NORTH CAROLINA REPORTS

VOL. 34

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1851, TO AUGUST TERM, 1851
BOTH INCLUSIVE

By JAMES IREDELL
(VOLUME 12)

ANNOTATED BY
WALTER CLARK
(2d Anno. Ed.)

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CLERK AT RALEIGH:

EDMUND B. FREEMAN

CLERK AT MORGANTON:

JAMES R. DODGE

REPORTER:

JAMES IREDELL

MARSHALL:

J. T. C. WIATT

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*Appointed 19 June, 1851, *vice* Bartholomew F. Moore, resigned.

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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, 1851

ASA BIGGS v. THOMAS FERRELL.

Where the owner of land, to which a ferry is annexed as a franchise, leases the land, together with the ferry, he is not responsible for any damage sustained by a third person, from the mismanagement of the ferry, while in possession of the lessee.

APPEAL from *Bailey, J.*, at MARTIN Fall Term, 1850.

Case agreed, as follows, to-wit:

In March, 1848, the plaintiff's carriage and horses were taken on board a flat at the public ferry on the Roanoke River, called Hill's Ferry, to transport across the river, and in carrying them across, both of the horses were thrown out of the flat by the limb of a tree projecting from the bank of the river striking the carriage, and one of the horses was thereby drowned.

The ferry was attached to a tract of land conveyed to the defendant's testator, to be held in trust for the sole and separate use (2) of one Mrs. Jones, with the stipulation that she should enjoy it, free from all claim whatsoever by her husband. The deed was executed by the grantor and trustee.

The defendant's testator never undertook to control or manage the property, nor in any manner opposed the management thereof by Mrs. Jones or her husband. Mrs. Jones always permitted her husband to take the profits, and he always furnished his own hands for ferrymen, and leased it according to his discretion.

The ferry, for the year 1848, was leased to one Purvis, who was to pay Mr. Jones therefor two-thirds of the profits. There was also a marriage contract between Mr. and Mrs. Jones, and the witness stated that the defendant's testator sometimes, when there was a dispute between Mr. and Mrs. Jones about the property, would, on being consulted with, advise them what to do.

If, upon the foregoing facts, his Honor should be of opinion that the plaintiff is entitled to recover, judgment is to be entered for $125 and costs. If otherwise, the plaintiff to be nonsuited. His Honor, being of opinion with the plaintiff, rendered judgment for $125 and costs of suit, from which the defendant appealed and entered into bond, etc.

Rodman for plaintiff.
B. F. Moore for defendant.

PEARSON, J. If there was no privity between the defendant's testator and Purvis, the ferryman, it is clear, the action cannot be maintained. It is therefore most favorable for the plaintiff to put the agency of Jones out of view and consider the lease as made by the defendant's testator. This question is then presented: The owner of land, with the franchise of a ferry annexed, makes a lease for one year, and is
(3) to receive as rent two-thirds of the profits. Loss is suffered by the plaintiff. Has he a right of action against the lessor?

We think he has not. We suppose his Honor fell into error by not adverting to the distinction between a lessee and a *cropper* (as he is termed), a servant whose wages depend upon the amount of profits.

The leading case, *S. v. Jones,* 19 N. C., 545, which has been followed by several others, establishes the distinction. It is not verbal, but substantial, and leads to important differences in regard to the rights and liabilities of the parties. A lessee of the land and ferry annexed becomes *the owner* during the term. The toll belongs to *him.* If payment is refused, it is recovered in his name. If an injury is done to the boat, the action must be in his name. The lessor's remedy for his rent is like that of any *other* creditor; and if a third person suffers loss at the ferry, his remedy is against the lessee, *because he is the owner. Deaver v. Rice,* 20 N. C., 567.

On the other hand, if the owner employs one to act as ferryman for a year, and agrees to pay him one-third of the profits as his hire, the ferryman does not become *the owner,* as the toll does not belong to him; if he receive it, he does so as agent of the owner; if payment is refused, it must be sued for in the name of the owner. So far as injury accrues to the boat, the action must be in the name of the owner. The ferryman must sue for his wages like *any other creditor,* and if loss is suffered by a third person, he has a right of action against the owner, because the ferryman is *his servant and is doing the work for him.* For this, *Wiswall v. Brinson,* 32 N. C., 554, is in point. It was relied on in the argument, but it has no bearing whatsoever on this case, where there was a lease. It is suggested that much inconvenience will result to the public if owners of ferries are allowed to lease to insolvent ferrymen and thus

avoid responsibility, while they receive a part of the profits. The (4) county courts are directed to take bonds from the owners of ferries. If the duty has been neglected in reference to this ferry, it is the plaintiff's misfortune.

It is suggested, a franchise cannot be assigned. That may be true in regard to the franchise of being a corporation, for corporations have a "limited capacity" and only such rights and powers as are conferred by the charter. But there is no reason why an individual who owns land with a franchise annexed, as a ferry or market, may not transfer the land in fee or for any less estate, and then the franchise passes as incident, like rents, which passes with the reversions incident thereto.

It is again suggested that a lessee for years is not the *owner of the land* and has a mere right to occupy and receive the profits. For feudal reasons, anciently, none but freeholders were considered "owners of the soil." A freeholder is defined to be *"the possessor of the soil by a free name."* None but freeholders were good "tenants to the precipe" to answer real actions; and a lessee for years, if evicted, had at law no remedy to recover the unexpired part of his term. The law in this particular was changed at an early period, and the writ of possession was given as incident to the judgment in ejectment; and in modern times it is settled that, although for certain political purposes a preference is given to freeholders, yet for all civil purposes a lessee for years has a part of the estate and is *the owner of the land during the time.* This is taken to be clear law in *Deaver v. Rice, supra,* and is not an open question.

PER CURIAM: Judgment reversed, and a nonsuit.

Cited: S. v. Willis, 44 N. C., 225; *Haithcock v. Mfg. Co.,* 72 N. C., 414; *Howland v. Forlaw,* 108 N. C., 569; *Knight v. Foster,* 163 N. C., 331.

(5)

STATE v. BENJAMIN S. POWERS.

Where an indictment for a libel charged that the defendant set up in public a board, on which was a painting or picture of a human head, with a nail driven through the ear and a pair of shears hung on the nail, and the proof was that a human head, showing a side face with an ear, a nail driven through the ear and a pair of shears hung on the nail, was inscribed or cut in the board by means of some instrument, but was not painted: *Held*, that there was a fatal variance between the allegation and the proof, and that the defendant must be acquitted.

APPEAL from *Bailey, J.*, at STOKES Spring Term, 1851.

The defendant was charged under an indictment, the material parts of which are as follows: That Benjamin F. Powers, the defendant, contriving and unlawfully, wickedly and maliciously intending to hurt, injure, vilify and prejudice one Samuel Fulton, and to deprive him of his good name, etc., and to bring him into great contempt, etc., on 15 June, 1850, with force and arms, in the county aforesaid, unlawfully, etc., did publish and cause and procure to be published and exhibited in a certain public place in the county aforesaid, a certain wicked, libelous, malicious and scandalous painting and picture, on a board, or plank, meaning by said board or plank a pillory, representing the head of a man (thereby meaning the head of the said Samuel Fulton), with a picture, likeness, or representation of a human ear thereon (meaning thereby the ear of the said Samuel Fulton), with an iron nail driven into the said painted likeness or representation of an ear (meaning thereby to represent the ear of the said Samuel Fulton nailed to the pil-
(6) lory for the crime of perjury), from which said nail driven into said painting or likeness of an ear was suspended by him, the said Benjamin F. Powers, a pair of shears or large scissors (thereby, to-wit, by said board, painting, nail, shears and large scissors meaning to indicate and represent that the ears of the said Samuel Fulton should be nailed to the pillory or whipping-post and be cut off for the crime of perjury), to the great damage, etc., etc.

The second count charged that the said Benjamin F. Powers, being a person of wicked and malicious mind, etc., and unlawfully and maliciously contriving, etc., to injure, etc., the said Samuel Fulton, and to bring him into great scandal, etc., afterwards, on 15 June, 1850, did unlawfully, etc., make and cause to be made a certain effigy or figure intended to represent the said Samuel Fulton, and afterwards, on the same day, etc., unlawfully, etc., erected, etc., on a certain public place, where the said Samuel Fulton was accustomed to pass in the way of his business, and kept and continued the said effigy or figure so there erected, etc., for a long space of time, to-wit, for the space of ten days, and during that time and on divers other days and times then next following, unlawfully, etc., hung up, etc., the said effigy or figure as and in manner aforesaid, with a painting and picture representing the head of a man, with a picture, likeness or representation of a human ear thereon, and with an iron nail driven into the said painted likeness or representation of an ear inscribed on a piece of board or plank, on which was fixed and painted the said effigy or figure, and to which was attached a pair of shears hung on a nail driven into the ear of said painting, and with divers other scandalous inscriptions, etc., etc., to the great damage, etc., and against the peace and dignity of the State.

Benjamin Pullam, a witness for the State, testified that in the latter part of May or the first part of June, 1850, he was at the defendant's house, in the County of Stokes; that the defendant took him to the side of his shop and showed him a board or piece of plank nailed up at the side of his said shop; that the defendant's shop was situated (7) on the side of the public road in Stokes County; that the defendant's dwelling-house was situated on the other side of said public road, some 10 or 15 steps from said board or plank; the door of the defendant's dwelling-house fronted the said road; that the defendant, with others, worked in said shop; that on said plank or board was inscribed, by means of some instrument, the form of a human head and face, an ear on the side of the head, a nail driven through said ear, and a pair of shears hung on said nail; that the defendant pointed out this figure to him; said that he had put it up there; that that was Samuel Fulton, the prosecutor; that he had sworn to a damned lie and he could prove it; that the said board or plank remained up for several months; that it was in a very public place; that on other occasions the defendant pointed out to him the figure aforesaid, still up at the same place; said that was the prosecutor; that all he had to do was to shut the shears down upon the ear; told the witness to tell the prosecutor, Samuel Fulton, that he, the defendant, intended to get him a gang of hound puppies and fatten them on the souse that his ears would make. He said the effigy was inscribed on the wood, but not painted.

The court charged the jury that if they believed, from the testimony that the defendant erected, caused to be erected, or kept up, after it was erected by others, the said board with the said figure and devices upon it, thereby maliciously intending to represent the head and ear of Samuel Fulton, and this was made public for the purpose of provoking the said Samuel Fulton and exposing him to public contempt and ridicule, the offense was sufficiently charged in the second count, and they could find the defendant guilty.

Under this charge, the defendant was found guilty on the second count in the bill of indictment, and not guilty on the first count.

Rule for a new trial, upon the ground of misdirection; and the (8) sole question is whether the proof sustained the indictment.

Rule discharged. Motion in arrest of judgment disallowed. Judgment, and appeal.

Attorney General for State.
J. T. Morehead for defendant.

PEARSON, J. It is charged that the defendant made a certain effigy, or figure, intended to represent Samuel Fulton, which he set up on a shop near a public road; "that he unlawfully, wickedly and maliciously

hung up and suspended the said effigy, or figure, as and in manner aforesaid, with a *painting* and *picture* representing the head of a man with the picture, likeness and representation of a human ear thereon, and with an iron nail driven into the said *painted* likeness or representation of an ear inscribed on a piece of board, or plank, on which *was fixed and painted* the said *effigy, or figure,* and to which were a pair of shears, or scissors, hung on a nail driven into the ear of said *painting,"* with other scandalous inscriptions and devices upon and about the said "effigy, figure, and painting," reflecting on the said Fulton.

By rejecting repetitions and general words, we are enabled to extract a definite idea and put a construction on the indictment, so as to make this to be the descriptive allegation: The defendant set up against the side of a house, near a public road, a board, on which was a *painting or picture of a human head* and ear; a nail was driven through the ear, and a pair of shears was hung on the nail.

It was proven that the defendant had set up on the side of a house, near a public road, a board, on which a human head was *inscribed,* showing a side face, with the ear; a nail was driven through the ear, and a pair of shears was hung on the nail. The figure was *inscribed* or *cut in the board* by means of *some instrument,* but was not painted.

(9) The defendant's counsel insisted that the indictment was not sustained by the proof. His Honor held the proof sufficient.

There is error. The variance between the allegation and proof is fatal in this. It is alleged there was a painting or picture of a human head and ear on the board. The proof is, the head and ear were inscribed, engraved, or cut in the wood with an instrument, and there was no paint about it.

It is difficult to lay down a general rule on the subject of variance in particular terms (and one in general terms would be of no use). It is almost impossible to mark out the dividing line between such a variance as is fatal and such as is not; for, like light and shade, they run into each other; and although it be easy to determine "this is light," "that is shade," yet it is almost impossible to say, "Here the light ceases and the shade begins." A general rule cannot be established, except by decisions in many particular cases. We shall, therefore, content ourselves by deciding in this case that an allegation that a human head and ear were painted on a board is not sustained by proving that the head and ear were cut in the board with an instrument, no paint being used. This variance may be pronounced fatal without the aid of a general rule, because it does not approximate the "dividing line."

It is suggested, as it is equally a libel, whether the head be engraved or painted, therefore the difference is not essential. It is true, it is equally a libel, but *non constat* that the difference is not essential. It is murder,

whether death be caused by poisoning or shooting, yet an indictment charging the death in one way is not sustained by proving it was caused in the other.

The Attorney General urged that, on account of the difficulty in setting out the particulars of a libel effected by the means used in this case, the certainty of description required in other cases ought in some degree to be dispensed with. It may be that the position is correct, but it cannot aid in the question now under our consideration. A gen- (10) eral allegation that the figure of a human head and ear was made on a board, which board was set up, etc., probably would have been sufficient; and then it would have been immaterial whether the head and ear were painted or engraved on the board. But when particulars are set out *as a part of the description,* although it was not necessary to go into particulars; still it is thereby made necessary to stick to the truth, and the proof must correspond with the allegation.

The defendant's counsel suggested a further variance in this: The indictment alleges that there was a figure, or effigy, intended to represent the prosecutor, and *to this* was *hung* and suspended a painting or picture of a human head and ear, etc.

It is not necessary to inquire whether the indictment, from the general terms used, will admit of this construction, nor is it necessary to consider the question made upon the motion to arrest.

PER CURIAM. *Venire de novo.*

(11)

DOE ON DEMISE OF JOHN SMITH v. JOHN BRYAN.

1. A., in 1793, took possession under *color of title* to land which had been previously granted to another, and died in 1794, leaving a will. In 1795, B., a son, but not a devisee of A., took possession without color of title, and continued in the uninterrupted possession, exercising acts of ownership for more than twenty years: *Held*, that B.'s title was perfected by such possession.

2. A mere wrongdoer, who has only a color of title, cannot pass any estate by his will to his devisees.

3. Even if B. were a trustee under the will of C., C. cannot dispute his title at law, much less can a mere wrongdoer.

4. If in the case of a *fieri facias* for the sale of the lands of a deceased debtor the heirs should be named, yet this is not necessary when the will is a *venditioni exponas*, the land having been ascertained by the levy and return of a constable.

APPEAL from *Dick, J.*, at BLADEN Special Term, December, 1850.

The case is stated by the judge in his opinion in the court.

Troy for plaintiff.
Strange for defendant.

PEARSON, J. It is only necessary to consider one exception, as that is well founded and gives the plaintiff a right to a *venire de novo.*

A grant issued to one Harrison in 1760. In 1793, Robert McRee took possession under *color of title,* and died in 1794, leaving a will. His son, William McRee, took possession in 1795 and continued in uninterrupted possession, "exercising acts of ownership over the land" (12) until his death, in 1818. After his death, proceedings (which will be noticed hereafter) were taken against his heirs by a creditor, and in 1825 the lessor of the plaintiff became the purchaser at sheriff's sale, and took a deed in 1828. The will of Robert McRee directs that after the death of his wife, who is long since dead, "all of his land, etc., be valued, and whatever it is valued at, to be divided into six parts, and each of my children to have their equal part. I desire my guardian, Robert McRee, do draw my son William's part; and I desire that my son William see this, my last will and desire perfected."

In 1839, one James Bryan, the father of the defendant, took possession without color of title, and remained in possession until 1843, when the defendant took possession without color of title, and still remains in possession.

The action was commenced in 1847.

His Honor charged, "That if Robert McRee had taken possession before 1795 under color of title, and died in possession, and his son William had succeeded him in that possession, his entry was not to be considered adverse to that of his father, unless so shown to be, and his possession, thus continued until 1818, would ripen the title of his father's heirs and devisees under his color of title, and bar the right of Harrison. But the plaintiff could not make title under William McRee because the will of Robert McRee deprived William of any right to the land as the heir or devisee of his father, and having no title himself, he could transmit none to his heirs."

When title is out of the State by grant, a *continued and uninterrupted* adverse possession for twenty years without color of title, or such possession for seven years with color of title, gives a title to the person so holding possession. We therefore concur with his Honor in the opinion that as William McRee held such possession for more than twenty years and exposed himself to the action of Harrison or his heirs, it (13) barred the right which they neglected to assert. But we think it gave *the title to William McRee,* and we are at a loss to conceive how, instead of having that effect, it can be made to have the effect of ripening the title of the devisees of Robert McRee. He was a wrong-

doer and had a mere color of title. Of course, his will could not pass the estate to his devisees. After his death, William McRee, by taking possession, made himself a wrongdoer and was exposed to the action of Harrison or his heirs, and when he acquires the title by their negligence, then the devisees of Robert McRee, who had kept out of the way during the time of danger, are made to step forward and assert that in some way or other this acquisition of title "inures to their benefit." William McRee was not their tenant, nor was he their agent. They had no title and could neither gain nor lose by his acts.

It was urged in the argument that the will of Robert McRee constituted William a trustee and vested the legal estate in him in trust for the persons among whom it was to be divided. This, as it seems to us, would be a strained construction. But not to raise a question of construction, admit that he took the legal estate as trustee, at his death it descended to his heirs and could be sold under execution; and admit, further, that after the lapse of so many years, the supposed *cestui que trust* would be at liberty to set it up in a court of equity, how is it possible that the defendant, who is a stranger and a wrongdoer, can take any benefit from it in a *court of law?*

Again, it was urged that, although there was not a perfect trust under the will because it did not vest the legal estate in William, yet there was an imperfect trust or moral obligation imposed on him, growing out of the fact that one of the devisees was his "own son" and the others his near kinsman, and his father had by his will desired him to see "this my will and desire perfected," and it was therefore wrong in William to attempt to acquire the title for himself, and he will be (14) presumed to have acquired it for the devisees of the father. In other words, he will be presumed to have become a wrongdoer for their benefit.

This idea of an imperfect trust or moral obligation is too attenuated to be handled even in a court of equity. All the objections to the defendant's taking any benefit from it in a court of law, which have been pointed out in reference to a perfect trust, apply to it with increased force; for if a court of law will not notice an express perfect trust, how can it notice one of the kind supposed? We think there is error. His Honor ought to have told the jury that the title was in the heirs of William McRee.

The remaining question is, Did the lessor of the plaintiff acquire title by his purchase at the sheriff's sale? His Honor was of opinion that he did not. In this we think there is error. The defendant is a wrongdoer, and as against him it is sufficient to show a sale, a sheriff's deed to the lessor, and an execution which authorized the sale (*Rutherford v. Rayburn,* 32 N. C., 144); for if it be not necessary under the act of

1848 to show a judgment in an action against the debtor in the execution, or one claiming under him by a transfer after the lien of the execution attached, of course it is not in an action against a mere wrongdoer.

To the sale and sheriff's deed there is no objection, but it is said the paper alleged to be an execution is fatally defective and that is the point on which the case turns. The paper is in these words:

To the Sheriff of Bladen—GREETING:

JONATHAN EVANS & CO.
vs.
HEIRS AT LAW OF WM. MCREE, DECEASED.
Order of Sale.

It appearing to the satisfaction of the court that a judgment was granted against James P. McRee, the administrator of William
(15) McRee, deceased, by J. Evans & Co., for the sum of £12 1s. 6d., with interest from 1 July, 1851. Administrator plead no assets.
14 October, 1818. J. SEAWELL, J. P.

Said judgment revived for the above sum and interest against the said administrator, who plead no assets, by Robert Melvin, J. P., 20 January, 1823.

STATE OF NORTH CAROLINA,
BLADEN COUNTY.

To any Lawful Officer to execute and return agreeable to law:

You are hereby commanded that of the land and tenements of William McRee, deceased, you levy on so much thereof as will satisfy the above judgment, with interest and costs, and make return to next court, and have the same agreeable to law.

Given under my hand and seal, this 27 May, 1823.

ROBERT MELVIN, J. P.

Levied on 109 acres of land, the property of William McRee, deceased, joining James B. Purdis' lines and James Bryan's lines on the northeast side of the Northwest River, this 4 July, 1823. D. MELVIN, D. S.

Whereas, writs of *scire facias* issued legally against the heirs at law, and the sheriff made due return thereon that the defendants reside out of the State and are not to be found, those who are minors have no guardians on whom a process can be served, May Term, 1825, court ordered judgment to be entered up according to *sci. fa.*

Court of Pleas and Quarter Sessions, May Term, 1825. Court ordered the sheriff to advertise and sell, agreeable to law, as much of the above described land as will satisfy the above mentioned judgment, interest and costs of this *sci fa.*

Attest: ALEX'R MCDOWELL, *Clk.*

Issued 7 June, 1825.

Upon this the sheriff returns that he sold the land levied on to the lessor for $100. It is said this is no *renditioni exponas,* but professes to be a mere copy of the order of sale, and is not returnable to any given time and place. All of these objections are fully met by (16) *Lanier v. Stone,* 8 N. C., 329. There the paper was not even directed; here it is directed to the sheriff; and in the language of the court, "The proceedings might have been more formal, but it is right in substance."

It is next objected that the case comes within the decision of *Roberson v. Woollard,* 28 N. C., 90, where it is held that a *fieri facias* commanding the sheriff, "of the lands descended to the heirs of Joseph Roberson, to cause to be made," etc., was void, because the heirs were not named. That decision was made in 1854, and the reasons on which it is put are, first, "because it is necessary that the execution should conform to the judgment in all respects," and much stress is laid upon the fact that there were *five* heirs and the judgment had been taken against *only four of them;* so the execution, in its general terms, extended to one against whom there was no judgment. This difficulty is obviated by the act of 1848. Second, "that the sheriff may know certainly whose property he is to sell." This difficulty is obviated; for in that case the sheriff was to act under a *fieri facias* and to ascertain the land himself. Here the writ is a *renditioni exponas;* the land had been ascertained by the levy and return of a constable; it was in *custodia legis,* and the sheriff was simply ordered to sell "as much of the above described land as will satisfy the judgment." The names of the heirs of William McRee was information of which the sheriff stood in no need.

PER CURIAM. *Venire de novo.*

(17)

ELMSLY STAFFORD v. ALLEN NEWSOM.

Where a judgment has been had in the Superior Court, and on appeal to the Supreme Court the judgment is reversed for error, the whole judgment, as well for the costs as for the other matters, is set aside, and the costs must be taxed by the court below, which finally determines the case.

APPEAL from *Manly, J.*, STANLY Spring Term, 1851.

Strange for plaintiff.
G. C. Mendenhall for defendant.

PEARSON, J. By the judgment at Fall Term, 1850, of Stanly Superior Court, the clerk was directed to tax costs in respect of no other witnesses except those named. He departed from the order and taxed costs in respect to certain other witnesses for attendance up to the time of the trial in Montgomery, Spring Term, 1849, under the impression that an order made at that term, allowing costs in respect of a larger number of witnesses, was still in force and had the effect of qualifying to some extent the order which formed a part of the judgment under which he was acting.

The judge in the court below adopted this view and refused the motion for a retaxation. In this there is error. The order made in Montgomery was an incident, or rather a part of the judgment, which on appeal was set aside. The question of costs, as well as the rights of the parties, was decided by the judgment in Stanly.

The defendant by his appeal established that the judge who tried the case in Montgomery took an erroneous view of it, and the effect of the *venire de novo* was not merely to relieve from the direct conse-
(18) quence of the error in its bearing upon the results of the case, but also from its indirect consequence in its influence upon the question of costs.

In other words, the order of the judge who determined the case and who was in no error is decisive as to the question of costs, because it is a part of the judgment. The position that it is to be qualified and restricted, "so as to make the two stand together," by an order of a judge who was in error and whose decision was reversed, is untenable.

The judgment refusing the motion for a retaxation must be reversed and the motion allowed.

PER CURIAM. Reversed.

JOHN A. MEADOWS *v.* WILLIAM SMITH.

An agent who in making a contract discloses the name of the principal is not legally responsible to the person with whom he contracts, and therefore if he pays any damages arising from a breach, he cannot recover the amount so paid from the principal unless paid by his special request.

APPEAL from *Caldwell, J.*, at JONES Spring Term, 1851.

Assumpsit, to recover the price of a flat. The declaration contains three counts. First, in a special contract to indemnify; second, for money paid to the use of the defendant; third, for work and labor done.

The facts, as they appeared on the trial, are as follows: Some time in the winter of 1846 the defendant employed the plaintiff to (19) have a flat built for him at New Bern by the first of May of that year; that the plaintiff, in pursuance thereof, made a contract with Roberson & Howell, ship carpenters, to build the same, by the time mentioned, large enough to carry 250 barrels, at and for the price of $225, telling the said Roberson & Howell at the time that it was for the defendant and that he resided in Wayne. And the said Roberson & Howell testified that they built it accordingly and of the proper size, and had it ready to launch by 15 April, 1846, and on the last day of the said month launched it, where it still remains. They also testified that they did not know the defendant Smith; that they did not execute the job upon the faith of being paid by him; that when the work was done, they charged it to the plaintiff, on whom they relied, and upon their application he paid them in the spring of 1848. And they further stated that they did not tell the plaintiff in express terms that they would look to him for the payment when the said contract was made. On their cross-examination they stated that they allowed the plaintiff to bring a suit in their names against the defendant for the price of the flat in question; that it pended for some time and terminated in a nonsuit before this suit was brought; and that the plaintiff, on being urged to do so, paid for the flat before the nonsuit aforesaid. It also appeared by the testimony of a witness that he had called on the defendant, in Wayne, before suit in the names of said Roberson & Howell, and demanded payment of him, as well in behalf of said parties as in behalf of the plaintiff; that he refused to make payment, alleging that the flat was not finished within the time agreed upon. It did not appear that any other demand had been made upon the defendant.

It was insisted for the defendant that the plaintiff could not recover, for that there was no evidence of a special contract, for (20) that the plaintiff made the contract as an agent, declaring at the time the name and residence of the defendant; for that, as the payment made by the plaintiff was voluntary and without demand on his part, he could not thereby make the defendant liable.

The court charged the jury that if they believed the flat was finished and ready for delivery on 1 May, 1846, and the other evidence on the trial, the plaintiff was entitled to recover the value of the flat, with interest on the money from the time it was paid by the plaintiff. Rule for a *venire de novo,* because of misdirection. Rule discharged. Judgment rendered on the verdict. Appeal.

W. H. Washington for plaintiff.
J. W. Bryan for defendant.

PEARSON, J. We can see nothing to distinguish this case from the ordinary one of an agent who engages work to be done for and in the name of his principal, whose name and residence he discloses. The agent is under no legal obligation to pay for the work, and if he does pay for it he will not be able to make good the necessary allegation that he "paid money for the use of his principal and at his *instance* and *request.*"

In this case the defendant had, on demand made by the builders of the flat, expressly refused to pay. Whether his refusal was upon sufficient cause is not material; he had expressly refused to pay, and a suit was pending against him at the time the plaintiff alleges he paid the money *for him;* but the idea that he paid it at his instance and request is out of the question, in the absence of any prior legal obligation to do so, and the defendant had cause to complain that thereby the matter which he saw proper to contest with the builders of the flat was, without his
(21) consent, put an end to by the officious interference of the plaintiff, who now seeks to make him pay for the flat without any inquiry as to the merits of the defense upon which he was relying in the action brought by the builders.

This disposes of the count "for money paid." Upon the other two counts there was no evidence; at all events, the case does not seem to have been made out in reference to them.

PER CURIAM. *Venire de novo.*

Cited: Davis v. Burnett, 49 N. C., 71; *Osborne v. McCoy,* 107 N. C., 731; *Robinson v. Sampson,* 121 N. C., 101; *Rounsaville v. Ins. Co.,* 138 N. C., 194; *Hicks v. Kenan,* 139 N. C., 344.

DOE ON DEMISE OF WILLIAM C. WILLIAMS v. STEPHEN DAVIS.

The act of 1844, ch. 83, making devises to operate on such real estate as the testator may have at the time of his death, was altogether prospective and did not extend to wills made and published before the time when the act went into operation, though the testator did not die until afterwards, unless there had been a republication of the will after the act went into operation.

APPEAL from *Ellis, J.,* at WARREN Spring Term, 1851.

Ejectment, to recover the lands and tenements mentioned in the plaintiff's declaration. A verdict by consent was given for the plaintiff upon

the trial, subject to the opinion of the court upon a case agreed. The case agreed is as follows:

The premises in dispute belonged to Peter R. Davis, under (22) whom they are claimed by both parties. On 2 June, 1836, the said Peter R. Davis, being then entitled to a large real and personal estate, made and published a will in writing, with all the formalities required by law to pass every description of property. The said Peter R. Davis died some time in 1850, without revoking, altering or republishing his said will, and upon his death it was duly proved by the subscribing witnesses in Warren County Court, in which county he resided at the time of his death; and thereupon Stephen Davis, the defendant, and William C. Davis, one of the plaintiff's lessors in this suit, being the executors named in said will, qualified as such. The testator, after the making and publication of his said will, purchased the lands and tenements described in the declaration. The testator died unmarried and without issue, leaving as his heirs at law one brother, the defendant, Stephen Davis, and four sisters, to-wit, Rebecca Williams, who is the wife of William C. Williams; Nancy, Powell, wife of John B. Powell; Elizabeth Pitchford, and Polly Kearney, wife of Edward Kearney, all of whom, with their respective husbands, are the plaintiff's lessors in this suit. The plaintiff claims four-fifths of the lands and tenements described in the declaration as property undisposed of by the said will of the deceased brother. The defendant claims the whole under the residuary clause of the said will. It is admitted that the *feme* lessors were married to their husbands, named in the declaration, before the death of Peter R. Davis, and that the defendant, Stephen Davis, was in the possession of the premises at the commencement of this suit. The court, being of the opinion that Peter R. Davis died intestate as to the lands and tenements described in the declaration, rendered a judgment in favor of the plaintiff, as follows, to-wit: It is considered by the court that the said plaintiff do recover against the said defendant his said term, yet to come, of and in four undivided fifth parts of the tract of land first described in the declaration, and also his term, yet to (23) come, of and in four undivided fifth parts of one undivided fourth part of the tract of land secondly described in the declaration, and also his said damages and costs of suit. And the said plaintiff prays for a writ of possession, and it is granted to him, etc. From the above judgment the defendant prays an appeal to the Supreme Court, and it is allowed to him.

Eaton for plaintiff.
B. F. Moore for defendant.

NASH, J. The case presents the single question, whether the act of 1844, ch. 83, making devises to operate on such real estate as the testator may have at the time of his death, applies to the will of Peter R. Davis, under whom the plaintiff and defendant claim the land in controversy. It is a well known principle of law that land purchased by a testator after the publication of his will does not pass under it, for the reason that a devise is considered as a species of conveyance, and must therefore operate on a specific subject. The act of 1844 has changed the law in this respect, and after-purchased lands will now pass by devise, provided the will be one on which the act operates. The case states that the will of Peter R. Davis was made and published in 1836, and that he died in 1850. After several devises, the will contains a residuary clause, whereby the testator devises to the defendant "all the rest and residue of my estate of every description," etc. Under this clause, the defendant claims the land in dispute. The plaintiffs are a part of the heirs at law of Peter R. Davis. The case further states that the will was not republished after the purchase of the land. In *Battle v. Speight,* 31 N. C., 288, the precise question now before us was litigated and decided. It was there settled that the act of 1844 "was altogether prospective" and did not extend to wills made and published before the time when
(24) the act went into operation, though the testator did not die until afterwards. If there had been a republication of the will after the purchase of the land, it would have passed. There being no such republication, it did not pass, and as to it the testator died intestate.

PER CURIAM. Affirmed.

Cited: Williamson v. Williamson, 58 N. C., 143.

JOHN RAY v. MALCOLM RAY.

1. After an appeal from a County to a Superior Court, a *procedendo* will not be ordered to the County Court to give judgment for the costs, because the question was to be determined by the Superior Court in deciding on the appeal.

2. Where there has been an appeal to the Superior Court and thence to the Supreme Court, a *procedendo* cannot issue to the County Court to give judgment for costs, because that question is involved in the appeal.

3. If after the decision of an appeal the Superior Court refuses to obey the mandate of the Supreme Court, an appeal cannot again be had, for there is no question to be reviewed, but the party grieved must apply for a *mandamus.*

APPEAL from *Manly, J.*, at CUMBERLAND Spring Term, 1851.

The judgment of the Supreme Court in this case being certified to the Superior Court for Cumberland County at its Spring Session, 1851, judgment and execution for the costs of the said Superior (25) Court against the defendant and his sureties on the appeal bond (to be taxed by the clerk) were moved for by the petitioner's counsel, which was allowed, etc., etc.

Judgment and execution were also moved for the costs of the County Court against the defendant and sureties aforesaid (a memorandum of which is appended to the transcript of the record from said court), which the court declined to give, but offered a writ of *procedendo* to the County Court, where the case might be disposed of in accordance with the decision of the Supreme Court, and the costs, as the County Court might adjudge.

With this refusal, the petitioner was dissatisfied and prayed an appeal, which was granted.

Petitioner's counsel then asked for a writ of *procedendo* to the County Court pending the appeal, which was refused, and from this refusal the petitioner appealed.

Banks and Mullins for plaintiff.
J. G. Shepherd and Strange for defendant.

PEARSON, J. There is no error. Judgment for the costs of the County Court ought not to have been rendered in the Superior Court, because it was repugnant and inconsistent with the fact that there was no right of appeal, and of course no case constituted in that court.

After the appeal to this Court, upon the question as to the costs of the County Court, it was clearly right to refuse to grant a *procedendo,* because thereby the County Court would have been called upon to give a judgment as to the costs of that court, whereas the appeal assumed that that judgment ought to have been rendered in the Superior Court, and it was repugnant and inconsistent pending an appeal which was taken to try the question whether the Superior Court ought not to have given the judgment to move for a *procedendo,* under which the (26) County Court must have given it.

Another view may be taken of the question. If the Superior Court refuses to obey the mandate of this Court, the counsel is not to appeal, for there is no question to be reviewed, but to apply for a *mandamus.* In this case the refusal is accounted for and explained by the fact of the appeal as to the question of costs, pending which the *procedendo* ought

not to have been sent, for thereby the case would have been split up and put in two courts at the same time.

PER CURIAM. Affirmed.

Cited: Murrill v. Murrill, 90 N. C., 124; *Tussey v. Owen,* 147 N. C., 338.

DOE ON DEMISE OF DAVID PRICE v. LOUISA OSBORN.

Where A. had leased land to B. for the year 1848, and during the year 1848, while B. was in possession under the lease, A. executed to C. a deed purporting to convey him the fee simple, and thereupon C., on 25 December, 1848, commenced an action of ejectment against B.: *Held*, that the action would not lie, because at the date of the demise C. had not the right of entry.

APPEAL from *Bailey, J.,* at ROCKINGHAM Spring Term, 1851.

The evidence was that the lessor of the plaintiff purchased the land in dispute as the property of Robert L. Osborn, husband of the defendant, at November Term, 1847, of Rockingham County Court, at
(27) sheriff's sale, took a sheriff's deed, and had the same duly recorded; that before Christmas, 1847, the lessor leased the said land to the said Robert L. Osborn for the year 1848; that the said Robert held over, and lived with the defendant, his wife, on the land until 5 May, 1849, when the said husband died, and that the defendant, his widow, continued on the land until after she was served with a copy of the declaration in this case.

A verdict was rendered for the plaintiff, subject to the opinion of the court, whether in case the said Robert L. Osborn, the husband, rented the land for the whole of the year 1848; the demise, as stated in the declaration, being on 25 December, 1848, and the ejectment being stated on 1 January, 1949, the plaintiff could recover.

The court, being of opinion with the defendant on the point reserved, set aside the verdict and ordered a nonsuit, from which judgment of nonsuit the lessor of the plaintiff appealed.

J. T. Morehead for plaintiff.
Kerr for defendant.

NASH, J. We concur with his Honor, before whom the case was tried, and in the judgment he gave. The demise in the declaration is laid on 25 December, 1848. In the latter part of the year 1847 David Price, the lessor of the plaintiff, and who was the owner of the land, leased it to

Robert L. Osborn for the year 1848. Osborn entered into possession and continued it during the whole of that year and until some time in 1849, when he died, and the defendant, his widow, continued on the land. On 26 December, 1848, the date of the demise, R. L. Osborn, the lessee, was in possession of the premises under his unexpired lease. His possession was a lawful one, and David Price, the lessor, had no right of entry, and without such right he could make no lease to the plain- (28) tiff. In ejectment, the lessor of the plaintiff must recover upon the strength of his title. He must show a good title to the premises, *and a right of entry, rested in him at the time of the demise;* otherwise, he cannot recover. Brown on Actions, 466; 1st Chit. Pl., 880; 2 East, 250; 13 East, 210, 212.

PER CURIAM. Affirmed.

WILLIAM WALTERS v. FLEETWOOD WALTERS.

Where A. gave B. a bond for $50, and at the same time it was agreed by parol that whenever A. paid certain costs in a suit then pending between the parties the bond should be surrendered and given up, and A. afterwards paid the costs: *Held*, that this was competent and sufficient evidence of the discharge of the bond.

APPEAL from *Manly, J.*, at ROBESON Spring Term, 1851.

ACTION originally commenced before a justice of the peace on a bond, of which a copy accompanies this case, marked "A." The defendant pleaded general issue, and payment, accord, and satisfaction. The execution of the bond was proven by the subscribing witness thereto, who also proved that a suit which had been pending between the same parties in the Superior Court of Robeson was compromised, the terms of which were reduced to writing, signed and sealed by the parties, a copy of which accompanies this case and is marked "B." The defend- (29) ant proved by the subscribing witness to the bond (who was also a subscribing witness to the paper-writing, the copy of which is marked "B") that the bond declared on was given by the defendant at the same time of the written agreement, the same being insisted on by the plaintiff and given with the express understanding that whenever the defendant, Fleetwood Walters, complied with the agreement by paying to the clerk of the court $80 and balance of the costs, that the bond of $50, on which this suit is brought, should be given up and surrendered. This testimony was objected to by the plaintiff, but was admitted by the court. The defendant then further proved by the clerk of the court that, previous to the commencement of this action, the defendant, Fleetwood Walters, had certainly paid him the $80, and according to his impression, also the

balance of the costs, amounting to about $20 more. The plaintiff objected to this evidence, but it was admitted by the court. The counsel for the plaintiff asked the court to charge the jury that the defendant ought to have given notice to the plaintiff of his payment of the money to the clerk and demanded a surrender of the bond. But the court declined giving this instruction. The plaintiff insisted that, notwithstanding these facts, he was entitled to recover on the note, but his Honor charged the jury that if they believed the verbal agreement between the parties to have been as stated by the witness, and that the $80 had been paid by the defendant, and the other $20, which was half of the remainder, before the bringing of the action on trial, to find for the defendant.

[COPY OF THE BOND, MARKED "A."]

On or before 24 July, 1846, I promise to pay William Walters, or order, $50. Value received. This 24 March, 1846.

Test: FLEETWOOD WALTERS. [SEAL]
J. WINSLOW.

(30) [COPY OF AGREEMENT, MARKED "B."]

FLEETWOOD WALTERS
vs.
WILLIAM WALTERS.
Robeson Superior Court,
Spring Term.

The parties agree to dismiss this suit on the following terms: The plaintiff to pay $80 of the costs, and if any balance is due, whatever balance there is, is to be paid, one-half by the plaintiff and one-half by the defendant.

Test: FLEETWOOD WALTERS, [SEAL]
J. WINSLOW. WILLIAM WALTERS. [SEAL]

Banks and Mullins for plaintiff.
Dobbin, J. G. Shepherd, and W. Winslow for defendant.

NASH, J. This case was before the Court at June Term, 1850 (*Walters v. Walters*, 33 N. C., 145), and the principles of law there discussed and decided by the Court are decisive of the case now presented. The case, then, did not set forth what amount of costs were to be paid by the defendant. The Court says: "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 as 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." This is declared to be erroneous, annexing, upon parol evidence, a condition to a bond which is absolute in its face, and upon this principle the case was decided. In the case now before us the agreement upon which the suit previously pending between the parties was compromised is set out. By it the defendant bound himself to pay $80 of the costs, and if any balance is due he obliges himself to pay one-half of it; and the bond upon which this action is brought was executed at the same time; and the defend- (31) ant offered to prove that it was at the time expressly agreed that the bond should be given up and surrendered upon the defendant's complying with that agreement. To this evidence the plaintiff objected, but it was received by the court. And we concur with his Honor that the evidence was competent, not as annexing, by parol, a condition to a written instrument, but as laying a foundation to show its discharge. If A. owe by bond $100 to B., and B. owes C. a like sum, A. cannot discharge his obligation by showing he has paid his obligee's bond to C. But if it be agreed between A. and B. that A. shall pay to C. the amount of his bond, and he does so, it will be a discharge under the plea of payment, and to that effect is the opinion of the Court upon the former trial of this case. It is there said (page 147): "If, indeed, the defendant paid the costs, or any part of them, we should hold the amount thus paid to be a payment *pro tanto* upon the bond sued on." But here he had not paid a less sum than that called for in the bond, but a much larger one. It is, of course, not a payment *pro tanto*, but one *pro toto*.

PER CURIAM. Affirmed.

Cited: Woodson v. Beck, 151 N. C., 148.

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(32)

ROBERT S. HUNTLEY v. JAMES M. WADDELL.

1. A., by deed, conveyed a tract of land by metes and bounds, specifying the number of acres, and covenanted as follows: "*To have and to hold* to him, the said R. S., his heirs and assigns, the right and title of the same, I warrant and will ever defend": *Held*, that this was only a covenant for quiet enjoyment, and not a warranty as to the number of acres mentioned in the deed.

2. In the sale of land by deed there are no implied warranties.

APPEAL from *Battle, J.*, at ANSON Fall Term, 1850.

Covenant for the breach of a warranty alleged to be contained in a deed for land, in which the defendant, after conveying by metes and

bounds, covenanted as follows: "To have and to hold to him, the said Robert Huntley, his heirs and assigns, the right and title of the same, I warrant and will ever defend the same." Upon a survey of the land contained in the metes and bounds set forth in the deed, it appeared that there were only 197 acres instead of 212½, as mentioned in the deed. The plaintiff contended that the warranty in the deed embraced the quantity of land mentioned therein, as well as the title, but this was denied by the defendant. A verdict was taken for the plaintiff, subject to the opinion of the court upon the question stated above, upon which the court being of opinion that the action could not be sustained, the verdict was set aside and a judgment of nonsuit given, from which the plaintiff appealed to the Supreme Court.

(33) *G. C. Mendenhall for plaintiff.*
W. Winslow and R. Strange for defendant.

NASH, J. As early as 1810 the Supreme Court decided that in a deed of bargain and sale the words, "containing so many acres," do not import a covenant of quantity. In *Ricketts v. Dickens,* 5 N. C., 243, this principle was affirmed, and reiterated in the subsequent one of *Lyles v. Powell, id.,* 348, and recognized as sound law in *Williams v. Lane,* 4 N. C., 246. In the first, the words of the deed are, "containing 250 acres, etc., to have and to hold the said land and premises, and every part thereof, etc." The operative words in the case of Powell are the same. Yet in such it was decided there was no covenant of quantity, though upon surveys the number of acres fell short of that specified in the deed. In this case the same description is contained. After describing the metes and bounds of the land, it continues, "containing two hundred and twelve acres and a half." The only difference between this case and the two first referred to is that in the latter there was no express covenant, whereas in this case there is. It is as follows: "To have and to hold to him, the said Robert Huntley, his heirs and assigns, the right and title of the same, I warrant and will ever defend." Does this covenant extend to and cover the quantity of land conveyed? His Honor who tried the case ruled that it did not, and we agree with him. The covenant is one for quiet enjoyment of all the land conveyed by the deed. No land was conveyed by the deed but that which was contained within the specified metes and boundaries. It can be made to apply to the quantity mentioned only by implication; but there are in the sale of real estate by deed no implied warranties. If there had been more land within the lines than the quantity specified, they would certainly have passed. Would the bargainor in such case have been entitled to remuneration from the purchaser for the surplus? Surely not, because he

had sold all the land within the boundaries. If in such case as (34) this the purchaser wished to be protected in the number of acres mentioned, he ought to have taken a covenant to that effect, or he might, if he had chosen, have had the land surveyed before the contract was executed. He has done neither and must abide the consequence.

PER CURIAM. Affirmed.

Cited: Barden v. Stickney, 130 N. C., 64.

JOSEPH AREY v. DAVID STEPHENSON.

An *omission* by a judge to instruct the jury upon a particular point is not error. If the party, deeming them material, ask for instructions and they are improperly granted or refused, the question may be brought before the Supreme Court for review.

APPEAL from *Manly, J.,* at CUMBERLAND Spring Term, 1851.

Assumpsit, brought to recover $70, alleged to have been paid by the plaintiff for the defendant's use.

Pleas, general issue, and the statute of limitations.

The plaintiff proved by one Murphy that the plaintiff had paid to him, in 1829 and 1830, two sums of money, amounting to $70, on a debt which he, Murphy, held against the defendant, and (35) which was among the debts mentioned in the deed of trust hereinafter mentioned, and which was intended to be paid out of the property conveyed by the defendant to the plaintiff.

One Stephenson, the brother of the defendant, introduced by the plaintiff, testified that on 22 September, 1837, he was present at a settlement between the plaintiff and the defendant; that the plaintiff had been acting as the trustee of the defendant in selling property and paying his debts under a deed (a copy of which forms a part of this case); that the plaintiff exhibited an account of his trusteeship, and among the items charged was one for the said sum of $70 paid by him to Murphy. To this item the defendant objected, alleging that he had paid to one Gordon, of Mobile, the whole amount of his debt to Murphy, the said Gordon being his attorney.

It was then proposed by the witness that the parties should proceed in their settlement, leaving out the said sum of $70, and that if the plaintiff could show that the defendant had not paid the said sum to Gordon, then the defendant should pay it to the plaintiff. This was agreed to by both parties, and the plaintiff surrendered to the defendant the trust estate.

The plaintiff then proved by Murphy that he had received from Gordon the amount of his claim against the defendant, except $70. The plaintiff introduced the deposition of one Sebastian L. Jennings, which forms a part of this case.

The defendant contended that he was not liable upon the original payment of $70 by the plaintiff to Murphy—first, because it was paid without authority; secondly, because the balance due by the trustor to the trustee, or by the trustee to the trustor, could only be recovered in equity, without an express promise; and therefore the plaintiff was driven to rely upon the express promise, and insisted that it had not been
(36) proven by the plaintiff that the defendant had not paid the whole amount due to Murphy to his agent, Gordon.

His Honor instructed the jury that the plaintiff's right to recover depended upon the fact whether they were satisfied that the defendant had not paid the whole amount of Murphy's debt to Gordon, and if they were so satisfied, the plaintiff was entitled to recover, and if not, the plaintiff was not entitled to recover.

Verdict for defendant, and a rule for a new trial being discharged, the plaintiff appealed.

W. Winslow for plaintiff.
Strange for defendant.

NASH, J. This case is here for the second time. When before us on the former occasion, the only question presented by the bill of exceptions arose under the plea of the statute of limitations. The case now before us presents a different question. The defendant, being largely indebted, conveyed to the plaintiff a quantity of property in trust, to sell and pay the debts enumerated. Among them was one due to a Mr. Murphy. Upon this debt the plaintiff paid to Mr. Murphy $70, the balance having been paid to him by a Mr. Gordon, his attorney, who had received it from the defendant. In a settlement between the plaintiff and the defendant this payment of $70 by him was claimed as a charge against the defendant as money paid for and on his account. The defendant refused to allow it, on the ground that *he* had paid the whole of the Murphy debt to Gordon. The parties finally agreed to settle the trustee's account, except this item, and as respected it, it was agreed "that if the plaintiff could show that the defendant had not paid the said sum to Gordon, then the defendant should pay it to the plaintiff." Upon entering into this agreement, the trust property was delivered up to the defendant. In his charge his Honor instructed the jury that the plaintiff's right to recover depended on the fact whether they were
(37) satisfied that the defendant had *not* paid the whole of the Mur-

phy debt to Gordon. If they were so satisfied, the plaintiff was entitled to recover; if not, he was not entitled to recover. We are not sensible of any error in law in the charge, of which the plaintiff had a right to complain. The debt to Murphy, its payment of all but $70 by Gordon, his attorney, and the payment of that amount by the plaintiff are all admitted in the case. The defendant, however, alleged he ought not to pay to the plaintiff that $70, because *he* had paid to Gordon the whole of the Murphy debt. Like any other plea of payment—for it was not denied that the payment to Gordon, if made, was legal and proper—it would have been the duty of the defendant to sustain it by proper proof of the fact. But the plaintiff voluntarily released him from that obligation and took upon himself to prove he had not paid it to Gordon, and makes that proof a condition precedent to his right of recovery, as it was the condition upon which the plaintiff's new promise rested. The charge in its first branch is in the language of the agreement; the second, upon the general liability of the defendant. Gordon was the authorized agent of Murphy to receive the debt. If the jury were satisfied the defendant had paid the whole of it to him, then the payment of the $70 by the plaintiff was unauthorized, and he had no right to claim it from the defendant; he must look to Murphy.

In the course of the argument here it was insisted that the judge ought to have instructed the jury that the deposition of Jennings, which constitutes a part of the case, if believed by them, proved an acknowledgment of the debt by the defendant. No such instructions were asked for by the plaintiff on the trial, and it has been several times decided by this Court that an *omission* by a judge to instruct the jury upon a particular point is not error. If a party deem it material to his (38) case, he must ask for instruction upon it, more especially when the party complaining does not show that the jury were probably misled by the charge. *Torrence v. Graham,* 18 N. C., 288; *S. v. O'Neal,* 29 N. C., 253.

PER CURIAM. Affirmed.

Cited: S. v. Cardwell, 44 N. C., 249; *Ward v. Herrin,* 49 N. C., 24; *S. v. Deal,* 64 N. C., 278; *Pierce v. Alspaugh,* 83 N. C., 261; *Brown v. Calloway,* 90 N. C., 119; *Terry v. R. R.,* 91 N. C., 243; *S. v. Bailey,* 100 N. C., 534; *McKinnon v. Morrison,* 104 N. C., 363.

EDMUND S. MOORE v. JOHN R. HYMAN ET AL.

1. A principal cannot maintain an action against his agent for money had and received until a demand and refusal, but the proof of a demand and refusal is not restricted to any particular form of words, but any declaration of the agent to the principal which shows a denial of his right puts him in the wrong and gives to the principal a right of action.

2. Where the plaintiff had employed the defendant to sell for him a quantity of fish, and in attempting to make a settlement they differed as to six barrels of the fish, the plaintiff wishing the defendant to pay for six barrels of fish more than he was willing to account for: *Held*, that this was not only evidence of demand, but was in law a demand. It was a denial of the plaintiff's right, and whether correct or not, gave him an immediate right of action and set the statute of limitations in action.

APPEAL from *Dick, J.*, at MARTIN Special Term, 1851.

Assumpsit, brought in October, 1848. It was in evidence that the plaintiff deposited with the defendants, some time in May, 1841, 150 barrels of fish, to be sold by them on commission, and took their receipt. The defendants relied on the statute of limitations.

It was proved by a witness for the plaintiff that the plaintiff
(39) said that one of the defendants came to his house in 1843 and they would have made a settlement, but they did not settle on account of 6 barrels of fish about which they differed. There was no other evidence of any demand by the plaintiff until within a few weeks before the bringing of the suit.

The court instructed the jury that the defendants were the agents of the plaintiff; that the statute of limitations did not begin to run until a demand by the plaintiff and refusal by the defendants; that what took place between the parties in 1843 was not sufficient to put the statute in operation, and that the defendants had not sustained their plea.

Verdict for plaintiff. The defendant moved for a new trial, which was refused, and judgment was given against them, from which they appealed.

B. F. Moore for plaintiff.
Biggs and Rodman for defendants.

NASH, J. In May, 1841, the plaintiff deposited with the defendants 150 barrels of fish to sell on commission. In 1843 one of the defendants called on the plaintiff to settle the account, and the case states that "they would have made a settlement, but they did not settle on account of 6 barrels of fish about which they differed." No other demand was made upon the defendants until within a few weeks before the bringing of the

action. The writ issued in October, 1848, and the defendants relied upon the plea of the statute of limitations. The jury were instructed "that the defendants being the agents of the plaintiff, the statute of limitations did not begin to run until a demand and refusal; that what took place between the parties in 1843 was not sufficient to put the statute of limitations into operation." In other words, that there was no evidence of a demand by the plaintiff and a refusal by the (40) defendants until within a few weeks before the action was brought.

As a general principle, it is true that a principal cannot maintain an action against his agent for money had and received until a demand and refusal, but the proof of a demand and refusal is not restricted to any particular form of words, but any declaration of the agent to the principal, or any act which shows a denial of the right, puts him in the wrong and gives to the principal a right of action. It is not necessary for the principal to seek the agent by going to his residence, nor is it necessary for him to say "I demand a settlement." If the parties meet at a third place, either by accident or agreement, the demand may then be made. In this case one of the defendants went to the plaintiff's house, for what definite purpose is not stated, but while there the parties attempted to make a settlement, and would have so done, but they differed as to 6 of the barrels of fish. As we understand it, the plaintiff wished the defendants to pay for 6 barrels of fish more than they were willing to account for. We hold that this was not only evidence of a demand, but was in law a demand; it was a denial of the plaintiff's right, and whether correct or not, gave him an immediate right of action and set the statute of limitations in action. *Burrill v. Phillips,* 1 Am. Leading Cases, 519, in note; 2 E. C. L., 356.

More than three years have elapsed, after the attempted settlement in 1843, before the action was brought. The charge of his Honor was erroneous. The statute was set in motion by the attempted settlement, and having commenced running, continued so to do; and the defendants did support their plea.

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

Cited: Comrs. v. Lash, 89 N. C., 168; *Wiley v. Logan*, 95 N. C., 361.

(41)

MAY STRINGER v. SHEPHERD W. BURCHAM.

1. The plaintiff, a colored person, claimed to be free, and for the purpose of proving it introduced a record of Craven County court in 1807 setting forth a petition in the name of William Jessup praying for liberty to emancipate certain slaves owned by him for meritorious services—the order of the court that William Jessup have leave to emancipate the slaves mentioned, among whom was the slave by the name of Sinah—and the copy of the bond filed, as directed by the act of 1796. *Held*, that the emancipation of the said Sinah was completely effected by these proceedings; that the petition setting forth the master's wish, *then* to emancipate for meritorious services, the judgment of the court and the granting to the master liberty to emancipate being entered of record, make the liberation required by law.

2. After an acquiescence for thirty years by the public in the enjoyment of her freedom every presumption is to be made in favor of her actual emancipation, especialy against a trespasser and wrongdoer.

APPEAL from *Caldwell, J.*, at CARTERET Spring Term, 1851.

Trespass for false imprisonment, the plaintiff alleging that she is a free person of color.

On the trial, in her behalf, a record, duly certified by the clerk of Craven County Court, was introduced, showing that at December Term, 1807, of said court a petition was filed at the instance of one William Jessup, by his attorney, Owen Stanton, praying permission to emancipate certain of his slaves for meritorious services, and, amongst others, negro woman Sinah; that upon the hearing it was decreed according to the prayer and bond given as directed by statute in such case provided. It was proved upon the trial that the plaintiff was the daughter of
(42) Hannah, and Hannah was the daughter of Sinah, and was born after the decree of emancipation. And it also appeared that Sinah and her descendants had always passed for and were reputed free persons of color since the said act of emancipation, except upon one occasion a man calling himself Jessup, and claiming to be the son of said William, the petitioner, came to Craven about 1817 and endeavored to carry off the said Hannah and one other; that he was arrested by virtue of process, whereupon he surrendered them and has not been since heard of.

The jury, under the charge of the court, found in favor of the plaintiff. Rule for a new trial upon the ground that said record is irregular and void. Rule discharged. Judgment on verdict. Appeal.

Donnell for plaintiff.

J. W. Bryan for defendant.

NASH, J. Our attention is confined by the bill of exceptions to the sufficiency of the record offered in evidence by the plaintiff. The defendant objected to its competency on the ground that it was irregular and void. In what particulars it is alleged to be so we are not informed. The plaintiff claimed to be a free woman; and in order to prove it she introduced a copy of the record of Craven County Court setting forth the proceedings under which she claims her freedom. The records sets forth a petition in the name of William Jessup praying for liberty to emancipate certain slaves owned by him for meritorious services, the order of the court that William Jessup have leave to emancipate the slaves mentioned, and the copy of the bond filed as directed by the act of 1796. Those proceedings were had in 1807. In *Bryan v. Wadsworth*, 18 N. C., 388, the Court declares what, under the acts previous to 1807, should amount to an emancipation by the owner of a slave. These are the petition setting forth the master's wish *then* to emancipate (43) for meritorious services, the judgment of the court, and the granting to the master liberty to emancipate. "These," say the court, "entered of record, make the liberation required by law. The slave is *then* freed by the master under the license of the court." It was suggested that an objection had been raised in the court below to the regularity of the record because the petition is not signed by William Jessup, but by his attorney. That objection is answered by the case of *Sampson v. Burgwin*, 20 N. C., 21, in which it is declared by the Court that the act of 1796 did not require a petition in writing. The one, however, set forth in the record is sufficient, if one were required. We think the record is neither irregular nor void, and that it was properly received in evidence.

From 1807, the mother of the plaintiff and her descendants have been, in the community in which they live, considered and treated as free persons. After a period of thirty years the defendant, without a pretense of right as far as we are informed, seized upon the plaintiff and questions her right to freedom. After so long an acquiescence by the public in her enjoyment of her freedom, every presumption is to be made in favor of her actual emancipation, especially against a trespasser and wrongdoer. *Cully v. Jones*, 31 N. C., 169.

We observe that the bond filed by William Jessup refers only to Sinah, one of the negroes mentioned in the petition, and the case states that the plaintiff is her descendant, born after the emancipation.

There is no error in the judgment appealed from, which is accordingly

PER CURIAM. Affirmed.

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

(44)

STATE, TO THE USE OF MOSES RINGOLD, v. JOHN T. MCGOWAN ET AL.

Where a constable was appointed at February Term, 1848, and in August, 1848, a claim was put in his hands for collection, on which he obtained a judgment, and a stay was granted by a magistrate, which expired during February Term, 1849, when the said constable was not reappointed at February Term, 1849, but in July following was appointed deputy sheriff, and then took out execution on the claim, collected it, and failed to pay it over: *Held*, that he was not responsible on his constable's bond, no default having been committed during the year of his appointment.

APPEAL from *Ellis, J.*, at PITT, Spring Term, 1851.

No counsel for plaintiff.
Biggs and Donnell for defendants.

NASH, J. The action is upon a constable's bond, and the breach relied on was for collecting money and not paying over.

At the February Term, 1848, of Pitt County Court the defendant McGowan was appointed a constable, and entered into bond with the other defendants as his sureties. His official year expired at February Term, 1849. In August, 1848, the relator placed in his hands a note, for which he gave a receipt, binding himself to collect or return. On the same day the constable obtained a judgment on the note, on which the magistrate granted a stay of six months, which expired during February Term, 1849. McGowan was not appointed a constable at February term, but in July following was, by the sheriff, appointed his deputy, after which he took out an execution on the judgment
(45) and collected the money. The action is brought upon the official bond of 1848. The plaintiff cannot recover. The appointment of a constable is but for one year, and the bond given by him loses its force as to any breach of duty after that period. The bond upon which this action is brought covered only such breaches on the part of the constable as occurred after his appointment in February, 1848, and before February court, 1849. *Keck v. Coble*, 13 N. C., 489; *S. v. Lackey*, 25 N. C., 25. During that period he received no money on the claim put in his hands for collection, nor was he guilty of any negligence. He received the note in August, 1848, and on the same day took a judgment on it, and the stay upon it ran out at February Term, 1849, when his official year expired. He subsequently did receive the money under an execution, not as constable, but as deputy sheriff, and as such is answerable.

PER CURIAM. Affirmed.

Cited: Graham v. Buchanan, 60 N. C., 95.

JAMES DICKINSON v. JOHN B. JONES.

A bond was given to an officer to indemnify him for selling under an execution at the instance of "J. and H. against W." *Held*, that to entitle the officer to recover on this bond he must show that he sold under the execution mentioned in the bond.

APPEAL from *Ellis, J.*, at WAYNE, Fall Term, 1850. The case is stated in the opinion delivered in this Court.

Mordecai and Washington for plaintiff. (46)
J. H. Bryan for defendant.

PEARSON, J. The plaintiff had, as a constable, levied on certain articles as the property of one Briggs. One Bynum claimed the articles, and thereupon the defendant executed a bond to indemnify the plaintiff for selling under an execution in his hands, "wherein John B. Jones and Henry Dickinson are plaintiffs and one William G. Briggs is defendant." The plaintiff sold the property and was sued by Bynum, who recovered 6 cents and a large sum for costs. The action is on the bond for indemnity. On the trial the plaintiff did not offer in evidence an execution in favor of John B. Jones and Henry Dickinson against William G. Briggs, and of course did not prove that he sold the property under the execution recited in the bond.

His Honor was of opinion that it was not necessary for the plaintiff to make this proof, and that he was entitled to recover by proving that he sold the property without showing that he made the sale "under an execution corresponding with that recited in the bond." To this the defendant excepts.

There is error. The defendant agrees to indemnify the plaintiff for selling under a certain execution. How can the indemnity be claimed without alleging and proving that he did sell under that execution? Suppose the plaintiff sold under a different execution. It may be that it was not levied in time, or that the defendant had not the same interest in it. At all events, it does not come within the terms of the bond.

It is unnecessary to notice the other exception, because upon the next trial, if the plaintiff has in fact paid the amount recovered by Bynum, he will be able to prove it without depending upon the (47) entry on the execution docket.

PER CURIAM. *Venire de novo.*

DOE ON DEMISE OF BENJAMIN FLOYD v. WALTER B. TAYLOR.

1. The delivery of a deed is a question of fact, and the law has prescribed no particular form in which it shall be made.
2. When any circumstances are proved, no matter how slight or inconclusive, from which a delivery may be inferred, the party relying upon them has a right to have them submitted to a jury, and it is error in a judge to instruct them that there is no evidence of a delivery.

APPEAL from *Bailey, J.*, at ROCKINGHAM, Spring Term, 1851. The case is stated in the opinion of the Court.

J. T. Morehead for plaintiff.
Kerr for defendant.

NASH, J. The only question submitted in the bill of exceptions is as to the correctness of the presiding judge in refusing to submit to the jury the inquiry as to the delivery of the deed from Robert L. Osborn to Jane McDonald. To come to a satisfactory conclusion on the point it is necessary to state the facts as they appear in the case.

(48) In 1841, the legal title to the premises in question was in Osborn. Judgments were obtained against him and were levied on the land by a constable on 10 July, 1847, and at the sale by the sheriff at November Term, 1847, of the county court, the plaintiff purchased. Osborn had purchased the land for Jane McDonald, and paid for it with her money, but took the deed in his own name. Upon discovering such to be the fact, Jane McDonald insisted he should convey the land to her, and on 16 June, 1844, he did execute a deed of conveyance to her. To this deed one Mois and another person were attesting witnesses, and it was admitted to probate and registered at the same term of the county court that the land was sold. Mois proved that in 1844 Osborn came to his shop in Leaksville with this deed in his hand and asked him to witness it, which he did, when Osborn observed, he believed he would go and deliver it to Jane McDonald, and that he started in the direction of her house, taking the deed with him. It was further proved that Jane McDonald, from the year 1841 down to the trial of the case, exercised acts of ownership over the land, renting it out, cutting firewood, cultivating portions of it, and that in 1844 she had caused a part of it to be surveyed preparatory to a sale. Upon these facts the defendant's counsel asked the court to instruct the jury that they were at liberty to infer a delivery of the deed to Jane McDonald prior to the levy made by the constable in 1847. This was refused,

and the jury were instructed that there was *no evidence* of a delivery before November court, 1847. In this position the Court is of opinion there was error. The delivery of a deed is a question of fact. The law has prescribed no particular form in which it shall be made. When the question rests upon the attendant circumstances and the intention of the parties, the facts of their existence and their effect are peculiarly within the province of the jury. It is error, then, for a judge to tell the jury there is no evidence of a delivery when any circumstances are proved from which it may be inferred, no matter how slight or inconclusive they may be. The party relying upon them has a (49) right to have them submitted to the jury for their consideration. Where, in the opinion of the court, undue weight is given to such circumstances, the correction is in the hands of the judge. We think there was evidence to go to the jury upon the question of delivery.

PER CURIAM. *Venire de novo.*

Cited: Whitman v. Singleton, 108 N. C., 94; *Tarlton v. Griggs,* 131 N. C., 221; *Gaylord v. Gaylord,* 150 N. C., 234; *Toy v. Stephens,* 168 N. C., 442.

