiction. The court, then, acted right in removing Mr. Cooke from the guardianship, and, of course, were at liberty to appoint Mr. Beale or any other person who in their opinion was qualified to receive it. The object of the action of the court, under the proceedings we are now considering, is to declare the appointment of Mr. Beale to the guardianship to be void because there was already a regular guardian—in other words, to declare Mr. Cooke still the guardian. We have al- (40) ready said the appointment of Mr. Beale was not void, but legal. Upon the order of the County Court repealing the order appointing the defendant guardian, he appealed, and his Honor before whom it was heard held and so adjudged that the order removing Cooke from the guardianship was not void for want of notice to him, but that he had been removed without sufficient cause. Where a party has right of appeal and exercises it, the appellate court is at liberty and is bound to look to all the circumstances contained in the case; and here, we are of

opinion there was sufficient ground for removing Cooke. It follows that the appointment of Beale was proper, as it is admitted he was a suitable person to be appointed.

There was error in the judgment of the Superior Court, which is therefore reversed and judgment rendered for the defendant Beale.

RUFFIN, C. J. It is unnecessary to consider whether there was any irregularity in the order removing Cooke from the guardianship of the infants, for the want of notice to him or any other reason, inasmuch as such irregularity, if there were any, is immaterial to the case as it now exists. Upon the subsequent motion of Cooke, in the County Court, to rescind the first order, by which he was removed and Beale appointed, both of those persons were before the court, and it was then competent to hear the whole matter upon its merits, and it was so heard. The decision was in favor of the motion, and removed Beale and restored Cooke to the guardianship, notwithstanding he (Cooke) then resided in Virginia. From that decision Beale appealed, as he was entitled to do, by the express provision of the act of 1777; and on hearing the parties on the merits in the Superior Court, although it was not alleged that Beale was not a good guardian and a fit person for the office, his Honor held that Cooke also was a suitable person therefor, and that,
(41) for the quiet and security of the infants, it was expedient to remove Beale and reappoint Cooke as the guardian; and he made the order accordingly, from which Beale again appealed. As the case stands at present, then, the question is simply, which of these two persons the interests of the infants require to be appointed their guardian? Upon that the Court cannot doubt, for, however well qualified for the office one may otherwise be, it is a conclusive objection to his appointment that he is not a citizen of this State, but an inhabitant and citizen of another State. In like manner, his removal from this State, after having been appointed a guardian, raises an equally strong objection to continuing him in the office, and is a good cause for taking it from him and giving it to another. A guardian ought always to be amenable to the process of the court by which he is appointed, in order that proper and prompt inquiry may be made whether he is taking due care of the infants, their education, and estate; and when Cooke changed his domicil from this State to another, the court was bound to remove him for that cause, and for that alone, if there were no other. The orders in the Superior Court must therefore be reversed, and the case remanded, with directions to reverse the order of the County

Court, from which Beale appealed, and to issue a *procedendo* to the County Court to refuse the motion of Cooke and to let the appointment of Beale stand.

PER CURIAM. Ordered accordingly.

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(42)

DEN ON DEMISE OF WILLIAM W. PRICE v. JOHN HUNT ET AL.

On a separate judgment against one partner for a partnership debt, only the interest of that partner in any portion of the partnership property can be sold by execution.

APPEAL from the Superior Court of Law of GUILFORD, at Spring Term, 1850, *Battle, J.*, presiding.

Morehead for plaintiffs.
Iredell for defendant.

NASH, J. The case is as follows: John H. Bennett and Stephen R. Neil were partners in trade, and as such owned the land in dispute. Bennett lived in Guilford in this State, where their business was carried on. Neil lived in Virginia. The firm owed a debt, secured by note executed by both the parties, and an action was brought upon it against Bennett alone, a judgment obtained, and at the execution and sale the defendants became the purchasers. The sheriff conveyed to them the whole tract, and their deed was duly proved and registered. After this, another creditor of the firm sued Neil, the other partner, by attachment, which was levied upon his interest in the same tract of land, obtained his judgment, and at the sale by the sheriff under an execution duly issued the plaintiff became the purchaser and the sheriff made him a conveyance for the land. The action is brought by the plaintiff to recover his share of the land. Upon the case agreed his Honor below was of opinion the plaintiff could not recover, and rendered (43) judgment for the defendant.

In the opinion of his Honor we do not concur. The only question presented is, What interest did the defendants acquire by their purchase? Did they thereby acquire the legal title to the whole tract, or only the interest of the partner Bennett? If the former, then very clearly the judgment below was right, and the plaintiff could not recover. If the latter, then the plaintiff was entitled to his judgment. The land in question was partnership property, held by the partners, Bennett and Neil, not as tenants in common, but as joint tenants. *Baird v.*

Baird, 21 N. C., 538. When a judgment was obtained against one of a firm it was for a long time doubted how the sheriff should proceed: whether he could take the property of the firm or not. It is now settled that the sheriff may seize and sell the *interest* of the debtor against whom the execution is sued. What that interest is or may be, it is, in many cases, impossible to ascertain until a final adjustment of all the partnership concerns. The purchaser at such sale must take such interest as the partner had; he could acquire no more. Story on Partnership, sec. 260, 1, 2, 3. In the case before us the judgment under which the defendants claim the land was against Bennett, and, although the sheriff's deed covers the whole tract, in truth it conveyed to them nothing but the interest Bennett had. The sheriff could seize nothing more, and of course he could sell and convey nothing more. If he could, the purchaser would by the sale have acquired what was not in Bennett, either in law or equity. He had only an undivided interest, and which could only be divided by first freeing the land from the partnership debts. And the purchaser must take it in the same manner the debtor himself had it, and subject to the rights of the other partner, Neil. *Skip v. Harwood*, 1 Atk., 239. Story on Partnership, 261, in note. It makes no difference in this
(44) case that the debt was a partnership debt; the judgment was a separate one against Bennett, to which Neil was no party. *Jackey v. Butler*, 2 Ld. Ray, 871; Collier on Partnership, 474. Nothing but the interest of the judgment debtor being sold, that of the other partner, Neil, was subject to a like sale on a judgment against him; and the purchaser under the execution became a tenant in common of the land with the defendants, subject to the equities existing between them as respectively representing the original partners. With these equities we have now nothing to do. Some stress seems to be laid upon the fact that, at the time the attachment issued against Neil, Bennett, the other partner, was residing in Guilford County. We do not consider this circumstance as affecting the question. Bennett had no further interest in the land in question; and though he might have been again sued by every creditor of the firm, they could have no further redress against the land as to his interest in it. To reach that of Neil it was necessary to sue him: he was in Virginia, but under the attachment he could still be made liable. The only effect of a recovery by the plaintiff in the present action is to admit him into the possession of the land in controversy as a tenant in common with the defendants.

The judgment below must be reversed and judgment be rendered for the plaintiff.

PER CURIAM. Judgment accordingly.

Cited: Latham v. Simmons, 48 N. C., 28; *Ross v. Henderson,* 77 N. C., 173.

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(45)

DEN ON DEMISE OF JOHN BANNER ET AL. V. JOHN CARR.

In an action of ejectment, where the plaintiff declares in a single count upon the *joint and several* demise of different persons, he must be nonsuited.

APPEAL from the Superior Court of Law of STOKES, at Spring Term, 1850, *Battle, J.,* presiding.

Morehead and *Kerr* for plaintiff.
Iredell for defendant.

PEARSON, J. This was an action of ejectment. The declaration has but one count, which alleges that a *joint and several* demise was made on 11 April, 1845, by John Banner, Nathaniel Moody, John Martin and Fleming Priddy, to the plaintiff, for the term of ten years from them next ensuing, etc. Upon the trial it appeared that one of the lessors had no title. Whereupon his Honor intimated the opinion that the plaintiff could not recover, and a nonsuit was submitted to.

Hoyle v. Stowe, 13 N. C., 318, which is cited and approved in *Bronson v. Paynter,* 20 N. C., 527, is in point and fully sustains the opinion of his Honor. It is there held, if one of the lessors in a joint demise has no title, the plaintiff cannot recover, "for there is neither a joint right to convey the land nor a joint right to possess it or to let the possession."

The plaintiff alleges a joint title in his lessors. The (46) jury cannot separate the title and find for the plaintiff against his own allegation. So one who has no title would be let into possession with the other lessors.

The allegation, that the demise was made by the four lessors severally as well as jointly, does not obviate this objection, and makes the matter worse, for the pleading is faulty for uncertainty, which is ground for demurrer. A party must always set out his title, and when he claims a particular estate (one less than a fee simple) he must show when it began, how it is derived, and its limit or quantity of interest. As it is expressed

in the books of pleading, "the *commencement* of every particular estate must be set out." Stephens Pleading, 306; Coke on Littleton, ch. 3, 3b.

This plaintiff derives his title under a lease from four lessors. It is left uncertain whether the lease was made by them jointly or severally. The inference is that it was made jointly, and, at the same time, severally. This, it seems to us, involves an absurdity. At all events, it is too uncertain to be allowed in good pleading.

It is said that the action of ejectment is a creature of the courts, contrived to effect the ends of justice. That is true, but it does not furnish a reason for allowing "this creature" to do violence to the rules of pleading.

PER CURIAM. Judgment affirmed.

Cited: Elliott v. Newbold, 51 N. C., 10.

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(47)

WILLIAM BOWMAN v. PATRICK FOSTER.

1. Where a *certiorari* is returned to court, no proceedings can be had on it until notice of its return has been given to the person against whom it issued.

2. Where a party who is brought in by *certiorari* may, upon motion, on the ground of irregularity, have the proceedings dismissed, but he waives that motion and submits to plead to the action, he has a right to do so.

APPEAL from the Superior Court of Law of GUILFORD, at Spring Term, 1850, *Battle, J.*, presiding.

The defendant gave his bond to one Peebles for $31.34, payable 21 September, 1841, which was indorsed after it fell due to James McNairy, the intestate of the plaintiff. In February, 1846, the plaintiff gave the bond to a constable to collect, and on 14 March, 1846, a justice of the peace gave judgment for the defendant on a warrant on the bond, upon the allegation by the defendant and evidence that it had been paid before the assignment. On 15 October, 1848, the plaintiff obtained a *recordari* upon his affidavit that the witness who gave evidence of the payment was a person of doubtful character, and that the plaintiff believed his testimony to be false, and that the bond was unpaid and still due; and, further, that the constable omitted to give him any information of the judgment, and that he had no knowledge thereof until the spring or summer of 1848.

The proceedings were brought into court in October, 1848, and, without any notice served on the defendant, there was an order entered at the next term that the judgment was set aside and a trial in court awarded; and at the succeed- (48) ing October Term, 1849, the plaintiff, for the want of a plea took a judgment by default final for the debt and interest according to specialty, and thereon issued execution. At Spring Term, 1850, the defendant moved the court to set aside the judgment and execution and allow him to plead. In support of the motion he made an affidavit that no notice of the *recordari* had been given to him, and that, until the sheriff came with the execution, he was entirely ignorant of anything having been done in the matter after the judgment had been given by the magistrate, and also that he paid the debt to Peebles while he held the bond. A rule was accordingly granted, and on service thereof the plaintiff showed cause against it by his affidavit, that he still believed the debt had not been paid, but was due, and, also, that from the length of time the *recordari* pended before entering the judgment, he inferred that the defendant had notice of it in fact. The rule was made absolute, and by leave of the court the plaintiff appealed.

Iredell for plaintiff.
Morehead for defendant.

RUFFIN, C. J. The purposes of justice require that judgments by default should be under the control of the court at all times, and be set aside, when signed irregularly and against the course of the court, when there was no regular service of process or other due notice to the party, and without his appearance. *Bender v. Askew,* 14 N. C., 150. The oath of this person is positive that he had no information of any step taken in the matter for nearly four years after judgment given in his favor; and there is nothing in the record in opposition to that statement. It follows, necessarily, that the judgment could not stand against him. When set aside, the defendant might, indeed, have insisted on the *certiorari* being dismissed, as (49) having been improvidently granted. For it was the plaintiff's own lookout that his agent should serve him faithfully; and, moreover, his delay in making inquiry into the matter until the expiration of two and a half years after the judgment against him constituted such laches as ought to preclude him from this remedy. The defendant, however, did not insist on that, and was content to be admitted to plead, averring the merits to be with him; and to that there can be no just objection.

PER CURIAM. Judgment affirmed.

SAMUEL C. BENJAMIN v. REBECCA TEEL.

In a controversy respecting the probate of a will, any person who is entitled in interest may become an actor. The course is to state on the record such matter as shows on which side the person becomes an actor, so as to show distinctly whether he may in the result be entitled to or liable for the costs.

APPEAL from the Superior Court of Law of MARTIN, at Special Term in February, 1850.

A paper, purporting to be the will of Drury Teel, deceased, was offered for probate by Benjamin, the executor, and its validity contested by the widow of the party deceased. The County Court ordered an issue *devisavit vel non* to be made up, and also a notice to issue to James L. Teel and Mary Teel, the heirs and next of kin of the deceased, to come in and see proceedings. Those persons were infants, and a guardian *ad litem* was appointed for them. The issue was afterwards tried and found against the will, and the executor appealed. In the Superior Court a motion was made on the part of the executor to set aside the issue, upon the ground that the widow
(50) was not a party in interest, and that it ought not to have been made up at her instance. That was opposed on the part of the infants, on whose behalf the guardian moved that they should be admitted to contest the will as parties to the issue. Thereupon, the court denied the motion of the executor and allowed the other; and the executor appealed.

B. F. Moore for plaintiff.
Biggs for defendant.

RUFFIN, C. J. Persons to whom notice to see proceedings is given are bound by them, and are, in the view of the court of probate, parties to the proceedings, as far as there can be said to be parties in such a controversy. It is true, they may not be actors in the cause, and therefore not liable to costs. But, unless they do something to preclude them, they may become active at any time before the sentence is pronounced; for, until that is done, any party in interest is entitled to be heard for or against the script. The usual manner of effecting that with us has not been by a new and distinct allegation for or against the will, but by becoming a party to the issue made up under the direction of the court, according to the statute. For, if such allegation were made, it would not entitle that person to an issue to be tried separately, as that might lead to opposite verdicts on the same matter; but the course is merely to state

on the record such matter as shows on which side the person becomes an actor, so as to show distinctly whether he may in the result be entitled to or liable for the costs. The proceeding being *in rem,* any person may intervene to protect his interest while the thing continues *sub judice.*

PER CURIAM. Orders affirmed with costs.

Cited: Cameron v. Brig "Marcellus," 48 N. C., 85.

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(51)

WILLIAM TOW AND WIFE v. GILBERT ELLIOTT.

Where a person, settling with a guardian, paid him, by mistake, more money than he was entitled to receive: *Held,* that he was entitled to recover the excess from the guardian individually.

APPEAL from the Superior Court of Law of PASQUOTANK, at Spring Term, 1850, *Ellis, J.,* presiding.

This was an action on the case.

It was in evidence on the part of the plaintiff that, some years since, one Thomas Lister, deceased, became the guardian of Margaret, Richard and Elizabeth Lister, infant heirs of John Lister, deceased, and as such received a considerable amount of funds belonging to his said wards. At the death of the said Thomas Lister, this defendant became guardian to said Margaret, Richard and Elizabeth; and the wife of the plaintiff, then the widow of the said Thomas Lister, having duly administered on the estate of the said Thomas Lister, paid over to this defendant, without suit, the amount supposed to be due the said wards, amounting to some $2,000; it was also in evidence from a reference and report made in this case that the said administratrix of Thomas Lister paid to the said defendant more than was justly due his said wards by the sum of $205, on 3 September, 1849. To recover back this sum this suit was brought.

The defendant insisted that the plaintiffs had no right to recover at all, but if they had, they could not recover against him individually in this form of action.

His Honor being of opinion with the plaintiffs, there (52) was a verdict and judgment for $211.15, of which $205 is principal. From which judgment the defendant appealed.

A. Moore for plaintiffs.

Heath for defendant.

NASH, J. The action is brought to recover a sum of money paid to defendant by mistake. One of the most familiar heads in text writers on actions to recover money is that of mistake. In this case it does not seem to be denied by the defendant that the money claimed is justly due to the plaintiffs. It is questioned so feebly as to amount nearly to an admission. He insisted, if they had a right to recover at all, they could not recover against him individually in this form of action. Why not? He had received the money through mistake, and it was still in his hands. He was the only person against whom the action could be brought. His receiving it as guardian could make no difference, as against the plaintiff; it was not the money of his wards, and was in fact held by him for the use of the plaintiffs. We must suspect the claim was resisted and the action brought to furnish the defendant with a satisfactory voucher of a proper disbursement of so much of the apparent funds of his ward. The action is properly brought in *assumpsit*.

PER CURIAM. Judgment accordingly.

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(53)

ROBERT S. BURNEY v. RUFUS GALLOWAY.

An obligation in these words, "On or before the first day of January next, I promise to pay to Robert S. Burney or order $160 for the hire of a negro by the name of Abram, and the use of two full crops of boxes on Moore's Creek. Witness," etc., is not a conditional obligation.

APPEAL from the Superior Court of Law of BRUNSWICK, at Spring Term, 1850, *Settle, J.*, presiding.

The declaration is in debt on a single bill under seal for $160, and *non est factum* pleaded. On the trial the instrument appeared to be in these words: "On or before 1 January next, I promise to pay to Robert S. Burney, or order $160 for the hire of a negro by the name of Abram and the use of two full crops of boxes on Moore's Creek. Witness my hand and seal, this 15 ....., 1848." The defendant thereupon moved for a nonsuit because the bond produced was conditional and only bound the defendant to pay the money, provided the plaintiff let him have the use of the negro and two crops of turpentine boxes, whereas the plaintiff gave no evidence on those points, but declared on the bond as obliging the defendant absolutely to pay the money. But the court refused the motion, and the plaintiff had a verdict and judgment, and the defendant appealed.

No counsel for plaintiff.
Strange for defendant.

RUFFIN, C. J. It is true, the word "for" may make a (54) condition; and it does so when each party is subsequently to do some act, and, upon the sound construction of the instrument, it is apparent that the act on the part of the party suing ought to precede or concur in point of time with that stipulated by the other party. Many cases were cited in the argument for the defendant; but in all of them the contracts were so expressed as to appear to be executory on both sides, and amount to stipulations for mutual acts *in future,* which were, at the least, to be concurrent. Cases of that kind, however, have no application to one like the present. If the consideration mentioned in the bond was past, the obligation of the defendant to pay the money was, of course, intended to be absolute. But if it cannot be collected from the instrument (to which alone we are to look for its meaning in this respect) that the defendant had already had the use of the negro and boxes, still there is nothing to show that he was to have them before the day on which he was to pay the money. Suppose the expression in the bond had been "for value," without adding the word "received"; it is plain it would stand indifferent whether the value had been received before or was to be received after the making of the contract. Therefore, it could not be said that the instrument purported to be conditional. But admitting that it could be construed as providing for value to be received, yet that provision could not be deemed a condition to be performed by the plaintiff before he could have a cause of action, since neither the kind of value nor the period of rendering the benefit is specified. Now, it is not stated in this instrument when the hire of the negro was to begin nor for what period it was to continue. We are told at the bar that the phrase, "crops of boxes," means as many pine trees, prepared for making turpentine, as one hand will attend during a season. But, taking that to be so, it cannot be told what years the defendant was to have the boxes, namely, whether in 1848, or whether a crop for one hand in that year and (55) for another in some other year. The words were probably intended merely to show on what transactions between the parties this money was due, namely, those of hiring a particular negro and the rent of certain turpentine boxes, and not to enter into any particulars of such hiring and renting. The case, therefore, falls within the common rule, upon which stipulations are deemed independent when the one party engages, for

example, to pay money at a certain day, for which the other party is to do other acts, which may or may not be performed before or at that day.

PER CURIAM. Judgment affirmed.

JAMES C. HOLMES v. ALFRED JOHNSON.

1. Where a society exists which has its written rules and by-laws, it is not competent to show by parol testimony that there are other rules and usages independent of those contained in such written rules and by-laws.
2. Where the general character of a party in an action of slander is attacked and several witnesses are introduced for the purpose of sustaining the attack, the act of Assembly requiring only two witnesses to a fact to be taxed in the bill of costs does not apply. It is a case for the exercise of the discretion of the judge presiding at the trial.

APPEAL from the Superior Court of Law of SAMPSON, at Spring Term, 1850, *Settle, J.*, presiding.

The action is for slanderous words spoken, imputing
(56) to the plaintiff the crime of stealing some watch guards and studs from the shop of the defendant in the town of Clinton, and was tried on the pleas of not guilty and justification. The plaintiff called a witness, who stated that he (the witness), the plaintiff and defendant were members of a society called "A Lodge of Odd Fellows," which met in Clinton, and that certain charges were preferred in the lodge against the plaintiff by some member, and the witness and two other members were appointed a committee to investigate the same and make a report to the lodge; that, in the discharge of his duty on the committee, the witness called on the defendant to state what he (the defendant) knew upon the subject of those charges, and the defendant gave him the information, as requested; and that after getting through with that matter, the defendant added that there were other suspicious matters against the plaintiff, and then went on to accuse him of stealing watch guards and studs from the defendant's store. Another witness for the plaintiff deposed that he also was a member of the same lodge and an intimate friend of the defendant, and that on a certain occasion, when the defendant visited the witness while the latter was very sick, they were engaged in a conversation respecting Odd Fellowship and the said lodge, and the defendant stated to the witness that he suspected the plaintiff of taking his studs and watch guards, and also that the plaintiff was suspected by

others of having stolen other articles at different times; and that the witness understood the communication to be made in confidence, though the defendant did not express himself to that effect.

The defendant then gave in evidence a printed pamphlet purporting to be the rules and by-laws of the said lodge, regulating the duties and conduct of the members of the society; and among them was one requiring any member who knew anything against the character or integrity of another, to accuse (57) him to the lodge, and directing that thereupon a committee should be appointed to investigate the matter.

The defendant offered further to prove by a witness that the Order of Odd Fellows is a society for charitable and benevolent purposes, and that by the principles and usages of the order it was the moral duty of every member to keep the lodge pure, to admonish any other member of any danger to his morals or his character or estate; and if any member did, or was suspected of having done, an improper act, to give information thereof to the lodge, and also to communicate the same to the members individually; and that those principles and usages exist, independent of the written and printed rules and by-laws, as a kind of common law of the order treasured up in the bosoms of its members. But the court refused to receive the evidence, and the counsel for the defendant excepted thereto, and, after a verdict and judgment against him, the defendant appealed.

Strange for plaintiff.
W. Winslow for defendant.

RUFFIN, C. J. The exception is restricted to the question of evidence; and that, therefore, is the only point in the case. The Court thinks his Honor's decision on it right. The object of the evidence seems to have been to show that, as a member of the society mentioned, the defendant was bound to give the information he did to the two witnesses, and thence to insist that the communications were privileged. But the evidence was either unnecessary or insufficient to establish such a privilege; and in either case it was not erroneous to exclude it. For if, by the general law of the land applicable to the relation existing between those several persons, the defendant was privileged to accuse the plaintiff to his brother members, he (58) could have the full benefit of the defense, independent of the supposed regulations of the society. If, however, those regulations were material to the question, it seems plain that

they would not have been established by the evidence rejected. The defendant had the full benefit of such as had been adopted by the society. One of them was directly applicable to this subject, and required the members to make known to the society, at its meetings, offenses committed by their fellow-members, for the legitimate purpose of having them inquired into and punished according to the rules. The defendant, however, insisted further, not that there was any other law of the order on the subject, but that there were certain usages and principles, supposed to be treasured up in the bosoms of its several members, that made it a moral duty of the defendant to make those charges on the plaintiff. It seems to the Court that such evidence is altogether too vague and unsatisfactory to authorize the finding from it any regulation of the society. The origin and antiquity of the society are not stated, and we must suppose that it has lately sprung up, and has expressly adopted such by-laws as were decreed necessary for their government, in addition to the duties imposed by the law of the country. It is idle to talk of a common or traditional law applicable to a matter like this and peculiar to this lodge; and it is obvious that the attempt was to get from the witness his opinion of the moral duty of the defendant under the circumstances, instead of stating what the law of the society, as adopted and recorded, required of the defendant as a member of the association. Such evidence could have no legitimate effect on the minds of the jury, but might mislead, and therefore was properly rejected.

(59) Upon the trial the defendant attacked the general character of the plaintiff, and to that point examined nine witnesses. In opposition thereto, and in support of his character, the plaintiff examined about thirty witnesses. After the verdict the defendant moved that in taxing the costs only two of those witnesses should be allowed to the plaintiff. But the presiding judge thought they were necessary or proper to the plaintiff's case under the circumstances, and refused the motion. The Court holds that the act of 1783, which provides that the party cast shall not be obliged to pay for more than two witnesses to prove a single fact, is not to be construed so strictly as not to allow of more than two witnesses in any case, or always to tax the party summoning them with all but two. The general purpose of the statute is to give to the gaining party all such costs as are necessarily or reasonably incurred by him, but not to put it in his power to oppress the other party by wantonly accumulating costs. Commonly, two witnesses to any one fact are sufficient to establish it. But others may become necessary and almost indispensable, in order to counteract

the testimony of witnesses offered on the other side; and in such a case the losing party is not necessarily exonerated from the payment of such additional witnesses, but may be taxed with them. *Hayle v. Cowan,* 2 N. C., 21. That is peculiarly applicable to a case like the present, where the point involved was the general character of the party (which cannot strictly be called a single fact), and it was necessary to counteract many witnesses adduced on the opposite side. Upon such a question much must depend upon the number and respectability of the witnesses and their opportunities of knowing the party; and therefore it is a very proper case for the exercise of a discretion of the judge presiding at the trial. In the present case this Court must take it for granted that his Honor deemed the witnesses useful and proper, and that they were truly called for the purposes of justice and not to oppress the defendant; and under those circumstances the Court cannot interfere with his decision.

PER CURIAM. Judgment affirmed.

Cited: McRae v. Leary, 46 N. C., 94; *Beckwith, ex parte,* 124 N. C., 115.

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(60)

WILLIAM SATTERFIELD v. CHARLES SMITH.

Where, before a hiring commenced, a paper-writing was read purporting to contain the terms of the hiring, and also, before the hiring commenced, the crier in an audible voice announced other terms: *Held,* that the hirer or his agent had a right to make such alteration.

APPEAL from the Superior Court of Law of PERQUIMANS, at Spring Term, 1850, *Ellis, J.,* presiding.

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

PEARSON, J. The action was for a breach of contract for hiring, one of the terms of which was (as the plaintiff alleged) that "the negro should not be employed at a fishery or sent by water."

The plaintiff read in evidence a paper-writing purporting to contain the terms of hiring, one of which was that the negro should not be employed at a fishery or sent by water, and proved by several witnesses that no paper was read aloud by the crier before the hiring commenced.

The defendant called several witnesses, who swore that no such paper was read in their hearing, and that the crier, just as the bidding commenced, said in a loud voice, "The negro can be sent by water or put at a fishery, at the risk of the hirer." He also called several other witnesses, who swore that after the paper was read, and before the hiring commenced, the crier said in a loud voice, "The negro can be sent by water or
(61) put at a fishery at the risk of the hirer." This last evidence was objected to, but was admitted.

The defendant employed the negro at a fishery; but there was no evidence of any damage.

The court charged that if the jury believed that it was one of the terms of the contract of hiring that the negro should not be employed at a fishery, as alleged by the plaintiff, he was entitled to recover nominal damage. But if the person hiring was, by the terms of the contract, allowed to put the negro at a fishery "at his risk," as the negro had been injured, the plaintiff could not recover. He also charged that, notwithstanding the paper had been read aloud, it was competent for the plaintiff or his agent to change the terms, and if this was done before the hiring, the plaintiff could not recover.

The case does not set out upon what exception the plaintiff appealed.

There is no error in the charge, and we are at a loss to see upon what ground the evidence was objected to.

"The paper" which was read before the hiring began was not adopted and agreed on by the parties as preappointed evidence of the terms of hiring, and the rule that a written instrument shall not be contradicted, added to or varied by parol proof has no sort of application. The paper contained a mere proposal of terms, and when it was found that those terms were not accepted, the plaintiff or his agent had a right to vary them as they thought expedient.

PER CURIAM. Judgment affirmed.

Cited: S. v. Credle, 91 N. C., 648.

(62)

SAMUEL TOPPING v. NATHAN G. BLOUNT.

The sole purpose of the act of 1827, relating to indorsers, was to turn the conditional contract between the indorser and the holder of a bond into an unconditional one. It was not intended to charge the indorser, as if he had executed bond as a co-obligor or upon an indorsement without consideration, or to deprive him of the benefit of the statute of limitations.

APPEAL from the Superior Court of Law of BEAUFORT, at Spring Term, 1850, *Bailey, J.*, presiding.

The plaintiff declared in several counts in *assumpsit*, but the only question made in the bill of exceptions arises on a count charging the defendant as indorser of a bond for $652.22, executed by Littlejohn Topping and William Holland on 22 January, 1837, and payable twelve months after date to Blount. The pleas were *non assumpsit* and the statute of limitations.

On the trial the evidence was that about the time the bond fell due the defendant indorsed it in blank and passed it for value to Susan Jones, and that she held it until 20 November, 1845, and received various payments thereon, which reduced the sum then due thereon to $555.66; and that on that day Littlejohn Topping and the plaintiff executed a bond for the said sum of $555.66, payable to Susan Jones, which she accepted in discharge of the former bond, and thereupon directed her agent to deliver the first bond to the said Littlejohn Topping or to the plaintiff, and the agent shortly thereafter delivered it into the hands of the plaintiff; Littlejohn Topping, the principal debtor, failed to make any payment on the second (63) bond, and on 13 August, 1847, the plaintiff discharged the same by giving Mrs. Jones a bond for the sum due, executed by himself and another person as his surety. The plaintiff then filled up Blount's blank indorsement by making it to himself, and brought the present action on 29 September, 1847.

The counsel for the plaintiff thereupon moved the court to instruct the jury that, if they believed the evidence, the plaintiff was a purchaser of the bond sued on, and had a right to fill up the indorsement in his own name, and so was entitled to recover thereon, unless the action was barred by the statute of limitations. And as to the latter point, the counsel insisted that Littlejohn Topping, by giving the bond of 20 November, 1845, in renewal of that sued on, acknowledged the latter as then

constituting a subsisting liability on him, which implied a promise to pay it; and that, by such acknowledgment and promise of the principal, the case was taken out of the statute of limitations in respect to Blount, as indorser and surety. The court instructed the jury that, whether the transaction between the plaintiff and Susan Jones or her agent were a purchase of the bond or no, the defendant was protected by the statute of limitations, and that the acts of Littlejohn Topping mentioned were not sufficient to renew a liability of Blount as indorser. The jury found for the plaintiff on the first issue and for the defendant on the statute of limitations; and the plaintiff moved for a *venire de novo* upon the ground of misdirection, which was refused, and he appealed.

Biggs for plaintiff.
J. W. Bryan and *J. H. Bryan* for defendant.

(64) RUFFIN, C. J. It is difficult to conceive the meaning of the proposition that, from the act of giving a new bond in place of a previous one, a promise is implied by law to pay such prior bond. To whom can the promise be supposed to be made, and to what end is it to be implied, when the debtor actually gave an obligation under seal for the same money? It is somewhat surprising, therefore, that the plaintiff should have had a verdict upon any part of the case. But, without notice of that point, the Court holds the instructions and verdict upon the statute of limitations to be unquestionably correct. The contracts of the obligor and indorser are in their nature several, and no act of the former can change the latter. The act of 1827, indeed, says the indorser shall be liable as surety to the holder; and it is insisted that the alleged liability of the defendant arises under that provision. But it has been for some time settled that the sole purpose of that act was to turn the implied conditional contract, between the indorser and holder, into an unconditional one; and that it was not intended to charge the indorser, as if he had executed the bond as co-obligor, or upon an indorsement without consideration, or to deprive him of the benefit of the statute of limitations by exposing him to stale demands, kept alive, perhaps, by collusion between the obligor and the holder. *Williams v. Irwin,* 20 N. C., 70; *Ingersoll v. Long,* 20 N. C., 436. The act does not change the mode of declaring against the indorser, except in omitting the former requisites of a demand on the obligor and a notice of the dishonor to the indorser. Indeed, the count upon which it is sought to recover from the defendant charges him as

indorser merely—that is, an *assumpsit* upon a several and simple contract; and, consequently, the case is within the express provision of the act of 1715.

PER CURIAM. Judgment affirmed.

Cited: LaDuc v. Butler, 112 N. C., 460; *Barrett v. Reeves,* 125 N. C., 539.

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(65)

WILLIAM W. TERRY v. JOHN P. VEST, ADMINISTRATOR, ETC.

1. An administrator is protected by judgments rendered against him within the nine months allowed him to plead, though in suits after that in which he pleads them.

2. An administrator who establishes his plea of fully administered is entitled, of course, under our statute, to his costs; and the plaintiff, though he take a judgment *quando*, cannot have a judgment against the surety in the administrator's appeal bond, the case having been tried upon appeal.

APPEAL from the Superior Court of Law of FORSYTH, at Spring Term, 1850, *Battle, J.*, presiding.

The defendant administered on the estate of the intestate at December Term, 1848, of the County Court; and on 2 January, 1849, the present warrant was brought in debt on a bond of the intestate for $81.13 and returned before a justice of the peace. The defendant appeared before the magistrate and alleged his want of assets to pay any part of the debt, and prayed that the trial should be postponed to some day after the expiration of nine months from the administration taken. But the magistrate refused the postponement, and gave an immediate and absolute judgment for the debt, interest and costs; and the defendant thereupon appealed to the County Court. Upon the filing of the appeal the defendant moved to quash the judgment on the ground of the magistrate's refusal to postpone the trial. The court refused the motion, but allowed the defendant time until September Term, 1849, to plead in respect of the assets. At that term he accordingly pleaded *plene administravit,* no assets, and prior judgment. After a decision in the (66) County Court, the plaintiff appealed, and on the trial in the Superior Court the defendant offered to prove that he had applied all the assets to the satisfaction of judgments obtained against him prior to September, 1849, in suits brought after January of that year. The plaintiff objected to the evidence, but the court received it, and the jury found that the defendant

had fully administered. Thereupon the plaintiff signed a judgment *quando* for the debt, and he also moved for judgment therefor against the surety for the appeal from the judgment of the magistrate. But the court refused the latter motion, and gave judgment against the plaintiff for the defendant's costs; and thereupon the plaintiff appealed.

Morehead for plaintiff.
Iredell for defendant.

RUFFIN, C. J. The course of the justice of the peace was directly in opposition to the act of 1828, and therefore erroneous. The postponement of the trial of a warrant brought before the expiration of nine months from the administration is not in the discretion of the magistrate, but it is made peremptorily his duty; that is, if required by the administrator, for whose benefit the act was passed. But it is not material now to consider that matter, since the administrator had in the County Court the benefit of the delay in pleading until the end of the nine months, and the question is as to the effect of his plea. As to that point the recent case of *Bryan v. Miller,* 32 N. C., 129, is decisive, as it establishes as the necessary construction of the statute that the administrator is protected by judgments rendered against him within the nine months, though in suits after that in which he pleads them.

(67) As the administrator established his plea of *plene administravit,* he was, of course, entitled under the act of 1777 to his costs. *Welborn v. Gordon,* 5 N. C., 502. That rule is not altered by the statute, which allows a plaintiff, contrary to the common law, to sign judgment *quando* after issue joined on *plene administravit* and found against the plaintiff, as was expressly held in *Battle v. Rorke,* 12 N. C., 228.

It follows necessarily from those positions that the plaintiff could not have judgment against the surety for the appeal, for it is impossible there should be judgment against the surety when in the same record the judgment is for the principal. If the original judgment had been against the intestate and he had appealed and died, and the cause been revived against the administrator, then the surety would have been liable for the debt formed and the costs; for, supposing that the administrator could therein put the question of assets in issue and it were found for him, such finding would not cover the whole obligation of the surety, who undertook for the ability of the debtor to pay the debt, if any should be adjudged. But when the administrator appeals, the very question may be, and generally is,

whether he hath assets; and if that be found for him, it entitles him to judgment that the plaintiff take nothing by his writ; and that covers the entire undertaking of the surety for his principal, the administrator.

It is considered, therefore, that the decisions were right on each point, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Lewis v. Johnston, 67 N. C., 39; *s. c.,* 69 N. C., 395.

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(68)

JOSIAH BRIDGERS AND WIFE v. ISAAC W. HUTCHINS, ADMINISTRATOR, ETC.

1. An advancement to a husband by his father-in-law is an advancement to the wife.

2. The release or canceling of the bonds of a child, with an intention thereby to prefer him in life, is as much an advancement as so much cash.

APPEAL from the Superior Court of Law of WAKE, at Spring Term, 1850. *Manly, J.,* presiding.

The suit is for an account and distribution of the personal estate of Isaac Hutchins, who died intestate in 1844, leaving four children, of whom the *feme* plaintiff is one. After the administrator's answer, it was referred to the master to state the accounts of the administration, and also to inquire whether the intestate made any advancements to his children respectively, and what they were, and upon the basis thereof, if found, to state the share due to the several children, if any.

The report ascertained the surplus in the hands of the administrator, and, after taking into the fund the several advancements made to the children respectively, it found that nothing further was going to the plaintiffs by reason of an advancement made to the husband, Bridgers, as found by the master upon the examination of Bridgers. Besides advancements in slaves and other effects, and cash given, Bridgers stated before the master that some years before 1842, but after his marriage, he borrowed from the intestate the sum of $250 and $200, and at the several times of borrowing gave his notes therefor to the intestate; and that in 1842 the intestate gave him up the two (69) notes to be canceled, saying at the same time that his reason for doing so was that he, the intestate, did not want them

to come against the examinant after his (the intestate's) death, and that he was then old and did not expect to live long.

The plaintiffs objected to so much of the report as found those sums of $200 and $250 to be advancements; and upon argument the exception was overruled and the petition dismissed with costs, and the plaintiffs appealed.

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

RUFFIN, C. J. The decree must be affirmed with costs. A gift to the husband during coverture is undoubtedly an advancement to the wife; and it is quite clear that the release of canceling of the bonds of the child, with the intention thereby to prefer him in life, is as much an advancement as so much cash. *Gilbert v. Wetherell.* 2 Simons and Stuart, 254.

PER CURIAM. Decree affirmed.

Cited: Banks v. Shannonhouse, 61 N. C., 286; *Melvin v. Hubbard,* 82 N. C., 39.

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(70)

THE STATE v. WILLIAM MOORE.

1. Turpentine which has run out of the trees into boxes cut into the tree for the purpose of receiving the liquid is the subject of larceny.

2. But to support an indictment for stealing two barrels of turpentine, it must appear that the turpentine was in barrels when it was stolen, not that it was dipped from the boxes in small quantities, from time to time, and then deposited in barrels.

APPEAL from the Superior Court of Law of BEAUFORT, at Fall Term in July, 1849, *Manly, J.,* presiding.

This is an indictment for petit larceny in stealing two barrels of turpentine, of the goods and chattels of Frederick Grist; and on not guilty pleaded, there was a special verdict to the effect following: Grist owned a piece of land, on which some pine trees were boxed for making turpentine in 1846, and he cultivated them during the months of March and April and a part of May in that year, and he then discontinued the working of them for that season. In August, 1846, the prisoner during two days secretly dipped out of the said boxes, made by Grist, as much turpentine in quantity as two barrels, which had run into the boxes after Grist had discontinued the working in May,

and he, the prisoner, put the same into two barrels which he had provided and kept concealed in the woods, and he afterwards carried away the said two barrels of turpentine secretly, and sold them for his own gain. Thereupon, the jury say that they are ignorant whether the said turpentine was the subject of larceny, and, if it be, whether the said facts sustain the allegation that the prisoner stole two barrels of turpentine; and upon those questions they pray the advice of the (71) court, etc. Upon the verdict judgment was given by the court for the prisoner, and the solicitor for the State appealed.

Attorney-General for the State.
J. H. Bryan for defendant.

RUFFIN, C. J. Upon the first question the Court is of opinion that the turpentine was the subject of larceny. We learn from a former special verdict, which appears in the record, and from various other sources—including our own observation—that the mode of making turpentine is this: an excavation, commonly called a box, is made in the body of the tree near the ground, into which the turpentine runs from the tree above; and, in order to produce a flow of the gum or to promote it more freely, the tree is occasionally scored above the box with a sharp iron instrument, called a round-shave, and the scoring is done in such a manner as to direct the current of the descending sap into the box; and the turpentine is then collected or dipped out of the box from time to time as it becomes full, during the season of gathering, which ordinarily begins in March and ends in October. The scoring often extends up the body of the tree to the height of ten or fifteen feet, and in its descent a part of the turpentine generally adheres to the tree and becomes hard, while that which remains liquid continues its course downwards until it drips in the box, where it remains until collected and put into casks for use or market. Such being the process in this business, it seems clear that turpentine, when in the boxes in a state to be dipped up, is personalty. It no longer forms a part of the tree, but it exists separate from the tree, and has been separated by a process of labor and cultivation. If, like the sap of the sugar maple, its flow were directed into a vessel set on the ground near the tree, no one would (72) doubt its being severed from the realty. Now, this is the same in substance. For the box, though in the tree, is but a more convenient receptacle for the turpentine after it has been extracted or has been made to exude from the pores which contained it, while in the tree, as a part of it. When it ceases to be a part of the tree, it necessarily becomes a chattel.

Upon the other question, however, it is the opinion of the Court that it is a material part of the description of the turpentine that when taken it was in barrels. That would not be so if the term "barrel" imported or could be referred to quantity only; for one may undoubtedly be convicted when the evidence shows a larceny of more or less in measure or weight than is charged in the indictment. But a "barrel" of turpentine, or a "barrel" of flour, or a "hogshead" of tobacco, in agricultural and mercantile parlance, as also in the inspection laws, means *prima facie,* not a certain quantity merely, but, further, a certain state of the article, namely, that it is in a cask. The statute exacts, for example, that every "barrel of turpentine" shall contain thirty-two gallons and be in good and sufficient casks made of staves of certain dimensions. "A barrel of turpentine" is in a degree a term of art in trade and in the law; and when one says he has so many barrels of turpentine, he is universally understood to mean that number of casks of the statute size, etc., containing turpentine, and, consequently, that the casks, as well as the turpentine, are his. "A barrel" of turpentine or flour is, thus, one thing, constituted by both the cask and its contents; and it is known so to be by that description. Upon that point, therefore, the judgment was properly given for the prisoner.

PER CURIAM. Judgment affirmed.

Cited: Branch v. Morrison, 50 N. C., 17; *S. v. Horan,* 61 N. C., 574; *Lewis v. McNatt,* 65 N. C., 65; *S. v. Campbell,* 76 N. C., 262; *S. v. Bragg,* 86 N. C., 690; *S. v. King,* 98 N. C., 650; *S. v. Kiger,* 115 N. C., 750.

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(73)

ETHELDRED J. PEEBLES v. HEZEKIAH LASSITER.

Under the act of 1840, ch. 37, which gives to the landlord, who has leased to a tenant, the rent to be paid in a part of the crop, a certain interest in the crop raised, if the tenant remains in possession until an execution against him is levied on the whole of the crop, although the landlord *may* have a special action on the case against the officer levying, yet he cannot maintain an action of trespass, for he has neither the possession nor the property.

APPEAL from the Superior Court of Law of NORTHAMPTON, at Spring Term, 1850, *Manly, J.,* presiding.

The action is trespass *de bonis asportatis* for taking twenty-eight barrels of corn belonging to the plaintiff, and was tried on

the general issue. The evidence on the part of the plaintiff was that one Wheeler leased a piece of land from the plaintiff for 1848, and agreed to give as rent therefor one-fifth part of all the crops raised on the land that year, or the sum of $25, at the option of the plaintiff; that the plaintiff furnished Wheeler with certain provisions during the year, and it was also agreed between them that they should be returned out of the crop; that Wheeler entered and made crops of sundry articles, and among them a crop of corn, and that, during the autumn, and while Wheeler was gathering the crop of corn and before the provisions had been returned or any part of the rent had been paid to the plaintiff, and before he had elected whether he would take the rent in money or a share of the crops, the defendant, being a constable, seized twenty-eight barrels of corn under executions issued against the goods of Wheeler by a justice (74) of the peace, and sold the same. Upon the foregoing evidence the court was of opinion that the action would not lie, and ordered a nonsuit, and the plaintiff appealed.

B. F. Moore for plaintiff.
Bragg for defendant.

RUFFIN, C. J. The right of the plaintiff is supposed in the argument to arise under the act of 1840, ch. 37, of which the title is "an act to protect the interests of landlords," and by which it is enacted that "when any lessee of land shall agree to pay a certain share of his crops or a specific quantity of grain for the rent of land he shall cultivate under his lease, so much of the crop of the lessee raised on his farm under lease as will be sufficient to satisfy the rent to his landlord for the year shall be exempt from execution and from the lien of all other debts until the end of each respective year." It is said that as the purpose of the act is so plainly declared to be the protection of the interests of landlords, it must receive such a construction as will at all events effect that purpose, and that, as it is necessary to that end that the landlord should have the property in the crops, to the extent of the whole of them, for his satisfaction in the first instance, leaving the surplus to the tenant, the court will so interpret the statute. But such a rule of construction is altogether inadmissible, for, although it be true that the Legislature intended by the act to secure rents to landlords, yet, upon the mere declaration of such intent in the title, the court is not at liberty to apply any and all means that may be necessary or useful to such security, but is restricted to such means as the statute may provide, and to the extent therein prescribed, ad-

vancing the remedy, however, as far as a liberal interpretation of the language will allow. Now, in the present instance, it is impossible to invest the landlord with the whole property
(75) in the crops, since that would be in direct opposition to the express words of the act, which are that "so much" (only) "of the crop as will be sufficient to satisfy the rent for the year shall be exempt from the execution." The whole crop, therefore, cannot belong to the landlord; and it must be admitted, we think, that unless he has the whole, he has not the property in any part—since there is nothing in the act to make him the owner of one part more than another, but he is only the creditor of the lessee for so much rent. In order to secure the payment of the rent the crop is *pro tanto* exempted from execution against the tenant. Still, the property remains in the lessee, and it would seem that, by reason thereof, the lessee might have an action against the sheriff for seizing that part of the crop. Perhaps, also, the landlord may have an action grounded on the statute against the officer or creditor for doing execution on the tenant's crops on the land, without leaving sufficient to pay the rent reserved in kind. Something like that was, probably, thought of by the writer of the act; and it is possible the words might be stretched that far and the remedy given as under an act in England in *pari materia,* namely, St. 8 Anne, ch. 14, for the better security of rents and to prevent frauds by tenants. That statute has, however, several material provisions which are not in ours, and which show that the security of the rent was alone in the purview of the act, and that it was meant the landlord and no other should have the action for taking the goods in execution. The one is, that, before the removal of the goods by the officer, the creditor shall pay the landlord the rent due on the premises at the time, not exceeding that for one year; and the other is, that if the tenant fraudulently remove his goods from the premises, the landlord may, nevertheless, distrain them elsewhere within a fixed period. Upon that act a special action on the case has been
(76) framed for the landlord against the sheriff for taking the goods without paying the year's rent, upon notice that it was due and in arrear. Possibly an action may likewise arise to the landlord upon the act of 1840 for doing execution without leaving his share of the crop. But if so, it must be like a special action on the case on the statute, upon the general principle laid down by Lord Coke, 10 Rep., 75, that when a statute prohibits anything, the party grieved shall have an action upon the statute, although it be not given by the words of the statute. The difficulty is in holding, under the imperfect

provisions of the act of 1840, that the landlord is a person grieved, since it does not charge the officer or the creditor with any duty to him, nor vest in him a property in any part of the crop or lien on it, but leaves the whole at the absolute disposition of the tenant. Whether, however, such an action will lie on this act in any case, or, if so, whether it would lie when the rent is not to be paid exclusively in the specific crops, but in them, or in money, are questions upon which further consideration would be bestowed if the decision of the case turned on them. But it does not, for this is an action of trespass, and is founded on possession in the plaintiff, and here he had neither the property nor the possession, but both were in the lessee at the time of the taking; and therefore the action will not lie.

PER CURIAM. Judgment affirmed.

Cited: Sanderlin v. Shaw, 51 N. C., 228.

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(77)

F. & S. WARING v. DANIEL RICHARDSON.

Where money has been received by an agent, a demand or a misapplication of the money is necessary before an action can be brought, and the statute of limitations only begins to run from the time of such demand.

APPEAL from the Superior Court of Law of PASQUOTANK, at Spring Term, 1850, *Ellis, J.,* presiding.

This was action of *assumpsit,* brought to recover the sum of $61.19, with interest on the same from 15 March, 1842. The plaintiffs proved by their agent that on 15 March, 1842, the defendant received from them a note to collect as their agent; that the note was the property of the plaintiffs and was originally drawn payable to one.

For the purpose of repelling the plea of the statute of limitations and showing the collection of the note by the defendant, the plaintiffs called a witness who swore that, as the attorney of the plaintiffs, he called on the defendant several times within three years before the beginning of this suit, and, in the name of the plaintiffs, demanded payment of the money; that the defendant said he had collected the *money.* This witness also stated that the defendant raised no objection to paying said

money, and never pretended that he had ever paid, previous to that time, until the last time he called upon him, when he pretended that the plaintiffs had collected the amount of this claim from another person, against whom he had brought a suit.
(78) He did not say in this conversation that he had paid the money himself, but that he was a surety with others of the persons sued, and that the said sureties paid the said claim. The witness said that this allegation of payment was made only in the last conversation they had on the subject, and that the said claim had not been collected in the said suit. The court charged the jury that, if they believed the witness, the plaintiffs were entitled to recover; that the words used by the defendant, when taken in connection with the other evidence, was an acknowledgment of an existing debt, from which the law would imply a promise. The jury returned a verdict for the plaintiffs. Defendant moved for a rule for a new trial. Rule granted and discharged. Judgment of the court was rendered, from which defendant prayed an appeal to the Supreme Court, which was granted.

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

NASH, J. It is deemed unnecessary to decide the question upon which the opinion of the judge below was given. From the statements of the case, the point did not arise. The plaintiffs had put into the hands of the defendant for collection a promissory note, and the action is brought for collecting the money and not paying it over. Among other defenses, the defendant relied upon the statute of limitations. The complaint is not for a breach of duty in collecting, not for undertaking and entering upon an agency, for a compensation, and then either failing to perform it, or performing it so negligently that an injury was sustained by the plaintiffs; but for the money secured by the note, which the plaintiffs allege the defendant had received. The plea of the statute of limitations assumes or admits that the money had been received by the defendant, but when it is accompanied by the general issue, as in this
(79) case, it does not exempt the plaintiffs from the obligation to prove it. Accordingly, the plaintiffs did not rely upon this assumption, but gave in evidence the admission of the defendant that he had received it. The admission was made within three years next before the bringing of the action, and when, for the first time, as far as the case discloses, the money was demanded of him. The defendant was a collecting agent of

the plaintiffs to receive the money. His reception, then, was a rightful one; and to give the plaintiffs a right of action for its detention a demand or evidence of the misapplication of the money was necessary (*Potter v. Sturges,* 12 N. C., 79; *White v. Miller,* 20 N. C., 50; *S. v. Sugg,* 25 N. C., 96); and from the time of the demand the statute began to run. Strike out the admission of the defendant and the demand then made, and there was no evidence in the case that the money ever had been received by him or of any demand upon him. And according to that admission, the money might have been received by him the day before. The length of time in which the claim for collection has been in the hands of an agent may, under the circumstances, be evidence both of the collection of the money and its use by him. But the case does not state the length of time the note put into the hands of the defendant had to run, or whether it was then at maturity. We are merely informed that the money had been received by him, and that within three years before the bringing of the action, at which time also the demand was made. The statute never was set in motion, according to the case, until the time mentioned in the statute.

PER CURIAM. Judgment affirmed.

Cited: Carroway v. Cox, 44 N. C., 176; *Comrs. v. Lash,* 89 N. C., 168; *Bryant v. Peebles,* 92 N. C., 177; *Moore v. Garner,* 101 N. C., 378.

(80)

ANDREW J. BARWICK v. JOSHUA BARWICK ET AL.

In an action of trover, except for a mere temporary conversion the plaintiff recovers the value of the property recovered, and, therefore, to entitle him to recover he must show title and a possession, or a present right of possession.

APPEAL from the Superior Court of Law of WAYNE, at Spring Term, 1850, *Bailey, J.,* presiding.

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

PEARSON, J. Benjamin Sutton, by his will, gave a number of slaves to his wife, Sarah Sutton, for her life, and at her death to be divided among his four daughters, one of whom was Winifred, the wife of Joshua Barwick, one of the defendants. Joshua Barwick and his wife sold their interest in said slaves

to the plaintiff, who took four of them into his possession. Afterwards, the said Joshua sold the two slaves sued for to Wood, who, with the assistance of the other defendant, Brown, took them from the possession of the plaintiff, and sent them out of the State; whereupon this action of trover was brought.

The case made up by his Honor states that it was not proven that Sarah Sutton was dead. The plaintiff insisted that he was entitled to recover on two grounds: First, because he had the title; and, second, because he had the possession, and could recover against wrongdoers.

(81) His Honor charged that the plaintiff could not recover on the first ground, because it was not proved that Sarah Sutton was dead; but he charged, on the second ground, that if the plaintiff was in possession of the slaves, and the defendants took them, and sent them out of the country, he was entitled to recover their value, with interest from the time of the conversion, as the defendants were wrongdoers and had shown no title. There was a verdict for the plaintiff, and from the judgment thereon the defendants appealed.

The defendants excepted to the charge of his Honor upon the second ground, and we think the exception well founded.

The bare possession is sufficient to maintain an action of trespass against a wrongdoer, for the gist of that action is an injury to the *possession*, and the measure of damage is not the value of the property, but the injury done to the plaintiff by having his possession disturbed.

In trover, the injury done by the *wrongful taking* is waived, and the plaintiff supposes he has lost the property, and alleges that the defendant found it and wrongfully converted it to his own use. So the gist of the action is not that the defendant, having found the property, took it into his possession, but that, after doing so, he wrongfully converted it to his own use; and the measure of damage is the value of the property.

It is true that when nothing appears but the fact that the defendant took the property out of the possession of the plaintiff and converted it to his own use, trover will lie. For the possession of personal property is *prima facie* evidence of title, and in the absence of any proof to rebut this presumption, the person in possession is taken to be the owner and can recover the full value. But if it appears on the trial that the plaintiff, although in possession, is not in fact the owner, and that the property belongs to a third person, the presumption of

(82) title, inferred from the possession, is rebutted; and it would be manifestly wrong to allow the plaintiff to recover the value of the property. For the real owner may forth-

with bring trover against the defendant and force *him* to pay the value a second time; and the fact that he had paid it in a former suit would be no defense. When trover is brought and the defendant satisfies the judgment, he pays the value of the property, and the title is vested in him by a *judicial* transfer, because he has paid the *price*. Consequently, trover can never be maintained unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant, except when the property is restored, and the conversion was temporary. Accordingly, it is well settled as the law of this State that to maintain trover the plaintiff must show title and a possession, or a present right of possession. *Hostler v. Scull*, 3 N. C., 139; *s. c.*, 1 N. C., 183; *Laspeyre v. McFarland*, 4 N. C., 620; *Andrews v. Shaw*, 15 N. C., 70.

These are cases in the English books and in the reports of some of our sister States to the contrary; but we must be allowed to say that the doctrine of our courts is fully sustained by the reason of the thing, and is most consonant with the peculiar principles of this action. The cases differing from our decision are all based upon a misapprehension of the principle laid down in the leading case, *Armory v. Delamirie*, 1 Strange, 504. In that case the jewel was lost, and was found by the plaintiff, a chimney-sweeper. He had a right to take it into possession and became the owner, by the title of occupancy, except in the event of the true owner becoming known. The former owner of the jewel was not known, and it was properly decided that the finder might maintain trover against the defendant to whom he had handed it for inspection, and who refused to restore it.

But the result of that case would have been very different if the owner had been known. The defendant could then have said to the plaintiff, You have no right to make me (83) pay you the value, when I must forthwith deliver up the property to the owner, or else pay him the value a second time.

The distinction between that case, when the possessor was the only known owner, and the ordinary case of one who himself has the possession wrongfully and sues another wrongdoer for interfering with his possession, the true owner being known and standing by, ready to sue for the property, is as clear as daylight.

In this case, for instance, as the facts appeared on the trial, the plaintiff was in the wrongful possession, which was disturbed by the defendant, and for that injury he had a right to recover in trespass. But Sarah Sutton was known as the true owner, and had a right to demand her property of the defendants, or else to recover its value, and they could not protect

themselves by showing that they had paid the full value to the plaintiff, under the coercion of a judgment and execution. This result would seem, by the *reductio ad absurdum,* to show that the inference from the case of *Armory v. Delamirie,* 1 Strange, 504, that trover can be maintained against a wrongdoer by one not having a naked possession, when the true owner is known, is contrary to good sense. That which is not good sense is not good law.

The judgment must be reversed, and there must be a *venire de novo.*

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

Cited: Craig v. Miller, 34 N. C., 376; *Herring v. Tilghman,* 35 N. C., 393; *O'Neal v. Baker,* 47 N. C., 169; *Barwick v. Wood,* 48 N. C., 310; *Branch v. Morrison,* 50 N. C., 17; *Hooper v. Miller,* 76 N. C., 403; *Boyce v. Williams,* 84 N. C., 277; *Russell v. Hill,* 125 N. C., 473; *Vinson v. Knight,* 137 N. C., 412.

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(84)

RICHARD FELTON v. SAMUEL SIMPSON.

In order to raise the presumption of the grant of an easement, two things are necessary: there must be a thing capable of being granted, and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant.

APPEAL from the Superior Court of Law of PERQUIMANS, at Spring Term, 1850, *Ellis, J.,* presiding.

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

PEARSON, J. This was a case for an injury to land and a crop of corn. The plaintiff has owned and been in the possession of the land ever since 1822. Before that time a dam was constructed on the land of one Welch, which was situated above and adjoined the land of the plaintiff. The effect of the dam was to protect the land of the plaintiff from sudden inundations in heavy falls of rain, by ponding the water until it could be drained off by ditches leading from the pond through the plaintiff's land to a swamp below. The plaintiff had been in the uninterrupted enjoyment of the benefit of this protection of his land from 1822 up to 1848, when the defendant cut through

the dam, and a large body of water, then collected from recent falls of rain, passed through on the plaintiff's land, overflowed his ditches, flooded his land and injured his crop of corn. For this injury to his land and corn the action is brought. The case does not state by whom the dam was constructed, or for what purpose.

The court instructed the jury that if the plaintiff had (85) been in the uninterrupted enjoyment of the benefit of this protection afforded by the dam and the ditches to his land for more than twenty years, he had acquired such a right or easement in the dam as to entitle him to recover. To this the defendant excepts.

The exception is well founded, for the doctrine of the presumption of grants to easements from long possession has no application to this case.

When one continues in the uninterrupted possession of land for thirty years or enjoys the use of a franchise for twenty years, a grant is presumed. So, if one erects a dam and ponds back water upon the land of another, and is allowed to keep it there for twenty years, a grant of the easement or privilege of doing so is presumed; and so in many similar cases. But to make this doctrine applicable, two things are necessary. There must be a thing capable of being granted, and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant; for it is the fact of his being thus exposed to an action and the neglect of the opposite party to bring suit that is seized upon as the ground for presuming a grant in favor of long possession and enjoyment, upon the idea that this adverse state of things would not have been submitted to if there had not been a grant.

Where one erects a dam on his own land, and another, who owns land below, incidentally derives a benefit by availing himself of the protection which the dam enables him, by means of ditches, to give to his land, which is our case, neither of these essentials for presuming a grant has an existence.

There is nothing capable of being granted, for the one has a right to cut ditches and to protect his land, and therefore cannot acquire such right by a grant, for he has it already, (86) and the other cannot grant it, for he has not got it to give.

There is no adverse possession or assertion of right so as to expose the party to an action. The owner of the dam can make no objection—his rights are not interfered with; and the owner of the land below can acquire no new right by simply doing what everybody admits he has a perfect right to do and what nobody has any right to oppose.

We think his Honor erred in holding that the plaintiff had by his long enjoyment acquired an easement or right to have the dam kept up, which is the ground upon which the case was put, in reference to which the damage was found and to which the defendant excepted. We do not feel called upon to decide any other point.

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

Cited: Mebane v. Patrick, 46 N. C., 25; *Ingraham v. Hough, ib.,* 43; *Powell v. Lash,* 64 N. C., 459; *Canal Co. v. Burnham,* 147 N. C., 48.

JOSEPH AREY v. DAVID STEPHENSON.

A promise of a party that he will settle with another will only take a claim out of the statute of limitations when it clearly appears that the promise referred to that particular claim.

APPEAL from the Superior Court of Law of CUMBERLAND, at a Special Term in February, 1850, *Ellis, J.,* presiding.

The action is *assumpsit* for money paid for the defendant, and was brought in October, 1839. Pleas, *non assumpsit*
(87) and statute of limitations. The plaintiff proved that in 1830 he paid to one Murphy the sum of $70 for the defendant; and he further examined one Jennings as a witness, who stated that, shortly after this suit was brought, he was in Mobile, in Alabama (where the defendant then resided), and received a letter from the plaintiff, written from Fayetteville, in this State, which he showed to the defendant, who read it and flew into a passion and said, "I will not settle with you; but I am going to Fayetteville shortly, and will settle with Mr. Arey himself." The witness did not produce the letter, and was unable to state its contents; but he said further, that the defendant and he had other talk at the time, and he thought the Murphy claim was mentioned in their conversation.

The court instructed the jury that the action was barred, unless it was taken out of the statute of limitations by the testimony of Jennings; but that if they believed the words spoken by the defendant to Jennings referred to the claim in suit, they amounted to an acknowledgment of it as a subsisting debt, and the statute would not bar. The jury found for the plaintiff, and the defendant appealed from the judgment.

W. Winslow for plaintiff.

Strange for defendant.

RUFFIN, C. J. The Court would concur in the opinion given to the jury, if the contents of the letter to which the defendant referred sufficiently appeared, so as to enable us to see that the defendant intended to promise to settle this claim. The case would then be similar to that of *Smith v. Leeper,* 32 N. C., 86, in which the promise was to settle an account that had been before stated and was then shown to the defendant. That circumstance defined and limited the language of the party, so as to make it applicable to a certain debt then in the contemplation of the person, and to that only, as in all fair- (88) ness and justice it should be. It was, in terms, to settle the particular debt appearing upon the account before the parties. But it is entirely otherwise in the present case. Nothing appears here, except that a letter from the plaintiff to the witness was shown to the defendant, and the defendant, after reading it, said he would settle with the defendant. Settle what? Why, it could only be the matter mentioned in that letter. What was that? We are uninformed. It is but a bare conjecture that it may have related to this demand; and that is too vague to authorize an inference that the promise was in fact to pay this very debt. It is impossible to understand the language used by the defendant without some colloquium: for, "I will settle with Mr. Arey" is in itself senseless. That is not furnished here, for the want of a knowledge of the subject of the letter. The subsequent part of the testimony of the witness is equally unsatisfactory. He could not remember certainly that "the Murphy claim," as he calls it, was mentioned in the conversation, though he thought it was; but he does not tell us what was understood by that description, nor does he say what was said in relation to it, much less that the defendant agreed to settle that claim. Such loose language is unfit to go to a jury as evidence of a promise to pay a debt for which the party was not before bound. It would virtually take away the protection which the Legislature meant to give against stale demands. The present case seems clearly to fall within the rule laid down in the previous ones of *Peebles v. Mason,* 13 N. C., 367, and *Smallwood v. Smallwood,* 19 N. C., 330.

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

Cited: Moore v. Hyman, 35 N. C., 276.

(89)

DEN ON DEMISE OF BENJAMIN HARRIS v. NANCY Y. DEGRAFFENREID.

1. Under our act of Assembly a man cannot be held to be a purchaser for a valuable consideration who gives for the land not more than one-half or two-thirds of the value.

2. Although one of the debts inserted in a deed of trust to secure several creditors be fraudulent, yet the legal title passes to him, and his sale to a third person is valid.

APPEAL from the Superior Court of Law of CHATHAM, at Spring Term, 1850, *Battle, J.*, presiding.

Joseph J. Rives was seized of a tract of land, containing about 170 acres, and on 6 December, 1847, he conveyed it by a deed of trust to Samuel H. Crutchfield to secure certain sums of money therein mentioned as due from Rives to sundry persons. The deed recited that Rives was indebted to James Perry in the sum of $302.85, due upon three bonds dated 3 December, 1847; also to John McPherson in the sum of $44.13, upon a bond given 28 May, 1847; also to Marsh & Co. in the sum of $38 and interest, on a judgment rendered by a justice of the peace; and to Robert Love in the sum of $16, on a judgment of a justice of the peace; and that he was desirous to secure the payment of those debts. The deed then purports, in consideration of the premises and of the sum of $1 paid to Rives by Crutchfield, to convey the land in full to Crutchfield,

(90) upon trust that if the several debts should not be paid and satisfied on or before 1 January, 1848, the trustee should sell the premises at auction to the highest bidder for ready money, and out of the proceeds pay the debts or such sums as might then be due thereon. The deed was executed by Rives and Crutchfield, and was proved on the 6th and registered on 7 December, 1847.

On 13 December, 1847, Rives sold and conveyed to Harris, the lessor of the plaintiff, 100 acres of land, parcel of the above tract, at the price of $200, which Harris then paid. Evidence was given that the same was worth at the time from $300 to $400.

On 31 January, 1848, Crutchfield, in pursuance of the terms of the deed, exposed the whole tract of land for sale to the highest bidder, and the defendant became the purchaser at the price of $480.50, then paid down, and took a deed from the trustee. Evidence was given that the value thereof was $500 or $600.

The plaintiff alleged that the deed of trust was made with the fraudulent intent to delay and hinder the creditors of Rives, and was therefore void as against the creditors and the lessor of the plaintiff. In support thereof the plaintiff examined the said Rives as a witness; and he deposed that a large portion of the debt to Perry, mentioned in the deed, was not owing by him, and was inserted by an arrangement between him and Perry, with a view to save his land or a part of it for the benefit of his family; that the other debts mentioned in the deed were just, and that Crutchfield, the trustee, was not aware of the fraudulent arrangement between the witness and Perry, and was told by them that everything was fair. The plaintiff gave further evidence that just before the sale by the trustee a person stated to the defendant that the plaintiff had purchased a part of the land, but that he did not think he intended to (91) claim it.

The counsel for the plaintiff thereupon moved the court to instruct the jury that the deed of trust was fraudulent and void, and that if the jury believed the witness, the defendant had, at the time of the purchase from the trustee, such notice of the claim of the lessor of the plaintiff as prevented the defendant from acquiring the title by the sale and deed from the trustee. But the court refused the instruction as prayed for, and told the jury that, supposing the deed of trust to have been executed with the fraudulent intent imputed to it, yet, if the defendant purchased for a fair price and without notice of such fraudulent intent, the title was good; and that there was no evidence that the defendant had notice of the alleged fraudulent intent in the execution of the deed. The jury found for the defendant, and after judgment the plaintiff appealed.

Haughton and *W. H. Haywood* for plaintiff.
No counsel for defendant.

RUFFIN, C. J. There seems to have been a singular confusion of matters, entirely distinct in their nature, in the mode of stating the propositions on the part of the plaintiff at the trial. Although the lessor of the plaintiff was not a creditor and did not claim under a creditor of Rives, but was a purchaser from that person after he had made the deed of trust, yet it was insisted for the plaintiff that the deed of trust was fraudulent and void against the creditors of the maker, and, therefore, was void also as to the lessor of the plaintiff. Now, in the first instance, it does not appear that the deed of trust could have been void as against creditors, since there were no cred-

itors, as far as we see, but those secured in the deed, and, as to them, no fraud can be inferred, as the fund was ample to
(92) pay them all and produced enough for that purpose, even according to the sums set forth in the deed. In the next place, it does not follow that the deed of trust would be void as against Harris, although it might have been fraudulent as to certain creditors of Rives; for, although the same facts which make a deed fraudulent under 13 Eliz., as to creditors, may, generally speaking, render it fraudulent also under 27 Eliz., as against a purchaser, yet it is clear that a deed is not fraudulent as against a purchaser merely because it was so as against creditors. Since our act of 1840, ch. 28, that is so beyond all doubt; for by that act no person can be held to be a purchaser except he purchase for full value, and without notice of the prior conveyance, which he impeaches as fraudulent. The distinction is very material, and its existence probably accounts for the effort on the part of the plaintiff to put his lessor's claim upon the merits of supposed creditors of his vendor and not upon his own merits as a purchaser, since, however this might have been deemed a purchase at a fair price, according to the old law (*Fullenwider v. Roberts*, 20 N. C., 420), it is certain that under our late act one cannot be held to be "a purchaser for the full value who gave not more than one-half or two-thirds of the value. His Honor was, therefore, not only right in not giving the directions prayed on the part of the plaintiff, but might properly have told the jury that the deed of trust was not void as against the lessor of the plaintiff, upon the ground that it was made with an intent to defeat creditors of the maker or purchasers from him, inasmuch as the plaintiff did not bring his lessor within either of those classes of persons; and therefore the deed of trust was good as against him as much as against Rives himself. That consideration alone would have put an end to the title under which the plaintiff claims, and required the verdict to be rendered for the defendant.

(93) But the Court holds that the defendant was entitled to a verdict upon the other ground, that the legal title vested in the trustee, in virtue of the separate trusts in favor of the several real creditors secured in the deed, according to the principle laid down in the recent case of *Brannock v. Brannock*, 32 N. C., 428, there being no imputation of collusion between them or the trustee and the other parties, Rives and Perry. That case shows that, whatever relief Harris might have in another forum, out of the fund applicable to the debt of Perry under the deed, by reason of the fraud and illegality of the trust for that debt, yet the title of the trustee was not thereby avoided at

law. Consequently, the conveyance of the trustee to the defendant must likewise be effectual at law. Of course, the defendant's purchase could not be affected by notice of the claim of Harris, if there had been the most direct and sufficient evidence of notice, inasmuch as the title of Harris was intrinsically defective, being posterior to the deed of trust and not for full value, and consequently notice of it could not impart to it new validity.

PER CURIAM. Judgment affirmed.

Cited: Stone v. Marshall, 52 N. C., 303; *Morris v. Pearson,* 79 N. C., 258, 262; *Savage v. Knight,* 92 N. C., 500; *Abernathy v. R. R.,* 150 N. C., 107.

(94)

HENRY H. SMALL v. HARMAN EASON.

An overseer of a public road has no right, at his discretion, to widen the road. This can only be done by a jury under the direction of the County Court.

APPEAL from the Superior Court of Law of BEAUFORT, at Special Term in January, *Battle, J.,* presiding.

The plaintiff was the overseer of "a public road leading from Singleton's to the town of Washington," in Beaufort County, and this is a warrant by him for the penalty given by section 10 of the Revised Statutes, ch. 104, for neglecting to send a hand to work on the road. On the trial in the Superior Court, on *nil debet* pleaded, the case was this: The defendant carried his hands to the road at the time appointed, and found the plaintiff engaged in cutting and grubbing bushes on each side of the road, so as to widen it from twenty to thirty or thirty-five feet. He then inquired of the plaintiff whether he intended to make the road that width all the way to Washington, and the plaintiff told him he did. Thereupon the defendant stated to the plaintiff that he was willing his hands should remain and work on the road to the width of twenty feet, but that they should not work outside thereof, to the greater width of thirty or thirty-five feet. For that refusal and failure this suit was brought.

The counsel for the defendant insisted that the plaintiff had no right to require the hands to clear the land or do work to a greater width than the road then was, for the pur- (95) pose of widening it to the extent mentioned, and therefore that the defendant did not become liable to the penalty by refusing to work for that purpose. But the court instructed the

jury that the overseer had a discretionary power to make the road of greater width than twenty feet, when he deemed it necessary, and therefore that the plaintiff had the right to widen his road to the dimensions mentioned, and was, consequently, entitled to recover. From a verdict and judgment against him the defendant appealed.

No counsel for plaintiff.
Biggs for defendant.

RUFFIN, C. J. In section 14 of the statute concerning roads it is enacted that "all roads laid off under the provisions of the act shall be deemed public roads, and shall be at least twenty feet wide"—with other provisions, that where the overseer may deem it expedient to make causeways they shall be at least fourteen feet wide, and the earth be taken equally from each side to cover them, and that the overseers shall have all stumps and runners cut and completely cleared for the width of sixteen feet in the center of the highways. The enactment, therefore, is positive that roads must be laid out so as to be twenty feet wide; and from the terms, "at the least," it follows that the width of the road may be more, not less, and that twenty feet is to be the minimum. A provision for roads of greater dimensions than the minimum mentioned is most reasonable, as the great highways of the country and those near large towns ought to be of more spacious dimensions than such as are less used. The question, however, on which the case turns is, by whom and in what manner the width of a road is to be determined.

(96) There seems to be strong and decisive objections to leaving it to the discretion of the overseer. What is the public road ought not to be varying and uncertain, but determinately fixed in some authentic manner. That is requisite, as well in order to ascertain the quantity of land which the public appropriates to its use, and the measure of compensation to the proprietors, as to determine the powers and duties of the overseer and the hands. An overseer, for example, is liable to indictment for suffering any part of his road to be out of repair. But when a road has been laid off by a jury twenty feet wide and opened accordingly, it could not be maintained that, because an overseer should clear ten feet on each side, he thereby legally took the additional land from the owner and converted it into highway and subjected himself and his successors to prosecution for not keeping the addition, as well as the original road itself, in repair. And it would seem clear that the overseer could not compel his hands to work on any place unless he

could be indicted for not clearing or repairing the same place as a part of the public highway. Besides, a discretion to enlarge from time to time involves also a like discretion to diminish the dimensions of the road; and the latter clearly could not be tolerated, since it would put it in the power of the overseers to contract a road, though it lead to a great market town and had been laid off thirty or forty feet wide, as required by the public convenience. It is plain, therefore, that it would not be fit to invest overseers of the roads with a discretion so arbitrary and fluctuating, and one which might practically produce so many mischiefs. Accordingly, upon recurring to the statute on this subject, it is found that it does not vest such a discretion in the overseer, and that its provisions require the track of the road, necessarily including its dimensions, to be judicially established. The first and second sections give power to the County Court to order the laying out of public roads where necessary; and the fourth section enacts that "all roads to (97) be hereafter laid out shall be laid out by a jury of freeholders—which laying out, and such damage as private persons may sustain, shall be done and ascertained by the jury on oath." The terms, "lay out the road" and "lay off the road," import that the jury should not only fix the course of the road, as passing particular points, but also designate it, after the manner of a survey, by its lines—in other words, lay down the whole ground covered by the road, or specify its width. For when it is said that every road shall be laid out by a jury, and shall be so laid out as to be at least twenty feet wide, it is made the duty of the jury, upon their own judgment or under the order of the court, to lay it out of that or such greater width as to the court or jury may seem fit. The inquisition, being returned and sanctioned by the court, concludes the overseer and hands, as it does the rest of the community. It is supposed not to be common for the jury to specify the width of the road, so that it can be seen on the face of the report; and the usual course is to stake or otherwise designate the ground by marks, and refer to them in the report, so as to enable the overseer to identify the intended track of the road and open it accordingly. The appropriation of that line of road, by opening and using it as such, would subsequently sufficiently establish it to be the true line as laid out by the jury, and constitute the public road. But if the inquisition should omit the width it would not follow that it was void; but the road would be established as ordered by the court and reported by the jury, and be deemed of the width of twenty feet along the prescribed line, since it must, by law, be of that width at all events, and there is no other limit in par-

ticular to which it can be carried. The proceedings by which this road was laid out were not given in evidence, and probably were not necessary. The exception states it as a fact that it was a public road. It is taken, therefore, to have been duly
(98) laid off by a jury, and, upon the grounds mentioned, to have been laid off twenty feet wide. Indeed, it is apparent, from the statement of the facts and the form of the prayer for the instructions, that probably for a long time and up to the period of this controversy it had been used and worked on as a road of that width. To that extent the defendant was bound and willing to work in repairing it; but the overseer did not wish that, and insisted on employing him in extending the road from its original width of twenty feet to thirty-five feet. That he had no right to do; and, as the defendant was only bound to work the public road, he incurred no penalty by refusing to work on what was not a part of the road. It may be said that the public convenience may require that a road, though sufficient for public uses when laid off, should be made wider than twenty feet; which is certainly true. But when a necessity of that kind arises, application must be made to the court and a jury ordered to lay it off again, of the requisite dimensions. An overseer ought not to be allowed of his own head to encroach on private right or to diminish his own responsibilities by enlarging or lessening a public highway as legally established.

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

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(99)

HARRY NICHOLS v. RICHARD P. FREEMAN.

1. A vendee, by contract for the sale of a tract of land, can maintain an action upon the bond for title, without having made a payment or tender of the whole of the purchase money, when, by a sale of the property, it is put out of the power of the vendor to make the conveyance at the time the vendee has a right to call for it.

2. And it makes no difference whether the vendor himself has made the conveyance or whether it has been made by a sheriff under process of law.

3. In such a case, the measure of damage is the difference between the real value of the property at the time of the breach and the amount of the purchase money remaining unpaid.

APPEAL from the Superior Court of Law of BERTIE, at Fall Term, 1849, *Manly, J.*, presiding.

Smith and *A. Moore* for plaintiff.
Bragg for defendant.

PEARSON, J. On 1 January, 1841, the plaintiff purchased of one Sutton "the town lot, house and furniture" in the town of Windsor, at the price of $8,000, and to secure the payment thereof executed three notes for $2,666 each, falling due on 1 January, 1842, '43, '44, and drawing interest from date, and on that day was let into possession. At the same time Sutton, with the defendant as his surety, executed to the plaintiff a penal bond in the sum of $10,000. The condition, after reciting the contract, the execution of notes for the purchase money, and that the plaintiff was let into possession, but that the title was to be held by Sutton as a further security for the purchase money, is in these words: "Now, if the said Nichols, or any other person for him, shall well and truly pay the purchase money, and the said Sutton thereafter, upon being requested, shall (100) refuse to execute a good and sufficient deed, with covenants of seizin and warranty, to the said Nichols, his heirs and assigns, for the above-mentioned property, then the obligation to be in full force; otherwise, to be void."

The action was commenced in March, 1848, and is for a breach of this bond. The breach assigned is that on 8 May, 1843, the lot, house and furniture were sold by the sheriff under executions against Sutton issuing upon sundry judgments rendered against him at August Term, 1842, of the County Court of Bertie; by reason of which sale the said Sutton was disabled, and so continued until his death, and his heirs and administrator have ever since been disabled and incapable to convey the property, according to the true intent and meaning of the bond. The declaration has several counts, setting out the breach in different ways.

It was admitted that the sheriff sold the property and made a deed to the purchaser, who evicted the plaintiff in March, 1845. In January and February, 1841, the plaintiff made payments amounting to $6,552.78. Sutton died in December, 1843, intestate and insolvent, leaving several infants his heirs. The value of the property at the time of the sale by the sheriff was $2,500. It was also admitted that the plaintiff had not tendered to pay the balance of the purchase money; and in August, 1841, he conveyed his interest in the lot, house and furniture, in trust, to secure certain of his creditors, whose debts still remain unpaid.

And it was agreed that if his Honor was of opinion that the action could not be maintained, a nonsuit should be entered;

otherwise, judgment to be entered for the penalty of the bond, to be discharged by the payment of $8,060.25, if his Honor should be of the opinion that the proper measure of dam-
(101) age was the amount which had been paid by the plaintiff, less the rent of the property, while the plaintiff was in possession (from 1 January, 1841, to 8 May, 1843, the date of the sheriff's sale); or of the sum of $207.80, with interest from 8 May, 1843, if his Honor was of opinion that the proper measure of damage was the difference between the value of the property at the time of the sheriff's sale and the balance of the purchase money remaining unpaid with interest; or of sixpence, if his Honor was of opinion that the plaintiff was only entitled to nominal damage.

His Honor was of opinion that the action could not be maintained. A nonsuit was entered, and the plaintiff appealed.

Two questions are presented. Can a vendee, without making a tender of the balance of the purchase money, maintain an action upon a bond for title, on the ground that by a sale of the property it is put out of the power of the vendor to make the conveyance at the time the vendee has a right to call for it?

Lovelock v. Franklin, 55 E. C. L., 372; *Bondel v. Parsons,* 10 Each., 359; Coke on Littleton, 221, and the other authorities cited by the plaintiff's counsel, fully support the position for which he contends. In *Lovelock v. Franklin* the defendant had put the plaintiff in possession of the house, at an annual rent, and had agreed to convey the absolute interest to him at any time within seven years on payment by him, at any time during the seven years, of the sum of $1,406. The defendant, during the seven years, sold and conveyed the premises to a third person, and the action was brought before the expiration of the seven years and without a tender of the $1,406. The Court held that the defendant had broken his contract by making the conveyance, and that the action could be maintained without a tender; for, as the defendant had put it out of his power to make the conveyance, a performance on the part of the plain-
(102) tiff was dispensed with, and it would have been a "vain and foolish" thing to make the tender.

In that case the action was brought before the expiration of the seven years; and it was urged that there was no breach, for the defendant might recapacitate himself to make the conveyance by purchasing back the property before the time ran out; but the Court held that there was a breach, for the defendant had incapacitated himself at the very time when he might be called on and should be ready.

In this case, from the terms of the bond, we think that the

plaintiff was at liberty to pay the money at any time and call for a title before his last note became due; for the credit was given for his benefit, and he might waive it and pay sooner and stop interest; and the defendant was to convey upon the payment of the purchase money, for which purpose alone the title was retained. This action was not brought until the last note fell due; and, admitting that the defendant might have recapacitated himself by a repurchase before that time, it is sufficient to say he failed to do so, and was incapacitated at a time when he "might be called on and should be ready."

The defendant's counsel, admitting the general principle, insisted that this case did not come within it, on three grounds: 1. The plaintiff, before the sheriff's sale, had conveyed all of his interest in the property to a trustee, who had a right to call for the title. The answer is: the legal interest of the plaintiff in this bond still continues. Whether he carries on this action for his own use or for the use of another, is beside the case. This Court must act upon legal rights, and has no concern with equities.

2. It does not appear that the plaintiff was able to pay the balance of the purchase money on the day it fell due, and it is to be inferred, from his making an assignment to pay the debts which are still unpaid, that he was not. So he *first* (103) became incapacitated, and has no right to complain that the defendant was *afterwards* equally unfortunate. This objection is fully met in *Lovelock v. Franklin, supra.* The plaintiff was not *bound* to pay until his last note fell due. The defendant was bound to convey sooner, if the money had been tendered; and as he was incapacitated from doing so, a performance on the part of the plaintiff is dispensed with, and the inquiry whether the plaintiff *would have* been able to pay the balance of the money is precluded.

3. The incapacity was not caused by the act of the defendant, but by the act of law. The sheriff's sale was in *"invitum"* on the defendant's part. Several cases were cited, which show that conditions not to assign or underlet leases were not broken by an assignment under the bankrupt and insolvent laws. Those cases are all put upon a strict construction of the terms of the condition; and it is admitted by them that if the terms of the condition are made broad enough to include assignments by force of the laws referred to, such an assignment would be a breach, although made by an act of law and in *"invitum."* In our case the terms are broad enough. The defendant is to convey on payment of the purchase money. It makes no difference,

so far as concerns the plaintiff, whether the inability is caused by a conveyance made by the defendant or the sheriff, to pay his debts.

The second question is as to the measure of damage.

We cannot yield our assent to the position assumed by the plaintiff, that he has a right in this action against one of the obligees for a breach of a bond for title, to recover as damages the amount of the purchase money, which had been paid in the same way as if the plaintiff had repudiated the contract and sued the vendor for money "had and received to his use."

(104) In this action the plaintiff does not repudiate the contract, but seeks to recover compensation in damage for its nonperformance; and the question is, What damage has he suffered? What sum will put him in as good a condition as if the contract had been performed? In that event, he would have got a property which is worth $2,500, but he would have been forced to pay the balance of the purchase money and interest. He has not paid this latter amount, and his damage is the difference between that sum and the value of the property; which, by the case agreed, is $207.80, with interest from 8 May, 1843. This gives the plaintiff his redress at law, by compensation in damages, which he has elected to pursue as his remedy. He had the right to file a bill in equity for a specific performance, and the decree would have been for a conveyance of the property, upon his paying the balance of the purchase money, with interest. He would not have been entitled to a decree for the amount of the purchase money which he had paid; and there is no principle upon which he can recover it in this action upon the bond.

The only difference between his remedy at law and in equity upon the contract is that in the one count he gets the property by paying for it; in the other he gets compensation in damages, which is the difference between the value of the property and the amount of the purchase money remaining unpaid.

Our attention was called to the fact that in the action for a breach of a covenant of quiet enjoyment the measure of damage is the price paid for the land, which is taken, as between the parties, to be the true value; and it was urged that $8,000 should be taken as the value in this case, and not $2,500, which is admitted to be the real value at the time of the breach.

(105) The analogy does not sustain the position for which it was invoked, because the rule of damage in that action is founded on peculiar reasons. The covenant of quiet enjoyment is a substitute for the old *real warranty*, the remedy upon which was by voucher; and if the demandant recovered,

the tenant had judgment against the vouchee for other lands of equal value. This remedy could only be used in real actions, where the *land* was demanded. After the action of ejectment took the place of those actions, the courts, to give effect to the warranty, were obliged to construe it into a covenant of quiet enjoyment, but allowed the new action to retain some of the peculiarities of the remedy for which it was substituted—among others, that of considering the price as the rule of damage in lieu of "other land of equal value." *Williams v. Beeman,* 13 N. C., 483.

There is nothing peculiar in the present action; and the general principle applies, that the plaintiff shall recover compensation for the injury which he has sustained.

The judgment of the court below must be reversed, and judgment be entered for the plaintiff for $10,000, to be discharged by the payment of the sum of $207.80, with interest from 8 May, 1843, according to the case agreed.

PER CURIAM. Judgment accordingly.

Cited: Freeman v. Mebane, 55 N. C., 46; *Buffkin v. Baird,* 73 N. C., 291; *Dunn v. Tillery,* 79 N. C., 500; *Pendleton v. Dalton,* 92 N. C., 191; *Smith v. Ingram,* 130 N. C., 103; *LeRoy v. Jacobosky,* 136 N. C., 458.

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(106)

WILLIAM H. GILLIAM v. WYATT CANADAY.

The owner of land injured by the erection of a mill, who has proceeded by petition, under which the annual damage assessed is as high as $20, and who has taken judgment for and received the damage for the whole five years, cannot maintain an action on the case, brought after the expiration of the five years, without having again ascertained the annual damage by proceeding under a second petition.

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

Gilliam and *Graham* for plaintiff.

H. W. Miller, McRae, T. B. Venable and *W. H. Haywood* for defendant.

PEARSON, J. In 1835 one Taylor filed a petition against the defendant, under the act of 1809, to recover damages for the

injury done to his mill and premises by the ponding back of water by the milldam of the defendant, so as to obstruct the plaintiff's wheel and otherwise injure his premises; and in 1838 a verdict was returned in his favor, assessing the annual damages at the sum of $20, and a judgment was thereupon rendered for the sum of $20, annually for five years, commencing in August, 1834. It was admitted that the defendant had satisfied this judgment, and paid the last installment in August, 1839.

In 1841 Taylor sold his mill and land to the plaintiff, who commenced this action on the case in 1845.

The defendant insisted that the action could not be maintained, as Taylor had received the damages for the five
(107) years, and the plaintiff had not proceeded by petition to ascertain the annual amount of damage done to him.

His Honor decided that the action could not be maintained.

It is clear that the plaintiff, as assignee, "stands in the shoes" of Taylor, and is entitled to his right to sue, so far as it is affected by the statute. "The right runs with the estate," like certain covenants which follow the estate as incidents.

The broad question, then, is presented, Can the owner of land, injured by the erection of a mill, who has proceeded by petition, under which the annual damage assessed is as high as $20, and who has taken judgment for and received the damage for the whole five years, maintain an action on the case, brought after the expiration of the five years, without having again ascertained the annual damage by proceeding under a second petition? We think, by a proper construction of the statute, he cannot.

At common law one whose land was injured to the smallest amount had it in his power to issue a new writ every day, and was entitled to recover at least nominal damages in every one of his actions. This would carry costs, and he could break down his adversary, not by the amount of damages, but by the amount of costs.

The act of 1809 was passed to remedy this evil, in favor of the persons erecting mills, and the *controlling idea* of that statute is to prevent an action on the case from being brought against the owner of a mill unless it be first ascertained, by verdict of a jury, that the annual damage, *during the time for which such action is to be brought*, amounts to $20 at the least.

To effect this purpose the verdict is made binding for five years. If the annual damage is less than $20, the action cannot be brought. But if it is as high as $20, the action is allowed;
and in that event the verdict and judgment thereon are
(108) only binding for the year's damage preceding the filing

of the petition. So that when the action is brought it is for injury done during the four years as to which it has been ascertained that the annual damage is as high as $20.

But suppose instead of taking one year's damage and then bringing his action, the party receives the whole damage and brings his action after the expiration of the five years. He cannot declare for the injury done during the four years, because he has been satisfied for that. He must therefore declare for the injury done afterwards—that is, during a time as to which the verdict is not binding, and during which it is not ascertained whether the annual damage amounts to more or less than $20, which would be a plain violation of the controlling idea of the statute.

The correctness of this construction is confirmed by this additional consideration. When the action is brought the statute contemplates that the plaintiff shall receive the annual damage for one year only. Now, if he receives the damage for the whole five years, he has, by his own act, made it possible for this provision of the statute to take effect, and has no right, against the very words of the statute, to receive the damage for the whole five years, and bring his action also.

As an argument against this construction, it was insisted for the plaintiff that if the proceedings under the petition pended for more than five years, as is not infrequently the case, the action could not be brought without another petition, which might also be protracted for more than five years, and so the action would be wholly defeated. There is more plausibility than force in this argument. For, consistently with this construction, the action can be brought after the expiration of the five years, supposing the proceedings to have pended that long, and the injury sued for is the damage done during the four years as to which the annual damage has been ascer- (109) tained. If the plaintiff is allowed to add the time from the expiration of the four years to the issuing of the writ, as to which the damage has not been ascertained, it is a departure from the principle of the statute, made necessary by the action of the courts. But it is not such an absolute and total departure from it as the plaintiff asks to be allowed to make when he seeks to recover for a time as to no part of which the damage has been ascertained in the manner required by the statute, and the necessity for which is the effect, not of the slow action of the courts, but of his own act in receiving satisfaction for the whole time.

It is a *condition precedent* to the action that the annual damage, during the time for which it is brought, shall be first ascer-

tained to be as high as $20. This action is for damage between 1841 and 1845, and there is no telling whether the annual damage during this time was as much as $20. Many changes have taken place since the rendition of the verdict in 1838, and the fact has not been ascertained in the mode required by the statute. The plaintiff's case is not within its words or its meaning. If he can maintain this action, he can maintain fifty more, and break the defendant down with costs; for there is no provision that a nonsuit shall be entered or that the plaintiff shall not recover costs, if it turns out on trial that the annual damage is less than $20. The protection intended to be given to the owners of mills can only be secured to them by the construction we have adopted.

The judgment of the court below must be reversed, and there must be a *venire de novo*.

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

Cited: McIntire v. R. R., 67 N. C., 279; *Jones v. Comrs.*, 130 N. C., 453.

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(110)

THE STATE ON THE RELATION OF LEMUEL WILLIAMS ET AL. V. WILLIAM BRITTON'S ADMINISTRATOR ET AL.

The next of kin cannot maintain an action on the administration bond, after the death of the administrator, because he failed to take into his possession and distribute certain negroes to which his intestate was entitled. These negroes pass to the administrator *de bonis non*, and are to be by him distributed.

APPEAL from the Superior Court of Law of BERTIE, at Spring Term, 1850, *Ellis, J.*, presiding.

This was an action of debt on a bond executed by William Britton, with the defendants as his sureties, upon his obtaining letters of administration upon the estate of one Hodges Harrel. The breach assigned was that Britton wrongfully delivered the slaves to the widow, instead of making distribution of them among the next of kin of the intestate.

It was in evidence that Hodges Harrel died in January, 1838, and at the ensuing February term of the Court of Pleas and Quarter Sessions of Bertie County letters of administration were committed to William Britton, who gave the bond upon which this suit is brought. It was proved that the wives of Williams and Cox were the children of the intestate, and the other relators were the children of another daughter by the

same mother; and they, with the widow and her children, were the only persons who were entitled to distribution of the estate of Harrel. A negro, Lucy, was bequeathed by John Acre to his daughter, Patience Harrel, wife of the said Hodges Harrel, in 1814, which negro was delivered by the execu- (111) tor of Acre to Hodges Harrel. Lucy had a child by the name of Ann, who is now the mother of five children. These negroes were in the possession of Harrel at his death, and continued among his assets when Britton became his administrator. It was proved that Harrel sometimes threatened to sell these negroes; at other times he spoke of them as belonging to his wife, and expressed a wish to sell them, if his wife would agree to it, as he thought it was hard he should have to raise negroes for other persons. Britton, after he administered upon the estate of Harrel, never took the negroes into his possession, but let them remain in the possession of the widow. At the time of the sale of the perishable part of the estate of Harrel, which took place shortly after his qualification, Britton said he should have nothing to do with the negroes, as they, under the will of John Acre, belonged to the widow for life. Britton died in 1845, having, before his death, settled the estate of Harrel.

His Honor, *Judge Ellis*, intimating the opinion, upon the foregoing statement of facts, that the action could not be maintained, the plaintiffs, in submission thereto, suffered a nonsuit.

Rule for a new trial. Rule discharged. Judgment and appeal.

Bragg for plaintiff.
A. Moore for defendant.

PEARSON, J. The only question presented in this case is, Can the next of kin maintain an action on the administration bond, after the death of the administrator, because he failed to take into his possession and distribute certain negroes to which his intestate was entitled?

His Honor was of opinion that the action could not be (112) maintained, and we fully concur with him.

Taylor v. Brooks, 20 N. C., 273; *Baldwin v. Johnson*, 30 N. C., 381, and *Spruill v. Johnston*, *ib.*, 397, are in point and settle the question.

The name *"administrator de bonis non"* explains itself. That officer is to take charge of all the estate which has not been administered, and is to finish whatever has been left undone by the first administrator. Assets are administered by taking them into possession and paying them over to creditors, or to the next of kin, in the course of distribution. Both acts must con-

cur before the goods can be said to have been administered. In regard to the negroes, which are the subject of controversy in this suit, neither act has been done, and they are, to all intents and purposes, *unadministered.*

PER CURIAM. Judgment affirmed.

Cited: Spencer v. Moore, post, 163; *Ferebee v. Baxter,* 34 N. C., 65; *Davidson v. Potts,* 42 N. C., 274; *Duke v. Ferebee,* 52 N. C., 11; *Strickland v. Murphy, ib.,* 245; *Latta v. Russ,* 53 N. C., 113; *Goodman v. Goodman,* 72 N. C., 509, 10; *Lansdell v. Winstead,* 76 N. C., 369; *Ham v. Kornegay,* 85 N. C., 122.

ANDREW DUKE v. SOLOMON ASBEE.

A person who, on the day of or previous to an election, furnished liquor, either at the request of a candidate or any other person, with a belief that such furnishing of liquor is for the purpose of influencing the electors, cannot recover his account against the person ordering the supplies, because the contract is against good morals and the purity of elections, and because such conduct is prohibited by our statute-law.

APPEAL from the Superior Court of Law of CURRITUCK, at Spring Term, 1850, *Ellis, J.,* presiding.

(113) This was an action of *assumpsit* upon an account.

The plaintiff was introduced as a witness under the book-debt law, and testified that in the summer of 1849 the defendant was a candidate for the office of Superior Court clerk for the county of Currituck, and that the plaintiff retailed spirituous liquors in the said county; that the defendant, during the canvass between himself and the present incumbent, requested of the plaintiff repeatedly to let him have and to furnish his friends, upon public occasions, what liquor and other articles in the said account enumerated, by the small measure or otherwise, they might desire; that, upon the call of Mr. Asbee, previous to the election day, for liquor and other articles for himself and friends in the election, he set out accordingly as he or they may have requested. At other times, when the defendant was not present, according to a previous understanding with the defendant, and upon the call of his friends in the election, he furnished them with liquor, and all of which was drunk on public grounds at public gathering places; and the plaintiff had engagements of the like kind with other candidates during the said election year, and under the said engage-

ments furnished them and their friends with liquor in the like way; that the plaintiff furnished to all persons indiscriminately, who called upon him in the names of the candidates, liquor, etc., under the arrangement aforesaid, both before the election and on the day thereof.

The plaintiff further swore that he did not deal out the liquor, etc., as above stated, with any design of influencing the election, and did not vote for the defendant. The plaintiff here closed his case; and the defendant insisted that the plaintiff was not entitled to recover, because the contract was against good morals and therefore void, upon the ground that treating at elections was prohibited by statute and a penalty annexed.

The defendant then insisted that treating at elections was prohibited by law, a penalty being attached thereto, (114) and requested his Honor to charge the jury, if the defendant's object was to influence votes at the election, and the plaintiff knew it, then the plaintiff could not recover.

The presiding judge instructed the jury that if they believed the testimony, the plaintiff was entitled to recover.

The jury returned a verdict for the plaintiff, upon which judgment was given. Rule for a new trial granted and discharged. Appeal to the Supreme Court prayed and granted.

H. Burgwyn for plaintiff.
Jordan for defendant.

NASH, J. In 1801 the Legislature passed an act to punish the crime of bribery at elections. Rev. St., ch. 52, sec. 23. The preceding section of the act makes it highly penal for any person who is a candidate for a seat in the Legislature to give, either directly or indirectly, any money, gift, gratuity or reward, etc., in order to be elected, and embraces all persons who shall do either of the acts "to procure any other person to be elected." The penalty is a forfeiture of $400. Section 23 forbids *treating* with either meat or liquor, on *any day of election or on any day previous thereto,* with intent to influence the election, under the penalty of $200. Section 22 of the act of 1836 is taken from sec. 11, ch. 16 of an act passed in 1777, and section 23 was originally passed in 1801. The policy of these two acts is the same with that of the British statute passed 7 William III., ch. 4. It is remarkable that the acts of the General Assembly passed in 1760, and the act of 1777, both omit a provision contained in the statute of William, and a most important (115) one for the suppression of the offenses at which they were aimed. The statute of William III., among other acts of bribery,

enumerated the giving of "meat, drink, and entertainments, etc." These are omitted in our acts of 1760 and 1777; but the material words embracing them all are brought forward in the act of 1801. I mention these circumstances to show the anxiety which the Legislature has at different times exhibited to keep pure the elective principle of our government.