JAMES F. PEARCE v. JAMES L. BLACKWELL.

Where a vendee takes an article at his own risk or with all faults he becomes his own insurer, and the seller is relieved from all obligation to disclose any fault he may know the article has, but he must resort to no trick or contrivance to conceal the defect or mislead the purchaser.

APPEAL from *Bailey, J.,* at ROCKINGHAM, Spring Term, 1851. *Case* for deceit and false warranty in the sale of horses.

William B. Grant, witness for the plaintiff, testified that the plaintiff, a resident of Guilford County, came to his tavern in Statesville, at the Superior Court in April, 1848; that the defendant Blackwell put up at his house with his two horses on Tuesday of court, and told him he wished to sell his horses; that he learned from the plaintiff that he wished to buy; that on that day or the next the parties (50) came before him and told him that they had swapped horses; that the plaintiff had received of the defendant Blackwell two horses, and the defendant Blackwell had received of the plaintiff one horse and one hundred dollars in money; that he counted the money at their request, a part of which the plaintiff borrowed of the witness Hunt; that he heard the defendant Blackwell say the horses had the distemper, but

whether before or after the trade he did not know; that the plaintiff left Statesville towards the last of the week, on Friday or Saturday; that the weather was cool and rainy.

Jason Hunt, the plaintiff's witness, testified that he went with the plaintiff from Greensboro to Statesville the first week in April, 1848; that he took with him two buggies to sell; that the plaintiff went to buy horses; that he stayed at Statesville during the week of the Superior Court; that the defendant Blackwell proposed to sell to him his two horses for buggies, took him to the stable of the witness Grant and showed him the horses; that the horses seemed to be laboring under distemper; that Blackwell told him that the horses had distemper; that one had it about four weeks and was getting over it, and the other horse had it about two weeks, and it was then at its worst; that he lent Pearce $10 to aid him in paying the $100; that he saw the horses some few weeks afterwards in the possession of the plaintiff, and that they had the glanders; that he had once owned a horse that had the glanders, a fatal disease; that the horses, when he saw them the second time, were worth nothing, but had they had only the distemper would have been worth $225 or $250, and that the period of distemper with horses generally was about a month.

Reuben Ross, the plaintiff's witness, testified that he was at Statesville at February court, 1848; that the defendant Long, who was a brother-in-law of the defendant Blackwell, proposed to sell him a
(51) pair of horses; said he had two horses to sell; showed him in the stable one of the horses; said the other was at Blackwell's; said the horses, or one of them, had the distemper badly, but was getting better. Witness asked him if he would take a buggy in part pay for the horses; Long replied that Blackwell had a buggy. The witness declined to trade, but saw the same horse he had seen in Statesville in the possession of the plaintiff in Greensboro in April, 1848, and that the horse had the glanders; that he did not examine the horse shown to him at Statesville, but the horse seemed to be healthy and had good hair.

W. J. McElray, the plaintiff's witness, testified that the defendant Blackwell drove the horses by Oak's Ferry, in Davie County, about the first of February, 1848; proposed to sell the horses to the witness; that Blackwell said the horses had common distemper—had had it a short time, and were getting well; that he saw one of the horses had what he supposed to be distemper; that the wife of the witness was not pleased with the horses, and he declined to buy; that the plaintiff passed with his horses by his house on Saturday about 3 o'clock p. m., on his way from Statesville to Greensboro, about the first week in April, 1848; that the weather was cool and rainy; that it is 35 miles from Oak's Ferry to Statesville; that in May, 1848, he saw the horses again in

possession of the plaintiff; that the horses were greatly reduced, and seemed to have glanders, though he was no judge.

C. A. Gillespie testified that he resided in Greensboro; saw the horses in April, 1848, the next day after the plaintiff got home, and on examining them was satisfied that they then had the glanders, and so informed the plaintiff; that glanders is a disease very fatal with horses; that he had managed and had much to do with horses; that moderate exercise with horses affected with distemper was good for them, but that, in the first stage of distemper, hard driving and exposure might do injury; that distemper rarely affected horses longer than four (52) weeks; that persons having the care of horses affected with the glanders for three or four months would, in his opinion, discover that the disease was not distemper.

William B. Wooller, the plaintiff's witness, testified that he, in May or the first of June, 1848, went with the plaintiff to the defendant Blackwell's house in Iredell County to tender to him the horses; that he rode one of the horses and the plaintiff the other; that they walked the horses most of the way; rode moderately; that they expected to stay the first night at Oak's Ferry, 40 miles from Greensboro, but were disappointed; that they went on in the night 5 miles further; got to Blackwell's house next day; saw the defendant Long first, the defendant Blackwell being from home; the plaintiff asked how long the horses had had the distemper, to which he replied he had discovered that one had it when he returned from the North the December before; that Blackwell returned home in a short time; that the plaintiff tendered to him the horses, demanded his horse and the money, and said to Blackwell that he had told him the horses had distemper, when in fact they had the glanders; Blackwell replied that he had sold them as diseased horses; the plaintiff said he had sold them as distempered horses, and he would sue him. Blackwell said he would sue the plaintiff; that his horse was not such as he represented him to be; that the plaintiff was a stranger to him; that he expected he would come back, and that he had his witness fixed expressly for him. The plaintiff said no one was present, and if he had a witness he must have been hid; that in a conversation that occurred some fifteen or twenty minutes afterwards, Blackwell said that one Needham had told him that the plaintiff was dissatisfied with the swap and was going to bring the horses back; that he had had much to do with horses, and that the horses had the glanders. He also stated that Blackwell said there had been no glandered horses in (53) his neighborhood.

John Hiatt, the plaintiff's witness, testified that he had dealt much in horses; had bought and sold a great many; that at Guilford Superior Court in April, 1848, he bought these two horses of the plaintiff; thought

they had the distemper when he got them; took them home; discovered in two or three days they had the glanders; that glandered horses are worth nothing; that he returned the horses immediately to the plaintiff, who took them back again; that the usual period for distemper to remain with horses rarely exceeds four weeks; that distemper did not materially impair horses in value, not being considered a dangerous disease; saw Pearce, the plaintiff, afterwards sell the horses at public auction in Greensboro, when one brought a dollar and the other brought $1.87\frac{1}{2}$.

Labeccus Gaither, the plaintiff's witness, testified that in the month of November, 1847, he thought about the middle of the month, he hauled a load of corn to the defendant Blackwell's; that he showed him these horses; called them his match horses; that Blackwell told him they had the distemper, and had had it some time; that some time afterwards Blackwell rode one of the horses to his house and led another horse; wanted to sell the horse he led to his son; that he saw the defendant Blackwell in February, 1848; that Blackwell wanted to sell him one of the matches; that he declined to buy; that the horses still had something like the distemper; that Blackwell tried at the same time to sell him a horse that belonged to another person who accompanied Blackwell on that occasion; that he examined the eyes of the horse, saw the eyes were defective, and mentioned this to Blackwell, who replied he had not discovered it before; that he lived within five or six miles of Blackwell, and that he, Blackwell, dealt a great deal in horses. He also stated that

(54) when Blackwell offered to sell him one of the said match of horses in February, 1848, he told the witness if he would buy he would take less than he offered to take before.

Amos Sharp, the plaintiff's witness, testified that he lived within about two miles of the defendant Blackwell; that Blackwell dealt in horses; that during the fall of 1847 and the winter and spring of 1848 he had a glandered horse; that his horse got gradually worse until he shot it in 1849; that he never knew his and the defendant's horses to be near each other; that after the plaintiff got the horses from Blackwell he heard the said Blackwell say, either that he had limed his troughs or intended to lime them. The witness further states that it was a common thing in that neighborhood to lime troughs after horses had had distemper.

Miles Dobbins, the plaintiff's witness, testified that he was at Statesville on Tuesday of April court, 1848; that the defendant Blackwell took him to the stable and offered to sell him the horses; told him they had distemper; that one was very bad off with it; that he considered the other near about well; that witness examined the horses; saw some small sores about one of the eyes of one of the horses; asked Blackwell

if he thought distemper caused them; Blackwell replied he thought it did. The witness told Blackwell the horses did not suit him. Blackwell said to him, "Make me a bid." The witness declined. Blackwell said the reason he wished to sell was because he had too many horses.

Oliver H. Farrington, the plaintiff's witness, testified that in the latter part of April and the first part of May, 1848, he went with the plaintiff from Greensboro to Laurel Hill, distant about 100 miles; that they drove those two horses in a two-horse wagon; hauled down a barrel of whiskey and a box of tobacco; were gone eighteen or twenty days; good weather; drove moderately—from 18 to 25 miles each day; drove home empty; that great care was taken in feeding and rubbing off the horses; that the horses gradually declined, and seemed to be (55) worse.

Silas D. Sharp, the defendant's witness, testified that he was at Statesville on Monday of April court, 1848; that he went with the plaintiff and the defendant Blackwell to the stables; that Blackwell showed the plaintiff his horses; that the plaintiff said they looked badly. Blackwell replied, "Yes, they have the distemper, I believe, and if he traded for them he must take them as they stand," to which the plaintiff made no reply. That the plaintiff and Blackwell went into the stable to the stall, in which stood the plaintiff's horse, when the plaintiff said his horse was lame with the swinny, and if he took him he must take him as he stood; that the defendant Long came also to the stable; had with him the child of Blackwell; requested him to keep the child, which he did; that the plaintiff, Blackwell, and Long were in the stable together a short time out of his hearing; that the terms of the trade he did not hear; that when they came out Blackwell said he had lost $30 in the trade, but he thought that better than to rub and fatten them up; that he was present when the one hundred dollars was paid over; the plaintiff borrowed a part of the money; that he had once owned one of the horses, which he sold to the witness Cowan in August, 1847; that the horse while he owned him, in March, 1847, had the farcy; broke out in two sore places on the body behind the forelegs; that he washed with soft soap these sores and they soon got well and haired over; that he saw sores were again breaking out on the horses; that he said nothing about these sores because he did not think they would ever injure the horse; that with this exception, the horse was perfectly healthy and sound while the witness owned him; that the witness desired to own the horse again, and had gone to the stable on that day to buy the horse if he could get him for $85.

William F. Cowan, the defendant's witness, testified that he (56) owned both the horses; purchased one from Silas Sharp in August, 1847, to match the other; that he kept them until 3 November,

1847, when he sold them to the defendant Blackwell; that the horses were perfectly sound and healthy all the time he owned them, and were so when he let Blackwell have them; that he saw them repeatedly afterwards while Blackwell owned them; that he saw nothing the matter with either of the horses until 1 January, 1848; that one of the horses seemed to be bad off with the distemper; that Blackwell told him he had been offered a certain price for the horses; that he told Blackwell he thought he ought to have taken it, as he feared the horses might have the glanders; that Blackwell said he thought they did not have the glanders, because they improved, and he thought they would soon be well; that he had expressed his fears to others, but did not recollect having expressed them to the witness Jacob Conay; that he saw the plaintiff in the streets of Statesville on the afternoon that he left Statesville; asked him what he had given, and whether Blackwell had sold the horses to him as sound, to which the plaintiff replied that he had taken the horses as sound up to the time they took the distemper, and that he had paid $100 and a piece of a horse; that it was a wet, cold day, and the weather continued so until Sunday, when it faired away. He also stated he was induced to suspect glanders because there was a mare in the neighborhood diseased in such a way as induced him to think she had the glanders; that the mare did not die, but lived and had two colts, and that he changed his opinion as to Blackwell's horses, and thought they had the distemper only.

James Claywell, witness for the defendants, testified that he was the defendant Blackwell's clerk; lived with him; that he did not know that either of the horses had had distemper until about a week before
(57) Christmas, 1847, when he drove one of the horses to Clemmonsville, and discovered for the first time that he had a cough; that the other horse did not have the distemper until about two weeks before April court, 1848; that he was sitting in the store while the plaintiff, the defendant Blackwell, and the witness Wooller conversed; that the plaintiff told Blackwell he had traded the horses to him as having the distemper, when in fact they had the glanders; that Blackwell refused to take back the horses; told the plaintiff he had taken them as diseased horses. Pearce replied, "You can't prove it." That he expected him to come back. Did not recollect that anything was said about a witness being fixed, or about Needham; that the defendant Blackwell limed his troughs after the plaintiff got the horses; that he never discovered anything about the horses but distemper, and thought the horses had the distemper; that the defendant Blackwell bought a mare after he let the plaintiff have the horses; that she had the distemper when the defendant Blackwell got her; that he kept her in a stable to herself; that she got well, and the defendant Blackwell afterwards sold her.

William Taylor, the defendant's witness, testified that he was a brother-in-law of the defendant Blackwell; that he worked the horses about the first of March, 1848, and that he thought they had the distemper; that he worked them about a week in a team with two of his own horses; watered them with the same bucket; that they performed well, and he thought they had nothing but the distemper, and his horses took no distemper.

Robert Baxter, the defendant's witness, testified that he had much to do with horses; that he saw the horses shortly after the plaintiff got them, and he thought they had the distemper; that he had known distemper to continue with one or two horses as long as five or six weeks; that exposure and hard work would injure horses afflicted with the distemper.

Jacob Conay, the plaintiff's witness, testified that the defend- (58) ant Blackwell tried to sell his son one of these horses, and at another time tried to sell one of them to him; said they had the distemper; that this was a short time before the plaintiff got them; that he asked the witness Cowan about the horses, and Cowan told him not to trade for them, that they had the glanders; that the defendant Blackwell, after he parted with the horses, whitewashed the inside of his stable and the trough; that the defendant Blackwell traded in horses.

Joel McLean, the plaintiff's witness, testified that he had managed and dealt in horses for many years; that glanders and distemper were two separate and distinct diseases, resembling each other; that distemper continued would turn into glanders; that glanders was often produced by distemper; that farcy is intimately connected with glanders; they will run into each other, or their symptoms will mingle together, and before either arrives at its fatal termination its associate will almost invariably appear. An animal inoculated with the matter of farcy will often be afflicted with glanders, while the matter of glanders will frequently produce farcy. They are different types or stages of the same disease. That moderate exercise is good for distemper, while exposure and hard labor are injurious to horses in the incipient state of distemper; tended to inflame and diffuse or scatter the disease through the system. That distemper was generally considered harmless. That horses were rarely affected with distemper longer than four or five weeks—more generally a shorter space of time; that glanders would likely in all instances be detected in less time than three or four months; that glandered horses would often eat heartily, keep in fine order, and do service for a long time, and some few horses would recover, but the disease was generally fatal.

Several witnesses testified that the general character of all the witnesses on both sides was good.

(59) The counsel for the defendants moved his Honor to charge the jury that if they believed that the trade was upon the terms stated by the witness Silas Sharp, it was immaterial whether the horses had common distemper or glanders, or whether the defendants knew it or not, or whether the fact was disclosed to the plaintiff or not, the defendants were entitled to a verdict.

The court charged the jury that if the defendant Blackwell sold the horses to the plaintiff, and represented that they had the distemper—a disease which would last but a short time and do them no injury, but knew at the same time that they had a fatal disease called glanders, and the plaintiff was ignorant of this—they should render a verdict for the plaintiff, and the measure of his damage would be the difference between the value of the horses with the distemper and what they were worth having the disease called glanders. That if they were not satisfied that the horses had the glanders, they must find for the defendants. That if the horses had the glanders, and the defendants did not know it, they should find for the defendants. That if the plaintiff knew as much about the disease which the horses had as the defendants, they should find for the defendants. That if the horses had the glanders, and it was brought about by hard driving or improper exposure to the weather by the plaintiff after he purchased them, they should find for the defendants. That if the plaintiff took the horses at his own risk, with all faults, and Blackwell used no artifice or contrivance to cheat or defraud him, they should find for the defendants. That Blackwell was under no obligation to disclose any defects if the plaintiff agreed to take the horses at his own risk; but that this rule would not apply if artifice or contrivance was resorted to for the purpose of throwing the plain-
(60) tiff off his guard and thereby to cheat and defraud him; and whether this was done or not was a question entirely for them. That if they should be satisfied that the defendant Long had nothing to do with the trade, and did not participate in the fraud, if the other defendant was guilty of any, they could find a verdict against one and in favor of the other.

Under this instruction the jury found a verdict against Blackwell and in favor of Long.

Rule for a new trial; rule discharged, and defendant Blackwell appealed to the Supreme Court.

Kerr for plaintiff.
J. T. Morehead for defendant.

NASH, J. Action on the case for deceit and false warranty in the sale of horses. It is unnecessary here to state the case at length. The prin-

ciples of law deducible from the evidence are set forth in the judge's charge, and the exception is to the instructions at large.

The first instruction is: That if the defendant Blackwell sold the horses to the plaintiff, and represented that they had the distemper—a disease which would last but a short time and do them no injury, but at *the same time knew* that they had a fatal disease called the glanders, of which the plaintiff was ignorant—they should render a verdict for the plaintiff. There certainly can be no objection to this charge. The defendant's liability is strongly and fully put on the ground of fraud practiced by him. The second, third, fourth, and fifth branches of the charge were in favor of the defendants, and they cannot complain of them.

The main argument was upon the sixth branch of the instructions. It was as follows: "If the plaintiff took the horses at his own risk, with all faults, and Blackwell used no artifice or contrivance to cheat or defraud him, they should find for the defendants. That he was under no obligation to disclose any defects if the plaintiff agreed to take the horses at his own risk; but that this rule would not apply if (61) artifice or contrivance was resorted to for the purpose of throwing the plaintiff off his guard, and thereby to cheat and defraud him." This portion of the charge is nearly in the language of this Court in the case of *Smith v. Andrews*, 30 N. C., 6, and it fully sustains his Honor, the presiding judge. When a vendee takes an article at his own risk, or with all faults, he becomes his own insurer, and the seller is relieved from all obligation to disclose any fault he may know the article has; but he must resort to no trick or contrivance to conceal the defect or mislead the purchaser. *Pickering v. Dawson*, 4 Taun., 779. There is no error in law in the charge, and in every form in which it is put by the court the jury have found against the defendant upon the question of fraud.

PER CURIAM. Affirmed.

LEVI PIPPIN v. WILLIAM J. ELLISON.

1. The term "property," in its legal sense, does not include *choses in action*, and in reference to personalty is confined to "goods," which embraces things inanimate, as furniture, etc., and to "chattels," which term embraces living things, as horses, etc.

2. Where a testator devised all his "property" to his wife for life, and directed that after her death "it should be sold," etc.: *Held*, that *choses in action* did not pass.

APPEAL from *Ellis, J.*, at MARTIN Spring Term, 1851. The (62) case is sufficiently stated in the opinion in this Court.

Rodman for plaintiff.
Biggs for defendant.

PEARSON, J. The petitioner is the administrator *de bonis non,* with the will annexed, of John Wyatt; the defendant is the administrator of Lawrence Cherry, who was the executor of said Wyatt. The petition is filed for an account of the estate of said Wyatt.

An account was taken, to which the petitioner filed four exceptions. The first and fourth were sustained. The second and third were overruled, and the defendant appealed. This presents the first and fourth exceptions for our consideration.

Both of these exceptions involve the construction of the following clause of the will: "I give and bequeath to Lydia Wyatt all the balance of my *property* during her natural life, and at her death it is my will and desire that the said *property* loaned to my said wife *shall be sold* by my executor, with the exception of one acre of land, and the moneys arising *from the sale of said property* to remain in the possession of my executor in trust for the benefit of my daughter Keziah Roby during her natural life, to be furnished to her at such times and at all times at the discretion of my executor." After the payment of his debts, which he directs "to be paid out of *my estate,*" there remained in the hands of the executor $273.80, being the principal and interest of the bonds, accounts, and claims due the testator. This amount the executor paid over to Lydia Wyatt.

The question is, whether the bonds, accounts, and other *choses in action passed* under the above clause, or were undisposed of and subject to distribution. The word "estate" has a broader signification that the word "property." The former includes *choses in action.* The latter does not. And in reference to personalty is confined to "goods," which
(63) term embraces things inanimate—furniture, farming utensils, corn, etc., and chattels," which term embraces living things—slaves, horses, cattle, hogs, etc. Nothing but personal property or "goods and chattels" could at common law be seized under a *fi. fa.* or be the subject of larceny.

As the testator uses the word "property," *choses in action* are excluded, taking the word to have been used in its legal sense; and that such was his meaning is made still more manifest by the direction that all said property at the death of his wife shall be *sold,* and the moneys arising from the sale applied, etc.

The fourth exception, because the defendant is charged with the amount of the debts, etc., which he collected and paid over to the widow, his Honor sustained. We concur in the opinion that the defendant ought to be charged with this sum; but there is error in not allowing the

receipt of the widow to stand as a voucher for such part of the sum as she was entitled to under the statute of distributions, and as to which the payment to her was rightful.

The first exception, because the defendant is credited with the sum of $75 paid to Keziah Roby, his Honor sustained. In this there is error. The distributive share of Keziah Roby in the proceeds of the notes, accounts, etc., greatly exceeded this sum, and the payment of the $75 to her use was proper.

There must be a reference to reform the accounts.

PER CURIAM. Ordered accordingly.

Cited: *Webb v. Bowler*, 50 N. C., 365; *Bond v. Hilton*, 51 N. C., 181; *Hurdle v. Outlaw*, 55 N. C., 76, 79; *Lowe v. Carter, id.*, 386; *Lea v. Brown*, 56 N. C., 150; *Lane v. Bennett, ib.*, 394; *Scales v. Scales*, 59 N. C., 166; *Hastings v. Earp*, 62 N. C., 6; *Wilson v. Charlotte*, 74 N. C., 756; *Vaughan v. Murfreesboro*, 96 N. C., 320; *Patterson v. Wilson*, 101 N. C., 588; *Foil v. Newsome*, 138 N. C., 118; *Duckworth v. Mull*, 143 N. C., 473.

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(64)

SAMUEL FEREBEE v. ISAAC BAXTER ET AL.

1. Upon the death of an administrator, the duty of settling up the estate devolves on the administrator *de bonis non*. The representative of the first administrator has nothing to do with it except to account for and deliver over to the administrator *de bonis non* such assets as may remain undisposed of.

2. Creditors cannot sue him directly, nor have they a right of action on the first administrator's bond, for the bond does not vary nor add to the duties or liabilities of an administrator, but merely increases the security for performance of his duty.

3. A judgment obtained by a creditor against the administrator *de bonis non* ascertaining the amount of the debt, but declaring that this administrator has no assets will not vary the principle.

APPEAL from *Caldwell, J.*, at CURRITUCK Fall Term, 1850.

Debt upon the administration bond of one Jesse Doxey, who was the administrator of James Doxey, deceased.

The facts in the case are as follows: The said Jesse, after the expiration of two years from his administration, paid over to the next of kin all the estate in his hands. He died some time in the year, and Benjamin Simmons became the administrator *de bonis non* of said James Doxey. The plaintiff brought suit against the said Simmons upon a cause of action which accrued between the death of said Jesse and the

grant of letters of administration *de bonis non* to said Simmons. The said Simmons, in the suit against him, pleaded fully administered. On the trial the jury found in favor of the plaintiff as to the debt
(65) and in favor of said Simmons on the plea of fully administered. There was no judgment on the verdict other than such as the law implies. This suit is brought to recover the amount of the judgment.

The court was of opinion that the action could not be sustained, and in submission to this opinion the plaintiff submitted to a nonsuit. A motion to set aside was refused, and the plaintiff appealed.

No counsel for plaintiff.
Heath for defendant.

PEARSON, J. Upon the death of the administrator the duty of settling up the estate devolves on an administrator *de bonis non.* The administrator of the administrator has nothing to do with it except to account for and deliver over to the administrator *de bonis non* such of the assets as have not been disposed of by the first administrator in the due course of administration.

Creditors and distributees must look to the administrator *de bonis non,* for he represents his intestate. There is no privity between them and the administrator of the administrator. They cannot sue him directly, nor have they a right of action on the administration bond executed by his intestate. This bond does not vary or add to the duties of or liabilities of an administrator, but merely *increases the security* for the performance of his duty. *S. v. Johnson,* 30 N. C., 397; *S. v. Britton,* 33 N. C., 110; *S. v. Moore, ib.,* 160.

We prefer to put our decision on the broad principle, and lay no stress on the fact that the debt in this case did not become due until after the death of the first administrator.

The circumstance that the debt has been ascertained by a judgment seems to be relied on by the plaintiff for the purpose of taking his case out of the operation of the general principle. We are at a loss to
(66) perceive how it can have that effect. In the first place, such a judgment is unknown at common law, and there is no statute to warrant it. At common law, no plaintiff could take judgment without showing a liability on the part of the defendant. The judgment *quando* was not an exception, for it did not in fact become a judgment until assets come to hand. Our statutes authorize a judgment when the defendant is not shown to be liable in but three cases: where "no assets" is pleaded, or before a single justice; when a creditor admits the personal estate to have been fully administered and seeks to charge the real estate; and where a creditor seeks to proceed on the refunding bond.

So the judgment in this case not being authorized either at common law or by statute can have no force or effect.

In the second place, as there was no privity or cause of action before the judgment it is impossible that such a judgment can have the effect of creating a privity and giving the plaintiff a cause of action against a stranger. We imagine this experiment was suggested by some supposed analogy to the proceeding in equity, where relief is given after a creditor has ascertained his debt at law and is unable to obtain satisfaction. There is in fact no analogy. The action in this case is of the first impression, and has neither principle, authority, or analogy to support it.

PER CURIAM. Affirmed.

Cited: Strickland v. Murphy, 52 N. C., 244; *Thompson v. Badham*, 70 N. C., 143; *Morris v. Syme*, 88 N. C., 455; *Grant v. Reese*, 94 N. C., 726.

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(67)

STATE ON RELATION OF JEFFERSON D. BRITT v. HENRY COOK.

1. A guardian is not at liberty to consider the amount expended on infants by a former guardian, even for board, if it exceeds their increase as a debt due from the word's estate and payable out of the principal.

2. A guardian is presumed to furnish all necessaries for his infant ward, and a stranger who furnishes them, except under peculiar circumstances, must take care to contract with the guardian, otherwise the provision that guardians shall not in their expenditures exceed the income of their wards would be vain and nugatory.

APPEAL from *Dick, J.*, at HERTFORD Spring Term, 1851.

The case is stated in the opinion in this Court.

Bragg for plaintiff.

W. N. H. Smith for defendant.

PEARSON, J. This was debt on the guardian bond of the defendant Cook. The amount claimed as disbursements exceeded the income of the wards. But the defendant, admitting the general rule, insisted that an exception ought to be made upon the facts of this case, which were as follows: The defendant Cook was appointed guardian in 1843. From 1840 to 1843, one Moore had been the guardian. The infants lived with their mother during 1840. Cook married her in 1841, and they continued to live with him. One of the items of the defendant Cook's account was a charge of $36 a year against each of the infants for board

for the years 1840-41 and 1842, and it was insisted this amount was a *debt due by the infants* to the defendant Cook, for the satisfac-
(68) tion of which he had a right to "encroach" on the principal, the income being consumed by his disbursements and those of the former guardian, exclusive of this item of board, which it is insisted he was at liberty to pay out of the principal, because it was a *debt* due by his wards when he was appointed guardian.

His Honor was of a different opinion, and we concur with him. If Cook had been guardian all of the time it is admitted he would not have been at liberty thus to exceed the income. How can that be done indirectly which could not have been done directly? How could the infants, during the guardianship of Moore, incur a liability exceeding their income, which upon the appointment of Cook as guardian became a debt chargeable upon the principal of their estate? Moore, as guardian, was bound to furnish them with necessaries, and was not at liberty to exceed their income. The infants had no capacity to incur a debt exceeding their income, even for necessaries. The guardians for infants are presumed to furnish all necessaries, and a stranger who furnishes board or anything else must, except under peculiar circumstances, take care to contract with the guardian, otherwise the provision that guardians shall not in their expenditures exceed the income of wards would be vain and nugatory.

PER CURIAM. Affirmed.

Cited: Hussey v. Rountree, 44 N. C., 112; *Hyman v. Cain,* 48 N. C., 112; *Freeman v. Bridgers,* 49 N. C., 4; *Fessenden v. Jones,* 52 N. C., 15.

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(69)

BENNETT P. PITT v. WILLIAM D. PETWAY.

1. Where A, B, and C were interested as the principal *cestuis que trust* in a deed of trust of slaves for the payment of debts in which A was the trustee, and by an agreement between the three B., at a public sale, under the deed by the trustee, bid off the slaves for the benefit of the three: *Held,* that by this sale the legal title vested in all as tenants in common.

2. The position that "a trustee cannot buy at his own sale" must be taken with some qualifications. He may buy at his own sale and charge himself with the bid, and the *cestuis que trust* may, at their election, hold him bound by it or may repudiate the sale and treat the property as still belonging to the trust fund.

3. In our State it is held that if a tenant in common takes a slave out of the State to parts unknown and sells him, the cotenants may treat this as a destruction of the property; but a sale to a citizen of the State is not tantamount to a destruction, and therefore does not amount to a conversion.

PITT *v.* PETWAY.

APPEAL from *Ellis, J.*, at EDGECOMBE Spring Term, 1851. *Trover* for the conversion of a slave named Burton.

The plaintiffs proved that the slave in question had been the property of one Robert Belcher, who, by deed in trust dated 1 June, 1849, conveyed him, with other slaves, for the payment of debts to the defendant Petway. In December of the same year the defendant exposed this and the other slaves thus conveyed to sale at public auction upon a credit of four months, the purchaser giving bond with approved sureties. This sale was made in pursuance of the terms of the said deed of trust. One Lewis Belcher bid off the slave Burton with others, who then went into his possession; and by deed dated 16 April, 1850, the said Lewis Belcher conveyed to the plaintiffs several slaves by (70) name, and also his "*interest in negroes Luke, Edmund, Burton, and Kate,*" to be held by the plaintiffs in trust for the payment of debts owing by him. In June, 1850, the defendant, who was also sheriff of Edgecombe County, took the said slave into his possession under an execution in favor of one Lawrence against the said Robert Belcher and exposed him to public sale, when he was purchased by one Armstrong, a citizen of Edgecombe County. The circumstances under which Lewis Belcher bid off the slave at the sale of Robert Belcher's property were as follows: The defendant Petway and one Sugg and Lewis were creditors of Robert Belcher, whose claims were provided for in the said deed in trust to Petway. The said Petway, Sugg, and Belcher held a conference just before the slaves were exposed to sale in December, 1849, when it was agreed between the three that as they were all interested in making the property bring a fair price, the purchase money being principally applicable to their respective claims under the said deed in trust, unless the slaves brought certain prices, which were set forth in a paper which Sugg then held in his hand, they should be bid off by Lewis Belcher for the benefit of the three; and that they should be again sold when an opportunity presented for the benefit of the said Lewis, Petway, and Sugg. He gave no note for the purchase money for the slave, nor did he pay any money. After this sale it was agreed between the said Petway, Sugg, and Lewis Belcher that he (Belcher) should keep possession of the slave, and that either of them should make a sale of him for the benefit of *them* when an opportunity presented. That the said Belcher, with the approval of Petway, did once offer to sell the slave.

It was also proved that Mr. Lawrence's execution, under which the slave was sold by Petway, was under the control of Sugg, the judgment having been assigned to one Norfleet, who held it in trust for Sugg, and that the said debt was one provided for under the deed (71)

in trust of the said Robert Belcher. It was admitted that the said execution *per se* gave no valid lien upon the said slave, the said Sugg having assented to the first sale by Petway.

It was proved by Lewis Belcher that at the time of making his trust deed he declined the request of the plaintiffs to insert the slaves Burton and others, because, as he told the plaintiffs, it could not benefit the trust then making, but finally yielded to the plaintiffs and inserted them in the form stated.

The plaintiffs contended that Lewis Belcher acquired a title to the whole legal interest in the slave at the said first sale, and held him afterwards as trustee for said Petway and Sugg, and that the plaintiffs were entitled to recover in this action the full value thereof, they having acquired Lewis Belcher's interest; that if he (Lewis Belcher) only acquired one-third interest in the slave, the plaintiffs were entitled to recover to the extent of that interest, as the slave had been sold by Petway, another joint owner.

The court was of opinion that Lewis Belcher did not acquire a legal title to the entire slave as trustee for Petway and Sugg, as contended; but that if any title at all passed from Petway as trustee for Robert Belcher, the said Lewis Belcher only acquired title to the extent of one-third of the interest in the said slave, and held this as joint owner with Petway and Sugg; and that it did not appear that there had been any such distinction of the property as would enable the plaintiffs, who had Lewis Belcher's interest to maintain, *trover* against one of the other joint owners.

The jury returned a verdict for the defendant. Rule for a new trial. Rule discharged. Plaintiff appealed.

(72) *Rodman for plaintiff.*
Moore and Biggs for defendant.

PEARSON, J. The case turns upon the legal effect of the sale and delivery to Lewis Belcher. It must have operated in one of three ways: The slaves were simply "bid in" by Lewis Belcher, acting for the trustee, so that there was no sale and they continued a part of the original trust fund; or they were purchased by him for himself and as agent of the defendant Sugg, so as to vest the title in the three as tenants in common; or they were purchased by him to be held in trust for himself and the defendant and Sugg, the legal title being in himself alone.

The proof was, the slave in controversy and three others, together with other property, had been conveyed by one Robert Belcher to the defendant in trust to sell and pay certain debts in which Lewis Belcher, the defendant, and Sugg were the persons *principally interested.* Before

the sale it was agreed between said Lewis Belcher, the defendant, and Sugg that unless the slaves were run up above certain sums, Lewis Belcher should become the purchaser for the benefit of the three, and either of them was afterwards to make sale of them whenever a favorable opportunity occurred. Accordingly, Lewis Belcher became the purchaser and the slaves were delivered to him. He did not pay or give his note for the amount of his bids; that was left as a matter of future arrangement.

It is obvious that the object of the parties was not simply to "bid in" the slaves and allow them to remain a part of the original trust fund, because there were other persons concerned in that fund, and because, upon this supposition, there was no occasion for a change of possession and no reason why the trustee should deliver the slaves to Lewis Belcher.

It remains to be decided, did the sale and delivery vest the title in the three as tenants in common, or did it vest the title in Lewis Belcher in trust for the three? His Honor, we think, properly (73) adopted the former conclusion. The purchase was made for the benefit of the three, and they were to contribute ratably towards the price. The natural inference, then, is that the title was to be vested in the three unless there was some purpose to be accomplished by vesting the title in one to the exclusion of the others. We can see no such purpose and reason for excluding the defendant and Sugg from the legal ownership.

It is suggested that as a trustee cannot buy at his own sale, there was a necessity for Lewis Belcher to become a trustee for the defendant; and this is a reason, so far as he is concerned, for excluding him from the legal ownership. The position that "a trustee cannot buy at his own sale" must be taken with some qualification. He may buy at his own sale and charge himself with the bid; and the *cestuis que trust* may, at their election, hold him bound by it, or may repudiate the sale and treat the property as still belonging to the trust fund. This consequence follows, whether the purchase is made by the instrumentality of an agent or that of one who is to hold the title as trustee. This suggestion, then, has no weight; and the fact that the defendant was the person who made the sale favors the one view as much as the other, and we are left to adopt the natural inference that the title was to be in the three in the absence of any reason for vesting it in one to the exclusion of the other two, except as *cestui que trust*.

It was then insisted that if they were tenants in common the defendant had so converted the slave as to entitle the plaintiffs to recover an *aliquot* part of the value in the same way as if he had destroyed the property. The conversion consisted in this: the defendant, as sheriff,

sold the slave under an execution in favor of Sugg, and he was bought by one Armstrong, *"a citizen of Edgecombe County."*

(74) The rule as between tenants in common is, that one cannot maintain trover unless there be a destruction of the property. The first exception made—if it can be termed an exception—was where a tenant in common of a ship had it repaired, the name changed, and sent it to the East Indies, where he sold it and appropriated the whole price to his own use. This was held to be "tantamount to a destruction," because the cotenants could not follow it. In our State it is held that if a tenant in common takes a slave out of the State to parts unknown and sells him, the cotenants may treat this as a destruction of the property. But the idea that a sale to "a citizen of the county" is "tantamount to a destruction" is now advanced for the first time, and cannot be sustained without putting a tenant in common upon the footing of a mere wrongdoer, with whom there is no privity, for which position there is no authority and no reason.

PER CURIAM. Affirmed.

Cited: Pitt v. Albritton, post, 77; *Robinson v. Clark,* 52 N. C., 564; *Roberts v. Roberts,* 65 N. C., 28; *Grim v. Wicker,* 80 N. C., 344; *Strauss v. Crawford,* 89 N. C., 150; *Shearin v. Riggsbee,* 97 N. C., 219; *Moore v. Eure,* 101 N. C., 15; *Waller v. Bolling,* 108 N. C., 294; *Doyle v. Bush,* 171 N. C., 12.

FRANKLIN G. PITT ET AL. v. BURTON G. ALBRITTON.

Where a bailment is made by one of two tenants in common and the bailee undertakes to hold for him and subject to his order *alone*, the bailee is not estopped as to the other tenant in common, but in an action by the two jointly against him may show that the true title is in a third person.

(75) APPEAL from *Ellis, J.,* at PITT Spring Term, 1851.

Trover on a bailment to the defendant for the value of two slaves, Edmund and Luke. On the trial it was proved that one of the plaintiffs, Franklin Pitt, in June, 1850, brought to the defendant, who was sheriff of Pitt County, the two slaves and requested him to keep them in the common jail until he should call for them himself or by his order. The defendant received them on those terms. In August following, the said Franklin Pitt came and demanded the slaves of the defendant, and the defendant stated that he had delivered them to a Mr. Petway, who had claimed the right to possess them.

The plaintiffs then offered in evidence a deed in trust executed by one Lewis Belcher to the plaintiffs in April, 1850, conveying to them in trust the said slaves. The plaintiffs further proved that the said slaves had been in the possession of Lewis Belcher before the making of the said deed. In the course of the cross-examination of the witnesses offered by the plaintiffs, the defendant made inquiry into the title of the slaves tending to show that it was in one Robert Belcher. The plaintiffs objected to this evidence on the ground that the defendant being their bailee he could not deny their title, and the objection was sustained. The plaintiffs then offered evidence of the value of the slaves and closed their case. The defendant objected that the plaintiffs had not entitled themselves to a verdict, because only one of the plaintiffs had bailed the slaves, and only one could sustain the action simply by showing a bailment without title by him to the defendant; and that as the other plaintiff, in order to entitle himself to a verdict, was obliged to show title, the defendant was at liberty also to meet the question of title and show a different and superior one. But the court was of opinion with the plaintiff. Thereupon the defendant proposed to show that the slaves were at the time of delivery to him and the surrender by him the property of the said Petway; that the said Petway, as sheriff of Edgecombe County, had, under an execution issuing on a judgment (76) obtained at May court, 1849, of that county, levied on the said slaves in June following, and returned his levy without sale to August, 1849; that a *venditioni exponas* issued from August, 1849, to November, 1849, commanding him to sell the said slaves, and another from May, 1850, commanding him likewise to sell the said slaves, and that the slaves having been withdrawn from Edgecombe, the said Petway claimed them while in custody of the defendant by virtue of his levy aforesaid, and the defendant had surrendered them to him. The plaintiffs excepted to this evidence, and the court rejected it as irrelevant to any matter of deference to the action. Thereupon the defendant offered to show that in 1849 one Robert Belcher was the owner of the said slaves and had executed to the said Petway a deed in trust duly proved and registered conveying them to him for the purpose of paying his debts; that in December of that year the slaves had been sold, and by virtue of an agreement made before the sale between them, the said Lewis Belcher bid them off as the joint property of himself, the said Petway, and one Sugg; that after the sale the slaves went into the possession of the said Lewis Belcher, and so continued until, "and for some time afterwards," the said Lewis Belcher executed his deed in trust which the plaintiffs had read; that during the whole time the slaves were in the possession of the said Lewis Belcher before the execution of the deed to the plaintiff, he claimed to hold the slaves as tenant in common with the said

Sugg and Petway; and at the time of executing the said deed, he stated to the plaintiffs his interest to be such and no more, and that the deed was made and accepted upon such information to the plaintiffs. And the defendant averred that the said Petway claimed the right to possess said slaves as one of the tenants in common with the said Lewis Belcher or his assignee, and had received them on this claim of right; and to this end, as a complete defense as well as for the purpose of de-
(77) termining the damages, if the plaintiffs were entitled to recover at all, the defendant declared this purpose in offering it. But the court declined to receive the evidence for any purpose. And the jury, under the instructions of the court, rendered a verdict for the full value of the slaves. Whereupon the defendant obtained a rule on the plaintiffs to show cause why a new trial should not be granted:

First. Because the plaintiffs on the proof were not entitled to maintain the action jointly.

Second. Because of the rejection of proper testimony offered by the defendants.

Rule discharged. Judgment for plaintiffs. Appeal.

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

PEARSON, J. The title of the slaves vested in Lewis Belcher, Petway, and Sugg as tenants in common. *Pitt v. Petway, ante, 69.* After the delivery to Lewis Belcher he conveyed all of "his interest" to the plaintiffs in trust; and afterwards, one of the plaintiffs, Franklin Pitt, delivered the two slaves now sued for to the defendant, the jailer of Pitt County, to be kept for the said Franklin until he called for them. The defendant afterwards delivered them to one Petway, one of the tenants in common, so that when called on for them by Pitt he was not able to deliver them, and this action is brought by the two Pitts, to whom they were conveyed by Lewis Belcher.

On the trial the plaintiffs proved the bailment by Franklin Pitt to the defendant and his failure to deliver the slaves on demand. They then read in evidence the deed from Lewis Belcher to them, and proved the value of the slaves, and rested the case. The defendant offered to show that Petway was a tenant in common with the plaintiffs,
(78) and that, on demand, he had delivered the slaves to him. His Honor rejected this evidence, being of opinion that the defendant was bound as bailee and could not be heard to deny the title of the plaintiffs. There is error.

If Franklin Pitt had sued on the contract of bailment, it may be that the defendant would have been bound by it and estopped from showing

the facts, for, although a bailee may excuse himself by proving that he delivered the article on demand to the true owner, this is on the ground that he could have been estopped by the true owner to deliver the article and it was not worth while to stand a suit. But when a bailment is made by a tenant in common and the bailee undertakes to hold for him and subject to his order alone, the bailee cannot excuse himself by showing a delivery to the other tenant in common, for he could not have compelled him to do so by action, and there was consequently no necessity for it.

In this case the action is trover by the two Pitts; and although the case states they declared in trover "on a bailment," that can make no difference, for the gist of the action is that the defendant, being in possession of the property, converted it wrongfully. To sustain the action in the name of the two it was necessary to depart from the special bailment and rely on the title to show that by implication of law the bailment was made by the *owners*. This opened the whole title; and the same implication which let in Bennett Pitt (and which was necessary to sustain the action in the name of the two) also let in Sugg and Petway as part owners and parties to the contract of bailment; and so the defendant delivered the property to one of the parties to the contract, which is a defense available under the general issue, because it is a performance of the terms of the bailment.

The idea that there ought to have been a plea in abatement for (79) nonjoinder has no bearing.

PER CURIAM. *Venire de novo.*

Cited: Thompson v. Andrews, 53 N. C., 126.

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

In an action on an express contract for the price of rope sold and delivered where no price was agreed upon the defendant can only show what was the *market* price generally of rope of this kind at the time of the sale, but cannot show what was the real or actual value of the article sold, so as to reduce the amount which the plaintiff would be entitled to recover below the market price at the time.

APPEAL from *Ellis, J.*, at PERQUIMANS Spring Term, 1851.

Assumpsit in two counts: First, on a special contract for the sale to the defendants of ten coils of fishing rope, at the price of 13¾ cents per pound; and, secondly, on a *quantum valebit* for goods, wares, and merchandise sold and delivered. It appeared from the evidence that the

plaintiffs were merchants in the city of Norfolk, and the defendants were engaged in fishing operations in the spring of 1848 on the Chowan River, in the county of Hertford. And the plaintiffs proved by one Kingfield, their clerk, that in the latter part of 1847 one of the defendants—he did not know which—left a verbal order with the plaintiffs to send them ten coils of fishing rope; that the plaintiffs did not
(80) then have the rope on hand; that he knew nothing of any bargain between the parties as to the rope, but that he only knew that it was forwarded to the defendants in February, 1848, and that the price at which the rope was charged by the plaintiffs in their account against the defendants, to wit, 13¾ cents per pound, was the same as that usually charged by the plaintiffs to their other customers. And in reply to a question of the plaintiffs as to the quality of the rope, the witness further said that the quality was good and such as they sold to others for fishing purposes. The rope was 2½ inches in diameter and the kind of rope used in hauling seines. It further appeared that the rope came to hand and was used by the defendants in their said business.

The defendants then offered to prove that the rope was of bad quality; that within two days after they commenced using it it repeatedly broke and proved to be rotten and defective in quality; that it was of little use and they had to procure other rope in the place of it.

This evidence was objected to by the plaintiffs and rejected by the court. But the court held that the defendants might show, and could *only* show, what was the *market* price generally of rope of this kind at the time of sale, but could not show what was the real or actual value of the article sold so as to reduce the amount which the plaintiffs would be entitled to recover below the *market* price of the article at the time. The defendants then proved that the market price at the time was 12½ cents per pound for such rope, and the plaintiffs had a verdict accordingly.

Rule on the plaintiffs for a new trial. Rule set aside, and judgment for the plaintiffs. Appeal.

W. N. H. Smith for plaintiffs.
Jordan and Bragg for defendants.

(81) PEARSON, J. It was held in *Dickson v. Jordan,* 33 N. C., 166, that no warranty of quality is *implied* in the sale of goods. An attempt is made to distinguish the case as it now comes up, because it appears now no price was agreed on, whereas before it was stated that "the rope" was sold at the price of 13¾ cents per pound. No stress was laid in the opinion on the fact that there was an agreed price, and the circumstance that no price was *expressly* agreed on cannot distinguish this case and take it out of the general principle then announced.

If a defendant is not allowed to abate the amount of damages for a breach of contract in failing to pay for goods sold and delivered when the price was agreed on by proof of their inferior quality, it would be singular if he was allowed to do so because the price had not been expressly agreed on.

It was said, *there* the action was on an express contract; *here* it is on an implied contract; and as the plaintiff must declare on the *"quantum valebit"* the question of value is open. We deny the premises from which this conclusion is drawn. The contract in both cases is an express one, the only difference being that in one the parties fix on the price, in the other leave it to be inferred from the circumstances, and the inference is that the one agreed to take and the other to give the selling price, or, as it is termed in the case, the market price. If the vendor demands more it is his duty to make it known; if the vendee is not willing to give it he must say so. Silence is taken for consent to give and take the market price. Neither party is allowed to take advantage from the fact that the dealing was upon this mutual understanding.

A doctor is sent for, and attends day and night upon a slave. It would be singular if the owner when sued for the services should insist "no price was agreed on," the declaration is upon a *"quantum meruit,"* and I may show, in abatement of the damages, that the slave died, and so the services were of no value. If a carpenter works day after day according to instructions, and the building is of no use because (82) of a defect in the plan, can the employer on that ground be allowed an abatement from the wages ordinarily demanded and paid to carpenters?

From the argument and the cases cited (those referred to in 2 Gr. Ev., 136, note 4), we presume the counsel has fallen into a misapprehension, by not adverting to the distinction, between a case like the present, where the contract is express, and an action on a contract implied by law, as when one agrees to build a house according to certain specification for a given sum, but does not build the house according to contract, and therefore cannot maintain an action on it. Still, if the other party takes any benefit from his labor and materials, *the law will imply,* from his doing so, *a promise de bono et quo* to pay what the labor and materials are worth to him. Here the question of value is open; with this restriction, however, that the price agreed on is the "standard" and cannot be exceeded, and the rule is, if the house, built according to contract, be worth the sum agreed on, how much should be allowed for it built as it is? In such a case it would be out of the question to allow the plaintiff to recover according to workman's wages or the rates of the trade, so much per square, for it may be the defend-

ant would not have had the house built but for the very low price at which the plaintiff agreed to do it.

PER CURIAM. Affirmed.

Cited: Farmer v. Francis, post, 284; *Odom v. Harrison,* 46 N. C., 404; *Waldo v. Halsey,* 48 N. C., 108; *Hobbs v. Riddick,* 50 N. C., 82.

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(83)

JOHN S. WOOD ET AL. v. WILLIS H. BAGLEY ET AL.

1. If at the time a judgment is obtained the parties agree that an execution shall not issue for a certain time, which is duly entered of record, the time within which a plaintiff can take out his execution is extended to twelve months and a day from the termination of the specified time, and no execution can regularly issue in the meantime except by order of the court.

2. When a judgment is confessed upon terms, which are duly entered, it is in effect a conditional judgment, and the court will take notice of the terms and enforce them.

3. Where a rule or order is entered on the record by a proper officer of the court in the clerk's office, but during term time, and the court meets and sits afterwards, the conclusion of law is that it was recognized and adopted by the court.

APPEAL from *Dick, J.,* at PERQUIMANS Spring Term, 1851.

Rule on the defendant obtained by the plaintiff, after due notice given him, at May Term, 1850, of the county court of Perquimans County, to show cause why an execution of *fieri facias,* which he had caused to be issued on a judgment recovered by him against the plaintiff John S. Wood at the preceding term of the court should not be set aside. The rule having been made absolute in the county court and the court having ordered the said execution to be set aside, the defendant appealed to the Superior Court.

Upon the hearing of the case in this Court the following were the facts:

The defendant's intestate, Miles Dail, recovered at February Term, 1850, of Perquimans County Court, against the plaintiff John S. Wood, judgment for the sum of ..... dollars, with costs of suit, and
(84) caused an execution, tested of that term, and returnable to the May term following, to be issued on the .....day of....., against the property of the said Wood, and on the same day delivered

to the sheriff of Perquimans County aforesaid. Subsequently, to February term of Perquimans County Court aforesaid, to wit, at the terms of the Superior Courts held in the counties of Perquimans and Pasquotank, respectively, in the month of April of that year, the other persons, who are plaintiffs severally, recovered judgments in those courts against the said John S. Wood, on each of which executions of *fieri facias* were issued shortly thereafter, to wit, on the.....day of..... of the same year, which were on the same day delivered to the sheriff of Perquimans, and were returnable to the Fall Term, 1850, of those courts, respectively.

Under these executions and the execution of the defendant Bagley which afterwards came into his hands as stated, the sheriff made sale of the property of the said John Wood, and holds the proceeds of the sale in his hands unappropriated.

The judgments recovered by the several plaintiffs were by default on writs, of which the said Wood accepted service during the latter part of the week of the said Superior Courts.

Accompanying the judgment, as entered upon behalf of the said Dail against John S. Wood and immediately underneath, appears the following entry on the docket in that cause, to wit:

"Stay execution till May court, and thereafter till called for."

It was in proof that this entry was made on Thursday of the February term aforesaid of the court in the office of the county court clerk, which is in the courthouse, in the presence both of the said Dail and the said Wood by the county court clerk under the direction of the defendant Dail, and that no court sat on that day or the (85) next day.

The circumstances under which this entry was made in the case were as follows:

After judgment had been rendered in the case of *Dail v. Wood* the said John S. Wood called on the said Dail to know if execution was to be issued, and stated that he did not wish to prejudice his debt, but it would not be convenient for him to pay it before May term, and perhaps not before August term of the court. The said Dail suggested that under the advice of the counsel he preferred that his execution should issue, but not be enforced. To this the said Wood answered that that arrangement would not suit him, and that he could appeal and keep it off longer; and thereupon the said Dail, turning to the clerk, instructed him to make the entry of the stay, as already described, and it was done. The execution, at the instance of Dail, was for $1,700 or thereabouts; and the executions in favor of the plaintiffs other than Wood amounted to about $3,000, while the proceeds of sale of said Wood's property in the hands of the sheriff were about $4,000.

It further appeared that, according to the practice and usages in the county court of Perquimans, rules and other orders are taken and entered on the docket in the county court clerk's office at any time during the week until Saturday, when the court adjourns, and that the said court did sit and transact business on Saturday of the February term aforesaid, not having adjourned until that day.

The court was of opinion on the above statement of facts that the entry on the docket was merely a private agreement between Dail and Wood and not a record of the court. It therefore ordered that the judgment of the county court be reversed and the rule discharged. From which judgment the plaintiffs appealed.

(86) *W. N. H. Smith for plaintiffs.*
Heath for defendant.

NASH, J. The intestate recovered a judgment in the county court of Perquimans against John S. Wood. When the judgment was obtained it was agreed between the parties that if the defendant would not appeal to the Superior Court a *cessat executio* until the succeeding May term of the court should be entered. Accordingly, the following entry was made upon the docket: "Stay execution until May term, and thereafter until called for." Between the February term, when the judgment was obtained, and the May term following of the county court a term of the Superior Court intervened, at which judgments were confessed to his other creditors by J. S. Wood. Thereupon the intestate Dail caused the execution in controversy to issue upon his judgment before the
(88) expiration of the time agreed on. Upon the application of Wood and the plaintiffs in the judgments confessed the county court at May term set it aside, and Dail appealed. In the Superior court the order of the county court was reversed upon the ground that the order entered on the docket was a private agreement between the parties and not a record of the court.

In this opinion we do not concur. The agreement upon being entered on the record of the court in the manner this was became a rule of court, vesting in the parties legal rights which it was the duty of the court to protect. After a final judgment in favor of a plaintiff, he is entitled to his execution and may take it out at any time within a year and a day where the parties remain the same. If, however, a writ of error is brought, or the parties at the time the judgment is obtained agree that an execution shall not issue for a certain time, which is duly entered of record, the time within which the plaintiff can take out his execution is extended to twelve months and a day from the decision on

the writ of error, or the termination of the specified time, and no execution can regularly issue in the meantime except by order of the court. 2 Tidd's Prac., 994; 1 Mod. Rep., 20. In his first volume, page 550, Mr. Tidd states that when a judgment is confessed upon terms which are duly entered, it is, in effect, a conditional judgment, and the court will take notice of the terms and enforce them. Here the judgment became, by the agreement of the parties, a conditional judgment, so far as the execution was concerned. The defendant in the original action had a right to appeal to the Superior Court. The effect of his so doing would have been to vacate the judgment, delay the plaintiff, and put him to trouble and expense of another trial. To avoid these results Dail, the plaintiff, agreed to a *cessat executio* for a limited time. This was entered on the records of the court at the instance of the parties and in their presence by a proper officer of the court. This was done in the clerk's office during term-time, and the court met and sat on the second day after; so that the conclusion of law is that it was (89) recognized and adopted by it. It thereby became a rule of the court and beyond the action of either of the parties without its order. The execution in this case was improperly issued, not because the rule of court vacated the judgment, but because it violated that rule or order. That the county court had the power to set it aside on the application of J. S. Wood, who was the defendant, is shown in *Cody v. Quinn*, 28 N. C., 193, and they were right in so doing.

We think there was error in the court below. The judgment is therefore reversed and that of the county court affirmed.

PER CURIAM. Judgment accordingly.

Cited: Bagley v. Wood, post, 90.

(90)

WILLIS H. BAGLEY, ADMINISTRATOR, v. JOHN S. WOOD.

1. Every court has the control of its own records, and may alter or amend them, or refuse to do so, at its discretion.

2. Where the county courts exercises this discretion, their decision is subject to an appeal to the Superior Court, and is thereby vacated, and the trial in the Superior Court is *de novo*.

3. In considering the matter in appeal the Superior Court is not confined to the evidence in the court below, but may hear, and will hear, any additional or new evidence which may be offered by the parties.

4. Whether the decision in the Superior Court is one purely in the discretion of the judge or one which is subject to review here, the judgment is final and conclusive, because the Supreme Court is a court for the correction of errors in matters of law and not matters of fact.

APPEAL from *Dick, J.*, at PERQUIMANS Spring Term, 1851. The facts of the case appear in the opinion.

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

NASH, J. This is a branch of *Wood v. Bagley, ante,* 83, the parties being reversed. The motion in that case was to set aside the execution, in this to amend the record. The facts in both cases are the same and need not be repeated here. The motion in this case was to strike out of the record the *cessat executio* entered at the time the original judgment was obtained. Upon due consideration the county court refused so to amend the record and an appeal was taken by the plaintiff to the
(91) Superior Court, where the judgment of the county court, as stated in the case, was affirmed, and an appeal taken to this Court.

Every court has the control of its own records, and may alter or amend them, or refuse to do so, at their discretion. So far as the action of the county court is concerned the exercise of this discretion is subject to the revision of the Superior Court, to which an appeal lies by act of 1836, Rev. St., ch. 4, sec. 1, from every judgment, sentence, or decree made by it. There are some cases in which no appeal lies, but this is not one of them. Where an appeal is properly taken it vacates the judgment, and the trial in the appellate court is *de novo* as if no such judgment had been obtained in the county court, and the motion to amend is made in the Superior Court as if for the first time. And in considering the motion the latter Court is not confined to the evidence in the court below, but may hear, and will hear, any additional or new evidence which may be offered by the parties. Whether the decision in this case was one of amendment, which is purely in the discretion of the judge, or one which is subject to review here, we equally think the judgment is final and should be affirmed, for the reason this is a court for the correction of errors in matters of law and not matters of fact. These principles are abundantly shown by the cases of *Quiett v. Boon,* 27 N. C., 9; *Galloway v. McKethan, ib.,* 12, and *Dickinson v. Lippett,* 31 N. C., 163, and more fully in the recent case of *Britt v. Patterson,* 32 N. C., 390. The case shows that the same evidence was laid before the judge below as was submitted to the county court, and the case was heard by his Honor "upon the evidence submitted." His decision, there-

fore, must be final. We cannot look into the facts upon which his judgment was founded, it being a judgment given in the exercise of a discretionary power.

PER CURIAM. Affirmed.

Cited: Jones v. Jones, post, 99; *Simonton v. Chapley,* 64 N. C., 153; *Perry v. Adams,* 83 N. C., 268; *Hinton v. Roach,* 95 N. C., 111; *S. v. Warren, ib.,* 676; *Mills v. McDaniel,* 161 N. C., 115.

(92)

WILLIAM T. HYMAN v. WILLIAM K. A. WILLIAMS.

1. A bequeathed as follows: "I loan to my wife Charity one negro man, Primus" (and other negroes); "also, she may take choice of any one of the negro girls belonging to my estate which I may not give away," etc., "and at the death of my wife, the negroes I have loaned to my wife, and their increase, I want to be equally divided between my four grandchildren, A. B., etc." *Held,* that the wife took a life estate only in the negro girl selected by her from those not given away.

2. A residuary clause operates as a limitation of the interest of the tenant for life and passes it over as effectually as if there had been an express limitation over of the specific thing.

APPEAL from *Dick, J., at* MARTIN Special June Term, 1851.

Detinue for a slave, Hasty, and a horse, which was decided on a case agreed. James Burnett by his will bequeathed and devised as follows:

"Item First. I loan to my wife Charity one negro man Primus, one negro woman Mahaly, one boy Hampton, and negro woman Amy; also, my wife may take choice of any one of the negro girls belonging to my estate which I may not give away; also two head of horses such as she may think proper to take; also all my cleared land and as much of the woodland as she may think proper; and at the death of my wife the negroes I have loaned to my wife and their increase I want to be equally divided between my four grandchildren, Henry R. Watts, James H. Watts, Charity Mitchell, and Mary Mitchell; also, the land I have loaned to my wife, at her death, I wish for it to be divided between my two grandchildren, Henry R. Watts and James H. Watts."

Then follows dispositions of slaves and other goods in three (93) clauses, and then this item:

"Fifthly. All the negroes and property of every kind which I have not given away hereinbefore I wish my executor to sell enough of said property to pay my debts, and the balance to be equally divided between my said grandchildren, Henry R. Watts and James H. Watts."

The testator left two negro girls not specifically bequeathed to any other person, and his widow took one of them named Hasty under that part of the clause giving her the choice of one, and she also selected two horses, to all which the executor, who is the defendant in this suit, assented. Mrs. Burnett made a will and appointed the plaintiff the executor, and then died in 1850. Thereupon the defendant took Hasty and one of the horses into his possession, alleging that Mrs. Burnett was entitled to them for her life only under her husband's will, whereas the plaintiff claims that they belonged to her absolutely. To determine the controversy this action was brought, and it was agreed, if the court should be of opinion for the plaintiff, that there should be judgment for him as therein particularly mentioned; but that if the opinion should be to the contrary, there should be judgment of nonsuit. There was judgment in the Superior Court for the plaintiff in respect both to the slave and the horse, and the defendant appealed.

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

RUFFIN, C. J. The Court holds that the widow took for her life only. All the gifts to her are in one item, or clause, and there is no word of gift in it, but "loan" in the beginning. That, to be sure, is improperly used as a verb, but it is the vulgar use of it among the illiterate instead of "lend," and the sense is very plain here. It applies to all the subjects of the bounty to the wife. The argument for the plaintiff is that the language used in respect to this girl and the horses amounted to independent and, therefore, absolute gifts. But besides the cir-
(94) cumstance just noticed, that there is no word of gift in reference to these things in particular, there are the facts that those parts of the clause are connected in each case with what precedes them by the word "also"—that is, "in the same manner"—and showing that the wife was to take them as she did the negroes given by name. This is rendered clearer upon the will, because in the same clause the land is afterwards given to the wife in a manner precisely similar to that of the gift of the girl to be chosen by her—that is, by the connecting adverb "also" —and without applying any word of gift or loan to the land in particular, the words being "also all my cleared land and as much of my woodland as she may think proper." Yet in the conclusion of this very clause, after giving over the negroes lent to the wife to four grandchildren, the testator adds, "also the land loaned to my wife, at her death, I wish to be divided" between two of these same grandchildren. This is a plain declaration that "loan" in the first of the clause was

understood by the testator as reaching the land, and consequently it relates to and controls all the gifts made to the wife in that clause and limits them to her life. The plaintiff therefore has no title to the slave Hasty, who is included with the others in the gift over to the four grandchildren. Nor has he a title to the horse, for although it is not limited over specifically after the death of the wife, and although it be true that a loan for life of a personal chattel is a gift for life and, without more, passes the whole property, yet it has been held that a residuary clause operates as a limitation to the interest of the tenant for life and passes it over as effectually as if there had been an express limitation over of the specific thing. *Jones v. Perry*, 38 N. C., 200; *Speight v. Gatlin*, 17 N. C., 5; *Saunders v. Gatlin*, 21 N. C., 86.

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

Cited: Robertson v. Roberts, 46 N. C., 76, 77; *Faison v. Moore*, 160 N. C., 150.

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(95)

WILLIAM B. WHITEHEAD v. BURWELL REDDICK.

Where an agreement purported to be between A. B. "for and on behalf of the Albemarle Swamp Land Company of the one part" and B. R. of the other part," and stipulated that the party of the second part should "get on the land of the party of the first part" a certain quantity of lumber and deliver it, etc.; and in conclusion it is said "in witness whereof, A. B. for and on behalf of the party of the first part, being the Albemarle Swamp Land Company," and B. R. as the party of the second part, have hereunto set their hands and seals, and the agreement was signed by A. B. for and in behalf of the Albemarle Swamp Land Company": *Held*, that this was a contract between the company and B. R., and that A. B. could support no action for a breach of it in his own name, but that the action must be in the name of the company.

APPEAL from *Caldwell, J.*, at BEAUFORT Spring Term, 1851.

Covenant. Plea: *non est factum.* The instrument is in the following form: "Know all men by these presents, that William B. Whitehead, for and on behalf of the Albemarle Swamp Land Company of the one part, and Burwell Reddick and Willis S. Reddick on the other part, do enter into the following agreement: The party of the second part agree to get on the land of the party of the first part, near Plymouth, N. C., the following kinds of lumber, and deliver the same on board such vessels as Shell Landing as the party of the first part may send for the same, to wit, 500,000 to 700,000 juniper shingles of the best quality, to be 30 inches long, etc." (Then describing other kinds of shingles and

staves and juniper bolts.) And the said party of the first part agrees to pay to the party of the second part for each and every thousand shingles so got and delivered $10; for each and every thousand staves $12, etc. The said lumber to be considered as received by the party of the first part when delivered on board such vessels as may from time to
(96) time be sent for it, and payment made on presentation of the captain's receipt or bill of lading, subject to deductions for such as may be thrown out as cullings when the said lumber shall be sent to market. All the foregoing timber to be gotten on or before the first of January, 1848, at which time the getting or making is to cease if desired by either party.

"In witness whereof, William B. Whitehead, for and on behalf of the party of the first part, being the Albemarle Swamp Land Company, and Burwell Reddick and Willis S. Reddick, as the party of the second part, have hereunto set their hands and affixed their seals, this 23 June, 1846.

"W. B. WHITEHEAD, (SEAL)

"For and on behalf of the Albemarle Swamp Land Company.

"B. REDDICK, (SEAL)

"W. S. REDDICK. (SEAL)"

On the trial it was objected by the defendant that Whitehead could not maintain an action on the agreement in his own name, but that it ought to have been brought by the Albemarle Swamp Land Company, which, it was admitted, was a copartnership consisting of the said Whitehead and five other persons. Of that opinion was the court, and the plaintiff submitted to a nonsuit and appealed.

J. W. Bryan for plaintiff.
Donnell for defendant.

RUFFIN, C. J. The natural supposition is that in contracts made by agents the stipulations are by and with the principals. Yet as agents may bind themselves for their principals, and as the language of agreements is often inexplicit, it frequently happens that it is not easy to determine whether the contract is that of the agent personally or of the principal exclusively. In this case, however, there is no difficulty of that sort. The instrument purports to be between two parties, and only two; and the question is, Whitehead or the Land Company is one
(97) of these two. Perhaps, from the structure of the sentence comprising the premises, the character of the instrument in this respect might be deemed somewhat equivocal. But the first stipulation contained in the next sentence speaks explicitly. It is that the defendants "agree to get on the land of the party of the first part" the lumber

specified. The defendants were undoubtedly not to work on Whitehead's land, but on that of the company; therefore the company is here shown to be the first party to the contract. In the same manner it is seen in other parts that the timber is to be got for and delivered to the company and paid for by them, they being described all along as "the party of the first part." Moreover, in the conclusion of the articles, it is plainly declared that Whitehead does not execute them as being himself a party to them, but executes them as the deed of the company by saying that he does so "for and on behalf of the party of the first part, *being* the Albemarle Swamp Land Company." It is thus clear that the deed throughout calls the company the party of the first part, and hence the plaintiff is not exclusively that party, and the judgment must be

PER CURIAM. Affirmed.

Cited: Brown v. Bostian, 51 N. C., 3; *Bryson v. Lucas,* 84 N. C., 687.
Dist.: Savage v. Carter, 64 N. C., 197.

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(98)

ELIZA F. JONES v. JOHN JONES.

When the Superior Court, upon the facts submitted to and determined by them, refused a motion to dismiss a guardian: *Held*, that an appeal could not be taken from their decision.

APPEAL from *Caldwell, J.*, at JONES Spring Term, 1851.

Motion to remove the defendant from the guardianship of the infant children of Jonas Jones, deceased. The plaintiff is the mother of the wards and the defendant their grandfather. In the county court the judgment was that the defendant be removed and the plaintiff be appointed in his place. From this decision the defendant appealed to the Superior Court, where a motion was made by the counsel of the plaintiff to dismiss the appeal on the ground that the defendant had no right to appeal. This was refused, and the plaintiff then insisted that the order of the county court removing the defendant from his guardianship ought to be confirmed unless the defendant showed that there was no error in law or in fact in said order. This was denied by the court upon the ground that the trial in that court was *de novo*. A motion was then submitted by the defendant to dismiss the proceeding for error in the rule and notice. This was overruled by the court. The case states that "then the court proceeded to hear the whole matter upon evidence and witnesses introduced in court. And after hearing the whole matter, the court reversed the judgment of the county court removing the defendant

(99) from the guardianship of the infant children and declaring that he was the proper person to be their guardian, and directed a *procedendo* to be issued to the county court. Whereupon the plaintiff appealed to this Court.

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

NASH, J. For the reasons set forth in the case of *Bagley v. Wood, ante,* 90, without examining into the testimony upon which the Superior Court acted, which we have no power to do, the orders of said court are affirmed upon the ground that we have no power to revise a discretionary judgment of the Superior Court except for error in law. Here none is shown.

PER CURIAM. Affirmed.

(NOTE.—The same point decided at this term in the case of *Leavitt v. Etheridge,* from Currituck.)

STATE v. WILLIAM C. WHITFORD.

A person who is exempted by law from serving on juries is not bound to serve on a *special venire.*

APPEAL from *Caldwell, J.,* at CRAVEN Spring Term, 1851.

The defendant was summoned as juror under a special writ of (100) *venire facias* issued by the judge of the court according to the provisions of the act of the Assembly, Rev. Stat., ch. 35, sec. 17. The writ was issued on Wednesday of the court, in an indictment for grand larceny, and the defendant by virtue of the writ was summoned to appear as a juror on Thursday of the same term of the court. On his appearance he proved that he was at the time of the summons, and still continued, an acting member of an incorporated fire company in the town of New Bern by the name of the Atlantic Fire Company No. 1. The defendant produced in evidence the private act of Assembly incorporating the said company 1846-7, ch. 163, and also an act of Assembly 1848-9 in relation to the said company, which was in the following words: "The members of the aforesaid fire company, while they continue to act as such, shall be exempt from serving as jurors either in the county or Superior Courts." It further appeared that the said fire company had complied with all the requirements of the act of incorporation. The defendant claimed that he was exempt from serving as a juror.

The court was of opinion that he was not exempt. Thereupon the defendant refused to serve, and was adjudged by the court to pay a fine of $5. From this judgment the defendant appealed.

Attorney-General for the State.
Strange and Dobbin for defendant.

NASH, J. The case presents the single question whether the defendant was bound to attend the Superior Court of Craven to serve as a juror upon a special venire. The defendant alleges that he was not so bound, for the reason that he was a member of the Atlantic Fire Company in the town of New Bern, and was then acting as such. The company was incorporated in 1846 and in 1849 by a public act, the members of that company, while they continue to act as such, (101) are exempted "from serving as jurors either in the county or Superior Courts." The defendant was regularly summoned and refused to serve.

The words of the act are sufficiently broad to embrace the defendant's case. It is alleged, however, that it does not come within its meaning. We are referred to *S. v. Hogg*, 6 N. C., 319, and to *S. v. Williams*, 18 N. C., 303, recognizing it. The defendant in the first case was a commissioner of navigation, and by the act of 1807 was exempted from serving on juries. He was summoned to attend the Superior Court of New Hanover as a tales juror; and refusing, under his exemption, was fined and brought his case to the Supreme Court, when the judgment of the court below was affirmed upon the ground that the act of 1807 did not extend to tales jurors, but that the exemptions stated in it meant from serving on the original panel. The reasons assigned are that these exemptions are not intended as privileges or compensation to the party unless so expressed in the act. "So far, therefore," concludes the Court, "as serving on a jury does not interfere with their public avocations, they are still liable to be called on for that service." And it is because a talesman must be taken from the bystanders at the court that they may be summoned, as his being a bystander proves that he was not then on official or professional duties which required his attention. Do these reasons apply to an individual summoned to serve on a special *venire?* It is thought not. It is true a special *venire* is not the original panel, and the jurors are summoned only to try prisoners capitally indicted; yet they are to be taken from the body of the competent citizens of the county liable to be summoned while they are engaged in the pursuit of their ordinary business while at home at a distance from the courthouse, bound to attend under the same penalties that compel the presence of the original panel, and bound as the latter are "to attend from day

(102) to day until discharged by the court." There is little if any similarity between the talesman and the special *venire* juror. The former is bound to attend only on the day on which he is summoned, and upon its close, if not impaneled, he stands discharged and may, without any leave of the court, depart to his home. There is no reason, then, furnished by *S. v. Hogg* why the exemption contained in the act of 1849 should not cover the defendant's case. The duties which he as a member of the Atlantic Fire Company has to perform are highly important to the community, and to their due performance a regular train of drilling and exercise is necessary; and at any moment, as well in the day as in the night, the services of the company may be needed. As the language of the act of 1849 embraces the defendant's case, and no good reason, so far as we can perceive, exists why he should be deprived of the privilege therein expressed, we are of opinion that there is error in the judgment appealed from, and that he was entitled to his discharge.

PER CURIAM. Reversed.

Cited: S. v. Willard, 79 N. C., 662; *S. v. Cantwell,* 142 N. C., 614.

(103)

STATE v. RANDALL PRESNELL.

It is not a sufficient justification for a person who does an unlawful act to show that he did not believe it unlawful. When the act is unlawful and voluntary the *quo animo* is inferred necessarily from the act itself.

APPEAL from *Bailey, J.,* at RANDOLPH Spring Term, 1851.

Indictment for selling spirituous liquor to a slave, contrary to the statute. On not guilty pleaded, the defendant was convicted and fined a small sum, and he appealed. There was evidence on the trial that the defendant kept a shop in Randolph County, on the side of a public road leading from the upper country to Fayetteville, and that in the evening of a day in December, 1849, John Tapscott and another person came with their wagons near to the shop and stopped for the night in the road, and that Tapscott had with him his slave Nelson, who drove his wagon. About 8 or 9 o'clock at night the defendant went from his dwelling-house to the shop with three of his neighbors to do some business for them, and while they were in the shop Nelson went in and asked the defendant whether he had spirits for sale, and upon being answered in the affirmative he asked for a quart, and the defendant drew it and delivered it to him and received the price in the presence of three white men. On the part of the defendant, Tapscott was then examined, and he stated that Nelson was a confidential and trusty servant and for

some years had driven his wagon and gone trips to different and distant markets by himself, and that he was usually furnished with money and authorized to provide necessaries, such as provisions for himself and horses, shoeing the horses, repairing the wagon, and the like; that during the day on which they got to the defendant's there was a (104) cold rain, and Nelson had asked him for a dram, and he told him that when they met with any spirits he should have some; that he did not know that Nelson had gone for the spirits, but that the next morning Nelson told him he had purchased it and brought him the jug containing it, which belonged to Nelson, and that he and his companion drank some of the spirits, also Nelson and another slave who was with the other wagon, and that in the course of the day one of his horses was taken sick and he used the residue of the spirits in drenching him, and then or afterwards refunded to the negro what he had paid for the spirits. This witness, being further examined, stated also that he had never given Nelson any authority to buy spirits for him, nor expressed a wish that he should, and that he did not know that the defendant kept spirits for sale or that Nelson had gone into the shop until informed thereof the next morning, as before stated.

The counsel for the defendant moved the court to instruct the jury that a slave might be his master's agent to purchase spirits, and that there was evidence upon which the jury might find that Tapscott had constituted Nelson his agent to buy the liquor from the defendant, and that he bought it for his master. But the court refused to give the instruction as prayed and informed the jury that although a master may make his slave his agent to purchase spirits for him, yet there was no evidence that Nelson was the agent of his master to make the purchase from the defendant, or that it was made for the master.

The counsel for the defendant then insisted to the jury that the defendant had reason to believe, and did believe, that Nelson was buying the liquor for his master; and he furthermore moved the court to instruct the jury that if they found the defendant believed the slave had been sent by his master to purchase the spirits for him he ought not to be convicted, although it turned out that he was mistaken (105) in that belief and the slave had no authority from his master to buy for him. But the court advised the jury that the defendant acted at his peril in selling the spirits to the slave, and therefore, although he might have believed that the negro was acting as the agent of his master, they ought to find the defendant guilty if in point of fact he had not any authority from his master to make the purchase for him. Verdict and judgment for the State and appeal by the defendant.

Attorney-General for State.

Mendenhall and Morehead for defendant.

RUFFIN, C. J. There was no error in holding that there was no evidence of an authority to the slave to act as the master's agent in buying the spirits. To prevent imposition on trades-people, it is a rule that one who habitually sends his servant to shops and pays for the articles taken up by the servant is bound to pay for all thus taken up, though some of the articles do not come to his use, but are converted by the servant. But that rule has no application here, for it does not seem that these parties ever had any dealings before, or even an acquaintance, or that the defendant knew the negro as being the slave or the servant of Tapscott. If the liquor had not been paid for, but bought on the credit of Tapscott, he certainly would not have been bound to pay for it. But it was not even got in his name, but when the negro asked for it the defendant, without asking who wanted it or who he was, at once sold it to him. There was no semblance of agency in the matter. But if there had been any presumption of it from the circumstances it is directly repelled by the express testimony of the master to the contrary.

The Court is also of opinion that there was no error in the second instruction given. The sale of spirituous liquor to a slave is apparently illegal, and it is incumbent upon one who does the act to justify (106) it by showing that was done under such circumstances as render it lawful. He must show not merely that he thought that such circumstances existed, but that they actually existed. It was said that when one believes he is not doing an unlawful thing there is not the guilty mind necessary to constitute a crime. But that is not correct. When the act is unlawful and voluntary, the *quo animo* is inferred necessarily from the act. If a piece be brought to a printer for publication which is injurious to the character of another, and the author make such representations and adduce such proofs in support of the charges as induce the printer to believe that they are all true and may, therefore, be lawfully published, yet the publication will be criminal or not as it may happen that the charges may be true or false in point of fact, for by making the publication in derogation of another, the printer holds out and undertakes that the charges are true. Therefore he must maintain their actual truth. It is plain that his belief of their truth does not then denote that innocence of intention in making the publication, which can prevent it from being a crime, if they prove not to be true; and there is, therefore, in that case the guilty mind spoken of. So if one trade with a slave upon the faith of an order or permit in writing in the name of the owner he must take care to see that it is genuine, for if it be not genuine, but a forgery, then the authority required by law for dealing with a slave is wanting and the party would be guilty under the act. Upon that point every person must necessarily take the risk of judging for himself. It must be the same in this case, for the act being

against the policy and the letter of the law can only be made innocent by showing facts which in law justify it, and not by showing merely the probability or the party's mistaken belief of the existence of those facts. Those circumstances might well affect the degree of punishment, and seem to have had their effect in reducing the fine here to almost a nominal one. But they could not prevent the act from being a violation of the law, for which the party was liable to conviction. The (107) instruction prayed would, therefore, have been properly refused upon the matter of law if in fact the defendant had believed that the negro was buying the liquor for his master. But in truth it might and ought to have been refused because there was no evidence to raise the point, since, as has been already observed, there was no semblance of an agency in the transactions for the reasons mentioned in disposing of the first exception. A party has no right thus to ask for an instruction upon an abstract proposition which, upon the evidence, has no application to the case in hand.

PER CURIAM. Affirmed.

Cited: S. v. McBrayer, 98 N. C., 624, 628; *S. v. Williams,* 106 N. C., 649; *S. v. Kittelle,* 110 N. C., 567, 587; *S. v. McDonald,* 133 N. C., 685; *S. v. Craft,* 168, N. C., 212.

(108)

ISRAEL H. JUDGE v. STEPHEN M. HOUSTON.

1. Where A. lives upon land together with B., who claims the title, and the land is sold under an execution against A. in an action of ejectment by the purchaser under the execution brought against A., the latter cannot protect himself from the action by setting up the title of B.

2. But, by *Pearson, J.*, if B., in such a case, after judgment, can satisfy the court by proper affidavits that he had a *bona fide* claim of title and is in possession, the court has power to order the writ of possession not to be issued until the plaintiff brings an action of ejectment against him.

3. A sheriff is not bound, like a constable, to any particularity in his return of a levy on a *fi. fa.*

4. Although a deed is made to include more land than was sold it is not on that account fraudulent, but it is only void for the excess.

APPEAL from *Ellis, J.*, at DUPLIN Fall Term, 1850.

Ejectment, for three tracts of land, but abandoned his claim for one tract, No. 3. He claimed title to the said lands as purchaser at sheriff's sale under execution against the defendant. To prove title in his lessor he offered a deed of bargain and sale from the sheriff of Duplin County

purporting to convey the premises in question, which recited that the said land had been sold under a *fi. fa.* running against the property of the defendant. He then offered in evidence the *fi. fa,* recited in the deed against the defendant and in favor of one William D. Pearsall, which was duly returned into the office with the following endorsement: "Levied this execution upon the lands of Stephen M. Houston on the east side of the North East River, adjoining the lands of Stephen M. Grady and others, and, after due advertisement, sold the land levied on on the (109) third Monday in March, A. D. 1840, being the sixteenth day of the month, at which time and place Israel H. Judge became the last and highest bidder at the sum of $150, which is applied to this execution. "JOHN E. HUSSEY, *Sheriff,*

"By JAMES MAXWELL, D. S."

The plaintiff further introduced the record of a judgment in the court of pleas and quarter sessions for said county in favor of said Pearsall and against the defendant, and upon which the said *fi. fa.* was regularly issued.

The plaintiff then introduced a witness who testified that the defendant was living upon Tract No. 1 set forth in the declaration, commonly called the home tract, at the time of the service of the said declaration, and that he did then, and had several years before and since that time, cultivated Tract No. 2, as claimed, in turpentine, and used the standing timber for procuring turpentine; that the said tract did not adjoin No. 1, but was two miles distant.

The defendant objected to the recovery of the plaintiff, first, because two sisters of the defendant were living upon the *locus in quo* at the time of the service of the declaration in ejectment, claiming title in the same; that the defendant was merely living with them upon the premises at the time of the sale, and that they had a life estate in possession in the said premises and were still living. But the court refused to hear evidence to sustain this position, for the reason that this defendant, being the defendant in the execution, was estopped from denying title in himself at the time of the sale, and that living then (at the sale) upon the premises, and continuing there until the service of the declaration, was estopped from setting up possession in his said sisters in the present action.

The defendant objected, secondly, that the levy was too vague in its terms and too uncertain in its description to include No. 2, which (110) was two miles distant from the other, and did not adjoin the lands of Stephen M. Grady, as admitted, although it lay upon the east side of the North East River and in the neighborhood of Stephen M. Grady, and that the said tract not being included in the levy, no title

passed to it by the sale and sheriff's deed. The court reserved the point.

The defendant objected, thirdly, that the sheriff's deed was fraudulent and void in the following particulars: First, the deed included more land and greater estate than were sold; secondly, more land was sold than was levied upon. To sustain this position the defendant examined one Wallace, who testified that he was present at the sale under the execution and heard the deputy proclaim that he would sell only the tract of land on which the defendant lived at the time, which is the same as Tract No. 1 in the declaration, and that he reserved the life estate of his sisters. The witness thought the lands worth $1,000.

In this connection, James Pearsall was offered by the defendant, who swore that he was present at the sale and heard the officer offer for sale "the lands of Stephen M. Houston." These were the words used by the officer. He said he heard it rumored among the bystanders that there was an encumbrance upon the lands, but did not hear it as coming from the sheriff's officer. Maxwell, who made the sale, was then offered by the plaintiff to prove the *bona fide* character of the sale, together with the circumstances connected with the levy and the sale, and to explain them. This witness was objected to by the defendant upon the ground that his action in the matter was set forth in the return upon the execution and sheriff's deed and he could only be heard to speak through them. The court overruled this objection, and the witness was examined. He swore that he was the officer who made the levy and sale; that he was not at the time acquainted with the exact location of the defendant's lands; he understood they were situated on the east side of the North East River, in the neighborhood of Stephen M. Grady, (111) and adjoining him; that it was all wild or woodland except the tract on which he lived, and that tract did adjoin the said Grady, but the other did not, as he had subsequently learned. That when he made the levy which was endorsed upon the *fi. fa.* he intended to levy upon all the interest of the defendant in all the lands he had in the neighborhood. That he sold all the lands in dispute, and which were before levied upon, and were the same as those set forth in the sheriff's deed offered as evidence. That he made no reservation of any life estate of the defendant's sisters, nor any other reservation, and that he never heard of that or any other encumbrance upon the land until a subsequent period. That he sold the land at the courthouse with a large number of persons present and to the highest bidder.

The court charged the jury that to enable the plaintiff to recover it was sufficient for him to show a judgment against the defendant, an execution thereon with a levy and sale of the lands claimed, and a sheriff's deed to himself, and possession in defendant, at the time the declaration was served. That possession was made out if they believed the de-

fendant lived upon one tract of land and used the other, by way of cultivating turpentine upon it, or exercised ownership over it by any other acts or uses. Upon the question of fraud the court charged the jury that any combination between the sheriff and plaintiff, as purchaser, calculated to injure the sale of the property would avoid the deed and all other proceedings under the execution, and no title would pass to the plaintiff thereby. That any combination to include more land in the deed than was sold would render it void. That the deed could convey title for no more and no other lands to the plaintiff than those actually sold at the sheriff's sale. The jury returned a verdict for the plaintiff for both tracts. The defendant moved and obtained a rule for a new trial for misdirection to the jury and admission of improper tes-
(112) timony and exclusion of legal evidence, and because the court reserved the question relative to the levy, instead of leaving it to the jury as a question of fact. The court overruled these various exceptions, and being of opinion with the plaintiff upon the point reserved—that is, that the terms of the levy were not so vague as not to be capable of including the land in dispute, and considering the question as to whether the particular lands in dispute were included in the levy as having been passed upon as a question of fact by the jury—discharged the rule and gave judgment for the plaintiff, from which the defendant appealed.

D. Reid for plaintiff.

W. Winslow and Washington for defendant.

PEARSON, J. The lessor was a purchaser at sheriff's sale under a *fi. fa.* in favor of one Pearsall against the defendant. It was proved that the defendant was living on the land at the time of the sale, had been living on it for several years before, and was still living on it.

The defendant offered to prove that his two sisters had the possession at the time of the service of the notice, they being entitled to a life estate, and that he was living with them merely as their guest, without in fact having the possession or any title except the reversion. This evidence was rejected, and the defendant excepts. There is no error. *Thomas v. Orrel,* 27 N. C., 569, is directly in point. The defendant and his two sons were living together. It was held that "he had no right to assert title for them—or rather, to set up their title and their possession with him—to protect himself."

The action is for two tracts. No. 1 (as it is called in the case) was the tract on which the defendant lived. No. 2 was situated near No. 1, but did not adjoin it, and was cultivated for turpentine only. The levy endorsed on the *fi. fa.* is in these words: "Levied this execution

on the lands of Stephen M. Houston, on the east side of North (113) East River, adjoining the lands of Stephen M. Grady and others, and, after due advertisement, sold the land levied on," etc.

The defendant's counsel objected that the levy was too vague and uncertain in its description to include No. 2. This question was reserved. The plaintiff called the officer who made the levy to explain the position of No. 2 in reference to No. 1 to the lands of Grady and the North East River. This was objected to, but was received. For this the defendant excepts. The court decided the question reserved for the plaintiff. For this the defendant excepts. There is no error.

These points were made under a misapprehension of the nature of a sheriff's levy under a *fi. fa.* The defendant's counsel did not advert to the difference between such a levy which need not be returned and the levy of a constable which creates a lien must be returned and must have a certain degree of particularity so as to identify the land and enable the sheriff to know which land to sell under the *renditioni exponas*, and of which notice must be given. None of these things is required in reference to a levy by the sheriff under a *fi. fa.* It is not easy to perceive why a levy is required when the land is sold under the *fi. fa.*

The defendant insisted that the sheriff's deed was fraudulent and void because it included more land and greater estates than were sold.

One Wallace, a witness for the defendant, swore he was at the sale and heard the officer proclaim that he would sell only the tract of land on which the defendant levied, and that he reserved the life estate of the defendant's sisters. One Pearsall and the officer swore that all of the land in dispute was sold, and there was no reservation of a life estate. The court charged "that any combination between the sheriff and the plaintiff as purchaser calculated to injure the sale of the property would avoid the deed; and any such combination to include more land in the deed than was sold would avoid it. The deed could convey (114) title for no more and no other lands than those actually sold."

The defendant moved for a new trial because of *misdirection*. There is no misdirection of which he has a right to complain. The first proposition was uncalled for, because there was no evidence of a combination to injure the sale of the property. The second, unless qualified by the latter part of the sentence, is too broad, for although a deed is made to include more land than was sold, it is void only for excess. This, however, did not prejudice the defendant.

The only difficulty in law is in consequence of an *omission* to charge in reference to the alleged reservation of a life estate. There is no exception for this omission, and we are therefore obliged to infer either that the charge was satisfactory on this question or that the defendant

did not wish to raise the question before the jury, and did not object to the omission, being satisfied that the fact was against him.

We should have no doubt of the correctness of this inference but for the fact that the evidence in regard to the alleged reservation is stated, which was unnecessary. Such statements, however, are very common, and we cannot permit it to influence our decision. If the reporter did not omit a great deal of surplusage his books would be quite voluminous. The other two judges prefer to rest the first point upon the decision in *Thomas v. Orrel, supra.* It is proper for me to say, in that case collusion between the father and son is taken for granted, and I acquiesce in the decision upon the assumption that, after judgment in this case, if the sisters of the defendant can satisfy the court by proper affidavit that they have a *bona fide* claim to a life estate and are in possession, the court has power to order the writ of possession not to be issued until the plaintiff brings an action of ejectment against them.

(115) I think the court has this power, and put my opinion on the ground that awarding a writ of possession is no part of the original judgment in ejectment, but is a new incident superadded by the court in order to do complete justice, and is, therefore, under its control, so that, although an execution for the damage and cost necessarily follows the judgments, being what is demanded by the writ and declaration, yet the writ of possession may be refused if this "creature of the court" is likely to be made an "instrument of injustice." 3 Blackstone Com., 199.

If the court has not this power I should question the decision in *Thomas v. Orrel* that the plaintiff in ejectment entitles himself to judgment by showing that the defendant was "an occupant of the premises," if it was proven that he was living then as the guest or servant of the real owner, for when two are living in the same house the law adjudges the possession to be in the one who has title. *Gwyn v. Stokes,* 9 N. C., 235. Under the writ of possession it is the duty of the sheriff to put the defendant and *all other persons off of the land;* and if the writ issues in this case, the sisters of the defendant will, by process of the law, be turned out of "house and home" without an opportunity of being heard. It is true, they may by an action of ejectment regain the possession, but that cannot compensate for the inconvenience and injury resulting from the loss of it. Suppose this case in trespass against the sheriff, they can recover damages for the eviction (which I deny, for he does only that which the writ commands him to do), this will be but a poor consolation for the injustice inflicted on them by the order of the court, to which they are obliged to submit. I cannot bring my mind to the conviction that such oppression can be a legitimate consequence of the formal action of ejectment which, it is said, is "so molded and fashioned by the courts

as to do complete justice in every case." In *Bledsoe v. Smith*, 13 N. C., 314, it is held that a judgment against the casual ejector will be set aside, and if a writ of possession has been executed, a writ of (116) restitution will be issued when it is proven that the notice has not been served, and of course the same will be done when it has been served on one who is *not the person in possession*. It is a settled rule in this State not to enter judgment against the casual ejector unless it be proven that the person on whom the notice was served is the person in possession. In the above case the court remarks, "If the writ of *hebere facias possessionem* is issued, every person in possession claiming title to the land who might have a good title to it would be turned out of possession. This would be iniquitous and oppressive and a gross violation of the principle that no man shall be deprived of his property without a hearing, since it is, in order that the fictions in this action shall do no wrong, that the courts will not permit judgment to be entered against the casual ejector unless it is made to appear that notice has been given to the tenant in possession. The affidavit should be positive that the person on whom the notice has been served was the *tenant* in possession, or acknowledged himself to be so. This rule was adopted to protect *third persons*, and if by any means a judgment by default is entered and a third person is turned out of possession, upon its being made to appear that the person served with notice was not the person in possession, the court will order a writ of restitution to prevent the rule from being evaded. The right to order restitution necessarily implies the right to prevent the recovery in the first instance, and the person in possession is permitted to object to the judgment against the casual ejector and to prove error contrary to the admission of the person served with notice that he is not the person in possession.

Our question is a new application of the same rule to a different state of facts. Suppose the person served with notice admits himself to be in possession, and defends the action, and judgment is given against him. Are the rights of a third person to be affected by that circumstance? and does he thereby lose the protection of the rule? If (117) so, on what ground? It is said, "why did he defend?" and collusion will be implied from the fact of his doing so. It seems to me that is a *non sequitur*. The person in possession is not presumed to have control over his actions, and the right to say "you must not defend, for I will thereby be precluded from showing my title, and that I am the person in possession."

So far from furnishing an inference of collusion, it seems to me the inference is the other way—that the plaintiff is attempting a fraud on the court. For instance: In this case the sisters of the defendant could not prevent his making defense, whereas the plaintiff had control over

the process, and might have had the notice served on them, so as to allow them to be made defendants; and by not doing so, he gives an indication that he preferred contending with one *"whose hands are tied,"* rather than with those who are at liberty and can make a full defense. At all events, if there be a presumption of collusion, it cannot be conclusive so as to exclude the sisters of the defendant from showing, after the judgment against him, that they have a *bona fide* claim and are in possession, and that he was living with them as their guest or servant, and consequently that a writ of possession ought not to be issued by which they would be turned out without having had an opportunity to prove their title. If this be not so, the result of our cases is that if my land is sold under an execution against my overseer, and he defends an action of ejectment, I will be turned out of possession, with the consoling assurance that I may bring ejectment and regain it. Unless the Court can protect third persons in the way pointed out, this strange corollary necessarily follows, from the nature of the action of ejectment and the doctrine, that the purchaser at sheriff's sale, as against the defendant in the execution, is entitled to judgment by showing an
(118) execution, a sale, a sheriff's deed, and that the defendant was *living on the land.*

PER CURIAM. Affirmed.

Cited: Jackson v. Jackson, 35 N. C., 161; *Sinclair v. Worthy,* 60 N. C., 117; *McLennan v. McLeod,* 75 N. C., 65; *Farmer v. Willard, id.,* 402; *Edwards v. Tipton,* 77 N. C., 226; *Edwards v. Phillips,* 91 N. C., 359; *Springs v. Schenck,* 99 N. C., 556; *Farrior v. Houston,* 100 N. C., 373; *Perry v. Scott,* 109 N. C., 383, 384; *Ferguson v. Wright,* 115 N. C., 570.

JAMES WILLIAMS AND WIFE v. SUSAN C. EDWARDS.

In a writ of error *coram nobis*, only such errors in fact can be assigned as are consistent with the record before the court in which the case was tried.

APPEAL from *Caldwell, J.*, at GREENE Spring Term, 1851.

Motion in the Superior Court of Greene for a writ of error, *coram nobis*, to reverse a judgment of that court for error in fact. On affidavits, the case was this: Richard Edwards gave his bond to the plaintiff, and after the obligor's death intestate suit was brought thereon in the county court against his administrator. He pleaded fully administered, and the plaintiff confessed the truth of the plea and signed judgment for the debt, and then sued out a *scire facias* against Susan C. Ed-

wards as heir at law to have execution against the real estate descended. The *scire facias* recited the former suit, and that the administrator pleaded fully administered, and the confession of the plea by the plaintiff. The heir pleaded thereto, among other things, *nul tiel record*, on which issue was joined. After a trial in the county court the case went by appeal to the Superior Court. Through the inadvertence of the clerk, as now suggested by the plaintiff, the transcript from (119) the county court did not set forth the above mentioned plea, nor the plaintiff's admission that the administrator had fully administered; and on that ground the court adjudged that there was no such record, and gave judgment for the costs against the plaintiff. The plaintiff further swears that the original record in the county court contains the matters so recited in the *scire facias*, that the debt is justly due, and that there are no personal assets to satisfy it.

The court denied the motion, and the plaintiff appealed.

Rodman for plaintiff.
J. W. Bryan for defendant.

RUFFIN, C. J. It is not to be considered whether there be error in law in the judgment, for if there were such error it could not be corrected by writ in the same court. Moreover, the motion is founded exclusively on an alleged error in fact. A writ of that kind can be had only when allowed by the court where the record is; and if such a case on appeal will lie to this Court, we must say, in our own opinion, it was right not to allow it in this instance. The only error which it is proposed to assign is in a matter of fact directly repugnant to the record. The party wishes now to show that in truth there is such a record, in contradiction to the finding of the fact by the court that there was not such a record. An averment of fact against the record cannot be heard in a case of this kind more than in others. Bac. Abr., *Error*, K. 3. Only such errors in fact can be assigned as are consistent with the record. When an infant, for example, is sued, there is nothing to enable the court to see that he is or he is not an infant. The law considers that, as an infant, he has not discretion to choose an attorney, and therefore will not let him appear by attorney, but requires the court to appoint a fit person his guardian to make defense for him. As (120) the court does not know the defendant's infancy, it is the part of the plaintiff to ascertain and make known the fact, so as not to allow the court to decide against a person under disability, for whom the full defense may not have been made which the law intends. For that fault the plaintiff's judgment must necessarily be reversed, so as to let in the other party with all the advantages to which the law entitled him; and,

therefore, the defendant may aver the fact of his disability which stands well with the record, in order that he may have the benefit of a legal defense. It is the same when a *feme covert* is sued without her husband. But if in those cases issue be joined on the questions of the defendant's infancy or coverture, and it be found that the party is of full age or not a *feme covert,* but *sole,* we apprehend that the verdict must of necessity conclude all parties on that point as on any other put in issue and found, and that an averment to the contrary could not be allowed. If it could, it will render the litigation interminable, as each party might say from time to time that then he or she had fuller proof, which would establish the fact to be contrary to the last finding. But the present case is much weaker than those mentioned. It is not one in which it is alleged that the court wrongfully administered the law for want of information, which the plaintiff ought to have given, as to a fact from which the defendant would have derived advantage had it been brought to the notice of the court. But here the allegation is that the court erred in finding a fact against the plaintiff on which the parties were at issue, contrary to the truth, and even that, not because the finding was not right according to the proof then before the court, but by reason simply that he can now produce evidence sufficient, he supposes, to establish the fact as then alleged by him. It is in reality an attempt in a novel way and at a remote period to get a new trial
(121) for surprise. The plaintiff's proper course would have been to suggest a diminution of the record and had the defect supplied before the trial by *certiorari,* or, after the trial and at the same term, on account of the surprise, to have moved for another trial. The present attempt cannot be countenanced.

PER CURIAM. Affirmed.

Cited: Massie v. Hainey, 165 N. C., 178.

STATE v. MARTHA JENKINS.

Although a bastard be born in one county, yet if the mother and child afterwards remove to another county, and there acquire a residence before proceedings in bastardy are had against her, those proceedings must be in the latter county, which is alone responsible for the maintenance of the bastard.

APPEAL from *Manly, J.,* of RICHMOND Spring Term, 1851.

This was a proceeding under the "Bastardy Act," instituted in the county court of Richmond. It appeared that the child was born in Rich-

mond County; that the mother and child removed to Montgomery, and there resided more than two years before this proceeding was commenced. The defendant therefore moved to dismiss the prosecution for the want of jurisdiction in the county court of Richmond, but the court refused the motion and gave judgment against the defendant, who appealed therefrom. The Superior Court affirmed the judgment of the county court, and the defendant appealed. (122)

Attorney-General for State.
J. W. Cameron and Banks for defendant.

PEARSON, J. The mother and her child had acquired a settlement in the county of Montgomery at the time this proceeding was commenced. The county of Richmond was not chargeable, and therefore had no right to require an indemnity. There is error. The point is settled by *S. v. Roberts*, 32 N. C., 350.

PER CURIAM. Reversed.

Cited: S. v. Elam, 61 N. C., 463.

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(123)

DEN ON DEMISE OF SUSAN C. MOORE v. DAVID PARKER.

1. A. devised to his son a tract of land "for and during his natural life," and after his death "to the heirs of his body, to be equally divided between them, to them and their heirs forever"; and if he dies without heirs of his body living at the time of his death, then to his daughter: *Held*, that under this devise the son took only a life estate.

2. The son having only a life estate, when he sells and conveys the land with warranty in fee, this warranty does not bar nor rebut the purchaser.

3. The presumption of death arising from the absence of a party for more than seven years is not removed by proof of a rumor during that time of his being alive, which rumor, upon investigation, turns out to be without foundation.

APPEAL from *Dick, J.*, at HERTFORD Spring Term, 1851.

Ejectment. The case was as follows: The land formerly belonged to one John S. Moore, who died in 1827, having first made and published his last will in form to pass real estate, which was duly proved and recorded. And in the said will the said land was devised as follows: "I give, devise, and bequeath to my son, Adolphus Edward Moore, for and during his natural life, the three following tracts of land to wit: (Here the testator describes the lands.) I also give and bequeath to my son Adolphus Edward aforesaid, for and during his natural life, one feather bed and furniture, my large brandy still, and two mahogany tables. The

above property, both real and personal, I give to my son Adolphus aforesaid for and during his natural life; and after his death, I give the above property, both real and personal, to the heirs of his body lawfully begotten, to be equally divided between them, to them and their
(124) heirs forever. But in case my son Adolphus Edward should die without such heirs of his body lawfully begotten, living at the time of his death, then and in that case the lands given to him as above described to my daughter, Sally Matilda aforesaid; and should she die without heirs of her body begotten, living at the time of her death, then I give the above described land to all my children living at the time of her death, to be equally divided between them, to them and their heirs forever"; which is all in the will that relates to the land in controversy.

Adolphus E. Moore, to whom the land was devised as aforesaid, took possession of the land after the father's death, and continued that possession until the year 1837, when, by his deed of bargain and sale with warranty, he conveyed the same to one Alfred W. Moore, and thence by successive deeds the title was transmitted to the defendant before the date of the demise in the plaintiff's declaration.

It was further in proof that the said Adolphus E. Moore left the county of Hertford in December, 1841, and the witnesses for the plaintiff, to wit, the brother of the said Moore, the husband of his sister, and the brother of his wife, and with whom she had resided ever since the said Moore left this State, stated that they had never heard from him since 1842, and the brother stated that in 1842, and prior to November, he had received two letters from the said Adolphus, dated in Winyaw District, South Carolina, and that he subsequently received another letter from Charleston, South Carolina, dated November, 1842, but that he had never heard from him since, though he had written to both places to have inquiries made, and he and the husband of the sister of said Moore stated that they had requested persons traveling South to inquire for him, but had never heard from him.

The defendant then proved that one John D. Jenkins, since deceased, while traveling in South Carolina in 1845, wrote to his brother in Hertford County that he had heard of the said Moore, and that he was in South Carolina.

(125) The plaintiff then proved by the brother and the husband of the sister of said Moore that on the return of the said Jenkins, having before heard what he had written, they called on him to ascertain what information he had on the subject, and were told by him that he had no other than this—that he had seen a man in South Carolina whom he did not know, who told him that he had heard of a man by the name of Moore residing in some village, he did not remember what, who was said to be a shoemaker, with a wife and three children. It was

further proved that the said Adolphus had no such trade when he left this State; and, also, that when he left this State he had a wife, who is yet alive, and that the lessor of the plaintiff was his only child, and that she is yet an infant.

The defendant's counsel insisted that, under the will of John Moore, the lessor of the plaintiff had no title to the land devised, so as to recover; and if that was not so, that there was not sufficient proof that the said Adolphus was dead at the time of the demise of the plaintiff's lessor.

By agreement, his Honor reserved his opinion upon the first point. And on the second he charged the jury that if the said Moore had been absent upwards of seven years, and had not been heard from, the law raised the presumption that he was dead, and that such presumption could not be rebutted by a report of his being alive, which when inquired into proved to be baseless and unfounded.

The jury returned a verdict for the plaintiff; and his Honor, by consent, ruled *pro forma* that under the said will the land passed to the plaintiff's lessor on the death of her father. And judgment was rendered accordingly, and the defendant appealed.

Bragg for plaintiff. (126)
W. N. H. Smith for defendant.

PEARSON, J. John Moore, who died in 1826, devised the land sued for to his son Adolphus for life, "and after his death to the heirs of his body, to *be equally divided between them, to them and their heirs forever*"; and if he dies "without heirs of his body, *living at the time of his death*," then to his daughter, Sally Matilda.

Adolphus took only an estate for life. The rule in *Shelley's* (129) *case* does not apply.

This point is settled by *Ward v. Jones*, 40 N. C., 400, where the matter is fully discussed and the cases reviewed. Indeed, this is a plainer case, for there no words of inheritance were added to the estate of the issue, and it was necessary to supply them by inference from the act of 1784, ch. 204, sec. 12. Here the words are added by the will. Then it was necessary to supply the words *"living at the time of his death"* by inference from the act of 1784; here the words are added by the will.

Adolphus Moore having only an estate for life, his warranty does not bar or rebut the lessor of the plaintiff, for she claims by purchase and not by descent. By the Rev. Stat., ch. 43, sec. 8, it is provided that all warranties made by a tenant for life, descending or coming to any person in *remainder* or reversion, shall be void and of no effect. This is a reënactment of 4 Anne, ch. 16, sec. 21.

We also concur with his Honor upon the question as to the presumption of death when one has been absent or not heard of for more than seven years. The circumstance that during the term there was a rumor of his being alive, which proved upon investigation to be wholly without foundation, tended rather to confirm than to weaken the presumption, for it thus appeared that diligent inquiry had been made after him.

PER CURIAM. Affirmed.

Cited: Southerland v. Stout, 68 N. C., 450; *Dowd v. Watson,* 105 N. C., 476; *Starnes v. Hill,* 112 N. C., 13; *Hauser v. Craft,* 134 N. C., 329.

(130)

STATE v. PEARCE W. YARRELL.

A proprietor of a mill who cuts a canal across a public road, whereby the passage along the highway is obstructed, and those who are in possession of the mill claiming under him and using the canal are liable to an indictment for such obstruction, the one for creating and the others for continuing the nuisance. But if a bridge is erected over the canal neither is indictable simply for suffering the bridge to be out of repair.

APPEAL from *Ellis, J.,* at MARTIN Spring Term, 1851.

Indictment was in the following words:

SUPERIOR COURT OF LAW. } Fall Term, 1850.
MARTIN COUNTY, }

"The jurors for the State, on their oath, present that on 1 September, 1848, there was, and from thence to the taking of this inquisition there hath been, and is now, in the county of Martin, over a water-course called the canal, a certain common public bridge in a highway in said county leading from Hamilton to Williamston, used by all the citizens of the State on foot and with their horses and carriages, to go, pass, repass, ride and labor at their free will and pleasure, and that the said bridge on the day and year, and during the time aforesaid, was and yet it very ruinous, dangerous, broken and in great decay for the want of amending and repairing the same, so that the citizens aforesaid, upon and over the said bridge, on foot and with their horses and carriages during the time aforesaid, could not, nor yet can go, pass, repass, ride and labor as before the said time they were used and accustomed to do, and still of right ought to do, without great danger of their lives and the loss of their goods, to the great damage and common nuisance of the citizens of the State upon and over the said bridge going, passing, repassing, riding and laboring as aforesaid.

"And the jurors aforesaid, on their oath aforesaid, do further (131) present that Pearce W. Yarrell, late of the said county of Martin, by reason of his tenure of a certain mill called the Canal Mill and the lands appurtenant thereto, situate in said county, ought to rebuild, repair, and amend the said bridge when and as often as it should or shall be necessary, to the evil example of all others in like cases offending and against the peace and dignity of the State. MOORE, *Atty.-General.*"

To which the defendant pleaded not guilty. On the trial the State proposed to show that many years ago a very small branch which needed no bridge across it, and which was not bridged, ran across the highway described in the indictment. That in the year 1800 one Williams built a mill upon the branch, and in order to supply it with water-power cut a canal across the road and directed the water from a large stream which was on the opposite side of the road and crossed the road several miles distant, where it was then and is now bridged. That the canal brought across the road such a quantity of water as to require a bridge to make the highway safe and convenient for travelers, and the proprietor of the mill and the said Williams put up a bridge across the canal where it crossed the road as soon as it was cut, and kept up the bridge by rebuilding and repairing it as long as he owned the mill. That the mill passed from Williams by mesne conveyance to several persons, who held it until the defendant came into possession, and that each of them while in possession had rebuilt and repaired said bridge as often as was necessary, except the defendant, who came into possession of the mill in 1845.

The defendant objected to the reception of this testimony, but it was admitted by the court.

The State proceeded to introduce other testimony, and upon all the evidence in the case the jury returned the following special verdict:

The jury find that in 1800, and ever since, there was a certain highway in the county of Martin leading from Hamilton to Williamston which crossed a small branch not requiring a bridge, and which (132) was not bridged. That one Williams built a mill down said stream, on the north side of the road, and in order to supply it with water-power cut a canal across the road at the channel and brought to the mill across the said highway a large quantity of water, which before that time found its way into a large stream on the south side of the road. That the quantity of water so brought along the canal was so great as to obstruct traveling along the highway, and made a bridge necessary at that place, which the said Williams immediately erected and kept up during his life. That after his death the mill was owned by one Cloman, who rebuilt and repaired said bridge as often as needed, until his death

in 1842, when it was rebuilt and repaired by his representatives, till the mill came, in 1845, by purchase at a sale under a decree of the court of equity of Martin County, to the possession of the defendant, or owner thereof, who ever since has continued to own, possess, and use the said mill. And the jury further find that the defendant, within two years next before the finding of the indictment, allowed said bridge to become out of repair, ruinous and dangerous to be passed by persons traveling over the same, which at all times since it was erected had been a part of said highway. They further find that at all times since the cutting of the said canal a bridge has been necessary over the same where it crosses the said highway. They also find that soon after the death of said Cloman the milldam broke, and the mill was not used for two years, and that said Cloman's heirs, on whom the mill descended, were infants, and continued such till after the sale aforesaid and purchase of the same by the defendant. But whether, upon the premises aforesaid, the defendant be guilty or not guilty of any offense, as charged in the bill of indictment, they say they are ignorant, and pray the advice of the court; and if, in the opinion of the court the defendant be guilty, then they find him guilty; and if in the opinion of the court the defendant be not
(133) guilty, then they find him not guilty.

Upon this verdict the court was of opinion that the defendant was guilty, and pronounced judgment accordingly, from which the defendant appealed.

Attorney-General for the State.
Biggs for defendant.

PEARSON, J. The defendant, without doubt, is liable to indictment for obstructing the public highway by means of the canal, which he uses and takes benefit of for the purpose of supplying water to turn his mill. The original proprietor of the mill was guilty of a nuisance in cutting the canal, and the defendant is guilty of a nuisance in *continuing to use it.*

It may be that if he is indicted for the nuisance he may attempt to excuse himself by proving, that for more than twenty years, he and those "whose estate he has" have had the benefit of this *easement* or privilege; but it will appear that the enjoyment of this privilege had a condition annexed thereto, to wit, that a bridge should be kept up over the canal, so that the public should sustain no inconvenience or hindrance by reason of the highway being cut across. The excuse will not avail unless he proves that this condition has been complied with.

The indictment charges that the defendant, being the owner of the mill, was bound to repair the bridge, *"virtute tenuræ."* Our
(135) late very able Attorney-General followed an English form, and

did not devote to the subject the degree of care which he usually bestowed upon every question. In this State, we are all tenants *in capite,* and our tenure is that of free and common socage, yielding fealty, doing suit to court, and paying such taxes as the "General Assembly" may from time to time assess. The land upon which the mill is situated was in all probability granted long before the mill was built and the canal cut, so the repairing of the bridge could not have been a *condition of the grant.*

When the canal was cut there may have been an express license for so obstructing the public highway granted by the county court upon condition that the bridge should be built and kept in repair, or this may be presumed by a usage for more than twenty years, in the absence of such a contract expressed or presumed. The proprietor of the mill who cut the canal was guilty of a nuisance in so obstructing a public highway, and the defendant who continues to use the canal is guilty of the like nuisance. *Rex v. Slaughter,* 2 Saunders, 158, 9, note; *King v. Kerrison,* 1 Maule. & Selwin, 526.

The judgment must be reversed, and, upon the special verdict, there must be judgment for the defendant.

PER CURIAM. Error.

Dist.: Hall v. Morrow, 47 N. C., 468; *Kornegay v. Collier,* 65 N. C., 71.

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(136)

HERMAN H. ROBINSON v. CALL McDUGALD ET AL.

Where a party who has been arrested upon a *ca. sa.* gives bond for his appearance, etc., he may, when a judgment is moved for a breach of the bond, adduce any matter which amounts to a defense.

APPEAL from *Manly, J.,* at BLADEN Spring Term, 1851.

The defendant, Call McDugald, was arrested on the Tuesday of the county court and forced to give a *ca. sa.* bond, conditioned for his appearance on the next day. He failed to appear and was called out, and judgment was moved for the plaintiff. The motion was resisted by the defendant, Call McDugald appearing by counsel, and his sureties, who appeared in person, and in their behalf the court was moved to quash the *ca. sa.* and the bond. The court refused the plaintiff's motion for judgment and allowed the motion made in behalf of the defendant. The plaintiff appealed to the Superior Court, where he renewed his motion for judgment on the *ca. sa* bond, which was opposed on behalf of the defendant, and a motion made to quash the bond; and the defendant

offered to prove that when the officers arrested the principal, Call McDugald, he told him that if he did not sign the bond he would put him in jail. But the court, holding that the defandants having failed to avail themselves of said defense, if it existed, in apt time, refused to hear the evidence and gave judgment for the plaintiffs, from which the defendant appealed.

(137) *Strange for plaintiff.*
W. Winslow and D. Reid for defendant.

PEARSON, J. We do not understand upon what ground his Honor held that the defendants had failed to avail themselves of the said defense, if it existed, in apt time. They resisted the motion for judgment in the county court, moved on their part to quash the *ca. so* and bond, and were successful in resisting the motion made by the plaintiff. This was done on the very day after the bond was executed, and was in apt time for aught that is stated in the case, which is set out by us more at large than would have otherwise seemed necessary.

In *Williams v. Bryant,* 33 N. C., 614, it is remarked: "It is true the debtor cannot, after failing to appear, adduce any matter of fact by way of defense," etc. "The case may be likened to a default in an action of debt," etc.

In *Hardison v. Benjamin,* 31 N. C., 331, it is remarked: "If the officer, upon arresting the debtor thirteen days before January court, had refused to take a bond for his appearance at April term and insisted upon holding the debtor in custody unless he would execute a bond for his appearance at January term, the bond would have been void as obtained by duress."

These remarks were unnecessary to the decision of either of the cases, and were thrown out only as suggestions in the course of discussion. But the very point is now presented, and we are of opinion that the defendants were at liberty, when judgment was moved for, to adduce any matter which amounted to a defense. We do not see why, upon this motion, the defendants stand in the condition of a defendant in an action where judgment by default has been rendered. It is true the debtor fails to appear, and was called out, but that failure was not in reference to the condition of the *ca. sa.* bond, and had no reference to or bearing on the motion for judgment afterwards made, in reference to which the defendants stood in the condition of defendants in an action who
(138) appear and claim the right to enter their pleas. Why should the defendants not have the same right to resist judgment, where it is moved for in a summary way, as they would have if sued in debt on the bond, and the breach assigned was failing to appear according to the

condition of the bond? The summary judgment is provided to prevent plaintiffs from being delayed, not to exclude defendants from any good defense. Suppose the officer forges a bond, and, upon calling out the debtor, a judgment is moved for, will the court refuse to allow the fact of the forgery to be proven? The same reasons apply to the present case, where it is alleged it was obtained by duress.

Upon examination, it will be found that provision is made for the case, Rev. St., ch. 58, sec. 7. Either of the parties to the bond may have an issue and a jury impaneled immediately to try it, "*non est factum*." shall only be received on oath of its verity.

PER CURIAM. *Reversed,* and remanded that the issue may be made up and tried.

(139)

WILLIAM COX v. WILLIAM C. BUIE.

In a proceeding under our statute to recover damages for overflowing land by a mill-pond, it is not necessary that a copy of the petition should be served on the defendant. It is sufficient for the plaintiff to give the defendant ten days notice, in writing, of his intention to file the petition.

APPEAL from *Manly, J.,* at DAVIDSON Fall Term, 1850.

Petition for damages for overflowing land by a mill-pond. It was filed at May County Court, 1849, which was on the second Monday. On the first day of the month, more than ten days previous to the term, the petitioner gave the defendant notice, in writing, of his intention to file the petition at the next term; and on the 7th day of the month the plaintiff served the defendant with a copy of the petition. At May term the defendant put in an answer setting forth several grounds on which he claimed the right to erect his mill and overflow the plaintiff's land, and denying the plaintiff's right to damages. It further stated the facts as to the serving of the notice and copy of the petition, and insisted that the copy ought not to have been served until after the county court, and that for that reason the petition ought not to be entertained, but dismissed. The county court nevertheless ordered a jury, and damages were assessed and judgment rendered, and the defendant appealed. In the Superior Court the defendant renewed the objection that the suit was not properly constituted, and prayed the court to dismiss it. But the court refused, and after a trial at bar and judgment for the damages assessed, the defendant again appealed.

No counsel for plaintiff. (140)
Mendenhall for defendant.

RUFFIN, C. J. If the objection were open after a full defense on the merits, it would not avail the defendant, for there is nothing in it. The statute does not provide for or intend that a copy of the petition should be served. The purpose was to give a summary remedy on motion at the same term at which the petition was filed. But to prevent surprise, it requires the notice in writing of the intention to file the petition. That was just the course in the court of chancery before the statute required the master to send a copy of the bill with the subpœna. Before that the plaintiff sued out his subpœna often before his bill was filed; and the defendant being served with the process, brought the bill for himself if he wished one. In respect to petitions of this kind, we believe a practice has grown up of serving a copy of the petition in order to obviate possible objections for omissions in the notice. Though unnecessary, it may thus be convenient to the petitioner to serve the copy. That is at his own expense, and can by no possibility do any wrong to the defendant.

PER CURIAM. Affirmed.

(141)

HUGH SIMPSON v. ARCHIBALD McKAY.

1. In the sale of a slave, a warranty of soundness includes soundness of mind as well as of body.
2. The soundness of mind meant in the warranty of a slave means only such a degree of mental capacity as renders him fit to perform the ordinary duties of a slave.

APPEAL from *Manly, J.*, at BLADEN Spring Term, 1851.

Covenant, brought for several breaches assigned of the covenants contained in the following instrument:

"$450. BLADEN COUNTY, N. C., 13 May, 1846.

"Received of Hugh Simpson four hundred and fifty dollars in payment for a negro boy, named Graham, about seventeen years of age, which negro I warrant both as to soundness and right of property, except a small rupture on said Graham.

"In witness my hand and seal. ARCHD. S. MCKAY. (SEAL)

"Test: WM. BRYANT, JR."

The plaintiff alleged that the covenant was broken in that the said Graham had a large rupture, instead of a small one; had other bodily diseases, of some one of which he finally died, and that he was of unsound mind. Upon all these points the plaintiff offered proof, and, among other things, proved that before the sale a witness who had ex-

amined the negro discovered that the negro's feet had been severely frost-bitten, and that they sometimes became swollen and subjected the negro to inconvenience; but there was no proof that this was communicated to the plaintiff, or that it was otherwise known (142) to him before the purchase.

The counsel for the defendant objected that the warranty of soundness contained in the covenant did not extend to mental soundness; and if it did, that the extent of unsoundness proven by the plaintiff was not such as to constitute a breach of the warranty of soundness. Upon those points and the extent of the rupture and the general unsoundness of the negro, the argument was mainly conducted on both sides before the jury, the defendant insisting that there was no breach of the warranty, and that from the evidence the negro died from the maltreatment of the plaintiff himself and his other slaves, and was not unsound beyond a small rupture.

Among other things, his Honor instructed the jury that the covenant extended as well to soundness of mind as of body, and it was for them to say, from the evidence, and especially from the opinion of the medical witness, whether the rupture was a large or a small one, and, if large, how far the difference between a small rupture and the one proven, if they found any difference, impaired the value of the slave, and how far he was otherwise diseased, either in mind or body, and how far any such diseases, if they existed, impaired the value of the slave. That as to the frosted feet, if that was a permanent injury and diminished the slave's capacity for labor, they must take that into consideration. That the soundness of mind meant in the warranty of a slave was only such a degree of mental capacity as rendered him fit for the ordinary duties of a slave; that this did not imply that he was very bright or intelligent; and if, from the evidence, they believed that the slave, although dull and below the ordinary standard of human intellect, yet that he possessed sufficient capacity to perform the ordinary duties of a slave, the warranty in that respect was not broken; otherwise, it was; and it was for them to estimate the amount to which his value was impaired by such mental incapacity, if found by them (143) to have existed.

A verdict having been returned for the plaintiff, the defendant obtained a rule for a new trial upon the grounds: first, of an error in the court upon the question of mental capacity, which the defendant insisted was not embraced in the warranty; secondly, because the judge had said anything about frosted feet, which the defendant insisted was not embraced in the warranty, being a patent defect, if it existed at all.

The rule for a new trial was discharged, the court being of its original opinion respecting the warranty of the mental soundness; and as to

the last point, that no such objection had been taken on the trial, and if it had that there was no evidence that the negro at the time of the purchase was with or without shoes or in any way that the defect was such as must have been known to or observed by the plaintiff.

Whereupon the defendant appealed to the Supreme Court.

Strange for plaintiff.
Banks for defendant.

PEARSON, J. The bill of sale has this clause: "which negro I warrant, both as to soundness and right of property, except a small rupture."

We concur with his Honor in the opinion that this warranty included soundness of mind as well as body; and we agree with him as to the degree of mental incapacity which would amount to unsoundness of mind in a slave.

The value of a slave depends as much, if not more, upon his having sense enough to do the work ordinarily done by slaves as upon the soundness of his body; and if there had been simply a warranty of soundness, without question it would have included soundness of mind as well as body. The exception as to the small rupture cannot (144) have the effect of restricting the general term "unsoundness"; it merely qualifies the warranty in regard to the soundness of the body and has no bearing whatever in regard to the soundness of mind.

The second exception is also untenable. It is not necessary to consider how far the fact that a defect is so apparent that it must have presented itself to the notice of the purchaser (as if the slave has but one leg) will justify such a construction of the warranty as to exclude the particular defect from its operation under the idea that the parties could not have intended to include it because there is no evidence to raise the question. It does not appear that the condition of the negro's feet was apparent, or that the plaintiff's attention was called to it. He was prudent enough to require a warranty and has a right to the benefit of it.

PER CURIAM. Affirmed.

Cited: Bell v. Jeffreys, 35 N. C., 357.

(145)

JOHN MIDGETT v. ISRAEL BROOKS.

1. Where a deed for land, after setting forth the parties, the description of the land and the interest conveyed, goes on as follows: "to have and to hold the above described piece or parcel of land, free and clear from me, my heirs, executors, administrators and assigns, and from all other persons whatsoever, unto the said," etc. *Held*, that this clause contained a covenant for quiet enjoyment.

2. No precise or technical language is required by law in which a covenant shall be worded, any words which amount to or import an agreement, being under seal, are sufficient.

APPEAL from *Caldwell, J.*, at HYDE Spring Term, 1851.

This was an action upon the covenant contained in the following deed:

"This indenture, made this 24 August, 1839, between William S. Douglas and John Midgett, both of the county of Hyde and State of North Carolina, witnesseth: That the said William S. Douglas, for and in consideration of the sum of $120 to him in hand paid by the said John Midgett, the receipt and payment of which is hereby acknowledged, hath bargained and sold, and by these presents doth bargain, sell and convey to him, the said John Midgett, his heirs and assigns forever, a certain piece or parcel of land, situate and lying in the county and State aforesaid, in the settlement of Mount Pleasant, and beginning at, etc. (here the boundaries are described), containing 15 acres, more or less, to have and to hold the above described piece or parcel of land free and clear from me, my heirs, executors, administrators and assigns, and from all other persons whatsoever, unto him, the said (146) John Midgett, his heirs, executors, administrators and assigns.

"In witness whereof, I, the said William S. Douglas, hereunto set my hand and seal, the day and year above written.

"WILLIAM S. DOUGLAS. (SEAL)

"Sealed and executed in the presence of:

"REILY MURRAY,

"GEORGE H. SHILDON."

The declaration contained a count on a covenant of seizin, and also a count on a covenant of quiet enjoyment. The defendant pleaded the general issue—covenants performed. The following facts are agreed upon: The plaintiff took possession of the premises described in the deed, and continued in possession until the death of the defendant's intestate, the party to the said deed. After the death of the said intestate a suit in ejectment was brought against the plaintiff by one Samuel S. Pugh, who had paramount title to the premises. A judgment was

recovered by him against the plaintiff. The said Pugh sued out a writ of possession and evicted the plaintiff from the premises on 26 February, 1850.

It is further agreed that if the court is of opinion that the plaintiff can recover, a judgment shall be rendered against the defendant for $120, with interest from 26 February, 1850. If the court is of opinion that the plaintiff cannot recover, it is agreed that judgment of nonsuit be entered against the plaintiff.

The court on the said case agreed is of opinion that the plaintiff is entitled to recover on the first count mentioned; and thereupon it is considered that the said plaintiff recover against the said Israel Brooks, etc. From this judgment the defendant appealed.

(147) *Donnell for plaintiff.*
Shaw for defendant.

NASH, J. This cause is here upon a case agreed. The declaration contains two counts—one on a covenant of seisin, the other upon a covenant of quiet enjoyment. It is agreed that if upon either count the plaintiff is entitled to a recovery, judgment shall be rendered for him for the sum set forth. The alleged covenants are contained in a deed of bargain and sale for a tract of land sold by William S. Douglas, who is now dead, to the plaintiff. The deed, after setting out in the premises the parties to it, and specifying the land and the interest conveyed, goes on as follows: "To have and to hold the above described piece or parcel of land free and clear from me, my heirs, executors, administrators and assigns, and from all other persons whatsoever, unto the said John Midgett," etc. Midgett was sued and turned out of possession by paramount title.

We are of opinion that the clause in the deed as above set forth contains a covenant for quiet enjoyment. The defendant, through his counsel, insists that the deed contains no covenant whatever. It is true, the word covenant or agreement does not appear in it, nor is it necessary that either of them should. No precise or technical language is required by law in which a covenant shall be worded, any words which amount to or import an agreement are sufficient, a covenant being an agreement or contract under seal. Platt on Covenants, 28; Lamb and Morris, 1 Bur., 290. The words in the deed we are considering, upon their face, import a promise or agreement on the part of Douglas, the vendor, that Midgett shall enjoy the premises free from disturbance from any one claiming by title paramount, and that is a covenant for quiet enjoyment. *Woodward v. Ramsay,* 9 N. C., 335. The language of the deed is that he "shall have and hold—that is, possess—the land free and

clear," etc. It is objected, however, that these words are in the *habendum* of the deed, and constitute a part of it. By themselves, they properly constitute no part of the *habendum*. The office of the (148) *habendum* is to point out the interest conveyed. The words "free and clear," etc., go beyond that, and, in connection with the *habendum* (technically so called), are unmeaning. But it is a rule in the construction of deeds that every clause and word, if possible and consistent with law, shall have a meaning given to it. If, however, they do constitute a part of the *habendum* they certainly are out of place. But that circumstance ought not to deprive them of their existence and legal effect. It is the office of the premises to specify the parties to the deed and the thing granted; if, however, the name of the grantee appears for the first time in the *habendum*, it is sufficient. *Hafner v. Irwin*, 20 N. C., 570; Coke on Lit., 26 b, note. Now, if a grantee may appear for the first time in the *habendum*, we can see no good reason why a covenant may not. Had the words we are considering appeared in a separate clause to themselves, there can be no doubt as to their being a covenant for quiet enjoyment. The whole clause, however, is a covenant for quiet enjoyment. An *habendum* clause is not essential to the validity or completeness of a deed, it may be entirely omitted without affecting its validity. The parties, the thing granted, and the quantity of estate may all be contained in the premises—and such is the modern or most frequent mode of conveyances. 4 Kent Com., 468.

It is the duty of this Court to look into the whole case, and to pronounce such judgment as the court below ought to have done; and, believing that the deed contains a covenant for quiet enjoyment, judgment is given to the plaintiff.

PER CURIAM. Affirmed.

Cited: Fishel v. Browning, 145 N. C., 79.

(149)

JOHN McLEAN AND WIFE v. MARY ANN JACKSON.

In detinue by a husband and wife for a slave, when it appeared that the slave had been given to A. for life, and after her death to the *feme* plaintiff, who, at the death of the tenant for life, was an infant and married and had never since been discovert: *Held*, that the action was not barred by the statute of limitations.

APPEAL from *Dick, J.*, at PASQUOTANK Spring Term, 1851.

Detinue for a female slave, named Anne, and three others, who are her children. The pleas were *non detinet* and the statute of limitations.

On the trial the case was this: Shadrack Davis bequeathed Anne, when quite young, to Mrs. Sexton for her life, and then over to Susanna Williams, the *feme plaintiff*, who afterwards intermarried with the other plaintiff while she was an infant and before the death of Mrs. Sexton, which happened in the year 1833. The defendant alleged that the plaintiff John sold the girl Anne to one Owen Williams; and to establish the sale, evidence was given that soon after the death of Mrs. Sexton one Shadrack Davis, Jr., had the girl in possession, claiming her as his, and that the plaintiff John, in the presence of the girl, mentioned to a witness that he had sold her too low to Owen Williams, and that he ought to have had $50 more for her; and that he said to another witness that he had sold her to said Williams. Evidence was also given that the plaintiffs resided in Pasquotank before 1833 and have resided there ever since, and that Shadrack Davis, Jr., resided there until his death in 1837, and that then his administrator sold the girl publicly to one Jackson, and that he and the defendant who claims under him
(150) have continued the adverse possession of her and her children in the same county up to the bringing of this suit in 1850.

The court instructed the jury that if they should believe, upon the evidence, that the plaintiff John McLean had sold Anne to Owen Williams, they ought to find for the defendant. And if they should not find that such a sale was made, but should believe that Jackson purchased the girl in 1837, as stated by the witnesses, and that he and the defendant under him have held her and her issue ever since as their own, the plaintiffs were barred by the statute of limitations. The jury found for the defendant, and the plaintiffs appealed.

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

RUFFIN, C. J. There is error in the instruction upon the statute of limitations. The action is in the name of husband and wife in her right, and would survive to her. There was no adverse possession until after the death of the tenant for life, and consequently it commenced during the coverture, which still exists. By the express words in the saving in the fourth section of the statute of limitations, the *feme* plaintiff would have three years after being discovert to bring this suit in her own name, because she was under coverture when the cause of action arose. Of course, she is at liberty to bring suit at any time within that period, though if it be brought during the coverture her husband and she must join by reason of her want of capacity to sue alone. It is probable indeed that the action would not lie in the name of the husband and wife, for the reason that the right vested in the husband upon

the death of Mrs. Sexton, as no adverse possession at that time appears. But that point is not raised, and, therefore, it may be that the facts are not stated respecting it. Consequently, the Court can- (151) not act on it; and as there was error in the instruction as given, the judgment must be reversed.