The acts of Assembly bear so striking a likeness to the English statute that, although the latter never was in force here, the decisions of the English courts under it are very safe guides to us. The case of *Rebbans v. Crickett,* 1 Bos. and Pul., 264, was very similar to the one now under consideration. The second count was for provisions furnished the voters at the request of the defendant, and it decided the plaintiff could not recover, because the contract was *malum prohibitum,* of a very serious nature in the opinion of the Legislature, who had drawn a very strict line, which was not to be departed from. This doctrine was affirmed in *Lophouse v. Wharton,* 1 Campb., 550, note; nor is it necessary that the person treating should be the agent of the candidate, or act with his knowledge; in either case he (the person treating) is within the provisions of the statute. *Ward v. Nanny,* 3 Car. and P., 399; 14 E. C. L., 369. If a mercer sells ribans, knowing that they are to be distributed among voters, he cannot recover the price. *Richardson v. Webster,* 3 Car. and P., 128; 14 E. C. L., 238; and so, if a candidate pay the expenses of buying out the freedom of voters or pay their traveling expenses, they incur the penalty of the statute. 1 Sel. N. P., 12; *Bayntun v. Cattle,* 1 M. and Rob., 265. Such have been the decisions of the Court under the English statutes, and they are safe guides to us in putting a construction upon our act, if we need any. The language of the act of 1801, Rev. St., ch. 52, sec. 23, is plain and perspicuous: "If any person
(116) shall treat with either meat or drink on the day of election or on any day previous thereto, with intent to influence the election," etc. It is, then, illegal to treat at any election for the purpose set forth in the act, and if so, a contract founded on such act is illegal and void, and cannot be enforced in a court of justice. Whether, therefore, the person who gives the bribe be a candidate or not, or whether he be the agent of one, or whether or not he acts with the knowledge or consent of a candidate, he incurs the penalty of the act, if his object be to influence the election; and any contract made by him, with *any* person, for payment of such treating is null and void. No one, on reading this case, can for a moment doubt the intention with which the treating was done; the testimony comes from the plaintiff. The defendant was a candidate for the clerkship

of the Superior Court of Currituck County, and during the canvass requested the plaintiff to let him have *"and to furnish his friends* on public occasions what liquor and other articles they might want." Can any one hesitate for a moment as to the object of the defendant; and can any doubt exist as to the knowledge of the plaintiff of his object and intention? It is true, the plaintiff swore *he* had no intention, in furnishing the articles contained in his account, to influence the election, as he voted against the defendant, and as he furnished the opposing candidate and his friends in a similar way. If this were a suit against the plaintiff to recover the penalty inflicted by the act, it would become important to inquire into his object and intention in furnishing the liquor and provisions, and whether he could escape this responsibility by showing that, instead of pandering to the passions of the friends of one of the candidates, he had furnished his efforts to corrupt those who were opposed to him. For the present, our inquiry is not whether *he* intended to influence the election, but whether the defendant did not, and whether *he* did not know such to be the fact. (117) The jury were instructed, if they believed the evidence, the plaintiff was entitled to a verdict. In this there was error. They ought to have been instructed that if, from the testimony, they believed it was the intention of the defendant to influence the election by the meat and drink furnished by the plaintiff, and that intention was known to the plaintiff, the latter could not recover.

If in England the purity of the ballot-box is considered so important, how much more sedulously ought it to be guarded here. Upon the virtue and intelligence of the people our institutions rest; nor can they be endangered until these principles are lost sight of. The Legislature has done its part, and if its enactments are enforced by those to whom the duty belongs, much may yet be done to give them stability and vigor. And among the most corrupting practices of candidates for office is the one we are considering in this case; it is bribery of the most vicious and destructive tendency, and deserves to find no favor, either in courts of justice or from the people themselves. Whenever the offense is known to exist, the law ought to be rigidly enforced.

For the error in the charge pointed out, the judgment ought to be reversed and a *venire de novo* awarded.

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

Cited: Burbage v. Windley, 108 N. C., 363.

(118)

JOHN CRAWFORD'S ADMINISTRATOR v. STEPHEN GLASS'S EXECUTORS.

Where there is an action on a bond against two obligors, and a nonsuit is entered as to one, this is no *retraxit* as to him.

APPEAL from the Superior Court of Law of ALAMANCE, at Spring Term, 1850, *Battle, J.*, presiding.

This was an action of *assumpsit* brought to recover money paid by the plaintiff as surety for the defendants' testator.

On the part of the plaintiff it was proved that his intestate executed a bond with the defendant's testator to one Morphis, for $100. He then produced the record of a recovery against them in Chatham Superior Court of Law, in a suit on the said bond, and proved that he had paid and satisfied in full the judgment and costs. He then introduced a witness who testified that while the suit was pending against the plaintiff he (the witness) met the defendant's testator, who informed him that he had been to Chatham court to attend to the said suit; that the plaintiff's intestate was his surety, and that his estate should lose nothing by it.

The defendants relied on a former judgment in favor of their testator in a suit brought against him upon the bond in question, and that the fact that he had paid it before the suit was instituted against his surety. They produced the record of the suit, in which it appeared that it was commenced against both the obligors in the bond, but a *nol. pros.* entered as to the present plaintiff's intestate; and, upon the trial upon the issues joined with the present defendant's testator, he had a verdict and judgment in his favor. The defendants then introduced a

(119) witness who proved the payment of the bond by their testator before the institution of any suit on the bond. This witness also proved that when the bond was paid, the holder did not have it with him, but promised to deliver it up to the maker to be canceled, in a short time. This he failed to do, but afterward, and long after the bond was due, indorsed it to the person who brought the suits above mentioned upon it. The defendants' testator died before the institution of the suit against the present plaintiff.

The plaintiff contended that upon showing that his intestate was the surety of the defendants' testator, and that the money was received from him in a suit on the bond which he had executed as surety, without any collusion on his part, he was entitled to recover what he had thus paid; but, at all events, he was

entitled to recover if the defendants' testator undertook the management of the suit against the present plaintiff, and managed it so negligently and unskillfully that a recovery was had against him. The defendants contended that their testator was entirely discharged from any responsibility to his surety, by paying the debt, and showing that in the suit on the bond he had a verdict and judgment in his favor; and that there was nothing in the plaintiff's testimony to waive that responsibility. They also contended that the entry of *nol. pros.* as to the plaintiff's intestate in the first suit on the bond was equivalent to a *retraxit,* and that the plaintiff in that suit was thereby relieved from any further action against him.

The court instructed the jury that the payment of the bond by the defendants' testator, and the verdict and judgment in his favor in a suit against him upon the bond, was a complete defense against the claim of the plaintiff, though a recovery was afterwards had against him as surety of the said testator; but that if the jury believed that the testator had (120) undertaken the defense of the suit against his surety, and conducted it so negligently and unskillfully that a recovery was had against the surety, then he was responsible for the money so recovered of and paid by his surety, and that his death before the termination of such suit made no difference. The court was also of opinion that the *nol. pros.* in the first suit on the bond as to the plaintiff's intestate made no difference.

The plaintiff had a verdict. The defendants moved for a new trial for misdirection to the jury. The motion was overruled. Judgment was given upon the verdict, and the defendants appealed.

Norwood for plaintiff.
Graham for defendant.

NASH, J. The only points presented by the case for our review are the opinions expressed by his Honor below, as to the character and effect of the nonsuit entered as to the intestate Crawford in the original suit on the note against Glass and himself, and the portion of the charge relating to the management of the suit in Chatham against Crawford. We concur with his Honor as to the first; the entering the nonsuit, as set forth, was no *retraxit.* Tidd Pr., 175. 1 Strange, 439. As to the other point, we do not agree with him. The charge is, "that if the jury believed that the testator, Glass, had undertaken the defense of the suit against his surety, and conducted it so negligently and unskillfully that a recovery was had against the

surety, then he would be answerable for the money so recovered of and paid by his surety, and that his death before the termination of the suit made no difference." There was no evidence of an agency to go to the jury. The declaration of Glass, as stated in the case, was that he had been to Chatham to (121) attend to the suit against Crawford. Every witness who goes to court to give his testimony in a case goes to attend on that suit; and his compensation is, by the law, designated to be for his attendance at court. But if there was evidence to show that Glass had undertaken the defense of the suit, there was none to show any negligence in the management of it by him; and, surely, none which took place after his death could affect him. When it was his declaration was made, at what stage of the case, whether at the return term or a subsequent one, we are not informed. He died before the termination of the suit. If he had lived until the trial, no doubt the evidence of his payment of the debt for which Crawford was his surety would have been before the jury. This is satisfactorily shown by his declaration that Crawford was his surety and his estate should not suffer.

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

DEN ON DEMISE OF JOSEPHUS TRIPP v. JAMES POTTER.

On a *scire facias* against heirs to subject the lands of their ancestor, it is too late for them, after they have appeared and pleaded to the *scire facias*, to move to dismiss the proceedings because no declaration has been served on them, although some of the heirs may have been infants.

APPEAL from the Superior Court of Law of BEAUFORT, at Special Term in January, 1850, *Battle, J.*, presiding.

(122) *Donnell* for plaintiff.
J. H. Bryan and *J. W. Bryan* for defendant.

NASH, J. This action was originally brought against James Potter, and upon his death, during its pendency, the *scire facias* issued within the time prescribed by the act of 1799, Rev. St., ch. 2, secs. 7, 8, 9. Some of the heirs were of age, others were infants. At the return term of the *sci. fa.* the heirs all appeared—the infants by their guardians, we presume—and en-

tered into the common rule and pleaded not guilty. After the suit had been pending for several terms a motion was made by the defendants that "the court should make an order that the suit had abated, because no declaration had been served upon them." This motion was refused by the court. By the act of 1799 it is directed "that after the death of a defendant the action of ejectment may be revived by *serving* on the heirs at law, within two terms after his decease, a *copy of the declaration,* together with a notice to the heirs to appear and defend the suit, and, after such service, the suit shall stand revived." To complete the service in such a case, there is no doubt a copy of the declaration must accompany the notice. This was not done, and there was no obligation upon the heirs to appear. But they did appear, and made themselves parties defendant by entering into the common rule. If they had declined to appear, the court, upon the fact being brought to their notice, would have made an order that a copy of the declaration should be served upon them, or have dismissed the *sci. fa.* and abated the suit; or if the cause had been proceeded in, without their appearance, and judgment entered against them, it would have been erroneous, not affecting their rights. *Love v. Scott,* 26 N. C., 79. The defendants came too late; the time was passed for them to make their motion; their appearance cured the defect complained of. There is a proper time and mode for taking advantage of errors in proceedings. If there (123) has been no process, or if it be defective in point or form, or in its direction, service or nature, the defendant may move to set aside the proceedings for irregularity. But he cannot, after he has appeared, take advantage of any such error. His application must be made as early as possible, or, as it is commonly said, *in the first instance.* He cannot, when he has overlooked it, or taken subsequent steps in the cause, turn back and object to it. 1 East, 77; 3 Term, 7; 1 Tidd Pr., 161, 162. For the reasons assigned, we are of opinion that no error was committed. The case of Scott only proves that, in an ejectment, when the defendant dies a *sci. fa.* and a copy of the declaration must be served on the heirs within two terms after the death of the defendant, or the suit will stand dismissed. It is not sufficient to apply for the process within two terms. If the proceeding attempted in this case could succeed, it would be in the power of an heir to come into court, cause himself to be made defendant without any process against him, enter into the common rule and lie by until after two terms have passed, and then throw the case out of court for the want of a declaration being served as the act directs. This would be a surprise upon

the plaintiff and depriving him of a privilege secured to him by the law—that of reviving his suit against the heirs within two terms.

PER CURIAM. Judgment below affirmed.

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(124)

EDWARD STANLY AND WIFE v. JOAB WATSON.

An appeal will not lie from the decision of the County Court upon a petition for draining the petitioner's lands through those of others.

APPEAL from the Superior Court of Law of BEAUFORT, at Spring Term, 1850, *Bailey, J.*, presiding.

This is a petition in the County Court against Murray, Watson and three others, for leave to drain flat lands belonging to the plaintiffs, by means of a canal through the lands of the defendants to a certain creek, according to the statute. Murray answered that he had never prevented the plaintiffs from draining through his land, but, on the contrary, upon being informed of their desire to drain, that he had proposed to unite with them in cutting a canal through his land in such a way as to enable both of them to drain into it; and that, without giving him any answer thereto or making any other proposal, the plaintiffs filed the petition. Watson put in a similar answer. The other defendants made no answer or opposition to the prayer. The County Court appointed twelve freeholders to go on the premises and examine whether the canal was necessary, and, if it was, to direct how it should be cut, etc., as prayed for and directed by the statute; and from the order the parties, Watson and Murray, appealed. In the Superior Court it was ordered that the petitioners should have the drain as prayed for, but the same defendants were allowed an appeal therefrom to this Court.

(125) *Donnell* for plaintiffs.
Shaw for defendants.

RUFFIN, C. J. There seems to be nothing in the objection raised in the answers, for, at most, it ought only to affect the costs, and they are payable by the petitioners at all events under the statute. Indeed, an agreement between the petitioners and two of the defendants, as to direction and size of the canal through their respective tracts of land, would not be material

in respect to the proprietors of the other tracts, and the petition would, therefore, be unavoidable. The statements in the petition are, probably, too vague in respect to the *termini* of the proposed canal, and the ownership and description of the parcel or parcels of land through which the petitioners desire to drain; and, perhaps, it would be difficult to support a title by means of an inquisition taken under it, without giving it more precision by an amendment. But the Court does not consider that point, since, whether the petition be sufficient or not, the decision of the County Court is not subject to review upon appeal, and the Superior Court has no jurisdiction to entertain the case upon its merits in point of fact. *Collins v. Haughton,* 26 N. C., 420, establishes that the inquisition must be exclusively under the order of the County Court, and that no appeal lies in a case of this sort under the act. Rev. St., ch. 40. His Honor ought not, therefore, to have entertained the appeal, but have dismissed it, as having been improvidently allowed. Instead of doing so, however, the court proceeded to determine the merits *de novo* upon the matters of fact and law. In doing so there was error, according to the case cited, and, as we think, the proper construction of the act. The opinion of the Court, therefore, is that the order of the Superior Court ought to be (126) reversed. This will be certified to that court, to the end that the appeal be there dismissed and a *procedendo* awarded to the County Court.

PER CURIAM. Ordered accordingly.

Cited: Skinner v. Nixon, 52 N. C., 344; *Porter v. Armstrong,* 134 N. C., 451.

WILLIAM W. GRIFFIN v. ISAIAH SIMPSON.

Money belonging to an intestate, used by his widow after his death, must be accounted for by her to the administrator.

APPEAL from the Superior Court of Law of PASQUOTANK, at Spring Term, 1850, *Ellis, J.,* presiding.

Burgwyn for plaintiff.
Heath for defendant.

NASH, J. The action is in *assumpsit* to recover a sum of money left by the plaintiff's intestate at the time of his death, and which, it is alleged, came to the hands of the female de-

fendant, and which was used by her. The defense was that the money, if used by her, was used in burying the intestate and supporting the family, and that not more was left by him than was necessary for those purposes. His Honor instructed the jury that the defendant, Mrs. Simpson, as the widow of her deceased husband, had a right to use as much of the money on hand as was necessary to pay the funeral expenses, and
(127) also as much as was absolutely necessary for the support and maintenance of the family, until her year's provision was assigned her. The case states that, at the time James Brothers, the intestate, died, he left an ample store of necessary provisions.

We do not concur with his Honor in the view he took of the law in this case. The privilege of a widow, upon the death of her husband, intestate, to interfere with the personal property left by him is clearly pointed out by sec. 17, ch. 121, Revised Statutes. By that section it is provided that "she may take into her possession and charge the whole of the personal estate, and to use so much of the stock, crop and provisions, then on hand, as may be absolutely necessary for the support of herself and family, until administration is granted, when her right to the possession of said estate shall cease." It is by virtue of this statute alone that a widow is, in this State, authorized to interfere with the personal property of her deceased husband. It is conceived in a spirit of kindness to her and the family, and frees her from the risk of becoming an executor of her own wrong, which any intermeddling with it would otherwise have made her. By the charter of Henry I., and by Magna Charta, she was entitled to her quarantine, which is the right to remain in the capital mansion house of her husband for forty days, within which time her dower was to be assigned her. Of the personal property no mention is made, nor until the act above recited, originally passed in 1796, was she, in this State, authorized to intermeddle with the personalty. It all belonged to the administrator, when appointed, and his letters related back to the death of the intestate. Until such appointment, any person, as well the widow as others, who intermeddled with the assets, except to take care of them, made himself an executor of his own wrong. The act of 1796 made the possession of the widow a rightful one, and invested her with
(128) the power to use a certain portion of the stock, crop, and provisions on hand, for a certain and specified purpose. This right existed until administration granted, and it is made her duty to take out letters at the next term of the County Court succeeding the death. But the act nowhere authorizes

the widow to use the money which is left; as to it she stands as any other person, and if she does use it for any purpose, she is using money that does not belong to her, and must account for it to the administrator. His Honor charged that she had a right to use as much of this money as was necessary to defray the funeral expenses and to purchase such provisions as were absolutely necessary for the support of herself and family until her year's provisions were assigned her. The latter branch was uncalled for. From the case it appears that at the death of Mr. Brothers, the intestate, he left his family amply provided with everything necessary to their comfort. It was not necessary, therefore, for the widow to purchase anything. But the charge was wrong in principle. If there had been a deficiency of crop, stock, and provisions on hand, and the widow had used the money of the estate, she would have done what the *law* did not allow. So, also, as to the funeral expenses. The speedy interment of the body was demanded alike by a decent regard to the opinion of the community, the rights of humanity, and the comfort of the family. And upon whom does that duty more appropriately devolve than upon the surviving head of the family? But it is a moral and not a legal duty—one of imperfect obligation. Imperfect, so far that the law cannot compel the surviving wife to perform it—and yet so strong that its neglect would be punished by the universal execration of the community. While, therefore, no voice could be raised to condemn the act of a widow who uses so much of the money of the estate as may be necessary to deposit in its resting place the body of her husband, the law, with a stern adherence to the rights of others, disavows the right to do so. She (129) had no authority to make use of the money of the estate. In doing so she became responsible to the administrator, when appointed, and the most she could claim would be to be considered as an executor in her own wrong, in which capacity her disbursements in discharge of the liabilities of the estate would be allowed her. For, although funeral expenses are not strictly a debt due by the estate, it is a charge upon it, and to be paid as *"opus pium et caritatis,"* before any debt or duty whatever. 3 Coke Institutes, 22; Toller, 191. The instructions given to the jury on both points were erroneous. Mrs. Simpson, as the widow of the intestate, her former husband, had no legal right to use the money belonging to the estate for either of the purposes designated.

The judgment must be reversed, and a *venire de novo* ordered.

RUFFIN, C. J. The act of 1796 entitles the widow to use as much of the crop, stock, and provisions left by her intestate

husband as may be necessary for the support of herself and the family until the administration granted. But neither that act nor any other authority confers any power on her, more than on any other person, to use money left by the intestate for any purpose whatever. Therefore, she must account to the administrator for whatever comes to her hands, like every other person would. If the widow had defrayed the expenses of the funeral, she might have been allowed them, as far as they were proper, in reference to the estate, by way of abatement in the amount recovered. But there was no evidence that the widow conducted the funeral or paid any part of the expenses of it; and she was bound, therefore, to pay the plaintiff all the
(130) money she took, and the instructions were erroneous, and the verdict wrong as to the whole sum.

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

WILLIAM R. STREET v. JOHN A. MEADOWS.

It is not competent to introduce as a witness a member of a firm, to prove that his individual board or any other individual debts were to be paid by the firm.

APPEAL from the Superior Court of Law of CRAVEN, at Spring Term, 1850, *Bailey, J.*, presiding.

W. H. Haywood for plaintiff.
J. H. Bryan and *J. W. Bryan* for defendant.

PEARSON, J. This was an action for board furnished to one Clark. To make out his case the plaintiff called said Clark as a witness. The defendant objected, but his testimony was admitted. He swore that a copartnership was entered into by the defendant and himself to carry on the tin business in the town of New Bern; that he applied to the plaintiff to furnish him with board, and agreed to pay for it in the name of the firm; that board was furnished accordingly, and was charged to the firm by the plaintiff.

(131) He swore further, that his reason for contracting in the name of the firm (and he so stated to the plaintiff) was because it was one of the articles of the copartnership that his board should be paid for by the firm; that it was not set out in the written articles executed by the defendant and himself,

but it was expressly agreed upon when the copartnership was formed, and he insisted that it should be inserted, but, upon the defendant's saying "their word was as good as their bond," he consented to execute the articles without having it inserted. Clark was the only witness.

The defendant excepts because of the reception of this testimony. We think the exception is well founded. It is an abuse of power for one member to attempt to bind the firm for the payment of his private debts, whether it be an antecedent debt or one about to be contracted, for his board, or clothes, or any other personal expenditure. The mere fact that he asserts at the time that he is allowed by the firm to do so can make no difference, for the act of doing it amounted to such an assertion in every case. *Cotton v. Evans,* 21 N. C., 284; *Norment v. Johnson,* 32 N. C., 89.

In order to bind the firm, it was necessary for the plaintiff to prove that Clark had the authority of his partners to bind the firm for his private debt, or that they afterwards acquiesced in it.

No acquiescence is alleged, nor is it alleged that Clark had this authority, unless it was given to him by the original agreement creating the firm. So the only question is, Was Clark a competent witness to prove that the original agreement gave him the authority? We hold he was not. From the existence of a firm the law implies that each of the members has certain powers, and if the firm seeks to put any restriction upon these powers, the fact that such restriction is contained in the articles of copartnership will not bind a third person, unless it is also proven that he had express notice of it. (132)

The question here is precisely the reverse. A third person seeks to add to these powers the authority of a member to bind the firm for his private debts—and this, not by the written articles of copartnership, nor by the testimony of a third person, but by the oath of the debtor.

If this was admissible, the firm would be entirely at the mercy of each of its members; for each might pledge the firm for his private debts, and his oath would suffice to fix the liability. Such a position is inconsistent with the very existence of all copartnerships. The bare statement of it shows that it cannot be law. *Willis v. Hill,* 19 N. C., 231.

It is said the debtor in such cases stands indifferent; for, if the plaintiff fails, the witness remains liable; if he succeed, then, the defendants, after paying the debt, can recover the whole from the witness, unless the authority existed; and the record of the first suit could not be used in his favor. So, it is

insisted, he has no interest in the result of the suit. The substance of it is that a witness may, by his own oath, shift his debt upon the defendants, because the latter in an action for "money paid" can recover the whole back from the witness. This reason is very unsatisfactory, if we suppose such an action could be maintained; for it puts every one in the power of any debtor who will take a false oath. But in this case the witness and the defendant are partners; and if, by the oath of the witness, his private debt is fixed upon the firm, the firm cannot maintain an action at law for "money paid," against him, to recover it back. The only relief of the firm would be in equity, and it is well settled that a court of law can only regard legal rights and liabilities, and must not act upon the supposition that there is another forum before which more complete justice can be obtained.

(133) The plaintiff's counsel relied upon *Cummins v. Coffin,* 29 N. C., 196, and *Washing v. Wright,* 30 N. C., 1.

In the former case it is held that when the fact to be proven is one that may be established by the *admission* of a partner, his statement upon oath is admissible; for the oath does not weaken the admission. The deposition offered by the plaintiff was treated as a mere *statement* upon oath; for the deposition of the same witness, offered by the defendant, was rejected; whereas, if the plaintiff had been permitted to use the deposition in the strict sense of its being the testimony of a witness called by him, the defendant would surely have been at liberty to continue the examination. But it is expressly put upon the footing of a mere written statement, on oath, of a fact which it was competent to establish by proof of a simple admission. So that case has no bearing.

It is held in *Washing v. Wright,* which is based upon *Blackett v. Weir,* 11 Eng. C. L., 257, that a member of a firm is competent to prove that the defendant is also a partner and liable for the debt. These cases proceed upon the reasoning insisted on by the plaintiff's counsel in this case, and upon which we have already remarked.

We are not willing to extend the principle farther than it has been carried by decided cases. This is an attempt to extend it greatly beyond that limit, and to put it in the power of every member of a firm to shift his private debts upon the firm by simply swearing that he had authority to do so, and thus add to the powers implied by law. This consequence, so fatal to the existence of all copartnerships, has nothing to support it but the idea that the defendants may have redress in equity, and we do

not adopt it to the extent contended for. *Bland v. Ansley,* 5 Bos. and Pull., 331, and *Marquand v. Webb,* 16 Johns., 90, are in point.

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

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(134)

THE STATE ON THE RELATION OF SOLOMON BLYTHE v. JOAB OUTLAND ET AL.

Constables are not general collecting agents, except so far as relates to claims within the jurisdiction of a magistrate. Therefore, where an order of the County Court was put into a constable's hands for collection: *Held,* that though he received the money, his sureties were not liable.

APPEAL from the Superior Court of Law of NORTHAMPTON, at Spring Term, 1850, *Manly, J.,* presiding.

B. F. Moore for plaintiff.
Bragg for defendant.

PEARSON, J. Blythe put into the hands of one Powell, a constable, for collection, the following county order:

Ordered by the court, that the county trustee pay to Solomon Blythe sixty-three dollars for rebuilding bridge, etc.

Issued 4 July, 1842. THOMAS HUGHES, *Clerk.*

Powell received the money, and, upon demand, refused to pay over. The question is, Are the sureties upon his bond liable? We think with his Honor, that they are not.

It is settled by *S. v. Mangum,* 28 N. C., 369, and *S. v. Long,* 29 N. C., 379, that the sureties of a sheriff or constable are only liable for such claims as are within the jurisdic- (135) tion of a single justice and may be recovered by warrant.

The claim in this case was upon a county order, and, of course, was not within the jurisdiction of a single justice, and could not have been recovered by warrant; so it falls within the very bounds of the rule above announced.

It was not the intention of the Legislature to make constables *general* collecting agents, except so far as relates to claims within the jurisdiction of a magistrate. This was the extent of the evil, and to this the statute must be confined.

PER CURIAM. Judgment affirmed.

Cited: Dunston v. Doxey, 52 N. C., 224.

THE STATE TO THE USE OF DUGALD McCALL ET AL. v. THE JUSTICES OF ANSON.

When a criminal case is removed for trial from one county to another, in which the prisoner is convicted, the expense of guarding the jail in the county in which the conviction takes place must be defrayed by the county from which the case was removed.

APPEAL from the Superior Court of Law of ANSON, at Spring Term, 1850, *Settle, J.*, presiding.

Strange for plaintiff.
Winston for defendant.

NASH, J. The relators join in this proceeding for a (136) mandamus. A man by the name of Martin was indicted in Anson Superior Court for murder, and the cause was duly removed for trial to Richmond County. There it was tried and the prisoner convicted. After the conviction a guard was ordered out by the proper authorities to guard the jail. The property of the prisoner was exhausted in the payment of his liabilities, and the several individuals composing the guard applied for a mandamus to compel the county of Anson to pay the costs of their services. Several reasons were assigned by the defendant why the writ should not issue. The first is that the claims of the relators are several, and not joint, and therefore they could not join in the application; the last, that the county of Anson is not liable. The presiding judge, believing the first objection fatal, discharged the rule, not passing upon any other. The last is the main one, as it affects the rights and liabilities of the parties. Consequently, that, though not decided in the Superior Court, was principally argued here, and the Court has thought it proper, for the satisfaction of the parties, to express its opinion upon it.

The question arises solely under the acts of our Legislature. A slight review of them will serve to bring the point in controversy plainly before us. It is a principle of the common law that every criminal offense shall be tried in the county in which it is perpetrated. Under our system of administering the law it is sometimes found that justice demands this principle should be departed from. Accordingly, an act was passed in 1801, Rev. St., ch. 31, sec. 120, in which power is given to a judge of a Superior Court, upon a suggestion on oath by either party to the suit that justice cannot be done, to remove the cause for trial to an adjoining county. Under this act the prosecution of

Martin was removed to Richmond County for trial. There it was tried and the prisoner convicted. After the conviction, a guard was, by the proper officer of the county, (137) ordered to guard the jail. This proceeding was had under an act passed in the year 1795. Rev. St., ch. 90, sec. 5. By this section a judge of the Superior Court, being in the county in which the prisoner is confined, is authorized to direct the commanding officer of the county to furnish to the sheriff or jailer such a guard as may be suitable to the occasion; it further provides that "the guard so ordered out shall receive such compensation as is or may be provided by law for the militia." Upon the requisition of the Superior Court, then in the county of Richmond, a guard was called out by the commanding officer of the county; and the inquiry before us is, Which county, that where the prosecution commenced or that where the trial was had, shall bear the burthen of guarding the jail? By an act passed in 1808, ch. 757, sec. 1, it is provided that "the several county courts of pleas and quarter sessions shall lay such a tax, etc., as shall be sufficient to pay off the expenses to be incurred for guarding the jail and removing persons to other counties. Previous to this period, it was a burthen borne by the public treasury. The second section provides, "that hereafter all claims for guarding of prisons and conveying of prisoners shall be all allowed by the court of the county in which such prison is situated or from which any person is removed." By the first section of the act of 1810, Rev. St., ch. 28, sec. 14, it is enacted, "that in all cases where the counties are liable to pay costs, those counties wherein the offenses shall have been charged to be committed shall pay them. And all fines, forfeitures and amercements shall be accounted for and paid to the trustee of the county wherein the offense may have been charged to be committed, wherein such fines, forfeitures and amercements as may have been charged shall have arisen." If during the pendency of the prosecution of Martin in Richmond any fine, forfeiture or amercement had been incurred in any way, though collected in that county, they would have gone to (138) the trustee of the county of Anson. As this fund, then, and all derived from a similar source in the latter, go to constitute, with the appropriate tax, the fund for defraying these expenses, it would seem to be but right that the county deriving the benefit should bear the burthen. A very ingenious argument was built upon the phraseology of sec. 7, ch. 90, Revised Statutes, which is taken from section 2 of the act of 1808, above cited. It was, according to that act, to show that, if the county of Anson was bound to pay anything, it was only the expense

of removing the cause and transferring the prisoner; and that Richmond County ought to bear the expense of guarding her own jail, as it was her duty to provide one that did not need guarding. To this argument the first reply is, it nowhere appears that the guard was rendered necessary by any defect in the jail. Nor is that the only ground upon which it may be ordered out. But another and a more sufficient one is to be found in the act itself. The provision is evidently made to meet the two cases, where the trial shall be had in the county possessing original jurisdiction, and the other where it is acquired by removal. Read in this manner, *redendo singula singulis,* and the meaning is apparent. The act of 1810 was passed to remove any doubt which might rest upon that of 1808 in this matter. We are of opinion that the county of Anson is bound to pay the expenses of the guard while Martin was confined in the jail of Richmond County.

The point decided by his Honor is not so important, as it relates solely to the mode of proceeding. The decision on it seems to us to have proceeded on a wrong idea as to the nature of the case as it was before the court. It was treated as a mandamus, at the instance of several relators. It was in truth but a rule, and was so considered in most respects by the
(139) parties. There was no writ, no return; but simply affidavits on both sides. Upon the rule, we suppose the court could mould the writ or writs so as to suit the case and give to each one of the relators his due. Indeed, we presume the justices of Anson, when informed that their county is liable for the expenses of the guard, would much prefer the decision on that point in this form of one rule, rather than to be put to the expense of a separate mandamus for each of the guard. It is for that reason the Court has decided the matter of right, so as to facilitate the disposition of the controversy on the case going back.

Judgment reversed, at the costs of the defendant. This opinion will be certified to the Superior Court of Anson County.

PER CURIAM. Ordered accordingly.

Cited: S. c., 44 N. C., 302.

JOHN GREEN v. ROBERT WILLIAMS.

A surety to an appeal by a party, who dies pending the suit, has no lien on his assets until after he has paid what, by the judgment, he was ascertained to be liable for as surety.

APPEAL from the Superior Court of Law of DAVIDSON, at Spring Term, 1850, *Caldwell, J.*, presiding.

No counsel for plaintiff.
Mendenhall for defendant.

PEARSON, J. The plaintiff was the surety of one Har- (140) ris for an appeal from the judgment of a magistrate in favor of one Garner upon a simple contract debt. After the appeal Harris died, and the defendant, his administrator, was made a party, and pleaded "fully administered." Pending this suit the defendant paid to one Sumney a simple contract debt of about $140 against his intestate. On the trial the plaintiff, Garner, obtained a verdict for his debt, but the plea of "fully administered" was found in favor of the defendant, and Garner signed judgment for his debt, and proceeded by *sci. fa.* to subject the real estate. But failing to get his judgment satisfied, he moved for judgment *"nunc pro tunc,"*-which was entered against the plaintiff as surety for the appeal of the defendant's intestate; and the plaintiff was compelled to pay the balance due on the judgment. Whereupon he brought this suit, to which the defendant pleaded "no assets" and "fully administered." It was agreed that if the payment to Sumney was a legal voucher as against the plaintiff's debt, then the defendant had fully administered. But if the payment to Sumney was not a legal voucher as against the plaintiff's debt, then the defendant had not fully administered, and judgment was to be in the plaintiff's favor. The court was of opinion with the defendant, and the plaintiff submitted to a nonsuit.

We are not able to see any ground upon which the plaintiff can object to the preference which was given by the defendant to Sumney by a voluntary payment of his debt, although made pending the proceedings by Garner; both were simple contract debts. The plaintiff can take no benefit from the act of 1829, which provides that a surety who pays the debt shall have the same priority against the assets as the demand against his principal was entitled to, which in this case was that of a simple contract creditor. (141)

Admit that after the death of Harris, the defendant as his administrator, being made a party to the suit, was at

liberty to put in the plea of "fully administered" (which point we do not decide); admit, also, that by a proper construction of the act of 1829 a surety paying the debt has a right to take the place of the creditor, and becomes entitled to all of his rights and priorities (a point which we do not decide): in this case the creditor, Garner, was bound by the finding of the jury that the defendant had fully administered, and so the plaintiff can take no benefit, if allowed to stand in his place.

It was urged by the plaintiff's counsel that as he was bound as surety for the appeal, the obligation on his part ought to be ranked as a specialty debt, if not as a debt of record; and so had priority over and excluded all simple contract creditors. The obligation of the plaintiff was contingent and did not bind the assets. This is fully settled. *Delamothe v. Lane,* 4 N. C., 296; 2 Williams on Exrs., 672; 2 Vernon, 101; *Miller v. Spencer,* 6 N. C., 281.

PER CURIAM. Judgment affirmed.

THE STATE TO THE USE OF WILLIAM BUTTS v. MICHAEL BROWN.

The sureties on the official bond of the sheriff are not liable for a trespass committed by him under color of his office.

APPEAL from the Superior Court of Law of FORSYTH, at Spring Term, 1850, *Battle, J.*, presiding.

This was an action of debt against the defendant, a (142) surety on the official bond of R. W. Long, sheriff of the county of Rowan, for the year 1843. The breaches assigned were that Richard W. Long, sheriff, in October, 1843, under sec. 10, ch. 102, Rev. St., had improperly and illegally distrained, seized, and by public sale made out of certain property of the relator, to wit, segars, the sum of $202.37; and knowing that the said segars were not subject to taxation, appropriated the sum of $202.37 to his own individual purposes.

The relator claimed, first, the value of the segars, and, secondly, the sum for which they sold.

The witnesses for the plaintiff testified that the segars were manufactured at Bethania, in Forsyth County, North Carolina; were conveyed to Salisbury, in two wagons, for sale; that the sheriff was fully informed that the said segars were manufactured as aforesaid in this State, but nevertheless claimed a peddler's tax on each wagon of $100, for failing to show a license, which sums the relator refused to pay; that the sheriff there-

upon proceeded to distrain, advertise and sell the said segars, agreeably to the provisions of the said sec. 10, ch. 102, Rev. St., and by his sale raised the aforesaid sum of $202.37; that the said sale was forbidden by the relator. The plaintiff also showed by the certificate of the comptroller that the said R. W. Long, sheriff as aforesaid, had not paid any portion of the proceeds of said sale into the public treasury. The plaintiff also showed by the record that he had sued and recovered of said sheriff, R. W. Long, the value of said segars in a suit at law, and that under a *ca. sa.* issued in pursuance of the said judgment against the said Long, he had taken the oath of insolvency before the bringing of this suit.

All the aforesaid evidence was heard by agreement of (143) parties, subject to the opinion of the court upon the admissibility of the whole or any part thereof. The court intimating an opinion that the plaintiff could not recover, taking the whole testimony to be true, he submitted to a nonsuit, and appealed to the Supreme Court.

Morehead for plaintiff.
Mendenhall for defendant.

NASH, J. We entirely concur with his Honor who tried the case below. And, while we confirm his judgment, must be permitted to express our own regret that the obligation into which our ministerial officers enter upon taking office are so insufficient to the security of the public. The defendant is sued as surety upon the official bond of Richard W. Long, as Sheriff of Rowan County, and the only question submitted to us is, Do the facts set forth in the case agreed amount to a breach? We are constrained to say that they do not; and although we admit that a gross and palpable act of violence and oppression has been perpetrated on the relator by the sheriff, we cannot say it is within the bond. The conditions of the sheriff's bond are prescribed by the act of Assembly, Rev. St., ch. 109, sec. 13, and are as follows: "The condition of the above obligation is such that, etc.; if, therefore, the said ..... shall well and duly execute and make return of all process and precepts to him directed, and pay and satisfy all fees and sums of money by him received or levied by virtue of any process, into the proper office into which the same, by the tenor thereof, ought to be paid, or to the person or persons to whom the same shall be due, etc., and in all other things well, truly and faithfully execute *the said office* of sheriff, then," etc. It is under the last condition this action is brought. Was Richard W. Long executing the office of sheriff

in seizing the segars of the relator? Very clearly not.
(144) He was indeed professing to do what alone a sheriff can do, but what no sheriff has a right to do—committing a simple trespass. The Revenue Act of 1836, Rev. St., ch. 102, sec. 10, imposes a tax of $25 on every person who shall peddle in any county of the State "any goods, wares or merchandise not of the growth of this State." The segars in question were manufactured in this State, and of this the sheriff was fully informed, and he therefore knew they were not the subject of taxation. This was not executing the office of sheriff; it was violating it in a most flagrant manner, and perverting it to an instrument of wrong and violence. If he had been willing to execute his office truly and faithfully, he would have abstained from taking the property. We have not been able to find any case in which the sureties of a sheriff have been held responsible for a trespass committed by their principal, and we have looked with much care. The books are full of cases where sheriffs have under an execution against one man taken the goods of another; but in no instance have the sureties been held responsible. The latter are here sued upon an express contract, and their liability is confined to it and cannot be carried beyond its proper and fair meaning. The principles governing this case were fully discussed in *S. v. Long,* 30 N. C., 415.

The Court then decided that the provision in the sheriff's bond we are now considering "binds the officer affirmatively to the faithful execution of his office; there is no clause to cover the case of an abuse or usurpation of power—no negative words, that he will commit no wrong by color of his office, nor do anything not authorized by law." This fully and entirely meets this case.

We see no error committed by the judge below in admitting the testimony, and agree with him that the plaintiff upon it cannot maintain his action.

PER CURIAM. Judgment affirmed.

Cited: Eaton v. Kelly, 72 N. C., 113; *Holt v. McLean,* 75 N. C., 349; *Prince v. McNeill,* 77 N. C., 403.

(145)

WILLIAM WALTERS v. FLEETWOOD WALTERS.

In an action on a bond, where evidence was given that the bond was to be delivered up when the obligor paid the costs of a certain suit: *Held*, that this evidence was inadmissible to show that the bond was a conditional one, but that it was proper to show that, by the agreement of the parties, the bond was to be paid in whole or in part by the payment of the costs of the suit, and, therefore, the obligor, if he paid the costs, was entitled to a credit on the bond, *pro tanto*.

APPEAL from the Superior Court of Law of ROBESON, at Fall Term, 1849, *Dick, J.*, presiding.

The defendant gave to the plainitff his bond for $50, dated 24 March, 1846, and payable on or before 24 July, 1846, and this suit was brought thereon by way of warrant. Pleas, *non est factum*, payment, and accord and satisfaction. On the trial the defendant offered evidence that, prior to the execution of the bond, a suit was pending between the parties, which they agreed to compromise, and, as a part of the compromise, that the defendant undertook and promised the plaintiff to pay certain costs incurred in that suit, and that the bond was given as a security for those costs and upon an express agreement, at the time of the execution of the bond, that, upon the payment of the costs by the defendant, the plaintiff should deliver up the bond to the defendant. The plaintiff objected to the evidence, but the court admitted it; and the defendant then gave further evidence that before this said suit was brought (which was on 15 October, 1847), the defendant paid the said costs to the clerk of the court in which the suit had pended. Thereupon the court gave an opinion that, supposing the evidence to be true, the plaintiff could not recover; and the plaintiff submitted to a nonsuit and appealed. (146)

Mullins for plaintiff.
Dobbin and *Winslow* for defendant.

RUFFIN, C. J. As the amount of the costs which the defendant agreed to pay, and did pay, is not stated, and the opinion of the court was given against the plaintiff without any reference to the amount, it must be understood that the opinion rested exclusively upon the agreement that the bond should be void or be delivered up if or when the defendant should pay the costs, whether more or less, and upon the fact that he had paid them. That is clearly erroneous; for it is, plainly, nothing less than annexing, upon parol evidence, a condition to a

bond which is absolute upon its face. If the agreement had been that the plaintiff would accept a deed from the defendant for a tract of land, or any other collateral matter, in satisfaction of the money for which the bond was given, and the thing had been done and accepted accordingly, it is true the defendant would have been discharged, as there would then be an actual subsequent satisfaction, and it would be immaterial when the plaintiff first agreed that he would accept such satisfaction. But in the present case the alleged agreement is that the plaintiff would accept a less sum of money, whenever paid, in discharge of a bond for a larger sum; which is a thing that cannot be, unless the larger sum be regarded in the light of a penalty, to be saved on the condition of paying the smaller; and it is against fundamental principle to admit parol evidence to establish such a condition in opposition to the tenor of the bond.

If, indeed, the defendant paid the costs in question or
(147) any part of them, we should hold the amount thus paid to be a payment, *pro tanto,* upon the bond sued on; for if a creditor by bond request the obligor to pay a sum of money to a particular person, and agree that such payment shall be allowed as a payment of so much of the obligation, there is no doubt that it may accordingly be treated as a payment or satisfaction to that extent. And it can make no difference whether the request be at or after the execution of the obligation; since, if the former, it is a continuing request, and, until countermanded, authorizes the debtor, in confidence thereof, to make the payment to a third person. Therefore, the defendant was entitled to credit on the bond for what he paid to the clerk under the agreement. But that was all he was entitled to, and he could not ask for a verdict that he had paid or satisfied the whole sum mentioned in the bond by having paid a less sum to or for the plaintiff—since that, in law, is not such payment or satisfaction.

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

Cited: S. c., 34 N. C., 28; *Cross v. Long,* 51 N. C., 154; *Martin v. McNeely,* 101 N. C., 639.

(148)

EDWARD H. MEADOWS v. MARY MEADOWS.

1. In order to constitute an advancement of a slave by parol gift there must be an actual delivery and change of possession.

2. While a son continues to reside with his father the gift has no operation, but when he removes and takes the slave with him, the advancement becomes effectual, and its value must be estimated at that period.

3. A child does not lose the benefit of an advancement of a slave by selling it.

4. Advancements are understood to be gifts of money or personal property for the preferment and settling of a child in life, and not such as are mere presents of small value or such as are required for the maintenance or education of the child.

APPEAL from the Superior Court of Law of CRAVEN, at Spring Term, 1850, *Bailey, J.*, presiding.

Edward Meadows died intestate in 1846, and the present suit was instituted by petition by some of his children against the administratrix and widow and other children for distribution of his estate. A question was made at the hearing, whether one of the children, John A. Meadows, was fully advanced or not; and as to that the parties argued on the following facts: Edward Meadows was a mechanic, and worked at his trade. When this son, John A., was about ten years old, the father purchased a negro boy, and declared he intended him for his said son, and from that time forth the negro was called the son's in the family. The son was then living with his father, and when he became large enough he worked with his father at his trade. After he became eighteen years old the father allowed the son to take the earnings of the negro until he married; and when he married he removed to himself, and carried the (149) negro with him and kept him in his possession, using him as his own until, in July, 1841, for some fault, he sold the boy for $700; and the father assented to the sale. On the part of the son it was insisted that the gift was made as soon as the father purchased the slave, and that the negro should be valued as of that period, or, at the latest, when he had the boy's earnings; while the other children insist that the son was chargeable with the price, $700, and also with the various sums made and received by him as earnings of the boy, after the son was eighteen. The court held the son to be chargeable with the price he got for the negro, that is, the $700; and each side appealed.

J. H. Bryan and *J. W. Bryan* for plaintiffs.

No counsel for defendants.

RUFFIN, C. J. The opinion of the Court is clear that there was no such possession of the son, while he continued to live with his father, as could constitute a good gift of the slave as an advancement under the statute. An actual delivery and visible change of possession are indispensable to constitute a valid parol gift. This point was so fully investigated in *Adams v. Hayes*, 24 N. C., 361, that it is only requisite to refer to that case as settling it. The Court holds, however, that the gift of the negro became complete, for the purposes of the question before us, when the son left the father and actually took the negro with him. That was a visible change of possession upon an actual, though imperfect, gift by the father; and the negro would, unquestionably, have been an advancement as of that period, under the proviso in the act of 1806, had the son not sold the negro, but retained him in his own possession, until the death
(150) of the father intestate. *Stallings v. Stallings*, 16 N. C., 298; *Hinton v. Hinton*, 21 N. C., 587. It seems to the Court that to this purpose the possession of the son's alienee is that of the son himself. The substance of the proviso is that when a gift of a slave is made by a parent, either expressly or by implication, and the parent actually parts from the possession to the child and never again takes it, but dies without otherwise disposing of the property by any act *inter vivos*, or by making a will, the gift thereby becomes complete *ab initio*, so as to amount to an advancement from that period. That is the effect of what was said upon the construction of the act in the cases just cited and in that of *Cowan v. Tucker*, 27 N. C., 78; *s. c.*, 30 N. C., 426, in which the judges use the expression that the parent died "without having resumed the possession," and the like, as equivalent to that in the statute of the slave's "remaining in the possession" of the child. Several cases may readily be put which show that such must be the sense of the act. Suppose, for example, that a parent gives six slaves to a child by parol; if they all live and remain with the child until the parent die intestate, the case is within the words of the act, and the slaves constitute an advancement from the time of the gift, and the issue of the slaves are deemed to have been the child's. But if one of the six die before the parent, could it be doubted that the child would, nevertheless, have to account for that one as a part of his advancement? Plainly, he ought; for the gift was of the whole at once, as one advancement, and the child could not keep the other five and their increase, at the original value of the five, and throw the loss of the death of one on the parent. Nay, suppose such a gift of a young female slave, who afterwards has a numerous progeny and dies before the donor: the

accident of such death cannot alter the right to the issue, nor change the period to which the advancement is to be referred. For if she had lived longer than the donor, she (151) would have been, alone, the advancement, and no notice would be taken of the children, which would be regarded as belonging to the child, as they came *in esse,* as incident to the child's title to the mother. Surely, the Legislature could not mean that the death of the woman should make her cease to be an advancement, and, further, convert the issue into several substantive advancements. At what periods would they be advancements? They were never "put by the parent into the possession of the child," and the child would not have a title to them at all, or would derive it through that to the mother, and, consequently, the mother was the subject of the advancement, though dead at the period when the child's title first became irrevocable and complete. Again, if the child die before the parent and the slaves be taken by the child's administrator or executor, and applied in a course of administration, or held as a part of the estate until the parent's death, it seems plain that the slave would still be an advancement to the child as of the time of the original gift; for the case would not be within the mischiefs against which the act is directed; and if the gift were not effectual, the unquestionable purpose of the parent and expectation of the son and his creditors and family would not be defeated. So, if there be grandfather, father, and son, and the grandfather make a parol gift to the father of slaves, and the father makes a like gift to his son of the same slaves, and then dies intestate. Now, in such a case, it may be admitted that the grandfather could annul his gift and take back the negroes; yet, if he did not, it could not have been the intention of the Legislature that his gift should be annulled, as a matter of law simply, since it is plain that, as between the father and his son, the portion given to the son was an advancement, and the very purpose of the grandfather in making his gift originally was to enable his son to provide for his family. The possession of the grandson in such a case must be deemed that of (152) his father, being under him, within the meaning of the Legislature. Again, if the fact of the possession not remaining with the child at the death of the parent, by reason of the prior death of the slave, were to defeat the operation of the proviso, it would produce manifest and gross injustice in many cases; as, for example, by making the child account for hires or profits while he had the possession, though the parties contemplated no such thing. The case of a sale by the child, not invalidated by an objection of the parents, stands upon the same reason

with the cases just put. The possession of the vendee is the same as that of his vendor, and, instead of impeaching, completes the advancement. This sale is called that of the son, since the case is understood so to mean. It might be very different if the son did not profess to own the slave and not to sell him as his, but only under the authority of the father, and to ask for the assent of the father as necessary to the validity of the sale. Then, indeed, it would be substantially the sale of the father, and his gift that of the money, and not of the slave. But here the sale is stated to be that of the son, and, of course, as upon his own title; and the assent of his father is to be understood as rather evidence of his approbation of the son's sale, and not importing that he, the father, made it or joined in it. The Court therefore holds that, in this case, the advancement is to be estimated as of the day the negro was exclusively in his son's possession, that is, when he left his father's and took the negro with him; which may be more or less than the price of $700, subsequently received for him—for the case agreed does not state the length of time between those events, nor the value at the former one. Of course, the son is not liable for hires or profits after he had such exclusive possession, as the negro is then taken to be his. Whether the sums given him by his
(153) father, while living with him, are advancements or not, the case does not furnish facts to enable the Court to say; for it does not appear what was the amount of those sums, nor for what purpose they were given. It may be possible they were advancements, though it is not very probable, we conjecture. Small sums of money given by a father to a son in his minority, who is living with him, to supply him with clothing or to defray the expenses of the ordinary pleasures and amusements of youth in their rank of life, are not deemed advancements; and the rule would not be varied by the circumstance that the father derived the money from any particular source. We suppose it most probable that such was the nature of this case; and, if so, the opinion of the Court would be that sums given for such purposes, though spoken of as the profits of the negro, would not be advancements, for advancements are understood to be gifts of money or personal property for the preferment and settling of a child in life, and not such as are mere presents of small value or such as are required for the maintenance or education of the child, which the law throws on a father, at all events. Not knowing the facts, however, with precision, the Court cannot determine that point definitely. The decree must, therefore, be reversed—each party paying their costs in this Court; and the cause must be remanded and this

opinion certified to the Superior Court, in order that the decree may be there varied accordingly, and further proceedings taken in the case.

PER CURIAM. Ordered accordingly.

Cited: Walton v. Walton, 42 N. C., 139; *Credle v. Credle,* 44 N. C., 227; *Davis v. Haywood,* 54 N. C., 257; *Shiver v. Brock,* 55 N. C., 140; *Bradsher v. Cannady,* 76 N. C., 447; *Kiger v. Terry,* 119 N. C., 459.

(154)

THE STATE ON THE RELATION OF ISRAEL FANSHAW v. WILLIAM JONES ET AL.

An infant mulatto child was found at the door of a gentleman, who took charge of it, and it remained in his possession for more than seven years, he professing that he did not claim her as a slave, but believed she was free, and refused to deliver her to any person who could not show a good title to her as a slave. At his death he left her $200: *Held, first,* that if she was free, of course the next of kin could not claim distribution of her or of the legacy; *secondly,* if she was a slave, the next of kin were entitled to distribution of the legacy, and also of the girl herself, if he had her three years or more in adverse possession; and that, to vest the title of the slave in him by virtue of the statute, it was not necessary that he should have claimed her as a slave.

APPEAL from the Superior Court of Law of CURRITUCK, at Spring Term, 1849, *Manly, J.*, presiding.

This is an action of debt on the bond given by Jones as the administrator of the will annexed by Henry Britt, deceased. Pleas, conditions performed and no breach. The relator is the administrator of the testator's widow, who dissented from her husband's will. The breach assigned is in not distributing a negro slave named Mary Ann and the sum of $200, left by the testator and not effectually disposed of in his will. It was admitted at the trial that, if entitled at all, the relator was entitled to one-third of the negro and money, and that, before suit brought, he demanded the same of the defendant Jones, who denied the relator's right to any part of the fund. In the will there is the following clause: "The girl Mary Ann, which was picked up or found at my door, is to remain with my wife Polly until she arrives at the age of twenty-one; and then it is my will that she be and enjoy all the benefits of a free person of color. I also give and bequeath to the said Polly (155) the sum of $200."

For the purpose of showing that the girl Mary Ann was the slave of the testator, the relator gave evidence to the following effect: The testator resided in Currituck County, and about 1829 one Wilson, who resided in the same county, sold to one Willis a female slave, named Milly, who was pregnant. Willis resided in Caswell County, and was a negro trader. The woman ran away from Willis in Currituck, and in some short time afterwards she came to the house of a widow lady, who lived in Currituck, and a short distance from Britt's, bringing with her a female infant, perfectly naked and apparently not more than a day old. The lady told the woman that she and her child would die if they continued in that condition, exposed in the woods, and advised her to go to her owner. The woman went away, and in two or three days afterwards a mulatto female infant was found at the door of Britt's house, who is the girl Mary Ann. But the lady did not see the infant in any short time, and therefore did not know her to be the same which the woman Milly brought to her house; but evidence was given that the girl Mary Ann is a bright mulatto and bears a family resemblance to the said Milly. Britt and his wife had no children, and took the found child into the house with them, brought her up tenderly, and became much attached to her. About four years afterwards Willis returned to Currituck and claimed Mary Ann as the child of his woman Milly and his slave, and demanded her from Britt. But the latter refused to give her up, saying that neither Willis nor any other person should have her without establishing a title to her by law; for that he (Britt) did not claim her as a slave, and believed that
(156) she was not, but that she was the offspring of a white woman and a colored man. Britt frequently made similar declarations until he made his will and died, which was in 1836. Since that time the girl Mary Ann has lived with the defendant Jones, but he did not claim her as a part of Britt's estate, nor as the property of any person.

Upon the foregoing evidence the court instructed the jury that their first inquiry should be whether the girl Mary Ann was born a slave or not, which depended upon the fact whether she was the child of a free woman or of a slave. If they should find that her mother was free, then their verdict should be for the defendants. But if they should be of opinion that she was the child of the woman Milly or of any other slave mother, so as thereby to be, herself, a slave, the next inquiry was whether she was the slave of the testator, Britt. And upon that point the court proceeded to say that the possession of Britt, as stated, was insufficient to vest the property in him, unless during the

time he claimed a property in her; for, to have that effect, his possession must not only have been maintained for three years against all other persons, but must also have been maintained with a view to his own benefit; and, therefore, if the jury should be of opinion that Britt did not claim Mary Ann as his slave, then, also, the verdict should be for the defendants. From a verdict and judgment against him, the relator appealed.

Heath for plaintiff.
Jordan for defendants.

RUFFIN, C. J. The directions were certainly right, if the jury believed the foundling to be the child of a free mother. But on the supposition that her mother was a slave, the directions were clearly wrong, at least as to the money claimed by the relator; for, whether the donee of the money was a slave of the testator, or of Willis, or of another person, (157) she was equally incapable of taking under a bequest, and the $200, therefore, resulted to those entitled to the surplus of the estate. The Court, however, holds that the whole of that part of the instruction was erroneous, if in fact the child was a slave. For the possession of Britt, and of the defendant since Britt's death, was, undoubtedly, adverse to Willis, to whom the testator refused to deliver the child upon demand. Indeed, the instruction supposes the possession of Britt to "have been maintained against all other persons"; in other words, to have been adverse to all the world who claimed the girl as a slave; and yet, it was laid down further, that such a possession did not vest the title of the slave in the testator, if he believed her to be free and did not keep the possession with a view to his own benefit. The Court cannot adopt that opinion; for the possession for more than three years bars the action of the owner under the act of 1715; and then the act of 1820. Rev. St., ch. 65, sec. 18, is that the person so in possession, and those claiming under him, shall be deemed to have a good and absolute title to the slave as against all persons so barred by the statute of limitations. When the owner is thus barred and loses his action and title, the negro must necessarily belong to the possessor; the *status* of the slave is not changed, but continues, and as a slave must belong to some one, and as no one can recover from the possessor, such slave must be deemed in law the absolute property of the possessor. So the rule was laid down in the case of *White v. White*, 18 N. C., 260, and it governs the present case.

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

(158)

JOHN L. FAIRLY v. MARGARET McLEAN.

The interest in a bond payable to A, or to A or order, can only be transferred at law by indorsement.

APPEAL from the Superior Court of Law of RICHMOND, at Spring Term, 1850, *Settle, J.*, presiding.

Banks for plaintiff.
Winston for defendant.

PEARSON, J. This is trover for three single bonds. The plaintiff's intestate owned the bonds. One was payable to him or *bearer;* the others were payable to him. The intestate delivered the bonds to his son, John McLean, saying, "I give these to you and your children forever." The son died soon after his father, having the bonds in his possession, and the defendant, who is his widow, took them into her possession and converted them.

His Honor charged that the gift was perfected by the delivery; the right thereby vested in the son, and the plaintiff could not recover. To this part of the charge the plaintiff excepts. We think the exception well founded as to the bonds payable to the plaintiff's intestate. The plaintiff yields the question as to the bond payable to his intestate or bearer.

By the act of 1786 the bonds payable to the plaintiff's intestate are considered as if payable to him *or order;* and it is provided that all such bonds shall be negotiable, and all interest and *property* therein shall be transferable by indorsement in the same manner as promissory notes; and, by the act of 1762, promissory notes are made assignable in the same manner
(159) as inland bills of exchange are by the custom of merchants in England; and inland bills of exchange payable to *order* are, by the law merchant, assignable by indorsement and delivery. Baily on Bills, 98.

The result is that the two bonds in controversy were negotiable by indorsement and delivery. In that way, and in that way only, can the right of property be transferred. Both acts must concur. An indorsement without a delivery will not effect the transfer. *Nelson v. Nelson,* 41 N. C., 409. And for the same reason the transfer is not perfected by delivery without indorsement.

At common law a note or bond was not considered property. It was not the subject of larceny. It could not be seized upon a *fieri facias,* nor could it be transferred in any way. It was a

mere "chose in action," an ideal thing—giving certain rights to the owner—and although courts of equity, from an early period, have given protection to persons who, for valuable consideration, purchased this ideal thing, or right to have money, courts of law have never recognized a third person as being the owner, unless the interest and property therein have been transferred in the manner prescribed by the statute.

It is said that by allowing the action of trover to be brought for the conversion of notes and bonds, the courts recognize them as property. That is true to a certain extent; but, although recognized as property, *non constat* that bonds and notes may be transferred in any other than the mode prescribed by law. Slaves are property; but slaves can only be transferred by gift in the manner prescribed by law.

There must be a *venire de novo.*

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

Cited: Marsh v. Brooks, post, 411; *Brickhouse v. Brickhouse, post,* 405; *Herring v. Tilghman,* 35 N. C., 393; *Killian v. Carroll, ib.,* 433; *Overton v. Sawyer,* 52 N. C., 6; *Kiff v. Weaver,* 94 N. C., 227.

(160)

THE STATE ON THE RELATION OF P. W. SPENCER v. R. M. G. MOORE ET AL.

1. *It seems* that the presumption of the death of an individual, arising from his absence from his domicil for seven years, does not imply that he died at the end of the seven years, but he died either then or at some other period during the seven years.

2. The next of kin cannot support an action on an administration bond for their distributive shares, because this implies that the estate has not been administered, and the action should be by an administrator *de bonis non.*

APPEAL from the Superior Court of Law of HYDE, at Spring Term, 1850, *Bailey, J.,* presiding.

Samuel Spencer died intestate in Hyde County, in May, 1846, and in November following administration of his estate was granted to Thomas B. Gibbs, who entered into the usual bond for $2,500, with the defendants as his sureties. The intestate left no issue, and Gibbs married his aunt and claimed to be entitled in her right, as sole next of kin, to the personal estate. He sold the effects and got in the money to the amount of $829.09, which he applied to his own use, and then he died

insolvent, in April, 1848. John Spencer, a brother of the intestate Samuel, formerly resided also in Hyde County, and left it on 1 May, 1841, saying he was going to some distant Western State, and he has not since been heard of; and in May, 1848, administration of the estate of the said John was granted to the relator, as upon a death and intestacy; and in August, 1848, this action was brought on the administration bond, alleging the breach to be in failing to pay the said sum to the relator, as the administrator of said John, the surviving brother
(161) and sole next of kin of the intestate Samuel. The pleas were conditions performed and no breach.

Upon these facts the court was of opinion that the plaintiff could not maintain the action, and ordered a nonsuit, and the relator appealed.

Shaw for plaintiff.
W. H. Haywood and *Donnell* for defendants.

RUFFIN, C. J. To constitute the relator's intestate Samuel's next of kin, it is necessary that John should have survived his brother: as to which point the only evidence is that, at the time of Samuel's death, seven years had not elapsed from John's departure from this State, though that period has now elapsed, and had when administration was granted to the relator. It is thence inferred that John Spencer is now dead, but that he was not dead at his brother's death in 1846. The rule as to the presumption of death is that it arises from the absence of the person from his domicil without being heard of for seven years. But it seems rather to be the current of the authorities that the presumption is only that the person is then dead, namely, at the end of seven years; but that the presumption does not extend to the death having occurred at the end or any other particular time within that period, and leaves it to be judged of as a question of fact, according to the circumstances, which may tend to satisfy the mind that it was at an earlier or later day. *Doe v. Napeau,* 5 Barn. and Ad., 86; 1 Greenleaf Ev., sec. 41. The authorities, however, are not uniform upon the point. *Smith v. Knowlton,* 11 N. H., 191. However the rule may be on that subject, it is not necessary that the Court should take the trouble of investigating, because, at all events, the relator, as the representative of the next of kin, cannot have an
(162) action on the administration bond. By the very act of bringing the suit the relator affirms that the first administrator had not administered the estate. Therefore, the right to call him to account and to put the bond in suit is vested in

the administrator *de bonis non,* as the Court has already held in *Williams v. Britton, ante,* 110, upon the authority of *Baldwin v. Johnston,* 30 N. C., 381; *Spruill v. Johnston, ib.,* 397.

PER CURIAM. Judgment affirmed.

Cited: Ferebee v. Baxter, 34 N. C., 65; *Spencer v. Roper,* 35 N. C., 333; *Strickland v. Murphy,* 52 N. C., 245; *Lansdell v. Winstead,* 76 N. C., 369.

JOHN LAMBERT v. JOAB LAMBERT.

Where a party offered in evidence the copy of a deed for the purpose of showing the receipt of money, and it appeared that the deed had not been proved nor acknowledged by the supposed bargainor, but notice had been given to produce the original: *Held,* that the copy was not admissible for any purpose, as the original would not be, until properly proved.

APPEAL from the Superior Court of Law of RANDOLPH, at Spring Term, 1850, *Battle, J.,* presiding.

This was an action of *assumpsit* for money paid by the plaintiff, as defendant's surety.

On the part of the plaintiff it was proved that the defendant was indebted to Abel Cox and several other persons, and being about to leave the State, and not being able at the time to pay the debts, an arrangement was made between him and his son, John R. Lambert, and the plaintiff, that the said John R. and the plaintiff should assume his debts, or should become security for them, upon his conveying to them a certain (163) tract of land and certain articles of personal property to be applied to the payment of them. The defendant therefore executed to the plaintiff and John R. Lambert absolute deeds for two tracts of land, and made a verbal assignment of the personal property, and they took up and canceled the notes held by the defendant's creditors, and gave their own notes for the debts, which the plaintiff subsequently paid, the other surety, John R. Lambert, having become insolvent.

The defendant insisted that the agreement between him and the plaintiff and John R. Lambert was that the two latter were to pay the debts of the defendant upon his conveying to them his land and other property; and, consequently, the notes which they gave to the defendant's creditors were given as their own in discharge of the defendant's liability, and that when they were paid by the plaintiff it was a payment of his own debts,

and not as surety for the defendant. He gave in evidence a letter. The defendant contended further, that if this were not the true agreement between the parties, but his property was conveyed to the plaintiff and John R. Lambert as collateral security only, that then the plaintiff and John R. Lambert had sold this land and the plaintiff had received more than enough to pay the amount of the debt which he now seeks to recover. And to prove this, he offered in evidence a copy of a deed for the land, alleged to have been executed by the plaintiff and John R. Lambert to John Lambert, Sr., the father of both the plaintiff and defendant. This was objected to, because the original was not produced and because, though it had been acknowledged by John R. Lambert and registered, it had never been proved or acknowledged as the deed of the plaintiff, and consequently had not been registered as to him. The defendant then showed a notice to the plaintiff to produce the original; that

(164) John Lambert, Sr., was dead, and that the plaintiff and another were his executors; and that at the time of his death the testator had property amply sufficient to pay $400, the consideration recited in the deed. He then stated that the deed was offered only for the purpose of showing an acknowledgment by the plaintiff that he had received the amount or at least half of the amount of the consideration money recited in the deed, and for this purpose and this alone it was received by the court. It was then proved that John R. Lambert had received $50 only of the purchase money, and it appeared that the proceeds of the personal property had been applied to the payment of debts not claimed in this action.

The court instructed the jury that if they inferred from the letter offered in evidence by the defendant that the agreement between the parties was as the defendant first contended, then the plaintiff could not recover; but if they found that the land and other property were conveyed to the plaintiff and John R. Lambert as collateral security, then the plaintiff was entitled to recover unless they were satisfied by the evidence that he had actually received from the proceeds of the land sufficient to pay the amount now claimed by him.

The jury returned a verdict for the defendant; and the plaintiff moved for a new trial, because the presiding judge had left the construction of the letter to the jury, instead of deciding upon its meaning himself; and because of the admission of improper testimony in suffering the defendant to read the deed from the plaintiff and John R. Lambert to John Lambert, Sr., for any purpose. The court thought there was nothing in either of these objections of which the plaintiff had a right to com-

plain, and therefore refused the motion for a new trial and gave a judgment for the defendant, from which the plaintiff appealed.

Mendenhall for plaintiff. (165)
W. H. Haywood for defendant.

NASH, J. The plaintiff asks for a *venire de novo* on two grounds. The first, for error in the judge in submitting to the jury the construction of the letter which was given in evidence by the defendant. The second, for error in suffering the defendant to read to the jury the copy of the deed from John and John R. Lambert to John Lambert, Sr., for any purpose. In the argument here the first ground has been properly abandoned. The instrument is so worded that the judge committed no error in law in submitting the construction to the jury. In admitting the paper purporting to be the copy of a deed of conveyance from the plaintiff and John R. Lambert there was error.

The deed had been proved and registered as to John R. Lambert, but not as to the plaintiff. His Honor rejected it as evidence of a conveyance of the title of the land, but upon notice to the plaintiff to produce the original, admitted it as evidence of a receipt of the money, or a portion of it, for which it was said the land sold. But as far as the case discloses the fact, there was no evidence whatever that the plaintiff had executed the paper, of which the one offered in evidence was alleged to be a copy. The supposed original, therefore, would not have been evidence against him. Upon what rule of evidence could the copy be? The sole question presented to us at this time being the competence of this evidence, our view of the case is confined to it. And being of opinion that it was erroneously admitted, the judgment must be reversed and a *venire de novo* ordered.

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

Cited: Tooley v. Lucas, 48 N. C., 148; *Williams v. Griffin*, 49 N. C., 32; *Todd v. Outlaw*, 79 N. C., 237; *Duke v. Markham*, 105 N. C., 137.

(166)

DICKSON, MALLORY & CO. v. PLEASANTS JORDAN ET AL.

1. No warranty of quality is *implied* in the sale of goods.
2. If a vendor sells articles, apparently of the kind ordered by the vendee, though the vendee has no opportunity of testing the quality until after he has used them, yet, if there be no fraud on the part of the vendor, the purchaser must bear the loss if it turns out that there is a defect in the articles.

APPEAL from the Superior Court of Law of HERTFORD, at Spring Term, 1850, *Ellis, J.*, presiding.

Smith for plaintiffs.
Bragg for defendants.

PEARSON, J. This was *assumpsit*. The declaration contained two counts: one on a special contract, the other for goods sold and delivered.

The defendants, who were the owners of a fishery, applied to the plaintiffs, who were merchants, at their store in Norfolk, for ten rolls of "seine rope," and informed them that it was to be used at their fishery. The plaintiffs did not have the article on hand, but engaged to procure it and send it to the defendants, at the price of 13¾ cents per pound, and which was accordingly done.

The rope sent was new and of the size and kind known as "seine rope." The defendants used it, but it proved to be of inferior quality, and repeatedly broke in drawing the seine, and was unfit for fishing purposes. The court instructed the jury

(167) that if the plaintiffs knew the purpose for which the rope was intended, and it was not present at the time of the sale, so that the defendants had no opportunity to judge of its quality, the law implied a warranty that it should be reasonably fit for the purpose of fishing; that if the defendants, when the rope was sent, could by examination have detected its bad quality and unfitness, their reception of it was a waiver of the warranty. But if its bad quality and unfitness could not be detected except by actual trial and using it in the fishing operations, the reception of it was not a waiver of the warranty; and if the jury were satisfied that it was in fact of bad quality and unfit for fishing purposes, they ought to make a reasonable deduction from the price. The jury made a deduction, and the plaintiffs except for error in the charge.

It is a principle of the common law that no warranty of quality is implied in the sale of goods. *"Caveat emptor."* In the absence of fraud, if the article proves to be of bad quality,

the purchaser has no redress, unless he has taken the precaution to require a warranty. This rule is founded in wisdom, and its practical good sense is so well fitted to the habits of our trading people that we are disposed to adhere to it. We believe it is adopted in almost all of the States of the Union where the common law prevails.

The law protects against fraud, and the vendor is held liable if he *knows* of the defect. If he is innocent, the purchaser must protect himself by a warranty. And it is supposed that, in general, trade is sufficiently protected, in the absence of fraud, by the inducement which is held out to all dealers to take proper care in the selection of their merchandise, arising from the fact that by selling articles of good quality they secure customers, and by selling those of bad quality their customers desert them. Merchants buy upon their own judgment; they sell upon the judgment of their customers, and only (168) undertake for good faith and fair dealing. If a warranty was implied of the good quality of every article sold, there would be but few merchants, or prices would be exorbitantly high.

His Honor was of opinion that, in this case, there were two facts which furnished a sufficient ground for making an exception to the general rule. The plaintiffs knew the purpose for which the rope was intended, and it was not present to be judged of by the defendants. One or both of these facts might have been a very sufficient reason for requiring a warranty, and then it is to be presumed an advance in the price would have been insisted on. But we do not see how they can furnish a ground for the law to imply a warranty in favor of the defendants, when they neglected to take one for themselves.

The purpose for which an article is intended is known in almost every case, and the accident that it happens to be expressed, unless it *enters into and forms a part of the bargain*, can make no difference. One buys a set of harness, for instance. Can it make any difference if he happens to say that his purpose is to use them for his carriage? The purpose is known, whether he says so or not, and the *price* is the same. Where, then, is the consideration to support this implied warranty: what does he *pay for it?* The case would be different if he should tell the merchant that his carriage was particularly heavy, or his horses unruly, and he was willing to pay a higher price to have the article warranted to be strong and fit for his purpose. So, if two men buy seine rope; one says nothing about his purpose; the other most unnecessarily says he intends it for his fishery; both pay the same price, and the rope turns

out to be of bad quality; upon what principle can the one insist on a reduction, while the other is obliged to pay the price agreed on?

But the rope was not present and the defendants had no opportunity, at the time they engaged it, to judge of its qual-
(169) ity. If the bad quality could not have been detected by an examination, and it was necessary to put it in use before its unfitness could be discovered, what did the defendants lose by not having a chance to inspect it? They saw it when it was sent, which answered the same purpose as if they had seen it when it was bought. One inspects for himself; another sends an order; both pay the same price. The rope upon trial is found to be unfit. Can there be any difference, and from what can the law imply a warranty in the one case and not in the other?

His Honor was of opinion that if the bad quality could have been detected by examination, the defendants, by receiving it, impliedly waived the implied warranty. We do not clearly apprehend the meaning of this part of the charge, unless it be that if the defect was obvious the defendants could not, in such case, complain of being cheated, for their means of information were the same as that of the plaintiffs, and a man cannot be cheated who acts with his eyes open and knows of the defect before the contract is executed. In this we concur.

The only difference it can make, when the purchaser sees the article and when he sends an order or has not an opportunity to see it, is that in the former case he judges for himself; in the latter he constitutes the vendor his agent to select for him, and from the confidence reposed has a right to expect that the vendor will give him the aid of his judgment. But this does not furnish ground to imply a warranty; there is no consideration for that. It only gives him a right to a fair exercise of the vendor's judgment in place of his own, and he has no cause of complaint, unless there be fraud, from which the law equally protects in both cases.

The decisions in which an exception is made when the vendor is the manufacturer of the article have no application to
(170) the present case, and we do not enter upon the inquiry how far the exception is well founded.

There was error in the charge. There must be a *venire de novo*.

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

Cited: Farmer v. Francis, 34 N. C., 81; *Waldo v. Halsey*, 48 N. C., 108; *Smith v. Love*, 64 N. C., 441; *Woodridge v. Brown*, 149 N. C., 302.

TILMAN FARROW v. ISAIAH RESPESS.

On the guaranty of a note, the guarantee is not bound to show that he has made a demand on the maker, but the guarantor is only discharged when it appears that he has suffered loss in consequence of the guarantee's not using due diligence.

APPEAL from the Superior Court of Law of BEAUFORT, at Special Term in January, 1850, *Battle, J.*, presiding.

This was an action of *assumpsit* upon the guaranty of a note, a copy of which, marked A, is sent as a part of this case.

For the plaintiff it was proved that the note was given by the guarantor in payment for the purchase of a share in a vessel.

At the time when the note became due, on 1 October, 1846, the maker had a store in the town of Bath and had $2,000 or $3,000 worth of property in possession, and was then supposed to be solvent; but on 6 January following he executed a deed in trust, and the effects therein conveyed did not pay his debts by $5,000 or $6,000. In February or March after- (171) wards he died totally insolvent, and no administration has been taken on his estate. It was proved that up to the time when he executed this deed of trust, he was punctual in paying demands upon him, borrowing money to meet such demands rather than be sued or warranted upon them; and that, as late as the latter part of December, 1846, he borrowed $400 from the bank by the aid of his father, who was a man of property. No evidence was offered of any demand having been made of Topping, the maker of the note, nor was it shown that any was made upon the defendant as guarantor, until a few days before the bringing of the action. This demand was made by Havens, to whose use this suit is brought, who has always resided in Washington, twenty miles from Bath.

The plaintiff's counsel contended that by the special terms of the guaranty the defendant was bound absolutely and in all events to pay the note; but that, if that were not so, he was bound unless it appeared that the money might have been collected from the maker by the use of reasonable diligence. The defendant's counsel contended that the plaintiff could not recover, for the want of a demand on the maker of the note, and also of a failure to use due diligence in endeavoring to collect the money from the maker; and that the question of diligence was a question of law, to be decided by the court.

The court held, and so instructed the jury, that the defendant was not bound absolutely and in all events, as if he was a surety to the note; nor was he discharged by the plaintiff's failing to show a demand upon the guarantor under the circum-

stances of this case; that the true inquiry was whether the defendant had sustained any damage by the plaintiff's failing to use due diligence in endeavoring to collect the note from the maker, that is, such diligence as a man of ordinary prudence would use in collecting his own claim; that if they be-
(172) lieved that the plaintiff could not have collected the money from the maker by the use of such diligence, then they ought to find a verdict for him; otherwise, for the defendant. The plaintiff had a verdict and judgment, and the defendant appealed.

(A)

$307.70. WASHINGTON, N. C., 1 April, 1846.

Six months after date I promise to pay W. H. Willard or bearer three hundred and seven dollars and seventy cents, for value received, as witness my hand and seal.

L. J. TOPPING. [SEAL.]

Upon the back of which note this indorsement appears:

I hereby guarantee the payment of the within note to Tilman Farrow.

ISAIAH RESPESS.

26 April, 1846.

No counsel on either side.

NASH, J. On the part of the defendant it is objected that the plaintiff cannot maintain the action for the want of a demand on the maker of the note, the subject of the guaranty, and also because of a failure on the part of the plaintiff to use due diligence in endeavoring to collect the money from the maker of the note, and because the question of diligence was one of law, to be decided by the court.

To these objections the charge of the presiding judge was a full answer. The jury were instructed that the defendant was not discharged, under the circumstances of this case, by the plaintiff's failing to show a demand; that the true inquiry was, Has the defendant sustained any damage by the failure of the plaintiff to use due diligence in endeavoring to collect the note from the maker?—that is, such diligence as a man of ordinary prudence would use in collecting his own claim. That
(173) he might not be misunderstood, his Honor proceeds: If they believed the plaintiff could not have collected the money by the use of such diligence, then they ought to find a verdict for him; otherwise, for the defendant. To enable the

jury to come to a satisfactory conclusion on the question, he informs them what in law is due diligence. Their attention was then drawn, very distinctly, to the true point in issue between the parties, to wit, the injury sustained by the defendant in consequence of any misconduct of the plaintiff in endeavoring to collect the money. There can be no doubt but that the indorsement of the note by the defendant is an express guaranty. It is so in its terms, and was not made simultaneously with the note, but nearly three months thereafter. "I hereby guarantee the payment of the within note to Tilman Farrow." There is no room for constructions; it is a positive undertaking, and the defendant assumed all the responsibilities of a guarantor, and no more. After ascertaining the true character of the contract on the part of the defendant, the only inquiry is as to the fact of damage to him resulting from the *laches* of the plaintiff. If the plaintiff has, by any misconduct of his, put it out of the power of the defendant to secure himself in part or in whole, to the same extent is his claim upon the guarantor diminished. If the loss has been a total one, his claim is gone; if a partial one, he is entitled to redress *pro tanto;* because the obligation of a grantor is, that if the money, by due diligence, cannot be collected out of the maker of the note, he will pay it. Ordinarily, it is the duty of the holder of a guaranty to demand the money of the maker of the note; but if the maker be insolvent, it is not necessary. In this a guaranty differs from an indorsement. In the latter case the indorsee is bound to strict punctuality in presenting the note for payment, and giving notice, by the earliest opportunity, to the indorser sought to be charged, of its dishonoree. Any neglect in either of these particulars (174) will discharge the indorser, without any proof on his part of any loss or injury resulting from it. But negligence alone will not discharge a guarantor. He must go further, and show that by it he is injured. *Shewell v. Knox*, 12 N. C., 404; *Ashford v. Robinson*, 30 N. C., 144; Story on Notes, sec. 400; *Vanevar v. Woolly*, 3 Bar. and Cross., 439, 447. The question was fairly and fully left to the jury, and they found that the defendant had suffered no loss by any negligence of the plaintiff, and, according to the authorities cited, the plaintiff was entitled to a verdict for the full amount of his claim.

We find no error in his Honor's charge, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Rowland v. Rorke, 49 N. C., 339; *Kenyon v. Brock*, 72 N. C., 557; *Sullivan v. Field*, 118 N. C., 360.

CHARLES L. GURVIN v. JAMES W. CROMARTIE.

A promise by A, that if B will marry and have a child by his wife, he will *pay him* a certain sum, is a valid contract, and, upon the contingency happening, B is entitled to recover the amount, with interest from the time his child was born.

APPEAL from the Superior Court of Law of BLADEN, at Spring Term, 1850, *Settle, J.*, presiding.

The action is *assumpsit* on special promises of the defendant's testator, James Cromartie, to pay the plaintiff
(175) $500 in consideration that the plaintiff would marry and have issue of the marriage; and they are laid in different ways in several counts. Plea, *non assumpsit.*

On the trial the case upon the evidence was this: a tract of land was devised to the plaintiff in fee simple, but with a limitation over to another person in case the plaintiff should die without leaving lawful issue surviving him. In 1843 the plaintiff sold the land to James Cromartie for $1,000, and conveyed it to him by a deed of bargain and sale in fee with general warranty. After the deed was executed, Cromartie said to the plaintiff, who had never been married, "Now, Charles, be smart and get a wife and have a child, and I will give you $500." In December, 1842, the plaintiff married; and, upon hearing thereof, Cromartie said that he was bound to pay the plaintiff $500 if his wife should have a child. In February, 1846, the plaintiff's wife had a child, and, Cromartie being then dead, the plaintiff gave notice to the defendant, the executor, and requested payment—which being refused, the plaintiff brought this action.

The counsel for the defendant insisted that there was no consideration to support the promise; that there was no evidence of any assent to the contract on the part of the plaintiff; that the plaintiff had not married and had issue within a reasonable time, and that there was no evidence that the plaintiff was the father of the child his wife had. For those reasons he prayed the court to instruct the jury that the plaintiff could not recover. But the court refused to give that instruction; and his Honor told the jury that if they found that the plaintiff accepted the offer of Cromartie, and in consequence and by reason thereof married, and had issue by his wife at the period mentioned and gave notice thereof to the defendant, he was entitled to recover. The jury gave a verdict for $500, with the interest accrued after the demand, and judgment was given therefor, and the defendant appealed.

Strange for plaintiff. (176)
W. Winslow for defendant.

RUFFIN, C. J. It is not needful to consider of the benefit which the marriage of the plaintiff and the birth of issue might have been to the testator in preventing the estate, which he had purchased, from going over and making his fee absolute; since, without doubt, marriage is a valuable consideration, and sufficient to support a contract, whether executed or executory. It is generally the sole consideration on which marriage settlements are founded, and it sustains them against the creditors of the contracting parties and purchasers from them. It was so decided by *Lord Clarendon* in *Douglass v. Ward,* 1 Chan. Cas., 99; and in *Brown v. Jones,* 1 Atk., 188, *Lord Hardwicke* said that a settlement on the wife before marriage, though without a portion, is good—for marriage itself is a consideration. It is most clearly so, for by the marriage the respective parties incur duties and obligations to or in respect of each other, and the one acquires in the estate of the other, or loses in his or her own, certain rights which are valuable in a pecuniary sense. So, mutual promises between a man and woman to marry will sustain each other, and the party violating his or her promise is liable to the action of the other, as is often seen. In like manner a promise by one man to another to pay him so much in consideration that he will marry a certain woman is valid. The same reasons make it so upon which a marriage settlement is upheld upon the consideration of the marriage. There are many cases of actions on collateral promises to one in consideration that the promisee will marry a third person. In *Browne v. Garborough,* Cro. Eliz., 63, the promise was to a woman, that if she would marry one R. B., and one J. B. should not assure to them certain land, then the defendant would pay her $100; and the marriage took effect, and an action was brought thereon by the husband and wife. After verdict for the (177) plaintiffs on *non assumpsit,* it was moved in arrest of judgment that there is no sufficient consideration, as the defendant was a stranger to the *feme.* But the court gave judgment on the verdict, giving as one reason that it was intended the woman was induced by the promise to marry R. B., which otherwise she would not have done, and peradventure she trusted the defendant rather than J. B. *Bradford v. Foder,* Cro. Jac., 228, and *Beresford v. Woodroff, ib.,* 404, are other instances in which similar actions were sustained. It is true that in those cases it happened that the person whom the plaintiff was to marry was a relation of the defendant, and that in *Browne v. Gar-*

borough some stress was laid on that circumstance. But it is quite clear that was not material; for it is not the benefit that may accrue to the promiser or his relation which constitutes the consideration in such a case, but the liabilities incurred by the person marrying and the effects the marriage may have on his or her estate, real or personal. Accordingly, we find a precedent, 2 Went., 492, in which the declaration was on a promise to pay the plaintiff £7 in consideration that he would marry one D. B., who then had a bastard; and there is another precedent, 2 Chit. Pl., 254, in which the declaration is on a promise to pay the plaintiff a sum named for marrying one E. F., without otherwise describing her as of kin to the defendant, or as under any particular discredit or disadvantage. In *Ex parte Cottrell,* Cowp., 742, a person gave to another a bond to pay him certain sums by installments, in consideration that he would marry a woman by whom the obligor had several bastard children, and, after the marriage had, the obligor became bankrupt, and the question was whether the obligee could prove this debt under the commission. A case was sent out of chancery to the Court of King's Bench for the opinion of the court (178) of law. The court interrupted the counsel for the creditor by inquiring what could be objected to the bond; and when the counsel on the other side contended that the debt could not be proved, because it was not founded on a good consideration, *Lord Mansfield* replied that the consideration was good between the parties, as it was a stipulation between them in consideration of marriage; the one having performed his part and married the woman, the other was bound to perform his. Those cases and precedents fully establish that a promise to pay a man for marrying a particular woman will maintain an action, after the marriage had. It follows that a promise to pay him for marrying any woman, without designating one in particular, is likewise valid; for there is no perceptible distinction on which the law can give an action in the one case and not in the other. It was argued, indeed, that it might be a prejudice to one to marry a particular woman, and by possibility, in such a case, the man would not have married her had it not been for the promise; whereas marriage generally is to be taken to be to the party's gratification and benefit, and when he is left at large to his own free choice, his marriage cannot be intended to be to his disadvantage; and, therefore, that in this last case the marriage is not a sufficient consideration. But the distinction seems to be entirely untenable, for experience proves, even when the parties are of their own exclusive selection, marriages may or may not be judicious or happy. And it is just as much an

act of prudence for a man to refrain from marrying any woman without having a competent livelihood for himself, his wife, and a family, as it is for him, under those circumstances, not to marry a particular woman. In either case he may be induced to marry or not to marry by his having or not having a reasonable consideration. But the law does not inquire whether the party has or has not made a fortunate match, because it is not the adequacy of the consideration which determines the validity of the promise, but it is the doing of something (179) by the party to whom the promise is made, and it is a familiar elementary principle that such act, however trifling, constitutes a sufficient consideration. The act of marriage with any one woman must, in this point of view, be the same as that with any other; and therefore, as far as the objection to the want of a consideration affects the case, the instructions to the jury were right.

It was next said that the plaintiff gave no such assent to this promise as amounted to a contract between the parties, on which the other party could have an action; and so it was void for want of mutuality. That is but presenting the last objection in another aspect, and therefore cannot avail. There are two modes of making simple contracts and declaring on them. The one is, when one party promises to do a certain thing, and in consideration of that promise the other party engages to do something on his part. Then, as nothing is done but the making of the promises, it is absolutely necessary that mutual valid promises, amounting to an express contract, should appear; otherwise, one of the parties might claim the benefit of the promise of the other, without in return doing any act or being liable for any loss whatever. And in such a case it is necessary only to set out the mutual promises, without averring performance on the part of the plaintiff. The other mode is, when one party promises, in consideration that the other will or will not do some act. Then no mutual promise need be set forth or exist; but it is necessary and sufficient to show the act done. It is not requisite that it should appear the plaintiff might have been sued for not doing the act; for he may recover after the thing done, though it was at his election whether he would do it or not up to the moment of its execution. Thus, in an action on a promise to pay the debt of another in consideration of forbearance, the declaration sets forth no agreement of the plaintiff to forbear, but only the promise of the (180) defendant to pay up on the consideration of forbearance for the particular time, and, then, that the plaintiff, confiding in the defendant's undertaking, did forbear during the prescribed

period. In like manner are framed the precedents upon promises to pay one for marrying a particular person. They set forth that in consideration that the plaintiff, at the instance of the defendant, would marry A. B., the defendant promised the plaintiff to pay, etc., and that the plaintiff, confiding in the promise, afterwards married, etc. In no instance is there an averment, or is it set forth as a part of the consideration, that the plaintiff agreed to marry, excepting only when the action is between a man and woman for breach of promise to intermarry. The declaration alleges merely that the plaintiff in fact married, and that thereupon the action arose upon the defendant's promise. For in all such cases it is the intendment of the law that the marriage was induced by the promise, and therefore it is not necessary to aver or prove that it was done at the instance of the defendant. *Beresford v. Woodroff*, Cro. Jac., 404; *Poynter v. Poynter*, Cro. Car., 194; *Bockenham v. Thacker*, 2 Vent., 71. There is, however, another case which presents a remarkable instance of the validity of a promise by one person to pay a sum of money for an act done by another, when no other person is or can be found to do the act, the right to claim the benefit of the promise arises simply from the performance of the act by any person and without any previous communication with the defendant. It is that of the promise of a reward for apprehending a felon, discovering lost goods, or the like, in which the promise is deemed to be a continuing one, and to be binding in favor of any person who afterwards acts upon it. *Williams v. Carwardirel*, 5 Car. and P., 566, and 4 Barn. and Ad., 621. And the precedents of declaration upon such offers of reward aver merely that the plaintiff,
(181) upon the faith of the offer, did the service, and that the defendant had notice thereof. 3 Went., 30. It was not necessary, therefore, that the declaration here should have averred more than it has, or that there should have been any engagement by the plaintiff to marry, in order to entitle the plaintiff to recover upon his marriage and the birth of a child.

As to the objection that these things were not done in a reasonable time, there is nothing in it. The contract specified no time within which the marriage and birth of issue should occur; and, from their nature, the party had his lifetime to perform them, and, upon performance completed, could claim the compensation agreed on—at least, unless, before any act done by the plaintiff towards performance, the other party had retracted his offer.

The last ground of exception was that the plaintiff did not prove that he was the father of his wife's child; and to that

was added here that an inquiry on that point would be indecent, and therefore, also, that the promise ought not to entitle the plaintiff to an action. The answer is that there is legal evidence of the paternity of the child, as it is matter of law that the husband who cohabits with his wife—and nothing to the contrary was suggested here—is presumed to be in fact the father of the wife's issue. Then, as to the notion of the indecency of investigating an inquiry into the legitimacy of the issue, it seems to the Court to be entirely unfounded. This is not a case of a wager between two persons upon a question involving the feelings of others or naturally calculated unnecessarily to produce indecent inquiries. On the contrary, it is a promise to pay one a certain sum in consideration of marrying and having issue of the marriage, which is a very common contingency, upon which estates devised are enlarged or defeated, and it is also a contingency on which almost all the limitations in marriage settlements depend. They can offend the feelings or delicacy of no one, but are contingencies naturally (182) connected with the proper provisions for a family, and therefore they almost always give rise to important limitations in settlements. The present is a transaction much of the same nature, whereby the plaintiff, who was single at the time, was to become entitled to demand a particular sum from the testator upon his future marriage and the birth of issue.

PER CURIAM. Judgment affirmed.

ALEXANDER KELLY v. JESSE F. MUSE.

Where there is a judgment against two or more, an appeal cannot be granted unless all the defendants join in the appeal.

APPEAL from the Superior Court of Law of MOORE, at Spring Term, 1850, *Settle, J.*, presiding.

The plaintiff warranted four defendants, Muse, Spivey, McNeill and McDonald, on a former judgment for $40, and on 1 January, 1837, judgment was rendered against the four for debt, interest and costs. The justice then made this entry: "The defendant Jesse F. Muse, no other defendant in the case being present, prays an appeal, and it is granted, by giving for surety one William D. Harrington." In the County Court several pleas were put in generally for the defend- (183) ants, and the cause pended until July, 1847, when Spivey came into court and declared that the appeal had been taken

and prosecuted without his consent or knowledge, and moved to dismiss the same. The court refused the motion; and then the plaintiff moved to dismiss the appeal. But the court refused that motion, also, and the plaintiff appealed. The Superior Court at the next term refused to take cognizance of the plaintiff's appeal, and dismissed it, and remanded the case with a writ of *procedendo* to the County Court. At July Term, 1849, the plaintiff again moved the County Court to dismiss the appeal from the judgment of the justice of the peace, upon the ground that it was a joint judgment against four defendants, and one of them only appealed; which motion was overruled, and the plaintiff appealed. At February Term, 1850, the Superior Court reversed the last decision of the County Court, and allowed the motion of the plaintiff to dismiss the appeal, upon the ground stated by the plaintiff, and thereupon the defendant Muse, by consent, was allowed to appeal to this Court.

Kelly for plaintiff.
Mendenhall, Haughton and *Winston* for defendants.

RUFFIN, C. J. The decision of his Honor, from which this appeal was taken, is in conformity with the judgments then recently given by this Court in the case of *Smith v. Cunningham,* 30 N. C., 460, and *Donnell v. Shields, ib.,* 371, and was, probably, founded on those judgments. Of course, as a majority of the Court concurred in them, his Honor's decision must stand affirmed, unless the minds of those judges can be fully convinced that they were, before, wrong. As that is not the case, it would ordinarily be sufficient to refer to the previous cases. But as there is not now an unanimity among the (184) judges, it is, perhaps, proper that the reasons which govern the majority should be stated a little more at large. Upon recurring to the cases mentioned, it will be perceived that they occurred in 1848, and that the whole Court at that time united in them; and also that they professed to follow, and, in fact, do follow a rule laid down upon this point in the earlier cases of *Dunns v. Jones,* 20 N. C., 291, and *Hicks v. Gilliam,* 15 N. C., 217—the former of which occurred in 1838 and the latter in 1833, at which periods two other judges sat in the Court, and the Court was then also of one mind. It is also a fact well known that the case of *Hicks v. Gilliam* was decided in conformity with the previous general opinion and the established practice of the profession. Under such circumstances the Court does not consider it allowable now, whatever might have been the opinions *ab origine* of the judges individually, to overturn a rule and principle laid down and

acted upon as the ground of decision of the rights of persons in such a series of cases. The importance of adhering to well-considered judicial precedents, running through several generations of lawyers and judges, can hardly be overrated. It is difficult duly to estimate it, except by turning one's mind to the mischiefs which would arise from a total disregard of them, and the misery to a people, who could not tell what the law was under which they were living until they took the opinion of the judge for the time being upon every particular question. That would, indeed, be both a new and a dangerous principle—one which the Court cannot adopt. But the majority of the Court must acknowledge that, as it seems to them, the old decisions are right which do not allow an appeal to one of two or more defendants from a joint verdict and judgment. It is true, hardships not infrequently grow out of the rule; and it must not be supposed that the judges hitherto have not been aware of them, and willing to prevent them, if (185) they could. In some of the cases the hardship was as great as it could be—for example, in *Donnell v. Shields,* 30 N. C., 371; and observations were made on the hardship with the view of calling the attention of the Legislature to it. But the grievance has ever been found to be beyond the reach of the judicial function. If to be remedied at all, it requires the power of the Legislature; and we are persuaded that, whenever the attempt shall be made, the subject will be found to be one which will require much caution and consideration to provide a fit remedy without producing or opening the way for greater mischiefs than those obviated. At all events, the courts have no power of legislating upon the subject. The statute gives the right of appeal, and by it annuls the judgment appealed from, and directs a trial *de novo* in the appellate court, except in appeals to the Supreme Court. How is it possible a court can say that as to one of the persons against whom the judgment was given, it is annulled, but not as to the others? The language is the same as to appeals by defendants and by plaintiffs. Now, if one defendant can have an appeal, how can it be denied to one of the two plaintiffs? We do not say that the two cases ought to be governed by the same rule; that is for the Legislature to determine. But it seems to us, as a matter of judicial construction of a statute, or of judicial authority independent of a statute, an action standing for trial on issues before a jury cannot in this State be split up, so that different parts of the case will be in different courts at the same time, in the one instance more than in the other. It has been supposed that the court is at liberty to do so upon what is called a new

principle laid down by the Legislature, namely, that contracts shall be deemed joint and several, and that actions may be brought accordingly. But, clearly, that cannot affect rights to which that principle has not been applied by the Legis-
(186) lature, or alter the constructions of statutes previously existing. If the Legislature adopts a new policy, the courts must enforce it as far as the enactment commands or authorizes. But they cannot carry the principle itself further than the Legislature has carried it, so as to make it reach cases which the Legislature would not venture to touch. When a statute authorized an appeal from a judgment against two upon a joint contract, it followed, upon the principles of common law, that there could not be an appeal, unless both defendants joined in it; because the judgment could not be for one and against the other, but must be for both, unless it were against both. There another statute authorizes a creditor to sue on a joint contract as if it were joint and several—that is, to sue all the parties together or separately. When the creditor sues jointly, surely it is not for the defendants, or one of them, to say that the creditor shall be deprived of that privilege, and each of them be allowed to appeal and turn the joint action into several ones. Nor can the court allow, without some statute to help them, that upon a judgment against two the plaintiff may take out several executions as upon two separate judgments. The symmetry of the law would be completely marred thereby. It is true that when an action *ex contractu* is brought against two, there may be a verdict and judgment for one and against the other, as was held in *Jones v. Ross,* 4 N. C., 335; and that seems to have been carrying the construction of the act of 1789 very far—further than, on principle, it ought to be carried, because it allowed of a variance between the declaration and evidence by permitting the plaintiff to recover on the several contract of one, when the issue is whether the two contracted together. But it was so decided, and so long decided and acted on that in *Brown v. Conner,* 32 N. C., 75, the Court deemed it a duty to submit to it. Yet that decision by
(187) no means affects the construction of the statutes granting appeals, or alters the rule of law as to the process to be sued out on joint judgments. A particular enactment, altering the law in one point or on one subject, cannot be judicially extended to other points and other subjects not within the purview of the act; but each statute is necessarily to be construed in reference to the previous law upon the subject of that act, the mischief and the remedy provided by the act. The acts granting appeals form a system of law upon that subject, and

are to be construed upon their own terms and such reasons as apply to that particular subject; and, as it seems to the majority of the Court, the point is concluded by authority and entirely supported by reason, that an appeal, on which another trial by jury is to be had, cannot and ought not to be taken by one of several defendants, by himself, so as thereby to split up the cause into several parts and greatly multiply costs.

It must, therefore, be certified to the Superior Court that there is no error in the order of that court from which the appeal was taken to this Court; so that the Superior Court may remit the case to the County Court, with directions to dismiss the appeal to that court from the judgment of the justice of the peace, to the end that the plaintiff may have execution of the judgment given by the justice of the peace.

PEARSON, J. This case presents the question, Is a judgment against two or more joint? or is it joint and several, and to be treated in its consequences as if the defendants had been severally sued?

The decision of *Trice v. Turrentine*, 32 N. C., 443, and *Jackson v. Hampton, ib.*, 579, was put by me upon the ground that the acts of 1789, 1796 and 1797 were intended to do away with the hardships growing out of the doctrine of joint obligations, joint judgments, and survivorships, and had made a change in the law by abolishing the principle of the Eng- (188) lish law as to joint judgments, and introducing the principle that the defendants in a judgment are to be treated as if they had been "severally sued," whenever the ends of justice required it. And I venture the opinion that as we had, by a liberal construction of these remedial statutes, adopted a *new principle* and got rid of all those hardships, except one (which is the one involved in the present case), it was wiser to rid ourselves of that also, by overruling the cases which adhere to the *old principle*, than to embarrass the law by attempting to sustain those cases by distinctions "too fine for use."

This case made it necessary to review that opinion. I have performed the duty most anxiously, and the result is a clear conviction of its correctness.

My position is that the statutes referred to changed the law and introduced a new principle; that this new principle has been acted upon by the Legislature and has been adopted by this Court, in two cases, which have never been drawn in question, and which directly conflict with the class of cases adhering to the old principle; and that to relieve ourselves of the confusion in which we are now involved, and the great confusion to

which we will be exposed in future, it is necessary to adopt the one principle or the other by overruling the cases which adhere to the old principle or the cases which adopt the new principle. If this necessity exists, no one will contend that the new principle should give way to the old one, with all of its absurd consequences.

The old principle is that all of the defendants are "a unit" and make but one, or, as it is elsewhere expressed, "though they are several persons, yet they make but one defendant, when jointly sued." 6 T. R., 525.