PER CURIAM. *Venire de novo.*

STATE v. ADAM CLARK.

1. In order to obtain a *venire de novo* for the admission of improper evidence, it is not sufficient to state matter, rendering it probable that such evidence may have been received, but it is indispensable to state the evidence itself, otherwise the Court cannot see that the evidence was illegal, and judgment will be affirmed.

2. It is an established rule in the law of evidence that in matters of art and science, the opinions of experts are evidence touching questions in that particular art or science, and it is competent to give in evidence such opinions when the professors of the science swear they are able to pronounce them in any particular case, although at the same time they say that precisely such a case had not before fallen under their observation or under their notice in the course of their reading.

3. The effect of the evidence is of course to be decided by the jury.

APPEAL from *Bailey, J.*, at PERSON Spring Term, 1851.

The prisoner was charged in two counts with the murder of Eli Sigman—in the one by shooting and in the other by striking, thrusting, and cutting with a knife upon the throat, the front part of the neck and the left side of the belly. He pleaded not guilty, and was convicted on both counts, and after sentence of death he appealed. The bill of exception states that on the trial evidence was given that the body was found in a secret place in the woods, about three months after the (152) killing, and when found was torn very much by beasts. Other evidence was then given tending to show that the prisoner killed said Sigman. Then several witnesses, on the part of the State, described the condition of the body when found, and stated that the head was separated from the other parts of the body, and that the skin attached to the face and the throat under the chin where it separated from the body presented a smooth and straight edge as if it had been cut with a knife across the throat; and they gave it as their opinion that it was so cut. Among these witnesses was a practicing physician and surgeon. The others were not professional persons. The State then called another practicing physician and surgeon who had not seen the body, but had been present and heard the evidence given on the trial. He was asked

by the solicitor whether, as a matter of skill and science, he could form an opinion from the evidence, supposing it to be true, whether the skin of the throat under the chin of the deceased was cut by a sharp instrument or torn; and if he could form an opinion, he was requested to give it to the jury. Before an answer from the witness, the counsel for the prisoner interrogated him whether he had ever seen or read of a case of this sort where the body had been exposed for three months, and he replied he had not. Thereupon the counsel for the prisoner objected to the question asked on the part of the State. But the court allowed the question to be put and answered, and the prisoner excepted therefor. Being found guilty and judgment pronounced against him, the prisoner appealed.

Attorney-General for the State.
Saunders for the defendant.

RUFFIN, C. J. The answer of the witness is not set forth in the bill of exceptions, so as to show it to have been made to the prejudice (153) of the prisoner, which must always be done to entitle the party to a *venire de novo*. It has been often said in the court that everything is to be presumed right unless he who alleges error show some one in particular. It is obvious that it is not competent to the Court here to go out of the record for the affirmative presumption that this witness replied that from the evidence he could form an opinion as a matter of science, and, further, that his opinion was that the skin was cut with a knife and not torn. Such a power like that of going out of the record upon a motion in arrest of judgment for other facts would be most dangerous. The principle upon which a court of error must of necessity act in our judicature is that verdicts and judgments must stand unless he who impeaches them distinctly show an error to his prejudice, either in his exception or in the record. In order to obtain a *venire de novo* for the admission of improper evidence, it does not suffice to state matter rendering it probable that such evidence may have been received, but it is indispensable to state the evidence itself, for in that way only can it be seen that the evidence was in itself really illegal or that it might have been to the prejudice of the appellant. On this ground the judgment would be left unreversed even if it were erroneous to admit the evidence, assuming it to have been adverse to the prisoner, for though a matter of extreme regret, in such a case and upon that assumption it is better to submit to that evil than that the Court should usurp the authority of presuming facts not appearing in the record.

Upon the question of evidence, however, the Court is of opinion that such answers from the witness as those supposed are proper for the con-

sideration of the jury. Authorities need not be adduced to show that it is an established rule in the law of evidence that in matters of art and science the opinions of experts are evidence touching questions in that particular art or science. The rule is founded in necessity, because persons of ordinary avocations, including jurors and judges, (154) are not generally capable of judging correctly upon many questions which must be determined in order to the decision of a legal controversy, and which depend on scientific knowledge or skill in art. Resort is then had to the information of those who made it, or are supposed to have made it, the business of their lives to study the principles of that science or art and carry them out into practice. The information derived from them may not lead, in the minds of those constituting the tribunal, to certain and satisfactory conclusions, and indeed is often unsatisfactory, especially when opposing opinions are delivered by different professors, yet from necessity they must be received, because those opinions are the best accessible evidence on the matters in issue; and when received, their weight must depend on the impression made thereby on those who hear them. In reference to questions involved in controversies like the present, namely, as to the nature and effect of a wound described to a witness, it certainly is to a considerable extent a matter of science to be able to judge of them correctly. Whether a wound was made by a shot or a sword or other sharp instrument can, beyond all doubt, be better judged of by one who has habitually examined and treated wounds of such kind—as, for example, an old surgeon in the army—than by one without experience or scientific theory, whatever may be the degree of his general intelligence on other subjects. So, surgeons familiar with fields of battle and the appearance of dead bodies lying there long without burial, may be competent, at the distance of three months, not only to distinguish what kind of wound caused the death, but also to distinguish wounds made on the body before or at the death from lacerations of the dead body by the tearing or crushing of wild beasts or other brutes. At all events, when professors of the science swear they can thus distinguish, it would be taking too much on themselves for persons who, like judges, are not adepts to say the witness cannot thus distinguish, and on that ground refuse to (155) hear his opinions at all. By such a course, the judge would undertake, of his own sufficiency, to determine how far a particular science not possessed by him can carry human knowledge, and to determine it in opposition to the professors of that science. That course would subvert the principle on which the rule of evidence is founded, and exclude the evidence in all cases, since, in truth, its utility depends on having the aid of men of science at that point at which it is necessary to supply the deficiency in the knowledge of those who are not experts. In-

deed, that was the aspect in which the case was pressed in the argument of the prisoner's counsel—insisting that the opinions of medical men were not entitled to little or no confidence and ought not to be received, and laying little stress on the particular circumstance that the witness said he had not seen or read a case in which the body had been exposed for "three months," as here. That circumstance, indeed, does not touch the question of competency, though it may lessen the credit given to the testimony. As just noted, it is the point for the man of science to consider, whether in a particular state of facts, he can or cannot form a sound opinion which would satisfy his own judgment as to the matter of fact. In the next place, if it were the office of the Court to determine whether the circumstances were or were not sufficient to enable the witness to form such an opinion, it could not be held they were insufficient here merely because exactly such a cause as this had not before fallen under the observation of the witness or under his notice in the course of his reading, for the man of science is distinguished from an empiric in nothing more than in not relying on specifics, and also not waiting for exact similitudes in things material and immaterial before forming a judgment whether two patients are laboring under diseases of the same character and requiring the like treatment. It is the province of science to discover general principles from long and accurate (156) observation and sound reasoning, and it must be sufficient to induce courts of justice to receive assistance from men of science in making their investigations when assured by them that the principles of their science applicable to a particular subject of inquiry established certain results, even though the witness may not have seen or read of a case in all its particulars like that under consideration. Those results may often surprise, and indeed some of them are strange enough to uniniated minds, yet, unless the rule be abrogated, they must be heard and left to be combatted before the jury by the better opinions of abler experts or by the sound sense and observation of the jurors themselves. In fine, this matter went to the weight due to the opinions of the witness, rather than their competency, supposing that in point of fact he did deliver the opinions imputed to him in the argument though not expressed in the exception.

PER CURIAM. No error.

Cited: Otey v. Hoyt, 48 N. C., 411; *Horton v. Green,* 64 N. C., 66; *S. v. Sheets,* 89 N. C., 549; *S. v. Pierce,* 91 N. C., 609; *S. v. Boyle,* 104 N. C., 830; *Lowe v. Dorsett,* 125 N. C., 302; *S. v. Wilcox,* 132 N. C., 1132.

(157)

THE STATE v. EDMUND MARTIN.

1. To constitute a capital felony in the case of stealing, etc., slaves, the taking and conveying away of the slave must be from *the possession of the owner*. The felony is not created by our statutes when, before the taking or carrying away, the owner has lost the possession of the slave by the act of another, even though such act was procured to be done by the person charged with felony for a felonious purpose.

2. Neither the act of 1779, Rev. Stat., ch. 34, sec. 10, nor the act of 1848-9, ch. 35, constitutes a felony in such a case.

APPEAL from *Bailey, J.*, at FORSYTH Spring Term, 1851.

The prisoner was indicted for stealing a slave, Giles, the property of George W. Smith, and charged in fourteen counts. The last seven counts were a repetition, with no material alteration, of the first seven.

The first count charged that the prisoner, with force and arms, the said slave, the property, etc., "did steal and take and carry away, against the form of the statute," etc. The second count charged that the prisoner, with force and arms, etc., the said slave, etc., "feloniously, by violence, did take and carry away with an intention the said slave to sell and dispose of to another, against the form of the statute," etc. The third count charged that the prisoner, with force and arms, etc., the said slave, etc., "feloniously, by violence, did take and carry away with an intention the said slave to sell and dispose of to others, against the form of the statute," etc. The fourth count charged that the prisoner, with force and arms, the said slave, etc., "feloniously, by seduction, did take and carry away with an intention the said slave to sell and dispose of to another, against the form of the statute," etc. The (158) fifth count charged that the prisoner, with force and arms, etc., the said slave, etc., "feloniously, by seduction, did take and carry away with an intention the said slave to sell and dispose of to others, against the form of the statute," etc. The sixth count charged that the prisoner, with force and arms, etc., the said slave, etc., "feloniously, by violence, did take and carry away with an intention the said slave to appropriate to his own use, against the form of the statute," etc. The seventh count charged that the prisoner, with force and arms, etc., the said slave, etc., "feloniously, by seduction, did take and carry away with an intention the said slave to appropriate to his own use, against the form of the statute," etc.

To this indictment the defendant pleaded not guilty.

The first witness introduced by the State was Edward Booker, who stated that in the latter part of October or November, 1850, he was passing on to the South, in company with his son Henry and another

man by the name of Null, with two loads of tobacco, which was the property of a gentleman in Stokes by the name of Hamlett; that they stopped for the night at a camping ground near the house of the prisoner in the county of Davidson; that a horse in the team of Null was taken violently sick, insomuch that they could not leave till the ensuing Monday; that the prisoner, during Saturday night and the next day, assisted in procuring and administering remedies for the relief of the sick horse; that during the time they were attending to the horse two or three drinks were given to the prisoner by the witness; that he told the witness that he "liked his looks" and expressed himself as much pleased with him, asked him if wagoning was not a slow business, and being told that it was said he could put him into a business he could make money much faster if he would be sworn; that he had fine stock and could make him rich as Hairston. The witness asked him (159) what sort of stock—if it was horses. He said no, they were worth from $600 to $1,200 apiece, and by being smart, witness could make $500 or $600 in a few weeks. The witness told him he would like to get into any other way of making money faster that was honest. That the prisoner did not fully disclose his business or his plans, but the witness inferred from what had been said what that business was and told the prisoner that he was obliged then to go on to the South, and on his return, which would be in five or six weeks, he would call and see him again, and that during his trip he would consider on it. That all the above conversation between him and the prisoner took place privately and not within the hearing of any other person, and that during a portion of it the prisoner was excited with liquor. That on Saturday of the first week in December following he again came to the house of said prisoner on his way home, and remained there till Sunday evening. That the prisoner asked him what determination had he come to, and upon being informed by the witness that he would go into it, the prisoner told him that he had several negroes out; that he could take the witness to them and show them to him; that they were at a distance from home—he could not keep them near him for fear of being suspected. That there were a great many fox hunters around him, and he had been frequently tracked by their dogs, and been compelled to stand in water up to his waist for an hour at a time in cold weather to escape. That he induced the negroes to believe he was going to send them to a free State. That he was interrupted in his intercourse with the prisoner by a man by the name of Rains, who went there with him, who had a great deal of private conversation with the prisoner, and who, the prisoner informed, was also going to take off negroes for him. That before leaving, the arrangement was made for the witness to return about Christmas and the prisoner would have a slave in readiness to

go with him, which he was to take off and sell and divide the (160) profits with the prisoner; that he went back to the house of the prisoner on Thursday evening after Christmas, was informed by the prisoner that he could not get things ready before Saturday night, and their plans were thwarted by the presence of another white man who persisted in staying all night, although the prisoner used every effort to get him to leave. On Sunday the witness went off again into the neighborhood and remained absent until Sunday evening, when he returned to the house of the prisoner. About one hour by sun he saw Jeff at the prisoner's. The prisoner gave Jeff a dram and he went off. After he was gone the prisoner told him he had sent Jeff after the negro he was to let the witness have. The witness went to bed, and between midnight and day he heard some person come into the kitchen end of the house, where the prisoner and his family stayed, he (witness) being in the other end of the house by himself. That he heard the prisoner and two others talking together. Soon after the prisoner came to him with the negro and said he was the one he was to take away, and his name was Giles; that he had had him six or seven weeks; that he must get up and get ready and be off as soon as possible; that it was not long till day; never saw Jeff again after he left in the evening. The prisoner told him to get his horse and go on by himself to the end of Thompson's lane; that there were too many wagoners camping near the house, and that Swicegood's dogs, by whose house they had to pass, were very bad and he was afraid, if Giles went with witness, they would be interrupted or stopped; that he knew a byway which was nearer, and he would take Giles and meet him near the end of Thompson's lane. That after waiting for some time at or near the end of Thompson's lane, about a mile from the prisoner's, the prisoner came with Giles; said he had been bothered by Swicegood's dogs. That he then delivered Giles to him and told him to be off; it was most day, and must be smart; had sent off two negroes before and had never heard from them again. That he brought Giles to Salem, exhibited him to Mr. (161) Lash, and, finding that the jail of Forsyth was not completed, carried him to Germantown and lodged him in jail, and immediately sent word to Smith where his negro was. That in all the passed transaction he was acting *bona fide* for the purpose of detecting the prisoner and not for the purpose of coöperating with him. Saw Smith in Salem afterwards with Giles, the same negro he had committed to jail. That in a short time witness returned to the house of the prisoner for the purpose of getting another slave; was furnished by a friend, who was in the secret, with $400 spurious money and a fictitious note for $300; returned to prisoner's, paid him $200 and exhibited the note; told him he had sold Giles for $700, and arrangements were immediately set on

foot to carry off another slave that prisoner said was a blacksmith. Prisoner expressed himself well pleased with the result of the former trip. That witness went to Mr. McDonald, who was a magistrate in Davidson, and disclosed to him what he had done and was then trying to effect, and also carried a letter from other friends. That he returned to the prisoner's on Sunday night; found him in an ill-humor. Prisoner chained his horse to the smokehouse; told him he had deceived him —the money he had paid him was counterfeit; that he suspected he was about to betray him; that he would kill him that night; that he belonged to a Murrel clan, and if he did not kill him some of the clan would; refused to let him have his horse. Another white man, who was known to the prisoner, was present, who also expressed himself that the prisoner had been treated badly by witness; that witness, becoming alarmed, left and went to a house in the neighborhood, where he remained all night; that he returned next day in company with one of the neighbors, sent for Mr. McDonald, and had the prisoner arrested. The witness Booker also stated that he gave the prisoner spirituous liquors at each visit before they conversed on the subject.

(162) The State then called several witnesses to confirm Booker's evidence.

Wallis McDonald was then examined, who stated that Booker had related the whole affair to him at his house about four or five miles from the prisoner's, and that he told the same tale as deposed to on the trial, with the exception that he stated that the prisoner in the first conversation with him was drunk, and on that account he did not press him to disclose himself more fully, and that upon his return from the South he (Booker) first spoke to and arrested the prisoner on the subject. That Booker stated his object was to detect Martin and get the reward if any were offered for the negroes. He also stated that Booker in this conversation told him that the prisoner told him that Jeff had brought Giles to his house.

The witness Richmond Swicegood testified that he lived within 300 yards of the prisoner's house; that he saw Booker, who was a stranger to him, at the prisoner's house frequently; and on Saturday after Christmas saw the prisoner and Booker talking privately together several times. That believing that something wrong was going on, he determined to watch the house on Saturday night, which was very wet and rainy; that he slipped up near the house and heard the prisoner endeavoring to get Wood away, who was the man spoken of by Booker; that after a failure to get Wood off the prisoner went into the kitchen house with his wife and son Henry, leaving Booker and Wood in the other house; that he approached the kitchen softly and got near a crack, when he could see and hear the inmates; that the prisoner, addressing

himself to his son Henry, said: "I never told your mother till yesterday what Booker was staying here for," to which she replied, "I could not tell what in the name of God Booker was up to before"; that prisoner then said he was not after tobacco; that by being smart he could make five or six hundred dollars in six or seven weeks. It was a dangerous business, but he did not know any better they could do. That his wife replied she did not know that they could; that the (163) prisoner then said, "If I could just get to see him tonight it would all do yet; perhaps it is better, if any harm should come of it, that he's here. I'll wait till they all go to bed and then I can go and get back before day, and I can prove by him that I was here when he went to bed and when he got up in the morning." The witness stated that there was a good deal of other conversation that he could not hear distinctly. That being satisfied that something was going on, he sent for one of his neighbors that same night to consult what should be done, who did not come till next morning. That Booker left the prisoner's next morning and he did not see him again during that visit.

The State then called G. M. Smith, who proved that he resided in the county of Davidson, about seven or eight miles from the prisoner's, who resided in the same county. That his slave Giles left his employment against his will and without his permission on the 22d day of November, 1850, and he found him in Germantown jail the 8th day of January, 1851, and carried him home and sold him immediately; that on his way home from Germantown with Giles he saw Booker in Salem, who also saw Giles with him.

The prisoner's counsel, on being asked, before Hamlett and McDonald were examined, whether the witness Booker was to be attacked, stated that he should insist that if Booker was innocent, the prisoner was not guilty; otherwise Booker was a *particeps*, and in his testimony to be commented on before the jury as such.

The court was requested by the prisoner's counsel to charge the jury as follows:

First. That if the jury believed from the evidence that the negro Jeff brought the slave Giles to the prisoner's house for Booker, the prisoner was entitled to a verdict on the first seven counts, although he had gone for the negro at the request of the prisoner.

Second. That if entitled to a verdict on the first seven counts, (164) as the last seven counts conclude against the statutes, the prisoner was also entitled to a verdict on them.

Third. That, taking the whole evidence to be true, the prisoner in law should be acquitted.

Fourth. That as the slave Giles ran away on the 22d of November, if the witness Booker, on his return from the South, stayed with the pris-

oner, gave him spirits, and renewed the subject to induce and ensnare the prisoner, acted throughout for the purpose on his part of catching a runaway slave through the agency of the prisoner made drunk and insiduously led on by him, Booker was the principal and the prisoner only an accessory to his (Booker's) operations, although from the effects of the liquor and the false promises of Booker he carried the slave as and for the purpose deposed to.

Fifth. That if Booker was not guilty, the prisoner was not.

This the court declined, but charged the jury as follows:

That the prisoner was indicted under two acts of the General Assembly—the one passed in the year 1779 and the other in the year 1848.

The stealing a slave, as well as the taking away and conveying away by violence or seduction with the intents mentioned, was embraced in both acts. That the only alteration made as to the stealing of slaves was depriving the felon of his clergy. That the taking and conveying away any slave or slaves the property of another or others, by violence or seduction, with the intent to sell or dispose of to another, or with the intent to appropriate to the taker's use, was a felony created by the act of 1778. That it was not a felony before at common law, but was made so by this act of the General Assembly, and that the privilege of clergy was taken away for these new offenses, as well as the old one of stealing.

(165) That a construction had been put upon this act of 1779 by the Supreme Court. That the Court had decided that to constitute the offenses created by the act, there must not only be a taking, but a conveying away the slave of another with the intent mentioned. That the caption alone was not sufficient, nor was the conveying away alone sufficient, but to convict one as a principal, he must not only take, but convey away also. That to cure this defect in the law, the act of 1848 was passed, which enacted "That any person or persons who shall steal, or shall by violence, seduction or any other means, *either* take or convey away any slave or slaves, the property of another or others, with an intention to sell or dispose of to another or others, or to appropriate to his or their own use such slave or slaves, and be thereof legally convicted, shall be adjudged guilty of felony, and shall suffer death without benefit of clergy." That under this last act, the crime would be complete by either taking a slave or conveying away a slave, the property of another, with an intention of selling or appropriating to the taker's use. That either the taking or the conveying away with the intention would be sufficient.

The Court further instructed the jury that they were to find the facts, and the prisoner was to be tried as if he were a white man. That they were not to suffer their minds to be influenced either by sympathy for or prejudice against the prisoner; that they were to divest themselves of

all prejudice on account of his color, and try the case as they would others, according to law and the testimony. That if they were satisfied from the testimony of the witness Booker that when he was on his way to the South the prisoner at the bar proposed to steal or take by seduction a slave or slaves, the property of another or others, for the purpose of selling; that on his return home the same proposition was made by the prisoner, and the witness acceded to this proposition and agreed that he would carry away the slaves which the prisoner might steal or could take by violence or seduction or other means and sell the same and divide the profits between them, and in pursuance of this agree- (166) ment the witness Booker went to the prisoner's house at the time mentioned by him, and the prisoner stole Giles, the property of George M. Smith, or took him by violence or seduction against the will of the owner, and did this either by his own hand or through negro Jeff, or any other person; or if they should be satisfied that the prisoner did not take the slave Giles by his own hand, nor was Giles induced to come by a message sent by Jeff or another, the said Jeff or the other acting as the agent of the prisoner, but the slave Giles was stolen or was by violence or seduction taken by Jeff or another person against the will of the owner and brought to the prisoner, and the prisoner received the said Giles and carried him from his house to the place mentioned in the county of Davidson, and there delivered him to the witness in pursuance of the agreement entered into between them that the said slave should be sold and the proceeds divided between them, that the prisoner would be guilty, and the jury should so find. And that this was the law, although they might be satisfied that Giles was a runaway, and although the witness did not intend to act in good faith towards the prisoner, but intended to deceive him, having no intention to sell the slave, but to entrap the prisoner, with a hope that he might obtain such a reward as the master might have offered for his runaway slave. That if he had no hand in the actual taking of Giles, but merely persuaded, commanded, or hired negro Jeff, and that negro Jeff took him, etc., Giles being runaway at the time, and brought him to the prisoner, which would only make the prisoner an accessory before the fact at common law, and the prisoner only conveyed him from his house to the place mentioned, he would be guilty under the act of 1848, if this was done against the will of the owner and with the intention that the slave should be sold and the proceeds divided between them, although the witness did this for the purpose of a reward which the owner might have offered for his runaway slave. That it was the province of the jury to determine upon the credibility of the witnesses; that it was insisted by the prisoner (167) that Booker was not worthy of credit; that there were many ways by which a witness might be discredited; that it was insisted that his

deportment upon the trial was bad; that he was ready to answer for the State and reluctant to answer for the accused; that he had contradicted himself; that his story was improbable and unsatisfactory, and that he had been contradicted by McDonald and Hamlett in parts of his evidence that were material to the issue; that he had sworn falsely, and that the jury could not place entire confidence in his statement. These views taken by the prisoner's counsel were submitted to the jury for their consideration. The court informed them that they were to judge of the facts; that it was proper for them to look at the deportment of the witness Booker while under examination. Had he answered readily for the State and with reluctance for the prisoner? Had he either suppressed the truth or suggested a falsehood? Had he contradicted himself? or had he been contradicted by others? All these matters should be deliberately weighed by the jury. That if Booker was not believed by them, they could not convict. That it was a rule of law if the witness was false in one thing he was in all. That if they should be satisfied that Booker had sworn falsely and corruptly in one thing mentioned in the issue they should reject the whole of his evidence and acquit; or if they should, from the whole of the evidence, have a reasonable doubt of the prisoner's guilt, they should return a verdict of not guilty. The jury found the prisoner guilty.

Rule on the State for a new trial overruled. Judgment and appeal.

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

(168) PEARSON, *J.* In *S. v. Hardin,* 19 N. C., 407, it is decided that the taking and conveying away of the slave must be *from the possession of the owner.* The point on which the case turned was not whether taking from the possession of the owner or "conveying" away from his possession amounted to the same thing (about which learned men would scarcely differ), but whether the statute, besides having the effect of making it a felony to convey away a slave from the possession of the owner, could by a proper construction be made to have the further effect of creating a new and distinct felony where the slave was conveyed away from the possession of one who had previously, by stealing, violence, or seduction, or otherwise, dispossessed the owner, so that this new felony was not to involve an injury to the *possession of the owner.* That was the point. The Court held that the creation of a new felony, simply by the use of the word "or" in a very awkward connection could not be justified by any sound rule of construction, and that if the intention of the Legislature had been to make those who committed a subsequent asportation, after the owner had lost his possession, guilty as

principal felons, "this intention would have been explicitly expressed in terms more appropriate and less equivocal by the use of the words *procurers or receivers* or some terms by which they were explicitly embraced, as had been done in analagous cases."

The act of 1848, which is now before us for construction, professes to be explanatory of the act of 1779; and the whole explanation consists in using the word *"either"* before "take *or* convey away." This does not obviate the difficulty in the slightest degree. We are satisfied that the draftsman of the act did not understand the point in *"Hardin's case,"* otherwise he would not have supposed that the word "either" superadded could explain and show that the Legislature meant to create a new offense, so as to punish with death not only a conveying away a slave from the possession of the owner, but the procuring him to be so conveyed away or receiving him from one who had before taken or conveyed him away, so the offense would be the receiving and (169) carrying away a slave from the possession of one who had *dispossessed the owner,* and by the usual analogies of the criminal law made himself the principal felon, the receiver being an accessory after the fact.

This misconstruction of the draftsman, we suppose, originated in his confining his attention to the doubt expressed as to whether the words "take or convey away" "do not require the interpretation that *either* constitutes the offense within the meaning of the Legislature." If he had taken a more comprehensive view of the subject he would have seen that the majority of the Court arrive at the conclusion that *either* does not constitute the offense, and that it was necessary in express and unequivocal terms to say whether it was the intention of the Legislature to make it a felony to convey away a slave from the possession of one who had before taken him from the possession of the owner and to put a receiver or procurer on the footing, not of an accessory, but of a principal felon.

As the decision in *Hardin's case* was acquiesced in, and the reasoning is not met by the word "either" introduced into the act of 1848, for it in this connection, in fact, means the same thing as the word "or," we do not feel at liberty to depart from the construction adopted in *Hardin's case,* especially in a matter of life and death, where there has been a distinct announcement that this Court cannot give to a statute the effect of creating a new felony, unless the intention of the lawmakers is expressed in plain and unequivocal *terms of enactment.*

PER CURIAM. *Venire de novo.*

Cited: S. v. Ruffin, 164 N. C., 417.

(170)

ELIZABETH WALTERS v. CLEMENT H. JORDAN.

A widow is not barred of her right to her year's provision, under our statute, Rev. Stat., ch. 121, sec. 18, by her adultery, etc., as she is of her dower by the Rev. Stat., ch. 121, sec. 11.

APPEAL from *Bailey, J.*, at PERSON Spring Term, 1851.

Petition by a widow for a year's allowance out of the personal estate of her late husband, Hardy Walters, who died intestate. It came on upon appeal in the Superior Court, and the parties agreed upon the following facts: The intestate seduced the petitioner and lived in adultery with her and then married her. After the marriage and while they were living together, the petitioner (she and her husband being white persons) had criminal conversation with a negro man, by whom she became pregnant. The husband discovered it and ordered the petitioner to leave his house. She did so accordingly, and by his permission lived in another house on his premises, where she was delivered of a mulatto child. The husband did not receive her into his family again, nor treat her as his wife further than to allow her to live in the said house and to maintain her there until his death, which happened soon after the birth of the child. It was submitted thereon to the court whether the petitioner was entitled to a year's support or not. His Honor was of opinion that she was, and so ordered, but allowed the administrator an appeal.

Norwood for plaintiff.
E. G. Reade for defendant.

(171) RUFFIN, C. J. The Stat., 13 ed., 1, bars a wife of dower in her husband's lands if she willingly leave her husband and go away and continue with her adulterer, unless the husband should become reconciled to her and suffer her to dwell with him. Rev. Stat., ch, 121, sec. 11. The counsel for the defendant admits this case not to be covered in terms by that statute, as it is restricted to dower, and personalty is not in its purview. But it was supposed that section 18 of our act, which gives the widow the right to a year's provision, does, by the use of the words "such widow," extend section 11 to this case and exclude from such support a widow before excluded from dower. Clearly that is not so. Sections 17 and 18 in the Revised Statutes are taken literally from the act of 1796, which is confined to making provision for the immediate support of the widow and family of an intestate out of the crop, stock, and provisions on hand. The first section of it enacted that until the next court the widow might take possession of the personal estate and use as much of those articles as might be necessary for herself and

family, and the second section enacted that "such widow" might at court petition for an allotment of the crop, stock, and provisions for the further support of the widow and family for a year. It is apparent that the words "such widow" in the second section of the act of 1796 refers to the widow mentioned in the preceding section—that is, the widow of an intestate leaving those articles of personal estate. It has the same reference in section 18 of the Revised Statutes to section 17, and exactly the same sense, for it cannot be supposed that the words of those parts of the Revised Statute are to have a different meaning from that in which the same words were used in the original act of 1796. Therefore, that phrase "such widow" in section 18 has no relation to the provision in section 11 barring an adultress of dower. But if it had it would make no difference here, because, in truth, this petitioner is not excluded from dower under that section. She did not leave her husband willingly, in the sense of the act—that is, of her own accord— (172) but she went away by her husband's orders, which she was obliged to obey. Besides, she did not "go away and continue with her adulterer," whom, as far as appears, she never saw after her husband forced her to live separately from him. Whatever cause this woman may have given her husband for taking steps to have the marriage dissolved, and thereby protect his estate from her claims, it is sufficient for this case that he did no such thing, but did leave her his widow and under no bar to her claims, as such, on his property.

PER CURIAM. Affirmed.

Cited: Cook v. Sexton, 79 N. C., 307; *Leonard v. Leonard*, 107 N. C., 172.

STATE v. THOMAS H. WILLIAMS ET AL.

1. Where a public law imposes a public duty, the omission to perform the duty is indictable; but if it is not an absolute duty, but a conditional one, dependent upon the honest exercise of the judgment of the person or persons to whom it is submitted whether it is to be performed or not, the omission to perform it *per se* is not an indictable offense.

2. Thus, where an indictment charged that the wardens of the poor had omitted to make by-laws, rules and regulations for the comfort of the poor under the act, Rev. Stat., ch. 89, sec. 13: *Held*, that the indictment would not lie, because the duty imposed upon the wardens by that act was a discretionary one, to be exercised as they might deem expedient.

APPEAL from *Manly, J.*, at NEW HANOVER Spring Term, 1851. (173)

The defendants are indicted for an omission of duty as wardens of the poor of New Hanover County; and the case comes here upon a motion in arrest of judgment. The indictment is as follows:

"STATE OF NORTH CAROLINA—New Hanover County.

"Court of Pleas and Quarter Sessions, December Term, 1850.

"The jurors for the State, upon their oath, present: That there were on the first day of March, in the year of our Lord one thousand eight hundred and fifty, and yet are, in the county of New Hanover, a certain poorhouse and other outbuildings erected for the maintenance and support of the poor of said county, in which said poorhouse there were on the first day of March, and yet are, divers poor persons and sick and disabled persons residing, inhabiting and being, and that Thomas H. Williams, Daniel McAllister, Albert G. Hall, William Henry, Robert J. Howard, Bernard Baxter, and Michael Register, all late of the said county of New Hanover, were, on the said first day of March, in the year aforesaid, duly elected wardens of the poor for the county of New Hanover; and they, the said Thomas H. Williams, Daniel McAllister, Albert G. Hall, Willliam Henry, Robert J. Howard, Bernard Baxter, and Michael Register, did, on the said first day of March, in the year aforesaid, take upon themselves the said office of wardens of the poor for the county of New Hanover, and as such were bound by law annually to let out to the lowest bidder the said poorhouse and the said poor persons in the county of New Hanover, or to employ some fit and suitable person as overseer to superintend said poorhouse, and provide for the comfort of the poor persons in the said poorhouse, residing, inhabiting and being; and the said Thomas H. Williams, Daniel McAllister, Albert G. Hall, William Henry, Robert J. Howard, Bernard Baxter, and Michael Register did, on the said first day of March, in the year of our Lord one thousand eight hundred and fifty, unlawfully omit and neglect, and yet do unlawfully omit and neglect, to appoint some fit and suitable person as overseer to superintend said poorhouse and provide for the comfort of the poor persons in said poorhouse, inhabiting, residing, and being, as they were bound by law to do, to the great damage and nuisance of all the good citizens of the State, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

(174) "And the jurors aforesaid, upon their oath aforesaid, do further present: That there were on the said first day of March, in the year aforesaid, and yet are, in the county of New Hanover aforesaid, a certain poorhouse and other outbuildings erected for the maintenance and support of the poor of said county, in which said poorhouse there were on the first day of March, and yet are, divers poor persons and sick and disabled persons residing, inhabiting, and being; and that the said Thomas H. Williams, Daniel McAllister, Albert G. Hall, William Henry, Robert J. Howard, Bernard Baxter, and Michael Register, late

of the county of New Hanover aforesaid, were on the first day of March, in the year aforesaid, duly elected wardens of the poor for the county of New Hanover; and they, the said Thomas H. Williams, Daniel McAllister, Albert G. Hall, William Henry, Robert J. Howard, Bernard Baxter, and Michael Register did, on the said first day of March, in the year aforesaid, take upon themselves the office of wardens of the poor for the county of New Hanover, and as such were bound by law to ordain by-laws, rules and regulations for the government of the said poorhouse and of the poor persons in the said poorhouse, inhabiting, residing, and being; and the said Thomas H. Williams, Daniel McAllister, Albert G. Hall, William Henry, Robert J. Howard, Bernard Baxter, and Michael Register did, on the said first day of March, in the year aforesaid, unlawfully omit and neglect to ordain by-laws, rules and regulations for the government of the said poorhouse and of the poor persons in the said poorhouse inhabiting, residing, and being, as they were required by law to do, to the great damage and common nuisance of all the good citizens of the State, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the jurors aforesaid, upon their oath aforesaid, do further present: That there were on the said first day of March, in the year aforesaid, and yet are, in the county of New Hanover aforesaid a certain poorhouse and other outbuildings erected for the maintenance and support of the poor of said county, in which poorhouse there were on the first day of March, and yet are, divers poor persons and sick and disabled persons residing, inhabiting, and being; and that the said Thomas H. Williams, Daniel McAllister, Albert G. Hall, William (175) Henry, Robert J. Howard, Bernard Baxter, and Michael Register, late of the county aforesaid, were, on the said first day of March, in the year aforesaid, duly elected wardens of the poor for the county aforesaid; and they, the said Thomas H. Williams, Daniel McAllister, Albert G. Hall, William Henry, Robert J. Howard, Bernard Baxter, and Michael Register, did, on the said first day of March, in the year aforesaid, take upon themselves the office of wardens of the poor for the county aforesaid, and as such were bound by law to do all such matters and things as were expedient for the promotion of the comfort of the said poor persons in the said poorhouse residing, inhabiting, and being; and the said Thomas H. Williams, Daniel McAllister, Albert G. Hall, William Henry, Robert J. Howard, Bernard Baxter, and Michael Register did, on the said first day of March, in the year aforesaid, unlawfully omit and neglect to do all such matters and things as are expedient for the promotion of the comfort of the poor persons then and there in the said poorhouse inhabiting, residing, and being, who were, on the said first day of March, in the year aforesaid, and yet are, utterly neglected

and unattended to, to the great damage and common nuisance of all the good citizens of the State, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

This indictment was found in the county court; and upon the trial, the jury acquitted the defendants upon the first and third counts and convicted them upon the second. Upon argument the judgment was arrested and the State appealed to the Superior Court, where the judgment of the county court was affirmed, and the State again appealed to the Supreme Court.

Attorney-General for the State.

Iredell for defendants.

NASH, J. The only question is as to the legal sufficiency of the second count. That count sets forth "that there were on the 1st day of March, 1850, and yet are, in the county of New Hanover, a certain poor-
(176) house and other outbuildings, etc., and that the said (setting forth the names of the defendants), on the said first day of March aforesaid, were duly elected wardens of the poor," etc., and that the said, etc., "did take upon themselves the office, etc., and as such were bound by law to ordain by-laws, rules and regulations for the government of the poorhouse and of the poor persons in said poorhouse inhabiting," etc. The omission is set forth as follows: "and the said (setting forth the names of defendants) did unlawfully omit and neglect, and yet do unlawfully omit and neglect, to ordain by-laws, rules and regulations for the government of the said poorhouse," etc. In looking into the act under which this indictment is framed (Rev. Stat., ch. 87, sec. 13), we find that the wardens of the poor are directed "annually to let out to the lowest bidder the said poorhouses and the poor of their respective counties, or shall employ some person or overseer to superintend the business as to them may seem best." The section concludes, "and the wardens shall have full power and authority to ordain by-laws, rules and regulations, and do all such matters and things as they may deem expedient for the comfort of the poor." The indictment sets forth that before the appointment of these defendants or overseers of the poorhouse, it had existed, and we must suppose that wardens of the poor had been in office. If so, it was their duty to have passed such by-laws as the interest of the poor inhabiting or to inhabit the poorhouse might require. If such was the case, no obligations rested on these defendants to enact other laws any farther than they may have found those already in existence to be defective and unsufficient. Here the charge is that they passed *no laws*—neglected to discharge a duty imposed on them by their office. This duty was imposed *sub modo,* subject to their judgment and discretion. The count, then, is defective in not averring that no by-laws, rules and regu-

lations for the government of the poorhouse existed at the time (177) these defendants were elected, *non constat,* that such by-laws, etc., were not in existence, made by some preceding board. Throughout the section of the act of 1836 we are considering, the duties enumerated are submitted to the discretion of the wardens; they are to hire out the poorhouse and the poor or to retain them in their hands and employ an overseer, "as to them may seem best," and only in the latter case does the duty arise to adopt by-laws, etc., and such by-laws, etc., only are to be made by them "as they may deem expedient." A second reason why the second count cannot be sustained is that the indictment does not aver that the defendants did keep the poorhouse and the poor under their own management and control. It may be that they did not let them out as the act permits. A third is that by law, the duty set forth in the second count is a discretionary one—that is, to be performed according as, in the judgment of the wardens, it might be necessary. When a public law imposes a public duty upon a single person or a number of persons, the omission to perform the duty is indictable; but if it is not an absolute duty, but a conditional one, dependent upon the honest exercise of the judgment of the body to whom it is entrusted whether it is to be performed or not, the omission to perform it *per se* is not an indictable offense.

PER CURIAM. Judgment arrested.

Cited: Battle v. Rocky Mount, 156 N. C., 338.

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(178)

STATE v. REUBEN COHOON.

1. One who votes illegally at an election of sheriff cannot defend himself against an indictment upon the ground that the election was conducted irregularly.
2. The county court, a majority of the acting justices being present, is the tribunal to decide all contested elections of sheriffs, and the validity of the election or any alleged irregularities can only be objected to in a direct proceeding before that tribunal.

APPEAL from *Dick, J.,* at TYRRELL Spring Term, 1851.

Indictment against the defendant for illegal voting. The case was as follows:

It was proved on the trial that an election for sheriff of Tyrrell County was held in said county on the first Thursday of August, 1851; that polls for that purpose were opened at a place known as the Gum Neck Precinct in said county, under the superintendence of inspectors duly appointed by the county court of said county at the term thereof

next preceding said election; that the defendant appeared at the said precinct and voted in said election for sheriff, and was registered in the list of voters in the return of the election at the precinct, which returns, duly certified, were made by the inspectors to the county court clerk as required by law and filed among the records of his office. It further appeared that the defendant had never paid any public tax previous to his giving said vote.

It was shown by the defendant that the inspectors at said poll were not sworn by the sheriff or any other person. That in 1837, and for several years before and after that date, the place in Gum Neck where the elections were held was about two miles distant from the place (179) where the election was held in August last, though both these places were within the locality known as Gum Neck, by which name this precinct was known and called, but that for about four years past the elections have been only held at the place, where the said elections were held in August last. There was no further evidence that any change in the place of holding elections in said precinct was made by the county court aforesaid.

It was contended by the defendant's counsel that the election was not held at the place required by law, for which reason, as well as because the inspectors were not sworn, the election was illegal and the defendant could not be convicted.

His Honor charged the jury that the alleged irregularities did not invalidate the election, so far as this case was concerned, and that if the jury believed from the evidence that the defendant voted in the said election, and had never previously thereto paid any public tax, both which it was incumbent on the State to show, that the defendant would be guilty.

The jury found the defendant guilty. Motion for a new trial for misdirection; motion overruled. Judgment against the defendant, from which he appealed.

Attorney-General for the State.
Heath for defendant.

PEARSON, J. We concur with his Honor that the alleged irregularities in the manner of holding the election did not invalidate it, so far as this case was concerned.

The returns, duly certified, were made by the inspectors to the clerk of the county court and filed among the records of his office as required by law.

The county court, a majority of the acting justices being present, is the tribunal to decide all contested elections of sheriffs. The (180) validity of the election, or any alleged irregularities, can only be

objected to in a direct proceeding before that tribunal and cannot be drawn in question in a collateral manner, as was attempted in this case.

PER CURIAM. No error.

DOE ON DEMISE OF CHARLES F. KLUGE v. PHILIP LACHENOUR.

When there is a lease of a house, and a person lives in it by an assignment or undertaking from the lessee or by her license merely and at her will, he is concluded from questioning the lessor's title, for he came in under him and cannot withhold the possession when the term has expired or been legally surrendered.

APPEAL from *Bailey, J.*, at FORSYTH Spring Term, 1851.

Ejectment. The premises consisted of a house and garden in the town of Salem. The demise was laid on the first of January, 1850; and upon the trial, the case was this: Benigna Boner leased the premises from one Van Vleck for one year, commencing on 30 April, 1837; and she continued to hold as tenant from year to year under him until 1844, and thereafter she held in like manner under the lessor of the plaintiff, who claimed Van Vleck's estate. She paid the rent on 30 April in each year up to 1849, inclusive. On 1 November, 1849, she came to an agreement with the lessor of the plaintiff to pay the rent up to (181) that day and surrender the term, and this was accordingly done.

At some time while Mrs. Boner lived on the premises, the defendant, by her permission, lived in one part of the house and she in the other, there being two apartments in the house with a door between them, which was sometimes kept open and sometimes closed. When the defendant went there does not appear further than that he was there in May, 1849. After Mrs. Boner went away the defendant occupied all the premises and refused to give them up on the demand of the lessor of the plaintiff, who then brought this action.

The defendant moved the court to instruct the jury that the plaintiff had not shown a title in his lessor, and could not recover. But the court held that if the defendant entered by the permission of Mrs. Boner, he was estopped to deny the title of her landlord. The defendant then insisted that if thus treated as a tenant, he was entitled to occupy until 30 April, 1850, and therefore the action would not lie. The court thereon instructed the jury that if Mrs. Boner assigned her lease or the residue of the term to 30 April, 1850, to the defendant before her surrender to the lessor of the plaintiff, then the plaintiff could not recover; but if the defendant did not purchase the residue of the term, but was permitted by Mrs. Boner to stay in the house at her pleasure while she

occupied it, then her surrender of the premises to the landlord and leaving them gave him the immediate right to the possession and entitled him to bring this action upon the defendant's refusal to go out when required.

Verdict and judgment for the plaintiff, and appeal.

Mendenhall and J. T. Morehead for plaintiff.
H. W. Miller for defendant.

(182) RUFFIN, C. J. Whether the defendant lived in the house by an assignment or underletting from the lessee, or by her license merely and at her will, he was equally precluded from questioning the lessor's title, for he came in under him and cannot withhold the possession when the term has expired or been legally surrendered.

It was competent to the defendant to show that the supposed surrender was ineffectual, as the original tenant, before the alleged surrender, had underlet a part of the premises, or assigned the whole of them to him. But as that could only be by contract with her and was peculiarly within the defendant's knowledge, the *onus* of establishing the agreement was on him. Instead of doing so clearly, there was no evidence of any such agreement. It did not appear that the defendant paid, or undertook to pay, any rent or price, or even that the apartments were occupied as distinct tenements, or that the defendant had a family living with him, or carried on any separate business, or, in fine, that there was anything to show that those two persons did not live together in the house as hers, with a free communication between the two rooms. The court might, therefore, have properly told the jury that there was no evidence of a title in the defendant to any part of the term. But the court gave him the benefit of that hypothesis by submitting the question of fact to the jury, and they found it against the defendant, which certainly disposes of the case.

PER CURIAM. Affirmed.

Cited: Springs v. Schenck, 99 N. C., 558.

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(183)

HERMAN H. ROBINSON v. JOSHUA BRYAN ET AL.

Where, in an appeal bond given by the defendant, the plaintiff's name is omitted, although the court at the first term would dismiss the appeal unless the defendant gave a sufficient bond, yet they will not do so as a matter of course when several terms have elapsed.

APPEAL from *Manly, J.*, at BLADEN Spring Term, 1851.

The suit began in the county court, and was there tried on issues, and the plaintiff had a verdict and judgment in February, 1849. The defendant appealed, and in filling up the appeal bond the name of the plaintiff as the obligee was omitted by the clerk. The defendant filed the transcript in the Superior Court before the next term, which was in April, 1849, and each party summoned witnesses, and the suit pended until April Term, 1851; and then the plaintiff moved to dismiss the appeal for the defect in the bond. The court allowed the motion, and the defendant appealed.

W. Winslow for plaintiff.
Strange for defendant.

RUFFIN, C. J. If the motion had been made at the first term it would have been proper to allow it unless the defendant had then offered to give a sufficient bond. *McDowell v. Bradley*, 30 N. C., 92. So, if the defendants were not of substance to answer the plaintiff's recovery made and the costs, the court might have laid them under a rule to give a proper bond which would secure the plaintiff. There was no (184) suggestion of that kind, but the plaintiff insisted peremptorily that the court should not entertain the appeal by reason merely that an appeal bond had not been duly given. Now the omission to make that motion for two years after the case was in the Superior Court for trial is, according to the established practice, such *laches* as deprives the appellee of the right to make it at all. *Wallace v. Corbit*, 26 N. C., 45; *Arrington v. Smith, id.*, 59.

PER CURIAM. *Reversed*, and *procedendo*.

Cited: Russell v. Saunders, 48 N. C., 432; *Stickney v. Cox*, 61 N. C., 496; *Hutchinson v. Rumfelt*, 82 N. C., 427.

SARAH A. McALLISTER v. SARAH McALLISTER.

1. A., having a life estate in two negroes, executed an instrument in which were the expressions "which right and title I relinquish to B. for value received," which instrument was signed, sealed, witnessed and delivered: *Held*, that if this be not good as a release technically, it is good as a bill of sale or deed of gift.

2. A court may correct a slip by withdrawing improper evidence from the consideration of the jury or by giving such explanations of an error as will prevent it from misleading a jury.

3. When in detinue there is a verdict for the plaintiff and error in the assessment of damages only, a reversal will be for the damages only, a *venire de novo* will not be ordered.

(185) APPEAL from *Manly, J.*, at RICHMOND Spring Term, 1851.

Detinue for a slave Caroline and her two children, which was tried on *non detinet* and the statute of limitations. The case was that John McAllister owned the slave Caroline and conveyed her for life to the defendant, his sister. Afterwards the defendant executed a deed to the said John of the following tenor: "I, Sarah McAllister, having a lifetime right from my brother, John McAllister, for a negro woman named Nicey and her two children, Valentine and Caroline, which right and title I relinquish to him, the said John, for value received, under my hand and seal, this 1 August, 1829." The deed was attested by a witness who proved it in 1850, when it was registered. After the execution of the deed the three slaves therein mentioned were left in the possession of the defendant, and so continued up to the trial. While thus in the defendant's possession, the said John gave, and by deed of gift conveyed, the said Caroline to the plaintiff, who was his infant daughter and is still an infant, and subsequently thereto Caroline had the two children.

On the part of the defendant it was insisted that the deed made by her was not sufficient to pass her estate. But the court held otherwise.

It was further insisted on the part of the defendant that her long possession after the deed of 1829 barred the plaintiff's action. In reply thereto the plaintiff alleged that the defendant was in possession under John McAllister as his bailee, and that he, during such possession, continually claimed and exercised act of ownership over the slaves. And in order to sustain the same the plaintiff, among other things, offered in evidence a mortgage made by the said John of the said slaves and other property, real or personal, which he made to a third person to secure certain debts. The mortgage was read from the register's book; and while the plaintiff's counsel was reading it from the book, it was objected on the part of the defendant that the book was not competent evidence of the contents of the deed, but that a certified copy of the regis-
(186) try ought to be produced. The objection was overruled and the reading finished; but it appearing thereby that the mortgage was made after the deed to the plaintiff, the presiding judge remarked that it could have no effect favorable to the plaintiff and no further notice was taken of it on the trial.

The jury found a verdict for the plaintiff and assessed the value of each of the slaves, but did not assess any damages for the detention, remarking that they had yielded no profits. After the verdict had been

thus entered the jury was discharged; but in about one minute and before any of the jurors had left the court, they were called together and informed by the court that in such cases it was the usual form to give nominal damages, and thereupon the jury assessed one cent as the damages. Judgment was entered on the verdict thus altered, and the defendant appealed.

Strange for plaintiff.
Banks for defendant.

RUFFIN, C. J. The exceptions do not furnish any ground for reversing the judgment. The objection to the validity of the deed made by the defendants is founded on the technical nature of a release and the possession of the slaves held at the time by the defendant. But if that had any application to personal chattels it is answered by the settled rule that if a deed cannot operate in one way as intended it shall operate in any other which will make it effectual—*ut res magis valeat quam pereat.* Therefore, if this be not good as a release it must be upheld as a bill of sale or deed of gift. If there had been an error in admitting the register's book, the defendant would have no cause of complaint, for the evidence was clearly and promptly withdrawn from the jury as irrelevant, and the defendant suffered no prejudice from it. It is undoubtedly proper and in the power of the court to correct a slip by withdrawing improper evidence from the consideration of the jury, (187) or by giving such explanations of an error as will prevent it from misleading a jury. *S. v. May,* 15 N. C., 328. Here that was so effectually done that neither the court nor the counsel on either side took any notice of the mortgage in submitting their observations to the jury.

If the judgment were reversed on account of the damage of one cent, a *venire de novo* would not be awarded, but the reversal would be in respect of the damages merely, because in that respect only would the verdict and judgment be erroneous, and not in relation to the slaves and their values. *Frederick v. Lookup,* 4 Bur., 2018; *Dowd v. Seawell,* 14 N. C., 185. But the Court is of opinion there was no error as to the damages. The alteration in the verdict was made so immediately as to exclude all possibility of ill practices with the jury, and was in itself so unimportant and immaterial as not to call for any correction.

PER CURIAM. Affirmed.

Cited: S. c., 36 N. C., 22; *Cobb v. Hines,* 44 N. C., 351; *S. v. Collins,* 93 N. C., 566; *S. v. McNair, ib.,* 631; *S. v. Crane,* 110 N. C., 535; *Toole v. Toole,* 112 N. C., 157; *Wilson v. Mfg. Co.,* 120 N. C., 95; *Gattis v. Kilgo,* 131 N. C., 207.

(188)

WILLIAM J. ELLISON v. WILLIAM W. ANDREWS ET AL.

1. Where a decree is made in the county court in favor of the plaintiffs on a petition for a legacy in which there are several plaintiffs, one of whom is the executor of a deceased legatee, and this executor dies before satisfaction or execution sued, the right to the legacy of the deceased legatee vests in the administrator *de bonis non*, but he is not entitled to have execution until he has made himself a party either by *sci. fa.* or according to the course of courts of equity.

2. Where several legatees or distributees obtain a decree against executors or administrators for a monied legacy, the decree is several, and each is entitled to a separate execution for his share.

3. Suits for legacies, distributive shares, and filial portions given in the courts of law by petition are considered in the nature of proceedings in equity in respect to the pleadings, taking the accounts, decreeing, and rehearing or reversing. And so also as to process on the decrees.

By PEARSON, J. Where two or more joint obligees who are not partners in trade take a joint judgment, how far and in what manner the right of survivorship is abolished in this State in regard to such joint judgments, by force of the act of 1784, Rev. Stat., ch. 43, sec. 2, is an open question.

APPEAL from *Ellis, J.*, at MARTIN Spring Term, 1851.

Debt on the bond of the clerk of the Superior Court of law for refusing, upon the demand of the relator, to issue a *fieri facias* on a decree in a suit by petition. The pleas were conditions performed and conditions not broken; and on the trial, these were the facts: A petition was filed by Charles H. Mizell, Stephen Long, and several other persons against William L. Mizell, the executor of a will giving pecuniary legacies to the plaintiffs. Before a decree, Stephen Long died, and Edgar A. Long, as his executor, became a party in his stead. Then such proceedings were had that in the Superior court of law in August, 1849,
(189) the defendant William L. Mizell was found indebted in the premises to the several plaintiffs in various sums, and it was decided that he should pay to the petitioner Charles H. Mizell the sum of $213.76, and should also pay to Edgar A. Long, as executor of Stephen Long, deceased, the sum of $335.23, and to the other petitioners, respectively, the various sums so due them severally; and it was further added "that the petitioners have execution therefor." Shortly after the term of the Superior Court and before any execution issued on the decree, Edgar A. Long died intestate, and at the next term of the court, which was in October, 1849, William J. Ellison, the relator, obtained letters of administration *de bonis non, cum testamento annexo,* of the said Stephen Long, deceased, and applied to the clerk to issue an execution on the decree—whether for $335.23 only and in the name of himself or

in that of Edgar A. Long, or whether in the name of all the petitioners and for all the sums decreed, is not stated. But the clerk declined to give him the execution demanded, saying that he would not do so until he knew whether he (Ellison) was the proper person. This action was brought to the next term, and, by consent, a verdict was taken for the plaintiff for nominal damages, subject to be set aside and a nonsuit entered in case the court should think the action would not lie. His Honor was of that opinion, and, after judgment, the relator appealed.

Rodman for plaintiff.
Biggs for defendant.

RUFFIN, C. J. Upon the death of the plaintiff after judgment, the general rule is that his representative must revive the judgment by *scire facias* in order to have execution. It seems that he may have it in the name of the original party if he apply in time to get one of a *teste* prior to the death. But that must needs be in the case only in (190) which the person claiming the execution is the representative of the original party—that is, his executor or administrator—who will be legally entitled to the money when raised. It cannot apply to the present case, for, at common law, there was no privity between the executor and administrator *de bonis non* which was created by the St. 17 Car. II, reënacted here (Rev. Stat., ch. 31, sec. 118) and established to this extent, that where a judgment is had after verdict by an executor or administrator who dies, the administrator *de bonis non* may sue forth a *scire facias* on such judgment and take execution. The administrator *de bonis non*, then, hath no right in the judgment until he shall have revived it in his own name by *sci. fa.*, and consequently he could not require the clerk to give him execution in any form before he had thus made himself a party. It is plainly right that it should be so, since neither the clerk nor the other party should be concluded as to his representative character without the opportunity to contest it.

The statute does not in terms cover our case, since there was not a judgment after verdict, but a decree upon petition. But we do not put the decision on that ground, because we suppose that by force of another act it is brought within the operation of the one under consideration. The act of 1787, ch. 278, provides that upon a decree in equity for money, execution may issue against the body or estate to satisfy such decree in the same manner as executions may issue at law, and that the decree and execution shall bind the estate in the same manner as judgments and executions do at law. It may be observed by the way that the party is entitled to the execution on such a decree for money by force of the statute, whether the decree give it in terms or not. There

is as little necessity for inserting a *fiat* for execution in a decree as in a judgment, as in each the right to the process is incident to the right to the money. But since the right to an execution on a decree is (191) thus correlative to that of taking execution on a judgment, it follows that an administrator *de bonis non* must likewise in some appropriate method make himself a party in equity in order to take execution there. That is necessarily to be done according to the course of that court for reviving suits or making parties, as by bill or by the more summary method given by the act of 1801, Rev. Stat., ch. 32, secs. 8 and 9. It is true this is not the decree of the court of equity, technically speaking. But it is virtually so within the remedial provisions for reviving suits and having executions on decrees, since suits for legacies, distributive shares, and filial portions given in the courts of law by petition are considered in the nature of proceedings in equity in respect to the pleadings, taking the accounts, decreeing and rehearing or reviewing. So they must be also in respect to process on the decrees. We conclude, therefore, that an administrator *de bonis non* may enforce decrees for money in equity or on petition at law, but that to do so, he must first make himself a party.

The counsel for the plaintiff, however, contended that if it be true that an administrator *de bonis non* cannot take the execution on a judgment recovered by an executor without first suing a *scire facias,* yet it is otherwise where there is a joint judgment for the executor and others, and that, in this last case, without suggesting the death, execution may be taken in the name of the original parties, and the clerk ought to have given the relator an execution of that kind, on which he might have the money raised, to which, when raised, he would be entitled. It seems true that on joint judgments, for or against several persons, the death of one of the parties does not render a *scire facias* necessary in order to obtain execution, according to the course of the courts in England, but it may be had for or against the survivor upon suggestion, or if there be no suggestion, for or against the original parties. But it is (192) plain the reason is that a joint judgment survives, and there could, therefore, be no harm in taking execution in either form, since, if the execution for conformity's sake followed the judgment, it could not be executed in respect of the dead person, and the survivors alone would be entitled or liable under it—as, for example, when there are two executors here, and one of them dies after judgment, no *scire facias* is needful to enable the other to have execution. But proceedings of the nature of those in this case are essentially different from such judgments at law. If a residue or other fund be given to divers persons to be divided equally between them, the rule of the court of equity is that they must all be parties to a suit against the executor for it in order

to avoid litigation and expense. Yet they have not a joint interest in the legacy, and in respect of unequal payments to them respectively unequal sums may be found in the suit to be due to the different legatees. Hence the decree in their favor is not in the nature of a judgment in a joint action, but it is that the executor pay to each one what is found due to that one, and so on until every one has a decree for his own share. Therefore, the decree is several, and each plaintiff proceeds for himself to enforce it as he may be advised, as if the recovery were made in a suit in which he was the sole plaintiff, and without any power in the other plaintiffs to interpose between him and the debtor on the decree. The rights of the several parties are entirely distinct before the decree and under the decree. Then the statute, in giving execution on decrees for money in the same manner as upon a judgment, must be understood in reference to this distinction. Therefore, the other petitioners could not interfere with the particular sum decreed to the executor Edgar A. Long, viz., $339.23, but the right to that sum passed exclusively to the person entitled in law to succeed thereto, who, in this case, was the administrator *de bonis non* of the original testator. But although he thus had the several rights to the money, he could not, as we (193) have seen, have execution for it until he should entitle himself to it in his own name by the method given in the statute or otherwise, according to the course of the court of equity.

PEARSON, J. In England, a judgment in favor of two or more plaintiffs, upon the death of one, survives, and the survivors become entitled to the judgment absolutely, and may sue out execution and collect the whole sum for their own use, except in case of copartners in merchandise, etc. So in this State a judgment in favor of two or more *executors*, upon the death of one, survives to the others by virtue of the office which they continue to represent, for there is *one office*, although it may be filled by several. But when two or more joint obligees, who are not partners for the purpose of carrying on trade, commerce, etc., take a joint judgment, how far the English doctrine applies, or how far and in what manner the right of survivorship is abolished in regard to such joint judgments, by force of the act of 1784, Rev. Stat., ch. 43, sec. 2, which provides that all *estate*, real or personal, held in joint tenancy, upon the death of one, shall not descend or go to the survivor, but shall descend or be vested in the heirs, executors, administrators, etc., of the party dying, in the same manner as estates held by tenancy in common, is an open question. The statute uses the word *"estates,"* which is broad enough to include bonds and judgment, as well as land and other property.

My purpose is not to express an opinion on this point, for it is not prevented, but simply to "exclude a conclusion," so as to leave it open

until it is presented and is the point in the case. This seems to me to be necessary to prevent an inference from the opinion of the Court, as delivered, that it was assumed that in this State a *joint judgment at law* would survive as in England, about which no intimation of opinion was called for.

(194) A judgment or decree for distributive shares or for legacies, which is our case, very clearly so far partakes of the nature of a decree in equity as to be several, and, in fact, there is a decree for each severally, according to the amounts to which they are respectively entitled. This is fully set out in the opinion of the Court.

PER CURIAM. Affirmed.

Cited: Thompson v. Badham, 70 N. C., 142.

PHELPS v. CHESSON.

1. Under the act of 1842-3, ch. 36, sec. 1, the Literary Board can acquire no title of land alleged to be forfeited by a grantee from the State for non-payment of taxes, unless some proceedings has been first had on the part of the State or its assignees, the president and directors of the Literary Fund, so as to give to the grantee, his heirs or assigns, "a day in court," an opportunity to show that the arrearages of the taxes had in fact been paid within the year.

2. An estate once vested cannot be defeated by a condition or forfeiture without some act on the part of the grantor or his heirs by which to take advantage of the condition or forfeiture, even when the words of the condition are "the estate shall thereupon be void and of no effect," which words have the same legal import as the words "*ipso facto* void."

APPEAL from *Manly, J.,* at WASHINGTON Spring Term, 1849.

Trespass *vi et armis, quare clausum fregit.* The plaintiff claimed under Frazier and Davidson, to whose title he had succeeded, the grant having issued to them in 1797 for the land trespassed upon. The (195) plaintiff proved that the defendant in 1847 and early in 1848 entered upon the lands aforesaid and cut down and made into shingles a large quantity of lumber, and carried them away, and proved their value.

The defendant showed in evidence a grant from the State to himself, dated 8 August, 1846, for the same premises; and also a deed from a tenant in common with the plaintiff, who was not joined in the suit, dated 8 August, 1848, and further proved that the land consisted of above 50 acres of swamp land unfit for cultivation, and valuable for its timber only. He further showed that the lands had not been listed for

taxation, nor the taxes paid for many years previous to 1842, nor since. The defendant insisted that the plaintiff could not recover for the reason that the title to the land at the time of the suit brought was vested in the Literary Board by virtue of the provisions of the act of 1842-3.

No proceedings were shown to divest the title derived under the grant to Frazier and Davidson. It was insisted on the part of the plaintiff that no title of the president and directors of the Literary Board or Literary Fund could be set up against their grant, because the defendant did not claim under them, nor has he shown any proceedings, or even an election, on the part of the president and directors aforesaid to divest the title derived under the grant to Frazier and Davidson. It was also insisted that the defendant was estopped to set up any outstanding title against them, because he had shown a deed for an undivided portion of the premises trespassed on from a tenant in common with themselves, and that the effect of the estoppel related back to the trespass in 1847-8.

A verdict was taken on the issues, subject to the questions raised. His Honor being of opinion with the defendant on the questions reserved, set aside the verdict and entered a judgment of nonsuit, from which the plaintiff appealed.

Heath for plaintiff. (196)
W. H. Haywood and E. W. Jones for defendant.

PEARSON, J. The defense relied on is that the title of the plaintiff derived under Frazier and Davidson, to whom the land was granted in 1797, had been divested by the act of 1842, ch. 36, sec. 1.

To this the plaintiff replies: First, supposing the act of 1842 to be constitutional, no proceeding had been taken, nor had the president and directors of the Literary Fund in any way made an election to divest the plaintiff's title by force of this statute. Second, the statute is unconstitutional.

Our opinion being very clearly with the plaintiff on the first point, we shall not enter into the consideration of the second, for the reason that we deem it disrespectful to the legislative branch of the Government to call in question the constitutionality of the statute unless the decision of the cause make it necessary to do so.

The first section of the act provides "that where a grant of swamp land had been obtained from the State, and the grantee, his heirs or assigns, have not regularly listed the same for taxation and (199) paid the taxes due thereon, they shall forfeit and lose all right, title, and interest in said land, "and the same shall *ipso facto* revert to and be vested in the State unless such grantee, his heirs or assigns, shall

in twelve months from the passage of this act pay to the sheriff of the county in which the land lies all the arrearages of taxes due on the said lands, with lawful interest thereon from the time the said taxes ought to have been paid."

The second section provides that the land to which the State shall become entitled under this act "shall be and hereby is vested in the president and directors of the Literary Fund of North Carolina."

Admit that this act has the force of inserting in the original grant a condition that if the taxes are not paid when due, but shall at any time be in arrear, "the land shall *ipso facto* revert to and be vested in the State." According to the well-settled principles of law, if the taxes were in arrear at any time, the estate created by the grant would not be defeated and revert to the grantor unless some solemn act was done by which to enforce the condition, for the estate having commenced by a solemn act, viz., *a grant*, must be defeated by an act equally solemn, upon the maxim of the common law, *"eo ligamine quo ligatur."*

If a feudal tenant failed to perform the services, his estate was not defeated until the lord had judgment in a writ of *cessavit*. If a subject incurs a forfeiture by committing treason, his estate is not defeated until "office found." If a feofment is made on condition, and the condition be broken, the estate continues until it is defeated by the entry of the feoffor or his heirs. Coke on Lit., chapter on Conditions.

The law books teem with cases fixing the principle that an estate once vested cannot be defeated by a condition or forfeiture without some act on the part of the grantor or his heirs by which to take advan-
(200) tage of the condition or forfeiture, even when the words of the condition are "the estate shall therefore be void and of no effect," which words have the same legal import as *"ipso facto* void."

In this act, after the emphatic declaration that the land shall *ipso facto* revert to and be vested in the State, there is the qualification, *"unless* such grantee, his heirs or assigns, shall within twelve months pay the taxes," etc.

This shows conclusively that it was contemplated to have some proceeding on the part of the State or its assignees, the president and directors of the Literary Fund, so as to give to the grantee, his heirs or assigns, "a day in court"—an opportunity to show that the arrearages of taxes had in fact been paid within the year.

Our opinion, therefore, is that as neither the State nor its assignees, the president and directors of the Literary Fund, had taken any proceedings or in any way signified an election to defeat the estate of the plaintiff, the estate was still in him and he was well entitled to maintain this action.

This conclusion is confirmed by the fact that the Legislature in 1850 passed an act declaring that the act of 1842 shall be applicable to those swamp lands only which have been surveyed and taken possession of by the president and directors of the Literary Fund, or their agent. Chapter 52, section 2.

Without admitting that the Legislature has the right to say what the law was, or what it is, and supposing its province is to say what shall be the law, see *Houston v. Bogle,* 32 N. C., 496. We are gratified to find that there is this concurrence of opinion as to the true construction of the act of 1832.

The judge below was of opinion with the defendant.

PER CURIAM. Error.

Cited: Wellons v. Jordan, 83 N. C., 377; *Land Co. v. Board of Education,* 101 N. C., 35; *Parish v. Cedar Co.,* 133 N. C., 481; *Brittain v. Taylor,* 168 N. C., 275.

(201)

JOHN BUFFALOE v. CALVIN BAUGH.

When, in a suit by legatees against the administrator, with the will annexed, it was decreed that the administrator should deliver to three of the four legatees entitled to legacy of slaves their respective shares, which was done; and as to the other share (the legatee being in parts unknown) it was decreed that this share "should be allotted to the administrator," etc., "for the use" of such legatee, upon the trust declared in the will, etc., and the administrator under this decree kept possession of the share of the slaves thus allotted, and hired them out and deposited the hires in court: *Held,* that this amounted to an assent to the said last mentioned legacy.

APPEAL from *Dick, J.,* at WAKE Fall Term, 1848.

Trover for a slave which had belonged to William Andrews, and of which he died possessed. The will of William Andrews was admitted to probate in 1828, and the executors having renounced, John Bunn was appointed administrator with the will annexed. Among others, there is this clause in the will: "Fourth. I lend to my son William Andrews one-half of my Ruffin tract of land, also one-fourth of my other property, and at his death I lend the same to his lawful heirs. I leave the same in the hands of my executors for the support of my said son William."

In 1833 a bill was filed by one of the legatees against Dunn and other legatees for a settlement and division of the estate. Such proceedings were had therein that in 1835, all the debts having been paid, a settlement was made and the property was divided into four parts, of which

three parts were delivered to the legatees entitled thereto and the remaining fourth part, which included the mother of the slave sued for, continued in possession of the administrator under this clause in the
(202) decree: "The other share of the said slaves shall be allotted to John Dunn, administrator, etc., for the use of the defendant William Andrews upon the trust declared in the will of William Andrews, deceased."

William Andrews, Jr., had left the State before the bill was filed and gone to parts unknown. John Dunn hired out the slaves from year to year and deposited the notes taken for hire in court.

Dunn died in 1839. The plaintiff was appointed administrator *de bonis non*, with the will annexed, of William Andrews, Sr., and soon thereafter commenced this action.

Upon the trial the court was requested to instruct the jury that John Dunn, administrator of William Andrews, Sr., had assented to the legacy to William Andrews, Jr., and that John Dunn, after the allotment under the decree of 1835, held in trust for William Andrews, Jr., and, therefore, the plaintiff, as administrator, etc., could not recover. The judge declined to give this instruction, and charged the jury that there was no evidence of any assent by John Dunn which would prevent the plaintiff from recovering in this suit.

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

W. H. Haywood for plaintiff.
McRae for defendant.

(204) PEARSON, J. The will of William Andrews was admitted to probate in 1828, and the executors having renounced, John Dunn was appointed administrator with the will annexed. Among others, there is this clause: "Fourth. I lend to my son William Andrews one-half of my Ruffin tract of land, also one-fourth of my other property; and at his death, I lend the same to his lawful heirs. I leave the same in the hands of my executors for the support of my said son William."

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Andrews upon the trust declared in the will of William Andrews, deceased."

William Andrews, Jr., had left the State before the bill was filed and gone to parts unknown. John Dunn hired out the slaves from year to year and deposited the notes taken for the hire in court.

Dunn died in 1839. The plaintiff was appointed administrator *de bonis non,* with the will annexed, of William Andrews, Jr., and soon thereafter commenced this suit.

The only question intended to be presented to this Court is (205) whether the part bequeathed to William Andrews was *unadministered* at the death of the death of the first administrator, so as still to be a part of the estate of the testator, and, as such, vest in the plaintiff as administrator *de bonis non,* or whether the facts above stated show an assent by the first administrator to this legacy, the legal effect of which was to vest title in him as trustee for William Andrews, Jr.

The assent of an executor to his own legacy, as well as his assent to the legacy of another, may be expressed or implied. *Hearne v. Kevan,* 37 N. C., 34, where this doctrine is fully discussed.

Dunn expressly assented to the legacies of the persons entitled to the other three shares by an actual delivery to them, and it is entirely clear that as to the remaining fourth share there was an assent, expressed or implied.

Our opinion is that there was nothing unadministered, and the plaintiff, as administrator *de bonis non,* consequently has no title in the slave sued for.

His Honor was of opinion that there was no evidence of an assent by the first administrator. In this there is

PER CURIAM. Error.

WILLIAM SHANNON v. ARTHUR JONES.

1. An officer may levy an execution upon a standing crop, provided it is matured. The act of 1844, ch. 35, prohibiting officers from levying executions "on growing crops" embraces only crops which are not matured.

2. If an officer sells under execution a growing crop, and the purchaser afterwards gathers it, the officer, if he had no authority to sell under his execution, is as liable in an action of trover as the purchaser.

(206)

APPEAL from *Dick, J.,* at PASQUOTANK Spring Term, 1851.

Trover for the conversion of a parcel of Indian corn, tried on not guilty. The case appearing in the bill of exceptions is this: In 1850, one Jennings planted a crop of corn on shares in a field belonging to one Pool—Pool to have one-half and Jennings the other. On 9 September, 1850, Jennings sold his share of the crop to the plaintiff for $130

and made him a bill of sale "for the one-half of my entire interest in that growing crop of corn on the lands of J. H. Pool, being in," etc., and therein covenanted to have the crop properly gathered and delivered in merchantable order when the same shall mature and be demanded. In October, 1850, one Williams placed a *fieri facias* on a justice's judgment against Jennings in the hands of the defendant, a constable, and he levied it on "the interest of said Jennings in a field of standing corn," etc., and advertised it for sale. On the day of sale, the defendant went to the field and offered one-half of the corn for sale under the execution. He and the bidders were not at the time within the inclosure, but stood in a public road which the field adjoined and in view of the corn. Williams became the purchaser, and, believing he acquired
(207) the title thereby, he went some few days afterwards and, without any further act of the defendant, he took one-half of the corn under the purchase. The court was of opinion that, supposing the plaintiff to be the legal owner of the corn, he could not maintain this action because the defendant had done no act which would amount to a conversion or any way interfered with the rights of the plaintiff. In submission thereto, the plaintiff suffered a nonsuit and appealed.

Heath for plaintiff.
No counsel for defendant.

RUFFIN, C. J. The case is not stated with a view to the question whether Jennings was the lessee or the servant of Pool, but assumes that he had a property in the crop and had effectually conveyed it to the plaintiff. Taking that to be so, the Court is of opinion there was a conversion of the corn for which the defendant is answerable to the plaintiff. It is the common doctrine that if an officer, under an execution against the goods of one, sell the goods of another, he and the purchaser are jointly and severally liable in trover. If this corn had been gathered and the sale made at the heap, there could be no doubt of the plaintiff's remedy against the officer, or of his right to recover the full value, as for a conversion if the purchaser under color of the purchase took it away. It seems to have been supposed that it was otherwise in this case, because the sale was utterly void and gave no color to take the corn, though it had belonged to the debtor Jennings, upon the ground that the parties were not in the field at the sale, and, therefore, the defendant did not take and deliver actual possession of the corn to the purchaser. But the Court holds the levy and sale well enough in that respect. If the corn had been gathered and lying in a pile in a stack-pen, as is usual, the officer need not get into the pen, but may sell standing on one
(208) side of the fence while the corn is on the other. There being no forcible resistance at the time, that is a sufficient presence of the

corn and possession by the officer to render his sale effectual and must be considered as including a delivery to the purchaser, especially if the latter speedily take the thing away. The sale under such circumstances imports that the right and possession shall be in the purchaser *prima facie*. It must be the same in the case before the court, at least, so far as depends upon the mode of selling. *Skinner v. Skinner*, 26 N. C., 175, and *McNeely v. Hart*, 30 N. C., 492, sustain it and lay it down that in order to make a valid sale of a standing crop, the officer need not go inside of the field, but it is sufficient if he be in view at such convenient distance that bidders can see what is offered and judge for themselves of the quantity, quality, and value thereof. Though the point does not seem to have been raised at the trial, yet it appears upon the facts, and therefore it seems incumbent upon us to consider, whether the sale was or was not effectual by reason of the state in which the crop was. If a crop not severed from the soil cannot be taken in execution and sold, it may be that a sale by the officer, though made in the field, is so utterly void as not only not to vest the right and possession in the purchaser, but also not to constitute an authority or color of authority in him to take the crop by harvesting and removing it. At present we are not called on to say how that is, since the crop in this case was, we think, the subject of execution. At common law, annual crops were the subjects of immediate sale as personal chattels, and in order to render the execution effectual, it was held that of necessity a possession passed to the purchaser, which the law protected by investing him with the rights of ingress and egress to gather and take the crop away. It was upon clear authorities thus ruled in *Smith v. Tritt*, 18 N. C., 241. Until the purchaser secure the crop, it may well be that neither he nor the officer is liable in trover, for by the sale merely the crop did not become in fact separated from the soil so as to be purely personal and (209) *ipso facto* converted. But however that might be, it seems clear to the Court that a sale of a standing crop, which legally passes the right, must be an authority from the officer to the purchaser to take actual possession, and in convenient season to secure and remove the crop. It can be no less, for after the officer has made the sale, and thereby transferred the property, he is not bound to proceed further and gather the crop so as to deliver actual possession after severance. The purchaser takes such possession by force of the sale by the officer and under his authority. When Williams thus took actual possession and used the corn, he was unquestionably guilty of a conversion. It would seem plain that the officer under whose authority all that was done, and was from the beginning intended by all the parties to be done, must be a partaker in the conversion and liable for it. From the condition of the property the acts are separated from each other in point of time, but

in truth they constitute but different parts of an entire transaction. It was a conversion in him whose hand did the act, and also in him who authorized it, just as much so as if he had been again present at the gathering of the crop and commanded or aided in it. Great mischief would follow if the officers were not liable, as the purchaser might not be able to answer to the owner for the value of the goods. It has just been stated that this crop was liable to execution, supposing it to have been the property of Jennings, for although the act of 1844, ch. 35, has altered the law of execution against crops on the ground, it does not reach the present case. It enacts, shortly, that it shall not be lawful for any officer to levy an execution on any growing crop. The term "growing" imports that it is not come to maturity, but is green, or not made. That would be the construction if it depended on that word in the enactment, because it is the natural sense of it, and because a statute in
(210) restriction of the remedies of creditors against the property of debtors is not to receive a liberal interpretation. But the intention in this enactment appears very explicitly in the title of the act, which is, "An act to prevent the levying of executions upon growing crops until said crops are matured." That clearly denotes that standing crops when ripe remain subject to execution as they are at common law. It is not, indeed, expressly stated that this crop matured, but facts are stated which require that to be presumed in the absence of something to the contrary, as the sale must have been about the middle of October, and it is known as a matter of common observation that the crop of Indian corn in the eastern part of the State is ordinarily ripe by that time. Indeed, the case states that "some few days" after his purchase, Williams gathered the corn and used it.

PER CURIAM. *Venire de novo.*

Cited: Kesler v. Cornelison, 98 N. C., 385.

(211)

ELIJAH GASKILL v. WILLIAM C. KING.

1. When a deed by a husband for a slave was signed and sealed, but not delivered, in the presence of a subscribing witness, but was afterwards delivered by the husband to his wife for the benefit of the grantee: *Held, first,* that the delivery was good and inured to the benefit of the grantee. *Held, secondly,* PEARSON, J., *dissentiente,* that when the deed was signed, sealed and attested by a subscribing witness, a delivery not in the presence of the attesting witness might be proved by a third person, so as to satisfy the requisitions of our statute relating to the transfer of slaves.

2. After the death of a husband, the wife is a competent witness to prove the execution of a deed made by him in favor of a third person.

APPEAL from *Caldwell, J.*, at CARTERET Spring Term, 1851.

The action is detinue for several slaves which the plaintiff claims as the administrator of James Gaskill, deceased, and the defendant claims under a deed of gift from James Gaskill to Anson Gaskill, son of the former and an infant ward of the defendant. It was tried on *non detinet*, and the defendant produced a deed from the father to the son dated in February, 1833. To prove the execution thereof, one Chadwick deposed that at the date of the deed James Gaskill came to a house where he was and requested him to write a deed of gift for the slaves from him to his son Anson, who was then an infant of tender years and not present, saying that he did it at the request of his wife, who wished those negroes given to Anson as they were part of those which came to her, and Anson was the only child by that marriage; that he wrote the deed, and it was signed and sealed by Gaskill, the father, and at his request was attested by this witness and another person as sub- (212) scribing witnesses, and then Gaskill took it and carried it away. That about two years afterwards, Gaskill saw the witness and said to him, "I have changed my mind about that deed you wrote for me and do not wish it proved," and the witness replied that he had not seen the deed since the day he wrote it, and thereupon Gaskill remarked, "I thought my wife had given it to you to carry to court and prove." The defendant further offered Mrs. Gaskill, the widow of the intestate, to prove that her husband handed the deed in question to her, and told her to take care of it for Anson, and have it proved and recorded for him whenever she pleased; that she then took it and put it in her trunk separate from her husband's papers, and he never saw it afterwards to her knowledge, and that he died in 1836, and shortly afterwards she had the deed proved and registered.

The counsel for the plaintiff objected to this evidence of Mrs. Gaskill, but the court received it, and then instructed the jury that if they believed the witnesses, the evidence was sufficient to establish the execution and delivery of the deed. After a verdict and judgment for the defendant, the plaintiff appealed.

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

RUFFIN, C. J. Upon the question whether there was legal evidence of the delivery of the deed, the cases of *Vines v. Brownrigg*, 15 N. C., 265, and *Andrew v. Shaw, ib.*, 70, are in point. They lay it down that the act of 1806 does not create any new rule as to the proof of the execution and delivery of a deed of gift of slaves, and that if the subscribing witness, from want of integrity, will not, or from want of memory or

knowledge, cannot prove the signing, sealing and delivery of the deed, the deficiency in his evidence may be supplied by that of the other (213) witnesses. Those adjudications and the reasons for them are attacked on the ground that the statute requires a deed of gift to be attested by at least one credible witness, and that he shall prove the due and fair execution of it on the trial. It is argued that delivery is an essential part of the execution of a deed, and, indeed, that it is no deed until delivery, and thence that the subscribing witness must attest the delivery as well as the signing and sealing. But that seems to be rather a play on words and an adherence to the letter without regard to the sense and purpose of the statute, which would render it absurd and inoperative. It is true that, technically, delivery forms part of the execution of a deed—that is, it is not a deed without delivery—but in common speech, execution means generally signing and sealing a paper, as contradistinguished from its delivery. It seems plain that it is to be understood in that sense in statutes which require subscribing witnesses, for no one ever thought of delivering a deed before its attestation. This verbal criticism, overlooking the context and nature of the thing, would destroy the attestation of deeds delivered as escrows unless the same person happened to be the witness to the signing and sealing, and to both the first delivery and the final one, for until the latter the instrument is not a deed, and so the attestation could not be that of a witness to the deed. Thus, also, the statute of devises uses the language that no last will shall be good unless such last will be written in the testator's life and signed by him and be subscribed in his presence by two witnesses at least, and then that the same shall be proved by at least one of the subscribing witnesses; but if contested, it shall be proved by all. What is to be subscribed by the witnesses? The will, answers the statute. But by the same statute, *literatim*, it is not a will until it be subscribed by the two witnesses; and then, according to the argument, the attestation must be null since it was not a will—that is, a perfect (214) will—upon the subscription of the first witness, nor, indeed, until the death of the testator. That cannot be the meaning of the statute. On the contrary, it is manifest that "such last will shall be subscribed by two witnesses" means that the paper-writing purporting to be the will shall be thus subscribed. Accordingly, it has been supposed to be perfectly settled that the two witnesses need not even subscribe together, but may do so at different times and not in the presence of each other. The ground on which *Vines v. Brownrigg* and *Andrews v. Shaw* are impeached thus seems to the majority of the Court altogether unsatisfactory in itself, and to leave those cases with all the authority to which as judicial precedents they are entitled. The point decided distinctly arose in each case, and upon mature consideration,

the judges held that it was not the purpose of the act of 1806, more than that of 1792, to require more to be proved by the witnesses to the writings mentioned in them than by the witnesses to other instruments, but that the intention was merely to restore the rule of the common law that upon trials such instruments were to be read upon proof of them then made by the witness and not upon the proof on which they were registered. That was thought to be the whole scope of the act of 1806, and the more especially as it was but applying to it the construction known to have been invariably put on that of 1792 couched in like language. Those decisions were made in December, 1833, and have been fully acquiesced in, we believe, ever since by the profession and not questioned until the present time. They have, besides, received the sanction of the Legislature. In revising the body of the statute laws in 1836, not only is the first section of the act of 1806 reënacted without alteration, but, with those decisions before the Legislature, the third section of the act of 1792 and the second of that of 1806 are incorporated into one section, saying that on trials the due and fair execution of written conveyances of slaves by way of gift or sale shall be proved by the subscribing witness, thus expressly putting the two on the same foot- (215) ing, as the Court had by inference before held it had been intended to do. Rev. St., ch. 37, sec. 21. It would be a public mischief, in this state of the matter, to overrule those cases, for if the point now agitated is not to be considered as thus put to rest, it would seem that nothing is to be deemed settled in our law.

It was, however, further contended in the argument that although that may be generally true, here the deficiency is not supplied because the wife was not competent to accept the delivery, nor to prove it. As to the competency of Mrs. Gaskill to give evidence, it is true she could not have done so in her husband's lifetime in a controversy to which he was a party, both in respect of his interest and person, but when he died, her exclusion, as far as it arose from the interest of the husband or the policy of the law, ceased and she became competent in any suit by or against the husband's administrator to give evidence against the administrator, though not for him. The first she can do because she swears against her interest, which is always allowable; the latter she cannot, because the effect of her evidence would be to increase the fund out of which she is to have a distributive share, or repel a charge on it. But the question of her capacity to give evidence in this case is much like that started in *Harrison v. Burgess*, 8 N. C., 384, whether, upon a caveat of a husband's will, the widow could prove that he deposited it with her for safe-keeping, so as to bring it within the act of 1784, on which the opinion of the Court was undoubtedly in the affirmative. In truth, this communication must from its nature have been made to the

wife for the express purpose that she should make it known so as to effectuate the deed, and, therefore, the case falls directly within that of *Hester v. Hester*, 15 N. C., 228. As to the other part of the proposition, namely, that the delivery to the wife was not a delivery of the deed in law, this is said on the ground that husband and wife are
(216) one, and thence is derived the idea that the delivery to her was retaining the custody in his own hands; and so he did not part from the control of the instrument and it never became his deed. The Court cannot adopt the reasoning. In the case just cited this notion was repudiated. For although to many purposes husband and wife are one, yet they are naturally two persons, and to many other purposes they are distinct in a legal sense, both *criminaliter* and *civiliter;* and among those instances it was there held that a wife might be a depository of her husband's will as any other friend might be. That seems to be directly applicable to the case in hand. It is common doctrine that a wife may be her husband's attorney and, with the husband's assent, the attorney of another person. There is nothing in their relation to forbid that. If a third person, then, had made this deed and delivered it to the wife for the son, there can be no question of the delivery, for not only is a delivery to the donee's attorney a delivery to the donee, but it has been long laid down that a delivery to a stranger for the donee is sufficient, and makes it a deed presently and until he disagree thereto. The old cases were looked into in *Tate v. Tate*, 21 N. C., 22, and the conclusion there drawn from them is that when the maker of a deed parts from the possession of it to anybody, there is a presumption that it was delivered for the benefit of the grantee, and it is for the maker to show the contrary. If, indeed, the husband had professed to deliver the deed to his wife or to any one else to keep for him, or subject to his disposition, the presumption just mentioned would not arise. But that was not the fact in this case. The deed was expressly delivered to the mother for the son. The wife did not take it as wife or the servant of the husband, but exactly the contrary. The intention was that it should operate as a deed to the son. It is said, however, that he had a legal dominion over her, and might have compelled her to give him up the paper. Whether he could or not depends upon the
(217) question whether she held the instrument as the husband's or the son's property. He might, it is true, by superior strength and his authority over the person of the wife, have forcibly compelled her to part from the paper, but he could not have done so rightfully if he parted from the instrument as his deed for one instant, for he would have no more authority, legal or moral, to take from his wife a deed made by him to his son and in her custody for the son than he would have to take a deed made by a third person and left with her by the

donor or donee to keep for the donee. The dominion of a husband over the wife is given for his security and her protection, and to those ends will be upheld. But the law will not allow it to be abused and perverted to the prejudice of other persons and such of their rights as are founded in justice and law. In this case, by the act of delivering the deed to the mother for her son, the husband expressed in the strongest manner he could that she might act on behalf and for the benefit of their child in taking and keeping the deed as the son's, and it became at once as operative as if it had been put into the hands of the infant himself, and could not be recalled.

PEARSON, J., *dissentiente:* The deed of gift was signed and sealed in the presence of two, who signed their names as witnesses, but the paper was not delivered in their presence, and if it was delivered at all, the delivery was made some time afterwards to the wife of the donor, who alone proved the delivery after his death, when it was registered.

The act of 1806 requires a subscribing witness to all deeds of gift for slaves. To hold that in this case there is a subscribing witness to the deed is, in my opinion, contrary to the meaning and intent of that statute, and I am forced to enter my dissent.

"A deed is a writing on paper or parchment sealed and delivered." Signing is now made also necessary in most cases by statutes. A subscribing witness to a deed is one who sees it signed, sealed and delivered, or hears it acknowledged, and signs his name as a wit- (218) ness at the instance of the maker; he is a witness provided by law to guard against fraud and perjury. One, therefore, who sees a paper signed and sealed and signs his name as a witness of these two facts, but who is unable to prove its final consummation as a deed by delivery, does not come within the above definition of a *subscribing witness to the deed,* and, therefore, the deed in this case has not a subscribing witness as required by the statute.

What reason can be assigned why the statute should seek to guard against fraud and perjury in reference to two of the acts necessary to make a deed and provide no such guard in reference to the third, which is the final and most important act, and the one about which controversy is most apt to arise and as to which a safeguard is most needed and fraud and perjury most easily perpetrated? As to the signing, an attempt at perjury may usually be detected by the handwriting. As to the sealing, that, since the use of a mere scrawl, amounts to but little. The delivery is the act most exposed to be procured by fraud or to be proven by perjury. It seems to me a strange construction by which the statute is made to require a witness, as to the former, to sign the paper at the instance of the donor, and yet to provide no witness as to the fact that the delivery was his deliberate and well-considered act.

The particular facts of this case show that such a construction makes the statute a dead letter, so far as regards any useful purpose. It is clear from what the donor said to the witness about his not wishing the deed proven, some two years after it was signed, that what he did was by the importunity of his wife to give her child a preference over his other children, and he was reluctant to do it. There was, then, a necessity of clear proof that he made the delivery, as to which there is
(219) no evidence but that of the wife. Suppose, under the decision of *Hester v. Hester,* as qualified by *S. v. Jolly,* 20 N. C., 108, she was a competent witness after her husband's death, she certainly appeared in a "most questionable shape"; and if it be wise to require a "witness of the law" in any case, this is that case.

The majority of the Court feel bound by *Vines v. Brownrigg.* The reasoning in that case is unsatisfactory and inconclusive, and I am persuaded that the decision entirely destroys the utility of the statute, and therefore do not feel at liberty to follow it.

The learned Judge who delivered the opinion devotes more than three-fourths of it to a question which was not controverted, viz., whether, on the trial, the execution of the deed of gift must be proven, or such proof is dispensed with by the *ex parte* probate and registration. At the close of the opinion, he asserts the proposition that "if A. is a subscribing witness to a writing evidencing a gift of slaves, saw it signed and sealed, but could not prove its delivery, then B., who is not a subscribing witness, may be introduced to prove the delivery." He cites two English cases which establish this proposition that, under the statute of wills, if two of the three who purport to be attesting witnesses deny their attestation, and the *fact of their being attesting witnesses* is established by the other attesting witness who knew the fact *that they did attest the will,* such proof satisfies the statute, for otherwise any will might be defeated by perjury. Hence he infers that if a subscribing witness to a deed of gift denies the fact of his being a subscribing witness, and thus perjures himself, the fact of his being a subscribing witness may be established by other witnesses. This is a correct conclusion. And so, if the subscribing witness cannot prove the delivery from the want of memory, other witnesses may prove that *he did in fact witness the delivery* as well as the signing and the sealing. But where there is
no perjury and no want of memory, and the fact is that he did
(220) not witness the delivery, the inference from the above premises that other witnesses may prove, not that he did *witness the deed,* but that the deed was delivered in his absence and without his knowledge, is a *"non sequitur";* and to assume that he is a subscribing witness is a *"petitio principii,"* for whether under the facts agreed, to wit, he saw the paper signed and sealed, but did not see or know of its delivery,

he is a subscribing witness to the deed or not within the meaning of the law was the very question to be decided.

In *Andrews v. Shaw*, 15 N. C., 70, which was decided at the same term, *Vines v. Brownrigg* is incidentally referred to and approved. But *Vines v. Brownrigg* is the only case decided on the point, and the question is, Does that give to the statute its true construction? The question, whether a writing attested by a witness subscribing the same, accompanied by an actual *delivery of the slave,* passes the title, does not arise, for here there was no delivery of the slave and a deed of gift was necessary.

The above was submitted to the Court before the opinion of the majority was filed as my ground for not following *Vines v. Brownrigg.*

First. My impression was that *Andrews v. Shaw* did not present the point. I therefore treated it as a *dictum* and not a decision, because in that case the subscribing witness saw the deed signed and sealed and heard it *acknowledged by the maker,* and *was directed in his presence to hand it to the attorney, who drafted it.* This, I thought, made him a witness of the "delivery" as well as the signing and sealing, and, according to my own definition, he was a subscribing witness to the deed. But suppose it is in point, it was decided at the *same term* upon the same reasoning, and is a mere repetition.

Second. To support the case, it is said, "But in common speech, execution means generally signing and sealing a paper, as contradistinguished from its delivery. It seems plain that it is to be understood in that sense in statutes which require subscribing wit- (221) nesses, for no one ever thought of delivering a deed before its attestation." To this my reply is, that execution means "finishing, completing an act"; and as delivery is a substantial, not a mere technical, requisite, the execution of a deed means that it has been "*delivered*" as well as signed and sealed; and although it is frequently the case that the maker of a deed, after signing and sealing the paper, requests some one to attest it and then delivers it to the other party as his deed, yet this request is generally made with the understanding that it is then and there to be delivered or acknowledged in the presence of the attesting witness. Yet it is also frequently the case that the maker, after signing and sealing, acknowledges the delivery and requests some one to witness it as his deed, which being done, the other party takes possession of it as a thing delivered to him before the attestation. The truth is, whether the attestation is before or after the delivery, the acts are understood to be contemporaneous and continuous and form a part of the "*res gestæ.*" It makes no difference which comes first, so that they both come. But I apprehend it is quite unusual for one to witness a paper *as a deed* when the maker has no present purpose of making a delivery,

and, except in the case of *Vines v. Brownrigg* and the present case, I question if such a thing has occurred within the last twenty years. The thing is so unusual that from the fact of there being a subscribing witness, if he is dead, proof of his handwriting is deemed in law sufficient evidence for a jury to infer the delivery.

Third. The objection that "no deed could be delivered as an escrow unless the same person happened to be the witness to the signing and sealing and to both the first delivery and the final one" is met by the fact that there is only *one delivery,* which is when the maker parts with the possession and control of the paper. If there be a witness to
(222) the signing and sealing, and he also is a witness to the fact that the maker delivered the paper as his deed to be handed to a third person if a certain thing is done, then the statute has been complied with; and if the thing is done, it is the deed of the maker from the time of its delivery as an escrow. *Hall v. Harris,* 40 N. C., 303.

Fourth. I am so unfortunate as not to feel the force of the illustration from the statute of devises.

Fifth. *Vines v. Brownrigg* and *Andrews v. Shaw* were decided in 1833, and have been "fully" acquiesced in by the profession and have received the sanction of the Legislature, for in 1836, when the statutes were revised, no change was made in the law.

My reply is: First. I presume no case of the kind has happened, except the present, since 1833. At all events, *Vines v. Brownrigg* and *Andrews v. Shaw* were not cited on either side in the argument.

Second. *Wagstaff v. Smith* was decided in 1832 (17 N. C., 264). It was overruled in 1833 (39 N. C., 1), and the law was then decided to be that, as between tenants in common, an account for the profits was cut off by the statute of limitations except for the last three years. It is proper to say this latter decision was not reported from some cause or other till 1845. Still the decision was one of importance and bore upon questions occurring almost every term. It was, of course, known to the profession, and we must presume it was known to the members of the Legislature, not only in 1836 but in 1834-37 and up to 1849, December Term, when *Northcot v. Casper,* 41 N. C., 303, "overruled it" upon the ground that it had put a construction on the act of 1715 (Rev. Stat., ch. 65, sec. 9) which was contrary to the "reason of the thing," and contrary to previous authorities, the acquiescence of the profession and of the Legislature "to the contrary notwithstanding."

My idea is that "law" is not a mere list of decided cases, but a *"liberal science"* based on general principles and correct reasoning. Cases
(223) are mere evidences of what the law is; and if a case is found to be unsupported by principle and "the reason of the thing," the Court is no more bound to follow it than is a jury bound to believe a

witness who is discredited by proof of his bad character or his demeanor or direct contradiction. In the one there is a *sworn* witness; in the other there is a decided case—both are *prima facie* entitled to credit until the contrary is made to appear.

It is true, law should be "fixed and steady," but it is also true it should be "reasonable and right." The latter is the more important, because without it the former object cannot be attained. There are two extremes—a disregard of authority, which I disclaim, and a blindfolded following of cases, which I also disclaim as not only absurd, but impossible, for suppose a court, in attempting to follow a case, should "miss the point," which case is then to be followed? There is a medium which I try to adhere to. Take a comprehensive view of all the cases from the "year-books" down to the present time, has not this middle course been adopted and acted on throughout? Is it not supported by good sense and general practice? Let a case be taken as settling the law *prima facie*, but if it is shown not to be supported by principle and "the reason of the thing," let it be overruled—the sooner the better—for if the error is allowed to spread, it may insinuate itself into so many parts and become so much ramified as to make it impossible to eradicate it without doing more harm than good; but if the seed has not spread too much, pull it up and throw it away.

Per Curiam. Affirmed.

Cited: Roe v. Lorick, 43 N. C., 91; *In re Cox*, 46 N. C., 323; *Phillips v. Houston*, 50 N. C., 303; *Whitman v. Singleton*, 108 N. C., 195; *Perry v. Scott*, 109 N. C., 376; *Board of Education v. Comrs.*, 111 N. C., 591; *Robbins v. Rascoe*, 120 N. C., 82; *Mallory v. Fayetteville*, 122 N. C., 491; *McIlhaney v. R. R., ib.*, 997; *Whitford v. Ins. Co.*, 163 N. C., 229; *Buchanan v. Clark*, 164 N. C., 63.

(224)

JOHN McRAE v. WINFIELD S. RUSSELL.

Where one of the subscribers to the Wilmington and Manchester Railroad Company, under the charter granted by the Legislature in 1846, gave his note for the first installment to one of the commissioners appointed to take subscriptions for the use of the company instead of paying the cash: *Held*, Pearson, J., *dissent.*, that the subscription was not void, and that the payee could recover on the note.

Appeal from *Manly, J.*, at New Hanover Spring Term, 1851.

This is an action of debt on a bond, commenced by warrant before a single justice and brought by successive appeals to the Superior Court.

The pleas are general issue, consideration of the bond unlawful, consideration fraudulent as against the policy of the law. The following facts are agreed:

The Legislature of this State, at its session of 1846-7, passed an act to incorporate the Wilmington and Manchester Railroad Company. Books of subscription for stock in said company were opened by the commissioners named in the act, of whom the plaintiff was one, and the defendant signed an agreement in the said book in the following words:

"Wilmington, N. C., 1 March, 1847.

"We, the undersigned, agree to take the number of shares opposite our names in the capital stock of the Wilmington and Manchester Railroad Company, to be paid as follows: The first installment to be paid on the formation of the company; the second and other subsequent installments to be paid whenever it shall appear that seventy-five
(225) hundred shares in all have been taken in the capital stock of said company. But it is understood and agreed that the second and other installments may be made and paid up in work or materials or money, at the option of the subscribers; and whenever materials or labor shall be so subscribed, they shall be valued by engineers hereafter to be appointed to superintend the Wilmington and Manchester Railroad."

And the defendant, at the time of signing the above, wrote the words *"five shares"* opposite to his name so signed, but did not pay the cash installment of 5 per cent on the amount of said subscription at the time of making the same, as required by the third section of the said act.

Afterwards, to wit, on 1 May, 1847, the defendant executed and delivered to the plaintiff the bond declared on, which is in the words and figures following:

"On demand, I promise to pay to John McRae, or order, twenty-five dollars, for value received, being the first installment of five per cent on five shares of stock subscribed by me to the Wilmington and Manchester Railroad. "W. S. Russell. (seal)

"1 May, 1847."

On the foregoing case, the court being of opinion for the plaintiff, gave judgment accordingly for the amount of the bond, with interest from the date of the warrant, from which judgment the defendant appealed.

J. H. Bryan for plaintiff.

D. Reid and Norwood for defendant.

RUFFIN, C. J. The opinion of the Court is that the judgment ought to be affirmed. As the suit was commenced by warrant before a justice of the peace, on which the proceedings are summary, the question arises without any special plea on the facts agreed. In them there is nothing, we think, rendering this bond void as being founded on an illegal and vicious consideration. It is not stated whether the corpora- (226) tion has been organized or not. If it has not, then clearly the plaintiff must recover on a voluntary bond executed to him by the defendant, as there is no statute declaring it void. But it is the same if the charter took effect by the requisite amount, including the defendant's stock, having been subscribed and a due election of a president and directors, for, giving the defendant the benefit of presuming all the facts he can ask—which are that the bond was taken for the first installment on five shares of stock subscribed by him and was made payable to the plaintiff in trust for the corporation—still that would not vitiate the bond. The provisions of the charter material to the question are that the subscriptions are to be received for $1,500,000 in shares of $100 as the capital stock of the Wilmington and Manchester Railroad Company; and certain commissioners, of whom the plaintiff was one, are appointed to receive the subscriptions; and upon each share of stock subscribed the subscriber is to pay to the commissioners taking the same $5; and on nonpayment of said installment, the subscription shall be void. Then it provides that, upon the subscription of $300,000 in manner aforesaid, the company is declared to be incorporated, and a general meeting of the proprietors of the stock shall be called, and the president and directors elected; and in such meetings and others afterwards, each share of stock shall be entitled to a vote; and in a subsequent part it authorizes a sale of the stock of delinquent stockholders, and also suits against such delinquents for their installments. We see nothing in any or all of those provisions to avoid this deed of the defendant. It is true, the act says his subscription was void unless he paid the first installment. That only proves that no recovery could be had on the subscription; but it does not show that, if instead of paying cash he got a receipt for it by giving his bond, the bond would be also void. To invalidate the bond, it is not sufficient that it is without considera- tion, but there must be an unlawful and vicious consideration. (227) No one would impute such a consideration to this bond were it not for the words in the statute that on nonpayment of the first installment the subscription shall be void. But they cannot have that effect. The provisions was intended manifestly to prevent persons who were nominal subscribers and had paid nothing from coming forward at the general meeting for the organization of the company and claiming to have a vote for every share standing in their names. The purpose was

to protect real stockholders from such men of straw. It was, moreover, meant to protect men from the consequences of making such subscriptions under the influence of momentary excitements which they could not fulfill. It gave them a *locus penitentiæ* until they deliberately chose to confirm the subscription by making the requisite payment on it. The meaning was that until such payment the one party should have no voice in the concerns of the company, and the other party should not be able to recover the charter price of the share. That, it seems to the Court, was the whole scope and purpose of the provisions. It is a shield to the one class of subscribers against another, and that merely. It involves no matter of public policy or morals more than any other contract between private or corporate bodies. The law, for example, says that a parol contract for a sale of land is void. It says so, no doubt, as a matter of policy, but it is a policy affecting private rights, and does not involve the interest of the community as such. But although such a contract be void, yet if the purchaser give his bond for the price, that bond is not void. Nor if the other party, though not bound, give a deed for the land, will that be void. So, in this case, the defendant could not have been compelled to pay the $5 a share by force of the subscription; yet if he and the other subscribers chose to waive the provisions thus made for their benefit respectively, and agreed that, upon his
(228) giving his bond for the same, it should be taken as cash and he admitted into the company, and he deliberately does so, it is not seen that any principle of law or justice is violated, or that there is any reason why he should not pay this as much as any voluntary bond. The State has no concern in the question as now presented, which simply involves the inquiry whether this or that man is one of these corporators, and not any breach of good morals or public weal. The bond, therefore, is not impeached, and the plaintiff is entitled to judgment on it.

PEARSON, J., *dissentiente:* The statute, which provides for taking subscriptions to the stock of the Wilmington and Manchester Railroad Company, appoints certain commissioners, makes it their duty to require *payment in cash* of five dollars in the hundred, and to pay over the amount to the company upon its organization, and declares all subscriptions void if this cash installment is not paid to the commissioner at the time he takes the subscription.

The plaintiff was one of the commissioners, and undertook to act in that capacity, and in violence of his duty accepted from the defendant, at the time he made a subscription, the note now sued on, instead of the cash, and reported him a subscriber entitled to five shares of stock. This was not true—the cash not having been paid—and the subscription on that account being void.

The question is, Will this Court countenance a breach of duty in a public agent by giving its aid in the collection of a note which it was a violation of his duty to take? How is the case distinguished from that of compounding a felony, where, on account of the breach of duty to the public in taking a note, the courts refuse to aid in its collection?

I cannot bring my mind to the conclusion that the judicial branch of the Government ought thus to encourage a departure from plain words of instruction given by the legislative branch to one of its agents.

The validity of the charter of the company is not involved in (229) this case. That cannot be drawn in question in this collateral matter. When the sovereign has cause of complaint against *the company* it must institute a direct proceeding in order to vacate the grant, and the difficulties and many grave objections which, in almost every instance, present themselves to this direct proceeding argue strongly in favor of watching with jealousy all dereliction of duty on the part of those whose instrumentality is relied on to give to the company its corporate existence, because, when all the conditions precedent to its coming into existence are faithfully performed, there is apt to be but little cause of complaint growing out of its future action.

It is the duty of our Public Treasurer to borrow money upon State bonds. Suppose he issues a bond, and instead of receiving the cash takes the note of the individual, trusting to his assurance that the cash will be paid the very instant it is needed for public use. No one would call in question the validity of the State bond, but I imagine few would be found to insist that the courts ought to aid the Treasurer in the collection of the note which he has taken in violation of his duty, although it happened that no direct harm resulted from the arrangement.

What was the object of the Legislature in requiring that there should be this *cash payment* upon every share of stock it is not for us to inquire. It may be it was to guard against "bubble corporation," which sometimes do much harm; or to give the company a fair start and prevent the necessity of contracting debts. Whatever the object may have been, it is certain that the Legislature, in *express terms* and as a condition to the subscription, directed the plaintiff to require the *cash*, and it was a breach of duty to take a *note*.

Per Curiam. Affirmed.

Cited: Haywood v. Bryan, 51 N. C., 84; *R. R. v. Thompson*, 52 N. C., 388; *Bank v. Statesville*, 84 N. C., 176.

MEMORANDUM.

BARTHOLOMEW F. MOORE, Esq., resigned his office of Attorney-General on the ..... day of May, 1851, and on 19 June, 1851, WILLIAM EATON, Esq., of Warren, was appointed by the Governor and Council to succeed him.

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT MORGANTON

AUGUST TERM, 1851

THE ATTORNEY-GENERAL v. ADRIEN CARVER ET AL.

1. An order taking a bill *pro confesso* for want of an answer dispenses with proof on the hearing, and is conclusive that the matter of the bill is true, as if the same were confessed in an answer.
2. If a bill, though confessed, does not entitle the plaintiff to a decree it must be dismissed; but if it contain matter for some decree for the plaintiff, that decree will be made.
3. Its nature, however, will depend upon the consideration whether there be or be not enough in the bill to show the precise extent of the relief which the plaintiff ought to have. If, for example, the bill be for the specific performance of a contract for the sale of land, and it is not so described in the contract or bill as to identify it by such metes and bounds as ought to be inserted in the conveyance to be decreed, then on the hearing the court would only declare that it was fit the contract should be specially performed, and a survey and inquiry would be directed thereon, and, of course, the party might offer proof touching that matter.

THIS was an *ex officio* information, filed by the Attorney-General in the Supreme Court at Morganton. The object of the information was to vacate a grant from the State to the defendant Carver.

The information states that on 29 June, 1851, the defendant (232) Carver made an entry of 200 acres of land lying in Burke County, on the waters of Toe River, under Humpback Mountain, and adjoining his own land on the east. That soon afterwards he obtained a warrant thereon and delivered it to David Chandler, a deputy of the county

surveyor, and procured him to make plots and certificates of survey of the entry and transmit them to the office of the Secretary of State, purporting to be a survey of a tract of land containing 200 acres, with the following butts and bounds: "Beginning at a white oak standing on the east bank of Toe River, and running thence east 200 poles to a stake on the top of Humpback Mountain; thence north with the mountain 260 poles to a stake on the bluff end of the mountain; thence west down the leading ridge between Brushy Creek and Laurel Creek 200 poles to a stake on the bank of the river; and thence down the meanders of the river to the beginning." And that on 12 December, 1832, he (Carver) paid into the public treasury the sum of $10 as the purchase money of the said tract of land, and obtained a grant of that date to himself for the same, described therein by those lines and boundaries and as containing the said quantity of 200 acres. The information further states that in fact and truth the line east from the beginning white oak to the top of the Humpback Mountain exceeds two miles in length; and the next line, north with the mountain to the bluff end of the mountain, is also upwards of two miles long; and the third line, west from the bluff end of the mountain to the river, and that down the river to the beginning, each is more than two miles long, so as, by reason of the calls for natural objects as corners, to include within the lines 3,000 acres instead of 200 only. That Chandler and Carver well knew the length of the lines, and that the latter, by collusion with Chandler, procured him corruptly and contrary to his duty as a deputy surveyor to make an untrue (233) plat and certificate by giving the false description of the land as above mentioned and stating falsely the quantity therein contained, with the corrupt and fraudulent intent that by such false suggestion Carver should obtain a grant for the 3,000 acres of land included in the survey without making due payment therefor, excepting only as to 200 acres part thereof. And that in pursuance of such corrupt and fraudulent intention, and by such false suggestion, Carver did obtain the grant covering the large quantity of 3,000 acres instead of the 200 acres, to which latter quantity alone he was justly entitled. The information further states that the defendant Hyatt, with full knowledge of all the facts before charged, subsequently took a conveyance from Carver for the land as and for 3,000 acres.

Copies of the warrant, plat and certificate and grant are annexed as exhibits, and they are of the tenor stated in the information as to the corners, lines, and quantity of land, the grant being dated 12 December, 1832, and numbered 5601.

Prior to August Term, 1850, a subpœna returnable to that term was duly served on the defendants, and also a copy of the information delivered to each of them, but neither of them appeared, and on the return

of the sheriff and motion of the Attorney-General, the court then ordered that the information should be taken *pro confesso* and set down to be heard *ex parte* at the present term.

Attorney-General and T. R. Caldwell for the State.
No counsel for defendant.

RUFFIN, C. J. Of cases of this kind, when instituted on behalf of the State by the Attorney-General, original jurisdiction is conferred by the statute on this Court, and the proceedings may be by bill or by information in the nature of a bill in equity, and are to be carried on according to the course of the court of equity. The grounds on which grants may be vacated or repealed are that they were issued (234) against law or were obtained by fraud, surprise, or false suggestion. No one can hesitate to say that the case in the information, if true, furnishes grounds for annulling the grant. The entry was for 200 acres, and the enterer procured a survey to be made purporting to contain that quantity, and describing the lines to be of lengths that would include no more. There was nothing, then, upon the face of the papers transmitted to the Secretary of State which would raise a suspicion of any unfairness or falsehood in the description therein given of the land, to which description the grant was necessarily to conform. But by artfully and deceitfully calling for the natural objects of a river, the top and end of a mountain, and a dividing ridge between two creeks as parts of the boundaries of the land, the distances called for are, by legal construction, overruled, and the lines are to terminate at, or go along, the natural objects; and thus a grant was obtained, and intended to be obtained, for 3,000 acres, professing all the while to be for 200 only. And all this false description as to the length of the lines, and false suggestions and affirmations as to the quantity of land, were to the intent and purpose of cheating the public revenue out of the price of the difference in the quantities—that is, 2,800 acres. The fraud on the State is palpable, whereby the party knowingly got a grant for a large tract of land by paying one-fifteenth only of the price required by law. It is clear that a grant thus obtained ought not to be of force, but be decreed to be brought in, canceled and annulled, and the enrollment thereof canceled.

A doubt, however, has been suggested whether the truth of the case set out in the information is established. The doubt is founded on a practice, which is said to have prevailed of late in some parts of the State, requiring a plaintiff to prove his case on the hearing, notwithstanding the bill may have been taken *pro confesso* and the cause set down thereon. The practice cannot be of long standing, and (235)

must be of limited extent, and there seems to be no foundation for it. The experience of the elder members of the Court is entirely to the contrary on the circuits, and it certainly never prevailed in this Court. Not to mention other cases, it was held, or plainly assumed, in *Andrews v. Lee,* 21 N. C., 318, and *McCaskill v. McBride,* 37 N. C., 52, that an order taking a bill *pro confesso* dispensed with proof on the hearing, or, rather, put the case into a condition in which there was no opportunity to get proof extrinsic of the bill. Prior to any alteration by statute, the appearance of a defendant, though served with a subpœna, was indispensable to any relief to the plaintiff, because without it the court had not jurisdiction to decree *in personam.* Various rules of court and acts of Parliament were made to enforce appearance or to authorize an entry of it by an officer of the court, even against the defendant's will; but it appears from *Hawkins v. Crook,* 2 Pr. Wms., 556, that when an appearance was thus entered, if the defendant still withstood process of contempt and refused to answer, the plaintiff was anciently put to prove the substance of his bill on the hearing. It further appears there that prior to that case the practice was established of setting down a cause when the defendant would not answer after appearance, and, upon the hearing, taking the bill *pro confesso* and decreeing thereon. The consequence of taking the bill *pro confesso* is there stated to be that every allegation in the bill is considered as confessed by the defendant. On that ground the reporter, who was the defendant's counsel, calls it an extraordinary consequence, "as it takes everything *pro confesso* which the fruitful fancy of counsel could invent, suggest, and put into a bill, and makes all pass for truth." Yet he admits that the practice was firmly established, and that it was founded on the sound reason, that without the order, the plaintiff would be without remedy, since
(236) by the defendant's contumacy in refusing to answer, the plaintiff could not join issue, and was thereby deprived of the opportunity of examining witnesses. The necessity for the rule is thus rendered clear, and the effect of it must obviously be that stated—which is taking the matter of the bill to be true as if the same were confessed in an answer. The terms, "taking the bill *pro confesso" per se,* carry that sense; and when it is perceived that in the state in which the cause is hereby placed the plaintiff cannot proceed to proofs by witnesses, the conclusion is clear that the truth of the bill is to be taken as admitted on the hearing, as if an answer confessed it in the terms of the bill. It was in that sense those words were used in Stat. 5 Geo. II, which first allowed a bill to be taken *pro confesso* against and absconding defendant on whom process could not be served. The statement of the bill was assumed to be true, and a decree made accordingly. Smith's Ch. Pr., 153. The same terms are to be found in our acts of 1782 and 1787

regulating the proceedings against defendants who do not answer, whether served with process, or absconding or residing abroad, and there cannot be a doubt that they were used and are to be received in the same sense. The latter act contemplates that the hearing may be immediately after the order taking the bill *pro confesso,* and provides that the Court shall "decree thereupon"—that is, upon the bill and order—on the security of the bond of the plaintiff for restitution, if decreed on a rehearing; and the act of 1782 requires that upon taking the bill *pro confesso,* the cause shall be set down to be heard *ex parte* at the ensuing term, with a proviso that upon a proper ground shown within the first three days of the next term, the preceding orders may be discharged and the defendant admitted to a full defense. The acts of 1762, ch. 79, and 1806, ch. 703, contain similar enactments respecting petitions in the courts of law for legacies and distributive shares. And all those provisions distinctly evince that the cause is not open for proofs, (237) so far, at least, as concerns the decree to be pronounced on the hearing, and the case is thus brought by the statute within the very reason assigned in *Hawkins v. Crook* for the rule originally. Therefore, the decree is to be on the bill upon the supposition that the matter thereof is true by the confession of the defendant. It seems probable that the recent local practice to the contrary which has been mentioned to us has arisen from the misapplication to this case of the rule, that the matter in the bill which, though not expressly denied, is not admitted in the answer must be proved. But the distinction between the cases is plain, for without insisting on the general traverse usually inserted in the conclusion of the answer, there is this marked difference: that as to those parts of the bill on which the answer is silent, the bill is not taken *pro confesso.* A bill must be taken *pro confesso* throughout or not at all. Hence an answer, however insufficient, puts the plaintiff to the necessity of proving his case either by witnesses or by obtaining a fuller answer on exceptions. But that has no application to the case in which, in default of any answer or appearance, the bill is expressly taken *pro confesso,* whereby the plaintiff is allowed to insist on a decree on the bill as being all true. The consequences are that if the bill, though confessed, do not entitle the plaintiff to a decree it must be dismissed, but if it contain matter for some decree for the plaintiff it will be made. Its nature, however, will depend upon the consideration whether there be or be not enough in the bill to show the precise extent of the relief which the plaintiff ought to have. If, for example, the bill be for specific performance of a contract for the sale of land, and it is not so described in the contract or bill as to identify it by such metes and bounds as ought to be inserted in the conveyance to be decreed, then upon the hearing there would be only a declaration of the opinion of the court

(238) that it was fit the contract should be specially performed, and, because the particular lines of the land did not appear, a survey and inquiry would be directed thereon, and, of course, the party might offer proof touching that matter. So it would be likewise in bills for redemption, to settle partnerships, and for accounts and payment of legacies, distributive shares, and the like. But if the bill contains matter which at all events entitles the plaintiff to a decree to the full extent of the prayer, and it is apparent that, taking the bill to be true, the result of no inquiry could vary the terms of the decree, then it is obvious that the decree on the hearing must be the final decree. Such is the present case. The information has but one purpose—that of vacating the grant. It asks for no account or other relief, and upon it there can be but one of two decrees under any circumstances—that is, to dismiss it or to vacate the grant. Therefore, it is incumbent on the Court now to declare that the grant was unduly obtained, as before mentioned, and to decree definitely that it be vacated and annulled according to the statute, and that the defendant Carver pay the costs.

PER CURIAM. Decree accordingly.

The following decree, drawn by the Court, was then entered:

21 August, 1851. This cause coming on to be heard on the information filed on behalf of the State by the Attorney-General, the exhibits and the former orders, and argument of counsel on behalf of the State, and the whole matter being considered by the Court, and it appearing in and by the information and exhibits as therein stated that on 29 June, 1831, the defendant Adrien Carver made an entry of 200 acres of land, lying in Burke County, on the waters of the Toe River, under Humpback Mountain, and adjoining his own land, and that the said Carver afterwards obtained a warrant thereon, and procured one David

(239) Chandler, a deputy of the surveyor of said county, to make out plats and certificates of survey, purporting to be upon the said entry and to be a survey of a tract of land containing 200 acres, with the following butts and bounds, that is to say: Beginning on a white oak standing on the east bank of Toe River and runs east 200 poles to a stake on the top of Humpback Mountain; thence north with the mountain 260 poles to a stake on the bluff end of the mountain; thence west down the leading ridge between Brushy Creek and Laurel Creek 200 poles to a stake on the bank of the river; thence down the meanders of the river to the beginning, and transmit the said warrant, plats, and survey to the office of the Secretary of State; and that on 12 December, 1832, the said Adrien Carver paid into the public treasury the sum of $10 as and for the purchase money due to the State for the said tract of land, and then obtained a grant to be issued to him, the said Carver,

for the said tract of land described therein by the aforesaid lines and corners, and as containing 200 acres, and that the said grant bears date the day and year aforesaid, and is numbered 5601. And it further appearing thereby that the distances between the several natural objects, which are described in the said survey and grant as corners of the said tract of land, are such that each of the four lines thereof exceeds two miles in length instead of the respective lengths in the said survey and grant mentioned, and that by reason thereof the said tract of land so granted to the said Carver contains 3,000 acres instead of 200 acres as mentioned in the said grant. And it further appearing thereby that the said Carver and the said Chandler well knew the true lengths of the said lines, and that the said Carver, by collusion and fraud, procured the said Chandler corruptly and contrary to his duty as a deputy surveyor to make an untrue plat and certificate by giving in the said plats and certificates, as made and transmitted by him as aforesaid, a false description of the land as aforesaid as to the lengths of the said (240) lines and falsely stating the quantity therein contained, to the corrupt and fraudulent intent that by such fraudulent description, suggestions and affirmations, the said Carver should obtain a grant from the State for a much larger quantity, namely, 3,000 acres of land included in the said survey without making due payment therefor or any payment whatever in respect of 2,800 acres part thereof. And it further appearing thereby that in pursuance of said corrupt and fraudulent intent, and by means of said false suggestions, the said Carver did obtain the said grant to be issued to him as aforesaid covering the 3,000 acres of land instead of the smaller quantity of 200 acres, to which alone he was justly entitled. And it further appearing thereby that for the said causes the Attorney-General, on behalf of the State, prays that the said grant so obtained by the said Adrien Carver may be decreed by this Court to be vacated and repealed. And it appearing to the Court that at the last term thereof, the information was taken *pro confesso* against both of the defendants, wherefore, and because all the matters appearing as aforesaid in and by the information are thus taken to be true as if the same were particularly confessed by the defendants, it is declared by the Court that the said Adrien Carver did procure the said grant to be issued and made to him, the said Carver, by false suggestions, surprise and fraud as aforesaid, and that, in the opinion of the Court, the said grant ought for that cause to be repealed and vacated as prayed in the information; and the Court doth thereupon order, adjudge, and decree that the said grant to the said Adrien Carver, numbered 5601 and bearing the date 12 December, 1832, for the said tract of land hereinbefore described be and the same is hereby vacated, repealed, rescinded and annulled, and that the defendants, after service of a copy of this

(241) decree twenty days before the next term, do bring the said grant into this Court at the next term to be canceled, and that the defendant Adien Carver do pay the costs of this suit to be taxed by the clerk. And the Court, in obedience to the statute in such cases made and provided, doth further order that, upon a copy of the information, orders and decrees thereon made, being filed by the Attorney-General, on behalf of the State, in the office of the Secretary of State, the said Secretary of State shall record the same in the book by him kept for that purpose, and shall also note in the margin of the original record of said grant the rendering of this decree, with a reference to the said record thereof in his office, and shall also cancel the enrollment of the said grant in his office by writing across the same the words, "Canceled by the decree of the Supreme Court."

Cited: Sinclair v. Williams, 43 N. C., 236; *Attorney-General v. Osborne,* 59 N. C., 301.

(242)

JOSEPH PONDER v. JAMES CARTER, ADMINISTRATOR.

1. A surety has no claim upon his principal until he has paid the money for which he was bound.

2. When A. was indebted to B., and C., for a fair consideration, agreed in writing to pay the debt to B., afterwards, upon demand from B., refused to do so, and A. subsequently was compelled to pay the debt: *Held*, that, as between A. and C., A. was to be considered as surety and C. as principal, and that the statute of limitations began to run against A.'s claim on C. not from the date of the agreement or of C.'s refusal to pay B., but only from the time when A. actually paid the money.

APPEAL from *Battle, J.*, at YANCEY Special Term, July, 1850.

The facts of the case will be found in the opinion of the Court.

J. W. Woodfin for plaintiff.

N. W. Woodfin and Gaither for defendant.

NASH, J. The only question presented to this Court is as to the operation of the statute of limitations. Ponder, the plaintiff, was indebted to one Anderson, and in order to discharge the debt sold property to the intestate Carter, and it was agreed between them that the purchase money should be paid to Anderson in discharge of his debt on Ponder, which was reduced to writing and signed by the intestate. In 1843, Anderson demanded payment of Carter, who refused to make it, and subsequently the plaintiff was compelled to pay it. This payment was

made within three years before the bringing of the action. On (243) behalf of the defendant it was contended that the plaintiff's action was barred by the statute of limitations, which began to run either from the time he signed the instrument or from the demand by Anderson. Neither proposition is correct. The arrangement between Ponder and Carter was of a nature not to discharge the former from the claim of Anderson. He was left still liable to pay it, and, under this liability, the debt was recovered of him and he did pay it. From the latter period the statute began to run. After the arrangement between Ponder and Carter the latter, as between themselves, became the principal in the debt to Anderson, and the former stood in the relation of surety; and it is settled by many adjudications that a surety has no claim upon his principal until he has paid the money for which he is bound. It is the payment of the money which gives his action and not his liability in law to do so. The statute begins to run only from the time when the cause of action accrued. *Sherrod v. Norwood*, 15 N. C., 360; *Brisendine v. Martin*, 23 N. C., 286; *Nowland v. Martin*, *id.*, 307.

We concur in the opinion of his Honor.

PER CURIAM. Affirmed.

Cited: Deaver v. Carter, post, 268; *Smith v. Moore*, 63 N. C., 139; *Leak v. Covington*, 99 N. C., 566.

(244)

WILEY REVEL v. F. A. PEARSON ET AL.

When a person who has commenced a suit *in forma pauperis* is afterwards dispaupered and enters into a prosecution bond, he is entitled upon his recovery in the action to a judgment for his costs, as well those incurred before he was dispaupered as those incurred afterwards.

APPEAL from *Dick, J.*, at McDOWELL Fall Term, 1850.

Rule on the plaintiff to show cause why certain costs taxed against the defendants should not be stricken out of the *fi. fa.* The facts are: On 5 May, 1847, the plaintiff commenced his suit *in forma pauperis* against the defendants, and continued to prosecute the same without surety up to November Term, 1849, when he came into court and on his own motion was dispaupered and tendered bond for the prosecution of his suit, which was accepted by the court. The case was tried at Spring Term, 1850, when the plaintiff had a verdict and a judgment in the usual form for damages and costs, and a *fi. fa.* issued therefor, returnable to the Fall Term of the court.

The court being of opinion that the plaintiff could not recover the costs of his witnesses which accrued prior to the time when the plain-

tiff was dispaupered, made the rule absolute and ordered that all the costs of the plaintiff's witnesses which accrued prior to the November Term, 1849, be stricken out of the *fi. fa.* The plaintiff, being dissatisfied, prayed and obtained an appeal to the Supreme Court.

(245) *J. and G. N. Baxter for plaintiff.*
Gaither, T. R. Caldwell, and Bynum for defendant.

NASH, J. This case differs from *Carter v. Wood,* 33 N. C., 22, in several respects. The plaintiff there, who sued *in forma pauperis,* had recovered a verdict against the defendant upon which judgment was rendered, but none for costs. The rule was upon the defendant to show why he should not be taxed with the attendance of the plaintiff's witnesses. The rule was discharged upon the special circumstances of the case. At the time the suit was tried the plaintiff was still under the protection of his order. Here the plaintiff was dispaupered on his own motion while the suit was still pending, and he entered into the ordinary prosecution bond given by plaintiffs in general. Upon his verdict judgment was rendered for him not only for his damages, but for his costs. The inquiry, then, is, for what costs was he liable? for under the act of 1777, ch. 115, sec. 90, the "party in whose favor judgment shall be given, etc., shall be entitled to full costs." Whatever costs the plaintiff was bound to pay, he is entitled to recover of the defendants. The doctrine as to the extent of the plaintiff's liability to pay costs, who sues *in forma pauperis,* as generally understood in this State, is fully stated in *Clark v. Dupree,* 13 N. C., 411. The protection furnished by the act of the General Assembly, Rev. Stat., ch. 31, sec. 47, is withdrawn whensoever, by the order of the court, it is adjudged that the plaintiff ceases to need it, and that will be whenever, in the progress of the case and before its determination, it is made to appear that either at the institution of the suit he had the requisite of property or that he had acquired it since. Our act is very nearly a transcript of that of 11 Henry VII., ch. 12, and the decisions under that statute are safe guides to us in the exposition of our act. In a case, Anonymous, 2 Salk., 506-507, it is decided that if the plaintiff be dispaupered, it is the usual prac-
(246) tice to tax his costs against him. This doctrine is approved in the third volume of Bacon's Abridgement, title *Paupers, Letter* D, p. 813; Stiles, 386. This is a direct authority against the motion of the defendants. But in addition, the plaintiff here has given a prosecution bond, of course in the ordinary form, to prosecute the suit with effect, and in case of failure to pay all such costs and damages as should be awarded against him. The defendants say that although this bond might subject them to pay the costs incurred subsequent to its execu-

tion, it did not subject them to such as were incurred by the plaintiff antecedent thereto, for the reason that the plaintiff was not bound to pay them, as at that time he was suing as a pauper. The case from Salkeld shows that upon being dispaupered, costs shall be taxed against him. What costs? All those which any other plaintiff was liable to. Under the English law, no person summoned to attend as a witness was bound to attend the court unless his expenses were paid or tendered to him. Our statute makes no such provision—the witness is bound to attend. At the termination of the term of each court he may compel the party for whom he is summoned to pay his attendance, or he may file his certificate in the clerk's office, term by term, to await the decision of the cause. At that time the successful party obtains a judgment for his costs, and the attendance of his witnesses is taxed in the bill of costs and is collected by the execution. The witnesses of the plaintiff in this case could not, it is true, while he was protected by his order, compel him to pay them, but they had a right to prove their attendance and file their tickets. We are to presume they did so. But again, if the defendants had succeeded in the suit, the plaintiff and his sureties in his prosecution bond would very clearly have been bound for the attendance of his witnesses, as well before as after the execution of it. *Wilson v. Hedgepeth,* 14 N. C., 37, establishes it. It was decided that a bond given after the institution of the suit covers all the costs, no matter at what stage of the suit incurred. If, under the (247) circumstances of this case, the defendants could have recovered their costs incurred while the plaintiff was protected by his order, we see no good reason why the latter, when he is dispaupered and rendered liable to them, shall not recover them of the defendants.

PER CURIAM. Judgment below reversed, and the rule discharged.

JACOB HARSHAW v. E. S. MOORE.

In an action brought by a mortgage against a creditor of the mortgagor claiming property under an execution against the mortgagor, it being alleged that the mortgage was made with a fraudulent intent, the declarations of the mortgagor immediately before and in contemplation of the act may be given in evidence against the mortgagee. His declarations after the act are not admissible in evidence.

APPEAL from *Dick, J.*, at BURKE Fall Term, 1851.

Trover for the conversion of a slave. Both parties claimed under one Clarke.

The plaintiff read in evidence the record of a suit in equity, in which he was plaintiff, against the said Clarke for the foreclosure of certain mortgages, in which such proceedings were had that a sale was ordered to be made by the clerk and master, at which sale the plaintiff became the purchaser of the slave. He also proved that the defendant
(248) afterwards took the slave out of his possession and sold her at public auction.

The defendant read in evidence an execution in favor of one Miller against the said Clarke, under which he made a levy and sale, and proved that the debt upon which the judgment in favor of Miller was rendered existed long before the execution of the mortgages upon which the decree was obtained. He also proved that before and at the time of the execution of the mortgages, Clarke was greatly indebted to several other persons; and he proved by one Presswood that he drew the mortgages at the request of Clarke. They conveyed all of Clarke's property, and he told the witness to insert $1,200 as the amount of his indebtedness to the plaintiff. He also told the witness shortly before the execution of the mortgages he was about to be pressed by some security debts; he would not pay them, and to avoid it he intended to mortgage all of his property to the plaintiff.