As a consequence of this principle, all of the defendants must join in an appeal, and the plaintiff, to fix the bail of one, (189) must first run a *ca. sa.* against all. Now, by the cases of *Trice v. Turrentine,* 32 N. C., 443, and *Jackson v. Hampton, ib.,* 579, the plaintiff is relieved from the hardship of being obliged to run a *ca. sa.* against all of the defendants; and the cases of *Trice v. Turrentine* and *Waugh v. Hampton,* 27 N. C., 241, which adhere to the old principle, are overruled. It is true, the two judges who make the decision do not agree as to the ground upon which it is put. The one adopts a new principle and gives the relief directly; the other gives the relief indirectly, by allowing the plaintiff to instruct the officer not to execute the writ upon one; still, the result of the decision is to relieve the plaintiff from a hardship which is a consequence of the old principle, and it must weaken the authority of the only class of cases which still adhere to it; for if the plaintiff is relieved from one of the consequences, a portion of the defendants should be. It was the plaintiff's act to sue both in one action, instead of having two actions, and the judgment in those cases remained, as to all of the defendants, unreversed and in full force; whereas, in this case, the defendant had no option as to whether there should be two warrants or one, and the judgment would be vacated as to one if the appeal is allowed, leaving it in force as to the other, just as if there had been two warrants. And if the plaintiff, in the one case, is relieved from the consequence of his own act, the defendant in the other ought not to be prejudiced by the accident, over which he had no control, that the plaintiff had sued both in one warrant, instead of having several warrants against each.

At all events, this is a favorable occasion to assail the old principle, and I now proceed to sustain my position. By the old principle, if, pending a suit *before* judgment, one of the defendants died, his executor or administrator could not have been made liable, although he was the only solvent defendant. The act of 1797 provides that, in such case, such process

(190) and judgment may be awarded against the executor or administrator of the deceased defendant as if he had been "sued severally." Here *the new principle* is announced, and is applied to one case, so as to relieve against a hardship of the old principle, and the question is, Shall this new principle, by a liberal construction of these remedial statutes, be extended to all cases coming within the same mischief, so as to relieve against all the hardships? or are we to "stick to the letter" and confine the relief to the cases expressly provided for?

The Legislature has acted upon the new principle. The act of 1820 provides that if more suits than one be instituted against several obligors, the suits, on the return of the writs, shall be consolidated. Now, the lawmakers must have supposed that the old principle and its consequences had been abolished, and that the new principle, by which the defendants are to be treated as if "severally sued," was in force, or else they intended manifest wrong; for, by the old principle, the plaintiff could not proceed against the bail of each, as he could have done if his suits had been let alone; and if one of the defendants had died *after judgment,* the plaintiff had no remedy against his representative; and, on the other hand, the defendants, after the consolidation, must all join in an appeal; whereas, if the suits had been let alone, each defendant had the right to appeal; and upon the supposition that the old principle was in force, all these hardships were imposed upon the parties by a wise Legislature to save a little cost.

Again, the act of 1844 provides that no *ca. sa.* shall issue unless the plaintiff makes oath that the defendant conceals his property. This shows conclusively that in the opinion of the Legislature the defendants are to be treated as if they had been "severally sued"; for if the defendants are "a unit," a fraudulent debtor must go free, if he has an honest codefendant, as to whom the oath cannot be made. It is a condition precedent, and no officer would be justified in issuing a *ca. sa.* (191) against both upon an oath as to one.

In *Jones v. Ross,* 4 N. C., 335 (1816), it is decided that in an action *ex contractu* judgment may be *against* one and in *favor* of the other defendant. This is directly opposed to the old principle; and by a liberal construction of the statutes referred to, the new principle is adopted, and each defendant is treated as if he had been "severally sued," and this in favor of the plaintiff, who elected to join the two in one action.

So in *Smith v. Fagan,* 13 N. C., 298 (1830), it is said "it is the policy of the authorities of the country to extend the principle of the act of 1789 as far as will *completely* remedy

the evils at common law," and it is held that the old principle, that a judgment is joint, so that, if one defendant dies *after* judgment, it cannot be enforced against his estate, is changed by a liberal construction of those statutes which apply to judgments, as well as to obligations strictly so called. Here, the new principle is adopted, and the defendants are treated as if they had been "severally sued," and this, too, in favor of the plaintiffs. Now, then, can it be insisted that the old principle should be adhered to so as to subject defendants to its hard consequences? They have no election as to whether there shall be one writ or two; and it is but reasonable that although the plaintiff chooses to include them in the same writ, they should be treated and allowed the same rights as if they had been severally sued. These two cases adopt the new principle, and have been acted upon by the courts and the profession ever since. Scarcely a court is held where judgment is not rendered against one defendant and in favor of the other, and where the representative of one defendant, who died *after judgment*, is not proceeded against; and it is done so much as a matter of course, and (192) with so little question that many practitioners are not aware of the fact that under the old principle the law was to the contrary.

The old principle is adhered to in only one class of cases, *Hicks v. Gilliam*, 15 N. C., 217, and six other cases which follow it, where it is held that as the defendants are a "unit," all must join in one appeal, and if one refuses, the others must lose their rights, without hope of relief.

The new principle is adopted in two cases which have never been questioned. The old principle is adhered to in one class of cases, seven in all, but the authority of these cases (as they all stand upon the same ground) is weakened by the formidable array of numbers. The new principle adopted in *Jones v. Ross* and *Fagan v. Smith* was so much in accordance with the sense of the profession and the common idea of justice that these cases have never since been questioned, while the old principle, which is acted on in *Hicks v. Gilliam, supra*, was so much at variance with the sense of the profession and led to such hardships that it was not only questioned, but sent up to this Court, sometimes under one aspect and sometimes under another, and the present is the eighth time that this Court has been appealed to for relief. The struggles of the profession and of the public against the old principle have been like the convulsive efforts of a strong man seeking to relieve himself from a weight with which he is oppressed.

That these two sets of cases cannot stand together is self-

evident. The one adheres to the old principle, that the defendants are a "unit"; the other adopts the new principle, that the defendants, although sued together, are to be treated and have the same rights as if "severally sued." That confusion will grow out of contradictory decisions based upon these inconsistent principles, and that there is a necessity to adopt the one and reject the other, is painfully exhibited by the cases of *Trice v. Turrentine* and *Waugh v. Hampton*, overruled by *Trice v. Turrentine* and *Jackson v. Hampton*, and the case of (193) *Brown v. Conner*, 32 N. C., 75. There the defendant was made to feel the weight of both these inconsistent principles; being sued with one Long, and judgment in the County Court being rendered against both, according to the old principle, they were forced to appeal jointly. In the Superior Court it was proven that Conner was not liable for the debt, and a verdict was rendered in his favor, and he had judgment for his costs and that he go without day; but, according to the new principle, and on the authority of *Jones v. Ross*, judgment was rendered against Long; and the result was that judgment was rendered against Conner upon the appeal bond, and he had to pay the plaintiff's debt and costs, notwithstanding there had been a verdict and judgment in his favor; and such must be the hard fate of all defendants until the one principle is adopted and the other is wholly rejected.

I should not feel at liberty to insist upon overruling the cases of *Hicks v. Gilliam*, and the other cases which follow it, but for the fact of their being directly opposed to the two acts of the Legislature and the two cases to which I have referred, and to which must now be added *Brown v. Conner*. This, I think, not only justifies, but makes it necessary to overrule them.

No one can read the case of *Brown v. Conner*, 32 N. C., 75, and say the law ought to stand as it does. That case was correctly decided. The conclusion is logical: there was no escape from it without overruling *Jones v. Ross*. That had been attempted in the Superior Court; but this Court sustained it, and, *in doing so, overruled Hicks v. Gilliam*, for the two cannot stand together.

The defendants are a "unit" and must join in an appeal. After *they join* in an appeal they *cease to be a unit*, and the plaintiff is entitled to judgment against one, although he shows no cause of action against the other. Is it right to (194) let this state of things continue?

I am not in favor of judicial legislation. Where new combinations of circumstances and changes in the state of society develop defects in the law, it is the province of the Legislature

to remedy these defects. But where a defect is occasioned by a train of decisions, all involving the same error, it is the duty of the Court to remedy this defect, because it is the consequence of its own wrong action, and it should correct its own error, and should not continue in error until "confusion becomes worse confounded," in the hope that the Legislature will extend its omnipotent arm and help the Court out of a difficulty of its own creation.

The Court not only has power to correct its own error, but it is most proper that it should do so; for, knowing the source and extent of the error, it can best apply the remedy; whereas, the Legislature, not knowing the case "in all of its bearings," may handle the subject too roughly, and while applying the remedy to one evil, may affect injuriously important principles in other parts of the system.

PER CURIAM. Judgment affirmed.

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(195)

HENRY HILL v. STEPHEN DOUGHTY.

Where one had a claim against three distributees on account of assets received from an intestate's estate, and they jointly promised, verbally, that they would pay the debt: *Held*, that this promise was void under our statute, being only oral, because each of the defendants was liable separately in proportion to the assets he had received, and by this promise each made himself responsible for the liability of the others.

APPEAL from the Superior Court of Law of BEAUFORT, at Spring Term, 1850, *Bailey, J.*, presiding.

The action is *assumpsit*, and *non assumpsit* pleaded; and it was decided upon the following case agreed:

In May, 1829, Thomas Doughty was appointed the guardian of John Doughty, an infant, and gave bond with George Hill as a surety. Thomas Doughty died in 1830, intestate, leaving three infant children, the two defendants and a daughter, who were his next of kin. William E. Smaw was appointed the guardian of the infants in 1835, and in 1838 he was also appointed the administrator *de bonis non* of Thomas Doughty, and received assets of his intestate. When the defendants came of age Smaw settled with each of them, and paid to each his share of the estate, without taking any refunding bond. In 1847 John Doughty brought suit on the guardian bond of Thomas Doughty against Smaw, as his administrator, and against Henry Hill, the present plaintiff, as the executor of

George Hill, who was then dead, and the damages were assessed to $100 for a balance due to the ward, and judgment indorsed accordingly. A *fieri facias* was issued thereon in September, 1849, and on 1 December following the present (196) plaintiff paid the same. He had before that time settled his accounts as executor and paid to sundry legatees all the estate, except such parts as were given to him by the will, which he retained as his own legacy. At the time of the suit brought by John Doughty, Smaw and the sureties to his administrator's bond were insolvent, and have been ever since. While the execution was in the sheriff's hands, the attorney of the plaintiff, Hill, informed the present defendants "that he had been instructed to commence proceedings to subject them to the payment of the amount recovered, upon the ground that it was a claim against their father's estate, and they had his property"; and the defendants then promised the attorney that if he would not commence proceedings against them and run them to costs, they would pay the execution at or before its return; and the attorney informed the plaintiff thereof, and was instructed not to commence any proceedings against the defendants until after the return of the execution. The defendants did not say expressly that each of them would pay a part of the demand, though they remarked that their sister was equally liable, and they said they would make her pay her proportion. Both of the defendants, however, when together, told the attorney, as aforesaid, that "they would pay the judgment and execution."

It was agreed that if the opinion of the court should be for the plaintiff, he should have judgment for $124 and the costs; and that if the court should be of a contrary opinion, there should be judgment as of nonsuit. Judgment was given for the plaintiff accordingly, and the defendants appealed.

J. H. Bryan and *J. W. Bryan* for plaintiff.
Donnell for defendants.

RUFFIN, C. J. Several objections were taken at the (197) bar to the recovery; but it is sufficient to consider one of them, as the Court deems that fatal. Supposing, then, that the action is properly brought in the individual capacity of the plaintiff, and also that the promise is to be deemed joint and not construed with reference to the previous several liabilities of the next of kin, still the action will not lie, because the promise was not in writing. The argument for the plaintiff is that the defendants were bound in equity to exonerate the plaintiff from the payment of the judgment, or to reimburse to him what he might pay on it, and that such a liability will support

an express promise to pay the money. Without saying how far next of kin may, on account of distributive shares received, be liable in equity to creditors upon the *devastavit* and insolvency of the administrator, and admitting such liability for the purpose of the present question, and also that an equitable liability will sustain an express promise at law, yet it will not follow that this verbal promise by two of the next of kin will maintain this joint action against them. If an equitable liability be a good consideration, it is so as far only as the liability went; for even forbearance will not uphold a promise to pay an unfounded demand. If, then, a court of law can recognize an equitable liability as a consideration for a promise, it must follow that the Court is obliged to determine the extent of the liability in order to ascertain how far it is a sufficient consideration, and also whether the promise founded on it is such an one as may be oral or must be written—in other words, whether the equitable liability was that of the party promising or of some other person; for the statute, which requires a promise to answer the debt of another to be in writing, must, of necessity, be construed to mean all debts, whether legal or equitable. Now, the liability to creditors of the defendants and their sister, as next of kin, was not joint, but arose, if
(198) at all, by reason of that portion of the assets of their father which came to their respective hands as their several shares of the estate. Each was, therefore, liable for only an equal proportion of the money—at all events, in the first instance, and while the others were able to pay their parts, which is not questioned here. Hence, it is obvious, if one of the defendants had verbally promised to pay the whole of this demand, that the promise would not have been binding, under the statute of frauds, beyond his own one-third: for, beyond that, the liability was not his own, but that of another. It seems clear that an undertaking by the defendants in a joint form to pay the whole debt cannot alter the rule of law or the legal effect of the promise as to each, in that respect; for if two persons owe another separate debts, then joint oral promise to pay both debts cannot sustain a joint action, since it is a promise by each to answer for another in respect to all but his own original debt. Therefore the plaintiff cannot have judgment in this action—not against both defendants, as there is no valid joint promise; nor against the defendants separately, as the plaintiff cannot have judgment against one defendant for a part of his demand, and against the other for the residue.

PER CURIAM. Judgment reversed, and judgment of nonsuit.

(199)

DEN ON DEMISE OF CLEMENT JOHNSON v. JAMES FARLOW.

When a deed from A to B calls for the line of an adjoining tract, testimony cannot be introduced to control that call by showing that, at the time of the execution of the deed, they ran to a different line; that B afterwards said this last was his line, and that A and those who claimed under him cultivated for many years up to this line.

APPEAL from the Superior Court of Law of RANDOLPH, at Special Term in July, 1849, *Battle, J.*, presiding.

Morehead and *Iredell* for plaintiff.
Winston and *Mendenhall* for defendant.

PEARSON, J. In 1767 Henry E. McCulloch conveyed to one Thomas King a tract of land, which is represented in the annexed diagram by the parallelogram A, B, G, O.

In 1794 a grant issued to one McCrackin for the tract of land represented by these letters, T, X, G, R, D, G, J, P, Q, R, S (at G). The grant calls for a post oak, *then north* 62 degrees *east* 27 *chains to a black oak* (at R), then east 49 chains to a *stake in King's line* (at D), then north 29 chains to a black oak, his corner (at G), then east 39 chains to a stake (at J), and around to the beginning.

In 1797 King conveyed his tract of land to one Laughlin.

In 1801 Laughlin conveyed to McCrackin the land represented by the letters L, E, H, O, which was the northern part of the land deeded to King by McCulloch and a small part of McCrackin's own land represented by the letters (200) D, E, H, G. The deed begins at a poplar (at L), thence west 130 poles to a corner post oak (at E) on the next side of the tract, thence north 130 poles to a stake (at H), thence east 130 poles to a stake (at O), thence south to the beginning.

In 1807 McCrackin conveyed to one Andrews the land represented by the letters F (or M), N, U, Z, G, R, E (or D). The deed calls for a post oak in the original line at Z, thence south 30 chains to the old corner post oak (at G), *then north* 62 degrees, *east* 27 *chains to a black oak* (at R), *then east* 49 *chains to a stake in King's line* (at E or D), then north to the beginning. The lessor claimed under Andrews, and the only question in the case was, Did the deed from McCrackin to Andrews, in the call from the black oak (at K), *"thence east* 49 *chains to a stake in King's line,"* run to D, or did it stop at E? It was proven that there was a post oak at E, marked as a corner,

which corresponded in age with the deed from Laughlin to McCrackin in 1801, and a witness swore that in 1807, when the deed was made by McCrackin to Andrews, a survey was made and they ran the line from K to E and from E to H, and that after his purchase Andrews said that a fence on the line E, H, was on his line. Several marked line trees were found on the line E, H. It was also proven that McCrackin, after he conveyed to Andrews, cultivated up to the fence at E, H, for several years, and that Morrison, under whom the defendant claims, after he purchased in 1818, continued to cultivate up to the same fence, until 1821 or 1822, when it was turned out and permitted to grow up as an old field. The defendant claimed under one Morrison, to whom McCrackin conveyed in 1818.

(201) His Honor charged, "that King's limiting the line B, D, G, according to the original calls, the plaintiff would be entitled to recover, unless the defendant could show that it had been subsequently established elsewhere; that when McCrackin purchased the upper part of the King grant from Laughlin in 1801, he owned the whole land, and it was competent for him then to run the line E, H, and establish it as the line between his original grant and the land purchased of Laughlin. And if the jury believed he did so, that line then became the King line, and would be the line called for in the subsequent deeds, unless there was evidence to show that it had been afterwards run and established at another place, of which there was none. To establish the position that it was competent for McCrackin to establish the line E, H, upon his purchase from Laughlin, the court remarked that if he purchased a part of his own land, he would be estopped from saying it was not Laughlin's, because he had by his own deed established the line E, H. The court told the jury they were to inquire whether the evidence satisfied them that the line E, H, was established in 1801, and if so, they would find for the defendant. But if the evidence preponderated in favor of the line B, D, G, they would find for the plaintiff."

His Honor was correct in the position that B, D, G, being ascertained to be the King line, the call in the deed to Andrews from K "then east 49 chains to a stake in King's line," must go to the line B, D, G, unless there was something to control it. We think there was nothing to be submitted to the jury as sufficient, if true, to have this effect. There was error in submitting the question to the jury, instead of charging that there was nothing to control the call.

Admit that in 1801, when Laughlin made his deed to McCrackin, the line E, H, was run and marked and established as the

line up to which Laughlin conveyed to McCrackin, that fact cannot control the call in the deed to Andrews, for (202) it was a matter between Laughlin and McCrackin; and although McCrackin has a right to make a line on his own land when he pleased, yet the fact of his doing so could not make that line "the King line," so as to have any effect in a deed which he afterwards made to Andrews, inasmuch as the establishing of this new line is in no manner recognized or referred to in the deed—the calls are the same as those in the grant to McCrackin—and no allusion is made either to the fact that McCrackin had purchased land of Laughlin or to the fact that the line E, H, had been run and marked. The deed to Andrews does not connect him with these collateral acts, and his title cannot, therefore, be affected by them.

The testimony that when McCrackin sold to Andrews a survey was made, and they ran from R to E, and from E to H; that Andrews afterwards said the fence at E, H, was on his line; and that McCrackin and those under whom the defendant claims cultivated for many years up to this fence cannot have the effect of controlling this call in the deed. It would not be admissible for the purpose of controlling "corner and distance," and, *a fortiori,* "it cannot control a call for the line of an adjoining tract."

We are not certain that we comprehend the meaning of his Honor in what he says about an estoppel. But we are certain that the doctrine of estoppel has no application in this case, and the plaintiff has a right to complain of the allusion made in reference to it, as being apt to mislead the jury. It may be that as between Laughlin and himself, McCrackin was estopped from denying that he had purchased up to the new line which they had established. But in the same way he was estopped from denying that the State had granted to him up to the King line, and so there was an estoppel against an estoppel, which left the matter "at large." After Laughlin had made the deed, he had nothing more to do with it. The idea (203) that McCrackin was estopped, as against himself, is absurd, and his Honor could not have intended to express it. The truth is that after McCrackin had become the owner of all the land, he had a right to sell off to Andrews just as much as he pleased; and the only question was, How much did he convey? His deed says he conveyed up to the King line, and there was nothing to control it and give to it the same legal effect as if it had called for the *line established* by the deed from Laughlin to McCrackin, which is not referred to, and with which Andrews and the lessor of the plaintiff, who claims under him, were in

no wise connected. So the doctrine of estoppel was not involved in the case, and the allusion to it had a tendency to mislead the jury.

There must be a *venire de novo.*

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

WILLIAM IRIONS v. JOHN COOK.

Where A, a citizen of North Carolina, appointed B, in Tennessee, to lease for him a certain tract of land in the latter State, and B accordingly leased it, but the lessor, not being willing to trust A, required B to give his own note for the rent, which he did, and he afterwards paid it: *Held*, that this was an undertaking by B within the scope of his general authority; that A was bound to reimburse him, and that it was not necessary for B to give to A any notice of the payment, to entitle him to an action against A for the money so paid.

APPEAL from the Superior Court of Law of NASH, at Spring Term, 1850, *Manly, J.*, presiding.

(204) This was an action to recover $130, with interest from December, 1847. The plaintiff declared in *assumpsit* in several counts: 1. Specialty on the case. 2. As agent of the defendant upon a contract of indemnity. 3. For money paid to the use and at the request of the defendant. 4. As between debtor and creditor for money laid out and expended at the instance and for the use and benefit of the defendant.

In the progress of the trial it was proposed to read depositions taken on 5 and 6 January, 1849. Their admissibility was objected to on the ground that the *notice* of place was not specific enough. The objection was overruled. In the deposition of John W. Mathews he states that he saw Irions pay Blackwell the sum of $130; and it was explained at the time of the payment, in conversation between them, to be for the rent of the land, taken for the defendant's use. This conversation was objected to, but overruled. The proofs are in depositions and letters.

The defendant contended: 1. That the agent had no authority to obtain the land upon his own credit; and making a contract of this sort and paying the money without request could not give him a right of action. 2. That the plaintiff could not at any rate sue without a previous notice of the demand.

The court instructed the jury, if the defendant gave Irions

general instructions to rent the land in question for him, without directing in what particular manner it should be done, and it became necessary, in order to attain the object, for the agent to make himself primarily responsible, it was within the range of his power to do so. And this he might do as well in case where his principal was known to the other as where he was unknown. And if the agent, Irions, contracted as above supposed, or by his own credit, for the land, and kept it for his principal during the year, and has paid the rent according to contract, he is entitled to recover it back, with interest. And no notice of the demand or of suit is requisite in such case previous to action. (205)

LOUISBURG, N. C., 11 January, 1846.

MR. JONES: Your letter of the 25th came to hand last night. I was glad to hear from you and your family. I got home the 20th of last month, but would have got home sooner, if I had come straight on. I stopped nine days at my brother's, in Georgia, and left him anxious for me to stay longer with him, but could not. I have bought you a blacksmith. They tell me he is a good one. He is about twenty-five years old. If you will take him, you can get him for $800; and if you don't want him, my brother will take him at that price. You may have refusal. I don't know when I shall start to Tennessee, but will come as soon as I can. If you don't see me by 1 March, I shall be there by the first of the fall. Tell Mr. Irions I am much obliged to him for his kindness to me, as I did not know but what I came up to my promise. If I don't get to Tennessee before the fall, I shall want the place he has rented for me. Tell him not to let it go, as I shall want it. My father's health is very bad at this time, but I think it will be so I can take him out next fall, etc.

JOHN COOK.

To THOMAS C. JONES.

NASH, J. Several exceptions were taken by the defendant to the competency of the evidence offered by the plaintiff and admitted by the court. The first is as to the admissibility of the depositions—the notice under which they were taken being, as insisted, not sufficiently explicit. Without passing any opinion upon the point raised, it is sufficient that there was a cross-examination by the defendant. As the object in giving notice is to enable the party to prepare for the exami- (206) nation and to attend if he thinks proper, if he does attend and cross-examine the witness, a waiver of the notice is to be

presumed, and the deposition is well taken without showing any notice—the very object of giving it is attained. *Beasley v. Downey,* 32 N. C., 286.

The next exception is as to the conversation between Irions, the plaintiff, and Blackwell, the person from whom the land was rented, which was made at the time the rent was paid. The plaintiff took a receipt from Blackwell for the money, the parties then stating for what it was given. It is a familiar rule of law that declarations made by a party at the time a particular transaction takes place are *pars rei gestæ,* a part of the transaction, as explanatory of it. It is true, parol evidence cannot be received to vary or alter a written contract; but this is a receipt, and may be explained by other testimony, because the law does not consider the writing as the best evidence of the transaction to which it relates. 3 Phil. Evidence, 1475, in notes. Now, the parol evidence was given, perhaps unnecessarily, to explain why and for what purpose the money was paid by the plaintiff. The declarations were properly received.

The defendant contends that the agent had no authority to obtain the land upon his own credit, and that making a contract of this kind and paying the money, without request, could not give a right of action; and, second, that the plaintiff could not, at any rate, sue without a previous notice of the demand. Neither of the objections can avail the plaintiff, under the facts stated in the case. It is a sound principle that one man cannot, by paying a debt of another, without his request, make him his own debtor, and thereby entitle himself to an action against him. But that principle has no application here. The plaintiff was not acting officiously, either in binding himself or paying the money. The exception concedes that the plaintiff was (207) the agent of the defendant. The case shows he was his special agent, to do a particular thing, with unlimited powers as to the mode and manner of doing it. His instructions were to rent that particular piece of land at the price of $120; but if he could not get it for that, to give Blackwell his price. Such an agency is sometimes called a general agency. Story on Agencies, sec. 18. Were the means used by the defendant unusual, in making such a contract as he did make? Was there anything in the instructions received by him which forbade the use of such means? The object of the defendant was to rent that piece of land, and the plaintiff was instructed to give the lessor his price. But Blackwell would not take the defendant as his debtor, but insisted that the plaintiff himself should become bound. He did so; and without it the lease would not have been made. Under such circumstances the plain-

tiff had the right to bind himself to pay the rent. In doing so he only bound himself as far as the defendant, his principal, would, as a lessor, have been bound. The case further discloses that the defendant was apprised by the plaintiff of his having rented the land, and the defendant approved of it and directed him not to give it up. If the plaintiff had a *right* in executing this agency to bind himself, then it follows as a necessary consequence that when he paid the rent the money was paid to the use of the defendant, and he is bound to repay it. Mr. Story, in his treatise on Agency, sec. 335, states that an agent has a right to be reimbursed all his advances, expenses and disbursements made in the course of his agency on account of and for the benefit of his principal, and which grow out of the employment and are incident to it. The direction to give Blackwell his own price was an express request to use his own funds or credit to effect this object; and it does not appear that Irions had any funds of the defendant in his hands. But whether the authority was express or not, from the na- (208) ture of the agency it was implied. If the lessor had insisted that the rent should be paid in advance, his instructions would have authorized the plaintiff to pay it, and he should have had a clear right of action against the defendant.

It is further urged by the defendant that he was a guarantor, and, as such, was entitled to notice of the payment of the money by the plaintiff before the action was brought. In the transaction there is no feature of a guaranty. That is a contract, ordinarily, of suretyship. With whom did the defendant in this case form the contract? Not with Blackwell, the lessor, for he knew when he let the land that the plaintiff was the agent of the defendant, and he expressly refused to trust his responsibility, but insisted on that of the plaintiff. It was upon his credit the contract was made, and to him alone did he look for his rent. With the plaintiff no *such* contract was made or implied, except such as arises in every case where one man pays money for another, at his request, and in such cases no notice is required of the payment of the money. This is very similar to the case where a bill is accepted for the honor of the drawee and the acceptor pays the money; the law implies a request on the part of the drawee. In the argument, *Grice v. Rix*, 14 N. C., 64, was cited. It has no application. The Court there decide that where the liability of a party is not *direct,* but collateral, and dependent upon the *default* of another, he must be notified of the *default* before he can be charged. Here the liability of the defendant is direct and not collateral, and the only default was his own, in not paying the rent at the end of the

year or furnishing the plaintiff with funds to do so; and this knowledge of the default was, to him, notice sufficient.

A number of depositions, notices and letters were made parts of the case. We must be permitted to suggest that this (209) practice is inconvenient and expensive to the parties. So many of the depositions or notices as may be necessary to present the point to the Court are required, and no more ought to be incorporated into the case. In this case the clerk has not only sent the originals, but also copies; for what purpose we cannot tell.

PER CURIAM. Judgment affirmed.

CASES AT LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT MORGANTON.

AUGUST TERM, 1850.

LEWIS CAMP ET AL. v. A. R. HOMESLEY.

1. Where a recovery is had in ejectment, upon the several demises of different persons, all the lessors may unite in a joint action for the mesne profits.
2. Tenants in common may, in general, sue separately for trespasses on real estate, yet they may also join in such action, in respect to the injury being to their joint possession.

APPEAL from the Superior Court of Law of CLEVELAND, at Spring Term, 1850, *Caldwell, J.*, presiding.

The action is brought by Camp and four others, and is trespass for the mesne profits of a tract of land, recovered in ejectment upon the several demises of the present plaintiffs. Upon the trial on the general issue, it appeared that the plaintiffs and the defendant were tenants in common of the (212) premises. The counsel for the defendant thereon insisted that the plaintiffs should not recover, because a tenant in common cannot have trespass against his companion; and, if that be not so, because the several lessors of the plaintiff in the ejectment cannot join in this action. The court gave instructions to the contrary, and the plaintiff had a verdict and judgment, and the defendant appealed.

G. W. Baxter for plaintiffs.
Thompson for defendant.

RUFFIN, C. J. The directions were right on both points. As the action for mesne profits is substantially a continuation

of the ejectment, for the purpose of recovering the actual damages which were formerly nominally assessed, it follows that whenever a person is allowed to maintain ejectment, he may have trespass against the same party, by way of completing his remedy. Hence, it is settled that, after a recovery in ejectment and entry, a tenant in common may sue his companion, who ousted him, for the mesne profits. *Catting v. Darby,* 2 Wm. Bl., 1077; *Goodtitle v. Tombs,* 3 Wil., 118; *Holdfast v. Shepard,* 31 N. C., 222. Then, as to the other point, although it be true that tenants in common may, in general, sue separately for trespasses on real estate, yet it is established that they may also join in such action, in respect to the injury being to their joint possession. *Chamier v. Clingo,* 5 M. and S., and *Chamier v. Slingow,* 2 Chit., 410, are direct decisions to that point; and there seems to be no reason why the case of two or more tenants in common, thus suing their fellow, after recovering in ejectment, should not fall under the common rule.

PER CURIAM. Judgment affirmed.

Cited: Overcash v. Kitchie, 89 N. C., 392.

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(213)

ALEXANDER FOX v. JOHN B. WOOD.

A *ca. sa.* issued by a justice of the peace in Buncombe County ought to be returned to the County Court of that county, notwithstanding the provisions of the act of 1844, abolishing jury trials in the county courts of Buncombe.

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

The only question presented is whether a *ca. sa.,* issued by a justice of the peace in the county of Buncombe, ought to be returned to the County or Superior Court, under the provisions of the act of 1844, which abolishes jury trials in the county courts of Buncombe and some other counties.

The *ca. sa.* was in the usual form, and, after directing the officer to have the body before some justice of the peace of the said county, to satisfy, etc., concludes thus: "and in case he shall give bond and security according to law for his appearance before your County Court, you are to take the same and make return thereof, with all the proceedings in the case, to said court, and herein fail not."

The officer took a bond for the appearance of the defendant at the next term of the Superior Court, to which court he

returned the writ, and the judge below refused a motion to dismiss, entertained jurisdiction of the case, and the defendant was allowed to appeal.

J. Baxter and *N. W. Woodfin* for plaintiff.
Henry and *Gaither* for defendant.

RUFFIN, C. J. His Honor was of opinion that the act of 1844 transferred jurisdiction in such a case directly from the justice of the peace to the Superior Court.

We do not concur, but believe the proper construction (214) of the act of 1844 only takes to the Superior Court, in the first instance, such cases as will require the intervention of a jury as a matter of course. A statute making an exception to the general law should be confined to the object which was in view and the necessity which gave rise to it. The statute under consideration provides, among other things, that *all* appeals from a justice of the peace in the counties of Buncombe, etc., in civil cases shall be returned to the next term of the Superior Court. This is not an appeal, and does not come within the words, nor does it come within the necessity, of the statute; for it may be that an issue of fraud will not be made up. In appeals the issue is made and tried by the magistrate, and a jury will be required in the court to which it is carried, as a matter of course, unless one party or the other makes default.

Proceedings in bastardy are returnable to the County Court, and if an issue is made up it is taken to the Superior Court by *certiorari*. *S. v. Sluder*, 30 N. C., 487.

The same principle governs this case. The judgment below ought to be reversed and the motion to dismiss allowed.

This opinion will be certified to the court below.

PER CURIAM. Ordered accordingly.

Cited: Harris v. Hampton, 52 N. C., 598; *Buchanan v. McKenzie*, 53 N. C., 97.

(215)

MICHAEL FRANCIS v. WILLIAM WELCH.

1. A negro slave was permitted by his master to own a horse. Afterwards the negro was sold to A, and the horse was taken to the latter's house. A directed the negro to take the horse away, and he was accordingly given to the negro's son, who was the slave of B. B set up no claim to the horse and his slave sold him to another person: *Held*, that A could support no action against B for the value of the horse.

2. An executor *de son tort* is entitled to no action.

3. One cannot be held liable as executor *de son tort* where there is a rightful executor, except in cases alleged to be fraudulent.

APPEAL from the Superior Court of Law of HAYWOOD, at Spring Term, 1850, *Caldwell, J.*, presiding.

This is trover for a horse, tried on not guilty pleaded. The evidence was that one Love owned a slave, and permitted him to purchase a horse and use him as his own. After the death of Love his executors delivered the slave to one Prather, to whom he had been bequeathed by Love, and Prather sold and delivered him to the present plaintiff. When the slave went to the plaintiff's he took the horse with him; but, after some time, the plaintiff objected to having the horse kept there, and the slave then put him into the possession of his son, who belonged to the defendant, and kept the horse on the defendant's plantation as his own, the defendant not assuming any control over the horse. Afterwards—how long did not appear—the plaintiff borrowed the horse from the defendant's negro to drive to an adjoining county, and, on his return, he locked him up in his stable for the night. The next morning the horse was gone, and afterwards he was seen in the possession and use of the defendant's slave on his plantation for a few days, and until,

(216) in the absence of the defendant from home and without his knowledge, as far as appeared, the said slave sold the horse. The plaintiff, in some short time afterwards, demanded the horse from the defendant, and then brought this suit.

The plaintiff thereupon insisted that he was entitled to a special property in the horse as the bailee of Love's executors, the owners; and further, that, if not so entitled, he had a right to the horse as the executor *de son tort* of Love, responsible over to the lawful executors. But the court refused so to instruct the jury, and the plaintiff submitted to a nonsuit and appealed.

N. W. Woodfin and *J. Baxter* for plaintiff.

Gaither for defendant.

RUFFIN, C. J. There is no ground whatever for the action. If the property were in the plaintiff, there is no evidence of a conversion by the defendant, who, when the plaintiff would not let the horse stay at his house, merely allowed his negro to keep him, and set up no claim to him. Property got by a slave may, for his want of capacity, vest in the master; but, certainly, a slave cannot, by conversion, divest the property from the owner and vest it in his master, so as to render the latter liable for conversion. But the plaintiff had, in truth, neither a general nor a special property in the horse. According to his own position, the property was in Love's executors, and from them it never passed, as far as is seen; at all events, not to the plaintiff, who purchased the negro only, and not the horse. As to his being executor of his own wrong, the answer is that the law holds such an executor to many liabilities, but gives him no action; and, moreover, that one cannot be held liable as executor *de son tort,* where there is a rightful executor, except in cases alleged to be fraudulent.

PER CURIAM. Judgment affirmed.

Cited: McDaniel v. Nethercut, 53 N. C., 99.

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(217)

E. G. MORROW v. J. B. ALLISON.

Where a *scire facias* has been sued out upon a judgment, and, while it is in the sheriff's hands, the parties agreed that the collection of the money should be suspended so as to enable them to make a full settlement, yet the sheriff is not thereby excused from returning the process, but is liable to an amercement if he fails to do so.

APPEAL from the Superior Court of Law of HAYWOOD, at Spring Term, 1850, *Caldwell, J.,* presiding.

This is a *scire facias* on an amercement *nisi* of $100 for not making return of a writ of *scire facias* sued out upon a judgment recovered by the plaintiff against one Smith and one Rhinehardt and delivered to the defendant, then the sheriff of Haywood. The defendant pleaded *nul tiel record* of the order *nisi,* which was adjudged against him. He also pleaded specially that the plaintiff directed the defendant not to return the said writ. On the trial evidence was given on the part of the defendant that, while the sheriff had the writ in his hands and before the day for the return thereof, an agreement was entered into between the plaintiff and the defendant in the execu-

tion, to suspend the collection of the money mentioned in the writ, with a view to a settlement between them in relation to it and other dealings between them. The court directed the jury that if the parties made such agreement to suspend the collection before the return day of the execution, the defendant was not liable to be amerced, at the instance of the plaintiff, for not returning the execution. The jury found for the defendant and he had judgment, and the plaintiff appealed.

J. Baxter for plaintiff.
N. W. Woodfin, Henry and *G. W. Baxter* for defendant.

(218) RUFFIN, C. J. If this were a rule for an attachment, on which the Court could hear affidavits to purge the contempt, probably a case might be made for discharging the officer. But it is not a proceeding of that sort; and, on the contrary, it is for a penalty expressly given by statute to the party grieved against a sheriff who neglects to make due return of process delivered to him twenty days before the court to which it is returnable. The plaintiff in the execution is, therefore, legally entitled to an amercement against the officer who fails in that duty, unless he be discharged by the party from its performance. Though pleaded, there is here no discharge in point of fact. An agreement to suspend the collection of the debt, or to stay the execution, as it is commonly called, even if communicated to the sheriff, gives no authority to the officer not to return the writ. The return may be material to the creditor in several ways: as to enable him the earlier or the more readily to sue out another writ, or to rebut the presumption of satisfaction, or the like. Certainly, a direction not to enforce the immediate payment of the debt in the execution is not a direction, nor even an allowance, that the sheriff should not return the writ. The jury, therefore, was not sustained by the evidence and ought not to have found for the defendant, and the judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment accordingly.

Cited: Swain v. Phelps, 125 N. C., 44.

(219)

WILLIAM PARHAM v. JOSEPH HARDIN.

1. Where a suit is commenced in the Superior Court for a less sum than $60 for goods, etc., sold, or for a less sum than $100 due by note, etc., the suit shall be dismissed; and if the party demands more in his writ for the purpose of evading the law, and the jury finds that a less sum is due to him than that of which the court has jurisdiction, he shall be nonsuited: *Provided*, that if the party will make affidavit that the sum for which he has sued is really due, but he cannot establish it for want of proof, or that the time limited for the recovery of any article bars a recovery, then the plaintiff shall have judgment, etc.

2. *Held*, that the same rules apply to suits in the Superior Court of Cleveland County, removed under the private acts of 1844 and 1846, from the County to the Superior Court of that county.

APPEAL from the Superior Court of Law of CLEVELAND, at Spring Term, 1850, *Caldwell, J.*, presiding.

J. G. Bynum for plaintiff.
J. Baxter and *G. W. Baxter* for defendant.

NASH, J. The action was commenced in the Superior Court of Cleveland. The declaration was in *indebitatus assumpsit* for $100. On the trial the plaintiff proved an account for $61, which was reduced by a payment to $41, for which sum the jury rendered a verdict. The court, on motion of the defendant, set aside the verdict and nonsuited the plaintiff, because the court had not jurisdiction.

By section 40 of the act of 1836 it is enacted, "that no suit shall be originally commenced in any court of record for any debt or demand of less value than $60, for goods, wares and merchandise," etc., "nor for any sum of less value than $100 due by bond, note," etc. By section 41 it is provided, "if any suit shall be commenced in any of the said county (220) courts for any sum of less value than $60, contrary to the provision of the preceding section, the same shall be abated on the plea of the defendant," etc. Section 42 directs that "if any suit shall be commenced in any of the Superior Courts, contrary to the provisions of section 40, the same shall be dismissed by the court, and if any suit shall be commenced in any of the Superior Courts contrary to the true intent and meaning thereof, or if any person shall demand a greater sum than is due, on purpose to evade the operation of this act or otherwise, and by the verdict of a jury it shall be ascertained that a less sum is due to him in principal and interest than by the provision of the said

section 40 the said court has jurisdiction of, then and in that case it shall be the duty of the court to nonsuit the plaintiff; and he shall pay all costs: *Provided,* that if the plaintiff will make an affidavit to be filed in the case, that the sum for which the suit is brought is really due, but that for the want of proof or that the time limited for the recovery of any article bars a recovery, then the plaintiff shall have judgment," etc.

The result from these different sections is that if a suit be *commenced* in the County Court for a sum of less value than $60, it shall be abated upon the defendant's plea. He cannot, if he plead in chief, avail himself of the prohibition by a motion to dismiss. If the suit be in the Superior Court, and be commenced for, that is, "if the writ demand, a less sum than pointed out in section 40, the court shall dismiss it." *Clark v. Cameron,* 26 N. C., 161. The object of the Legislature, however, might be evaded in the latter case by demanding in the writ a sum which would give the court jurisdiction, when, really, a less sum was due. In such case the court cannot dismiss the suit. It cannot judicially know the fact to be that it had (221) not jurisdiction; but that difficulty is met in section 42.

If the suit shall be commenced contrary to the provisions of section 40, or if a greater sum is demanded in the writ than is due, with the intent to evade it, and the verdict of the jury shall be for a sum less than that which gives jurisdiction to the court, the plaintiff shall be nonsuited and pay the costs; and the Legislature considers the finding of a less sum by the jury as proof of the *intent* of the plaintiff in demanding a larger sum than is found due. And such has been the practice under the act, as far as we are informed. But it is not conclusive upon the party—for he may, under the first proviso, show that the sum really due is such as to give jurisdiction to the court. The plaintiff, however, contends that, as he could have brought his action in the County Court by the general law, and as jury trials in that tribunal are abolished in Cleveland County and transferred to the Superior Court, by a just construction of the local acts, advantage must be taken of the want of jurisdiction, as is pointed out in section 41, and that the provisions of section 42 do not apply to such a case. We do not concur in this view of the law. By the local act of 1846, ch. 150, the trial by jury is abolished in the County Court of Cleveland, and it is declared that an act passed in 1844, giving to the Superior Courts of the counties of Yancey and others original and exclusive jurisdiction in all cases where the intervention of a jury may be necessary, shall extend to the county of Cleveland. By section 5 of the act of 1844 *all* suits are directed to be brought

in the Superior Courts of the counties embraced in the act. By the local act of 1846, section 41 of the general law, so far as the county of Cleveland is concerned, is repealed. The jurisdiction of the County and Superior Courts is not concurrent in all suits upon money demands. The private act of 1846 did not increase the jurisdiction which the Superior (222) Court of Cleveland would have had under the general law; its only effect in this particular was to increase its business by throwing into it original suits which might have been brought in the County Court; nor does it disturb the provisions of section 42 of the general law. As to the proceedings of the Superior Courts, they remain as they were under the act of 1836. By this latter act the finding of the jury ascertains the sum actually due to the plaintiff, and also the intent with which a larger sum was demanded in the writ, "to wit," to evade the act; and but for the proviso, it would have been conclusive upon the plaintiff, and the court would have been imperatively bound to nonsuit him, *non obstante veredicto*. But the proviso put it in his power to avoid the conclusion, if the facts will justify him in making the required affidavit. This has not been done, and the court committed no error in the judgment pronounced.

PER CURIAM. Judgment affirmed.

JOSEPH BROWN v. JAMES RAY, SR.

Where A contracted to deliver to B a certain quantity of corn, if called for by a particular day, and B did not call for it till some time afterwards: *Held*, that B was not entitled to recover in *assumpsit* on the contract.

APPEAL from the Superior Court of Law of YANCEY, at Special Term, in July, 1850, *Battle, J.*, presiding.

N. W. Woodfin for plaintiff. (223)
J. W. Woodfin for defendant.

NASH, J. The plaintiff declared in *assumpsit* for the non-delivery of a quantity of corn. The case was: the defendant being much indebted, several of his creditors obtained judgment against him, the executions upon which were levied on the corn in question, which was sold in parcels, and the plaintiff became a purchaser of three of the lots. After the sale had closed, the officer observed to the parties that he could not, at that time, measure out to the purchasers their respective quantities, and

proposed to the defendant that he should do it. He agreed to do so. One witness stated his agreement to be that he would deliver it whenever they would call for it. Another witness stated the agreement to be that he would deliver the corn if the purchasers would call for it in a week or ten days. The sale and the agreement were made on 26 March, 1846, and the demand for it in June or July following. His Honor instructed the jury if the promise by the defendant to deliver the corn was as stated by the first witness, the plaintiff was entitled to recover; but if it was as stated by the second witness, he was not, because in that case the defendant's promise to deliver did not extend beyond the time specified, and the subsequent refusal in June or July did not vary the case. The jury found for the defendant, and from the judgment the plaintiff appealed.

We entirely concur with his Honor in the opinion given by him, and for the reason expressed. There being contradictory evidence as to the terms of the contract, it was a proper subject of inquiry to be made by the jury, What was the true and correct agreement? They found that the defendant had agreed to deliver the corn, if called for in a week or ten days.

(224) This being the contract, the plaintiff, to avail himself of it in this form of action, ought to have demanded the corn within the time specified—that is, on or before 1 April, 1846—as the days would then have expired. The action is on the contract, and not for the conversion. The demand and refusal to deliver being made in June, might have entitled the plaintiff to damages in another form of action, but not in this.

PER CURIAM. Judgment affirmed.

HENRY E. LYNCH v. WILLIAM T. JOHNSON.

1. The jury cannot allow commissions to an executor, etc., without a previous order of the County Court; but it is not necessary that this order should be made before the commencement of the suit against the executor.

2. The act of 1826, Rev. St., ch. 31, sec. 119, authorizing references to be made in courts of law to state the accounts of administrators, executors and guardians, applies only to suits brought upon their bonds respectively. It does not apply to suits brought upon bonds given by a testator or intestate, in which fully administered is pleaded.

APPEAL from the Superior Court of Law of HENDERSON, at Fall Term, 1849, *Ellis, J.*, presiding.

This is an action of debt on a bond given by the intestate. Plea, *plene administravit.* By an agreement between the parties, it was referred to the clerk to inquire into the assets and state an account thereof, showing the balance. The report gave the defendant credit for $181, as commissions allowed him by the County Court pending the inquiry; and the plaintiff excepted thereto on the ground that the court had no power, after this suit brought, to make the order so as to affect (225) these parties. The report also gave the defendant credit for several sums paid, before this suit brought, to persons who had paid bonds given by the intestate and themselves as his sureties; and the plaintiff excepted also to them, upon the ground that they were simple contract debts. The plaintiff brought on his exceptions to be argued, and the court overruled them; but the plaintiff was allowed to appeal.

No counsel for plaintiff.
J. Baxter and *N. W. Woodfin* for defendant.

RUFFIN, C. J. The points made by the exceptions are very plain, and were correctly decided. A jury cannot allow commissions without a previous order of the court before which the administrator was to account. *Hodge v. Armstrong,* 14 N. C., 253. If the exception were well founded the consequence would be that a creditor could always defeat the party of his commission by bringing his suit soon after administration granted, and before the estate was in a condition to admit of a return of an account and a motion for commissions. In such cases the allowance is necessarily made pending the action.

The act of 1829 changed the rule of the common law on the second point, as it gives to the claim of the surety, paying a debt of the principal, the same priority against the assets which belonged to the creditor.

If the case, then, depended on those points alone, the judgment would be affirmed. But it cannot be done, as the Court is of opinion it was erroneous to take cognizance of the report and exceptions. The parties seem to have proceeded on the notion that the act of 1826, Rev. St., ch. 31, sec. 119, embraced cases like this. But that is a mistake, as that act has only suits brought on the bonds of executors, administrators and guardians in its purview, and it leaves the trial of the issue upon *plene administravit* to the jury and upon the evi- (226) dence required at the common law. It is not uncommon, it is said, for parties to make references of this kind. If so, it is a matter of consent, for convenience' sake, so as to reduce the

points to be disputed to as few as possible, and thus save the delay and expense incident to proving the whole administration account on the trial.

As to the matters disputed, however, the Court cannot act judicially on exceptions to the report, as in equity, or in the cases within the act of 1826, but only by giving instructions on them, as in other cases when asked upon the trial before the jury. Therefore, although the opinions given in the Superior Court were, in themselves, right, it was wrong to give them at all; and for that reason it must be certified to that court that the decision ought to be reversed. But as the error for which the reversal is directed was caused by the plaintiff, who is the appellant to this Court, he cannot have his costs, but must pay those of the defendant, as was done in the similar case of *Hicks v. Gilliam*, 15 N. C., 217.

PER CURIAM. Ordered accordingly.

Cited: Anderson v. Jernigan, post, 415.

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(227)

JONATHAN FORD v. LEWIS VANDYKE.

1. In charging a guardian, the mode of compounding interest is to make annual rests, making the aggregate of the principal and interest, due at the end of a particular year, a capital sum bearing 6 per cent interest thenceforward for another year, and so on, with rests from year to year. But if a sum be found due at a rest day during the guardianship, that sum, being then converted into capital, is entitled to draw interest thereafter until it shall be paid, and that is but simple interest, there being no subsequent rest made.

2. Where an assignee of a bond brings an action of debt upon the bond, and the defendant pleads *non est factum* only, this plea does not deny the assignment. But if the action be on the case, as given by our statute to the assignee of a bond, the general issue denies both the execution of the bond and the indorsement.

APPEAL from the Superior Court of Law of MACON, at Fall Term, 1849, *Ellis, J.*, presiding.

The declaration is in debt on a bond for $170.12, alleged to be executed by the defendant to George R. Ledford, indorsed to Javan Trammell and by him to the plaintiff. Pleas, *non est factum*, payment, and the statute against usury. The bond pro-

duced on the trial was for $262.56, with sundry payments credited on it. After proving its execution, the plaintiff offered it in evidence, and the defendants objected to it for the variance between it and that declared on; but the court received it. On it were the two indorsements stated in the declaration, but that to the plaintiff purported to be made in the name of Javan Trammell "by his agent, Newell Trammell." The plaintiff then produced a witness who stated that he was with said Javan and Newell at their residence in Georgia, before the indorsement to the plaintiff, and the former said that he was too unwell to visit North Carolina, and he intended to (228) send Newell to do some business for him, and that, on the same occasion, Newell stated to the witness that he was going to North Carolina to collect a bond on Lewis Vandyke; but the witness could not tell whether Javan heard that or not. Upon that evidence, and after objection from the defendants, the indorsements were read to the jury. The defendants then gave evidence that the defendant Vandyke had been the guardian of the obligee, Ledford, and that about three months after Ledford came of full age he and Vandyke met for the purpose of making a settlement, and that, between themselves, they ascertained the principal sums received, the disbursements made by the guardian for the ward, and that, then, they referred it to three persons to make the proper calculations of interest, so as to compute the sum then due to Ledford, and that, in doing so, those persons calculated compound interest up to the day of the settlement, and thereby made the balance of principal and interest amount to the sum of $262.56, for which the bond was given.

The counsel for the defendant insisted that the bond was usurious, and also, that Newell Trammell had no power to make the indorsement to the plaintiff. But the court instructed the jury that the transaction between Ledford and Vandyke was not usurious, and that if they believed Newell Trammell had in fact been authorized by said Javan to indorse the bond in his name, they ought to find for the plaintiff, after deducting the payments proved. The jury found the payments, and then a balance of principal money of $172.69 due on the bond, and assessed damages for interest since the last payment, and also found for the plaintiff on the plea of usury, and after judgment the defendant appealed.

J. W. Woodfin for plaintiff. (229)
J. Baxter for defendant.

RUFFIN, C. J. The instructions were right upon the question of usury. The point as to the amount of interest was referred to arbitrators, and there is nothing to show that their determination was not the honest result of their judgment, without collusion with the view of giving color to an arrangement of the parties in evasion of the statute. The award, thus fairly made, judicially established the interest legally due, and one of the parties can no more unravel the award in order to open the question than he could, for that purpose, go behind a judgment or decree of a court of justice. Besides, the decision of the arbitrators was perfectly correct. It is true that interest on a debt from a guardian is not compounded after the ward comes of age. But that was not done here. The mode of compounding the interest in such cases is to make annual rests, making the aggregate of principal and interest due at the end of a particular year a capital sum bearing 6 per cent interest, thenceforward for another year, and so on, with rests from year to year. But if a sum be found due at a rest day during the guardianship, that sum, being then converted into capital, is entitled to draw interest thereafter until it shall be paid, and that is but simple interest, there being no subsequent rest made. That was this case; for the settlement was made within three months after the ward came of age, and, as the Court understands the statement, 6 per cent interest merely was computed on the balance due at the preceding annual rest, during the infancy, from that day up to that of the settlement on which the bond was given. That was legal, for as no rest was made after the full age of the ward, it is manifest he only got simple interest on the sum the law made principal during his minority. The other part of the instructions, if erroneous, was immaterial,
(230) since the indorsement from Tramnell was not in issue on the record. If the plaintiff had brought the action on the case given by the statute to the assignee of a bond, proof of the indorsement as well as of the bond would have been received on the general issue; because that goes to every fact entering into the right of the plaintiff and the obligation of the defendant to him. But in debt on a bond the plea *non est factum* is, in terms, restricted to the point that the supposed bond is not the defendant's deed; consequently, a special plea was necessary to put the indorsements in issue. But it was clearly erroneous to receive in evidence a bond for $262.56, under a declaration on one for $170.12, upon *non est factum* pleaded. The description of a deed in the declaration must be sustained by the proof; otherwise, the pleadings do not identify the cause of

action, and there would be no means by which the defendant could avail himself, in another suit, of a judgment for or against him in this.

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

Cited: Whitford v. Foy, 65 N. C., 274; *Little v. Anderson,* 71 N. C., 191.

(231)

CHARLES COGLE v. ALEXANDER HAMILTON.

A, being a surety for B, to indemnify him, B gave him a lien on some hogs. B afterwards sold the hogs to C. A refused to deliver the hogs unless C would agree to pay the debt for which A was bound. This C promised, but failed to make the payment, and A had to pay the debt himself. He then warranted C for the money so paid: *Held,* that a justice of the peace had no jurisdiction of the case.

APPEAL from the Superior Court of Law of HENDERSON, at Fall Term, 1849, *Ellis, J.,* presiding.

N. W. Woodfin for plaintiff.
J. Baxter for defendant.

PEARSON, J. One Deaver held a note on one Richardson for $50, with the plaintiff as surety. Richardson gave the plaintiff a lien on a parcel of hogs to indemnify him. Afterwards Richardson sold the hogs to the defendant; but the plaintiff refused to let him have possession until he would undertake to pay the debt. Accordingly, the defendant agreed to pay it, and the plaintiff thereupon agreed that he might take the hogs. The defendant took the hogs, but neglected to pay the debt to Deaver, except $19, which was paid by Richardson. The plaintiff thereupon warranted the defendant to recover the amount which he had paid Deaver. The defendant insisted that a single justice of the peace had no jurisdiction. The judge in the court below was of opinion that the case was within the jurisdiction of a single justice of the peace, and so instructed the jury, who found a verdict for the plaintiff, and from the judgment the defendant appealed.

We think the exception is well founded. The defend- (232) ant had agreed, for a sufficient consideration, to pay the debt to Deaver. This was a collateral act, and the neglect to perform it gave the plaintiff a good cause of action. But it was

not a "debt or demand," within the meaning of the statute conferring jurisdiction on a single justice of the peace. It was like a promise to go to Rome or to do any other act.

The plaintiff resorted to the common counts in *assumpsit* to sustain his case; but none of them will fit, supposing him to be at liberty to abandon the special contract. The count "for money paid" cannot be sustained, because there was no privity of contract between the defendant and Deaver. If there had been a contract between them, by which the defendant assumed to pay to him the debt of the plaintiff, it was void by the statute of frauds. So the money was not paid for the defendant's use.

The count "for goods sold and delivered" does not apply, for the hogs were sold by Richardson, and the plaintiff merely gave up his lien, in consideration of the defendant's undertaking to pay the debt to Deaver. The price, over and above this undertaking, was due to Richardson; or, at most, it was a sale by Richardson and the plaintiff, in which case the action for the price must be by the plaintiff and Richardson jointly, for although, under the special contract, each had a separate cause of action, under the implied contract for the value of the hogs the action would be joint.

The judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment accordingly.

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(233)

BYNUM W. BELL v. WILLIAM W. PEARCY.

The verdict of a petit jury acquitting a man indicted for a conspiracy, does not, in an action for malicious prosecution, support the averment that the indictment was without probable cause.

APPEAL from the Superior Court of Law of MCDOWELL, at Fall Term, 1849, *Ellis, J.*, presiding.

J. W. Woodfin and *J. G. Bynum* for plaintiff.
N. W. Woodfin and *J. Baxter* for defendant.

PEARSON, J. This was an action for a malicious prosecution. The plaintiff read in evidence a record showing that an indictment against him for a conspiracy had been found by the grand jury "a true bill," and that he had been tried and acquitted. The defendant admitted that the proceeding had been instituted at his instance. There was no other evidence. The plaintiff

moved the court to charge that his acquittal supported the averment of "a probable cause." The court refused, and for this the plaintiff excepts.

Malice and a want of probable cause is the gist of the action. This averment is made by the plaintiff, and it is for him to prove it. He relies solely on the fact that the jury have acquitted him. This has no tendency to show a want of probable cause. The jury say the evidence was not strong enough to convict. What was the force of the evidence, how near it approached to conviction, whether the plaintiff was acquitted by having the benefit of a reasonable doubt, are matters about which the verdict is, of course, silent. The grand jury find there was probable cause—the petit jury find that there was not (234) sufficient to convict. *Non constat* that there was no probable cause. The question is too plain to admit of argument.

In *Griffis v. Sellars,* 20 N. C., 315, it is held that if one be convicted in the County Court, and, upon appeal, is acquitted in the Superior Court, still the fact of his having been convicted is *conclusive* evidence of probable cause, and his subsequent acquittal does not open the question.

The finding of a grand jury has not this conclusive effect, and an acquittal opens the question, so as to give the party an opportunity to offer evidence to repel the presumption growing out of the action of the grand jury. How the acquittal can have any further effect, we are at a loss to conceive.

PER CURIAM. Judgment affirmed.

Cited: Stanford v. Grocery Co., 143 N. C., 426; *Morgan v. Stewart*, 144 N. C., 424.

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(235)

THE STATE ON THE RELATION OF WAUGH & HARPER v. ELISHA P. MILLER ET AL.

Where money has been paid into a clerk's office upon a judgment, and the judgment is assigned and the attorney's receipt for the note on which the judgment was obtained has been transferred by the plaintiff in the judgment to a third person, such assignee has no right to sue the clerk for the money in his own name, as he had but an equitable interest.

APPEAL from the Superior Court of Law of CALDWELL, at Spring Term, 1850, *Caldwell, J.*, presiding.

J. G. Bynum for plaintiffs.

Gaither and *T. R. Caldwell* for defendant.

NASH, J. We agree with his Honor that the action cannot be sustained. The facts are as follows: Lyle and Clayton placed in the hands of an attorney certain notes for collection. Suits were brought, moneys made and the moneys paid into the office of the clerk of the court. During the pendency of the action the receipt given by the attorney, on receiving the notes, was by the plaintiff transferred to the relators for a full consideration. A part of the money was paid by the defendant, the clerk, to the present relators. Another judgment had been obtained by one Moody in the same court and the money also paid into the office of the clerk. The relators had purchased certain witness tickets, which were filed in the case, the amount of which, included in the costs, was also paid in. The action is upon the official bond of the defendant, as clerk of the court, and the breach assigned the nonpayment of
(236) the money so paid into the office. The refusal of the defendant to pay the money to the plaintiffs is no breach of the bond. Every clerk is required faithfully to pay over all moneys received into his office to the person or persons entitled to receive the same. The inquiry, then, is, Who was entitled, under the law, to demand from the defendant the money claimed in this suit? Clearly, not the relators. A judgment, it has been decided, is not assignable, and the transfer of the attorney's receipt for the notes could, at best, transfer but an equitable right to the money when collected. The judgment still remained, in law, the property of the plaintiffs at law. These were Lyle and Clayton, and they, or their attorney at law, or their attorney in fact, were alone legally entitled to demand and receive the money from the defendant. The case is in a court of law, where, in general, only legal interests are regarded. *Jones v. Blackledge*, 4 N. C., 342; *Arrington v. Horne*, 4 N. C., 435. The defendant was under no legal obligation to pay the money to the relators, and his refusal to do so was no breach of his bond for which they can sue.

PER CURIAM. Judgment affirmed.

Cited: S. v. Brown, 67 N. C., 479.

(237)

ANDREW J. PATTON v. JOHN R. DYKE ET AL.

1. In an action in which is involved the *bona fides* of a contract for the sale of goods, the declaration of the vendors at the time of the sale, that they were indebted to the vendee, and an agreement between the parties that the price of the goods or a part of it was to be credited on that debt, is competent evidence, though the action is against third persons for seizing and converting the goods.

2. So, also, the declaration of the vendors, made some time before the contract, to another person besides the vendee, that they were indebted to the vendee, is competent evidence to prove such indebtedness in an action by the vendee against third persons.

APPEAL from the Superior Court of Law of MACON, at Spring Term, 1850, *Ellis, J.*, presiding.

J. Baxter for plaintiff.
N. W. Woodfin and *J. W. Woodfin* for defendants.

NASH, J. The plaintiff complains that the defendants took and converted to their use a quantity of goods which were his property. The case is as follows: Colbert & Morris, merchants in trade, were the owners of the goods, and sold them to the plaintiff for the sum of $450, which was an advance of 20 per cent on what they cost; a part of the purchase money was paid at the time of sale. A witness by the name of Morris stated that he was present at the sale, as agent of his son, who was one of the owners of the goods, and that it was agreed between the parties that, after deducting the cash payment, the balance should be credited by the plaintiff on a debt due him by the firm for money advanced by him to them in Charleston, South Carolina, to pay debts due by the firm, for which they were there arrested. He further stated that he had, be- (238) fore that time, heard both the members of the firm say they owed the plaintiff for money advanced by him for them on that occasion, and the debt was spoken of by the parties at the time of the sale. All this testimony was objected to by the defendants. The defendants were officers of the county of Macon, confessed the conversion of the goods, and justified under several executions, some of which were issued by magistrates to collect debts due by the firm, and some issuing from court against Colbert, one of the firm, for debts due by him individually. The firm of Colbert & Morris was in failing circumstances at the time the sale was made to the plaintiff. On the part of the defendants it was contended that the sale to the plaintiff was

fraudulent as to all the creditors, not being for a valuable consideration and *bona fide*. The court instructed the jury that the executions created no such lien upon the goods as prevented the sale to the plaintiff, and that the question of fraud was one for their decision; and if they believed the sale to the plaintiff was *bona fide* and for a valuable consideration, going to pay a debt due by the firm, they should find for the plaintiff; otherwise, for the defendants. The jury found a verdict for the plaintiff. We concur with his Honor in the instructions given. The executions in the hands of the officers formed no justification, unless the sale to the plaintiff was fraudulent. If it was so, it was void as to the creditors of Colbert & Morris, and left the goods liable to these executions. Two questions are presented by the record: the one is the *bona fides* of the sale, and the other is the admissibility of the declaration of the parties at the time of sale and before, as to the indebtedness of the firm to the plaintiff. His Honor committed no error in admitting the declaration of the parties at the time of the sale; it
(239) was a part of the transaction. The plaintiff paid a part of the purchase money at the time of the contract, and the disposition of the remainder was a necessary inquiry, as constituting a part of the agreement. Was it to be paid then, or was the purchaser to have a credit for it? If so, how long, and what assurance was he to give—his bond or his note, or the bond or note of a third person? or was it to be paid in specified articles, or how else was it to be discharged? All these might have been the subject of arrangement, and which one of them might have been selected would have constituted a part of the contract of sale, and while it remained in parol, might be proved by evidence of what was spoken and agreed by the parties at the time. It *was*, then, competent for the plaintiff to prove how and in what manner he was to pay the balance of the price of the goods; and the agreement was that the vendors were to be credited for it on a debt due by them to him for money before that time, paid by him in the city of Charleston to prevent them from an arrest for a debt due by the firm. The partners at the same time acknowledged their indebtedness, and stated how it had been incurred. The plaintiff was entitled to the whole of what was said by the parties in making the contract. See the reasoning of the Court in *Askew v. Reynolds*, 18 N. C., 370. The declarations of the parties, made before the time of the sale, admitting their indebtedness to the plaintiff, being made *ante litem* and before any movement was made or, as far as the case discloses, was thought of, towards the sale of the goods to the plaintiff, in a question impeaching the fairness of that

transaction, was certainly evidence of the fact, it being against their interest at the time it was made. If these declarations were competent evidence, and the facts disclosed by them were believed by the jury to be true, then the only remaining question is answered. The sale was made *bona fide,* (240) and there was a valuable consideration for the contract.

PER CURIAM. Judgment affirmed.

Cited: McCanless v. Reynolds, 67 N. C., 269; *Smith v. Moore,* 142 N. C., 290, 4.

PHILIP HARSHAW v. WILLIAM CROW.

The preamble to a warrant constitutes a part of it, and where it sets out, in apt words, the offense for which, as the plaintiff alleged, the defendant had incurred the penalty sued for, the form is a proper one.

APPEAL from the Superior Court of Law of CHEROKEE, at Spring Term, 1850, *Ellis, J.,* presiding.

This was a suit by warrant for $50, the penalty for burning the plaintiff's woods. The warrant was as follows:

STATE OF NORTH CAROLINA,
CHEROKEE COUNTY.

To any lawful officer to execute and return:

Whereas, Philip P. Harshaw complains to me, William Manchester, a justice of the peace of said county, that William Crow, on the .... day of April last past, did set fire to a certain piece of woods of complainant and adjoining the woodlands of the complainant and others, without previously giving two days' notice to the owners of said adjoining woodlands, contrary to the act of Assembly in such case made and provided, whereby he has forfeited the sum of $50 for the said offense:
This is, therefore, to command you to take the body of (241) the said William Crow and him have before me or some other justice of the said county to answer the premises and render to the said Harshaw the said sum of $50, which he owes and unjustly detains. Herein fail not. Given under my hand and seal this 21 November, 1849.

WM. MANCHESTER, [SEAL.]

The warrant was tried before a magistrate and came up by successive appeals to the Superior Court. The jury there found

a verdict for the plaintiff, and the defendant moved in arrest of judgment, and, being sustained in his motion, the plaintiff appealed.

No counsel for plaintiff.
J. W. Woodfin for defendant.

PEARSON, J. This was a warrant for $50, the penalty for burning the plaintiff's woods. The jury found in favor of the plaintiff, but the judge below arrested the judgment, being of opinion that "the preamble constituted no part of the warrant." In this we think there was error. The recital or preamble, as it is called, does constitute a part of the warrant, and sets out, in apt words, the offense for which, as the plaintiff alleged, the defendant had incurred the penalty sued for.

The warrant is a very good form. We can see but one objection to it, as applied to this case, and that is the negative averment as to two days' notice not having been given to the owners of adjoining woodland. The defendant set fire to the plaintiff's woodland, and in such case he incurred the penalty, without reference to the fact of notice. The provision only applies to cases where one sets fire to *his own woodland.* This averment,
(242) however, is mere surplusage, and has no effect upon the validity of the warrant.

The judgment must be reversed, and there must be judgment for the plaintiff.

PER CURIAM. Judgment accordingly.

THE STATE v. FRANCIS B. WORLEY.

1. A seal is essential to a warrant issued by a magistrate to arrest a person for a criminal offense, and if there be no seal the warrant is void, and the defendant is justified in resisting its execution.

2. Whether there be a seal or not is a mixed question of law and fact, to be decided by the judge below, and from his decision there is no appeal to this Court.

APPEAL from the Superior Court of Law of CLEVELAND, at Spring Term, 1850, *Caldwell, J.*, presiding.

Attorney-General for the State.
Henry for defendant.

NASH, J. The defendant was indicted for an assault and battery upon an officer. A search warrant was issued by a jus-

tice of the peace, upon due information made to him, commanding the officer "to search the premises of the defendant" (for certain stolen property) "and, if found there, to bring it and the defendant before the magistrate granting the (243) warrant, or some other justice of the peace of the county, to be dealt with according to law. Given under my hand and seal this 30 September, 1849. JAS. SHARP, J. P.

This warrant was placed in the hands of the prosecutor, who was an officer of the county, and in endeavoring to execute it the assault was made. For the defendant it was insisted that the warrant was void for want of a seal and for other defects apparent upon its face. The court was of opinion that it had a seal attached, and that it was otherwise sufficient in law to justify the officer in arresting the defendant. The jury found the defendant guilty, and from the judgment on the verdict the defendant appealed.

It is certain a seal is essential to every warrant issued by a magistrate to arrest any person upon a criminal charge. If there be no seal, the precept is void and affords no protection to the officer attempting to execute it; and if its execution is resisted by the defendant, he is guilty of no offense against the law, though in doing so the person of the officer be assaulted. *Welch v. Scott,* 27 N. C., 72. The question, whether there be a seal or not attached to the warrant, is one exclusively for the judge who tries the cause, to be decided by him upon inspection, and is a mixed one of law and fact. In this case his Honor below decided that the scroll affixed to the name of the magistrate, and certified by him to be his seal, was a seal. Thereby the *fact* of its existence was adjudicated. This Court is established to correct errors of law, and not errors of fact. If, therefore, the judge had erred in his judgment in the matter of fact submitted to him, we could not correct the error. *S. v. Isham,* 10 N. C., 185. What were the other defects in the warrant, upon which the defendant relied, we are not informed, and are not able, upon an inspection of it, to ascertain.

PER CURIAM. Judgment affirmed.

Cited: Fain v. Edwards, 44 N. C., 68; *S. v. Dean,* 48 N. C., 396; *S. v. Durham,* 141 N. C., 750.

(244)

ELIJAH MATTHEWS v. PENNILL GILREATH ET AL.

Under the act of 1848, relating to the county of Polk, all the records transferred to the Superior Court of Polk from the county of Rutherford are directed to be returned to the Superior Court of Rutherford County, the act of 1846 establishing the Superior Courts in Polk having been repealed by the act of 1848: *Held*, that the Superior Court of Rutherford had the right to issue an execution on a judgment, rendered in the county of Polk, while the latter had jurisdiction, as to cases from the former county removed by the act of 1846 and retransferred by the act of 1848.

APPEAL from the Superior Court of Law of RUTHERFORD, at Spring Term, 1850, *Caldwell, J.*, presiding.

This is a motion, made by the defendants in Rutherford Superior Court, to set aside an execution issued from that court against them; and these are the facts on which it is founded: In 1846 acts were passed to establish a county called Polk, out of parts of Rutherford and Henderson counties, and also establishing superior and county courts therein. In 1848 those acts were repealed, and in a supplemental act (chapter 19) the clerk of the Superior Court of Polk is required to make out a transcript of all suits pending therein, and where either or both of the parties live in that part of Polk which was taken from Rutherford, to deliver the same, with the original papers relating to such transcripts, to the clerk of the Superior Court of Rutherford; with a similar requisition to deliver to the clerk of the Superior Court of Henderson the transcripts of the cases in which the parties live in that portion which was taken from Henderson. The third section of the act further requires of the clerk of the Superior Court of Polk to deliver "all
(245) the records and dockets belonging to his office to the clerk of the Superior Court of Rutherford." By section 15 it is further enacted that the clerks of the Superior Courts of Rutherford and Henderson, respectively, shall have the same power and authority over the records and papers which are hereby required to be transferred to their offices as if such records and papers had before belonged to the offices of the clerks of Rutherford and Henderson. The execution in question is a *fieri facias* on a judgment rendered in Polk Superior Court in 1848, of which the original record was removed into the Superior Court of Rutherford, and which, according to the record, remained unsatisfied. The alleged ground of the motion was that the clerk of Rutherford Superior Court could not issue a *fieri facias* upon a judgment rendered in the Superior Court of Polk. The court refused the motion, but allowed the defendants to appeal.

J. G. Bynum for plaintiff.
N. W. Woodfin for defendants.

RUFFIN, C. J. The Legislature is competent to direct where the records shall be kept and what officers shall from time to time issue lawful process upon them. The only question, therefore, is whether, by the proper construction of the act of 1848, executions are to be issued from the Superior Court of Rutherford on judgments rendered in the former Superior Court of Polk. It would seem that there could not be a doubt upon it. The acts abolish Polk County, its courts and clerk's offices, excepting only that the clerk is kept in office until he can perform the duty of transferring the records, as directed in the act. The provisions upon that subject are not the same in respect to both counties. They are, that of the suits pending, transcripts shall be made and, together with the original pa- (246) pers relating to the respective transcripts, shall be delivered by the clerk of Polk in the following manner: that is, to the clerk of Henderson those in which the parties live in Henderson, and to the clerk of Rutherford those in which either of the parties lives in the latter county. In that mode are disposed of all the undecided cases. Then, as to the cases which had been decided, the provision is plenary, with the exception of the original papers relating to pending suits, which go with the respective transcripts of those suits—"all the records and dockets belonging to his office" are to be delivered by the clerk of Polk to the clerk of Rutherford Superior Court. It obviously follows that the execution is to issue from the court in which the record of the judgment is; it can issue from no other; and, as the Legislature could not mean, if within its power, to deprive the citizen of the benefit of his judgment rendered in Polk, he must be entitled to execution on it from the court of Rutherford. That is rendered still clearer, if possible, by the command in section 15 to the clerks of Henderson and Rutherford to act on those records and papers, thus transferred, as if such records and papers had originally belonged to their offices; which, no doubt, was intended to enable and require those clerks to proceed immediately in those cases, without any special direction of the court, according to the course of the office. It must, therefore, be certified that there was no error in refusing the motion.

PER CURIAM. Ordered accordingly.

(247)

EDWARD RIPPEY v. W. J. T. MILLER, ADMINISTRATOR, ETC.

In an action against the representative of a deceased person, who had committed a trespass on the property of the plaintiff, the plaintiff cannot, no matter however aggravated the trespass may have been, recover vindictive damages.

APPEAL from the Superior Court of Law of CLEVELAND, at Spring Term, 1850, *Caldwell, J.*, presiding.

The action is trespass *quare clausum fregit*, and was tried on the general issue. The declaration and evidence were of an entry on the plaintiff's land by the defendant's testator secretly in the night, and maliciously burning a cotton ginhouse and divers articles therein, and killing a horse; and evidence was further given for the plaintiff that the house and other property were of the value of $750. The counsel for the defendant thereupon insisted before the jury that he, being an executor, was liable only for damages to the value of the property destroyed. But, in summing up, his Honor instructed the jury that where a trespass is committed, under circumstances of aggravation, by a person moved thereto by malice, the jury was not restricted to the value of the property in assessing the damages against the wrongdoer or against his executor, but they might, if they thought proper, give vindictive damages against either. Damages of $1,500 were given; and the defendant appealed from the judgment.

(248) *J. G. Bynum* and *Landers* for plaintiff.
Gaither, with whom was *Alexander*, for defendant.

RUFFIN, C. J. As the case appeared, it would have been a proper one for insisting to the jury on vindictive damages against the trespasser. The question is, whether damages of that character can be given against his representative. The Court is of opinion that they cannot. An action for a *tort* was lost at the common law by the death of either party, the injured or the injurer, upon the maxim, *actio personalis moritur cum persona*. That, in some cases, produced great hardship, as *torts* differ in their nature, some consisting of violence and insult to the person, or injury to the character and feelings; and for such, ordinarily, there is no precise measure of damages, but they are in their nature vindictive, and in a great degree lie in the discretion of a jury. Others consist of injuries to or in respect of property; and for them the natural and legal redress is to restore the value of the property destroyed, or to the extent of the deterioration of the property.

In cases of the former class, the death of a party prevents the great objects of an action from being attained, while it has no such effect in the latter, as the object then is to reimburse, out of the estate of the wrongdoer, the loss which the other party has sustained in his estate by the act of the wrongdoer; and it is plainly just that he should thus be made whole. It is true, the common law put both cases on the same ground and gave no remedy in either. But upon the distinction mentioned, the Legislature of this State, in 1799 and (249) 1805, passed two acts, which were incorporated into one section of the Revised Statutes of 1836, whereby, amongst other things, it is enacted that actions of trespass and trespass on the case shall survive against executors when they are not merely vindictive, that is, where property, either real or personal, is in contest, or where such actions are brought for damages done to such property. Rev. St., ch. 2, sec. 10. The affirmative language used and the negative provision respecting vindictive actions, taken together, show the principle of the enactment to be that in respect to a loss sustained by one in his property from the wrongful act of another, there shall be a commensurate redress in damages, notwithstanding the death of either or both of the parties. In respect, however, to injuries to the person or to the feelings, before alluded to, and for which such actions only lie as in their nature are vindictive, it was deemed wisest to leave the law as it was before. The present case presents an instance of a third class of cases, in which the action is for damages done to property, and, to that extent, cannot be said to be vindictive, and, under the statute, undoubtedly survives. But if the action were between the original parties, the jury might go beyond the loss to the plaintiff in his estate and assess the damages in reference to the circumstances of insult or other aggravation—which are called in the books by the various names of exemplary, or vindictive damages, or smart money, all signifying much the same, and denoting that such damages are not for the injury to the property, that is, merely therefor, but for something over and above that. Now, with regard to damages of this latter character, the Court thinks the action of trespass is not preserved by the act after the death of one of the parties. For, as the act gives the action between executors for property or damages done to property, and in those cases only, and, moreover, is particular to exclude from (250) its operation vindictive actions, it seems to be a necessary construction that, however it might be between the original parties, yet as between the representatives, the action is not to survive in respect to its vindictive features, but only as far as to

give reparation for the pecuniary loss, by reason of the destruction of the property or damage done to it. As far as an action is vindictive, there is the same reason why it should not survive as there is against one purely vindictive surviving at all. This seems to be the unavoidable interpretation of the act as applicable to such a case, and it is believed there is no decision to the contrary. It was indeed urged in the argument that a different doctrine was laid down in *Wylie v. Smitherman,* 30 N. C., 236. But that is a mistake; for, certainly, no such thing was intended, and what was said there meant only that, even assuming that to be a proper case for vindictive damages, it was erroneous in the Court to lay down their measure, instead of leaving that to the jury. The point whether an administrator was liable for vindictive damages, was not considered, nor, in truth, did it occur to the Court.

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

Cited: Butner v. Keenin, 51 N. C., 61; *Shields v. Lawrence,* 72 N. C., 44; *Mast v. Sapp,* 140 N. C., 537.

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(251)

THE STATE TO THE USE OF JACOB RANSOM ET AL. v. ROBERT THOMAS ET AL.

It is the rule in this country to apply payments to the debt for which the security is the most precarious, when no application is made by the party who pays.

APPEAL from the Superior Court of Law of HENDERSON, at Spring Term, 1850, *Caldwell, J.,* presiding.

This is an action on the official bond of the defendant, executed by him as sheriff of Henderson, for the default of his deputy, J. J. Summey. The breaches assigned were that the said deputy had not used due diligence in collecting certain debts, placed in his hands for collection, and, in the second place, had collected the same and refused, on demand, to pay over the money to the relators. The execution of the bond declared on was admitted, and that the said Summey was the defendant's deputy during his official term, commencing in September, 1842. The relators read in evidence a receipt signed by the said Summey for sundry notes, which was in the usual form of officers' receipt for notes given them to collect. It was admitted that

all the debts set forth in the same were on solvent persons, except the McCarson debt, and for that the relators did not claim to recover. The defendant's counsel admitted that the debts had been all collected, except the said McCarson debt and the debt on Brittain & Johnson. The defendants then showed that the said deputy had paid the relators $50 on 28 July, 1843; $437.43 on 2 November, 1843; $100 on 2 June, 1844; $85 on 7 July, 1844; $40 on 26 December, 1845, and $20 on 2 (252) November, 1846.

The relators then called William Brittain, who proved that he paid said Summey on the debt due from him and Johnson mentioned in the said receipt, in February or March, 1843, something over $200 in corn and $40 in claims on the county of Henderson, and in the fall of said year he paid said Summey $90 in cattle and $40 in county claims, and in the fall of 1844 paid off the balance of said note in cattle, and took it up. The credits were indorsed thereon from time to time according to the amount paid.

It appeared on the trial that the relators resided in Lincolnton, some seventy miles from Henderson. There was no evidence tending to show that the relators had authorized the said Summey to collect the debt on Brittain & Johnson in anything but money, or that they knew of the kind of payments made thereon, or that they ratified the same thereafter. The relators offered no proof to show that any of the other debts set forth in the said receipt had been collected, except the said Brittain & Johnson debt. There was no evidence of the application of the money paid by the said Summey to the relators, nor any evidence of any directions given by him as to its application. The counsel of the relators, in opening the case, stated that the money paid by the said Summey had been applied to the extinguishment of the Brittain & Johnson debt, and this suit was brought for the default of the said Summey in relation to the other debts set forth in the said receipt.

The defendant's counsel insisted that the money paid ought not to be applied to the Brittain & Johnson debt, there being no evidence that the said Summey had converted the property by him secured into money, when he made the (253) payments to the relators; that it made no difference whether he received the property with or without authority, the money paid could not be presumed to be the proceeds of the said property, unless there was evidence to show that he had received money for the property before the payments were made. The court charged that if Summey, the deputy, received property and county claims in payment of the Brittain & Johnson debt,

without authority from the relators, and there was no subsequent ratification by them, then he became their debtor to the amount of the said debt, and it was not material whether he converted the same into money before he made the payments to the relators or not. And the court further charged, as it did not appear that any application of the money had been made by the relators or directed by the said Summey, that the money proved to have been paid ought to be applied, first to the Brittain & Johnson debt, and, if there was a balance, then to the debts set forth in the said receipt, which were within the jurisdiction of a justice of the peace, and on persons admitted to be solvent. The jury found according to the charge of the court. A new trial was moved for and refused, judgment rendered on the verdict, and the defendant appealed.

J. Baxter for plaintiff.
J. W. Woodfin for defendant.

PEARSON, J. This case was before the Court at its last term and is reported *S. v. Thomas,* 32 N. C., 165. It was then held that no judgment could be rendered on the special verdict, because it did not appear that any of the claims had been collected, so as to make a debt or demand "to which the payments could be applied"; so the question as to the application of
(254) money, which was intended to be presented, did not arise.

But it was intimated that if the deputy had collected anything on the note of Brittain & Johnson, the payments ought, first, to be applied to that demand, because it is the rule in this country to apply payments to the debt for which the security is the most precarious, when no application is made by the party who pays. *Moss v. Adams,* 39 N. C., 42, was cited in support of the position. Upon the second trial it was proven that the deputy had collected the whole of the note of Brittain & Johnson; not, it is true, in money, but in horses and cattle, which he received as money, and gave up to them their note, and the judge in the court below held that this was such a collection of the claim as to make it a debt or demand to which payments could be applied, and that, in the absence of any proof that any collections had been made upon any of the other claims and paid over to the relators, it was proper to apply the payments to the extinguishment of the claim upon the bond of Brittain & Johnson, although it was not proven that the deputy had sold the horses, cattle, etc., and realized the money from such sales. We see no

error in this opinion; it fully accords with the intimation given in the case when it was last before us, which was in accordance with the law, as held in *Moss v. Adams, supra.*

PER CURIAM. Judgment affirmed.

Cited: Sprinkle v. Martin, 72 N. C., 93; *Miller v. Womble,* 12 N. C., 139.

(255)

DEN ON DEMISE OF ELIJAH CHASTIEN v. DANIEL PHILIPS.

Where a deed was delivered merely as an escrow, and never absolutely, was not registered and was finally destroyed by the maker, by the consent of the party to whom it purported to be made, it cannot constitute a color of title.

APPEAL from the Superior Court of Law of HAYWOOD, at Fall Term, 1849, *Ellis, J.,* presiding.

This action was commenced 29 September, 1847, and the declaration is on the several demises of Elijah Chastien and Samuel Higdon. On the trial a title was deduced from the State to Chastien, and it was shown that, early in 1841, he conveyed in fee to the other lessor. On the part of the defendant evidence was then given that, prior to 1839, Chastien contracted to sell the premises in fee to Leonard Higdon, and gave his bond or covenant to make the conveyance when the purchase money should be paid; that the price was fully paid, and that, in the latter part of that year or early in 1840, the said Leonard sent one Coward to Chastien, who lived in South Carolina, to get a deed, and that Chastien executed a deed, but, in consequence of Leonard Higdon's omission to send Chastien's covenant by Coward, he (Chastien) refused to deliver it absolutely, and put it into the hands of the said Coward, with directions to deliver the deed to the said Leonard on his surrendering to that person the bond which Chastien had given; that Coward, upon his return shortly thereafter, offered to deliver the deed to the said Leonard, as directed by Chastien, if he, the said Leonard, would surrender to him the said bond or covenant; but (256) the said Leonard refused to surrender the same or to accept the deed sent, and remarked to Coward that he might hold on to the deed until he should pay him a small sum which he owed him; and that, about a year afterwards, the said deed was destroyed by Chastien, by the consent of the said Leonard, without ever having been delivered to him personally, or otherwise, than as above set forth; and, by the direction of the said

Leonard, a deed was then made by Chastien to the said Samuel Higdon. Evidence was further given on the part of the defendant that in June, 1840, certain executions issued by a justice of the peace against the estate of the said Leonard were levied on land, and orders of sale made thereon in the County Court, and that writs of *venditioni exponas* were then issued and the premises sold by the sheriff on 5 October, 1840, to a person under whom the defendant claims; and that, in December, 1840, the defendant claimed the land under the title derived from the sheriff's sale, and, upon his demand, the said Leonard surrendered the possession to the defendant, who then entered, and, in July, 1841, the sheriff made a deed to the purchaser, and the defendant continued in possession up to the trial. On this, the court held that the purchaser did not acquire a title under the sale of the sheriff, because the writ of *venditioni exponas* did not describe or include the premises. Thereupon the counsel for the defendant insisted that the defendant was entitled to the benefit of the possession by Leonard Higdon, and that it perfected the defendant's title.

The court instructed the jury that, supposing the evidence to be true, it established the due delivery of the deed, so made, to Leonard Higdon by Chastien, and that the possession of the premises by the said Leonard and by the defendant together, for more than seven years after the deed was delivered to
(257) Coward by Chastien, was such an adverse possession under color of title as vested the title in the defendant. There was a verdict for the defendant, judgment, and appeal.

J. Baxter and *G. W. Baxter* for plaintiff.
N. W. Woodfin and *Gaither* for defendant.

RUFFIN, C. J. As the sale and conveyance by the sheriff are to be deemed void in the present state of the case, they are to be put out of our consideration, except so far as they may be color of title and enable the defendant to make a title under the statute of limitations. But he cannot do that, because the action was commenced in less than seven years from the defendant's entry, and, indeed, from the sheriff's sale. It is clear, then, that the title cannot be in the defendant, and the instruction on that point was erroneous. The title, therefore, must be in Chastien or one of the Higdons; and unless it be in Leonard Higdon, the plaintiff must recover on the demise of one of the other two persons. The Court holds that Leonard Higdon has not the title. The deed to him, if delivered absolutely, did not pass the title, for want of registration; and, therefore, at most,

it could only be color of title. Now, supposing that the possession of the defendant may be connected with that of L. Higdon, so as, together, to constitute a sufficient length of a possession, yet it cannot inure to vest the title in L. Higdon, because his possession was never adverse to Chastien, and, indeed, the supposed deed to him never, in point of law, became a deed. He entered originally as vendee under articles, and, of course, that possession was not adverse to his vendor. Its character, however, would be changed by the execution of a deed and its acceptance by him; and it has been held that a deed, not otherwise defective, is color of title, though not registered. But it seems impossible to allow that operation to an instrument which is not only unregistered, but which never took effect as a (258) deed—being merely an escrow and, by the consent of the party to whom it purported to be made, destroyed by the maker before a final delivery to the party. It is true, there cannot be a delivery to the party himself as an escrow, and a deed thus delivered is absolute.

It is likewise true that an unconditional delivery to Coward, as the agent of L. Higdon, would have made the deed complete at once. But there was, in fact, no such unconditional delivery in this case. It is nowhere laid down as a principle that a delivery to one, who is the agent of the bargainee, cannot be conditional, but must be absolute, as if the delivery were to the bargainee himself. Nor can that be the law, since, after the bargainor's refusal to deliver the deed absolutely to the agent of the other party, there is no reason why the bargainor may not make the same person his agent to take the deed, and deliver it, upon the performance of certain conditions by the other party. There is no repugnancy in such a transaction, as there is when the delivery is directly to the party himself; and, therefore, the instrument may be allowed to operate according to the actual intention of the parties, which is always the justice of a case and to be ascertained when the intention is not contrary to law. It is plain, then, that this deed was not delivered to Coward as the agent of Leonard Higdon, but that it was put in his hands as the agent of Chastien, to be delivered upon getting up the original articles of sale; and that it never was delivered to L. Higdon, but, when offered, was rejected by him. It was, therefore, no more than an escrow at any time during its existence, and it so continued, by reason of the party's own refusal to accept on the conditions specified. Now, it cannot be held, or even admitted, that L. Higdon held possession of the premises under the deed, which he had not received, but had thus explicitly rejected; and the very idea of possession under

(259) color of title is that it is a possession taken or held by one under an instrument which purports to convey or under which he claims an estate in the land.

That person never did set up the claim under the deed, but, after its execution, as before, his possession was under and merely subsidiary to the title of his vendor. The subsequent surrender by him of the possession to the defendant could not affect this point, under any circumstances. But it is plain that it proceeded altogether from a mistake of the parties as to the validity of the sheriff's sale; for, if it had been good in other respects, it would have been effectual under the act of 1812, without regard to the deed from Chastien, as L. Higdon had, before, fully paid for the land, and Chastien held upon a pure trust for him. Whether his title was legal or equitable, then, he conceived himself obliged to let the purchaser from the sheriff into possession; and no inference can be drawn from that fact which can operate one way or the other on the deed. There has not, therefore, been seven years' possession, under color of title, adverse to the lessors of the plaintiff, and there ought to have been a verdict against the defendant upon the one demise or the other.

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

Cited: Hardin v. Barrett, 51 N. C., 161; *Avent v. Arrington,* 105 N. C., 389.

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(260)

GEORGE BROOKS v. ANN JONES.

1. In an action for malicious prosecution, the plaintiff must show particular malice on the part of the defendant towards him.

2. This particular malice may be proven by positive testimony of threats or expressions of ill will, used by the defendant in reference to the plaintiff, or it may be *inferred* from the want of probable cause and other circumstances such as, in this case, are apt to engender angry feelings.

APPEAL from the Superior Court of Law of BUNCOMBE, at a Special Term in February, 1850, *Caldwell, J.*, presiding.

This is a suit for a malicious prosecution. The defendant sued out a State's warrant against the plaintiff and others, charging them with shooting and cutting her horses, in the night-time, which was tried before a magistrate and dismissed. On the trial the defendant introduced testimony tending to show that she had probable cause for suing out the State's warrant. The

court charged the jury that if the facts deposed to by the witnesses were true, there was probable cause, and further charged that if they did not believe the witnesses, then, to entitle the plaintiff to recover in this action, he must show express malice on the part of the defendant. The defendant's counsel asked the court to charge the jury what was meant by express malice, and the court said it meant ill-will, grudge, and to revenge herself. The only evidence on the part of the plaintiff as to malice was the existence of an action of trespass, instituted by the defendant and her son against the plaintiff and his father-in-law.

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

J. Baxter for plaintiff.
J. W. Woodfin for defendant.

PEARSON, J. His Honor was of opinion that the plain- (261) tiff must show express malice on the part of the defendant. Being requested to explain what was meant by express malice, he replied, "ill-will, grudge, to revenge herself." To this the plaintiff excepts.

If his Honor had said particular, instead of express, malice, his meaning would have been more clearly conveyed.

General malice is wickedness, a disposition to do wrong, a "black and diabolical heart, regardless of social duty and fatally bent on mischief." This is malice against mankind, and was the definition insisted on by the plaintiff's counsel in the argument before us.

Particular malice is ill-will, grudge, a desire to be revenged on a particular person, which is the definition given by his Honor.

The case, then, as we infer, was intended to present this question. In an action for malicious prosecution is it sufficient for the plaintiff to show that the defendant, in instituting the prosecution, was influenced by general malice, or must he show that the defendant had particular malice against him? His Honor thought the plaintiff must show particular malice on the part of the defendant, towards him. We concur in this opinion. 1 Stephens *Nisi Prius*, 2295.

This particular malice may be proven by positive testimony of threats or expressions of ill-will, used by the defendant in reference to the plaintiff, or it may be *inferred* from the want of probable cause and other circumstances, such as that set out in the conclusion of the case—the pendency of a lawsuit between the parties, which is apt to engender angry feelings.

We do not understand from the manner in which the case is made up, and it was not contended in the argument, that
(262) his Honor meant to lay down the position, or was so understood by the use of the term "express malice," that the particular malice necessary to support the action must be proven by positive testimony of ill-will, and that it could not be inferred by the jury from a want of probable cause or other circumstances. When there is a total want of probable cause, the jury will infer malice, almost of necessity, as a prosecution, wholly groundless, cannot be accounted for in any other way.

PER CURIAM. Judgment affirmed.

Cited: S. v. Long, 117 N. C., 798; *McGowan v. McGowan*, 122 N. C., 149; *Ellis v. Hampton*, 123 N. C., 195; *Savage v. Davis*, 131 N. C., 162; *Kelly v. Traction Co.*, 132 N. C., 273; *S. v. Thornton*, 136 N. C., 612.

JOHN BUTTS v. ANDREW J. PATTON.

1. Under the statute of 1826, the presumption of the payment or satisfaction of a judgment does not arise until ten years after the plaintiff has ceased to prosecute his judgment, that is, until ten years after the day of the return of his last execution.
2. The plea of payment to an action on a judgment, etc., is sufficient to cover the defense of a presumption of payment or abandonment of claim under our act of 1826.

APPEAL from the Superior Court of Law of MACON, at Fall Term, 1849, *Ellis, J.*, presiding.

Gaither, N. W. Woodfin and *J. W. Woodfin* for defendant.
J. Baxter for defendant.

(263) NASH, J. The action is in debt, and brought on a judgment rendered against the defendant in favor of the plaintiff in the State of Georgia. That judgment was obtained at October Term, 1837, of Habersham Superior Court, and an execution issued from that term to the April Term, 1838, of the said court. On 20 November, 1837, the sheriff returned the writ, with the indorsement, "No property." No other execution issued on the judgment. The writ in this case issued on 4 March, 1848. The defendant, among other defenses, pleaded "payment," and it was insisted by him that more than ten years had elapsed since the judgment was obtained and before the issuing of the writ in this case. The plaintiff insisted that the

presumption of payment did not arise: first, because ten years had not elapsed from the term of the court to which the *fi. fa.* issued on the said judgment was made returnable and the commencement of this suit; secondly, because the statute giving the presumption was not sufficiently pleaded; and, thirdly, because the statute did not apply to a judgment obtained in Georgia, where no such statute existed. The court was of opinion that, from the lapse of time, a presumption arose that the judgment upon which this action is brought was paid, and that presumption operated upon a judgment obtained in another State, as well as one obtained in this. The jury found a verdict for the defendant, and the plaintiff appealed.

Under the view we have taken of this case, it is not necessary for us to express any opinion upon the question whether the act of 1826 applies to a judgment obtained in a sister State, for, whether it does or not, the presumption of payment does not arise here. The act provides that the presumption of payment or satisfaction of all judgments, etc., shall arise (264) within ten years after the cause of action on the same accrues, etc. Rev. St., ch. 65, sec. 19. The question then is, from what period does the act begin to operate? Literally, from the rendition of the judgment, for then the plaintiff can bring his action upon it. Was that the meaning of the Legislature? We presume not, for the act goes on to provide that the action shall be brought under the same rules, regulations and restrictions as now exist at law. The statute of limitations does not apply to either bonds or judgments. With respect to the former, the doctrine of twenty years raising a presumption of payment was at an early period laid down by *Lord Hale*, who thought it merely a circumstance from which a jury might presume payment. The rule was followed, until at length it became the settled law of the Court. It was, however, a presumption, which ceased to exist when a sufficient cause was shown why the action had not been sooner brought. Thus, when it is shown that the debtor has been insolvent and unable to pay. *Hull v. Horace*, Cow., 109. So when a receipt for interest is indorsed on the bond by the payee, if it appears to have been made at a period when it was not the interest of the payee to make it, as when the twenty years had not elapsed at the time of the indorsement. *Tucker v. Crisp*, Sh., 827; *Rose v. Bryant*, Champ. N. P., 321. So when a demand has been made within the twenty years. *Oswald v. Legh*, 1 Term, 270.

The principle established by these cases is, that when the plaintiff shows that he could have derived no benefit by bringing his action sooner, or that the defendant has, within the

twenty years, acknowledged the debt to be a subsisting one, by either paying interest on it or by promising to pay it, or that, within the prescribed period, he, the plaintiff, has demanded payment—in other words, has been endeavoring to get his debt paid—the presumption of payment will not arise. Such
(265) were the rules and regulations governing the presumption of payment at common law upon the lapse of time. In this case the judgment was obtained at October Term, 1837, of the court. From that term an execution issued, returnable to April Term, 1838. The legal time which that execution had to run was six months, to wit, "until the first day of the court in April"; and in contemplation of law, up to that time the plaintiff was endeavoring to collect his judgment. So far as his rights were concerned in this particular, the return of it by the officer in November, 1837, had no effect. It was the act of the officer, voluntary on his part, and done, most probably, to free himself from the custody of the process. As evidence that its return did not affect the rights of the plaintiff on the question we are now considering, if he had caused an *alias fi. fa.* to issue from the April Term, 1838, of Habersham Superior Court, the law would have considered it so connected with the preceding one that the defendant would have had no power to dispose of his property between the time when the first writ was actually returned and the issuing of the *alias,* so as to defeat the latter. The lien created by the original would have been continued in the *alias. Gilky v. Dickinson,* 9 N. C., 341. In law, then, the plaintiff was endeavoring to enforce his judgment up to April Term, 1838, of the court, in which it was obtained. The time specified in the act did not expire until April, 1848. The writ in this suit was issued in March of that year. Suppose that executions had regularly issued from time to time of Habersham Superior Court, could it be pretended that a presumption of payment or of abandonment of his claim by the plaintiff could have arisen? Very clearly not. And why not? Simply because it would be manifest he had not abandoned his claim, which would rebut the idea of a payment. So
(266) here, ten years have not elapsed since the plaintiff ceased to prosecute his claim under his judgment and the issuing of his writ. The legal presumption authorized by the act of 1826 does not arise in the case.

By the plaintiff it is further objected that the statute is not sufficiently pleaded. We think the plea of payment is sufficient; the statute need not be pleaded: it only raises a presumption, which is evidence under the plea of payment.

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

GEORGE PLATT v. F. W. POTTS ET AL.

A judgment either before a magistrate or in a court of record is not the subject of an action of trover and conversion; nor is a note on which a judgment has been obtained, because it is merged in the judgment and is defunct.

APPEAL from the Superior Court of Law of HAYWOOD, at Fall Term, 1849, *Ellis, J.*, presiding.