The defendant then called one Coffy. He stated that Clarke told him a few days before the execution of the mortgages there were some security debts coming against him, and to avoid paying them and to keep his property he was going to mortgage it to the plaintiff. In the same conversation he told him he owed the plaintiff $105, and the plaintiff was his surety to Murphey's estate for $120. The plaintiff objected to this part of the conversation. The defendant also called the wife of Clarke. She stated her husband had told her the day before he mortgaged his property that he was going to do so to avoid paying security debts and to have the use of it. He also said he owed the plaintiff $105, and he was his surety to Murphey's estate for $120. This testimony was objected to. The mortgages were read in evidence.

The plaintiff then read the bill against Clarke to foreclose, and Clarke's answer, and an award of certain referees finding the
(249) amount of the indebtedness of Clarke to the plaintiff at the date of the mortgages, and offered to prove what Clarke said was the amount he owed him in a conversation after the execution of the mortgages and before the levy of the execution by the defendant. This was rejected.

The court instructed the jury, among other things, that in ascertaining the amount of the indebtedness of Clarke to the plaintiff at the time he executed the mortgages, the finding of the referees was not conclusive on the defendant, because he had no opportunity of being heard before them and was not a party to the suit in equity.

The jury found for the defendant, and the plaintiff moved for a new trial: first, because the court erred in admitting the declarations of Clarke as to the amount he owed the plaintiff made before the execution of the mortgages; second, because Clarke's declarations after the execution of the mortgages were rejected; third, for error in the charge in respect to the finding of the referees. Motion refused; judgment, and the plaintiff appealed.

Avery and Gaither for plaintiff.
Bynum, N. W. Woodfin, and T. R. Caldwell for defendant.

PEARSON, J. The case turned upon the intent with which Clarke executed the mortgage deeds. The defendant alleged that his intent was to hinder, delay, and defraud his creditors. His declarations immediately before and in contemplation of the act were clearly admissible to show his object in doing it. He was the owner of the property. His declarations were against his interest and strong evidence bearing upon the very point against him and the plaintiff who claims under *his deed.* In fact, the question was concluded by admitting the first part of the conversation without objection. In that he declared in general terms an intention to avoid the payment of his debts, and the subsequent part of the conversation, in reference to the amount he owed the plaintiff, was a mere explanation of the manner in which the fraud avowed (250) in the former part was to be effected.

The *competency* of the wife is not made a question by this record, and we can, therefore, give no opinion upon it.

The declarations of Clarke after the execution of the mortgage deeds were properly rejected. He was not then the owner of the property, for the conveyance, although void as to creditors, was valid as between the parties, and his declarations were inadmissible to sustain his deeds against one who claims under a title conferred by law.

We are at a loss to conceive of any principle by which it ought to have been held that the "finding of the referees" and the decree between the plaintiff and Clarke were conclusive on the defendant. It was *"res inter alios acta,"* and was evidence merely of its existence and not of its truth.

PER CURIAM. No error.

(251)

A. B. CHUNN v. W. D. JONES.

A defendant was arrested on a *ca. sa.* and gave bond as required by law; the plaintiff was permitted to amend his execution and the defendant allowed to appeal; in the Superior Court the plaintiff moved to dismiss the appeal on the ground that the appeal was improvidently granted, the motion was sustained by the court and the appeal ordered to be dismissed. The plaintiff is not then entitled in that court to a judgment for his debt and costs against the defendant and his sureties on the appeal bond.

APPEAL from *Bailey, J.,* at BUNCOMBE Special Term, July, 1851.

The defendant was arrested on a *capias ad satisfaciendum,* on a justice's judgment, and entered into bond under the act for the relief of honest insolvent debtors. On the return of the proceedings the plaintiff moved the county court to amend the execution, and it was allowed. The defendant prayed an appeal, and, having surrendered himself in discharge of his sureties and been ordered into custody, he was allowed to appeal. In the Superior Court the plaintiff moved to dismiss the appeal as having been improvidently granted, and the court allowed the motion and gave judgment against the defendant and his sureties for the costs on the appeal. Then the plaintiff further moved for judgment for the debt and all the costs against the defendant and his sureties for the appeal, but the court refused it, and ordered a *procedendo* to the county court, and the plaintiff appealed.

J. W. Woodfin for plaintiff.
Avery for defendant.

(252) RUFFIN, C. J. The two motions of the plaintiff were entirely inconsistent. The appeal was dismissed at his instance for the want of jurisdiction, and the defendant acquiesced therein. It necessarily followed that there could not be judgment for the debt, since that would imply jurisdiction and a decision on the merits.

PER CURIAM. Affirmed.

JACOB SIMMS v. JOHN KILLIAN.

A. contracted to purchase from B. a tract of land at a stipulated price, and gave his written obligation to that effect. Afterwards C., by parol, agreed to purchase A.'s interest in the contract, and A., by endorsement on his obligation, directed B. to convey to C. *Held*, that the contract between A. and C. was void by the statute of frauds, and, of course, no action could be sustained on it.

APPEAL from *Settle, J.*, at HAYWOOD Spring Term, 1851.

Assumpsit, in which the plaintiff sought to recover the sum of $200, part of the price which the intestate promised to pay the plaintiff for his interest in a tract of land. On the general issue the facts were these: The plaintiff contracted with one Wikle for the purchase of the land at $600, and paid him $210 and took his obligation to convey to him the payment of the residue of the purchase money. Afterwards Jones, the defendant's intestate, contracted orally with the plaintiff for the purchase of his interest in the land at $800, whereof he promised the plaintiff to pay $590 to Wikle in full of the balance due him, (253) and to pay the plaintiff the remaining $210. Thereupon the plaintiff signed a written memorandum on Wikle's obligation that Jones was authorized to take a deed from Wikle in his own name, and delivered the paper to Jones, who afterwards paid the purchase money to Wikle and got a deed from him, and also paid the plaintiff the sum of $10 in part of the $210, but died without making any further payment. The defendant insisted that the action would not lie because the agreement was not in writing, and the presiding judge was of that opinion and nonsuited the plaintiff, and he appealed.

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

RUFFIN, C. J. The Court concurs in the opinion of his Honor, which is in accordance with the case of *Rice v. Carter*, 33 N. C., 298. The contract concerns the sale of an interest in land, and by the statute of frauds a party to it cannot be charged therewith unless it be in writing and signed by the party thus sought to be charged. It was argued at the bar that the policy of the act was to protect owners of real estate from being deprived of it without written evidence under their own hand, and that a promise to pay money for land is not within the mischief. But the danger seems as great that a purchase at an exorbitant price may by perjury be imposed on one who did not contract for it, as that by similar means a feigned contract of sale should be established against the owner of land. Hence the act in terms avoids entirely every

contract of which the sale of land is the subject, in respect of a party—that is, either party who does not charge himself by his signature to it after it has been reduced to writing.

PER CURIAM. Affirmed.

Cited: *Wade v. New Bern*, 77 N. C., 462; *Holmes v. Holmes*, 86 N. C., 208; *Little v. McCarter*, 89 N. C., 236; *Love v. Atkinson*, 131 N. C., 546; *Hall v. Misenheimer*, 137 N. C., 186-188; *Brown v. Hobbs*, 154 N. C., 549.

(254)

ROBERT GANT v. WILLIAM HUNSUCKER.

1. A deed is valid in a court of law, notwithstanding any fraud in the consideration of the deed or in any false representation of a collateral fact whereby the party was induced to enter into the contract by executing the instrument.

2. A party who does not except to an opinion in the court below in a point of law is precluded from making the exception in the Supreme Court when the case comes on there.

APPEAL from *Battle, J.*, at GASTON Spring Term, 1851.

Covenant on a general warranty of title, contained in a bill of sale made by the defendant to the plaintiff on 21 September, 1847, for two slaves, and expressed to be for the consideration of one dollar. The pleas are *non est factum*, no breach, and a special plea that the deed was obtained from the defendant without consideration and by the fraud of the plaintiff.

On the trial, the signing, sealing, and delivery of the deed to the plaintiff were not disputed. The plaintiff then gave in evidence a deed from the defendant to John Hunsucker, dated 30 August, 1847, whereby he conveyed the same two slaves and other chattels in trust for the sole and separate use of Polly Gant, the wife of the plaintiff and a daughter of the defendant, during her life, and after her death upon a further trust for Sarah Gant, a daughter of the plaintiff and his wife, and for such other child or children, if any, as the said Polly might thereafter have; and in case the said Sarah and such other child or children should die without leaving issue, then in trust for the plaintiff as to a certain share of the slaves, and as to the residue thereof in trust for cer-

(255) tain other persons. And the plaintiff gave further evidence that he took the two slaves into possession when the deed was made to him, and that afterwards John Hunsucker, claiming the slaves under the said deed made to him by the defendant, brought an action of detinue against the plaintiff for them, and recovered therein and took the slaves from the plaintiff before the present action was commenced, and

that the slaves were of the value of $1,400. The plaintiff then produced one Cline, who deposed that he was the plaintiff's brother-in-law, and that on 21 September, 1847, the plaintiff came to his house and requested him to go to the defendant's and write the bill of sale, and that he went with the plaintiff and wrote the deed, and after the defendant had executed it, he and a son of the defendant attested it; and that on that occasion the plaintiff told the defendant that the defendant could take up the deed of trust he had made to John Hunsucker, and that it would be no harm to the defendant to execute the deed to the plaintiff, which the witness was then preparing. He further deposed that nothing was paid by the plaintiff for the negroes, as far as he understood, and that the defendant was at the time nearly eighty years of age, but, in the opinion of the witness, he understood what he was doing.

In support of the issues on the part of the defendant he called several witnesses. One of them was the sheriff of Catawba, who deposed that the defendant lived in that county, and was very aged, and an ignorant Dutchman of weak mind. Another was an unmarried daughter of the defendant who lived with him. She deposed that the defendant was very old and infirm, and was a drinking man, and that he had been sick with chills and fevers for three weeks before he made the deed to the plaintiff, and was of very weak mind and easily persuaded to almost anything; and that during that period the plaintiff was often at the defendant's to get him to make the plaintiff a bill of sale for the (256) negroes, and that he was there in the early part of the day on which the instrument was executed, and went for Cline to write it, and they came together just before night and did the business. The defendant also called one of his sons, who was the other witness to the deed, and he deposed that, before it was executed, the deed of trust to John Hunsucker was talked about by his father and the plaintiff and the other persons present, and that they all expressed the opinion that it might be taken up and destroyed. Evidence was also given that on the next day the plaintiff applied to John Hunsucker to get the deed of trust, but the latter declined giving it up until he could consult counsel.

For the plaintiff, it was contended before the jury that the defendant had mental capacity to execute the bill of sale, and that there was no fraud or imposition practiced on him by the plaintiff in procuring it, and that the plaintiff was entitled to damages to the value of the slaves. The counsel for the defendant also argued before the jury the question of fact as to the capacity of the defendant and as to the fraud and imposition on him to induce him to execute the deed, and contended further that if the jury should be of opinion against the defendant on these points, yet the plaintiff could only recover as damages one dollar—that being the purchase money mentioned in the deed.

The court instructed the jury that to render the instrument valid, it was not necessary the defendant should have a mind equal to the most intelligent and best-informed men, nor that his mind should at the time of executing it have been equal to what it had been, but it was sufficient if he had mind and memory enough to know what he was doing and understood its effects. The court further instructed the jury with regard to the alleged fraud and imposition, that if the plaintiff knew that the deed of trust could not be taken up, and yet represented to the (257) defendant that it could, so that he signed the bill of sale under that belief, induced by such fraudulent misrepresentation of the plaintiff, it would invalidate the bill of sale; but that if both parties were mistaken as to the right to take up the deed of trust, then it would not have that effect. As to the damages, the court instructed the jury that if upon other points they should think the plaintiff entitled to recover, he was entitled to one dollar only, being the consideration mentioned in the deed, with interest thereon. The jury found for the defendant on all the issues, and the plaintiff moved for a new trial because the verdict was against the weight of evidence. That was refused, and he then moved for a *venire de novo* because the court erred in the instruction upon the question of damages, which being also refused, the plaintiff appealed.

Avery, Landers, and Alexander for plaintiff.
Craig for defendant.

RUFFIN, C. J. This Court has no cognizance of the motion for a new trial, which was addressed entirely to the discretion of the court in which the trial was, and ought not to encumber the bill of exceptions.

The point respecting the damages presented questions on the trial of some novelty and perhaps of not very easy solution. The difficulty would not indeed arise out of a supposed restriction of a purchaser of slaves to the recovery of damages to the amount of the purchase money mentioned in the bill of sale, and interest thereon, in analogy, apparently, to the rule relative to the warranties of land, for the rule as to lands stands on peculiar reasons which were thought to control the usual measure of damages in the personal action of covenant which is held to lie on a warranty. *Phillips v. Smith*, 4 N. C., 87; *Williams v. Beeman*, 13 N. C., 483. But as mentioned in the latter case on covenants relating to personal things, the recovery always is for the (258) actual damages or loss to the covenantee from the breach, as, for example, the value of an article at the time it ought to be delivered, or the value of the slaves at the time of eviction. But it might not be so easy to say whether there be any rule of law as to the measure

of damages, or if there be, what it is, in a case like this in which the conveyance and covenant are substantially voluntary, and the eviction was by a title paramount in trust for the plaintiff's family and himself, of the existence of which he was aware at the time he took his deed, and from which he then represented to the defendant no harm could come. But whatever may be the rule of law on those points, the case, as it now stands, cannot be affected by it, for it is clear that the instructions on this part of the case had no effect on the verdict, since the jury did not give the plaintiff damages on either basis, but found against him altogether. It is thus reduced to a certainty that the verdict was upon the other parts of the case, and therefore that the instruction as to the measure of damages was perfectly immaterial and could not prejudice the plaintiff.

It was next said for the plaintiff that there is error in the instruction as to the effect on the deed of the alleged fraud and imposition in inducing the defendant to execute the deed by deceitfully representing to him that he could lawfully conceal the prior deed of trust made by him, although the plaintiff knew at the time that the deed of trust was irrevocable and conclusive of the title to the two slaves. The court, it is true, does not approve of that part of the instructions, for although the facts assumed in the hypothesis might in another forum affect the operation of the deed, so as to cause it there, according to circumstances, to be set aside or to be held as a security for money paid or laid out under it, yet at law they do not avoid the deed. In a court of law, the question is a naked one of deed or no deed, for if the deed be an instrument for any purpose, it remains so to all purposes, either as conveying (259) the thing or covenanting for the title. And supposing the defendant to have had capacity to contract, and that no trick or deception was practiced on him as to the terms of the instrument he was executing, but he knew the contents of it and executed it voluntarily, the Court holds that upon *non est factum* the instrument would not be avoided, but be held to be the defendant's deed notwithstanding any fraud in the consideration of the deed or in any false representation of a collateral fact whereby the defendant was induced to enter into the contract by executing the instrument. *Logan v. Simmons,* 18 N. C., 13; *Reed v. Moore,* 25 N. C., 310. But though that be the opinion of the Court, it is not now open to the plaintiff to complain of that error, because he took no exception to it on the trial. For the best reasons, it is entirely settled that the Court can take no notice of any error not apparent in the record—that is, in the pleadings, verdict, or judgment—unless the appellant except to it at the trial. Besides the presumption that everything was done right until the contrary be alleged, there is another—that for purposes of his own, the party assented to or acquiesced in

every opinion of the court to which he did not at the time except. In this case the exception is confined to the directions respecting the damages and finds no fault with that as to the fraud and imposition. Indeed, the plaintiff seems to have preferred putting his case before the jury on the question of fact alone, whether he had made the alleged representation, and whether the plaintiff acted on it. He did not raise the question of law below which he urges here, and therefore he cannot now raise it.

PER CURIAM. No error.

Cited: Ramsay v. Morris, 35 N. C., 458; *Nichols v. Holmes,* 46 N. C., 363; *Rogers v. Ratcliff,* 48 N. C., 231; *Hyman v. Moore, ibid.,* 419; *Gwynn v. Hodge,* 49 N. C., 170; *McArthur v. Johnson,* 61 N. C., 319; *Egerton v. Logan,* 81 N. C., 179; *Thornburg v. Mastin,* 93 N. C., 263; *S. v. Glisson, id.,* 509; *Phipps v. Pierce,* 94 N. C., 515; *Thornton v. Brady,* 100 N. C., 40; *S. v. Ashford,* 120 N. C., 589; *Cutler v. R. R.,* 128 N. C., 481.

(260)

JAMES SLOAN v. WILLIAM MCLEAN.

1. Where a judgment was rendered by a justice of the peace against an absent party, and the party within ten days thereafter applied for relief under the act of Assembly, Rev. Stat., ch. 62, sec. 15, the justice has no right summarily to vacate the judgment. Such an order is void.
2. It was the duty of the justice to issue a notice to the opposite party and an order to summon witnesses and produce all the papers before him or some other justice at some day within thirty days, in the meantime directing a forbearance of proceedings, on which appointed day the case should be reconsidered.
3. When a justice, on such application, made an order at once vacating the judgment, and no further proceedings were had thereon: *Held*, that the order not being warranted by law, the original judgment remained in full force.

APPEAL from *Settle, J.,* at IREDELL Fall Term, 1850.

This was an action commenced by warrant before a justice of the peace on a former judgment, as follows:

"15 August, 1844.

"Judgment by default in favor of plaintiff, principal $30, costs 30 cents. NEIL MCAULEY, J. P. (SEAL)"

The defense was that the former judgment had been vacated and made void by the granting of a new trial.

Neil McAuley, the magistrate who gave the judgment, swore that the defendant, eight days after the rendition of the judgment, applied to him for a new trial. He could not say whether he swore the defendant or not, but the defendant was absent on the day he gave the judgment, and upon his application he granted a new trial and drew up and signed a paper as follows:

"STATE OF NORTH CAROLINA—Iredell County. (261)

"To Thomas McConnell, Constable:

"Whereas William McLean hath this day applied to me, Neil McAuley, one of the justices of the peace for said county, for a supersedeas, or new trial, in the case wherein James Sloan is plaintiff and the said William McLean is defendant, tried before me at James Sloan's on the 15th inst., when and where the plaintiff obtained a judgment in the absence of the defendant, I do hereby supersede and make void the said judgment. This is, therefore, to command you to notify the plaintiff that a new trial in the said case will be held before me at the schoolhouse on the second Saturday of September next, when and where you are to return the said judgment, together with all the proceedings in the case. Given under my hand and seal 22 August, 1844.

"NEIL MCAULEY, J. P. (SEAL)"

He tendered this paper to the defendant, who declined taking it, but requested the witness to hand it to the officer, as he would be more likely to see him first. Witness put the paper among his private papers, where it has remained ever since until a few days before the term of the court. He did not see the officer until a few weeks after the "second Saturday of September." He then told him what had been done. He had no recollection of attending on the day appointed for the trial. One Graham swore that, according to his recollection, the justice of the peace and the defendant did appear at the "schoolhouse" on the day named, but neither the plaintiff nor the officer was present. There was no evidence that the plaintiff had any notice of the application for the new trial.

The jury rendered a verdict for the plaintiff, subject to the opinion of the court upon the question of law reserved, and the court, being of opinion with the defendant, set aside the verdict and directed a nonsuit, and the plaintiff appealed.

Osborne for plaintiff.
Boyden for defendant. (262)

PEARSON, J. The question depends upon the legal effect of what was done by the magistrate, and involves the construction of the statute,

Rev. Stat., ch. 62, sec. 15. We think the matter was left unfinished, and was not carried out so as to have the effect of vacating and making void the first judgment. We lay no stress on the fact that it does not appear that the defendant was sworn or gave the security required. The magistrate misconceived the power conferred on him by the statute. He had no power upon the *ex parte* application of the defendant to vacate the judgment. He had power only to issue certain process, the result of which would be, if carried out, a reconsideration or "new trial." If that took place, the first judgment was, of course, vacated. If it did not, then the first judgment remained in full force. Accordingly, the statute directs the magistrate to issue an order to the party or officer who has the papers in possession to forbear all further proceedings, and immediately to bring all the persons before him or some other justice of the peace for "consideration." It further directs him to issue his summons to some proper officer to cause the parties, with their witnesses, to appear before him or some other justice of the peace within thirty days, when "the matter shall undergo a fair investigation." It is this "fair investigation," "reconsideration," or "new trial," which vacates the first judgment; and, of course, if it never takes place, the judgment stands in full force. The magistrate is directed, without inquiry into the merits of the case, to issue process for the purpose of having the parties together. If the party who applies for the process, or one whom he chooses to depend on as his agent, neglects to have it served, and in consequence thereof no "reconsideration" or "new trial" takes place, it is his misfortune. In consequence of his being absent at the trial, if it is sufficiently accounted for, an opportunity is given him to have a new trial, provided he uses the means necessary for that purpose. This meets the necessity of the case. The construction
(263) contended for by the defendant goes beyond it, and would lead to injustice, for if the application or order for process had the effect of vacating the judgment, that end being effected, most defendants would not take the trouble to proceed any further; so the plaintiffs would be left to find out by accident that their judgments were void and to get new judgments in the best way they could.

This strange view of the statute no doubt was suggested by a supposed analogy between a new trial before a single justice and a new trial in court. But there is a very great difference. In the one the matter is *"in fieri"* and the parties are "in court" until the end of the term, so that if a new trial be granted the parties are *ipso facto* put in *"statu quo."* Not so in the other. As soon as the justice gives his judgment he is *functus officio,* and the parties are "out of his court," so that nothing can be done to affect the judgment until the parties are brought into "his court" again by a new process. There is a greater analogy to the

writ of error. There the parties being "out of court," the judgment is merely suspended until the proceedings are "carried out" and finished by a new judgment.

The judgment below must be reversed, and a judgment for the plaintiff.

PER CURIAM. Reversed.

(264)

THE STATE, TO THE USE OF SALLY POTTS, v. JEREMIAH B. ELLIS.

Where, under an order of the county court in a bastardy case, the defendant gave a bond to comply with any order of the county court in that case, and the court ordered that he should immediately pay to the woman a certain sum then ascertained to be due: *Held*, that the woman might release her interest in the said sum, and that such release would bar an action for the same where she was the relator and the suit brought in the name of the State, to whom the bond was payable.

APPEAL from *Battle, J.*, at DAVIE Spring Term, 1851.

Debt upon the bastardy bond of the defendant. Pleas: conditions performed and not broken, release, and payment. The facts are set forth in the opinion of the Court.

Attorney-General for plaintiff.
Craig for defendant.

NASH, J. The defendant was charged by the relator with being the father of her bastard child which had been previously thereto born. The defendant was regularly and by the proper authorities declared to be the father of the child, and under the order of the county court of Davie, of which county both parties were citizens, gave the bond upon which this action is brought. The county court at the same term made an order "that J. B. Ellis pay to Sally Potts $60 in three annual payments, to wit, $25, $20, $15, the first installment to be paid at this term." The action is brought to recover the first installment of $25. The pleas were: conditions performed and not broken, (265) release, and payment. On the trial the defendant offered in evidence a release executed by Sally Potts, for whose use the action is brought, to him "of all claims against him, founded either in law or equity." His Honor who tried the case, among other things, charged the jury "that nothing but payment could discharge the defendant from liability under the order of the court, and *that the plaintiff* (the relator) *had no such interest in the record that she could release so as to defeat this recovery.*" In this we think there is error. One of the conditions

in the bond is "and perform any other order of said court relative to said child," etc. The court made the order set forth in the case. The money was to be paid to Sally Potts, and the breach assigned in the declaration is for not paying this $25. Not paying it to whom? And who, under the order, was entitled to receive it? Certainly, Sally Potts. How long the child had been born before the order of filiation we are not informed, but its mother had maintained it up to that time, and she was entitled to be reimbursed for her outlays; and it is usual in such cases for the court, in its order, to provide for their immediate repayment by the father. In this case the $25 ordered to be paid during the term of the court were intended to cover the expenses so incurred by the mother, and which originally rested on the defendant. Her claim to them is very much in the nature of a claim for money laid out and expended for the use of the defendant; imperfect, it is true, but after the order it became perfect and obligatory. Sally Potts, therefore, had an interest which she could release. *S. v. Harshaw,* 20 N. C., 506. It is true, she could not by any act of hers release the defendant from his bond. The county, for whose use, as well as her own, it was given, still had claims under it against the defendant; but she could discharge him from all obligation which was exclusively to her, as
(266) the allowance for her *past* services. In their verdict, the jury find, under the instruction of his Honor, against the defendant "and assess *her* damage for the breach." Now it was competent for the defendant to show that he had performed the order of the court, and any evidence would be admissible which proved either that no damages ever arose to the relator, either in consequence of the performance of the covenant in the bond, or that the obligor was discharged from the performance, or that amends had been made for the breach assigned. "The Court is obliged in these and similar cases to look to the purposes of the action and the nature of the recovery sought. It is not given to any officious person, but to such only as are aggrieved by the nonperformance of any of the conditions. The action on the bond is therefore answered by any matter showing that the relator has no demand against the defendant, and, therefore, has sustained no damage." *Clark v. Cordon,* 30 N. C., 179, which, in principle, covers this case.

We are of opinion there was error in his Honor's charge, for which

PER CURIAM. New trial.

Cited: S. v. Henderson, 61 N. C., 230.

(267)

THOMAS S. DEAVER v. JAMES CARTER'S ADMINISTRATOR.

On the compromise of a suit, the defendant agreed to pay the fee of the plaintiff's attorney, neglected to do so, and the plaintiff was obliged to pay it himself. *Held*, that the statute of limitations did not begin to run against the plaintiff's claim until he paid the money, and that it was not necessary to give notice of the payment to the other party to entitle the plaintiff to bring his suit.

APPEAL from *Settle, J.*, at YANCEY Spring Term, 1851.

Assumpsit. The facts are stated in the opinion of the Court.

J. W. Woodfin for plaintiff.

N. W. Woodfin and Gaither for defendant.

NASH, J. A suit existed between these parties. It was compromised, and one of the conditions was that Carter should pay the fee of the plaintiff's attorney, and for which he held the plaintiff's note. This money Carter neglected to pay, and the plaintiff was obliged to discharge the note. The action is in assumpsit to recover the money so paid. The defendant relied on the statute of limitations and the want of notice, more than three years having elapsed since the promise was made upon the compromise of the suit, but less than three years since the payment made by the plaintiff.

The decision of his Honor, who ruled against the defendants on both points, is correct. The statute did not begin to run until the plaintiff discharged the note given to his attorney. Before that time he had and could have no cause of action against the defendant. No notice of the payment was necessary. The parties, after the compromise, stood *towards each other* in the relation of principal and surety. The (268) whole of this case is covered by that of *Ponder against these same defendants*, decided at this term. In addition to the authorities there cited may be added 1 St. M. Pri., 316.

PER CURIAM. Affirmed.

DAVID PARRIS v. PIERCE ROBERTS.

A. and B. entered into the following agreement in writing: "Sold to B. one gray filly for 115 bushels of corn, which the said filly stands good to the said (A.) as his own right and property until she is paid for." Signed and sealed by A. *Held*, that the legal title to the mare still remained in A., and that the sale was only conditional.

APPEAL from *Bailey, J.*, at BUNCOMBE Special Term, July, 1851.

Trover. The plaintiff owned a horse, which he agreed to sell to one W. D. Jones upon the terms set forth in a paper-writing, which is as follows:

"20 March, 1848. This day sold to William D. Jones one gray filly for 115 bushels of corn, which the said filly stands good to the said David Parris as his own right and property until she is paid for. (269) Given under my hand and seal, signed and delivered in the presence of: WILLIAM D. JONES. (SEAL)

"Test.: M. M. JONES."

The horse was delivered to Jones. In July, 1848, one Leander Mills levied an execution upon the said horse as the property of Jones and sold the same, the plaintiff being present and forbidding the sale. Mills was at the time of the levy and sale the deputy of the defendant, who was the sheriff of Buncombe County.

Two questions arose in the case: first, whether the property in the horse passed to Jones according to the written agreement, or did it remain in the plaintiff? and, secondly, suppose it remained in the plaintiff, did Mills, by what he did under the execution, subject himself, and consequently the defendant as his principal, to this action?

The court charged the jury that according to a proper construction of the written agreement, the property in the horse remained in the plaintiff, and that if Mills sold the same under an execution and was acting at the time as the deputy of the defendant, the defendant would be liable.

The jury found a verdict for the plaintiff, and the defendant appealed.

Avery for the plaintiff.
J. W. Woodfin for defendant.

NASH, J. In the charge of his Honor there is no error. By the contract between the plaintiff and Jones, the legal title to the horse sold is expressly reserved. The title did not pass to Jones—the sale was but conditional. *Ellison v. Jones*, 26 N. C., 48; *Gaither v. Teague, id.*, 65. Here the plaintiff expressly reserves the title to the horse sold until the

price is paid, and Jones, the purchaser, gave his note for the (270) price, which was not due when the constable sold. We are at a loss to perceive upon what principle the case was brought here.

PER CURIAM. No error.

Cited: Clayton v. Hester, 80 N. C., 277; *Frick v. Hilliard,* 95 N. C., 119; *Butts v. Screws, id.,* 217; *Whitlock v. Lumber Co.,* 145 N. C., 124.

THE STATE v. WESLEY CURTIS.

On an indictment for perjury in swearing that A., one of the several assailants in an affray, struck the defendant, when it appeared that A. did not, but another assailant did strike the blow, it was competent for the defendant, in order to disprove a corrupt motive, to show that immediately on his recovery from the unconsciousness occasioned by the blow he had given the same account of the transaction he did in his testimony before the court on the trial of the case in which the perjury was charged.

APPEAL from *Dick, J.,* at BUNCOMBE Fall Term, 1850.

Perjury. The perjury is alleged to have been committed in an oath taken by the defendant before one Lemuel Pagett, a magistrate of McDowell County, on the trial of a warrant for an assault and battery against four persons: Archibald Hemphill, Benjamin Hemphill, John Hemphill, and Jesse Watkins. Upon the trial of the warrant, Benjamin Hemphill not having been taken, Curtis was examined as a witness for the State, and swore that an assault and battery was committed upon him by the defendants, and that Archibald Hemphill knocked him down with an axe helve; that he was stunned by the force of the blow, and knew nothing further of the transaction. The case states that (271) upon the trial of the indictment, the warrant was offered in evidence and the magistrate called on to state what was proved before him. The testimony was objected to by the defendant's counsel upon the ground that it did not appear on the face of the warrant that any trial had taken place, or judgment reversed, and that it was incompetent to prove those facts by parol. The objection was overruled and the testimony admitted. It was proved that Archibald Hemphill did not touch the defendant during the affray, but that Curtis was knocked down by Benjamin Hemphill, who jumped on him while down, and Archibald pulled him off. The defendant then offered to prove by a Mrs. Allison, to whose house he was carried, "that the defendant was knocked senseless by the blow, but recovered his consciousness in a few minutes, but after the State's witness had left; and on being asked by her who inflicted the blow, he gave the same account of the transaction that he had

sworn to before the magistrate." This evidence, upon objection by the State, was rejected and the defendant convicted by the jury.

A rule for a new trial was obtained by the defendant and discharged by the court, and judgment being rendered against the defendant, he appealed to the Supreme Court.

Attorney-General for State.
J. Baxter and Bynum for defendant.

NASH, J. The first objection to evidence made in the court below has been very properly abandoned in the argument here. It certainly cannot be maintained; and the exception to be considered contained in the case properly speaking is as to the admissibility of the testimony of Mrs. Allison. His Honor who tried the case rejected it. In this we think there is error. To sustain a charge of perjury, it is necessary for the State to prove not only that the oath was false, but that the
(272) defendant took it corruptly and willfully against his better knowledge. Hawkins says a jury ought not to convict where it is probable that the fact of the falsity of the oath was owing rather to the weakness than the perverseness of the party, as where it was occasioned by surprise or inadvertence or by mistake. 1 Hawk., ch. 69; 4 Bl. Com., 137. Corruption is an essential ingredient in constituting the crime, and in this, as in other cases of intent, the jury may infer the motive from the circumstances. *Knitt's case,* 5 B. and Al., 929 (7 E. C. L., 306); Roscoe's Cr. Ev., 822. The oath taken by the defendant, it may be admitted, was not true; was it *corruptly* false? was the inquiry. To enable the jury to come to a conclusion satisfactory to themselves on a question of such vital importance to the defendant, they ought to have had submitted to them every fact attending the transaction—not those alone which preceded and accompanied the affray, but also such as immediately followed; and it was the right of the defendant to lay before them every circumstance connected with the transaction which could aid them in coming to a conclusion upon the question of intent. Was not the evidence rejected highly important in this point of view? An assault and battery was made upon the defendant by several individuals, and from one of them he received a blow which rendered him senseless. Immediately upon recovering his senses within a few minutes after being knocked down, being asked who struck the blow he answered it was Archibald Hemphill. It is admitted that the latter was there and of the company of the assailants. Mrs. Allison was not present when the assault was made, and the question she asked was a natural one, such as any one under similar circumstances would have put. The answer was made as soon as consciousness returned, unpre-

meditated, and without the possibility of concocting a false tale. It was strongly put in the argument here that if on the trial of the defendant, Curtis had sworn, as no doubt he did before the magistrate, what he told Mrs. Allison would have been evidence to sustain him. (273) And why is not that declaration so made evidence to prove the want of corruption?—evidence to show that he believed what he had sworn to? We can see no possible reason for his fixing the infliction of the blow upon the wrong individual. If they were all there with a common intent to commit the assault and battery, it was a matter of indifference in law which one of them gave the blow—they were all equally guilty of giving it. If A. and B. are engaged in an affray, any person may interfere to separate them; but if a person interferes for the purpose of assisting either party, or to prevent others from parting them, he is guilty of the affray. This is common learning, and it is prudent on such occasions for the interfering party to make known his intention before he does interfere; and nothing is more common upon the trial of such cases than to give such person's declaration in evidence as proof of his intention. The jury, it is true, are not bound by them, but the evidence is competent. Here the declarations were made before the act was committed, for which the defendant is indicted, to wit, the taking of the oath, and was not offered to show that Archibald Hemphill was guilty, but to show the absence of corruption on the part of the defendant in saying he was guilty. In that point of view, the declaration made by the defendant to Mrs. Allison was competent evidence.

PER CURIAM. *Venire de novo.*

(274)

CARTER ET AL. v. COLMAN ET AL.

Where there is a dormant judgment, the plaintiff may have a *scire facias* to revive and an action of debt to recover the amount of the judgment, both pending at the same time; and a judgment on the *scire facias* cannot be pleaded in bar of the action of debt.

APPEAL from *Bailey, J.*, at BUNCOMBE Special Term, July, 1851.

In 1842, the plaintiffs recovered a judgment in debt against the defendant, which became dormant. In 1847 they sued out a *scire facias* to revive, which was served. In October, 1849, they brought debt on the judgment to March Term, 1850, in the same court; and at that term the defendant confessed judgment on the *scire facias* and pleaded the same in bar of the action in debt. Upon these facts, as a case agreed, it was submitted, whether the plaintiffs were entitled to judgment or not; and after a decision for the plaintiffs, the defendant appealed.

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

RUFFIN, C. J. The judgment on the *scire facias* is that the plaintiff have execution on his original recovery, and nothing more, except as to the costs. It is not at all inconsistent that the creditor should also have another judgment to recover the debt, and it cannot prejudice the defendant, as they are but different securities for the same debt, and satisfaction of either would be satisfaction of both judgments. A plaintiff may sue on a judgment on which he may at the time have execution, and indeed the purposes of justice may sometimes require it, as
(275) it may be necessary to the recovery of interest on a judgment for damages, or, as in this case, to obtain new bail after the discharge of the former bail under the statute of limitations. The debtor can always defeat a disposition to oppress him with costs by paying the debt.

PER CURIAM. Affirmed.

Cited: Warren v. Warren, 84 N. C., 615; *McDonald v. Dickson,* 85 N. C., 249; *McLean v. McLean,* 90 N. C., 531; *Springs v. Pharr,* 131 N. C., 194.

JAMES HOLLAND'S HEIRS v. JOHN CROW ET AL.

1. On a petition to vacate a junior grant by more than one person, when one only had any existing title to the premises, the misjoinder is no bar to a judgment vacating the grant.
2. The relators have a right to this remedy whether they prove any actual damage or not, for the subsequent grant is *per se* a cloud upon the owner's title, and so a grievance to him.
3. Where there was an order to amend, and the subsequent proceedings in the case are based upon the assumption that the amendment has been made, the course is to consider the order as standing for the amendment itself.
4. Parties claiming under a junior grant cannot impeach an elder one directly, much less can they do it in a collateral manner.

APPEAL from *Battle, J.,* at HAYWOOD Spring Term, 1848.

This is a petition and *scire facias* to vacate a grant for 640
(276) acres of land in Haywood, obtained by the defendant John Crow on 17 November, 1820, upon the ground that the greater part of the same land had been granted to James Holland, the elder, on 5 September, 1798, and that at the time Crow made his entry and obtained his grant he knew of the said prior grant to Holland, and that the same

covered the greater part of the land included in the entry and grant to Crow, and, therefore, that the land was not then subject to entry, and with such knowledge fraudulently made his entry and obtained his grant. The petition was exhibited in October, 1838, by Hardy Perkins and his wife, Selina Sophia, and by Peter R. Booker and his wife, Cynthia, and represented that James Holland, the elder, died in the year 1825 seized of the land and in possession thereof, leaving the petitioners, Selina Sophia and Cynthia Booker and one James Holland, the younger, his only children and heirs at law, to whom the said land then descended from their said father; and that James Holland, the younger, afterwards died, and the petitioners entered into possession of the land and so continued up to the filing of the petition. The petition further states that by color of the grant to Crow, he and the other defendants claiming under him, by petition in Crow's name, instituted a *scire facias* against the said children and heirs at law of James Holland, the elder, for the repeal of the grant to Holland for certain pretended frauds in obtaining the same and otherwise disturbed them in their possession, and that in the suit so instituted by Crow, judgment was rendered for the defendants therein.

The defendant Crow did not appear, and the other defendants put in answers to the petition in which they state the manner in which they respectively claim under Crow all the land included in the grant to him, and further allege that the grant to Holland was itself void because it was founded on an entry by one Felix Walker which he, being surveyor, surveyed for himself and then transferred to Holland, and (277) because of other defects assigned. The answers then deny "that Crow procured his grant with a knowledge that the land was not the subject of entry, as the defendants are advised and believe; that the said land was vacant and unappropriated and the subject of entry at the date of the entry of the said Crow, the said grant to said James Holland being fraudulent and void as aforesaid." The answers further admit that some of the defendants instituted the proceedings in the name of Crow to vacate Holland's grant, and that the several defendants still set up various claims to the land under Crow. The answers deny a knowledge by the defendants of the children and heirs at law of the elder Holland. In 1840, the death of Peter R. Booker was suggested, and his wife Cynthia Booker was allowed to prosecute the suit for herself, and at the same time, on the motion of the relators and of Sarah Ann Holland, Mary L. Holland, and Cynthia Holland, the three infant children of James Holland, the younger, deceased, and his heirs at law, by their guardian and next friend, an order was made for amending the petition by making those three children parties as some of the heirs of James Holland, the grantee; and the court ordered the *scire facias* to issue as

prayed for. The amendment was not actually made in the petition, but the *scire facias* was issued as upon the relation of Perkins and wife, Cynthia Booker, and Sarah Ann Holland, Mary L. Holland, and Cynthia Holland, as the heirs at law of James Holland, the elder. On the *scire facias* issues were joined, on which the jury found, among other things, that at the time the defendant Crow obtained his grant and made his entry, he knew of the previous entry by James Holland, the elder, and of the grant to him, and that the two entries and grants interfere in a certain manner specified, and that the relators Cynthia Booker and Selina Sophia, the wife of the relator Hardy Perkins, are heirs at law of the said James Holland, the elder, and that the other
(278) relators, Sarah Ann, Mary L., and Cynthia Holland, are not heirs at law of the said James, the elder.

Upon the trial the relators produced as a witness one Andrew Welch, who deposed that many years ago a man came to the house of the witness in Haywood County who told him (the witness) that his name was John Crow, and that he had lately entered "The Holland Old Fields," being the premises in dispute, and that the witness asked him if he did not know that James Holland had entered the same lands long before, and he (Crow) replied that he did; and thereupon the witness further asked him why he had done so, and Crow replied that he did it because Holland's grant might be void; and as it would only cost him 40 cents to make an entry, he thought he would try it. On the part of the defendants, it was objected that there was no evidence to be left to the jury of the identity of John Crow, of whom the witness spoke, with John Crow, the patentee, and prayed the court to so instruct the jury. But the court was of opinion to the contrary, and left the evidence to the jury with directions that they were to judge of its weight.

The relators also produced in evidence the deposition of Thomas Love, who, being asked to state who are the heirs of James Holland, Sr., replied: "I was acquainted with James Holland, deceased, in his lifetime; and, from reputation, I understand that Cynthia Booker and Selina Sophia Perkins are the only daughters, and Sarah Ann, Mary L., and Cynthia Holland children and heirs at law of James Holland, Jr., deceased (whose guardian is Alcalem Thompson) are, as I am informed and verily believe, the only heirs at law who have claim to Holland's Old Field Tract in Haywood County, North Carolina." And the witness further stated that he had once been the agent of all those persons to attend to these lands and to have this suit instituted for them. On the part of the defendants, it was objected that the testimony of the witness did not tend to prove that Sarah Ann, Mary L., and Cynthia Holland were some of the heirs at law of James Holland, the
(279) patentee, for want of evidence of the relationship, if any, between

him, the patentee, and James Holland, the younger, and of that opinion was the court, and so instructed the jury, who found accordingly. Thereupon the other relators moved the court for judgment that the grant to Crow be vacated, and for their costs against the defendants. That was opposed by the defendants: first, because of the variance between the petition and the *scire facias* in stating the persons who were the heirs of the patentee, Holland; secondly, because three of the persons who were stated in the *scire facias* to be some of the heirs at law of James Holland, the elder, are found not to be his heirs; and, thirdly, because the relators offered no evidence that the defendants had disturbed or in any manner interfered with the relator's possession of the land granted to James Holland; and upon those grounds the court refused the motion of the plaintiffs and gave judgment for the defendants, and those relators appealed.

No counsel for plaintiffs.
Bynum, N. W. Woodfin, and Baxter for defendants.

RUFFIN, C. J. The Court is inclined to the opinion that the testimony of Love, though not as definite and precise as it might and ought to have been, is so expressed as to render it probable that the witness meant to depose that the patentee left the two daughters named in the deposition, and also a son, James Holland, Jr., who afterwards died, leaving the three infant children, who are the other relators, and that they and their two aunts were, therefore, believed by the witness to be the heirs of the elder James Holland, deceased. That seems to have been so probably the meaning of the witness as to have rendered it proper to leave the evidence to the jury for their inference upon that point. But it is not requisite to decide that question since, if held to be for the appellants, it would entitle them only to a *renire de novo*, whereas they were entitled in law to a judgment vacating the grant upon the (280) verdict as it stands and supposing it right in respect of the finding as to the heirs of the elder Holland. The judgment rendered on the *scire facias* was in behalf of the State, and it was held in *McRee v. Alexander*, 10 N. C., 322, that where the *scire facias* was awarded at the instance of three relators, of whom one only had any existing title to the premises, the misjoinder was yet no bar to the judgment vacating the grant, and that judgment was given. Afterwards, in ejectment upon the demises of the three, there was judgment against the defendant for the one-third in favor of one of the lessors of the plaintiff and in the defendant's favor as to the other two-thirds, because those two lessors had been barred by the statute of limitations operating on the defendant's possession for more than seven years under the vacated grant.

McRee v. Alexander, 12 N. C., 321. In *Hoyle v. Logan*, 12 N. C., 495, the first case of *McRee v. Alexander* is mentioned as establishing that a suit at the instance of several relators may be maintained upon the right of one of them alone, and the determination of the Court expressed to adhere to the decision. Those authorities are conclusive that there ought to be judgment vacating the grant *non abstante veredicto*, unless there be other grounds for refusing it. Several are alleged, but they appear to the Court to be all insufficient. The variance between the relators in the petition and the *scire facias* is cured by the order for amendment. It is true, the amendment was not actually made, but the *scire facias* was issued upon the assumption of the amendment, and all the subsequent proceedings were based upon the supposition that one was as properly a relator as the other; and in such case, the course is to consider the order as standing for the amendment itself. *Ufford v. Lucas*, 9 N. C., 214.

It is contended further for the defendants that there ought not to be judgment against them, because there was error in leaving the
(281) case to the jury upon insufficient evidence as to the knowledge of Crow, the patentee, of the previous grant to Holland at the time he made his entry. But the Court thinks the evidence was competent, and that its sufficiency depended on the conviction it produced in the minds of the jury that the John Crow of whom the witness spoke was or was not the same person who by that name obtained the patent. Under the circumstances, the evidence was not only competent, but in the judgment of most persons would be deemed sufficient. There was no suggestion that there were about that period two persons of that name in that part of the country, much less that the Holland Old Fields had been entered by more than one of them. Besides, the knowledge by the patentee Crow of Holland's grant when he made his own entry is but a reasonable inference from that part of the answer in which the defendants insist that Crow did not procure his grant with a knowledge that the land was not subject to entry—not because he was not aware that Holland had entered it and got his grant, but because Holland's entry and grant were void for certain reasons assigned, and for that reason the land was vacated and unappropriated. The facts were, therefore, properly left to the jury on that issue.

The answers also refute in point of fact the last objection of the defendants, that the grant to Crow did not aggrieve the relators as it had caused them no disturbance, for the defendants state explicitly that, under the grant to Crow, some of them had at different times during nearly the whole period from 1820 disputed the title under Holland's grant and been in litigation in some form with the tenants of the relators for the possession of the land. Indeed, if that were not the fact, the

relators would have a right to this remedy, since the subsequent grant is *per se* a cloud upon the owner's title, and so a grievance to him. *Hoyt v. Rich,* 20 N. C., 533. As to imputations in the answers against the grant to Holland upon which it is alleged to be void, it is (282) remarked that these parties claiming under a junior patent cannot even impeach it directly, and much less can they do it in this collateral manner. *Crow v. Holland,* 15 N. C., 417. Besides, those matters, though stated in the answers, are not pleaded to the *scire facias.* Therefore, the judgment must be reversed and a judgment given according to the statute, that the grant be repealed and vacated, and for costs against the defendants.

PER CURIAM. Judgment accordingly.

Cited: S. v. Yellowday, 152 N. C., 794.

JOHN D. FARMER v. M. FRANCIS.

When work is done under a special contract and not completed within the time limited, but is carried on after the day, with the assent of him for whom it is done, the party contracting to do the work is confined under the common count, *to the rate of compensation fixed* by the contract, when no further special contract is made. The rule to ascertain the damages is, if the work contracted for is worth the sum agreed on, what is it worth, as done.

APPEAL from *Dick, J.,* at HAYWOOD Fall Term, 1850. Case set out in this opinion.

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

NASH, J. The declaration contains two counts—one upon a (283) special contract and the other upon a *quantum valebant* for work and labor done and materials furnished by the plaintiff. The defendant employed the plaintiff to build him a house within a certain time and at a specified price. It is admitted the work was not done agreeably to contract, but a house was built which the defendant used.

The plaintiff is entitled to a verdict on the second count, and the only question is as to the rule by which his damages are to be assessed. On the part of the plaintiff it is contended that the damages are to be assessed according to the value of the work and materials, irrespective of the sum specified in the contract. By the defendant it is contended that they are to be assessed in reference to the price agreed. The court coin-

cided with the rule expressed by the plaintiff and directed the jury to ascertain the value of the work and materials, disregarding the price fixed by the special contract, as that had nothing to do with the case.

In this opinion we do not concur. It is manifestly unjust; and, if correct, would enable a workman at any time it suited his own interest to vary from his contract. An individual wishing to have particular work done applies to a workman, and upon consultation it is agreed that it can be executed for a particular sum; afterwards the contractor finds he has made an improvident bargain, or prices of work or materials may have risen—all he has to do, if the opinion we are examining be correct, is to vary from his contract, spin out the time in which the work is to be done, and thereby entitle himself to compensation—not such he had agreed for and which he had admitted was sufficient, but such as it might be proved the work was worth. In this way the contract would be entirely superseded and compensation recovered upon an entirely different one. It is no answer to say that the person for whom the work is done may refuse to receive it. So he may, but may (284) be so situated as to render it necessary for him to do so, and the law does not allow him to be so coerced. It has established a rule whereby justice is done to both parties and the spirit of the contract retained. It says to the contractor, you shall not abandon the original contract at your will and pleasure; if you do not execute it as agreed on, you shall not forfeit all compensation, but it shall be measured to you in reference to the stipulated price; you shall not exceed that. Where there is no special contract as to the price of the work and it is not finished according to contract, but is accepted and used by the person for whom done, there the rule is different—the contractor is paid according to value. In this case his Honor who tried the case below applied to it the latter rule, and in this erred. 1 Steph. N. P., 306; *Merritt v. R. R.*, 16 Wend., 586. In *Dickson v. Jordan, ante,* 79, the principle is recognized and stated. Where work is done under a special contract and not completed within the time limited, but is progressed in after the day, with the assent of him for whom done, the plaintiff is confined under the common count, *to the rate of compensation fixed by the contract* where no further special contract is made, and the rule is thus familiarly stated in the case last referred to—if the house contracted for is worth the sum agreed on, what is the house as built worth?

PER CURIAM. *Venire de novo.*

Cited: McEntyre v. McEntyre, post., 302; *Hobbs v. Riddick,* 50 N. C., 82; *Howie v. Rea,* 70 N. C., 564.

(285)

JOHN LEDFORD v. VINCENT FERRELL'S ADMINISTRATOR ET AL.

A parol agreement by C. to execute at another time a covenant to convey to D. title to a certain piece of land is void under our statute of frauds.

APPEAL from *Settle, J.*, at CHEROKEE Spring Term, 1851.

Assumpsit upon a special promise of Vincent Ferrell to execute to the plaintiff a covenant to convey to the plaintiff in fee a certain tract of land. Upon *non assumpsit*, the evidence was that one Standridge purchased a tract of Cherokee lands at the public sales in 1838, and paid the grantee part of the purchase money and gave his bond for the residue and took a certificate from the commissioners. He afterwards agreed to sell a part of the tract to the plaintiff and received the price and gave the plaintiff his covenant to pay the residue of the purchase money to the State, and obtain a grant, and then to convey to the plaintiff the part of the tract so sold to him. Subsequently, Standridge entered into a treaty with Ferrell for the sale of the residue of the tract upon the terms that Ferrell should accept an assignment of the commissioner's certificate for the whole tract, and pay the residue of the purchase money to the State and obtain the grant in his (Ferrell's) name, and then convey to the plaintiff the parcel he had purchased. Upon this arrangement being communicated to the plaintiff he assented thereto, and thereupon Standridge transferred and assigned his interest in the whole tract of land, and the plaintiff gave him up his covenant, and Ferrell promised the plaintiff to give him his covenant and obligation to obtain the grant from the State and to convey to the plaintiff in fee the part of the land which the plaintiff had purchased and paid for, but he failed to do so by reason of his sudden death a (286) few days thereafter. A verdict was rendered for the plaintiff for the value of the land upon an agreement that if the court should think the plaintiff was not entitled to recover upon those facts, the verdict should be set aside and a nonsuit entered. This was subsequently done, and the plaintiff appealed.

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

RUFFIN, C. J. The plaintiff may have relief in another forum against the heirs of Ferrell upon the ground that, by the written contract with Standridge, the plaintiff had a valid equitable title to the land, and that by Ferrell's purchase, with notice of the plaintiff's title, he became his trustee, and is liable as such, notwithstanding the plaintiff had canceled Standridge's covenant upon Ferrell's promise to give his own, and

his being prevented from doing so by the act of God. But as an independent verbal promise from Ferrell to the plaintiff to execute a covenant or obligation to the plaintiff to convey the land, the contract is within the statute of frauds and the plaintiff cannot maintain an action at law on it. The words are that "all contracts to sell or convey any lands, or any interest in or concerning them, shall be void unless such contract be put in writing and signed by the party to be charged therewith." The plaintiff's counsel admits that if Ferrell's promise had been to convey the land to the plaintiff, no action would lie on it. But a distinction is taken that the promise is not of that kind, but is to execute a valid obligation, binding upon [him] thereafter to convey, which is supposed not to be within the statute. But the Court is clearly of the contrary opinion, for both the obligation to convey the land and the promise to give the obligation are "concerning" land and within the words of the act. Indeed it would be absurd to say that an oral promise
(287) to convey land is void, but that a promise that the party will thereafter bind himself to convey the land is valid. But the same reason, although the promise to pay the debt of another be void under the tenth section of the act, a promise to give a bond for the debt would be good—which cannot be. Such a construction would be a palpable evasion of the statute and let in all the evils against which it is directed.

PER CURIAM. No error.

DEN ON DEMISE OF WILLIAM R. FEIMESTER v. THOMAS H. MCRORIE.

1. Where a deed of trust conveying a debtor's property for the satisfaction of certain creditors is necessary to support an action against persons claiming as purchasers under executions against the grantor, and it is not shown that, independent of the property conveyed, the grantor had enough at the date of the deed to satisfy other creditors, the party relying upon the deed must produce evidence of the existence of the debts therein mentioned, as the bonds, notes, judgments, etc., or at least of such an amount of them as will show *prima facie* that the transaction was *bona fide*.

2. When this *prima facie* evidence has been given by the grantee, the *onus* of proving any fraud alleged to impeach the deed is thrown upon the party alleging such fraud.

APPEAL from *Settle, J.*, at IREDELL Fall Term, 1850.

One James R. Feimester was seized of the premises in fee, and
(288) on 17 February, 1847, in consideration of $5, as expressed in the deed, he conveyed them to the lessor of the plaintiff in fee, upon trust to sell them and pay certain debts mentioned in the deed and therein stated to be due on notes and bonds made by the bargainor to sundry persons specified. James R. Feimester owed a number of debts

to other persons at the execution of the deed which were not secured in it, and the deed purported to convey the premises and all the personal effects of the bargainor, and assign all debts due to him. Upon some of the debts thus left out, judgments were taken before a justice of the peace, and executions levied on the premises in May, 1847, and at the sheriff's sale the defendant became the purchaser and took a deed. At the trial, on not guilty pleaded, after evidence of the case as above stated, the counsel for the defendant insisted that as he was a purchaser under the judgments and executions of creditors, the plaintiff ought to give evidence that the debts enumerated in the deed of trust, or some of them, were subsisting at the time the deed was executed so as to render it valid as against judgment creditors. His Honor declared that to be his opinion, but the plaintiff declined producing any of the bonds or notes mentioned in the deed and submitted to a nonsuit and appealed.

Guion for plaintiff.
Boyden for defendant.

RUFFIN, C. J. As the plaintiff gave no evidence that his bargainor retained property sufficient for the satisfaction of his other creditors at the time he made the deed, it would, by force of those acts of 1715 and 1840, be void as against those creditors unless founded upon an adequate valuable consideration. That position cannot be contested. But it is agreed that the debts mentioned in the deed constitute a sufficient consideration to render the deed *bona fide* and sustain it. So (289) they would if the plaintiff had made it appear that those debts existed, for it has been often held that deeds of trust of this kind are not invalid by reason of the nominal sum stated in them to have been paid by the trustee in order to make the instrument operative under the statute of uses, but that recourse may be had to the debts to supply the consideration necessary to the *bona fides* of the deed which would otherwise be deficient. It seems manifest, then, that the existence of the debts must be established, or a sufficient number of them, to satisfy the jury that the deed was not intended as a colorable security for fictitious debts, but was made to the intent of honestly securing real debts, for if the deed, instead of purporting to be a mortgage or deed of trust for the security of debts purported to be an absolute conveyance for an adequate consideration in money paid, the deed itself would not be evidence, as against purchasers or creditors, that any part of the money was paid, but the bargainee would be obliged to prove the fact *aliunde*. *Claywell v. McGimsey*, 15 N. C., 89. Of course, it is equally necessary the trustee in support of this deed should show the debts it professes to secure, since the debts, as a consideration, stand in this

deed in the place of the pecuniary consideration in the other. The Court does not mean to lay it down that the debts must be traced back by the trustee to their origin, so as in the first instance to be conclusively established to be *bona fide,* for, to the purpose under discussion, the securities for the debts, as judgments, bonds or notes, in themselves, create debts, and, therefore, they *prima facie* sustain the deed until impeached by its being shown that they were given for pretended and not true debts. *Hafner v. Irwin,* 26 N. C., 529. But the *onus* is clearly on him who sets up title under the deed to give the *prima facie* evidence of the existence of the debts in the schedule, or some of them at least, by producing and proving the evidences of them as
(290) constituting the *bona fide* consideration necessary to support the deed. Indeed, if the law did not impose that duty on that side it would be almost impossible for the other side to investigate the origin and subsistence of the alleged debts, and fraudulent and false recitals would be allowed to establish their truth against those whom it is the purpose of the law to protect.

PER CURIAM. Affirmed.

Cited: Hodges v. Lassiter 96 N. C., 356; *Barber v. Buffalo,* 122 N. C., 131, 134.

DOE ON DEMISE OF ISAAC LYERLY v. CLAUDIUS B. WHEELER.

The date of a deed or other writing is *prima facie* evidence of the time of its execution, upon the principle that the acts of every person in transacting business are presumed to be consistent with truth, in the absence of any motive for falsehood.

APPEAL from *Battle, J.,* at ROWAN Spring Term, 1851.

Ejectment. The facts are stated in the opinion.

Craig and Osborne for plaintiff.
Boyden for defendant.

(291) PEARSON, J. The lessor claimed title under a sheriff's sale and deed. The demise was on 6 November, 1848. The deed was dated on the same day.

The defendant contended that the date of the deed was no evidence that it was executed on that day, and the plaintiff could not recover without proving that it was executed on the day it bore date.

The court charged that the date of the deed was *prima facie* evidence of the time of its execution. To this the defendant excepts, which is the only point made in the case.

There is no error. The date of the deed or other writing is *prima facie* evidence of the time of its execution, upon the general principle that the acts of every person in transacting business are presumed to be consistent with truth in the absence of any motive for falsehood.

PER CURIAM. No error.

Cited: *Newlin v. Osborne,* 49 N. C., 158; *Meadows v. Cozart,* 76 N. C., 452; *Kendrick v. Dellinger,* 117 N. C., 493; *Kendrick v. Ins. Co.,* 124 N. C., 317; *Fortune v. Hunt,* 149 N. C., 362.

DEN ON DEMISE OF DAVID BRADFORD v. CALEB ERWIN.

It is error in a judge to leave it to the jury to decide who were the heirs of a deceased person. That is a question of law for the determination of the court.

APPEAL from *Ellis, J.,* at MECKLENBURG Special Term, 1851.

Ejectment. Plea: Not guilty. The facts are stated in the opinion.

Boyden for plaintiff. (292)

Wilson, Thompson, and Alexander for defendant.

PEARSON, J. The case is very long and presents many points. Most of them are not stated distinctly, and we prefer to put the decision upon one, in which there is manifest error.

There are some twenty lessors, who claim as the heirs at law of one David Bradford, Jr. David Bradford, Sr., died in 1779, having devised the land sued for, as the plaintiff alleges, to his son, the said David Bradford, Jr.; and to show that, the plaintiff examined one George Erwin, who swore that "said David died without children" (he does not state the time of his death), "leaving two brothers, James and Michael Bradford." He also swore David died in possession of the land, and that *the lessors of the plaintiff were the heirs at law of said David Bradford, Jr.* He further swore he knew all of the children of the said James and Michael except two whom he had never seen, but he had frequently heard those two spoken of in the family and among the relations as the children of the said Michael and James. He also swore that James and Michael, except two whom he had never seen, but he had ness was the uncle of David, James, and Michael. He also swore that David Bradford, Jr., had sisters and other brothers besides James and Michael. There was no proof of their death.

The defendant moved his Honor to charge "that there was no evidence that any of the lessors of the plaintiff were the heirs at law of David Bradford, Jr., and that the statement of the witness Erwin that they were his heirs at law was not a question of fact but one of law to be decided by the court and could not be proved by a witness in that way."

His Honor refused to give the instruction, but told the jury it was true that who were the heirs at law of a deceased person was a question of law and not one of fact to be proved by witnesses, yet if the
(293) jury could collect from the testimony offered in the case that the lessors of the plaintiff were the heirs at law of David Bradford, Jr., they should find for the plaintiff on that point.

In this there is error. His Honor correctly decided that the heirs at law of a deceased person are to be ascertained as a question of law according to the canons of descent in force at time of his death; but he then leaves it to the jury to "collect from the testimony that the lessors were the heirs of David Bradford," thus committing a double error by leaving a question of law to the jury and by leaving a question to the jury in reference to which there was no evidence.

PER CURIAM. *Venire de novo.*

Cited: Morrison v. McLaughlin, 88 N. C., 255; *Kerlee v. Corpening,* 97 N. C., 334.

JAMES HICE v. JOHN WOODARD.

If a judge omits to charge upon a point presented by the evidence, it is no error unless he is requested to give the charge But if he makes a charge against law, it is error, unless it be upon a mere abstract proposition and it is apparent upon the whole case that it could not have misled the jury.

APPEAL from *Dick, J.*, at YANCEY Fall Term, 1850.

Trover for four cattle. The plaintiff proved that in 1838 the cattle were levied on and about to be sold under an execution in favor of one Ray against one Landers. On the day of sale the cattle were brought to the muster ground (the place appointed for the sale) by the wife of Landers. She sold them to the plaintiff for the price of $30.75,
(294) which he paid to the officer and satisfied the execution, and then told her she might take them home and use them until he called for them.

The defendant proved that in 1843 he, as a constable, held a judgment and execution against Landers and levied on the cattle and sold them, and that the cattle had remained in the possession of Landers from the

time they were taken home by his wife in 1838 up to the time of the levy. He also proved by Ray that some time after Mrs. Landers had made the sale to the plaintiff, witness said to him "he doubted if he had got a good title by his purchase from Mrs. Landers." Plaintiff replied, "he did not care, for his money had been paid back to him, or nearly so." He also proved by one Metcalf that the plaintiff told him "Landers had agreed to work for him until the money advanced was repaid, and he wished witness to tell Landers that if he did not come and work he would take the cattle away."

The court charged "that the plaintiff acquired no title to the cattle by his purchase from Mrs. Landers unless her husband had authorized her to sell at or before the sale, or had subsequently assented to it; that there was no evidence that he had authorized his wife to sell at or before the sale, *nor was there any evidence that he had said anything on the subject after the sale;* that if the jury believed from the testimony of Ray and Metcalf that the plaintiff had entered into an arrangement with Landers subsequent to the sale that Landers was to work for the plaintiff until his wages amounted to the price paid for the cattle, and they further believed that Landers had done the work as agreed on, the plaintiff was not entitled to recover. How that was they were to decide from the testimony of Ray and Metcalf and the additional fact that Landers had been in possession of the cattle from the time they were taken home until the levy by the defendant, a period of between four and five years." (295)

Verdict for the defendant, and the plaintiff appealed.

J. W. Woodfin for plaintiff.
Avery for defendant.

PEARSON, J. The only difficulty we have is to put a construction upon the charge. If his Honor meant there was no evidence of a ratification of a sale, clearly there is error, for the testimony of Ray and Metcalf, and the fact that the wife took the cattle home and the husband kept them in his possession for four or five years, was the strongest kind of evidence. The structure of the sentence favors this construction—"the plaintiff acquired no title unless the husband had authorized his wife to sell at or before the sale or had subsequently assented to it; there is no evidence that he authorized the sale, nor is there any evidence *that he subsequently assented to it.*" This is what the order of the sentence called for, and we are at a loss to conceive why he used the words "that he had said anything on the subject after the sale," except on the supposition that he considered them as meaning the same thing.

This must be so unless he meant to drop "a part of the idea" and depart from the order of the sentence.

If the meaning is, that to constitute a subsequent assent, it was necessary he should *have said* something on the subject after the sale, there is error, because an assent can be implied from *acts* as well as *words*. But taking the words literally, there is error, for there was evidence that he had said something on the subject after the sale. The defendant's own witnesses prove that the plaintiff and Landers had been talking on the subject.

It is suggested that in the latter part of the charge a ratification is assumed, and thus all objection to the former part is removed. It is true, the jury are told if they believe there was a subsequent agreement, that Landers should repay the price in work, and he did so, then the plaintiff is not entitled to recover. But here the charge stops,
(296) and in any point of view in which the case is presented the plaintiff is *not entitled to recover*. Usually when the jury are charged that if a certain fact is established, the plaintiff is not entitled to recover, it is implied that otherwise he is entitled to recover; but when this alternative branch of the proposition is required to remove a ground of objection to a preceding part of the charge, it is necessary that it should be expressed and not be left to implication. In this case, if his Honor had gone on to say, "but unless the defendant has satisfied the jury that Landers did in fact repay the plaintiff by work, then he is entitled to recover," the objection might have been removed. As it is, we think the plaintiff has good cause to complain of the manner in which the case was put to the jury.

If a judge omits to charge upon a point presented by the evidence, it is no error unless he is requested to give the charge. But if he makes a charge against law it is error unless it be upon a mere abstract proposition and it is apparent upon the whole case that it could not have misled the jury.

PER CURIAM. *Venire de novo.*

Cited: S. v. Cardwell, 44 N. C., 249; *S. v. Robbins,* 48 N. C., 255; *Huffman v. Walker,* 83 N. C., 415; *Brown v. Calloway,* 90 N. C., 119; *Terry v. R. R.,* 91 N. C., 242; *S. v. Bailey,* 100 N. C., 534; *McKinnon v. Morrison,* 104 N. C., 363.

(297)

DANIEL WENTZ v. BENJAMIN FINCHER ET AL.

When a man built a rail fence upon a piece of land to which he had no title, and the owner of the land removed the rails and kept possession of them, the former has no right of action against the latter unless the removal has been effected by a breach of the peace.

APPEAL from *Settle, J.*, at MECKLENBURG Special June Term, 1851.

Trover. The plaintiff declared for the taking of a quantity of rails which belonged to him and the conversion thereof by the defendants. To sustain his allegations he introduced a witness, who testified that the plaintiff, some five years previous to the bringing of this action, had enclosed a small piece of land by a fence, containing about one acre and a half, and had cultivated the patch. The plaintiff then introduced a second witness, who testified that the defendants had taken down and hauled off about six hundred of the rails of which the fence was made, claiming them as their own.

The defendants then offered in evidence deeds covering the land of which the plaintiff had taken possession and on which he had built the fence, and showed that he had no title thereto.

Upon this evidence the counsel for the defendants asked his Honor to charge the jury that the plaintiff was not entitled to recover for the reasons: First, that as the fence was a part of the real estate, the action for trover could not be maintained; and, secondly, that as the defendants had showed title to the land upon which the fence stood, (298) in law the fence was their property, and the plaintiff, consequently, could not recover.

The court refused to give the instruction asked for, but charged the jury that, notwithstanding the defendants had showed title to the land upon which the fence stood, still if the testimony satisfied them that the plaintiff had built with his own rails the fence, as proved by the witnesses, and had possession of the land, and the defendants had taken the rails away or any portion thereof and converted the rails to their own use, the plaintiff was entitled to recover the value thereof.

Verdict for the plaintiff, and the defendants appealed.

Osborne and Hutchinson for plaintiff.
Wilson for defendants.

NASH, J. The charge of his Honor affirms a principle which we think cannot be maintained. The instruction to the jury was that "notwithstanding the defendants had showed title to the land upon which the fence stood, yet the plaintiff could recover if he had built the fence with

his own rails and had possession of the land, and if the defendants took them away." The action is in trover, in which it is essential to prove property in the plaintiff and a right of possession at the time of the conversion, and this property may be either absolute or special; and upon the latter an action may be maintained against a wrongdoer, but not against the rightful owner. 2 Star. on Ev., 1485. The sole question, then, in this case is, In whom was the legal title to the rails? In whom was the legal possession? The fence was built by the plaintiff on the land of the defendants without their consent. It becomes, by the act of building, a part of the freehold of the defendants upon the common law maxim, *cujus est solum, ejus est usque ad coelum.* If the defendants had brought an action of ejectment against the plaintiff for the land they would have recovered it upon the admitted facts of the case,
(299) and with it all that was upon it constituting a part of the freehold. Could the defendant in that action have justified a removal of the fence to land belonging to himself? Certainly not. Neither, in this case, can the plaintiff maintain this action against the defendants for converting the rails to their use. They, in law, belonged to them, and they had a right to take them in such a way as not to violate the peace. *Murchison v. White,* 30 N. C., 52. There cannot be two adversary rights existing in different persons at the same time.

There was error in his Honor's charge for which the judgment is reversed.

PER CURIAM. *Venire de novo.*

A. C. McENTYRE v. BURGESS McENTYRE.

When property bargained for is delivered, an action *for the price agreed upon* cannot be defeated except in cases where, if the money had been paid, it might be recovered back in an action "for money had and received." There must be a total failure of consideration. As when the property is retained by mutual consent, or is never delivered, or a counterfeit bill is received, an action for the price agreed to be paid may be defeated, but otherwise, if the property is delivered, although it turns out to be unsound and of no value, or if the bill is genuine, though upon an insolvent bank.

APPEAL from *Settle, J.,* at RUTHERFORD Spring Term, 1851.

Assumpsit brought to recover $200, part of the price of a negro named Juno, which the plaintiff alleges he had sold and conveyed to the
(300) defendant. The facts are set forth in the opinion.

G. W. Baxter for plaintiff.

J. Baxter for defendant.

PEARSON, J. The defendant's counsel did not insist in this Court upon the first two exceptions. It is, therefore, only necessary to state that in February, 1848, the parties executed an instrument in writing, duly attested, the legal effect of which was to transfer from the plaintiff to the defendant a negro woman for the price of $300, of which $100 was paid at the time and the remaining $200 was to be paid by the defendant on 25 December, 1848; and the plaintiff had the privilege of repaying the $100 and taking back the negro at any time before the said 25th of December. This instrument was put in the hands of a third person to be kept for the parties, and the negro was delivered to the defendant. This action is for the $200.

The defendant offered evidence tending to prove that the negro was unsound, and that the plaintiff knew it at the time of the sale, and that in consequence of her unsoundness the negro was "*almost* worthless." He also proved that some two months after he discovered the unsoundness, he offered to return the negro and insisted upon rescinding the contract.

The defendant's counsel moved the court to charge that if the plaintiff had practiced a fraud upon him, he had a right to rescind the contract and return the negro, and his offer to do so discharged him from all liability. Second, that if there was a partial failure of the consideration, and the plaintiff practiced a fraud, the defendant was entitled to a deduction from the rule agreed on.

The court refused to give the instructions prayed for, and (301) charged that if the jury were satisfied that the negro was unsound, and plaintiff knew it at the time of the contract, and that in consequence of her unsoundness the negro was worth nothing, they should find for the defendant; but if she was worth anything, then they should find for the plaintiff, and the measure of damage would be the $200 and interest from 25 December, 1848. Motion for a new trial refused; judgment for the plaintiff, and the defendant appealed.

When the property is delivered under a contract of sale neither party can rescind it without the consent of the other. If the purchaser desires this privilege he must stipulate for it expressly as a part of the contract, otherwise the remedy given by the common law is an action for damages upon the warranty or for deceit. There is no implied condition that he may return the property if it turns out to be unsound. How would this doctrine operate? If the money is actually paid, the property may be tendered and the contract rescinded; but if it is secured by bond, this implied right does not exist. So one who goes so far as to pay the price may rescind the contract; but one who merely secures its payment had no such right. This is absurd. Such an idea was advanced as far back as the time of Lord Mansfield. It was then rebuked, and

has never since been revived except to a very limited extent. *Power v. Wells,* Cowper, 818. There the plaintiff had exchanged a mare for the defendant's horse and given £20 as boot. The horse being unsound, the plaintiff tendered him to the defendant and demanded the mare and money, which was refused, and he brought trover for the mare and an action for money had and received for the £20, treating the contract as rescinded. The Court held both actions were misconceived. The remedy was by an action for the deceit, and the plaintiff was nonsuited.

The passage cited from 2 Kent's Com., 376, to show that this
(302) doctrine has been revived is not expressed with sufficient clearness to confine the idea, as revived, within its very narrow limits. *The cases* go only this far. If one, *not having seen them, orders* goods of a certain description at a certain price, and the goods sent do not answer the description, he may return them, or offer to return them, within a reasonable time and rescind the contract; or if he uses them, he may mitigate the damage in an action for the price, because the vendor cannot amend an action on the special contract, as the goods do not answer the description, and must declare upon a *"quantum valebant,"* and then the price agreed to be given will be the standard by which to measure the damage according to this rule: If goods answering the description be worth the price agreed on, *how much less* are those goods worth? *Farmer v. Francis, ante,* 282.

The defendant has no right to complain of the first part of the charge. We concur in the latter part. The fact that the negro was unsound and her value to some extent impaired ought not to have been allowed to reduce the damage. If a deceit was practiced, the defendant has his remedy. It would be inconvenient, and the plaintiff's case would be made too complicated, if the jury, while trying his case, were required to go into the trial of an action of deceit at the instance of the defendant, which action the plaintiff is not presumed to have come prepared to defend. Besides, suppose the damages are reduced in the manner here attempted, and the defendant should afterwards bring his action of deceit, how is the plaintiff to avail himself of that fact? *Washburn v. Picot,* 14 N. C., 390; *Caldwell v. Smith,* 20 N. C., 193.

It may be proper to add, the same reasoning which supports the conclusion that the defendant was not at liberty to reduce the damage by proving the negro to be unsound to a limited extent, will also sup-
(303) port the conclusion that the defendant could not defeat the action by proving the negro to be so unsound as to be worth nothing, the only difference being in the degree of the unsoundness. In fact, the charge is inconsistent. It amounts to this: if the negro was so unsound as to be of no value, the plaintiff is not entitled to recover; but if she was worth anything—5 cents, for instance—the plaintiff is entitled to

recover $200 and interest, whereas, upon the principle assumed, the recovery should have been only *5 cents.*

Although there are some loose expressions to the contrary, the true principle is this: when the property bargained for is delivered, an action for the *price agreed on* cannot be defeated except in cases where, if the money had been paid, it might be recovered back in an action "for money had and received." There must be a total failure of consideration and not a mere right to recover damages, although the damage may amount to the whole price. For instance, if the property is retained by mutual consent, or if it is never delivered, or if a counterfeit bill be received, an action for the price agreed to be paid may be defeated, otherwise, if the property is delivered, although it turns out to be unsound and of no value, or if the bill be genuine, although upon an insolvent bank. In these cases the reception of the property or of the bank bill is a consideration to support the promise to pay the price agreed on, and the defendant must resort to the warranty, if he had the prudence to require one, or to his action for the deceit if one was practiced.

It is suggested that to allow the action to be defeated by showing that the property was so unsound as to be of no value would prevent a multiplicity of suits. The same suggestion may be made in favor of allowing the damage to be reduced by showing unsoundness to a limited extent; but neither can be allowed without a violation of principle for the reasons above stated.

It would have been a saving of time in the case under consider- (304)
ation had all the evidence in reference to the unsoundness of the negro been rejected as irrelevant.

PER CURIAM. No error.

Cited: Moore v. Piercy, 46 N. C., 132; *Waldo v. Halsey,* 48 N. C., 108; *Hobbs v. Riddick,* 50 N. C., 81; *Baines v. Drake, id.,* 155; *Iron Co. v. Holt,* 64 N. C., 338; *Smith v. Love, ibid.,* 440; *Johnson v. Smith,* 86 N. C., 501.

ANDREW LOVE v. D. W. SCHENCK.

1. As the Legislature may constitute two counties out of one, it may also, as incident to that power, direct a fair and reasonable division to be made between them of any fund before raised by levies on the inhabitants of both the counties in common, and to provide for enforcing payment thereof by those who have it in hand.

2. Interpretation by the Court of the several acts relating to the division of the counties of Lincoln, Catawba, and Union.

APPEAL from *Ellis, J.*, at MECKLENBURG Spring Term, 1849.

Craig and Lander for plaintiff.
Guion and Thompson for defendant.

RUFFIN, C. J. The declaration is in debt for $948.12 2-3. Plea: *nil debet.* It was submitted to the Superior Court upon a case agreed, with a provision for an appeal to this Court by either party. The facts are as follows: In March, 1842, the county court of Lincoln laid a
(305) tax for the purpose of raising a fund for building a courthouse and jail in that county. In the session of 1842 the General Assembly passed an act establishing Catawba County out of a portion of Lincoln, and by a supplemental act of the same year (chapter 9) it was enacted that the county trustee of Catawba, or such officer as the county court of that county might appoint, should be authorized to demand and receive from the county trustee, or such officer of Lincoln County as might have the fund in charge, such amounts as had been collected from the citizens resident within the bounds of Catawba for the purpose of erecting a new courthouse in Lincoln, and that the trustee or such officer of Lincoln should pay over on demand said amount thus collected from and paid by the inhabitants of Catawba. At the time of passing the acts of 1842, a part of the fund, to wit, $1,200, had been collected from the citizens of that part of Lincoln which formed Catawba and from the other citizens of Lincoln. The county trustee of Catawba, in 1843, brought an action against the sheriff of Lincoln, who then had the fund in charge for a certain part thereof as the proportion to which Catawba was entitled under the act above mentioned; and the same pended some time and before the erection of Gaston County as hereinafter mentioned, when it abated by the death of the sheriff, and it has not been revived nor any new action brought.

At the session of 1846 the Assembly established Gaston County out of a portion of the remaining territory of Lincoln on the south and reannexed to Lincoln on the other side a part of the territory which constituted Catawba. By a supplemental act of that session (chapter 25) it was enacted that the county trustee, or such officer as the county court of Gaston might appoint, should be authorized to demand and recover from the treasurer of public buildings, or such officer of Lincoln as might have the fund in charge, two-thirds of all the moneys
(306) which had then been collected from the citizens resident within the limits of Lincoln since March, 1842, for the purpose of erecting a new courthouse and jail in Lincoln, and that the treasurer of public buildings, or other such officer of Lincoln, to pay over two-thirds of the money as aforesaid; the county trustee, or such officer as the county

court of Gaston might appoint, was authorized to sue for and recover the same, to be appropriated to the building of a courthouse and jail in the county of Gaston. The whole sum raised under the order of Lincoln County Court made at March Term, 1842, was $2,723.52½, whereof the sum of $1,200 had been applied by order of the county court in payment of the debts of Lincoln County before the passing of the said acts of 1846 establishing Gaston and supplemental thereto. On 3 March, 1847, the defendant was appointed treasurer of public buildings for Lincoln, and received from the former treasurer as part of the said fund the sum of 40 cents in cash, and bonds given by sundry persons to amount of $1,421.79½, then due, and he held the same on the 5th day of the same month, when the present plaintiff demanded of him the sum of $1,815.68 as the two-thirds of the whole fund of $2,723.52 to which the plaintiff alleged Gaston to be entitled. Between 5 March and 1 November, 1847, the defendant collected on the said bonds the sum of $607.68, and expended the same under orders of Lincoln County Court towards the building of a public jail in Lincoln; and on 1 November, 1847, the defendant had in his hands, as part of the said fund, the sum of $230.30 in cash and part of the said bonds remaining unpaid to the amount of $814.10; and then the present plaintiff demanded of him the sum of $948.12 2-3 as the share of Gaston County of the said fund unexpended at the erection of that county; and afterwards the whole of the said sum of $814.10 was received and expended by the de- (307) fendant under the orders of the county court of Lincoln towards the building of the said jail in that county. The plaintiff was duly appointed by the county court of Gaston, at February Term, 1847, treasurer of public buildings for that county, with special directions and authority to demand and receive the money to which that county became entitled under the before mentioned statutes; and the defendant having refused to pay him any part of the sums demanded by him, he brought this action in April, 1848.

It was agreed by the parties that if the court should be of opinion the plaintiff was entitled to recover by reason of his first demand, there should be judgment for him for the sum of $943.12 2-3, with interest thereon from 5 March, 1847, or for such other less sum as the court might think the plaintiff entitled to recover; and if the court should be of opinion the plaintiff was not entitled to recover thereon, but was entitled by reason of his second demand, that their judgment should be given for $542.53 1-3, with interest from 1 November, 1847, or for such other less sum to which the plaintiff might be entitled; but that if the court should be of opinion the plaintiff was not entitled to recover anything from the defendant, there should be judgment for the defendant, and that in each case the cost should follow the judgment. The Supe-

rior Court rendered judgment for the defendant, and the plaintiff appealed. The point principally discussed at the bar was as to validity of the grant to Gaston of money raised by the order of the court of Lincoln. Indeed, considering the two counties as the real parties, one would think that the object of the controversy was to have the rights of the counties declared, so that each might do or receive what pertains to it, and, therefore, that the parties should consider that the only material point. Upon it the Court apprehends there is no doubt. Unquestionably, the Legislature can divide an existing county so as to make two,
(308) or to unite two counties so as to make one. It is a political power necessary to a convenient local police and also to the general welfare, and seems to be inherent in the legislative authority unless prohibited by the Constitution. There is no such prohibition in the Constitution of this State, and these powers have been habitually exercised by the Legislature. Incidental to them is the further power of providing for the defraying of the necessary expenses arising out of county organization and the administration of county police. It may be true that upon the principle of the inviolability of property consecrated by our fundamental law and in the minds of our people, the Legislature cannot direct funds levied by one county or municipal corporation from the uses of those who raised it to that of another wholly unconnected with them. But that point need not be mooted, as it does not arise here, and it is not to be supposed that there will ever be such legislative action as will raise it. If, however, two counties, for example, be united by a new name, it is clear that the contributions of their citizens then in the hands of county officers ought not to be lost by leaving the fund with the officers without any authority in the new county to recover it. It is, then, a wholesome and necessary function of the law-making power to provide in this new state of things for the accountability of the officers having the funds to those whom they originally belonged and who remain justly entitled to it as the means of saving them from again imposing on themselves new levies to meet the indispensable expenditures of their new condition. By the same reason, it must belong to the Legislature, which makes two counties out of one, to make also a fair and reasonable division between them of any fund before raised by levies on inhabitants of both the counties in common and to provide for enforcing payment thereof by those who have it in hand. That power is likewise necessary, and it is perfectly just when fairly exercised. But it is said
it may be abused, and when it is that the courts are bound to in-
(309) terpose and protect the citizens from even legislative wrong, and that there are here an apparent inequality and unreasonableness in the disposition of the fund, but the difficulty is that it cannot be judicially perceived that the provisions of the statute are unreasonable and

unjust. The reasonableness of the enactments depends upon a variety of considerations which may properly influence the mind of the Legislature, but cannot be judicially ascertained or acted on. It may depend much on the proportion of territory, population, and wealth falling within the respective counties, raising a presumption that a large part of the fund had been drawn from the property or people of one of the counties, and therefore ought to go to it. A material circumstance may also be that the expenditures on permanent public erections in that part of the territory forming one of the counties were greater than in the other, as in building a courthouse, jail, bridges, or poorhouse. As the people of the new county contributed their quota to those purposes, it may be entirely just that they should, upon the division, have a larger portion of a fund happening to be on hand than they contributed to that particular fund, in order to bring them up to an equality in respect to their public erections. It is thus a case in which there is no certain measure of the shares the two counties ought to receive, but one for the exercise of a sound discretion by a just lawgiver; and, of course, if there be an abuse of power in its exercise, it is like most other cases of such abuse, beyond judicial perception or redress—as, for example, in the case of taxation. The right of Gaston County to the fund, as against Lincoln, must, therefore, be sustained to the extent of the grant. Other questions were made: whether the action will lie, and if so, for what sum there should be judgment? The opinion of the Court is that it lies for any sum that was in the defendant's hands which belonged to Gaston under the statute, and which, at the demand or at any time afterwards, the defendant ought to have paid to the plaintiff for Gas- (310) ton. It was objected that the defendant was the officer of Lincoln and bound to account to that county for whatever money he received in his office, and to pay the same as the court of that county might order, and, therefore, that an order of the justice was requisite to the completion of the plaintiff's right. That is true in reference to a fund belonging to Lincoln, but the defendant's duty in respect to the part which the act allots to Gaston is not subject to the control of the justices of Lincoln. It may be that the defendant, on going out of office, should transfer the fund to his successor if not before made directly liable to Gaston by suit or demand; but in reference to the sum belonging to Gaston under the act, the defendant's liability to Lincoln was discharged and that to Gaston arose by the statute, at all events, upon the demand, for the legislative power to grant the thing imports that of prescribing the mode of receiving or recovering it. In respect to the sum assigned to Gaston, the act makes the defendant the bailiff of that county, and on his failure to pay it to the person appointed to receive it, the statute expressly gives to that person an action for it, which may be maintained

as any other action given by statute for the benefit either of the party suing or of another. It was urged further that, by the admissions in the case agreed, the plaintiff cannot recover either of the sums *in numero* which he demanded, and this action for a different sum and one not demanded will not lie. But it was not requisite that the plaintiff should demand a particular sum in order to have his action. The act does not fix an exact amount, but gives a certain proportion of a fund that was in its nature uncertain. Even in an action of debt less than the sum demanded in the declaration may in such a case be recovered. *Dowd v. Seawell*, 14 N. C., 185. Much more can the sum recovered be different from that demanded *in pais*. The demand was not necessary to
(311) entitle the plaintiff to any sum in particular, but if at all, it was for the sole purpose of notice of the claim of Gaston and of the plaintiff's authority to receive the money so as to enable the defendant to pay without suit.

It was next said that the action cannot be maintained because, without the defendant's default, the fund consisted of bonds when the demand was made for payment in money. But that does not answer the plaintiff's case at the commencement of the suit. We are not to say what would have been the remedy at the time of the demand and refusal. In point of fact, he waited after demand until the defendant had converted the securities into money or disposed of them as money for the use of Lincoln, and therefore the plaintiff was then entitled to recover in debt.

But, upon the facts agreed, the precise sum due to Gaston cannot be ascertained, and, therefore, there cannot be judgment on the case in favor of either party. The reason is, that prior to the grant to Gaston, there was one to Catawba of so much of the fund as had been levied for building a courthouse in Lincoln, and had been collected between March and the third Monday of November, 1842, from such citizens of Lincoln as, upon the division, fell into Catawba. The subsequent act in favor of Gaston must receive the reasonable construction, which will let it stand consistently with the previous grant to Catawba, for it cannot be supposed the Legislature meant to interfere with the rights of Catawba, on which Gaston had no claim, nor, on the other hand, meant that Lincoln should pay over again to Gaston the money which it must have been assumed Lincoln had either then paid or, at all events, was bound to pay to Catawba. The grant to Gaston, then, must be understood to be for two-thirds of the fund raised for building a new courthouse and jail in Lincoln after deducting them from the grant to Catawba. It is, therefore, immaterial to this controversy whether Catawba has recovered or relinquished her portion, since, in effect, that was excepted out
(312) of the fund in the first place and Gaston's dividend comes out of

the residue. Now the amount thus excepted is undefined, so that it cannot be told what the residue is after the satisfaction of Catawba's claim. The case agreed states only that before the year 1842 the sum of $1,200 was collected for both the purposes of building a courthouse and jail in Lincoln from all the citizens of Lincoln before the division then enacted, but it does not state whether there was any distinction between that part of the fund which was to pay for building the courthouse and that for the jail, or if so, how much was raised for one purpose and how much for the other; nor does it state how much of the sum of $1,200 thus raised in 1842, for either or both of those purposes, was paid by those living on the Catawba side of the line. Before the jury on *nil debet*, evidence may be given by the defendant on those points, so as to adjust the proper deduction to be made on account of the grant to Catawba, and of the sum not thus shown to belong to Catawba, be it more or less, the plaintiff ought to recover two-thirds, provided it be within the sum demanded in the declaration, and also does not exceed the sum in the hands of the defendant. It is conjectured very confidently that the sum thus to be found due to the plaintiff will exceed that demanded in the declaration, viz., $948.12 2-3, which is also the larger sum for which in any case judgment was, by the case agreed, to be given for the plaintiff, and, therefore, it is regretted that the controversy cannot be terminated by a judgment for that sum at once. But it cannot be done, because the Court is unable to see certainly that it would be right by reason of the vagueness of the statement in reference to the sum belonging to Catawba. It is true, the case states that $1,200 of the fund was spent in paying the debts of Lincoln before the act of 1846, but it does not appear that it was the same $1,200 which was collected in 1842, or that this last sum had been kept separated from the residue of the fund; hence we are unable to disconnect the claim (313) of Catawba from the fund in the defendant's hands so as to see that out of it the plaintiff is absolutely entitled to any particular sum. The result is that there cannot be judgment for the defendant, because it is certain that he is indebted to the plaintiff, and that there must be judgment against him for some amount; yet judgment cannot be given here against him because, by reason of the imperfection of the case agreed, it cannot be ascertained in what sum in particular he is indebted. The judgment must, therefore, be reversed and the cause remanded with directions for a *venire* to try the issues.

PER CURIAM. *Venire de novo.*

Cited: *McCormac v. Comrs.*, 90 N. C., 445.

JOHN P. HOUSTON v. CHARLES STARNES.

In an action for a breach of covenant in a warranty of the soundness of a slave, the plaintiff may show what the slave afterwards sold for, to aid the jury in estimating the damages.

APPEAL from *Battle, J.*, at UNION Spring Term, 1851.

Covenant for the breach of a warranty of soundness in a bill of sale of a negro woman. The defendant sold the negro to the plaintiff, and warranted her soundness. It was in evidence that at and before the sale the purchaser was apprised that she had symptoms of disease (314) upon her, and it was proved she died of consumption, and that she had at the time of the sale the disease upon her. The defendant contended that the covenant did not extend to that disease upon the alleged principle that a general warranty does not extend to visible defects. The judge held that no defect except such as was apparent to the senses could be excluded from the operation of the covenant, and so charged. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Thompson and Wilson for plaintiff.
Osborne and Hutchinson for defendant.

NASH, J. The defendant has no reason to complain of the opinion upon this point. It was as favorable to him as it could be.

In the course of the trial the plaintiff offered evidence to show that he had, by his agent, sold the negro in Mississippi for $175. This was objected to by the defendant's counsel as incompetent on the question of damages. The objection was overruled and the testimony admitted. The witness then, in answer to a question, stated that in her diseased state, the negro was not worth more than $75 or $100.

There was no error in the admission of the evidence. The plaintiff was at liberty to show he had sold the slave and, as a fact, to prove what he got for her. It did not establish her value, but was a fact proper to be laid before the jury in the assessment of damages. The inquiry was, what was the extent of the injury the plaintiff had sustained? and the measure was the difference of the value of the negro as sound and diseased as she was, to be estimated by what she would bring in market. If the purchaser has sold, what he got for her may or may not assist the jury in estimating the damages. It is a fact he may prove. But if the evidence ought not to have been received, still the judgment (315) should not be disturbed. It has done the defendant no injury, as it is evident the jury were not influenced in their verdict by the price given, but by the value fixed by the witness.

PER CURIAM. No error.

Cited: Jones v. Mial, 89 N. C., 93; *Jones v. Call*, 93 N. C., 170.

DEN ON DEMISE OF JONES HICE v. AMOS COX ET AL.

On the trial of an ejectment, it became important to prove that the defendant was the tenant of A. To prove this the plaintiff called A., who proved the fact, and, on cross-examination, produced a conveyance dated more than seven years before the commencement of this suit, and swore that he had been continually in the peaceable and adverse possession. The counsel for the plaintiff was then about to urge to the jury that A.'s testimony as to the time he obtained said deed was false, and that the deed was antedated. The court informed the counsel that as he had introduced A. as a witness, he could not discredit him before the jury; that he might have proved by other testimony that the witness was mistaken, and that the facts were otherwise. The court permitted the deed to be given to the jury for their inspection, that they might determine from the face of it whether it was antedated or not. The court then instructed the jury that if they believed, from an inspection of the deed, that it had not been in existence for seven years or more before the action was brought, they should find for the plaintiff; but it did not lie in the mouth of the plaintiff to say that his witness, A., was unworthy of credit, and particularly as the plaintiff was not entitled to recover, unless that part of A.'s testimony in relation to the possession was believed. The plaintiff had no right to ask them to believe so much of A.'s testimony as was in his favor and to discredit him as to the balance.

1. *Held*, that the charge of a judge should be taken as a whole; that all he says upon any one particular point should be taken together, and that thus viewing it, the charge of the judge in this case was correct.
2. The party producing a witness shall not be allowed to prove him corrupt. He may prove that he is mistaken, or that the fact sworn to is other than is represented by him.
3. There is a distinction between discrediting a witness and showing that the facts are different from what he has represented them. In the latter case, the discrediting of the witness is incidental, not primary. The evidence may be discredited and the integrity of the witness remain unimpeached.

PEARSON, J., dissented as to the construction of the judge's charge.

APPEAL from *Dick, J.*, at YANCEY Fall Term, 1850. (316)

J. W. Woodfin for plaintiff.
Avery and N. W. Woodfin for defendant.

NASH, J. The only question presented by the case is as to the charge of the court below and the remarks made to the counsel. The case is: An execution was levied upon the land in question as the property of one Joseph L. Ray, and at the sale the plaintiff became the purchaser. The action is brought against the tenant in possession, Amos Cox, the defendant; and it became important to the plaintiff to show that he was

the tenant of Ray. To prove this, Ray was himself called and proved the fact. Upon his cross-examination, he stated that at the time of the sale he had no legal title, but that he acquired it afterwards, and produced a conveyance which bore date more than seven years before the commencement of this suit, and that he had been continually in the peaceable and adverse possesssion ever since.

The counsel of the plaintiff then proposed to *urge to the jury* that Ray's testimony as to the time he obtained said deed was false, and that the deed was antedated. The court informed the counsel that as he had introduced Ray as a witness, he could not discredit him before the jury;
that he might have proved by other testimony that the witness
(317) was mistaken and the facts were otherwise. The counsel then
contended that he was at liberty to show to the jury, from the face of the deed, that it was antedated, and the court permitted him to give the deed to them for their inspection. His Honor then instructed the jury that if they believed from an inspection of the deed that it was antedated and had not been in existence seven years or more before this action was brought, then they ought to find for the plaintiff. But as the plaintiff had introduced the witness Ray, it did not lie in his mouth to say he was unworthy of credit, and particularly as the plaintiff was not entitled to recover, unless that part of Ray's testimony in relation to the possesssion was believed. The plaintiff had no right to ask them to believe so much of Ray's testimony as was in his favor and to discredit him as to the balance.

The charge is, in our opinion, correct and sufficiently explicit to show the meaning of the judge and not to mislead the jury. The general rule of evidence on this subject is that a party shall not be permitted to produce general evidence to discredit his own witness. He shall not in that way prove him to be of such bad character as would render him unworthy of credit. It would be a fraud upon the administration of justice. But the rule does not extend to the exclusion of testimony to show that the facts sworn to by the witness are otherwise, or to show by other testimony how the facts really are, for such facts are evidence in the cause. The other witnesses in such case are not called to discredit the first, but the impeachment is incidental and consequential only. 2 St. N. P., 1785-6. The same doctrine is laid down by Justice Buller in his *Nisi Prius*, 297. In *Holdsworth v. Dartmouth*, 2 M. and Rob., 153, cited by Mr. Stephens, Baron Park observes that the party calling a witness cannot, if he give testimony unfavorable to him, prove that he has given a different account of the matter before, for the object of the
evidence is to discredit him, and he lays it down "as a clear rule
(318) that a party has no right to put a witness into the box as a wit-
ness of credit, and when he gives unfavorable evidence to call

witnesses to discredit him." To the same effect are the opinions of all the Judges in the case of *Erner v. Ambrose*, 10 E. C. L. R., 220. All these authorities state that the party calling the witness may prove by other testimony that the *facts* are not such as he has sworn, and they advert to the difference of the rule as to witnesses whom the law makes such and those which the party produced. The former the party is compelled to call, as in cases of wills. He, therefore, is under no responsibility as to their character, and he may impeach their evidence by proving they are not worthy of belief. The latter are witnesses of his own selection, and, in the language of some of the cases, he has the whole world to select from, and stands as their endorser that they are worthy of credit. To me it is obvious that the judge intended, and in substance did lay the rule down to the jury as sanctioned by the authorities above cited. The counsel was stopped by the court, assigning as his reason that he could not discredit his own witness, but he proceeds and explains to the counsel what he might have done—he might have proved that the witness was mistaken, and that the *facts* were otherwise. But his Honor leaves no doubt as to his meaning, for, upon the request of counsel, he suffers the deed to be handed to the jury for inspection, to ascertain from it how the fact was as to its date—a very important fact in the cause—and he directs them that if they believe, from inspection, *there being no other evidence*, it had been antedated, to find for the plaintiff—in other words, to throw the deed aside, put it out of their view. Of this portion of the charge the plaintiff certainly has no right to complain, and it plainly and fully shows the meaning of the judge in his remark to the counsel. The latter part of the charge, however, it is said is contradictory of the first. I do not think so, or, if it is, it is so in appearance only. Justice to his Honor requires that the charge should be taken as a whole—that all he says upon any one par- (319) ticular point should be taken together and not as *disjecta membra*. It is true the latter clause might have been omitted without any injury to the whole, but looked at with reference to what preceded, it is but a reiteration of its different terms and as a corollary from it. It cannot for a moment be supposed that his Honor intended to take back what he had stated immediately before—that the party might prove the fact testified to by Ray as to the date of the deed not to be as he had declared it. As a result of the rule contended for by the plaintiff, his Honor goes on to remark, if adopted, it would lead to the discarding of Ray's testimony altogether. In using the words he did, the judge intended to show that the plaintiff was, in truth, discrediting his own witness upon the ground that his evidence upon the date of the deed was corruptly false. The authorities all draw a distinction between discrediting the witness and showing that the facts of the case are different

from what he has represented them. In such case, the discrediting of the witness is incidental and not primary, the evidence *may* be discredited and the integrity of the witness remain unimpeached. It is nothing to the purpose, in my estimation, to say that if the fact sworn to by Ray as to the date of the deed was false, it must be corruptly false. This was a matter for the jury into which no one had a right to inquire. They might, upon proper evidence, have found against the deed either upon the ground of corruption or mistake. If upon the former, as before remarked, the discrediting of the witness would be incidental; if upon the latter, he would remain unimpeached. Mr. Stephens, it is true, does say that the rule is still unsettled. So far as authority can go, I consider the principle as firmly settled as it can be. It is plain and intelligible, and the only question is, shall this Court adhere to it? I see no reason to alter it. It forbids the attaining of right ends by corrupt means, and thereby contributes to the purity of the ad-
(320) ministration of justice. The party producing the witness shall not be allowed to prove him corrupt. He may prove he is mistaken or that the fact sworn to is other than as represented by him. Believing that his Honor was sustained both by authority and principle in his charge, as we understand his meaning, we cannot say there is error in the charge, nor are we willing to unsettle a rule of evidence of so much importance in practice and of so long standing because it ought to have been originally otherwise settled.

RUFFIN, C. J. I concur in affirming the judgment.

PEARSON, J. I think it evident from what was said during the trial and in the charge that his Honor was in error as to the law of evidence in two particulars. This error would as a natural consequence communicate itself to the charge and have a tendency to mislead the jury.

It was formerly considered to be a settled rule of evidence that a party was not at liberty in any way to discredit his own witness. If he called him it was for "better or for worse," and he was bound by what he swore. His Honor seems to have been of this opinion.

The rule has never been changed in one particular. A party is not at liberty to discredit his own witness by proving his general character to be bad, because, by calling him as his witness, he vouched for his good general character and cannot be heard to say that he attempted a fraud on the jury by calling a witness who, from his general character, was not worthy of credit. But it has certainly been changed in this particular. When a party is compelled by law to call a witness, as a subscribing witness to a deed or will, if the witness denies that he attested the instrument, he may be discredited by proof that he is perjured, and that

he did witness it and subscribe his name as an attesting witness. (321) *Lowe v. Joliff*, 1 Bl., 365; *Peter v. Babington*, 2 Strange, 1069.

More recently it has been changed in another particular. If a party calls a witness who is not a subscribing witness, and is, therefore, not forced on him by law, and he proves a *fact in the cause* against the party calling him, the party may discredit him by calling other witnesses to prove the fact in contradiction to his oath, and the reason given is "that the other witnesses are called to prove a fact in the cause, and not directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only." *Erner v. Ambrose*, 10 C. L., 220.

Still more recently an attempt has been made to change the rule in another particular, and thus, in effect, to abolish it and allow a party to discredit a witness called by himself, with the exception that he is not at liberty to do so by proving him to be a man of bad *general character* for the reason stated above, which is admitted on all sides to be a sound one. In 3d Chitty's General Practice, 896, it is said, "still to be a disputed point whether a party can be allowed to *discredit his own witness.*" The witness proved a fact against the plaintiff who called him, and the question was, if he could be discredited by proof, that he had stated the fact to the plaintiff's attorney, whose business it was to prepare the evidence and who took down this witness' statement in writing and read it to him, and he then said it was correct, and yet on the trial he contradicted it. *Denman, C. J.*, was of opinion in the affirmative, but *Bolland, J.*, in the negative. For this is cited *Wright v. Beckett*, 1 M. & Rob., 414, which is not in our library. Afterwards, *Parke, Baron*, in citing this case, agrees with Bolland; but he expresses some hesitation how it would be if the fact had been called out on cross-examination, as it was in our case. *Holdsworth v. Dartmouth*, 2 M. & Rob., 153, cited in 2 Stephens' *Nisi Prius*, 1785. I regret that I have not had the opportunity of seeing Lord Denman's opinion, for, although the question is not presented in this case, I profess I (322) have never been entirely satisfied with the reasoning upon which this part of the old rule has been retained. If a party expects he can prove a fact by two witnesses, and calls one who proves it, he may stop; but if he happen to call the other first and he disproves it, the party can then call his other witness to prove it, and the result is a flat contradiction. Why may he not be allowed to turn the scale by proving that the first witness had made different statements, just as he could have done if that witness had been called by the opposite party? Why should not the jury be put in possession of all the facts and let them judge between the witnesses? Will not a knowledge of this impunity tempt designing men to put themselves in the way of a party with a view to impose on him? If his general character is bad, the party

should turn away from him; but if his character is good and he says he will be able to prove a fact which the party knows to be true and wishes to prove, why say to him, you call this witness at your peril.

In this State it is settled the State may discredit its own witnesses by proving that on a former occasion he had given a different account of the transaction. *S. v. Morris*, 2 N. C., 429. The reason given is that the solicitors are not presumed to be well acquainted on the circuits. This certainly is not very satisfactory. In most cases there are prosecutors, and in all there are persons ready to aid the solicitor in the matter of procuring testimony. I am inclined to the opinion that the Court felt the inconvenience of the old rule, and were not altogether satisfied with the reasoning upon which it was put; at all events, the law is so settled in regard to State cases, and it seems to be proper that the rules of evidence should be the same, whether the trial be on the civil or the State docket.

The other particular in which I suppose the Judge was in error is in reference to the application of the rule "*falsum in uno, falsum in*
(323) *omnibus.*" The rule is settled, and I am not disposed to disturb it, although, if it was an open question, it might be urged with force, that the jury ought not to be interfered with in what is said to be the *peculiar province* of a jury—to pass upon the credibility of witnesses—for the reason that juries are composed of twelve men who are presumed to have a knowledge of human nature, which qualifies them especially for their duty, but I do insist that the rule did not apply to the present case, and it ought, under the special circumstances, to be made an exception.

The plaintiff calls a witness to prove a fact which is directly against the interest of the witness. The witness could not object (*Jones v. Lanier*, 13 N. C., 480) on account of his interest. He proves—or rather admits—the fact, on oath it may be, because he was afraid to deny it. He is then cross-examined, and swears to a fact directly on the side of his interest, and which gives him a good title to the land in controversy. Suppose he is false as to this fact. A jury would, nevertheless, believe his admission of the other fact because it *was against his interest*—a stronger guaranty of its truth than his oath. His Honor's charge and the application of the rule put the plaintiff in this predicament: If the testimony is true, the plaintiff cannot recover, because the land belongs to the witness; if the testimony in regard to the date of the deed is not true, and the plaintiff discredits the witness by showing that it was antedated, inasmuch as the deed was made to the witness, and he knew its true date, he is thereby shown to be perjured and false, and being so in this particular, the jury must reject the whole of his testimony and not even give credit to that part in which he swore *against his interest;* and

so the plaintiff cannot recover, because he has no proof that Cox was in possession as the tenant of the witness, and the only way in which the jury can find for the plaintiff is by coming to the conclusion that the deed under which the witness was attempting to hold the land (324) was *antedated by mistake.*

I think there should be a *venire de novo.*

PER CURIAM. No error.

Cited: Strudwick v. Broadnax, 83 N. C., 403; *Gadsby v. Dyer,* 91 N. C., 314.

J. F. HOKE'S EXECUTOR v. JAMES CARTER'S ADMINISTRATOR.

1. The legal effect of the sale and delivery of a bond without endorsement is not to pass the legal title to the purchaser, for the vendor may release it if he thinks proper to the maker of the bond. But the purchaser is constituted the agent of the vendor and the money vested in him as legal owner the moment it is collected, for the *chose in action,* of which the vendor was the legal owner, is extinguished by an act which he had authorized to be done, to wit, the reception of the money. The money then vests in the purchaser as legal owner by force of the contract of sale which thereby became executed.

2. Therefore, where such a purchaser obtained judgment in the name of the vendor, and the sheriff collected the judgment and, after notice by the purchaser, paid money to the vendor: *Held,* that he was notwithstanding answerable to the purchaser for the amount.

APPEAL from *Settle, J.,* at BURKE Spring Term, 1851.

Assumpsit for "money had and received." One Fleming held a bond for $297 on one Holcomb and one Brigman. Fleming sold the bond to the plaintiff's testator, and delivered it to him without endorsement. The testator instituted suit on the bond in the name of Fleming and took judgment, from which there was an appeal, and the de- (325) fendant's intestate was security for the appeal. There was judgment against Holcomb, Brigman, and the defendant's intestate. The testator sued out execution directed to the sheriff of Yancey and put into the hands of the defendant's intestate, who was then sheriff of Yancey, and directed him to collect the money out of Brigman, and informed him that he (the testator) had bought the bond from Fleming and was entitled to the money, and gave him special instructions not to pay the money to Fleming, but to pay it to him. The defendant's intestate received the money from Brigman. It was demanded by Fleming, who alleged that there were certain conditions annexed to the sale of the bond, and the defendant's intestate paid it to him, taking a bond of

indemnity. The plaintiff's testator demanded the money of the defendant's intestate, who refused to pay on the ground that he had paid it to Fleming. The defendant's intestate endorsed on the execution, "Satisfied," and returned it to office. Both parties soon afterwards died, and this action is brought by the executors of one against the administrators of the other. Upon the above state of facts the jury returned a verdict for the plaintiff, subject to the opinion of the court upon a point of law reserved as to the plaintiff's right to recover upon the facts in the case. His Honor being of opinion against the plaintiffs, set aside the verdict and directed a nonsuit. The plaintiffs appealed.

Avery and Bynum for plaintiff.
N. W. Woodfin and Gaither for defendants.

PEARSON, J. As the intestate was sheriff and also one of the defendants in the execution, he had no power to act in his official capacity. The question can, therefore, be presented in a plainer view by relieving it from both of those circumstances and treating it as if the testator had handed the execution to a third person, who was neither sheriff
(326) nor one of the defendants, with the instructions above stated; the money is accordingly received and is paid to Fleming, and the question is, Is this payment to Fleming an answer to the action?

Fleming was the legal owner of the bond after the sale and delivery to the testator. He was also the legal owner of the judgment, had control of it, and might have released it at any time while the "chose in action" was in existence.

The legal effect of the contract of sale and delivery of the bond was to constitute the testator an agent of Fleming to receive the money, but the money vested in the testator as legal owner the moment it was received, for the *chose in action,* of which Fleming was the legal owner, was extinguished by an act which he had authorized to be done, viz., the reception of the money, and the money vested in the testator as legal owner by force of the contract of sale which thereby became executed in the same way as if Fleming had himself received the money and handed it to the testator in execution of the contract.

If, therefore, the testator had called on Brigman and received the money, it would have been his, and Fleming would have had no right to it or cause of action for it.

The circumstance that the testator, instead of going himself, sent the defendant's intestate for the money can make no difference. The instant he received it it became the money of the testator, and the payment to Fleming *"was in his own wrong."* He must look to his bond for indemnity.

PER CURIAM. Judgment reversed, and judgment for the plaintiffs according to the verdict.

Cited: Monday v. Siler, 47 N. C., 391; *Johnson v. Sikes,* 49 N. C., 70; *Crawford v. Woody,* 63 N. C., 103; *Gibson v. Smith, id.,* 105; *Kiff v. Weaver,* 94 N. C., 278; *Bank v. Waddell,* 100 N. C., 343; *Redmond v. Staton,* 116 N. C., 143.

(327)

J. F. HOKE'S EXECUTORS v. JAMES CARTER'S ADMINISTRATORS.

1. A party cannot appeal when the judgment is in his favor just as he wanted it.
2. It is only when both parties except to *the judgment as erroneous* that both have a ground for appeal.

APPEAL from *Settle, J.,* at BURKE Spring Term, 1851.

This is the same case which has been decided at this term upon the appeal of the plaintiffs, and is brought up here upon the appeal of the defendants with a view of presenting an exception because of the rejection of Fleming, who was offered by the defendants for the purpose of proving that the sale and delivery of the bond had certain conditions annexed thereto.

Avery and Bynum for plaintiffs.
N. W. Woodfin and Gaither for defendants.

PEARSON, J. We cannot entertain the appeal. The defendants do not except to the judgment. It is just what they asked for—they are not "dissatisfied therewith." How can they appeal?

It is only when both parties except to *the judgment as erroneous* that both have a ground for appeal, as in the case of *Devereux v. Burgwin,* 33 N. C., 490. The defendant excepted because of error in not giving judgment in his favor, and the plaintiff excepted because of error in that he was not allowed interest upon the $1,000 for which he had judgment.

The appeal must be dismissed and the defendants will pay the costs of appeal.

PER CURIAM. Appeal dismissed.

(328)

ANDREW LOVE v. JACOB RAMSOUR.

The act of Assembly requiring the payment of certain moneys by the county of Lincoln to the county of Gaston (referred to in *Love v. Schenck, ante,* 304) applies only to such persons as had the fund, or a part of it, in hand at the passing of the act, or might have it afterwards. It does not charge one through whose hands the money had merely passed, and from whom it had been taken by the court before the enactment of the statute.

APPEAL from *Ellis, J.,* at MECKLENBURG Spring Term, 1849.

This case is similar to that of *Love v. Schenck, ante,* 304, except that the defendant was appointed county trustee for Lincoln in March, 1846, and in the summer after the sheriff of the county, by order of the county court, paid to the defendant the sum of $1,200, which he then had of the fund raised since March, 1842, for the purpose of building a court-house and jail in Lincoln; and except, further, that on or before 1 September, 1846, the defendant, by order of the county court, disbursed the whole of that sum in the payment of debts of Lincoln County, then including what is now Gaston County. After demand made the plaintiff brought this suit in the spring of 1848 for $800. There was judgment for the defendant on the case agreed, and the plaintiff appealed.

Craig and Lander for plaintiff.
Guion and Thompson for defendant.

RUFFIN, C. J. The judgment must be affirmed. The act gives an action against "the treasurer of public buildings, or such officer of Lincoln as may have the fund in charge," and it appears that the defendant was neither the one nor the other. The act only applies to such
(329) persons as had the fund, or a part of it, in hand at the passing of the act, or might have it afterwards. It could not charge the defendant upon the ground merely that the money had passed through his hands and had been taken from him by the court before the enactment of the statute.

PER CURIAM. Affirmed.

STATE v. RUEL JACKSON.

1. An indictment for malicious mischief must either expressly charge malice against the owner or fully otherwise describe the offense.
2. Setting forth in the indictment that the act was done "feloniously, willfully, and maliciously," without averring that it was done "mischievously," or with malice against the owner, is not sufficient.

APPEAL from *Battle, J.*, at SURRY Spring Term, 1851.

The defendant was indicted for malicious mischief in burning, and thereby destroying, two plows and gears, upon the following indictment:

STATE OF NORTH CAROLINA—Surry County.

Superior Court of Law, Fall Term, 1850.

The jurors for the State, upon their oath, present: That Ruel Jackson, late of the county of Surry, laborer, on the first day of April, in the year of our Lord one thousand eight hundred and fifty, (330) with force and arms, in the county aforesaid, into a certain field there situate, then and there did enter said field, then being in the possession of one Winston Fulton, and the said Ruel Jackson, in the field aforesaid, two plows and two sets of horse gears, the property of the said Winston Fulton, then and there being, then and there feloniously, willfully, and maliciously did set fire to and burn, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

Upon this indictment the defendant was convicted, and appealed from the judgment on the conviction. The question presented by the case will be found in the opinion of the Court.

Attorney-General for State.
Boyden for defendant.

NASH, J. The defendant is indicted for malicious mischief in burning a couple of plows and gears belonging to the prosecutor. The crime consists in the willful destruction of personal property from actual ill-will or resentment towards its owner or possessor. *S. v. Robinson,* 20 N. C., 129; 4 Bl. Com., 254. The charge of his Honor was in every respect correct. There cannot be a doubt that the acts charged upon the defendant, if true, amounted to malicious mischief, nor did it make any difference where the articles destroyed were found by him, or where burnt; the crime was complete. The judgment, therefore, would be confirmed but for a fatal defect in the indictment itself. There was no motion below to arrest the judgment, and, of course, the indictment was

not particularly brought to the notice of the judge. An indictment is a compound of law and fact, and must so set out the offense that the court may be able, without resorting to any evidence *dehors,* to perceive the alleged crime. It must be certain to every intent. It is of the (331) essence of the crime charged against the defendant that it was perpetrated from ill-will against the *owner of the property destroyed.* It is necessary, therefore, that the indictment should either directly charge this malice towards the owner, or so describe the offense, that the court may see that the charge is sufficiently explicit to support itself. 1 Ch. Cr. L., 172; *S. v. Cockerham,* 23 N. C., 381. The indictment in this case does not charge the crime to have been perpetrated from malice against the owner. In *S. v. Simpson,* 9 N. C., 460, and *S. v. Scott,* 19 N. C., 35, the Court decide that it was not necessary so to lay the offense, because the indictment was according to the precedents; but in both those cases the crime was sufficiently charged without those words. The charge in *Scott's case* was, "unlawfully, wickedly, maliciously, and *mischievously,*" etc.; *Simpson's,* "unlawfully, wickedly, maliciously, *mischievously,*" etc. In each of those cases the generic term designating the crime is used, and, therefore, we presume that the precedents did not call for the express charge of malice against the owner because the description contained in the indictment necessarily embraced it. In the case before us, the word *"mischievously"* is omitted, and the description is legally incomplete. If the indictment had gone on and charged malice against the owner the charge would have been sufficiently explicit to support itself. An indictment for malicious mischief must either expressly charge malice against the owner or fully otherwise describe the offense. For this defect in the indictment

PER CURIAM. Judgment arrested.

Cited: S. v. Jacobs, 47 N. C., 56; *S. v. Newby,* 64 N. C., 25; *S. v. Manuel,* 72 N. C., 202; *S. v. Hill,* 79 N. C., 658; *S. v. Sheets,* 89 N. C., 548; *S. v. Martin,* 141 N. C., 838.

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(332)

DOE EX DEM. JEFFERSON DULA v. LUCY MCGHEE.

When a grant calls for the line of an old grant, the rule is that it must go to it unless a natural object or a marked tree is called for, and before the calls of the junior grant can be ascertained those of the old must be located.

APPEAL from *Battle, J.,* at WILKES Spring Term, 1851.

The facts are set out in the opinion. Judgment for defendant, and the plaintiff appealed.

Guion for plaintiff.
Boyden for defendant.

NASH, J. The action is ejectment. The plaintiff claims under a grant issued by the State to him in 1848, which covers the *locus in quo*. The defendant introduced a grant from the State to David McGhee, dated in 1788, which commenced at the index in the plat and ran around to figure 3. Its call is for a line thence west, crossing Beaver's Creek to a hickory corner on said creek; then south to the beginning. The defendant then gave in evidence a conveyance from David McGhee to his son Bluford McGhee, under whom she claims. This deed for the northern part of the patent has its calls for a chestnut tree on the top of the Low Mountain and run around to the corner of the grant at the figure 3; and it calls thence west to the corner, a hickory; then south to the beginning. A grant from the State to Bluford McGhee dated in 1818 was then exhibited. The calls of that grant are, "lying on (333) Beaver's Creek, beginning on a hickory on the hillside west of the field, being Ellison's (now Horton's) hickory corner, *in said McGhee's own line;* then west with Ellison's line 62 poles to a gum, poplar and a white oak on a ridge; then south to a stake *in his own line near the conditional corner; then north with his old line to the beginning.*" It is evident from these calls in the two grants to the McGhees and the mesne conveyance to Bluford there is no vacant land between the two former. The plaintiff contends that the third line of the old grant stops at the letter D on the diagram and runs a direct course to the letter C, the defendant that it continues on to A, and then a direct course to the index. To the present inquiry, it is not important at which of the two points the true *terminus* is, for the closing line from that point to the index must be the boundary or line of the grant of 1788. *Hough v. Horn,* 20 N. C., 369. The grant to Bluford McGhee calls for a beginning in his own line and closes the third line at a stake in his old line, and makes the old line his closing line. His father had in 1808 conveyed to him the northern part of his grant, and the third line runs "west to the corner, a hickory"—evidently meaning the hickory which is the *terminus* of the third line of the grant—and then to the beginning. The surveyor proves that the conditional corner mentioned in the conveyance to Bluford McGhee and called for in his grant was near to the letter H in the plat and nearly on the line A B. Where a grant calls for the line of the older grant, the rule is that it must go to it unless a natural object or a marked tree is called for, and before the calls of the junior grant can be ascertained, those of the elder must be located. This is established by many decisions. *Miller v. White,* 3 N. C., 160; ..... *v. Heritage,* 3 N. C., 327; *Bradberry v. Hooks,* 4 N. C., 443; *Tate v.*

Southard, 8 N. C., 45. Now it is claimed by the plaintiff that the closing line of the old grant runs from D, either to the index or to the
(334) letter C. If so, the closing line of Bluford's grant must go to the same, for, by the conveyance to him in 1808, the same line is called for.

No error is perceived in the charge of the court.

PER CURIAM. No error.

Cited: Mason v. McCormick, 75 N. C., 266; *Murray v. Spencer*, 88 N. C., 361; *Hill v. Dalton*, 140 N. C., 13.

S. P. SIMPSON v. WILLIAM FULLENWIDER.

1. Persons may change notes for their mutual accommodation, with a view to raise money by having them discounted, and they will respectively constitute a consideration, which will make them all binding on the makers: provided, however, that they be not made with a view to their being illegally discounted. But a note made to the intent of being legally discounted for the accommodation of the maker or the payee, or both of them, would not be obligatory between the parties, and is void in the hands of one who discounts it at a rate exceeding 6 per cent; and there is no difference between a man's making his own note to the lender and getting a friend to make a note to himself and his passing that to the lender.

2. Whether the lender was cognizant of the intention of the parties to the note or not is not material in a question of usury, for the statute has no provision in favor of the assignee, and it is the fact and not the assignee's knowledge of it which determines the validity of the instrument.

APPEAL from *Battle, J.*, at IREDELL Spring Term, 1851.

Debt on a bond for $1,500, and the defense was usury. On the trial the defendant gave evidence that in 1840 he and his brother,
(335) Henry Fullenwider, executed to each other several promissory notes for the purpose of raising money thereon by having them shaved or discounted at a greater rate of interest than 6 per cent, and that three of the notes for $500 each thus made by the defendant to Henry were passed by the latter to the plaintiff at 15 per cent discount. One Miller also deposed that about ten years before the trial the plaintiff delivered to him three notes for $500 each which had been made by the defendant to Henry Fullenwider, with the words *"Satisfied by note"* written in the face of them by the plaintiff, and directed him to give them to the defendant, and that he did so on the same day, at the door of the defendant's house, and the defendant said when he took the notes he would burn them, and immediately walked towards the fire for that

purpose, and, returning, he said he had burned them, and he was sorry he had settled them by giving his bond with a surety for them. The declarations of the defendant were objected to by the plaintiff, but were admitted by the court. The defendant gave further evidence that the bond now sued on was given in place of the three notes passed by Henry Fullenwider to the plaintiff.

The counsel for the plaintiff insisted that, supposing the evidence to be true, it did not make out a case of usury: first, because the plaintiff took the defendant's notes from Henry Fullenwider without notice of any unlawful agreement between the maker and payee; second, because Henry and William, the defendant, exchanged notes for the same amount, so that the set of notes of the one was a good consideration for those of the other, and each of them had a right to part from those payable to him upon what terms he pleased without making the transaction usurious as between the purchaser and the maker; and, thirdly, because the defendant took up the original notes and gave the present bond in lieu thereof, and the latter security is not infected with usury, though the notes might have been. The court refused to give those instructions and directed the jury that if the facts were true as (336) stated by the witnesses, the bond was usurious. The jury found the issue for the defendant, and the plaintiff appealed from the judgment.

Guion, Thompson, and Osborne for plaintiff.
Craig, Boyden, and Alexander for defendant.

RUFFIN, C. J. The objection to the evidence is untenable. The defendant had to account for the nonproduction of the notes at the trial, and his declaration contemporaneous with the delivery of them to him and his going, apparently, to burn them, was proper evidence as tending to establish their destruction. It is said, however, that the other part of the declaration ought not to have been received, because the effect was to raise an inference that those notes form the consideration of the bond sued on, and the party ought not to be allowed thus to fabricate evidence for himself. But that is not a proper view of the subject. The witness Miller had stated that it appeared on the notes themselves, under the plaintiff's own hand, that another security had been taken in satisfaction of them. The defendant, then, did no more than express regret at having given the note thus admitted by the plaintiff. His declaration introduced no new matter in respect to giving another security, but amounted to his admission merely that, as stated by the plaintiff, he had given some security in lieu of those then delivered to him. It still lay on him to connect the present bond with the notes by the other evidence which he offered to that point.

Upon the main question there seems to be no doubt. Assuming the evidence to be true, it very clearly establishes the usury. It is true that persons may exchange notes for their mutual accommodation with a view to raise money by having them discounted, and they will respect-
ively constitute a consideration which will make them all binding
(337) on the makers, provided, however, they be not made with a view
to their being illegally discounted, but a note made to the intent of being usuriously discounted for the accommodation of the maker or payee, or both of them, would not be obligatory between the parties, and is void in the hands of one who discounts it at a rate exceeding 6 per cent. It is plain, when a man wants to borrow money at an illegal rate, that within the mischief and the meaning of the act there is no difference between making his own note to the lender and getting a friend to make a note to himself, and his passing that to the lender. The friend's note is, in truth, as much made for the borrower's use as his own would be, and it is not the less so because at the same time he made to his friend a note for the same amount to be used by the friend for a like purpose of his own. Each note is, in its concoction and in the use made of it, in contravention of the statute, and is avoided by it. The purposes of the act require that, whatever shape may be given to the dealings, the contract should be held void if in reality there was a lending and borrowing. It follows that every case is open to evidence of the intent and purpose with which the security is made. If the transaction appear upon the evidence to be a contrivance, under color of doing a different and lawful thing, of effecting in fact an illegal borrowing and lending, it is vicious, for the statute applies as well to indirect as to direct modes of dealing, and no shift for the purpose of veiling the intention can make the case different from a borrowing and lending in the simplest form, provided that in substance there was a borrowing and lending. That was the fact here, for the defendant's notes, being made for the accommodation of his brother Henry, had no vitality, according to the intention of those parties, until they passed into the plaintiff's hand for the money advanced by him to Henry. It is, therefore, in substance, a borrowing by the party who was intended to get, and did get, the money
from the plaintiff upon the discount of the note thus made for
(338) the accommodation of that party. Whether the plaintiff was
cognizant of the intention of the two Fullenwiders in making the notes is not material to the question under consideration, for the statute has no provision in favor of the assignees, and it is the fact, and not the assignee's knowledge of it, which determines the validity of the instrument. That is, *a fortiori*, true of an instrument made for the express purpose of being usuriously discounted in the hands of the person who thus discounts it, though he may not be privy to the making of the in-

strument or to the intent with which it was made. If it were not so held, the most flimsy device would be allowed to defeat this important statute, and, indeed, it might be considered as judicially repealed. These positions are fully sustained by numerous adjudged cases, and they are decisive of this controversy. *Floyer v. Edwards,* Cowp., 114; *Ruffin v. Armstrong,* 9 N. C., 411; *Dunham v. Day,* 13 John., 40; *Munn v. Commission Co.,* 15 John., 44, 56; *Bennet v. Smith,* 15 John., 355. Of course, the taking of a new bond by the usurer himself cannot remove the taint in the original transaction. It was an inherent vice in it and attaches itself to every security taken by the lender, including the illegal interest or any part of it.

PER CURIAM. No error.

(339)

ROBERT POSTEN v. ROBERT HENRY.

A purchaser of land is a privy in estate with the bargainor, and has the right, when necessary, to use the name of the bargainor to effect a recovery in ejectment, and also to take possession in his name.

APPEAL from *Bailey, J.,* at BUNCOMBE Special Term, 1851.

Trespass for mesne profits. The plaintiff read in evidence the record of a recovery in ejectment. The declaration contained three counts upon the several demises of the plaintiff, of Rebecca Posten, and of George W. Jones. At the trial the issue on the demise of the plaintiff was alone submitted to the jury. The writ of possession recited a recovery on the demise of the plaintiff. Under it the sheriff put George W. Jones in possession, and afterwards this action was brought. To show a privity of estate between the plaintiff and said Jones, and that the latter had authority to take possession in the name of the plaintiff, a judgment, execution, and sheriff's deed were read in evidence, from which it appeared that the land had been sold by the sheriff as the property of Posten and was bought by and conveyed to the said Jones. The sale was made in 1844. The deed was executed in 1847.

A deed from the plaintiff to Jones, executed in 1834, was also read in evidence. It is an ordinary deed of bargain and sale for the consideration of $600. At the foot of this deed is a memorandum that Jones is to have "full possession" at the death of Rebecca Posten.

The court was of opinion that the plaintiff had not made out his case because there was no evidence of an entry by him after the recovery in ejectment. The plaintiff submitted to a nonsuit and appealed.

N. W. Woodfin for plaintiff. (340)

J. Baxter and Henry for defendant.

PEARSON, J. When this case was before us at August Term, 1850, it was decided against the plaintiff upon the ground that no connection had been shown between him and Jones. We think that objection is now fully met by the two deeds which were read in evidence. By them Jones is made a privy in estate with the plaintiff, and this case is the ordinary one of a purchaser who brings ejectment on the demise of the bargainor to obviate an objection on account of an adverse possession at the execution of the deed.

The bargainee is a privy in estate, and has the right to use the name of the bargainor to effect a recovery and to take possession in his name.

PER CURIAM. Reversed.

Cited: Hassell v. Walker. 50 N. C., 271.

(341)

THOMAS BEATTY v. H. W. CONNER.

1. In a proceeding to recover damages for ponding water by a milldam under our act of Assembly, the verdict of the jury and the judgment of the court thereon are conclusive as to the assessment of damages up to the time when such judgment was rendered.

2. An application for relief from damages assessed for a period subsequent to the time of the judgment can only be heard if the dam is taken away or lowered. The washing out of the channel and other causes of a similar kind furnish no reason for abating the damages.

APPEAL from *Battle, J.,* at CATAWBA Spring Term, 1851.

At Spring Term, 1849, of Catawba, in a proceeding by the plaintiff against the defendant, who was the owner of a mill, for damage by reason of the ponding of water on the land of the plaintiff, the jury returned a verdict assessing the annual damage at the sum of $70, and judgment was entered that the plaintiff recover of the defendant the sum of $350, the execution to be stayed, except for the sum of $140, the damages assessed for the two years commencing on the second Monday in June, 1846 (which was one year prior to the filing of the petition), and ending on the second Monday in June, 1848. This part of the judgment was satisfied.

The plaintiff afterwards took out execution, returnable to Spring Term, 1850, for the $70 damage from June, 1848, to June, 1849. At the return term of the execution (Spring Term, 1850) the defendant filed an affidavit, in which he states that in two weeks after the first find-

ing of the jury on the premises in June, 1848, he lowered his (342) dam 36 or 37 inches, whereby the water was taken off of the land

of the petitioner and no longer did him any damage. Upon this affidavit a rule was taken on the plaintiff to show cause why the execution should not be set aside. The rule was made returnable to Fall Term, 1850, and the amount of the execution was paid into court. At Fall Term, 1850, the rule was discharged by his Honor, Judge Battle, who states, that in addition to the fact set forth in the affidavit, the defendant offered to show that, by the washing out of the channel of the creek since the rendition of the judgment and other causes, the water has been so lowered as not to injure the plaintiff, but he was of opinion that the defendant could not be permitted to show anything not set out in the affidavit. The defendant appealed.

Boyden for plaintiff.
Craig and Landers for defendant.

PEARSON, J. Lord Coke says, "good matter must be taken advantage of in apt time, proper order, and due form."

In debt upon a former judgment, the defendant cannot avail himself of any matter, the benefit of which he could have had on the first trial. So, upon a *scire facias* to revive a dormant judgment, or upon *audita querela*, the party is confined to matter arising since the judgment by which it has been satisfied, in whole or in part, and is not heard to allege any matter existing prior to the judgment upon the presumption that he has had the benefit of it.

The principle is decisive of the present question. In *Pugh v. Wheeler*, 19 N. C., 50, it is held, "if the jury can see that more or less damages have arisen to the plaintiff at different times they are at liberty to increase or diminish those found accordingly." In that case the wheel of the petitioner, who owned a mill above that of the defendant, was burned after the first year, and in consequence thereof the damage was greater afterwards than during the first year, and the jury assessed the damages at 12½ cents for the first year and at $10 for the annual (343) damages afterwards. This was held to be right and according to the proper construction of the statutes of 1809 and 1813, for although the first statute, which provides for a jury on the premises, seems to have contemplated that the jury would find an average sum as the annual damages, yet when the second statute allowed an appeal to the Superior Court and a trial at bar, under which the proceedings would most usually be pending for several years, there was then no reason why the jury should not find the actual damages up to the time of the trial, so as to assess a less sum for the first and a larger sum for the other years, if in fact the damage was greater as in the case above cited, or a larger sum for the first and a less for the other years, or none at all if,

during the pending of the proceedings and at any time before the trial at bar the dam was lowered so as to diminish the damage or remove it altogether. This was the necessary construction, for the dam was not kept up (say, after the first year), and the jury at bar were still required to assess the annual damage, taking no notice of that fact; as soon as judgment was entered pursuant to the verdict, the defendant must take a rule to show cause why it should not be ordered, that no execution issue, except for the damage of one year. This would be absurd, and it would naturally be asked, why could not this matter have been inquired of by the jury so as to let them fix the *actual damage?* Why the force of assessing high damages, and the instant thereafter having an affidavit to strike it all out except for one year?