N. W. Woodfin for plaintiff.
Henry and *J. W. Woodfin* for defendant.

PEARSON, J. This was trover. One count was for the conversion of a magistrate's judgment for $100 against one Tulbright. The other was for the conversion of a note for $100 on said Tulbright. The proof was that Tulbright had given the plaintiff a promissory note for $100. The plaintiff, by his agent, indorsed the note to one Allen, in anticipation (267) of a trade, which was not concluded, and the plaintiff then handed the note to the defendant Potts, a constable, for collection, without striking out the indorsement to Allen. Potts took a judgment against Tulbright on the note, and afterwards sold the judgment to the other defendant, Penland. The defendants, upon demand, refused to give up to the plaintiff either the note or the judgment; he then brought this action.

The judge in the court below was of opinion that the plaintiff could not recover on the first count, because "a judgment" of a magistrate was not a thing that could be recovered in trover. This is settled. *Cobb v. Cunningham*, 28 N. C., 368. But he was of opinion that the plaintiff could recover for the conversion of the note, "if the jury was of opinion that there had been a conversion of the note by the defendants, either by procuring a judgment to be rendered on it, or otherwise." To this part of the charge the defendants except, and we think the exception well founded.

There was no wrongful conversion of the note by taking a judgment on it in the name of Allen. The indorsement passed the legal interest to him, and it was the plaintiff's fault not to strike out the indorsement, and, although the beneficial interest, according to the facts of the case, was still in the plaintiff, the defendant Potts did nothing more than his duty in taking the judgment as he did. The judgment nullified the note, and it was, therefore, of no force or effect, and ought to have been canceled by the magistrate and filed away by him, and, in strictness, he ought also to have kept the judgment (or, rather, the paper

on which the judgment was written) as evidence of his adjudication, in which both the plaintiff and the defendant were interested, but to which neither of them had any right, (268) because it ought to be kept by the magistrate, so as to enable him to make a due return if a writ of *recordari* should issue. The rights of the plaintiff could be enforced by issuing an execution on a separate piece of paper, and the rights of the defendants (if he should ever be sued again for the same cause) could be protected by a reference to the judgment, etc., still remaining in the hands of the magistrate, as a *quasi* record.

We, therefore, do not concur in the opinion that a note, after a judgment has been rendered on it in the name of the apparent legal owner, can be the subject of an action of trover. A judgment is a thing merely in contemplation of law, and trover will not lie for its conversion, whether it be the judgment of a court of record or of a magistrate. A note, after judgment has been taken on it, is defunct, has no existence and is not a thing, either in fact or in contemplation of law, and therefore trover cannot be sustained.

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

Cited: Grant v. Burgwyn, 88 N. C., 99.

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(269)

JOSEPH COCKERHAM v. JOHN NIXON.

1. As soon as the owner of an animal knows or has good reason to believe that he is likely to do mischief, he must take care of him and be responsible for any injury that he may inflict; and it makes no difference whether this ground of suspicion arises from one act or from repeated acts.

2. The act done, however, must be such as to furnish a reasonable inference that the animal is likely to commit an act of the *kind complained of;* this is a matter to be decided by the jury and not by the court.

APPEAL from the Superior Court of Law of SURRY, at Spring Term, 1850, *Dick, J.,* presiding.

H. C. Jones for plaintiff.
Boyden for defendant.

PEARSON, J. This was a case for an injury done to the plaintiff's horse by the defendant's bull. The plaintiff proved

that a bull of the defendant, while running at large, gored his horse and killed it. One Cannady swore that before the horse was killed he was giving salt to a cow, when the bull came up; whereupon the bull made after him and forced him to jump on a fence near at hand, and he stated these facts to the defendant and told him he would have shot his bull if he had had a gun.

The court charged that it was not necessary to show that the defendant had knowledge of a vicious habit of the animal by proof of many acts, but that knowledge of one vicious act, showing him to be dangerous, would be sufficient to render the defendant liable, and that the testimony of Cannady did bring home to the defendant such a knowledge of the vicious propensities of the animal as would require him to pre- (270) vent the animal from going at large, and, so far as this point was involved, the jury would be authorized to find for the plaintiff.

The defendant excepts to this charge. We concur in the general proposition, that the allegation in the declaration that the bull had a vicious habit and was accustomed to do mischief, which was known to the defendant, may be sustained by proof of a single act, provided it be of such a nature and is committed under such circumstances as to satisfy the jury that the animal was vicious and too dangerous to be allowed to go at large. Such fact coming to the knowledge of the owner, is notice sufficient to put him in the wrong and make him liable for the consequences of his neglect to keep the animal confined.

The cases cited by the plaintiff's counsel fully sustain this position. *Jenkins v. Turner*, 1 Ray., 109; 3 Car. and Pa., 138; 1 Bar. and Ald., 629; 1 Holt, 617; Leigh *Nisi Prius*, 552; Buller *Nisi Prius*, 77; 2 Esp., 482. One act may sometimes furnish as convincing proof of the viciousness of an animal as a dozen, and the jury are, therefore, allowed to make the inference from a single act. The idea that the owner is not liable until the mischief has been known by him to be repeated time after time, is absurd; how many horses must the owner know his bull to have killed before he becomes liable? The rule is that as soon as the owner knows or has good reason to believe that the animal is likely to do mischief, he must take care of him; it makes no difference whether this ground of suspicion arises from one act or from repeated acts. The only restriction is that the act done must be such as to furnish a reasonable inference that the animal is likely to commit an act of the *kind complained of*. This explains the case in which it is held that an action against the owner of a dog for killing a sheep is not sustained by proof of a *scienter* that the dog had (271)

bitten a man, without adopting the suggestion made by the defendant's counsel, that the "old cases" favored dogs more than useful animals. Upon the same principle an action could not be sustained against the owner of a hog (a useful animal) for injury to the person of the plaintiff, by proof of a *scienter* that the hog would eat young chickens and ducks.

We think there was error in the particular proposition laid down in reference to the effect of the testimony of Cannady.

When the owner knows or has reason to believe that an animal is dangerous, on account of a vicious propensity in him, from nature or habit (a term used to denote an acquired as distinguished from a natural vice), it becomes his duty to take care that no injury is done; and he is liable for any injury which is likely to be the result of this known vicious propensity. But whether there be sufficient evidence of this vicious propensity, whether a single act and the attending circumstances are such as to justify the inference, are matters in reference to which the jury must inquire.

If a dog is known to have killed one sheep, a jury would be able, from their knowledge of that animal, to infer that he would kill another, if an opportunity presented itself. If so, the owner would, in law, be liable. But if a dog is known to have bitten a man, a jury would not be apt to infer that he would kill a sheep, because the one act proceeds from voraciousness, the other from combativeness, and fierce dogs are not so apt to be sheep-killing dogs. If a bull so far loses sight of his submission to the "dominion of man" as on one occasion to rebel and offer combat, it does not follow, as a *matter of course,* that he would be likely to attack a horse, and that fact must be decided by the jury, from the nature of the animal, the
(272) provocation and other circumstances attending the act.

It was error for the court to decide "that the testimony of Cannady did bring home to the defendant such a knowledge of the vicious propensities of the bull" as would make him liable.

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

ROBERT H. MAXWELL v. JOHN MILLER.

One may recover in an action of covenant or *assumpsit*, on a bill of sale for a slave, for a warranty of the soundness of the slave, although there be no witness to the bill of sale.

APPEAL from the Superior Court of Law of MECKLENBURG, at Spring Term, 1850, *Dick, J.*, presiding.

Thompson, Boyden and *Osborne* for plaintiff.
Craige and *Wilson* for defendant.

PEARSON, J. This was *assumpsit* upon the warranty of the soundness of a negro. The warranty was contained in a bill of sale given by the defendant, to which the wife of the defendant was the only subscribing witness. The plaintiff offered to prove the handwriting of the defendant and that of his wife, in order to establish the warranty. The court rejected the evidence, and the plaintiff submitted to a nonsuit and appealed.

The objection to the reception of the evidence is that (273) the attestation of the defendant's wife, as a witness, is a nullity; and so the bill of sale has no attesting witness, and does not pass the title, and, for that reason, the warranty, which is an incident to the sale, is of no validity. The reply is: admitting the position that, as between the parties, the title did not pass by the bill of sale, for want of an attesting witness, to be tenable, still, the warranty is distinct from that part of the bill of sale which purports to pass the title; and there is no reason why there should be an attesting witness to a covenant or contract of warranty of the soundness of a negro, nor necessity for its registration. And if a warranty be a mere incident of a sale, the title in this case might have passed by an actual delivery without a bill of sale; and so there was no ground for the objection. This reply seems to be sufficient.

But it is evident that the doctrine of warranty, as applied to real estate, has no sort of application to the warranty of the soundness of a chattel. Such a contract may be entirely distinct from and unconnected with a sale, and will support an action, provided there be a sufficient consideration, although there is no sale to which it may be *incident*.

The opinion of his Honor is obviously erroneous.

The nonsuit must be set aside and a *venire de novo* issue.

PER CURIAM. Judgment accordingly.

(274)

WILLIAM MURPHY v. JAMES McCOMBS.

Where a man who is liable to militia duty is arrested on a civil process while he is attending a militia muster, in violation of the act of Assembly, he may plead the same in abatement.

APPEAL from the Superior Court of Law of ROWAN, at Fall Term, 1849, *Caldwell, J.*, presiding.

A. H. Caldwell for plaintiff.
Craige for defendant.

NASH, J. The writ in this case was served on the defendant on 26 April. The defendant pleaded in abatement that, at the time of the service of the writ, he was attending his duty at a muster, as an officer of the militia, in the town of Salisbury, when the writ was executed. To this plea the plaintiff demurred. On the argument it was insisted by the plaintiff that the matter set forth in the plea could not be taken advantage of by a plea in abatement, but was proper only to set aside the return, for the reason that such a plea went to the writ, and the complaint here was of the service.

In this we think there was error. The act of Assembly under which the defense is offered expressly provides for this case. Rev. St., ch. 31. By section 32 it is provided how writs and other process, except subpœnas, shall be executed and returned. The concluding paragraph of that section is as follows: "All process made returnable at any other term, or executed at any other time or in any other manner, than is by this act directed, shall be adjudged void on the plea of the defendant." Section 58 of the same act directs, "it shall not be lawful for any sheriff or other officer to execute any writ or other process on a Sunday, or upon any person attending his duty at a muster of the (275) militia," etc. The law of the land, with regard to the militia, compels, under heavy penalties, all persons who are liable to perform militia duty and have been properly enrolled to attend musters; and the act we are considering protects them from arrest while they are in the performance of this duty. The officers of the law are forbidden to execute writs in civil cases upon a militiaman while so engaged. The time, then, when this writ was executed was in violation of the law; and section 53 directs that the defendant shall avail himself of it by a plea. That the defendant was within the protection of the

law is admitted by the demurrer. Whether, under the act of 1836, he could have availed himself of the objection by a motion to dismiss, it is not necessary to decide.

The decision below is erroneous and must be reversed.

PER CURIAM. Demurrer overruled and judgment for the defendant.

(276)

HUGH HAMILTON v. JOSEPH ELLER.

An obligation for a certain sum, payable in specific articles at a particular time and place, becomes, after it is due, necessarily an obligation payable in money, unless the defendant pleads and proves a tender of the articles at the time and place mentioned in the contract.

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

This is an action of debt on a bond for $150, dated 14 July, 1842, and "payable 1 January, 1844, in good trading, to be valued and delivered at Eller's house." Plea, payment. Before the jury was impaneled the defendant, upon the authority of a letter from the plaintiff to him, moved to dismiss the suit, but the court refused the motion. In support of the issue the defendant gave evidence that, before the bond fell due and while the plaintiff held it, the plaintiff and the defendant agreed that any debts of the plaintiff to other persons which the defendant would discharge and take up should be allowed as payments on this bond; and the defendant then produced several justices' judgments against the plaintiff to the amount of the bond, and alleged that he paid them before the bond fell due, but gave no evidence thereof. On the part of the plaintiff evidence was then given that, on 1 January, 1844, one Deaver, to whom the plaintiff had transferred the bond, attended at Eller's house to receive payment, and Eller then tendered him some old horses and other specific articles of the value of $150, as then alleged by the defendant, which Deaver refused to (277) receive, on account of their deficiency in quality.

The court directed the jury that the sums due on the judgments were not payments on the bond, unless the parties had applied them, or agreed to apply them, to it; and that, whether such was the fact or not, it was for them to inquire, and in doing so they might consider that the defendant tendered other things in discharge of the bond, after the period at which he alleged he had paid it by taking in the judgments. The court

also instructed the jury that unless they should find it to have been paid, they were to consider it as a bond for $150, payable absolutely in money, and allow interest accordingly. After a verdict and judgment for the plaintiff, the defendant appealed.

N. W. Woodfin for plaintiff.
J. W. Woodfin for defendant.

RUFFIN, C. J. The motion to dismiss was not made by the plaintiff or his attorney, but by the defendant, and, as must be understood, against the will of the plaintiff at that time. The alleged letter, under which the defendant assumed the authority, is not set forth, and hence it cannot be seen here that it conferred it, and that his Honor erred, supposing that the motion could be entertained under any circumstances. We do not, therefore, consider that point, which, moreover, the defendant abandons, as he states that both he and the plaintiff have been enjoined, at the suit of Deaver, from dismissing this suit.

The instructions to the jury were very indulgent to the defense, in leaving it to the jury to draw inferences to an extent not warranted by the defendant's own evidence. For he gave no evidence that he had paid the judgments against the plaintiff; and, moreover, if he ever paid them, he failed to
(278) show that he did so before his plea in this suit. For this latter reason, if no other, the verdict should have been against the defendant on that issue.

The instrument is an obligation for $150, and is necessarily payable in money, unless it was discharged in specific articles or the due tender of them at the day and place specified, of which there was no plea.

PER CURIAM. Judgment affirmed.

Cited: Plankroad v. Bryan, 51 N. C., 85; *Lackey v. Miller*, 61 N. C., 27, 8; *Fort v. Bank, ib.*, 420; *Marriner v. Roper Co.*, 112 N. C., 167.

PAYTON COLVERT v. ALLEN WHITTINGTON.

In an action brought to recover a penalty for not working on a road in Wilkes County, laid off by commissioners under an act passed in 1846, ch. 100, it is necessary, before a recovery can be effected, to show that the commissioners were duly sworn as the act directs.

COLVERT *v.* WHITTINGTON.

APPEAL from the Superior Court of Law of WILKES, at Fall Term, 1849, *Caldwell, J.*, presiding.

Boyden for plaintiff.
No counsel for defendant.

NASH, J. By an act passed in 1846, ch. 100, secs. 3 and 4, commissioners were appointed "to view, lay off and improve the State Road from Alexander Church's to Payton Colvert's." Section 4 provides, "that before they shall enter upon their duties as commissioners they shall take an oath, before some justice of the peace for the county of Wilkes, to (279) view and lay off the road the best and most convenient way, having strict regard to private property as well as to the public good, and shall assess all damages, etc., and shall report the same to Wilkes County Court, etc.; and the said commissioners shall appoint an overseer and allot him the hands necessary to open the said road, etc., and the hands so allotted him shall be subject to the same fines as in other cases is now provided by law." Under this act the commissioners proceeded to view and lay off the road, as directed, appointed the plaintiff overseer, and allotted him the necessary hands, among whom was the defendant, to open the road. This action was brought by warrant to recover from the defendant the sum of $4, the fine imposed by law for refusing to work as a hand in opening the road. The defendant had been duly summoned. To support his action the plaintiff produced in evidence two papers, purporting to be reports, made to the County Court of Wilkes, of the laying off the road and the assessment of damages. Several objections were made to the plaintiff's recovery. It is deemed necessary to examine but one. It nowhere appears in the proceedings that the commissioners were sworn. The act requires that, before they enter on their duties, they shall be sworn. This is required as well in justice to the persons whose interests may be affected by the location of the road as to the public. It is said that we cannot look beyond the action of the commissioners. If any action of the County Court had been required upon the return made by them, it might well be questioned whether we could look behind it; but, here, nothing is to be done by that tribunal but to order the payment of the damages assessed. They are not required to record the proceedings of the commissioners. We are not only at liberty, therefore, to look into these proceedings, to see that they are regular and according as the law directs, but it is our duty to do so. We cannot, otherwise, ascertain the liability of the de- (280)

fendant to work on the road in opening it. The commissioners, under the act, have limited the special powers; and it must appear that all has been done by them which is required before their acts can be legal and valid. The taking of the required oath is a condition to their entering upon the discharge of their duties. This not appearing is as if it did not exist.

PER CURIAM. Judgment affirmed.

ELISHA JONES v. MILES B. ABERNATHY.

1. When slaves, by a will made by a testator in South Carolina, were directed to be emancipated, and then the testator says, "all the balance of my estate to belong to C. J.": *Held*, that C. J. could not claim these negroes at law under the residuary clause, even if the bequest for emancipation were void by the laws of South Carolina, because they did not pass by the words of the residuary clause, but only fell into the residue by the operation of the law, and C. J's. title was only an equitable one.

2. *Held*, that this Court cannot presume that the emancipation of slaves is void by the laws or policy of South Carolina, but that this fact should have been proved.

APPEAL from the Superior Court of Law of LINCOLN, at Spring Term, 1850, *Dick, J.*, presiding.

This is a special action on the case, tried on not guilty pleaded.

On the declaration and evidence the case is as follows:

(281) William Barry, of Fairfield District, South Carolina, by his will, which was proved there in 1823, gave several slaves, his land, and all his other property to his wife, Lucy, during her life. The will then proceeds thus: "After her death, my will is that my negroes, Jub, Lid, Isaac, etc., be all emancipated, and continue under the care of Richard Harrison and John Pickett, as trustees. It is further my will that all my lands adjoining where I now live, with all the stock and plantation tools thereon, do continue in the care and under the protection of said trustees, for the benefit and support of said Jub, Lid and their increase forever. It is further my will that all the balance of my estate, after my wife's death, belong to Cynthia Jones." The testator appointed his wife executrix, and she qualified and died shortly before this suit was brought. During her life the defendant had some of the slaves in his possession in this State, and then took and sold them beyond the limits of the State. For doing so this action was brought, in order to recover damages alleged to have arisen thereupon to Cynthia Jones, who is the intestate of the plaintiff.

The court was of opinion the plaintiff could not recover, and, in submission thereto, he suffered a nonsuit and appealed.

Avery, Landers and *Thompson* for plaintiff.
Alexander, J. G. Bynum and *Craige* for defendant.

RUFFIN, C. J. Without considering the question whether a general residuary clause vests in the legatee the legal remainder in slaves specifically given to another for life, upon the assent of the executor to the legacy for life, the Court holds this case to be against the plaintiff. For, supposing the affirmative to be true ordinarily, it is not so upon this will. The residue in the slaves is not expressly given in that clause, but they are previously disposed of otherwise. If they form a part of the residue at all, they fall into it by operation of law (282) merely, contrary to the wish and expectation of the testator, upon the ground that the disposition of them, for emancipation, failed by reason of its illegality. Now, that illegality is not established. It is possible, and perhaps probable, that it is deemed contrary to policy in South Carolina to allow slaves to be emancipated and remain there, and the law of that State may not permit it. But, although we know that slavery is established in South Carolina, yet, without evidence, it cannot be judicially assumed here that a bequest for emancipation is not valid there, since a power in the owner to manumit is not so absolutely incompatible with slavery that they cannot coexist under the same government; and, in fact, such a power, in some form or other, has been tolerated in most countries and in the States of this Union in which that institution prevails. But if that were otherwise, still the right of this residuary legatee would not be a legal, but an equitable one. For it is plain the testator meant that either his personal representative or the trustees nominated in the will should perform the office of emancipating, or procuring the emancipation, of the slaves, if any further act were necessary to effect it; and to that end the legal title must have been intended to revert to the personal representative upon the death of the widow, or to vest in the trustees, with the land and other property given "for the benefit" of the slaves. If the purpose of those gifts were illegal and could not be enforced nor executed, still the gifts themselves would not be avoided, but a trust would result to the residuary legatee, upon which there can be no action at law, but only a remedy in equity.

PER CURIAM. Judgment affirmed.

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C. N. WHITE v. JOHN GIBSON.

The declaration of a partner, after the purchase of an article, that he had purchased it for and on account of the firm, is not of itself sufficient evidence to make his copartners liable.

APPEAL from the Superior Court of Law of CABARRUS, at Spring Term, 1850, *Dick, J.*, presiding.

Avery, Landers and *Osborne* for plaintiff.
Wilson and *Coleman* for defendant.

NASH, J. This action is in *assumpsit* to recover from the defendant the price of a mule, purchased by one Lee, who is since dead, from the plaintiff, for the use of a firm consisting of said Lee and the defendant. The copartnership was admitted, and was entered into for the purchase and sale of negroes, horses, cotton and tobacco. To prove that the mule in question was purchased for the use of the firm, the declarations of Lee were admitted in evidence. These declarations were that he had bought a mule from the plaintiff, and at a subsequent time, when the mule was brought home, he stated that he had bought it for the use of the firm. The latter declaration was objected to by the defendant and ruled out by the court.

The sole question now submitted is as to the correctness of this opinion. It is a general rule of the law of evidence that the acknowledgment of one joint contractor or partner is evidence against all the rest, and sufficient to bind them. The
(284) principle upon which such evidence is admissible is the community of interest between the party making the admissions and the party to be affected by them, and the presumption that the former would not make an acknowledgment against his own interest. 2 Starkie Ev., 26 and 583. If, therefore, it appears that it is the interest of the party, making the admission, to throw the burden of the contract on the firm, his acknowledgment cannot be received upon the well-known rule that interest in a cause will exclude a witness. The mule in this case was purchased by Lee, without, at the time, disclosing the fact (if it was so) that the contract was made for the firm. This conclusion necessarily results from other parts of the case. It is true, from the very constitution of a partnership, a presumption arises that each partner is an authorized agent for the rest in contracts relating to the subject-matter of the partnership. But this relationship does not deprive either party of the liberty of making contracts for himself in similar matters.

Thus, if A and B constitute a firm to merchandise goods, either of them, unless it is forbidden in the articles, is at liberty to enter into the same business, at the same place, on his own account. In this case the first declaration of Lee is that he has purchased the mule, without more. The legal presumption is that when a person purchases a thing he purchases it for himself. In such case the vendor, in order to charge another person as a partner, must show the purchase was made for the firm or that it went to their use. *Swann v. Heald,* 7 East, 209. Now, as before stated, from the case it appears that Lee did not, at the time of the contract, mention the name of the defendant. The entire obligation of the contract, as far as this question is concerned, rested upon him. Shall he be permitted, by his own declaration, to throw upon the defendant a burthen which was originally his alone? In other words, has he not a direct (285) interest in lessening his own responsibility? If, so, the presumption upon which the rule rests, as to the admission of the declaration of one partner to bind another, is taken away. This does not conflict with the principle that each partner may by his act and declaration bind his copartner in all transactions relative to the subject-matter of the copartnership, but extends only to the evidence required to show that responsibility.

It is believed the declarations of Lee were not competent evidence to prove the fact for which they were offered.

PER CURIAM. Judgment affirmed.

ELIZABETH HENRY v. WILLIAM J. WILSON.

Where A was entitled to a life estate in slaves, and, being threatened with a suit in equity to enjoin her from sending the negroes out of the State, in consideration that the suit should be forborne, agreed that the slaves should be placed in the possession of B, who was to pay her the hires annually, and they were accordingly so placed in B's possession: *Held*, that A thereby transferred all her legal interest to B, there being a sufficient consideration and an actual delivery of the slaves; that A, therefore, could not support an action at law for them, but her only remedy, if B failed to pay over the hires, was in equity.

APPEAL from the Superior Court of Law of GASTON, at Fall Term, 1849, *Caldwell, J.*, presiding.

Alexander, Landers and *Avery* for plaintiff.

Thompson for defendant. (286)

PEARSON, J. This was detinue for negro Amy and her two children, decided upon a case agreed, viz., Sarah McIntire in 1815 bequeathed the negro Amy to the plaintiff in these words: "I give to my niece, Elizabeth Henry, the services of my servant Amy, during her life, the said Amy to be liberated at her death, according to the laws of the State: provided the said Amy is well treated; but if it can be made to appear that she is not well treated, I allow my executor to take her and liberate her, or put her in the hands of some person who will treat her well"; and in a subsequent clause of the will are these words: "I do hereby authorize and empower my executor to be the sole judge of the treatment that the said Amy may receive in the possession of the said Elizabeth Henry." One Lot Cannon was appointed executor, was qualified and assented to the legacy, and put the negro in the possession of the plaintiff, who retained the possession of her and her children until 1843, when the said Cannon was about to file a bill in equity against the plaintiff, upon the ground that she intended to remove the negroes out of the State. Whereupon, to prevent litigation, the parties agreed to constitute the defendant their mutual agent and to put the negroes into his possession, with the understanding that he would hold them during the life of the plaintiff and hire them out annually during that period, and pay the proceeds of their hire to the plaintiff, and at her death deliver them to the said Lot Cannon. Accordingly, the negroes were put into the possession of the defendant, and he for several years hired them out and paid the money to the plaintiff. In 1845 the plaintiff demanded the negroes and commenced this action. His Honor in the court below was of opinion with the plaintiff, and judgment was entered in her favor, from which the defendant appealed.

We do not concur in this opinion. It admits of much
(287) question whether the plaintiff took a legal estate in the negro, and there is room to contend that the whole legal estate continued in the executor, being necessary to enable him to execute the trust in the event that the negro was not well treated; so that the plaintiff was only entitled to a trust or right to the services. But suppose the plaintiff took the legal estate for her life, leaving the reversion in the executor, we are of opinion that she cannot maintain this action; because she parted with her title and it became vested in the defendant, in trust for her, so far as relates to the hires, during her lifetime, and then to be delivered to the executor, by force of the arrangement entered into between the executor and herself in the year 1843; the legal effect of which was that, for a valuable consideration and forbearance to sue, she passed her estate to the defendant,

in trust to pay her the annual hires; and this transfer, although without writing, was valid as an executed contract, being a sale accompanied by an actual delivery. Thence she had no right to resume the possession, and has, in fact, no property in the slaves; her remedy, if the negroes are not annually hired out and the money paid to her, is by bill in equity to enforce the performance of the trust.

The judgment below must be reversed and a judgment entered for the defendant.

PER CURIAM. The judgment reversed and judgment for the defendant.

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DEN ON DEMISE OF ISAAC LYERLY v. CLAUDIUS B. WHEELER.

1. Where the lessor of the plaintiff in ejectment claims as purchaser at an execution sale made under a judgment in which he was himself the plaintiff, he must show the judgment as well as the execution; and if the sale was by execution under a decree in equity, he must not only show the decree, but also the bill and answer, and so much of the pleadings and orders as will show that the decree was pronounced in a cause properly constituted between the parties.

2. In an ejectment brought by a purchaser at a sheriff's sale against the defendant in the execution, the latter, while still in possession, cannot resist, upon the ground that he (the defendant) has a better title.

APPEAL from the Superior Court of Law of ROWAN, at Spring Term, 1850, *Dick, J.*, presiding.

Craige, Osborne and *Alexander* for plaintiff.
Boyden for defendant.

NASH, J. Two questions are presented by this case to the consideration of the Court. The plaintiff claims title under a sheriff's deed, and to establish it offered in evidence a copy of a decree in equity made in the Supreme Court in his favor against the defendant. The introduction of this evidence was opposed by the defendant, for the reason that copies of the bill and answer filed in the case ought also to be in evidence. The court admitted the evidence. In this, we think, there was error. The opinion of the court below was endeav- (289) ored to be sustained here upon the act of 1848, ch. 53, passed, as it declares, "to secure the title of purchasers of land sold under execution." It provides that "when lands had been

sold or might be hereafter sold by virtue of any writ of execution, etc., no variance between the execution and the judgment whereon it issued, etc., shall invalidate the title of the purchaser." In *Rutherford v. Raburn,* 32 N. C., 148, the Court decided that the effect of that act is to restore the common law on that subject. By the common law the execution not only justified the sheriff in acting under it, but the purchaser at the sale, in an action against the defendant in the execution, or one coming in under him after the lien attached, need not show the judgment. A contrary rule was established in this State by *Hamilton v. Adams,* 6 N. C., 161, and was considered the law until the passage of the act above mentioned. In *Rutherford v. Raburn,* however, the Court restrained the operation of the act to cases where the purchaser is not the plaintiff in the execution. When he is, he must show a judgment, not to show that there is no variance between it and the execution, but that the plaintiff had a just claim against the defendant, and it had been ascertained by a judgment; and to this *Lake v. Billers,* 1 Lord Raymond, is cited. If it was necessary, then, for the plaintiff to produce a copy of the decree in equity, which we hold to be the law in such a case, the copy of the decree alone will not answer. To make it evidence it was necessary for him to have the bill and answer and so much of the pleadings and orders as would show that the decree was pronounced in a cause properly constituted between the parties. *Williamson v. Bedford,* 32 N. C., 198. Another question was presented by the case, the decision of which is not necessary to the disposition of the
(290) case at present, yet, as it must be presented to another jury, and may again arise, to save time and trouble, we proceed to give our opinion upon it. The defendant offered to prove that, before the decree offered in evidence was obtained, he conveyed the land in dispute to one Locke in trust to secure his indorsers to a bank debt which he owed, and that the said trustee on 23 November, 1846, had sold the premises at auction to one Nathan Chaffin, to whom he made a conveyance, and who leased the land to him, and under whom he now held it. This evidence was rejected by the court. In an ejectment brought by a purchaser at a sheriff's sale against the defendant in the execution, the latter, while still in possession, cannot resist upon the ground that he, the defendant, has a better title.

The action of ejectment is to recover possession, and whatever possession the defendant in the execution had, the purchaser acquires by the sale and is entitled to recover. *Thompson v. Hodges,* 7 N. C., 546; *Islay v. Stewart,* 20 N. C., 297. Our attention in the argument was called to *Jordan v. Marsh,* 31

N. C., 234. This opinion is not in conflict with it. It was decided on its own peculiar features. The land had been sold under executions against the defendant for different persons, to one of whom he was considered as having surrendered the possession, and he took a new lease after the last sale by the sheriff.

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

Cited: Freeman v. Heath, 35 N. C., 500; *Stallings v. Gulley,* 48 N. C., 346; *Lee v. Eure,* 82 N. C., 431; *Swift v. Dixon,* 131 N. C., 45; *Evans v. Alridge,* 133 N. C., 380.

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JACOB BLEVINS v. WILLIAM BAKER ET AL.

An officer who has an execution against a tenant in common of chattels may levy upon the undivided property and take it into his possession for the purpose of selling the interest of the defendant in the execution; and he does not thereby subject himself to an action by the other tenant in common.

APPEAL from the Superior Court of Law of ASHE, at Fall Term, 1849, *Caldwell, J.,* presiding.

Craige for plaintiff.
Boyden for defendants.

PEARSON, J. This was trover for forty-five bushels of salt, a wagon and five horses, and a tent cloth, five pairs of wagon gear, an axe, bucket, one coat and log chain. The plaintiff and one Peppers were tenants in common of the salt, which they had in a wagon. The wagon was stopped at the store of the defendant Baker, the hind-gate taken off and several sacks of salt delivered to Baker. At this time the defendant Hunt, who, as constable, held several executions against Peppers in favor of Baker, was in the act of seizing and levying on the forty-five bushels of salt. The plaintiff and Peppers attempted to prevent his doing so by putting on the gate of the wagon and starting the horses; whereupon Hunt caught hold of the horses and kept them from moving, and, after much altercation, the plaintiff and Peppers went off and left the salt, wagon, horses and everything appertaining thereto. The de- (292) fendants took out the salt and put it in Baker's store-house, and weighed off one-half as the share of Peppers, which Hunt afterwards sold under his executions. The wagon be-

longed to Baker, he having hired it to the plaintiff to make the trip to the salt works; the horses belonged to persons in the neighborhood, who had hired them to the plaintiff. Baker kept his wagon, took the gear off the horses and turned them loose and they went to their respective owners. The tent cloth, gear, axe, bucket, coat, etc., belonged to the plaintiff. These articles the defendants did not remove or use or claim in any way. They remained where the plaintiff had left them; he could, without opposition, have taken them away at any time. It was not alleged that the plaintiff wished or offered to resume the use of the wagon and horses after the salt had been taken out.

The court charged "that the defendants had no right to take possession, at all, of the salt, in the way they had done, by virtue of a levy on Peppers' interest, and the plaintiff had a right to sustain this action for such taking." On the second point the court charged "that the plaintiff, having a general right to and possession of the tent cloth and gear and other articles, and a special right to and possession of the wagon and horses, had a right to recover, in this action, the actual damages which he had suffered by the interference of the defendants."

To this the defendants except. There was judgment for the plaintiff and an appeal.

We think there is error in the charge upon both of the questions made. The interest of a partner in partnership effects may be sold under a *fi. fa.* for his individual debt. *Treadwell v. Rascoe,* 14 N. C., 50. The sheriff must of necessity seize and take into his possession the effects levied on, in order to (293) make the sale, and the other partner cannot maintain an action of any kind either against the officer who levies and sells or against the purchaser who takes possession. Indeed, it is held that a partner cannot maintain an action of any kind against one who purchases copartnership effects from a copartner, though such sale was made in fraud of the rights of the partnership and to satisfy the individual debts of such copartner. *Wells v. Mitchell,* 23 N. C., 484. Such being the law in the case of partners, between whom the relation is more intimate, *a fortiori* it is so in reference to mere tenants in common. The legal interest of a defendant in undivided chattels may be seized and sold under execution (*Islay v. Stewart,* 20 N. C., 297), and the Court treat the question as too plain to call for authority. We know of "no principle which forbids a seizure and sale of a defendant's legal interest in undivided chattels." The officer must, of necessity, take possession of the

whole, as it is undivided, and sell the right of the defendant in his execution in the whole, and the purchaser becomes a tenant in common with the other part owner, and they must arrange the matter between themselves, as neither can maintain trespass, detinue or trover, unless the property is destroyed or (as some say) sold.

Upon the second point the construction ought to have been that the evidence, if true, did not prove a conversion, either as to the tent cloth, gear and other articles, or of the wagon and horses. The defendant Hunt seized the horses as a means necessary to enable him to complete his levy upon the salt. After he had seized the salt, the plaintiff might, without opposition, have taken the tent cloth and everything to which he was entitled, if he had chosen to do so.

An officer may justify an entry upon the land of a third person, if necessary to enable him to levy on the property of the defendant in the execution. So it would seem, (294) if this action had been trespass for seizing the horses, the officer might have justified the act as necessary to enable him to make the levy.

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

Cited: Vann v. Hussey, 46 N. C., 382; *McPherson v. Pemberton, ib.,* 380; *Flanner v. Moore,* 47 N. C., 123; *Latham v. Simmons,* 48 N. C., 28; *Ins. Co. v. Davis,* 68 N. C., 20.

JOHNSON LEDBETTER v. THOMAS J. TORNEY ET AL.

A surety who has paid money for his principal cannot sue him in an action of *tort.*

APPEAL from the Superior Court of Law of MCDOWELL, at Spring Term, 1850, *Caldwell, J.,* presiding.

This is a suit in *tort* to recover from the defendants a certain sum of money paid by the plaintiff to their use. The defendants, among other pleas, pleaded severally their certificate and discharge under the bankrupt law. On the trial it appeared that the plaintiff became the surety of the defendants to one Logan for $2,100; that on the defendants becoming insolvent he was forced to pay the said debt with costs, and thereupon instituted this suit. The court was of opinion that the plaintiff

could not elect to sue in *tort* in this case; and, in deference to this opinion, the plaintiff submitted to a nonsuit and appealed.

J. Baxter for plaintiff.
J. G. Bynum, Avery and *N. W. Woodfin* for defendant.

(295) PEARSON, J. The only question is whether a surety, who has paid money for his principal, can declare in *tort*, so as to escape from the plea of a certificate in bankruptcy. The plaintiff's counsel was not able to show any authority in support of his position, and it cannot be supported upon any fair reasoning upon the nature of the cause of action. In fact, if a surety is allowed his election to declare in *tort* or in contract, the landmarks by which actions are distinguished will be entirely obliterated and the marked difference between actions *ex contractu* and actions *ex delicto* will be lost sight of.

In *Williamson v. Dickens*, 27 N. C., 259, it is held that when a creditor has a claim which he may enforce, either by an action of *assumpsit* or in *tort*, if he sues in *tort* his action is not barred by a discharge in bankruptcy, and when an agent has failed to collect, or has collected and misapplied the funds, the principal may declare in contract or in *tort* at his election. So if a carrier or other bailee fails in the diligence required, he may be in contract or in *tort*.

Without undertaking to run out the dividing line between those cases in which the plaintiff must declare in contract and those when he has his election to declare in contract or in *tort*, and to reconcile the cases, it is sufficient for us to say that there is no authority nor reason for allowing the plaintiff in this case to declare in *tort*.

PER CURIAM. Judgment affirmed.

Cited: Bond v. Hilton, 44 N. C., 311.

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LEONARD SHOWN'S EXECUTORS v. JOSEPH BARR ET AL.

1. That the plaintiff, who sues as executor, is not an executor, is a plea in bar, and the defendant may plead it with any other bar.

2. The certificate of a presiding magistrate of a court of record in another State, which merely sets forth that A. B., who attests the transcript, was the clerk of that court, but does not declare that "his attestation is in due form of law," not being according to the act of Congress, cannot be received in evidence.

SHOWN *v.* BARR.

APPEAL from the Superior Court of Law of ASHE, at Spring Term, 1850, *Dick, J.*, presiding.

The plaintiffs declare, as the executors of Leonard Shown, deceased, on a bond to their testator; and the pleas are *non est factum* and *ne unques executor*. After proving the bond, the counsel for the plaintiffs insisted that they were thereon entitled to a verdict, forasmuch as the plea of *non est factum* overruled the other plea. But the court held otherwise. Then, in support of the issue on the latter plea on their part, the plaintiffs offered in evidence a transcript of the proceedings in the County Court of Johnson County in Tennessee, prior to this suit, purporting to be an order of the court that letters testamentary issue to the plaintiffs, "who were appointed executors in Leonard Shown's will," and to state that the plaintiffs took the oath prescribed by law for executors. To it was annexed an attestation by Alfred T. Wilson, as clerk of the court, under his hand and seal of the court, and dated 13 July, 1847, setting forth "that the foregoing is a true transcript of the records of the said (297) County Court at August Term, 1845," There was also annexed a certificate of "James King, chairman," etc., made 13 July, 1848, "that the within is a true copy of the record of this court at August Term, 1845, and that it is taken in due form of law, and that Alfred T. Wilson was then acting clerk of the Court, duly elected, and that the seal annexed is the seal of this court." Upon objection on the part of the defendants, that the transcript was not duly certified, the court rejected it, and the plaintiffs submitted to a nonsuit and appealed.

Craige for plaintiffs.
Thompson and *McCorkle* for defendants.

RUFFIN, C. J. The Court considers the decision on both points to be correct. That the plaintiff is not executor or administrator is a plea in bar. 3 Chit. Pl., 942; *Stokes v. Bate*, 5 B. and C., 491. Consequently, under the statute the defendant was entitled to plead it with any other bar. Without noticing any objection to the judicial proceedings in Tennessee as constituting letters testamentary, had the transcript been received in evidence, it is sufficient to say that the objection made at the trial to its reception is decisive. The act of Congress requires that the presiding magistrate of the court shall certify that the person who attests the transcript is the clerk of the court, and that "the attestation is in due form"; instead of which the certificate here is that Wilson was then, in August, 1845, clerk—and it is utterly silent as to the attestation. As the transcript was not

proved in any other manner, nor authenticated in conformity to the act of Congress, it was properly rejected; and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Kinseley v. Rumbough, 96 N. C., 196.

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(298)

ISRAEL RICE v. JAMES CARTER'S ADMINISTRATOR.

1. A sold a tract of land to B and gave him a bond for the title, and B, as the price of the land, promised verbally to pay $100 to C, to whom A was indebted: *Held*, that this case does not fall under section 10 of the statute of frauds, Rev. St., ch. 50, secs. 10 and 8, relating to promises to pay the debts of other persons, because the promise is to pay the debt of the very person to whom the promise is made.

2. But in such a case the promise, being verbal, comes within that provision of section 8 which provides that all contracts to sell or convey lands, etc., shall be void unless such contract or some memorandum or note thereof be put in writing and signed by the party to be charged therewith, etc. Under this part of the section the verbal promise was void.

APPEAL from the Superior Court of Law of YANCEY, at a Special Term in July, 1850, *Battle, J.*, presiding.

J. W. Woodfin for plaintiff.
Gaither, with whom was *N. W. Woodfin*, for defendant.

PEARSON, J. This was *assumpsit* upon a promise to pay $100 as the price of a tract of land. The plaintiff proved that he sold to the defendant a tract of land, and executed to him a bond for title, to be made when the purchase money was paid; (299) whereupon, as the price of the land, the defendant promised to pay $100 to certain persons to whom the plaintiff was indebted. The defendant relied on the statute of frauds, Rev. St., ch. 50, secs. 10 and 8. Section 10 provides that "no action shall be brought to charge the defendant upon any special promise to answer the debt, default or miscarriage of another person, unless the agreement or some memorandum or note thereof be in writing."

The case does not fall under the operation of this section, for the promise is to pay the debt, not of another person, but of the

very person to whom the promise is made, and it is well settled that such a promise does not fall within the operation of this section of the statute.

Section 8 provides that all contracts to sell or convey lands and slaves shall be void, unless such contract or some memorandum or note thereof be put in writing and signed by the party to be charged therewith, etc. The contract, in this case, was for the sale of land. The defendant signed no memorandum or note in writing whereby he can be charged, and we are at a loss to see any ground, at all plausible, to support an action against him upon a mere verbal promise. *Lathrop v. Bryant,* 2 Bing., N. C., 744. The defendant had signed a written contract to convey land. The plaintiff (like the defendant in this case) had only made a verbal promise to pay the price, and it was urged for the defendant that he ought not to be liable under his written promise, inasmuch as the plaintiff was not bound by his verbal promise; but, said the Chief Justice, "whose fault was that? The defendant might have required the plaintiff's signature. The object of the statute was to secure the defendant. In the argument a little confusion has grown out of the fact of not distinguishing between the consideration of an agreement and the mutuality of claim. The defendant, for a sufficient consideration, has bound himself in writing; whether the (300) plaintiff is bound or not is not now the subject of inquiry." In this case the construction of the statute was fully discussed. It is taken for granted, and as a thing not debatable, that the party *who did not sign* the memorandum or note in writing was not liable, and the idea of his being liable is not even suggested. In *Miller v. Irwin,* 18 N. C., 103, it is held that the act of 1819, to make void parol contracts for the sale of land and slaves, does not require the consideration to be set forth in the writing. This is a departure from the English law, but we cannot see that it has the least bearing upon the present question. So, in *Choate v. Wright,* 13 N. C., 289, and many cases following that decision, it is held that this statute does not apply to executed contracts. We concur with these cases, but they have no bearing upon the present question. The contract here was not executed on either side and was purely executory. *Carter v. Graves,* 9 N. C., 576; *Smith v. Lewis,* 10 N. C., 469, and several other cases for the price of land, where deeds had been executed, in which the payment of the purchase money was recited and a release given, all turned upon the question of estoppel, and the point is not made whether the vendee was bound for the price without a promise in writing, because those were cases of executed contracts. The contract in the case now

under consideration is *executory,* and comes within the words as well as the meaning of the statute, which was intended to prevent fraud and perjury in relation to contracts for the sale of land and slaves.

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

Cited: Wade v. New Bern, 77 N. C., 462; *Holmes v. Holmes,* 86 N. C., 208; *Black v. Black,* 110 N. C., 402; *Hall v. Fisher,* 126 N. C., 209; *Davis v. Yelton,* 127 N. C., 348; *Love v. Atkinson,* 131 N. C., 545; *Hall v. Misenheimer,* 137 N. C., 186; *Satterfield v. Kindley,* 144 N. C., 461.

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(301)

ROBERT POSTON v. ROBERT HENRY.

1. A recovery in ejectment will not support an action for the *mesne* profits, unless the lessor has regained the possession, either by being put under process or by being let in.

2. Where a recovery in ejectment is upon the demise of one of several lessors, putting another lessor in possession does not entitle the lessor, upon whose demise the recovery was effected, to an action for the *mesne* profits.

APPEAL from the Superior Court of Law of BUNCOMBE, at Special Term in July, 1850, *Battle, J.,* presiding.

The action is trespass for *mesne* profits. Plea, not guilty. On the trial the plaintiff gave in evidence the record of a recovery in ejectment. The declaration contained three counts, upon the several demises of George W. Jones, Rebecca Poston, and the present plaintiff, Robert Poston. It was served upon Evans, as the tenant in possession; but upon the affidavit of one Deaver and a motion in the name of the present defendant, he (Henry) was admitted a defendant and pleaded to the action. At the trial the issue on the demise of Robert Poston only was submitted to the jury, and on it there was a verdict for the plaintiff, and judgment was entered thereon in July, 1848. In August, 1848, an *habere facias possessionem* issued, which recited the recovery of the premises of John Doe on the demise of Robert Poston, and commanded the sheriff to put the said party, plaintiff, or his agent, into sole possession, etc. Under it the sheriff put in George W. Jones in August, 1848, and this suit was brought about a month afterwards. Upon those facts the counsel for the defendant took several exceptions; and among them

was one that the plaintiff could not maintain this action (302) because it did not appear that he had entered after the recovery in ejectment. It was overruled, and the plaintiff had a verdict and judgment, and the defendant appealed.

N. W. Woodfin for plaintiff.
J. Baxter, Henry and *Gaither* for defendant.

RUFFIN, C. J. The Court thinks the objection good. A recovery in ejectment will not support an action for *mesne* profits; for it is trespass for an injury to the possession, and therefore it is necessary the plaintiff should show that he had regained the possession, either by being put in upon process or let in. In this case that is not shown. We cannot conjecture why the ejectment was tried as it was. But so it is, that the verdict and judgment are on the count on Robert Poston's demise, and the writ of possession accords with them. In fact, however, Robert Poston has never been in under those proceedings; and, without further evidence of the connection between that person and Jones, the Court cannot presume that Jones was the agent of Poston to receive the possession. It is true, they were both lessors of the plaintiff in ejectment. But that was by separate demises of the whole, and imports several titles; so that it cannot be seen that the possession of one of them is that of the other, and consequently the present action cannot be maintained, and it becomes unnecessary to consider the other points made.

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

Cited: Carson v. Smith, 46 N. C., 107; *Stancill v. Calvert*, 63 N. C., 617.

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(303)

W. W. DAVIS v. WILLIAM T. COLEMAN ET AL.

When A, a citizen of Georgia, being in this State, offered to lend to B $6,000, but on his return to Georgia, not having sold his cotton crop, wrote to B that he could only lend $3,000, whereupon B went to Georgia, there received the money and executed his note for that amount: *Held*, that B was bound to pay 8 per cent, the interest according to the laws of Georgia.

APPEAL from the Superior Court of Law of RUTHERFORD, at Fall Term, 1849, *Ellis, J.*, presiding.

J. Baxter and *Bynum* for plaintiff.
Gaither and *Avery* for defendants.

PEARSON, J. This was debt upon a promissory note. The defendants relied upon the plea of usury. It was proven that the plaintiff, who is a citizen of Georgia, and has been in the habit, for many years, of spending his summers in this State at the springs, offered to lend one of the defendants $6,000, the interest to be paid annually and satisfactory security to be given. This offer was made in Asheville. Afterwards the plaintiff, having returned to Georgia, wrote a letter to the defendant William T. Coleman, informing him that he had not sold his cotton crop, as he had expected to have done, but would be able to accommodate him with $3,000. Whereupon the defendant Coleman procured a note to be signed by himself and the other defendants, carried it to Augusta, Ga., then filled it up, delivered it to the plaintiff, and received from him $3,000. Eight per cent (304) is the legal rate of interest in the State of Georgia.

The only question was whether the contract was made in this State or in the State of Georgia, there being a difference in the rate of interest. The jury, under the instructions of the court, returned a verdict for the plaintiff, with 8 per cent interest, and from the judgment thereon the defendant appealed.

We think it clear that the contract was made and carried into effect in the State of Georgia, and must be governed by the law of that State. The chaffering or talk about the loan of money, which took place in this State, did not amount to a contract. If the plaintiff had refused to lend the money, the defendants would have had no cause of action against him; nor would the plaintiff have had a cause of action against them for failing to apply for the money. So, in fact, there was no definite contract made in this State, but a mere preliminary arrangement, having no force nor effect in legal contemplation until consummated by the delivery of the note and the receipt of the money, all of which took place in the State of Georgia. We, therefore, concur in the opinion of his Honor, that the contract cannot be avoided upon the plea of usury, inasmuch as, although first spoken of and mentioned in this State, it was not, in fact, consummated until the parties met in the State of Georgia; and there was no evidence of any collusion or corrupt agreement to evade the law of this State.

PER CURIAM. Judgment affirmed.

(305)

MERCER FAIN v. A. S. EDWARDS ET AL.

Where a witness for the plaintiff, on being examined as to a particular transaction, stated that he had paid a certain sum of money to the plaintiff, and the witness' credit was attacked and the transaction impeached for fraud: *Held*, that it was competent for the plaintiff to show that he had entered the payment on his books at the time alleged.

APPEAL from the Superior Court of Law of CHEROKEE, at Spring Term, 1850, *Caldwell, J.*, presiding.

J. Baxter for plaintiff.
J. W. Woodfin for defendant.

NASH, J. The only question presented for the consideration of this Court is as to the admissibility of testimony. The case shows that the defendant Holcombe had a judgment and execution against one Loudermilk. The execution was levied on the horse in question, claimed by the plaintiff and sold by the defendant. To prove his title the plaintiff called Loudermilk as a witness, who stated that he had sold or swapped another horse, belonging to the plaintiff, for the one in question. The difference in value between the two animals was $30, which he paid to the owner of the other horse, and the plaintiff gave him a credit on his book for that amount. The plaintiff was a merchant. The transaction between the plaintiff and witness was impeached on the ground of fraud. To corroborate the testimony of Loudermilk the plaintiff offered his book (306) to prove that he had entered the credit, as deposed to. There was a verdict for the defendant, and from the judgment thereon the plaintiff appealed.

We think the court below erred in rejecting the evidence. As a general rule, it is admitted that a man cannot manufacture evidence for himself; but the evidence offered here does not touch upon it. For if the entry was made at the time it is alleged to have been, it was against the interest of the plaintiff, as it was an acknowledgment either of a subsisting debt due to Loudermilk or of a discharge from it. The fact offered to be proved by the plaintiff was not offered in chief, but in reply, to support the witness, whose veracity was impeached by the opposing party, and to rebut the imputation of fraud and want of consideration, by showing that the credit was entered as he had stated. The effect of the evidence, if admitted, was another question, for another tribunal. If, instead of entering the credit on his book, the plaintiff had given the witness a receipt

for it, or a note promising to pay it, would it not have been competent for him to sustain the credit of the witness by showing the one or the other? We think, unquestionably, it would. If so, why is not the entry in the book evidence? We can see no difference in principle in these cases and the one under consideration, except that, in the present case, the evidence of the fact was in the custody of the plaintiff; in the others, in that of the witness. In deciding this question we are bound to presume that the plaintiff was prepared to prove everything necessary to make the book evidence. Our attention is called to the single question as to the admissibility of the entry for the purpose for which it was tendered. We think his Honor erred in rejecting it. Evidence which is not proper in chief may become so in reply. Until a witness' testimony is impeached, the party producing him cannot show that he has stated the
(307) same facts at a previous time. So neither in the case of a person who is prosecuted for larceny can the State show that he is a man of bad character, until he has laid a foundation for the evidence by attempting to show his good character.

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

Cited: S. v. Oscar, 52 N. C., 306.

HARVY D. CARRIER v. ADAM HAMPTON.

1. Where the subscribing witness to a deed for land or slaves and the maker are dead, or cannot be procured, whereby it cannot be acknowledged by the one nor proved by the other, recourse may be had to the common-law mode of proof, for the purpose of registration, as for the purpose of making the deed evidence at common law generally.

2. In such a case the party would be under the necessity of giving similar evidence of the execution on the trial.

3. A mere mark or cross of an illiterate subscribing witness, *prima facie*, cannot be identified, and therefore the instrument may be read upon proof of the handwriting of the party.

4. Where from the certificate of the probate of a deed it only appeared that the witness swore, in general terms, that the signature of the party was *in his handwriting, but he did not state upon* what grounds he formed his opinion nor by what means he had acquired a knowledge of the handwriting of the party: *Held*, that this evidence gave no authority to grant an order of probate.

5. Where the plea of fully administered is found in favor of the administrator, and, upon a *scire facias* against the heirs, they come in and plead that the administrator has assets: *Held*, that upon the trial of the issue upon that plea the heirs may give evidence of any assets received by the administrator, either before or after the trial of the original suit, and up to the time of the plea pleaded to the *scire facias*.

APPEAL from the Superior Court of Law of McDOW- (308) ELL, at Fall Term, 1849, *Ellis, J.*, presiding.

This action was commenced in October, 1843, and is trover for slaves, which the defendant claims under a bill of sale from his father, Jonathan Hampton, the intestate of the plaintiff. On the trial of not guilty pleaded, the plaintiff produced as witnesses two other sons of the intestate, who executed to the plaintiff releases for their respective distributive shares of the personal estate and effects of their deceased father, and to whom, also, the plaintiff executed several releases for any claim for the costs of suit. The defendant still objected to their competency, upon the following grounds, which they stated on their *voire dire:* Certain creditors of the intestate instituted actions against the plaintiff for debts of the intestate, in which he pleaded "fully administered" and no assets, which were found for him; and the creditors took verdicts ascertaining their demands and signed judgments therefor, according to the statute, and then issued writs of *fieri facias* against the witnesses and the other heirs, to have execution against the real estate, in which the heirs had not yet pleaded, but the same were still pending. Upon the death of their father, lands descended from him to the witnesses, and, after the expiration of two years from his death, the witnesses respectively sold and conveyed their shares: the one without and the other with general warranty. The court was of opinion that upon the collateral issue, which the witnesses might have, the questions of fully administered and no assets extended only to the truth of the administrator's plea, when the same was pleaded, and, therefore, that the interests of the witnesses could not be affected by the result of this suit, and they were received and permitted to give evidence that the intestate had the slaves in his possession and use and claimed them as his own up to his death, which occurred several years after the date of the alleged bill of sale to the defendant, and, also, that during that period (309) the defendant did not claim them.

The defendant then produced his bill of sale, which purported to be attested by one Edmund Tomberlin as the subscribing witness, who did not write his name, but made his mark in the form of a cross, in the manner usual with illiterate persons;

and, having proved that the said Tomberlin was dead, the defendant moved to give the deed in evidence upon the probate and registration thereof. The probate was before a judge of the Superior Court on 6 July, 1846; and he certified "that Jefferson S. Hampton, being duly sworn, testified that Edmund Tomberlin, the subscribing witness to the within written bill of sale, is dead, and that the signature of Jonathan Hampton, the grantor therein, is in the proper handwriting of the said grantor; and, thereon, it was ordered to be registered. Upon objection by the plaintiff, the court refused to admit the instrument in evidence. After a verdict and judgment for the plaintiff, the defendant appealed.

J. G. Bynum and *N. W. Woodfin* for plaintiff.
Avery, G. W. Baxter and *J. Baxter* for defendant.

RUFFIN, C. J. The deed to the defendant was, the Court thinks, properly excluded. As creditors and purchasers are not parties to the controversy, but only those who are party and privy to the instrument, the old cases would have allowed it to be proved on the trial, as a conveyance at common law, and read, without reference to its attestation, probate and registration, under the acts of 1784, 1789 and 1792. *Cutlar v. Spiller,* 3 N. C., 61; *Rhodes v. Holmes,* 9 N. C., 193. But the Court does not further consider that point, as it was not raised on the trial, and the defendant insisted, on the contrary, that
(310) he was entitled, under the statute, to read the deed on the probate and registration appearing on it, without further proof of its execution. Rev. St., ch. 37, sec. 21. But that depends upon the question whether there has been that due probate and registration which the act meant, and the Court is of opinion there has not. The case that occurred is not expressly provided for in the act. But there is no hesitation in holding that a deed for land and slaves would not be avoided by the accidental circumstance of the death of the subscribing witness and of the maker, whereby it could not be registered upon proof by the one or acknowledgment by the other. In such a case, we hold that recourse may be had to the common-law mode of proof for the purpose of registration, as for the purpose of making the deed evidence at common law generally. But it would follow that, in such cases, the party would be under the necessity of giving similar evidence of the execution on the trial, since it is clear that the provision of the act which dispenses with the subscribing witness upon the trial, and admits the deed on its probate and registration, supposes the probate

and registration, thus received, to have been upon the evidence of that witness or the acknowledgment of the party, or in some other way specified by the statute. In the present case no such proof was offered on the trial, nor, in the opinion of the Court, was proper and sufficient evidence given to authorize the order for registration. *Horton v. Hagley,* 8 N. C., 48, shows that point to be open, when the instrument is offered to support a title and the defect of the evidence appears in the probate itself. The Court does not concur in one of the objections taken to the probate by the counsel for the plaintiff, that there ought to have been proof of the mark being in the hand of the witness, or, at the least, affirmative evidence that the defendant endeavored and failed to get proof to the mark as being that of the witness; for, although in some very extraordinary in- (311) stances the mark of an illiterate person may become so well known as to be susceptible of proof, like handwriting, yet, generally, a mark, a mere cross, cannot be identified, and, therefore, *prima facie,* it stands *per se* upon the same reason with the case in which the party, after due inquiry, has been unable to prove the signature of the person who, upon the face of the instrument, appears to have written his name as subscribing witness—in which case the instrument may be read upon proof of the handwriting of the party. *McKinder v. Littlejohn,* 23 N. C., 66; *Jones v. Blount,* 2 N. C., 238. But the other objection, that the proof of the grantor's handwriting was defective, and so did not authorize the order for registration, the Court deems well founded. The witness deposed in general terms that the signature of Jonathan Hampton was in the handwriting of that person; but he did not state upon what grounds he formed his opinion nor by what means he had acquired a knowledge of the handwriting of the party; and consequently it does not appear that his means of information were such as to render his opinion admissible. *Pope v. Askew,* 23 N. C., 17; *Jackson v. Waldron,* 13 Wend., 178. Upon the other point, as to the competency of the sons of the intestate, the opinion of the Court differs from that of his Honor. It is true, the creditor, who sued the administrator, could not in any proceeding of his own, directly against the administrator, either in law or in equity, reach personal assets subsequently received by the administrator. *Miller v. Spencer,* 6 N. C., 281; *Martin v. Harding,* 38 N. C., 603. But that arises from the forms of the pleadings and judgment, and the conclusiveness belonging to the adjudication of all tribunals upon matters within their jurisdiction, when the same matters come up a second time between the same parties. But the same operation is not given to a judgment

against third persons generally; and the statute enacts
(312) in the particular case of creditor, executor and heir, that execution may go against the estate of the heir upon a judgment in a suit against the executor, provided the executor has fully administered or hath not personal assets; and it enacts further that at the election of the heir, a finding in the first suit of fully administered and want of assets shall not bind the heir nor even the creditor, and enables the heir, on the *scire facias* of the creditor, to take a new issue upon the question of assets with the executor, who is kept in court for that purpose. That is a collateral issue, and the creditor stands by, awaiting the result, for the sake of the right of the other parties, as between themselves; for the law supposes the creditor is to be paid, at all events, by the one side or the other, whichever has the estate of the debtor that is then chargeable; and to that end, if the issue be found against the executor, it gives the creditor execution *de bonis testatoris et de bonis propriis.* It is apparent that through the rights of the heir the creditor may thus have satisfaction from the personal estate or the executor, when, of himself, he could not get at either. Although those provisions of the law were, doubtless, designed chiefly, if not entirely, for the protection of the heir, yet the creditor also derives, incidentally, a benefit from them. That benefit and protection are necessarily coextensive; and as far as the heir can show assets in the hands of the executor, the creditor is turned over to him and the land of the heir is, *pro tanto,* exonerated. That was admitted in the argument to be true in respect to such personal assets as the heir may show the executor to have been liable for at the time the executor pleaded originally; making the issue between the heir and the executor relate back to that between the creditor and the executor. But, as the Court conceives, that limits the issue too straitly, and is opposed to both the words
and the reason of the law. As the heir has no interest
(313) in the question of assets, save only to protect his own inheritance, it is to be presumed from his tendering an issue, that he has real assets, and therefore that the creditor will obtain satisfaction, at least, to some extent. If, then, the collateral issue relates to the executor's plea, the consequence would be that the heir's land might be sold under the judgment, while the executor had ample assets, received, indeed, after he had pleaded or after judgment in the action against him. That, unquestionably, is contrary to the policy of the law, and, we think, the construction of the statute. The law does not mean the land of the heir to be taken upon judgment on a *scire facias,* if there be personal assets with which the debt ought to be dis-

charged, at time payment is demanded of the heir; for the very purpose is to save the land of the heir, and it ought to be done, if practicable, and without reference to the ability or inability of the executor to pay the debt at any previous period, provided he then have the means. If the heir and the next of kin or legatee entitled to the personalty be the same person, the law could never intend that the executor, upon a technical rule of pleading affecting him and the creditor, should be enabled to withhold the personal estate belonging to this person as next of kin and thereby deprive him of his inheritance. If, on the contrary, different persons fill those characters, it is manifestly unjust that the property of one should be taken to pay the debt of the other; and that, too, when it may be conveniently ascertained, in a pending proceeding, out of which property of the two it ought to be paid. It is true, indeed, that this inquiry cannot be brought down to the day of trial, but, by the forms of judicial proceedings, is stopped by the tender of the issue by the heir. Up to that time, however, the purposes of the law require that the heir shall be allowed to call the executor to account. Hence the statute is, not only that "the heir shall be at liberty to contest the truth of the finding of the issue in favor of the executor," but he may thus contest its (314) truth by a "plea that the executor *hath* sufficient assets, or *hath* wasted the same." It was, therefore, erroneous to suppose that the issue is as to the truth of the administrator's plea that he then had no assets. In reality, however, that distinction is not material to the question of the competency of the heir as a witness for his ancestor's administrator, in a suit for property alleged to belong to the intestate; for, unquestionably, the heir would be entitled to satisfaction out of the personalty, no matter when received, for money raised by legal process out of his land, although the creditor to whom the money was paid had lost his remedy against the executor. However it may be between the creditor and the personal estate, that estate must certainly exonerate the real estate or reimburse to it all sums which it was compelled to pay to creditors, and it is a common equity to give relief in such cases. Therefore, although the witness might not be able to charge the administrator upon a collateral issue with these slaves, as they have never been in his possession, and he has, hitherto, been unable to recover them, yet, if he should hereafter do so, they can insist on the return thereout of the money raised out of their land or paid by them in respect of it, and, therefore, it is not competent to them to give evidence that the property was in their ancestor. The releases given by them make no difference, as they give up only

their distributive shares as next of kin, and their right, which we have been considering, is as heirs at law, and distinct from the other. Neither is their liability or recourse ever affected by their sales of the land, for the statute makes them answerable for debts, as the land itself would have been, to the value of it, and without any regard to the sale being with or without warranty.

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

Cited: S. c., 35 N. C., 436; *Tooley v. Lucas,* 48 N. C., 310; *Latham v. Bowen,* 52 N. C., 341; *Leatherwood v. Boyd,* 60 N. C., 125; *Starke v. Etheridge,* 71 N. C., 245; *Rollins v. Henry,* 78 N. C., 349; *Todd v. Outlaw,* 79 N. C., 237; *Miller v. Hahn,* 84 N. C., 227; *Black v. Justice,* 86 N. C., 509; *Love v. Harbin,* 87 N. C., 253; *Davis v. Higgins,* 91 N. C., 386; *Howell v. Ray,* 92 N. C., 511, 12, 14; *Southerland v. Hunter,* 93 N. C., 312; *Simpson v. Simpson, ib.,* 374; *Speer v. James,* 94 N. C., 423; *Anderson v. Logan,* 99 N. C., 475, 6; *Duke v. Markham,* 105 N. C., 138; *Quinnerly v. Quinnerly,* 114 N. C., 147; *Bright v. Marcom,* 121 N. C., 87.

(315)

JOHN C. WATTERS AND WIFE v. GEORGE W. SMOOT.

1. Where a man has charged a woman with incontinence with a particular individual, he cannot, on the trial of an action for this slander, go into evidence to show that she was incontinent with other persons.

2. The declarations of the husband, who is necessarily a party to the suit for slander of his wife, are admissible in evidence to show her guilt.

APPEAL from the Superior Court of Law of WILKES, at Fall Term, 1849, *Caldwell, J.,* presiding.

Boyden for plaintiffs.
H. C. Jones for defendant.

PEARSON, J. This was a case for slanderous words spoken of the plaintiff, Mrs. Watters.

The words charged the plaintiff with criminal intercourse with one Nelson Haggins. In support of his plea of justification the defendant offered no proof in reference to Haggins, but offered to prove that Mrs. Watters had had criminal intercourse with other men, and the plaintiff, her husband, had on several

occasions said she was guilty of such intercourse with men other than Haggins. This testimony was objected to, but was received. There was a verdict for the defendant, and from the judgment thereon the plaintiffs appealed.

The question is, Where the words make a charge of incontinence with a particular individual, can the plea of justification be supported by proof of criminal intercourse with other men? or must the defendant make good his plea by proof of such intercourse with the individual named? A (316) charge that the plaintiff stole the hog of A is not supported by proving that he stole the hog of B. When the charge is general, as that the plaintiff is guilty of larceny or of counterfeiting, the plea sets out some particular act of larceny or of counterfeiting, so as to make the issue certain; and in this case the defendant has the advantage of being able to put his defense upon any particular act of the kind which he thinks he can prove. But when the charge is *particular,* and the defendant, at the time he speaks the words, selects a specified offense, he is bound by it, and his plea must rest on that particular matter. This is obviously right, because, having, for the sake of giving point and force to his charge, gone into particulars, and having had the advantage of thereby making his accusation the more plausible, he has no right to complain that he is not allowed to make a departure, and run over the plaintiff's whole life to see "if there be no shame in it." This is a well-settled distinction in slander, and we see no reason to find fault with it.

The statute which gives the present action provides that it shall be prosecuted "under the same rules and regulations as have been heretofore observed in the trials of actions of slander"; and we are not at liberty, if we were so disposed, to give defendants in this action any greater latitude than they are entitled to in the common-law action.

Our attention was called, in the argument, to *Snow v. Wicker,* 31 N. C., 346. There is nothing in that case opposed to our present decision. There the charge was general. The defendant had selected no individual with whom he had connected the plaintiff, and the substance of that case is that conception and delivery did not make a part of the charge, and for that reason need not be proven. It was enough for the de- (317) fendant, by his plea, to aver that the plaintiff had had criminal intercourse with the witness. But here the charge is *particular.* The defendant, at the time he spoke the words, selected Nelson Haggins as the man, and he cannot be allowed in his plea to shift his ground.

The declarations of the husband ought also to have been re-

jected, because he did not allude to Haggins. We do not concur in the other reason suggested, that his wife ought not to be affected by his declarations. He is a party of record, is bound for the costs, entitled to the recovery, and could not be examined as a witness. The influence that such declarations ought to have is for the jury.

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

Cited: Sharpe v. Stephenson, 34 N. C., 350.

MARIA C. FEATHERSTON v. WILLIAM FEATHERSTON.

Where there is a contract for the sale of a slave, and the question was whether it was the intention of the parties that the contract was to be considered executed or only executory, the court cannot decide that question, but must leave it to the jury.

APPEAL from the Superior Court of Law of HENDERSON, at Spring Term, 1850, *Caldwell, J.*, presiding.

This is a suit in trover to recover the value of a negro boy named John. The plaintiff relied on the deposition of one Hawkins to show title. It is in the following words: "That (318) in July, 1844, he (Robert Hawkins) was in Henderson County, N. C., about dividing the property of Berryman Featherston, deceased, and the said M. C. Featherston and William Featherston were both there, and a division of the negroes took place, and in the said division a negro boy named John, aged about three years, fell in a lot to William Featherston, after which the said William Featherston traded him to M. C. Featherston for $200, it being the amount that the said boy was valued at to the said William Featherston. The trade took place on Saturday, some time in July, 1844, and he saw M. C. Featherston pay William Featherston between $15 and $20 in silver, and the said M. C. Featherston offered to give her note for the balance due and demanded a bill of sale, and they agreed to draw the writings on the Monday following, and the trade being made and assented to by the parties, William Featherston delivered the said negro boy John to M. C. Featherston, with that understanding, that they would draw the writings on the Monday following." The plaintiff lived with her mother and owned other slaves, and her mother owned the mother of John; and it was a matter of contest on the trial, in whose possession John was, up to the time when the defendant in some way got

possession of him, some two years after the trade. It did not appear that any bill of sale had ever been executed, but there was evidence which tended to show that a note had been executed by the plaintiff to the defendant for some purpose. A witness testified that he knew of no dealings between the parties. It was insisted for the defendant that, supposing Hawkins' testimony to be true, it was an executory contract, and no title passed. The court was of opinion that it was an executed contract, according to the said Hawkins' testimony, and that (319) a title to the boy John passed to the plaintiff, and so charged the jury. A verdict was rendered for the plaintiff, and from the judgment thereon the defendant appealed.

Gaither for plaintiff.
N. W. Woodfin and *Baxter* for defendant.

NASH, J. When his Honor, the presiding judge, pronounced his opinion in this case he entirely overlooked *Henry v. Patrick,* 18 N. C., 358, and *Caldwell v. Smith,* 20 N. C., 193, or drew a distinction in principle between them and the present case which the facts do not warrant. In the first case, the defendant sold to the plaintiff a negro; the price was agreed upon and the boy delivered. The value was to be paid in a bond, which the plaintiff then held upon the defendant. The bond not being present, it was agreed that, in a few days, the defendant would call at the plaintiff's house, execute a bill of sale and receive the bond. The plaintiff took the boy home with him. The contest between the parties there, as here, was whether the contract was an executed or executory one, to be completed by the executing of the bill of sale by the defendant and the delivery of the bond by the plaintiff. The court decided that it was a question of fact for the jury as to the intention of the parties, and not one of law. The court could not decide upon the intent. This case governs the one before us; the only fact differing the latter is that, at the time, a small part of the purchase money was paid by the plaintiff. This, we think, makes no material differ- (320) ence between the cases, in principle. Property in slaves can be passed in two ways: either by sale and delivery or by deed. Here the parties, at the time the terms of the contract were agreed on, agreed that the note for the balance of the purchase money and the bill of sale were to be executed and delivered at a subsequent day. Was the boy John, then, delivered at the time as the property of the plaintiff, under the parol contract, and the bill of sale to be given as further assurance or evidence of title? If so, the contract was complete. If the boy

was put into her possession, but not as her property, until a bill of sale was executed and a bond or note for the residue of the purchase money was delivered, and it was the understanding of the parties that the title should not be changed until those things were done, then the contract was not completed by the delivery of John and the payment of a part of the purchase money. Which was the intention of the parties was a question of fact for the jury to ascertain. We think his Honor erred, not in the conclusion which he drew from the facts—upon that we have no right to express an opinion—but that he assumed the jurisdiction of the jury in drawing any conclusion as a matter of law.

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

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(321)

DEN ON DEMISE OF JOSEPH BROOKS ET AL. V. BENJAMIN RATCLIFF.

1. Where the land of a debtor has been sold by execution and an action is brought against him to recover possession, he has no right to object that the sheriff has not made the deed to the purchasers at the execution sale, since the sheriff may convey to an assignee, whether he be an assignee by law or by contract.

2. In cases of verdicts subject to the opinion of the court, all the points on which either party means to insist ought to be reserved, for all points not reserved are taken to be given up. If one of the parties cannot have inserted a question on which the presiding judge inclines against him, he ought not to consent to a verdict, but peremptorily claim that an opinion shall then be given to a jury, as he has a right to do.

3. Where an action was brought in the name of James Brooks, William E. Colton and William E. Churchill, partners trading under the name and firm of "Brooks, Colton & Co.," and the judgment was in the name of Brooks, Colton & Co.: *Held*, that this was a variance, for which the judgment might have been reversed at common law, but the error was cured by our statute of amendments, Rev. St., ch. 3, sec. 5.

4. A purchaser of land at an execution sale gets a good title, although the sale was made on a Tuesday or Wednesday of the week, on the Monday of which the writ was returnable, but was not returned.

5. A deed, after reciting a sale of land by execution, proceeds thus: "In consideration, etc., the said P. R., sheriff, etc., doth hereby bargain, sell, alien, enfeoff, convey and confirm *with* the said James T. Brooks, etc., their heirs and assigns, etc., to have and

hold the same *to* the said, etc., their heirs and assigns": *Held*, that the use of the word *with* does not affect the sense or operation of the instrument; as, upon the context, it is evident between or with whom the contract is, and by and to whom the estate is conveyed.

APPEAL from the Superior Court of Law of BUNCOMBE, at Special Term, in February, 1850, *Caldwell, J.*, presiding.

The lessors of the plaintiff set up a title by virtue of a (322) sheriff's sale under a judgment and execution against the defendant, Ratcliff. By the transcript of the record it appeared that the action was debt by James S. Brooks, William E. Colton and William E. Churchill, partners trading under the name and firm of "Brooks, Colton & Co.," upon a bond given by the defendant to "Brooks, Colton & Co.," and that a *fieri facias* was issued thereon, running also in the name of "Brooks, Colton & Co.," by virtue of which the sale was made under which the plaintiff claims. For that variance or defect the counsel for the defendant insisted he was entitled to a verdict; but the court held otherwise. The plaintiff then gave in evidence the return of the sheriff on the execution, that on 4 October, 1843, he sold the premises to the plaintiffs in the said execution, and also a deed from the sheriff, dated 18 September, 1846, to James S. Brooks, William E. Churchill and William M. Colton and Eli Colton, in which is recited the levy of the execution and the sale of the premises to James S. Brooks, William E. Colton and William E. Churchill, copartners under the firm of Brooks, Colton & Co., and that, afterwards, the said William E. Colton died and left surviving him the said William M. Colton and Eli Colton, who were the only children and heirs at law of the said William E. Colton, deceased; and then the premises are conveyed therein to the said four persons, James S. Brooks, William E. Churchill and William M. Colton and Eli Colton in fee. After those recitals and stating the price bid and the payment thereof, the deed proceeds thus: "In consideration, etc., the said P. R., sheriff, etc., doth hereby bargain and sell, alien, enfeoff, convey and confirm *with* the said James S. Brooks, etc., their heirs and assigns, all, etc., to have and to hold the same *to* the said, etc., their heirs and assigns." By reason of an alleged defect in the deed in using the word "with" instead of "to" in the conveying part, the counsel for the defendant insisted that it did not pass the title to the lessors of the plaintiff. (323) But the court held to the contrary. The defendant then called as a witness the sheriff who made the sale; and he deposed that he did not sell on the first Monday of October, 1843 (which was the return day of the execution), but that, at the request of

the defendant, he postponed the sale from Monday until Tuesday, and again from Tuesday to Wednesday of that week, and that on this last day the sale was made. The counsel for the defendant thereupon insisted that if that testimony was true, the said sale was void; but the court held that it was, nevertheless, valid. The counsel for the defendant thereupon excepted to the opinions of the court upon those several points. The counsel for the defendant then insisted that, forasmuch as there was no evidence, besides the recitals in the sheriff's deed, that William E. Colton had died or that William M. Colton and Eli Colton were his heirs, the plaintiff could not recover.

The court gave no opinion thereon to the jury, but, by the request of the counsel in the cause, the point was reserved; and thereupon a verdict was taken for the plaintiff, subject to be set aside and a nonsuit entered if the court should be of opinion on that point for the defendant; otherwise, judgment to be entered on the verdict. Afterwards the court set the verdict aside and ordered a nonsuit, and the plaintiff appealed, and then the defendant appealed also.

N. W. Woodfin and *J. G. Bynum* for plaintiff.
J. Baxter and *Gaither* for defendant.

RUFFIN, C. J. Upon the point reserved the case of *Testerman v. Poe,* 19 N. C., 103, and those referred to in it are direct authorities against the judgment. The sheriff may rightfully convey to the assignee of the purchaser, and it is not mate-
(324) rial whether he be assignee by contract or by law. But, in truth, that is a matter with which the debtor in the execution has no concern, it being altogether between the sheriff, the bidder and the alleged assignee. In this case, indeed, the acquiescence by the sheriff and two of the partnership which purchased the land, jointly, with two persons purporting to claim as the children and heirs of the other partner, furnishes a presumption of the existence of those facts, since, otherwise, it would be against the interest of the supposed survivors thus to take the deed. But our opinion does not go on that ground alone, nor even chiefly. It proceeds on the broader one, that the objection is not one which the defendant has a right to raise. It was, therefore, erroneous to set aside the verdict, and there ought to have been judgment on it for the plaintiff, according to the agreement of the counsel. Consequently, that judgment must now be given here.

It will be thus perceived that the defendant has precluded himself from taking advantage of any error which might have

been committed in ruling the other points against him. For, although a plaintiff may, doubtless, appeal from a judgment for him, if it be, for example, for less than he was entitled to, yet we do not see how a defendant can bring a writ of error or appeal upon a judgment in his favor, since it is of no consequence to him upon what ground he is discharged. In cases, therefore, of verdicts subject to the opinion of the court, all the points on which the party means to insist ought to be reserved. If one of the parties cannot have that done in respect to a question on which the presiding judge inclines against him, he ought not to consent to such a verdict, but peremptorily claim that an opinion shall then be given to the jury, as he has a right to do. By consenting that the judgment shall depend on this or that particular question, all others are necessarily taken to be given up. These observations are made to prevent an (325) oversight of the kind in future; for it so happens that in the present case the opinion of this Court concurs on each point with that given against the defendant in the Superior Court, and therefore he suffers no prejudice from the manner in which the case was brought up.

There is no variance between the judgment and execution, both being in the name of the firm of "Brooks, Colton & Co." There is no doubt such error in the judgment would have been cause for reversing it at common law. But the statute of amendment cures it by the provision that no judgment shall be reversed for any mistake in the name of any party or person when the correct name has been once rightly alleged in any of the pleadings or proceedings. Rev. St., ch. 3, sec. 35. *Wall v. Jarrott,* 25 N. C., 42. If the judgment could not be reversed, the execution which conforms to it must, of course, be supported. It is said, indeed, that there was no judgment rendered in the action of debt. But we must hold to the contrary. First, that objection was not taken on the trial. If it had been, it would have been untenable, as we have had many cases in which it was held that although the judgment be not formally entered, yet that, upon a verdict which, connected with the pleadings, authorized a judgment, one shall be intended and the minutes be taken for the judgment, if a formal entry could be made up from them. *Barnard v. Etheridge,* 15 N. C., 295. *Gibson v. Partee,* 19 N. C., 530. The courts, being aware of the indulgence which counsel and attorneys extend to each other upon these parts of their duty, are obliged to admit such inducements in support of rights derived under judicial proceedings.

The act, which requires sales to be made at the courthouse on the same Monday of each month on which the court of the

county sits, expressly authorizes the sheriff to postpone
(326) the sale from day to day for any of the reasons mentioned in the act; and it has been held that in respect to the postponement of the sale the act is directory, and, therefore, that the purchaser is not bound to see that the officer complied with his duty in that respect, any more than in duly advertising, or selling all the personalty before offering the land. Hence a purchaser on Tuesday or Wednesday gets a good title; and it is settled that he does so, although his purchase be on those days of the week on the Monday of which the writ was returnable, but was not returned. *Pope v. Bradley,* 10 N. C., 16; *Lanier v. Stone,* 8 N. C., 229; *Mordecai v. Speight,* 14 N. C., 428.

Upon the remaining point, as to the effect of the use of the word *"with,"* in the conveying clause of the deed, the Court is of opinion that it is an inaccuracy which does not affect the sense or operation of the instrument, as upon the context it is evident between whom or with whom the contract is, and by and to whom the estate is conveyed. On the whole case, therefore, the judgment must be reversed; and the Court, proceeding to give such judgment as the Superior Court ought to have given, the verdict must be reinstated and judgment rendered thereon for the plaintiff, in conformity to the agreement between the parties.

PER CURIAM. Judgment reversed and judgment for the plaintiff.

Cited: Carson v. Smart, 34 N. C., 371; *Cobb v. Hines,* 44 N. C., 347; *Woodley v. Gilliam,* 67 N. C., 239; *Holmes v. Marshall,* 72 N. C., 40; *Maynard v. Moore,* 76 N. C., 164; *Mayers v. Carter,* 87 N. C., 148.

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(327)

DEN ON DEMISE OF JAMES GIBSON v. FREDERIC WALKER.

1. A man, being bound to maintain and support his father, conveyed a tract of land to his brother in trust to perform the conditions of that bond in the first place, and then out of the proceeds of the land to pay the other creditors of the maker of the deed. In the deed was contained the following clause: "The manner of executing the deed, as to the support of my father," is left to the discretion of the maker of the deed: *Held,* that this did not make the deed, on its face, fraudulent in law, for it reserved to the maker no control over the fund, but only the manner in which the father should be supported.

2. The fact that the debt to the father was prospective, as well as immediate, does not make it illegal to give it the preference.

GIBSON *v.* WALKER.

APPEAL from the Superior Court of Law of ROWAN, at Fall Term, 1849, *Caldwell, J.*, presiding.

H. C. Jones for plaintiff.
Boyden for defendant.

NASH, J. In 1825 William Gibson, James Gibson, Hugh Gibson and John Gibson executed to their father, Joseph Gibson, a written obligation in the penalty of $500 each. The condition set forth that the parties are "the sons and heirs of Joseph Gibson," and having received, and expecting to receive, titles to the whole of the land of said Joseph, bind themselves to discharge all the debts of their father, then due or to be afterwards contracted, and to maintain him during his natural life, and to bury him decently. In 1841 John Gibson conveyed to his brother James, the lessor of the plaintiff, and who was one of the parties to the contract of 1825, the tract of land in dispute, subject to the following condition and proviso: "The condition of the above obligation is such that, whereas the said John Gibson is bound by bond in the sum of $500, dated 29 April, 1825, together with William Gibson, James (328) Gibson and Hugh Gibson, in a like sum for the support of Joseph Gibson, their father, during his lifetime: Now, therefore, the condition of this deed is that the said James Gibson shall well and truly do and perform the covenants and contracts contained in the said bond, by maintaining and supporting the said Joseph during his life, and by burying him in a decent manner, etc., and, also, that the said James shall out of the proceeds, etc., pay certain debts therein enumerated." The deed then provides, but it is understood and agreed, "that the support and maintenance of my father is to have the preference of all other of these claims. After this is performed, the debts of these other creditors are to be paid by the sale of said land in such manner as will make the said land bring the most money. The manner of executing the deed, as to the support of my father, is left to his (said John's) option and discretion. The surplus, after the above trusts are performed, is subject to my order." At the time the deed of trust was executed John Gibson, the grantor, was indebted, was sued and judgment obtained, and a *fi. fa.* issued, and was levied on the land in dispute, and, at the sale, the defendant became the purchaser, and this action is brought by the trustee to recover the possession. His Honor, the presiding judge, ruled that the deed of trust, upon its face, was fraudulent and void as against then existing creditors of

John Gibson, and that, therefore, the plaintiff could not recover in this action. The plaintiff then submitted to a nonsuit and appealed.

We are not informed upon what provision in the deed his Honor's opinion rested. It is necessary, therefore, to examine it in all its parts. Does the first provision for the support of Joseph Gibson, the father, make it so? John Gibson (329) was indebted to his father in the sum of $500 for his maintenance; his father was, therefore, a creditor, and it was as much the intention of the deed of John, in conveying his land, to secure that debt as any other; nor does the fact of his giving that debt the preference over the other debts, and postponing them until its discharge, render the deed, in law, fraudulent. So far, the deed of trust presents the ordinary case of a debtor making an assignment of property for the payment of his debts, and classifying the claims or designating the order in which they are to be paid. This is not illegal. *Moore v. Collins,* 14 N. C., 126; *Hafner v. Erwin,* 23 N. C., 490. The debt to the father existed from 1825, and is, by the maker of the trust, placed in the first class. Does the fact that the debt to the father is prospective as well as immediate make it illegal to give it the preference? Surely not. A man may secure a future or contingent debt as well as a present one. Take this case: A man, considerably in debt, procures a note to be discounted in bank with a view to pay his creditors; in order to procure sureties, he is required to mortgage real estate to secure them; now, whether he will ever pay that debt or his sureties be called on to pay it, is contingent, and depends upon the fact of his failure to pay the necessary installments. This contingency, however, cannot make the security void in law. But, again, a man who owes debts purchases a tract of land, and gives to the vendor a lien upon it for the purchase money, either by mortgage or trust; this does not make the latter void in law. The maker of the trust or mortgagor does nothing the law condemns. This feature in the deed of trust did not make it, in law, fraudulent. *Cannon v. Peebles,* 24 N. C., 449. Our attention in the argument was drawn to the last clause but one in the deed of trust, to wit, "the *manner* of executing the (330) deed as to the support of my father is left to his (said John's) option and discretion." This reserves to John no control whatever over the fund conveyed, but only the manner in which the father shall be supported. Several persons were so bound, and the maker of the trust intended not to leave that to the arbitrary control of the trustee, but, as to the manner of the support, to reserve it, to be arranged between him and

his brothers, as that he should board with the one or the other, and *that his* contribution should be in money or specific articles. It is true that when the maker of a deed of trust to secure his creditors reserves to himself the power of revoking it, and declaring other trusts, whereby an interest or benefit may accrue to himself, the conveyance is fraudulent and void; but this is not such a case. The last clause is, "the surplus after paying all the debts is to be returned to the maker." This provision is only putting in words what equity would declare, to wit, a resulting trust for the maker after the debts are all paid. The deed of trust is not, upon its face, fraudulent; but it was a proper matter of inquiry for the jury to say whether it was the intention of the maker of it to defraud his creditors or any creditor in the collection of these debts, contrary to the provisions of the act of the General Assembly.

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

Cited: McCanless v. Flinchum, 89 N. C., 375; *Blalock v. Mfg. Co.,* 110 N. C., 107.

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(331)

WILFORD TURNER v. ANDREW BEGGARLY ET AL.

1. Where a note or bond is assigned after it is due, the assignee holds it subject to all the set-offs and payments to which it was subject in the hands of the payee.

2. Otherwise, when the note or bond is assigned before it is due, unless the payments are indorsed on the instrument.

APPEAL from the Superior Court of Law of IREDELL, at Fall Term, 1849, *Caldwell, J.,* presiding.

The defendant Beggarly gave to Isham Gaither his bond for $173.50, dated 19 February, 1847, and payable at twelve months. On 29 July, 1847, Gaither deposited the bond with the plaintiff, and they executed an agreement in writing that it was so deposited "to make the said Turner safe for the amount said Gaither is due him, and also as his surety in all cases; and whenever said Gaither shall pay said Turner and release him as the surety of said Gaither, the above bond is to be said Gaither's, and, otherwise, to be the said Turner's." On 1 October, 1847, Gaither indorsed the bond to the plaintiff, and soon after it fell due this action of debt was brought on it, and the defendant pleaded payment and the set-off of certain sums which Gaither owed to him (Beggarly). In support of those pleas the defendant offered to give in evidence the following notes

made by Gaither: One dated in 1846 and payable to Beggarly one day after date; another dated 1 September, 1847, and payable to Beggarly one day after date; one payable to one Gray, 2 September, 1846, and indorsed by Gray to Beggarly,
(332) 19 July, 1847. The counsel for the plaintiff objected to receiving them in evidence, but the court admitted them. Evidence was then given on the part of the defendant that, shortly after giving the bond which is sued on, the plaintiff applied to the defendant to take up certain debts which Gaither—then and during the year 1849, in the defendant's employment at wages of $26 a month—owed to the plaintiff, which the defendant refused, telling the plaintiff "the thing is nearly up," and also that, between 7 and 12 September, 1847, the defendant applied to the plaintiff to let him see the bond and the written agreement of 29 July, 1847, in his possession, and that the plaintiff then showed them to the defendant, asking him if he wished to pay the bond, and the defendant replied: "I am ready to pay according to my contract with Gaither, and it is about paid off to Gaither."

The court instructed the jury that, although the bond was assigned to the plaintiff before it was due, it was liable to all defenses by the obligor which he could set up against the obligee, provided the plaintiff had notice of those defenses at the time of the assignment, or such information as would put a prudent man upon inquiry; and, therefore, that in this case, if they believed that Turner had such information, they should allow as set-offs all the debts to the defendant up to 1 October, 1847. The counsel for the defendant then moved the court to instruct the jury that the defendant was not entitled to claim as a set-off any of the said debts which arose to the defendant after he had notice of the deposit of his bond with the plaintiff, upon the agreement of 29 July, 1847. But the court refused, and then told the jury that the deposit and separate written transfer made no difference, whether the defendant knew of them or not, and that, up to 1 October, 1847, the plaintiff stood in Gaither's shoes, provided he had notice of the alleged
(333) payments and set-offs. The jury thereon found payments for $152.29, and that, after deducting the same, a balance of $21.21 was due for principal money on the bond declared on, and assessed the damages for interest to $2. After judgment the plaintiff appealed.

Osborne and *Thompson* for plaintiff.
Craige and *Boyden* for defendant.

RUFFIN, C. J. Notes overdue are deemed dishonored, and one who takes them in that state is considered at this day as taking them upon the credit of his indorser, and is to stand in the place of the holders at or since its maturity. It is commonly said in such a case that the bill or note is affected in the hands of the indorsee by all the equities between the original parties. That form of expression is proper and strictly true in relation to such defenses as the maker could set up in a court of equity against the payee, for whenever the debtor, in the view of the Court of Equity, ought to be relieved from the payment of the debt, either because of some original vice in the contract or because of a counter-demand, or other sufficient reason, it is against conscience in the holder of a security of this kind to attempt to defeat the debtor of the benefit of such an equitable defense by making an assignment of it. Therefore, an assignee after maturity is, in equity, held to take the note as his assignor had it. But if the defenses of the debtor be equitable in their nature, that is, cognizable in the Court of Equity and not in a court of law, as between the original parties, the jurisdiction is not changed in respect of such defenses by the fact of the security being indorsed. It is true, the same form of expression, that an overdue note is liable after indorsement to all equities, is often used in courts of law and in books which treat of the legal rights of the assignee and debtor. But it is not, in reference to the legal rights of those parties, an accurate mode of speaking, for, as *Chief Justice Henderson* said, in *Haywood v. McNair,* 14 N. C., 231, "The (334) equities of the parties which attach to a contract of this kind can no more be examined in a court of law than any other equities. Therefore, defenses founded on mere equities must be made in equity, and the law takes notice only of such defenses as are of a legal nature. The meaning, then, of thus speaking in a court of law is that a note transferred under dishonor is subject to the legal exceptions to its payment in the hands of the assignee to which it was liable in the hands of the payee." Accordingly, in that case, the Court declined entering into mere equities between the parties, but held the defendant entitled to the same legal defenses against the note in the hands of Haywood to which it was subject in the hands of Barnes at the time of the assignment by him to Haywood. Upon the strength of *Burrough v. Moss,* 10 B. and C., 558, just then reported in this country, a second action was brought by Haywood, and the questions before decided were re-examined by the Court, and the opinions before given were again affirmed. It was held that if the debtor had a right to a deduction or set-off against

the plaintiff, at the time of the assignment, he should, although the set-off or deduction did not attach to the particular note or bond, have the same right after the assignment, and that he might have the benefit of such right upon the general issue, if sued in *assumpsit* or by special plea, if sued in debt on a bond; but that the defense thus set up must be one for the original debtor, if sued by the obligee at law, and not one which would be merely a ground for relief in equity. *Haywood v. McNair*, 19 N. C., 283. The utmost extent, then, to which, at law, this doctrine, that an assignee is affected by the liabilities of his assignor, has been carried, is that he shall be thus affected in respect of such liabilities as existed at the time of the
(335) assignment and constituted a demand which was then available as a defense at law. The proposition, thus stated, obviously excluded from its operation notes and bonds indorsed before due. There may be a few cases of bills, perhaps, which might be admitted as exceptions, as if a bill were noted for nonacceptance, and then wrongfully indorsed by one who held it for the benefit of the drawer or the like; then the instrument carries its dishonor on its face, though not due; but in respect to notes or bonds not at maturity, it is not seen how any defenses arising out of counter-demands between the original parties can be let in. They were not available at the time of the assignment. Indeed, in *Burbridge v. Manners*, 3 Camp., 192, *Lord Ellenborough*, admitting that payment at maturity extinguished a bill or note and that it could not be reissued, declared distinctly that payment meant a payment in due course, and not in anticipation, and therefore that a subsequent assignee for value before a majority could recover on the security. For, as *Mr. Justice Butler* said, in *Brown v. Davis*, 3 Term, 80, a transfer of a note before it is due carries no suspicion with it, and the assignee receives it on its intrinsic credit; and, as Mr. Chitty adds, he is not bound to inquire into circumstances existing between his assignor and any of the previous parties to the paper, as he will not be affected by them. Chitty on Bills, 14 Story Ed., 1819. It would clog in an inconvenient and dangerous manner the circulation of negotiable paper if such prepayments could affect its validity, when left in existence, with no note of the fact on it; much less can it be affected by a counter-demand of the maker or the payee—at least at law. Under what form of pleading could the defense be presented?

There was clearly no payment here. It is not a set-off of
(336) a debt against the indorsee, nor a set-off of a debt of the assignor, available at the time of the assignment, since at that time there could be no action by any one on the assigned

instrument. If there were any equities which tied up the hands of the payee from justly parting from the paper, another tribunal may give relief against the assignee on the ground of them, if they can be brought home to him: as if he had agreed to apply these demands to the debt, then being insolvent, indorsed it with notice. But in such a case, on the other hand, a court of equity would not confine its inquiry to the effect of the legal assignment by indorsement, but would have regard to an assignment as a security or by a separate agreement in any form which constitutes a contract of assignment in that court. We do not propose, however, entering into those considerations, taking notice of them only to show that they present points peculiarly belonging to the Court of Equity and which cannot be acted on at law, without danger of doing injustice to one or both of the parties. Here the plaintiff took the bond by indorsement, at a time when the defendant could make no defense against it, and it was not questioned on the trial that he gave value for it and holds it for himeslf. It is impossible for juries duly to estimate the circumstances which ought to put a person on inquiry, and thus affect him with notice of a counter-demand or other equity, and the attempt to do so would often work great injustice. It is safest, therefore, to rely upon the broad distinction founded upon the time of transfer, that is, before and after the maturity of the paper—in the latter case allowing to the debtor all the defenses he could have had against the obligee if sued at law by him; but in the former, passing the paper effectually at law, according to its tenor in its face or memorandum on it, and leaving the debtor to such relief in equity as by the rules of that court affect the conscience of the assignee.

PEARSON, J. I think there was error in both of the (337) grounds assumed as the basis of the decision in the court below.

There was error in the legal effect given to the agreement as to the mode in which the note was to be paid. That agreement did not have the effect of a payment, or any other legal defense; it was a confidence in trust, or understanding, that the debtor should be at liberty, when the note became due, to make payment in such debts or demands against the creditor as the former should pay off for the latter: it was a trust or agreement which equity would prevent the creditor from defeating, and to which it would subject a purchaser who acquired the legal title, provided his conscience could be affected by proof of notice, in the same way as one who takes the legal estate in land from a trustee is required to perform the trust, provided he had notice, on

the ground that he was *particeps criminis* in the breach of trust. But this is a principle which does not obtain at law. There the legal title prevails, and, under the statute, the plaintiff in this case became the legal owner by the indorsement.

I confess it is difficult for me to conceive how there can be a payment or any legal defense (other than such as avoids it *ab initio*) to a debt before it is due; but make the supposition, there was also error in the idea that, in a court of law, it was admissible to show that the indorsee had notice before the indorsement, and upon the ground of such notice defeat his legal title. A court of equity assumes that the title passes, and the remedy proceeds on the ground that the purchaser or indorsee should be declared a trustee by reason of his being affected with notice. This mode of giving relief never has been attempted in a court of law.

(338) If money be accepted as a payment before the note falls due, and it is indorsed as such on the note, the legal effect is to extinguish the note to that amount; its existence only continues as to the balance due, which is all that can pass by the indorsement. The effect is the same as if the first note had been canceled and a new note given; in other words, when payments are indorsed the indorsee takes the note in its "then state and condition," and acquires title only to such part as in law has an existence.

But if money be accepted as a payment before the note falls due, its legal effect is not to operate as a payment, so as to make an extinguishment to that amount. It is a mere agreement, trust or confidence that it *shall be applied* as a payment when the debt is due; it is a thing not done, but only agreed to be done, and if the note is indorsed the whole legal title passes, and the party can only have relief by commuting the purchaser into a trustee. A contrary rule would subvert the whole system of the negotiability of notes, which it has been the policy of our statutes to extend.

The doctrine in reference to notes indorsed after maturity is fully discussed and settled in *Haywood v. McNair*, 14 N. C., 231; *s. c.*, 19 N. C., 283, and in the opinion of the Chief Justice in this case, in which I fully concur.

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

Cited: Capell v. Long, 84 N. C., 19.

(339)

JOHN W. FOSTER v. NICHOLAS W. WOODFIN.

1. Where a man has conveyed a personal chattel, but still retains the possession, his acts and declarations, even subsequent to such conveyance, while he continues in possession, are evidence against the vendee or grantee on a question of fraud.

2. Where a man makes an absolute conveyance of a chattel, purporting to be either a sale or a gift, and continues for a long time in the possession of the chattel so purported to be conveyed, this creates, in law, a strong presumption, on which the jury should find the conveyance fraudulent as against creditors, unless opposing and explanatory circumstances should rebut the presumption.

3. Fraud is never exclusively a question of fact, that is, in the sense of leaving it to the uncertain judgment of jurors to give to the intent to convey upon a secret trust, or to the fact of credit being given to the grantor upon his continuing in possession, such effect as to them, in each case, may seem proper; but, on the contrary, the effect of such an intent or false credit, if in fact existing, depends upon the fixed principles of the law.

APPEAL from the Superior Court of Law of BUNCOMBE, at Special Term in February, 1850, *Caldwell, J.*, presiding.

This is trover for a slave, Lucinda, and her children, and was tried on the general issue. Both parties claimed under one Benjamin Ratcliff: the defendant as a purchaser at a sale under execution and the plaintiff under a conveyance to his wife, who was a daughter of Ratcliff. The question was whether the deed to the daughter was *bona fide,* or fraudulent against the father's creditors.