In this case the defendant says he lowered his dam in June, 1848, so that after that time the water did the plaintiff no damage. Why did he not prove this upon the trial at bar, Spring Term, 1849? That was the "apt time," and the jury would, in that case, have assigned no damages after June, 1848. He cannot now be heard, upon the principle above announced.

(344) We also concur with his Honor upon the other question, without deciding on the sufficiency of the reason given by him, that "the washing out of the channel and other causes," are not set forth in the affidavit, for this reason: such cases do not come within the meaning of the statute. The damages are not to be abated if "the dam is kept up," so the application can only be heard if the dam is taken away or lowered. If the question of damages was open upon every suggestion of diminution from other causes, there would be a contest every year when an execution was applied for, and the petitioner's right would depend upon whether it had been a wet or dry season.

PER CURIAM. Affirmed.

Cited: Burnett v. Nicholson, 86 N. C., 104.

T. A. BETTIS v. DANIEL REYNOLDS.

A bond given for money lost upon a wager on the result of a public election, though neither of the parties be a voter, is based upon an illegal consideration, being against public policy, and is therefore void.

APPEAL from *Dick, J.*, at BURKE Fall Term, 1850.

Debt on a bond for $100. The defense relied on was under a special plea that the bond was given for an illegal consideration to secure money lost upon a bet on the election of James K. Polk as President

of the United States by the people. The defendant proved that pending the election, the plaintiff let him have a watch worth $40, for which the defendant was to pay him $125 if James K. Polk was (345) elected President of the United States by the people. Under this agreement the plaintiff delivered to the defendant the watch, and the defendant delivered to the plaintiff a bond for $125 with the above condition expressed therein. After the election the defendant made a payment of $25 and executed the bond sued on to secure the balance of the $125 bond. The jury returned a verdict for the plaintiff, subject to the opinion of the court upon the question reserved. The court being of opinion with the plaintiff, he had judgment, and the defendant appealed.

Avery for plaintiff.
J. W. Woodfin and Tate for defendant.

PEARSON, J. It is clear that this was "a bet" upon the result of the presidential election; and the bet being lost, by the admission of the parties, the bond sued on was executed to secure the balance remaining unpaid. It was not proven that the parties, or either of them, were voters, and no presumption of that fact can be made to aid the defense. We are, therefore, to take it that neither were voters; and the question is presented, Can a bond given to secure money lost on a wager on the result of a presidential election then pending, made by persons who are not voters, be recovered?

It is settled that the action cannot be maintained if either of the parties is a voter. *Allen v. Hearne*, 1 T. R., 56; *Burns v. Riker*, 4 Johnson., 426. We think it cannot be maintained although neither of the parties is a voter, and put our opinion on the broad ground that the wager is against public policy, and the courts ought not to countenance it by aiding in the collection of a bond given to secure the money won.

Ours, both Federal and State, are representative, republican (346) governments, and rest upon elections by the people as "the corner-stone." Everything—not merely the proper action, but the very existence of our institutions—depends on the free and unbiased exercise of the elective franchise; and it is manifest that whatever has a tendency in any way unduly to influence elections is against public policy. This position, we assume, as self-evident. It seems equally clear that the practice of betting on elections has a direct tendency to cause undue influence, for, by the wager, the parties acquire a pecuniary interest in the election altogether foreign and at war with its true purpose and design which leads them into temptation, more or less strong, according

to the amount of the wager, to exert every and any means by which to effect the result and to strengthen one side and weaken the other. One who has a wager depending follows but the instinct of interest when he resorts to the perversion of facts, the circulation of falsehood, treating and bribing, for the purpose of gaining votes. The evil is not confined to himself. His relations and friends become excited and stimulated to exercise, not for the *good of the country,* but for the pecuniary interest growing out of the wager. Such a state of things is against the public good.

Putting our decision on this broad ground, the fact that the parties to the wager are not voters has no bearing on the question, because the evil effects of the practice of betting on elections pointed out above do not at all depend on that circumstance. One who is not a voter may be tempted as strongly as one who is a voter to pervert facts, circulate falsehoods, treat and bribe, and the infection extends as readily to his relatives and his friends.

While concurring in the correctness of the decisions in the two cases above cited, we must be allowed to say that the ground upon which they are put is very narrow, to wit, that as both, or one, of the parties were voters, the wager was illegal because it created a pecuniary interest calculated to swerve him from his duty, for although he may have bet upon the candidate for whom, at the time, he intended to vote, yet, perchance, but for this pecuniary interest he would have changed his vote, whereas after the bet he was not open to conviction and did not "stand indifferent."

(347)

The probability that a single vote might have been changed but for the fact that the door to conviction was shut by the wager is certainly very narrow ground. It presented itself, however, in those two cases, and the Judges chose to rest on it without deciding how it would be if neither of the parties had been voters. No case is found in which the question presented to us is decided, and we are at liberty to put our decision upon the broad ground which we have assumed as the result of principle and the "reason of the thing." This ground is so broad as to make it immaterial whether the parties are voters or not.

Burns v. Riker, supra, aids our conclusion. There the parties were both voters, but one had cast his vote; so, the reasoning in *Allen v. Hearne,* where the bet was laid before the poll was opened, did not apply to him. The other was on the day the bet was made, 50 miles from his residence, where alone he was entitled to vote, and the polls would be closed at sunset on that day. The difference, in the opinion of the Judges, turned upon the possibility of his being able, in 1807 (before the age of railroads) to ride the 50 miles in time to cast his vote, and to carry out the reasoning upon the further possibility that in thus

riding, he might have concluded to change his vote but for the pecuniary interest created by the wager.

The broad ground which we assume is recognized and acted upon in *Atherton v. Beard,* 2 T. R., 610, where the Court refuse to support an action for a wager as to the future amount of a branch of the *public* revenue, and Buller, Judge, says Lord Mansfield was of opinion that any wager as to a *public event* would be void. So in *Gilbert* (348) *v. Sykes,* 16 East., where it was agreed to pay certain sums per day as long as Bonaparte lived, this was held to be a wager, and illegal, as tending to create a private pecuniary interest in a matter of public concern.

PER CURIAM. *Venire de novo.*

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

MIRANDA SHARPE v. JAMES STEPHENSON.

1. In an action of slander (under our statute) for charging that the plaintiff had criminal intercourse with one A. at a particular time and place, the defendant cannot justify by showing that she had such intercourse with A. at another time and place.
2. The defendant in such an action, in a plea of justification, must aver and must prove the identical offense; and when any circumstance is stated which is descriptive of and identifies the offense, it must be averred and proved for the purpose of showing that it is the same offense.
3. Yet though the plea is not favored when other descriptive circumstances are proven, so as to show clearly that it is the offense charged, a slight variation in some of the other circumstances, which may be ascribed to mistake, would not be fatal, as, for instance, that it was on Saturday instead of Sunday, and the like.

APPEAL from *Dick, J.,* at CALDWELL Fall Term, 1850.

Sharpe and Bynum for plaintiff.
Avery and T. R. Caldwell for defendant.

PEARSON, J. This was case for slanderous words. The defend- (349) ant said of the plaintiff: "He saw her and Eli Lowrance apparently come from the same place out of the bushes along Mrs. Sharpe's lane, about 100 or 200 yards from the house, in a stooping position; they must have been down at it, or he would have seen them sooner, for he was in ten or fifteen steps of them before they saw him, and the fence was low and the bushes were low. There had been old reports, but he

had never seen anything amiss and knew nothing against her until now. They looked just like a man and his wife, if anybody was to come along and catch them at it. The plaintiff had said that on that occasion she was looking for a turkey's nest, but if she had looked behind her she would have found the turkey's nest. They were the worst confused people he ever saw; they were confused to death. The plaintiff's face looked like it would light a torch, it was so red. If it ever came to a suit he would make Abner swear hard. He did know things against her, and on oath he would be obliged to tell it. He was now done with her, and he would stop his daughters from school; they should not associate with her any more."

The defendant relied on the plea of justification, and "offered some evidence on that plea, and then proposed to prove an act of illicit intercourse between the plaintiff and Eli Lowrance at another time and place from that charged in the declaration under his plea of justification. This evidence the court rejected, and for this the defendant excepts." The other exceptions are clearly against the defendant, and not debatable, so it is unnecessary to state them.

The jury found for the plaintiff, damage $500, judgment, and the defendant appealed.

The defendant, in the words of his bill of exceptions, having offered some evidence under the plea of justification, then proposed to prove an act of illicit intercourse between the plaintiff and Eli Lowrance
(350) at *another time and place* from that charged. In other words, having failed to prove that the plaintiff was guilty of the *particular offense* with which he had charged her, he offered to prove that she was guilty of a *like* offense with the same man. This he was not at liberty to do. The question is settled. *Watters v. Smoot,* 33 N. C., 315. "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. The principle is, the defendant, in a plea of justification, must aver and must prove the identical offense; and when any circumstance is stated which is descriptive of and identifies the offense, it must be averred and proved for the purpose of showing that it is the same offense. Accordingly, it was held in that case that although whether A. or B. be the man, forms no part of the essence of the offense and is not material in regard to the guilt of the plaintiff, still, if by way of describing the offense, A. is named as the man, an act with A. must be averred and proved.

Upon this principle, a charge that C. passed to A. a counterfeit *two*-dollar *South Carolina* bill is not sustained by proof that he passed to A. a counterfeit *thirty*-dollar *Virginia* bill. That C. committed perjury on a trial at *Morganton* in a suit between A. and B. is not sustained by

proof that he committed perjury on trial at *Salisbury* in a suit between A. and B. That C. stole the *black horse* of A. is not sustained by proof that he stole the *white mare* of A. These circumstances are descriptive, and unless they be proven, it is not the same offense. It is merely an offense of the same kind. If the "earmarks" are given, they must be proven.

The defendant in this case gives, then, other descriptive circumstances, besides naming the man, place, time. "There had been old reports, but he had never seen anything amiss *until now.*" So it was recent in point of time, but a few days at farthest, and the circumstance that he was an *eyewitness, almost saw* them in the (351) very act. There are authorities requiring each of these circumstances to be averred in the plea, and, of course, to be proven. *Craft v. Boite,* 1 Sanders, 242. The words were, "he stole £200 worth of plate *out of Wadham College.*" The plea (drawn by Sanders) sets out, "he, the said Joseph Craft, three ounces of silver plate of the goods and chattels of the warden, fellows, and scholars of the college called Wadham College, in the university and city of Oxford, in the county of the same city, and at the said city of Oxford in the county of the said city, *within the said college,* found, feloniously, and as a felon, stole, took and carried away." Sergeant Williams, in his note, says: "The plea of justification seems to be properly pleaded. It confesses the speaking of the *words alleged* in the declaration, but says the plaintiff was guilty of a felony, and specifies the nature of it, together with the *time* when, and the *place* where, the plaintiff committed it, so that the plea alleges the plaintiff to be guilty of that species of felony which the defendant charged him with, and, therefore, the plaintiff may come prepared to answer and disprove it at the trial." In *Upshur v. Betts,* Cro. J., 578, the words were, "he *is* a bankrupt." The words were spoken the first of April, in the 17th year of James I. The plea averred that the plaintiff *was* a bankrupt on the 15th of April in the year of the same reign. Held, ill. The court remark, "from that is averred, he may *now* be a good merchant." There, *time* was material, and it was necessary to aver and prove it, otherwise the charge made was not shown to be true. 3 Chitty's Pleading, 1040, is this precedent words: "I saw the ship, and the scaff of the keelson was open, so that I could put my four fingers in edgeways." Plea: "Before speaking the words, to wit, at, etc. (venue), he, the said defendant, *had seen* the said ship, and the scaff of the keelson of the said ship was open, so that he, the said defendant, could put his four fingers in edgeways." This is an authority as (352) to the descriptive circumstance of being an eyewitness. But the authorities even require quality and number, when descriptive of the act, to be precisely averred and proved. Cook on Defamation, 78, refers

to a case as cited by Starkie—words, "he has robbed me to a *serious amount*. Plea, he robbed him of a loaf of the value of three pence. The jury found the justification as pleaded, but were directed to give some damages in respect to the words, "to a serious amount," which were not justified. *Johns v. Gettings,* Cro. Eliz., 239, words, "thou hast stolen my cloth and a half a yard of velvet"—plea, "he did steal the velvet"—bad, for it did not answer the words, thou hast stolen *my cloth. Tisk v. Thorowgoord,* Cro. Eliz., 623. The plaintiff and one F. S., under a commission issued out of chancery, took and returned the examination of several witnesses—words, "the plaintiff had returned, as depositions, the examination of *divers* that were never sworn"; plea, "the plaintiff did return the examination of one F. S., who was never sworn"upon demurrer, adjudged, no good justification, because it is of one witness only, whereas the charge was placed in the plural number." The authorities, then, sustain the position that the defendant must aver in his plea, and prove, *the very charge.* As it is said in *Watters v. Smoot, supra:* "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." If a woman some twenty years ago had fallen into error, but had since atoned for it as far as was in her power by an irreproachable life, and it be said of her, "many years ago she was guilty of fornication," although the allusion be prompted by a cruel and malicious spirit, she must submit, for it is true; and it may be, if it be said (353) "she *is* an unchaste woman" she must submit (although probably it would come under *Upshur v. Betts*), but if it be said "she was caught last night in A.'s *bedroom,* and they were in bed *'at it,'"* the slanderer cannot protect himself by proving her former guilt, although it may happen to have been committed with A., because he has made a *particular* charge and must prove *it* or stand convicted of falsehood. The bare suggestion that such a plea can justify such a charge shocks common sense.

It is said, if this strictness is required in proving the particulars which are descriptive of the offense, the plea never can be made out, as a few hundred yards in reference to place and a day in reference to *time* would be fatal.

It is true, this plea is not favored, but when other descriptive circumstances are proven, so as to show clearly that it is to offense charged, a slight variance in some of the other circumstances, which may be ascribed to mistake, would not be fatal. Like all questions of identity, the inquiry would be, does the proof establish it? notwithstanding a mis-

take in a part of the description, as if the place was a few hundred yards from the lane, or it was Saturday night instead of Sunday night, or the man turned out to be B. instead of A., in the case above supposed, the mistake being accounted for by the fact that it was in the bedroom of A.

It is so usual for time and place to be laid as a mere formal part of the pleading, where they are not material and need not be proven as laid, and ought to set out under a *"videlicit,"* that we are apt to fall into error in regard to them, and look upon them as immaterial, when in truth they are material as forming a part of the description, and must be averred and proved with as much certainty as any other part of the description, for this reason, a full extract was taken from Sanders as an instance where "the place" was material. The plate was alleged to have been stolen out of *Wadham College.* The place (354) there identified the offense, and it is not put under a *videlicit,* as an ordinary venue, but is specially stated. This, it will be remarked, was after 17 Car. II, ch. 8, dispensed with a particular venue, and it was sufficient to lay "the country," for the purpose of an ordinary venue, where place was not material. But if the place was material it was specially laid, as in that case. So, in trespass for an assault and battery, laying the venue in the county of Burke, if the defendant justifies, as sheriff of the county of Iredell, under an execution, his plea must aver that the act was done in Iredell at a certain time, when the execution was in force, and traverse the venue and time formally laid in the declaration, because time and place are made material by the plea.

It is said that a variance in the proof of the words charged in this case, in reference to time and place, would be fatal. That is merely stating the same question in a different way.

If time and place be material as a part of the description, the proof must correspond with the words as laid. It may be that where the words charged are general, proof of words in which the charge is made with more particulars would not be a fatal variance, because the defendant is benefited by being let into a more general plea. But where the words charged go into particulars, and time and place are descriptive, as in the case of the bedroom before supposed, the proof of words in which the charge is made in general terms would be a fatal variance, as in that case, if the words proven were that the defendant said, "the plaintiff and A. were caught at it," for in such a case the defendant would, by making the charge as set out in the declaration a particular one as to the *bedroom* and night *time,* be taken at a disadvantage in regard to his plea.

It is not necessary to consider whether the words in reference to *Abner* import a general charge, and so would have let in more general plea, because the point is not made by the bill of exceptions, and (355) such a plea would still have left the particular charge unanswered, and the verdict must have been for the plaintiff.

PER CURIAM. No error.

Cited: *McAulay v. Birkhead*, 35 N. C., 32; *Davis v. Lyon*, 91 N. C., 447.

JAMES R. LOVE ET AL v. HUGH JOHNSTON ET AL.

1. Unpublished wills of the supposed testator are admissible in evidence as to questions of capacity and undue influence as they tend to show intelligence and a settled purpose to make dispositions like those contained in the script in contest.

2. Where, on the trial of an issue, *devisavit vel non*, the declarations of a party are given in evidence, and it appears afterwards that those declarations were in fact in favor of his own interest, though apparently against it, the court may at any stage of the trial direct the jury to disregard them.

3. The proceedings in probate causes is not similar to those at common law, for in its nature it is a proceeding *in rem*, to which there are no parties in the strict sense of the common law, and the court retains that exclusive power over the subject which arises from the provision in the statute that the issue "is to be made up under the direction of the court." The court may modify the issue, both in respect of the scrips and parts of scripts and of the positions of the parties interest, so as to have the contest upon the issue determined conclusively and upon its merits as existing in fact.

4. There cannot be republication by oral declarations merely of what purports to be an attested will, and it is doubtful whether there can be a *holograph*. As to a paper purporting to be an attested will, there cannot be a republication unless by a reëxecution of a codicil, with the ceremonies required by the statute.

5. When one script only is put in issue, and that is but part of the will, the verdict ought not to be against it altogether, but should rather be according to the truth—that is, a part. Upon such a finding, the parties would be under the necessity of asking the court to set aside and remodel the issue so as to embrace both scripts, and thus the whole case would be properly brought up.

(356) APPEAL from *Caldwell, J.*, at McDOWELL Spring Term, 1850. *Devisavit vel non*, to try the validity of a script, bearing date 13 May, 1842, offered for probate as the will of Robert Love, deceased. James P. Love, Dillard Love, John B. Love, William Welch, Dorcas Henry, and Robert Love were parties to the issue as propounders. They

were all among the heirs at law and next of kin of the party deceased, and the script contained a devise or legacy to each of them, and the four first named were nominated as some of the executors thereof. The probate was contested by others of the heirs and next of kin upon the ground of want of capacity and undue influence, and it was also insisted that the script did not contain the whole of the will, but only a part of it.

The script is set out in the bill of exceptions and purports to be signed by the party deceased and attested by two witnesses, William H. Thomas and William Allman. They deposed on the trial that, at the date of the script, they went, by request from Love, to his house, and were told by him that he wished them to witness his will; that some one, without his knowledge, had cut his name from a will he made in 1834; that he then produced the script in contest and that of 1834, and after making some additions to the former, Love executed it and they attested it, and then Love reëxecuted that of 1834, and that both the papers were then put under one cover, sealed up together, and locked up. The witness Allman further deposed that when the script of 1842 was executed, Love said if that did not stand, or any accident happened to it, he wished that of 1834 to stand, and that, upon saying so, he executed the latter. The witness Thomas further deposed that Love said that (357) the old will was signed to cure the defect caused by his name being torn off; that the new will was made to provide for the change made necessary in the disposition of his property. The witness further deposed that the larger part of the party's estate was not embraced in the will of 1842.

On the part of those opposing the probate, the declaration of John B. Love, William Welch, Dorcas Henry, and Robert Love, that the party deceased was of unsound mind at the time he executed the writings on 13 May, 1842, were given in evidence without objection from the other side. The propounders then offered in evidence two writings purporting to be two unfinished wills of the party deceased written by himself and containing numerous dispositions of parts of his estate, which, as far as either went, conformed to those of the script in contest. They were objected to, but were received by the court.

In the argument to the jury, the counsel, in support of the will, insisted that in point of fact John B. Love, William Welch, Dorcas Henry, and Robert Love were interested against the probate, and therefore that their declarations ought not to be heard in opposition to it. Counsel on the other side did not deny that the interest of those persons was in opposition to the probate, but urged that the evidence of their declarations was nevertheless competent.

In summing up to the jury, the presiding judge advised them, that as those four persons were interested to break the will, their declaration

ought to have no weight against it. He further instructed the jury that it was competent to republish a will by parol, and also competent for the party deceased to declare, at the time of executing the two writings, which of them was his will, and consequently, that if they believed the statement of the witness Allman, the script in contest dated 1842 was his will, but that if they believed the statement of the witness
(358) Thomas, then the two scripts together, namely, that dated in 1834 and that of 1842, constituted but one will, and then they ought to find against that of 1842, because it was not the last will, but only a part of it.

The jury found for the propounders, and the other side appealed.

Avery and Gaither for plaintiffs.
J. W. Woodfin for defendants.

RUFFIN, C. J. The unfinished wills were admissible as evidence to both of the points of capacity and undue influence, as they tended to show intelligence and a settled purpose to make many of the dispositions contained in the script in contest. Minutes for a will are common evidence of capacity and the *animus testandi,* and letters or verbal declarations containing expressions of preferences for particular persons or importing a voluntary purpose of making particular dispositions are the ordinary means of rebutting the imputation of undue solicitation or influence.

With our mode of trying contests about the validity of wills by jury, there is naturally associated the ideas of parties and the rules of evidence applied to similar trials in a proceeding at common law, in which the side on which one is a party corresponds with his personal interests. Hence a notion seems to have been somewhat prevalent that in contests of this kind a party in interest one way may be most useful to himself and those in the like interest by taking on the record a position in opposition to the side on which his interest lies, so as to make declarations apparently against, but in reality for, himself, and have them offered in evidence by those in interest and conspiring with him. The case of *Enloe v. Sherrill,* 28 N. C., 212, is an instance of such an attempt, which was defeated; and this case seems to be another, which also prop-
(359) erly met the same fate. Against such practices the profession ought to guard the court, and no doubt would, if cognizant of the fraud at the framing of the issue. But if not discovered then, it is the duty of the court, whenever it may be discovered, to protect itself and the parties in interest from imposition; and it is, of course, within the province of the court to frame such rules as to the mode of conducting such proceedings as may be effectual to that end. The proceeding in

probate causes is not similar to those at common law, though the trial in each be by jury, for, in its nature, it is a proceeding *in rem,* to which there are not parties in the strict sense of the common law, and the court retains that exclusive power over the subject which arises from the provision in the statute that the issue is "to be made up under the direction of the court." There is no doubt, we think, that when the purposes of justice require it, the court may modify the issue, both in respect of scripts and parts of scripts and of the positions of the rules of the parties in interest, so as to have the contest upon the issue determined conclusively and upon its merits as existing in fact and not as they may be made to appear upon the declarations of fictions fabricated for the purposes of defeating a decision accordant with the very fact. In the courts of probate in our mother country, the propounding is on oath, and probate in common form may pass on that alone. Our statute requires proof by at least one witness in every instance, and hence it has come to be the usage not to swear the executor at the propounding, but only to administer to him the oath for the execution of the will after sentence has been pronounced for it. Perhaps it were better if the executor were still required to propound on oath in the first instance as well as to take the other oath, for he cannot honestly propound a script which he knows or believes not to be the will of the party deceased. Indeed, by propounding, he stands pledged to take his oath to that effect, since it is a part of the oath of an executor prescribed in the statute that he "believes this writing to be and contain the last will (360) and testament" of the party deceased. If he believes otherwise, though it be proper to summon him to see proceedings in order to make the sentence, whatever it may be, conclusive on all in interest, his duty to the court and to the ends of justice plainly is, either to contest the probate openly or, at the least, to see proceedings, literally speaking, and not to be an actor in the proceeding. It is a fraud upon the law to take part in the propounding in collusion with the caveators. He ought to act as he would if all the other parties besides himself were propounders, in which case he would be obliged to stand forth in opposition to the probate. In cases of such fraud and collusion whereby one, for his own interest, aims to have such control, directly or indirectly, over the trial of the issue as to secure a decision against himself and those with whom he acts in pretense and in favor of their adversaries, the ground fails on which the rule for admitting declarations is founded, namely, that they are against the interest of the person making them, and, therefore, the rule itself has no application in those instances. It seems to the Court, therefore, that in cases of reasonable suspicion of good faith in an executor in uniting with the other executors or parties in interest in propounding a script, he might and ought to be required to take at once

an oath as to his belief of its validity; and upon his refusal, the court should allow those in interest to prosecute by themselves. That would have been a proper course here, and perhaps the court would have adopted it if it appeared that the other propounders had been aware of the collusion in time to have asked it before the trial. But, as far as appears, this evidence was sprung upon them without any ground of suspicion, and, therefore, in furtherance of the principle mentioned, the court might have rejected the declarations when offered in evidence, and consequently his Honor was right, after they had been inadvert-
(361) ently admitted, in advising the jury that they ought to allow no weight to them.

Whatever error may exist in the other instructions to the jury, it would seem not to entitle the appellant to a *venire de novo,* because, upon the facts stated, it does not appear that it could be injurious to them. The instructions relate exclusively to the validity of the script in contest, as affected by the other paper called the will of 1834. Now if that paper was of no force as a will, its existence could not in any degree operate upon that in contest. It does not appear in the exception to have been executed so as to make it a will. As a will of 1834, it was revoked by an express clause of revocation in that of 1842, if the latter be a will to any purpose. Then, looking at it as executed also in 1842 as part of the will, it is not seen that it could have been a will or part of a will; no copy is set forth in the bill of exceptions, whereby it might appear to have been attested, nor is it otherwise stated that it was either a holograph or attested by the witnesses Allman and Thomas or any others. Those persons state merely that the party (Love) "reëxecuted it," and one of them said that Love mentioned that he "signed" the old will to cure the defect caused by "his name" being torn off. His Honor, who is to be supposed to speak more accurately, applies to the transaction in reference to that paper the term "republication" merely, which he informed the jury might be by parol. It cannot be inferred, therefore, that the execution in 1842 of the paper of 1834 was anything more than the resigning it by the party deceased; and hence it was not a will, because it is not so stated to have been written by himself, nor witnessed as required by the statute. It could, consequently, have no effect upon the paper of 1842 unless it was correct as laid down by the jury that it might be republished by parol, and was thus republished. That is understood to mean that republication may be by oral declarations merely; and with that position the Court does concur, either as
(362) applied to this case or as a general doctrine. It had no application to the case, because, in point of fact, if there was a republication at all it was not by words alone, but by the party's act of signing the paper, with the declaration that he did so to make it his will again,

either absolutely or *sub modo*. But supposing that in that respect the case were otherwise, and that there had been nothing more than a declaration made *animo republicandi* in 1842 that the paper, even with his name to it, as at first, was then his will, it was not correct to say that would be a republication. Supposing it to have been a holograph, with the original date left in it, it is at least very doubtful whether there could be an oral republication, as there was occasion to say in the cases arising on *Wilson's* will in Edgecombe. But, as just said, this does not appear to be a paper of that kind, and consequently it cannot be acted on as if it were. Then, as a paper not written by the party deceased, and therefore requiring attestation, and supposing it to have been duly signed and attested in 1834, it could not be republished by word of mouth merely, because it was decided early after the statute of frauds, and has been ever since considered as settled, that there cannot be a republication unless by reëxecution of the same instrument, or by the executors of a codicil, with the ceremonies required by the statute. *Masten v. Savage,* 1 Ves. Sr., 440. It is obvious the contrary doctrine would contravene the statute, since it would allow after purchased land to pass upon a verbal declaration alone. It is true, there might have been such a republication of the will in respect of the personal estate prior to July, 1841, but after that time the act of 1840 puts will of real and personal estate on the same footing. There was, therefore, no fact to make out the paper of 1834 to have been in form of a will, and the controversy was exclusively upon the validity of the script of 1842 within itself, unless it be supposed that the one of 1834 was not only "executed" by the party deceased, but also attested by Allman and Thomas.

If it were in the power of this Court to send cases back to have(363) the facts more fully stated in the bill of exceptions, as we might if the case came here upon a defective special verdict, the Court would not proceed to a final adjudication without having the fact on this point explicitly stated one way or the other. This is adverted to in order to engage the attention of counsel, in drawing their exceptions, to the necessity for stating every fact distinctly, which is requisite to show, that in laying down a rule of law, there was error to the prejudice of the appellant. The Court, though allowing much for the haste and multifarious engagements of their circuit, is unable to infer facts upon which the exception is altogether silent. But in this particular case it is not of so much consequence because if those witnesses did attest the papers of 1842, as it is called, the Court is of opinion that, according to the evidence of Allman—which the verdict affirms to be true—it was not the will or a part of the will. Publication is as necessary to constitute a will as delivery is to a deed. The statute, in prescribing particular ceremonies in the execution of wills, though not using the term publi-

cation, does not dispense with it, and it has never been considered as merged in the other ceremonies. It is as necessary now as it ever was, though now, as ever, it may be inferred from circumstances as well as directly established. 1 Powell Dev., 90. Publication is a declaration or act of the party showing the instrument *to be his* will, and the question is whether what was done here can, in law, be deemed a publication of the paper of 1834 in that sense. How it might have been if the paper itself had in the attestation clause said that it was published or "republished," as well as signed by the party, we do not say. But nothing of that kind appearing, it was necessary that the republication should be affirmatively shown, which, of course, could only be by the testimony of the witnesses to the acts or declarations of the party. Now the (364) declaration of this party was that the instrument *was not* his will—at least, not then. He published one paper as his will *in presenti* and absolutely, and of the other he said that he published it as a paper which might be his will in certain events, which would be destructive of the former. The doubt, if there be one, is, whether the paper of 1834 ever could become a valid instrument upon such a publication. It certainly was not published as being immediately the will, and cannot impair the validity of the other or its efficacy as being alone the will, and, therefore, the sentence must be affirmed.

These observations dispose of the controversy between the parties. Yet it is proper the Court should notice the closing direction to the jury to find against the script of 1834, upon the ground that it would be then only a part of the will, because it lays down a rule of much importance in practice which the Court deems erroneous. By such a finding, the script would finally be pronounced against, though it be admitted to be a part of the will, which seems manifestly wrong. The proper course in the case would have been to embrace both of the papers in the issue, and to have it special, whether both were, or one was, the will, or whether parts, and which parts, were. But when one script only is put in issue, and that is only part of the will, the verdict ought not to be against it altogether, but should rather be according to the truth—that it was a part—for although such a finding would be imperfect, yet it is better it should conclude nothing than that it should untruly conclude a thing as being in no part the will because it was but a part. Upon such a finding, the parties would be under the necessity of asking the Court to set it aside and remodel the issue so as to embrace both scripts, and thus the whole case would be brought properly up. But in the other way an intestacy would be effectually established, because, after sentence against one script, that the party did not devise thereby because it did not contain all his dispositions, a like sentence must follow against the (365) other script for the same reason, and thus both would be set

aside and the party left without a will, though the rule supposes that he had a will, and the two together made it.

PEARSON, J. I concur in the opinion that it was not error to advise the jury to put out of the case the declarations which had been offered in evidence, it *being admitted* that the persons making them, although they stood on the record as propounders, were in fact interested to defeat the probate. If the objection had been made in the first instance, before the evidence was heard, *Enloe v. Sherrill,* 6 Ind., 212, is direct authority for its exclusion, upon the ground that if one whose interest is to defeat the probate makes himself a propounder with a view that his declarations may be given in evidence by the caveator, this is a fraud which the court should defeat by striking out his name as propounder and placing him as caveator. This right of the court is deduced from the position that it is not an adversary suit, but a "proceeding *in rem*" to which there are strictly no parties, both sides being equally *actors* "in obedience to the order of the court directing the issue," as had been before held in *St. John's Lodge v. Callendar,* 26 N. C., 343.

The only difficulty arises from the fact that the objection was not made before the evidence was heard, and it is insisted that, not being taken in "apt time," it came too late, under the rule that if a party permits evidence to go to the jury, so that he will have the benefit of it if it be in his favor, he is not at liberty to object to it should it turn out to be against him. This is a rule of the common law founded on good sense; and if this was a suit to be conducted according to the course of the common law, where the parties necessarily take adversary positions corresponding with their legal interests and liabilities, and are left by the court to take care of themselves, the difficulty would be insuperable. But the rule is not applied to the present proceed- (366) ing, where, by the statute, the issue is made up and tried by a jury under the direction of the court. The court in such cases ought to protect itself and the jury from fraud and collusion *at any time,* even after the evidence is closed, for the court will not presume the *bona fide* propounders to have been aware "of traitors in the camp," which is the only ground for an unfavorable inference from the fact of the objection not being made before the evidence was heard.

Whether the declarations of a legatee or devisee tending to defeat the whole will, as if he says the testator was insane, although against *his interest,* can be given in evidence, inasmuch as, if they affect him, they must necessarily affect the other next of kin; or whether, in this proceeding, the persons opposed in interest may not call and examine, as a witness, a legatee, devisee, heir or distributee, are questions to which I

have given much consideration, but they are not presented by the present case.

PER CURIAM. No error.

Cited: Pannell v. Scoggin, 53 N. C., 409; *Hutson v. Sawyer,* 104 N. C., 3; *Sawyer v. Sawyer,* 52 N. C., 139.

(367)

JAMES R. LOVE ET AL. v. HUGH JOHNSTON ET AL.

Where there is an appeal from an interlocutory decree in a cause, and the parties proceed to the trial of the cause without waiting for the decision of the matter appealed from, the appeal will be dismissed at the costs of the appellant.

APPEAL from *Bailey, J.,* at McDOWELL Spring Term, 1849.

Avery and Gaither for plaintiffs.
J. W. Woodfin for defendants.

RUFFIN, C. J. This appeal arose out of the case between these parties upon the caveat of Robert Love's will, *ante,* 355. At a previous term of the Superior Court, upon affidavit, James R. Love, one of the propounders and an executor, moved the court for a rule on one James Gudger, who was a devisee in the will of 1842 and named an executor, to bring in the unfinished wills of the deceased, to be used as evidence for the propounders; and also for another rule upon the caveators and Gudger to show cause why Gudger's name should not be struck out of the record as a propounder, upon the ground that he was acting in collusion with the caveators. Both rules were refused upon the ground that the court had not the power to do those acts, although the presiding judge considered the facts set forth in the affidavit to be true; but he allowed an appeal to this Court. Before the case was brought on in this Court, the parties brought the issue on the will to trial, and there
(368) was sentence for the script of 1842 propounded by the said James R. Love and others, and the other party appealed. It appeared in the latter transcript that, before the trial, Gudger withdrew from the cause as a propounder and took the other side, and also that the unfinished wills were produced on the trial.

The Court perceives in the record of the other case between these parties that the appellants have thought proper to go to trial without awaiting the decision of this Court on the interlocutory orders from which this appeal was allowed, so that, in fact, the present does not, in

substance, differ from a feigned case. It is not proper, therefore, to decide the questions, but we think the appeal should be dismissed with costs.

PER CURIAM. Appeal dismissed.

(369)

DEM. ON DEMISE OF THE HEIRS OF J. W. CARSON v. HIRAM SMART.

1. On the trial of an action of ejectment, the court may, in its discretion, allow one of the lessors to be stricken out of the declaration upon the costs being deposited in court and mutual releases executed. The party stricken out may then be a witness, as if his name had never been in the declaration.
2. Under the act of 1846, a party may read a registered copy of a deed to the other party who has it in possession without notice to produce the original, in the same manner as he can read a copy of a deed to himself.
3. The title to land sold under execution vests in him to whom the officer makes the deed.
4. A deed made by a sheriff or coroner under a sale by execution passes the title, notwithstanding a third person may at the time be in the adverse possession.
5. In ejectment, all the cotenants need not be joined in the demise.
6. When a person takes a deed from a debtor while the land is subject to a levy, under which it is afterwards sold, he stands in no better situation that the debtor whose place he has taken.

APPEAL from *Settle, J.*, at RUTHERFORD Spring Term, 1851.

G. W. Baxter for plaintiffs.
Bynum for defendant.

PEARSON, J. The lessors claimed title under a judgment, execution, constable's levy, order of sale, *venditioni exponas,* and a sale and deed made by the coroner, James W. Carson; the plaintiff in the judgment, was high sheriff, and at the sale became the purchaser, but died before a deed was executed, and the coroner made the deed to the (370) lessors "as his heirs at law."

On the trial, the declaration was amended by striking out the name of W. P. Carson as one of the lessors, and he was called as a witness by the plaintiff and proved that the defendant was in possession and had been notified "to quit." This witness was objected to as incompetent, whereupon the amount of the costs was deposited in court by Tams, one of the lessors, to whom the witness released all of his interest in the land, and he released the witness from all claim or liability in regard to the costs. His Honor then admitted his testimony.

The plaintiffs read in evidence a registered copy of a deed from one Roberts, the defendant in the execution, as whose property the land was levied on, to the defendants dated 1 October, 1840, after the constable's levy and before the sale. This was objected to because the defendant had received no notice to produce the original.

The defendant proved that James W. Carson died in 1846, and that he had frequently said that the defendant had settled the purchase money paid by Carson for the land, and "that the land was his (Smith's)," who was the brother-in-law of Carson, and from October, 1840, claimed the land.

The defendants insisted that the plaintiff could not recover because there was no evidence that the lessors were the heirs at law of James W. Carson; because the defendant was in possession at the time the coroner executed his deed to the lessors; because W. P. Carson did not join in the demise; because Roberts had no title to the land at the time of the levy, and because the defendant's title had ripened into a perfect one under the deed of Roberts to him in October, 1840, if the jury believed the defendant had *claimed* the land as his from its date up to the issuing of the declaration, March, 1848. His Honor decided all these (371) points against the defendant; verdict for the plaintiff, judgment, and the defendant appealed.

First. We think it was a matter within the discretion of the court during the trial to allow one of the lessors to be stricken out of the declaration. It is common on the circuit, when, in the opinion of the court, the purposes of justice require it, to allow one who is security for an appeal or for the prosecution to be stricken off and a new bond given so as to make him a witness. The present was the exercise of a similar discretion.

Secondly. Under the act of 1846, registered copies of deeds for land are made evidence, and the production of the originals is dispensed with except under certain circumstances. The words are very general, and the present case is embraced by them. We can see nothing to take it out of its meaning. If a party may read a copy of a deed to himself, of which he has the possession, there can be no reason why he may not read a copy of the deed to the other party who has it in possession. Of the policy of this statute we have nothing to say. Our duty is to put on it a fair construction and make it consistent in its operations.

Thirdly. Our statute gives a power to sheriffs and coroners to sell all land and pass the title by deed. *They* must see to the proper execution of this power. The coroner, in this instance, having made the deed to the lessors as the heirs of James W. Carson, the title vests in them, on the same principle that it vests in one to whom the deed is made as assignee of the bidder. This is settled, *Brooks v. Radcliff*, 33 N. C., 321.

Fourthly. A deed made by a sheriff or coroner under the power conferred by the statute, like a descent, which is the act of the law, passes the title, notwithstanding a third person may at the time be in the adverse possession. There is no danger of the evils of champerty and the sale of "pretended titles" in such cases; indeed, few persons who are sold out for debt willingly give up possession. The power of the sheriff to sell would be nugatory if the position contended for be (372) true, unless the additional power was conferred on the sheriff to put the debtor in the execution out of possession and deliver it to the purchaser.

Fifthly. All of the cotenants need not be joined in the demise. This is settled in several cases.

Sixthly. In *Badham v. Cox*, 33 N. C., 456, it was held that one who takes a deed from the defendant in the execution after the levy is at liberty to show that the *title accrued after the levy*, and thereby avoid what would otherwise have been the effect of a subsequent sale under a *venditioni exponas*. The case has no application to the present, because it is not shown that the title of Roberts did *accrue after the levy*, and we have but the ordinary case of one who takes a deed from the debtor while the land is subject to a levy, under which it is afterwards sold. Of course, such person coming in, pending the proceeding, can stand in no better situation than the debtor whose place he has taken.

Seventhly. The last point is against the defendant on two grounds. There was no evidence when the defendant *took possession*. The evidence was that he "claimed the land as his." So there is no proof of a seven years adverse possession. But suppose there had been, and suppose further that the statute commenced running so as to bear on the defendant's color of title before the deed was made to the lessors of the plaintiff and in the lifetime of James W. Carson, whose laches it was not to take a deed after the coroner's sale, it is certain that his right of entry did not accrue until he became the purchaser at the coroner's sale in July, 1841, from which time to March, 1848, when the declaration issued, there was not the seven years necessary to ripen the defendant's color of title.

PER CURIAM. No error.

Cited: Allred v. Smith, 135 N. C., 449.

(373)

CALEB OSBORNE v. JOHN BALLEW.

An entry under a deed into a part of a tract of land shall, as against a mere wrongdoer, be considered an entry into the whole, it not appearing that any one else has possession of any part.

APPEAL from *Battle, J.*, at WILKES Spring Term 1851.

Quare clausum fregit, and plea, not guilty. On the trial the plaintiff gave in evidence a deed to himself covering the *locus in quo*. He also gave in evidence a grant to another person, which likewise covered the *locus in quo*, but he was unable to deduce title from the grantee to his bargainor. Upon taking his deed the plaintiff went to reside in a house situate on the land and cultivated a field that was enclosed, and soon afterwards the defendant committed the alleged trespass on an unenclosed part of the woodland included in the plaintiff's deed.

The counsel for the defendant moved the court to instruct the jury that the action could not be maintained because the plaintiff had not shown himself to be in possession of the *locus in quo* by having it enclosed, or otherwise in his actual occupation, or by having a title for it against all the world; but the court refused to give the instruction and directed the jury that the plaintiff's actual entry under his deed into a part of the land covered by the deed was *prima facie* sufficient to maintain trespass against the defendant, who set up no claim to the *locus in quo*, and was a mere wrongdoer, no other person appearing to be in possession of another part of the land under a conveyance, also covering the *locus in quo*.

(374) *Guion for plaintiff.*
Boyden for defendant.

RUFFIN, C. J. Although as between two persons claiming under deeds which interfere, the possession be with the better title unless the other party have an actual possession within the disputed part, yet, as applied to the case of a mere wrongdoer, the instructions conform to our adjudications, and seem, indeed, to follow from the doctrine of constructive possession, which is indispensable, in the present state of the country, to the protection of peaceable possessors and claimants against lawless intrusions. *Wyrick v. Bishop*, 8 N. C., 485, is in point, and gives very satisfactory reasons why an entry under a deed into a part of a tract of land should, as against a mere wrongdoer, be considered an entry into the whole, it not appearing that any one else has possession of any part.

PER CURIAM. No error.

Cited: McCormick v. Munroe, 48 N. C., 334; *Lamb v. Swain, id.,* 372; *Aycock v. R. R.,* 89 N. C., 324; *Thornton v. R. R.,* 150 N. C., 693; *Simmons v. Box Co.,* 153 N. C., 261; *Ray v. Anders,* 164 N. C., 314.

(375)

THOMAS CRAIG v. THOMAS B. MILLER.

A., owning a slave, died intestate, and no administration was ever granted on his estate. The next of kin took possession of the slave and kept him for seven years. They then sold him to B., who kept him for ten years, and he was then sold by B.'s executors to C. After remaining in C.'s possession four years he ran away, was caught and confined in jail, from which he was taken by D., who, upon demand, refused to deliver him to C. *Held,* that *C.'s* possession entitled him to an action of trover against D., who was a mere wrongdoer setting up no title in himself.

APPEAL from *Settle, J.,* at HENDERSON Spring Term, 1851.

Trover for a slave, and was decided on the following case agreed: Thomas Rhodes, of Buncombe County, owned the slave, and died intestate in the year 1827, leaving a widow and an only child, then married to John Miller. No administration was taken on the estate, but Mrs. Rhodes and John Miller paid all the debts and took the property of every kind into their possession, claiming and using it as their own; and in 1834 they sold the negro to John Craig, who lived in South Carolina, and kept the slave in his possession there for ten years and then died, and his executors sold him to the plaintiff, who had possession of him for four years. The slave then ran away and came back to the residence of Mrs. Rhodes, with whom the defendant lived; and the slave was committed to jail as a runaway, but was afterwards taken out of jail by the defendant, who is a son of John Miller, and, upon demand of the plaintiff, refused to deliver him; and then this action was brought. Judgment was rendered thereon for the plaintiff for (376) the value of the slave, as stated in the case agreed, and the defendant appealed.

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

RUFFIN, C. J. Without having recourse to the presumption of a good title from a sale by the next of kin and upwards of twenty years possession by the plaintiff and those under whom he claims since the death of the original owner, Rhodes, the Court is of opinion, that under the circumstances, the plaintiff's possession entitled him to hold the slave as against the defendant, who is a mere wrongdoer, and, therefore, that he

may maintain this action of trover. It is distinguishable from the cases of *White v. Ray,* 26 N. C., 14, and *Barwick v. Barwick,* 33 N. C., 80, in the former of which the action was brought by the administrator, and in the latter the true owner was in existence and known. But this is more like the case of the lost jewel, for which the finder was allowed to maintain trover against the goldsmith, to whom it had been submitted for his opinion and who refused to deliver it back. *Armory v. Delamirie,* 1 Str., 505. For, although the rightful owner was not known then, it was known that there must be some owner, and, therefore, if the mere possibility of an owner appearing or coming into existence would defeat the action, the plaintiff could not have had judgment. It would seem, therefore, that if the defendant had received the slave from the plaintiff and refused to redeliver him, or had taken him from the plaintiff's actual possession, he would be liable in trover. This is much the same, for the plaintiff did not lose his possession by the slave's running away, but he was still the subject of larceny as his and in his possession. Indeed he was taken by the defendant and committed as a runaway. From whom? Plainly from the person in whose possession he was at the time of absconding, and, as such, he was rightly detained as a (377) runaway. The defendant, therefore, cannot bar the plaintiff by setting up his subsequent wrongful act of taking the slave out of prison and holding him against the plaintiff. The defendant wrongfully interfered with the plaintiff's possession, which gave him such a right of property as entitled him to hold against every person, except an administrator of Rhodes, if one should ever exist; and there being none, he may have trover against a mere wrongdoer.

PER CURIAM. Affirmed.

Cited: Branch v. Morrison, 50 N. C., 17; *Thompson v. Andrews,* 53 N. C., 126; *Maxwell v. Houston,* 67 N. C., 306; *Russell v. Hill,* 125 N. C., 473; *Vinson v. Knight,* 137 N. C., 412.

ROSANNAH BRIGGS v. CHARLES BYRD.

1. A person is not answerable in an action of slander for anything he says in honestly preferring, before a judicial officer, complaints against an individual for offenses alleged to have been committed by him; and *prima facie* every application is to be deemed honest and to have been made upon good motives until the contrary be shown.

2. In such cases, whether the party complaining acted *bona fide* or from a wicked and malicious mind is always an open question. The opposite party, therefore, is at liberty to prove malice either by express evidence or by attending or collateral circumstances.

3. In an action of slander, evidence of the sense in which the words were understood by the hearers must be of the sense in which they were understood *at the time they were uttered.*

4. Although a juror may sit on the trial, against whom there was good cause of challenge, yet the party, by not having made the objection in time, waived it.

APPEAL from *Settle, J.*, at YANCEY Spring Term, 1851. (378)

Action for words spoken with the intent to charge the plaintiff with having stolen biscuits. Plea, not guilty. The declaration stated that a report had been in circulation that the plaintiff had stolen some biscuits belonging to one Elisha Hunicutt, and that the defendant, speaking of the plaintiff and of the said report, said, in the hearing of divers persons, of and concerning the plaintiff: "I will make the biscuits roar under the cloak before Saturday night," with inuendoes and averments, applying the words to the plaintiff, and that the defendant meant thereby, and was understood by the hearers, to charge her with feloniously stealing the biscuits.

On the trial, two witnesses deposed that on a certain day the defendant and the plaintiff's father had a dispute about a line and fence between them, and the plaintiff passed by the defendant and the witnesses, and the defendant said, "If they do not mind, I will make the biscuits roar under the cloak before Saturday night." But each of the witnesses said he did not understand what the defendant meant. Another witness, L. Phillips, deposed that he was a justice of the peace, and that on the day spoken of by the other witnesses, the defendant asked him what he would think if he were to see a woman take a parcel of biscuits and slip them under her cloak, and he answered that he would think it was stealing, and thereupon the defendant told him he wanted a State's warrant, and said that on the day he was talking with the other two witnesses, "as a certain woman passed by, and he said he would make the biscuit roar before Saturday night, and she looked worse than any one he had ever seen." The witness further deposed that he had previously heard of a report that the plaintiff had stolen biscuits at Hunicutt's, and he understood the defendant as alluding to the plaintiff, and that he intended to charge her with stealing those biscuits; that he, the witness, declined issuing the warrant at that time, and promised to attend to it at some other time, but the defendant made no fur- (379) ther application.

The counsel for the defendant insisted that the action would not lie, because the words were not understood by the first two witnesses in the sense imputed to them in the declaration, and because the communication to Phillips was for the purpose of obtaining a warrant for the felony, and was, therefore, privileged. The counsel for the plaintiff in-

sisted, on the other hand, that the communication to the magistrate was not privileged; and, further, that, although the two first witnesses did not at the time understand the defendant's allusion, the action will lay if they afterwards heard the report, and then understood the defendant's allusion, or if they believed the defendant really meant to charge the plaintiff with larceny, and other persons besides those two witnesses were present, who might or might not have understood the allusion.

The court instructed the jury, if they believed the application to the magistrate was *bona fide* for the purpose of obtaining a State's warrant and for no other purpose, the defendant was not answerable for the words then spoken, but that if he had any other purpose, then the defendant was answerable in this action; and that, for the purpose of arriving at the defendant's intention, the jury should consider all the circumstances, including the facts, if the jury believed the witness, that the defendant did not at the time insist on then having a warrant nor apply for one afterwards. The presiding judge did not express any opinion on the other points insisted on in the argument of the plaintiff's counsel to the jury, and was not requested to give any instructions on them. The jury found for the defendant, and the counsel for the plaintiff moved for a *venire de novo* upon the ground of error in the instructions as to the words spoken to the witness Phillips and in his Honor's not giving any instruction on the other two questions made in the argument, and also because one of the jurors on this trial had been on
(380) a jury on a former trial of this case and then concurred in a verdict for the defendant. The motion was refused and judgment rendered for the defendant, and the plaintiff appealed.

N. W. Woodfin for plaintiff.
Gaither for defendant.

RUFFIN, C. J. The privilege of charging persons with offenses in a judicial proceeding, or with a view to one, is given by the law, because the public interests require complaints to be made against offenders, or those really suspected of being such, and the complaints cannot be made without the use of such words as would, if spoken on a different occasion, be slanderous. Hence a person is not answerable for anything he says in honestly preferring a complaint before a justice of the peace; and, *prima facie*, every application is to be deemed honest and to have been preferred upon good motives until the contrary be shown, because it is a duty to bring offenders to justice. That, we believe, is all that is meant by the phrase, "privileged communication," namely, that the words are uttered in a legal proceeding, or on some other occasion of apparent duty, which *prima facie* imports that the party was actuated

by a sense of duty and not by the malice which is generally to be implied from speaking words imputing a crime to another. *Cockyane v. Hodgkison*, 6 Car. & P., 543; *Johnson v. Evans*, 3 Esp., 32. It is always open, however, to the opposite side to prove malice, either by express evidence or by circumstances attending the accusation, or by others that are collateral, as, for example, that the accuser had a particular grudge against the accused and knew the accusation to be unfounded. It is, therefore, the question in all such cases, whether the party acted *bona fide* in making the complaint or from a wicked and malicious mind. It follows that the instructions to the jury were as strong as they could possibly be, with any regard to the rights of the defendant, (381) being, that if he had any other purpose beside that of *bona fide* in instituting a prosecution against the plaintiff, she would be entitled to recover, and allowing the plaintiff the benefit of the intrinsic as well as all other evidence of some malicious purpose. It is apparent, therefore, that the plaintiff has no ground to complain of the instruction.

There are several answers to the other exception. The silence of the judge is not error, unless he be moved for a proper instruction. Here the party chose to take the chances before the jury without the help of the court on either of the two points. But if instructions had been asked, they ought to have been refused. The declaration is that the words—not importing, *per se*, a charge of larceny by the plaintiff—were meant by the defendant to be so understood by those to whom they were spoken, and were then so understood by them. Hence the court held, in this case, on a former occasion, that the plaintiff might give evidence as to the sense in which the hearers understood them. But that must of necessity be referred to the time of speaking the words, else it might happen that the words would be understood differently at different times, and be actionable or not, as the witness might apprehend their sense, more or less correctly, from time to time. Besides, there was no evidence that the report subsequently reached the two witnesses, or that it imparted to them a better understanding of the defendant's meaning; and the court ought not to submit a point to the jury on which there is no evidence. This observation is equally applicable to the other point, as it did not appear that any other person was present when the defendant spoke the words proved by the two witnesses, or that such person, if present, understood the allusion to be to the plaintiff.

There was good cause of challenge to the juror. But that does not vitiate the trial, for the juror might have conceived that he was bound to serve, and by not making the objection the party (382) waived it.

PER CURIAM. No error.

Cited: Shelfer v. Gooding, 47 N. C., 182; *S. v. Patrick,* 48 N. C., 447; *S. v. White,* 68 N. C., 160; *Sowers v. Sowers,* 87 N. C., 306; *Nissen v. Cramer,* 104 N. C., 576; *Gudger v. Penland,* 108 N. C., 600; *S. v. Council,* 129 N. C., 517.

STATE v. BEVERLY RASH.

1. On a trial for murder, charged to have been committed by a husband on his wife, the State has a right to prove a long course of ill-treatment by the husband toward the wife.
2. Whether an alleged subsequent reconcilation between the parties is real or pretended, so as to affect the question of malice, is a matter for the decision of the jury.
3. Proof of the declarations of a deceased wife, offered by the husband, that she had been guilty of adultery was properly rejected by the court, because it was irrelevant to the issue, and because it would have gone strongly to prove the malice charged on the husband.
4. In criminal, as well as in civil, cases all the testimony on both sides should be introduced before the argument commences. After that the parties have no *right* to introduce additional testimony, though the court, in its discretion, may permit it to be done.
5. A judge is never bound to instruct a jury upon an abstract proposition. His duty is to lay down the law to them as applicable to the evidence introduced.
6. It never can be error in a judge to assume that as true which the prisoner, in his defense, has treated as true, as, where a prisoner indicted for murder does not pretend that, if guilty of the homicide, he is guilty of anything but murder, but relies in his defense solely upon the ground that he was not guilty of the homicide.
7. It is not error in the judge to tell the jury that if the witness is credible, it is their duty to believe him, when he adds at the same time, "yet it is possible the witness may be mistaken or perjured."
8. It is not error in a judge to instruct the jury that "all the circumstances for and against the prisoner which were proved beyond a reasonable doubt must be taken all together and not separately."

(383) APPEAL from *Battle, J.,* at CABARRUS Spring Term, 1851.

The defendant was indicted for the murder of his wife, Mary Rash, and convicted. Several objections were taken to the charge of the presiding judge, which are set out in the opinion of the Court. The facts are also stated therein.

Attorney-General for State.
Boyden and H. C. Jones for defendant.

NASH, J. The bill of exceptions contains several objections to the charge of the presiding judge. We will consider them in the order in which they are presented.

The first is that his Honor admitted improper testimony. The testimony objected to by the prisoner is that portion relative to the treatment of his wife. After much testimony had been given in, the case states "that the State then introduced several witnesses to prove a long course of ill-treatment of his wife by the prisoner, for the purpose of showing that he had malice against her and wished to get rid of her." Was this a legitimate purpose, and the means used lawful? No person was present when the alleged homicide was committed. There could be no direct and positive proof of the fact of the person of the perpetrator, and the jury were left to draw their conclusions from such facts as could inform their understanding on the subject. The first inquiry would be, who could be the perpetrator? and the mind would (384) naturally turn upon the person who, either from interest or malice, might desire her death. Interest, in this case, could not exist, and malice alone could lead to the deed. Ordinarily, the eye of suspicion cannot turn upon the husband as the murderer of his wife; and when charged upon him, in the absence of positive proof, strong and convincing evidence—evidence that leaves no doubt on the mind that he had towards her that *mala mens* which alone could lead him to perpetrate the crime—is always material. How else could this be done than by showing his acts toward her, the manner in which he treated her, and the declarations of his malignity? What stronger proof of malice can be imagined than a husband sending his own brother into his wife's bedroom in order to found a charge of adultery, whereby he might get rid of her by a divorce? What stronger proof of malice than stripping her naked, and in that condition turning her out of his doors? On behalf of the prisoner, it is however, said the State was permitted to go too far back for its facts, and by that means the general character of the prisoner was brought before the jury to speak against him. Not so. In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful are they to show the state of his feelings. A single expression and a single act of violence are most frequently the result of temporary passion, as evanescent as the cause producing them. But a long continued course of brutal conduct shows a settled state of feeling inimical to the object. We are of opinion, then, that his Honor did not err in receiving the testimony objected to, because malice may be proved as well by previous acts as by previous threats, and often much more satisfactorily. Roscoe's Crim. Ev., 96, 740; 2 Phil. on Ev., 498.

(385) It is, however, said in the defense upon this part of the case that after the prisoner had turned his wife out of doors, they had become reconciled, and he had taken her back, and that, therefore, all the antecedent ill-blood on his part could not amount to malice in law. His Honor's instruction to the jury on this point was full. They were told "that the circumstance of malice was relied on by the State to aid in pointing out the prisoner as the murderer; they must inquire whether it ever existed; that a reconciliation was alleged on the part of the prisoner; they must inquire whether it was made, and whether it was real or pretended; and if they believed it to be real, then the circumstance of malice was not to be taken into account." This was going as far as the judge was authorized to go. The rest belonged to the jury.

Second. As to the testimony rejected by the court. The prisoner offered to prove by the declarations of the deceased that she had been guilty of adultery, and also to prove by an exposition of his foot that his account of her ploughing was correct, as showing that the tracks in the row of the ploughed corn could not have been made by him. The first branch of the evidence above mentioned was properly rejected, because it would have gone strongly to prove the malice charged against him, and, therefore, its rejection could do him no possible harm, and because it was irrelevant to the issue before the jury, and it is never error to reject evidence of such a character.

The court committed no error in not suffering the defendant's counsel to exhibit to the jury the foot of the prisoner. It is the duty of the respective parties to a cause, as well criminal as civil, to adduce their testimony in apt time and in apt order; and if not so done, it is a matter of discretion with the judge who tries the cause whether he will suffer it afterwards to go to the jury; and all the testimony must be given to the jury before the argument commences. After that the parties have no *right* to introduce additional testimony (*S. v. Hop-*
(386) *kins,* 27 N. C., 406; *Williams v. Averitt,* 10 N. C., 308; *Simpson v. Blount,* 14 N. C., 34), although it is often done, and will always be allowed in a case of life and death, when the court sees that its omission was clearly an oversight, unless at the same time it is seen that it is irrelevant and uncalled for. If, however, the court does refuse to receive it at such time it is no error of law, it being a mere exercise of a discretionary power. Here the testimony had been closed and an argument submitted to the jury. But another reason why its rejection was not erroneous is found in the fact that the State had withdrawn that portion of the evidence to which it was intended as a reply. It was not relied on in the argument in behalf of the State, and the opposing testimony was rendered unnecessary, or, rather, irrelative; neither did his

Honor in his charge advert to it. In ruling it out, no error was committed.

The next exception in point of order is, that the judge told the jury the prisoner was guilty of murder, if guilty at all. His Honor commenced his charge by stating to the jury "that it was unnecessary to explain to them the principles of the law of homicide and to point out the distinction between its different grades, because the prisoner was not guilty at all, or he was guilty of murder." This exception cannot be entertained, first, because it never is error to *omit* to charge upon a particular principle. If a party wishes the judge to do so, it is his duty to require it. *McNeil v. Massey*, 10 N. C., 91; *Simpson v. Blount*, 14 N. C., 34; *S. v. Scott*, 19 N. C., 35. Secondly, if the instruction had been asked for it would not have been the duty of the court to have given it. A judge is never bound to instruct a jury upon an abstract proposition. His duty is to lay down to them the law as applicable to the evidence before them. *S. v. Martin*, 25 N. C., 101. Here there was not the slightest evidence to mitigate the offense, if committed by the prisoner, from murder to manslaughter. And, thirdly, it never can be error in the judge to assume that as true which the prisoner in (387) his defense has treated as true. *S. v. Miller*, 18 N. C., 500. On looking through the case sent here, we do not find it anywhere suggested that the prisoner was guilty of manslaughter—the whole argument, on his part, is bottomed upon the proposition that the prisoner did not commit the homicide. In this part of the charge there is no error.

The next exception is, that the judge, speaking of the doctrine of one credible witness, told the jury that it was their duty to believe him. The first remark to be made is that the language used by the judge was upon a hypothetical case not called for, and used only in pointing out to the jury the difference between positive and presumptive evidence. But if there had been such evidence of the killing, still—put as it was by his Honor—there would have been no error. He winds up what he has to say upon that point, in strict connection with it, "yet it was possible the witness might be mistaken or perjured."

The charge of the court in *Noland v. McCracken*, 18 N. C., 594, was essentially different from the one we are considering. There the jury were told "that when a witness was heard by a jury, who was neither impeached nor contradicted—whose story was credible, and in whose manner there was nothing to shake their confidence—they were bound to believe him." In the case before us the judge clearly did not intend to lay it down as a rule of *law*, that in such case they must believe the witness, for he immediately goes on to guard them from such a conclusion by stating that the witness might be mistaken—a caution omitted

in *Noland's case.* The remark of his Honor was general, and properly qualified, and could do the prisoner no injury.

The last two exceptions run into each other and will be considered together. The first is, that his Honor instructed the jury they must take all the circumstances together, and not separately. His language
(388) is, "*all* the circumstances for and against the prisoner which were proved beyond a reasonable doubt must be taken altogether, and not separately." Now in order rightly to understand the precise meaning of the judge, we must advert to the argument of the prisoner's counsel addressed to the jury on that point. *He* contended "that the circumstances testified to by the witnesses ought all to be considered separately by the jury, and then *classed, as either conclusive or inconclusive,* according to the force and effect *they* might deem them entitled to." The rule thus laid down by the counsel was well calculated for a philosopher in his closet, but little suited to a jury in coming to any conclusion whatever. The object of all evidence is to satisfy the mind of the inquirer, and that satisfaction is to be derived from the effect of the whole. One particular fact isolated from the others, viewed by itself, might appear entirely unimportant; connected with others, it may become very important. Every one acquainted with circumstantial testimony knows this to be so. In fact, its force and power to convince is this union of separate and distinct circumstances into one continuous chain, which, being at last connected with the prisoner, produces that state of mind in the jury which enables them to pronounce him guilty. It was this principle which the judge had in view; he did not intend that the jury should not look at or consider the several circumstances given in evidence, for they could come to no just conclusion without doing it. All that he meant was that they must draw their conclusions from the whole of the circumstances, and pronounce their verdict as that conclusion should direct. If, in the concluding remarks of his Honor, there is error, it is one in favor of the prisoner, and which certainly do him no injury. The widest range was given to them. They had just previously been instructed, "if there is any reasonable hypotheses consistent with his innocence (believing the facts to be true beyond a reasonable doubt),
(389) then he ought to be acquitted"; and in conclusion, he tells them, in substance, "if you believe the facts to be as testified to, and can *suppose any case* in which they do not apply to the prisoner, it is your duty to make the supposition and acquit him." Taking the whole of what the judge said on this point, we repeat, the prisoner has nothing to complain of, and there is no error. *S. v. Swink,* 19 N. C., 9.

In the argument of the case, it was contended by the prisoner's counsel that from the discrepancy in the testimony of the medical witnesses, the jury could not, and ought not, to say that the deceased came to her

death by violence at all. His Honor instructed the jury that that was the first point to be ascertained by them, and then left it to them to say how the fact was under the evidence. This was all he could do. It was a matter of fact exclusively for their consideration.

We have carefully and with much solicitude examined the evidence in the case and the exceptions brought before us, fully sensible of the inquiry and our own responsibility, and are constrained to say, that in his Honor's charge and in the reception and rejection of evidence, there is no error; that the law has been fairly administered, and that the prisoner has no just cause of complaint.

We have examined the record, and find no cause there why the judgment should be arrested.

PER CURIAM. No error.

Cited: *S. v. Noblett,* 47 N. C., 425; *Morehead v. Brown,* 51 N. C., 371; *S. v. Oscar,* 52 N. C., 307; *S. v. Haynes,* 71 N. C., 84; *S. v. Chavis,* 80 N. C., 358; *Gilbert v. James,* 86 N. C., 248; *S. v. Gee,* 92 N. C., 761; *S. v. Thompson,* 97 N. C., 498; *S. v. Jones.* 98 N. C., 656; *Featherstone v. Wilson,* 123 N. C., 627; *S. v. Battle,* 126 N. C., 1047; *S. v. Foster,* 130 N. C., 672; *S. v. Wilkins,* 158 N. C., 606.

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