The plaintiff produced the bill of sale to his wife, dated in March, 1835, and proved its execution by the subscribing witness, who was a son of Benjamin Ratcliff. It pur- (340) ported to have been made in consideration of $400 then paid, and was proved and registered in July, 1847. The witness further deposed that no money was paid, and that no person was present at the time but the members of the family; and that the father said that he made the deed with a view to a division of his slaves among his children. Further to support the issue on his part, the plaintiff produced as a witness the said Benjamin Ratcliff, and he deposed that he executed the said bill of sale at the time it bears date, and then delivered it and the said slave, Lucinda, to his daughter, who was then married to "the plaintiff and lived about a mile from the witness; that the said Lucinda was then about six years old, and was not sold by him, but was intended as a gift to his daughter, and that she was not taken away by the daughter, but left by her to wait

upon her mother, the wife of the witness, who was then sickly; that at that time he owned a negro man and three other negro girls, two of whom were older than Lucinda, and also owned a tract of land of the value of $2,000, a wagon and team and other stock, and did not owe as much as $50, and that there was no fraud in his gift to his daughter; that in 1838 and 1839 he became involved in debt as surety for the subscribing witness to the deed and another son; that therefor the judgments were obtained under which the defendant purchased, and that in 1839 and in 1840 he conveyed all his property to his children; that he continued in possession of said Lucinda up to 1843, and that in that year the plaintiff hired her to James Ratcliff, a son of the witness, who lived with him, and they worked the plantation on which the witness resided; and that during that year the sheriff came to his house with executions on the said judgment, (341) to levy on that slave and the others, and they were kept out of the way there about a week, and then Lucinda went into the possession of the plaintiff, who also kept her out of the way of the sheriff, and held her until she was taken under the executions in 1847, and that during that period she had the two children."

On the part of the defendant the judgments and executions under which he purchased were produced, and evidence was further given by several persons that they had long resided near Ratcliff and the plaintiff, and that Ratcliff paid the taxes on the said Lucinda and claimed her as his own until the sheriff endeavored to levy on her in 1843, and that they were in the habit of conversing with him about his property, and, before that time, had never heard, from him nor from any other person, of a conveyance or transfer of Lucinda to the plaintiff's wife. The defendant then offered to prove by a witness that in 1842 a son of the said Ratcliff applied to the witness on behalf of his father to become his surety for an appeal from the County to the Superior Court upon one of the said judgments, and informed the witness that as a security to him his father said he would execute a deed of trust for his negroes; that he, the witness, declined doing so, but went with the son to the said Ratcliff's house, and there the father asked the son "whether he, the witness, had agreed to go into the arrangement," and the son replied thereto, "he had not," and that then the said Ratcliff, the father, said to the witness, "There is no danger." The testimony thus offered was objected to on the part of the plaintiff, but was admitted.

In summing up the case to the jury the presiding judge instructed them that when a person makes such a conveyance of

a negro as that made by Ratcliff in this case, and then continues in possession for eight years, using and claiming the slave as his own, there is such a repugnance between the transfer and possession as raises a presumption of a secret trust for the donor, which is fraudulent, and also that, (342) unless such possession be accounted for satisfactorily to the jury, the impression of fraud remains on the transaction; and then left it to the jury to say how far that presumption of fraud was repelled in this case. The counsel for the plaintiff then moved the court further to instruct the jury that if the testimony of the witness, Benjamin Ratcliff, was believed by them, they ought to find for the plaintiff, and the instruction was given as asked.

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

Gaither and *J. Baxter* for plaintiff.
J. G. Bynum and *Avery* for defendant.

RUFFIN, C. J. The objection to the evidence is not well founded. The acts and declarations of the father, while in possession of the slave, as to the nature of his possession and claim of title, are evidence on those points, though they occurred after his conveyance to his daughter. *Askew v. Reynolds,* 18 N. C., 367. Whether the statement of the son to the witness was competent or not depends upon the question whether the son was the father's agent to enter into the arrangement, as it was called, with the witness, or induce the witness to become the surety for the appeal upon the security of the negro Lucinda and the other negroes. Upon that point it is very clear from the father's language to his son and the witness, upon seeing them, that the son had been sent by the father to the witness upon some agency or with some proposal; and, although not constituting direct or full proof of any agency, to the extent of engaging for the conveyance of these slaves by the father, yet it is equally clear that those acts and declarations of the son and father were evidence tending to show such an authority in the son. They were, therefore, fit to be received and submitted to (343) the jury for their consideration on that point. Indeed, coupled with the other evidence, that the father claimed and used the negroes as his own for so long a period, both before and after that date, the evidence raised a strong presumption that the son had authority from the father to make the witness the proposal he did; for to what else did he allude when he spoke of "the arrangement" and said "there was no danger in it"?

Of the instructions to the jury the plaintiff, in the opinion of the Court, has no cause to complain. They are, of course, to be understood in reference to the facts of the case. They are, that a conveyance of a negro child of six years of age, supposing its date to be true, was made by a father to a daughter living within a mile of him, without any valuable consideration, though purporting to be for the large price of $400, and was followed by the continued possession of the father for eight years afterwards, and by his contracting large debts and making voluntary conveyances to his children of all his other property in three or four years after its execution, the father, during that period, using and claiming and offering to convey the negro as his own, and the conveyance to the daughter being, for the whole eight years, not only unregistered, but concealed, so as to be unknown to the nearest neighbors and most intimate friends. Certainly, under those facts the transaction is presented to our consideration in a most questionable shape, and a strong presumption of fact arises that it was not fair, but merely colorable, and therefore ought not to stand in prejudice to the debts contracted by the father on the faith of that property. That was not seriously resisted in the argument, but it was said that the presumption was purely one of fact, and therefore that it was the province of the jury, exclusively, to consider of its weight, and it was erroneous in his Honor to make any observations on it. But that is not the law, as it
(344) seems to the Court. There have been so many cases in this State involving this doctrine, and it has been so frequently and so fully discussed here, as to make it unnecessary now to look beyond our own decisions for authority on it. As was said in *Gregory v. Perkins,* 15 N. C., 50, fraud is never, exclusively, a question of fact, that is, in the sense of leaving it to the uncertain judgment of jurors to give to the intent to convey upon a secret trust, or to the fact of credit being given to a grantor upon his continuing in possession, such effect as to them in each case may seem proper, but that, on the contrary, the effect of such an intent or false credit, if in fact existing, depends upon the fixed principles of the law. It is true that, in respect to the consequences of a grantor continuing in possession of a chattel, it was observed in that case that, contrary to the rule as once laid down in England, we held that it did not, *per se,* conclusively establish covin in the conveyance, but was to be left to the jury as matter of evidence. Yet it was further observed that it was to be left to them "as a ground of presumption" that there was a secret trust or that the parties had a view to a false credit of the vendor, which would be more or less

strong under all the circumstances of the parties, the subject, length of possession, and the notoriety of the title of the vendee and of its acquisition." And it was explicitly stated that a conveyance by an owner in trust for himself, or his possession after an absolute conveyance, with a view to contract debts on the credit of the property, of which such possession is "a ground of presumption," is in law fraudulent. In the subsequent case of *Askew v. Reynolds,* already cited, the opinion of the Court is again given very distinctly to the same effect. After noticing the old rule, that the possession of a donor, after an absolute transfer of a chattel, established the fraudulent intent, so as to render any further inquiry as to its existence unavailing, the judgment of the Court proceeds to set forth how far it had been modified. It states that the doctrine had been (345) so far overruled as to allow explanations to be made to repel the inference of the unlawful intent. Still it was declared that the repugnance between the transfer and the possession was such as yet raised the presumption of a secret trust for the benefit of the grantor, which, while it admits, also requires an explanation, and which, unexplained or not satisfactorily explained, establishes the fraud. And in applying the principle to the case then under consideration the Court said that a possession for eight or nine months after making the conveyance was sufficient to impress upon the transaction the character of a fraudulent transfer, unless from other facts and circumstances another character could be clearly assigned to it. It is useless to quote other cases, as what fell from the Court in those referred to plainly shows that in such a case it is deemed a reasonable and legal presumption, upon the grounds mentioned, that the conveyance and possession by the donor were fraudulent—open, indeed, to proof, or to inferences from other circumstances to the contrary. The very ground of admitting the evidence of such possession, as relevant to the question of fraud, is that it tends to establish and raises a presumption that the conveyance was not *bona fide,* according to its purport, and that the possession was calculated to deceive those who dealt with the possessor; and it would seem impossible that it can be wrong to lay such ground before the jury, so as to enable them to perceive the more clearly the reasonable force of the presumption and the effect properly to be allowed to opposing and explanatory evidence. The instructions in the present case did nothing more than that. In truth, they stated the presumption under consideration, its force and effect and its susceptibility of being rebutted, substantially, as laid down and much in the same language used by this Court in *Askew v. Reynolds,* 18 N.

(346) C., 367. It was, however, contended at the bar that, since that case, the law had been altered by section 4 of the act of 1840, ch. 28. But that is clearly a mistake; the only provision of that section is that a gift by one indebted at the time is not absolutely void as against his creditors, by reason merely of such indebtedness, without regard to the sufficiency of the property reserved by the donor for the satisfaction of his debts; the affirmative of which had before been held to be law (whether the donor or the donee had the possession), upon the ground that the donor could not honestly give away his property to the defeating of his creditors. But that is, altogether, a different species of fraud from that here imputed, and depends upon different facts and considerations, and the law touching this case is entirely unaffected by the statute. His Honor, therefore, was fully authorized by previous adjudications to lay the principle down to the jury as he did. Indeed, he went further on behalf of the plaintiff than was strictly proper, in saying that the testimony of Ratcliff, the father, repelled the presumption of fraud, and, if believed, entitled the plaintiff to recover. It is true that the witness denied there was a trust for himself, simply by saying that a gift to his daughter was intended, and that there was no fraud in the gift. But he failed entirely to account for the secrecy of the conveyance and its concealment for eight years, for the falsehood in setting forth the consideration in the deed, and for his long subsequent possession and apparent ownership of the other property, which, he admitted, he conveyed to his other children, whereby he was able to get credit to the value of all of it, and perhaps more. Upon all those material points he deposed to nothing, saving only that he kept the negro—then six years old—to wait on his wife, who was sickly at that time. But that circumstance does not remove those grave grounds of suspicion and presumption of fraud, since he did not state that his

(347) wife continued to need or to have the girl as a nurse—a very poor one, truly—or even that she lived through those eight years or any considerable portion of them. For the probable and, in this case, the actual deception of the persons with whom he contracted debts, arising from his possession of the slave, and not only the apparent, but the claimed, property in her for such a length of time, and from the omission of the plaintiff, for that period, to assert a title under the conveyance to his wife or to let its existence be known, the witness furnishes no reason or excuse whatever, but leaves the presumption raised by such deception to operate unimpeded. It is quite certain,

therefore, that the plaintiff had all the advantage in the charge which he could claim, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Marsh v. Hampton, 50 N. C., 383; *Taylor v. Dawson,* 56 N. C., 92; *Cheatham v. Hawkins,* 76 N. C., 338, 9; *Brown v. Mitchell,* 102 N. C., 375.

THOMAS M. YOUNG v. MARTIN BOOE ET AL.

When a deed of trust for the payment of debts conveys a cotton factory, etc., and in the deed are provisions that the maker of the deed shall retain possession for eleven months, and during that time his family may be supported out of the proceeds of the factory: *Held,* that these provisions did not make the deed fraudulent in law, upon its face; but as the provisions might have been for the benefit of the creditors, as well as of the debtor, the question of fraudulent intent was one upon which the jury must decide under all the circumstances.

APPEAL from the Superior Court of Law of DAVIE, at Spring Term, 1850, *Dick, J.,* presiding.

This action is trover for a parcel of blacksmith's tools, (348) and the plea "not guilty." The plaintiff claims under a deed of trust made to him by Thomas McNeily, on 2 February, 1849, and registered the same day. The deed conveyed to the plaintiff a piece of ground near Mocksville, containing sixteen acres, known as the factory lot, on which are situated the cotton-factory building and other outbuildings, together with the steam engine, grist-mill, three wool-carding machines, and all the cotton machinery, consisting of four cotton cards, pickers, drawing frames, two speeders, one card grinder, four frames containing 504 spindles, four reels, one banding machine, one yarn press and all the battins, one turning lathe with all its tools, and a variety of other tools, all the raw cotton on hand, and all the factory wood on hand; also a lot adjoining, containing one acre; also another lot, on which there is a blacksmith's shop, with all the smith's tools, and one new wagon partly ironed; one house and lot, wherein McNeily resided, and his storehouse and lot, and all his household and kitchen furniture and library, and three horses and another wagon and gear, four head of cattle, all his corn, wheat, oats, hay and fodder, and four slaves; and the deed further assigned to the plaintiff all debts owing to McNeily by bond, note account or otherwise, and all other property whatsoever, whether real or personal, to

which the grantor was in anywise entitled: upon trust that the whole or such parts of the property as should remain undisposed of on 1 January, 1850, should, after due notice, be sold by Young at public auction to the highest bidder upon a limited credit, and that, in the meanwhile, any part of the property might be sold at private sale, should a reasonable price be offered; and that, until such public sale, McNeily should remain in possession and management of the property as the agent of the trustee, and might also make private sales thereof as aforesaid, and that he should, "as early as practica-
(349) ble," make out a complete list of all the judgments, bonds, notes and other debts of every description belonging to him, for the said Young; and that, out of the proceeds of such sales, and with the sums collected on the debts, all necessary expenses of executing the trusts should first be paid by the said Young, and then certain enumerated debts for which persons were bound as sureties; and, thirdly, certain other debts specified, and also all others which the said McNeily then owed, whether particularly mentioned therein or not—the said debts to be fully paid, if the fund should be sufficient therefor, and, if not, they should be paid *pro rata*. The deed then adds: "It is understood and agreed that the said McNeily is to support his family upon the property hereby conveyed, until this trust is closed by a sale of the property."

A short time after the execution of the deed a judgment was rendered by a justice of the peace for one of the debts mentioned in the deed, and an execution issued thereon, under which the defendant purchased the tools for which the action is brought. The question on the trial was whether the deed of trust was fraudulent as against the creditors of McNeily existing at the time. It was admitted by the defendant that the debts mentioned in the deed were just and true, and that the property and effects assigned were not sufficient for their discharge, and also that there was no evidence of any actual fraud in the object of the deed; but it was insisted on the part of the defendant that the deed was fraudulent in law, from the stipulations on its face. By the agreement of the parties, a verdict was thereupon rendered for the plaintiff, subject to the opinion of the court upon the question, as a point reserved, whether the deed was or was not thus fraudulent. The court afterwards set aside the verdict and gave judgment of nonsuit, and the plaintiff appealed.

(350) *Osborne* for plaintiff.

J. G. Bynum and *Avery* for defendant.

RUFFIN, C. J. Without the admission on the part of the defendant that there was no actual fraud intended in the execution of the deed, the Court would hold the judgment to be erroneous. It is exceedingly difficult to find fraud, as a matter of law, unless it be so plain and express in the deed as to constitute fraud in itself, without any inference of one fact from another, and thus appear so distinctly as to admit of no explanation from extraneous circumstances. Where the conveyance is in trust for the maker merely, or, upon no valuable consideration, in trust for his family, it has always been considered as constituting fraud, thus incapable of explanation. *Sturdevant v. Davis.* 31 N. C., 365. But where the provisions are, in the nature or under the circumstances of the particular case, equivocal—that is, may have been introduced for bad or good ends, taken as a whole—then the law cannot justly infer the dishonest intent in order to avoid the instrument, but ought rather to presume good faith. Hence, in such cases, the actual intent is a subject of inquiry by a jury, and not of decision by the Court. *Cannon v. Peebles,* 26 N. C., 204. It is argued, however, upon this deed that it reserves to the debtor himself the management and power of disposition of the property for nearly a year, and also that one of the trusts is for his own support and that of his family for the same period; and that the provisions establish a fraud. It may be yielded that those parts of the deed afford just grounds of suspicion, but, certainly, they are not conclusive of an intent to the prejudice of the creditors in the actual state of things, and under which the deed would appear to have been made. A man justly indebted beyond the value of his property, and, indeed, in very large sums, as stated in the deed, finds himself unable to meet his engagements and go on with his business, and makes an assignment of everything he has (351) on earth—not reserving even the lawful allowance to insolvent debtors; and the principal part of the effects conveyed consists of a steam cotton factory and stock of cotton and wood. Now, every one must know several things concerning such property in this part of the world—that its value is materially impaired by suspending its operations, and that there are but few persons among us with skill and experience for its judicious management, and, particularly, that there is no ready sale for such establishments; and a forced, public and immediate sale could, probably, be only made at a great sacrifice. Therefore, it may have been with no intent to his own benefit or to reserve to himself any wrong power, but with an eye single to the interest of his creditors in the mass, that the debtor here deferred the period at which the sale should be made publicly, at

all events for eleven months, and provided for fair sales in the meanwhile by private contract. He does not reserve that power to himself. That is not the fair construction of the deed. It is legally vested in the trustee by virtue of his estate, and the debtor was to act as "the agent of the trustee," and subject, therefore, to his approval of the contracts and receipt of the price got. It may have been rather a stipulation for services by the debtor, than the reservation of a privilege or dangerous power to him. For, as he had conducted the business of the factory, and a profit might result from working up the stock on hand, and other competent managers might not be readily procured hereabouts, it might have been important to the proper care and disposition of the trust fund that this person should attend to the factory or seek purchasers either at home or abroad, and preserve and show the property. If those were the purposes of the agency to be performed by McNeily, they were beneficial, not to him, but to his creditors, to whom alone the fund belonged. That they were, is rendered probable by the consideration that there is no allegation that the debts were in
(352) judgment or even suit; and hence it would have been almost entirely in the power of the debtor, if that had been his object, to have retained the possession and use of all the property for nearly that period by pleading to suits brought against him. As that provision might, then, have been innocent, it must be so taken, as fraud is not to be presumed. Thus regarding that part of the deed, it affords evidence rebutting, or tending to rebut, the presumption of fraud arising out of the provision in the conclusion of the deed for the support of the debtor's family out of the property. That provision, *simpliciter*, is undoubtedly fraudulent. But it is not, in this case, an isolated stipulation, by which a benefit is secured to the debtor in spite of the creditors, and without just compensation to them therefor. The support of the family is to be for the same period for which the debtor was to serve the trustee, and it may be fairly concluded that the former was in remuneration for the service. We are not informed what were McNeily's qualifications for the business, nor what would be fair wages for him, nor the amount required for their support; and if we were, the Court could not pass upon their weight, as they belong, important as these circumstances are, to the jury exclusively. It is apparent, therefore, that the questions on which the validity of the deed depends are questions of actual intent, and that the provisions of the deed, by itself, do not enable the Court to pronounce against it, but are proper for the jury in connection with such facts *dehors* as the parties may be able to adduce.

If, however, that were otherwise, the admissions in the case, of the value of the property, the justice of the debts and that there was no actual fraud intended, are conclusive for the plaintiff. *Hardy v. Skinner,* 31 N. C., 191.

PER CURIAM. Judgment reversed and judgment upon the verdict for the plaintiff according to the agreement.

Cited: Hardy v. Simpson, 35 N. C., 141; *Gilmer v. Earnhardt,* 46 N. C., 560; *Jessup v. Johnston,* 48 N. C., 339; *Cheatham v. Hawkins,* 76 N. C., 337; *s. c.,* 80 N. C., 162; *Stoneburner v. Jeffreys,* 116 N. C., 85.

(353)

ROSANNAH BRIGGS v. CHARLES BYRD.

1. In an action of slander, when the charge is made by using a cant phrase or a nickname, or when advantage is taken of a fact, known to the person spoken to, in order to convey a meaning which they understood by connecting the words (of themselves unmeaning) with such fact, the plaintiff is obliged to make an averment of the meaning of such cant phrases or nickname, or of the existence of such collateral fact, for the purpose of giving point to the words and of showing that the defendant meant to make the charge complained of; and, in such cases, there must also be an averment that the words were so understood by the persons to whom they were addressed.

2. These averments are traversable and must be proven, and differ entirely from what are called innuendoes, which need no proof.

APPEAL from the Superior Court of Law of YANCEY, at a Special Term, in July, 1850, *Battle, J.,* presiding.

N. W. Woodfin for plaintiff.
B. S. Gaither for defendant.

PEARSON, J. This was an action on the case for slander. The words charged in the declaration were that the defendant, in speaking of the plaintiff on a certain occasion, said, if they did not mind, "he would make the tray of biscuit roar before Saturday night," intending thereby to impute to the plaintiff the crime of having stolen biscuit.

On the trial a witness was called who testified that on a certain occasion the defendant and the plaintiff's father were quarreling about the running of a fence, and that, afterwards, as the plaintiff passed near where the defendant, the witness

(354) and one or two other persons were standing, the defendant said that, if they did not mind, he would make the tray of biscuit roar before Saturday night. The counsel for the plaintiff then proposed to ask the witness if he did not understand the defendant to allude to the plaintiff and to intend to impute to her the charge of stealing biscuit, a report to that effect having been circulated in the neighborhood. The defendant's counsel objected to the question, so far as it related to the identifying the plaintiff as the person intended to be charged, and to that extent the court ruled it to be improper. The counsel for the plaintiff then asked the witness whether he had not told the defendant that he understood him to allude to the plaintiff and charge her with stealing biscuit, to which he answered that he did. There was other evidence in the case, which it is unnecessary to state. The defendant had a verdict, and the plaintiff moved for a new trial because of the rejection of the testimony in relation to the understanding of the witness as to the plaintiff being the person intended to be charged by the defendant.

The motion was overruled and a judgment given, from which an appeal was taken.

When a charge is made by using a cant phrase or words having a local meaning, or a nickname, or when advantage is taken of a fact known to the person spoken to, in order to convey a meaning which they understood by connecting the words (of themselves unmeaning) with such fact, the plaintiff is obliged to make an averment of the meaning of such cant phrases or nickname, or of the existence of such collateral fact, for the purpose of giving point to the words and of showing that the defendant meant to make the charge complained of, and, in such cases, there must also be an averment that the words were so understood by the persons to whom they were addressed, for, otherwise, they are without point and harmless.

(355) These averments are traversable and must be proven, and differ entirely from what are called innuendoes, which need no proof, and in fact prove themselves, their office being merely to point out the meaning and give a greater degree of certainty than is usual in conversation or ordinary writing. *Hamilton v. Smith,* 19 N. C., 274; *Watts v. Greenlee,* 13 N. C., 115. When the words in their ordinary signification designate the person and the offense, there is no necessity for an averment, and but little use in an innuendo. But when the words do not designate the person or the offense, an innuendo will not suffice, unless it be supported by the averment of some fact. For instance, if the words are, "the queen has stolen biscuit,"

a simple innuendo, meaning the plaintiff, will not answer, and it is not necessary to support it by averment that it was known to the persons who heard the words, and that the plaintiff was called by that term, and that they understood the defendant to mean her; for if the meaning was not understood, the words could do her no harm. So, if the offense consist in words of themselves unmeaning, there must be an averment of some fact to support the innuendo and give them a meaning. The jury must not only be satisfied that the defendant's meaning was as charged, but that he was so understood by the persons who heard him, which latter part can only be established by their oath. *Woolworth v. Meadows,* 5 East, 46. It is the same as if the charge was made in the Chinese or any other foreign tongue (which the hearers are not presumed to understand), and in such case there must be an averment, not only that the defendant meant to make the charge, but that he was so understood by those who heard him.

In this case the words are, "they had better mind, or I will make the *tray of biscuit roar* before Saturday night." These words are unmeaning, and point neither to the person nor the offense. His Honor was of opinion that it was proper to ask the witness what he understood the words to mean, (356) so far as they had relation to the offense, but held that it was unnecessary so far as they had relation to the person to whom the witness understood the defendant to attribute it. To this the plaintiff excepts. We are at a loss to perceive the ground of this distinction; the words are unmeaning in both particulars; both equally require explanation. In fact, it is impossible to explain the one without at the same time giving an explanation of the other. The declaration contains an averment that there had been a report, which was known to the persons to whom the defendant spoke, that the plaintiff had stolen a tray of biscuit. The defendant and the father of the plaintiff had just quarreled, and the plaintiff was passing near the defendant and several other persons when he used the words—meaning to charge the plaintiff with stealing biscuit, and that he was so understood by the persons who heard him. The witness was allowed to say that by the words "tray of biscuit roar" he understood the defendant to mean that a tray of biscuit had been stolen and to threaten a prosecution, and he understood the defendant to allude to a report which he had heard about stealing biscuit. This was only telling half of the tale; why exclude the other? The report was that the plaintiff had stolen biscuits. If from this and the other circumstances annexed, the witness was able to understand the defendant's meaning as to

the offense, he was obliged also to understand it as to the person, and there was the same necessity and the same reason for permitting him to give his understanding in reference to one as to the other. The rules of evidence are designed to enable plaintiffs in such actions to get at the truth, and to prevent defendants from stabbing in the dark.

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

Cited: Sasser v. Rouse, 35 N. C., 144; *Sowers v. Sowers,* 87 N. C., 306.

CASES AT LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

DECEMBER TERM, 1850.

JOHN RAY v. MALCOLM RAY.

An appeal will not lie to the Superior Court from the decision of the County Court on a petition, by an alleged lunatic, to have the verdict of an inquest in his case set aside and the guardian appointed in pursuance thereof removed.

APPEAL from the Superior Court of Law of CUMBERLAND, at Fall Term, 1850, *Battle, J.*, presiding.

The plaintiff in this case filed his petition in Cumberland County Court, at March Term, 1849, alleging that, at the instance of the defendant, the said court, at March Term, 1848, passed an order directing a jury to inquire whether or not the plaintiff was a lunatic; that at June Term, 1848, (358) the jury returned a verdict finding that the plaintiff was a lunatic; whereupon the court appointed the defendant guardian to the plaintiff. The plaintiff, in his petition, alleges that he was not then nor is he now a lunatic, and prays the court to set aside the former order directing an inquest, the verdict returned thereon, and the appointment of the defendant as his guardian. The defendant answered, and the court, at June Term, 1849, ordered the following issue to be made up: "Is the petitioner, John Ray, a lunatic or not?" The jury found that John Ray was not a lunatic. "Whereupon it is adjudged by the court that the traverse of the verdict of the former jury, mentioned in complainant's petition, is sustained; and it is further adjudged, upon the finding of the jury now impaneled in

the cause, that John Ray is *compos mentis,* and that the order appointing a guardian is rescinded." From this judgment the defendant obtained an appeal to the Superior Court of Law.

In the Superior Court, on motion of the petitioner's counsel to dismiss the appeal for want of jurisdiction, the court orders that the appeal be dismissed. From this order the defendant appealed to the Supreme Court.

Banks for plaintiff.
No counsel for defendant.

PEARSON, J. There is no error in the record. The guardian of the lunatic had no right of appeal from the judgment of the County Court. The question is settled. *Willis v. Davis,* 27 N. C., 14.

PER CURIAM. Judgment affirmed.

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(359)

JONATHAN OSBORNE v. WILLIAM HORNER.

One who has only a verbal authority to sell a slave can transfer the title by a sale and actual delivery.

APPEAL from the Superior Court of Law of GRANVILLE, at Fall Term, 1850, *Manly, J.,* presiding.

This case was an action of trover, in which damages for the conversion of a slave named Esther were demanded. It appeared that the slave had belonged to the defendant, and was loaned by him to his daughter, upon her intermarriage with one Joseph M. Hicks. The said Hicks afterwards sold the slave to the plaintiff, having an oral authority only from Horner to do so, and at the same time gave him a bill of sale, receiving the consideration money, and delivering the slave pursuant to the bill of sale. The conversion was admitted. Upon this state of the facts the court was of opinion that the plaintiff had not acquired a title to the slave, and could not therefore recover, and so instructed the jury. The plaintiff's counsel asked his Honor to charge the jury that if they believed Hicks had oral authority from the defendant to sell and deliver the slave, and that the authority was unrevoked at the time of the sale, and the sale and delivery were made by virtue of the authority, the fact that the said Hicks, the witness, executed a bill of sale in his own name did not affect the plaintiff's title; which the court declined giving.

There was a verdict for the defendant. Rule for a new trial discharged, and an appeal.

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

PEARSON, J. An agent, having a verbal authority to (360) sell a slave, does sell and deliver the slave and receive the purchase money, and at the same time executes a bill of sale, under seal with warranty, in his own name, without any reference to the principal: does the title of the slave pass to the purchaser? The judge in the court below held that it did not. In this, we think, there is error.

His opinion, we presume from the argument made in this Court, was influenced by the suggestion that, as there was a bill of sale executed by the agent at the same time, the title could not pass by the sale and delivery, and as the bill of sale was not binding upon the principal, the title did not pass in either way.

The proper view of the question, as it seems to us, is this: The principal says the bill of sale is inoperative, so far as he is concerned, because the agent was not authorized to bind him by a *deed*. That is true, and therefore it has no effect whatever, except so far as it may subject the agent upon his covenant of warranty. But it has no effect in reference to these parties. So the transaction is left as a mere sale and delivery of a slave by one having a verbal authority to sell. Such a sale is valid.

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

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(361)

NEILL CURRIE v. SAMUEL SWINDALL.

1. Where an action is brought by a plaintiff to recover the amount of a reward offered by the defendant for the apprehension and delivery in jail of an individual charged with a criminal offense, it is incumbent on the plaintiff to prove that he either compelled the individual by force or induced him by persuasion to make the surrender.

2. If the surrender of such individual was wholly voluntary, although the plaintiff accompanied him to the jail and saw him lodged there, he has no right of action.

3. Where an agent is authorized to offer a reward for the apprehension of an individual, it is only necessary to prove that this was done—the mode of doing it is entirely immaterial.

CURRIE *v.* SWINDALL.

APPEAL from the Superior Court of Law of BLADEN, at a Special Term in December, 1850, *Dick, J.*, presiding.

This was an action of *assumpsit*, brought to recover the sum of $100, which, it was alleged, the defendant had offered to give any one who would apprehend and commit to prison a certain person of color, named Chavis, charged with homicide.

The plaintiff proved by a Mr. McNeil that the defendant requested him (the witness) to offer a reward of $100 in his (the defendant's) name to any person who would apprehend and commit to jail the said Chavis; that the defendant did not direct in what manner the reward should be offered, whether by written advertisement or by publication in a newspaper; that he (the witness) wrote to the editor of the *Fayetteville Observer*, and the purport of what he had written was (here the defendant's counsel objected that the witness could not speak of (362) what he had written to the editor without producing the letter or accounting for its absence, but the court permitted him to proceed) contained in the newspaper then before the court, dated 20 November, 1848. The plaintiff then introduced the jailer of the county, who proved that the plaintiff came to his house on the Saturday night before the trial of the culprit, distant from the jail about two hundred yards, and told him he wished him to go to the jail; that he accordingly went, and found there Chavis and a man by the name of Smith with him; that the said Chavis was not confined in any way, and upon the jailer's opening the door, the plaintiff told Chavis to go in, which he accordingly did.

It was in proof that Chavis was tried the week following the Saturday night of his going into custody, being the Spring Term, 1849, of Bladen Superior Court of Law. It was also in proof that the culprit, Chavis, was in the employment of the plaintiff at the time of the homicide. The defendant offered to prove that he was in the employment of the plaintiff after his trial, but this latter evidence was objected to and excluded by the court.

There was no proof that the plaintiff made any effort to arrest the culprit, nor was there any proof of his having arrested him, but that before stated.

The defendant contended, among other things, that the plaintiff had not, in fact, apprehended the culprit, but that he had intended to come in of himself, and the plaintiff, being aware of it, merely accompanied him to claim the reward; and this, it was insisted, was inferable from the facts, that it was just the Saturday night before his trial that the culprit came in; that he came untrammeled; that there was no show of force or constraint upon him; that he had been in the employment of the

plaintiff at the time of the homicide, and that no proof had been offered of any act of arrest by the plaintiff, or even of his having searched for the offender. And the defendant's (363) counsel prayed the court to instruct the jury that if they believed the culprit had come in of his own accord, and although the plaintiff may have accompanied him, yet, if it was not in consequence of any force or persuasion used by the plaintiff, the plaintiff was not entitled to recover.

The court refused to give the instruction prayed for, but told the jury that it was not necessary for the plaintiff to have brought Chavis to jail by force to enable him to recover, but if he had induced Chavis to come to jail by persuasion and promises of assistance, it would be the same as if he had used force. The only evidence how Chavis got in jail was the evidence of the jailer, and they must decide upon that whether the plaintiff had brought Chavis and put him in jail, and if they found for the plaintiff on this point, and also found that the defendant had authorized McNeil to offer the reward, as stated by McNeil, then the plaintiff was entitled to recover; and there was no evidence calling for such instructions as the defendant's counsel had asked for. A verdict being rendered for the plaintiff, and a rule for a new trial discharged, the defendant appealed.

W. Winslow for plaintiff.
Strange and *McDougald* for defendant.

PEARSON, J. There is error in the refusal to give the instruction prayed for, and in the manner in which the case was left to the jury.

The instruction concedes that the plaintiff is entitled to recover if the person accused surrendered himself in consequence of either force or persuasion used by the plaintiff; but it asserts that if the man surrendered himself of his own accord, the plaintiff is not entitled to recover. There can be no question of the truth of the proposition asserted, for if the man surrendered himself of his own accord, without any force or (364) persuasion on the part of the plaintiff, then he has not performed the services for which the reward was offered. Indeed, his Honor does not deny the proposition, but refuses "to give the instruction," and after reciting what the defendant had conceded, "that it was not necessary for the plaintiff to have brought the man to jail by force, but if he had induced him to come to jail by persuasion and promises of assistance, it would be the same as if he had used force," he proceeds to instruct the jury, "that the only evidence how the man got in jail was the testimony of the jailer, and they must decide upon that

whether the plaintiff had brought and put him in jail," and puts his refusal to instruct the jury, as prayed for, on the ground that there was no evidence to raise the question.

There is error in thus narrowing down the case, and, in effect, deciding it. The man is in jail; he was induced to come either by force or persuasion used by the plaintiff, or he came of his own accord. There is no evidence that he came of his own accord—*ergo*, he came by force or persuasion used by the plaintiff.

There is no evidence that the plaintiff had used force to apprehend the man. The testimony of the jailer, although not inconsistent with the idea that the plaintiff had, by persuasion, induced the man to surrender himself, was by no means conclusive of the fact, and did not exclude the idea that he had surrendered himself of his own accord. So the fact that the surrender was made on Saturday night before court was consistent with either view of the case. The same may be said of the other fact, that the man was in the plaintiff's employment at the time of the homicide. And it seems to us that there was nearly if not quite as much ground for instructing the jury that there was no evidence that the surrender was made in consequence of persuasion used by the plaintiff as for the instruction

(365) that there was no evidence that the man surrendered himself of his own accord. That inquiry ought to have been submitted to the jury, with instructions that the burthen of proof was on the plaintiff, and, in the absence of any proof of an act done or words used by him tending to induce the man to surrender himself, if the jury could not satisfy themselves how the fact was, they should find for the defendant.

There is no error upon the question relative to the letter of McNeil to the editor of the *Observer*. It was not necessary to prove its contents. It was sufficient to prove that the defendant had authorized McNeil to offer the reward, and that it was offered. The mode in which McNeil procured it to be done was wholly immaterial.

As to the other question, it is only necessary to say that, in a case depending on well-balanced circumstances, the fact that the man after his acquittal went to work with the plaintiff might have had some weight on one side or the other; and in a case of circumstantial evidence the facts following, as well as those which precede and those which accompany the act, are sometimes important.

PER CURIAM. There must be a *venire de novo*.

Cited: Hollingsworth v. Smith, 49 N. C., 271.

(366)

ALEXANDER D. McRAE v. DANIEL D. McRAE.

1. A died, leaving three children, of whom B, the defendant, was the guardian, and who had slaves left to them by will by C to the amount of upwards of $600. B gave to D, the plaintiff, a bond, executed 4 February, 1846, of the following purport: "I promise to pay D $360, being in consideration of money which he paid for A and his heirs, which sum I am to pay when it can be raised out of the estate left to them by the will of C." The writ was issued nearly three years after the date of the bond:

2. *Held*, that the true construction of this bond is, not that the payment should be delayed until the guardian could raise the amount out of the hire and profits of the property, but that it should be made as soon as the guardian could, by proper proceedings, raise the money by the sale of the property, and that this could have been done within less than three years.

APPEAL from the Superior Court of Law of RICHMOND, at Fall Term, 1850, *Battle, J.*, presiding.

This was an action of debt upon a bond, of which the following is a copy: "With interest from date, I promise to pay to Alexander D. McRae the sum of $360, being in consideration of money which he paid for Hugh D. McRae and his heirs, which sum I am to pay when it can be raised out of estate left to them by the will of Daniel McRae, their father. In witness whereof, etc., dated 4 February, 1846, and executed by Daniel D. McRae."

The defense relied on was that the bond showed upon its face that it was payable upon a condition precedent, which had not been performed.

The plaintiff produced in evidence the will of Daniel McRae, deceased, in which was the following clause: "I give and bequeath to my son Alexander McRae, for the sole and (367) separate use and benefit of my son Hugh McRae, in trust, the following slaves, viz., Ehloe and her child Hannah, Sam, Abram and Dinah, together with their future increase; also I give and bequeath the one-half of the tracts of land whereon I now live, containing 750 acres, for the sole and separate use of my son Hugh McRae during his natural life, and at his death to his heirs forever." He then proved that Hugh McRae, mentioned in the said clause, had died, leaving three children, to whom the defendant had been regularly appointed guardian; and that two of the slaves mentioned in the clause aforesaid were worth about $600. The writ was issued on 15 January, 1849, nearly three years after the date of the execution of the bond; and the plaintiff contended that the defendant had had

ample time to have raised the amount mentioned in the bond, by a sale of the property of his wards; that it was his duty by law so to have done, and that his neglect or delay in so doing ought not to prevent the plaintiff from recovering.

The defendant contended that the true construction of the bond was that the money was to be raised out of the rents and profits of the property of his wards; that he had no right to sell it, or any part of it, to pay the bond; and that there was no evidence that any rents or profits had been received by him, nor even that the property had been delivered over to him, except what might be inferred from his appointment as guardian; and that, consequently, the plaintiff could not deliver. And of this opinion was the court, in submission to which the plaintiff was nonsuited, and appealed to the Supreme Court.

No counsel for plaintiff.
Strange for defendant.

(368) PEARSON, J. This was debt on a bond for $360. The defense was, that payment was not to be made until the defendant, as guardian of the children of Hugh McRae, could raise the money out of the *rents and profits* of the property of his wards.

His Honor was of opinion that such was the proper construction of the bond. In this, we think, there is error. It is true that for the maintenance and education of a ward the guardian has no right to expend more than the income. But for the payment of debts for which his ward is liable, a guardian has it in his power, by proper proceedings, to sell the real as well as the personal estate.

The true construction of the bond is that the money was to be paid as soon as it could be raised by a sale of the property of the wards of the defendant. He was bound to procure a sale for that purpose within a reasonable time. Certainly, it could have been done within some time short of *three* years.

PER CURIAM. There must be a *venire de novo*.

SAMUEL P. MORTON AND WIFE ET AL. v. INGRAM ET AL.

A person named as executor is not competent as an attesting witness to a will of personalty. Nor will his subsequent renunciation and release make him so. He must be disinterested at the time of attestation.

MORTON *v.* INGRAM.

APPEAL from the Superior Court of Law of ANSON, at Fall Term, 1850, *Battle, J.*, presiding.

This was an issue *devisavit vel non* made up to try (369) whether a certain script was the last will and testament of Isham Ingram, deceased. While the issue was pending in the County Court the caveators had an entry made upon the records of the court that they admitted the script to be the last will and testament of the said Isham Ingram, as to his real estate therein devised, and contested it only as a will of personalty. Upon the trial of the will in the County Court the jury found it to be the will of the said deceased, both as to his real and personal estate, and from the judgment thereon the caveators appealed to the Superior Court. At the trial in the Superior Court Dr. Christopher Watkins, one of the subscribing witnesses to the script, was offered as a witness to prove its due execution, but he was objected to as a witness to prove the script to be a will of personalty, because he was named executor therein. The plaintiff then exhibited a release from the said Christopher Watkins of the following purport, to wit: that he had no desire or intent of acting as executor, or of taking upon himself any of the trusts mentioned in the said paper-writing and which by law might be cast upon him; that, therefore, and in consideration thereof, he released to Joseph Ingram, etc., all right, trust and interest which, by the said appointment as executor aforesaid, or by law, or otherwise, he might or could have by reason of said appointment, thereby renouncing and absolutely refusing to assume or take upon himself any of the rights or trusts of an executor under said paper-writing, purporting to be the said Isham Ingram's will. The court held that the said witness was incompetent to prove the script to be a will of personalty; and the jury, under the charge of the court, found the script to be the last will and testament of the said Isham Ingram, deceased, as to the real estate therein devised, but not his last will and testament as to his personal estate therein (370) mentioned. Judgment was given accordingly, and also against the plaintiffs for the costs, and the plaintiffs appealed.

Mendenhall and *Dargan* for plaintiffs.
Winston and *Miller* for defendants.

PEARSON, J. There is no error. The only question presented is whether the person named as executor is competent as one of the *attesting* witnesses to a will of personalty. It is settled that the witness must be disinterested at the time of the attestation, and it is decided in *Allison v. Allison,* 11 N. C., 141, cited and

approved in *Tucker v. Tucker,* 28 N. C., 161, that a right to commissions is such an interest as disqualifies a witness. An executor has a right, by law, to commissions upon the receipts and disbursements of the assets. The fact that the witness renounced and executed a release does not remove the disqualification, which existed at the time of the attestation.

No unnecessary costs were incurred in reference to the will, so far as it concerned the real estate. It was, therefore, right to require the propounders to pay the costs of the proceeding.

PER CURIAM. Judgment affirmed.

Cited: Huie v. McConnell, 47 N. C., 456; *Gunter v. Gunter,* 48 N. C., 442.

(371)

THE STATE TO THE USE OF RICHARD J. GREGORY v. WILLIAM R. HOOKS ET AL.

When in an action upon a constable's bond the breach assigned is that the constable "had failed to return to the relator the note" which he had placed in his hands for collection, it is a sufficient defense for the officer to show that he had obtained a judgment on the note; for then the note became merged in the judgment and remained in the hands of the justice.

APPEAL from the Superior Court of Law of WAYNE, at Fall Term, 1850, *Ellis, J.,* presiding.

This was an action of debt upon the official bond of the defendant Hooks, executed in February, 1845, for the faithful discharge of the duties of the said Hooks as constable for the ensuing year. The plaintiff alleged that the relator had placed in the hands of Hooks, during that year, a certain note for collection. The declaration charged three breaches of the bond in relation to this note, the two first of which it is unnecessary to State, as no question upon them was presented to the Supreme Court. The third breach assigned was that "the defendant Hooks had failed to return the note to the relator," his engagement having been to collect the note or return it. Upon the latter count it appeared that the defendant Hooks had been elected constable for one year from February, 1845, and had entered into the bond declared on; that during that year the relator had placed in his hands for collection, as constable, the note in question, which the said Hooks promised to collect or return; that within a day or two after Hooks received the note a judgment was obtained thereon and execution was sued out

against the maker. A demand by the plaintiff was admitted, and the note had never been returned nor ac- (372) counted for to the relator, nor did the defendant offer to return it upon the trial. The plaintiff contended that he was entitled to recover the full amount of his claim, as the note had never been returned.

The court charged the jury that, as to the third breach alleged, for a failure to return the note, the plaintiff was entitled to recover, but they should give him only nominal damages, as there was no evidence that the maker of the note was able to pay it at any time after it had been received by Hooks.

The jury returned a verdict for the plaintiff upon the third count only of the declarations, and gave nominal damages.

From the judgment thereon the plaintiff appealed.

J. H. Bryan for plaintiff.
Mordecai and *Washington* for defendants.

PEARSON, J. The third breach assigned is that he "had failed to return the note to the relator." Upon this (which is the only matter excepted to) the charge is, "for a failure to return the note, the plaintiff is entitled to recover nominal damages only." To this the plaintiff excepts. There is no ground for the exception, for, admitting that his Honor ought to have charged that, unless the note was returned or *accounted for,* the plaintiff was entitled to recover its value, as being converted and applied to his own purposes by the officer, the exception was untenable, because the case states that, "in a day or two after the note was put into his hands a judgment was obtained thereon and execution sued out." This accounts for the note; it merged in the judgment, was canceled, and remained in the hands of the justice.

Whether the plaintiff would have been entitled to any, (373) and what damage, if a failure to return the *judgment* had been assigned as a breach, is a different question; for a judgment is a *quasi* record, and ought properly to be retained by the justice. We are not informed what is the fact in reference to this matter; at all events, the judge did not decide this question, and the exception does not raise it.

There is no error of which the plaintiff has a right to complain.

PER CURIAM. Judgment affirmed.

Cited: Miller v. Pharr, 87 N. C., 398.

DEN ON DEMISE OF WILLIAM B. EDMUNDSON v. WILLIAM HOOKS.

What the description in a deed for land means, or whether it conveys any definite idea, are questions for the court, and ought not to be left to the jury.

APPEAL from the Superior Court of Law of WAYNE, at Fall Term, 1850, *Ellis, J.*, presiding.

This was an action of ejectment, in which the lessor of the plaintiff claimed title to the premises in dispute by purchase at a sheriff's sale, made under several judgments and executions tested from November, 1845, to June, 1846, of which regular transcripts were produced; and the plaintiff also produced a deed from Otlin Carr, sheriff of Wayne, which, it was alleged, conveyed to him the title to the premises. The sheriff's deed recited several executions against John Hooks and other persons,

(374) that in pursuance thereof he levied upon *certain pieces or parcels of land, situate, lying and being in the county of Wayne, to wit, defendant's lots at Nahunta Depot, and land adjoining Ichabod Pearson and Josiah Evans, and Daniel Hanell and others,* and that he afterwards, at public auction, sold the said premises to William B. Edmundson, and the deed then, in consideration of the premises and the purchase money paid, conveyed the said pieces or parcels of land, as above described, and their appurtenances to the said William B. Edmundson in fee. The plaintiff then proved that John Hooks, the tenant in possession, had been in possession of the premises for several years prior to the sale made by the sheriff, was in possession at the time of the sale, and has continued in possession ever since. The sheriff was introduced, and proved that he levied on the lot described in the declaration (the description in the declaration corresponded substantially with that in the sheriff's deed) under the executions above referred to, and sold that identical lot on 16 November, 1846, when the lessor of the plaintiff became the purchaser, and that he intended to convey the same by his said deed.

The defendant, William Hooks, who had been admitted to defend as landlord of John Hooks, gave in evidence a deed from John Hooks (under whom the plaintiff claimed) to Wright Woodard, one of the defendants in the above executions, dated 9 May, 1844, and also a deed from the said Woodard to him, William Hooks, dated 21 November, 1846, and contended that thereby the legal title vested in him, and therefore the plaintiff could not recover. He further proved that, although the lots

sued for adjoined A. G. Person, they did not adjoin Daniel Hanell, but that John Hooks, one of the defendants in the executions, had land which did adjoin Person, and Daniel Hanell and others, and contended that this land, and not the lots, must be held by a proper construction of the levy (375) to have been levied on. The defendant further contended that the description of the lots in the sheriff's deed to Edmundson was entirely too vague and uncertain to operate as a conveyance of land. The defendant further proved that, at the execution sale at which Edmundson bought, the sheriff declared that he only intended to sell the interest of John Hooks, and that, therefore, no interest of Woodard could pass by the sale.

The plaintiff insisted that whatever interest John Hooks had in the premises at the time of the sale made by the sheriff, if nothing more than a naked possession, was transferred to him, and that he had a right to be put in possession of it, and that William Hooks, as landlord, could not set up any title acquired by him subsequently to the sale, in opposition to the plaintiff's title and to defeat his claim.

His Honor overruled the defendant's objections, and instructed the jury that if they believed the premises in dispute were included under the levy, and the sheriff's deed to the lessor of the plaintiff, the plaintiff was entitled to recover.

The jury found a verdict in favor of the plaintiff, and from the judgment thereon the defendant appealed.

Mordecai for plaintiff.

J. H. Bryan, with whom was *Washington*, for defendant.

PEARSON, J. The sheriff held several executions against (376) John Hooks and others, one against John Hooks alone, and one against John Hooks and Woodard. The deed recites all of these executions: a levy upon "the defendant's lots at Nahunta Depot," a sale, and thereupon conveys "the lots levied on" to the lessor. The question is, Does this deed vest the title of the lots sued for in the lessor? We think the description too vague and uncertain, and therefore the deed passes nothing.

The execution against John Hooks and Woodard was not levied on the lots, and has no bearing on the case.

"The defendant's lots at Nahunta Depot" is the description; what it means, or whether it conveys any definite idea, was a question for the court, and ought not to have been left to the jury. It has no definite meaning. If we suppose it means lots belonging to all of the defendants, there is no subject to fit it. If we suppose it means lots belonging to John Hooks, one of the

defendants, still there is no subject to fit it, for, although John Hooks lived on the lots sued for, and they might have been described as "the lots on which John Hooks now lives," yet they do not answer the description supposed, for in fact they did not belong to him, as he had, some two years before, conveyed them to Woodard. The description is unmeaning, and the court should so have instructed the jury.

This defense does not at all impugn the rule that William Hooks, defending as landlord, could only make such de-
(377) fense as was open to the tenant; because he was at liberty to say to the purchaser at the sheriff's sale, "Your deed does not cover the land."

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

Cited: Carson v. Ray, 52 N. C., 611; *Robeson v. Lewis,* 64 N. C., 738; *Farmer v. Batts,* 83 N. C., 389.

JOHN SIMPSON v. NATHAN KING ET AL.

A testatrix bequeathed as follows: "My girl Maria, after my death, I do not leave her as a bond slave to any person. I wish her to live among my children, or otherwise if she sees proper. I leave J. S. to act as trustee for said girl." Also, "I will and bequeath $25 to Maria": *Held,* that under this will J. S. took the legal title to the girl Maria.

APPEAL from the Superior Court of Law of CASWELL, at Fall Term, 1850, *Manly, J.,* presiding.

This was an action of detinue for the slaves Maria, etc., tried upon the plea of *non detinet.*

In the last will and testament of Letitia Foster, who died and whose will was admitted to probate in 1837, appears the following clause, to wit: "My girl Maria, after my death, I do not leave her as a bond slave to any person. I wish her to live among my children or otherwise, if she sees proper. I leave John Simpson to act as trustee for said girl." And in another clause she says: "I will and bequeath $25 to Maria." Under this will the plaintiff claims the slaves in question.

It appeared in evidence that a short time after the death of Mrs. Foster in the same year, Nathan King, the execu-
(378) tor, and now one of the defendants, consented that the plaintiff might take the negro Maria, which he accordingly did, and she has since been under his control, up to within

a short time before the institution of this suit, when the defendant King and the other defendant, one of the next of kin of the testatrix and interested in her estate, took possession of the slave Maria, and the other slaves, who are the children of Maria, born since the death of the testatrix and since possession was given to the plaintiff; and the defendants, upon demand, have refused to surrender them to the plaintiff.

The point raised by the defendant's counsel was whether by the will and the facts of the case, any such estate was vested in the plaintiff as would enable him to maintain this suit.

The court was of the opinion that there was a manifest intent in the clause of the will in question to vest in the plaintiff a trust estate in the *person* of the woman, and this, connected with an assent by the executor, would operate to confer upon the plaintiff the legal estate, which was all that was necessary to support the action in this Court.

The jury, under the instructions of the court, found a verdict for the plaintiff, and from the judgment thereon the defendants appealed.

Kerr and *T. Ruffin, Jr.*, for plaintiff.
Morehead for defendants.

PEARSON, J. The declaration by the testatrix, that she does not leave the girl Maria as a *bond* slave to any person; the legacy to her of $25, which she could only take as a person, as distinguished from mere property, and the appointment of Simpson to act as trustee *for* her, treating her as a person, instead of appointing him a trustee *of her,* treating her as property, furnish strong ground for the position that it was not the intention of the testatrix to bequeath the legal (379) title of the girl, as property, to Simpson. As the girl was the property of the testatrix, upon her death the legal title must belong to some one, and unless it was the intention to give it to Simpson, it remains with the executor; and thus the assumed purpose of the testatrix would be defeated, because it would be impossible for Simpson to act as trustee *for* the girl, as a person, or as trustee *of* her property, if the legal title remained with the executor.

He was made trustee for the one purpose or the other, and neither can be accomplished without giving him the legal title. We do not feel at liberty to adopt a construction by which the appointment of Simpson as trustee would be rendered wholly nugatory, and the purpose of the testatrix be necessarily de-

feated—not by reason of anything *dehors,* but by reason of an intrinsic defect in the will—and we therefore conclude that the legal title is given to Simpson.

It is evident that the testatrix supposed she had a right to confer on the girl the privilege of acting as a free person, provided she appointed a trustee to act for her, by which she means some person to act as her *ostensible owner,* but in whom the confidence or trust was reposed that, although he was in law the master, yet he would not treat her as a *bond* slave, but would allow her to live among the children of the testatrix, or elsewhere, if she saw proper, as a privileged person. The trust is clearly unlawful, and the result of this suit can be a matter of but little consequence, for the residuary legatees, if there be any, if not, the next of kin, in equity may have the trust declared void, and call for the legal title.

PER CURIAM. Judgment affirmed.

Cited: Malloy v. McNair, 49 N. C., 300.

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(380)

DOE ON DEMISE OF WIGGINS' HEIRS v. LASSITER REDDICK.

In ejectment the rule is well established that when a person is admitted by the court to defend as landlord, which he has a right to claim, he stands in the place of his tenant, and can make no defense which the tenant could not have made.

APPEAL from the Superior Court of Law of GATES, at Fall Term, 1850, *Caldwell, J.,* presiding.

On the trial of this ejectment the lessors of the plaintiff deduced title to the land in dispute through a deed from one Benton to their ancestor, executed in August, 1841. This suit was commenced against Benton, and the defendants were allowed by order of court to come in and defend as landlords of Benton. They alleged that they had purchased the said land, as the property of the said Benton, at a sheriff's sale subsequent to 1841, and that the deed from the said Benton to the ancestor of the lessors of the plaintiff was made expressly to defraud one of the defendants of a large debt, which he had against the said Benton, on which there had been a judgment and execution, and under which the said land had been sold, when they became the purchasers; all of which they offered to prove. The introduction of the testimony was opposed by the counsel of the plaintiff, on the ground that Benton was estopped as against the

lessors, and the same estoppel extended to the defendants. (381)
The court received the testimony and the defendants had a verdict. From the judgment thereon the plaintiff appealed.

A. Moore and *W. N. H. Smith* for plaintiff.
Heath for defendants.

PEARSON, J. It is stated in the record, "At Fall Term, 1846," "Timothy Lassiter, Wiley Reddick and Lassiter Reddick came into court *as landlords,* enter into the common rule, and are permitted to defend." A landlord has a right to be made defendant with his tenant, when he appears, or to defend in his stead if he fails to appear, but in either case he can only make such defense as the tenant can make. He stands with or in the place of the tenant, and is entitled to his rights and is subject to his disadvantages. *Balfour v. Davis,* 20 N. C., 443; *Knight v. Smyth,* 4 Maule and Selwyn, 347.

Wise v. Wheeler, 27 N. C., 196, and *Lee v. Flannegan,* 29 N. C., 471, were cited by the defendant's counsel as being in some measure opposed to the rule above laid down. But it will be seen, upon examination, that such is not the fact. The former case expressly admits the general rule in reference to landlords, and takes a distinction because John H. Wheeler did not profess upon the record to be the landlord; and inasmuch as no stranger has a right to defend with or in the place of the person in possession, the court inferred that Wheeler, upon the default of the person in possession, had been allowed, by the *consent of the plaintiff,* to make himself defendant, and was at liberty to take an independent position. In the latter the case states that Mary Flannegan was made defendant by the consent of the plaintiff, and no objection was made to her defense. So both these cases recognize the well-settled rule in regard to landlords. There is error in allowing the defendants to rely upon a ground of defense which was not open to Benton, the person in possession, for, except as his landlords, (382) they had no right to make themselves defendants, and, after doing so, they were bound to act up to the relation which they professed, in order to get the privilege of making defense.

There is some discrepancy between the record and the case made by the judge. This states, "This suit was commenced against Benton, and the defendants were allowed, by an order of court, to come in and defend." If a contradiction occurred, we should be bound by the record, because the province of the judge is simply to state the case; the record is sent to speak for

itself. There is, however, no contradiction; the judge makes a general statement, which is reconcilable with the particular statement of the record.

It is probable the attention of his Honor was not directed to the statement in the record, that the defendants were allowed to defend *as landlords,* and because he thought the case within the decision of *Wise v. Wheeler,* and not under the general rule.

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

Cited: Whissenhunt v. Jones, 80 N. C., 349; *Maddrey v. Long,* 86 N. C., 385.

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(383)

JOHN PATTERSON v. JOHN BRITT ET AL.

1. The acts of a ministerial officer, as a constable or sheriff, in making returns on warrants and writs, although required by law to be returned into a court of record, do not make a part of the *record,* are only *prima facie* taken to be true, and may be contradicted and shown to be false, antedated, etc.

2. A sheriff cannot be made responsible for the acts of a constable who sometimes acted as his deputy, but never without a special deputation, and who has committed a trespass by levying a void attachment, unless it can be shown that he was expressly authorized by the sheriff to levy such attachment.

3. Much less can he be responsible when the constable returns the attachment levied by him *as constable,* although by an order of court the return is permitted to be amended by stating the levy to have been made by *the sheriff,* by the said constable as his deputy, the sheriff's office having then expired and the order of amendment having been appealed from.

APPEAL from the Superior Court of Law of BEAUFORT, at Fall Term, 1850, *Ellis, J.,* presiding.

This was an action of trespass *de bonis asportatis.*

The plaintiff alleged that he was in the possession and owned a stock of merchandise, on 28 June, 1847, when they were taken from him by one Exum, who professed to levy upon them in pursuance of an illegal attachment, sued out by the defendant Britt, and that he did the act as deputy of the other defendant, Edmundson, who was at the time the Sheriff of Greene County when the goods were taken.

The defendants pleaded severally the general issue and justification.

It was proved by the witnesses that the plaintiff was the owner and in possession of a stock of dry goods, groceries, and

a variety of articles of merchandise in the town of Snow (384) Hill and county of Greene, on 28 July, 1847.

It was also proved that on that day the defendant Britt sued out an attachment against the property of the plaintiff for the sum of $450. It was issued by a justice of the peace, directed to "any constable or other officer" of Greene County, and made returnable before the justice issuing it, or any other justice of the peace for Greene County.

This attachment was placed in the hands of one Exum to execute. Said Exum was at the time a constable in Greene County, and sometimes acted as deputy sheriff for the defendant Edmundson, but only when specially deputized. It was also proved that the entire stock of merchandise of the plaintiff was taken from his possession by the said Exum, who professed to levy upon the same under said attachment. It did not appear that the said Exum had any valid process against the plaintiff on 28 July, 1847, but it did appear that on the following day, the 29th, he had other regular attachments authorizing him to levy on the property of the plaintiff.

The witnesses differed as to whether the property was taken, under the defendant Britt's attachment, upon 28 or 29 July of said year. Two witnesses stated that it was on the 29th, and one stated that it was on the 28th; and the levy indorsed upon the attachment itself, which was subsequently returned to the County Court, was dated as having been made on 28 July, 1847. By a record introduced by the plaintiff it appeared that the said attachment was returned into the Court of Pleas and Quarter Sessions for Greene County at its next regular term after July, 1847, to wit, in August, 1847, when the defendant Britt applied to the court to order it to be docketed, and for (385) leave to amend by making the attachment returnable to the said Court of Pleas and Quarter Sessions at its said term, and for leave to amend the officer's return, and the direction of the attachment. The court ordered the case to be placed upon the docket, and allowed the amendments to be made, as moved for, and they were actually made, from which order of amendment the plaintiff took an appeal to the Superior Court. The return upon that attachment, as amended, as appeared from said transcript of the record of said court, recited that said attachment had been executed by levying upon the aforesaid property of the plaintiff on 28 July, 1847, and was signed "Haywood Edmundson, sheriff, by James E. Exum, deputy sheriff." It appeared from the record that the defendant Edmundson resigned his office of sheriff on Tuesday of the term,

when another person was elected, and the amendments to said attachment were allowed on Wednesday of the same term of the court, and that the first return was indorsed by Exum, as constable, upon the said attachment. Upon the question of damages the plaintiff called John S. Hardie, who testified that the stock of goods which the plaintiff had on hand when they were taken by Exum was worth between $4,000 and $5,000. Joseph Dixon, a witness, thought the goods were worth from $3,000 to $4,000 when Exum took them. The plaintiff proposed to show, for the purpose of recovering vindictive damages, that he had been forced by a body of armed men to leave his storehouse and goods at Snow Hill, on 27 July, 1847, and that he was subsequently kept away by the same means, and that these facts, and the cause of his absence, were known to these defendants and said Exum, the deputy of the defendant Edmundson, when the said attachment was sued out on the next day, and the
(386) goods taken by Exum. The defendants objected to the evidence, but it was admitted by the court.

The defendants introduced evidence of regular and valid process by attachment, placed in the hands of Exum on 29 July, 1847, against the plaintiff's property.

The defendants also called a witness to prove that when Exum took the property of the plaintiff under the attachment of the defendant Britt, he was acting as constable, and not as the deputy of the defendant Edmundson. Upon objection on the part of the plaintiff, the court expressed the opinion that it was immaterial how the fact was, as the return of the defendant Edmundson to the County Court (which is heretofore set forth), after the amendment was allowed, amounted to an acquiescence in the trespass which had been theretofore committed by the said Exum, when professing to act under the said attachment, if the act was a trespass; that it appeared from the record of the said court that the return was made by the defendant Edmundson through Exum, his deputy; and the return, thus appearing of record, was full and conclusive proof that it was the act of Edmundson, and he could not now be heard to deny it, at least so far as the fact of its being his return. And by this act of record he assented to and adopted all the previous acts of the said Exum done under the said attachment. The evidence was not heard. It was proved by the defendants that a part of the said goods came to the hands of one Vass, with the assent of the plaintiff, and another portion to the hands of one Williams, under orders of the County Court of Greene, by consent of parties, made in the case of the defendant Britt against this plaintiff relative to the said attachment returned to the said

court; and that another part came in the same way to the hands of one Moses Patterson. It was also proved by the defendants that a part of the said goods had been sold by the said Exum and the proceeds applied to the payment of regular attachments placed in his hands on 29 July, 1847. The (387) defendants also introduced evidence of the value of the several amounts of goods that came to the hands of the respective parties above named, and the amount applied by Exum to valid attachments.

The court charged the jury that the plaintiff's right to recover depended entirely upon the question whether the goods were taken on 28 or 29 July, 1847. If they were taken on the 29th, they should return a verdict for the defendants, because on that day Exum had regular and valid process in his hands authorizing him to take the property of the plaintiff, and it mattered not, though he professed to take under other and void process. But if they should be of opinion that the property was taken upon 28 July, then the plaintiff would be entitled to recover, because the attachment under which Exum professed to act was void, and did not authorize him to take the property of the plaintiff, and it did not appear on that day he had any regular and valid process; and because these defendants were both responsible for the acts of Exum, it appearing of record that they both, subsequently, acquiesced in these acts, the defendant Edmundson by the return of the attachment and the other defendant, Britt, by accepting the return and prosecuting the said suit against the plaintiff; that if they believed the plaintiff entitled to recover, the proper measure of damages would be the value of the goods at the time they were taken, deducting the value of goods that came to the hands of Vass, Williams and Moses Patterson by the consent of the plaintiff; that they might also allow such sum as they should think reasonable for the injury sustained by the plaintiff by being deprived of the use of his property since it was taken; that if they thought the circumstances of the case would justify them, they would be at liberty to give vindictive damages by way of punishment to the defendants; that they should make no deduction for any of the goods appropriated by Exum (388) to any purpose without the consent of the plaintiff, even though the same might have been appropriated to valid claims in his hands against the plaintiff.

The jury returned a verdict for the plaintiff. The defendants moved for a new trial for error in the instructions to the jury, and for the exclusion of proper evidence and the admis-

sion of illegal testimony. Rule discharged, and a judgment, from which the defendants appealed to the Supreme Court.

Rodman for plaintiff.
J. H. Bryan, J. W. Bryan and *Washington* for defendants.

PEARSON, J. The court charged, "that the defendants were both responsible for the acts of Exum, it appearing of (389) record that they both subsequently acquiesced in these acts—Edmundson by the return of the attachment and Britt by accepting the return and prosecuting the suit."

There is error in holding Edmundson responsible for the acts of Exum, and giving to the return this conclusive legal effect. How far the superior is bound by the acts of the deputy is not the question; but it is, Did Exum levy upon the goods of the plaintiff *as the deputy* of Edmundson? The original return, made by Exum, was a levy by him as constable. The County Court permitted him to amend so as to make it a return of a levy by Edmundson, as sheriff, by Exum, his deputy. To this amended return is given the conclusive effect of a record, whereby it is established that Exum made the levy as deputy, and, consequently, that Edmundson is responsible in the same manner as if he had done the act himself.

In what light the question would be viewed if Exum had been a regular and known deputy, without any other capacity, is not before us. The case states that he was a constable, who sometimes acted as deputy, but only when *specially deputized;* no express deputation is pretended, and, if he can be made a deputy at all, it must be, as an inference, from the fact of his assuming that character in making the amended return. This was done after Edmundson went out of office, and he is not shown to have had notice of it. How the assumption in a single instance, without the knowledge of the principal, can conclusively establish the character assumed, so as to make the superior liable in trespass, we are not able to conceive. His Honor, it seems, gave to the return this conclusive effect, by treating it as a record, which imparts absolute verity. He was mistaken in his premises. A record states the acts of the court itself. The acts of a ministerial officer, as a constable or sheriff, in making returns on warrants and writs, although required by law to be returned into a court of record, do not make a (390) part of *the record,* are only *prima facie* taken to be true, and may be contradicted and shown to be false, antedated, etc. *Smith v. Low,* 27 N. C., 197. If such a return is

not conclusive as to the acts, much less is it conclusive as to the character of the person who makes it in the name of a supposed superior.

The amended return, if evidence at all, was *at most* only *prima facie* evidence that Exum was the deputy, and there are many circumstances tending to rebut it: he was a constable—never acted as deputy without a special deputation; he made the levy and the original return as constable, and the order allowing the return to be amended was vacated by an appeal.

His Honor ought to have submitted the question to the jury, and it was error to hold the fact conclusively established by the record. As the case will be tried again, it is proper to notice an error on the question of damages. His Honor held that the damages could not be abated in respect of the regular attachments, levied on 29 July, and under which a part of the property was subsequently sold and the proceeds applied in discharge of the debts sued for. In this there is error. The levy created a *lien* on the property, and authorized the officer to retain an amount sufficient to satisfy the judgments, *without the consent* of the plaintiff. His Honor seems to have confounded this case where there was a lien with that of an officer who sells under one execution and claims a right to apply the excess of sales to a note or other debt upon which there was no judgment, execution and levy; here there was a levy which created a lien. We give no opinion upon the subject of vindictive damages, because the case does not raise the question. The damages were $2,800, they are not stated to be vindictive, and for anything that is stated, it may be that this sum was the balance of the value of the goods, after deducting the sums allowed for the amounts which, with the consent of the plaintiff, went into the hands of Vass, Williams and Henry Patterson. These (391) amounts are not given.

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

Cited: Simpson v. Hiatt, 35 N. C., 472; *Isler v. Murphy,* 71 N. C., 438; *Walters v. Moore,* 90 N. C., 47; *Curlee v. Smith,* 91 N. C., 179.

JOHN McPHERSON ET AL. v. ALEXANDER McPHERSON.

1. In the action of account there are two judgments: first, that the plaintiff and defendant account together; secondly, that the plaintiff or the defendant recover the balance found to be due from the one to the other.

2. In order to obtain the first judgment it is not necessary for the plaintiff to show that the defendant is indebted to him as bailiff, etc. He need only show that he is bound to account with him as bailiff, or as a tenant in common, who has been in the pernancy of the profits, and the right to this judgment can only be barred by proof on the part of the defendant that he has already accounted, or by a denial, uncontradicted on the part of the plaintiff, of the existence of any such relation between the parties as gives the plaintiff a right to call for an account.

3. Where there are several tenants in common, some of whom have been in the receipt of profits and some not, each of the latter must bring his own action of account for what he claims; they cannot bring a joint action in the names of two or more to recover their several shares.

4. So where several tenants in common receive the profits, unless it can be shown that they received them jointly as partners, an action of account cannot be brought against them jointly, but each must be sued separately.

5. If either of these cases appear upon the trial, the court will order a nonsuit.

6. Every tenant in common who has been in the enjoyment of the property is liable to account; and it is not material what was the mode of enjoyment—whether he used it merely for shelter, or as a means of supporting himself and family, or made money by selling the products, or received money as rent.

APPEAL from the Superior Court of Law of CUMBERLAND, at Spring Term, 1850, *Settle, J.*, presiding.

(392) This is an action of account brought by the plaintiffs, alleging that the defendants were tenants in common with them of a certain tract of land which had descended to them from a common ancestor, and received more than their proper share of the rents and profits, for which they had refused to account.

The proof was that Alexander McPherson died more than twenty years ago, leaving his widow and eight children, all of whom had gone off and left their parents, except the three daughters, who, with their mother, remained on the land until 1836, when the defendant Alexander purchased a place of his own and moved off, leaving his sisters still there.

It appeared that in 1841 Mrs. McPherson died; that in 18.. Mrs. Rhodes, formerly Margaret McPherson, died, leaving a

husband and several children surviving her; that in the year 1838 Hugh, one of the brothers, died intestate and without issue or ever having been married; that in the year 1839 Neill, one of the brothers, released all that interest in the land which he had acquired by descent from his father, to his two sisters, the defendants, and that by a deed without date, and it did not appear when made, he released his interest as heir at law of his deceased brother Hugh to one of the plaintiffs; that in 1831 Martin McPherson released his interest as heir at law of his father, to his sisters, the defendants, but it did not appear that he had ever released his right as heir at law of his deceased brother Hugh. It also appeared that Rhodes, the husband of Margaret, died in 1848, pending this action, and that his administrator was made a party plaintiff in his stead.

The defendants denied that they were the tenants in common of the plaintiffs, or that they were their bailiffs; and also pleaded and relied on the statute of limitations. They further objected to the plaintiffs' recovery, upon the ground that, although one tenant in common may maintain an action of account for his separate share against any one or more tenants in (393) common who jointly receive more than his or their share of the rents and profits of the common property, yet he cannot bring a joint action against several cotenants who, without any concert, each takes more than his share of the common profits. Again, the several tenants in common cannot join in a common action against several other tenants in common, without some contract whereon to have such an action. And, again, that if several tenants in common may join in an action against several others, who occupy the property, all the tenants in common, out of possession, must join in such action against those in possession, and that, in this case, Martin McPherson, who has clearly not parted with his interest as heir of his brother Hugh, and Neill, who had not been proven to have parted with his interest before the bringing of this action, were not parties. It was further objected that the mere perception of the products of the land, not turned into money by sales, by one tenant in common, would not enable his cotenant to maintain the action against him. It was further objected that Rhodes and his administrator were not the proper parties in this action. It was further objected that no demand had been made before bringing the action.

His Honor charged that if the defendants, or any of them, had received more than their share of the profits of the land, either in money or fruits of the earth or otherwise, within three years before the bringing of this action, the plaintiffs were en-

titled to their verdict; that merely living and breathing on the land would not subject the defendants to account, if they did not exclude the plaintiffs from a like enjoyment, nor would the use of no more than their proportionate share of the land in any way subject them. But if they used more than their own share of the land, and derived anything from such use, they would be liable.

(394) The plaintiffs' counsel then asked the court to charge the jury that if one of the defendants was seen bringing wood from the land to market apparently to sell, and the jury believed it was so sold, the defendants would be liable. His Honor declined so charging, but said, unless it appeared that the defendants or one of them had received more than his own share, the action would not lie.

A verdict being rendered generally for the defendants and judgment rendered thereon, the plaintiffs appealed.

Banks, with whom were *Mullins, W. Winslow* and *Kelly,* for plaintiffs.

(400) *Strange* for defendants.

PEARSON, J. The judge in the court below was of opinion that in the action of account against the defendants, who were tenants in common with the plaintiffs, and were sued as bailiffs under the statute for using more than their just share, in proportion, of the profits, it was necessary for the plaintiffs to prove to the satisfaction of the jury, not only that the defendants were tenants in common with the plaintiffs, and

(401) had been in the pernancy of the profits, but that they had received more than their just share or proportion. To this the plaintiffs excepted. We think there is error.

The action of account is peculiar, for in it there are two judgments: in the first place, there is judgment that the plaintiff and defendant account together, and, in the second place, that the plaintiff *or* defendant recover the balance found to be due.

The first judgment, like an order of reference to the clerk to take an account in equity, merely decides that the plaintiff is entitled to an account; it can only be barred by proof that the defendant had already accounted, or by denial, uncontradicted by proof on the part of the plaintiff, of the existence of any such relation between the parties as gives the plaintiff a right to call for an account.

To require, as a preliminary question before the first judgment is given, that the plaintiff should prove *to the jury* that the defendants have received more than a just share of the

profits, is totally inconsistent with the nature of the action, for three reasons: 1. It will require the plaintiff to prove to the jury the very thing that is to be decided by the auditor, and leaves nothing for him to do. 2. It will require the jury to investigate and decide matters of account, which the mode of proceeding in this action presupposes a jury is incapable of doing. 3. It will deprive the parties of the right given by the statute of an examination on oath touching the matters in question.

Every tenant in common who has been in the enjoyment of the property is liable to account, but no recovery can be had against him unless, upon taking the account, it is shown that he has received more than his just share. The mode of enjoyment is not material. It makes no difference whether he uses it merely for shelter and as a means of supporting himself and family, or makes money by selling the products, or (402) receives money as rent; in either case he is bound to come to an account with his fellows, and can only avoid it by averring and proving that he has already accounted.

The defendants' counsel earnestly contended that it was a hardship to be subjected to a judgment to account, without proof *in the first instance* that more than a just share had been received, and that no tenant is safe in taking possession if, by doing so, he subjects himself to the trouble and expense of an account. We are unable to perceive the force of the argument. If a bill is filed against an executor, or an agent, or a tenant in common, who has been in the perception of the profits it would be strange if the plaintiff was required, in the first instance, to prove that the defendant is in arrear. That is the very question to be settled by taking the account, and if the plaintiff fails to establish it before the master, he pays the costs of the suit.

We think, therefore, there is error in the part of the charge excepted to by the plaintiffs, but it is apparent from the case that they have not been prejudiced by the error. The part of the charge excepted to is a restriction or qualification of a general proposition that the plaintiffs were entitled to recover. There is manifest error in this general proposition in favor of the plaintiffs, and of course an error in the restriction or qualification of an erroneous proposition would work no prejudice. The charge ought to have been that the plaintiffs were *not* entitled to recover; this would have cut off the question raised by the exception.

The action is fatally defective, by means of a misjoinder, both of plaintiffs and defendants. The plaintiffs declare, not upon an express understanding with them jointly, but upon

the implied understanding raised by the statute. Now, the interest of tenants in common is several, and of course (403) this implied understanding with them must also be several; so their right of action is not joint, and there are too many plaintiffs, which is a fatal variance. In regard to the defendants, there is no proof that they received the profits jointly as partners. Each received portions of the profits severally, and therefore they cannot be sued jointly, for in that case each would be bound for the whole judgment, and if the defendant, who had received the greatest share, happened to be insolvent, the burthen would fall on the others. The principle is the same as that applicable to cosureties. If one of them pays the debt he cannot, at law, sue the other two jointly, for each is only liable for his aliquot part, and to allow a joint suit would be to subject one to the whole recovery, although his fellow may be insolvent. *Powell v. Mathis*, 26 N. C., 83. It was ingeniously argued for the plaintiffs that there was no plea under which advantage could be taken of the defect of parties, and he cited a passage, 1 Chitty, 14, where it is said, "a variance, in respect to parties, can only be a ground of nonsuit, under the plea of *non est factum*, in debt, on specialty and covenant, and the general issue in all other actions." It is clear, Chitty has no reference to the action of account, which he considers obsolete, and therefore does not treat of it—and in which, like covenant, there is, properly speaking, no general issue. As in the latter the variance may be taken advantage of under *non est factum*, so in the former it may be done under the plea that the defendants are not the bailiffs of the plaintiffs in the manner alleged in the declaration. Both of these pleas deny the relation between the parties as alleged, and if, upon the trial, there is a variance between the *allegata* and the *probata*, it is ground of nonsuit; if the plaintiffs will not submit to a nonsuit, the court must instruct the jury to find for the defendants.

PER CURIAM. Judgment affirmed.

Cited: Roberts v. Roberts, 55 N. C., 131.

(404)

THOMAS C. BRICKHOUSE, ADMINISTRATOR, v. JAMES BRICKHOUSE.

1. Trover will lie for promissory notes by the administrator of the payee against a donee by oral gift, though the gift be accompanied by delivery.
2. A recovery in trover for a note or bill and payment of the damages divest the property out of the plaintiff, and, indeed, vest it in the defendant, as between him and the plaintiff.
3. In actions by administrators the letters of administration, granted, as they are, by a domestic tribunal of exclusive jurisdiction, and remaining unrevoked, are *prima facie* evidence of the death of the alleged intestate and of the right of representing him.

APPEAL from the Superior Court of Law of TYRRELL, at Fall Term, 1850, *Caldwell, J.*, presiding.

The action is trover for three promissory notes, made by third persons, and payable to Joseph Brown, the intestate of the plaintiff, and amounting, together, to the sum of $175. On the trial upon the general issue the defendant set up title to the notes under a gift from Brown; and he gave evidence that, about 1 November, 1848, he (Brown) being about to sail on a voyage to the West Indies, delivered the notes to the defendant (who was his uncle), saying to him, "If I never return, these notes are to be yours." Brown proceeded on the voyage at the time mentioned, and, at the time of trial, in September, 1850, he had not returned, nor had he, or the vessel in which he sailed, ever been heard of, and it was the general belief that they were lost on the voyage.

The counsel for the defendant thereupon insisted that the evidence, if believed, established a gift of the notes to the defendant by the intestate, to take effect in the event the (405) intestate should not return; and that for that reason the plaintiff could not recover. And he further insisted that the evidence, if believed, established a bailment of the notes to the defendant, to be kept by him for the payee Brown until he should return home, and that the same had not been determined, and that, for that reason, the plaintiff could not recover. But the court refused to give these instructions, and, after a verdict and judgment for the plaintiff, the defendant appealed.

P. H. Winston, Jr., for plaintiff.
Smith for defendant.

RUFFIN, C. J. The recent case of *Fairly v. McLean, ante*, 158, is an authority in point, that the right to property in the

notes could be transferred only by indorsement and delivery, and that trover will lie for them by the administrator of the payee against a donee by oral gift, though accompanied by delivery. The doctrine is well settled. Bayley on Bills, 18; Story Prom. Notes, sec. 120. No point was made at the trial about a demand by the administrator, so as to render the detention of the notes wrongful, and it must therefore be assumed that the defendant refused to deliver them up and claimed to keep them as his legal property under the gift, conditional or absolute, which he set up, which is a conversion, and renders the defendant liable in this action, provided the notes belong to the plaintiff as administrator. It was said, indeed, at the bar, that if the notes cannot pass to the defendant but by indorsement, it is thereby established that trover will not lie for them, as it is incident to that action that a recovery therein of the value and satisfaction thereof vest the property in the thing converted in the defendant. That may be generally true, but it is by no means universally so, since trover often lies for a conversion by the destruction of a thing. It is, moreover, well settled (406) that trover will lie for a bond or note, although the former be not the subject of transfer at all; and further, that a recovery in trover for a note or bill and payment of the damages divest the property out of the plaintiff, and, indeed, vest it in the defendant as between him and the plaintiff. *Holmes v. Wilson*, 10 Ad. and E., 511.

It is said, however, that the action does not lie, because, according to the terms of the bailment, it has not been determined by the return of the bailor. But his death determines the bailment, unquestionably, so as to make the property, which was in him, vest in his administrator. What the defendant held for the intestate at the time of his death, he held, after that event, for the plaintiff as administrator. But it was argued that it did not sufficiently appear that the bailor was dead. The circumstances constituted evidence on which the jury might have found that person's death, were it necessary that the plaintiff should have directly established it. But in actions by administrators the letters of administration, granted, as they are, by a domestic tribunal of exclusive jurisdiction, and remaining unrevoked, are *prima facie* evidence of the death of the alleged intestate and the right of representing him. *Moons v. De-Bernoles*, 1 Russ., 301.

PER CURIAM. Judgment affirmed.

Cited: Overton v. Sawyer, 52 N. C., 6; *Kiff v. Weaver*, 94 N. C., 277; *University v. Bank*, 96 N. C., 286; *Smith v. Durham*, 127 N. C., 418.

(407)

COOK & TAYLOR v. JOHN A. ARTHUR.

1. The assignment of a covenant for the delivery of staves does not, at law, transfer the interest in the covenant.

2. Where in a suit by A and B, copartners, against C, he pleaded that in his garnishment on an attachment against A, one of the present plaintiffs, he had admitted that he owed A the sum for which he is now sued, and he had paid the judgment rendered against him on the garnishment: *Held*, that this plea did not avail him, for he had confessed a debt due to A alone, being different from that to A and B now sued on.

3. The effects of a firm are not subject to attachment for the separate debt of one of the partners.

APPEAL from the Superior Court of Law of BEAUFORT, at Spring Term, 1850, *Bailey, J.*, presiding.

The action was brought in May, 1848, and is covenant on an agreement under seal, dated 7 June, 1845, whereby the defendant obliged himself to deliver in Beaufort County 50,000 red-oak hogshead staves on or before 1 December, 1845, to the plaintiffs, Cook & Taylor, who were partners and merchants in New York. The defendant pleaded covenants performed, and a foreign attachment in the Superior Court of Beaufort, commenced on 14 April, 1846, by Vannostrick & Cogdell, against the estate of John Moore Taylor, one of the present plaintiffs, on the bill of exchange for $1,100, in which the defendant was summoned as a garnishee, and upon his garnishment, in April, 1846, confessed (amongst other things) that in June, 1845, he gave to said Taylor his obligation to deliver to him 50,000 red-oak hogshead staves, and stated that he had delivered 26,713 of
them, and that the remaining 23,227 had not been de- (408)
livered, but remained due to the said Taylor; and that, before the present suit was brought, judgment was rendered in the attachment against Taylor, and the value of the 23,227 staves was condemned in the hands of the defendant, and by him paid in part satisfaction of the recovery against Taylor.

On the trial the defendant gave evidence that, in a few days after the execution of the covenant, Taylor, in the name of Cook & Taylor, made an indorsement thereon in writing in these words, "Deliver the within to Messrs. Freeman & Houston"; but the witness stated further, that Freeman & Houston had no interest in the transaction, and that the order was given to them to enable them to receive the staves for Cook & Taylor, and that, under it, they did receive nearly 27,000 between December, 1845, and May, 1846, for them. The defendant also

gave in evidence the record of the attachment pleaded by him; and the garnishment and judgments therein appeared to be as pleaded. And thereupon the defendant moved the court to instruct the jury that the plaintiffs could not recover: first, because they had extinguished their right by the transfer to Freeman & Houston; and, secondly, because the proceedings in the attachment were a bar to this action. The court refused to give either instruction, and told the jury the plaintiffs were entitled to damages to the value of the staves not delivered. The plaintiffs had a verdict and judgment, and the defendant appealed.

No counsel for plaintiffs.
Donnell and *Rodman* for defendant.

RUFFIN, C. J. The judgment must be affirmed. The covenant was not negotiable, and the assignment could have
(409) no effect on the legal right to sue on it, if it had been so intended. But there was no such intention. The purpose was merely to make Freeman & Houston the agents of Cook & Taylor, so that they might accept the staves on behalf of the owners. Nor does the attachment help the defendant. The garnishment stated an indebtedness to Taylor, the sole defendant in the attachment, on an obligation to deliver staves to Taylor—being a different instrument from that to Cook & Taylor now sued on. The difference is not formal merely, but essential to the rights of the parties, as the liability of the garnishee depended on it; since the effects of a firm are not subject to attachment for the separate debt of one of the parties. *Jarvis v. Hyer,* 15 N. C., 367.

PER CURIAM. Judgment affirmed.

JAMES B. MARSH v. WILLIAM N. BROOKS.

1. Although a bill or promissory note may be made payable to A. B. or bearer, yet a bond cannot. That being a deed, it must be made to some certain obligee, to whom it may be delivered.

2. After the bond has become a perfect instrument, the obligee can, by indorsement, order the payment to be made to the bearer, for, in respect to their transfer, notes and bonds are put on the same footing. But their nature, in their inception and before indorsement, is not touched by the statute and remains as at common law.

APPEAL from the Superior Court of Law of BEAUFORT, at Fall Term, 1850, *Ellis, J.*, presiding.

The declaration is in debt on a single bond for $325.05, (410) payable to Ezekiel Midgett, or bearer, and on *non est factum* pleaded the defendant objected to the recovery by the plaintiff as the bearer, because the bond was not delivered to him, nor was it a contract with him. Of that opinion was the presiding judge, and the plaintiff submitted to a nonsuit and appealed.

Rodman for plaintiff.
Biggs and *Shaw* for defendant.

RUFFIN, C. J. The judgment must be affirmed. Although a bill or promissory note may be made payable to A. B. or bearer, or to the bearer, yet a bond cannot. That being a deed, it must be made to some certain obligee, to whom or for whom it may be delivered. In that respect it is like other deeds, which cannot be effectually made to the bearer, that is, to any person who may happen to come into possession of them. There are essential differences between notes and bonds, in many respects. The former, for instance, can be made in blank as to the sum, the payee, the time of payment, and the like, and may be filled up by any person duly authorized, though orally; while a bond must be complete from the beginning in all those respects. The plaintiff cannot sue on this bond, because he is neither named in it as the obligee nor is it transferred to him by the obligee named. If it be a bond at all, it is so as being payable to Ezekiel Midgett, and the words "or bearer" are unmeaning, and may be rejected as surplusage. That is supposed to be very clearly the law; and then no person can claim the bond but by the assignment of Midgett under the statute. The plaintiff must, then, fail for want of evidence of a delivery to Midgett, or to any one for him, and also for want of Midgett's indorsement. It was argued that the effect of the statute making bonds negotiable, and transferable by indorsement, in the same manner as promissory notes, must be to allow this form (411) of a bond, that is, payable to bearer or to A. B. or bearer. But that consequence can by no means follow. On the contrary, the instrument must be a perfect bond before it can be negotiated; for, it is only as a bond for money that it is susceptible of transfer, and then it is by indorsement. No doubt, after it has become a perfect instrument the obligee can, by his indorsement, order the payment to be made to the bearer; for, in respect to their transfer, notes and bonds are put on the same footing. But their nature, in their inception and before indorsement, is not touched by the statute, and remains as at common law. The counsel for the plaintiff relied also on the

case of *Fairly v. McLean,* 33 N. C., 158, as an authority for the validity of such bonds, and that they inure to the benefit of the bearer. But that is a mistake, for the court then gave no opinion on the question, and could give none. The action was brought for three bonds, of which two were payable to the intestate and the other to him as bearer; and in the Superior Court it was held that all three vested in the son by the gift and delivery from the intestate, and yielded the point as to the one payable to him or bearer. The question now under consideration was, therefore, not open to the court upon that occasion, and that case cannot affect the present.

PER CURIAM. Judgment affirmed.

Cited: Respass v. Latham, 44 N. C., 143; *Gregory v. Dozier,* 51 N. C., 5; *Bryan v. Enterprise,* 53 N. C., 263; *Bland v. O'Hagan,* 64 N. C., 472; *Parker v. Carson, ib.,* 564; *Weith v. Wilmington,* 68 N. C., 30; *Spence v. Tapscott,* 93 N. C., 249; *Humphreys v. Finch,* 97 N. C., 307.

(412)

THE STATE TO THE USE OF JUSTICE B. JONES v. JOSEPH D. BIGGS.

The official returns of a guardian to the County Court of the state of his account with his ward are admissible evidence in an action against the clerk of the County Court for neglect of duty in not issuing a *scire facias,* as required by law, to cause the guardian to renew his bond.

APPEAL from the Superior Court of Law of BEAUFORT, at Spring Term, 1850, *Bailey, J.,* presiding.

The action is debt on the bond given by the defendant as the clerk of the County Court of Martin, and the breach assigned is in not issuing a summons to one Redding from January Term, 1838, to renew his bond as the guardian of the relator, to which office he was appointed at January Term, 1836, and in virtue thereof received large sums of money and other effects belonging to the relator, by reason whereof, and the subsequent insolvency of the guardian, the relator sustained damages from the loss of the money and other effects. The defendant pleaded, conditions performed and *non damnificatus;* and on the trial the relator offered the returns made to the County Court by the guardian of the estate of the ward in his hands in January, 1835, and thence from time to time to 1840, as evidence of the amount of the estate, and of the amount of damage sustained by

the relator from the insolvency of the guardian and alleged omission of the defendant. But upon objection on the part of the defendant, his Honor rejected the evidence, (413) and the relator submitted to a nonsuit, and appealed.

Rodman, J. W. Bryan and *J. H. Bryan* for plaintiff.
Biggs for defendant.

RUFFIN, C. J. The Court is of opinion that the evidence was improperly excluded. The returns of the guardian stand on the same footing with an inventory by an administrator, which has been repeatedly held to be admissible to charge the administrator's sureties, at the instance of creditors or next of kin. *Armistead v. Harramond,* 11 N. C., 339. They are acts required by the law from those persons in the discharge of their official duties, as a mode of charging them upon their own oaths, contemporaneously with their getting the effects in hand or nearly so. They establish the indebtedness of the administrator or guardian, at least *prima facie,* and are much like the return of satisfaction by a sheriff, whereby his sureties are bound. *Governor v. Twitty,* 9 N. C., 5; *s. c.,* 12 N. C., 153. These returns constitute natural evidence, arising out of the ordinary course of business, to charge the guardian, and therefore they tend to show the extent of the relators' loss by the subsequent insolvency of the guardian, and, by consequence, of the damages which by possibility arose from the *laches* of the defendant. It is not like an indebtedness established by judicial sentence, which is *in invitum.* But this is the party's own act against his interest, done not only in the ordinary course of business, but in the most solemn manner in the prescribed course of official duty.

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

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(414)

JOHN A. ANDERSON v. LEMUEL R. JERNIGAN.

A reference to the clerk of the court to take and report the accounts of an executor, administrator or guardian, can only be made, under the act of 1826, Rev. St., ch. 31, sec. 119, in a suit brought upon the bond given by such executor, administrator or guardian for the faithful performance of his duty.

APPEAL from the Superior Court of Law of HERTFORD, at Fall Term, 1850, *Caldwell, J.,* presiding.

The suit was commenced by warrant in debt on a former judgment for $45.66, and on the trial the defendant suggested the want of assets to the magistrate, who indorsed the suggestion on the warrant, and gave judgment for the plaintiff for the debt demanded and interest and costs, and returned the proceedings to the County Court. The defendant appeared and pleaded no assets and *plene administravit,* and issue was taken thereon. By the consent of the parties an order was then made referring it to the clerk to take and state an account of the personal estate of the intestate in the hands of the defendant or for which he ought to be liable to the plaintiff in this suit. The clerk made his report to the next term, by which it appeared that the defendant had fully administered, and that a small balance was due from the estate to the defendant. The plaintiff took several exceptions to the report, which were overruled; and then the court confirmed the report, and the plaintiff appealed to the Superior Court. In the latter court his Honor over-
(415) ruled all the plaintiff's exceptions but one. That he allowed, and, by doing so, the balance of the account was changed so as to make the defendant debtor to the estate of his intestate in the sum of $7.60; and for that sum and the costs there was judgment against the defendant, from which he appealed.

B. F. Moore and *Barnes* for plaintiff.
Bragg and *Smith* for defendant.

RUFFIN, C. J. The reference was not to the clerk as an arbitrator. The parties did not treat the report as an award, and it is plain that it was not so intended to be. The purpose was to proceed under the act of 1826, upon the supposition that the case was within it, as was done in *Lynch v. Johnson, ante,* 224, and there held to be erroneous. Issues were joined in the record for the jury, and there has been no trial of them; consequently, the judgment, thus rendered without a verdict, must be reversed and the cause remanded for further proceedings according to law.

PER CURIAM. Judgment reversed and cause remanded.

(416)

WILLIAM ADKINSON v. SAMUEL W. SIMMONS.

Under the book-debt law, Revised Statutes, ch. 15, in order to entitle the party to recover, he must swear, not only that he "sold," but also that he actually "delivered," the articles for the price of which the suit is brought.

APPEAL from the Superior Court of Law of BERTIE, at Fall Term, 1850, *Caldwell, J.*, presiding.

This is a warrant for a sum due by account, and the claim of the plaintiff is for the price of five stacks of fodder, sold and delivered. Plea, *non assumpsit;* and on the trial in the Superior Court the plaintiff proposed to prove his demand under the book-debt act. On being sworn, he stated, amongst other things, that he purchased five stacks of fodder from a neighbor, and that the defendant knew of the purchase and knew the fodder; that a few days thereafter the defendant and he met at a place about seven miles from the fodder, and the former proposed to purchase it, and the plaintiff offered to take $2.85 per stack for the whole; that the defendant wanted time to examine the fodder, but the plaintiff told him that he must either agree then to take it or he could not have it at all, as he, the plaintiff, must sell it or move it, and he wished to have no further trouble with it; that thereupon the defendant said, "I will take it," and the plaintiff replied, "Then it is your fodder," to which the defendant said "Yes." The plaintiff further stated that he did not know that the fodder ever went into the defendant's possession, or that he ever exercised any dominion over it.

On that statement the court refused to admit the plain- (417)
tiff's book in evidence, and held that the plaintiff could not recover, and from a judgment against him he appealed.

Smith, Winston, Jr., and *Bragg* for plaintiff.
A. Moore for defendant.

RUFFIN, C. J. The book was properly excluded, and there was no evidence competent to establish the demand. Although *assumpsit* may lie for the price of goods bargained and sold, yet it must be sustained by disinterested witnesses. It is only in suits for "goods sold and delivered" that the plaintiff and his book are made competent by the statute. The act is express upon that head. It repeats more than once that the delivery is to be proved, saying that if the plaintiff will declare on oath that he hath no means "to prove the delivery of such articles" as he professes to prove by his own oath but by his books, and

also, that the articles contained in the book and by him so proved "were *bona fide* delivered," then the book and oath shall be received "as good evidence for the several articles so proved to be delivered." Rev. St., ch. 15. It is clear, therefore, that there must be a *bona fide* or actual delivery established by the party's oath before he can recover on the evidence of his oath and book; and the reason seems manifest. It is to lessen the danger of perjury by the departure from the rule of the common law whereby a party was excluded from being a witness for himself. For there would be great danger in allowing one to prove for himself special agreements for sales, unaccompanied by acts openly denoting the change of property. It is a wholesome provision, therefore, that the oath, as to the contract of sale, should be corroborated by the further oath of the party to the delivery of the thing, since, if false, the falsehood in (418) the latter point is much more open to detection than in the former, and in the same proportion the temptation to perjury and its frequency are diminished. There was not only no delivery in this case, but the defendant, not having paid or tendered the price, was not even entitled to the possession. 2 Bl. Com., 448.

PER CURIAM. Judgment affirmed.

WILLIAM D. SMITH v. JOSHUA BRYAN.

Where A brought an action to recover the amount of a bill of exchange, which he had drawn on B in favor of C, and which had been accepted by B and afterwards come into the possession of A without indorsement: *Held*, that A could not recover on a count on the bill, because it had not been indorsed to him; and that he could not recover on a money count, without showing either that the bill had been indorsed to him or in blank, or that he had been obliged to pay the money in consequence of his liability as drawer, or that they had accounted together and the acceptor been found indebted to the drawer in the amount of the bill.

APPEAL from the Superior Court of Law of NEW HANOVER, at Fall Term, 1850, *Battle, J.*, presiding.

The declaration is in *assumpsit* and contains two counts: one on the acceptance of a bill of exchange, drawn by the plaintiff on the defendant in favor of Randolph McMillan, or order, and indorsed by him to the plaintiff, and the other on an account stated. Plea, *non assumpsit;* and on the trial the plaintiff proved the acceptance and rested his case; and the counsel for the defendant then insisted that the plaintiff could not recover.

But a verdict was rendered for the amount of the bill (419) and interest, upon an agreement that judgment should be entered on it if the court should think the plaintiff entitled to recover on either count; and, if not, that the verdict should be set aside and a nonsuit entered. His Honor was afterwards of opinion that the plaintiff could not recover on the bill, but that he could on the other count. Judgment was entered accordingly, and the defendant appealed.

No counsel for plaintiff.
D. Reid, with whom was *Strange,* for defendant.

RUFFIN, C. J. As the bill was payable to the order of McMillan, the plaintiff could make a title to it only through his order. Indeed, the plaintiff declared as the indorsee of McMillan. The omission to prove the indorsement was, therefore, fatal to the count on the instrument.

The proof seems to be equally defective on the second count. The drawer of a bill in favor of another person has an action on him against the acceptor, upon its being returned for nonpayment; and, in such a case, the bill may be evidence upon the common counts. But when the drawer brings such an action on the bill, the declaration states not only the drawing of the bill, and its acceptance, and the nonpayment by the defendant, but also that the plaintiff thereby became liable, as drawer, and paid it. *Symmond v. Parminter,* 1 Wil., 185; Bayley on Bills, 392, and the cases collected in 1 Saund. Plead. Ev., 278. It is therefore indispensable on such a count to prove the payment of the bill, or, at the least, to prove the payee's name (420) in blank on the bill, as an authority to fill up a receipt to the plaintiff for its amount; for the mere possession of the bill, payable, and therefore belonging, to a third person, is not evidence that the drawer has got it up by paying it, so as to entitle him to sue on it. If a bill be payable to the drawer's own order, and he transfers it by indorsement, and afterwards becomes the holder again, he may then have an action on it, against the acceptor, because by the possession he stands, *prima facie,* on his original rights—like the payee of a promissory note, who loses it and gets it back again, for, by striking out the indorsements, the holder in each case has the apparent legal title. But it is otherwise between the drawer and acceptor of a bill payable to another, for the drawer has no original right to the instrument nor against the acceptor, but only the right arising out of his secondary liability in the event of nonpayment by the acceptor on due presentment. Hence, the necessity, as before mentioned, that the drawer should show such

failure by the acceptor, and that he, the drawer, paid the money in order to entitle him to sue on the bill. Then, if the plaintiff had declared on the bill upon his own right as the drawer, instead of indorsee of the payee, he could not have recovered for want of requisite proof. The same reasons apply equally to the count on the *insimul compulassent,* and, indeed, to all the money counts; for the possession of the instrument—belonging upon its face to another person—is no evidence that the drawer, more than any other stranger happening to get hold of the bill, was liable on it and had been duly compelled to pay it, so as thereby to found a presumption that he had lent the acceptor money, or paid it for his use, or that they had accounted together and the acceptor been found to be the drawer's debtor to the amount of the bill. There is in that case no direct liability of the acceptor to the drawer, and, consequently, no such priv-
(421) ity as can authorize the implication of the promises supposed in the common count.

The judgment must be reversed, and judgment of nonsuit be entered, according to the agreement in the record.

PER CURIAM. Judgment accordingly.

THOMAS C. WILDER v. RICHARD B. CREECY ET AL.

Where a person hired a negro to another, and one of the stipulations at the hiring was "that the negro should not go by water," and the person who hired the slave permitted others to use him, and by them he was employed on the water, in consequence of which he lost his life: *Held*, that these latter persons were not answerable in damages for the loss of the slave to the original hirer, for the stipulation was merely personal, and in no way attached to the slave.

APPEAL from the Superior Court of Law of CHOWAN, at Fall Term, 1850, *Caldwell, J.,* presiding.

The action is trover for a negro slave, Alfred, with a special count in case on the following facts, which appeared at the trial on not guilty pleaded: One Fenill hired the slave from the plaintiff for 1846, and one of the terms of the hiring was that the negro "should not go by water." Fenill placed this and other slaves for the year under the charge of one Carter, his brother-in-law, at a place situated on Albemarle Sound, and in the month of December of that year the defendants Creecy and Pool hired Alfred and some other slaves from Carter to assist in getting out and delivering some corn (which they had at

Carter's, and had sold) on board a vessel lying at anchor about three or four hundred yards from the shore. (422) Those defendants put the hands under the other defendant, Gregory, and he, by the consent of Carter, sent Alfred on board the vessel to assist in stowing away the corn in the hold, and he worked there one day and went on shore at night. The next day he returned to the same employment, and worked at it until evening, when the captain of the vessel, then being on shore, stated to Carter that he thought there was about to be a storm, and said that he would go aboard and send Alfred ashore, but Carter told him he need not send the boy ashore, as he might be of service in case a storm should come on. The captain went aboard and did not send Alfred ashore, and a storm came on that night, and during its continuance the slave died from fright or cold, or their combined effects. On the part of the plaintiff objection was made to the admission of the conversation between the captain and Carter, but the court received it. The plaintiff gave evidence that the hiring by Fenill was as the highest bidder at a public hiring, and that the defendant Pool was at the place of hiring when the terms were made known, and hired another negro at that hiring.

The counsel for the plaintiff moved the court to instruct the jury that if they believed the defendants knew of the terms upon which Fenill hired the boy Alfred, it was a wrongful act in them to send him aboard the vessel, for which the plaintiff was entitled to recover. But the court refused to give the instructions prayed for, and directed the jury that, upon the facts as stated, the plaintiff was not entitled to recover. The plaintiff then submitted to a nonsuit and appealed.

Heath for plaintiff.
A. Moore for defendant.

RUFFIN, C. J. The opinion of the Court concurs with (423) that given by his Honor. By the hiring the property vested for the term in the hirer, and the plaintiff had the reversion only. The stipulation that the slave was not to go by water was not a limitation to the estate of the hirer, whereby it would be determined and the property be revested in the plaintiff, nor even a condition which would have authorized him to determine the hiring and resume the possession, but merely an engagement of the hirer not to expose the slave to the hazards of employments on the water. As the plaintiff had but the reversion at the time of the slave's death, that by itself defeats the count for trover. For much the same reasons the

other count must also fail. As a stipulation it was personal merely, and did not attach to the slave, in the nature of a covenant running with land. The knowledge or ignorance of its existence could not make it more or less binding upon one not a party to it, as the assignee of the property can in no degree be affected by it. It would expose third persons to great damage and, indeed, prevent much of the traffic of life, if they were charged with the consequences of collateral engagements of this kind, between persons who let or take on hire; and therefore their obligation is wisely restricted to the parties themselves. The evidence objected to was competent to show that the negro was on board the vessel by the direction or account of Carter, the person in possession.

PER CURIAM. Judgment affirmed.

(424)

DEN ON DEMISE OF JAMES W. MURRELL v. JAMES E. ROBERTS.

1. A reversion in fee, after a term for years, is the subject of execution; the sheriff's deed is as effectual to pass it as that of the reversioner; and the tenant who claims under such deed is not estopped from setting it up as a bar to an action of ejectment by the reversioner.

2. Payments to the sheriff discharges an execution; and a subsequent sale of property under such execution is void, and conveys no title to the purchaser.

APPEAL from the Superior Court of Law of BRUNSWICK, at Fall Term, 1850, *Battle, J.*, presiding.

The lessor of the plaintiff was seized of the premises in fee on 1 January, 1843, and then leased them to one John Smith for the term of six years. The plaintiff gave evidence that Smith entered and executed a deed in fee in 1846 to one Dudley, under whom the defendant was in possession at the commencement of this suit in April, 1849.

On the part of the defendant evidence was then offered that one Sullivan obtained a judgment in debt against the lessor of the plaintiff and another person, on which a *fieri facias* was issued, by virtue of which the premises were sold in 1846 by the sheriff, and conveyed in fee to the said Smith, and that he afterwards conveyed to Dudley. This evidence was objected to on the part of the plaintiff, upon the ground that Smith was estopped to deny the lessor's title or withhold the possession from him at the expiration of the term, and that the defendant, who claimed under Smith, was likewise so estopped. But

the court received the evidence, and thereon instructed (425) the jury that Smith had a right to purchase the premises at the sale by the sheriff, and that the title thereby derived might be set up against the plaintiff as a bar in this action.

On the part of the plaintiff further evidence was then offered, that while the sheriff had the *fieri facias* in his hands and before the sale of the premises, the whole sum due thereon was paid to the sheriff by one of the defendants therein, in satisfaction thereof. But, upon objection on the part of the defendant, the court refused to receive the evidence, upon the ground that it was not competent thus to impeach the title of the purchaser at the sheriff's sale.

After a verdict and judgment against the plaintiff, he appealed.

Strange for plaintiff.

No counsel for defendant.

RUFFIN, C. J. There is no error on the first point. The defendant did not attempt to set up a title in derogation of that of the lessor of the plaintiff at the time of his lease to Smith. On the contrary, he acted in affirmance of that title by showing the subsequent acquisition of it by Smith, so that both the term and the reversion became united in him. If the lessor of the plaintiff had, by his deed, assigned the reversion to Smith, the title thus derived might be set up as a bar to this action. It must be the same under the sale by the sheriff; for a reversion in fee, after a term for years, is the subject of execution, and the sheriff's deed is as effectual to pass it as that of the reversioner. On the other point, however, the Court holds that there is error. Payment to the sheriff discharges the execution. If the sheriff have a *ca. sa.* and, after payment by the debtor, within his knowledge, he (the sheriff) arrest him, (426) it is undoubtedly false imprisonment. It must also be illegal to act on a *fi. fa.* after satisfaction to the sheriff, and he is a trespasser if he seize goods afterwards. *Lefans v. Moonis-cun*, 1 Hob., 685. As was said in the case cited at the bar, the execution became thereby *functus officio*. *Hammett v. Wyman*, 9 Mass., 138. It follows that a subsequent sale under it is void, and it was so held in that action, which was trespass by the purchaser at that sale for a second taking of the goods, upon another execution against the same defendant. If it were not so, the sheriff might, upon another execution for a trifling sum, ruin any person, since he might raise the money over and over again by sale after sale. For there is no difference between

satisfaction by a payment by the debtor in money and one by the sale of his property. After satisfaction to the sheriff in either way, he cannot lawfully seize and sell property, more than he could without having had an execution at all.

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

Cited: Smith v. Fore, 46 N. C., 490; *Brooks v. Gibbs,* 47 N. C., 327; *Halcombe v. Loudermilk,* 48 N. C., 492; *Taylor v. Newkirk,* 51 N. C., 325; *S. v. Queen,* 66 N. C., 617; *Wall v. Fairly,* 77 N. C., 107; *Motz v. Stowe,* 83 N. C., 438; *Heptinstall v. Medlin, ib.,* 18.

(427)

NATHANIEL TAYLOR v. JONAS AND WILLIAM SPIVEY.

Where to an action on a justice's judgment the defendant pleads "the statute of limitations," the plaintiff cannot reply a new promise within the seven years. The replication of a new promise is confined to actions "on promises."

APPEAL from the Superior Court of Law of GATES, at Fall Term, 1850, *Caldwell, J.,* presiding.

Jordan for plaintiff.
A. Moore for defendants.

PEARSON, J. This was a warrant on a former judgment of a single justice. The defendants relied on the statute of limitations. The plaintiffs in the replication alleged a new promise within the seven years. His Honor correctly decided that the statute could not thus be met. The replication of a new promise is confined to actions "on promises." This is settled in this State and England.

The other instructions were uncalled for; at all events, the plaintiff has no right to complain of them.

PER CURIAM. Judgment affirmed.

Cited: Hewlett v. Schenck, 82 N. C., 235.

(428)

JOHN NIXON v. WILLIAM P. LONG.

Where one has a cause of action against another, accruing *after a demand* made, the suing out of a writ for that cause of action, though the writ was in *assumpsit*, when it should have been in covenant, is a demand in the strongest form.

APPEAL from the Superior Court of Law of PERQUIMANS, at Fall Term, 1850, *Caldwell, J.*, presiding.

This is an action of covenant upon a guaranty under seal dated 12 September, 1845, of a note executed by one Halsey for $250, payable to the defendant. The note was executed in July, 1845, and fell due 1 January, 1846. On 13 April, 1844, Halsey executed a deed in trust to Badham, conveying the greater part of his property to secure debts due to sundry persons, amounting to $5,000 or thereabouts; and on 11 April, 1846, the said Halsey executed another deed in trust to one Norcom and one Benbury, embracing all the balance of his property of every description and the interest thereon, including fourteen negroes, not conveyed in the deed of 1844, to secure debts due to sundry persons, amounting to a much larger sum than those secured in the deed of 1844. It was proved on the trial that Halsey was reputed to be entirely insolvent from and after the execution of the deed of 1846, and that on the sale of all his property in December, 1848, by the said trustees, it fell short of paying the debts secured in the sum of $6,000.

It also appeared that in March, 1849, the plaintiff made (429) a demand on Halsey to pay the said note; that in May, 1849, the plaintiff, by his counsel, sued out a writ in *assumpsit* on the said covenant, returnable to May term of Perquimans County Court (the second Monday of May) and returned "Executed"; that his counsel moved the court to change the said writ from case to covenant, which motion was refused, and the plaintiff submitted to a nonsuit. Whereupon the present suit was brought, returnable to August Term, 1849, of Perquimans County Court.

The defendant offered to prove by parol that it was a condition of the said guaranty that suit should be brought by the plaintiff on the note in question. The evidence was rejected by the court.

The court charged that the plaintiff was bound to use the same degree of diligence in collecting the note from Halsey that a prudent man would use in collecting a debt of his own; that if he had failed to do so, then the defendant was entitled to their verdict. The court further charged that the suing out

of the writ in May, 1849, though not in proper form, was such a demand on the defendant as would satisfy the law. To this latter part of the charge the defendant excepted. After the jury had been out some time, they returned into court and asked if the said note was not secured in the deed of trust of April, 1846; to which the court answered that the deed embraced a debt of $250, the balance due on two notes, and there was no other evidence that it embraced the note of $250, now the subject of litigation. To this answer of the court to the interrogatory of the jury the defendant excepts. The defendant also excepts to the opinion of the court in rejecting the parol evidence.

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

(430) *A. Moore* for plaintiff.
Heath and *Jordan* for defendant.

PEARSON, J. The defendant offered to prove by parol that it was a condition of the covenant that Nixon was to bring suit on the note. The court rejected the evidence, and to this the defendant excepts. There is no error. We can see no reason for making an exception, in this case, to the rule, that a written instrument cannot be added to, varied, or explained by parol proof.

The court charged that suing out the writ in May, 1849, although it was not in proper form (being in *assumpsit*), was a sufficient demand. To this the defendant excepts. There is no error. The writ, issued in May, 1849, was for the *same cause of action,* and amounted to full notice and was in fact a demand in the strongest form. *Linn v. McClelland,* 20 N. C., 596.

We can see no force in the exception to the answer made by the court to the interrogatory of the jury; it was simply a recital of the evidence on that point. These are the only points presented by the case.

PER CURIAM. Judgment affirmed.

(431)

DEN ON DEMISE OF MARTHA DUCKET ET AL. v. CHARLES W. SKINNER, JR.

The County Court, on the petition of the guardian of a certain infant, passed the following order: "Ordered, that he, the said W. B., guardian, sell the land of said deceased T. H., or so much thereof as will be sufficient to discharge the debts": *Held*, that this order was unauthorized and void, and, of course, that a purchaser under it acquired no title.

APPEAL from the Superior Court of Law of PERQUIMANS, at Fall Term, 1850, *Caldwell, J.*, presiding.

In this action of ejectment, the following facts appeared: Thomas H. Harvey died in 1808, seized of the premises in fee, and left an only child, Mary Eliza, who married under the age of twenty-one years, and died under coverture, leaving two children, who are the lessors of the plaintiff and were infants when this suit was brought. In May, 1809, William Blount was duly appointed the guardian of Mary Eliza Harvey by the County Court of Perquimans, and at the same time the court passed an order in the words following: "Ordered, that he, the said William Blount, guardian, sell the land of said deceased Thomas Harvey, or so much thereof as will be sufficient to discharge the debts." In pursuance of that order the premises described in the declaration were sold by the said Blount, at public sale, to a person under whom the defendant came in, and was in possession at the commencement of this action.

On the foregoing statement, as a case agreed, the cause (432) was submitted in the Superior Court, upon an agreement that, if the court should be of opinion the plaintiff was entitled thereon to recover, judgment should be entered for him for the term and sixpence damages and costs; and, if otherwise, that there should be judgment for the defendant. Judgment was given for the plaintiff, and the defendant appealed.

No counsel for plaintiff.
A. Moore for defendant.

RUFFIN, C. J. The case is very defectively stated: omitting, for example, to set forth that the purchaser did or did not take a conveyance. But it is not material to advert to those considerations, since, supposing the best for the defendant on everything not stated, it appears affirmatively that his title is essentially defective, by reason that the order for the sale was un-

authorized and void. *Leary v. Fletcher,* 23 N. C., 259, is a direct authority to that point, and renders further discussion of the principle unnecessary.

PER CURIAM. Judgment affirmed.

Cited: Spruill v. Davenport, 48 N. C., 44.

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(433)

FRANKLIN F. FAGAN v. THOMAS S. ARMISTEAD.

1. Where several cases have been decided upon the same question, after argument, the Court will not reconsider the grounds of those decisions, especially upon a case presented without argument.

2. That "all waters which are actually navigable for sea vessels are to be considered navigable waters, without regard to the ebb and flow of the tide, and that no one is entitled to the exclusive right of fishing in any navigable water, unless such right be derived from an express grant by the sovereign power, or, perhaps, by such a length and kind of possession as will cause a presumption of such grant to arise," must now be deemed the settled law of this State.

3. A common informer cannot recover a penalty unless he sue within the period allowed by the act imposing the penalty. As where a penalty is imposed on persons fishing in the Roanoke River at certain times, and any person may sue for the same, provided he does so within one month from the forfeiture, and if no such suit is brought within that period, the law officer of the State is directed to sue for the use of the State (act of 1827, ch. 54): it was *held,* that after the expiration of the month the right of the common informer was gone.

APPEAL from the Superior Court of Law of WASHINGTON, at Fall Term, 1849, *Bailey, J.,* presiding.

This is debt for $250, claimed as a penalty for fishing in Roanoke River with a seine, contrary to the act of 1827, ch. 54, entitled "An act to prevent the obstruction of fish passing up the Roanoke and Cashie rivers and their waters." Pleas, *nil debet* and statute of limitations. By the act every person owning and using a seine for the purpose of catching fish in either of the rivers is required to take it out of the water and let it remain out from 12 o'clock on Saturday until 12 o'clock on Monday of each week, from 1 March to 25 May in every
(434) year; and it is enacted that any person who shall violate that provision shall forfeit for each offense the sum of $250, to be recovered by any person who shall first sue for the

same—one-half for the use of the informer and the other half for the use of the poor of the county; with a proviso that if no person shall sue for the penalty within one month from its forfeiture, then that the solicitor for the State shall sue for the same in the name of the Governor, for the use of the State.

The writ was sued out on 24 May, 1849, and on the trial the parties made up the following case agreed: The defendant was seized in fee simple in possession of a tract of land lying on Roanoke River, and consisting entirely of marsh or swamp land, destitute of timber and valuable only for its fishing privilege and used for no other purpose, to which he derived title under a patent which issued before 1827. Roanoke River in front of said land is a fresh-water stream, about 300 yards wide, from 10 to 12 feet deep, and affords, with the sounds, unobstructed navigation for sea vessels to the ocean; but it has not there, nor for many miles down the river, any ebb or flood of the tide. On 16 April, 1849, between the hour of 12 o'clock on Saturday and 12 o'clock on Monday next following, the defendant, being the owner of a seine, put it into the water of Roanoke River in front of his said land, and hauled it ashore on his land aforesaid, enclosing, landing, and catching therewith a quantity of shad and herrings. On this case the opinion of the presiding judge was in favor of the plaintiff, and judgment was entered for him, and the defendant appealed.

No counsel for plaintiff.
Heath for defendant.

RUFFIN, C. J. The case has not been argued, but it (435) seems probable that it was framed with a view to obtaining the opinion of the Court upon the questions, whether the land of the defendant is bounded by the Roanoke at the water's edge or by a line along the thread of the stream, and, if the former, whether the Legislature can restrict him in the use of it, as enacted in the statute. The latter point is immaterial to the defendant, if the former be against him, and that it is against him the cases of *Wilson v. Forbes,* 13 N. C., 30, and *Collins v. Benbury,* 25 N. C., 277; *s. c.,* 27 N. C., 118, are direct authorities. Although we might have been willing to hear another argument on the point, and to have reconsidered it, if the argument should raise a doubt on it, yet it is too much to expect the Court, without argument, to go over the whole subject of themselves, and reverse a series of adjudications made upon solemn arguments. We think it our duty to adhere to those

decisions under the circumstances, simply upon their authority, and therefore the judgment would be affirmed if it were not for another objection, which appears on the record and is deemed fatal to the action. It is, that the suit was not brought in due time, and therefore cannot be maintained. A common informer cannot recover a penalty unless he sue within the period allowed him by the act, as it forms a part of his title. The general rule is that a penalty imposed by statute belongs to the sovereign, unless the right to sue be given to some one else. Here, the enacting clause gives it to the person first suing for it, subject only to the limitation in point of time by the general act of 1808. But the proviso makes it the first duty to the public law officers to sue for the use of the State, if no private person shall have sued within one month from the forfeiture. As the right is thus reserved to the State after that period, it is an unavoidable implication that individuals are excluded from it after the same period. This suit was not brought until 24 May, (436) although the forfeiture was on 16 April; and for that reason the judgment must be reversed, and judgment entered for the defendant, according to the case agreed.

PER CURIAM. Judgment reversed and judgment for the defendant.

Cited: S. v. Dibble, 49 N. C., 110; *S. v. Glenn*, 52 N. C., 325; *S. v. Eason*, 114 N. C., 790; *S. v. Baum*, 128 N. C., 605.

THE STATE TO THE USE OF FERRAND'S EXECUTORS v. SHEPARD W. BURCHAM ET AL.

When a constable is appointed by the County Court at May term, his appointment expires at the next February term, which is the regular time prescribed by law for the qualification or appointment of constables.

APPEAL from the Superior Court of Law of CARTERET, at Spring Term, 1849, *Battle, J.*, presiding.

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

PEARSON, J. This was an action of debt upon a constable's bond.

The defendant Burcham was appointed constable at May Term, 1843 (no appointment of constable for his district having been made at February term). The claim for which this action is brought was put into his hands in March, 1844.
It was insisted that Burcham's term of office expired at (437) February court, 1844, and it was so decided, and the plaintiff appealed. We concur in the opinion. February term is the time fixed on, by law, for the appointment of constables, and if one is appointed at a subsequent term, his term of office expires at the next February term.

This is the construction given to the statute in *S. v. Wilroy,* 32 N. C., 330. There is no error in the judgment below.

PER CURIAM. Judgment affirmed.

Cited: S. v. Lane, 35 N. C., 256; *Hoell v. Cobb,* 49 N. C., 260.

WILLIAM C. LOFTIN v. GEORGE W. KORNEGAY ET AL.

Where three are sued in debt, and one of the defendants, not contesting the plaintiff's right to recover, pleads that he is a cosurety of one of the other defendants, and a verdict is found against him, it is very doubtful whether he can appeal at all; but certainly he cannot appeal alone.

APPEAL from the Superior Court of Law of LENOIR, at Fall Term, 1850, *Ellis, J.*, presiding.

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

PEARSON, J. This was debt on a note executed by Kornegay, Davis and Jarman. The defendants did not resist the plaintiff's recovery, but Jarman "pleaded" that he was the surety of Kornegay and Davis. Davis "pleaded" that he and Jarman were sureties of Kornegay.

The jury returned a verdict for the plaintiff, and (438) found that Jarman was a cosurety with Davis. From the judgment rendered on this finding, Jarman was allowed to appeal, the other defendants not objecting.

This proceeding is under secs. 131, 132, ch. 31 of the Revised Statutes. The "pleas," as they are called, do not contest the plaintiff's right to recover, but merely raise a family dispute between the defendants, in which the plaintiff has no con-

cern. It is very questionable whether the right of appeal is given in such cases, as an appeal must necessarily delay the plaintiff's admitted right of recovery. But in this case the appeal is only taken by the defendant Jarman, and it is settled that one of two defendants cannot appeal. In such cases it is hardly to be expected that the other defendant will join in the appeal, as he has no reason to complain of the result.

PER CURIAM. Appeal dismissed.

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(439)

WILLIAM W. GRIFFIN v. DANIEL RICHARDSON.

1. A. by a *bona fide* deed proved and registered in May, 1843, conveyed a slave to B, in trust to secure the payment of certain debts. B, by deed, conveyed the slave to C for a certain price, all of which was afterwards paid by A, except $100. C then, by deed dated in 1847 and proved in 1849, in consideration of the said $100, conveyed the slave to D: *Held*, that though D might have taken that conveyance in trust for A upon the payment of the $100, yet, while the property remained in that situation, the $100 not being paid, A had no such interest as was liable to an execution against him.

2. Estoppels must be mutual, and bind only parties and privies. One who is not bound by an estoppel, cannot take advantage of it.

APPEAL from the Superior Court of Law of PASQUOTANK, at Special Term in December, 1850, *Battle, J.*, presiding.

This was an action of detinue for a negro slave named Mary. Plea, *non detinet*. Upon the trial, both parties claimed under Stephen D. Pool, to whom the slave in question formerly belonged. The plaintiff exhibited a deed in trust from the said Pool to William L. Shannonhouse, dated, proved and recorded in 1843, the trust being in payment of certain debts therein named. Shannonhouse, the trustee, sold the slave at public auction to Samuel J. Proctor for $625, and conveyed her by bill of sale for that consideration. Proctor afterwards conveyed the slave to the plaintiff, by deed dated in November, 1847, and recorded in March, 1849. In this deed the consideration is stated to be $500, and it is recited that the property had been conveyed by the said Proctor to J. C. B. Ehring-
(440) haus in trust, by a deed bearing date in December, 1843, and duly registered. The plaintiff further proved a demand and refusal.

The defendant then produced the record of a judgment against the said Pool, rendered by the County Court of Pasquotank, at December Term, 1848, on a note bearing date in August,

1848. He then showed an execution issued on the said judgment, proved a sale made under it by the sheriff on 17 February, 1849, and produced the sheriff's deed to himself. He then called as a witness Samuel J. Proctor, who testified that the slave, Mary, remained in the possession of Pool from the time of his execution of the deed in trust to Shannonhouse until she was sold by Shannonhouse; that he, the witness, purchased her for the benefit of the said Pool, intending, however, to retain the title until her purchase money should be repaid; that payments were made by some person (it was alleged to be by Pool) until the sum was reduced to $100, with a small amount of interest accrued thereon. He testified further, that when he was about to sell the slave to the plaintiff he and Pool were at the plaintiff's office, and Pool said to him in the plaintiff's presence that he, the plaintiff, had befriended him before, and that he was willing to do it again, and that the plaintiff would pay him $100 for the said slave, and keep the title as collateral security until Pool should be able to repay him; and that he, the witness, received the $100 from the plaintiff and executed the bill of sale above referred to. This witness testified further, that the debts mentioned in the deed in trust from Pool to Shannonhouse were fair and *bona fide*. It was also in evidence that Pool was reputed to have been insolvent for some years prior to 1848, but no witness testified to the existence of any debt owing by him in 1843 which was not embraced in the said deed in trust. It was proved, also, that the slave remained in Pool's possession until she was levied upon by the sheriff. The (441) defendant contended that the plaintiff was estopped, by the recital in the bill of sale from Proctor, to show that the title was not in Ehringhaus. But the court was of opinion that the plaintiff could not be estopped by a deed which the defendant objected to as void. The defendant then insisted that the plaintiff's bill of sale was not registered until after the time the lien of his execution had attached, and that it was fraudulent and void because it was absolute on its face, whereas he contended, that it was made in trust for Pool. He contended further, that it was void, as was also the deed in trust from Pool to Shannonhouse, because Pool had been permitted to retain possession.

The court was of a different opinion upon all these points, and charged the jury that the plaintiff was entitled to recover. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

B. F. Moore and *Ehringhaus* for plaintiff.
Heath for defendant.

PEARSON, J. In May, 1843, Pool conveyed the slave to Shannonhouse, in trust to pay certain debts. Soon thereafter Shannonhouse sold the slave, at public auction, to Proctor, who paid for her by putting his note in bank for the price, $625, in satisfaction of a debt secured by the trust. Pool continued in possession and made sundry payments upon Proctor's note in bank, so as to reduce it to about $100. In November, 1847, Proctor, upon the payment of the $100 by Griffin, conveyed the slave to him. In December, 1848, a judgment was taken against Pool, and the slave was levied upon as his property and sold by the sheriff to the defendant, in February, 1849.

The court was of opinion that the plaintiff was entitled to recover. We concur in the opinion. The deed of trust, (442) which is *admitted to have been bona fide,* passed the title out of Pool, and the sale by Shannonhouse passed it to Proctor, who passed it to Griffin, the plaintiff.

Admit that Proctor took the legal title in trust for Pool after the payment to himself of $625. Admit that, under this arrangement, Pool reduced the debt to $100, and then Proctor, upon the payment of that sum by the plaintiff, conveyed to him, and that he took the title to secure the $100, and then in trust for Pool. The latter had no such interest as was liable to execution. *Gowing v. Rich,* 23 N. C., 553. Nor does the fact that Pool continued in possession during all the time make it a fraud under the statute of Elizabeth. That statute never applies, except when the original transfer by the debtor is fraudulent, so that, by treating it as void against creditors, the title will still be in him. Suppose, on account of the benefit intended for Pool, the deeds to Griffin and Proctor are both treated as void. The title is in Shannonhouse, who is admitted to have acquired it without fraud, and Pool has only such an interest as can be reached in equity.

The question of estoppel does not arise. The defendant was not a party, or privy to either of the parties, in the deed by Proctor to the plaintiff, in which there is a recital of a deed by Proctor to one Ehringhaus or in the deed referred to in the recital. Estoppels must be mutual, and bind only parties and privies. One who is not bound by an estoppel cannot take advantage of it.

PER CURIAM. Judgment affirmed.

Cited: Ray v. Gardner, 82 N. C., 148; *Shew v. Call,* 119 N. C., 453; *Allred v. Smith,* 135 N. C., 446.

(443)

JACOB LASSITER v. HYRAM WARD.

In an action on the case, a count in deceit, for knowingly misrepresenting the soundness of a chattel, may be joined with a count for the breach of a warranty of the soundness of the same chattel.

APPEAL from the Superior Court of Law of MONTGOMERY, at Fall Term, 1850, *Battle, J.*, presiding.

This is an action on the case in *tort*, and the declaration contains two counts. The first is in the usual form for a deceit in selling the plaintiff an unsound horse, by falsely representing him to be sound, he, the defendant, then and there knowing him to be unsound; and the second, for a false warranty of soundness of the horse. Plea, not guilty. On the trial the evidence was that the defendant warranted the horse to be sound, and that he was in fact not sound. The counsel for the defendant then insisted that the plaintiff could not recover for want of proof that the unsoundness was known to the defendant. But the court held that the plaintiff might recover on the second count without proving a *scienter*. The jury gave a verdict for the plaintiff, and the defendant moved for a *venire de novo*, on the ground of error in the opinion of the court, which was refused. A motion was then made in arrest of judgment, upon the ground that the two counts could not be joined. That was also refused, and judgment given on the verdict, and the defendant appealed.

Winston, Sr., and *Miller* for plaintiff.
Dargan and *Mendenhall* for defendant.

RUFFIN, C. J. Though one would expect *assumpsit* to be brought on a warranty of goods, as well as any other parol contract, yet it is, comparatively, a recent thing that (444) it was brought in such cases. Its propriety seems to have been questioned as late as the case of *Stewart v. Wilkins*, Doug., 18; and it cannot be said to have been judicially settled earlier, though the action had been sometimes brought. It was questioned on the ground that the action on the case in *tort* was the established remedy, and, therefore, the proper one. It was, however, held that either of the actions would lie upon an express warranty. Afterwards it was attempted to give another turn to the matter in the opposite direction, namely, by contending that *assumpsit* was the peculiar remedy on a false warranty, and that the declaration could not be in *tort*, unless it

alleged a *scienter;* which was as much as to say that the action on the case would not lie on the warranty, but only on the cheat. *Williamson v. Allison,* 2 East, 446. But there were so many precedents of actions in *tort* for a false warranty as to show clearly that it had been formerly the common remedy, if not the only one, in use, and to induce the judges to sustain it. It was, accordingly, there held that the declaration might be in *tort* without alleging a *scienter,* and, if it be alleged in addition to the warranty, that it need not be proved. The doctrine of the case is that when there is a warranty, that is the gist of the action, and that it is only when there is no warranty that a *scienter* need be alleged or proved. It is nearly half a century since the decision, and during that period the point has been considered at rest, and many actions have been brought in *tort,* as well as *ex contractu,* on false warranties. 1 Chit. Pl., 956, 429; 2 Chit. Pl., 279. There is no doubt as to the propriety of joining the two counts; for it is an action on the case, and the counts, being both in *tort,* are compatible. If it were otherwise, it would not be material in this case, as the evi-
(445) dence applied to the second count, and the instructions to the jury referred to it alone, and therefore the verdict might be amended by entering it on that count only. *West v. Ratlidge,* 15 N. C., 31.

PER CURIAM. Judgment affirmed.

Cited: Blanton v. Ward, 49 N. C., 533; *Chamberlain v. Robertson,* 52 N. C., 13; *Ashe v. Gray,* 90 N. C., 139.

WILLIAM RICHMOND v. JOHN FUGUA.

After a debt had been barred by the statute of limitations, the debtor said to the creditor, "Unless J. R. had paid it for me, it is a just debt, and I will pay it"; and again, "It is a just debt and I will pay it, if I cannot prove that it has been settled by J. R.": *Held,* that the case was thereby taken out of the statute. By such declarations the *onus* of proof that the debt had been paid rested on the defendant.

APPEAL from the Superior Court of Law of CASWELL, at Fall Term, 1850, *Manly, J.,* presiding.

The suit is *assumpsit* for money paid for the defendant, as his surety. It was commenced 20 November, 1848. Plea, statute of limitations. On the trial the evidence was that the plain-

tiff was the surety for the defendant to one Long, and that the plaintiff paid the debt in 1840, at which time the defendant resided in another State. In 1848 the defendant returned to this State, and, a short time before this suit was brought, the plaintiff requested payment from the defendant, and, in the conversation between them about this debt, the defendant said, "Unless John Richmond has paid it for me, it is a just debt and I will pay it," and in another conversation on the same subject the defendant said to the plaintiff, "It is a (446) just debt, and I will pay it, if I cannot prove that it has been settled by John Richmond." John Richmond, who was referred to by the defendant, was present in court at the trial, but was not called upon by either party. The point made was whether there was such a promise or acknowledgment on the part of the defendant as revived the debt and entitled the plaintiff to recover. The court held that there was, and after a verdict and judgment for the plaintiff the defendant appealed.

Kerr for plaintiff.
S. P. Hill for defendant.

RUFFIN, C. J. The Court thinks the judgment should be affirmed. There is not only an acknowledgment of the original justice of the debt, and of its being just still, with the proviso only that it had not been paid by a particular person named, but also an express promise, then, to pay the debt unless or if the defendant could not prove the payment had been made by that person. The defendant undertook, in substance, to prove payment by an individual named, or, upon failure thereof, to pay the money. Upon the strength of that undertaking the *onus* was on the defendant, since he designated, with precision, the fact on which he relied for his discharge, and the person by whom he engaged to establish the fact affirmatively.

PER CURIAM. Judgment affirmed.

Cited: Kirby v. Mills, 78 N. C., 125.

(447)

JAMES TAYLOR v. JOHN W. STEDMAN.

1. Where a plaintiff in an action of *assumpsit*, in order to bar the operation of the statute of limitations, gives in evidence words used by the defendant, the language must be such as, without straining, imports a willingness and intention thereby to assume the debt, or amounts to an equivocal acknowledgment of its subsistence and obligation.

2. In a conversation between the plaintiff and the defendant, in relation to the matter in dispute, the former said to the latter, "That matter about Frank's hire in 1842 must be fixed," when the latter asked, "Will not other notes or judgments do instead of my note?" and the plaintiff remarking, "Yes, if they are good," nothing further passed between them: *Held*, that the defendant's expressions did not revive the debt and bar the operation of the statute.

APPEAL from the Superior Court of Law of CHATHAM, at Fall Term, 1850, *Manly, J.*, presiding.

This action is *assumpsit* for the hire of a slave named Frank, for the year 1842. The suit was brought on 25 August, 1848, and the defendant pleaded *non assumpsit* and the statute of limitations. After establishing the hiring and the price, the plaintiff gave evidence of a conversation between him and the defendant in 1845, in which the plaintiff demanded the payment of this and other debts from the defendant, and the latter denied that he owed the plaintiff on any account, and insisted particularly that he had paid him for Frank's hire, and thereupon the plaintiff produced a note, given to him by the defendant on another account, on which there was a balance due, and contended that the hire of Frank had not been paid. The
(448) plaintiff gave further evidence of another conversation between the parties in 1848, in which the plaintiff said, "That matter about Frank's hire for 1842 must be fixed," and the defendant, in return thereto, asked the plaintiff, "Will no other notes or judgments do, instead of my note?" and the plaintiff replied, "Yes, if they are good"; and nothing further passed between them. The court instructed the jury that "the conversation between the parties in 1847 or 1848, wherein the defendant proposed to pay the debt in other notes or judgments, was an acknowledgment of a subsisting debt, which repelled the operation of the statute of limitations." The jury found for the plaintiff, and the defendant appealed from the judgment.

J. H. Haughton for plaintiff.
W. H. Haywood for defendant.

RUFFIN, C. J. The Court does not concur in the directions to the jury. The defendant is entitled to have his words fairly construed, so as to ascertain his real meaning, and the statute must stand as a bar, unless his language be such as, without straining, imports a willingness and intention thereby to assume the debt, or amounts to an unequivocal acknowledgment of its subsistence and obligation. Here it was supposed by his Honor that the defendant proposed to pay the debt, and that the requisite acknowledgment was to be implied from the proposal. But there was in truth no such proposal. The defendant, upon being pressed by the plaintiff to adjust the dispute about this demand, only inquired whether the plaintiff would take notes on other people instead of his, which is very different from directly proposing payment in that manner, since his willingness to settle the controversy in that way might depend much on the value of the securities to be transferred, and his liability on them. Hence, where the plaintiff said they (449) must be good, the defendant proceeded no further in making either an inquiry or proposal. If, however, there had been a distinct proposal to give the plaintiff particular notes or judgments, the requisite promise or acknowledgment could not be inferred therefrom, by itself, for that would convert an offer to pay in notes or a horse into a promise to pay in cash, though so very different, since an offer to pay in notes, like one to give a smaller sum than the alleged debt, is rather a proposal of compromise than assuming the debt anew, which brings the case within that of *Wolf v. Fleming*, 23 N. C., 290.

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

Cited: S. c., 35 N. C., 98.

ROBERT CAFFEY AND WIFE v. ROBERT C. RANKIN.

On a petition, under our act of Assembly, for permission to emancipate a slave, the right of property in the slave cannot be determined. If a claim of right in the property, supported by affidavit or otherwise, is set up in opposition to the right asserted by the petitioner, the court should stay proceedings on the petition until this matter can be determined between the parties in an action at law or in equity.

APPEAL from the Superior Court of Law of GUILFORD, at Spring Term, 1849, *Battle, J.*, presiding.

CAFFEY *v.* RANKIN.

This was a petition filed at the Spring Term, 1848, of Guilford Superior Court, for permission to emancipate a negro boy named Alvis, and other slaves named. The petition in substance sets forth that some time about 1837 James Davis
(450) died, having first made and published his last will and testament, which was afterwards admitted to probate, and his widow, Sophia Davis, who was named therein sole executrix, duly qualified as such; that the said Sophia Davis died about 1848, having duly made and published her last will and testament, which was duly admitted to probate, but of which she appointed no executor; that the petitioner, Robert Caffey, has been duly appointed administrator with the will annexed of the said James Davis, and the other petitioner, Jane Caffey, administratrix, with the will annexed of the said Sophia Davis. The petition further set forth that the said James Davis by his said will, among other things, bequeathed and directed as follows: "One negro girl named Nelly, and one mulatto named Nehemiah, I give them to my wife (said Sophia) during her natural life or widowhood, then to my son, Michael C. Davis, to him and his heirs forever, except Nelly and Nehemiah are to be free, if they can comply with the requisition of the law of this State; and if they cannot comply with the law to be free, and Michael C. Davis should die, without any heirs of his body, Nehemiah and Nelly may choose their own homes, where they like to live, and is to be sold privately at the valuation of two men." That, between the making of the will of the said James Davis and his death, the slave Nelly had one child named Wright, which was sold by the said Sophia as executrix to one M. C. Davis, who afterwards sold and conveyed the same back to the said Sophia; and that after the death of the said James Davis the said Nelly had another son by the name of Alvis. The petition further sets forth that Michael C. Davis, son of the testator, James Davis, is dead, leaving an only child, the defendant James C. Davis, an infant, of whom Robert C. Rankin is guardian. The petition further sets forth that the said Sophia Davis, by her last will, among other things, bequeathed and directed as follows: "I
(451) give and bequeath to my grandson, James C. Davis, the only son of my son Michael Caffey Davis, deceased, one negro boy named Wright and one negro boy named Alvis, on condition, if Nehemiah and Nelly, their father and mother, comply with the laws of this State and go free, it is my will they should go with them, and not be kept back on account of their age, and if not, then these negroes, Wright and Alvis, must stay with their father and mother, and not be hired out;

and if not, they must have the same chance of their father and mother in choosing homes, and be sold to the same person at the valuation of the same two men that value their father and mother according to my husband's (James Davis) will; and if James C. Davis dies, not leaving no heirs of his own body, and these negroes cannot comply with the requisitions of the laws of this State and choose their homes and is valued, the money, on conditions if James C. Davis leaves no child of his own, if he does it is theirs, if not, it must go to the use of my stepchildren. It is my will they never shall be parted from their parents." The petition further sets forth that Nehemiah is about the age of forty-five, Nelly about forty, Wright about twelve and Alvis about nine years of age, that the petitioners are desirous to emancipate all four of the said slaves, as requested in the said wills, but that Robert C. Rankin, as guardian of the infant, James C. Davis, objects thereto, so far as regards the boy Alvis. The petition further sets forth that the said Sophia willed and bequeathed to the said James C. Davis other property, greater in value than the said boy Alvis, and that the petitioners are advised that the said James C. Davis cannot hold both with and against the will of the said Sophia, and that, if he takes the legacy given him in the said will, he cannot refuse to let the said boy Alvis be emancipated; and the petitioners aver that they are ready and willing to give the bonds and security required by law to emancipate all of the said slaves.

The petitioners then pray that advertisement may be (452) made, according to law, that James C. Davis, by his guardian, Robert C. Rankin, be made a party defendant, and that the court will grant them permission to emancipate the said slaves, according to law, and will make such other orders, decrees, and grant such further relief as the nature of their case may require, etc.

Whereupon advertisements were ordered and made, and a subpœna issued and executed, according to the prayer of the petition.

At the Fall Term, 1848, of the said court, Robert C. Rankin, as guardian of the said James C. Davis, by leave of the court, filed an answer in behalf of his ward, in substance and to the effect following: That he admits the execution and probate of the respective wills of James and Sophia Davis, and that the petitioners are the administrators with the wills annexed of the said testators, respectively; the death of M. C. Davis, leaving an only child, the defendant James C. Davis, of whom the defendant Robert is the guardian; the birth of the negro children Wright and Alvis, at the times stated, and the purchase of

Wright by Michael C. Davis, all as set forth in the petition. But he denies that Wright was resold to Sophia Davis, and prays strict proof thereof. He submits that this proceeding is in a court of law, and that a court of law has no power to compel an election; that even a court of equity would not do so in a case like the present, for the reasons he assigns. He avers that he objects to the emancipation of all the slaves named, and prays to be dismissed, etc.

Replication was taken and commissions issued.

At Spring Term, 1850, the following decree was made by the court:

This case coming on to be heard, upon the petition, answer and agreement of the parties, which is in the following words,

(453) to wit: "In this case it is agreed that advertisement hath been made according to law; that James Davis made his will at the time it bears date; that Sophia Davis died 9 January, 1848, and made her will at the time it bears date; that James Davis died in April, 1827; that the slaves, Nehemiah and Nelly, are husband and wife, and were so at the date James Davis made his will; that the slave Nelly had one child, to wit, Wright, between the making of the will of James Davis and his death, which said slave, Wright, the said Sophia, as executrix of her husband, James Davis, sold at public auction to Michael C. Davis for $150, then an infant some twelve months old, and duly executed a bill of sale to the said Michael; that the said Michael afterwards sold to the said Sophia Davis the said slave, Wright, for $150; that he conveyed him by bill of sale, and the said Sophia held the said Wright as her own property until her death, and that after the death of James Davis the negro woman Nelly had the other child Alvis." It is considered, ordered, adjudged and decreed by the court that the petitioners may emancipate the slaves mentioned in the petition, to wit, Nehemiah, Nelly and Wright, and that they have leave to emancipate the said three slaves, when they shall enter into bonds, with two sureties, each good and sufficient, payable to the State of North Carolina in the sum of $1,000 for each of the said slaves, Nehemiah, Nelly and Wright, conditioned that the said slave or slaves shall honestly and correctly demean themselves while they shall remain within the State of North Carolina, and that they and each of them will, within ninety days after the granting of the prayer of the petition, leave the State of North Carolina, and never afterwards come within the same.

And the court, being of opinion on the whole case and on the proper construction of the two wills, made also a part of the

case, that the petitioners or either of them did not have the right and power to emancipate the negro slave child, Alvis, born after the death of the testator, James Davis, (454) on the ground stated in the petition or any other, considered and adjudged that the prayer of the petitioners to emancipate the said slave, Alvis, be refused.

From this judgment the petitioners prayed for and obtained an appeal to the Supreme Court.

H. W. Miller for plaintiffs.
Morehead for defendant.

PEARSON, J. We do not concur in the view taken in the court below of the proceedings under sec. 59, ch. 111, Rev. St., in regard to the emancipation of slaves. In that court it was assumed that the right of property and the authority of the executor might be contested and their rights adjudicated, and, consequently, that there was an appeal to this Court.

On the contrary, we think the proceeding is *ex parte* under section 57. The title of the petitioner is presumed to be unquestioned. Under section 59 the authority of the executor is taken for granted, the court gives no *judgment,* but merely grants permission to emancipate, upon being satisfied that due advertisement has been made and the bonds required executed. This permission to emancipate does not bind the rights of third persons. There is no "adversary suit," and consequently no right of appeal. The proceeding does not fall under the first section or within either the cases enumerated in the second section of ch. 4 of the Rev. St. But it is asked, Why require advertisement if there is no right of contestation? The answer is, because the interest of the real owner may be prejudiced by having his slave under this *ex parte* proceeding apparently converted into a free person, and sent out of the State, and the petitioner may not be able to answer in damages for the money.

If the petition be under section 57 and the right of property is disputed, upon this suggestion, supported by (455) proper affidavit, the court ought to suspend the proceedings until the right can be settled in the proper action at law. If the proceeding be under section 59 and the authority of the executor is disputed, upon this suggestion properly supported, the court ought to suspend the proceedings until the power of the executor can be settled by a declaration of the rights of the parties in a court of equity: in analogy to the proceeding under a petition for partition, when, if the party sets up claim in severalty, an action at law must be brought.

In this case, for instance, it is suggested that, as the woman Nelly was given to Sophia Davis for life, remainder to Richard Davis, the boy Alvis, after the testator's death, belongs to the personal representatives of Richard Davis, and Sophia Davis could not by her will give any authority to emancipate. The right of property, therefore, as well as the authority, is disputed, and these questions cannot be settled in an *ex parte* proceeding. At all events, they cannot be conclusively settled, so as to bind the representatives of Richard Davis. So it may be suggested that as James C. Davis takes other property under the will of Sophia Davis, he ought to be put to his election. These are interesting questions, which can only be decided in equity. It manifestly was not the intention of the statute that such questions should be settled under a petition for permission to emancipate slaves.

PER CURIAM. Appeal dismissed.

(456)

DEN ON DEMISE OF WILLIAM BADHAM ET AL. V. JOHN COX.

1. When a vendor of land retains the title, as a security for the purchase money, and a balance remains due, the vendee has not such an interest as is liable to execution under the act, Rev. St., ch. 45, sec. 4, so as to divest the legal title of the vendor.

2. Under a *venditioni exponas* against land, the sheriff can sell only that which he could have sold under the *fi. fa.* on which the *venditioni exponas* issued, while such *fi. fa.* remained in his hands unreturned.

3. If the defendant in an execution has no interest in land which is subject to be levied on while the *fieri facias* remains in the hands of the sheriff, unreturned, but, after the return he acquires a title, which is subject to execution, this subsequently acquired title cannot be sold under a *venditioni exponas* issuing upon such *fieri facias.*

4. Such subsequently acquired title shall not operate as an estoppel in favor of a purchaser at a sale made under such *venditioni exponas.* The law only sells *estates* under its process, and not the *chances of an estoppel.*

APPEAL from the Superior Court of Law of CHOWAN, at a Special Term in December, 1850, *Battle, J.*, presiding.

This was an action of ejectment.

Upon the trial the case appeared to be as follows: The defendant, Cox, was seized in fee of the premises, being a wharf and store in the town of Edenton, and on 1 January, 1843, contracted for the sale of them to one George Bordon, in fee, for

the price of $2,500, payable as follows: $1,800 on 1 May, 1848, and $700 on 1 January, 1849; and a conveyance was to be made when the purchase money with the interest thereon should be fully paid, but, in the meanwhile, Gordon was to be (457) let into possession. Articles were entered into accordingly, and Gordon took possession and paid the first installment, but no part of the second. In March, 1849, judgments were obtained before justices of the peace by several of Gordon's creditors, and executions were issued thereon, and levied on the premises and returned to the County Court, and in August following orders of sale were made, and then writs *venditioni exponas* were sued out, under which the sheriff sold the premises to the lessors of the plaintiff on 10 November, 1849, and made them a deed. On 6 May, 1849, Gordon made to Samuel T. Bond an assignment of all his interest "in the premises, in trust to sell the same and out of the proceeds pay a debt from him to Haynes and Goodridge"; thereafter Gordon continued in possession until 8 October, 1849, on which day Bond, in conformity with the assignment to him, made a contract for the sale of a part of the premises to the defendant, and Gordon went out, and he and Bond let the defendant into possession of that part of the premises which he (Cox) purchased back, and which is in dispute in this action. On 6 November, 1849, Cox executed to Gordon a deed in the following terms:

"Know all men by these presents, that I, John Cox, of, etc., agreeable to a memorandum of agreement entered into with George Gordon, of, etc., on 1 January, 1848, to make title to a certain portion of wharf property known as, etc., on the payment of, etc.: Now, therefore, in consideration of the sum of $2,650 being paid before the delivering of these presents, and to enable Haynes and Goodridge to make sale and pay me, as also to convey to me, the said Cox, such portions of said property as I may purchase at said trustee's sale, as also agreed to by the said George Gordon, I hereby convey the following property in fee simple to him, the said George, and his heirs and assigns forever, that is to say, the wharf, etc. Which said property hereby conveyed I do warrant, etc., to the said (458) George Gordon, and his heirs, against the lawful claim of all persons." On the same day Bond and Gordon executed to Cox a deed for the part of the premises claimed by the defendant in this suit, purporting to convey the same in fee. Thereupon the counsel for the plaintiff insisted that Gordon had, under the original contract between him and the defendant, such an interest as might be levied on under the *fieri facias*, and be sold under the *venditioni exponas*, or that, by the deed

from the defendant of 5 November, 1849, Gordon acquired such an interest as was liable to be sold under the *venditioni exponas* and passed by the sheriff's sale of 10 November, 1849, and his deed to the lessors of the plaintiff; and that the defendant was estopped to deny their title. But the court held that the plaintiff could not recover, and after a verdict and judgment against him, he appealed.

A. Moore and *Heath* for plaintiff.
No counsel for defendant.

RUFFIN, C. J. No title passed by the sheriff's sale. When the vendor retains the title as a security for the purchase money, and a balance remains due, the vendee has not such a trust as is made liable to execution by section 1 of the act of 1812, so as to divest the legal title of the vendor. That was settled as soon as the act passed. Consequently the constable's levy was ineffectual at the time it was made and returned. It follows, likewise, that the sale under the *venditioni exponas* was equally inoperative, notwithstanding the debtor may have acquired the legal title while the sheriff had the latter writ in his hands. The case may be considered as if the *fieri facias* had been issued from a court of record and directed to the sheriff. The debtor's interest in the premises could not
(459) have been sold or taken under it at any time before its return, inasmuch as it was not subject to execution; and, if there had been a sale under the *fieri facias,* the subsequently acquired legal estate would have been unaffected by it, because the law only sells estates under its process, and not the chances of an estoppel. *Flynn v. Williams,* 23 N. C., 509; *Gentry v. Wagstaff,* 14 N. C., 270. It must be the same with the sale under the *venditioni exponas,* since that was founded upon the levy, which was made and returned when the debtor had no estate. That results from the effects of a *fieri facias* on land and from the peculiarity of the *venditioni exponas.* The levy of the *fieri facias* does not vest either the title or the possession of land in the sheriff, but merely confers on him the power to sell the debtor's estate or interest, such as it is, while he has the writ in his hands before the return day. *Barden v. McKinnie,* 11 N. C., 279. If a title accrue to the debtor after the levy, but while the *fi. fa.* is in force, no doubt it may be sold, and will pass by the sale of the land, simply, without special reference to the new title; for it is within the mandate of the writ under which the sale is made. That may be true, also, when a sale was not made on the *fi. fa.,* but on a *venditioni exponas,* but a

title accrued to the debtor between the levy and the return of the *fi. fa.* But it seems clear that the *venditioni exponas* does not attach to an estate acquired by the debtor after the return of the *fieri facias.* In respect to chattels, that writ confers no authority to take or even sell them, but is merely to compel the sale of property before vested in the sheriff and in his possession, which he might sell without the writ. It is, indeed, otherwise in respect to realty. There the office of the writ is to confer an authority on the sheriff, as well as to compel him to sell. But it is not an authority to take anything. It is merely to sell the land, and that only, which the levy of the *fieri facias* placed in *custodia legis* and appropriated to the satisfaction of the debt, and which is identified in the writ. The *venditioni exponas,* therefore, relates to the *fieri facias,* and (460) is a warrant to the sheriff to do then what he might have done under the *fieri facias* while it was in force; and it can have no other effect. *Tarkinton v. Alexander,* 19 N. C., 87; *Smith v. Spencer,* 25 N. C., 265. The levy of the *fieri facias* created a specific lien on the estate of the debtor as it was at the teste of the writ and at any time between the teste and the return, which could not be enforced by virtue of the *fieri facias* itself, as it might be as to personals, but required a *venditioni exponas* for that purpose. Still the latter writ gave no more power to sell than the sheriff once had under the *fieri facias,* if he had exercised it when he had the *fieri facias;* because its object is only to have a sale of what was lawfully taken on the *fieri facias,* and nothing more. An estate in this land which accrued after the *venditioni exponas* sued is, therefore, no more subject to it than any other tract of land, purchased out and out in the interim, would be; for, in a legal sense, the one was no more levied on than the other. It is unnecessary, therefore, to inquire into the operation of the deeds between the defendant and Gordon and Bond; for, supposing Gordon to have gained a title thereby, which was liable to execution, it was not liable to the particular execution under which it was sold. For that reason the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Carson v. Smart, 34 N. C., 372; *Walton v. Jordan,* 65 N. C., 172; *Moore v. Byers, ib.,* 243; *Swann v. Myers,* 75 N. C., 594; *Peebles v. Pate,* 90 N. C., 355; *Gentry v. Callahan,* 98 N. C., 449, 50.

(461)

DOE ON DEMISE OF HENRY BULLARD v. GEORGE T. BARKSDALE.

1. It is established, as a general proposition, that from a long and peaceable possession of land, upon a claim of the right, a presumption arises that the possession was rightful, and therefore was under such grant, deeds and assurances as are necessary to impart to it that character.

2. The presumption is not deduced as an inference of fact from the possession, as evidence merely and according to its influence on the minds of the jury, in producing or failing to produce a conviction that the presumption is according to the truth, but the deduction is made, without regard to the very fact, by a rule in the law of evidence.

3. The force of this presumption is not destroyed or in any degree repelled by evidence which renders it probable that, in truth, a grant was not issued.

4. The grant is presumed, not because the jury believed that one issued, but because there is no proof that it did not issue; indeed, in the nature of things, it would seem that there can be no sufficient negative proof of the kind supposed.

5. Where a long possession, under a claim of title by a grant, as in this case of forty-seven years, has been proved, and to rebut the presumption it was shown that the party so claiming was unable to produce a grant, declared his belief that it never existed, and made efforts to obtain another grant; the court ought not to have submitted to the jury, upon this evidence, to find whether there was a grant or not, but should have instructed them that, from the possession alleged, they should presume a grant, and, as matter of law, that there was no evidence to oppose and repel the presumption.

APPEAL from the Superior Court of Law of SAMPSON, at Fall Term, 1850, *Battle, J.*, presiding.

This was an action of ejectment.

The premises are situate in Sampson County and contain 440 acres, and were granted to the lessor of the plaintiff (462) in 1845, who instituted this suit in May, 1846. The defendant gave evidence at the trial that, in 1847, he purchased the premises from a person then in possession, and immediately entered and had been in actual possession of them ever since, and that his vendor and those under whom he claimed had been in the actual continued possession of the premises from 1777 to 1847, claiming them as their own, under known and visible boundaries. On the part of the plaintiff evidence was then given that, in 1844, the defendant said he could

not find a grant for the land, and that one Black, a surveyor, had said to him that some one might trouble him, and advised him to enter it and get a grant; that the defendant accordingly made an entry (after that of the lessor of the plaintiff) and took out a warrant and had his survey made and sent it to Raleigh by a messenger in haste, for the purpose of being before the lessor of the plaintiff in getting a grant, if he could.

The counsel for the defendant insisted that, by reason of the long continued and peaceable possession of the premises by the defendant, and those under whom he came in, claiming them as their own, a presumption of a grant from the State, prior to that made to the lessor of the plaintiff, arose, and that, for that reason, the plaintiff could not recover. The court declined giving the instruction in that form, but directed the jury that if they believed the defendant, and those under whom he claimed, had been in possession of the land under known and visible boundaries for the period alleged by him, they were bound to presume that the defendant, or one of those under whom he claimed, had a grant for it, unless they were satisfied from other evidence offered that, in fact, no such grant existed.

The counsel for the defendant further moved the court to instruct the jury that if they found such a possession (463) on which a grant was to be presumed by them according to the foregoing instruction, there was no other evidence offered in this case which could rebut that presumption, and that the defendant was entitled to a verdict. But the court refused to give this instruction, and directed the jury that the declarations and acts of the defendant, respecting a grant, were evidence tending to rebut the presumption, which was proper to be considered by the jury, and the court would not intimate an opinion whether it was sufficient for that purpose, but that the jury were the judges of its weight, and were to consider whether those declarations and acts were the results of knowledge or of ignorance and mistake in the defendant, as one might by mistake admit that he had no title, when he had a good one. There was a verdict for the plaintiff on which judgment was entered, and the defendant appealed.

D. Reid, with whom was *Dobbin*, for plaintiff.
Strange and *W. Winslow* for defendant. (465)

RUFFIN, C. J. There have been so many adjudications upon titles set up under the presumption of conveyances, from ancient and continued possession, after full discussions, that one is under no necessity of going back to the nature and grounds

of the presumption, in order to consider them in detail. It is sufficient to say that it is established, as a general proposition, that from a long and peaceable possession, upon a claim of the right, a presumption arises that the possession was rightful, and, therefore, was under such deeds and assurances as are necessary to impart to it that character. The presumption is not deduced, as an inference of fact, from the possession, as evidence merely and according to its influence on the minds of the jury in producing or failing to produce a conviction that the presumption is according to the truth; but the deduction is made without regard to the very fact, by a rule in the law of evidence. It is a rule of reason and of policy, calculated to make men diligent and active in asserting their rights before proofs, once existing, may be lost, and while there (466) is no insuperable difficulty in ascertaining the real truth.

If, indeed, one enter for a particular estate or under a particular title, and the nature of the original entry be shown, then the presumption that the possession, though very long, was upon a claim of the possession to the estate, does not arise as a legal inference; and it can inure to transfer the estate only when the possession is so very long and upon a claim of right as, with other circumstances, to induce the actual belief that, subsequent to the possession taken, there were other dealings upon which conveyances were in fact made. That, however, concerns mainly transactions between individuals touching estates already vested in one of them; for, considering the state of our law respecting the public domain, its management and disposition to private citizens, it is seldom, if ever, to be supposed that possession is taken of any part of it for any particular estate or purpose which can give a character to a long possession, by which it may be disconnected from the purpose in the possessor of obtaining the absolute title from the State, or from the apparent exercise of the rights of one who is already the owner of the land by having a grant for it. The only question in such cases is whether the possession has been long enough to justify an implication against the sovereign from the *laches* of the public servants, and the omission of private persons to appropriate the land. But it is manifest, from the necessity which gives rise to the presumption, and from its nature, that it is not supposed to establish as a fact that a grant was issued; and that its force is not destroyed or in any degree repelled by evidence which renders it probable that in truth a grant was not issued. If that were the sort of presumption the law raises, or if it could in that way be repelled, it would poorly serve its purpose, and be, really, worth nothing. For, as to the actual probability upon

the point, the facts that the grant is not produced, that it does not appear upon the registry in the county, and (467) that no counterpart is enrolled in the Department of State, and no survey or entry is exhibited, nor credit for the payment of the purchase money at the treasury, would, in every case, constitute a mass of evidence which could not fail to overturn the artificial presumption we are considering, and is in itself much stronger in its tendency to repel the presumption than the acts and declarations of the defendant which were offered in this case. But, as first remarked, it is hardly pretended in any case that a grant was actually made out; for it was truly stated by *Lord Mansfield,* in *Eldridge v. Knott,* Cowp., 215, that the court often told the jury to presume a grant from long possession, when there was no idea that the jury believed or the court thought they ought to believe, in the particular case, that a grant had been made, and when it was not probable it had; the fact being presumed upon a principle of quieting possessions. These probabilities to the contrary, therefore, do not at all answer the presumption. The same position is very distinctly laid down in *Reed v. Earnhart,* 32 N. C., 516; and in that all the judges concurred. It is there said that the grant is presumed, not because the jury believe that one issued, but because there is no proof that it did not issue. Indeed, in the nature of the thing, it would seem that there can be no sufficient negative proof of the kind supposed; for, whatever probabilities may be shown that there was no grant in fact, yet the probability of its existence remains, which is sufficient to serve the presumption created by long possession under a claim of title by a grant. Such a possession was admitted to exist here—being for forty-seven years. That constitutes a title under a presumed grant. The existence of the grant, thus presumed, is not disproved by the inability of the party to produce it, or even by his declaration of a belief that it never existed—much less by his efforts to obtain another grant, since he (468) might wish it as the most direct and permanent evidence of title. Indeed, the obtaining of a new grant does not disprove the existence of a former one, nor even render it highly improbable, where there has been a long possession, as under an old grant; for there is nothing inconsistent in a person's making sure his title by further conveyances, and especially in getting a patent, which proves itself, instead of relying on witnesses to establish an ancient possession under a claim of right, as a foundation for presuming a grant. A second grant could only show the party's caution and vigilance, evinced in making out a title under two distinct grants—the one presumed to have

existed and the other shown to be existing. *Hurly v. Morgan,* 18 N. C., 425. The Court therefore holds it to have been erroneous to submit this question to the jury on this evidence, as one of fact to be found by them according to the weight they might give to the circumstances as evidence to their minds. The instruction ought to have been that, from the possession alleged, they should presume a grant, and, as matter of law, that there was no evidence to oppose or repel the presumption.

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

Cited: Mason v. McLean, 35 N. C., 265; *Rhodes v. Chandler,* 55 N. C., 34; *Melvin v. Waddell,* 75 N. C., 366; *Davis v. McArthur,* 78 N. C., 360; *Osborne v. Anderson,* 89 N. C., 262; *Bullard v. Hollingsworth,* 140 N. C., 638.

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(469)

THOMAS E. POWELL, ADMINISTRATOR, ETC., v. JOHN FELTON ET AL.

1. When a man claims title under color of title and seven years' possession, it is not evidence of the adverse possession that he had put the wife of one who claims to be the owner of the land in possession. When a husband is in possession, he is not deprived of it by any arrangement between his wife and a third person, pretending to own the land and to put her in possession.

2. The provisions of the act of 1846, ch. 1 (Pamphlet Laws), do not apply to a case where an administrator of the deceased was appointed before 1 February, 1847, though that administrator be dead, and an administration *de bonis non* be granted subsequently to that date, when the act was to go into operation.

APPEAL from the Superior Court of Law of GATES, at Fall Term, 1850, *Caldwell, J.,* presiding.

This is a petition filed in August, 1847, by the administrator *de bonis non* of Elisha F. Hare, to sell a tract of land under the act of 1846, ch. 1, which makes real estate personal in certain cases. The intestate died in 1846, and administration was granted in that year to a person who died in 1847, and in August, 1847, the letters were granted to the petitioner. The intestate had no child, but left his father and brothers and sisters, who were his heirs at law and are defendants. The petition states that the intestate died indebted to several persons in particular sums mentioned, and that he left no personal assets, but died seized in fee of the tract of land described in the petition, and that it was necessary to sell the same for the

payment of those debts, and prays that such sale be made. The heirs at law made no resistance. But one John Felton claimed the premises under an alleged sale and convey- (470) ance made to him by one Norfleet, and applied to the County Court to have an issue made up to try the title, which was allowed. On his motion the petition was then dismissed by the County Court, but without any cause assigned in the record, and an appeal was taken by the petitioner. In the Superior Court the counsel of Felton objected that the petition could not be sustained because administration on the intestate's estate had been first granted in 1846, and therefore the case was not within the act. But the court held that it was within the spirit and equity of the act, and denied the motion; and a jury was then impaneled on the issue. On the trial evidence was given that in 1824 Thomas Hare conveyed the premises in fee to the intestate, then an infant of tender years, and delivered the deed and the possession of the premises to Jesse L. Hare, the father of the intestate, to be held for his said son; and that the said Jesse L. and the intestate lived together on the premises until the death of the latter in 1846. Felton then gave in evidence a deed for the premises, made to him by Norfleet in 1833, reciting that Norfleet had purchased the land at sheriff's sale for taxes, as the property of the intestate. And he gave further evidence that in the year 1833, he (Felton) put the wife of the said Jesse L. in possession of the premises, to hold the same during her life, and that thereafter the said Jesse L., his wife, the intestate, and their other children, continued to live there as one family, as they had done before, until the death of the intestate, and up to the present time. And evidence was further given on the part of said Felton that the intestate, about a year before his death, said the land belonged to said Felton.

The counsel for Felton prayed the court to instruct the jury thereon that the possession of the premises by his tenant, the wife of Jesse L. Hare, from 1833 to the death of the (471) intestate, under the color of title constituted by the deed from Norfleet, vested the title in him. But the court refused to give that instruction, and directed the jury that if Jesse L. Hare took possession and held for his said son, his possession did not become opposed to his son by reason that Felton professed, as stated, to put the wife of the tenant into possession. The jury found that Felton was not entitled to the premises, and the intestate, Elisha L. Hare, was seized of the same in fee at the time of his death. After judgment against Felton for costs, he appealed.

A. Moore for plaintiff.
Heath for defendants.

RUFFIN, C. J. Besides the points made at the trial, there are others arising on the facts stated in the record which would be worthy of consideration, if needful to the decision of the pending appeal. One, for instance, is whether, notwithstanding the broad terms of section 13 of the act of 1846, "when the land shall be claimed by another under any pretense whatsoever," a stranger who sets up a title adverse to the deceased is within the act, so as to enable the administrator to make him a party to the petition in order to determine the property; or whether those terms are not rather to be construed in reference to sections 4, 11 and 12 and thus confined to persons "interested in the said estate" of the deceased, either as heir, devisee, mortgagee, fraudulent donee, or other person claiming under the deceased. Then, supposing that an adverse claim may be litigated in this form of proceeding, another question is, whether it must not be at the instance of the administrator, and the claim be set forth in the petition, or whether, as here, the adverse claimant may, of himself, intervene and demand an issue upon his title. These points, however, may be passed over, since, supposing them for the appellant, the Court hold the opinion to be correct, that he has not the title to the premises, and, therefore, that he has no right to a reversal of any judgment that might have been rendered on the petition. He did not set up the deed to himself, as vesting the title in him, but only as color of title. Consequently it remained for him to show seven years' possession under it, adverse to the real owner; and in that he failed entirely. For it cannot be in the least doubted that when a husband is in possession, he is not deprived of it by any arrangement between his wife and a third person, pretending to own the land and to put her in possession. So when the husband is in under one person, the character of his possession cannot be changed by such an arrangement and pretense, the husband not being, in fact, disturbed, but continuing to enjoy as before. If the wife could be regarded at all as Felton's tenant, yet she had no distinct possession of her own, as the husband and son were all the time on the land, and the possession would be adjudged to be with the title. Judgment was therefore properly rendered against the appellant for the costs accrued on the issue tendered by him.

(472)

As the appellant is thus put out of the case, it is not material between those parties whether the court was right or wrong in holding this to be a proper case for the sale under the act of

1846, notwithstanding administration was first granted on the intestate's estate in 1846; for, if wrong, then, in the first place, it was the appellant's folly to intervene in a matter in which no order could be made to his prejudice, and, in the next, having no title to the property, he has no interest in the question. But, as the appeal was from an interlocutory judgment on a collateral question, there can be no final judgment here, but the cause must be remanded for further proceedings between the other parties; and as the question is raised in the record, it seems proper the Court should give an opinion on it, in (473) aid of the parties upon these or other proceedings to subject the land for the intestate's debts. Upon this question the opinion of the Court differs from that of his Honor. Both in section 4 and in section 18 it is expressly provided that the mode of proceeding prescribed in the act shall only be in use when the will may have been proven or letters of administration granted on or after February 1, 1847. When there is a will there can be no mistake as to the construction; for, without any regard to the date of the will or the period of the testator's death, or the qualification of the executor or administrator *cum testamento annexo,* the jurisdiction is determined by the period of the probate of the will, and by that alone, according to the tenor of the act. It seems plain that the provision intended to designate explicitly some certain event and period for the important changes introduced, not only as to the mode of proceeding to subject real estate, but as to the application thereof or the proceeds to the debts, so that the creditors and representatives of deceased debtors might know exactly their rights and duties at the different periods, before and after that day. An administrator with the will annexed is thus plainly excluded, when the will was proved before February, 1847, though his letters were granted afterwards. As the reason for that provision arises out of the rights of the creditors to preferences, it follows, when the original administration was before February, 1847, that the administrator *de bonis non,* subsequently appointed, stands on the same ground with the administrator with the will annexed, above supposed. But that is put beyond all question by the additional enactment in the close of section 18 that "the present mode of proceeding against real estate shall be in use in all cases when the will may have been proven or letters of administration granted prior to that day," (474) that is, prior to 1 February, 1847. Upon the grant of the first administration, the rights of the creditors, as between themselves, were determined by the law then in force, as were also the means of obtaining satisfaction by the various legal and

equitable remedies, according to the nature of the securities and of the assets, as legal or equitable; and the provisions under consideration were intended as a plain declaration that neither those rights nor remedies were to be interfered with in any existing case or any one that might arise thereafter, provided there had been, or should be, a probate of the deceased debtor's will, if he left one, or an administrator on his estate, if intestate, before the first of February following, by which time it might be expected the new law would be generally known. Whatever obscurity may rest on other parts of the act or difficulties arise out of its provisions, those upon this point seem sufficiently plain, and show that the present case is not embraced in the act, and that it was erroneous to entertain the petition.

The decision of the Court, however, is that there is no error in the judgment against John Felton, from which he appealed. That will be certified to the Superior Court, with directions to proceed as between the other parties according to right and justice.

PER CURIAM. Ordered to be certified accordingly.

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(475)

THE STATE v. DARLING CHERRY.

Whether, when a man presents a pistol at another, threatening to shoot, and the pistol is not loaded, he is guilty of an assault, may admit of some question; but the man charged, clearly, cannot be excused, unless he proves that it was not loaded. The State is not bound to prove that it was loaded.

APPEAL from the Superior Court of Law of MARTIN, at Fall Term, 1849, *Bailey, J.*, presiding.

This was an indictment in the usual form for an assault and battery. Upon the trial it was proved that the prosecutor was a constable and had in his hands an execution against the defendant, under which he seized a negro belonging to the defendant. Whereupon the defendant, standing within a few feet of the prosecutor and within carrying distance of the pistol, presented the same at the prosecutor, remarking to him, "If you do not turn that negro loose I will shoot you," by which the prosecutor was put in fear. The prosecutor did not turn the negro loose, and the defendant immediately lowered the pistol and went away.

The defendant's counsel contended that, as it did not appear that the pistol was loaded, the defendant was not guilty. The

court charged the jury that if they believed the facts deposed to were true, the defendant was guilty in law of an assault.

The jury found the defendant guilty of an assault, (476) and from the judgment on the verdict the defendant appealed.

Attorney-General for the State.
Biggs for defendant.

PEARSON, J. When a man presents a pistol at another, threatening to shoot, he puts him in fear, and gives him a legal excuse for a battery, and it may be questioned whether the act can be excused by proving that the pistol was not loaded, without also proving that the other person knew that fact. In this case there was no proof that the pistol was not loaded, and the question is, Was the State bound to prove that it was loaded? We entirely concur with the judge in the court below. The fact that it was not loaded is a matter of excuse, and must be proved by the defendant. The fact was within his knowledge, and as by his act (actions, it is said, speak louder than words) he represented the pistol to be loaded, he has no right to complain that such is *prima facie* taken to be the fact, unless he proves to the contrary.

PER CURIAM. Judgment affirmed.

Cited: S. v. Hinson, 82 N. C., 598; *S. v. Scott,* 142 N. C., 585.

(477)

THE STATE v. ANTHONY BURROWS.

1. The provisions of the act of 1811, ch. 814, Rev. Code, Revised Statutes, ch. 34, sec. 61, punishing the cheating by false tokens, etc., do not apply to the case of conveyances of lands.

2. Where the charge intended to be made in such an indictment is that the defendant intended to cheat the plaintiff out of twenty acres of land, the excess in quantity over thirty-five acres, the indictment should expressly aver that there was, in fact, such an excess of twenty acres.

3. Where the true ground of complaint was that the defendant, by means of a forged paper, induced the prosecutor to execute a deed for 35½ acres of land instead of 55½ acres, thereby defrauding the prosecutor, the indictment should distinctly aver this fraudulent purpose; but, though this be a fraud, it does not come within the definition of any crime or misdemeanor known either to the common or statute law.

STATE *v.* BURROWS.

APPEAL from the Superior Court of Law of MARTIN, at Fall Term, 1850, *Bailey, J.*, presiding.

The defendant was tried upon the following indictment:

STATE OF NORTH CAROLINA, Martin County. } Superior Court of Law, Fall Term, 1849.

The jurors for the State upon their oath present, that Anthony Burrows, late of the county of Martin, on the first day of May, in the year of our Lord one thousand eight hundred and forty-nine, with force and arms, at and in the county of Martin aforesaid, unlawfully, knowingly and designedly, a certain forged paper in writing as a true paper in the proper handwriting of one Thomas R. Cofield, falsely, fraudulently and deceitfully did exhibit to one Eli Cherry (the said Eli Cherry having theretofore agreed to sell to the said Anthony Burrows a tract of land, situate in the county of Martin, at the price of $1 an acre, and both the said Eli Cherry and Anthony (478) Burrows having requested the said Thomas R. Cofield to survey the said tract, in order to ascertain the number of acres contained, and the said Thomas R. Cofield having surveyed the same and made a plat, as requested, and delivered the same to the said Anthony Burrows, to be exhibited to the said Eli Cherry before the execution of a deed, whereby the said tract of land was to be conveyed from the said Eli Cherry to the said Anthony Burrows), in and by which false and forged writing it was made to appear by the writing thereof that the said tract of land had been surveyed by the said Thomas R. Cofield, and contained only thirty-five and one-half acres of land, by reason of which said forged paper the said Anthony Burrows, on the day aforesaid, at and in the county aforesaid, unlawfully, knowingly and designedly, falsely, fraudulently and deceitfully did obtain a deed of conveyance from the said Eli Cherry for the tract of land aforesaid, wherein and whereby the said tract of land was described as containing thirty-five and one-half acres of land at the price of $35.50, and for payment thereof to the said Eli Cherry, the said Anthony Burrows then and there executed his bond to the said Eli Cherry for the said sum of $35.50, with the intent then and there to cheat and defraud the said Eli Cherry of twenty acres of said tract of land of the value of $20; whereas, in truth and in fact, the said plat and survey so made as aforesaid by the said Thomas R. Cofield, when delivered to the said Anthony Burrows by the said Thomas R. Cofield as aforesaid, did represent the said tract of land to contain fifty-five and one-half acres of land, and the said An-

thony Burrows, after the said plat came to his hands and before he exhibited it to the said Eli Cherry as aforesaid, at and in the county aforesaid, unlawfully, knowingly, designedly, falsely, fraudulently and deceitfully did alter and change (479) the writing of the said Thomas R. Cofield on the said plat, so that the said tract, by means of the said alteration and change, was described as containing only thirty-five and one-half acres, to the great damage and deception of the said Eli Cherry, to the evil example of all others in the like case offending, against the form of the statute in such cases made and provided, and against the peace and dignity of the State.

On the trial of this indictment, upon the plea of not guilty, the evidence was that the prosecutor, Eli Cherry, owned a tract of land in the county of Martin, and that he agreed with the defendant to sell the same to him at $1 per acre; that they agreed upon the boundaries, but did not know the quantity, and selected one Thomas R. Cofield to survey the same to ascertain the number of acres. It was further agreed, that after the survey was made and the number of acres ascertained by a plat, the surveyor should hand the plat which he had made to the defendant, in order to procure a deed for the said land from the prosecutor; that, in pursuance of the said agreement, Cofield (accompanied by the prosecutor and the defendant), surveyed the said tract of land, made a plat by lines, words and figures, and found that it contained fifty-five and one-half acres of land; that the said plat contained within its course and distance, and about the middle thereof, the figures and letter 55½ A; that the plat, with these figures upon it, was handed to the defendant; that while the plat was in the defendant's possession he said to a witness, "How easy it would be to alter the figure 5 into a 3, and that he would do so; and the witness must say nothing about it." The defendant afterwards handed the plat to the prosecutor, with the first figure 5 of the figures 55½ changed into the figure 3, so as to represent by the said figures 35½ acres of land, instead of 55½ acres. The prosecu- (480) tor examined the same, and believing the land contained but 35½ acres, and believing that was the plat made by the surveyor, Cofield, and having no suspicion that it had been altered, agreed with the defendant to execute a deed to him for the land embraced within the said plat. A paper-writing was prepared, conveying to the defendant the land embraced within the courses and distances of the said plat, and described as conveying thirty-five and one-half acres only, when it conveyed fifty-five and one-half acres, in consideration of $35.50 paid

by the defendant to the prosecutor. The courses and distances mentioned in the deed were the same as those mentioned in the plat, with the exception of the distance of one line, as to the number of poles in the said line. The number of poles in the said line was left blank, at the request of the defendant; but there were trees at the beginning and termination of the said line, which trees were marked by the surveyor, and agreed upon by the prosecutor and defendant as the correct *termini* of the said line. The paper-writing, thus prepared, was executed by the prosecutor and delivered to the defendant as his deed, with a request that the blank should be filled up shortly thereafter, because he (the prosecutor) was fearful that he (the defendant) would run beyond the line into his (the prosecutor's) land. The courses, the lines and distances of the said plat were correctly made and laid down on the said plat by the surveyor. The name of the surveyor was not to the said plat, but it was all in his handwriting, except the figure 3 substituted for the figure 5.

The defendant's counsel objected that there was a variance between the proof and the charge in the bill of indictment; that, according to the proof, it did not appear that by "the false and forged writing it was made by the writing thereof that the said tract of land had been surveyed by the said Thomas R. Cofield and contained only thirty-five and one-half acres"; and, (481) further, it was charged in the bill of indictment that the fraudulent means resorted to by the defendant was with the intent to cheat and defraud Eli Cherry of twenty acres of land, whereas the proof showed that he intended to cheat and defraud Cherry of $20, and not of his land. It was further insisted by the defendant that the number of poles being left blank in the paper-writing handed to him as the prosecutor's deed, although it appeared that the blank was afterwards filled up with the number of poles, yet it was not a deed sufficient to convey lands and tenements, because there was no evidence that the prosecutor assented to the filling up of that blank, nor was there any evidence of a redelivery. It was further objected that, admitting the charge in the bill of indictment to be true, it was not an indictable offense; that real estate was not embraced in the statute (Rev. St., ch. 24, sec. 61) by the words used or any of them, to wit, "money, goods, property or other thing of value"; that it was not intended by these words in the statute to include any other than personal property. It was further insisted that if it was an indictable offense under the statute, the bill of indictment was insufficient: 1. Because the bill of indictment did not negative the allegation that the

plat was forged and was made to appear as containing thirty-five and one-half acres of land. 2. It was not alleged, nor did it appear by the bill, except by inference, that the deed conveyed more, or the plat actually embraced more, than thirty-five and one-half acres, and further, that it is nowhere alleged that the land conveyed to the defendant was the land of the prosecutor; and if it did not belong to him or was not conveyed with warranty, he was not and could not be defrauded.

The questions at law which could be urged in arrest of judgment were reserved by the court. The court summed up the evidence and charged the jury that if the prosecutor agreed to sell a tract of land which he owned, and the (482) defendant agreed to purchase the same at the price of $1 per acre, and they selected the witness, Thomas R. Cofield, to make a survey to ascertain the quantity, and the agreement was that Cofield, after making the survey and plat, should hand the plat to the defendant, in order to procure from the prosecutor a deed for the land contained in the survey; and the plat embraced fifty-five and one-half acres or any number of acres over thirty-five and one-half, and that the defendant altered, or procured another, who altered, by his consent, the figure 5, so as to make it appear as if the plat contained thirty-five and one-half acres of land instead of fifty-five and one half, and this was handed to the prosecutor as a true plat, with the fraudulent design and purpose of procuring a deed from the prosecutor for all the land embraced in the said plat, and the prosecutor, being misled and deceived by the defendant, and supposing that the plat exhibited to him contained but thirty-five and one-half acres, executed a deed to the defendant, by which he conveyed to him fifty-five and one-half acres, or any number of acres over and above thirty-five and one-half, in consideration of $35.50 paid by the defendant, the defendant would be guilty of cheating and defrauding the prosecutor of twenty acres of land, or the amount over and above the thirty-five and one-half acres which he paid for, as charged in the bill of indictment; and that, although a blank was left in the paper-writing, as to the number of poles of one of the lines, if the points of beginning and termination of the said line were fixed upon and agreed to by the prosecutor and the defendant, and marked by the surveyor as the *termini* of the said line, and the paper was handed to the defendant as the act and deed of the prosecutor, it was in law a valid deed to convey the land embraced in its boundaries, although the blank was filled up afterwards by the defendant in the absence of the prosecutor and without any redelivery by him.

(483) The jury found the defendant guilty. The defendant moved for a new trial for misdirection, which was refused. He then moved in arrest of judgment, which last motion was sustained, and the judgment was arrested. Both the defendant and the Attorney-General prayed an appeal, which was allowed.

Attorney-General for the State.
Briggs and *Rodman* for defendant.

PEARSON, J. The judgment was properly arrested. There are three fatal objections to the indictment: 1. Land is not included within the operation of the statute. It is true, the words are very general, "money, goods, property, or *other things of value*," "or any bank note, check or order for the payment of money, etc." But they must be construed with reference to the nature of the offense, the mischief intended to be guarded against, and the particular terms used in connection with the general terms. Larceny at common law was confined to "goods and chattels"; it did not extend to land, because land could not be feloniously taken and carried away, except insignificant parcels thereof, and there was no mischief complained of in that regard. By the act of 1811, ch. 814, Rev. Code, Rev. St., ch. 84, sec. 23, larceny is extended so as to include "any bank note, check or order for the payment of money issued by or drawn on any bank or other society or corporation within this State or within any of the United States, etc." Section 24 includes corn, wheat, cotton, rice, etc., growing or standing together in any field, etc.; this was necessary because these articles, being attached to the land, did not fall within the rule at common law, but, it was supposed, fell within the mischief to be guarded against.

By the *same act* of 1811, ch. 814, Rev. St., ch. 34, sec. 61, it is provided that "if any person shall knowingly and de-
(484) signedly by means of any forged counterfeit paper, etc., obtain from any person, etc., any money, goods, property or other things of value, in any bank note, etc., check or order for the payment of money, issued by or drawn on any bank or other society or corporation within this State or any of the United States, etc.," and goes on in the *very words* of section 23 and concludes by subjecting the party offending to the pillory, public whipping not exceeding thirty-nine lashes, etc., the appropriate punishment of larceny.

Thus we are furnished with a key whereby to unlock the meaning of the statute. It was justly considered as great a mischief to be defrauded of property by means of a forged or counterfeit paper, etc., as to be deprived of it by means of a

felonious taking and carrying away, and the object was to extend the principle to cases where property was obtained in this fraudulent manner. Money, goods and chattels were included in common-law larceny, and bank notes, checks or orders, etc., were included in larceny as extended by statute; so the same statute under consideration is made in express terms to embrace all of these; it may be that *"other things of value"* was inserted to include corn, wheat, etc., growing and standing ungathered, but it would be a strained construction to make it include *the very land,* for that is not the subject of larceny at common law, and as extended by the statute. It would be to make the corollary or sequent embrace a subject not embraced by the original proposition, which is bad logic as well as bad law.

2. The land was bargained for by metes and bounds, and the deed is made corresponding thereto. The charge is that the defendant cheated Cherry out of twenty acres of land, to wit, the excess in quantity over thirty-five and one-half acres. But there is no averment that, in point of fact, the tract of land contained more than that number of acres; so *non constat* that he cheated him out of any land, and he certainly did not do it, unless the tract really contained more than that (485) quantity. It is true, the indictment was that the plat made by Cofield represented the said tract of land to contain fifty-five and one-half acres, and that the defendant altered the plat, so as to make it thirty-five and one-half acres, but that does not make good the charge of cheating Cherry out of the excess over thirty-five and one-half acres, without a direct avowal of the existence of such an excess; it may be the plat was incorrect, and that the tract contained but thirty-five and one-half acres or a less number; and, if so, Cherry was not cheated out of any land, the plat to the contrary notwithstanding.

3. The intent charged is "to cheat and defraud the said Cherry of twenty acres of said tract of land, of the value of $20." It seems to us the indictment does not "fit" the case. No more land was conveyed than was agreed upon by the original contract; so Cherry was not cheated out of any land. We do not adopt the suggestion that the indictment should have charged the intent to cheat Cherry out of "$20." He never had the $20, and therefore it could not be said that the intent of the defendant was "to obtain" from him that sum by means of the forged paper. The true ground of complaint is that the defendant, by means of the forged paper, induced Cherry to *execute a deed* for fifty-five and one-half acres of land upon the receipt of $35.50, and thereby obtained the conveyance without paying for twenty acres of land; so the fraudulent intent was to procure

the deed upon the payment of $35.50, instead of $55.50. This is a fraud, but it does not come within the definition of any crime or misdemeanor known either to the common or statute law. There is no error. This opinion will be certified.

PER CURIAM. Ordered to be certified accordingly.

Cited: S. v. Munday, 78 N. C., 461.

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(486)

PETER ADAMS v. HICKORY NUT TURNPIKE COMPANY.

The true construction of the act of Assembly incorporating the Hickory Nut Turnpike Company is that the State road, where it crosses the Blue Ridge at the Hickory Nut Gap, is not abrogated by the said charter, but is to be continued and kept in repair by the road overseers in their respective counties, until the turnpike is completed; and that the company, for the purpose of constructing the turnpike, has the privilege, when it is located along the State road, to enter upon it and obstruct it, when, where, and as long as is reasonably necessary to enable them to make their improvements, and, when it is located near the State road, the same privilege is conferred, to be exercised in a reasonable manner, in reference to the interest of the company and the convenience of the public—the latter being made, for a reasonable time, to give place to the former.

APPEAL from the Superior Court of Law of GUILFORD, at Fall Term, 1850, *Manly, J.,* presiding.

H. W. Miller for plaintiff.
Bynum and *Kerr* for defendant.

PEARSON, J. The plaintiff was a contractor for carrying the mail in stage coaches from Salisbury to Asheville, his route passing along the State road from Rutherford to Buncombe, crossing the Blue Ridge at the Hickory Nut Gap. This was case for damages by reason of obstructions placed in the road by the defendants, whereby the plaintiff's stages were frequently detained and in one instance a stage upset.

The defense was that by virtue of an act of the General Assembly the defendant had a right to shut up the part of
(487) the State road where the damage was occasioned, during the time allowed by said act for the construction of a turnpike, that part of the State road being "abrogated" by a grant to the defendants. His Honor, in making up the case, says: "The only question intended to be raised in this case is

whether the turnpike company, by virtue of their charter, had a right to close up the old road and keep it closed at pleasure." His opinion was against the defendants upon this point, and to this they except. The case is made in reference to this point alone, and we are therefore confined to it.

The act incorporates the company with a capital of $10,000, "for the purpose of making and keeping in repair a turnpike road, commencing at Cove Creek bridge in Rutherford County, thence *along or near the State road,* crossing the Blue Ridge at Hickory Nut Gap, to Joseph Gavin's in Buncombe County." "The company shall have power to appoint commissioners to lay off and mark the location of said road." "The commissioners shall have power to assess damage in favor of any person through whose land said road may pass. The road shall be twenty feet wide, clear of obstructions, except where side cuttings may be necessary, in which case it may be twelve feet wide. The ascent or descent of no part of the road shall exceed one foot perpendicular to ten feet horizontal. *When* the road *shall be received* by a commissioner appointed by each of the county courts of Rutherford and Buncombe to examine and receive so much of said road as may be situate in their respective counties, then it may be lawful for said company to erect a tollgate, etc. The said road shall be and is hereby declared to be a public highway, *when completed.* The charter to be null and void unless carried into effect within two years from its passage."

It was expected that the turnpike would in some places pass along the State road, in others near it, and in others diverge from it. But it was to cross the mountain at the (488) same gap. The purpose was to improve the communication across the mountain, between the points designated, and the turnpike, *when completed,* was to be a public highway and take the place of that part of the State road, so as to connect the other two ends, and such part was then to be discontinued, because, so far as the public was concerned, it would be no longer necessary to burthen the counties by keeping it up; and so far as the company was concerned their profits would be interfered with.

But the defendants take higher ground, and insist that this part of the State road was "abrogated" or discontinued as soon as the turnpike was marked off and located by the commissioners, or, at all events, as soon as the work was commenced. They insist that it would otherwise be impracticable to make these improvements, and from this they infer a legislative grant of this part of the State road and their right to shut it up, not when

the turnpike was completed, but as soon as it was located and operations commenced. To this proposition we cannot yield our assent.

We learn from the case that this was a part of the State road, and was used for transporting the mail, and we know, as a public matter, that this State road was one of the great thoroughfares between this State and Tennessee, and the only line of communication between Rutherford, Buncombe, and several other counties. In the absence of any express legislative enactment discontinuing a part of this road, we believe it would be doing violence to the intention of the Legislature to discontinue it by implication until a better road was completed and in a condition to take its place, because thereby the public would be subjected to a grievous inconvenience, and the interest of the company does not imperatively call for it until they can demand toll.

(489) The true construction of the charter, taking it altogether, is that this part of the State road is to be continued and kept in repair by the road overseers in their respective counties until the turnpike is completed, and that the company, for the purpose of constructing the turnpike, has the privilege, when it is located along the State road, to enter upon it and obstruct it, when, where, and as long as is reasonably necessary, to enable them to make their improvements, and, when it is located near the State road, the same privilege is conferred, to be exercised in a reasonable manner in reference to the interest of the company and the convenience of the public, the latter being made for a reasonable time to give place to the former.

If a company is incorporated to improve the navigation of a river, already used for some purposes, for flat-bottomed boats or to raft timber, for instance, there can be no inference of an abrogation of the right of navigation and of a right on the part of the company to stop it, except so far as it may be reasonably necessary to enable the company to make their improvements; for the object is not to discontinue, but improve, the navigation, thus showing that the Legislature is aware of the importance of the communication, and therefore cannot be presumed to intend to deprive the public of it, except so far as is reasonably necessary to make the improvements. So, in this case, the object being, not to discontinue, but to improve a part of the road, it is to be presumed that the Legislature intended the public to use it as a highway, so far as such use is not inconsistent with the rights of the company, exercised in a reasonable manner, until there is a better road to take its place.

PER CURIAM. Judgment affirmed.

(490)

THOMAS P. DEVEREUX v. HENRY K. BURGWIN ET AL.

1. Tenants in common agreed to a division of their land, and covenanted that it should be referred to A and B to value their respective parts, and that the party refusing to abide by the award should pay a certain sum, as *stipulated damages*, and not as a penalty. The covenant further provided that "the valuation should be made upon such examinations and surveys as the referees might think proper, of which they were to be the sole and exclusive judges." The award having been made, and one of the parties objecting: *it was held*, upon a suit for the stipulated damages, that the award was good, notwithstanding but one of the referees made the survey, the other relying upon such survey and on his own previous knowledge of the land, the referees having, by the terms of submission, a discretionary power to make such surveys as they might think proper:

2. *Held*, further, that the award cannot be impeached in a *court of law* by showing that it was procured to be made unfairly and by the exertion of undue influence:

3. *Held*, further, that the award cannot be impeached by showing that, after the submission, one of the arbitrators had become addicted to intemperance to such an extent as to impair his mind, unless it be further shown that, at the time he made his award, he was so drunk as not to know what he was doing, or his intemperance had been carried to such an extent as to reduce him to a state of *fatuity*, so that he had no mind.

4. These two last conclusions do not apply to cases where the award is made under a rule of court. There the court retains a supervising power, and will see that the award was not obtained by unfairness or undue means, when a summary judgment is moved for.

5. The party who sues to recover the stipulated damages is not entitled to claim interest, even from the date of his writ.

6. In England the rule is that interest is to be allowed where there has been an express provision to pay interest, or where such promise is to be *implied* from the usage of trade or other circumstances. But for goods sold, money lent, money paid, work and labor done, or on a guarantee, interest is not allowed, unless there be an express or implied agreement. Our decisions have extended the rule, and for money lent, or money paid or had and received, or due on an account stated, the jury ought to be instructed to allow interest, the promise to pay being implied from the nature of the transaction. And in trover and trespass *de bonis asportatis* the jury may, in their discretion, allow interest upon the value from the time of the conversion or seizure, as a part of the damages, so as to compel the wrongdoer to make full compensation by charging him with the price as at a *cash sale*.

7. When both parties appeal from a judgment, the clerks of the Superior Courts must make out two transcripts, so as constitute,

as there really are, two cases in the Supreme Court. When this is neglected the clerk of the Supreme Court will state two cases on his docket, and charge costs in each case.

(491) APPEAL from the Superior Court of Law of NORTHAMPTON, at Fall Term, 1849, *Bailey, J.*, presiding.

B. F. Moore and *Winston, Sr.*, for plaintiff.
J. H. Bryan, Barnes and *Smith* for defendants.

PEARSON, J. The parties, being tenants in common of valuable real estate, agreed upon a division, and executed a covenant to submit the valuation of the respective parts to the arbitration of Mr. Britton and Mr. Smith; but it was agreed that either party might refuse to abide by the award, in which event the party refusing was to pay to the other the sum of $1,000, which sum was declared to be *stipulated damages,* and not a penalty. The arbitrators made their award, and the defendants refused to abide by it; whereupon the plaintiff brings this action to recover the $1,000.

In the covenant of submission there is this clause: "The valuation to be made upon such examinations and surveys as the referees may think proper, of which they shall be the sole and exclusive judges."

(492) The defendants, under the plea of "no award," offered to prove that Smith did not go upon the land or make any examination of the premises; and insisted that the award had not been made according to the terms of the submission. They also offered to prove that the plaintiff had interfered with one of the arbitrators and exerted undue influence over him; and insisted that the award was not valid, because it had been procured by unfairness on the part of the plaintiff. They also offered to prove that, after the submission, Mr. Britton had become addicted to intemperance to such an extent as to impair his mind; and insisted that, for this reason, the award was not valid and was void.

His Honor rejected the evidence as immaterial and not tending to establish the issue. To this the defendants excepted.

There is no error. By the terms of the submission the arbitrators were to make such examination and surveys as they might think proper; and of this they were to be the exclusive judges. Language could not be more definite; and if the arbitrators thought proper to have the examination and surveys made by one of them alone, the other depending upon his own prior knowledge of the premises and the report of his fellow as

to the number of acres in the different tracts and the quantity of river bottom, second bottom, swash and upland, in the several tracts, the parties had no right to complain because the arbitrators in so doing acted within the terms of the agreement. There is then *"an award"*—the decision of judges of the parties' own choosing, acting within their jurisdiction (so to call it) on the terms of the submission.

The next question is, Can this (judgment or) award be impeached in a *court of law,* by proving that it was procured to be made unfairly and by the exertion of undue influence? It is clearly settled to the contrary, upon the same principle that, under the plea of *"non est factum,"* if the execution (493) of the deed is proven, it cannot be avoided in a court of law by proof that it was *procured to be* executed by means of falsehood and misrepresentation or other fraud. There must be fraud *in the "factum,"* as by substituting one paper instead of the one intended to be executed, so as to show that the party did not intend to execute the paper he was thus made to sign, seal and deliver as his deed.

We also concur with his Honor on the third question. If it be proven that at the time an arbitrator made his award he was so drunk as not to know what he was doing, or if his intemperance had been carried to such an extent as to reduce him to a state of *fatuity,* so that he had no mind, it may be that a court of law would pronounce a paper signed by him and purporting to be his award, to be in fact no award, for the want of a legal capacity to make one, in the same way that a paper signed, sealed and delivered under such circumstances is *not the deed* of the party.

The defendants did not pretend to be able to make any such proof, but offered merely to show that his "mind was impaired" —was not as strong and vigorous as it had been. This might have given either party a right to insist upon substituting another arbitrator in his stead, but it ought not to have been heard as ground to avoid the award.

These conclusions, of course, do not apply to cases where the award is made under a rule of court. There the court retains a supervising power, and will see that the award was not obtained by unfairness or undue means when a summary judgment is moved for.

The judgment is affirmed so far as it is appealed from by the defendants.

The plaintiff insisted that he was entitled to interest upon the $1,000, from the time the defendants refused to abide by the award; if not, from the time he filed his bill (which bill

(494) was filed to compel the specific execution of the contract); if not, at least from the time his writ issued. His Honor refused to allow any interest whatever, and to this the plaintiff excepts, and he also appealed. There is no error. It is clear the plaintiff had no claim to interest—at all events, until after the proceeding in equity was determined; for by his bill he seeks a specific performance of the contract, and insists that the defendants had forfeited their right to refuse to abide by the award and pay the $1,000 stipulated damage, on account of their laches in refusing to say, definitely, whether they would or would not abide by the award, and pending his proceeding in equity he would not have received the $1,000. How can he claim interest for the time during which he was denying the right of the defendants to pay the money? See *Devereux v. Burgwyn,* 40 N. C., 351. But we do not think he is entitled to interest even from the date of his writ. The act of 1786, Rev. St., ch. 13, sec. 4, provides that all bonds, etc., and signed accounts shall bear interest. This act is amended in 1808, Rev. St., ch. 31, sec. 96, directing the clerk, upon judgments by default, to calculate interest without a jury of inquiry. We do not consider this act changes the law in regard to interest, in cases where it was allowed before, which do not come within its provisions.

The question then is, independent of this statute, is interest allowed by law in cases like the one under consideration?

Interest is allowed where there has been an express provision to pay interest, or where such promise is *to be implied* from the usage of trade or other circumstances. *Higgins v. Sargent,* 2 B. and C., 349. For instance, where a party agrees to give a note on a contract for goods or otherwise, and fails to give it, he is liable for interest from the time such note would have arrived at maturity. But for goods sold, money lent, money paid, work and labor done, or on a guarantee, interest is (495) not allowed, unless there be an express or implied agreement. This is the rule according to the English cases. Our decisions have extended the rule, and for money lent, or money paid, or had and received, or due on an account stated, the jury ought to be instructed to allow interest—the promise to pay being implied from the nature of the transaction; *S. v. Blount,* 2 N. C., 4; *Hunt v. Jucks, id.,* 173; and in trover and trespass *de bonis asportatis* the jury may in their discretion allow interest upon the value, from the time of the conversion or seizure, as a *part* of the damages, so as to compel the wrongdoer to make full compensation by charging him with the price, as at a *cash sale.*

We are not at liberty to relax the rule any further, and to allow interest in this case would carry relaxation to the extreme.

The defendants have not had the money or the property of the plaintiff. It is true, the plaintiff has sustained damage to some extent, but the parties have not left the amount to be ascertained by a jury. They preferred to fix it themselves, and, in the absence of any stipulation for interest, there is no principle by which the plaintiff has a right to call on the court to allow interest, or to leave it to the discretion of the jury to do so. For the amount of damage is fixed; and the jury cannot enter into the consideration of the question of damage, so as to increase it, unless they were also at liberty to lessen it.

The judgment must be affirmed, so far as it is appealed from by the plaintiff.

In this case exceptions were taken by both plaintiff and defendant—both parties appealed, and the judgment is affirmed as against both of the appellants. This raises a difficulty as to the costs. To prevent a recurrence of the same difficulty, and to prevent cases from being made too complicated, the clerks of the Superior Courts will in future, when both parties appeal, make out two transcripts, so as to make, as there really are, two cases in this Court. In this case the clerk of (496) this Court will state two cases on his docket, and charge costs against the appellant in each case.

PER CURIAM. Judgment accordingly.

Cited: Hoke v. Carter, 34 N. C., 327; *Nichols v. Holmes,* 46 N. C., 363; *Rippey v. Miller, ib.,* 482; *Burrage v. Crump,* 48 N. C., 332; *Gardner v. Masters,* 56 N. C., 468; *Morrison v. Cornelius,* 63 N. C., 352; *Lewis v. Rountree,* 79 N. C., 126; *Patapsco v. Magee,* 86 N. C., 355; *Perry v. Adams,* 96 N. C., 347; *Davenport v. McKee,* 98 N. C., 508; *Brem v. Covington,* 104 N. C., 494; *Mills v. Guaranty Co.,* 136 N. C., 255; *Mosely v. Johnson,* 144 N. C., 275.

THE STATE TO THE USE OF BURTON W. HATHAWAY v. JAMES N. FLOYD ET AL.

A householder who wishes to avail himself of the provisions of the act of Assembly of 1844-5, ch. 32, Ire. Digested Manual, p. 118, may do so by making application and procuring the assignment to be made according to the act of Assembly at any time, even after a levy of an execution or attachment before the property is changed or converted by a sale.

APPEAL from the Superior Court of Law of CHOWAN, at a Special Term in December, 1850, *Battle, J.*, presiding.

This was an action of debt, on a bond executed by the defendant Floyd, and the other defendants as his sureties, on his being appointed a constable of Chowan County. The plaintiff produced and proved the execution of the bond, and showed that he sued out and placed in the hands of the defendant Floyd an attachment against one Caffee, an absconding debtor; that the same was levied by Floyd on goods and chattels of the defendant therein, sufficient to satisfy the amount of the attachment; that final judgment was regularly had thereon, the goods and chattels condemned, and a *venditioni exponas* awarded, which was also placed in the hands of the defendant Floyd. (497) Floyd was proved to have been a constable for the said county at the time of the issuing of the attachment and its levy and also at the time the *venditioni exponas* came to his hands, and for some eleven months afterwards. The defendants then showed that, on the levying of the attachment, Floyd placed the property, by the plaintiff's directions, in the hands of a Miss White, who was a sister of Caffee's wife, and was living in his family; and that on the award of the *venditioni* the plaintiff further directed him to let the property remain in her hands until Caffee's return home, he being expected home by his family, and that the constable indulged accordingly. And it was further in evidence that the plaintiff directed the defendant Floyd to permit the property to remain in Miss White's possession until 1 July. The plaintiff then proved that Caffee returned home and remained some four or five days, and went off again, but there was no evidence that Floyd knew of his return or departure; and it was also proved that he again returned and was seen by the defendant Floyd, and remained in Chowan for some weeks. The defendants then proved that, by three freeholders and a justice of the peace, the articles levied on under the attachment and directed to be sold by the *venditioni exponas* were assigned to the said Caffee, under the provisions of the act of 1844-5, ch. 32, Ire. Digest. Manual, p. 118.

The assignment was on 14 June, preceding 1 July aforesaid, and after Caffee's second return, and after the seizure under the attachment and the award of the *venditioni,* and while the latter was in Floyd's possession. On this assignment being made, Floyd abandoned the control of the property.

The plaintiff contended that none of the property was protected from this claim, for two reasons: first, that the property of an absconding debtor was not protected against an attachment, and therefore the act did not apply; secondly, that as the property, which consisted in part of household (498) and kitchen furniture, in addition to beds and bedding, was divested out of the defendant before the assignment, it was therefore not protected under and by virtue of the act. The defendant contended that, under the act aforesaid, the property might be laid off at any time before an actual sale under an execution, notwithstanding a lien by execution or attachment thereon; and that the property, under the circumstances of the case, was protected, and, supposing the evidence to be believed, the jury ought to find for the defendants. Of this opinion was the presiding judge, and he so charged the jury, who found a verdict for the defendants. From the judgment thereon the plaintiff appealed.

Heath for plaintiff.
A. Moore for defendants.

PEARSON, J. The failure to collect the debt is fully accounted for by the facts stated in the case, and we concur in the opinion that the defendants were not liable.

The delay in making sale was by the order of the plaintiff, who directed the goods to be left in charge of Miss White; and, after the debtor returned, he had a right to avail himself of the provisions of the act of the General Assembly passed in 1844, ch. 32 (118 Iredell's Digested Manual). He was, within the words of the statute, "a housekeeper," and notwithstanding the levy, had a right to have the property "laid off and assigned" as the portion to which he was entitled under the provisions of the act. The *"poor debtor"* is in time if he makes his application and procures the assignment to be made at any time before the property is changed and converted by a sale.

PER CURIAM. Judgment affirmed.

Cited: Schonwald v. Capps. 48 N. C., 343.

(499)

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

A and B, being infants and tenants in common of a tract of land, C, their mother, who was the administratrix of their deceased father, rented out the land to D, who entered into possession of it. The infants afterwards brought a bill in equity against C for an account of their estate, and charged her with having acted as their guardian in renting out the land, and obtained a decree for the amount ascertained to be due, including the rent; but it did not appear that the decree had been satisfied: *Held*, that D, not being a party to these proceedings in equity nor a privy to either of the parties, could not avail himself of them, so as to prevent his being sued as a trespasser.

APPEAL from the Superior Court of Law of BERTIE, at Fall Term, 1850, *Caldwell, J.*, presiding.

This was an action of trespass *quare clausum fregit.*

It was in evidence that the plaintiffs were seized and in possession of the *locus in quo* in 1841, as the heirs at law of their father, Edward Hardy; that they were infants and without a guardian; that Joseph Hardy, one of the plaintiffs, arrived at full age twelve months before the institution of this action; and the other plaintiff is still an infant. It was further in evidence that Mrs. Hardy was the administratrix of said Edward Hardy; and that one William Cherry, an agent of Mrs. Hardy, rented out at public auction the *locus in quo*, and one Holly bid off the same and assigned his bid to the intestate of the defendant and the said William W. Cherry; and that the defendant's intestate and the said W. W. Cherry entered on the premises, and,
(500) during 1841, cultivated the lands and used the fishery attached thereto. It was in evidence further, that at the Fall Term, 1845, of Bertie Court of Equity, the plaintiffs, by their guardian, Humphrey H. Hardy, filed their bill against Mrs. Hardy, the administratrix of the said Edward Hardy, for an account and settlement of the estate of the said Edward, in which they claimed for the rents of land received by the administratrix, and the administratrix, in her answer to the said bill, admitted that she appointed by parol the said William W. Cherry her agent for the settlement of the said estate, and that the said Cherry had rented out the lands of the plaintiffs. An account of the said estate was taken, in which the administratrix was charged with the rents of other lands belonging to the plaintiffs, and also with the rent of the *locus in quo* for 1841, at the sum bid for the same by the said Holly; and at the Fall Term, 1847, of the said court of equity a decree was entered in favor of the plaintiffs against the administratrix for the bal-

ance due, as appearing upon the said account, and in which decree it is declared that the administratrix had received the rents of lands belonging to the plaintiffs, for which she was liable to account. It did not otherwise appear that the said Holly or the intestate of the defendant or the said Cherry had paid the rent of the *locus in quo* to Mrs. Hardy; and there was no evidence that the said decree had been paid by the administratrix.

The court charged that, as the plaintiffs, by their guardian, and under the sanction of a court of equity, had elected to treat their mother as guardian and charged her with the rent of the land in question, they could not now convert the defendant's intestate into a wrongdoer.

The jury returned a verdict for the defendant. Judgment for the defendant, from which the plaintiffs appealed to the Supreme Court.

Biggs for plaintiffs.
W. N. H. Smith for defendant. (501)

PEARSON, J. The court charged "that as the plaintiffs by their guardian, and under the sanction of a court of equity, had elected to treat their mother as guardian and charged her with the rent of the land, they could not now convert the defendant's intestate into a wrongdoer." There is error.

In *Hardy v. Williams*, 31 N. C., 177, the same facts were presented between the same parties, in an action on the case in *assumpsit* for the rent of the land, and it was held that the action could not be sustained, because there was no privity between the plaintiffs and the defendant's intestate, and "that, although it was at the election of the plaintiffs to treat their mother as a wrongdoer, or as their agent, they were not at liberty, by *supposing* her to be an agent, thereby to affect the rights of third *persons* and make a privity where none before existed."

This was a decision as to the legal effect of the proceedings and decree in equity by the plaintiffs against Mrs. Hardy, in which she was charged with the rent of the land, and it was held that the proceedings and decree did not have the legal effect of creating a privity of contract between the plaintiffs and the defendant's intestate, because he was a *third person* and *his rights could not be affected*. For the very same reason his *liability* cannot be affected. When an attempt was made to charge him *as a privy*, he escaped upon the ground that he was a third person and not bound by those proceedings, and now, that an attempt is made to charge him as a *wrongdoer*, he cannot shift his ground, and invoke the aid of those proceedings to relieve

him from the position of a wrongdoer, by converting him into a privy. Estoppels must be mutual, and who is not bound by them cannot take advantage of them.

(502) If the decree had been satisfied, then the defendant could have availed himself of it, not as an estoppel, but a *satisfaction* of the cause of action.

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

REBECCA WILSON v. QUINTON PURCELL ET AL.

Property passes by a sale and delivery, notwithstanding an *executory* agreement to sell to another, and the receipt of a part of the price.

APPEAL from the Superior Court of Law of ROCKINGHAM, at Fall Term, 1850, *Manly, J.*, presiding.

This was an action of trover for a mare, in which it appeared that the defendants had, on 10 November, 1847, converted the mare by virtue of a process of *fi. fa.* against Urias Wilson, a son of the plaintiff.

George Wilson, a son living with his mother, testified that he bought the mare of a man of the name of Woollen in the spring of 1847, and after trying and finding that she worked kindly, sold her to his mother, and his mother, Urias having no animal with which to cultivate a crop, loaned the mare to him.

Henry Suthern, who worked a part of the plaintiff's farm in 1847, also testifies that George made the purchase of Woollen, and not long afterwards sold to the mother, and that the mother lent the mare to Urias.

Betsy Baker, defendant's witness, swore that the plaintiff said she had found out that the mare was bought by George

(503) for Urias, and she (the mother) was angry about it, and that George should make Urias pay him for it, else she would turn him off. It was accordingly agreed between the sons that Urias was to pay George for the mare as he might want it. She saw a small sum paid. This witness, as well as several others, testified that Urias worked and fed the mare during the summer of 1847.

A man by the name of Baker, also a witness in behalf of the defendants, swore the mare was bought by Urias, and that he worked her and used her and claimed her as his property.

Pascal, another witness for the defendants, also swore that

Urias was the purchaser of the mare; that she was selected by a man named Stewart, and that Urias rode her home and claimed her as his own.

Stewart, designated by the last witness as the person upon whose judgment the purchase was made, swore that he was not present at the sale at all, and knew nothing of it.

The defendants' counsel, in the course of his argument, when noticing the testimony of George Wilson, asked instructions from the court to the effect that if he was believed to be corruptly false in any material particular, his testimony should be rejected altogether. In the reply of the plaintiff's counsel this rule for judging of witnesses was not denied, but expressly admitted to be correct.

The court in the explanation to the jury did not notice the matter, for the reason that the court did not then, and does not now, perceive how it could be applicable to the plaintiff's witness.

In the course of his Honor's charge he informed the jury that if George sold and delivered the mare to his mother for a reasonable consideration, the property in the animal would pass, although George at the time might be under a promise to let his brother Urias have the mare whenever he might (504) pay for her, and although they might believe further that this arrangement had been partially carried into effect by payment of a portion of the money.

This part of the charge was excepted to, because of a want of evidence to make it pertinent.

Under other instructions from the court, not objected to, the jury found a verdict in favor of the plaintiff.

Rule for a new trial was discharged.

Kerr for plaintiff.
Morehead and *Miller* for defendants.

PEARSON, J. In the course of his Honor's charge he informed the jury that "if George sold and delivered the mare to his mother for a reasonable consideration, the property in the animal would pass, although George at the time might be under a promise to let his brother Urias have the mare whenever he paid for her, and although they might believe further that this arrangement had been partially carried into effect by payment of a portion of the money."

This part of the charge was excepted to.

His Honor announced a clear proposition of law, that property passes by a sale and delivery, notwithstanding an *executory* agreement to sell to another and the receipt of a part of the

price. This part of the charge, we think, was pertinent, and was called for to prevent a misapprehension on the part of the jury as to this question of law. In fact, it was the point upon which the case turned.

PER CURIAM. Judgment affirmed.

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(505)

DAVID WHARTON *v.* SOLOMON HOPKINS.

1. It is the settled law in this State that a debt due by an assignor of a bond or note at the date of the assignment may be pleaded as a set-off to an action by an assignee after maturity; but this departure from the statute, Rev. St., ch. 31, sec. 80, is put on the ground that a liberal construction is necessary to prevent evasion and injustice.

2. Where it is shown this injustice will not result, the rule is different. As when the assignor, at the date of the assignment, had an account against the defendant in the action, larger in amount than that which is attempted to be set off: *Held*, that the defendant could not avail himself of his account, as a set-off, in an action by an assignee on a note or bond assigned after maturity.

APPEAL from the Superior Court of Law of GUILFORD, at Fall Term, 1850, *Manly, J.*, presiding.

H. W. Miller for plaintiff.
Mendenhall and *Morehead* for defendant.

PEARSON, J. This was an action in case upon a promissory note. Hogg and Lindsay assigned the note sued on to the plaintiff, after maturity. The defendant relied on an account against Hogg and Lindsay, which he held at the date of the assignment, as a set-off. The plaintiff opposed this set-off by proof that, at the time of the assignment, Hogg and Lindsay, besides the note, held an account against the defendant of an amount greater than his account.

It was decided in the court below that this proof defeated the set-off. After a verdict and judgment against him, the defendant appealed.

(506) We think there is no error.

At common law, if a bill of exchange was assigned before maturity, the assignee took it subject only to indorsed credits; if after maturity, he took it subject to any legal defense that might have been made to it in the hands of the assignor at the date of the assignment, for it was dishonored, and the assignor was not allowed to evade the defense by transferring it to a third person. The Statute of Anne puts promis-

sory notes and our statute notes under seal on the same footing with bills of exchange. In the meantime the statute in regard to set-offs created a new legal defense; and the question was presented whether this new defense existing against the assignor at the time of the assignment was available against the assignee.

It is settled in England, after much hesitation, *Burrough v. Moss,* 10 B. and C., 558, that this new defense is not available, and that the suit of the assignee can only be met by a defense existing against the assignor at the date of the assignment, which was *connected* with the bill, as a payment; but that a set-off of a debt against the assignor, being a thing collateral and unconnected with the bill, is not a defense at law, although the bill was assigned after maturity, because the words of the statute embrace only a mutual debt which the defendant holds against the plaintiff, and does not extend to a debt which he holds against the plaintiff's assignor.

It is settled in this State that this new defense is available, and that the principle of the common law applies so as to bring it within the *meaning* of the statute of set-offs. *Haywood v. McNair,* 14 N. C., 231; *s. c.,* 19 N. C., 283.

It is unjust to attempt to evade a defense by making a transfer of a bill or note after maturity, and the principle applies as forcibly to a defense given by statute as to one (507) existing at common law. To allow any defense to be thus evaded would be a violation of the maxim, "no man shall take advantage of his own wrong," which is as fully recognized in courts of law as in equity. It is true, the set-off is not *connected* with the bill or note, and is collateral and may or may not be pleaded, as the defendant chooses; but what right has the holder to deprive him of this election? and is not a liberal construction of the statute to be adopted, when it is necessary to prevent an evasion of its enactments and a manifest wrong?

It seems to us our court has taken the true view of the subject, and that the English judges have fallen into the error, *"haeret in litera, haeret in cortice."* Indeed, their decisions are not reconcilable. When a factor sells goods without disclosing his principal, in an action by the principal the purchaser may make any defense that he could have made if sued by the factor. He may plead, as a *set-off* to the action of the principal, a *debt due by the factor.* "The principle is, the purchaser shall not be defrauded of a legal defense by the introduction of a third person to whom he is a stranger." *George v. Clagett,* 7 Term, 355. Barrington on Set-off, 44. This is a departure from the words of the statute to prevent evasion and injustice, and the reasoning would seem to call for it with much force, so as to

allow, as a set-off to the action of the assignee after maturity, a debt due by the assignor. It is true, the English cases take a distinction between mutual *credits* and mutual *debts*. The distinction is not substantial when both debts are at maturity and nothing remains to be done but to make application of one in satisfaction of the other. If a departure from the words of the statute is justified in the former case, it must be so in the latter, where transfer is made after maturity to evade a legal defense.

(508) Be this as it may, it is settled in this State that a debt due by the assignor at the date of the assignment may be pleaded as a set-off to the action by the assignee after maturity; and this departure from the words of the statute is put on the ground that a liberal construction is made necessary to prevent evasion and injustice. And the question presented in the case under consideration is whether this necessity is not met and removed by proof that, at the date of the assignment, the assignors had an account. We think this fact removes the ground for making a departure from the words of the statute, because the reason ceases. The assignors did no wrong, for they had an account to which the set-off might be applied, and there was, consequently, no attempt to evade a legal defense.

But it is said the defendant is deprived of his right to apply his set-off to the note or the account, as he might elect. This is true, but his legal defense is not evaded; and at the most he loses only the right of making a capricious application of his debt as a set-off, supposing him to have it. No injustice is done, for it can make no difference to him whether he pays the note or applies his account as a set-off to the account of the assignors, or applies his set-off to the note and pays the account. There is no evasion of his legal defense and no injustice done to him by refusing to allow his set-off to the note, or the contrary. The negotiability of the note is not unnecessarily trammeled, by which means the assignors are enabled to raise by a transfer the money which he ought to have paid, and the policy of the statute, which seeks to avoid a multiplicity of actions, is subserved; for, if the set-off is allowed, the assignee must sue the assignors, and they must sue the defendant, making two additional actions necessary, instead of one. The defendant's right to apply his debt to the note, or to hold it back for the account, if the suit was in the name of the assignors, is

(509) assumed; but, as above remarked, it would be a capricious application, and he can take no benefit from it, if the assignors choose to include both causes of action in the same declaration.

Upon the same reasoning it is held in the English cases of a sale by a factor, that if, before all the goods are delivered, the purchaser has notice of the principal, then his set-off of a debt due by the factor will not avail, for the reason ceases; and he has no right to complain that he is defrauded of a legal defense. "Justice is on the other side," and there is in such cases no ground to depart from the words of the statute. Babington on Set-off, 45, and the cases there cited.

PER CURIAM. Judgment affirmed.

Cited: Hurdle v. Hanner, 50 N. C., 361; *Neal v. Lea,* 64 N. C., 680.

JOHN McLEOD v. J. H. KIRKHAM.

1. In the case of a proceeding under the insolvent debtor's law, the court has authority to permit the schedule to be amended, so as to make more certain the description of the defendant's interest in matters there set forth, at any time before the oath is administered; and if the plaintiff is surprised, it is ground for a continuance.

2. It is sufficient to file the evidence of the debts set out in the schedule, which are in the possession and control of the defendant, at any time before the oath is administered.

3. It being a matter of public notoriety that proclamation money is wholly worthless, it is not necessary to state in the schedule the amount thereof with nicety, or file the same.

APPEAL from the Superior Court of Law of MONTGOMERY, at Fall Term, 1849, *Battle, J.,* presiding.

This was an application to be discharged under the (510) insolvent debtor's law.

The defendant was arrested under a writ of *ca. sa.*, returnable to this term of the Superior Court of Law for the county of Montgomery, and gave bond for his appearance to take the benefit of the act for the relief of insolvent debtors. He accordingly issued a notice, which was regularly served upon the plaintiff more than ten days before the first day of this term. The plaintiff objected that the notice was insufficient, but the court overruled the objection. The defendant filed with the clerk of the court, ten days before the first day of this term, his schedule, but did not file with the said clerk the notes and other papers therein referred to until the second day of the term, on which day the plaintiff filed the exceptions. The court decided that no further description of the claims to property in Eng-

land or Scotland, or of the amount of the proclamation money, was necessary, but that the description of the defendant's interest in his wife's land in the county of Halifax and his interest in the pension claims was not sufficiently specific, and, on his motion, allowed him to amend his schedule in that particular. The amendment having been made to the schedule, the defendant, by his counsel, moved the court that he should be allowed to swear to the same, and thereupon to be discharged. The plaintiff opposed the motion, because:

1. The notice was insufficient.

2. The notes, accounts, proclamation money, etc., were not filed with the schedule ten days before the first day of the term.

3. The amount of the proclamation money was not sufficiently specified.

4. The plaintiff's interest in the English claim was not sufficiently set forth.

(511) 5. The court allowed the defendant to amend his schedule without any authority for so doing; and insisted that he could not swear to his schedule at the term at which the amendment is made.

6. The defendant has not filed at all the notes and judgments against Medlin, Martindale and Campton, nor the constable's receipt for the same. The plaintiff further objects that neither the notes nor judgments against Medlin, Martindale and Campton, nor the constable's receipt for the same, are filed at all, and, for that reason, the defendant could not take the oath.

The court overruled all these objections, and ordered that the defendant be allowed to swear to his schedule and thereupon to be discharged. From which order the plaintiff prayed an appeal to the Supreme Court, which was granted.

Kelly for plaintiff.
Morehead for defendant.

Pearson, J. None of the objections to the right of the defendant to be discharged under the insolvent law are tenable, and there is no error.

1. The notice, a copy of which and of the schedule was served on the plaintiff, gave full information "of the intention of the defendant to avail himself of the benefit of the act."

2. We think the court had authority to permit the schedule to be amended so as to remove the objection for the want of certainty in the description of the defendant's interest in several matters there set forth, at any time before the oath was administered, and if the plaintiff was in any way surprised, it was ground for a motion to continue.

3. It was sufficient to file the evidence of the debts set out in the schedule, which were in the possession and control of the defendant, at any time before the oath was ad- (512) ministered. There is no reason for requiring them to be filed at the same time with the schedule. It may be they are not in the defendant's possession, and every useful purpose is answered if they are delivered at the time the discharge is moved for.

4. The defendant assigns a sufficient reason for not filing the notes and judgments against Medlin, Martindale and Campton. The schedule set out the fact that the papers are in the hands of one Putney, a constable in the city of Raleigh. They are thus put within the control of the officer in whom the title is vested by force of the statute for the benefit of the creditors. There is no evidence that the defendant had a constable's receipt for those papers.

5 and 6. It is a matter of public notoriety that proclamation money is wholly worthless and of no value, and the objection because the amount thereof is not stated with precision, and because the same was not filed, cannot be sustained.

PER CURIAM. Judgment affirmed.

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(513)

THE STATE v. JOHN TILGHMAN.

1. In order to make the declarations of a deceased person evidence as "dying declarations," it is not necessary that the person should be *in articulo mortis* (in the very act of dying); it is sufficient if he be under the apprehension of impending dissolution, when all motive for concealment or falsehood is presumed to be absent, and the party is in a position as solemn as if an oath had been administered.

2. A witness cannot be admitted to state that "he thought the deceased thought he would not die from his wounds." He cannot give his own opinion, but only depose to the state of the wounds of the deceased and what he *then* and *there* said and did, from which the Court may decide what he thought of his condition.

3. If the deceased, at the time he made the declarations, was, *in fact*, in a condition to make them competent evidence, a hope of recovery at a subsequent time would not render them incompetent.

4. There is a distinction between a cause for a *new trial* and a cause for a *mistrial;* the former is a matter of discretion, the latter a matter of law.

5. Where on a trial the circumstances are such as merely to put suspicion on the verdict by showing, not that there *was*, but that

there might have been, undue influence brought to bear on the jury, because there was opportunity and a chance for it, it is matter within the discretion of the presiding judge. But *if the fact be* that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or the prisoner, or if they be solicited and advised how their verdict should be, or if they hear other evidence than that which was offered on the trial, in all such cases there has been, in contemplation of law, *no trial*, and this Court, as a matter of law, will direct a trial to be had, whether the former proceeding purports to have acquitted or convicted the prisoner.

6. Where the facts in relation to the jury on a trial for murder were that the jury were placed in charge of an officer and confined in the ordinary jury-room; that they retired from the court on Thursday at 6 P. M. and rendered their verdict on Saturday at 10 A. M.; that while out the members of the jury separated at various times to obey calls of nature; that each one separated himself from the others more than once for this purpose, and one of them as often as six times; that, when they did this, they went, one at a time, under charge of an officer, and during such absence the other jurors remained together in the jury-room, with the door locked; that they went about fifty yards from the courthouse, and returned as soon as practicable, holding no intercourse with any one; that one of the jurors separated himself from his fellows and visited a drug store, about one hundred and fifty yards from the jury-room, for the purpose of procuring medicine, being sick; that he went under the charge of an officer, and held no conversation except with the keeper of the drug store, who asked him if they had agreed on their verdict, to which he replied, "they had not"; that this store was the most public place in the town of New Bern; that another juror separated himself from his fellows and stood on the outside of the jury-room, near the door closed, and conversed privately for ten or fifteen minutes with a third person, but what was said did not appear; that the jurors also ate and drank, while out, but not to excess; that a part of the time they did so with permission of the court, but when enjoined by the court not to eat or drink, they violated this injunction, contrary to the wishes of the officer who had them in charge; that several jurors wrote notes and dropped them from the windows of the jury-room, and also received notes from persons not of the jury, but neither the contents of the notes nor the names of the persons to whom sent or from whom received appeared; that some of the jurors conversed from the windows with persons in the street, on various subjects and about this suit, but what was said did not appear; and that some servants and small children had access to the jury-room, the servants for the purpose of carrying food and clothing to the jurors, and the children to see their fathers: *Held*, that these facts might, in the discretion of the presiding judge, have been a good cause for granting a new trial, but they could not justify the court in declaring, as a matter of law, that there was a mistrial.

7. The admission of dying declarations, as evidence, is not in opposition to that part of the Bill of Rights which says that "In

all criminal prosecutions every man has a right to be informed of the accusation against him, and to confront the accuser, and witnesses with other testimony."

APPEAL from the Superior Court of Law of CRAVEN, (514) at Fall Term, 1850, *Ellis, J.*, presiding.

The defendant was tried for murder. The bill was (515) found by the grand jury of LENOIR at Fall Term, 1850, and the case was removed by the State, upon the affidavit (517) of the solicitor, to CRAVEN, where it was tried at the present term of the court.

The solicitor called as a witness for the State one Joseph Wilson, who testified that he knew the prisoner at the bar, and also the deceased, Joseph J. Tilghman; they both lived formerly in Lenoir County, where Joseph J. Tilghman died on 15 August, 1850; that in the afternoon of that day, a few hours before night, the deceased parted with the witness at a hogpen on the land of the deceased, where he had gone to feed his hogs; that the deceased started towards his dwelling-house, about four hundred yards distant, and the witness went to resume his labor at which he had been engaged a short distance from the hogpen; that, in about eight or ten minutes after the deceased left, he heard the report of a rifle gun in the direction in which the deceased had gone; that the witness, upon hearing this, walked a short distance towards the place from whence the report emanated, when he saw the deceased walking rapidly towards his house, and apparently staggering; that he had his hat on his head at the time; that the witness returned to his work, and in a very short time thereafter heard an alarm at the house of the deceased, when he left his work and ran as speedily as he could to the house; that when he reached there he saw the deceased sitting in his door, bleeding profusely, and his wife was engaged in cutting off his hair, and in an effort to stop the flowing of blood; that the deceased had a wound on each side of his head, and one in the forehead just above the right eye, from which latter the blood was flowing; that, at the request of the deceased, witness started immediately to Kinston, about seven miles distant, for a physician, and as he started, he passed along the road leading from the hogpen to the house of the deceased, when he saw a wallet with corn in it lying in the road, (518) about two or three hundred yards from the hogpen, which he recognized as the same the deceased had while feeding his hogs at the time referred to. This witness further said that he went to Kinston as soon as he could and without delay, and

when he returned he saw Joseph J. Tilghman at his house, and he was then dead. The witness also stated that upon examination the same afternoon he saw a puddle of blood in the road, leading from the hogpen to the house of the deceased, about twenty-five or thirty steps from the wallet, and nearer the hogpen; that he saw the tracks of a barefoot person, pointing both ways between the wallet and puddle of blood, and that the deceased had on no shoes when he last saw him at the hogpen; that there was no blood between the wallet and the puddle spoken of, but there were frequent marks of blood between the wallet and the house of the deceased; that there was an impression upon the ground at the place where the puddle of blood was, similar to one made by a person lying down; that this witness lived with the deceased at the time as a laborer.

The solicitor then proposed to prove by this witness that the deceased told him just before his death that the defendant inflicted the wounds upon him, of which he died.

The prisoner's counsel objected to the testimony, and the court decided that it could only be admitted as the dying declarations of the deceased, made when all hope of recovery had forsaken his mind, and when he entertained the belief that he would speedily die from the effects of the wounds he had received, and that as yet such did not appear to be the case.

The solicitor was then permitted to lay the grounds for the admission of this evidence by calling witnesses to prove
(519) the condition of the deceased's mind at the time the declarations were made.

For this purpose Dr. Woodley was called by the State, who testified that he called to see the deceased on 15 August last at the summons of the witness, Wilson; that he found him dead when he reached his house; that the deceased had a wound two and three-fourths or three inches long on the left side of the head, laying bare the skull bone; on the right side of the head there was another wound that fractured the skull and detached a small portion of the skull bone; that there was a puncture wound just above the right eye, which turned, after it reached the skull bone, without breaking it, in the direction of the ear, passing under another bone below the temple and extending down in the neck. The witness probed it to the depth of three or four inches; thought it a gunshot wound, though he did not find the ball or search for its termination. The witness was of opinion that either this wound or the one upon the right side of the head would have produced death. The witness stated that he was a practicing physician, possessing peculiar knowledge and skill upon the subject of wounds.

The State then called Mrs. Susan Tilghman upon this part of the case, who testified that she was the widow of the deceased, and was at home on 15 August, when the deceased returned home with a wound upon each side of the head and one above the right eye; that he was bleeding when he came; that he said to the witness: "I shall leave you a widow before to-morrow morning"; that she and deceased then had some talk about the disposition of his property after his death, when they concluded it would be better to sell the land and keep the negroes; that she told the deceased she thought, if the blood could be stopped, he would yet recover, when he told her to stop the blood; that she did stop the blood and told him she thought he would recover and yet live longer than she would, and he re- (520) plied, *"Save me, if you can."*

This witness also stated that she thought the deceased thought he would not die from the wound, but the court refused to consider the witness' opinion as to what the deceased thought. This witness also said the last words she heard the deceased say were, "Save me, Wilson, if you can"; that the appeal was made to Wilson Tilghman, his brother, who was present. She further said that the deceased seemed addled like a drunken man; that he spoke very indistinctly, sometimes talking rationally and at other times foolishly.

The prisoner called Wilson Tilghman upon this part of the case, who testified that he was brother to the deceased and father to the prisoner; that he was at the house of the deceased on 15 August last, just before his death; that he did not believe the deceased thought he would die; heard him say, "Save me, Wilson, if you can."

This witness also stated that the deceased seemed addled and spoke indistinctly, saying some things intelligibly and others foolishly.

The prisoner's counsel still objected to the admission of the declarations of the deceased, for the reason that his request of the witnesses, to save him if they could, manifested hope on his part that he would still recover, and a belief that it was possible for him to survive. And that, even though he had entertained the opinion at one time that he would die from the effects of the wounds, yet he subsequently changed that opinion and entertained hopes of recovery; and that any declaration made while laboring under the first impression would not be admissible, in consequence of such subsequent change of opinion and hopes of recovery; and that the expression referred to, (521) "save me if you can," was evidence that the deceased had changed his opinion that he would die from the effects of the

wounds, if he had before entertained such opinion; and that the declarations were inadmissible for the further reason that the deceased was *non compos mentis* and insane at the time they were made.

The court concurred with the prisoner's counsel in the correctness of the legal positions assumed, but expressed the opinion that the deceased did entertain the opinion that he would soon die from the effects of the wounds, and so expressed himself; and that it did not appear from the testimony that he had subsequently changed that opinion; and that the exclamation, "save me if you can," rather manifested a desire to live than a hope that he would recover; that the nature of the wounds was calculated to confirm the deceased in the opinion that he would necessarily die from their effects in a short time; and that it did not appear from the evidence that the deceased was insane in his last moments, but it did appear that he was rational and sensible of his situation.

The evidence proposed was therefore admitted.

The solicitor then continued the examination of the first witness, Wilson, who further testified that when he reached the house of the deceased, as set forth in the other part of his testimony, he found him bleeding and wounded, as described; that witness asked the deceased if he knew who had given him the wounds, and he replied that he did; that the witness then asked who it was, and he said it was John Tilghman, the prisoner at the bar; that the witness also asked him if he had been shot, to which he replied, "if he had been, he did not hear the report of the gun; that he heard something pop like a percussion cap"; that the witness did not remain to have further conversation, but proceeded to Kinston after a physician.

(522) William Wingate was then called as a witness by the State, who testified that he saw the deceased at his own house after he had received the wounds spoken of and just before his death; that he was at the time engaged in a conversation with Wilson Tilghman, the witness heretofore called; that Wilson Tilghman asked the deceased how the affair took place, and the deceased attempted to tell him, but his lips and tongue seemed to be stiff, and he so muttered his words that he could not be understood by the witness; whereupon Wilson Tilghman told the deceased how John Tilghman, the prisoner, said it took place, to which deceased replied, "Not so, Wilson; John met me in the road and told me he had come on purpose to kill me." The witness said he did not remember any of the statement of Wilson Tilghman which brought forth this reply of the deceased.

The prisoner's counsel objected to the testimony, upon the ground that the witness could not remember the substance of the statement of Wilson Tilghman to which this negative of the deceased applied, and that it was but a part of the conversation. The court overruled the objection and admitted the evidence.

This witness further stated that subsequently to this conversation he heard the deceased exclaim, "He has killed me."

Upon cross-examination this witness said he saw the prisoner the same afternoon at Council Wooten's—he was lying down on the piazza and was bleeding; the blood had run through the bed and along the floor. He also saw the knife, exhibited in court, picked up the same day after he saw the prisoner at Wooten's. It was found in the road spoken of by the witness Wilson. There was blood upon it at the time, and blood in the road at different points.

In reply to a question asked by the prisoner's counsel, this witness said he had told one Garby that we would for $150 leave the country and not appear as a witness (523) against the prisoner; that this was said in reply to an offer made to him by the said Garby, who told him that Wilson Tilghman, the father of the prisoner, said he did not want his (Wingate's) oath to hang his son, and that he would give him $100 to leave the country and not appear as a witness.

Dr. Woodley was again called to the stand, and described the wounds of the deceased to the jury, as he had done to the court when he was before examined, and gave the same opinion as to their effects. He also said that he saw the prisoner soon after he saw the deceased, and upon the same day; that he had a wound through the right hand near the thumb. It was made with a knife, which cut an artery and a nerve in passing through. Witness took up the artery some days after this time, and was compelled to take it up again at another place twelve days later. The knife entered on the inside of the hand and turned towards the brawn of the thumb. The prisoner would have died during the night had he not received medical aid.

Council Wooten was next called by the State, who testified that he lived three or four hundred yards from the place in the road where the wallet and blood were found as described by the witness Wilson; that he was at home on 15 August last, in the afternoon, when he heard the report of the rifle gun proceeding from about the place where he afterwards saw the blood in the road; that in about five minutes or, perhaps, less, after he heard the report of the gun, the prisoner at the bar came to his house with the rifle exhibited in court; he came from the direction in which witness had heard the gun fire; the rifle had blood

upon it at the time, and the barrel was bent; that prisoner had blood upon him, and was then bleeding profusely from a cut through the right hand; the rifle was the one claimed by the prisoner before this time, and which he usually carried.
(524) It was a percussion lock and required to be sprung before the hammer of the lock would fall. The barrel was not bent when the witness last saw it before this time. The witness then sent for Wilson Tilghman, the father of the prisoner, who came to the house of the witness and proceeded with him, Wingate, and another to the place where the blood was found in the road. They saw the blood as described by the witness Wilson, and found lying upon the ground the knife exhibited in court. It had blood upon it, and is the same the witness saw the deceased have a short time before.

The solicitor next called Carroll Jackson for the State, who testified that in the month of July last, he was at the house of the deceased, when a controversy arose between two little girls about a broach of cotton; that the prisoner interposed with some remarks, when the deceased seemed to get angry with the prisoner, and threatened to kill him. The prisoner told him not to do it sneakingly, but to go out with him and have a fair fight. The prisoner then took down his rifle, wiped it out and loaded it, and told the deceased to take his double-barrel gun, and go out with him and take a fair fight with these weapons; to which the deceased replied that the prisoner might go where he pleased, but he (the deceased) would not go with him. This witness also said the deceased told him the prisoner had been working at his house; that he saw the deceased's hat after the blows had been inflicted, and it had no hole in it.

The solicitor next introduced Mr. King, who said he saw the deceased on the morning after his death, and that he had no marks of gunpowder about his face.

The prisoner then called as a witness one Cox, who said Joseph J. Tilghman died on Thursday, and on the Sunday before, the witness met him, when he said the prisoner had abused him in his own house, and if he did not mind he (the
(525) deceased) would kill him; that he had a great mind to kill him anyhow.

Mrs. Susan Tilghman, who had heretofore been introduced by the solicitor upon a question to the court, was now recalled by the prisoner, and cross-examined as to the facts of the case. She said the prisoner and deceased had a quarrel in July last; it grew out of a controversy between two little girls about a broach of cotton; that the deceased then threatened to kill the prisoner, who told him not to do it sneakingly, but openly—to

take his double-barrel gun and he (the prisoner) would take his rifle and with these weapons they would have a fair fight; that the deceased replied, "he was not ready then"; the deceased then said he would kill the prisoner if he did not let him alone; that the prisoner then threatened to tell his grandfather, and the father of the deceased, about certain notes the deceased held against him; and said, "You know you got the land for nothing you bought from grandfather"; that the deceased had, previous to this time, informed the witness and prisoner that he had taken up several notes from Mr. John C. Washington upon his father, and he merely acted as his agent in the matter; that he (the deceased) still held the notes uncanceled, and intended to hold them against his father, as though he had purchased them from Mr. Washington; that he also had another note made payable to his father and signed by the deceased, with the word "Paid" marked across its face; that this note was of the same date and for the same amount as one his father then held on him for the purchase money of a tract of land; and that when the note held by his father was presented for payment he intended to offer this canceled note to show that the money for the land had been paid, it being the only debt of the kind he ever owed his father; that the $500 note in his possession was drawn to secure the purchase money of the land bought, but was not delivered, because in it the word, "dollars" was spelt "dolers," and upon this being observed, that he (the deceased) executed another note for the land, and retained (526) this.

The witness further said that on the Sunday night before his death she told the deceased she had heard the prisoner had told his grandfather about the notes and would make an affidavit of the facts, and she was afraid she would be called on to give evidence in the matter; to which the deceased replied, "He will have to swear soon if he does, for I intend to kill him before Saturday night." She also stated that the prisoner and deceased had another quarrel just before his death, when deceased took down his gun, drew a load of small shot and reloaded it with large shot, and followed after the prisoner towards the woods; that he returned, and said he could not overtake the prisoner, and that if he had done so he would have killed him; that at another time, just before his death, the deceased hid his musket in his blacksmith shop, near his house, as he said, for the purpose of killing the prisoner; he said he did not want every person to see him carry his gun out. She also said that the knife exhibited in court and spoken of by the witnesses was

the knife of the deceased; that the prisoner was at the house of the deceased on the same day the deceased received his wounds, and they seemed then to be friendly.

The witness also stated that she was present when the conversation took place between Wilson Tilghman and the deceased, and that she did not hear the language used by the deceased, as stated by Wingate.

Wilson Tilghman was next called by the defense. He said he was the father of the prisoner; that on 15 August past, in the afternoon, he went to the house of the witness Wooten, having been sent for by him; that he there found the prisoner, who had a fresh cut through the right hand which was bleeding profusely; that the prisoner had then lost much blood and seemed to be greatly exhausted; that the witness then went to (527) the place in the road referred to by the other witnesses; that they picked up the knife exhibited in court and it had blood upon it; that this place was about three hundred yards from Wooten's house, and that the intervening space was unobstructed, so that a child could be seen in Wooten's house door; that there was a scuffling place in the road between the wallet and puddle of blood, as marked by the road; that the witness walked from this place to the hogpen, spoken of by the witness Wilson, in the space of two and quarter minutes. This witness also said he was at the house of the deceased the same afternoon just before his death; that he had a conversation with him, and did not hear him make the declarations deposed to by the witness Wingate; that this witness was there at the same time and during the entire time that Wingate was present. This witness also stated that the deceased seemed addled like a drunken man; his speech was indistinct and thick—he muttered out his words and could not be distinctly understood in everything he attempted to say.

Several witnesses were then called by the State and defense as to the character of Wilson Tilghman, whose testimony it is deemed unnecessary to report.

The court, after reciting all the evidence offered in the case, charged the jury that before they could convict the prisoner they must be satisfied of the death of Joseph J. Tilghman; that he was killed by the prisoner, and that the act was done with malice aforethought, either expressed or implied; that such malice did not mean simply ill-will or hatred—those passions might or might not characterize such malice as is charged in the bill of indictment, and which is necessary to constitute the crime of murder; that if they entertained the opinion from the testimony that the prisoner, with a previously formed design

and fixed will, and an actual and deliberate intention to take away the life of the deceased, did kill him, then he would be guilty of murder, for this would be a killing (528) with express malice; that if they believed the prisoner killed the deceased with a deadly weapon, then the fact implied malice from the very fact of killing, and he would be guilty of murder, unless the inference of malice was repelled by evidence offered by the prisoner, or circumstances arising out of the evidence produced against him, or both combined; for in such case the law would infer that he intended the natural consequences of his own act; that a rifle gun, such as described by the witnesses, is what is known in law as a deadly weapon, whether it be used by shooting a ball therefrom or by striking upon the head with either end of it. If the prisoner, having his rifle gun, sought the deceased with the design of provoking him into a fight, and when engaged in the affray of killing or doing him some great bodily harm, and under these circumstances did kill him, the prisoner would be guilty of murder.

Or if they should be of opinion that the deceased gave to the prisoner a provocation by assaulting or striking him, and the prisoner retaliated with a weapon greatly more dangerous than the one used by the deceased, or with an excess of force, wholly inadequate to such provocation, then these were circumstances from which they might infer a wicked, depraved and malignant spirit upon the part of the prisoner, amounting to malice, and by killing the deceased under such circumstances he would be guilty of murder. If the prisoner and deceased engaged in a mutual affray, and, while so engaged, the prisoner killed him of passion, he would not be guilty of murder, but of manslaughter only; and this would be the case even though he killed him with his rifle or any other deadly weapon, for such would be a killing without malice; that if they believed the deceased made an assault upon the prisoner, that there was an actual necessity for the prisoner to kill the deceased in order to save his own life or prevent some great bodily harm to (529) himself, and, under such circumstances, he killed the deceased, he would not be guilty of any offense, but excused in law; or even if there was an *apparent* necessity for him to kill the deceased in order to save his own life or to protect himself from some great bodily harm, he would not be guilty. And by *apparent* necessity it is meant that if, from the character of the weapon used by the deceased and from the manner of his assault, a person of ordinary fears and ordinary apprehensions would be induced to believe it necessary to kill in order to

prevent death or some great bodily harm, then by killing the deceased, under such circumstances, the prisoner would not be guilty of any offense, but would be excused in law.

Here the charge of the court closed, when the presiding judge turned to the defendant's counsel and asked if they desired any other instructions from the court to the jury. In reply to which the defendant's counsel asked the court to charge the jury that if they entertained a reasonable doubt of the prisoner's guilt, they ought to acquit him. Upon which the court informed the jury that, before they could convict the prisoner, they should be satisfied beyond a reasonable doubt that he killed the deceased; and that if they should be satisfied beyond such doubt that the prisoner killed the deceased and with a deadly weapon, then they ought to convict him, unless the prisoner convinced them by his own proofs or circumstances arising out of evidence offered by the State that he killed in self-defense, or that the killing was extenuated from murder to manslaughter; in which latter case they should find him guilty of manslaughter only; and if the killing thus appeared to be in self-defense, they should return a verdict of not guilty.

The court again asked the prosecuting officer and coun-
(530) sel for the prisoner if they desired to ask further instructions to the jury, to which they replied that they did not.

Whereupon the jury retired, and afterwards returned with a verdict, in which they found the prisoner guilty of murder.

The prisoner's counsel moved for and obtained a rule for a new trial:

1. Because the court admitted improper testimony against the prisoner, after objection.

2. Because the court excluded proper testimony offered by the prisoner.

3. Because the court gave erroneous instructions to the jury.

4. Because the court refused proper instructions prayed for.

5. Because the court, in summing up, omitted to tell the jury they ought to disregard the dying declarations of the deceased, if they thought him insane at the time he made them.

6. Because there was a separation of the jury and other irregularities practiced by them, before they returned their verdict.

For these latter reasons the prisoner also contended that there was a mistrial, and that he was entitled to a *venire de novo*. As to the alleged misconduct of the jury while out and before their verdict was returned, many witnesses were examined, and the following facts appeared to the court as satisfactorily proved:

The jury was placed in charge of an officer and was confined

in the ordinary jury-room in the third story of the courthouse in the town of New Bern; that they retired from the court on Thursday of the term at 6 o'clock P. M. and rendered their verdict at 10 o'clock A. M. on the following Saturday. While out, the members of the jury separated at various times to obey calls of nature. Each one so separated himself from the others more than once for this purpose, and one of them did so (531) as often as six times. When they did this they went, one at a time, under charge of an officer, and during such absence the other jurors remained together in the jury-room with the door locked. They went about fifty yards from the courthouse, and returned as soon as practicable, without holding intercourse with any one. And at one time one of the jurors went for the same purpose as far as one hundred and fifty yards from the other jurors. That one Elijah W. Ellis, a juror, separated himself from his fellows and visited a drug store at the distance of one hundred and fifty yards from the jury-room. He was sick at the time and went to procure medicine, which he did, and returned without delay to the jury-room. He went under the charge of an officer and held no conversation with any one except the keeper of the drug store, who asked him if they had agreed in their verdict, to which he replied, *"they had not."* This drug store was in the most public place in the town of New Bern.

It also appeared that one Dewey, a juror, separated himself from his fellows and stood on the outside of the jury-room, near the door closed, and conversed for ten or fifteen minutes with one Richardson, privately.

The subject of conversation did not appear to the court.

The jurors also ate and drank while out, but not to excess. They did so with the permission of the court a part of the time, and when enjoined by the court not to eat or drink, they violated this injunction, contrary to the wishes of the officer who had them in charge. Several jurors wrote notes and letters and dropped them from the windows of the room in which they were confined. The contents and names of the persons to whom these letters were directed did not appear to the court. It also appeared that several jurors received letters from persons not upon the jury. The contents did not appear to the court.

It further appeared that some of the jurors conversed (532) from the windows of the jury-room with persons in the street on various subjects and about this suit. What was said did not appear. It also appeared that negro servants and some small children of one of the jurors had access to the jury-room.

The servants entered for the purpose of carrying food and clothing to the jurors, and the children to see their father.

The court expressed its disapprobation of the irregularities of the jury, but being satisfied that they were generally men of high character, and that no undue influence was brought to bear upon them, but that these irregularities were the results of their long and unpleasant confinement, overruled this and other causes assigned for a new trial, and discharged the rule.

The court, being further of opinion that the separation and other irregularities of the jury did not vitiate the verdict, pronounced judgment of death upon the prisoner.

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

Attorney-General for the State.
J. W. Bryan for defendant.

(551) PEARSON, J. We have considered the several questions presented by the case as made up by his Honor, and have come to the conclusion that there is no error.

The first exception is untenable. The condition of the deceased was such as to make his declarations competent evidence as "dying declarations." It is not necessary that the person should be *in articulo mortis* (the very act of dying); it is sufficient if he be under the apprehension of impending dissolution, when all motive for concealment or falsehood is presumed to be absent, and the party is in a position as solemn as if an oath had been administered. The evidence was competent. The degree of credit to which it was entitled was a matter for the jury; it was liable to be impeached, like the testimony of a sworn witness, and the jury were at liberty to give it more or less weight, as from the conduct of the witness and the attending circumstances they might suppose him to be more or less *impressed* by the obligation of his oath or the solemnity of the condition in which he stood.

The second exception, because of the rejection of the opinion of the wife of the deceased, that "she thought the deceased thought he would not die from the wounds," is also untenable. A witness is allowed to give his opinion as to the sanity of one at the time he made his will; or as to the affection of a wife towards her husband, viz., whether she loved him or not; because a witness may have acquired a knowledge of the fact from a thousand little circumstances occurring at different times which it is not possible to communicate; but the matter to which our attention is now directed is not of that character. What the deceased thought of his condition was to be judged of by the

state of his wounds, and what he *then* and *there* said and did. These circumstances it was in the power of the witness to communicate to the court; and the judge did right, requiring her to do so, whereby he was enabled to form an opinion, instead of allowing the witness to form one for him. Upon the third ground of exception the prisoner has no right to (552) complain. The judge, perhaps, entered more largely into the discussion of the law of homicide than the facts of the case called for, but he confined himself to the announcement of well-settled principles, except in one instance; there he erred in favor of the prisoner. In this he held that if the deceased, at the time he first made his declaration, was in a condition to make the evidence competent, but afterwards got better for a short time, and *then* had hopes of recovery, this would make the prior declaration incompetent. This cannot be law. We presume his Honor was misled by a misapprehension of *Rex v. Faquet*, 32 E. C. L., 501, where it is said that a subsequent hope may reflect back to the time of a prior declaration, so as to show that the deceased was not *in fact* in a condition to make his declarations competent. But this falls very far short of supporting the position that if, at the prior date, the deceased was *in fact* in a condition to make his declarations competent, a hope of recovery at a subsequent time would make that incompetent which was before competent.

The fourth exception has been fully considered in treating of the third.

The fifth exception, for an omission to charge, cannot be entertained, because the point was not made during the trial, and at the close of the charge, the counsel on both sides expressly stated they desired no further instructions to the jury.

The last ground of exception, because of the irregularity and misconduct of the jury, is the only one upon which we have had much difficulty. Perhaps it would have been well had his Honor in his discretion set aside the verdict and given a new trial, as a rebuke to the jury and an assertion of the principle that trials must not only be *fair, but above suspicion*. This, however, was a matter of discretion, which we have no right to reverse. Our inquiry is, Was the misconduct and irregularity such as to vitiate the verdict, to make it in law (553) null and void, and *no verdict?*

In the consideration of this question we have had occasion to review *S. v. Miller*, 18 N. C., 500, and it seems to us that the decisions of the Court and the distinction between a cause for a new trial, which is a matter of discretion, and cause for a *mistrial*, which is a matter of law, is fully sustained by author-

ity and by reason. The eminent talent of *Judge Gaston,* in a long and labored opinion, was exerted on the other side of the question. But his argument fails in this: he does not give due weight to the fact that, according to the modern practice, the presiding judge, *in favorem vitat,* has a discretion to give the prisoner a new trial when suspicion is put upon the conduct of the jury, and although evidently oppressed by the position that if such irregularity works a *mistrial* so as to make no verdict, a prisoner acquitted may again be put on trial, he attempts to escape the conclusion by a denial of the truth of the position, which is not supported by authority or any sufficient reason.

We wish not to be understood as disclaiming a right to grant a *venire de novo* when it is made to appear on the record that there has not been a fair trial; on the contrary, we assert that right, whether it is to be exercised *for* or *against* the prisoner. We take this plain position: if the circumstances are such as merely to put suspicion on the verdict by showing, not that there *was,* but that there might have been undue influence brought to bear on the jury, because there was opportunity and a chance for it—it is a matter within the discretion of the presiding judge. But if the fact be that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or of the prisoner, or if they be solicited and advised how their verdict should be, or if they have other evi-
dence than that which was offered on the trial, in all
(554) such cases there has in contemplation of law been no
trial; and this Court, as a matter of law, will direct a trial to be had, whether the former proceeding purports to have acquitted or convicted the prisoner.

In the argument the prisoner's counsel assumed the position that dying declarations are excluded as evidence in our State by the provision of section 7 of the Bill of Rights: "In all criminal prosecutions every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony." We do not feel the force of the argument. The witness who proved what the dying man said may be confronted with "other testimony," and the case is exactly the same as that of a witness who proves that the prisoner executed a certain deed or wrote a certain letter, whereupon the deed or the letter is received as evidence against him. This section of the Bill of Rights was aimed at the old practice, by which prisoners were not allowed to have witnesses *sworn* on their behalf, and the testimony came altogether on the part of the crown. Our ancestors did not intend to deny the

rule of evidence as to dying declarations, but to assert that in criminal prosecutions prisoners ought to be allowed to have witnesses in their behalf, sworn and examined.

There is no error.

PER CURIAM. Ordered to be certified accordingly.

Cited: S. v. Perry, 44 N. C., 332; *S. v. Hester,* 47 N. C., 86; *S. v. Frank,* 50 N. C., 386; *Moore v. Edmiston,* 70 N. C., 479; *S. v. Durham,* 72 N. C., 447; *S. v. Swepson,* 79 N. C., 640; *S. v. Blackburn,* 80 N. C., 478; *S. v. Morris,* 84 N. C., 764; *S. v. Brittain,* 89 N. C., 505; *S. v. Barber, ib.,* 526; *S. v. Gould,* 90 N. C., 664; *S. v. Mills,* 91 N. C., 595; *Johnson v. Allen,* 100 N. C., 141; *S. v. Harper,* 101 N. C., 764; *S. v. Jacobs,* 107 N. C., 782; *S. v. Crane,* 110 N. C., 537; *S. v. Behrman,* 114 N. C., 803; *S. v. Perry,* 121 N. C., 537; *S. v. Kinsauls,* 126 N. C., 1098; *S. v. Ellsworth,* 131 N. C., 775; *S. v. Dixon, ib.,* 813; *Willeford v. Bailey,* 132 N. C., 408; *S. v. Boggan,* 133 N. C., 765, 8; *Abernathy v. Yount,* 138 N. C., 340; *S. v. Exum, ib.,* 606.

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(555)

THE STATE v. ATLAS JOWERS.

Insolence from a free person of color to a white man will excuse a battery in the same manner and to the same extent as in the case of a slave.

APPEAL from the Superior Court of Law of ANSON, at Fall Term, 1850, *Battle, J.*, presiding.

The defendant, a white man, was indicted for an affray with Bob Douglass, a free black man. The evidence was that the defendant and Bob got into a quarrel, when the defendant asked Bob why he had reported at a certain place that he, the defendant, had told a lie, to which Bob replied, because he had told one. Upon this the defendant struck Bob, and a fight ensued, in the course of which Bob struck the defendant with the butt end of a wagon whip, and the latter knocked him down with the broken limb of a tree. The defendant's counsel contended that the insulting language used by the free negro justified the blow which the defendant gave him, and that he afterwards used no more violence than was necessary to protect him in the fight.

The presiding judge charged that, though the courts have held that insulting language used by a slave may justify a white

man in striking him, yet the principle did not apply to the case of a free negro, stricken under similar circumstances, by a white man.

The defendant was convicted, and, judgment being pronounced against him, appealed.

Attorney-General for the State.
(556) No counsel for defendant.

PEARSON, J. It is settled that insolent language from a slave is equivalent to a blow by a white man, in its legal effect, as an excuse for a battery. If a blow is given by a white man, a return of it is excusable in self-defense, to prevent a repetition of the injury; so, if a slave gives insolent language, a blow is excusable in self-defense, being necessary to put a stop to his insolence.

The question presented to this case is, Does the principle apply to free negroes? His Honor was of opinion that it did not. In this a majority of this Court believe there is error.

The same reasons by which a blow from a white man upon a slave is excusable on account of insolent language, apply to the case of a free negro who is insolent. It is a maxim of the common law, where there is the same reason there is the same law.

But it is suggested that free negroes differ from slaves in this: they have a right to own property and to make contracts, which necessarily must frequently give rise to a difference of opinion, and if a free negro disputes the accounts of a white man, it is insolence, and will excuse a battery.

It is unfortunate that *this third* class exists in our society. All we can do is to make it accommodate itself to the permanent rights of free white men. What amounts to insolence is a question for the court, and is the subject of review in the Court of supreme jurisdiction; this is some protection. But as compared with a slave, how stands the case? If a slave is insolent, he may be whipped by his master, or by order of a justice of the peace; but a free negro has no master to correct him, a
(557) justice of the peace cannot have him punished for insolence, it is not an indictable offense, and unless a white man, to whom insolence is given, has a right to put a stop to it in an extrajudicial way, there is no remedy for it. This would be insufferable. Hence we infer from the principles of the common law that this extrajudicial remedy is excusable, provided the words or acts of a free negro be in law insolent. Such a being as a slave or a free negro did not exist when the ancient common law was in force. But the excellence of that "perfec-

tion of reason" consists in the fact that it is flexible and its principles expand so as to accommodate it to any new exigence or condition of society, like the bark of a tree, which opens and enlarges itself, according to the growth thereof, always maintaining its own uniformity and consistency.

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

Cited: Windley v. Gaylord, 52 N. C., 54.

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(558)

COLUMBUS MILLS v. P. B. WILLIAMS.

1. The Legislature has the constitutional power to repeal an act establishing a county. It has the same power to consolidate as to divide counties, the exercise of the power in both cases being upon considerations of public expediency.

2. The purpose of making all corporations is the *public good*. The only substantial difference between corporations is that in some cases they are erected by the *mere will* of the Legislature, there being *no other party interested or concerned*, and these are subject at all times to be modified, changed or annulled.

3. Other corporations are the result of contract; the Legislature, for the purpose of accomplishing a public good, chooses to do it by the instrumentality of a *second party*. These two parties make a *contract;* the Legislature, in consideration of certain labor and outlay of money, conferring upon the party of the second part the privilege of being a corporation, with certain powers and capacities. Being a *contract*, it cannot be modified, changed or annulled without the consent of both parties.

4. Counties, etc., belong to the first class; railroad and turnpike companies, etc., are instances of the second class.

APPEAL from the Superior Court of Law of RUTHERFORD, at Spring Term, 1849, *Bailey, J.*, presiding, to the Supreme Court at Morganton, and thence transferred, by an order of that Court, to the Supreme Court at Raleigh.

This was an action of trespass, *vi et armis*, for an assault and battery on the plaintiff's person, tried at Rutherford Spring Term, 1849, upon the following facts, submitted to the court for judgment, as a case agreed.

The General Assembly, at its session of 1846 and 1847, passed an act establishing a county by the name of Polk out of certain portions of the counties of Rutherford and Hen- (559) derson. By virtue of that act and a supplemental act, passed at the same session, courts, both county and superior,

were organized, and all county officers were appointed and elected, and entered upon the discharge of their duties as such.

The site for the county town and courthouse was selected, and a deed to the chairman of the County Court was duly executed and delivered. At the general election for sheriff, in August, 1848, the defendant was duly elected Sheriff of Polk County for two years next ensuing, entered into bond according to law, and was qualified as such and acted as sheriff of said county, and claimed the right to act as such, at the time of executing the writ under which the arrest was made, which issued from the Superior Court of Rutherford, with the county seal attached, tested of the Fall Term, 1848, and was directed to the Sheriff of Polk County. The writ was issued on 1 April, 1849, came to the defendant's hands on the 2d day of that month, and it was immediately executed by arresting the plaintiff.

The said act of Assembly was repealed at the session of 1848.

It is further agreed that a majority of the people of Polk County were opposed to the passage of the repealing act.

On the above statement of facts it is contended by the plaintiff that the defendant, being no longer Sheriff of Polk County after the act went into operation which repealed the act establishing it, his arrest was not authorized, and, therefore, a trespass. On the other hand, it is contended by the defendant that the repealing act was unconstitutional and void, and therefore he was Sheriff of Polk County at the time of arresting the plaintiff, and well justified therein by virtue of the writ aforesaid.

(560) And it was further agreed that, if the repealing act be constitutional, there is to be judgment for the plaintiff for sixpence and costs of suit; if otherwise, then the plaintiff is to have judgment of nonsuit. And his Honor being of opinion that the repealing act was constitutional, gave judgment against the defendant accordingly for sixpence and costs, from which the defendant prays an appeal to the Supreme Court, which is granted.

B. F. Moore for plaintiff.

N. W. Woodfin and *Bynum* for defendant.

PEARSON, J. In 1846 the Legislature established a county by the name of "Polk." In pursuance thereof justices of the peace were appointed, courts organized, and a sheriff and other county officers elected, who entered upon the discharge of the duties of their respective offices. In 1848 the act of 1846 was repealed, and the question is presented, Has the Legislature a right, under the Constitution, to repeal an act by which a county is established?

From the formation of our State Government the General Assembly has, from time to time, changed the limits of counties, and has, over and over again, made two counties out of one, so that, in many instances, even the name of the old county has been lost; and it would seem to an unsophisticated mind that where there is the power to make two out of one, there must be the corresponding power to make one out of two. In other words, as the Legislature has, undoubtedly, the power to divide counties, where they are too large, that there is the same power to unite them, when they are too small: the power in both cases being derived from the fact that by the Constitution "all legislative power is vested in the General Assembly," which necessarily embraces the right to divide the State into counties of convenient size, for the good government of the whole. Political and other collateral considerations are apt to con- (561) nect themselves with the subject of corporations, and thereby give to it more importance than it deserves as a *dry question of law:* and the unusual amount of labor and learning bestowed on it has tended to mystify rather than elucidate the subject. Divested of this mystery, and measured in its naked proportions, a corporation is an artificial body, possessing such powers and having such capacities as may be given to it by its maker. The purpose in making all corporations is the accomplishment of some *public good.* Hence, the division into public and private has a tendency to confuse and lead to error in the investigation; for, unless the public are to be benefited, it is no more lawful to confer "exclusive rights and privileges" upon an artificial body than upon a private citizen.

The substantial distinction is this: some corporations are created by the *mere will* of the Legislature, there being *no other party interested or concerned.* To this body a portion of the power of the Legislature is delegated to be exercised for the public good, and subject at all times to be modified, changed, or annulled.

Other corporations are the result of contract. The Legislature is not the only party interested, for, although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a *second party.* These two parties make a *contract.* The Legislature, for and in consideration of certain labor and outlay of money, confers upon the party of the second part the privilege of being a corporation, with certain powers and capacities. The expectation of benefit to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. *It is a*

contract, and, therefore, cannot be modified, changed or annulled without the consent of both parties.

(562) So corporations are either such as are independent of all contract or such as are the fruit and direct result of a contract.

The division of the State into counties is an instance of the former. There is no contract—no *second party,* but the sovereign, for the better government and management of the whole, chooses to make the division in the same way that a farmer divides his plantation off into fields and makes cross fences where he chooses. The sovereign has the same right to change the limits of counties, and to make them smaller or larger by putting two into one, or one into two, as the farmer has to change his fields, because it is an affair of his own, and there is no *second* party having a direct interest.

A railroad is an instance of the latter—certain individuals propose to advance capital, and make a road by which it is supposed the public are to be benefited, in consideration that the Legislature will incorporate them into a company with certain privileges. The bargain is struck: neither party has a right to modify, change, annul or *repeal* the charter without the consent of the other; and (still to borrow an illustration from the farmer) he has in this case *leased* out his field at a *certain rent,* and has no right to make one larger and another smaller without the consent of his tenant.

Roads furnish another familiar illustration. The County Court has a public road laid out, and an overseer and hands appointed. It may be altered or discontinued by the county authorities, and the overseer and hands have no direct interest or right to be heard in the matter, except as other citizens. But, if the Legislature, instead of acting by its agent, the county authorities, choose to make a contract with certain individuals that if they will raise funds and make a road they shall be incorporated with the right to exact tolls, etc., then

(563) the road cannot be altered or discontinued without the consent of the corporation.

When a county is established it is done at the mere will of the Legislature, because, in its opinion, the public good will be thereby promoted. There is no *second party directly* interested or concerned. There is no contract, for no consideration moves from any one, and without a consideration there cannot be a contract. The discharge of certain duties by the persons who are appointed justices of the peace, or sheriff, clerk, or constable, can, in no sense of the word, be looked upon as a consideration for establishing the county. In legal parlance, the

"consideration is past"—the thing is done, before their appointment. Some act for the honor of the station, others for the fees and perquisites of office, but their so doing did not form a consideration for the erection of the county, and is a mere incident to their relation as citizens of the county.

It was ingeniously argued that, upon the erection of a county, certain rights attach by force of the Constitution, as the right to have at least one member in the House of Commons; and as these rights are conferred by the Constitution, it is insisted that, having attached, it is not in the power of the Legislature to take them away.

The argument is based upon a fallacy. It is true, the Constitution invests every county with certain rights as incident to its existence as a county. But by no sound reasoning can the incident be made to override the principal; and the Constitution, by conferring these incidental rights, cannot be, by any fair inference, made to interfere with the control of the Legislature on the subject of counties, as instruments for the good government and management of the whole State.

The Constitution preordains these rights, but they are put expressly as incidents to the existence of counties; and although they may very properly enter into the question of expediency, they have no legislative bearing upon the power to (564) create and abolish counties, as may to the wisdom of the Legislature seem fit. Such statutes are not the result of contracts. There is no second party who pays a consideration, which is the essence of every contract. *Terrett v. Taylor,* 9 Cranche, 43; *Dartmouth College v. Woodward,* 4 Wheaton, 663; *Phillips v. Bury,* 2 Term, 346.

PER CURIAM. Judgment affirmed.

Cited: Justices v. Simmons, 48 N. C., 189; *S. v. Petway,* 55 N. C., 404; *Manly v. Raleigh,* 57 N. C., 373; *Nav. Co. v. Costen,* 63 N. C., 266; *R. R. v. Reid,* 64 N. C., 158; *Comrs. v. Ballard,* 69 N. C., 19; *R. R. v. Rollins,* 82 N. C., 532; *McCormac v. Comrs.,* 90 N. C., 445; *Barksdale v. Comrs.,* 93 N. C., 485; *Comrs. v. Comrs.,* 95 N. C., 192; *Brown v. Comrs.,* 100 N. C., 98; *Ward v. Elizabeth City,* 121 N. C., 3; *Harriss v. Wright, ib.,* 181; *Tate v. Comrs.,* 122 N. C., 813; *Gattis v. Griffin,* 125 N. C., 333; *Mial v. Ellington,* 134 N. C., 152; *Jones v. Comrs.,* 135 N. C., 225; *Bank v. Comrs., ib.,* 247; *Waynesville v. Satterthwait,* 136 N. C., 240; *Jones v. Comrs.,* 137 N. C., 597; *S. v. Cantwell,* 142 N. C., 616; *Jones v. Comrs.,* 143 N. C., 64; *Lutterloh v. Fayetteville,* 149 N. C., 71.

FLETCHER ORMOND v. WYATT MOYE.

1. Where one is summoned as garnishee in an attachment, who owes a note which is negotiable, if he chooses to stand upon his rights, no judgment can be taken against him without proof that the absconding debtor still holds the note, or had not assigned it by indorsement before it was due; for, otherwise, it does not appear that he is indebted to the absconding debtor.

2. However it may be as to notes payable *on demand*, whether or not they are considered overdue until demand made, it is certain that a note, payable "at sight" or "when presented," is not due until it is presented.

APPEAL from the Superior Court of Law of GREENE, at Fall Term, 1850, *Ellis, J.*, presiding.

This was an action of debt. The plaintiff declared, as the indorsee of a promissory bond, of which the following is a copy:

"$160. I promise to pay Benjamin C. D. Eason or
(565) order, at any time after ten days from this date, when presented, $160, value of him received. 24 April, 1848."

Signed, "Wyatt Moye," and sealed. Indorsed, "I transfer the within note to F. Ormond for being value received, 29 May, 1848." It was admitted that the indorsement should, in fact, have been dated on 29 June, 1848. The defendant pleaded that there was no indorsement, and, specially, that he was summoned as garnishee by the Sheriff of Edgecombe County, on 1 May, 1848, to appear before the justices of the County Court of Edgecombe on the fourth Monday of May, 1848, in a suit of attachment at the instance of Joshua Speight against B. C. D. Eason, and that on the said fourth Monday of May he filed his answer in the said cause, and pleads the proceedings in the said suit by attachment, the judgment therein and his satisfaction of the same. The defendant produced a copy of the record in the attachment suit referred to in his plea, from which it appeared that the defendant stated in his garnishment that on 24 May, 1848, he executed his note to the said Eason for $160, payable ten days after date; that he knows nothing of the said note since it was executed; that the said Eason left his residence on the same day, as is reported and believed, and went out of the State, and has not since returned; that, knowing from the negotiable character of the said note, a good and unquestionable title to the same may be procured by indorsement, and that, if the same has been transferred before it became due, he may be compelled to pay the said note to the holder when presented, he prays the court for protection against such liability of double responsibility. It appeared further from the

said transcript that, upon this garnishment, judgment was subsequently rendered against Moye for the amount of the said note and interest; and it appeared by other evidence that the judgment had been satisfied.

The defendant contended, and prayed the court to in- (566) struct the jury:

1. That if they believed the testimony, the plea of the defendant was sustained, and the plaintiff could not recover on the issue.

2. That the bond declared on was overdue and dishonored at the time of its transfer to the plaintiff on 29 June, 1848, and that it was subject, in the hands of the plaintiff, to all the defenses which would have been good against the payee; that the proceedings under the attachment of Speight operated to give to Speight a lien upon the sum owing by the defendant upon the bond, either from the time of the service of the summons on the defendant, on 1 May, 1848, or from the time of the defendant's answer as garnishee on the fourth Monday of May, 1848; that, after that period, Eason could not transfer the bond, so as to give his transferee any better title than he had himself; and that the proceedings under the attachment would have been a defense to a suit by Eason, and were a defense to the suit of the plaintiff.

3. That if any demand was necessary, after the expiration of ten days from the date of the bond declared on, in order that the bond remaining unpaid should be considered dishonored, the law would or the jury might infer a demand and refusal prior to the time of the indorsement, to wit, 29 June, 1848; and that the suing out of the attachment on 27 April, 1848, and the notice to the defendant, as garnishee, on 1 May, 1848, were equivalent in law to a demand and refusal.

4. That the transfer to the plaintiff was not an indorsement and did not give him a legal title, so as to enable him to sue, as indorsee, in his own name.

The court instructed the jury that there was no evidence of a demand on the bond declared on before 29 June, 1848, and that it was not overdue or dishonored, when transferred to the plaintiff on that day; that the transfer to the plaintiff was a valid indorsement, and gave him the legal title of (567) an indorsee; that, inasmuch as the bond was not due at the time of its indorsement, and the plaintiff was a *bona fide* indorsee, the proceedings under the attachment created no lien, and, if they believed the testimony, the plaintiff was entitled to a verdict in his favor.

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

J. H. Bryan for plaintiff.
Rodman for defendant.

PEARSON, J. There is no error. The defendant upon his garnishment ought to have denied the fact of his indebtedness to Eason, unless it was first proved that Eason had not assigned the note before its maturity. It was his folly to submit to a judgment by which the amount of the note was condemned in his hands to the payment of the debt of the creditor in the attachment. This subject is fully explained in *Myers v. Beeman,* 31 N. C., 116, where one is summoned as garnishee who owes a note which is *negotiable;* if he chooses to stand upon his rights, no judgment can be taken against him, without proof that the absconding debtor still holds the note, or had not assigned it by indorsement before it was due; for, otherwise, it does not appear that he is indebted to the absconding debtor.

Assuming that, as against the payee Eason, the satisfaction of the judgment upon the garnishment is sufficient, without its being done *on execution* (which is required by the old cases), the plaintiff, in this case, asserts and is entitled to all the rights of an indorsee *before maturity:* if so, the note passed to him, subject only to *indorsed payments.*

(568) There is some difference in the books upon this question of a note payable *on demand,* whether it is due presently, and therefore cannot be assigned except as a note overdue, until demand is formally made; but it is conceded in all the cases that a note payable "at sight," or "when presented," is not due until it is presented, and so the note in question was transferred to the plaintiff before its maturity. In fact, the defendant, in his garnishment, alleges the fact that the note had never been presented for payment, and in his amended answer admits expressly that the indorsement was made before the note had been presented, and of course before it was dishonored.

PER CURIAM. Judgment affirmed.

Cited: Shuler v. Bryson, 65 N. C., 303; *Davis v. Glenn,* 72 N. C., 520; *Rice v. Jones,* 103 N. C., 233.

DOE ON DEMISE OF WILLIAM MOORE v. MILLICENT EASON.

Parol evidence may be admitted to show a custom or usage of a place where a contract is entered into, for the purpose of annexing incidents to and explaining the meaning of terms used in it. But before the incident can be annexed the contract itself, as made, must be proved. The incident cannot be used to establish the contract, nor can it be inconsistent with the terms of the contract.

APPEAL from the Superior Court of Law of PITT, at Fall Term, 1849, *Battle, J.*, presiding.

Rodman for plaintiff.
No counsel for defendant. (569)

NASH, J. This action in ejectment is to recover from the defendant a house and lot in the town of Greenville, in the county of Pitt. The demise is laid on 1 January, 1849. The plaintiff claims that the defendant entered into possession of the premises in 1848 as his tenant, and produced evidence tending to prove the fact to be so. In order to show that the tenancy had expired at the date of the demise set forth in the declaration, he offered to prove that it was the general usage in the town of Greenville for all leases to expire on the day next before the 1st of each January. This evidence was objected to, but was admitted by the court. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

The only question now presented is as to the admissibility of this testimony, under the circumstances under which it was offered. We must take the case as it is sent to us. There cannot be a doubt that parol evidence may be admitted to show a custom or usage of a place where a contract is entered into for the purpose of annexing incidents to and explaining the meaning of terms used in it. The leading case on the subject is that of *Hutton v. Warren*, 1 Mason and Welbsly, 466. In that case it was decided that the plaintiff was at liberty to show a custom by which a tenant, cultivating the premises according to the course of good husbandry, was entitled on quitting to receive a reasonable allowance for seed and labor bestowed on the arable land in the last year of his tenancy, etc. The custom, however, is admissible in proof, not for the purpose of establishing the contract, but to add an *incident* not expressly embraced in it, and in reference to which the parties are presumed to have contracted. Thus, if the lease in this case was made on 1 February, 1849, or from 1 January, 1849, for and during that year,

(570) the plaintiff would be permitted to show that by the usage or custom of Greenville all leases made within the town and so terminating expired on the day preceding the 1st of January. In that case the custom would transport into the contract an incident upon which it was silent, but with respect to which the parties must be presumed to have contracted. But before the incident can be so engrafted the contract, as made, must be proved; the incident cannot be used to establish the contract. The expiration of a lease is as much a matter of contract as its commencement; nor can the incident be inconsistent with the terms of this contract. In *Wigglesworth v. Dollison*, Douglas, 201, it was decided that a custom that a tenant, whether by parol or deed, shall have the waygoing crop after the expiration of his term, is good, if not repugnant to the lease by which he holds. See 1 Smith Leading Cases, 300, where the case of Dollison is also reported, and the notes. The contract of lease in this case may have been for one month, two months, or six months, and whether the custom was applicable or not would depend upon the term agreed for.

We think the testimony under the circumstances of this case was improperly admitted, and there must be a *venire de novo*.

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

Cited: Morehead v. Brown, 51 N. C., 370; *Starke v. Etheridge*, 71 N. C., 245; *Brown v. Atkinson*, 91 N. C., 397; *Quinnerly v. Quinnerly*, 91 N. C., 147; *Richardson v. R. R.*, 126 N. C., 101; *Thompson v. Exum*, 131 N. C., 113; *Blalock v. Clark*, 137 N. C., 142.

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(571)

THE STATE v. JOHN SMALL.

If the weather is so bad as to prevent an overseer of a road from working on the road, or to render unavailing any work he might do, he ought to be excused.

APPEAL from the Superior Court of Law of PASQUOTANK, at Fall Term, 1850, *Caldwell, J.*, presiding.

Attorney-General for the State.

No counsel for defendant.

NASH, J. The defendant is indicted as an overseer of the road set out in the indictment. It was not denied that the road

was out of order and not in such repair as the law required. The defense was that, during the time specified, the weather was such that it could not be worked. It was shown that, during the winter of 1849-'50, and up to the finding of the indictment, the defendant had worked the road five days, and that up to April the weather was very wet, but that the latter month was fair. The bill was found at the Spring Term, 1850, of Pasquotank Superior Court, which commenced on 22 April. The court was requested to instruct the jury that the defendant ought not to be convicted, because of the state of the weather, and if he had used due diligence. This was declined, but the jury were instructed that where the law imposed a duty and its execution was prevented by the act of God, the party was excused. If, in this case, the weather was so bad as to prevent the defendant from working on the road, or rendered unavailing any work he might have done, he ought not to be (572) convicted. But if they believed the witnesses who testified to the state of the weather in the month of April, and of the road during that month, they ought to convict him. The jury found a verdict against the defendant, and from the judgment thereon he appealed.

We see nothing in the charge that is erroneous. Whether the facts testified to by the witnesses were true, was a proper inquiry for the jury; whether, if true, the defendant was excused or not, was a question for the court. And we concur in the opinion expressed. We have looked through the record and see no error, or sufficient cause to arrest the judgment.

PER CURIAM. Judgment affirmed.

THOMAS C. SMITH v. DANIEL CAMERON.

An overseer is not strictly a bailee, though many of the principles of that relation and many of its duties attach to him. It is his duty to take such care of the property intrusted to him as a man of ordinary prudence would take of his own property.

APPEAL from the Superior Court of Law of BLADEN, at a Special Term in December, 1850, *Dick, J.*, presiding.

W. H. Haywood for plaintiff.
Strange, W. Winslow and *D. Reid* for defendant.

NASH, J. The action is in case, brought to recover from the defendant, who was the plaintiff's overseer, (573)

damages for the loss of a negro man by the name of Israel, upon the allegation that the defendant negligently and wrongfully employed the negro upon business not belonging to the plaintiff's concerns, which was dangerous in its nature, and whereby Israel lost his life. The plaintiff owned three fields on the Cape Fear River—two on the west side and one on the east. The defendant was his overseer, and Israel a hand under him. The lower field on the west side of the river was called "Pemberton," below which the defendant and the negroes lived; and the upper field was called "The Point," and lay opposite the field on the east side. On the day before the accident occurred, the defendant, with Israel and other hands, was employed in floating logs out of the field on the east side of the river into the current, that by it they might be carried off, there being at the time a very large freshet in the river, spreading over the lowgrounds and cultivated fields. Late in the evening the defendant went down the river in a boat with Israel, stopped a while at a raft belonging to a man named Nardin, and then proceeded down the river to where he and the slave resided. The next morning the defendant came up the river in his canoe with Israel, and, after a short stoppage at Nardin's raft, proceeded on his way to his business in floating off logs. Nardin went with them to where their business lay, and after working nearly all day the defendant, still attended by Israel, came down to a raft belonging to a man named Cameron, where he got out of the boat, and directed Israel to carry Nardin, who was with him, to his own raft and then return for him. When Israel left Nardin's raft he crossed directly over to the other side of the river, where the boat got entangled among the bushes, was upset, and Israel was drowned. Israel was about forty years of age, a stout, active man, a good waterman, and (574) understood the management of boats and canoes, and was acquainted with the river. This was proved by a witness for the plaintiff, who further stated that he did not consider that there was any danger, in the main current of the river, to boats or canoes. After Israel was drowned, the other hands, who had been employed in floating off the logs, came down the river in the course that the defendant had pursued in coming down. The case further states that the usual course and the safest in getting from the dwelling of the defendant to the field on the east side, when a freshet was in the river, was through the lowgrounds of the Pemberton and Point fields to a spot opposite to the field on the east side. The case does not tell us distinctly on which side of the river the raft of Nardin

was moored. We presume, however, that it was on the west side, as it is stated to have been a little above where the defendant lived.

The counsel for the plaintiff moved the court to charge the jury that the defendant had been guilty of gross negligence, which made him liable to the plaintiff's recovery. This was declined, and the jury were instructed that it was the duty of the defendant to take the same care of the plaintiff's property under his control that a man of ordinary prudence takes of his own; and if they believed he had not taken such care, or that he had not taken care, or that he had placed the slave in a dangerous situation, not in his owner's business and employment, and the loss of the slave was from want of proper care or from unnecessary exposure to danger, it was gross negligence, and the plaintiff was entitled to recover.

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

We can see in the instructions given no error of which the plaintiff has a right to complain. In the argument the case was treated as one of strict bailment, and the instruction asked for placed it upon that ground. An overseer is not strictly a bailee, though many of the principles of that (575) relation and many of its duties attach to him. It is his duty to take such care of the property intrusted to him as a man of ordinary prudence would take of his own property. The court could not give the instruction asked for—the case discloses no such gross negligence. The court then instructed the jury what would amount to gross negligence. Was there error in this charge? We repeat, none of which the plaintiff has a right to complain. The defendant, after spending as much time floating off logs from the field on the east side of the river as he thought was prudent and safe, left on his way to his residence on the opposite side of the river. He was obliged to cross the river to effect his purpose. Pursuing his ordinary course, he stopped at a neighbor's raft, and directed Israel to put Nardin on his raft about two hundred yards below and then return for him. That he was in his ordinary course in returning home is shown by his pursuing the same course the night before, and from the fact that the other negroes in their boats followed in the same direction. Israel was not a boy, ignorant of boating, nor a feeble man, but hale and strong, living upon the river, skillful in boating and accustomed to managing boats and canoes, and the witness of the plaintiff stated there was no danger in the body of the stream. To return from Nardin's raft to Cameron's did not require the negro to cross the river, both rafts

being on the same side, and, where he left, about a hundred yards apart. Why he did cross it is not stated, and cannot now be known. We cannot perceive of what negligence the defendant was guilty, and think his Honor would have been justified in telling the jury there was no evidence of any negligence.

PER CURIAM. Judgment affirmed.

(576)

JOHN C. McDUGALD v. ALFRED SMITH.

1. It is no ground of exception to a deposition that the notice was given to take the depositions of A, B, C, and others, and the deposition of neither A, B, C was taken.

2. Where a copy of a statute of another State has been received in evidence in the court below, upon insufficient proof, yet, if it is made to appear to this Court, from an official and proper source, that the copy so received in evidence was correct, a *venire de novo* will not be awarded for that error.

APPEAL from the Superior Court of Law of COLUMBUS, at Fall Term, 1850, *Battle, J.*, presiding.

McDugald for plaintiff.
Strange for defendant.

NASH, J. The action is in *assumpsit* on a promissory note by the indorsee. The general issue was pleaded, but the execution of the instrument admitted. The note was made in Maryland, where the payers lived. To prove the indorsement, a deposition was offered in evidence, which was objected to, and several reasons assigned. The *first* was the insufficiency of the notice, in this, that it notified the defendant that the evidence of two witnesses, whose names were mentioned, "and others," would be taken; and that neither of the persons whose names were stated were examined; but others were, whose names were not stated. *Secondly,* because the witnesses were not examined on interrogatories; and, *thirdly,* because the clerk of the court, in passing upon the deposition, had given the defendant, (577) or his counsel, no *particular* notice of the time and place of passing on it. These objections were overruled. It was then objected by the defendant that there was no evidence that by the laws of Maryland, where the indorsement was made, such an instrument was negotiable. To answer this objection, the plaintiff offered in evidence a paper-writing, purporting to be a certified copy of an act of the General Assembly of that

State upon this subject; its reception was opposed, upon the ground that it was not certified according to law. His Honor being of a contrary opinion, it was received. There was a verdict for the plaintiff, and the defendant appealed. We concur with his Honor in his opinion as to the admission of the deposition in evidence. To support his first objection, the defendant's counsel cited *Ninnot v. Bridgewater,* 16 Mass., 472. We do not consider this case as an authority by which we can be governed, or even assisted, in our present inquiry. The Court, in that case, place their decision upon the statute-law of the State. Their language is, "the Court being of opinion that the notice required by *statute* was not sufficient unless it contained the name of the person whose deposition was to be taken." There the notice contained the names of several persons, and nothing more as to any others. Now, it may be that the statute of Massachusetts requires, in so many words, that the names of all the persons whose depositions are to be taken shall be set forth in the notice. If so, the deposition in that case could not be used, as the individual whose testimony was taken was not named in the notice. Be this, however, as it may, the Court, professedly, only gave their *construction* of the statute, and no doubt gave a sound one. But to make it bear upon our decision, or to assist us in placing a sound construction on our statute, it is not sufficient that the statutes are in *pari materia;* it was the duty of the defendant to show by proper evidence that their directions and provisions are the same. (578) This he has not done. Nor do the Court, in their decision, name the statute, so as to enable us to examine it and see how far it corresponds with our act. In the different States the practice in their several courts is regulated, mostly, by their own statutes and usages, and it would be unsafe, in putting a construction upon our statute, to be governed by that put upon a similar one in a sister State, without knowing what its provisions are. But there is another reason why the decision in Massachusetts, referred to, is not an authority in this case. As before stated, in that case the notice was to take the deposition of certain specified witnesses, and a person was examined whose name it did not contain. There the defendant might well say, perhaps, I did not and could not know that any persons would be examined but those named in the notice, otherwise I should have attended; it is a surprise upon me. In this case he can rightfully make no such allegation; he was apprised that the examination would not be confined to the witnesses named. It was his duty to attend or be properly represented, that he might take care of his interest. The act of our Legislature points out

no form in which the notice shall be drawn; it simply directs that notice shall be given the adverse party of the time and place when the "commission shall be executed." So far as the practice under it can be considered a construction of it, the notice complained of is proper. We see no provision in the act forbidding it, and no evil or danger resulting from it. The defendant, however, further complains on this point that the persons named in the notice were not examined. We know of no law requiring a party to examine all or any of the witnesses named in the notice. As well might it be required of a party to examine all the witnesses he summons on a trial before a jury, and who are in attendance.

(579) The second exception to the deposition is properly abandoned.

The third is that the clerk passed upon the deposition without giving to the defendant or his counsel any *particular* notice of the time when, etc. The decision upon the first point renders it unnecessary to examine this objection.

In admitting in evidence the paper-writing purporting to be a copy of the law of Maryland there was error. It was not certified, as required, either by the laws of the United States or of North Carolina. For this error we should certainly direct a *venire de novo,* if it would serve any good purpose. Availing ourselves, as we have before done in other cases, and as we consider our duty to do, of the facilities furnished us by the vicinity of the office of Secretary of State, we are satisfied the copy upon the trial was a true and correct copy of the statute of Maryland upon the subject. We have been supplied with a copy of that law, certified as directed by the laws of this State. There is no complaint that the law of Maryland is not as stated by the judge in his charge. The complaint is that the evidence upon which his opinion was founded was insufficient and contrary to law. To what purpose grant a *venire de novo,* where we are satisfied that the law upon which the case turned has been correctly stated to the jury? Why send the case back to another jury, where the result must be the same? *Interest reipublicæ ut sit finis litium.*

PER CURIAM. Judgment affirmed.

Cited: Grace v. Hannah, 51 N. C., 97; *Copeland v. Collins,* 122 N. C., 621, 625.

(580)

HENRY G. HAMPTON v. DAVID M. COOPER, ADMINISTRATOR.

Where an executor arrests a defendant on a *ca. sa.*, sued out on a judgment obtained by his testator, and afterwards dies, and the proceedings on the *ca. sa.* are discontinued, and then administration *de bonis non with the will annexed* is granted, this administrator is not liable in any way for the costs of the proceedings on the *ca. sa.*

APPEAL from the Superior Court of Law of SURRY, at Spring Term, 1850, *Dick, J.*, presiding.

Boyden for plaintiff.
Morehead for defendant.

RUFFIN, C. J. The action is *assumpsit*, and, upon the trial on the general issue, the case was this: Stephen Haynes, as the executor of Moses Crissman, obtained a judgment in Surry Superior Court against Aaron Crissman, and sued out a *ca. sa.* and delivered it to the plaintiff, who was the sheriff of Surry. He arrested the debtor, who gave a bond to appear and take the benefit of the act for the relief of insolvent debtors. He appeared, and, upon a suggestion of fraud, an issue was made up. Before it was tried Haynes died intestate, and no further proceedings were had on the issue for more than two terms, and the court discharged the debtor from further attendance. Afterwards, the defendant, Cooper, obtained letters of administration *de bonis non* with the will annexed of Moses Crissman, and this action was brought against him in that character for the plaintiff's fees and commissions on the execution. (581) The court was of opinion that the action would not lie, and ordered a nonsuit, and the plaintiff appealed.

We suppose the administrator of Haynes could not have discharged the defendant out of custody, but that the power to do so or to complete the execution belonged to the administrator *de bonis non*, as incident to the debt, which was a part of the original testator's goods unadministered. But, in fact, the defendant did nothing in the matter, but the proceedings were at an end before he administered. Therefore, it seems impossible to charge him in any capacity, by implying a promise to pay the plaintiff his commissions. The executor, who sued out the execution, was doubtless liable for the sheriff's poundage, if anybody besides the debtor was. The sheriff was not bound to look to the testator's estate for his demand, for that might be insolvent, and he did the work at the instance of the executor

himself. Haynes would, therefore, be liable in his natural capacity, if at all. *Matlock v. Gray,* 11 N. C., 1. If he acted with good faith and reasonable prudence in suing out the *ca. sa.* and incurring this expense, he might claim to be indemnified out of the assets. That, however, is a different point from the present. We cannot tell but that Haynes did retain an indemnity out of the assets. Whether he did or not, his personal liability excludes that of the administrator *de bonis non;* for the sheriff cannot have a right to look to both, so as to imply a separate promise from each. At common law there was no privity between the executor and the administrator *de bonis non,* and this case is not within the act of 1824.

PER CURIAM. Judgment affirmed.

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(582)

WILLIAM GLOVER v. ABRAM RIDDICK.

1. A conversion, to subject a defendant in an action of trover, consists either in an appropriation of the thing to the party's own use and beneficial employment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the sheriff's rights, or in withholding the possession from the plaintiff under a claim of right inconsistent with his own.

2. Giving to a negro a certificate that he is free does not amount to a conversion in the person giving the certificate, if the negro should turn out to be a slave.

APPEAL from the Superior Court of Law of PERQUIMANS, at Fall Term, 1850, *Caldwell, J.,* presiding.

This is an action on the case, and the declaration contains three counts: one in trover for the conversion of two slaves from November, 1847, to August, 1848; one for harboring the said slaves; and one for trading with them.

The facts of the case, as they appeared on the trial, are as follows: In 1843 the plaintiff purchased from one Mitchell two slaves, named Tony and Armistead, then runaway; they were first seen in 1846 or 1847, in Nansemond County, Virginia, passing as free persons of color, under the names of Jack Douglas and Charles White; they worked for several persons as free persons, and exhibited certain papers called free papers, to several persons; they purchased goods out of the defendant's store in 1846 and 1847, and settled the account of 1846; they called on the defendant at his store in the said county, and asked him for a certificate of freedom, alleging that they had left their free papers at some point distant from the said store; the

defendant called on two of the bystanders, to wit, his (583) clerk, and one Everitt, for the latter of whom they had worked, to state what they knew about their freedom, and they stated that they had passed as free persons since they came into the neighborhood, and that they had seen their papers with the county seal appended; thereupon the defendant gave them a paper-writing in the following words, to wit: "Newton, 8 November, 1846. The bearer, Jack Douglas, a very stout black man, about thirty-five years old, lives in the neighborhood of my cotton factory, is free and of good character; his partner, Charles White, also a stout black man (not quite so tall as Jack), about thirty-five years old, is also free, lives in this neighborhood and is also of good character; they are looking for work. Abram Riddick." It also appeared that they remained in the neighborhood until the spring of 1848, when they left, and were apprehended at Weldon by one Scott, in the act of taking the cars; that he committed them to Halifax jail, where they remained six weeks or two months, and from which they were taken by the plaintiff in August, 1848, and carried to Norfolk; that he paid the jail fees amounting to $40, and $200 to the jailer for the said Scott; that the said $200 were paid in pursuance of a reward he had offered by advertisement for their apprehension in 1843. The entire transaction, as appears, took place in the State of Virginia. The alleged free papers were identified on the trial, and turned out to be forgeries. The said Scott did not know of the reward offered at the time he apprehended the said slaves. They stated to the defendant, when they applied for the certificate, that they wanted to go elsewhere to get work.

The court charged that the plaintiff could not recover on the count for trading with the said slaves, because it did not appear that any law existed in Virginia prohibiting such traffic; that he could not recover on the count for harboring, because the mere selling of goods by the defendant, out of (584) his store, would not amount to harboring. On the first count the court charged that any wrongful dominion exercised by one man over the property of another amounted to a conversion, and the giving of the paper-writing in question was the exercise of such dominion. To this part of the charge the defendant excepted. On the subject of damages the court charged that the plaintiff was not entitled to recover the reward of $200, nor any other sum by way of reward, as insisted on by his counsel; that he was entitled to recover the value of the hire of the said slaves from November, 1847, to August, 1848, the jail fees by him paid, and his reasonable expenses in going from

Pasquotank to Halifax and returning. To the part of the charge, denying the plaintiff the right to recover the reward as a part of the damages, the plaintiff excepts.

There was a verdict for the plaintiff according to the charge of the court, and from the judgment thereon both parties appealed.

A. *Moore* for plaintiff.

(586) *Heath* and *Ehringhaus* for defendant.

(587) NASH, J. None of the acts of the defendant which are stated in the case, taken separately or together, amount in law to a conversion. A conversion, to subject a defendant in an action of trover, consists either in an appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's right, or in withholding the possession from the defendant under a claim of title inconsistent with his own. Such is Mr. Greenleaf's summary of the acts of a defendant to constitute a conversion in the sense of the law of trover. 2 Gr. Ev., sec. 642. Which one of these acts, it may be asked, has this defendant been guilty of? The defendant is a merchant; and in 1846 and 1847 the negroes in question first appeared in his neighborhood, claiming and acting as freemen. They remained in that neighborhood

(588) until 8 November, 1849, and during that time worked for different persons, openly. They purchased goods out of the defendant's store in 1846 and 1847, and settled and paid the account of the first year, and exhibited to various persons free papers, as they are called. On 8 November, 1847, they requested the defendant to give them a certificate that they were free, alleging that they had left their free papers at a house some distance off. The defendant called on his clerk and a Mr. Everitt, who was in the store, and for whom they had worked, to state what they knew of their being free. They both stated that the negroes had passed as free ever since they had been in the neighborhood, and that they had seen their free papers with the county seal appended. The defendant then gave them the certificate set forth in the case, in which he certifies they are free. This is the only act upon which the plaintiff relies to prove a conversion. Admit it was a wrongful act, yet it is not every tortious act, affecting the property of another, that amounts to a conversion; thus, cutting down his trees, without taking them away, is no conversion. *Myers v. Solebay*, 2 Mod., 245. The giving of the certificate was certainly a very indiscreet act, to say the least of it, but is no evidence of an act of ownership

on the part of the defendant—it expressly disclaims it. His Honor, however, ruled that the giving the paper-writing by the defendant was the exercise of such dominion over the slaves as amounted to a conversion. In this opinion we think there is error. We agree with his Honor, and for the reasons expressed by him, that the plaintiff cannot recover upon the counts for harboring or trading with the slaves. As, in the opinion of the Court, the plaintiff cannot recover in this action upon any of the counts in his declaration, no opinion is expressed as to the question of damages. (589)

There being no error in the charge, upon the count in trover upon which the verdict was given, the judgment is reversed and a *venire de novo* awarded.

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

Cited: McDaniel v. Nethercut, 53 N. C., 99; *Rhea v. Deaver,* 85 N. C., 340; *University v. Bank,* 96 N. C., 285; *Smith v. Durham,* 127 N. C., 419.

ALEXANDER REID ET AL. V. THOMAS PASS ET AL.

1. Where a petition had been filed in the County Court by the next of kin of an intestate for the sale of negroes for the purpose of distribution, and a sale had been made by a commissioner appointed by the court, according to the prayer of the petitioners, and he had paid over to them what he alleged to be their full respective shares, it is not competent for these petitioners to file a subsequent original petition in the same court, charging that the commissioner had not paid them their full shares (they having signed a receipt in full by mistake), and requiring the commissioner to account, etc., and to pay over the balance, etc.

2. Their relief could only be obtained by an application to the County Court for a hearing, if the proceedings of the commissioner had been confirmed, or by recourse to a court of equity to set aside the receipt, if given through mistake.

APPEAL from the Superior Court of Law of CASWELL, at Fall Term, 1850, *Manly, J.,* presiding.

Morehead for plaintiffs.
Kerr for defendants.

NASH, J. Whatever may be the merits of the petitioners, they cannot in these proceedings obtain the relief they seek. The petition was filed at the September Term, 1848, of Caswell Court of Pleas and Quarter Sessions, and set (590)

forth that at January Term, 1849, of the court the defendant Pass, as executor of Thomas Reid, deceased, filed a petition against the petitioners, as next of kin with the testator of John Gamble, deceased, for the purpose of selling a parcel of negroes belonging to the estate of John Gamble, in order to make a division among the next of kin; that a decree was made for the sale and distribution of the proceeds, and Thomas Pass, the present defendant, was appointed by the court a commissioner for that purpose, who duly sold the negroes and paid over to the petitioners what, he alleged, was their proper shares, for which they gave him a receipt in full, dated in August, 1849. The petitioners allege that the receipt was written to be in full by mistake, and not so intended to be by them, as a considerable sum is still due them as next of kin of John Gamble. The prayer of the petition is that the court will "cause a copy of this petition, together with the State's writ of subpœna, to be issued and served on the said Thomas Pass, as *commissioner aforesaid*, and as executor of Thomas Reid, requiring him to appear," etc., "and full, true and perfect answer make," etc., "and also to account and pay to the petitioners the balance," etc. The proceeding throughout is an original one in the County Court against Thomas Pass as an officer of the court, and acting as their commissioner. What has become of the first suit we are not informed. It may be still pending, or there may have been a report and final decree. Whichever may be the case, it is evident the petitioners have mistaken their remedy. If the defendant Pass has in his hands any money arising from that sale which rightfully belongs to the petitioners, he holds it still as commissioner, and it is under the control of the court and subject to such order as they may make. The proper course for the plaintiffs to have taken in the court of law was to move in that cause, either when the commis-
(591) sioner made his report or by the necessary steps, to procure a rehearing or review of such decree as may have been made. This proceeding cannot be sustained. So far as the setting aside the receipt complained of is involved, the County Court, as an original matter, has no jurisdiction, but as incidental to the discharge of his duty by its commissioner, it has power both to hear and to grant redress. To a court of equity belongs the original jurisdiction in such matters.

The decree made by his Honor below is affirmed, and the petition dismissed with costs.

PER CURIAM. Decree affirmed and petition dismissed.

Cited: Lord v. Beard, 79 N. C., 11.

THOMAS THREADGILL v. JOSEPH WHITE.

1. Where notice has not been given to produce a bill of sale or other instrument of writing, or where its absence is not satisfactorily accounted for, it is not competent to introduce, as evidence of the execution or contents of the instrument, the oral admissions or declarations of the alleged maker.

2. A party cannot introduce secondary evidence of the contents of a written instrument, merely upon showing that the instrument, though in existence, is in another State.

APPEAL from the Superior Court of Law of ANSON, at Fall Term, 1850, *Battle, J.*, presiding.

This is an action of *assumpsit,* which was tried on the general issue. The case was, that the defendant as sheriff sold some slaves under writs of *fieri facias* against the plaintiff; and the present suit was brought to recover a sur- (592) plus of the proceeds after satisfying the executions. The defense was that the plaintiff was not entitled to the surplus, because the slaves were not his, but he had conveyed them by deed to one Colson before the defendant took them. In support of the defense evidence was given that Colson had removed from this State and carried the bill of sale with him; and then the defendant offered a witness to prove the contents of the deed. But, upon objection by the plaintiff, the court ruled out the evidence, because the nonproduction of the instrument was not sufficiently accounted for. The defendant then offered a witness to prove that the plaintiff, upon his examination as a witness in a suit brought by Colson for the slaves, stated that they belonged to Colson, and that he (the plaintiff) had no interest in them. But the court refused to receive the evidence; and, after a verdict and judgment for the plaintiff, the defendant appealed.

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

RUFFIN, C. J. It is understood from the case that the mode in which the title to the slaves was supposed to have passed from the plaintiff to Colson, as proposed to be established by proof of the declarations of the plaintiff, was by the deed of conveyance, which the defendant had previously alleged. That presents the inquiry whether it be competent to prove the title of Colson derived under the supposed deed—in other words, the contents and operation of that instrument—by oral testimony of the plaintiff's admissions on those points. The Court is of

opinion that it is not. It is to be observed that the title to the slaves is the gist of this controversy; and therefore that the execution, terms and legal effect of the deed by which it was
(593) alleged to have passed were directly in issue. It is perfectly settled that the evidence of its execution, if produced, must be by the subscribing witness, and that the want of that evidence cannot be supplied by proof of the party's admission *in pais*. Much less, it would seem, can such an admission supply both the place of the subscribing witness and the production of the instrument. There have been cases in which, as exceptions to the general rule of evidence, the admission of a fact by a party was considered sufficient to dispense with the regular proof of deeds. They are not numerous, and are stated in 1 Phil. Ev., ch. 7, sec. 6; and they seem to be in cases in which the subject of the deed was collateral to the principal thing in issue. There appears, however, to have been much conflict of opinion on the admissibility of such declaration; and it is admitted that the Court of Exchequer has held that an admission of the party is competent evidence of the contents of a deed, so as to dispense with its production and proof of its execution, even when the contents are directly in issue. *Slatterie v. Pooley*, 6 M. and W., 663. That decision has been followed by other cases in which the doctrine has been either laid down or assumed, so that, perhaps, it may be said to prevail at this time in that country. It has, however, been stoutly resisted both on the bench and by reputable writers. The Chief Justice of Ireland, in *Lawless v. Queale*, 8 Irish Law Rep., 385, did not hesitate to follow *Lord Tenterden*, in *Blosam v. Elsee*, Ry. and M., 187, and said that the doctrine of *Slatterie v. Pooley* was most dangerous, as it opens the door to fraud and surprise by false testimony of the contents of a deed in the form of the party's admission, instead of giving the deed itself. It seems to be in direct opposition of principle: the evidence being received as primary, and the production of the deed and notice to produce it and direct proof of its execution being dispensed with.

For, if it be attempted to prove the contents by a person
(594) who has read it, the law will not hear him, even after proof of execution, unless the nonproduction of the deed be accounted for; and the reason is that the law will not trust to the frail memory of any man upon that point, when the higher grade of evidence constituted by the instrument itself is kept back. There is evidently the same reason for refusing the evidence of a person who deposes upon his recollection of what the party said of the contents. That is, indeed, going a step

farther than in the former instance, since there is not only danger that the witness may have misunderstood or not fully remembered what the party said, but also that the party may not have remembered and understood the terms and effect of the deed correctly. The incongruity will be the more readily seen if we suppose the same witness, who is called to prove the party's admissions of the contents of a deed, to state also, upon further examination, that he, upon his own knowledge and remembrance, could state the contents, and that they were entirely different from those stated by the party, so as to show that the party by mistake understood the deed to operate more strongly against him than in fact it did. Would it not seem as strange a thing as can be, that the better recollections of the witness, as they may be, of the contents of the instrument—which, perhaps, he attested—should not be admissible, while his recollections of the party's declared and mistaken recollections as to the contents should be sufficient to establish them? There is clearly in each case the danger that the court and jury may be misled; on which the rule of evidence rests which rejects inferior evidence, because better may be had, and upon that ground requires the production of deeds as the best proof of their contents. In this country that view seems to have been generally taken of the question. In *Welland Canal Company v. Hathaway,* 8 Wend., 484, the rule is stated in very correct terms, as it seems to the Court, by *Mr. Justice Nelson,* now of the Supreme Court of the United States. After citing (595) several cases, he laid it down as an undeniable proposition that the admissions of a party are competent evidence only in cases where parol evidence is admissible to establish the same facts, or, in other words, where there is not, in the judgment of the law, higher and better evidence in existence. He said further, that it would be a dangerous innovation upon the rules of evidence to give any greater effect to the admissions, unless in open court; and the tendency would be to dispense with the production of the most solemn documentary evidence. No case to the contrary in this country has been found; and it is in the experience of each member of the Court that in this State the rule on the circuits has always been to require the deed itself. The present is the first instance in which a question has been raised on it, and the Court feels bound to abide by the old rule.

As to the other point, that secondary evidence of the contents of the deed was admissible, because the deed, though in existence, was in another State, the case of *Davidson v. Norment,* 27 N. C., 555, is a direct authority the other way.

PEARSON, J. Is it competent to prove the admissions of a party as to the contents of a writing, without notice to produce it, or accounting for not offering the writing itself?

According to the English cases, such evidence is competent, upon the ground that the admissions of a party against his own interest is *primary* and not *secondary* evidence. *Slatterie v. Pooley,* 6 M. and W., 663; *Regina v. Welch,* 2 Car.; 61 E., ch. 1, sec. 296. One of the points on the trial at *nisi prius* was the admissibility of declarations of the defendant as to his appointment, which was in writing. The case was reserved for the consideration of the fifteen judges; and when it was called
(596) for argument, the prisoner's counsel abandoned the point as *not debatable.* "According to the case of *New Hall v. Holt,* 2 M. and W., 662, and *Slatterie v. Pooley, ib.,* 653, I must concede that admissions made by a party as to the contents of a written document are evidence against him." See Best on the Principles of Evidence.

After much reflection, according to my judgment, the "reason of the thing" is against the admissibility of the evidence. I therefore concur in the opinion that the evidence was not admissible.

PER CURIAM. Judgment affirmed.

Cited: McCracken v. McCrary, 50 N. C., 400; *Justice v. Luther,* 94 N. C., 798; *Gillis v. R. R.,* 108 N. C., 448; *Avery v. Stewart,* 134 N. C., 292.

SALLY A. TARKINTON v. CHARLES LATHAM, ADMINISTRATOR.

Where a grandfather, since the act of 1806, made a parol gift of a negro woman slave to his granddaughter, and placed the slave in possession of the granddaughter's father, with whom she lived, as her property, and the negro was always alleged by the father to belong to the granddaughter: *Held,* that the father, and, of course, any person claiming under him, were estopped to deny the granddaughter's title.

APPEAL from the Superior Court of Law of WASHINGTON, at Fall Term, 1850, *Caldwell, J.,* presiding.

This was an action of trover, brought to recover a negro woman, a slave, by the name of Marina, and her two
(597) children.

The plaintiff proved that Marina was once the property of Zebulon Tarkinton, who made a parol gift of her to his granddaughter, the plaintiff, when she was an infant and

quite small. At the time of the gift the slave was delivered to the plaintiff by the grandfather's taking the hand of Marina and placing it in the hand of the plaintiff; and, thereupon, Joseph Tarkinton, the plaintiff's father, with whom she was living, took possession of Marina for and on behalf of his daughter, and continued that possession, repeatedly declaring that Marina was not his property, but belonged to the plaintiff, until shortly before his death, when he sold and delivered the slave to Thomas Myers, the defendant's intestate. The plaintiff was about twenty-one years of age at this trial, and was proved to have lived in her father's family till his death in 1841.

Zebulon Tarkinton, the grandfather, died in 1834, a few years after the gift. Shortly after the death of Zebulon Tarkinton, and at the sale of his personal estate, one ——— Spruill, who conducted the sale and professed to be the administrator, inquired of Joseph Tarkinton for Marina, and demanded her of him, that he might sell her as the property of said Zebulon. Joseph Tarkinton refused to deliver her or permit her to be sold, declaring that she was the property of his daughter, and had been given to her by her grandfather, the said Zebulon, and referred to the witnesses who were present when it was done. One of the witnesses appealed to was the said Thomas Myers, who thereupon stated that himself and another witness were called on to witness the gift; that the said Zebulon did give and deliver Marina to the plaintiff, for a nurse, and that Joseph Tarkinton then took possession for his daughter. Marina was not present at this sale, but was then in possession of Joseph Tarkinton, and was at his house.

It was further proved that Joseph Tarkinton, while Marina was in his possession, claimed her for the plaintiff, declaring at some times that she was his daughter's prop- (598) erty, at others that she was given to his daughter by her grandfather in presence of two witnesses; and that Myers had often expressed a wish to purchase Marina, but said he could get no title, as she belonged to the plaintiff.

Myers purchased Marina of Joseph Tarkinton, in 1841, shortly before which he remarked to a witness: "I can now try and get a good title to Marina from Joe Tarkinton, for the other witness to the gift is dead, and I cannot be compelled to swear against myself."

No will of Zebulon Tarkinton was offered in evidence, and to show that the said ——— Spruill was administrator, the plaintiff offered to prove that he took possession and sold the goods and effects of said Zebulon, and acted as administrator in the settlement of his estate, and further, that at the sale referred to,

which was conducted by him as administrator, the said Myers became purchaser of part of the property sold. This evidence was objected to by the defendant, but the presiding judge, reserving the question of its admissibility, permitted the proof to be made. It was admitted that Myers had converted to his own use the slave Marina, and also two children, born after his purchase from Joseph Tarkinton and before suit.

It was insisted for the defendant that the plaintiff could not recover, for that she acquired no title by the gift, nor had she such an adverse possession against Joseph Tarkinton as would transfer to her the title to the said slave.

The court charged the jury that, although the parol gift in the first instance conveyed no title to the plaintiff, yet if the possession of the slave in question were held by her, or by her father for her, and, upon a demand being made by the said administrator to sell said slave, her surrender was refused, and therefore she was held by the plaintiff, or by her father
(599) for her, three years adversely to the title of said administrator, the plaintiff would be entitled to recover.

The jury returned a verdict in favor of the plaintiff. Rule for a new trial for misdirection to the jury and because of the admission of improper evidence. Rule discharged, judgment, and appeal.

Smith for plaintiff.
A. Moore for defendant.

(601) RUFFIN, C. J. The plaintiff could have entertained this action against her father upon her coming of age. He could not have set up the grandfather's title against her, because he did not receive the negro to hold for the owner, whoever that might be, but he received her expressly as his daughter's, and engaged to hold her as the agent of the plaintiff and for her. He could not, therefore, dispute her right, but was estopped to deny it. That estoppel was imparted to Myers, as he bought and received the slave from the father, and thus became his privy in estate; and it extends to the defendant, the administrator of Myers. The verdict and judgment were, therefore, clearly right on that ground; and as they rest upon the estoppel, arising out of the relation of bailor and bailee, or principal and agent, between the plaintiff and her father, any particular demerits of Myers are not to be regarded, since the estoppel would affect any other purchaser from the father in the same manner.

PER CURIAM. Judgment affirmed.

(602)

DANIEL McNAIR v. JOHN McKAY, ADMINISTRATOR, ETC.

No action at law can be maintained to collect the assets of a deceased man, except by his personal representative; but where A, claiming a slave as a distributee of B, employs C to sell such slave, and C accordingly sells the slave and receives the price, he receives it for the use of A, and cannot dispute the title of A, but is bound to account with him for the sum received.

APPEAL from the Superior Court of Law of BLADEN, at Fall Term, 1850, *Battle, J.*, presiding.

This was an action of *assumpsit*, in which the plaintiff declared for money had and received, and in the other money courts. Pleas, the general issue, statute of limitations.

On the trial the evidence was that, some time in 1848, the defendant's intestate sold a negro slave named Jack for $750, and received $400, part of the purchase money, and said that he was acting as the agent of the plaintiff. The negro Jack had belonged to one Dugald Blue, who died in August, 1828, leaving five children, with one of whom, named Annie, the plaintiff intermarried.

The purchaser said he thought he had paid the balance of the purchase money for Jack to John F. Blue, who was one of Dugald Blue's children. Another witness testified that, in 1842 or 1843, he believes in the latter year, he indorsed a note for the intestate to enable him to borrow some money (603) from the bank, the intestate saying he wanted it for the plaintiff, who was expected to come in from Tennessee, where he resided.

The intestate said afterwards he had laid out the money in the purchase of goods. He died in the fall of 1844. And the defendant took out letters of administration on his estate, and in October, 1846, the plaintiff, by a regularly constituted attorney, made a demand upon him for the money which his intestate had received as the plaintiff's agent for the sale of Jack. The defendant refused to pay the amount claimed, which was one-fifth of the whole purchase money, with interest; and the suit was commenced in 1848. There was no distinct evidence that any letters of administration had been taken out on the estate of Dugald Blue, deceased, and the defendant contended that, whether there was or not, the plaintiff could not recover, for if there had been no administration, no person could claim the slave Jack, or his proceeds, except as administrator of the said Dugald Blue, and if there had been an administration the slave or his proceeds belonged to such administrator, or, if he were dead, to an administrator *de bonis non*.

The court instructed the jury that the principles of law contended for by the defendant were correct, and would determine this case in his favor, if the length of time and other circumstances would not enable them to make such presumptions as would support the plaintiff's title; that if they found that the defendant's intestate had possession of the slave, on the day of sale, eighteen years after the death of Dugald Blue, or the plaintiff's agent had sold him as such and subsequently acknowledged that he held the proceeds of such slave for the plaintiff as his agent, they were at liberty to make any and every presumption, as against the defendant's intestate, to support his right (604) to recover. The jury under this instruction returned a verdict for the plaintiff, and the defendant, after an ineffectual motion for a new trial for misdirection by the court, appealed to the Supreme Court.

McDugald for plaintiff.
D. Reid and *Banks* for defendant.

NASH, J. We see no such error in the charge of the judge below as to authorize this Court to interfere with the judgment. The plaintiff is entitled to retain his verdict. It is not denied that John McKeethan, the intestate of the defendant, as the agent of the plaintiff, sold, in 1838, a negro man slave, and received the purchase money, which he converted to his own use. The money so received by the intestate was received by him to the use of the plaintiff. On the part of the defendant, however, it was insisted that the slave so sold by the intestate had belonged to one Dugald Blue, who died intestate in the year 1820, and that no action could be brought to recover the proceeds of the sale, except by his administrator. The principle contended for is correct. No action at law can be maintained, to collect the assets of a deceased man, but by his personal representative. This is not a case, however, for its application. The action is not brought to collect in the assets of Dugald Blue; but the plaintiff seeks to recover the money in contest, upon a personal contract with the intestate, John McKeethan. If an action had been brought by the plaintiff against the intestate to recover the negro before the sale, or the proceeds of the sale, the intestate could not have been heard to deny the title of the plaintiff in either case; so neither can the defendant, who stands in his place. See *Dunwoodie v. Carrington*, 4 N. C., 355; *Means v. Hogan*, 37 N. C., 525; *Love v. Edmonds*, 23 N. C., 152; Story Agency, sec. 217.

PER CURIAM. Judgment affirmed.

Cited: Davidson v. Potts, 42 N. C., 274; *Webster v. Laws*, 89 N. C., 228.

(605)

THEOPHILUS M. BELL v. WILLIAM B. TOOLEY.

A court-martial is a court of special and limited jurisdiction. It must be organized agreeably to law, and this must be shown distinctly by every one who seeks to enforce its sentences or justify action under its precepts. Therefore, where a company court-martial, as is required by our law, must be composed of at least two commissioned officers, and it did not appear in this case that more than one commissioned officer sat in the court, an execution issued by a tribunal so constituted is void and does not justify an officer in acting under it.

APPEAL from the Superior Court of Law of HYDE, at Fall Term, 1850, *Ellis, J.*, presiding.

Rodman for plaintiff.
Shaw for defendants.

NASH, J. The action is in trover, to recover the value of a horse belonging to the plaintiff, and alleged to have been converted by the defendant. The defendant, who was a duly qualified officer of Hyde County, justified under process issued by a military court-martial. To sustain his defense, he produced a paper-writing, purporting to be a judgment rendered by a company court-martial, composed of William Fisher as acting captain, Major O'Neal as acting lieutenant, and the ensign of the company, against the plaintiff, for the amount of a fine imposed on him for not attending the preceding muster of the company, of which he was a member; a paper-writing, purporting to be an execution signed by William Fisher, as captain, to collect from the plaintiff the amount of the judgment, (606) was also offered in evidence by him, and, after objection, admitted by the court. By color of this paper the horse in question was levied on and sold by the defendant. He also introduced a paper, under seal of the State, purporting to be a commission to Fisher as captain of the company, and bearing date before the sitting of the court-martial at which the judgment was given, but no commission to either of the other officers who sat on the court-martial was offered. It was proved by the commanding officer of the regiment that he had administered the oaths of office to Fisher and O'Neal. The reception of this testimony was opposed by the plaintiff, but admitted. The plaintiff objected to the reception in evidence of the alleged judgment and execution: *First,* because it did not appear that the officers comprising the court-martial were commissioned officers and authorized to hold a court-martial. *Secondly,* because

it did not appear that the said officers had been duly qualified by taking and subscribing the oaths required by the act of the General Assembly. Rev. St., ch. 73, sec. 31. *Thirdly,* because the judgment was void, the plaintiff never having had any notice of the proceedings against him. To sustain his objection, he offered to prove that the commission to William Fisher, offered in evidence, had been issued in blank and filled up with the name of William Fisher by the commanding officer of the regiment to which the company belonged, after the conversion by the defendant; and that Fisher was not duly elected by the company. The court overruled the objection to the commission.

The jury were instructed that if the defendant, at the time he took the horse, had in his hands an *execution,* upon its face regular, and issued *by a court-martial* having jurisdic-
(607) tion of the subject-matter, he would be justified; that, in this case, the *execution* appeared upon its face to be regular, and would justify the officer, if they should be of opinion that the officers of the court-martial were elected by a majority of the company, and, at the time they rendered the judgment, the *acting* officers of the company.

We do not concur in the above opinion. The error of his Honor consisted in considering the paper, purporting to be an execution, to be a valid one. The objection is that it is not an execution, and therefore could confer upon the defendant no authority whatever.

The first and second objections of the plaintiff to the justification relied on by the defendant are to the organization of the court. They raise the question, Had the individuals, assuming to act as a court-martial, any legal right to perform the duties of such a tribunal? If they had, then his Honor was correct as to the effect of the execution in protecting the officer. If not, there was no legal tribunal, and the whole proceedings were *coram non judice,* and entirely void. A court-martial is a court of a special and limited jurisdiction, called into existence for a special and limited purpose. It exists only temporarily, and when the business for which it is called is transacted, it ceases to exist. Such a court must be organized agreeably to the law, and this must be shown distinctly by every one who seeks to enforce its sentences or to justify action under its precepts—the law will intend nothing in its favor. *Brooks v. Adams,* 11 Pick., 441; *Mills v. Martin,* 19 John., 7; *Wise v. Withers,* 3 Cranche, 331. In the latter case *Chief Justice Marshall* declares that "the decision of such a tribunal, in a case clearly not within its jurisdiction, cannot protect the officer who executes it." Much more must it fail of such an effect where

from a defect in its organization it fails to be a court. The court-martial in this case was ordered under the (608) provisions of the act of 1836. Rev. St., ch. 73. By section 16 "the captain or commanding officer of a company shall muster his men at least twice in the year," and it is made the duty of every private to attend the musters, under a specified penalty. Section 17 authorizes "the *commissioned* officers of the company or any two of them to meet in court-martial, and proceed to try and determine on all cases that shall be brought before them," etc. This requisition was not observed in constituting the court-martial in this case. It is stated in the bill of exceptions that Fisher was the acting captain of the company, and O'Neal the acting lieutenant, and that the court-martial was composed of them and the ensign of the company. Admit that the commission to Fisher was legal, it is not pretended that either O'Neal or the ensign ever had been commissioned, and it is explicitly stated that no commission for either of them was produced on the trial. This section of the act requires that a company court-martial shall be held by the *commissioned* officers of the company, or any two of them. To constitute, therefore, a legal company court-martial, there must be at least two commissioned officers. Here, giving the defendant all that he could ask, there was but one.

His Honor erred in rejecting the evidence offered by the plaintiff to show that the commission to Fisher was issued in blank and filled up after the conversion. The evidence rejected is to be regarded *pro hac vice* as true. Without inquiring into the objection that the commission issued in blank, here it was shown that the blanks were not filled until after the conversion, and proves conclusively that the court was not organized according to law.

There is nothing in the third objection of the plaintiff. No personal notice to the plaintiff of the time of the trial was, under the act of 1836, necessary. Section 32 pro- (609) vides that the calling of the names of the delinquents or absentees by the captain or commanding officer, and the proclamation made for their attendance at the succeeding court-martial, shall be sufficient notice. This provision is a strong reason for holding courts-martial in their organization to a strict compliance with the law.

For the errors pointed out in the opinion of his Honor,

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

WALDO AND SHERROD v. ROBERT BELCHER.

Where a person had in store 3,100 bushels of corn, and sold 2,800 bushels of it to A, but the 2,800 bushels were never separated from the 3,100 bushels, and the whole was afterwards destroyed by fire: *Held*, that the property in the 2,800 bushels had not passed to A, as there had been no delivery; and therefore A was not bound to pay the stipulated price. And this result follows, whatever may have been the intention of the parties as to the property passing presently, on the contract being made.

APPEAL from the Superior Court of Law of PITT, at Fall Term, 1849, *Bailey, J.*, presiding.

(610) *B. F. Moore* and *Biggs* for plaintiffs.
Rodman for defendant.

PEARSON, J. Ferguson & Milhado, of Norfolk, had in store for the plaintiffs 3,134 bushels of corn. On 25 March, 1848, the plaintiffs sold to the defendant 2,822 bushels of the corn at $2.60 per barrel, and in payment took the bill of the defendant (which was never paid and was returned at the trial) and gave the defendant an order upon Ferguson & Milhado for the corn, which order was returned by them to the defendant. On 2 May, 1848, the parties agreed that the plaintiffs should draw a bill on Ferguson & Milhado for $117.66, at ninety days, which the defendant should indorse; that the corn mentioned in the order should be subject to the control of the defendant, and should be sold by him before or at the maturity of the bill, and the proceeds applied to the payment of the bill; and if the proceeds should be more or less than the amount of the bill, it was to be a matter for future adjustment. The bill was accordingly drawn and indorsed, and accepted by Ferguson & Milhado, who paid it to the indorser, by whom it was discounted for the plaintiffs, and it was finally repaid to Ferguson & Milhado by the plaintiffs. The whole of the 3,134 bushels of corn remained credited to the plaintiffs on the books of Ferguson & Milhado, until June, 1848, when it was destroyed by fire. The 2,822½ bushels *were never separated from the bulk of 3,134 bushels.*

The action was *assumpsit* for the price of 2,822½ bushels of corn at $2.60 per barrel, making $1,467.15. The court charged that if the plaintiffs, on 25 March, delivered to the defendant, and he accepted the order for the corn, the property passed, and the subsequent loss by fire fell on the defendant. And if the property did not pass by the transaction of 25 March, it did

pass by the agreement of 2 May, if the evidence was believed.

The defendant excepts to the charge; and we think there is error. (611)

To entitle the plaintiffs to recover, the property of the corn must have passed to the defendant, so as to make it his corn when it was burnt. We think the property did not pass, either by what was done on 25 March or on 2 May, because the corn was not in a condition to be delivered. The 2,822½ bushels were not separated from the bulk. It could not, therefore, be identified—it was not specific. The defendant could not tell what corn was his.

We are relieved from the necessity of discussing this question, because it is settled by several cases directly in point. *White v. Wilks,* 5 Taunton, 176. The agreement was for twenty tons of oil in the vendor's cisterns, and, in point of fact, the cistern contained much more than twenty tons. Held at *nisi prius* that no property passed, because the contract did not attach on any particular portion of the oil. The Common Pleas approved of the decision. One of the judges says, "Suppose a part of the oil had leaked out, can any one say whose oil it was?" So, in *Bush v. Davis,* 2 M. and S., 397. The agreement was for ten tons of flax at "Davis' wharf, by vrow Maria." The vendors had more than ten tons at "Davis' wharf by vrow Maria." The King's Bench decided that no property passed, although an order was given for ten tons and was accepted by the wharfinger. *Le Blanc, J.,* says "it was to be ascertained what goods the vendee was to have." Something was to be done to ascertain the *individuality.* Blackburn on Sales, 124, 56 L., lib. 68, and the cases there cited; *Austin v. Craven,* 4 Taunton, 644.

It was insisted that, in this case, no measuring was necessary or intended to be made, and there was no reason why the defendant should desire his corn to be separated from the bulk until he made sale of it, and that the parties intended by what was done to deliver the corn—to pass the prop- (612) erty as an executed contract; and so was distinguished from *Devane v. Fennell,* 24 N. C., 36.

It is true, when the property is specific and is in a condition to be identified and delivered, and the intention is proven to be that the property shall *presently pass,* it does pass, although something remains to be done, as to put bows upon a wagon which was sold and delivered (*Allman v. Davis,* 24 N. C., 12), or to measure, or to weigh, so as to ascertain the precise amount. For instance, if I sell *all* the corn in a certain crib at $2.60 per barrel, and it is the intention that the corn shall presently pass

to the purchaser and become his property, it does pass, although it is necessary afterwards to have the corn measured to ascertain the amount and fix on the sum to be paid; because, supposing the thing to be in a condition to be delivered, the fact that something remains to be done to ascertain the quantity and fix the amount to be paid only raises a presumption that it was not the intention of the parties that the property should pass until the weighing or measuring was done. *Devane v. Fennell,* 24 N. C., 36. But this presumption may be rebutted, and the property does pass, if the jury are satisfied that such was the intention. *Allman v. Davis,* 24 N. C., 12.

But it must be borne in mind that this is only true in regard to such things as are *in a condition to be delivered.* If the corn is in bulk, so that there is no telling what corn in particular was sold, there the property does not pass, although it was the intention of the parties to consider it as delivered and that the property should pass. The intention may rebut a presumption, but it is impossible by an intention to change an *indefinite* into a *definite* thing. If I sell one hundred bushels of corn in my crib, which contains a thousand, although the purchaser pays me the money, and it is the intention that the property therein shall presently pass to him, yet it does not pass, because (613) it is *physically impossible.* It cannot be told what corn is his until it is separated. The purchaser could not bring detinue, because he cannot describe the specific thing; and if any of the corn in the crib be stolen or damaged before the one hundred bushels are delivered, can it be told whose corn it was? Or, rather, would not the purchaser have the right to call for one hundred bushels of sound corn, the loss or damage to the contrary notwithstanding? The vendor should have required the vendee to assume the risk when the corn was put at his disposal.

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

Cited: Willard v. Perkins, 44 N. C., 255; *Morgan v. Perkins,* 46 N. C., 172; *Long v. Spruill,* 52 N. C., 99; *Blakely v. Patrick,* 67 N. C., 42; *Edmundston v. Fort,* 75 N. C., 407; *Austin v. Dawson, ib.,* 526; *Lumber Co. v. Wilcox,* 105 N. C., 38; *Holman v. Whitaker,* 119 N. C., 115.

ALEXANDER McD. WILLIAMS ET AL. v. JOSHUA BRYAN ET AL.

1. A bond given by a person arrested on a *ca. sa.* for his appearance at court is required by our law to be made payable to the plaintiff in the execution; a bond otherwise payable, for that reason alone, will prevent the court from entering a summary judgment.

2. Where a person arrested on a *ca. sa.* gives a bond payable to A. B., who makes the affidavit for the *ca. sa.* and styles himself the agent of C. D., the plaintiff, no action can be maintained on such bond in the name of C. D., for he is not the obligee.

APPEAL from the Superior Court of Law of BLADEN, at Fall Term, 1850, *Battle, J.*, presiding.

Alexander McD. Williams obtained a judgment against Joshua Bryan in Bladen County Court for $11.91 debt and $66.89 costs, and sued out a *ca. sa.* thereon, upon (614) which Bryan was arrested by the sheriff. The affidavit on which the *ca. sa.* was issued was made by William H. White, who states therein that he is the agent of the plaintiff in that suit; and the sheriff took a bond from Bryan and two others as his sureties for his appearance, in the sum of $155.60, payable "to William H. White, agent for Alexander McD. Williams."

The execution and bond were returned to the next term. But Bryan did not appear, and thereupon a motion was made against the obligors in the bond. But the court refused it and ordered the bond to be delivered up, and thereupon White appealed. In the Superior Court a motion was again made on behalf of Alexander McD. Williams for judgment on the bond, which was resisted on the part of both Bryan and his sureties. But the court was of opinion that, inasmuch as Bryan did not appear in the County Court, the suit was undefended, and therefore gave judgment in favor of Alexander McD. Williams for the penalty of the bond, to be discharged by the payment of the debt and costs. The defendants appealed.

Troy for plaintiffs.
Strange, McDugald and *D. Reid* for defendants.

RUFFIN, C. J. The judgment cannot be supported. The act of Assembly directs the bond to be made payable to the plaintiff in the execution, and for that reason, if no other, there could not be a summary judgment on this bond. But if that were otherwise, clearly Williams cannot have a judgment in his name on a bond payable to White, though White be therein stated to be his agent, for only an obligee can maintain an action on the obligation. It is true, the debtor cannot, after failing to ap-

pear, adduce any matter of fact by way of defense. But
(615) that is not material to the present question, which is, whether the party who moves for the judgment shows a case on which he is entitled to judgment against the defaulting debtor. The case may be likened to a default in an action of debt, in which the declaration states a bond to A, without deriving any title from A to the plaintiff; upon which, certainly, it would be erroneous to give judgment against the defendant, though in default. Here the creditor's own case—the bond, upon its face—showed that Williams could not have judgment on it in any form of proceeding, whether by action or motion. The default admits the whole case stated in the declaration in the one case, or in the bond in the other. But it admits no more, and does not authorize a judgment on the bond in favor of any person but the obligee. The judgment was therefore erroneous, and must be reversed, and that of the County Court allowed to stand. The County Court ought not, perhaps, to have canceled the bond. But if that were erroneous, it did not concern the present appellant, as he had no interest in the bond, in a legal sense, and had no right to appeal.

PER CURIAM. Judgment reversed.

Cited: Robinson v. McDougald, 34 N. C., 137; *Earle v. Dobson,* 46 N. C., 517; *Cohoon v. Morton,* 49 N. C., 258.

(616)

DOE ON DEMISE OF BENJAMIN C. WILLIAMS v. WILLIAM D. HARRINGTON.

1. A court of equity has a general jurisdiction to direct the sales of the estates of infants, wherever the purpose for which the sale is directed shall be deemed by the court beneficial to the infants.

2. The decree in such a case cannot be impeached in any other case: neither upon the ground that a guardian was not appointed by the proper court, nor that there was not due advertisement or competent evidence of it, nor that the interest of the infant was not promoted by the sale, nor that, for any other reason, it was not a proper case for a sale, nor that the decree did not find the facts which showed the sale to be beneficial, nor upon any similar grounds.

3. Where a decree is made, on behalf of infants, for the sale of "the lands of the deceased debtor lying in Moore County," and a sale is made of several specified parcels of land, the sale rati-

fied, and an order of the court to convey to a particular purchaser, no exception can be taken to the general description of the land in the decree ordering the sale.

4. The court has the power, with the consent of the reported purchaser, to substitute another person in his place; though, as a matter of wholesome practice, such a substitution ought not to be allowed before the payment of the purchase money, nor, perhaps, without looking to the rights, even of third persons, as against the first purchaser.

5. Under an order of the Court of Equity for the sale of the real estate of infants, the deed of the commissioner appointed to make the sale, by virtue of the provisions of the act of 1827, transferred to the purchaser the legal title.

APPEAL from the Superior Court of Law of MOORE, at Fall Term, 1850, *Battle, J.*, presiding.

The premises descended from his father to the lessor (617) of the plaintiff, while he was an infant, and the defendant claimed them under a deed to him from the clerk and master of the Court of Equity for Moore County. The whole question was on the validity of the defendant's title. The deed was made in 1833, and recites that at August Term, 1831, the court by its decree commanded the clerk and master, after advertisement, to sell certain lands belonging to the estate of Benjamin W. Williams, deceased, and that, by virtue of that decree, after due advertisement according to the decree aforesaid, the clerk and master set up the following tracts of land for sale to the highest bidder on 29 November, 1831, in said county, when Charles Chalmers, John B. Kelly and Daniel McNeil became the highest bidders for William D. Harrington, at the price of $1,890, and that the said Harrington had paid the same. In consideration of the premises, the deed then purports to convey to Harrington, the defendant, the premises in fee, describing them by metes and bounds. In support of the deed, evidence was given on the part of the defendant that after 1835 all the original papers and records of the Court of Equity for Moore were burnt by accident, including the proceedings on which the recited decree was founded. And evidence was further given by witnesses that in 1831 a petition was filed in the court in the name of the lessor of the plaintiff by one Charles Chalmers, as his guardian, which set forth in substance that Benjamin W. Williams, the father of the lessor, had died seized and possessed of a large real estate and also entitled to a large personal estate; that he died very much indebted, and all the personal estate had been applied towards the debts, and that several large debts remained unsatisfied, among which was a large debt to one Mr.

Haskill, on which judgment had been obtained, and the plaintiffs were about to sue out process to subject the lands of
(618) the deceased debtor thereto; that if the lands should be sold for cash under execution, they would probably be sold at a great sacrifice, and that it would be for the interest of the infant heir, as well as beneficial to the creditors, that they should be sold on a reasonable credit under the decree of the Court of Equity; and the petition prayed that the court would decree a sale of all the lands of the deceased debtor lying in Moore County, upon such terms and in such manner as to the court might seem meet. Evidence was further given by witnesses that testimony was offered to the court, upon the petition, to show the necessity of the sale, and that the court decreed the sale of the lands set forth in the petition as prayed for, and ordered the clerk and master to make the sale at auction on the premises, on certain terms therein specified, after advertising the same; but the witnesses stated they were unable to recollect whether the decree declared the facts upon which it was made. Evidence was further given by the clerk and master that he duly advertised the sale in a newspaper printed in Fayetteville according to the decree, and proceeded to sell the lands on the premises, when John B. Kelly became the highest bidder for the tract in controversy in this suit and was declared the purchaser and gave bonds for the purchase money; that he reported the sales to the Court of Equity, and the court passed an order ratifying them, and directing the clerk and master to convey the lands to the purchasers upon the payment of the purchase money, and that afterwards Kelly paid the purchase money for this tract, and that under his direction and under an order also of the court, he, the clerk and master, then made the deed to the defendant. The witness further stated that all the proceedings were recorded. The counsel for the plaintiff objected to that part of the evidence respecting the advertisement in the newspaper, without producing the paper. But the court over-
(619) ruled the objection.

On the part of the plaintiff it was insisted that Charles Chalmers was not duly appointed guardian of his lessor; and in order to establish that, he gave evidence that his mother died soon after he was born, and afterwards his father resided in Moore County until his death in 1828; and that the lessor of the plaintiff lived with his father up to his death, and was then seven years old; and immediately afterwards he was taken by his maternal grandfather to reside with him at Chapel Hill, and that before he had been in Orange County twelve months

the said Charles (who was the maternal uncle of the lessor) was appointed his guardian by the County Court of Orange.

The plaintiff's counsel contended that the defendant had no title under the deed, on the following grounds: that Chalmers was not duly appointed guardian, and therefore had no authority to file the petition; that the Court of Equity had no power to order the sale of land upon the facts and for the objects set forth in the petition; that the decree did not declare the facts upon which it was founded; that the clerk and master had no authority to convey to the purchaser, and that his deed, therefore, was inoperative; that the defendant was not the purchaser, and therefore the clerk and master had no authority to convey to him, and the deed was inoperative; that the petition and decree ought to have described particularly the lands to be sold, and that they were not sufficiently specified in that respect. But the court held that neither of the grounds of objection was sufficient to invalidate the defendant's title; and, under directions to that effect the jury found for the defendant, and the plaintiff appealed.

Strange, Reid and *Mendenhall* for plaintiff.

Winston, Sr., Haughton, Kelly and *H. W. Miller* for defendant.

RUFFIN, C. J. Most of the objections are untenable (620) in themselves. But without considering them in detail, there are some general considerations which apply to them all and show that they cannot detract from the defendant's title. It is not necessary to go back further than our own statutes to find a general jurisdiction vested in the courts of equity of this State to dispose of the land, as well as the chattels, of infants, for their benefit. Those courts were constituted in 1782, with all the powers and authorities of the court of chancery. By the act of 1762 the powers of the court of chancery, as to orphans' estates, are expressly saved. Then the act of 1827, after reciting that doubts had been entertained whether any court could direct a sale to be made by guardians of the real and personal estates of their infant wards, except in certain cases specified in two previous acts, and that the best interests of infants sometimes demand that such sales should be made in cases to which those acts did not extend, enacts, by way of remedy therefor, that on the application of a guardian by bill or petition, setting forth facts which, if true, show that the interest of the infant would be materially promoted by the sale of any part of the infant's estate, real or personal, the Court of Equity shall cause the truth of the facts to be ascertained,

and may thereupon decree that a sale be made by such person, in such way and on such terms as the court in its wisdom shall adjudge. Then follow, in the next section, provisions that the sale shall not be deemed valid until it shall be ratified by the court; and that the court shall designate the person to make the title to the purchaser, and that no conveyance shall be made until the court shall order it—with a provision also for investing the proceeds of a sale. A jurisdiction over any subject could not be more extensive than that of the Court of Equity, as confessed or recognized by the statutes quoted. If it were before doubtful, the act of 1827 thus confers upon the
(621) highest equitable tribunal known to our law full power to order the sale of the estate of infants, provided only that the court shall think it for the interest of the infant in any way whatever, as to pay debts, for partition, or more convenient management, or to produce greater profit, or any other purposes deemed beneficial by the court. In the exercise of that power the acts of the court are, therefore, not to be regarded as those of a court not possessing a general jurisdiction over a subject, but only a special one to proceed on a particular subject for certain specified purposes in a particular way. The cases of *Harris v. Richardson,* 15 N. C., 279, and *Leary v. Fletcher,* 23 N. C., 259, are contrasted examples of the difference between such general and special jurisdictions, touching the very point now under consideration, namely, the powers of the Court of Equity and the County Court to authorize a guardian to sell his ward's personal property (over which those courts have a general jurisdiction), and the special authority of the County Court to order a sale of the infant's land under the act of 1789. That distinction is further illustrated by the case of *Jennings v. Strafford,* 23 N. C., 404, in which also the general rule is recognized, that the judgment or decree of a court having general jurisdiction over a subject-matter, subsisting unreversed, must be respected, and sustains all things done under it, notwithstanding any irregularity in the course of the proceedings or error in the decision. Supposing, therefore, that there may have been irregularities or even error in the Court of Equity, still the decree cannot be questioned in a court of law for such causes. It is not for another court to arraign the decree or the orders confirming the sale and for the conveyance to the defendant, upon such grounds, as that the guardian was not appointed by the proper court, or that there was not due advertisement or competent evidence of it, or that the interest of the infant was not promoted by the sale of the land,
(622) or that for any other reason it was not a proper case

for a sale, or that the decree did not find the facts which showed the sale to be beneficial; for all those matters were necessarily the subjects of consideration for the Court of Equity, and must have been passed on in the cause before the decree or order could have been made. Having been judicially decided, it cannot be averred that they were not duly and rightly decided. It would be monstrous if the title of a purchaser under the decree—who paid his money to the court, and got his deed from the court, as it were—could be impeached upon any such grounds. Therefore, all the objections must fail upon the principles mentioned, unless it be those which insist on intrinsic defects in the decree or orders, as not being in themselves sufficient to authorize a sale of the premises in dispute and the conveyance to the defendant.

The court cannot suppose that the petition and decree did not describe the land more particularly than "as the lands of the deceased debtor lying in Moore County," for no respectable counsel would draw pleadings nor the court decree in such terms. It was probably thus stated by the witness because, after the destruction of the papers, they were unable to repeat the particular words, or do more than give the substance. But if it were otherwise, the decree, though less precise than usual, would not be so very vague as to be ineffectual when taken in connection with the subsequent proceedings. It would then be as particular as a *fieri facias* on a judgment against heirs, which runs against the lands descended from the debtor; and they are identified by the sale and sheriff's deed. Here any defect as to the certainty of the land is cured by the report of the master of the sales of the several parcels, and their ratification, and the order of the court to the master to convey this particular tract to the defendant. So it appears that there could not be a mistake as to the identity of the land intended and (623) ordered to be sold and that actually sold.

Cases were cited at the bar in which the Court of Equity has refused to allow another person to be substituted for the purchaser reported; and it was thence inferred that the deed was not properly made to the defendant. Those cases seem to have been all proper, and this Court agrees that, as a matter of wholesome practice, such a substitution ought not to be allowed before the payment of the purchase money, nor, perhaps, without looking to the rights, even, of third persons as against the first purchaser, which is the whole extent of those cases. But although under those circumstances it may be against the course of the Court of Equity to discharge one bidder and take another, yet there is nothing in those cases intimating the idea of a defect

of power to do so. In this instance it was done by the express leave of the court, after the payment of the whole price, and an order was made for a conveyance to the substitute; and that is conclusive.

It is competent to the Legislature to direct the mode of transferring the legal title upon a judicial sale under a decree, as it is on one under execution at law. It was very meet that some mode should be provided, as the decree itself only constituted an equitable title, and conveyances could not commonly be got from the owners by reason of their disability. It is at present the province of the clerk and master *virtute officii*. But at the period of this transaction it was not. The act of 1827, however, is express, that a conveyance shall be made to the purchaser when the court shall order it, and by the person who shall be designated by the court. It is certain, then, that the estate at law was intended to be transferred by a deed, to be executed under the direction of the court; and, in this case, the deed was thus executed, and, consequently, it passed the title to the defendant.

PER CURIAM. Judgment affirmed.

Cited: Harshaw v. Taylor, 48 N. C., 514; *Campbell v. Baker,* 51 N. C., 258; *Sutton v. Schonwald,* 86 N. C., 201, 2, 4; *England v. Garner,* 90 N. C., 200, 1; *Hare v. Holloman,* 94 N. C., 22; *Tate v. Mott,* 96 N. C., 22, 25; *Brittain v. Mull,* 99 N. C., 492; *Tyson v. Belcher,* 102 N. C., 114, 15; *Millsaps v. Estes,* 137 N. C., 543.

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(624)

WILLIAM H. WILLARD v. PATSEY BLOUNT.

1. In this State land is taxed according to its fee-simple value, and whoever is owner of the land for the time being is bound to pay the tax: as if an estate is limited to A for life or for ten years, remainder to B and his heirs, the valuation is assessed without reference to this division, and each must pay the tax during the time that he is the owner and enjoys the possession and pernancy of the profits.

2. It is otherwise in the case of landlord and tenant, *where rent is reserved*, for the rent is in lieu of the land, and the landlord is *in pernancy of the profits of the land:* and if the tenant is compelled to pay the tax, he may recover from the landlord or deduct the amount out of the rent.

APPEAL from the Superior Court of Law of BEAUFORT, at a Special Term in January, 1850, *Battle, J.*, presiding.

No counsel for plaintiff.
Donnell and *Rodman* for defendant.

PEARSON, J. In September, 1846, the defendant leased to one Watson a lot at the corner of Water and Market streets in the town of Washington, 22 feet on Water and 50 feet on Market street, for the term of ten years, to begin on 1 January, 1847, *free of rent,* in consideration that the said Watson would erect on said lot a building according to specifications, and deliver the said building to the defendant, her heirs or assigns, at the end of the term in good repair, natural decay alone excepted; and the said Watson covenanted for himself and his assigns that, after the erection of the said building, (625) it should be at all times insured at a valuation of not less than $2,000 against loss or damage by fire, for the benefit of all persons having estates therein, with a condition of re-entry in case the covenants were not complied with.

In April, 1847, Watson assigned his lease to the plaintiff in consideration of $2,050, Watson binding himself to erect the building according to his covenant with the defendant.

Afterwards taxes became payable by virtue of an assessment authorized by an act of the Legislature, passed at its session in 1846-'47. These taxes, amounting to $13.20, were paid on a threat of distress, and under protest by the plaintiff, who demanded of the defendant the amount so paid, and, upon refusal, commenced this suit by warrant.

His Honor was of opinion that the plaintiff was not entitled to recover. In this we concur.

By the Revised Statutes, ch. 102, sec. 1, it is provided that a tax of six cents on *every hundred dollars thereof* shall be annually levied and collected from all real property, with the improvements thereon.

By section 2 all real estate held by deed, grant, or lease, or by title of dower, curtesy or otherwise, shall be subject to the payment of public taxes, except land of the University, houses set apart for divine worship, etc.

Land, then, is taxed according to its fee-simple value, and whoever is owner of the land for the time being is bound to pay the tax. If the estate is divided by giving a particular estate to one, the remainder to another—as, if an estate is limited to A for life or for ten years, remainder to B and his heirs, the valuation is assessed without reference to this division, and each must pay the tax during the time he is the owner and enjoys the possession and pernancy of the profits. According to

this general proposition, the plaintiff, being the owner for the time being, and enjoying the possession and pernancy (626) of the profits, is bound to pay the tax.

The case of the landlord and tenant forms an exception, *where rent is reserved;* for the rent is in lieu of the land, and the landlord is in the *pernancy of the profits of the land,* the profit of the tenant being the fruit of his own labor. Hence, in such cases the landlord is bound to pay the tax, and if the tenant be compelled to pay, he may recover from the landlord or may deduct the amount out of the rent. But in the case under consideration no rent is reserved. The defendant receives nothing in lieu of the land, and the entire profits are enjoyed by the plaintiff. He, then, does not come within the reason for making the case of ordinary tenants paying rent an exception to the general rule.

Let us see how it operates. A vacant lot, worth say $200, is leased for ten years without rent; a building, worth say $2,000, is erected upon it. The lessee enjoys the entire use and profits of the lot in its improved condition. The amount of the assessment, and, of course, the tax is increased ten times. It is right that the lessee, who has the whole profit, should pay the tax; for, in fact, the lessor has parted with his entire estate for the ten years and stands as a *remainder-man,* and not as a landlord receiving rent.

It is said the lessor will be benefited by receiving the property in its improved condition at the end of the term. That is true, and then he will be bound to pay the tax; but, in the meantime, it is manifestly unjust to require the lessor to pay tax for what he has never enjoyed; and there is no mode of apportioning the tax, so as to show what ought to be paid for and on account of the original value, and what for the additional value; and upon the general rule, the plaintiff is bound to pay the tax.

The English cases give no aid in deciding this question, because the land in that country is assessed upon the an- (627) nual rent, and, if it be not rented, upon such sum as it could reasonably be rented for; and the statute provides that in case tenants are compelled to pay the tax, they shall have the right to deduct it out of the rent. 38 Geo. III.

PER CURIAM. Judgment reversed.

JAMES SLOAN, ADMINISTRATOR, v. CYRUS STANLY ET AL.

1. Where an execution is about to be levied by a constable, the debtor, if he has personal property, must show it, and if he does not the officer commits no wrong by levying on the land in the first instance.

2. So, if it does not appear that the officer knew of the existence of the personal property, he is justifiable in levying on the real estate.

3. If an interlineation appears on the face of an officer's return, and there is no evidence to show when it was done, the court will presume that it was done before the return was made, when the officer had authority to alter his return.

APPEAL from the Superior Court of Law of GUILFORD, at Special Term in July, 1850, *Dick, J.*, presiding.

This case was submitted to the court on the following facts:

On 4 August, 1848, Aaron Mendenhall, as executor of Moses Mendenhall, deceased, sued out four different warrants against one Israel Stanly, which were all returned before a magistrate, and judgment granted on 8 September, 1848, amounting in all to about the sum of $450. Executions were issued on the same day, and levied on two tracts of land, and the levies (628) were returned to November Term, 1848, of Guilford County Court. After the levies aforesaid, and before November Term, 1848, Israel Stanly, the defendant, died. At February Term, 1849, the heirs at law of said Stanly were made parties defendants. At February term the court ordered the lands to be sold and *venditioni exponas* to be issued, from which order the heirs of Israel Stanly appealed to the Superior Court.

After the cases aforesaid were in the Superior Court Aaron Mendenhall died, and administration *de bonis non* on the estate of Moses Mendenhall was granted to James Sloan, the present plaintiff. In the Superior Court the plaintiff moved for a confirmation of the order of the County Court, which motion was opposed by the defendants: 1. Because the judgments were void, having been, as the defendants alleged, entered up more than thirty days after the date of the warrants. 2. Because the defendant had personal property which ought to have been levied on, instead of the land. 3. Because the levies were fraudulent, and were interlined by the constable after they had been returned to court.

As to the first objection made by the defendants, the court was of opinion that the first levy, if made on 8 September, as it purported to be, was good, for by excluding 4 August, the day of the levy, and excluding five Sundays, 8 September would be

the 30th day. As to the second objection, it appeared in evidence that, at the date of the levy, Israel Stanly had personal property to the amount of $350 or more, but it was admitted by the defendant's counsel that he had not personal property to discharge the whole of the said judgments, and there was no evidence tending to prove that the constable was requested by Stanly to levy on the personal property, or that the con-
(629) stable knew of the existence of the personal property.

It was also proved and admitted that Israel Stanly, on 28 September, 1848, conveyed the whole of his personal property in trust to secure other creditors.

As to the second objection, the court was of opinion that the constable was authorized to levy on the land, because the personal property was not sufficient to discharge the four judgments, and therefore the levies were not void.

As to the third objection, it appeared by inspection of the levies that the words, "goods and chattels," were interlined in each of the four levies, in a different colored ink. The clerk of the County Court was examined; he stated that he could not say whether the levies were now different from what they were when they were first returned to his office; that after the papers were first returned to his office the constable once or twice (by the consent of the clerk) took the papers to counsel, and returned them again to the office. The defendants then proved by a witness that on the day Israel Stanly was buried, he (the witness) informed the constable of his death. The constable remarked that he ought to have been there, and levied before his death. The court, being of opinion that the defendants failed to prove that the levies were interlined after they had been returned to court, and had also failed to prove that the levies were made after the death of Stanly, therefore ordered and adjudged that the order of sale made by the County Court be confirmed, and that a *procedendo* issue to the County Court; from which orders the defendants prayed for and obtained an appeal to the Supreme Court.

Morehead and *Miller* for plaintiff.

No counsel for defendants.

(630) NASH, J. We have examined the exceptions filed against the opinion of the judge who tried the cause, and concur with him in his judgment. The first objection is founded, we presume, upon section 7 of the act of 1836. *It* directs that "all warrants issued by a justice of the peace shall be made returnable on or before thirty days from the date thereof, Sundays excepted, and not after," etc. The warrant in

this case literally complies with the act. It is directed "to any lawful officer to execute and return within thirty days, Sundays excepted." The exception is that the judgment is void because it was rendered or entered up more than thirty days after the date of the warrant. Looking to the substance, and not simply to the language, and the objection is that the warrant was returned after the expiration of the time designated in the act, and the judgment was then rendered. The warrant was dated on 4 August, 1848, which was Friday, and the judgment obtained on 8 September. Supposing that a judgment obtained before a magistrate, on a warrant returned after the thirty days, as stated in the act, be void, the question does not arise here; because, by allowing the four Sundays in August and the one in September, the warrant was returned on the 30th day.

The second objection is that the defendant in the execution had personal property which ought to have been levied on, and not the land. The case shows that, at the time the judgment in this case was obtained, three others were given against the present defendant in favor of this plaintiff, amounting in the whole to $150. Executions were issued upon all of them, at the same time, and all placed in the hands of the same officer; and all of them were levied at the same time. The defendant in the executions had personal property, but not to an amount sufficient to satisfy them. The personal property was not shown to the officer, nor did he know of its existence. The act of 1836, Rev. St., ch. 62, sec. 16, expressly recognizes (631) the personal property of a debtor as the primary fund for the satisfaction of a justice's execution; nor is the officer at liberty to levy it on the land, but when no goods and chattels are to be found, or not a sufficiency to discharge it. This provision is for the benefit of the debtor, and when an officer is about to make a levy, if the debtor has personal property and wishes to save his land, he must show it. If he does not, the officer commits no wrong by levying on the land in the first instance. The fact, however, disclosed by the case, that the officer did not know of the existence of the personal property, or, what is the same thing, that there was no evidence to prove that he did know it, is decisive of this objection—he could not levy on that of whose existence he had no knowledge. Moreover, no possible injury could arise to the defendant in the execution or to his heirs, as the former had, before the return of the execution, conveyed away, by a deed of trust, all his personal property to secure debts of a greater amount than it was worth.

The third exception is that the levy was fraudulent and inter-

lined after it came to court. The fraud consisted in the alleged fact that, after the levy had been returned to court, the officer had altered his return by interlining the words "for the want of goods and chattels." There is nothing in the case to show when those words were interlined, whether before or after the return of the levy. The constable is an officer whose official returns are made on oath; and as, before he makes his return, he may alter it in any manner he pleases so as to present the truth, we are bound in common charity and justice to presume in this case the alteration was made at the time when he could legally make it.

(632) In what the fraud consists of which the defendant complains, beyond the interlineation, we are not positively informed. We gather, however, from the close of the judge's opinion that it was in the alleged fact that the levy was made after and not before the death of Israel Stanly, the father of the defendants, and against whom the judgment was obtained. The case discloses no evidence showing that the levy was antedated.

We concur with his Honor in the view which he took of the case, and that there is no error in the proceedings in the County Court. The judgment is affirmed, and a *procedendo* will issue to the County Court of Guilford.

PER CURIAM. Judgment accordingly.

Cited: Stancill v. Branch, 61 N. C., 308.

NOTE.—There were three other cases, at this term, between the same parties, in which the same judgment was rendered.

JOSEPH BYNUM ET AL. V. MARK BYNUM ET AL.

1. Although it be not error to refrain from giving instructions, unless they be asked for, yet the judge, when he does give instructions, either of his own motion or at the party's, should give them in such a way that they be not in themselves erroneous, or so framed as to mislead the jury.
2. In order to satisfy that part of the law which requires the attestation of subscribing witnesses to a will to be *in the presence* of the testator, it is sufficient if the attestation be in the same room in which he is, provided it be not done in a clandestine, fraudulent way, which would not be in the party's presence.
3. Where two persons agree to make mutual wills, *it would seem* that bad faith in the one, either in not making his will or in canceling it after it was made, will not prevent the probate of the will of the other party.

BYNUM *v.* BYNUM.

APPEAL from the Superior Court of Law of RANDOLPH, at Spring Term, 1850, *Battle, J.*, presiding.

This is an issue of *devisavit vel non,* upon a script (633) alleged to be the last will and testament of Martha Ward, deceased. It bears date 13 July, 1833, and has two subscribing witnesses, W. J. Fuller and W. Gates; and it gives to Nathaniel Ward, one of the brothers of Martha, her half of a tract of land on which they lived, containing 670 acres, 8 slaves, a bed and furniture, and all her other property. She died in 1834, and Nathaniel Ward then obtained probate in common form. But in 1848 some of the next of kin and heirs, who were infants at the probate, obtained an order for re-probate, under which the present issue was made up.

Evidence was given that Martha Ward and her brother Nathaniel (neither of whom had ever been married) lived together for many years and worked their property in common; and that there was some agreement between them that the longest liver should have the whole. At the date of the paper she was about sixty years of age. Fuller, one of the subscribing witnesses, deposed that Martha Ward had mentioned to him that she wished him to do some business for her, and that some time afterwards Nathaniel came for him and said that he wanted him to go and do some business for him and his sister Martha; that he went to their house, and at the request of Nathaniel he then wrote his will, giving all his property to Martha; that he thought, but was not certain, Nathaniel then requested him to keep his will; that Martha Ward was very sick and in bed, and that he then prepared a table near the head of the bed, in which she was lying, and there wrote her will; that Nathaniel was present when Martha made her will, and assisted in giving him the names of her negroes; that, after he had finished the writing, he read it over to her, and she was raised up in bed and signed it, and then laid down again, and he and Gates subscribed it, as witnesses, at the table at which it had been written, which was about two or three feet from the bed; that she could see the table and the witnesses, while they were (634) subscribing, but that he was not certain, from the position in which she was lying and of his arm, while he subscribed, that she could see the paper at that time; and that he thought another paper might have been substituted for that she signed without her knowing it; that Nathaniel then left the house, and Martha exclaimed, "Oh! sisters Betsy and Polly," and began to weep; that as he was leaving the place, after doing the business, he saw Nathaniel in the yard, and he asked him for his will and he gave it to him, and never saw it afterwards, though he had

several times looked over the valuable papers in Nathaniel's pocketbook; that he kept Martha Ward's will until her death, and that she had capacity to make a will. The other witness, Gates, deposed that he was present when Fuller wrote the script, and that it was written at a table within two or three feet of the head of the bed in which Martha Ward was lying, very sick; that she was raised up, and Fuller held her hand while she signed the paper, and that Fuller and he then signed as subscribing witnesses at the same table; that, while they did so, Martha could see them, but he was not certain that, from the position in which she lay, and of his arm, she could then see the paper, and he thought another might have been substituted without her knowing it; and that, though very sick, she had sufficient testamentary capacity.

Another witness deposed that, one or two years after Martha's death, he saw, in Nathaniel's possession, a paper purporting to be a will, with two subscribing witnesses, one of whom was the said Fuller and the other he could not recollect, and that Nathaniel took it up and spoke of his sister Martha, and wept.

The court instructed the jury that, as to the formal execution of the script, it was not necessary it should be proved that the party deceased actually saw the paper at the time it
(635) was subscribed by the witnesses; but it was necessary she should be in such a situation that she could see it if she wished; and that if the jury believed she could not see it at that time, it was not subscribed in her presence, within the meaning of the law. And the court further instructed the jury that if Nathaniel Ward induced his sister Martha to make a will in his favor by making his in her favor, and intended at the time to destroy his as soon as he obtained hers, and he did destroy it in her lifetime, it would be such a fraud in procuring the script as rendered it a nullity.

The jury found against the script altogether. The propounder then moved for a *venire de novo*, because the script, according to the evidence, was so subscribed in the presence of the party as to make it a good will to pass the real estate, and, at all events, it was sufficient to pass the personalty; and because there was no evidence to be left to the jury that there was any such fraud as that supposed in obtaining the script, and that, if there were, it would not invalidate it as a will. The court refused the motion, and stated as a reason for doing so, in respect to the paper as a testament, that, though the counsel for the propounder insisted in general terms before the jury that the script was properly executed, and read it throughout, yet

he did not particularly call the attention of the court to the date, nor to the distinction between its execution as a will disposing of realty and personalty.

Miller, McRae and *Kelly* for plaintiffs.
Haughton, Mendenhall and *W. H. Haywood* for defendants.

RUFFIN, C. J. As the paper was executed before 1840, attestation was not necessary to its validity as a will of personalty; and probably the presiding judge would not have allowed a mistake of that kind—arising from a mere slip of his memory or attention—to prejudice the party, and would (636) have granted a new trial, but for the desire to have the litigation put into a way to be terminated by having the other points decided. The Court thinks, however, that the propounder could not only ask for a new trial, but he is entitled to a *venire de novo* for error in that part of the instructions. The propounding of the script, as disposing of both kinds of property, and reading it through to the court and jury, and insisting in the argument that it was well executed to all the purposes involved in the issue, it would seem, sufficiently presented the distinction between the execution of wills and testaments, in 1833, to make it incumbent on the court to inform the jury of the distinction, if the judge undertook to give any instructions at all on the points of attestation and execution. Although it be not error to refrain from giving instructions unless they be asked, yet care must be taken, when the judge thinks it proper, of his own motion or at the party's, to give them, that they be not in themselves erroneous, or so framed as to mislead the jury. Such care was not taken here; for the instruction given, unaccompanied by any qualification or explanation, may have left, and probably did leave, the jury under the impression that attestation in the presence of the party was requisite to give validity to the paper for any purpose, and may have prevented it from being sustained as a testament.

But, upon other points, the Court also deems the directions erroneous, considered in reference to the evidence on which they were given. It is true, the terms, "in the presence" and "within view," are considered generally synonymous, because the sight of the testator is the best means of preventing the fraud within the province of the act. But they are not perfectly so; for a blind man may make a will. Besides, as the court here said, actual view is never necessary, but it is sufficient if the (637) party might see the witness attest, though in a different as well as in the same room. For, if actual sight were requisite,

it would vitiate a will, as was mentioned in *Sheers v. Glasscock,* 1 Salk., 688, if a man did but turn his back or look off, though literally present by being at the spot where the thing was done. But when the witnesses attested in the same room in which the testator was lying in bed, it was good, though the curtains of the bed were closed; because it was in his power to see them, and therefore it was construed to be done in his presence. *Davy v. Smith,* 1 Salk., 395. It is not, therefore, the feasibility of obtaining another paper which will avoid the attestation, when all passes in the same room, so that the party has opportunity of watching for him or herself; for under those circumstances the attestation is *prima facie* good. It is true, it is not to be taken to be conclusively good. The Chancellor in *Longford v. Eyre,* 1 Pr. Wms., 740, stated that the bare subscribing by the witnesses in the same room did not necessarily imply it to be in the testator's presence; for it might be in a corner of the room in a clandestine, fraudulent way, which would not be in the party's presence. Yet in that case it was held the attestation by the witness in the same room, by the request of the party, could not be fraudulent and was sufficient. Those cases seem to be full authorities for holding that this attestation, being done openly and without any clandestine appearance about it, but in the same room with the testatrix and within two or three feet of her, when she had her senses and nothing intervened between her and the witnesses, is good under the statute. It was done both literally and substantially in her presence, which is the safeguard provided by the law, and must be enough, though it may not exclude all possible chance of imposition.

The Court is not prepared to adopt the proposition respecting the supposed fraud of the brother in procuring this
(638) will and then destroying his own. No case is found like it. There was no misrepresentation of any matter of fact then passed or supposed to be existing. If it be supposed there was an agreement for mutual wills, it is not seen how the validity of the sister's will could be impeached upon the bad faith of the brother in canceling his. If the agreement was in a form to render it valid, its performance could be enforced specifically by the sister had she survived. But she died first, and the destruction of the brother's will became immaterial, because it could not have operated if it had not been destroyed. If there was no valid contract between them, then each knew that the intended bounty by will depended upon the pleasure of the other in revoking or not revoking his or her will. So that, looking at it in any light, it is not seen how the supposed conduct of

the brother could have rendered the sister's will a nullity, supposing it to be in other respects valid; as the preservation of her will would only argue that she meant to carry out her engagement in good faith at all events, or that she had not changed her mind as to the object of her bounty. But there may, possibly, be more in it than strikes one at the first blush, and, as its decision is not necessary to the determination of this case, the Court declines the decision of it. For, supposing the law to be as laid down to the jury, there was not evidence, as we conceive, to the facts necessary to raise the point. It was but a remote inference from the evidence, that the sister, then aged and supposed to be *in extremis*, was induced to make her will in consideration of one in her favor by the brother. But admit that she may have been, there is no evidence that the brother contemplated, at the time, the destruction of his, nor that he did destroy it in her lifetime. His omission to produce it on the trial, fourteen years after her death (which rendered it nugatory by the lapsing of the gifts), can authorize no inference against him. Of course, no reliance is placed on the testimony of the witness who speaks of seeing a will in (639) Nathaniel's possession a year or more after Martha's death; because, as stated, he does not speak of it as purporting to be the will of the brother or of the sister, nor whether he knew the handwriting to the signatures, nor whether the paper was a copy or original. Indeed, that is evidence on the other side; whereas this question depends upon the defect of proof, by the caveators, of the fraud, which they allege and must establish. They offered no evidence to it but that of Fuller, and that is entirely deficient. He was under an impression, though not certain, that when Nathaniel executed his will he asked him to keep it—whether in the presence or with the knowledge of the sister, he does not intimate; and he said that, as he was leaving the house, Nathaniel got the will from him, and he never saw it afterwards, though he had examined the valuable papers in Nathaniel's pocketbook. It is singular, if any such understanding existed as to mutual wills to be kept by the witness, as is supposed, that such an immediate violation of it should not have made a permanent impression on the witness, and, indeed, that he had not communicated it to the sister. But, overlooking that, the observation is obvious that the witness does not state that Nathaniel kept all his valuable papers in his pocketbook, or that he professed to submit all of them to his examination, or, especially, that such examination occurred during Martha's life, which is the essential point. There is, in truth, nothing relevant to this matter, but a vague impression

on the mind of the witness that Nathaniel asked him to keep his will, and subsequently, on the same day, he took it into his own keeping; which affords no clue to an existing intention to destroy it, or to its actual destruction then or at any time in his sister's lifetime. The case was, therefore, left to the jury to draw an inference of fraud against the party, without
(640) any evidence that could in law or reason sustain the imputation.

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

Cited: S. v. Cardwell, 44 N. C., 249; *Pinner v. Pinner, ib.,* 477; *Shelfer v. Gooding,* 47 N. C., 184; *S. v. Noblett, ib.,* 429; *Cornelius v. Cornelius,* 52 N. C., 596; *S. v. Austin,* 79 N. C., 627; *Burton v. R. R.,* 82 N. C., 509; *Pierce v. Alspaugh,* 83 N. C., 261; *Burton v. R. R.,* 84 N. C., 197; *S. v. Nicholson,* 85 N. C., 549; *Branton v. O'Bryant,* 93 N. C., 104; *Pollock v. Warwick,* 104 N. C., 642; *Lee v. Williams,* 111 N. C., 205; *Burney v. Allen,* 125 N. C., 318, 19, 22; *Jarrett v. Trunk Co.,* 144 N. C., 301; *In re Bowling,* 150 N. C., 515.

SOLOMON HEATHCOCK v. NELSON PENNINGTON.

1. The degree of care to be taken of a hired slave does not differ from that required as to other things.

2. It is erroneous to leave the question of due care to the jury, since it is the province and duty of the court to advise them on that point, supposing them to be satisfied of certain facts.

3. Ordinary care is that degree of it which, in the same circumstances, a person of ordinary prudence would take of the particular thing, were it his own; and it will differ much, according to the nature of the thing, the purpose for which it was hired, and the particular circumstances of risk under which a loss occurred.

4. If an owner hire out his slave for a particular purpose, it is to be understood he is fit for it, and, therefore, he may be set to that service, and kept at it, in the way that is usual. If there be risks in such service, it is to be presumed the owner must have foreseen them and provided for them in the hire.

APPEAL from the Superior Court of Law of STANLY, at Spring Term, 1850, *Settle, J.*, presiding.

The declaration states that the plaintiff hired to the defendant a negro slave between the ages of ten and twelve years, for the term of one year from, etc., with permission to the defendant to employ the slave in driving a horse attached to a
(641) whim at a certain gold mine belonging to the defendant,

and that the defendant undertook and promised the plaintiff to take ordinary care of the said slave during the term; and that the defendant, not regarding his understanding aforesaid, wholly neglected and refused to take ordinary care of the said slave, and by means of the negligence and improper conduct of the defendant, the said slave, while in the employment aforesaid under the defendant, during the term and year aforesaid, viz., on, etc., fell into the shaft of the said gold mine, the same being 160 feet deep, and was killed and wholly lost to the plaintiff, to the damages, etc. Plea, not guilty.

On the trial the plaintiffs gave evidence of the hiring, as stated in the declaration, and that the negro was of the age specified; that on a day in the month of January the slave was put to driving the horse to the whim of the defendant's gold mine, at about 9 o'clock in the evening, with orders to continue the driving through the night until the next morning, under the directions of a young man, who was about nineteen years of age and was employed as lander, as he is called, at the mouth of the mine or shaft. That the whim was about 10 feet from the mouth of the shaft or pit, which was 160 feet deep, and at the surface 8 feet long and 4 feet wide. That the negro boy did not have an overcoat, but was allowed to warm himself at a fire, which was kept up about 2½ feet from the mouth of the shaft; that upon one occasion, when he went to warm, which was just before daylight in the morning, and when it was dark, the lander called to him and directed him to start his horse, and the boy, being drowsy, in attempting to go to his horse fell into the pit and was killed.

The defendant then offered evidence that he employed a negro boy of his own, and his son, who were about the same age with the hired boy, in the same service to which the plaintiff's slave was put; which was objected to on the (642) part of the plaintiff, but admitted by the court.

His Honor, therefore, charged the jury that the defendant was bound to ordinary care of the hired boy; that his having employed his own son and slave in the same way with the plaintiff's negro was not a rule or standard by which they should measure the care the defendant ought to have taken of the plaintiff's slave; because, if he did not take due care of his own family and property, that was no reason why he should not be chargeable for want of taking care of the slave he had hired. The court then left it to the jury to say whether the defendant had used ordinary care or not. There was a verdict for the defendant, and from the judgment the plaintiff appealed.

Strange for plaintiff.
Dargan for defendant.

RUFFIN, C. J. The decree of care to be taken of a hired slave does not differ from that required as to other things; and it was correctly so held on the trial. Indeed, the declaration lays the defendant's undertaking to be for ordinary care of the slave, and that the loss arose from the want of due care. It was, however, erroneous to leave the question of due care to the jury, since it is the province and duty of the court to advise them on that point, supposing them to be satisfied of certain facts. *Biles v. Holmes, ante,* 16. Therefore the judgment would be reversed if the verdict did not appear to be what it ought to have been if the court had given the proper direction. For, supposing all the evidence to be true—and as to that there was no dispute—it did not establish, we think, a want of due care in the defendant. The jury therefore judged rightly, and their decision ought not to be disturbed.

(643) Ordinary care is that degree of it which in the same circumstances a person of ordinary prudence would take of the particular thing were it his own. It is manifest that it may differ very much according to the nature of the thing, the purpose for which it was hired, and the particular circumstances of risk under which a loss occurred; a coach, for example, is not kept like a casket of jewels. So, a slave, being a moral and intelligent being, is usually as capable of self-preservation as other persons. Hence, the same constant oversight and control are not requisite for his preservation as for that of a lifeless thing, or of an irrational animal. Again, if an owner let his slave for a particular purpose, it is to be understood that he is fit for it; and therefore he may be set to that service and kept at it in the way that is usual. If he hire him, for instance, as a mariner upon a sea voyage, it is implied that he is to do the duty of a sailor. The ship's master, therefore, does the owner no wrong and evinces no want of due care by sending him for a useful purpose to the masthead, though it happen that from want of experience or a steady head, he fall and be hurt. If, indeed, he were sent aloft in a tempest and forbidden to use the common means of security by lashing himself to the mast or rigging, that would make a difference. But surely the omission to give the slave particular instructions to use those ordinary means of preservation could not render the bailee liable, as for culpable neglect; since every one would confide in his understanding and disposition to take care of himself, as a sufficient guaranty for his using the ordinary precautions against the danger naturally incident to the service.

Moreover, the owner must have foreseen those risks and provided for them in the hire. These considerations tend to the conclusion that the defendant here would not be liable if the loss had arisen from a cause naturally connected with the employment for which the slave was hired. For it seems certain that the plaintiff knew that the whim at which his (644) slave was to work must be within a few feet of the mouth of the shaft, and, from the depth of the shaft, that the operations of drawing off the water and raising the ore must go on night and day, and, of course, that the mouth of the shaft would not at any time be closed. The hazards of working near the open shaft, and in the night as well as the day, were the known hazards of the service. Why did not the plaintiff warn the boy of his perils from those causes? Because he did not conceive there was the least necessity; and he ought not to complain that the defendant omitted directions which he thought unnecessary from himself. Unless the defendant, then, exposed the boy at an unreasonable time, or kept him at work for an unreasonable period, and the loss arose therefrom, he cannot be deemed negligent. It is stated that the boy had no overcoat. But the state of the weather is not given, nor is it stated that he was not otherwise sufficiently clad. Indeed, his condition in that respect is not pretended to have been the cause of his death, or connected with it, saving only that he may have been thereby induced to go oftener to the fire, and it happened upon the final occasion when he went there that he fell into the shaft. But admit that the boy would not have met with the fate he did but for going to the fire, or if the fire had been in a different situation, yet it cannot be deemed gross negligence not to forbid the boy to go to the fire where it was, or not to have one in a different situation. The fire was between the boy and the lander, whose station is at the mouth of the shaft; and it is not stated that such was not its usual position, or that it was not a proper one. Apparently it was the most proper. It was there equally convenient to the lander and the driver of the horse, and, in fact, it was, by its light, a better protection to the slave against accidentally stumbling into the shaft, as he passed near its mouth at every round on which he followed the horse, than if it had been in a different direction. There was (645) no such extraordinary hazard to the boys who worked the whim, in going to the fire where it was, as to have induced the defendant to forbid them or to use any uncommon precautions, or give any particular instructions; for example, to keep that fire so as to give a light, or to make the fire in another place. It could not have been anticipated that the boy was

running any risk of falling into the shaft, which his own intelligence, at his age, would not prompt and enable him to avoid, considering him, as we must, as possessing the ordinary degree of intelligence and instinct of self-preservation of persons of his age and class. Then as to the time of making the boy perform this service—that is, at night. As has been observed, it is to be inferred that the work could not be stopped during any part of the twenty-four hours, without much loss; and that, in fact, it was the course of the business to keep at work. It is in that point of view that the evidence as to the employment of other hands in the same service, and for the night as well as the day, was relevant and proper, not as excusing gross neglect as to one by a similar neglect as to others, but as establishing the usual and necessary duties of the employment, and as tending to establish the safety with which it was attended, when pursued by others of no more years or discretion than this lad, without any particular supervision. Some one had necessarily to perform this service at those times. Therefore it was not unreasonable, *prima facie*. It is not to be collected from the case that the slave had been worn down by labor so protracted as would ordinarily overcome persons of his age and condition by fatigue and heavy drowsiness, so as to deprive them of consciousness and the power of self-control. On the contrary, we understand that this boy took his rest through the day, as it is stated that in the evening he commenced his duty for the night—there being three of them, who performed the
(646) task among them, and probably by turns. We cannot say that was unreasonable; at least, not so in its bearing on the point now under consideration, namely, as ordinarily disqualifying a boy like this for taking care of his life by avoiding the shaft, as with his senses about him he would do, and thereby making it incumbent on a bailee, as an act of ordinary care, to stop him from work, or appoint a superintendent to keep him away from the shaft. If the defendant had, for example, sent the boy down the shaft, considering his inexperience and timidity, it would, doubtless, have been gross negligence not to provide against the accident of his falling, by making him fast to the bucket or chain. But with common bodily vigor and ordinary intelligence the boy was capable, after the repose of the day, of doing his business on the surface of the ground for the night, though near the shaft, without any probable hazard of getting into it; and, in the same degree, the vigilance of the defendant over his safety might be relaxed without exposing him to the imputation of negligence, much less gross negligence. The truth is, the event could not have been

reasonably apprehended, and was not likely to result from the service, nor had any natural connection with it. No one could suppose that the boy, knowing the place and its dangers, would incur the risk of stumbling into the shaft by not keeping wide awake. It was his misfortune to resemble the soldier sleeping at his post, who pays the penalty by being surprised and put to death. The event is to be attributed to one of those mischances to which all are more or less exposed, and not, in particular, to the want of care by the defendant.

Cited: Hathaway v. Hinton, 46 N. C., 246; *Brock v. King,* 48 N. C., 48; *Couch v. Jones,* 49 N. C., 407; *Woodhouse v. McRae,* 50 N. C., 2; *Swann v. Brown,* 51 N. C., 152; *Haden v. R. R.,* 53 N. C., 365; *Bryan v. Fowler,* 70 N. C., 597; *Pleasants v. R. R.,* 95 N. C., 203; *Emry v. R. R.,* 109 N. C., 592; *Miller v. R. R.,* 128 N. C., 28.

(647)

THE STATE v. JOHN JOHNSON.

1. Where a charter has been granted for a turnpike road and the road opened, the County Court has no right to convert it into a public road, unless the charter has been duly surrendered or, from a *nonuser* for twenty years, a dedication to the public may be presumed.

2. Even in such case the road can only be made a public road in the manner prescribed by the act of Assembly. The mere appointment of an overseer will not be sufficient for that purpose.

APPEAL from the Superior Court of Law of YANCEY, at Spring Term, 1850, *Battle, J.*, presiding.

The defendant was indicted as an overseer of a public road for not keeping the same in repair.

Upon the trial, the jury found the following special verdict:

That there is a public road leading from the county of Burke through the county of Yancey to the Tennessee line, and that the same has been used by the citizens for the space of nineteen years; that said road was made by Isaac T. Avery, in 1829, by virtue of a charter granted him by the Legislature of North Carolina in 1827 and 1828, which charter authorized said Avery to erect tollgates on said road when completed, and exact toll from persons traveling the same; that gates were put up and tolls collected for the first four years, but for twelve years past the gates have been removed and no tolls taken; that the said Avery was willing and desirous to surrender said road to the

(648) county, it being an expense to him, and wished overseers appointed by the County Court for the purpose of keeping the same in repair; that application was made to the County Court by citizens of the county to appoint overseers over said road; that overseers were appointed accordingly, and hands allowed to work said road; that the present defendant was appointed overseer over part of said road, a distance of about six miles; that the land over which the said road passes belongs to the said Avery; that his hands, together with other persons, were allotted by the court to work under the defendant as overseer; that the said Avery acquiesced in the said appointment and allotment of hands, and his hands worked under the said defendant as overseer by the consent and approbation of the said Avery; that a part of the said road, leading from Burke County to the Tennessee line, passed over land belonging to other persons; that the defendant was duly notified of his appointment; that he has failed to keep the said road over which he is overseer in good repair, but suffered the same to become ruinous, miry, and in great decay, for want of due reparation and amendment. But whether upon the whole matter aforesaid the said John Johnson be guilty of the misdemeanor in said indictment specified and charged upon him, the said jurors are ignorant, and pray the advice of the court thereupon, and if, upon the whole matter aforesaid, it shall appear to the court that he is guilty of the misdemeanor in manner and form as charged in the bill of indictment, the jury find him guilty; otherwise, not guilty.

The court being of opinion against the defendant, it was ordered and adjudged that he pay a fine of $5. With which judgment the defendant being dissatisfied, prayed an appeal to the Supreme Court, which is granted.

Attorney-General for the State.
Avery for defendant.

(649) PEARSON, J. *Baker v. Wilson,* 25 N. C., 168, settles this case. There, certain engineers in the service of the United States had surveyed and marked out the line of a road contemplated to be made by the Federal Government. The Government abandoned the road, and the County Court of Yancey, availing itself of the survey and location which had been made, passed an order that the plaintiff, Baker, oversee the road from the top of the mountain, etc., and assigned hands, among others, the defendant, who refused to work, and was warranted for the penalty. The court decided in his favor, on the ground that the

road had not been established, according to law, a common public highway which the inhabitants were bound to keep up. *Gaston, J.:* "Our laws are explicit in requiring no new road shall be laid out but by a judgment of the court upon notice and a petition filed, and allows an appeal by any persons dissatisfied with the judgment. Rev. St., ch. 104, and secs. 2 and 3. These provisions would be substantially annulled if the mere appointment of an overseer and assignment of hands to a supposed road were to be held, *per se,* a judicial determination that a public road be laid out, when none before existed. Such an order may be *prima facie* evidence of the existence of the road, but it is competent for the inhabitants when sued for refusing to work, or for the person appointed overseer, when indicted for not putting the road in order, to show that there is no such road to be made or repaired."

The defendant is indicted as an overseer for neglecting to keep the road in repair. He says there is no such common highway, and that the order in the County Court was void and of no effect. The facts are that, in 1827, the Legislature authorized certain commissioners to lay off a road, which road was vested in Colonel Avery for twenty-five years, he undertaking to make and keep it in repair for and during that time, in consideration of the exclusive privilege conferred on him of taking tolls and owning it as a *turnpike* road. The road (650) was accordingly made and gates erected and toll received for some four years, when Avery threw open his gates and allowed any one to travel along it who chose, and he expressed a willingness that the county might take it as a county road. This state of things continued for about twelve years, when the County Court, without a petition being filed and notice given as the statute requires, made an order appointing the defendant overseer, and assigning hands.

We agree with the defendant, that this was not a common public highway which the inhabitants are bound to keep in repair. It was chartered and originally made as a turnpike, and it has not been changed into a common county road by any such proceeding as the law requires. Avery, by *nonuser,* has subjected his franchise to forfeiture; but it is not in fact forfeited and the right divested. That can only be done by judgment on *si. fa.:* on the same principle that an estate of land can only be defeated by force of a condition upon *actual entry.* There has been no surrender of the franchise; that could only be with the consent of the Legislature, the grantor; and there has been no "dedication" of the road to the public. A dedication, like most other matters, can only be effectual with the consent of both

parties. Avery we will suppose willing to make the dedication; still it has not been accepted by the proper authority, acting for and on behalf of the public; and admitting that had a petition been filed in the County Court, setting out a wish to dedicate, and praying that it might be established as a common public road, and due notice, with the right of appeal according to the statute, that the proceeding would have been effectual to make it a common public road, still *that has not been done.* And admitting that if the public had used it as a road, and the County Court had so recognized it, by the appointment of over-
(651) seers and hands to keep it in repair *for twenty years,* which is the shortest time, that there would then have been the presumption of a dedication: still, that has not been done. And so there has neither been an express nor an implied dedication. Several cases were cited as to the manner of dedicating streets, by laying off and settling lots in towns. Those cases have no bearing, because the manner of establishing county roads is expressly regulated and provided for by statute.

The case may be looked at in another point of view. The franchise has never been divested out of Avery. Suppose the defendant had gone on and put the road in good repair, and Avery had then erected his gates, as he might have asserted a right to do: it would have presented a strange state of things! Or suppose the solicitor had sent a bill of indictment against Avery for not keeping his road in repair, as he had undertaken to do, for the term of twenty-five years, and that and the present indictment were called for trial at the same time—a strange state of things would have again been presented; and yet, there is no question that Avery has, during all this time, been liable to an indictment. If he made a bad bargain or "missed his calculation," he ought to have petitioned the Legislature to accept a surrender.

It was probably expedient to have this road, provided those who used it would pay for making and keeping it in repair; but *non constat* that it is expedient to establish the road, if the labor of a sparse population is to be taxed to keep it up.*

PER CURIAM. Judgment reversed and judgment for the defendant.

Cited: Tarkington v. McRae, 47 N. C., 49; *S. v. Fisher,* 117 N. C., 739; *S. v. Lucas,* 124 N. C., 806.

*NOTE.—For dissenting opinion of NASH, J., see *post,* 659-664.

(652)

JAMES C. TURRENTINE v. THOMAS FAUCETT.

1. Where a sheriff arrested a man on a *ca. sa.* and committed him to jail, in custody of the jailer, and the prisoner escaped: *Held*, that without a bond of indemnity, the jailer was only bound to the sheriff for want of fidelity or due care in the discharge of his duty.

2. A sheriff has a right to take a bond from the jailer to indemnify him for *all losses* to which he may be subjected by the escape of a prisoner while in custody of the jailer.

APPEAL from the Superior Court of Law of ORANGE, at Fall Term, 1850, *Manly, J.*, presiding.

In this case the following facts are agreed upon by the parties: That one Fleming was committed in due course of law, as a debtor in execution, at the instance of Boaz Adams in one case and of John P. Mabry in another case, to the custody of James C. Turrentine, the plaintiff, as the Sheriff of Orange County, and he delivered the said Fleming to the defendant Faucett, the jailer of said county; and he remained in close prison until the night of 1 November, 1844, when he made his escape by his own act, assisted by some one from the outside of the prison, by cutting through the iron bars of the window, but without the knowledge or consent or actual negligence of the defendant. The plaintiff was sued for an escape, as sheriff, in an action of debt, by both Adams and Mabry, who effected recoveries against him for their debts against Fleming. And on 30 August, 1849, he paid said Adams the amount of his judgment against him for said escape, viz., $3,630.69, and for costs of said suit $71.43. And on 30 August, (653) 1849, he likewise paid the said Mabry his said judgment, viz., $620, and for costs of said suit $80.82; that on the same day he paid to his own attorneys in the said two suits $310, and in expenses in attempting to arrest the said Fleming, $62.50; that the said Turrentine commenced an action of *assumpsit* for said escape against the said Faucett, as jailer, on 15 October, 1847, in Orange Superior Court; and at March term of said court, in 1849, the said plaintiff was nonsuited therein, and judgment of the court was rendered against him; and that afterwards the said Turrentine, on 30 August, 1849, commenced the present action for the same cause of action against said Faucett, as jailer; that the said Faucett was jailer and the said Turrentine sheriff on 1 November, 1844, when the said Fleming made his escape. Upon this state of facts the court was of opinion the plaintiff was not entitled to recover, and instructed the jury that, while the action was believed to be in time and not barred

by the statute, yet, upon the other plea, the plaintiff could not recover. There was a verdict in accordance with these instructions.

Rule discharged; judgment, and appeal.

W. H. Haywood and *J. H. Haughton* for plaintiff.
J. W. Norwood and *J. H. Bryan* for defendant.

(654) PEARSON, J. One Fleming, who was in jail under a *capias ad satisfaciendum,* escaped. The plaintiff was sued, as sheriff, and forced to pay a large amount to the creditors, and brings this action against the defendant, his jailer, and declares upon an undertaking to keep the said Fleming faithfully and securely, and on failure to indemnify and save the plaintiff harmless from all loss or damage. It is
(655) stated in the case agreed that Fleming made his escape without the knowledge or consent or *actual negligence* of the defendant.

The defendant by his counsel admits that there was an implied undertaking to keep the prisoner faithfully and diligently, but denies that the law implies an undertaking to keep *safely* or *to indemnify.*

The judge in the court below so decided. To this the plaintiff excepts. There is no error.

For the plaintiff it is said the sheriff is by law bound to keep prisoners *safely.* The defendant, when he undertook to act as jailer, must be presumed to have done so with reference to this liability of his principal; hence, there is an implied undertaking on his part so to act as to prevent his principal from being subjected to loss, or, in other words, there is an implied undertaking to keep safely or indemnify.

For the defendant it is said the general rule is that agents, servants and bailees, where the contract is for the benefit of both parties, are only liable for ordinary neglect. In the case of sheriffs, common carriers and innkeepers an exception is made; they are held liable as *insurers,* except against "the act of God and the king's enemies," upon the ground of *public policy.* This reason does not extend to their deputies, agents and servants. Therefore, the latter do not fall under the exception, but stand under the general rule.

The argument for the plaintiff clearly shows the expediency of taking a bond of indemnity (as sheriffs usually do). But if he neglects to do so, *non constat* the law will imply an undertaking to keep prisoners safe or indemnify. An undertaking to act faithfully and diligently is implied by law. This the jailer is *able to do,* if he will. But when it comes to *insuring*

that prisoners will be kept safely, and indemnifying against acts beyond the control of the jailer, and which do not fall within the reach of ordinary diligence, it is clearly a different question. This higher obligation which the law, from (656) motives of public policy, imposes on the superior, can only be imposed on the inferior by an express undertaking. Public policy is satisfied by holding the superior responsible. As between him and his jailer, the general rule applies, unless there be an express agreement to indemnify.

To illustrate: a railroad company, as a common carrier, is bound to insure every article bailed to be carried, because public policy requires it, and it is presumed the rates are fixed in reference not only to the trouble of carrying, but to this liability.

This policy does not extend to the conductor of a train, and there is no presumption that he has undertaken a higher degree of responsibility than that which is imposed by the general rule, in the absence of an express undertaking to that effect in consideration of higher wages. So, although the company be chargeable, as a common carrier, he is not liable over, without proof of a want of ordinary care.

It is suggested that if this liability is not implied by law, it is unlawful to take a bond of indemnity, and such bond is void, and that the real purpose of taking these bonds is not to add to the liability, but to increase the security.

It is against law to take a bond of indemnity and thereby encourage or permit an unlawful act—as to give a stranger a key and free access to the jail. But an indemnity from the jailer is an inducement to make him more strict and vigilant in the discharge of his duties. Sheriffs have, for this reason, always been allowed, by bond or express undertaking of jailers and deputies, to raise the responsibility of the inferior to the same degree as that imposed on the superior.

The practice of taking bonds has been so uniform that we have not been able to find a single case like the present. There is, however, an old case, in a report of high author- (657) ity, which fully sustains our conclusion. *Atterton v. Harward*, Croke Eliz., 349. That was case by a bailiff against a debtor for making his escape, whereby the creditor recovered of the sheriff, and he of the bailiff, on his *assumpsit* to save the sheriff harmless against all escapes; and so the bailiff sought to recover of the debtor for making his escape, by which *tort* he had been subjected to damage. Upon not guilty, it was found against the plaintiff. The court was of opinion "that the bailiff was not chargeable to the sheriff by law, but by *his assumpsit*, and this, being his voluntary act, shall be no cause to

charge the defendant, but shall make himself liable." But they argued, "if the bailiff had been chargeable *by law,* without *such promise,* an action did lie for him against the defendant, who caused him to be charged."

Upon the authority of this case, in *Kain v. Ostrander,* 8 John, 207, it is said, "the usual course is to resort to his bond of indemnity, and if he has omitted to take one, the jailer is only answerable on his implied undertaking to serve the sheriff with diligence and fidelity." And the decision is in favor of the jailer, on the ground that there was no evidence of that *culpable neglect* which is requisite to make a jailer liable.

PER CURIAM. Judgment reversed.

Cited: Brock v. King, 48 N. C., 49.

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(659)

STATE v. JOHNSON.

The following dissenting opinion of NASH, J., should have been inserted at page 651.

NASH, J. The consideration which I have been able to give this case leads me to a conclusion different from that to which a majority of the Court have come. From the facts set forth in the special verdict I am of opinion that the road over which the defendant was appointed overseer was, at the time of his appointment, a public road or highway, duly constituted; and that the defendant was bound to keep it in the repair required by law, and for neglecting to do so he was guilty of a misdemeanor and punishable by indictment. Originally, the road was a turnpike, erected under the authority of an act of the General Assembly of the State. It was completed in 1830, toll-gates erected and the proper tolls exacted from those bound to pay them. At the end of four years the gates were removed by the grantee of the franchise, and the road thrown open to the public, and so continued for twelve years, the citizens of the country, for all that period, passing and repassing as over any other public highway. At the end of this time the County Court, at the instance of a portion of the citizens of the county, and with the knowledge of the grantee, appointed the defendant overseer of that portion of the road embraced in the indictment. The whole of the road lay within the county of Yancey. The objection is that the County Court had no power to constitute

this road a public road in the manner in which it was done, and that, therefore, the appointment of the defendant as overseer was void and of no effect. If the first proposi- (660) tion fails, the second follows, of course, its fate.

There are three modes known to our law by which a public road may be established—by dedication, by an uninterrupted use of it by the public for twenty years, and by the mode pointed out for legislative acts. The two first are by the common law, and have been repeatedly recognized by the decisions of the Supreme Court. *Woollard v. McCullock,* 23 N. C., 436; *S. v. Marble,* 26 N. C., 320; *Smith v. Harkins,* 38 N. C., 622. When the road in this case was finished by the grantee according to his contract, he acquired in the land over which it ran, for the term specified in his charter, a legal interest, which was liable to the payment of his debts, and if sold under execution against him, the purchaser would acquire a valid legal title to the interest owned by him. In such case the ownership of the land or road would be separated from the franchise, which would still remain in the grantee, for it could not be sold. *S. v. Rives,* 27 N. C., 297. This property or interest in the land or road was susceptible of being dedicated by the grantee to the public; for, in *Smith v. Harkins, supra,* his Honor, the Chief Justice, in delivering the opinion of the Court, states it as a plain principle that "private persons may dedicate their land or other property to the public." Here the owner of the turnpike road abandoned it to the public by removing his gates and suffering the public to pass over it free of toll. It is true that no use short of twenty years will raise a presumption of a dedication; but here there is no room for a presumption—the case states he did abandon it to the public use, which is in itself a dedication. There is no form by which a dedication shall be made, pointed out in the authorities; and I can conceive of no other better adapted to the purpose, more expressive of the intention of the grantee, than the one adopted by him, more especially as the land itself, over which the road ran, (661) which is embraced in the indictment, was his freehold.

I admit that the grantee here could not, of his mere action, by such an abandonment of the road strip from his own shoulders the obligation of keeping the road in repair and throw it upon the public. Something more was necessary—the public, through its constituted authorities, must accept the road. This, I hold, has been done by the County Court of Yancey, in appointing overseers over the road. In *Smith v. Harkins* it is declared by the Court that "the making and regulating roads, fences and bridges are the proper subjects of political action, and are *nec-*

essarily governed by the will of the lawmaking power, or of those to whom it may be delegated," p. 622. This is said in reference to the claim by the defendant in that case to erect a free bridge and dedicate it to the use of the public. The Court admit the principle, but qualify it with an exception, "but not so as to injure or impair exclusive rights, previously granted by the public. To authorize such interference they must show the *acceptance* thereof by the regular organs of the community, the constituted authorities"; and at page 620 they show that the constituted authority meant in that case was the County Court. And such is the spirit and meaning of the legislative acts of our State. It is said, however, that this is not an open question; that the case of *Baker v. Wilson,* 25 N. C., 169, is decisive of it. To my apprehension that case does not justify the conclusion which is drawn from it. That conclusion is that the County Court of Yancey could not, by their acceptance of the road in this case, constitute it a public road; that, in order to constitute it such by their action, the directions of the act of 1785 must be pursued; nor would it have been an authority in this case, if it had so decided. The facts in the two cases are essentially different. What were they in the former? The Government of the United States, by its agents, had surveyed and marked out a line of road *contem-*
(662) *plated* to be made under its authority; but no such road was opened; and the County Court, acting upon the idea that the survey constituted a public road, appointed the defendant as overseer upon it. The Court decide that the appointment of the overseer was void; and the opinion shows clearly why it was so. His Honor, *Judge Gaston,* says: "Our laws are explicit in requiring that no *new* road shall be laid out but by a judgment of the court upon petition filed." "These requirements (that is, as set forth in section 2 of the act of 1784) would be substantially annulled if the mere appointment of an overseer or assignment of hands to a *supposed* road were to be held, *per se,* a judicial determination that a public road be laid out where *none existed before.*" In speaking of the liability of the overseer and hands, the opinion concludes: "But neither the one nor the other have failed in the performance of duty in regard to a public road, if it appear that such road has no existence either in law or in fact." This opinion, as I understand it, establishes this proposition, and no other, that when there is no road in existence, no road *de facto,* the *County Court* cannot lay off or establish a *new* road on land previously granted without pursuing the requirements of the act of 1784. If the decision had the effect now attributed to it, it would be a

virtual abrogation of the common-law mode of establishing public roads; and that would be directly in conflict with the opinion of this Court in *Woollard v. McCullock,* 23 N. C., 436, where it is decided that the common-law modes of establishing public roads are not repealed by our statutes or any of them. In this case there was a public highway in existence, when the order was made appointing the defendant an overseer over it—a road established by the highest authority known to the law in the establishment of roads, and which had been used by the public for twelve years as a public road. To such a state of facts the case of *Baker v. Wilson,* 25 N. C., (663) 169, does not apply, nor could the Court have intended it should. Suppose the road had been kept up as a turnpike until the expiration of the charter, and either the Legislature had refused to recharter it or the owner did not desire it; or, suppose that the owner of the franchise had, after erecting the road, forfeited it, and by due course of law the charter had been repealed; or, suppose the owner of a tract of land, adjoining the town of a newly established county, opens a road through it to the town and gives it to the public—can it be pretended that in either of these cases the County Court cannot adopt the road, as a public road, without a petition regularly filed and a jury? Where the necessity of a petition?—the road is already in existence. Where the necessity of a jury?—it is already laid off. Whether the public interest or convenience requires a public road there, the county courts are the exclusive judges. The language of the acts of 1784 and 1813 strongly sustains, I think, the view taken by me. It is, "The courts of pleas and quarter sessions shall have full power and authority, etc., to order the *laying out* of public roads," etc., evidently showing that the provisions in them extended only to the establishing of *new* roads. But it is further said the owner of the franchise could not surrender it to the County Court. Let that be so. It is not necessary in my view to decide that question here. The freehold in land may be in one person, and a right of way over in another. The ownership of the road and franchise are separate and distinct interests and are governed by separate and distinct rules. In conclusion, I can but repeat that, in my opinion, the dedication of the road in question was complete so far as the owner of it was concerned, when he removed his gates and abandoned it to the use of the public, for it is rather the intention of the owner than the length of time of the use, which must determine the (664) fact of dedication; Woolidge on Ways, p. 11, and 11 East, 376; and that the County Court had the power to accept

the dedication, and by the appointment of overseers did accept it. I consider the opinion of the Court in this case as materially shaking the authority of those previously made by the Court on the subject of public roads.

NOTE.—In consequence of the indisposition of Judge NASH, very few opinions were delivered by him at this term.

GENERAL ORDER.

Students preparing to be examined for a Superior Court license are required hereafter to read ADAMS' EQUITY, instead of FONBLANQUE.

INDEX.

PLEADING, PROCESS AND PRACTICE.

1. Where there is an action on a bond against two obligors, and a nonsuit is entered as to one, this is no *retraxit* as to him. *Crawford v. Glass*, 118.

2. On a *scire facias* against heirs to subject the lands of their ancestor, it is too late for them, after they have appeared and pleaded to the *scire facias*, to move to dismiss the proceedings because no declaration has been served on them, although some of the heirs may have been infants. *Tripp v. Potter*, 121.

3. Where a *scire facias* has been sued out upon a judgment, and while it is in the sheriff's hands the parties agreed that the collection of the money should be suspended so as to enable them to make a full settlement, yet the sheriff is not thereby excused from returning the process, but is liable to an amercement if he fails to do so. *Morrow v. Allison*, 217.

4. The act of 1826, Rev. Stat., ch. 31, sec. 119, authorizing references to be made in courts of law to state the accounts of administrators, executors and guardians, applies only to suits brought upon their bonds respectively. It does not apply to suits brought upon bonds given by a testator or intestate in which fully administered is pleaded. *Lynch v. Johnson*, 224.

5. Where an assignee of a bond brings an action of debt upon the bond, and the defendant pleads *non est factum* only, this plea does not deny the assignment. But if the action be on the case, as given by our statute to the assignee of a bond, the general issue denies both the execution of the bond and the indorsement. *Ford v. Vandyke*, 227.

6. The plea of payment to an action on a judgment, etc., is sufficient to cover the defense of a presumption of payment or abandonment of claim under our act of 1826. *Butts v. Patton*, 262.

7. Where a man who is liable to militia duty is arrested on a civil process while he is attending a militia muster, in violation of the act of Assembly, he may plead the same in abatement. *Murphy v. McCombs*, 274.

8. That the plaintiff who sues as executor is not an executor is a plea in bar, and the defendant may plead it with any other bar. *Shown v. Barr*, 296.

9. In cases of verdicts subject to the opinion of the court, all the points on which either party means to insist ought to be reserved, for all points not reserved are taken to be given up. If one of the parties cannot have inserted a question on which the presiding judge inclines against him, he ought not to consent to such a verdict, but peremptorily claim that an opinion shall then be given to the jury, as he has a right to do. *Brooks v. Ratcliff*, 321.

10. Where an action was brought in the names of James Brooks, William E. Colton and William E. Churchill, partners, trading under the name and firm of "Brooks, Colton & Co.," and the judgment was in the name of Brooks, Colton & Co.: